



Interpretive Letter #1153

May 11, 2015

June 2015

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[]

Subject: [] Program

Dear []:

This is in response to your letter of March 26, 2015, to Senior Deputy Comptroller and Chief Counsel Amy Friend. Your letter was referred to me for response. You requested confirmation that the weight loss program described in your letter is not a prohibited lottery and may be made available by national banks and federal savings associations to their employees. Based upon the representations in your letter and other information you provided, I conclude that the program is legally permissible for financial institutions regulated by the OCC.

I. FACTS

As related in your letter, [] (“LLC”), a [] limited liability company, operates a weight loss challenge program known as the [] Program (“ ”) that it makes available to employers across the country who, in turn, offer it to their employees. Several hundred companies and government agencies participate in this program, and the LLC has been in discussions with various financial institutions, including national banks, that wish to offer it to their employees.

Administration of the [**Program**] is the responsibility of the LLC. The [**Program**] is structured in such a way that employees interact exclusively with the LLC rather than the employer. The employer’s role is typically limited to providing information regarding the [**Program**] in order to encourage participation, and sometimes conducting an awards ceremony for the winners of the [**Program**].

A company’s employees who elect to participate in the [**Program**] form teams of approximately five members and sign up to participate through the LLC’s website. While at least one team member must be a company employee, non-employees also may be members of a team. To participate, each member is often required to pay an entry fee, typically about \$70 and broken up into three equal installments paid over the course of the [**Program**]. In some cases, an employer elects to make the payments on behalf of its employees. At the conclusion of

a specified time period, the LLC awards prizes based on the teams' mean weight loss percentages, and also based on individual weight loss by participants, and other similar indicia of weight loss effort and achievement. First-place prizes can be approximately \$10,000. Prizes are funded by participant entry fees, employer contributions, and other sources available to the LLC.

II. LEGAL ANALYSIS

A. Applicable Law

National banks and federal savings associations are generally prohibited from engaging in lottery-related activity. For example, they may not deal in lottery tickets, announce, advertise, or publicize the existence of a lottery or a lottery winner, or permit others to use their banking offices for any of these purposes. 12 U.S.C. § 25a (national banks), 12 U.S.C. § 1463(e) (federal savings associations).¹ A “lottery” is defined as follows:

The term “lottery” includes any arrangement, other than a savings promotion raffle,² whereby three or more persons (the “participants”) advance money or credit to another in exchange for the possibility or expectation that one or more but not all of the participants (the “winners”) will receive by reason of their advances more than the amount they have advanced, the identity of the winners being determined by any means which includes –

- (A) a random selection;
- (B) a game, race, or contest; or
- (C) any record or tabulation of the result of one or more events in which any participant has no interest except for its bearing upon the possibility that he may become a winner.

12 U.S.C. § 25a(c)(2). A fine of not more than \$1000, or imprisonment for not more than one year, or both, is provided for knowing violations of 12 U.S.C. § 25a (and the lottery provisions applicable to other institutions). 18 U.S.C. § 1306.³

Traditionally, a lottery requires three elements: 1) the distribution of a prize; 2) according to chance; 3) for consideration. *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 291 n.8 (1954); *United States Postal Serv. v. Armada*, 200 F.3d 647, 651 (9th Cir. 2000); *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W. 2d 408, 457 (Wis. 2006); 38 Am.

¹ For the sake of simplicity, this letter will use the citations for national banks under 12 U.S.C. § 25a because the statutory language applicable to federal savings associations in 12 U.S.C. § 1463(e) is identical. The same restrictions also apply to state member banks, 12 U.S.C. § 339, and state non-member banks, 12 U.S.C. § 1829a.

² This is an exception to the lottery prohibition that was recently enacted by Congress. American Savings Promotion Act, Pub. L. No. 113-251, § 3a(a)(1), 128 Stat. 2888, 2889 (2014). The [**Program**] is not a savings promotion raffle.

³ This letter expresses no opinion about 18 U.S.C. § 1306, as this statute is under the jurisdiction of the Department of Justice.

Jur. 2d *Gambling* § 7 (2015). Under the statutory definition of “lottery” above, the type of consideration is limited to money or credit.

The [**Program**] you describe clearly incorporates the element of a prize. However, in my opinion, the elements of chance and consideration are lacking. These elements are discussed below.

1. Chance

“Chance” refers to the determination of an outcome, not by skill or known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. *United States v. Rich*, 90 F. Supp. 624 (E.D. Ill. 1950). Another court equated chance with “blind fate,” as opposed to something that “happens by plan or design, or by the exercise of volition or judgment.” *State v. Lindsey*, 2 A.2d 201 (Vt. 1938). Without chance, there can be no lottery. *People v. Hecht*, 3 P.2d 399, 401 (Cal. App. 1931). A contest whose outcome is determined by skill is not a lottery. 38 Am. Jur. 2d *Gambling*, *supra*.

Although the [**Program**] involves a contest, that does not make it a lottery. The winners of the [**Program**] are not determined by chance, but by effort and achievement, in other words, skill. The winners are chosen based upon which individual and team have lost the most weight. This is not a matter of “blind fate,” but rather, one that is within the control of the individual participants through “the exercise of volition or judgment,” *State v. Lindsey*, *supra*. Weight loss is not appropriately described as “incapable of ascertainment or accomplishment by means of human foresight or ingenuity,” *United States v. Rich*, *supra*.

2. Consideration

For purposes of the lottery statute, the element of consideration means an “advance [of] money or credit to another in exchange for the possibility or expectation that one or more but not all of the participants (the ‘winners’) will receive by reason of their advances more than the amount they have advanced” 12 U.S.C. § 25a(c)(2). Participants in the [**Program**] pay an entry fee of approximately \$70, while the first-place prize can be approximately \$10,000. Nevertheless, the entry fee does not constitute the type of consideration that would make the [**Program**] a prohibited lottery.

You state that, in exchange for the entry fee, participants receive not only a chance of winning a prize, but also other services such as a significant program of tips focused on losing weight with a team, motivational e-mails and content, scoreboards, a team chat area, and many other features. OCC precedent has taken the position that where a banking transaction is required in order to enter a contest, there is no consideration if the customer pays the normal fee for the banking service and does not pay anything extra to enter the contest. Office of Thrift Supervision, Op. Gen. Counsel, 1988 WL 1022201 (April 5, 1988); Office of Thrift Supervision, Op. Gen. Counsel, 1985 WL 667043 (November 1, 1985).

Here, although no banking services are involved, the entry fee may be considered as payment for the services you listed and not solely in exchange for the chance of winning a prize. Thus, it

does not constitute consideration within the meaning of 12 U.S.C. § 25a. In addition, the entry fee for the [**Program**] is analogous to the entry fee to compete in a race. A contest whose outcome is determined by skill or effort, such as a race, is not a lottery for the participants involved. OCC Interpretive Letter No. 923 (December 19, 2001).

B. Public Policy

The [**Program**] is not the type of activity that Congress sought to prohibit when it enacted 12 U.S.C. § 25a. The policy rationale behind the lottery prohibition is that financial institutions should not be used to encourage vulnerable members of society to waste their money through gambling. The legislative history shows that Congress was focused on the sale of state lottery tickets at financial institutions and the evils of gambling. In a May 11, 1967, letter to Comptroller of the Currency William B. Camp, one congressman complained that it was “inconceivable to permit the use of thrift institutions as bookie parlors.” Congressman Patman, the primary sponsor of the legislation, stated that it “was brought about in response to the dangers arising from a new lottery voted into existence by the State of New York.” 113 Cong. Rec. 18581, 18582 (1967). *See generally, To Prohibit Certain Financial Institutions From Participating in Gambling Activities: Hearings on H.R. 9892 Before the House Committee on Banking and Currency, 90th Cong., 1st Sess.* (1967).

Clearly, the [**Program**] is not the type of gambling activity that Congress was concerned about. Individuals who participate in the [**Program**] will not be encouraged to dissipate their money through vice and recklessness. Rather, they will participate in an activity that is designed to promote weight loss and a healthy work force. These are goals that benefit society and that public policy supports and encourages.

III. CONCLUSION

For the reasons outlined above, I conclude that the [**Program**] is not a lottery within the meaning of 12 U.S.C. § 25a and 12 U.S.C. § 1463(e). Therefore, it is legally permissible for institutions regulated by the OCC to sponsor the [**Program**] and make it available to their employees. This conclusion is based upon the representations contained in your letter and other information that you provided. A material change to the facts as you described them could result in a different conclusion.

I trust that this has been responsive to your inquiry. If you have further questions, please feel free to contact me at (202) 649-5500.

Sincerely,

signed

Christopher C. Manthey
Special Counsel
Bank Activities and Structure Division