STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

October 17, 2000

The Honorable Jerry Ward
Alaska State Senate
716 W. 4th Ave., Ste. 450
Anchorage, AK 99501

Re: Promoting the Sale of Pre-Paid Phone Cards through a Cash Prize Sweepstakes, without a Gaming Permit
A.G. file no: 663-00-0212

Dear Senator Ward:

You have asked whether promoting the sale of pre-paid phone cards through a cash prize sweepstakes, without a gaming permit, is legal in Alaska. Based on the facts set out, we conclude that such a practice is illegal. Conducting such an enterprise would be a criminal offense under AS 05.15 and AS 11.66.

I. BACKGROUND

According to the materials submitted with your request, an Alaskan resident has entered into an agreement with Diamond Game Enterprises to distribute the Lucky Shamrock Emergency Phone Card (phone card) in the state, through use of a promotional sweepstakes. The phone cards are dispensed by Lucky Shamrock phone card dispensers (dispensers) that mimic the appearance of a slot machine and provide audio and video effects to promote sales. Attached to the phone card is a game piece that displays three rows of gaming symbols. Any game piece that displays three like-numbers or symbols in a row or any nine like-numbers or symbols is a winner.

When a customer inserts a dollar into one of the dispensers and presses the dispenser button, the machine delivers a phone card good for two minutes of long

distance phone service anywhere in the continental United States. At the same time a TV monitor on the dispenser displays the sweepstakes symbols on the game piece in a slot machine-like manner. The customer then presents winning tickets for payment to the owner of the establishment where the dispenser is located. Prizes range from $1 to $500 in cash.

Phone cards may also be sold in non-mechanical tubs placed on counter tops. According to the information provided, game pieces will be available, free of charge, from the owner of the establishment where the dispensers are located and by requesting them in writing.

II. DISCUSSION

A. Lucky Shamrock Game Cards Are Pull-tabs.

In general, gambling is illegal in Alaska. Charitable organizations may, however, engage in a variety of regulated gaming activities if the proceeds go to provide financial support for municipalities or qualified charitable organizations. AS 11.66.280(2)(C) (Gaming activities are not criminal if authorized by Department of Revenue under AS 05.15.); AS 05.15.150 (The authority to conduct gaming, authorized by AS 05.15, is contingent upon the dedication of the net proceeds of the activities to designated charitable purposes). These gaming activities include bingo and pull-tab games. AS 05.15.100(a). The Alaska criminal code defines "gambling" as an activity in which a person stakes or risks something of value on the outcome of a contest of chance. AS 11.66.280(2). Charitable gaming activities that would otherwise meet the definition of gambling are excluded provided the activities are authorized by the Commissioner of Revenue pursuant to AS 05.15. AS 11.66.280(2)(C).

We have previously reviewed the legality of a similar sweepstakes promotion and found that it violated the Alaska gaming code as well as AS 11.66. *See* 1992 Inf. Op Att'y Gen. (Sept. 2; 663-93-0004). That promotion involved the sale of Arctic Treasure Cards, which featured the photograph of an Alaskan animal along with factual information about the animal. A game card, much like the one attached to the Lucky Shamrock phone card sweepstakes, was attached to each Arctic Treasure Card. We opined that the Arctic Treasure Card game cards were pull-tab games for which a permit is required under AS 05.15. We also found that the sweepstakes constituted a form of gambling under AS 11.66. *See* 1992 Inf. Op Att'y Gen. (Sept. 2; 663-93-0004).

The Lucky Shamrock phone cards also meet the definition of pull-tabs provided in AS 05.15. The Alaska Statute 05.15.690(35) defines "pull-tab game" as "a game of chance where a card, the face of which is covered to conceal a number, symbol, or set of symbols, is purchased by the participant and where a prize is awarded for a card containing certain numbers or symbols designated in advance and at random." According to the information accompanying your request, the Lucky Shamrock game card pieces fit the physical description of a pull-tab game provided by AS 05.15.690(35). The question then is whether a sweepstakes player "purchases" the game piece when he or she pays for a prepaid phone card with the game piece attached to it.

One could argue that, since the game pieces are attached to the phone cards, that sweepstakes players purchase the phone cards, not the game pieces. We rejected a similar argument raised by the promoters of the Arctic Treasure Card Sweepstakes, finding that the Arctic Treasure information card was incidental to the game piece. *See* 1992 Inf. Op Att'y Gen. (Sept. 2; 663-93-0004). Although the value of a prepaid phone card arguably might be more than that of the Arctic Treasure information card, the phone card appears to be incidental to the game card. Unlike hamburgers and soft drinks promoted by time-limited sweepstakes conducted by portions of the food industry, the phone cards are not designed to be sold without the game cards. We found this to be significant in finding that the Arctic Treasure sweepstakes cards were pull-tabs. *See* 1992 Inf. Op Att'y Gen. (Sept. 2; 663-93-0004).

Furthermore, phone card dispensers are designed to mimic slot machines, which undercuts any argument that the primary motivation of a would-be purchaser is to obtain a phone card. Because of this, the Office of the Attorney General in Illinois found that the same Lucky Shamrock phone card sweepstakes discussed here constituted an illegal lottery because even though, "the purchaser of the phone card receives something for his or her money, which is arguably worth the amount deposited into the Lucky Shamrock Dispenser (although the utility of a two-minute phone card is questionable) it is the 'lure of an uncertain prize,' that appears to motivate a purchaser to patronize the Lucky Shamrock Dispenser." Illinois Attorney General Opinion No. 98-010, 1998 WL 401609 at 3 (Ill. A.G.) Therefore, the Attorney General opined that the Lucky Shamrock Dispenser sweepstakes was carefully designed to appear to meet the criteria for a legal sweepstakes while it is, in fact, but a thinly veiled lottery. Illinois Attorney General Opinion No. 98-010, 1998 WL 401609 at 3 (Ill. A.G.).

The Attorney General for the State of Texas, in written advice to the Texas Lottery Commission, found that the Lucky Shamrock phone dispenser sweepstakes

would be a prohibited lottery under Texas law if the commission found "that the controlling inducement to purchasing the phone card sweepstakes ticket is the lure of playing the slot machine-like dispensing device." Office of the Attorney General Texas Opinion Letter 97-008 at 6. The Attorney General also found that, "in our opinion, the prominence given by the 'dispensing device' to the 'sweepstakes' portion of the transaction in comparison to the 'phone card' portion is a factor that bears significantly on the determination of whether consideration is being paid for the phone card or for participation in the sweepstakes." Texas Opinion Letter 97-008 at 5-6. In both the Texas and Illinois opinions, the attorney generals relied, in part, upon the following language from an Illinois appellate case:

> The controlling fact in the determination of whether a given scheme is a lottery is determined by the nature of the appeal that the business makes to secure the patronage of its customers. If, as here, the controlling inducement is the lure of an uncertain prize, the business is a lottery. *G.A. Carney, Ltd. v. Brzeczek*, 453 N.E.2d 756, 760 (Ill. App. 1983).

Since the sweepstakes game pieces meet the definition of pull-tabs, their manufacturer must first obtain a pull-tab manufacturer's license before they may be distributed in the state. AS 05.15.181. Anyone distributing them must obtain a distributor's license. AS 5.15.183. They must be sealed and may only be distributed to an entity that has a charitable gaming permit. AS 05.15.185. Only licensed municipalities or qualified organizations may operate the sweepstakes. AS 05.15.187. The net proceeds of the sale of the sweepstakes games must go to designated charitable purposes. AS 05.15.150. Violations of provisions of AS 05.15 subject the violator to potential criminal penalties. AS 05.15.680.

B. The Phone Card Dispensers Are Illegal Coin Operated Gaming Instruments.

The use of coin operated instruments designed or intended primarily for gaming or gambling is prohibited by AS 05.15.180(a). The possession of a gambling device is made criminal by AS 11.66.260. We opine that the ban on coin-operated gaming instruments applies to the phone card dispensers. We also opine that they are gambling devices for purposes of AS 11.66.

The Alaska Supreme Court has determined that the essential elements of gambling are price, chance, and prize. *State v. Pinball Machines*, 404 P.2d 923, 935 (Alaska 1965). Therefore, the phone card dispensers are illegal coin-operated gaming devices if all three elements of gambling are present in the phone card sweepstakes.

The element of prize and chance are clearly present. According to the information provided by Diamond Game Enterprises, a player receives a chance to win up to $500 with each use of the machines. Chance is also present because the outcome, that is the question of whether or not the purchaser will win a prize, is uncertain. *State v. Pinball Machines*, 404 P.2d 923, 935 (Alaska 1965). ("The element of chance is present because the outcome... is not a certain thing.") Therefore, the phone card dispensers are subject to the ban in AS 05.15.180 if the gambling element of price is present.

The gambling element of price is present if one has to pay a price for the availability of chance. *Pinball Machines*, 404 P.2d at 927. Proponents of the phone card sweepstakes might argue that this element of gambling is missing. According to the documentation provided with your request, sweepstakes game pieces are available free, upon request. Furthermore, in addition to an opportunity to win sweepstakes prizes, a purchaser also obtains a pre-paid phone card.

With the documentation submitted with your request is a legal opinion from the Office of the Attorney General for the State of Kansas which states that Lucky Shamrock phone cards sweepstakes is not a lottery for purposes of Kansas law. Kansas Attorney General Opinion No. 97-26, 1997 WL 156491 (Kan. A.G.). The author of that opinion based her opinion, in part, on a finding that the element of consideration is absent from the phone card sweepstakes because no purchase is necessary for participation in the lottery. *Id.* We have already found that a sweepstakes game is not gambling simply because the promoter provides a free way to play the game. 1992 Inf. Op Att'y Gen. at 3-4 (Sept. 2; 663-93-0004). Nothing in the opinion of the Kansas Attorney General persuades us to reverse our opinion. Although not directly relevant to whether the sweepstakes would violate Alaska law, we note that at least four states have found that the same sweepstakes violate their gaming laws. As noted elsewhere in this letter, the attorney general of Illinois has found that the Lucky Shamrock sweepstakes violates the state's gaming laws. The Attorney General of Texas advised the Texas Lottery Commission that the sweepstakes would violate Texas law if the commission made findings of facts in line with those presented here. In 1997, the Oregon State Police seized a collection of Lucky Shamrock phone card dispensers as illegal gambling devices or gray machines. Diamond Game Enterprises unsuccessfully brought suit to challenge

the seizure in the U.S. District Court in Oregon. *Diamond Game Enterprises v. Howland*, 1999 WL 397743 (D. Or.).

The fact that customers of the phone card dispensers receive a pre-paid phone card does not save the phone card dispensers from being illegal coin operated gambling instruments. As mentioned earlier, we have already opined that the sale of sweepstakes cards attached to non-gaming products is gambling when the non-gaming products have never been offered for sale without the sweepstakes cards. Alaska Attorney General Informal Opinion No. 663-93-0004 at 12-17. This factor distinguishes the phone card dispenser games from the periodic sweepstakes games offered free of charge to customers of fast food restaurants.

The Office of the Attorney General for Florida has determined that a phone card dispenser sweepstakes with the same characteristics as the Lucky Shamrock phone card sweepstakes would violate Florida's gaming laws. Florida Attorney General Opinion, 1 AGO 98-07, 1998 WL 80586 (Fla. AG 1998). In the Florida sweepstakes, as here, by depositing one dollar in a machine, a customer could obtain a two-minute phone card and a game card. A player could also obtain a game card by written request. The author of the Florida Attorney General Opinion found:

> It appears that the principal function of the device you have described is gambling, that is the user inserts money and the machine operates to provide the user with a sweepstakes ticket that, by reason of chance, may entitle the recipient to a money prize. The incidental receipt of merchandise, in this case a telephone card, will not provide justification or authorization for the ownership, sale, or possession of a machine or device described in section 849.16 Florida Statutes. (Which bans coin operated gaming machines.) *Florida Opinion* 1 AGO 98-07 at 2.

We have also opined that when a company is marketing game pieces and not the product received by the purchaser along with the game piece, the sales constitute promotion of illegal gambling. See 1992 Inf. Op Att'y Gen. at 11 (Sept. 2; 663-93-0004). As mentioned above, the attorney general of Illinois found the Lucky Shamrock phone card sweepstakes to be an illegal lottery because it used the lure of an uncertain prize to induce product purchases. Likewise, if operated in Alaska, the phone card dispensers would lure purchasers with the opportunity to win $500, not with an offer for a two-minute phone card. The purchaser would therefore be paying a price for the right to win

a $500 prize, not a two-minute phone card. For these reasons, we opine that the intended use of the phone card dispensers is gaming and therefore they are coin-operated instruments of gaming subject to the ban on such devices set out in AS 05.15.180(a).

We also opine that the phone card dispensers are illegal gaming devices for purposes of AS 11.66. A "gaming device" for purposes of AS 11.66 is defined as "any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of unlawful gambling, whether it consists of gambling between persons or gambling by a person involving the playing of a machine." AS 11.66.280(3). We have showed above that the phone card dispensers are gaming machines the use of which would violate AS 05.15. With some exceptions that do not apply here, gaming that is not authorized by the Commissioner of Revenue, is unlawful gambling. AS 11.66.280(2). Therefore, the phone card dispensers are illegal gaming devices for purposes of AS 11.66.

Possession of a gaming device is a Class A misdemeanor offense. AS 11.66.260. Operation of a gaming device like the phone card dispenser is gambling, and would be punishable as either a Class A misdemeanor or a Class C felony, depending upon the circumstances. AS 11.66.210-220.

C. The Phone Card Sweepstakes Is Illegal under AS 11.66

"Gambling," for purposes of AS 11.66, "means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." AS 11.66.280(2). We have shown above that the phone card sweepstakes qualify as gambling under this definition. A person risks something of value, *i.e.* the purchase price, on the outcome of a future event that is not under the purchaser's control. This is true whether or not others may participate in the sweepstakes for free. 1992 Inf. Op Att'y Gen. At 12-17 (Sept. 2; 663-93-0004). The design of the sweepstakes and the phone card dispensers is to use the lure of the prize rather than the value of the two-minute phone card to induce customers to purchase a phone/game card. Therefore, the fact that a customer also receives a pre-paid phone card does not mean promoting the sweepstakes is not gambling. According to the information provided with your request, a customer must pay $1 for a two-minute prepaid phone card or fifty cents per minute of long distance phone service. If other prepaid phone cards provide long distance service at a cheaper rate that fact would reinforce this conclusion.

We hope this letter answers your questions. Please contact us if we can be of further assistance.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
Dan Branch
Assistant Attorney General