ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7533 SENATE LABOR & COMMERCE

Amendment to this section further describes those situations in which these types of court orders may be sought.

Section 61. AS 21.78.040. Grounds for Rehabilitation
Page 54, line 18 to page 55, line 8.

In addition to the 10 grounds on which the director may seek an order of rehabilitation under AS 21.78, four new grounds are added by the amendments to this section. The new grounds are as follows:

1. an insurer fails to remove an officer found, after hearing, to be dishonest or untrustworthy;

2. if the insurer fails to make available records of its transactions for examination;

3. if an insurer has within four years willfully violated its charter or bylaws, any Alaska insurance law, or any valid order from the director; and

4. if an insurer has failed to file any required financial statement or report.

Because the grounds for liquidation found in AS 21.78.050 include, by reference to AS 21.78.040, the same grounds as are available for rehabilitation, the above new grounds are also established for commencing a liquidation proceeding.

Section 62. AS 21.78.040(b). Grounds for Rehabilitation
Page 55, lines 9 - 28.

In addition to the new grounds described in the last Section, additional grounds are added relating to criminal activities impacting the insurer. These are: on which the director may seek an order of rehabilitation under AS 21.78, four new grounds are added by the amendments to this section. The new grounds are as follows:

1. the occurrence of fraud which endangers the insurer's assets;

2. control of an insurer is by a person found, after hearing, to be untrustworthy; and,

3. if an officer has refused to be examined under oath concerning an examination of the insurer.

Because the grounds for liquidation found in AS 21.78.050 include, by reference to AS 21.78.040, the same grounds as are available for rehabilitation.

the above new grounds are also established for commencing a liquidation proceeding.

Section 63. AS 21.78.090. Order of Rehabilitation
Page 55, line 29 to page 56, line 28.

Amendment to this section adds new subsections pertaining to an order of rehabilitation and its effect. An order of rehabilitation stops any legal proceeding against an insurer for 90 days and puts on hold any statute of limitation time limit for a legal action which an insurer might take for 60 days. This section now makes it clear that any guarantee association may intervene in a rehabilitation proceeding if the association is required to act the result of the entry of an order of rehabilitation. The receiver is required to provide periodic accountings to the court of the condition of the insurer in rehabilitation.

Section 64. AS 21.78.100. Order of Liquidation, Domestic Insurers
Page 56, line 29 to page 59, line 9.

New subsections pertaining to an order of liquidation and its effect are added to the section. Liquidation orders are required to call for specified periodic accountings to the court of the affairs of an insurer being liquidated. Orders of liquidation are required to contain provisions for the termination or continuation in force of all insurance contracts of the insurer according to the guidelines now set forth in this section. This section also contains the effects that an order of liquidation has on legal proceedings similar to those found pertaining to orders of rehabilitation. Also, this section now provides for any guarantee associations to intervene in a liquidation proceeding if the association is required to act as the result of the entry of an order of liquidation.

Section 65. AS 21.78.130. Conduct of Delinquency Proceedings Against Domestic and Alien Insurers.
Page 59, line 10 to page 60, line 26.

The new subsections added to this section augment the powers and authority of the receiver in a rehabilitation or liquidation. The receiver is allowed to pursue on behalf of the insurer all legal remedies from any person due to tortuous acts, breach of contract, or breach of fiduciary obligation.

If the receiver finds that reorganization, consolidation, merger, conversion or other transformation of an impaired or insolvent insurer is appropriate, the receiver is required to develop a plan for the appropriate action and submit the plan to the court for approval, disapproval or modification. A plan of this

nature may include a moratorium on nonforfeiture benefits under contracts insured by an impaired or insolvent life insurer.

If an insolvent insurer's estate does not possess sufficient cash or other liquid assets to cover the costs of rehabilitation or liquidation, funds may be advanced by the Division of Insurance for that purpose. However, these funds are required to be repaid out of the first available money and take priority over all other claims against the estate.

The receiver is granted the authority to conduct examinations in conjunction with a delinquency proceeding with the same ability to subpoena, examine under oath, and review records as the director has in the examination of any insurer. The receiver is also granted the power to move records of the insurer to any location that would facilitate the rehabilitation or liquidation and to provide reasonable access to those records necessary to any guarantee association to carry out its lawful duties.

The receiver may also intervene in similar proceedings in other jurisdictions and act as a receiver or trustee in another jurisdiction if an appointment is offered. The receiver may enter into agreements with a receiver or other insurance regulatory official of another state which relates to a delinquency proceeding affecting an insurer that is or has conducted business in both states.

Section 66. AS 21.78.170(c) Form of Claim
Page 60, line 27 to page 61, line 5.

This section contains the provisions pertaining to claims filed against the estate of an insolvent insurer. Subsection (c) has been amended to require the receiver to notify a claimant if the claim has been denied in part or in whole in writing by first class mail. The claimant must raise any objection with this determination within 60 days of when the notice was mailed or is barred from any objection.

Section 67. AS 21.78.170. Form of Claim
Page 61, lines 6 - 12.

If the receiver receives an objection, the amendments to subsection (d) provide that the receiver request the court to conduct a hearing on the matter if the receiver does not change the original determination after such objection is made.

Section 68. AS 21.78.170. Form of Claim
Page 61, line 13 to page 62, line 4.

New subsections (e) through (h) have been added to provide further guidelines for claims made against an insurer in liquidation. A claim does not have to be considered or allowed if not all the required supporting documentation is provided or if the prescribed (and court ordered) claim form is not used. The receiver may at any time request that additional information be provided by any claimant and may take testimony under oath to obtain supplementary information. A judgement or an order against an insured or an insurer entered after the date of a liquidation order or a judgement or an order entered at any time by default or collusion need not be considered as support of evidence of liability or amount of damages in connection with a claim. A claim by any guarantee association against the estate of an insurer in liquidation must be in a form and contain support agreed to by the receiver and the guarantee association.

Section 69. AS 21.78.180(d). Priority of Certain Claims
Page 62, lines 5 - 18.

This section is amended to clarify certain circumstance involving claimants whose claims against the estate of an insurer in liquidation are secured. Amendment to subsection (d) provides the methodology for arriving at the value of the security and allows for the entire claim to be allowed if the security is surrendered to the receiver.

Section 70. AS 21.78.180(e). Priority of Certain Claims
Page 62, line19 to page 63, line 4.

A new subsection (e) has been added to allow in certain circumstances for a person other than the secured creditor to file a claim with the estate of an insolvent insurer. That other person must be the person that provided the security via some undertaking and the secured creditor has failed to file and prove a claim. In such a circumstance, that person may file a claim in lieu of the secured creditor. However, the secured creditor will get any distributions from the estate of the insolvent insurer and the other person that made the claim will only be entitled to a portion of the distribution if the distribution and the amount paid on the undertaking exceed the entire amount of the secured creditor's claim. Any such excess must be held in trust by the secured creditor for the benefit of the other person who made the claim.

Section 71. AS 21.78.200(a). "Uniform insurers liquidation act."
Page 63, lines 5 - 8.

This is an editorial change to amend internal cross references. No substantive change.

Section 72. AS 21.78.250. Fraudulent Transfers Before Petition
Page 63, line 9 to page 64, line 29.

Currently AS 21.78.250 gives a broad outline as to how transfers of property made by or on behalf of an insurer before an order of rehabilitation or liquidation are treated when the transfer was accomplished with the intent to gain a preference or a greater percentage of the insurer's assets in a delinquency proceeding. In essence, the receiver may avoid or reverse these transactions unless the insurer received fair value for the asset transferred. This broad outline is repealed and replaced with a more detailed description of the acceptable transfers and unacceptable transactions which may be voided. The essential intent of current AS 21.78.250 is retained.

The reenacted AS 21.78.250 pertains to transfers occurring prior to a petition for rehabilitation or liquidation. This new section specifically recognizes transactions involving reinsurance contracts.

Section 73. AS 21.78 251. Fraudulent Transfer After Petition.
Page 65, line 1 to page 66, line 14.

New section AS 21.78.251 pertains to transfers and transactions occurring after a delinquency proceeding has been undertaken but before an order of rehabilitation or liquidation has been entered or before the receiver takes possession of the insurer's property.

Section 73. AS 21.78.252. Voidable Preferences and Liens.
Page 66, line 15 to page 71, line 19.

New section AS 21.78.252 provides the detailed guidelines for the voiding or reversing improper transfers of property. This section maintains the personal liability of any person, (including insurer employees, officers, or shareholders), acting on behalf of an insurer that knowingly participates in giving of a preference who knows or has a reasonable cause to believe that an insurer is or is about to become insolvent.

Section 73. AS 21.78.253. Claims of Holders of Void or Voidable Rights
Page 71, line 20 to page 72, line 8.

New section AS 21.78.253 outlines how claims of person who received a preference are to be treated. In general such claims are to be disallowed and not allowed to participate in any distribution of the insolvent insurers estate. However, a claim by such a creditor will be allowed as an "excused late claim" only if the transfer which provided for the preference is reversed.

Section 74. AS 21.78.260. Priority of Distribution
Page 72, line 9 to page 74, line 13.

The current law governing liquidations does not provide for a statutory priority for distribution of an insolvent insurer's estate. By interpretation, the administrative expenses to liquidate an insurer receive priority treatment. Currently, AS 21.78.260 provides a priority for wages owed employees up to $500. The new version of AS 21.78.260 provides for a specific priority for the distribution of an insolvent insurer's estate. Additionally, a methodology is defined that calls for all claims in each class to be paid or sufficient funds set aside before any claims in the next lower priority class are paid. The order of distribution is as follows:

1. Class 1. The expenses and costs administration for the rehabilitation or liquidation;

2. Class 2. Wages for employees for up to two months pay but principal officers and directors are not allowed to benefit by this priority;

3. Class 3. All claims for losses incurred under insurance policies including third party liability claims and claims of any guarantee association;

4. Class 4. Claims for unearned premiums under nonaccessible insurance policies, other premiums refunds, and claims of general creditors including claims made by ceding or assessing reinsurers under contracts of reinsurance;

5. Class 5. Claims of federal, state, or local government other than claims made under Class 3;

6. Class 6. Claims filed late or any other claims other than those claims under Class 7 or Class 8;

7. Class 7. Surplus notes, contribution notes, or similar obligations, and premium refunds under assessable insurance policies; and

8. Class 8. Claims of shareholders or other owners in their capacity as shareholders or owners.

Section 75. AS 21.78.270. Setoffs and Counterclaims
Page 74, line 14 to page 75, line 3.

This section clarifies the requirement that mutual debts or credits between the impaired or insolvent insurer and any other person be netted out with a resultant single amount either paid to the insurer or paid by it.

Section 76. AS 21.73.271. Recovery of Premiums Owed
Page 75, lines 4 - 23.

This new section requires that any person, including licensed agents and brokers, responsible for the payment of premium to an insurer pay to the receiver the amount of premium due for the entire term of the policy at the time of the declaration of insolvency. The amounts are to include commissions. The director may impose a monetary penalty of up to $1,000 for each violation of this section and may also suspend or revoke the agent's or broker's license.

Section 76. AS 21.78.272. Reinsurers Liability
Page 75, line 24 to page 76, line 2.

This new subsection pertains to a reinsurer's obligations to the estate of an insolvent or impaired insurer. Payments under a contract of reinsurance due an insurer in delinquency may not be reduced as a result of the rehabilitation or liquidation proceeding. Unless the reinsurance contract specifically provides for payment to a person other than the impaired or insolvent insurer, a payment to a person other than the impaired or insolvent insurer does not reduce the reinsurer's obligation to that insurer.

Section 77. AS 21.78.280. Special Claims.
Page 76, lines 3 - 28.

Currently AS 21.78.280 contains provisions pertaining to both contingent and unliquidated claims, and third party liability claims. This one section has now been divided into two separate sections with AS 21.78.280 pertaining to contingent and unliquidated claims and AS 21.78.281 pertaining to third party claims.

AS 21.78.280 provides that a contingent and unliquidated claim will be allowed to participate in a distribution of an insolvent insurer's estate only if,

either the claim becomes absolute before the last day allowed for the filing of claims or a surplus of funds remains after all other claims are paid.

Section 78. AS 21.78.281. Special Provisions for Third-Party Claims.
Page 76, line 29 to page 78, line 17.

New section AS 21.78.281 provides the special guidelines for third party claims. It provides for either the third party or the insured of the insurer in liquidation to file a claim against the insolvent insurer's estate. The receiver is required to make recommendations to the court in regard to the allowance of a third party claim based on the receiver's consideration of the probable outcome of the pending action against the insured. If several third party claims against one insured are made which exceeds the policy limits, each claim will be proportionately reduced so that the total paid does not exceed the policy limits. No separate third party claim is allowed if covered by any guarantee association.

Section 79. AS 21.78.290. Notice to Creditors and Others
Page 78, line 18 to page 79, line 17.

This section has been repealed and reenacted to provide for a more detailed outline of how the receiver is to provide notice to potential claimants and other persons affected by the liquidation of an insolvent insurer. Notice is required to be made by several different media.

The notice must be given by the receiver as soon as is possible after the entry of the order of liquidation and must specify the amount of time allowed for the filing of claims. The time allowed for the filing of claims must be at least six months after the date of the liquidation order is entered.

Section 80. AS 21.78.291. Duties of Agents
Page 79, line 18 to page 80, line 18.

This new section requires that each appointed, licensed agent of an insurer in liquidation provide written notice to each policyholder issued coverage through the agent of the liquidation order. This notice must be accomplished within 15 days from the date the agent receives notice under AS 21.78.290. The written notice must include the name and address of the agent, identification of the policy affected, and the nature of how the policy is affected such as termination under AS 21.78.100. The receiver may waive the notice required by this section if other appropriate notice has been given to policyholders.

Section 80. AS 21.78.292. Filing of Claims
Page 80, line 19 to page 81, line 23.

This new section requires that proof of a claim must be filed in the form required by AS 21.78.170. This section also provides for the guidelines under which late filed claims may participate in the distribution of the estate of the insolvent insurer.

Section 80. AS 21.78.293. Receiver's Recommendation to the Court
Page 81, line 24 to page 81, line 13.

This new section requires the receiver to report to the court the nature of each claim made to include the name and address of the claimant and amount of claim recommended. The court may approve, disapprove, or modify the report on the claims made. However, if the court takes no action on a report within 60 days of the date of reporting, the claims will be considered to be allowed in the amount reported. In no event, will a claim under a policy of insurance be allowed in an amount in excess of the applicable policy limits. This report or reports as accepted by the court provide for the detail of the claims which will participate in the orderly distribution of the assets of an insolvent insurer.

Section 80. AS 21.78.294. Distribution of Assets
Page 82, lines 14 - 21.

This new section requires the receiver to accomplish the final distribution of funds to claimants under the court's supervision. The distribution plan must recognize the statutory priorities and provide for a reasonable balance of expediency with the protection of unliquidated and undetermined claims including third party claims.

Section 80. AS 21.78.295. Unclaimed and Withheld Money
Page 82, line 22 to page 83, line 14.

This new section provides that any unclaimed funds subject to distribution under a liquidation proceeding remaining when the court is going to end the receivership will inure to the state without going through any further proceedings.

Section 80. AS 21.78.296. Termination of Proceedings
Page 83, lines 15 - 23.

This new section provides for the receiver to apply to the court for discharge from the rehabilitation or liquidation proceedings when all duties have been performed. The court may grant the discharge and issue any other orders it deems appropriate. It is anticipated that such orders would include an order dissolving the corporate existence of an insolvent and liquidated insurer.

This section allows any other person to apply to the court at any time for an order discharging a delinquency proceeding. However, if the application is denied, the applicant is required to pay the costs incurred by the receiver in resisting the application.

Section 80. AS 21.78.297. Reopening Liquidation
Page 83, line 24 to page 84, line 1.

For good cause including the discovery of additional assets, the director or any other person may petition the court to reopen a previously closed liquidation. If sufficiently justified, the court must reopen the liquidation.

Section 80. AS 21.78.298. Disposition of Records During and After Termination of Liquidation.
Page 84, lines 2 - 7.

This new section allows the director to recommend to the court and the court to order which records of a liquidated insurer should be retained and which should be destroyed.

OTHER. (Sections 81-89)

Section 81. AS 21.88.050(a). Powers and duties
Page 84, line 8 to page 85, line 22.

This editorial change merely amends a cross reference to statutes revised elsewhere in this legislation.

Section 82. AS 21.90.900. Definitions for Title
Page 85, line 23 to page 86, line 13.

This section is amended to provide definitions for the terms "impaired", "impairment", "insolvent", "insolvency", and "policyholder surplus". These terms are used in several chapters of Title 21.

Section 83. Applicability of Reinsurance Credit
Page 86, lines 6-9.

This section delays the effective application of the changes affecting reinsurance credit allowed a domestic ceding insurer to avoid impact on existing contracts. This makes renegotiation of those contracts unnecessary.

Section 84. Applicability of Capital and Surplus Requirements
Page 86, lines 18 - 23.

This section delays the impact of the new capital and surplus requirements required in this legislation until January 1, 1992 when this section is repealed by section 86.

Section 85. Repealer
Page 86, lines 24 - 25.

Sections repealed are:

AS 21.09.080(b). This repeal requires domestic insurers to maintain the currently required capital and surplus amounts.
AS 21.09.080(c). This repeal requires domestic insurers to maintain the currently required capital and surplus amounts.
AS 21.21.020(b). This repeal deletes the grandfathering necessary for the 1966 major redrafting of this chapter but which now, after 22 years, is not required.
AS 21.21.270(d). Moved to definition section AS 21.21.600(6).
AS 21.78.330(1). Definition of "ancillary state" removed.

Section 86. Repeal of Section 84
Page 86, line 26.

This section repeals section 84 which delays the impact of the new capital and surplus requirements required in this legislation.

Section 87. Change of Civil Rule 62(a)
Page 86, line 27 to page 87, line 1.

Section 88. Change of Civil Rule 65(c)
Page 87, lines 2 - 6.

Section 89. Change of Civil Rule 41
Page 87, lines 7 - 11.

Section 90. Change of Civil Rule 19
Page 87, lines 12 - 14.

Section 91. Effective date of Act
Page 87, line 15

The Act takes effect immediately.

SB

82

SENATE LABOR & COMMERCE COMMITTEE
BILL FILE

BILL NUMBER: SB 82
BILL TITLE: CHARITABLE GAME BROADCASTING

SPONSOR: DUNCAN RECEIVED: 1/23/91

WRITTEN REQUEST TO SCHEDULE: DATE 1/25/91 FROM DUNCAN
SECTIONAL ANALYSIS RECEIVED: DATE _____ FROM _____
FISCAL NOTE REQUESTED: DATE 2/1 FROM GOV BRD
FISCAL NOTE RECEIVED: DATE _____ FROM _____
FISCAL NOTE CS REQUESTED: DATE _____ FROM _____
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____
FISCAL NOTE CS REQUESTED: DATE _____ FROM _____
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____
FISCAL NOTE CS REQUESTED: DATE _____ FROM _____
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____

FIVE DAY NOTICE GIVEN:
COMMITTEES OF REFERRAL: FIRST: L&C SECOND: JUD THIRD: ____

DATE	COMMITTEE ACTION
2/11	HEARD
2/28	CS ADOPTED AND MOVED

HEARING NOTIFICATION LIST

1. SPONSOR
2. AGENCY
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 82

Revision Date: _____ Department Affected: Commerce & Economic Dev.

Title: An Act repealing the moratorium of conducting and advertising gaming

BRU: Occupational Licensing

Component: _____

Sponsor: Senator Duncan

Requestor: Senate Labor & Commerce Cmte

COMPONENT SERIAL NO. | | | | |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.) (TO THE EXTENT ~~PROHIBITED~~ PROHIBITED UNDER FED LAW)
This bill would repeal the moratorium placed on gaming or advertising gaming on the airwaves as passed in HB 587. It would allow gaming on commercial airwaves as well as advertising of gaming. Under current law, noncommercial broadcasting stations may conduct gaming 12 hours in a calendar year.

Prepared By: John Hansen, Gaming Program Manager Phone: 465-2548

Division: Occupational Licensing Date: 2/7/91

Approved by Commissioner: Glenn A. Olds

Agency: Department of Commerce & Economic Development Date: 2/10/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90
JH7dg18870D/020891b

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 82

Revision Date: _____ Department Affected: Administration

Title: Charitable Gaming: Use of Broadcasting BRU: Alaska Public Broadcasting Commission

Component: _____

Sponsor: Duncan

Requestor: Duncan COMPONENT SERIAL NO. 7 7

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	Ø	Ø	Ø	Ø	Ø	Ø
CAPITAL	Ø	Ø	Ø	Ø	Ø	Ø
REVENUE	Ø	Ø	Ø	Ø	Ø	Ø

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	Ø	Ø	Ø	Ø	Ø	Ø

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: Ø

ANALYSIS: (Attach a separate page if necessary.)

(SEE ATTACHED)

Prepared By: Charles M. Northrip CMN Phone: 465-2846

Division: A.P.B.C. Date: 2/11/91

Approved by Commissioner: Millett Keller Mark Meiners for MK

Agency: Administration Date: 2/11/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

HOUSE BILL #82
BILL ANALYSIS

This bill repeals a moratorium on commercial broadcast advertising by State charitable gaming permittees. It permits activity now allowed by Federal law. Under the current moratorium, commercial broadcasters can't even promote the awarding of charitable door prizes as a public service. This bill will have no effect on public stations.

Alaska non-profit organizations would be able to buy commercial radio or TV time to promote gaming activities for which they hold official state permits. Gaming operators or third-party vendors would not be able to purchase such advertising, only the permit holders themselves.

Alaska State Legislature

SENATOR JIM DUNCAN

P. O. BOX V JUNEAU, ALASKA 99811-3100

(907) 465-4766

COMMITTEES:
FINANCE
VICE CHAIR – HEALTH EDUCATION & SOCIAL SERVICES
BUDGET & AUDIT
BANKING & ECONOMIC DEVELOPMENT

To: Senator Drue Pearce
Chair
Labor and Commerce Committee

From: Senator Jim Duncan

Regards: Hearing for Senate Bill 82

Date: January 25, 1991

I request the earliest possible hearing for Senate Bill 82 by the Senate Labor and Commerce Committee.

This measure lifts the moratorium placed on commercial broadcasters in Alaska in regards to charitable gaming activity last legislative session and permits activity allowable under federal law, the Charity Games Advertising Clarification Act of 1988. A copy of the act and a United States House of Representatives Judiciary Committee Report on the measure is attached for the benefit of your committee.

Passage of this act was a recognition by Congress of the unfair nature of banning charitable gaming through the electronic media. The law provides broadcasters essentially the same opportunities afforded the print media as it pertains to advertising lotteries and other games of chance such as the Golden North Salmon Derby in Juneau. Restrictions on broadcasters remain and violations are subject to the enforcement powers of the Federal Communications Commission which include fines and license forfeiture. The new law allows activity which is:

"(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

A number of questions concerning the scope of activity allowable by commercial stations and the role of game operators under terms of the new federal law were debated by the Legislature last year prior to its imposition of a moratorium. The Enforcement Division of the Federal Communications Commission's Mass Media Bureau has made it very clear that a charitable gaming activity may not be conducted on a commercial broadcast station and operators of games may not advertise or profit from advertising conducted by permit holders.

The National Association of Broadcasters has published an excellent guide explaining the new federal law. It contains a thorough explanation of the law and provides specific examples of activities which are allowed and those

considered in violation. I have provided a copy of this publication with this memo. Additional copies for each committee member will be provided in the near future. The National Association of Broadcasters, and in turn, the Alaska Broadcasters Association, do a good job ensuring its members are aware of the restrictions imposed by this law. As pointed out previously in this memo, individual commercial broadcasters run the risk of FCC fines and forfeiture of their license if found in violation. Obviously, there is great motivation on the part of broadcasters to adhere to the terms of federal measure. I do not feel additional state restrictions are necessary as a result. Alaska should follow the example of the States of Iowa and Illinois which allows federal law to exclusively regulate this activity.

Another issue of importance in this debate is one of basic fairness. My measure will allow commercial broadcasters to compete with the print media for the limited advertising dollars which may be available. Broadcasters would also be able to run public service or free time to promote the activities of non-profit organizations which are already promoted in Alaskan newspapers.

The measure approved by the Legislature last year also allows Alaska's public broadcasting facilities to air gaming activity. Even though commercial stations are banned by the federal law to conduct such activity, it is inherently unfair to restrict the activities of commercial broadcasters under this measure while allowing activity by non-commercial broadcasters. I've attached an opinion by the State Attorney General dated May 4, 1990, on this matter which states in its opening paragraph, "...we have serious concerns, from an equal protection standpoint, with any proposal that would allow one particular group or organization to conduct or advertise gaming activities on the air while excluding all others."

Alaska's commercial broadcasters should be allowed to operate under the restrictive terms of federal law without additional state regulation. I have every confidence that federal authorities will enforce violations of the law and I have every confidence that the commercial broadcasting industry in Alaska will ensure compliance to the law by its members.

The favorable consideration of Senate Bill 82 by the Labor and Commerce Committee is appreciated.

February 21, 1991

Drue -

Diane Kaplan would like our hearing on CSSB 82, Broadcasting of Charitable Gaming Advertising, teleconferenced. It is scheduled to be first on the agenda on Wed, 2/27.

February 9, 1991

Drue -

Diane Kaplan(sp), APRN, called friday and asked if the L&C hearing on SB 82, Use on broadcasting for charitable gaming, could be teleconferenced.

The bill is scheduled for monday. We could put the bill first on the agenda and teleconference half the meeting, if you would like.

I told her I would check to see if it was still possible and let her know today.

Rod

TELE CONFERENCE TO ANCH

210 FROM 3:30 → 4:30 IS

ALL SRT.

TELE CONFERENCE # 9102034

February 7, 1991

Drue -

I spoke with Jim Duncan and Pete Cairn about Eliason's concern over whether public radio and tv can advertise gaming activity...

According to Dennis Egan, as long as the activity advertised is for a non-profit, including themselves, SB 82 would remove the only obstacle to their advertising, as public service announcements, non-profit sponsored games.

On the question of whether or not the Dept of Commerce held public hearings on the advertising of games of chance, I called the Dept of Commerce...

According to Guy Bell, Dir of Admin Svcs., hearings were held. The report is still in draft. He is attempting to obtain a draft of the report or at least a draft of the statistical results of those hearings.

February 6, 1991

Drue -

HB 587 Electronic Ad Ban by H L&C
passed house 28-6 (M. Davis, Hanley, Leman, Martin, Phillips, Swackhammer)

Senate Action:
2/7/90
Amend # 1 Duncan - Allowing a permit holder to contract for actual conducting of gaming operations.
Failed 10 - 10 Eliason voted no

Amend # 2 Coghill - Deleting named derbies and contests and allowing all derbies. Directing regulations to be written as though broadcasting was legal.
Failed 8 - 12 Eliason voted no

Move to Rescind Action in not adopting Amend # 1.
Failed 9 - 11 Eliason voted no

Vote on full bill
Failed 10 - 10 Pearce Nay to Yea
Uehling Yea to Nay

Faiks notice of reconsideration.

2/8/90
Reconsideration
Failed 15 - 5 (Duncan, Fischer, Frank, Halford, Jones)

Alaska State Legislature

Senate

Office of the Secretary

OFFICIAL BUSINESS

PO BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

February 20, 1991

MEMORANDUM

TO: Senator Pearce, Chair
Labor and Commerce Committee

FROM: Nancy Quinto NQ
Secretary of the Senate

SUBJECT: Boards and Commissions Performance Reports and Charitable Gaming on the Airwaves Report

President Eliason referred the following reports to your committee for consideration:

ANNUAL PERFORMANCE REPORT OF BOARDS AND COMMISSIONS, FY 90
from Patricia Park-Fisher, Secretary
Division of Occupational Licensing
Department of Commerce and Economic Development

REPORT ON CHARITABLE GAMING ON THE AIRWAVES, (CH. 33, SLA 1990)
from John Hansen, Gaming Program Manager
Division of Occupational Licensing
Department of Commerce and Economic Development

NQ/ps

Attachments

REPORT TO THE LEGISLATURE
SCS CSHB 587 (L&C)
Charitable Gaming On the Airwaves

On November 16, 1990, in response to section three of SCS CSHB 587 (ch 33, SLA 1990), the Division of Occupational Licensing, Department of Commerce and Economic Development, proposed regulation 12 AAC 34.100, CONDUCT OF GAMING ON THE AIRWAVES. This proposed regulation allowed the advertising and conducting of a game of chance and skill over the airwaves under a number of conditions which the department saw as necessary to adequately protect the public. Those limitations included:

(1) the game conducted must be a game already authorized under existing statutes (AS 05.15.100(a));

(2) the permittee conducting the game had to be a not-for-profit organization as defined by federal tax code; and

(3) the permittee conducts the game without the use of an operator.

Division staff conducted hearings statewide via the Legislative Teleconference Network on January 7, 1991. Additional hearings were held in Anchorage on January 8, 1991, and Fairbanks on January 9, 1991.

The testimony we did receive was generally supportive of the legislative intent to allow public broadcasting stations to conduct a game of chance and skill on the airwaves on a trial basis. While specifics were unclear at the time of the hearing, the Alaska Public Radio Network (APRN) was proposing to conduct a radio/TV lotto game via public broadcasting affiliate stations. Some representatives from public broadcasting interests expressed some reservations about their individual station involvement in charitable gaming, but they were all generally supporting of trying this fund raising method as an alternative to the current proliferation of on-air membership/fund raising drives. Denmark's us of on-air charitable gaming by public television was cited by APRN as an example of how well this method of gaming can work.

A number of commercial broadcasters testified at the hearing in Anchorage, expressing concern over 12 AAC 34.100 as proposed. While they were not generally opposed to a public broadcaster permittee attempting to conduct charitable gaming, they testified that the proposed regulations did not adequately regulate the timing and method of gaming on the airwaves. Primarily, commercial broadcasters were fearful that public broadcasters would conduct gaming on the air during a commercial broadcasters' rating period. If viewers or listeners were artificially drawn from a commercial broadcast station to a public broadcasting station because of conducting a charitable game during a ratings week for the commercial broadcaster, the local commercial broadcaster rating would be reduced based upon a temporary and artificial condition. This would mean loss of revenue for the station for the remaining year or until a subsequent rating period. Since, by law, commercial broadcasters are not able to conduct gaming on the air, they feel as though they could be financially harmed with no way to respond competitively. They did not express a desire to be able to conduct or advertise charitable gaming, but rather want stricter control of when and how gaming is conducted on competing public broadcasting stations.

We received no comment from the general public, either supporting or opposing, the conducting of charitable gaming on the airwaves. This may be due to the nature of our public notice process which was geared more toward the gaming industry than to the general public who was not involved in gaming activity.

On January 15, 1991, APRN submitted an application for a charitable gaming permit. Our initial review of their application resulted in our written request for more information clarifying the type of gaming activity to be conducted. Their application is pending receipt of this additional information.

Because APRN has not yet been able to conduct gaming on the air, as envisioned by SCS CSHB 587 (L&C), we are unaware of any known impact this activity will have on Alaska in general.

JOHN HANSEN, GAMING PROGRAM MANAGER

MEMORANDUM

State of Alaska
Department of Law

TO: Randall P. Burns, Director
Division of Occupational Licensing
Department of Commerce and
Economic Development

DATE: May 4, 1990
FILE NO: 663-90-0386
TEL NO: 465-3600
SUBJECT: Gaming on public airways

FROM: Elizabeth J. Kerttula
Assistant Attorney General
Commercial Section-Juneau

You have requested our advice on a number of issues relating to the broadcasting of gaming activities over television and radio. Briefly, we conclude that within First Amendment restrictions the state may prohibit the broadcasting of gaming activities or advertisements. However, we have serious concerns, from an equal protection standpoint, with any proposal that would allow one particular group or organization to conduct or advertise gaming activities on the air while excluding all others.

Currently, under federal statute, only information about state-conducted lotteries is allowed to be broadcast by radio or television. 18 U.S.C.A. § 1307 (1988). On May 7, 1990, a new federal law, the Charity Laws Advertising Clarification Act of 1988, P.L. 100-625, H.R. 3146, 100th Cong., 2nd Sess. (1988), will go into effect. This law will "expand the scope of Chapter 61, U.S. Code, to allow the advertising in interstate commerce of lotteries, gift enterprises, and similar activities (including casino gambling and bingo halls) if the activity being advertised is legal in the State in which it is being conducted." H.R. No. 557, 100th Cong., 2nd Sess., 134 Cong. Rec. 4343 (1988). Specifically, the new law allows to be broadcast

> an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme . . . that is authorized or not otherwise prohibited by the State in which it is conducted and which is:
>
> (A) conducted by a not-for-profit organization or a governmental organization; or
>
> (B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

To address the new system, the House Labor and Commerce Committee has introduced House Bill 587. As of today, the current

committee substitute (offered 4-25-90) proposes a moratorium on broadcasting gaming information until October 1, 1990, except that the "Department of Commerce and Economic Development may authorize a noncommercial broadcasting station or network of stations to broadcast the conducting of an activity under AS 05.15." P. 1, lines 22-24, CSHB 587 (Labor and Commerce). Broadcasting information about fish derbies is also allowed, as federal statute currently allows broadcasting this information. 18 U.S.C.A. § 1305 (1950).

As a result of the new federal act and HB 587, you have a number of concerns. Your questions and our answers are addressed in sequence below.

1. Does the new federal act authorize both the advertising and the conduct of authorized games on radio and television?

First, you have only asked about "authorized" games. We think it is important to note that the state retains the right to determine which activities it will allow and that AS 05.15 and regulations promulgated under it govern this. The Charity Games Advertising Clarification Act of 1988 does not interfere with a state's decision concerning which gaming activities it will allow within its boundaries or which of those activities it will allow to be advertised. Summary of H. R. 3146, H.R. No. 557, 100th Cong., 2nd Sess., 134 Cong. Rec. 4343-4356 (1988).

Congress has specifically not preempted the states from deciding which games they will authorize and what kind of advertising they will allow. H.R. No. 557, 100th Cong., 2nd Sess., 134 Cong. Rec. 4343-4356 (1988). However, once a game is authorized, the question of whether the game may be actually conducted on television or radio, or whether it may only be advertised, is up to the FCC.

The federal act does allow advertising if a state allows it. However, as further explained in our response to your second question, constitutional restrictions still apply no matter what the latitude of the federal act. See Edge Broadcasting Company, t/a Power 94 v. FCC, ____ F. Supp. _____, 58 U.S.L.W. 2517 (E.D. Va. Feb. 23, 1990) (holding current 18 U.S.C.A. § 1307 constitutionally invalid as to commercial free speech).

We are not certain if federal law allows the actual conducting of games on the airwaves due to the ambiguous language of the federal act. Even though the state may regulate its own gaming activities, we think that the question of whether the federal act itself authorizes the actual conducting of games on

radio or television is still an open question, and that it is a question over which the state has no authority. See Federal Communications Act of 1934, 48 State. 1064, 47 U.S.C. § 151 et seq.

2. Could the state limit the conduct of gaming activities to noncommercial broadcasting stations to the exclusion of other qualified organizations and municipalities that have a gaming permit issued under AS 05.15? (See draft CSHB 587 (L&C)).

We assume that this question concerns the conducting of gaming activities on radio or television, since other types of conduct are currently allowed and CSHB 587 does not address them. You have only asked about limitations on the conduct of gaming activities, and we will answer this question first. However, this question also raises a concern about limitations on the advertising of gaming activities, which we will also address.

Before analyzing whether or not a statute could constitutionally create a distinction between those who can and cannot conduct gaming activities (or advertise them) on the airwaves, we would note that on its face current CSHB 587 (L&C) does not appear to be constitutionally invalid because it only creates a possibility that the Department of Commerce and Economic Development will allow noncommercial broadcasting stations to conduct gaming to the exclusion of other organizations. If the department does allow this, then the department must be able to justify the distinction between the two types of organizations, and the following analyses should be used.

CONDUCTING ON-THE-AIR GAMES

The question of whether noncommercial broadcasting stations may be allowed to conduct gaming activities on radio or television when other qualified organizations may not raises an equal protection issue. Alaska Const. art. I, § 1.

Under Alaska's equal protection analysis, the Alaska Supreme Court employs a sliding scale to determine if classifications violate equal protection. This scale depends on the importance of the interests involved, the purposes served by the statute, and an "evaluation of the state's interest in the particular means employed to further its goals." Patrick v. Lynden Transport, Inc., 765 P.2d 1375 (Alaska 1988) (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984)); see also State v. Enserch Alaska Const., ___ P.2d ___, Op. No. 3539 (Alaska Dec. 18, 1989).

The question of who may conduct gaming activities on the

airwaves also involves the right to commercial speech. Although commercial speech is not as protected as other types of speech, it is still an important right. See Alaska Transp. Comm'n v. Airpac, Inc., 685 P.2d 1248, 1253 (Alaska 1984). In analyzing an equal protection issue about commercial speech the Alaska Supreme Court recently utilized a fairly minimal level of scrutiny. However, even under this level the Alaska Supreme Court held that

> [t]here must be a substantial relationship between legitimate legislative goals and the means chosen to achieve those goals. . . . [A statute] will be upheld as long as (1) the statutory purpose is legitimate and within the police power of the state; (2) the means chosen substantially further the legislative purpose; and (3) the interest in [the state's] chosen means outweighs other interests.

Barber v. Mun. of Anchorage, 776 P.2d 1035, 1039 (Alaska 1989) (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984)).

Using the above analysis, in order for the state to allow noncommercial broadcasting stations the right to conduct their games on the air to the exclusion of other qualified groups (or "permittees"), it must have a legitimate reason for doing so. Furthermore, the means chosen to advance the state's interest must actually further the purpose; and finally, the state's interest must justify the state's excluding other legitimate permittees from conducting games on the air. This standard could arguably be met. Whether it is or not will depend on the reasons given for allowing the distinction and the rest of the equal protection analysis outlined above.

ADVERTISING

In addition to the same type of equal protection concerns about allowing only a certain group of permittees to conduct gaming activities on the air, other issues arise concerning the broadcasting of advertisements about charitable gaming in CSHB 587. Although we think that the state can legitimately ban all advertising of gaming in Alaska, see Barber v. Mun. of Anchorage, 776 P.2d 1035 (Alaska 1989); Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328 (1986); H.R. No. 557 supra, two First Amendment issues arise when one group is allowed to utilize the airwaves for the gaming purposes and others are not.

The two issues are: 1) whether the state can limit legitimate permittees from conducting or advertising their gaming activities on the airwaves (permittees vs. permittees); and 2) whether it is constitutional to allow public broadcasting to broadcast its gaming information while commercial broadcasters are prohibited from broadcasting gaming activities or advertisements (broadcasters vs. broadcasters). With respect to the first issue, testimony concerning the new federal statute made it clear that Congress intended for the states to retain the ability to make decisions concerning the conducting and advertising of gaming within their borders. H.R. No. 557, supra. However, testimony also presented the issue that allowing one group to advertise its activities while foreclosing another may violate the First Amendment and guarantees to free speech. Id. at 4348. Even though this is commercial free speech and thus is not as protected as other types of speech, any ban on it must pass a four-prong test contained in the seminal case of Central Hudson v. Public Service, 447 U.S. 557 (1980), recognized in Barber and Alaska Transp. Comm'n v. Airpac, Inc., 685 P.2d 1248 (Alaska 1984). In outlining the Central Hudson test, in Barber the Alaska Supreme Court cited the U.S. Supreme Court's decision in Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981), which stated:

> [I]n Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), we held: The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. (citation omitted). We then adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The first Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

776 P.2d at 1307 (citations omitted).

The Alaska Supreme Court also noted "a state may curtail speech when necessary to establish a significant and legitimate governmental interest." Id. However, the Court warned:

> It is further established that the first amendment of the United States Constitution "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

Id. (citation omitted). If there is a significant and legitimate governmental interest in allowing one permittee to conduct its games on the air while excluding others, and if a statute enacted to further this interest did not favor any particular permittees' points of view, then under Barber, Metromedia, and possibly Central Hudson, the distinction may pass constitutional scrutiny.

In Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986), the U.S. Supreme Court utilized the Central Hudson test cited in Barber to analyze whether or not a Puerto Rico statute banning advertising of casino gambling aimed at the residents of Puerto Rico (there was no ban on advertising aimed at nonresidents) violated the First Amendment to the U.S. Constitution. In its decision, the Court showed great deference to the Puerto Rico Legislature. The Court found that, even though the advertising of casino gambling concerned a legal activity and was not misleading or fraudulent (the first prong), the Puerto Rico legislature believed that

> excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.

Id. at 341. The Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest." Id. Thus, the Court found that the second prong of Central Hudson was met. The Court went on to find that the challenged restriction "directly advanced" the government's interest in that advertising would serve to increase the demand for the product advertised," 478 U.S. at 343, thus meeting the third Central Hudson test. Finally, the Court found that Puerto Rico's statute met the fourth Central Hudson test because it "was no more extensive than necessary to serve the government's interest [of not inducing Puerto Rico residents to engage in potentially harmful conduct]." Id. Since Puerto Rico could have prohibited gambling altogether, that power "necessarily include[d] the lesser power [to ban only the advertising of casino gambling to residents of Puerto

Rico]." Id. at 346. The Court also commented that, even though Puerto Rico had legalized casino gambling for its residents, it did not have to allow the advertising of it, again because Puerto Rico had the power to ban gambling altogether. Id.

If public broadcasting stations are allowed to broadcast their gaming information but other permittees are not, then as previously outlined under both Central Hudson and Posadas de Puerto Rico, the four-prong test enunciated above must be met. The same rationale utilized in Posadas de Puerto Rico could be used to argue that it is legitimate to restrict the overall dissemination of gaming information by allowing only public broadcasting to broadcast its information while not allowing other permittees to broadcast theirs. However, although Posadas upheld a restriction on the advertising of gambling, Posadas was a 5-4 decision, and testimony concerning the new Charity Games Advertising Clarification Act of 1988 noted that it is possible that Posadas will be "treated as aberrational." H. R. No. 557, supra. At the same time, the testimony also noted that partial rather than total bans on advertising were likely to survive scrutiny under Posadas. Id.

It is difficult to tell whether allowing only public broadcasting stations to broadcast their gaming information would violate the First Amendment. If public broadcasting gains a valid state permit, then the first prong of Central Hudson would be met, in that the broadcasting would be lawful and presumably not misleading. The second prong, whether there is a substantial governmental interest at stake in restricting the broadcasting of other permittees' information, could probably be met by using the analysis in Posadas and other cases outlining the fact that the state controls gambling. The third prong might be met by noting that precluding advertising advances the government's interest. Whether or not the restriction would be held to be no more extensive than necessary is questionable. Under Posadas and Barber, the restriction might be upheld. However, there is at least one recent U.S. District Court opinion, Edge Broadcasting Co., t/a Power 94 v. FCC, ___ F. Supp. ___, 58 U.S.L.W. 2517 (E.D. Va., Feb. 23, 1990), that has questioned Posadas and has noted that "neither the Supreme Court nor any lower federal court, in the wake of Posadas, has yet held a commercial speech restriction constitutional which would not have passed scrutiny under the traditional Central Hudson tests." A copy of this case is attached.

The second question is whether it is constitutional to allow public broadcasting to broadcast its gaming information while commercial broadcasting stations are prohibited from broadcasting gaming activities or advertisements. Using the same four-prong Central Hudson and Posadas test, the U.S. District Court for the

Eastern District of Virginia recently held in Edge Broadcasting Co. that current 18 U.S.C.A. §§ 1304 and 1307, as applied to the situation before the court, were constitutionally invalid as to commercial free speech because they violate the third prong of the test.

In Edge Broadcasting Co., a station broadcasting from North Carolina whose signal reached mostly Virginia residents asked for a declaratory decree and injunctive protection against enforcement of (current) 18 U.S.C.A. §§ 1304 and 1307 (prohibiting the advertising of lottery information except from locations within a state which conducts a lottery). North Carolina does not allow lotteries, but Virginia does. The station showed that 92.2 percent of its listeners reside in Virginia, and that although the station's signal reaches nine counties in North Carolina, less than two percent of North Carolina's population reside in those counties. The court granted the station declaratory and injunctive relief against 18 U.S.C.A. §§ 1304 and 1307 because it found that under the facts of the case enforcement of the federal statutes was an

> ineffective means of reducing lottery participation by the North Carolina residents in Power 94's service area because the North Carolina residents within the area of Power 94's signal receive most of their radio, newspaper and television communication from Virginia-based media.

The court further noted that the application of the statute could only "speculatively advance the goals of the State of North Carolina," and that "to the extent that [statute] does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of 'remote' support rejected by Central Hudson as not 'directly advancing' either interests of federalism or limitations on lottery sales." (Citation omitted.) Thus, the court found that the third prong of Central Hudson was not met. In so finding, the court noted, citing testimony on the recent Charity Games Advertising Clarification Act of 1988, that Posadas "contrasts with the approach in Central Hudson." Following what it interpreted as necessary under Central Hudson, it gave somewhat less deference to the North Carolina legislature than Posadas suggests might be appropriate.

Given the uncertainty between Posadas and Central Hudson, excluding commercial stations from being allowed to advertise legitimate charitable games while public broadcasting stations are allowed to do so may violate the third prong of the Central Hudson test. However, Barber suggests that the Alaska Supreme Court will

show greater deference to the state in its attempt to regulate speech. See also Johnson v. Tait, 774 P.2d 185 (Alaska 1989). If there can be a showing that such a restriction actually advances a legitimate governmental interest, there will be a stronger case to allow such a distinction. This analysis may depend to some degree on just how many listeners public broadcasting reaches in Alaska. If the governmental interest is in reducing the number of Alaskans who gamble, and a substantial number of Alaskans listen to public broadcasting, Edge Broadcasting Co. suggests that a ban on advertising by commercial stations may not actually advance the government's asserted interest (and Barber still requires this). If, however, public broadcasting does not reach a substantial proportion of the population, not allowing commercial stations to broadcast advertising may have a more valid constitutional foundation.

Current CSHB 587 would allow the Department of Commerce and Economic Development until October 1, 1990, to conduct hearings on the issues raised by the Charity Games Advertising Clarification Act of 1988. While under the bill the department may allow noncommercial broadcasting stations to broadcast the "conducting of an activity under AS 05.15" (CSHB 587 (L&C) p.1, lines 23-24), this moratorium will allow the department some time in which to identify and clarify the state's interest, and to ascertain whether allowing public broadcasting stations to broadcast gaming information to the exclusion of commercial broadcasting would directly advance the government's asserted interest.

3. Is the type of gaming activity being considered by the Alaska Public Radio Network allowed under AS 05.15? (See attached APRN application.)

The Alaska Public Radio Network ("APRN") has not submitted a final outline for its gaming activity, so it is not possible to answer this question at this time. APRN's original paperwork, received by the Department of Commerce and Economic Development, Division of Occupational Licensing, on January 31, 1990, briefly describes a lottery with winners announced on member stations. Lotteries and raffles are allowed under AS 05.15.180(b), but further definition of APRN's plan will have to be analyzed before it can be approved.

4. Does the department have sufficient regulatory authority under AS 05.15 to adopt regulations addressing the issue of advertising charitable gaming over the airwaves, and if so, to what extent? (See particularly AS 05.15.060(7) and (12) and AS 05.15.130.)

The Department of Commerce and Economic Development does have regulatory authority to adopt regulations addressing the issue of advertising charitable gaming over the airwaves. AS 05.15.-060(7) states that the department shall adopt regulations covering "the method and manner of conducting authorized activities and awarding of prizes or awards." AS 05.15.160(12) commands the department to adopt regulations concerning "other matters the commissioner considers necessary to carry out [the chapter on games of chance and skill] or protect the best interests of the public." AS 05.15.130 allows the commissioner to "supplement the definitions of qualified organizations and activities by regulations . . . adding to the definitions additional requirements which the commissioner considers necessary for the best interest of the public or for the proper administration of this chapter." The department thus has broad regulatory authority over games of chance and skill (or "charitable gaming") in Alaska.

We believe that, in the absence of any legislative action to the contrary, the department may regulate the advertising of charitable games over the airwaves. Having said this, we would note that the department is still subject to the normal restrictions on any regulatory authority. The regulation must be within the scope of the department's authority (which is broad in this case); the regulation must be consistent with other standards provided by law (including constitutional standards); the regulation must be consistent with the statute under which it was adopted; the regulation must be reasonably necessary to implement the statute; and the regulation itself must be reasonable. See Kenai Peninsula Fisherman's Cooperative v. State, 628 P.2d 897, 906; Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971); see also Department of Law Drafting Manual for Administrative Regulations 26-33 (10th ed. July 1989).

Although statutes can overrule regulations, "if the proper procedure is followed in adopting a regulation, and if the substance of the regulation is valid, it will have the 'force and effect' of law." Id. at 1 (citing AS 18.60.190, AS 42.05.541, and AS 45.75.050(a)). Therefore, if the legislature does not enact a law restricting the department's authority over this area, the department is free, within the noted boundaries, to adopt regulations addressing the issue of advertising charitable gaming over the airwaves.

We hope this answers your questions. If we can be of further service, please let us know.

EJK:jf

563-7733
Alaska Public Radio Network
4640 Old Seward Highway
Suite 202
Anchorage, Alaska 99503

3-4-91

ANCHORAGE, AK 995
PM
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1991

ALWAYS
USE
ZIP CODE

Dear Rod

Thanks for keeping us so well informed on SB82 & thanks for making sure it works for public radio

Best regards,
Diane Kaplan

APRN
VOICES OF ALASKA

Rod Mormant
Office of Senator
Dave Pearce
P.O. Box V
Juneau, AK 99811


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FEB 11 1991

APRN
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FACSIMILE TRANSMISSION COVER SHEET

THIS TRANSMISSION CONSISTS OF 2 PAGES
(INCLUDING THIS COVER SHEET)

DATE 2/11/91

TO Senator Pearce

FACSIMILE NUMBER 465-5352

FROM: Diane Kaplan

NOTES:

Please deliver to Senator Pearce immediately — Labor & Commerce Hearing Room.

Thanks!

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 3 1991

IN REPLY REFER TO:

8210-BH
C6-175

Ms. Diane S. Kaplan, President and CEO
Alaska Public Radio Network
4640 Old Seward Highway, Suite 202
Anchorage, AK 99503

Dear Ms. Kaplan:

This is in reference to your request for a declaratory ruling concerning the propriety of conducting an on-air game of chance to benefit public broadcasting in Alaska. You propose a 10-week game, during which game tickets would be sold at retail locations statewide. A one-hour entertainment show would be broadcast on Alaska Public Radio Network's 24 member stations once a week during the game period and winning tickets would be drawn during the program. You state that the game will be conducted exclusively by your non-profit corporation. You have provided a copy of a letter of strong support for your proposal from Senator Ted Stevens.

Title 18 U.S.C. Section 1304 prohibits broadcasting lottery information. Title 18 U.S.C. Section 1307(a)(2)(A) exempts lotteries conducted by not-for-profit organizations from that prohibition if the lottery activity is authorized or not otherwise prohibited by the state in which it is conducted. Accordingly, if the Alaska Public Radio Network meets the statutory definition of a not-for-profit organization by qualifying as tax exempt under Section 501(c)(3) of the Internal Revenue Code, See, Title 18 U.S.C. Section 1307(d), and if the state of Alaska authorizes or does not otherwise prohibit the activity, you may conduct on-air games of chance without violating federal statute or the Commission's Rules. In this latter regard, we suggest that you check with Alaska state officials to make certain that such an activity is not prohibited by your state's laws.

I trust that the foregoing is helpful.

Sincerely,

Edythe Wise

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Public Law 100-625
100th Congress

An Act

To clarify certain restrictions on distribution of advertisements and other information concerning lotteries and similar activities.

Nov. 7, 1988
[H.R. 3146]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Charity Games Advertising Clarification Act of 1988.
States and local governments.
18 USC 1801 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Charity Games Advertising Clarification Act of 1988".

SEC. 2. AMENDMENTS RELATING TO THE MAILING AND BROADCAST OF ADVERTISEMENTS FOR LEGAL LOTTERIES AND SIMILAR ENTERPRISES.

(a) STATE-CONDUCTED LOTTERIES UNDER TITLE 18.—Subsection (a) of section 1307 of title 18, United States Code, is amended to read as follows:

"(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

"(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

"(A) contained in a publication published in that State or in a State which conducts such a lottery; or

"(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

"(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

"(A) conducted by a not-for-profit organization or a governmental organization; or

"(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.".

(b) DEFINITION OF NOT-FOR-PROFIT ORGANIZATION.—Subsection (d) of section 1307 of title 18, United States Code, is amended by adding at the end thereof "For purposes of this section, the term a 'not-for-profit organization' means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.".

(c) POSTAL SERVICE REGULATION OF LOTTERIES.—Paragraph (1) of section 3005(d) of title 39, United States Code, is amended to read as follows: "(1) publications containing advertisements, lists of prizes, or information concerning a lottery, which are exempt, pursuant to section 1307 of title 18 of the United States Code, from the provisions of sections 1301, 1302, 1303, and 1304 of title 18 of the United States Code,".

29-139 O - 88 (625)

SEC. 3. TECHNICAL AMENDMENTS.

(a) AMENDMENTS TO TITLE 18, UNITED STATES CODE.—Chapter 61 of title 18, United States Code, is amended as follows:

(1) The section heading of section 1307 is amended to read as follows:

"§ 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries".

(2) The item relating to section 1307 in the table of sections at the beginning of chapter 61 is amended to read as follows:

"Sec. 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries.".

(3) Subsection (d) of section 1307 is amended by inserting after "purposes of" the following: "subsection (b) of".

(4) The first sentence of section 1304 is amended by inserting after "radio" the following: "or television".

SEC. 4. SEVERABILITY.

18 USC 1307 note.

If any provision of this Act or the amendments made by this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

SEC. 5. EFFECTIVE DATE.

18 USC 1304 note.

The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act.

Approved November 7, 1988.

LEGISLATIVE HISTORY—H.R. 3166:

HOUSE REPORTS: No. 100-657, Pt. 1 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 134 (1988):
May 10, 25, considered and passed House.
Oct. 14, considered and passed Senate, amended.
Oct. 19, House concurred in Senate amendment.

○

100TH CONGRESS
2d Session | HOUSE OF REPRESENTATIVES | REPT. 100-
Part 1

LOTTERY ADVERTISING CLARIFICATION ACT OF 1988

MARCH 31, 1988.—Ordered to be printed

Mr. FRANK, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 3146 which on August 6, 1987, was referred jointly to the Committees on the Judiciary and Post Office and Civil Service]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3146) to clarify certain restrictions on distribution of advertisements and other information concerning lotteries and similar activities, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lottery Advertising Clarification Act of 1988".

SEC. 2. AMENDMENTS RELATING TO IMPORTATION, TRANSPORTATION, MAILING, AND BROADCAST OF ADVERTISEMENTS FOR LEGAL LOTTERIES AND SIMILAR ENTERPRISES OFFERING PRIZES DEPENDENT ON CHANCE.

(a) AMENDMENT TO TITLE 18, UNITED STATES CODE.—Subsection (a) of section 1307 of title 18, United States Code, is amended by striking out "conducted by" and all that follows through the end of the subsection and inserting in lieu thereof ", gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, if the lottery, gift enterprise, or similar scheme is authorized or not otherwise prohibited by law in the State in which it is conducted."

(b) AMENDMENT TO TITLE 39, UNITED STATES CODE.—Section 3005(a)(1) of title 39, United States Code, is amended by striking out "a newspaper" and all that follows through "such a lottery," and inserting in lieu thereof "(A) an advertisement, list of prizes, or information concerning a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, if the lottery, gift enterprise, or scheme is authorized or not otherwise prohibited by the State in which it is conducted, or (B) a newspaper of general circu-

a containing an advertisement, list of prizes, or information referred to in such Act.

SECTION-BY-SECTION ANALYSIS

(a) AMENDMENTS TO TITLE 18, UNITED STATES CODE.—Chapter 61 of title 18, United States Code, is amended as follows:

(1) The section heading of section 1307 is amended to read as follows:

"§ 1307. Exceptions relating to certain advertisements and other information and to State conducted lotteries".

(2) The item relating to section 1307 in the table of sections at the beginning of chapter 61 is amended to read as follows:

"1307. Exceptions relating to certain advertisements and other information and to State conducted lotteries.".

(b) Subsection (d) of section 1307 is amended by inserting after "purposes of" the following: "subsection (b) of".

(c) The first sentence of section 1304 is amended by inserting after "radio" the following: "or television".

(d) AMENDMENT TO TITLE 39, UNITED STATES CODE.—Subsection (d)(2) of section 3005 of title 39, United States Code, is amended by striking out "such a lottery" and inserting in lieu thereof "a lottery conducted by a State acting under authority of State law".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act.

PURPOSE

The purpose of H.R. 3146, as amended, is to expand the scope of Chapter 61, U.S. Code, to allow the advertising in interstate commerce of lotteries, gift enterprises, and similar activities (including casino gambling and bingo halls) if the activity being advertised is legal in the State in which it is being conducted. The bill also amends section 3005 of title 39, U.S. Code, to allow for the mailing of such advertisements and materials, if the activity being advertised is legal in the State in which it is being conducted. The effective date of the bill is 18 months after enactment.

BACKGROUND

In 1895, at a time when lotteries were primarily privately run and largely unregulated, the Federal Government prohibited the importation of lottery tickets or prize lists into the United States; the transportation in interstate commerce of such articles; and the mailing of such materials. These restrictions were the predecessors of Sections 1301 and 1302 of title 18, U.S. Code. Shortly after enactment of Sections 1301 and 1302, the predecessor of Section 1303 was added to prohibit postal employees from acting as agents for a lottery. In 1934, the predecessor of Section 1304 was enacted to prohibit the broadcasting of any advertisement or information concerning a lottery by means of a radio station required to be licensed under federal law.

After the adoption of lotteries by several states in the 1960s and 1970s, Section 1307 was added to provide that the restrictions contained in Sections 1301-1304 would not apply to advertisements, list of prizes, or information about state-conducted lotteries that are advertised in the state conducting the lottery or in adjacent states that also conduct lotteries.

CURRENT LAW

Chapter 61 of title 18, U.S. Code (Sections 1301-1307) regulates the transporting of lottery tickets and lottery information in interstate commerce. Under the current law, interstate advertising of information relating to lotteries by importing, transporting, mailing, or broadcasting of such activities is prohibited (18 U.S.C. 1301-1304). Section 1307 of title 18 contains an exception which allows the advertising of state-conducted lotteries in those states and in adjacent states which also conduct lotteries.

A related federal statute, Section 3005 of title 39, U.S. Code, regulates the use of the mails in conducting lotteries or similar activities. Subsection (d) of this section contains an exception from the general prohibitions in subsections (a), (b), and (c) to allow the mailing of information, materials, or newspapers containing lottery advertisements to adjacent states which also conduct lotteries.

While state-conducted lotteries are allowed limited advertising in interstate commerce, the effect of the current law is to prohibit the interstate advertising of charitable raffles, church bingo games and casino gambling, even if such are legal in the state where the activity is being conducted. In addition, newspapers which print such advertisements are prohibited from being mailed to out-of-state subscribers.

SUMMARY OF H.R. 3146

H.R. 3146 would modify the current law to allow the advertising in interstate commerce of all legal lotteries, gift enterprises, and similar activities. The bill only removes federal restrictions on the advertising of legitimate lotteries and gambling activities in interstate commerce, whether conducted by public, private, or charitable interests.

H.R. 3146 makes no attempt to limit the rights of the individual states to restrict such advertising under state law. In fact, the Committee included a delayed effective date in order to allow each state time to enact legislation to prohibit this type of advertising within the boundaries of an individual state.

H.R. 3146 does require that the activity being advertised be legal in the state where it is being conducted. The Committee was very clear that illegal gambling activities may not be advertised. The purpose of the Committee amendment deleting the word "regulated" was to insure that charitable activities, such as church bingo games could advertise. The Committee was concerned that the word "regulated" would be construed in such a way as to preclude the advertising of charitable or church games if not directly regulated by the state.

The Committee also noted that the amendments contained in this legislation are intended to expand the advertising rights of state-conducted lotteries, as well as to allow other legal gaming to advertise. Nothing in this legislation should be construed as limiting the rights already held and enjoyed by state-conducted lotteries.

H.R. 3146 also amends 39 U.S.C. 3005(d) to provide that materials or advertisements concerning lotteries, gift enterprises, or similar activities, can be mailed anywhere as long as the activity being ad-

vertised is legal in the State in which it is being conducted. The bill does not authorize the mailing of lottery paraphernalia or tickets in interstate commerce. This amendment to title 39 conforms the mailing statutes to the amendments being made by the bill to title 18.

Committee Action

On April 2, 1987, the Subcommittee on Administrative Law and Governmental Relations held a hearing on H.R. 1568. The following witnesses presented testimony: Honorable Barbara Vucanovich, Member of Congress from Nevada; Honorable James H. Bilbray, Member of Congress from Nevada; Douglas Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice; George C. Davis, Assistant General Counsel, Consumer Protection Division; Edward O. Fritts, President, National Association of Broadcasters; Frank A. Daniels, Jr., President and Publisher of the Raleigh, North Carolina News and Observer and Times, representing the American Newspaper Publishers Association; and Dr. Larry Baker, Executive Director, The Christian Life Commission, Southern Baptist Convention. Dennis R. Patrick, Chairman, Federal Communications Commission, submitted written comments.

On July 30, 1987, the Subcommittee on Administrative Law and Governmental Relations held a markup of the bill, H.R. 1568, and favorably recommended to the full committee a clean bill, H.R. 3146.

The full Committee considered the bill, H.R. 3146, on March 15, 1988, and ordered the bill favorably reported, as amended, to the House.

Departmental Comments

The following agencies reported to the Committee that they are in favor of the amendments contained in H.R. 3146: The Department of Justice, the Federal Communications Commission, and the United States Postal Service. In addition, all three agencies reported to the Committee that the current statute was all but impossible to enforce.

Conclusion

The Committee determined that at the time the lottery statutes were enacted, lotteries and gambling activities were privately run and largely unregulated. The committee notes that this has drastically changed and now almost all states authorize some form of lottery or gambling activity. In addition, the Committee noted that in the interest of fairness, legal privately run or charitable activities should enjoy the same rights as state-conducted lotteries.

Therefore, the Committee recommends that the bill, H.R. 3146, as amended, be favorably considered by the House and urges that the bill be passed.

Statements Under Rule XI Clause 2(l)(B), Clause 2(l)(3)(A), Clause 2(l)(3)(B), Clause 2(l)(3)(D) and Clause 2(l)(4); Rule XIII Clause 7(a)(1); and Rule XI Clause 2(l)(3)(C); and Rule XIII Clause 6)

Committee Vote

(Rule XI 2(l)(2)(B))

On March 15, 1988, a reporting quorum being present, the full Committee on the Judiciary approved the bill, H.R. 3146, with amendments, by a voice vote.

Oversight Statement

(Rule XI (2)(l)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this Committee exercises the Committees' oversight responsibility with reference to advertising in interstate commerce of lotteries and similar activities in accordance with Rule VII(b) of the Rules of the Committee. The favorable consideration of this bill was recommended by that Subcommittee and the Committee determined that the legislation should be enacted as set forth in this bill.

Budget Statement

(Rule XI (2)(l)(3)(B))

H.R. 3146 does not directly provide budget authority nor does it involve new or increased tax expenditures contemplated by Clause 2(l)(3)(B) of Rule XI.

Oversight Findings and Recommendations of the Committee on Government Operations

(Rule XI (2)(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (d) of clause 2(l)(3) of House Rule XI.

Inflationary Impact

(Rule XI (2)(l)(4))

In compliance with clause 2(l)(4) of House Rule XI, it is stated that this legislation will have no inflationary impact on prices and costs on the operation of the national economy.

Cost

(Rule XIII (7)(a)(1))

The costs are those outlined in the cost estimate of the Congressional Budget Office included in this report.

Cost Estimate of the Congressional Budget Office

(Rule XI 2(l)(3)(c))

The cost estimate of the Congressional Budget Office, prepared pursuant to section 403 of the Congressional Budget Act of 1974 and received by the Committee on March 22, 1988, is as follows:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 22, 1988.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 3146, the Lottery Advertising Clarification Act of 1987, as ordered reported by the House Committee on the Judiciary, March 15, 1988. CBO estimates that enactment of the bill would result in no significant cost to the federal government and in no cost to state or local governments.

H.R. 3146 would allow advertising and the distribution of other information concerning lotteries, gift enterprises and similar activities if such activities are authorized or not otherwise prohibited in the state in which they are conducted and if the advertising or distribution of other information is not prohibited in the states in which it occurs. Currently, there is a limited exemption for state-conducted lotteries. This exemption applies only to advertisements or other information contained in a newspaper published within the state conducting the lottery or in adjacent states that also conduct lotteries, and to advertisements or other information broadcast by a radio or television station licensed within the state conducting the lottery or in adjacent states that also conduct lotteries. These changes would take effect 18 months after the date of enactment.

Based on information provided by the Department of Justice, the U.S. Postal Service and the Federal Communications Commission (FCC), CBO estimates that enactment of this bill would result in no significant cost to the federal government. Because this more general exemption would be subject to state law, postal employees would need to keep up-to-date with the various state laws in order to determine whether such material is legally mailable. While this could make enforcement more difficult and time-consuming, any additional administrative costs are not likely to be significant. In addition, costs to the FCC could be reduced because allowing advertisements and distribution of other information could reduce much of the need for FCC regulation in this area.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum,
Acting Director.

The following letter was submitted by the Federal Communications Commission to the Subcommittee on Administrative Law and Governmental Relations commenting on H.R. 3146.

Federal Communications Commission,
Washington, DC, November 4, 1987

Hon. Barney Frank,
Chairman, Subcommittee on Administrative Law and Government,
Committee on the Judiciary, House of Representatives, Rayburn
House Office Building, Washington, DC.

Dear Mr. Chairman: This letter comments on your legislation, H.R. 3146, the "Lottery Advertising Clarification Act of 1987."

The legislation would amend Section 1307 of Title 18 of the United States Code relating to legal lotteries. Currently, 18 U.S.C. Sec. 1307(a) permits the broadcast of lottery advertisements and information only with regard to lotteries "conducted by a state acting under the authority of State law * * *." H.R. 3146 would authorize the broadcast of lottery information and advertisements concerning all lotteries legal in the state in which they are conducted.

I strongly support H.R. 3146. This support is based both on legal grounds and on FCC experience in handling lottery inquiries and complaints from broadcast licensees and others. The existing Section 1307 unnecessarily restricts the free flow of information concerning legal activities (i.e., lotteries permitted by state law but not conducted by a state). Accordingly, the existing law may be constitutionally infirm given the increased recognition of First Amendment protection accorded commercial speech since the lottery provision was originally enacted. See, e.g., *Bigelow* v. *Virginia*, 421 U.S. 805 (1975).

With regard to our administrative experience, I estimate that we receive at least two calls a day seeking advice about the legality of proposed contests or games of chance. Many of these calls involve fund-raising purposes. Other calls involve inquiries from the fraternal organizations endeavoring to raise funds for a favorite charity through games of chance. Still other calls involve advertising campaigns in which games of chance are utilized as incentives to increase sales. Handling these inquiries often requires analysis by several persons and utilizes a significant amount of staff time. The amount of time expended seems inordinate to the "evil" involved.

In addition to telephone inquiries, we also receive complaints, usually in writing, about radio or television stations that may have violated the statute by promoting lotteries. A well-founded complaint will generate a letter of inquiry to the station, followed by a response from the licensee. If the facts establish that a lottery was aired, a forfeiture action commences as the usual sanction. The vast majority of the inquiries the Commission receives concern legal contests, often deemed important as fund-raising schemes to support community-based organizations or advertising promotions to sell goods and services.

It is my view that permitting the advertising of lotteries not prohibited by the states in which they are conducted would give full effect to the decisions of those local authorities who have determined that games involving prizes, chance, and consideration are legitimate fund-raising and market tools.

I hope these views on the current statute will prove helpful in your efforts to amend it. Please let us know if we can provide you with any other assistance on the legislation.

Sincerely,

DENNIS R. PATRICK,
Chairman.

The following is the testimony of Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice presented to the Subcommittee on Administrative Law and Governmental Relations at an April 3, 1987, hearing.

TESTIMONY OF DOUGLAS W. KMIEC, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. Chairman, Members of the Subcommittee, I am pleased to appear before you today, on behalf of the Attorney General, to discuss H.R. 1568, a bill "to clarify certain restrictions on distribution of advertisements of State authorized lotteries * * *." The Department believes that the bill should be enacted so that each State may decide for itself whether to prohibit within its borders the advertising of out-of-state lotteries. It is our view that this proposed legislation is consistent with a proper understanding of federalism, and recognizes Congress' affirmative responsibility to be protective of the interests of state and local government. *See Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, 1018 (1985).

As you are no doubt aware, the United States Code currently contains a number of broad anti-lottery provisions. Section 1301 of title 18 prohibits the importation and passing through interstate commerce of lottery tickets and related materials. Another section of the Code [18 U.S.C. 1302] proscribes the mailing of lottery tickets, advertisements, and related materials. Section 1303 forbids postal authorities from acting as agents for a lottery, and section 1304 bars the broadcasting of lottery-related information over radio channels.

Prior to 1975, these provisions made it very difficult for States to conduct lotteries successfully. In that year, however, these broad proscriptions were tempered by section 1307(a), which provides in part:

> The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisment, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> (1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or
>
> (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

Although this amendment to the statute obviously made it easier for States to conduct lotteries without running afoul

of federal law, the protection it affords is far from complete. The statute does not, for example, permit a state-conducted lottery to advertise outside the borders of the State by means of circulars or leaflets.

H.R. 1568 would amend 18 U.S.C. 1307(a) by deleting everything after the first reference to "lottery" and replacing it with: ", gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, if the lottery, gift enterprise, or similar scheme is authorized and regulated by the State in which it is conducted." This amendment would effect two major changes in the law. First, if the proposed legislation were enacted, federal law would permit nation-wide advertising of State authorized and regulated lotteries. The current statutory scheme, of course, permits only newspaper advertising in the State conducting the lottery or in a adjacent State which conducts a similar lottery. The second major change would permit the advertising of "state-authorized" lotteries, and not merely "state-conducted" lotteries.

The Department believes that both of these changes are consistent with a proper understanding of federalism. In our federal system, it is the States, rather than the federal government, that are responsible for "regulat[ing] the relative rights and duties of all within its jurisdiction so as to guard the public morals." *House* v. *Mays*, 219 U.S. 270, 282 (1911). Therefore, so long as First Amendment considerations are observed, each State should decide for itself how to restrict the advertising of lotteries. The present federal statute unnecessarily interferes with such State discretion. While a State under the current federal statute may be more restrictive with respect to lottery advertising, [*See Exxon Corp.* v. *Gov. of Maryland*, 437 U.S. 117, 132 (1978) ("[I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to preempt the States' power to prohibit any conduct within that exclusion.")], it is impossible for a State to be less restrictive toward the advertising of lotteries to which it is unopposed.

The manner in which the current federal scheme interferes with State sovereignty may be illustrated with three hypotheticals. First, let us assume that Illinois wishes to permit Michigan to advertise its lottery in Illinois newspapers. This does not seem to be a far-fetched supposition. After all, Illinois probably is not opposed to lotteries on moral grounds, as it has the third-largest lottery in the nation. Wall St. Journal, Feb. 7, 1986, at 42, col. 2. Moreover, it is at least possible that it would benefit both Michigan and Illinois if they could advertise their lotteries in newspapers published in the other State. The present statute, however, would prevent Michigan from advertising its lottery in Illinois under any circumstances, even if Illinois welcomed such advertising. Because the two states are not adjacent, this advertising would not come within the limited exception set forth in existing law. 18 U.S.C.

1307(a). H.R. 1568 would eliminate this problem by removing completely the federal limitations on the advertising of state lotteries. We are not suggesting, of course, that Illinois or any other State be forced to allow out-of-state lotteries to advertise within their borders. The Department simply believes that if a State is opposed to the promotion of out-of-state lotteries, it should devise advertising restrictions under State law.

The second hypothetical illustrates another way in which the current statutory scheme is inconsistent with a proper understanding of federalism. Assume that New York, which has one of the nation's largest lotteries, decided to advertise by sending leaflets through the mail to its citizens and those of New Jersey. This might be the best way for New York to promote its lottery. Again, however, this action would be proscribed by existing section 1302, which prohibits depositing in the mail any letter or circular concerning a lottery. The mailing to New York citizens might be permitted; the leaflets arguably constitute "material" within the meaning of section 1307(b). Existing law would not allow New York to mail the leaflets to New Jersey citizens, however, because (1) section 1307(a) exempts only advertisements "contained in a newspapers"; and (2) section 1307(b) exempts only the mailing of "material" to addresses in the state conducting the lottery. As I stated earlier, H.R. 1568 would remove completely the remaining federal restrictions on the advertising of State authorized and regulated lotteries and thus would permit New York to promote its lottery in the way it deems best.

Finally, a third example shows that existing section 1307(a), by limiting the exemption to "state-conducted" lotteries, interferes with the autonomy of the States. Assume that Alabama decided to permit certain organizations to conduct lotteries for charitable purposes. Alabama might decide, for example, that churches, veterans groups, and civic organizations perform important functions and should be able to raise revenues with lotteries. Under current federal law, Alabama would be unable to permit such charitable organizations to advertise their lotteries on the radio (or by any other means proscribed by sections 1301 through 1304) because the existing exemption protects only state-conducted lotteries. The proposed legislation would remove the federal restriction on the advertising of state-authorized lotteries.

Although the Department of Justice favors the proposed legislation on policy grounds, passage of H.R. 1568 would have the added advantage of avoiding, for the federal government, any First Amendment problems that may arise under the present statute. The current scheme obviously limits speech, and at least since 1976, it has been clear that such commercial speech is protected by the First Amendment. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Supreme Court has held that the Constitution protects

commercial speech because it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 561-562 (1980).

Although the First Amendment protects commercial speech, the Supreme Court has long recognized that there is a "'common-sense' distinction between speech which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). For that reason, the Court has held that the Constitution "accords less protection to commercial speech than to other constitutionally safe-guarded forms of expression." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983). In *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, supra*, the Supreme Court set forth the four-part test that is used in deciding whether a restriction on commercial speech passes constitutional muster. First, a court must ask whether the commercial speech concerns a lawful activity and is neither false nor misleading. If the commercial speech does not pass this initial test, there is no need to proceed any further; any restriction of such speech is permissible under the First Amendment. If it is determined, however, that the commercial speech concerns a lawful activity and is neither false nor misleading, a restriction on that speech will be upheld only if: (1) the government's interest in restricting the speech is substantial; (2) the restrictions directly advance the government's asserted interest; and (3) the restrictions are no more extensive than necessary to serve that interest.

Therefore, under the First Amendment, the validity of the current scheme depends upon the application of the four-part *Central Hudson* test to the existing restrictions on lottery advertising. While not entirely free from doubt, the Supreme Court's recent decision in *Posadas de Puerto Rico Assoc.* v. *Tourism Company of Puerto Rico*, 478 U.S. — (1986), suggests that the current federal scheme would be upheld. In *Posadas*, the Court upheld a Puerto Rico statute that restricted advertising by casinos aimed at residents of that Territory. In applying the *Central Hudson* test, the Court showed far greater deference to the legislature than had been shown in earlier opinions. For example, in holding that the Puerto Rico statute was no more extensive than necessary to serve the government's interest, the *Posadas* Court asserted that it was "up to the legislature to decide whether or not * * * a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as the restriction on advertising." This analysis certainly contrasts with the approach in *Central Hudson*, where the Court invalidated a regulation of the New York Public Service Commission that banned adver

tising promoting the use of electricity. There, the Court stated

> The Commission * * * has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression.
>
> To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulations would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

As the Department has stated before, it remains to be seen whether the Court in future cases will take the approach that it did in *Posadas, supra*, or whether it will show less deference to the legislature in applying the *Central Hudson* test. See Testimony of Douglas W. Kmiec, Deputy Ass't Att'y Gen., Office of Legal Counsel, on H.R. 4972, the Health Protection Act of 1986, before the House Subcommittee on Health and the Environment (August 1, 1986). Given the fact that the Court did not explicitly overrule or disavow earlier cases in which it refused to show deference to the legislature, it is possible *Posadas* will be treated as an aberrational 5-4 decision. In any event, under *Posadas* it is improbable that any court would invalidate the current federal restrictions on lottery advertising. As a partial, rather than a total, restriction on advertising, the existing federal law is similar to the Puerto Rico statute at issue under *Posadas*, and thus, likely to withstand scrutiny.

In conclusion, although the current scheme is probably constitutional, the Department believes that H.R. 1568 should be enacted. As Justice Frankfurter pointed out in his dissent in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 670 (1943), "[o]ur constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value." Even if the existing law is constitutional, it is unwise for two separate reasons. First, it is inconsistent with the notion, which is fundmental to both our government and our economy, that people can be trusted to make wise decisions if they have access to all relevant information. Second, the current statute is inconsistent with a proper understanding of federalism. It is the State to which the Constitution reserves the power to protect the health, safety and morals of the community. Therefore so long as First Amendment considerations are observed, it is the State, rather than the national government, that should decide the extent to which the advertising of lotteries should be permitted.

The following is the testimony of George C. Davis, Assistant General Counsel, Consumer Protection Division, Law Department, U.S Postal Service presented to the Subcommittee on Administative Law and Governmental Relations at an April 3, 1987, hearing.

STATEMENT OF GEORGE C. DAVIS, ASSISTANT GENERAL COUNSEL CONSUMER PROTECTION DIVISION, LAW DEPARTMENT, U.S. POSTAL SERVICE

Mr. Chairman, I am George C. Davis, Assistant General Counsel, Consumer Protection Division, Law Department. I appreciate this opportunity to express the views of the Postal Service on H.R. 1568, a bill which would exempt certain mailings relating to state authorized and regulated lotteries from Federal statutes restricting use of the mails in furtherance of a lottery.

The Postal Service has no particular expertise on the public policies involved in whether the lottery laws should be expanded or relaxed. Our comments are limited to an explanation of the Postal Service's role in the enforcement of the lottery statutes and a discussion of some possible problems of interpretation or enforcement of the bill as introduced.

Section 1302 of title 18 makes it a crime knowingly to mail any of the following:

> letters, packages, postal cards, and circulars concerning a lottery;
>
> publications containing any lottery advertisement or list of prizes awarded by means of a lottery;
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> payments for the purchase of lottery tickets;
>
> any lottery ticket or paper purporting to be a ticket or interest in a lottery;
>
> and certain wagering paraphernalia.

A civil statute, 39 U.S.C. § 3001(a), parallels the criminal statute by declaring such matter "nonmailable" and another civil statute, 39 U.S.C § 3005, authorizes the Postal Service to issue orders designed to prevent lottery operators from receiving mailed remittance or payment of postal money orders and to require them to cease and desist from unlawful lottery mailing activity.

The Postal Inspection Service is responsible for investigating unlawful mailing activities and seeking compliance with the laws or referring cases for enforcement proceedings. Apparent violations of sections 3001 and 3005 of title 39 are presented to my office for the initiation of civil administrative proceedings before the Postal Service's Judicial Officer Apparent violations of 18 U.S.C. § 1302 are presented by the Inspection Service to the appropriate United States Attorney.

Generally, the case-by-case exclusions from the mails which may result from civil enforcement of the mailing restrictions under 39 U.S.C. § 3001 are not a very efficient

mechanism for preventing the mailing of lottery matter. However, § 3001 can have a more serious impact on the acceptance of lottery advertisements by newspapers and other periodical publications. This is so because, to qualify for second-class postage rates, which are cheaper than third-class rates, a periodical publication must be legally "mailable". For example, the Postal Service has denied an application for second-class rates by a publication which carried advertisements for a Canadian lottery and for casino gambling activities. This decision is currently being challenged in the courts.

Legislation enacted in 1975 and 1976 gave state-operated lotteries limited exemptions from 18 U.S.C. § 1302 and 39 U.S.C. § 3005. These exemptions, which are contained in 18 U.S.C. § 1307 and 39 U.S.C. § 3005(d), allow the mailing to any address of "an advertisement, list of prizes, or information" concerning a state-operated lottery if it is contained in a newspaper published in that state or an adjacent state which also conducts a lottery. The legislation also partially exempted mailings of tickets and other state-operated lottery "material," allowing such matter to be mailed only to addresses located within the state conducting the lottery.

H.R. 1568 would expand the exemption to allow unrestricted mailing of any "advertisement, list of prizes, or information" concerning state authorized and regulated lotteries, provided it is made or disseminated in accordance with the state's law. We have two comments concerning this provision.

First, because existing law restricting the mailing of tickets and "material" to addresses within the state would not be altered, it is not clear whether the proposed exemption would apply to personal messages about a state-operated lottery, such as an acknowledgement of an individual's entry in the lottery. In other words, should such documents be treated under the law as completely exempt "information" or partially exempt "material"?

Second, we are also concerned about having an exemption from the federal prohibition depend upon a mailer's compliance with the various state laws. This proposal would, in effect, delegate to the several states the authority of variously set requirements for whether lottery matter may lawfully be mailed. This change would require postal employees to keep abreast of potentially different and changing state laws, in order to enforce federal statutes. The authorization for detailed state regulation of what is "nonmailable" within the federal postal system is a departure from the current mailability laws, and it would make the enforcement job more difficult in our view.

We have some suggestions for minor technical or clarifying changes to certain other provisions of the bill. These are discussed in an attachment to my testimony.

I would be pleased to respond to any questions you may have.

ATTACHMENT

We believe that the first three legislative findings, in section 2 of the bill, contain some inaccuracies. The first finding attributes to 18 U.S.C. § 1301 provisions which actually are found in sections 1302 and 1304. The second finding is not quite accurate in saying that advertising for a state-operated lottery may lawfully be disseminated only within the state conducting the lottery or within an adjacent state which also conducts a lottery. Actually, advertising contained in a newspaper published in the state conducting the lottery or in an adjacent state which conducts a lottery may be mailed to addresses throughout the United States. The third finding incorrectly indicates that the statutory prohibition on broadcasting lottery information was "enacted over one hundred years ago."

A suggested revision would reword the findings as follows:

(1) By virtue of sections 1301, 1302, and 1304 of Title 18 United States Code, respectively, lottery advertising is prohibited in interstate or foreign commerce, the mails, and broadcasts by stations subject to Federal licensing;

(2) Exceptions from these prohibitions have been enacted only for lotteries conducted by States of the United States under the authority of their respective laws; and

(3) Supreme Court decisions on the constitutional protection afforded commercial expression have led to serious questions about the validity of applying these prohibitions—the majority of which have nineteenth century antecedents--to advertising for lotteries which, altogether authorized and regulated by the States in which they are conducted, are not conducted by the respective States, themselves.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

(Rule XIII (3))

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

CHAPTER 61—LOTTERIES

. . . . . .

§ 1301. Broadcasting lottery information

Whoever broadcasts by means of any radio *or television* station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

. . . . . .

[§ 1307. State-conducted lotteries]

§ 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery [conducted by a State acting under the authority of State law –

[(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

[(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery], *gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, if the lottery, gift enterprise, or similar scheme is authorized or not otherwise prohibited by law in the State in which it is conducted.*

. . . . . .

(d) For the purpose of *subsection (b) of* this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

SECTION 3005 OF TITLE 39, UNITED STATES CODE

§ 3005. False representations; lotteries

(a) * * *

. . . . . .

(d) Nothing in this section shall prohibit the mailing of (1) [a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery,] *(A) an advertisement, list of prizes, or information concerning a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, if the lottery, gift enterprise, or scheme is authorized or not otherwise prohibited by the State in which it is conducted, or (B) a newspaper of general circulation containing an advertisement, list of prizes, or information referred to in clause (A),* (2) tickets or other materials concerning [such a lottery] *a lottery conducted by a State acting under authority of State law* within that State to addresses within that State, or (3) an advertisement promoting the sale of a book or other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: *Provided, however,* That no statement quoted or derived from the publication shall constitute a misrepresentation of fact as long as such statement complies with the requirements of subparagraphs (A) and (C); and (C) the advertisement, solicitation, or purchase order accurately discloses the source of any statements quoted or derived from the publication. Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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LOTTERIES & CONTESTS

A BROADCASTER'S HANDBOOK
THIRD EDITION

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NAB
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Foreword

It is essential that broadcasters have a working knowledge of both federal and state laws which regulate the broadcast of lottery advertisements or information about lotteries. Many states have laws that are much more strict than the new federal requirements, and penalties for broadcasting lottery information may be significant and vary from state to state. Learning what the law says is rather simple; applying it, however, can be considerably more difficult. The factors which result in a given contest being categorized as a lottery are often obscure. In states where lotteries are prohibited or when federal laws provide no exemption, seemingly innocent "give-away" schemes must be carefully analyzed to be reasonably certain that they are not lotteries.

Lotteries and Contests: A Broadcaster's Handbook has been updated to explain and clarify recent changes in the federal lottery laws and to assist broadcasters in avoiding the common problems involved in advertising contests and promotional plans. This 1990 version, updates the 1985 edition of the handbook, originally written by Cathy E. Blake in 1980, and both expands and revises Chapter IV of the **NAB Legal Guide to FCC Broadcast Regulations** (3d. ed. 1988). The 1990 revised edition was prepared by NAB Fellowship Attorney Eldred D. Ingraham with the assistance of Barry D. Umansky, deputy general counsel, NAB; and the NAB Legal Department law clerks, particularly Dina Casanova. NAB wishes to especially acknowledge the following persons for their valuable assistance in reviewing this publication: Charles Kelley, chief, Enforcement Division, Mass Media Bureau, FCC; Edythe Wise, chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, FCC; and Michael Cox, assistant solicitor, Division of Indian Affairs, U.S. Department of the Interior.

Although this booklet reflects changes in federal law that allow the broadcasting of most lottery information, the revised federal laws do not preempt state lottery laws, which may be more restrictive. This booklet, therefore, also contains information about state laws, and material reflecting past FCC rulings that may serve as a useful guide to broadcasters in states with lottery restrictions or prohibitions, or for factual situations where the federal law still prohibits the airing of the particular lottery information.

Henry L. Baumann
Executive Vice President and General Counsel

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I. Lotteries

Lottery Advertising and Lottery Information

Federal v. State Lottery Laws

The new Charity Games Advertising and Clarification Act of 1988 Pub. L. No. 100-625, 102 Stat 3205, 3206 (1988), effective on May 7, 1990, relaxes the old federal law by lifting the ban on the broadcasting of advertising and information concerning most legal lotteries. Moreover, another congressional act, the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat 2467 (1988), which became effective in the fall of 1988, opens the door to broadcast advertising of certain gaming held on Indian lands.

Most states, however, have their own lottery laws. Many of the state laws are more strict than the new federal law—and the federal law does not preempt current or future state restrictions on the broadcasting of lottery information. Since this booklet focuses primarily on federal lottery laws, one should consult a local attorney or the appropriate state attorney general's office about applicable state laws.[1]

Changes in the Federal Lottery Laws

Under the Charity Games Advertising Clarification Act of 1988, effective May 7, 1990, broadcasters generally are allowed to advertise, promote, and provide information about lotteries conducted by non-profit groups, governmental entities and also by commercial organizations[2] (including the station itself) provided there is no state restriction or ban on providing or advertising such information, and the lottery is legal in the state in which it is conducted.

Additionally, the state-operated lottery provision of the revised federal lottery law expands the "adjacent state" exemption to allow broadcasters licensed to cities in a state that itself conducts a lottery, to advertise state-operated lotteries of not only their own state but of any other state in the country. Here again, however, keep in mind that the federal law does not preempt existing or future state restrictions.

Remember, even though your state may have a state-operated lottery, it may still have significant restrictions on the conducting and/or advertising of lotteries not conducted by the state. The prohibition may be absolute—covering the conduct and the advertising—or it can address only the advertising. As an example of the latter, a state may authorize non-profit groups to hold bingo games but it may nonetheless prohibit the advertising of those games.

In those states where there are lottery advertising restrictions, it is likely that, however slight the reference is to a lottery in the advertising copy, the

broadcast of that advertisement would be prohibited, as virtually always was the case under the former, more stringent federal law. For example, if your state were to restrict the advertising of a lottery, a reference to the "fun and games" at a retailer's store would likely be disallowed under that state law. If the event being advertised does indeed contain a lottery, merely veiling or omitting the scheme's details in an advertisement will not prevent the ad from being "lottery information."

One further change in federal law is the Indian Gaming Regulatory Act enacted on October 17, 1988. This law generally enables broadcasters to advertise Indian "bingo" and certain other games conducted on Indian lands. But, here again, state law is not preempted. That is, if the state completely forbids bingo in the state, then bingo can't be played on the Indian reservation located in that state. And if the state allows bingo activity to take place but prohibits the advertising of the activity, then broadcasters would not be allowed to air spots for Indian bingo.

Also, it is important to underscore that the federal law change *has not* affected the federal prohibition against the advertising of casino gambling. Thus, stations cannot accept spots for Atlantic City or Las Vegas casinos (except under the conditions outlined on page 12 discussing ads for establishments with the name "casino" as part of the entity's formal name, or ads for the non-gambling aspects of a hotel or other edifice which houses a casino, ads that mention casino gambling that takes place on cruise ships, or ads for establishments (e.g., blackjack parlors) which are, in essence, gambling halls). Here, the federal law does preempt state law. Regardless of whether the state has OK'd casino gambling, radio and television stations cannot advertise such casino gambling. Violation of this federal prohibition on casino gambling advertising can subject a broadcaster to prosecution by the United States Department of Justice as well as by the FCC for violation of its rules (which continue the statutory prohibition against casino gambling).

The Broadcaster's Responsibility and Liability

Although federal lottery laws have been significantly relaxed, broadcasters must remember to check the provisions of state laws before airing information about a particular promotion. The new federal lottery laws do not preempt state laws. Broadcasters, therefore, may still be penalized under state law for airing information about lotteries, and should make sure that the information aired complies with state restrictions as well as any applicable federal restrictions. Remember, also, that a state law conviction can reflect adversely on your character at license renewal.

Broadcast of Non-Lottery Promotion Actually Conducted as a Lottery

Suppose a station were to broadcast the following advertisement: "Hurry

down to Howie's Shoe Station and take a look at our beautiful shoes. Spin Howie's wheel of discount and chop $1-$5 off your purchase price should you decide to buy a pair of shoes. You can spin the wheel with no obligation to purchase any shoes."

This promotion is not a lottery since the customer need not make a purchase in order to participate. He or she can simply spin the wheel and then walk away free of any obligation to purchase any shoes if dissatisfied with the discount. However, if Howie's Shoe Station disregards the content of its advertisement and actually requires a customer to make a purchase before or after spinning the wheel, the promotion is being conducted as a lottery. *Metromedia, Inc. (WASH-FM)*, 60 F.C.C. 2d 1075 (1976). (The WASH-FM case turned largely on the fact that: "the words of the announcement *on its face* indicated, or at least should have alerted the licensees to the possibilities, that the promotion was probably a lottery." 60 F.C.C. 2d at 1082). Similarly, if a station advertises that entry blanks are available both free of charge and with any purchase, the licensee must exercise reasonable diligence to confirm that the entry blanks are equally available to all without purchase.

A Word of Caution

This booklet contains a number of sample lottery and contest promotional plans with opinions as to the legality of advertising such plans. The comments primarily represent NAB Legal Department analyses, often based on previous interpretations of federal law by the FCC and the courts. The opinions are meant to serve as a guide in determining whether the elements of various promotional schemes constitute a lottery (where airing ads or information about such a lottery would be prohibited under state and/or federal law) or would violate the FCC's policies on station-conducted contests. They should not be construed as legally authoritative.

It is important to remember that federal and state laws are constantly subject to change, as are interpretations by agencies and courts. Thus, what is considered to be a lawful contest or promotion today, might become unlawful under a future law change or ruling.

Also, it should be emphasized that the lottery/non-lottery examples offered in this book are based largely on the definitions and interpretations evolving under federal law. Some states have defined certain lottery elements differently than have been the federal interpretations. Thus, and with state lottery laws now having much greater importance to broadcasters, it is critical that stations check the laws of their own states when analyzing advertiser copy or a proposed station promotion. Also, it is essential that broadcasters be reminded that there is no substitute for the timely advice of an attorney when confronted with a specific case.

Defining A Lottery

Three Elements of a Lottery

The traditional elements of a lottery are (1) prize, (2) chance and (3) consideration. All three elements must be present for there to be a lottery. If any element is missing in a promotional plan, then it is not a lottery under federal laws. *Federal Communications Commission v. American Broadcasting Company, Inc.*, 347 U.S. 284 (1954).

Under the revised federal law, even if it were determined that a particular contest were a lottery, that activity—and advertising of that activity—may well not be prohibited under these more liberal federal laws. This is where the lottery is conducted by a state itself, by an entity described in section 501 of the Tax Code or by a commercial organization where the lottery is promotional, occasional and ancillary to the primary business of that organization.

Individual states generally use the same prize, chance and consideration definition of what constitutes a lottery. However, the definitions of individual elements of a lottery tend to vary somewhat from state to state. For example, while one state might view the "mailing of an entry" as not being "consideration" (on the theory that the purchase of the stamp did not amount to "consideration flowing to the promoter of the event or contest"), another state might deem any such purchase to be enough to constitute the consideration element of a lottery.

Prize

A prize is anything of value offered to the contestant. It is irrelevant what the prize is, how little its value, or if the prize is in the form of a refund or price discount. Usually no difficulty is encountered in determining whether the element of prize is present. If there is no prize, there can be no lottery. Prize is the first clue to a lottery. However, the elements of chance and consideration often are not as readily detected.

Chance

The element of chance exists if the winner or the value of the prize is determined in whole or in part by chance. The element of chance is present in contests or promotions in which the prize is awarded to a person whose selection depends in whole or in part upon chance rather than the contestant's skill or other factors within the contestant's control. Generally, if the winner of a contest is determined solely on the basis of the contestant's skill or other factors within the contestant's control, or the entrant is allowed to research the answer to a question, the element of chance will not be present.

For example, chance exists in promotions in which the winner is determined by drawing or wheel spinning; by being the fifth person to call the station; or by being at a given (and not previously disclosed) spot in a business establishment when a bell rings. Similarly, future predictions and any types of guessing contests involve chance.

Some promotions—which at first glance appear to be based on skill—have been determined by the FCC to be based on chance. A small segment of the population may have expertise in predicting the final scores of sporting contests, such as the Super Bowl, or guessing the number of votes a candidate will receive, but for the general public the element of chance is paramount. Most baby contests and beauty pageants have been held to involve the element of skill. However, it is important that the criteria upon which the judges base their decision be carefully delineated and that objective or subjective criteria determine the winner, not chance.

Finally, chance may be present in a contest that initially involved skill. This may occur when a contest operator fails to adopt, announce or follow the appropriate standards for judging the entries or selecting the winner so that chance actually determines the outcome of a promotion. For example, if a "best slogan" contest is advertised, but the winner is actually selected by a drawing, the element of chance is present.

Value Of Prize Determined By Chance

Even if the winner is not determined by chance, the element of chance will be present in promotions in which the amount of the prize is determined by chance. For example, everyone who purchases a certain product at a local supermarket is entitled to select a prize from a grab bag of prizes ranging in value from a few cents to several dollars. Since everyone is a winner, the winner is not determined by lot or chance, but the value of the prize is determined by chance. Thus, the promotion is a lottery. *Public Clearinghouse v. Coyne*, 194 U.S. 497, 24 S. Ct. 789, 48 L.Ed 1092 (1904).

There is no FCC ruling which authoritatively states that offering prizes of similar cash value (such as a grab bag containing spatulas, potato peelers and can openers) is sufficient to eliminate the element of chance, or if it is necessary for all participants to be offered identical prizes (red coffee mugs). This is a gray area of the lottery law and it would be wise for a broadcaster to contact his or her attorney.

Tie-Breaking Procedures. A promotional plan that initially involves a participant's skill may succumb to the element of chance if tie-breaking procedures are done on a random basis. For example, if six contestants tie in a "best slogan" contest that was based on writing skill, but a name is drawn out of a hat to break the tie, the element of chance would arise. Thus, the tie-breaking procedure should involve a further test of skill if the

element of chance is to be avoided. The reverse of this example also would be a lottery. Thus, if there were first a drawing and the selected contestant were required to answer a history question based on skill before receiving a prize, the contest would still be a lottery.

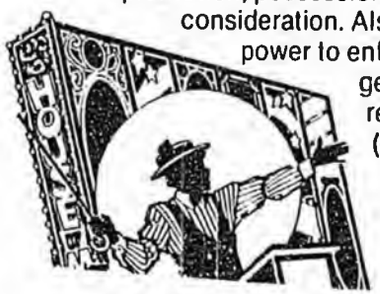
Consideration

Of the three elements necessary for a lottery, the element of consideration presents the greatest difficulties. Basically, consideration is an item of value—money, substantial time or energy—that a contestant must expend in order to participate in a promotional plan. The Commission has stated that consideration is present in any contest or promotion which requires a contestant to (1) "furnish any money or thing of value;" (2) "have in [his or her] possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast" by a station (47 C.F.R. §73.1211 (b) (1988)); or (3) meet any other requirement which involves a substantial expenditure of time and effort by the contestant.

Payment Necessary To Participate

Substitution of "Reasonable Facsimile" for Proof of Purchase. Determining whether or not money is paid to enter a promotion usually presents no problem. However, it is very important to note that in a contest or promotion in which a contestant must make a purchase in order to participate, the purchase price constitutes a payment of money and is, therefore, consideration. The United States Supreme Court has ruled that the fact that a purchaser receives the full value for money paid in making a purchase in order to participate in a contest does not eliminate the presence of consideration. *Horner v. United States*, 147 U.S. 449, 13 S. Ct. 409, 37 L.Ed. 237 (1893). The Court held that the purchase price was consideration on the theory that part of the price was allocated to the item purchased and part to the chance to participate. Id. at 463.

The guideline that possession of a particular product constitutes consideration should be qualified to the extent that if the product is furnished to the contestant at no cost by the sponsor as part of the promotion, possession of the product will not constitute consideration. Also, the U.S. Postal Service, which also has the power to enforce certain federal lottery laws, has noted a general exception to this rule in contests which require evidence of purchase with each entry (e.g., submission of box top or label). If a participant may also enter by submitting a plain piece of paper on which is written the name of the product or some other specified term, or if the entrant may submit a



reasonable facsimile of the box top, label, entry blank, etc., consideration may not be present. Facsimiles must be simple to make on the basis of information supplied in advertisements for the contest. A complete description of the rules of entry should also be included in the contest advertisements.

Purchasers And Non-Purchasers On Equal Ground

Entry slips may be distributed with purchases if the contest also provides a means for obtaining a "free entry" to participate without a purchase. The FCC has emphasized that the non-purchaser must not be disadvantaged in any way, and that free entry must be available on an equal basis to that enjoyed by contestants who make a purchase. If an applicant must purchase a specific product, free entry slips must be obtainable at most or all customary outlets where the product is sold. Also, a sufficient quantity of "free chances" must be available to ensure that everyone who acts will be able to obtain them.

Placing entry slips that are freely available to non-purchasers in front of the counter places buyers and non-buyers on equal ground. Certain complexities may arise by placing entry blanks behind the counter. *Tuscola Broadcasting Co.*, 76 F.C.C. 2d 367, 46 R.R. 2d 1616 (1980).

Expending Time And Effort As Consideration

Careful scrutiny is necessary in order to determine whether a contestant must furnish "substantial time and effort" or provide a "thing of value," as either would constitute consideration. For example, the cost of a postage stamp for submitting an entry blank does not constitute consideration (of course, the price of the stamp is paid to the post office—not the promoter), but the requirement of taking a test drive in an automobile while accompanied by a salesman, to qualify as a contestant in a car dealer's contest, has been determined to be consideration.

Broadcasters can rely on several definite rulings in determining whether consideration is present. First, the U.S. Supreme Court has ruled that simply listening to or viewing a program does not constitute consideration. *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). Second, the U.S. Court of Appeals (D.C. Circuit) has ruled that the mere act of going to a store solely for the purpose of picking up a card in order to participate in a promotion does not constitute consideration. On the other hand, having to visit multiple stores in a mall has been viewed as consideration. *Caples Co. v. United States*, 243 F.2d 232 (D.C. Cir. 1957). The U.S. Postal Service, which has powers similar to the FCC to define certain lottery matters, has stated that if a participant is required to visit the store to obtain an entry blank and also to be present for a subsequent,

scheduled drawing, consideration would not be present. However, in the latter situation, the time of the drawing must be pre-announced and the drawing held on time. If the drawing were delayed or held at an unannounced time, thus requiring the continuous presence of the contestant, a substantial expenditure of time and effort would have occurred and consideration would be present. In addition, if contestants have to travel a considerable distance to enter, or if the only store distributing entry blanks is not centrally located, consideration might be present.

Eligibility Requirements

Certain eligibility requirements, by their very nature, constitute consideration. Also, attractive promotions that encourage people to expend energy or money in order to qualify as a contestant contain the element of consideration. The FCC has stated that requiring a contestant to open a savings account or enlarge an existing account in order to be eligible to participate in a promotion, is consideration, since the deposit of money into a savings institution for an indeterminate period of time is an item of sufficient value. *In re Lottery Broadcasts Involving Savings Accounts*, 65 F.C.C. 2d 870, 39 R.R. 2d 1285 (1977).

Other eligibility requirements such as possession of a driver's license, residing in a particular area, or calling from a telephone which has a certain exchange do not present problems of consideration. Since it is unlikely that most promotions would actually encourage people to spend time and money moving to a different locale or requesting a new telephone number, the element of consideration is absent.

Consideration Must Flow to the Promoter: XL-95 Golf Classic Ruling

In December, 1973, the Commission released a very significant ruling concerning the definition of consideration. *Greater Indianapolis Broadcasting Co., (WXLW)*, 44 F.C.C. 2d 37, 28 R.R.2d 1434 (1973). The ruling involved a station promotion called the "XL-95 Golf Classic," whereby a person entered by visiting a participating merchant's place of business and obtaining an "XL-95" scorecard. Thereafter, the participant played 18 holes of golf and mailed his or her scorecard to the station. Although participants had to pay a greens fee or country club membership in order to play golf, they furnished no consideration to the station promoting the contest. Winners were determined solely on the basis of a random drawing from the score cards submitted to the station and scores were immaterial to the participants' eligibility for winning. The Commission ruled that while the elements of prize and chance were present, the element of consideration was lacking. Its conclusion was based "upon the absence of any indication that consideration, substantial enough to

support a finding that there was a lottery, flowed directly or indirectly from the participants to the promoter." Id. at 38. Additionally, the Commission explicitly reversed any previous contrary rulings.

As a result of this ruling, some contests and promotions which have been considered lotteries in the past are no longer considered lotteries. For example, an automobile dealer, as part of a display at a county fair, conducts a drawing and awards the winner a new car. To enter, a person must visit the dealer's display at the fair and fill out an entry blank. Everyone must purchase an admission ticket to enter the fair, but the automobile dealer will receive none of the revenues from the sale of admission tickets. This contest will not be considered a lottery because even though participants may pay to enter the fair, the consideration does not flow directly or indirectly to the promoter of the contest (the automobile dealer). (If this were only an occasional contest put on by the car dealer, it would not be a prohibited lottery under federal law under any circumstances.)

A licensee should carefully study each promotion before concluding that the XL-95 ruling applies. First, identify the sponsor of the promotion. A sponsor is a person, group or business responsible for the promotion or one that provides financial backing, goods or services for the event. For example, one who would be legally responsible for injuries or debts incurred as a result of the promotion is a sponsor. Examples of goods and services include: free use of grounds or facilities; free supplies, prizes or manpower; or free organizational support. If anything of value is donated to the promotion, the donor might be considered a sponsor. If a sponsor keeps proceeds of the promotion, the promotion is deemed a lottery. Even if only one co-sponsor receives a share of the profits, the element of consideration is present.

For example, if the Elks Club sponsors a "Monte Carlo Night" to raise funds for the local chapter of the Red Cross, the event cannot be held at the Red Cross site without that agency being deemed a co-sponsor of a lottery. In fact, participation by the Red Cross would have to be virtually non-existent. Red Cross personnel should not even sell tickets, distribute posters or other promotional information, or even provide word-of-mouth advertising. See NAB Counsel Memo L-8803. Therefore, although the Red Cross is a non-profit organization, if it is a sponsor or co-sponsor of the Monte Carlo Night and receives some of the proceeds, a licensee might be prohibited under possible state law restrictions from broadcasting information of the event. (For federal law purposes, broadcasting this information would be acceptable under the new Charity Games Act.)

As another example, suppose Bob's House of Melodies offers one year of free music lessons as a prize. To enter, a contestant writes his or her name

and address on the back of any ticket stub to an event in the Renaissance Music Festival and drops the entry stub into a barrel in the lobby of the music theatre. Bob collects the barrels after each performance and will hold a drawing for the music lessons in his House of Melodies as soon as the festival ends. Bob has co-sponsored several of the music festival events. Since Bob is entitled to a portion of the ticket sale profits, a contest in which ticket stubs serve as entry blanks contains the element of consideration. For state law purposes, if there is doubt whether the XL-95 ruling applies to a particular fact situation, a broadcaster should seek advice of counsel.

Summary Of Guidelines On Defining A Lottery

From the above comments, it is apparent that determining what is or is not a lottery can be difficult. However, if a particular promotion is carefully analyzed step by step, most lottery problems can be readily resolved. In analyzing a particular scheme, set out all the details of the plan and then determine:

1. Is there a prize? Is anything of value being offered to the contestant? If the answers are yes, then go on to question #2.
2. (a) Is the winner selected on the basis of chance rather than on the basis of the participant's skill or other factors within his or her control? (b) Is the amount of the prize determined by chance? Does the contestant have a chance of winning any one of a number of prizes of differing values? If the answer to (a) or (b) is yes, proceed to question #3.
3. Must the contestant expend money or a substantial amount of time or effort in order to qualify for the contest? Do the requirements for participation constitute consideration? Does consideration flow to the sponsor of the promotion?

If it is determined that all three elements—prize, chance and consideration are present in a promotional plan, then under no circumstances should the plan be given broadcast time if the airing of lottery ads or information is forbidden under state law and/or not exempt from the scope of the federal lottery laws.

Federal Lottery Laws

Charity Games Advertising Act Provisions

Under the Charity Games Advertising Act, effective May 7, 1990, the broadcast of lottery information *generally* is not a criminal offense. Provided there are no state restrictions, broadcasters may air information about virtually any non-casino contest or game, regardless of whether the elements of the contest or game comprise a lottery.

For example, broadcasters are able to advertise contests and drawings as well as religious bingo games and lotteries sponsored by charitable organizations and civic groups defined in Section 501 of the United States Tax Code.

Broadcasters are allowed to advertise (again, subject to state restrictions) lotteries conducted by businesses or other commercial organizations where the lottery is a "promotional activity" and is "clearly occasional and ancillary to the primary business" of the organization conducting the lottery. A local retailer, for example, who occasionally runs a lottery-type contest to attract customers would be eligible to advertise on radio or TV, and stations occasionally may run their own promotions which contain all three elements of a lottery. Co-promotions with local and area businesses also are allowed, even if the contests prove to be lotteries.

Broadcasters also are able to advertise lotteries conducted by businesses and non-profit organizations in other states, provided there are no state restrictions on such advertising in the state in which the station's city of license is located.

Casino Gambling. Both the U.S. criminal code and FCC regulations *still* prohibit the broadcast of information pertaining to casino gambling. These restrictions apply regardless of the state where a station is located.

In essence, the Charity Games Act provides "exceptions" to Title 18 of the Federal Criminal Code.

The Charity Games Act modified the federal criminal code to set forth several exceptions from the scope of the law. That is, where a broadcaster airs material found in one of the exceptions, such a broadcast would be immune from federal (but not necessarily state) prosecution.

As revised, the general prohibition reads as follows:

> "Whoever broadcasts by means of any radio/television station for which a license is required by any law of the United States or whoever, operating any such station, knowingly permits the broadcast of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gifts enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined no more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense."
>
> 18 U.S.C. §1304 (1976).

The broadcast related exceptions include:

- an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or
- an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in

paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

- conducted by a not-for-profit organization or a governmental organization; or
- conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

The Charity Games Act went on to define "not-for-profit organization" as "any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986." 18 U.S.C. § 1307 (d).

The term "State" is defined as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States."

Obviously, if a station were to air lottery information for a scheme which did not fit into one of these exceptions (e.g., an ad for a lottery of a foreign country or a spot for casino gambling), then the full force of the federal criminal code prohibition would apply—with possible grave consequences for the broadcast station.

In the opinion of the FCC staff, the criminal code's prohibition against casino gambling covers any video depiction of, or audio reference to, gambling activities that take place in casinos or hotels with casinos, even though the casinos may be legal under state law.

The FCC staff's interpretation, similarly, would apply to broadcast commercials for airlines, travel agents, governmental tourism bureaus, etc., depicting casino gambling activities at a particular casino or referencing such activities, no matter how brief or fleeting the depiction or reference.

Advertising of hotels with casinos may focus upon non-gambling activities and facilities available at the hotel. These could include, for example, restaurants, floor shows, lounges, shops, sports facilities, types of room accommodations, etc.

If the word "casino" is part of the actual name of the hotel, it may be included in broadcast advertising when the full name of the hotel is stated or shown, for example, "Rex Hotel & Casino."

The Indian Gaming Regulatory Act

In this separate Congressional Act, the U.S. Code was amended to allow broadcasters (in most situations) to advertise Indian "bingo" and certain other games conducted on Indian lands.

This legislation clears the way for broadcast advertising of the multi-million dollar Indian gaming industry. It also defines three classifications of Indian gaming, and authorizes the establishment of a National Indian Gaming

Commission ("Indian Commission") with regulatory authority over Indian bingo and certain other games.

Of the three classifications of Indian gaming defined in the Act, Class I (tribal ceremonies or celebration-type of Indian gaming) is inconsequential with respect to broadcast advertisements. Class II—the real meat and potatoes category—includes bingo and card games conforming to the Act. Not only is immediate (unless prohibited under state law) in-state broadcast advertising of these games generally allowed, but cross-border broadcasts (e.g., advertisements of Indian bingo conducted in one state carried by stations in another) also now are allowed. Class III Indian gaming (e.g., casinos, slot machines) requires Department of the Interior approval of a "compact" between a tribe and the state.

Class II Indian gaming includes bingo ("whether or not electronic, computer, or other technologic aids are used in connection therewith"), pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, if they are offered in the same location where bingo is played.

Card games are also part of Class II gaming, and are allowed if there is an explicit state authorization given by the state where the activity is to be conducted, or if no express state prohibition in the relevant state exists.

While Class II Indian gaming specifically excludes any "banking" card games, including baccarat, chemin de fer, and blackjack (21), such card games currently played in Michigan, North Dakota, South Dakota, and Washington are "grandfathered" in terms of operation and advertising. To gain such grandfather status, they must have actually been operated in those states by an Indian tribe on or before May 1, 1988, and must still be operated in the same nature and scope as they were on that date. Valid card games must conform to state laws and regulations governing hours or period of operation and limitations on wagers or pot sizes.

Five states have criminal prohibitions against any gaming: Mississippi, Utah, Arkansas, Hawaii and Indiana. The 45 remaining states permit some forms of bingo, and tribes with Indian lands in those states are free to operate bingo on Indian lands, leaving broadcasters free to immediately advertise valid Class II activity in and outside the state where the activity actually takes place.

If the Indian tribe itself runs an ongoing bingo or similar game, it is valid Class II activity and generally can be advertised now. However, one exception involves situations where third-party contractors set up and run the gaming activity for the tribe. Where there are legal third-party contracts associated with ongoing Indian gaming and the contracts were approved by the Secretary of the Interior, the games now can be advertised. But games operated under third-party contracts would be "technically flawed" if they have not been approved by the Secretary. These games may not be

advertised or mentioned until the Secretary approves the contract or the new Indian Commission gives approval to such third-party games. The Indian Commission has not yet been established. The Secretary of the Interior is vested with interim authority to regulate Class II Indian gaming until the Commission is created. As of this writing the Secretary had not ruled on any third-party games.

All advertising-related contracts in excess of $25,000 annually, and pertaining to Indian gaming, may be subject to an independent audit by the Indian Commission.

Class III Indian gaming, which includes all forms of non-Class I or non-Class II Indian gaming, e.g., casino gambling, craps, roulette, and slot machines, may be subject to tribal and state regulation. It will only be lawful if the Secretary approves a tribe-state compact. At press time, the Secretary of the Interior had been presented with several tribe-state compacts, one of which proposes casino gambling on the Fort Mojave Indian Reservation in Nevada. According to Department of the Interior staffers, once that casino gambling activity were to be approved and begin operation, broadcasters would be eligible, under federal law, to air that form of casino gambling. Such an interpretation would give an advantage to Indian casino gambling in that non-Indian casino gambling still would be barred from broadcast advertising under the provisions of the Charity Games Act. Broadcasters should check with their own attorneys and/or the NAB Legal Department regarding such Indian casino gambling before airing any spots for this form of gambling activity.

Moreover, NAB strongly advises broadcasters to check the status of each Class II or Class III operation prior to broadcasting any advertising pertaining to particular Indian games. Special-rule checks should be conducted on Rhode Island, Maine North and South Dakota, Washington and Florida due to specific provisions in the Act. Broadcasters making such inquiries can contact the Office of the Solicitor, Department of the Interior at (202) 343-9331.

FCC Rules

At press time, in order to conform with the Charity Games Act, the FCC was in the process of modifying its own lottery rules to conform precisely with the terms of the federal law (in the same way that the earlier FCC rules precisely tracked the federal statutory prohibition).

Where a station airs lottery information in violation of these FCC rules, the station would be subject to the agency's enforcement and "fine and forfeiture" power. These penalties can include fines of up to $25,000 per occurrence, up to a $250,000 limit. *See Regulatory Agency Fees*, Pub. L. No. 101-239, 103 Stat 2124, 2132 (1989). Also, the Commission theoretically can deny a broadcast license renewal application or revoke a license where

lottery violations are found. However, an FCC fine is the likely form of any FCC penalty.

State v. Federal Law

Many states not only have their own lottery laws but also have trade regulation laws which may restrict or prohibit "contests" that technically may not be "lotteries." And, as discussed earlier, state lottery laws tend to vary widely from jurisdiction to jurisdiction. Moreover, it is essential to remember that the revised federal lottery laws specifically *do not* preempt state law. As such, it likely will be state law, rather than federal law, that may stand in the way of a broadcaster airing a particular ad for a "lottery" contest, event or promotion.

Other Lottery Restrictions

United States Postal Service and the Federal Trade Commission. Both the United States Postal Service and the Federal Trade Commission have a certain degree of jurisdiction over the dissemination of lottery information and a broadcaster may occasionally run afoul of these restrictions.

United States Postal Service Jurisdiction

Consistent with the terms of the Charity Games Act and the Indian Gaming Act, federal statutes empower the United States Postal Service to restrict the use of the mails for certain non-exempt lotteries. These statutes largely parallel the federal lottery laws applicable to broadcasting. For a station, these statutes only would come into play if the station were using the mail to distribute non-exempt lottery information.

Although the practice was discontinued in the 1980s, for years the Postal Service offered its own interpretation of the former federal lottery laws as they applied to the use of the mails. In the text of this booklet there are references to these earlier Postal Service rulings. Because the Postal Service statutes (like the broadcast-related federal statutes) have been revised to exempt many lotteries on the basis of the organization conducting the lottery, these earlier rulings largely will be helpful in determining whether a particular contest might be a "lottery" prohibited under a state law restricting or prohibiting lotteries.

Federal Trade Commission Jurisdiction

The Federal Trade Commission is another agency that could take action against a broadcaster in lottery matters. The FTC can proceed against merchandising in interstate commerce by means of a lottery on the theory that it is an "unfair and deceptive" method of competition. Action would normally be in the form of a "cease and desist" order. The order, though, would be directed only to the lottery sponsor unless the broadcaster were the promoter or operating obviously, hand in glove with the sponsor.

The FTC has issued specific regulations pertaining to games of chance by food and gasoline retailers. These rules, in Title 16 of the Code of Federal Regulations, Section 419 et seq., make it unlawful for "users, promoters, or manufacturers" of games of chance used in the food retailing or gasoline industries to engage in broadcast or newspaper advertising pertaining to prizes unless such advertisements disclose the exact number of prizes in each category, the odds of winning any prize worth over $25 and other relevant contest information. However, in August 1982 NAB and others filed a letter with the FTC's Consumer Protection Bureau requesting that the FTC temporarily suspend enforcement of the regulations pending the outcome of a rulemaking proceeding that was to amend these rules.

NAB asserted that the disclosure requirements of these regulations, in effect, banned broadcast advertising of games of chance promotions of food and gasoline retailers, as full disclosure of the required information was not feasible in a spot radio or television advertisement.

The FTC granted a temporary partial exemption from the regulations for broadcast advertising, effective January 1983. *See FTC Notice of Temporary Exemption and Advance Notice of Proposed Rulemaking*, 48 Fed. Reg. 265, (January 4, 1983). A proposed amendment to the FTC's rules to make the exemption permanent was pending as of publication date.

Summary: The Law And Its Enforcement

To summarize this section, the broadcasting of most lottery information or advertisements generally will no longer be prohibited under federal law. The new federal law, however, does not preempt current or future state restrictions on lotteries. Moreover, the airing of information concerning casino gambling is still a criminal offense, subject to prosecution by the Justice Department under the United States Code and punishable by fine or imprisonment. FCC penalties range from fines to revocation of license. These are the primary sources of regulation and channels of enforcement concerning the broadcasting industry and lotteries. However, the FTC, in extreme cases, might in the future exert jurisdiction over broadcasters in lottery matters.

Lottery Exceptions And Anomalies

State-Operated Lotteries

On January 2, 1975, Congress exempted lotteries "conducted by a state acting under authority of state law" from the coverage of Section 1304 of Title 18, thereby permitting licensees to broadcast advertisements, lists of prizes and other information concerning a state-conducted lottery. Such broadcasts were permissible only if two conditions were met:

- the licensee was located in a state which conducted such a lottery; and
- the lottery information concerned the lottery in the licensee's home state or in an "adjacent state" which conducted such a lottery.

For the purposes of this section, "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States. "Lottery," under this section means the pooling of proceeds derived from the sale of tickets or chances, and allotting those proceeds, in whole or in part, by chance, to one or more chance takers or ticket purchasers. "Lottery" does not include the placing of bets or wagers on sporting events or contests.

With the new lottery laws, Congress has removed the "adjacent state" provision. Licensees located in a state which conducts a lottery will be able to advertise that lottery or the state-operated lottery of any other state, regardless of the latter's geographic location.

Recently, however, a federal district court in Virginia concluded that a broadcast station licensed in the non state-operated lottery state of North Carolina, but located near the border of Virginia, could advertise the Virginia state lottery. *See Edge Broadcasting Co. v. U.S.*, No. 88-693-N (E.D. Va. 1990). Though limited to the particular facts of the Edge case, the decision could signal a new and different standard that may be emerging for border stations licensed to locations in non state-operated lottery states but wishing to advertise an adjacent state's lottery.

Sporting Events

Fishing Contests. Certain fishing contests have been specifically exempted from the federal prohibitions against broadcasting lotteries. 18 U.S.C. §1305 (1984). However, this exemption only applies where "the fishing contest is a self-liquidating type of undertaking, whose receipts are fully consumed in defraying the actual costs of operation, and are not intended or used for any other collateral purpose such as establishment of a fund for civic, philanthropic or charitable objects, no matter how benevolent or worthy."[4] Any fishing contest conducted for the profit or personal gain of any individual or organization is not exempt from the federal laws prohibiting the broadcast of lottery information. However, if occasional and ancillary to the sponsoring organizations primary business, a fishing contest might well be exempt under the revised federal law.

Horse Racing, Dog Racing and Jai Alai. The bettor's handicapping skill and knowledge in placing a wager have been construed as eliminating the element of chance in horse racing, dog racing, and jai alai. Therefore, such competitions may be broadcast and legally advertised without running afoul of the lottery laws. However, prior to September 24, 1984, the broadcasting of horse races, horse race betting advertisements and other horse race information were strictly regulated by the FCC.[5] The primary concern of the Commission was that these broadcasts might directly aid or encourage illegal gambling activities (*In re Broadcasting of Information Concerning Horse Races*, 41 F.C.C. 2d 172, 26 R.R. 2d 1731 (1973)).

In a Report and Order effective September 24, 1984,[6] the Commission eliminated all FCC regulations directed at horse race related broadcasts and betting advertisements. The Commission cited the infringement such regulations imposed upon broadcaster's editorial discretion as one reason for their elimination. The other compelling reason was the Department of Justice's opinion that federal statutes proscribing illegal gambling activities' were sufficient to regulate such broadcast-related activity. Therefore, the Commission will now look to the Department of Justice to enforce these statutes which provide authority to prosecute any person who uses broadcasting to conduct or assist in the conduct of an illegal gambling operation.

Broadcasts involving other sports that have been the focus of gambling activity, such as dog racing and jai alai, are also free from FCC regulation. However, as with horse racing broadcasts, they will be closely scrutinized by the Department of Justice for violations of the above mentioned federal statutes after elimination of FCC regulations.

Lotteries As Editorial And News Topics

With the passage of the Charity Games Act and Indian Gaming Act, most lottery information is exempt from the scope of the federal prohibition. In those limited situations where a lottery may not be exempt, it would still be likely that a station could carry information about such a non-exempt lottery if such information were of a non-commercial (i.e., news or editorial comment) nature. A federal court has stated:

> "There is a difference between information directly promoting a lottery and information that is simply 'news' of a lottery...We are aware that at times the line drawn may be thin..." *New York State Broadcasters Association v. United States*, 414 F.2d 990, 998 (2d Cir. 1969).

During the era where the Federal Communications Commission enforced the formerly stringent federal lottery laws, it recognized the merit of allowing full discussion of the policy issues concerning lotteries and the "human interest" elements of a news story about, for example, a thrilled winner of a lottery. Thus, and while it is important on this matter for a broadcaster to consult an attorney familiar with state lottery laws, it is likely that a broadcast station's airing of news or editorial comment about a lottery would not subject the station to prosecution under state law. Again, consulting an attorney on the scope of any state prohibition is essential prior to airing such an item.

Sample Lotteries And Legal Analyses

The following pages contain a sampling of typical "give-away" plans and various lottery schemes that raise recurring questions. Although most of these promotions are now legal under the revised federal laws, the samples may serve as a useful guide to those broadcasters who must adhere to tighter state restrictions. Some of the opinions expressed, as to the legality of broadcasting the cited material, represent past FCC or court decisions. Where no citations are given, the opinions represent "educated guesses" by the NAB Legal Department as to how the FCC or courts would have reacted in considering the same material. In presenting these samples, NAB reminds broadcasters to check the laws of their individual states before airing information about a particular promotion. State law may vary somewhat from the opinions presented in this section. It is also important to emphasize that there is no substitute for the advice of an attorney in specific cases. Whenever any doubts exist as to whether the broadcasting of given material would violate state lottery laws, the advice of an attorney should be obtained.

Lotteries Sponsored by Commercial Organizations

Example #1: Commercial establishment holds regular bingo games.

A local dance hall advertises bingo games every Wednesday and Thursday night. An admission fee is charged and winners are awarded prizes at the end of the night. On Saturday and Sunday nights, the hall restricts its activities to dancing.

Bingo games are considered lotteries because they contain the elements of prize, chance and consideration. Although the federal rules for broadcasting information about lotteries have been relaxed, it is the opinion of the NAB legal staff that the dance hall's bingo activities could not be advertised over the air. The new federal law exempts from its lottery prohibitions, advertisements by commercial establishments of promotions that are clearly "occasional and ancillary" to the primary business of the establishment. The FCC has indicated that an event is not "occasional" if it is held on a daily basis or at regular intervals (weekly or monthly) so close together that the event appears to be part of one ongoing promotion or a series of promotions. In this example, the promotion is an ongoing (weekly) and major part of the dance hall's business and neither occasional nor ancillary.

Example #2: Radio station holds lottery drawing at local dance hall.

A radio station announces it will hold a dance at a local hall at which there is a cover charge. The radio station receives part of the proceeds from the cover charge. Attendees will be allowed to participate in a drawing for a trip to the Caribbean that will be awarded to the holder of a winning ticket stub.

All three elements of a lottery are present here. A prize is to be awarded, the drawing represents chance, and the cover charge proceeds represent

consideration. Since this promotion is not a regular, ongoing activity, or a primary part of the radio station's business, however, it would fall under the Charity Games Act's "exceptions" to the criminal code as a promotion that is "occasional and ancillary" to a commercial organization's primary business. The activity, therefore, would not be prohibited under federal law. The station would, nonetheless, have to check state lottery laws before participating in or airing information about the promotion.

The Give-Away

Example #3: Contestant selected by mailing in an entry card.
Cards are distributed free by local merchants (no obligation to purchase). A person fills in his or her name and address and mails the card to a broadcasting station. A drawing is made, and the station announcer broadcasts the name of the person whose card is drawn. If the person calls the station, he or she wins a prize.

This is not a lottery because the element of consideration is missing. The time spent listening for one's name to be called is not consideration. Also, the cost of the postage stamp to submit an entry card "flows" to the United States Postal Service, not to the promoter of the contest. Therefore, purchasing a postage stamp is not consideration except in those few states that do not adhere to the "flow of consideration" analysis.

Purchasing Requirements

Example #4: No purchase necessary to enter; must be present to win.
A local supermarket holds a contest which anyone may enter by going to the store and filling out an entry blank. No purchase is required. The store announces in the contest rules and in all spots advertising the contest that a drawing will be held on the following Friday at 3 P.M. Participants must be present at the drawing in order to win.

This contest is not a lottery. Visiting the store once to enter and then again to be present at a drawing is not considered a substantial expenditure of time and effort and, therefore, is not consideration. However, it is essential that the time of the drawing be pre-announced and it be held on time. If, in the above example, the drawing were not held until 4 P.M., thus requiring participants to remain in the store for a considerable length of time, the contest would be a lottery. While there is no rule of thumb here, it is the opinion of the NAB Legal Department that consideration would be present if the drawing were delayed more than a few minutes. Similarly, if the time of the drawing were not announced, thus requiring participants to make frequent and/or lengthy visits to the store, the contest would be a lottery. Licensees should remember that where state and/or federal restrictions apply they bear the ultimate responsibility, and should take necessary steps to determine whether or not particular contests are operated as lotteries.

Example #5: Box tops, wrappers or reasonable facsimiles.
A sponsor plan to award a prize to a person to be selected through a drawing. In order to participate, all one need do is write one's name and address on a box top or wrapper from the sponsor's product. "Reasonable facsimiles" may be substituted for the box top or wrapper.

Promotion plans which require box tops or wrappers from the sponsor's product in order to participate contain the element of consideration, since a purchase is generally necessary in order to obtain a box top or wrapper. However, if participation requirements permit entries from persons who send in "reasonable facsimiles" of box tops or wrappers, then the element of consideration may be eliminated. Neither the FCC nor the judiciary has had occasion to rule on the "reasonable facsimile" of box tops or wrappers, thus there is no authoritative answer for broadcasters in this matter.

The Postal Service, however, has ruled on facsimile questions and is of the opinion that if the sponsors of a "box top" promotion treat "reasonable facsimiles" the same as actual box tops, then the element of consideration is removed. However, what is acceptable as a "reasonable facsimile" is most important. If all that is required, is printing in block letters, the name of the product involved, then there is no consideration. If art work is needed, or purchase of the actual product is a practical necessity in order to make a facsimile, then the Postal Service would be of the opinion that consideration is present.

Example #6: Rules or entry blanks appearing in newspapers or magazines.
A broadcaster airs a promotion for a newspaper advertiser which states: "Next week marks the beginning of seven weekly drawings for a one year's subscription to the Sunday Globe. Look in your Sunday Globe for details."

Promotions sponsored by the publisher of a newspaper or magazine which encourage a contestant to purchase the sponsor's newspaper or magazine in order to obtain an entry blank contain the element of consideration and are lotteries which would be subject to any state restrictions. Under the revised federal law, the airing of such promotions would be okay as long as they were occasional and ancillary to the publisher's primary business.

Example #7: Random drawing for purchases.
A retail dealer wishes to advertise that at the end of the year a name will be drawn from among those who have purchased merchandise from her during the year and that a prize will be awarded.

This appears to be a lottery. The elements of prize and chance are apparent. Consideration also is present since an article must have been purchased in order to win. Hence, the NAB Legal Department feels that a

court would have little difficulty in finding that this constitutes a lottery. The Commission had held, under the old law, that the advertising of similar plans was illegal. *In re WRBL Inc.* 2 F.C.C. 687 (1936); *Metropolitan Broadcasting Corp. (WMBQ)*, 5 F.C.C. 501 (1938). The advertising of such plans over the air would likewise be illegal under the new law. According to an informal FCC opinion, a single promotion that is ongoing throughout the year is *not* occasional.

Example #8: Purchasers and nonpurchasers on equal footing.
Grocer A desires to attract new customers and wishes to advertise that a prize will be awarded to a lucky number holder selected in a drawing. In order to participate, all one need do is go to the sponsor's store for an entry blank and drop it in the hopper. However, Grocer A also gives entry blanks or registration tickets with all purchases.

According to the FCC, this contest would not be a lottery if non-purchasing and purchasing contestants are accorded an approximately equal opportunity to obtain chances to win. Furthermore, announcements promoting the contest should adequately describe the availability of such free chances and the locations, times and manner in which they may be obtained. In situations where state restrictions may apply, it is the broadcaster's duty to be reasonably certain, that, in fact, a purchase is not required in order to enter.

Example #9: Free admission during an event's final hour.
A station airs a promotion for a Halloween party to be held at a local nightclub. Those attending the party would be required to pay a cover charge during all but the final hour of the event when anyone could enter for free. People attending the party are eligible to win a vacation in a drawing to be held at midnight. The station will receive a portion of the proceeds from the cover charge.

Prize and chance are obvious in this promotion. The question is whether offering free admission during the last hour of the party eliminates consideration. According to the FCC staff, free admission during the last hour of the event would not eliminate the element of consideration unless free admission during the last hour of the party was announced while promoting the party, and those arriving during the last hour had an equal opportunity to participate in the drawing. This "reasonably equal availability" concept would require that those arriving during the final hour have equal access to entry blanks for the drawing and sufficient time before the drawing to deposit their entries before the winner is selected.

(Of course, under federal law, the promotion would be acceptable for broadcast whether or not consideration was present if the event was occasional and ancillary to the sponsor's primary business.)

Example #10: Discount or refund received prior to purchase. A record store wishes to advertise a promotion in which numerous balloons containing various discount amounts will be displayed throughout the store. Persons visiting the store will be entitled to break a balloon and receive the amount of the enclosed discount on a subsequent purchase.

This is not a lottery because while prize and chance are present, no consideration is involved. The mere fact that a prize is received in the form of a discount does not commit that person to make a purchase. Of course, if the person were allowed to break the balloon only after making a purchase or agreeing to make a purchase, the promotion would obviously be a lottery.

Example #11: Discount or refund received after purchase.
A ballpark wishes to advertise that every tenth ticket purchaser will receive a free baseball bat.

This is a lottery. The elements of prize and consideration are apparent. Winners are determined by the "chance" of being the tenth in sequence. It is highly unlikely that a ballpark would go through the trouble of requiring the ticket seller to call the numbered sequence of purchases. Thus, the customer's ability to win a bat is controlled predominantly by chance.

Example #12: Prize to the first twenty purchasers.
A greeting card shop announces that the first twenty card purchasers will receive a ball point pen as a prize.

This type of promotion can be risky. An informal FCC staff opinion indicates that this is not a lottery. Although prize and consideration are present, the staff noted that since theoretically, a person could camp out in front of the store to ensure that he or she were among the set number of automatic winners, the element of chance does not predominate. However, if there were more than one cash register or several entrances to the store, the element of chance would predominate and a lottery would arise.

Example #13: Refund if secret alarm rings or if receipt has a red star.
A store sets alarm clocks to go off at secret times at various checkout stands. The customer being waited on or checked out when the alarm goes off gets his or her purchase free.

This, in the opinion of the NAB Legal Department, is a lottery. In order to participate, a commitment to make a purchase is required. The fact that

those who do not win still receive full value for their purchase price is immaterial. The theory behind this is that part of the purchase price is allocated to the cost of the promotion plan. The prize element is obvious and the "chance" is being at the right spot when the alarm goes off. Similarly, prizes or discounts awarded to the lucky purchaser whose receipt bears a red star would constitute a lottery.

Example #14: "Fishing" for discounts, wheel spinning.
Purchase of an automobile valued at $500 or more, entitles customers of a local automobile dealer to "fish" for a prize worth from $1 to $100.

All the elements of a lottery are present. The purchase price of the auto is consideration. Chance is present because the amount of the prize was determined by chance. And, of course, prizes are awarded. *Folkways Broadcasting Co.*, 30 F.C.C. 2d 80, 21 R.R. 2d 1297 (1971).

This type of promotion has many variations. For example, purchasers might "spin the wheel" and receive the indicated discount on the price of merchandise which they have purchased. Under the above ruling, this would be a lottery since the prizes vary in amount and are not within the control of the parties. If, however, every purchaser received the same prize, the promotion would not be a lottery, since the element of chance would be missing.

Example #15: Stocking up on an advertiser's product.
A representative of an advertised product calls at a home, selected at random, and offers to purchase—at several times the actual value—any of that product found in the home. If none of the product is found, a smaller prize is usually given, generally, a sample of the product. Ordinarily, a broadcasting station's participation is limited to an announcement of the plan and advice to consumers to "stock up." Sometimes more elaborate coverage is given and calls at various houses are reported.

The key factor in this plan is that a product must be purchased. The plan, therefore, contains the element of consideration, along with elements of prize and chance. Consideration is present where, in order to win, persons are "required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished, or distributed by a sponsor of a program broadcast on the station." 47 C.F.R. §73.1211(b) (1988). The NAB Legal Department is of the opinion that this plan would constitute a lottery.

Example #16: Possession of a product or correct response required to win.
In addition to the requirement of Example #15 that a consumer must have in his or her possession at home the product involved, he or she must also

answer the company's "question of the day." If answered correctly, a prize is awarded.

When the need to have a given product is eliminated from this plan, there is no consideration and the promotion may be broadcast. As in Example #13 though, the requirement of possession of the advertiser's product supplies the necessary consideration which makes it a lottery banned from the air. Although skill may be involved in answering the question, the random method of selecting a contestant introduces the element of chance.

Example #17: Discount or free prize with purchase if customer mentions advertisement.
Leslie's Auto Works desires to air the following advertisement: "Hurry down to Leslie's Auto Works and we'll install a new muffler for the unbelievably low price of $49.95. Mention that you heard this ad on station XXXX and we'll give you a free quart of oil."

In the opinion of the NAB Legal Department, this would not be a lottery. Consideration and prize are present, but chance appears to be missing. This promotion is structured more like a give-away to attentive listeners than a random method of selecting winners. Either a customer has heard about the prize and will remember to tell the mechanic about the advertisement, or the customer is unaware of the offer.

Competitions Among Clubs
Example #18: Making purchases to accumulate points.
Local clubs participate in an awards scheme. From time to time the station broadcasts how many "club points" can be earned by specific purchases from local merchants. Clubs accumulate points when their members purchase the specified items. Additionally, the station periodically broadcasts the names of club members. If the club member is listening and calls the station, the club receives more points. At the end of the contest, the club with the most points wins a prize.

Neither part of this promotional plan constitutes a lottery.

- **Club Members Making Purchases to Garner Points.** Although consideration is present where a club member purchases a product and the prize element clearly exists, there is no element of chance. The FCC has stated that chance is not present in a "purchase for points" game. However, to avoid any possibility that chance determines the winner, the station should broadcast the point standings of the clubs at regular intervals during the contest period. If the point standings are not announced until the end of the contest, the element of uncertainty might induce parties to make purchases. In such cases, the final winner could not be determined solely by human skills or ingenuity. *See United*

States v. Rich, 90 F. Supp. 624 (E.D. Illinois 1950); Folkways Broadcasting Co., 27 F.C.C. 2d 619, 21 R.R. 2d 163 (1971).

• **Calling the Station to Earn Points.** The desire to listen to the radio with the hope that one's name might be announced does not constitute consideration. Thus, this part of the promotion is not a lottery.

Entry Blank As An Element Of Consideration

Example #19: Cash register receipt as entry blank.
To enter a grocery store contest, persons must sign a cash register receipt and deposit it in the bin for a subsequent drawing. Advertising spots for the contest indicate that entrants must sign their cash register receipt and also state that "no purchase is necessary."

Although the ad states that "no purchase is necessary," it is improbable that a prospective entrant would realize that a cash register receipt could be obtained without the necessity of purchase. In instances where there are state restrictions on commercial lotteries, or the lotteries are not exempt under the new federal law, licensees must ensure that advertisements are free of misleading directions or participation requirements which would cause the contest to operate as a lottery. With this scheme, cryptic messages like "no purchase necessary" and "nothing to buy" are not adequate to insulate such a contest from becoming a lottery.

Example #20: Label on product as entry blank, entry blank at advertiser's display case.
Entry blanks for a contest are printed on the label of a certain product. Entry blanks cannot be obtained otherwise. The winning entry will be determined by a drawing and a prize will be awarded.

Clearly, this is a lottery. To enter, a person must purchase the product. The purchase price is consideration. However, if an advertiser's display case offered free "tear-off" entry blanks without a purchasing requirement, the element of consideration would be absent and no lottery would be present.

Example #21: Submission of postcard as entry blank.

Listeners (or viewers) submit a postcard to the station. If the listener's card is drawn, he or she is called by the station and asked a question about the program then on the air. If the correct answer is given, the listener wins a prize.

This contest is not a lottery. The cost of postage to mail an entry card is not consideration, nor does the requirement of

listening to the broadcast in order to answer the contest question constitute consideration.

Example #22: Admission ticket as entry blank.
A movie theater has a "Bank Night" once a week. Persons who buy a ticket to see the movie that night thereby become eligible to win a cash prize in a drawing by dropping their names into a barrel in the lobby.

The NAB Legal Department is of the opinion that this is a lottery, whether or not a person must be present in order to win. The elements of chance and prize are obvious. As for consideration, the participants are required to buy an admission ticket and, thus, they are giving valuable consideration, which flows to the movie theater. The fact that purchasers receive full value for their money is immaterial. The purchase price is held to be consideration on the theory that part of the price of the ticket is allocated to the chance to participate in the drawing. *Horner v. United States*, 147 U.S. 449, 12 S.Ct. 409, 37 L.Ed. 237 (1893).

Example #23: Bingo card as entry blank.
A card similar to the familiar "bingo" card is made available to the public. (The usual plan makes it available at the sponsor's store, or by writing to the sponsor.) The card lists a number of songs to be broadcast over a particular program. The participant listens to the program, identifies the songs, and then checks them off the card. The first to identify songs falling in the usual "bingo" pattern telephones the station, announces the correct answers, and wins a prize. No purchase or entry fee is required.

The plan becomes a lottery only if the effort to secure a card is construed as "consideration." In view of the definition of "consideration" adopted in the *Caples* case, it seems unlikely that a court would find the plan to be a lottery.

Consideration Flowing From Participant To Promoter

Example #24: Consideration paid does not benefit sponsor.
The sports news department of a news-talk radio station asks its general manager to approve the following promotional scheme: "Send us your last bowling game receipt from any bowling alley. We will have a drawing for a 'Bowl Across America' vacation. The vacation includes all travel, lodging and meal expenses for a two-week tour of San Francisco, Cheyenne, Chicago and New York."

Prize and chance clearly are present. However, the Commission has ruled that consideration must flow from the entrant to the contest promoter. In this example, the radio station is the promoter. The money paid to bowl a game and receive a receipt flows from the contest participant to the

bowling alley, not to the sponsoring radio station. Thus, the element of consideration is absent and the promotion is not a lottery. This broadcaster also was wise to describe what was to be included in the prize tour, since the word "vacation" may be vague and misleading.

Example #25: Admission fees to trade fairs.
The Boater's Club has rented the local auditorium for its annual "Boat-A-Rama." Display booths are leased to interested merchants. A $3 admission fee is charged, all the proceeds from which go to the Boater's Club. The Happy Oar Boat Supply Shop has purchased display space and wishes to advertise a promotion. Any interested "Boat-A-Rama" spectator can visit the shop's display, fill out a card with no shop purchase necessary, and perhaps become the lucky winner in a drawing for an island cruise.

This advertisement would be permissible. Although a participant must pay to gain admission to the "Boat-A-Rama," the admission fee does not flow to the people who have purchased display space. The admission fee flows to the Boater's Club and not the Happy Oar Boat Supply Shop. The element of consideration is absent.

Example #26: Effect of co-sponsorship on flow of consideration.
Several youth groups joined ranks and are the sponsors of a Country Fair. For a $5 admission fee each spectator receives a box lunch and can visit the craft booths organized by the different youth organizations. The profits from the admission fees will be distributed among the various youth clubs. The "Teenagers to Save Endangered Animals" Club is holding a drawing. No purchase or contribution is required and the prize is a natural history digest.

This would be a lottery. Since a portion of the profits from the admission price flows to the "Teenagers to Save Endangered Animals," the element of consideration would be present. A licensee would have to check state law for possible restrictions on airing such a promotion. The licensee would also have to find out if the club was a non-profit organization as defined in section 501 of the federal tax code. (Under the revised federal law, lotteries sponsored by non-profit organizations are exempt from federal restrictions on airing lottery information.) If the admission fee profits were not redistributed among the youth clubs, and instead were donated to another worthy cause, consideration would not be present and the promotion would not be a lottery.

Eligibility Requirements
Example #27: Age requirements, possession of driver's license or social security card.
A radio station holds a contest for persons over 25 years old who possess either a driver's license or social security card. Each entrant must submit a

postcard disclosing his or her driver's license or social security card number. A card is selected at random, the number is announced and if the proper listener calls the station, a prize is awarded.

A program of this type was considered by the United States District Court for the Eastern District of Virginia in 1951, and the court there found that the program was "not a lottery within the prohibiting statutes of the United States or the rules promulgated by the Federal Communications Commission." *Capital Broadcasting Co. v. Arlington-Fairfax Broadcasting Co.*, 8 R.R. 2026, 2028 (E.D. Va. 1951). Thus, in this example, the entry requirements did not constitute consideration.

Example #28: Merchandise club membership.
Each participant pays $1 a week for thirty weeks into a "merchandise club." Once each week a name is drawn, and the person whose name is drawn receives a $30 merchandise certificate immediately, without further payment. At the end of thirty weeks, all participants whose names have not been drawn receive a certificate worth $30 in merchandise. The "club" is to be advertised over the radio.

It is the opinion of the NAB Legal Department that the lottery elements of prize, consideration and chance are all present in the plan. The fact that most participants receive full value for money paid does not remove the lottery aspects. That is because the amount of consideration necessary to get back $30 varies by virtue of chance—will a contestant be picked after only contributing one, five, or ten dollars?

Broadcasters also should check their state lottery laws before airing advertisements for a plan such as this one. Further, merchandise clubs appear to represent a style of promotion long held to constitute an "unfair method of competition" by the Federal Trade Commission. *FTC v. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423 (1934).

Most civic club membership dues, would not constitute consideration and could be used as an eligibility requirement under the revised federal lottery laws.

Example #29: Showing a credit balance.
A local store conducts a drawing from among the names of those persons who show a credit balance at the end of each month. The winner is awarded a prize.

This is a lottery. Maintaining a credit balance is consideration because a purchase is required to be eligible to win. Also, the fact that this is a continuous (every month) promotion, makes is unacceptable for airing under Federal law.

Example #30: Possession of a credit card.
A clothing store is conducting a drawing in which only customers possessing the store's credit card may enter.

A broadcaster in an area with stringent state lottery laws must scrutinize the requirements for obtaining a credit card to be certain that a purchase, membership fee, or substantial time and effort is not required in order to acquire the credit card. The FCC has determined for example, that the requirement of disclosing considerable personal credit information is consideration. However, if the prospective entrant is required to fill out a sample form, but no purchase is necessary, it would appear that the element of consideration would be absent. Since the one time drawing is an occasional promotion, the presence or absence of consideration is irrelevant under the revised federal law, because references to events that are occasional and ancillary to a commercial organizations business are acceptable over the air.

Example #31: Cashing checks.
A local store holds a weekly drawing from the names of parties who have cashed wage or payroll checks there during the preceding week. A prize is awarded to the winner. No fee is charged for cashing the check, and the participant is not required to make a purchase at the store.

In the opinion of the NAB Legal Department, this is not a lottery since consideration is not present. A person may cash his or her check and leave. No consideration flows form the person cashing the check to the store.

Example #32: Possession of a savings/checking account.
A banking institution wants to advertise a promotion in which each 24-hour ATM banking deposit serves as an entry in a drawing for a Caribbean trip.

This constitutes a lottery. The Commission has ruled that depositing money into a bank for an indeterminate period of time is something of value, and constitutes consideration. The drawing and trip constitute the other elements of a lottery: chance and prize. *In re Lottery Broadcasts Involving Savings Accounts*, 65 F.C.C. 2d 870, 39 R.R. 2d 1285 (1977). However, consideration may be removed if the bank allows non-account holders to participate, for example, through use of a demonstration ATM card. Also, because the contest is occasional, promotional and ancillary to the bank's primary business, it likely would not be barred from broadcast under the revised federal law. But, licensees should check relevant state law.

Winner Determined By Skill Rather Than Chance
Example #33: Best slogan, best jingle, best name.
A dog food company offers two contests. One winner will be selected who submits the best name for the basset hound appearing in its commercials.

Another winner will be chosen for writing the best limerick on "Why My Pooch Likes Bowser Bisquits." Each entrant must purchase a box of biscuits to enter. The prize for each contest is $500 worth of dog food and grooming supplies.

If these contests are judged impartially on their merits, rather than by chance, they do not appear to be lotteries, even though the purchase of some product is required to participate. The elements of prize, consideration and chance must be present. In these contests, skill and not chance is involved. Although prize and consideration are present, the third element is missing, therefore, no lottery exists.

Tie-Breaking Procedures. In a speech made to broadcasters in 1949, the Solicitor of the Post Office Department emphasized that caution must be exercised to keep this kind of contest within the law, remarking that, "even in such a contest involving skill, if a tie is possible, such as in 'best-name' and 'best-slogan' competitions, and consideration is required from contestants, it is necessary to include a rule that a prize identical with the one tied for will be awarded to each tying contestant in order to make such a contest acceptable. Otherwise, the possibility of two or more being tied for one or more of the prizes makes the amount of the prize indeterminate in advance, and, thus the element of chance enters into the contest..." Note also that ties may not be broken by awarding the prize to the entry bearing the earliest postmark. Such a contest rule may well introduce the element of chance.

Illustrating another possible pitfall in "best" contests, the Solicitor described a best-slogan contest wherein 8,000 entries were received in the last two hours of the contest, and the announcement of the winner was made exactly one hour after the closing time. Under such circumstances, it seems more than likely that chance supplanted skill as the means of selecting the winner.

Additionally, the Postal Service is of the opinion that chance is involved in contests when the judges take into consideration factors not disclosed to contestants. For example, in a "best-name" contest, if the judges give extra points to persons explaining their entry, but this is not disclosed to all contestants, the factor of skill is defeated and the element of chance is introduced. Remember, however, if the contest is promotional, occasional and ancillary to a commercial organization's primary business, under the revised federal law, it is not barred from the air. But, remember to check state law.

Example #34: Treasure hunts, word puzzles.
A money draft is hidden in the township of Tamarack. To be eligible to compete, a contestant must purchase the sponsor's product which

contains a list of helpful clues. Other clues are broadcast over the air which aid the contestant in deciphering the puzzle.

Although the elements of prize and consideration are present, if a successful search actually would require a good measure of skill, the element of chance would seem to be eliminated and there would be no lottery.

Example #35: Most sales.
A publishing company advertises that any person who sells the greatest number of subscriptions to a certain publication during a specific period wins a vacation to Miami.

According to an informal FCC staff ruling, this would not be a lottery. Even though the purchase of a subscription is necessary, the entrant need not make a purchase, and sale of subscriptions depends not on chance, but on the entrant's salesmanship.

Example #36: Beautiful baby pageant.
A photography studio wishes to broadcast its "Cupid Cutie Contest." To enter, a parent must pay $15 to have several photographs of his or her child taken in different poses. A panel of professional photographers will judge the photographs on the basis of facial expression, personality and poise of the child. The winning child will receive a $200 college scholarship.

It is the opinion of the NAB Legal Department that this would not be a lottery, so long as the judging criteria are spelled out clearly in advance, and are faithfully adhered to by the judging panel. However, if the judging guidelines were fuzzy, or the judges were slipshod in discharging their duties, the element of chance would be present and, in conjunction with the elements of consideration and prize, a lottery would exist.

Example #37: Dance competition.
The Blue Goose Disco Palace wishes to broadcast a dance competition advertisement. Each entrant would be required to pay a $5 entry fee. The prize is $100 and a guest appearance on a local TV show. The competition is judged solely on the basis of "audience reaction," whichever dancing couple receives the most enthusiastic round of applause wins.

Prize and consideration clearly exist, but it is unclear whether skill or chance determines the outcome of the competition. Since one couple could "stack" the audience by inviting numerous friends to act as a cheering squad, the most "skilled" couple may fail to prevail.

On the other hand, stacking the audience may involve skill, and not chance! Thus, a broadcaster located in a state where lotteries or the advertisement of lotteries is prohibited, may be treading on thin ice by broadcasting such a competition. (If the contest is not occasional, but run every week by the disco palace, a possible federal violation may exist as well.)

If the dancers were evaluated according to objective criteria (precision of movement, difficulty of steps, apparel choice) by a judge or panel of judges, the element of chance would be eliminated. The judges do not have to be professional dancers or teachers, but they should not have a predetermined bias in favor of particular contestants. In addition, the judging criteria should be articulated to participants in advance of the competition.

Example #38: Video games.
A local video arcade wants to publicize a "Dragonslayer Tournament," in which the participant with the highest score wins a mini-bike. Each participant must pay 25 cents per game, and is limited to a certain number of games.

Although video games depend on chance to a certain degree, an informal FCC staff ruling has held that video games are predominately games of skill. This promotion would not be a lottery.

Example #39: Poker tournaments.
A church advertises a poker tournament to raise money for its building fund. It charges $5 for admission, and each player gets 20 tokens to start. Each participant plays until his or her tokens are exhausted. At the end of the evening, the player with the most tokens wins $100. The church will use part of the revenue to pay the winner.

It is the opinion of the NAB Legal Department that this is an elimination tournament based on skill, and not a lottery. Although a single poker game would be considered a lottery, this tournament consists of a series of poker games to determine the best poker player. Information about the church's fundraiser, in this instance, could be broadcast.

Under the revised federal law, this contest would not be a problem because promotions sponsored by non-profit organizations, as defined by section 501 of the federal tax code (the church for example), are exempt from the federal prohibitions on broadcasting lottery information.

Guessing Contests
Example #40: Guessing the number of beans, scores of sporting events', amount of money collected during a charity fund drive.
A prize is to be awarded to the person guessing most closely the number

of beans in a quart jar, the score of the championship high school volleyball game, the amount of money collected for the Cancer Drive, or the number of votes cast in a special election. The contest is to be advertised over the air.

Whether the contests of this type amount to lotteries will depend upon whether or not consideration is required to participate. If some product must be bought, an admission purchased, a toll call made, etc., the courts will probably find consideration to be present.

It has been contended, unsuccessfully, that such contests involve skill rather than chance, and hence, should not be considered lotteries. A number of court decisions have held that, although knowledge of the subject matter, or skill in mathematics might enable one to make a close approximation of the answer, determining the exact number is impossible and must depend upon guesswork, another word for chance. See cases collected in *United States v. Rich*, 90 F. Supp. 624, 629 (E.D. Illinois 1950).

Example #41: Guessing weights and measures.
A gasoline station offers a free road atlas to any customer who can guess, within one tenth of a gallon, how much gas it will take to fill up his or her tank.

In the opinion of the NAB Legal Department, this plan is a lottery. The prize is a free road atlas. A guess necessary in order to win is the chance. Guessing the amount of gas is no different than guessing the number of beans in a jar which, as noted in Example #40, is still chance, even though a mathematician could perhaps calculate the amount of gas needed. This does not change the guess into an exercise of skill. The existence of chance must be considered from the standpoint of whether the average person must rely on chance to win. The "consideration" in this plan is the commitment to make a purchase. The fact that full value is received for the purchase price by losers is immaterial. Broadcasters should check state lottery laws before airing this promotion. (If the promotion is "occasional," its okay under the revised Federal law.)

Answer The Question And Win
Example #42: Exceptionally difficult questions may constitute chance.
The House of Exotic Fish wishes to broadcast the following announcement: "Every purchaser will be entitled to a $20 gift certificate if he or she can correctly answer two questions."

The House of Exotic Fish asks questions such as: (1) "What is the average number of scales on a piranha?" (2) "What is the respiratory rate per hour of an angel fish?" The contestant is not afforded an opportunity to research the answers to the questions.

At first glance, this might be considered a contest involving skill rather than chance, due to the difficult nature of the questions involved. However, these questions are so obscure, that they constitute a guessing contest and the element of chance outweighs the participant's skill in analyzing the queries. Since purchase is required, and a gift certificate is offered, all three elements of a lottery are present. However, if the contestant were permitted to research the questions before answering, skill rather than chance would be present, and no lottery would exist.

Example #43: Entrants selected at random.
Persons selected at random from the telephone directory are called and awarded $5 if they can answer two questions correctly while on the air.[10] Familiarity with the sponsor's product is not necessary in order to correctly respond to the questions.

The random selection process and the $5 gift constitute chance and prize. However, this plan is not a lottery since so little effort is required to win a prize that it may be said that no consideration is present.

Notice that in this example, even if the questions posed required the participant to respond on the basis of personal skill, rather than by guessing (as in the previous example), the element of chance would still be present due to the random method of selecting the entrants from a telephone directory. However, since a purchase is not required, once again, the element of consideration would be absent.

Example #44: Value of prize determined by chance.
Every person who visits Noah's Hot House and makes a purchase is asked two questions while the purchase is placed in a bag. The ability to answer the questions is based on the participant's skill: (1) "Who was the Vice President of the United States in 1960?" (2) "What is the largest lake in California?" If the purchaser answers both questions correctly, he or she is entitled to pick a gift certificate from the grab bag ranging in value from $1-$10.

Initially, it might appear that the element of chance is lacking since the questions test the participant's skill. However, since the value of the grab bag items ranges anywhere between $1-$10, the amount of the prize is determined by chance. Thus, all three elements of a lottery are present.

One simple way to cure the lottery element of this promotion is to have one uniform prize (e.g., a percentage discount) for all entrants who successfully answer the question. If one type of prize is awarded to all who qualify on the basis of skill in fielding questions, the element of chance is eliminated.

There is no FCC ruling which authoritatively states that offering prizes of similar cash value (such as a grab bag containing felt tip pens, small note

pads, or boxes of paper clips) is sufficient to eliminate chance, or if it is necessary to offer all participants identical prizes (red coffee mugs). This is another hazy area of the lottery law and a broadcaster would be prudent to contact an attorney.

Substantial Time And Effort As A Form Of Consideration
Example #45: Visiting promoter's place of business.
Numbered slips are made available to the public by a store. A purchase is not required, but the store must be entered to obtain the slip. A drawing is held and the number drawn is announced over the radio. If the person holding the properly numbered slip is listening, a prize is awarded.

Under the *Caples* decision, the requirement of entering the store would not appear to constitute consideration and, thus, the "give-away" is not a lottery. Listening for one's name to be called is not consideration under the *ABC* case.

Example #46: Substantial hardship in visiting promoter's place of business.
A local real estate developer wishes to promote his new development in an isolated mountain area 80 miles from the city by holding a drawing and awarding one of the lots to the winner. Participants would be required to visit the development to fill out an entry form. Only four-wheel drive vehicles would be capable of making a safe journey to the site.

This is a gray area of the lottery law. Although no purchase would be required, it is the opinion of the NAB Legal Department that travelling 80 miles to the site of the development through rough terrain would amount to a substantial expenditure of time and effort on the part of the contestant. Therefore, it would appear that consideration would be present. However, it should be noted that no hard and fast rule can define exactly how many miles or what type of external factors would constitute substantial hardship to the participant. The broadcaster should contact an attorney when in doubt. But, remember, if the event is, promotional, occasional and ancillary to the developer's primary business, airing information about the event would be acceptable under the revised federal law. Don't forget, however, to check the relevant state law.

Example #47: Test drive as consideration.
In order to participate in Lefty's "Buy-A-Wreck" promotion, individuals are required to visit Lefty's showroom and test drive a used car. After the test drive, the participant is entitled to spin the "Wheel of Gifts." There is no obligation to buy a "wreck," but a test drive is mandatory.

A test drive of an automobile with a salesperson present in the car for at least some of the time, constitutes consideration. Since the "Wheel of Gifts" furnishes the elements of prize and chance, all three lottery elements are present.

Las Vegas Nights, Monte Carlo Nights, Casinos
Example #48: Las Vegas Nights.
A "Las Vegas Night" is being promoted by the American Cancer Society, and is to be conducted as follows:

- Prior to entering the premises, participants are required to make monetary "contributions" in exchange for admission and "play money."
- Participants use this "play money" to play "games of chance" (gamble) and win or lose "play money."
- At the conclusion of the gambling, participants who have "play money" may take part in an auction of merchandise donated by local area merchants.
- The highest bidder purchases the items up for auction.
- The "play money" is used to pay for items won at the auction.
- The "play money" is not redeemable for cash.

All the essential legal elements of a lottery will be present in the actual operation of "Las Vegas Night." The element of prize apparently will be present since winners may participate in an auction and bid on and purchase a "thing of value." (The fact that prizes are donated by merchants does not make them valueless and is irrelevant.) The element of chance apparently will be present since participants will be engaging in "games of chance" (gambling), the results of which will determine whether prizes can be won. The element of consideration apparently will be present, inasmuch as persons will be required to pay money to the promoter, the American Cancer Society or its local chapter, in order to participate. Although broadcasting promotions of lotteries undertaken for charitable causes are now permissible under federal law, broadcasters should check state lottery laws to determine if any state restrictions are violated by airing such promotional information.

Large gambling houses have been permitted to broadcast advertisements pertaining to their restaurant and catering services and the names of celebrities currently providing entertainment in the casinos. If a local organization is sponsoring an extensive "Mardi Gras Night," with numerous food facilities, amusement rides and a substantial amount of entertainment, in addition to gambling tables, an advertisement restricted to the non-gambling activities (dining fare, thrill rides and entertainment) would be permissible in most instances. However, if only a 15-minute magic show and a cold sandwich booth were offered, an advertisement urging people to attend an "exciting social event" might be impermissible in states prohibiting lotteries or their advertisements since it would simply be a thinly veiled way of promoting a lottery.

Example #49: "Donations" to participate.
A church hosts poker games weekly. To play, participants are not required to pay any money. However, at the door, there is a sign requesting donations.

It is the opinion of the NAB Legal Department that this is a lottery. The fact that the church asks for donations is controlling. Even though no one is required to give money, one may feel morally obligated to contribute money to participate in the games. Again, under the revised federal law, if the church was qualified under section 501 of the federal tax code, there would be no federal violation for airing this promotion. Remember, however, to check relevant state law.

Example #50: No participation fee, refreshments sold.
The same facts as in Example #49, except the church, instead of asking for donations, charges $1 for each beverage served.

In this example, it seems unlikely that one would feel obligated to purchase a beverage in order to participate in the poker game. Therefore, this would not constitute a lottery.

Example #51: Bus trip to casino.
A bus company wishes to broadcast the following ad: "Hop aboard the 'Casino Riders Bus Line' for a trip to Atlantic City for a day of fun at the 'Apex Hotel and Casino' which has the finest food and floor shows on the boardwalk." The word casino is a part of the actual name of both the bus line and the hotel.

Broadcasting information about casino gambling is still prohibited by federal law. However, where the word "casino" is a part of the actual name of a hotel or organization, as it is in this example, it may be included in broadcast advertising. Non-gambling activities of the hotels and casinos (such as floor shows and restaurants) may also be advertised.

Example #52: Reference made to gambling activities.
The same facts as example #51, except the following information is included. "Each bus rider will receive chips worth $20 which can be used in the casino slot machines or gambling activity of your choice."

In this example, there is a direct reference to the gambling activities at the hotel. This ad violates the federal criminal code as well as FCC regulations. A licensee airing this ad would be subject to prosecution by the Department of Justice, and fines and/or revocation of license by the Commission.

Radio And Television Auctions

Example #53: "Auction dollars" to bid for prizes.
A local merchant gives each customer "auction dollars" in a face amount equal to the value of goods purchased. The "auction dollars" are then used to bid for prizes

offered by the merchant, the highest amount of "auction dollars" bid taking the various prizes. The auction may be conducted over radio or TV and bids taken by phone, or the auction may merely be advertised by radio or TV. A variation of this format is for the bidding to be in terms of box tops, wrappers, etc.

The auction format, to date, has not been formally ruled on by the FCC, the courts, or the Postal Service.

Prize and consideration (here, the requirement that merchandise be purchased) are certainly present. There is doubt as to the presence of chance, the third element necessary to make the lottery. Ordinarily, merchandise awarded to the highest bidder is not considered to be awarded by chance. However, whether or not chance is present depends on the specific rules governing the auction. For example, in the case of ties for high bids, if the rules call for a drawing among the high bidders, chance would be present. On the other hand, if all of the high bidders are allowed to receive a duplicate of the prize bid upon, chance would not be present.

Charities

Example #54: All proceeds go to charity.
Charity Bingo. A local service club wishes to advertise its weekly "bingo" games over the air. All proceeds go to charity. There is a $1 admission fee.

The game of bingo and its many variations are held to be lotteries within the meaning of federal law, if one is required to pay in order to participate. If the local service club is considered a "not-for-profit organization," as defined in the Charity Games Act, ads for the weekly bingo games will be allowable under federal law. However, the games would still be subject to any applicable state restrictions.

Example #55: Commercial establishment leases space for charity bingo.
A local catering hall leases its premises for a flat fee to a non-profit charitable organization for once-a-week charity bingo games. An admission price of $5 is charged and all proceeds go to the non-profit organization. The organization wishes to advertise the games on local radio stations.

Under the Charity Games Act, commercial organizations may only advertise lottery promotions that are "occasional." In this example, however, although the games are regular, once-a-week events, it is the *non-profit organization* that wishes to sponsor and advertise the activities. The catering hall is merely being used as a place to hold the events. It would, therefore, be legal, under federal law, to advertise these games. This would not be the case, however, if the catering hall were receiving, instead of an agreed upon lease fee, some of the proceeds from the games. In that

instance the hall could be viewed as sponsoring an ongoing lottery activity. Advertising information about such ongoing activities is prohibited under federal law.

Example #56: "Las Vegas Night."
A restaurant hosts "Vegas Night" every first Thursday of the month. It sells admission tickets for $60 each. Once inside, participants are given play money with which to gamble. During the evening, a drawing is held. The winner receives $1,000. There are other monetary prizes as well. Aside from the money set aside for the prizes and operating costs, the proceeds go to charity.

In the opinion of the NAB Legal Department, although some of the proceeds go to charity, promotions such as this are considered to be lotteries because the use of part of the proceeds to cover sponsor's costs, is consideration flowing to the promoter of the event. Licensees also are urged to consult with their attorneys about how this item would be handled under state law.

Example #57: Prize in the form of a charity contribution.
A company holds a contest in which the prize is a cash donation in the winner's name to a charity designated by the winner. Entry blanks can be obtained only through purchase of the company's product. The winner will be determined by drawing.

This is one of the rare cases in which it is difficult to determine if there is a prize. However, the right to designate which charity receives the prize money, along with the benefit of having one's name associated with the donation, is sufficiently valuable to the winner to constitute a prize. In addition, the winner would receive "something of value" if he or she could claim a tax deduction for the donation. Therefore, this contest is a lottery.

Endless Chain Purchasing Schemes, Pyramid Clubs, Chain Letters
Example #58: Endless chain schemes.
An "endless chain" marketing scheme operates as follows: the purchaser buys not only the product, but also the right to sell the product and receive commissions upon his or her own sales and sales made by those who have purchased from him or her and subsequent vendees on down the chain. Should a broadcaster air such a plan?

The Postal Service has considered various "chain letters" and "pyramid club" schemes to be lotteries. Since the "endless chain" scheme is very similar, it would also seem to be a lottery. The commissions received are considered to be the prize. The purchase price of the item is consideration. Chance is present in the scheme because the amount of the prize is determined by chance. The amount of commission received depends upon

conditions which the purchaser may not be able to control. *See Public Clearing House v. Coyne*, 194 U.S. 497, 48 L.Ed. 1092 (1904). Also, such advertisements run the risk of being misleading or deceptive since they may imply the participant will accumulate a substantial amount of money when, in fact, this cannot be promised.

News Stories And Editorials Concerning Lotteries
Example #59: News report that promotes a non-state-operated lottery.
A station wishes to broadcast the following news report: "The winning lottery ticket was drawn at the Cherry Hill Shopping Mall, witnessed by the Governor and other state and local officials. The top prize winner was John Doe."

Its possible, under state law, that this announcement would not be considered newsworthy because only persons holding tickets in the lottery would be interested in the announcement of just the name alone.

Example #60: Broadcasting winner names and numbers of non-state-operated lotteries.
A broadcaster wishes to broadcast a wire service report of the winning number and the name of the winner of the lottery. The proposed broadcast would last only a few seconds.

This is not a bona fide "human interest" story profiling the lucky winner. The fact that wire services treat the information as newsworthy does not make it news if the information is used to promote a lottery. The court has drawn a distinction between information directly promoting a lottery and information that is simply news of a lottery. *New York State Broadcaster's Association v. United States*, 414 F. 2d 990,998 (2d Cir. 1969). In the limited instances where a private (non-state operated nor operated by a charitable organization) lottery will not be exempt from federal prohibition under the revised federal lottery law, a station could still carry information about such a lottery if the information were of a news or editorial nature. It is also likely that a station's airing of news or editorial comment about a lottery would not subject the station to prosecution under state law. It is essential, however, to consult an attorney regarding any state restrictions prior to airing such an item.

Example #61: Human interest stories on non-state-operated lotteries.
An individual who resides in the station's service area has won $50,000 in a lottery. The station wishes to interview the winner asking about how he or she will spend the money, how it has affected his or her life, etc. The station will air the interview during its regular newscast on a day following the drawing.

Even for non-exempt lotteries, this broadcast would be legal under federal law. Interviews with winners are permitted, except where by their repetition

or airing in non-newscasts it is clear they are shams to promote the lottery. Again, however, a station should consult with an attorney about state prohibitions before broadcasting the spot

Example #62: Use of interview as a promotional sham.
In the above situation, the station broadcasts a brief excerpt from the interview at brief intervals throughout the day during the time lottery tickets are being sold for the next lottery. This is not a state-operated lottery, and the excerpts are not broadcast as part of a newscast.

Although interviews with winners are permitted, they may not be used as promotional devices where airing such lottery information is prohibited by state law or is not-exempt under federal law. Clearly, seeing and/or hearing a "happy winner" of a previous lottery would encourage the public to participate in the upcoming lottery.

As in the examples above, consultation with an attorney on state restrictions is advised.

Example #63: Editorial in support of or against establishing a state lottery.
The hypothetical state of New Wave has legislation pending which would create a state-operated lottery. A radio station airs an editorial which discusses the public policy arguments in favor of the legislation.

Such an editorial would be legal. The FCC does not want to inhibit the free exercise of public debate on topics of concern to a community, such as the establishment of a state lottery.

Indian Games
Example #64: Indian games run by third party.
A local broadcaster wishes to advertise bingo games that are conducted each week on the local Indian reservation. The games are operated by a non-Indian commercial organization, which has contracted with the Indian tribe to set up and run the activity.

If an Indian tribe itself runs an ongoing bingo or similar game, it is a valid activity under the Indian Gaming Act and unless there are state restrictions, it can generally be advertised. Where a third-party contractor runs the games, as in this case, the games may not be advertised unless or until the contract between the Indian tribe and the third-party has been approved by the Secretary of the Interior or approval of the games is given by the Indian Commission. In addition, Indian games, whether third-party or not, must be allowable under state law before they can be conducted, let alone advertised.

Example #65: Indian games consisting of casino gambling
The same facts as example #64 except for the following. In addition to the bingo games, there is a weekly "casino night" which consists of slot machines and roulette.

Casino gambling is not included in the class of Indian games (Class II) which, under the Indian Gaming Regulatory Act, now generally is eligible for broadcast advertising under the terms of the Act. Casino gambling falls under a separate class of games (Class III) that will only be lawful if the Secretary of the Interior approves a tribe-state compact. Once such a compact is approved, broadcasters are free to advertise the casino games authorized by tribal authorities. However, advertising *non-Indian* casino gambling over the air would still be prohibited under the Charity Games Act.