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May 18, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 886 and House Bill 990

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 886 and House Bill 990, identical bills entitled "Financial Institutions - Credit Unions and Depository Institutions - Authority to Conduct Savings Promotion Raffles." In reviewing the bill, we have concluded that the authorization for savings promotion raffles in the bills do not constitute a lottery grant within the meaning of Article III, § 36 of the Maryland Constitution. We have also concluded that the raffles authorized by the bills are not subject to the referendum requirement of Article XIX of the Maryland Constitution.

Senate Bill 886 and House Bill 990 authorize a depository institution or credit union to conduct a savings promotion raffle for the exclusive benefit of eligible customers or members if: (1) the sole consideration required for a chance to win is the deposit of a minimum specified amount in a qualifying account; (2) each ticket or entry has an equal chance of being drawn; (3) the depository institution or credit union maintains books and records relating to the savings promotion raffle; (4) the savings promotion raffle will not harm the ability of the depository institution or credit union to operate in a safe and sound manner; and (5) the savings promotion raffle will not mislead the depository institution's customers or the credit union's members.

Section 2 of the bill makes the effectiveness of the bill contingent on a change in federal law or regulations that would allow depository institutions to "provide prize-linked savings products such as a savings promotion raffle." If no such change is made on or before October 1, 2014, or if the Commissioner of Financial Regulation fails to learn of the change and give notice to the Department of Legislative Services by that date, the "Act shall be null and void without the necessity of further action by the General

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Assembly.” Because both nationally and state chartered banks are currently prevented from engaging in activities like savings promotion raffles, 12 U.S.C. § 25a(a); 12 U.S.C. 339; 12 U.S.C. § 1829a(d), the bills would have no current effect, either as to depository institutions or as to credit unions.

Lottery Grants

Maryland Constitution, Article III, § 36 provides:

No lottery grant shall ever hereafter be authorized by the General Assembly, unless it is a lottery to be operated by and for the benefit of the State.

This prohibition has been given a narrow interpretation by the Court of Appeals. The Court has interpreted the term “lottery” more narrowly than is the case in other states. *F.A.C.E. Trading v. Todd*, 393 Md. 364 (2006); *Mid-Atlantic Coca-Cola Bottling Co. v. Chen, Walsh and Tecler*, 296 Md. 99, 107-108 (1980); *American Legion Post, No. 10 v. State*, 294 Md. 1, 7-8 (1982). More importantly, the Court in *Bender v. Arundel Arena*, 248 Md. 181 (1967) examined whether an act authorizing bingo and slot machines in Anne Arundel County violated this provision and held that it did not. In doing so, the Court held that the prohibition was limited to lottery grants as the term was understood at the time the provision was adopted, and as reflected by acts of the General Assembly that named individual trustees who, after giving bond, were authorized to conduct a lottery to raise a specified amount of money for a specific charitable, religious, or public purpose. *Id.* at 192. This conclusion was based both on the history of legislation relating to lottery grants, and on the history of the constitutional provision itself. While the 1851 Constitution provided that “no lottery scheme shall be drawn for any purpose whatever, nor shall any lottery ticket be sold in this State,” Article VII, § 5 Constitution of 1851, subsequent constitutions lacked this language and provided only that “no lottery grant shall ever hereafter be authorized by the General Assembly,” Article III, § 35 Constitution of 1864, Article III, § 36, Constitution of 1867. As noted by the *Bender* Court, during the 1867 Constitutional Convention, the Committee on the Legislative Department was ordered to:

inquire into the expediency of engrafting into the constitution an article inhibiting lottery grants and the sale of lottery tickets, of whatever kind, or policies of risk, or certificates having in anywise any connection with the drawing of lotteries or schemes of raffle, or gift enterprises, either through

agents or otherwise, and requiring the General Assembly of the State to enact penal laws and prohibitions in that connection.

Perlman's *Debates of Maryland Constitutional Convention* of 1867, p. 89. Yet, they ultimately chose to include "only an article 'inhibiting lottery grants' and nothing more." *Bender v. Arundel Arena*, 248 Md. at 194. Thus, the Court concluded that "the words 'lottery grant' as used in § 36 were intended to mean traditional chartered ticket lotteries engaged in or sponsored by the State, so read, § 36 does not prevent classification of bingo and coin-operated gambling machines as gaming tables." *Id.* at 195.

For similar reasons, it is our view that Senate Bill 886 and House Bill 990, which simply authorize the operation of a form of raffle by depository institutions and credit unions in the State, for the purpose of encouraging participation in savings programs, do not constitute an unconstitutional lottery grant.

Expansion of Gaming

Maryland Constitution, Article XIX, § 1(e) provides that, after November 15, 2008, the General Assembly:

may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

This limitation does not apply, however, with respect to "[g]aming conducted under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland." Article XIX, § 1(a)(3).

Senate Bill 886 and House Bill 990 amend Criminal Law Article, Title 12, at § 12-106, to add:

(C) (1) Notwithstanding any other provision of this article, a credit union organized under Title 6 of the Financial Institutions Article may conduct a savings promotion raffle under § 6-716 of the Financial Institutions Article.

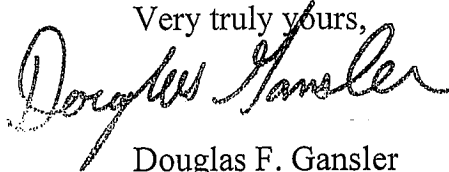
(2) Notwithstanding any other provision of this article, a depository institution, as defined in § 1-211 of the Financial Institutions

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Article, may conduct a savings promotion raffle under § 1-211 of the Financial Institutions Article.

While the General Assembly cannot evade the referendum provision of Article XIX, § 1(e) simply by placing new gaming authority in either Title 12 or Title 13 of the Criminal Law Article, in this case, § 12-106 already authorizes raffles of real property by charitable organizations and raffles of money and merchandise by political committees and candidates for public office. Thus, the bills authorize the type of gaming that is already authorized by Title 12, rather than create a new type of gaming. This conclusion is further supported by the fact that raffles of some sort are already allowed in every county in the State, and have been for some time. *See, e.g.*, Criminal Law Article, Title 13, §§ 13-401(c), 13-403 (Anne Arundel County); 13-501(d), 13-505 (Baltimore City); 13-601, 13-603 (Baltimore County); 13-901(c), 13-904 (Carroll County); 13-1001(c), 13-1003 (Cecil County); 13-1101(f)(2)(iii), 13-1106 (Charles County); 13-1201, 13-1202 (Dorchester County); 13-1301(c), 13-1304 (Frederick County); 13-1501(d), 13-1506 (Harford County); 13-1701(d), 13-1704 (Kent County); 13-1810 (Montgomery County); 13-1908 (Prince George's County); 13-2001(d), 13-2004 (Queen Anne's County); 13-2101(d), 13-2111 (St. Mary's County); 13-2503(a)(5) (Wicomico County); 13-2619(d), 13-2621 (Worcester County); 13-201(b), 13-203 (Allegany, Calvert, Caroline, Garrett, Howard, Somerset, Talbot and Washington Counties). The activity authorized is also similar to those permitted in connection with consumer transactions under Commercial Law Article § 13-305. For these reasons, it is our view that the gaming authorized by Senate Bill 886 and House Bill 990 is "conducted under Title 12 ... of the Criminal Law Article," and in any event, is not an additional form or expansion of commercial gaming under Article XIX, § 1. As a result, the bills are not subject to the referendum requirement.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Katherine A. Klausmeier
The Honorable John A. Olszewski, Jr.
The Honorable John P. McDonough
Joseph Bryce
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