



ALAN WILSON
ATTORNEY GENERAL

September 13, 2019

The Honorable Garry R. Smith, Member
South Carolina House of Representatives
District No. 27
534 Blatt Bldg.
Columbia, SC 29201

The Honorable Wes Climer, Member
South Carolina Senate
District No. 15
604 Gressette Bldg.
Columbia, SC 29201

The Honorable Gary E. Clary, Member
South Carolina House of Representatives
District No. 3
402D Blatt Bldg.
Columbia, SC 29201

Dear Representative Smith & Clary and Senator Climer:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states:

We are requesting that the Office of the South Carolina Attorney General issue an opinion regarding the legality of the resale of known winning lottery tickets that were previously sold by the South Carolina Education Lottery (SCEL), as addressed in a recent report from the Legislative Audit Council.

Specifically, we would like to request an opinion on whether:

1. Individuals who are not licensed lottery retailers may resell or purchase known winning lottery tickets.
2. Licensed lottery retailers who are not acting on behalf of SCEL may resell or purchase known winning lottery tickets.
3. Known winning lottery tickets may be resold for prices not approved by the South Carolina Lottery Commission.
4. Resale transactions may take place at locations not licensed to sell lottery tickets.

June 2019 Legislative Audit Council Report

The request letter attached a portion of the June 2019 Legislative Audit Council (“LAC”) report titled, “A REVIEW OF THE SOUTH CAROLINA EDUCATION LOTTERY AND ITS OVERSIGHT OF RETAILERS AND PLAYERS.” In chapter three, the report addresses issues regarding the “Enforcement of Prohibitions Against the Resale of Winning Lottery Tickets.” It summarized concerns about the resale of winning lottery ticket as follows:

Individuals who frequently redeem winning lottery tickets for prizes greater than \$500 may not be buying their tickets from SCEL but in resale transactions from individuals seeking to avoid redeeming their winning tickets at the SCEL claims center in Columbia.

...

When prizes are \$5,000 and greater, some players may resell their winning tickets to avoid having their winnings withheld by SCEL to settle debts, such as past due taxes, student loans, child support, or other court-ordered payments. ...

Id. at 18-19. The report interpreted the South Carolina Education Lottery Act (“SCEL Act”), S.C. Code Ann. §§ 59-150-10 *et seq.*, to prohibit such secondary sales of winning lottery tickets by retailers and lottery players. In particular, the report cited to Sections 59-150-210(A) and (C), -230(D) and -330(D).

Section 59-150-210(A) prohibits the sale of lottery game tickets except at the price established by the South Carolina Lottery Commission (“Commission”) as follows:

A person shall not sell a lottery game ticket or share at a price other than that established by the commission. A person, other than a duly certified lottery retailer, shall not sell lottery game tickets, but a person may purchase lawfully lottery game tickets or shares and make a gift of the lottery game tickets or shares to another. The commission may designate certain agents and employees to sell lottery game tickets or shares directly to the public.

S.C. Code Ann. § 59-150-210(A) (emphasis added). Section 59-150-210(C) similarly prohibits lottery retailers from selling lottery game tickets “except from the locations listed in the lottery retailer's contract and as evidenced by the lottery retailer's certificate of authorization” while allowing variances for temporary locations if the Commission grants written authorization. The SCEL Act defines “lottery retailer” to mean “a person who sells lottery game tickets or shares on behalf of the South Carolina Lottery Commission pursuant to a contract.” S.C. Code Ann. § 59-150-20(8). Based on this statutory authority, the report states that “Retailers who resell winning tickets are not acting as agents of the SCEL and, therefore, are violating these provisions, regardless of where they sell these winning tickets. Regular lottery players who resell winning

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lottery tickets are not certified retailers and, therefore, are in clear violation of these provisions.” LAC Report at 19.

The report also addresses Section 59-150-330(D) which directs the Commission to withhold specific debts from winnings, including taxes due the State, delinquent child support, delinquent student loans, and all other judgments and liens. S.C. Code Ann. § 59-150-330(D). The report speculates that “[t]o avoid having outstanding debts deducted from a prize, an individual may sell a known winning lottery ticket at a discount to a third party.” LAC Report at 20. Finally, the report cites to Section 59-150-230(D) which states, “A prize must not be paid upon a lottery game ticket or share purchased or sold in violation of this chapter and is an unclaimed prize for purposes of this section.” The report does not expressly connect this section to the resale of lottery game tickets or shares thereof. Instead, it notes that this section does not provide the standard of proof that is required to deny a claim, and suggests an amendment to the SCEL Act which expressly makes resale of lottery game tickets a violation of the Act could establish the standard of proof.

South Carolina Education Lottery Commission’s interpretation of the SCEL Act regarding resale or discounting of winning lottery tickets.

This Office contacted the Commission as it is charged with administering the SCEL Act as well as organizing, initiating, supervising, and administering the operation of the lottery. See S.C. Code Ann. §§ 59-150-50(4) (“The board shall ... promulgate regulations relating to the categories of lottery games and the conduct of lottery games ...”), -60(6) (“The commission has ... the power to: ... (6) organize, initiate, supervise, and administer the operation of the lottery as provided by this chapter and regulations promulgated relating to the categories of lottery games and the conduct of the games ...”). The Commission provided the following comments in response:

The LAC refers to the act of reselling (as repetitively explained to the LAC, the term “discounting” is the common term used in the lottery industry) throughout the report. Because no law provides that discounting by a retailer is prohibited, SCEL amended the retailer contract in 2011 to expressly forbid discounting by retailers, which was the only step that SCEL could take. It may be helpful to provide a more in-depth explanation of the nature of these referenced transactions.

“Discounting” is a voluntary transaction regarding a bearer instrument (winning ticket) that is defined by law to be negotiable. “Discounting” IS NOT when an owner or clerk steals winnings from a player by scanning a player’s winning ticket at the sales terminal and then paying the player an amount less than the winning amount. This conduct is a criminal offense (theft and/or fraud), that is investigated, and the retailer’s license will be revoked. Discounting committed by retailers or nonretailers is a voluntary, consensual act: a person agrees to buy a

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prize from a ticket (one already scratched or one for which the draw has been conducted, i.e., “a played ticket”) for less than the full value of the prize. The retailer contract prohibits retailers from engaging in discounting and allows for expedited license suspension/revocation with a lower standard of proof irrespective of whether the transaction was legal or criminal.

LAC report at 103. In a subsequent letter to this Office, the Commission elaborated on its position that the statutes referenced above do not address reselling or discounting as follows:

A person who sells the right to claim a prize is not reselling a lottery ticket in violation of *S.C. Code Ann.* § 59-150-210(A) as suggested by the LAC. A lottery “[t]icket” [is] tangible evidence issued by the South Carolina Lottery Commission to **provide participation in a lottery game.** *S.C. Code Ann.* § 59-150-20(7)(*emphasis added*). Under South Carolina law, three elements are required for an activity to be considered “a lottery”: prize, **chance**, and consideration. (*See, Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, at 292, 2 S.E.2d at 786, 2 S.E.2d 782 at 787 (1939)). Lottery game “means a **game of chance** approved by the General Assembly and operated pursuant to this chapter...” (*S.C. Code Ann.* § 59-150-20(7)(*emphasis added*). Once the prize is revealed, the ticket is no longer a lottery ticket within the meaning of § 59-150-210(A). It is a bearer instrument. The chance of winning (or losing) is no longer present. Without the chance component, there is no lottery. *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, at 292, 2 S.E.2d at 786, 2 S.E.2d 782 at 787 (1939). As a result, there cannot be a “known winning lottery ticket” within the meaning of § 59-150-210(A).

Once a lottery ticket has been “legally issued” (sold) by a lottery retailer, it is a bearer instrument until signed and the person who signs the ticket is considered the “bearer of the ticket” for payment (*S.C. Code Regs.* 44-80(C). *S.C. Code Ann.* § 59-150-20(17), not cited by the LAC, states: ““Share” means an intangible interest in a lottery ticket, by way of assignment, contractual participation, or other claim or right.” This definition clearly explains what a purchaser of a prize obtains from a “played ticket,” a right to be paid. This bearer instrument creates a contractual obligation for SCEL to pay the bearer the value of the prize once it is signed. However until presented to SCEL, an unsigned ticket remains a bearer instrument. The prize is payable to the bearer and it may be negotiated by transfer of possession alone. ...

(emphasis in original).

To answer the questions presented in the request letter, and considering the differing positions in the LAC report and the Commission’s comments, two threshold issues must be

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addressed: (1) Does a lottery game ticket continue to be a ticket after it has been revealed whether it is a winning ticket? and (2) Did the General Assembly intend the SCEL Act's prohibitions on the sale and assignment of lottery game tickets to apply to the practice of discounting lottery game tickets?

Law/Analysis

In order to address the questions identified above, this opinion must review relevant statutes in the SCEL Act and related regulations according to the rules of statutory construction. The primary rule of statutory construction is to “ascertain and give effect to the intent of the legislature.” Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citations omitted). The South Carolina Supreme Court has held that when the meaning of a statute is clear on its face, “then the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) (citations omitted) (internal quotations omitted); see also Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that where a statute's language is plain and unambiguous, “the text of a statute is considered the best evidence of the legislative intent or will.”). “A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers.” State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). However, the Supreme Court of South Carolina has stated that where the plain meaning of the words in a statute “would lead to a result so plainly absurd that it could not have been intended by the General Assembly ... the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect.” Duke Energy Corp. v. S. Carolina Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016).

It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, “[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.” The Court stated that the determination of whether deference is afforded to an agency’s interpretation of the statutes and regulations it administers involves two separate steps. Id.

First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“We recognize the Court generally gives deference to an

administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi-Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. In Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003), the Court held that "where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." See also Richland Cty. Sch. Dist. Two v. S.C. Dep't of Educ., 335 S.C. 491, 498, 517 S.E.2d 444, 448 (Ct. App. 1999) ("[A]n administrative construction 'affords no basis for the perpetuation of a patently erroneous application of the statute.'"); Kiawah Dev. Partners, II, 411 S.C. at 34–35, 766 S.E.2d at 718 ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'").

It is this Office's opinion that a court may well narrowly interpret the terms of the SCEL Act and in turn find few ambiguities. The South Carolina Constitution was amended in 2001 to allow the State to establish a lottery and for the Legislature to provide the parameters by which to conduct it. See S.C. Const. Art. XVII, § 7 (2008) ("Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law."). Prior to this amendment, the Constitution broadly prohibited lotteries. See S.C. Const. Art. XVII, § 7 (1976) ("No lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State."). It has been the historical position of this Office and our state courts that lotteries and gambling are against public policy. See Op. S.C. Att'y Gen., 1995 WL 805729 (September 5, 1995) (discussing South Carolina's strong public policy against gambling and lotteries); Op. S.C. Att'y Gen., 2004 WL 885188, at 3 (April 16, 2004) ("We begin by noting that the State of South Carolina has a long-standing public policy against gambling."). In light of the how the State has historically viewed lotteries and gambling being against public policy, a court would likely narrowly construe the terms of the SCEL Act. See Proctor v. Whitlark & Whitlark, Inc., 414 S.C. 318, 331–32, 778 S.E.2d 888, 895 (2015) (holding the "clear intent of the Legislature and [] public policy" compelled the conclusion that the gambling loss statutes granted "the exclusive remedy"); Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) ("[T]his Court will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public policy."). Of course, such an interpretation of law is ultimately

with the province of our state courts. This opinion simply reflects how this Office anticipates a court would analyze the issues presented under the SCEL Act.

A. The SCEL Act speaks directly to the issue that a lottery game ticket continues to be a ticket after the chance of winning a prize has been revealed.

It is this Office's opinion that a court likely would hold that a lottery game ticket remains a ticket after it has been revealed whether it entitles its holder to a prize. The SCEL Act speaks directly to the issue of whether a ticket remains a ticket after its status as a winning or non-winning ticket has been revealed. The word "ticket" is statutorily defined within the SCEL Act to mean "tangible evidence issued by the South Carolina Lottery Commission to provide participation in a lottery game." S.C. Code Ann. § 59-150-20(18). "Share" is defined as "an intangible interest in a lottery ticket, by way of assignment, contractual participation, or other claim or right." S.C. Code Ann. § 59-150-20(17). "Lottery", "lotteries", "lottery game", or "lottery games" are also defined statutorily to mean "a game of chance approved by the General Assembly and operated pursuant to this chapter including, but not limited to, the lottery game categories of instant tickets, on-line lottery games and drawing numbers ..." S.C. Code Ann. § 59-150-20(7).

The Commission's letter states, "Once the prize is revealed, the ticket is no longer a lottery ticket within the meaning of § 59-150-210(A)." It is this Office's opinion that a court likely would not defer to the Commission's interpretation on this point. The SCEL Act and related regulations expressly refer to "nonwinning instant tickets" and "a winning lottery game ticket." Section 59-150-230(C)(5) states, "A holder of a winning lottery game ticket or share from a lottery game or multi-state or multi-sovereign lottery game must claim a cash prize within one hundred eighty days after the drawing in which the cash prize was won." S.C. Code Ann. 59-150-235(C)(5) (emphasis added); see also S.C. Code Ann. §§ 59-150-70(F) ("[T]he board must consider instituting an additional lottery game that makes use of the nonwinning instant tickets on a monthly or other periodic basis ...").

Moreover, the Commission's regulations use the phrase "winning ticket" twenty three times in Title 44 of the South Carolina Code of Regulations. See, e.g., S.C. Code Ann. Regs. 44-10.Z ("'Unclaimed Prize' means the prize on a winning ticket for which no claim is made within 180 days after the drawing or winner selection event which made the ticket a winning ticket."); 44-10.BB ("'Validation' means the process of determining whether an instant or online ticket presented for payment is a winning ticket."); 44-40.10 ("The ticket bearer shall notify SCEL of the win and submit the winning ticket as specified by the Executive Director. The winning ticket shall be validated by SCEL through the use of the validation number and any other means as specified by the Commission."); 44-50.10 ("A ticket bearer entitled to a prize shall submit the winning ticket for validation. The winning ticket shall be validated as required by the Executive Director."); 44-70.F ("The Executive Director's decisions and judgments in respect to the

determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission.”).

The text of the SCEL Act demonstrates that the General Assembly intended a ticket to remain a ticket after it is revealed to be a winning or nonwinning ticket. The Commission’s regulations likewise repeatedly refer to winning tickets. Because the statutes discussed above and related regulations speak directly to the issue of a lottery game ticket’s status as a ticket after it has been revealed whether it entitles its holder to a prize, a court would likely “utilize the clear meaning” of the SCEL Act and hold that a lottery game ticket remains a ticket after it has been revealed whether it entitles its holder to a prize. Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717.

B. Whether the General Assembly intended the SCEL Act’s prohibitions on the sale and assignment of lottery game tickets of apply to the practice of discounting lottery game tickets.

It is this Office’s opinion that a court may find the SCEL Act and related regulations are ambiguous regarding the applicability of the prohibitions on selling and assigning lottery tickets to the practice of discounting and grant the Commission’s interpretation deference. However, this conclusion is not free from doubt. Legislative or judicial clarification may be necessary to provide a satisfactory resolution to the concerns raised in the request letter and the LAC report.

As is discussed more fully above, the LAC report cites several statutes and regulations which could be read to apply to the practice of discounting. The Commission, however, found those authorities inapplicable to the practice of “discounting” or reselling a ticket after it has been determined whether a ticket entitles its holder to a prize. Specifically, both bodies cite to Section 59-150-210(A) which states:

A person shall not sell a lottery game ticket or share at a price other than that established by the commission. A person, other than a duly certified lottery retailer, shall not sell lottery game tickets, but a person may purchase lawfully lottery game tickets or shares and make a gift of the lottery game tickets or shares to another. ...

The plain language of the statute prohibits a “person” from selling a lottery game or ticket at a price other than that set by the Commission. The SCEL Act broadly defines “person” as “an individual, corporation, partnership, unincorporated association, or other legal entity.” S.C. Code Ann. § 59-150-20(14). This definition demonstrates that the statute applies to more than just lottery retailers, who are a defined subset of persons. Stated another way, the first sentence of Section 59-150-210(A) forbids anyone from selling a lottery game ticket at a price other than that established from the commission. The second sentence forbids anyone other than a lottery retailer from selling lottery tickets. When read together, the statute allows only retailers to sell

lottery game tickets, and no other persons, but only at the price established by the commission. The statute goes on to allow a person to purchase lottery game tickets or shares of lottery game tickets and transfer them to another person as a gift.¹

It is this Office's understanding that the Commission interprets Section 59-150-210 to apply to retail sales of lottery game tickets, but not to secondary sales. The Commission does not interpret this statute nor the remainder of the SCEL Act to address the practice of "discounting." While Section 59-150-210(A) uses several defined terms, the word "sell" is not a defined term. When a word in a statute is undefined, it is interpreted according to its normal and customary meaning.

When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000). Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Id., at 410, 532 S.E.2d at 292.

S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010). Merriam-Webster defines the word "sell" to mean "to give up (property) to another for something of value (such as money)." Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/sell>; see also SELL, Black's Law Dictionary (11th ed. 2019) ("sell *vb.* (bef. 12c) to transfer (property) by sale."). Therefore, when read according to its usual and customary meaning, Section 59-150-210(A) prohibits transferring a lottery game ticket or share for money or other property of value except by retailers at the price set by the Commission. Providing a lottery game ticket to another as a gift without an exchange of property is a permitted post-retail transfer. Id.

The Commission provided this Office with statutes from four other states which more specifically address the secondary sales of known winning tickets. Because many states adopted similar statutory framework in their state lottery's enabling legislation, reference to other jurisdictions' codes may provide insights, but not control, as to our General Assembly's legislative intent in adopting the SCEL Act.

In 2019, the Code of Virginia was amended to add civil penalties for the practice of discounting as follows:

- A. As used in this section, "ticket discounting" means reselling or having a person other than the prize winner claim a winning lottery ticket or buying or

¹ In fact, lottery game tickets or shares may even be transferred as a gift to persons under eighteen years of age when such a person could not purchase a ticket. See S.C. Code Ann. § 59-150-210(D).

claiming a winning lottery ticket for the purpose of assisting the original prize winner with concealing his identity as a prize winner.

B. No person shall engage in the practice of ticket discounting.

...

Va. Code Ann. § 58.1-4018.2 (West) (emphasis added). While the Virginia statute explicitly refers to discounting, the three additional jurisdictions do not use this term. Texas criminalizes the practice as follows:

(a) A person commits an offense if the person:

- (1) induces another person to assign or transfer a right to claim a prize;
- (2) offers for sale the right to claim a prize; or
- (3) offers, for compensation, to claim the prize of another person.

§ 466.310. Certain Transfers of Claims, V.T.C.A., Government Code § 466.310 (emphasis added). The statute does not use the term discounting, but instead describes the same actions that the Virginia statute used to describe discounting. The Texas statute uses the phrases “assign or transfer”, “offers for sale”, “offers for compensation,” and “right to claim a prize.” *Id.* The Florida and Indiana state lottery statutes follow a similar structure and phrasing as the Texas statute.² Whether these statutes use the phrase “claim a lottery ticket” or “claim a prize,” they can be read to relate to a limited subset of resales; those that occur only after a person knows that a ticket is a winning lottery game ticket and, therefore, entitled to a prize.

While Section 59-150-210(A) does not expressly prohibit the assignment or transfer of “the right to claim a prize” or use the term “discounting,” other statutes in the SCEL Act and its related regulations speak to the assignment of a prize. For instance, Section 59-150-230(C)(1) states, “A prize, a portion of a prize, or a right of a person to a prize awarded is not assignable except as provided in this section.” S.C. Code Ann. § 59-150-230(C)(1) (emphasis added). This section, nonetheless, could be read to relate to prizes which have already been claimed because it prohibits the assignment of prizes “awarded,” rather than a right to claim a prize or winning lottery ticket. *Id.* The South Carolina Code of State Regulations 44-80 more directly prohibits the assignment of the right to claim a prize where it states:

A. No person entitled to a prize may assign the right to claim it, except:

² See Fla. Stat. Ann. § 24.118 (West) (“Any person who induces another to assign or transfer his or her right to claim a prize, who offers for sale his or her right to claim a prize, or who offers for compensation to claim the prize of another is guilty of a misdemeanor ...”); Ind. Code Ann. § 4-30-14-2 (West) (“A person who: (1) induces another person to assign or transfer a right to claim a prize; (2) offers for sale the right to claim a prize; or (3) offers for compensation to claim the prize of another person; commits a Class A misdemeanor.”).

- (1) That payment of a prize may be made to any legal representative, including, but not limited to, guardians, executors, administrators, receivers, or other court-appointed assignees;
- (2) For the purpose of paying federal, state or local tax; or to satisfy executions, judgments, or orders or other processes legitimately obtained from federal or state courts; or
- (3) Transfers of remaining lottery annuity prize payments may be assigned as authorized by the Executive Director.

S.C. Code Regs. 44-80. The plain language prohibiting assignment of the right to claim a prize appears applicable to much of the same resulting conduct as the statutes cited above. However, the regulation does not include the other elements listed in those statutes; inducing another to assign his right to claim a prize, offering for sale the right to claim a prize, offering for compensation to claim a prize, or having a purpose of concealing a prize winner's identity. While Regulation 44-80 prohibits assignment of the right to claim a prize, its application can be read to apply more broadly than to just the practice of discounting because it does not require the additional elements of a transfer of property in exchange for the right to claim a prize or the purpose of concealment to be present. Unlike the statutes discussed above, Regulation 44-80 does not impose criminal or civil penalties for a violation, but instead allows the Commission or Executive Director to "refrain from making payments of the prize pending a final determination" regarding a disputed prize. S.C. Code Regs. 44-80(B). Therefore, Regulation 44-80 could be interpreted to prohibit the practice of discounting like the statutes discussed above, but without imposing criminal or civil penalties.

The Commission stressed to this Office that Regulation 44-80(C) allows the holder or bearer of a lottery ticket to transfer a ticket. Regulation 44-80(C) states, "A ticket that has been legally issued by a lottery retailer is a bearer instrument until signed. The person who signs the ticket is considered the bearer of the ticket." "Ticket bearer" is defined by regulation to mean "the person who has signed the ticket or has possession of the unsigned ticket." S.C. Code Regs. 44-10(W). The Commission explained its position as follows:

This bearer instrument creates a contractual obligation for SCEL to pay the bearer the value of the prize once it is signed. However until presented to SCEL, an unsigned ticket remains a bearer instrument. The prize is payable to the bearer and it may be negotiated by transfer of possession alone. There is no law in [South Carolina] stating that the original ticketholder is the only valid claimant ...

As discussed above, the SCEL Act expressly authorizes the transfer of a lottery game ticket or share as a gift and would allow the recipient, a person other than the person who originally purchased the lottery ticket, to claim a prize. See Section 59-150-210(A). However, this opinion also interprets Section 59-150-210(A) to prohibit transferring a lottery game ticket

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or share for money or other property of value. Ultimately, this appears to be the disagreement between the LAC report and the Commission's interpretation of the SCEL Act: whether the prohibition from selling tickets except by a retailer in Section 59-150-210(A) conflicts with a lottery game ticket being described as a bearer instrument in S.C. Code Regs. 44-80(C).

The South Carolina Supreme Court has held that an administrative regulation fails "when it alters or adds to a statute." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). If a court were to find Section 59-150-210(A) and Regulation 44-80(C) conflict, then Section 59-150-210(A) would control. However, it is unclear whether a court would find Regulation 44-80(C) conflicts with Section 59—150-210(A). Although, this Office's review of the SCEL Act found no references to "bearer instruments" or any variation on the term "negotiable," a court may find that Regulation 44-80(C) merely fills a gap in the law not covered by statute rather than adding to the SCEL Act.

Two cases discussed below illustrate how courts have come to opposite conclusions regarding state lottery statutes interaction with their state UCC statutes. These cases demonstrate the difficulty of accurately anticipating how a court will interpret the negotiability of a lottery ticket as a bearer instrument in light of issues that arise under a state's commercial code.

In Ramirez v. Bureau of State Lottery, 166 Mich. App. 275 (1990), the Michigan state lottery argued that a lottery ticket is not necessarily negotiable. In Ramirez, the plaintiff, a lottery player who allegedly lost a winning lottery ticket, argued that, because the lottery tickets are bearer instruments, they are negotiable and Michigan's UCC statutes applied to allow him to prove ownership of the lost ticket. Id. at 247-248. The state lottery argued that a lottery ticket, although described as a bearer instrument on its back, does not qualify as a negotiable instrument because "it is not signed by the maker or drawer, it does not contain an unconditional promise or order to pay a sum certain in money, and is not payable on demand or at a definite time." Id. at 238-239. The Court of Appeals of Michigan did not directly address whether lottery tickets were negotiable under the UCC, but assumed for the sake of argument, that they were. Id. The court concluded that even if lottery tickets were negotiable, as adopted in the Michigan code, the provisions of the UCC may be varied by agreement. Id. By purchasing and playing the lottery ticket, the plaintiff agreed to abide by the statutes and rules governing the lottery, and, therefore, the plaintiff was required to present his ticket before payment would be required. Id.

In contrast, in Texas Lottery Com'n v. First State Bank of Dequeen, 325 S.W.3d 628 (2010), the Texas Supreme Court held that UCC provisions permitting account assignment prevailed over the provisions of the Texas Lottery Act (the "Lottery Act") which prohibited assignment of prize payments. The Texas Lottery Commission argued that where there is a conflict between the UCC provisions and the Lottery Act, the Lottery Act controlled. Id. at 635. The commission argued that the court's holding "will inhibit the State's efforts to collect child support because the Lottery Act provisions requiring the Commission to deduct the amount of a

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child support lien before paying a prize to a child support obligor will also be rendered ineffective.” Texas Lottery Comm'n, 325 S.W.3d 628, 640 (Tex. 2010). While the Court agreed that “persons who owe child support should pay it,” the Court held that its ruling was bound by the clear and unambiguous statutory language of the UCC. It is important to note that this ruling was based on Texas UCC statutes that listed lottery winnings as an “account” and permitted account assignments. It was not based on a lottery ticket’s status as a bearer instrument.

The analysis in each is based on the specific state statutes at issue and neither would be controlling authority for our state courts or necessarily applicable to the SCEL Act. However, to the extent this authority is persuasive, the analysis in both cases either assumed or found lottery tickets are negotiable or assignable. Similarly, a court may well find that there is ambiguity in the SCEL Act regarding whether lottery tickets, as bearer instruments, are negotiable until signed or presented to the Commission to claim a prize. In such a case, a court likely would defer to the Commission’s interpretation of Regulation 44-80(C) to find that the SCEL does not prohibit discounting.

Conclusion

It is this Office’s opinion that a court may find the SCEL Act and related regulations are ambiguous regarding the applicability of the prohibitions on selling and assigning tickets to the practice of discounting in deference to the Commission’s interpretation. However, this conclusion is not free from doubt. As is discussed more fully above, the resolution to the questions raised in the request letter turns on how a court would interpret Section 59-150-210(A) and whether it would interpret Regulation 44-80(C) to alter or add to a statute. It is this Office’s opinion that a court would likely interpret Section 59-150-210(A) to prohibit transferring a lottery game ticket or share for money or other property of value except by retailers at the price set by the Commission. See also S.C. Code Ann. § 59-150-160(B) (“Lottery game tickets and shares must be sold only by the lottery retailer named on the lottery retailer certificate.”). If Section 59-150-210(A) &(C) are read in isolation, it is this Office’s opinion that a court likely would answer each question presented in the negative. There is little evidence in the SCEL Act to support finding legislative intent to permit the practice of “discounting” as described by the Commission. In fact, the SCEL Act never once uses the terms bearer instrument, negotiable, or discounting. However, the absence of these terms may support finding that Regulation 44-80(C), which describes a lottery game ticket as a “bearer instrument,” fills a gap in the law. In such a case, a court may defer to the Commission’s interpretation that the SCEL Act does not prohibit discounting. There is some uncertainty regarding how a court would interpret the prohibition on the sale of lottery tickets in Section 59-150-210(A) &(C) in light of Regulation 44-80(C). Legislation which expressly addresses discounting or influencing a person’s right to claim a prize may be necessary to definitely address the concerns raised in the LAC report and request letter.

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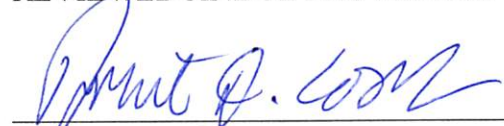
This Office notes that selling lottery tickets, except for those methods authorized by the SCEL Act, remains a criminal offense.³ This Office has previously interpreted this prohibition to apply to lottery tickets which were initially legally purchased while later secondary sales of those same tickets constituted a criminal violation. See Op. S.C. Att’y Gen., 1989 S.C. Op. Atty. Gen. 22 (January 10, 1989) (opining that a scheme where “an individual pays a courier service a fee in order for the service to buy a lottery ticket in another state which is then delivered back to the purchaser” violated S.C. Code Ann. §§ 16-19-20, -30). To the extent that secondary sales of lottery tickets, including those initially sold by retailers approved by the Commission, occur outside of the methods authorized by the SCEL Act, it is this Office’s opinion that those unauthorized sales are criminal violations. See S.C. Code Ann. §§ 16-19-20, -30.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

³ See S.C. Code Ann. § 16-19-30 (2015)

It shall be unlawful to offer for sale any lottery tickets or to open or keep any office for the sale of lottery tickets, and if any person shall offend against any of the provisions of this section he shall, on conviction thereof, forfeit and pay to the State a sum not exceeding ten thousand dollars. The county treasurer of the county in which such offense occurs shall prosecute the offender.