

Opinion No. 2013-082

October 1, 2013

The Honorable Mark Perry  
State Representative  
Post Office Box 97  
Jacksonville, Arkansas 72078-0097

Dear Representative Perry:

This is in response to your request for my opinion on the following questions concerning lottery games:

1. Is a lottery draw game, as defined under Ark. Code Ann. § 23-115-102, whereby the results of the lottery drawings are communicated to player via monitors located on the premises of licensed lottery retailers, a permissible lottery game under the Arkansas Scholarship Lottery Act?

If the answer to (1) is “yes,” then:

2. In light of Ark. Code Ann. § 23-115-904, is a lottery draw game marketed under the title “keno” a permissible lottery game under the Arkansas Scholarship Lottery Act?
3. Are there any provisions of the Arkansas Scholarship Lottery Act that restrict or otherwise regulate the frequency of lottery game drawings?
4. Does a lottery draw game or instant ticket game offered by the Arkansas Scholarship Lottery and marketed under the title “bingo” constitute “conducting or participating in charitable bingo and raffles under the Charitable Bingo and Raffles Enabling Act, § 23-114-101 *et seq.*?”

## RESPONSE

The answer to your first question is, generally, “yes.” With regard to your second question, in my opinion, neither A.C.A. § 23-115-904 nor a game’s title is determinative of whether a particular game may be conducted under the Act. In response to your third question, the Act authorizes the Arkansas Lottery Commission to adopt rules regarding the frequency of drawings. The answer to your fourth question is “no,” in my opinion.

## DISCUSSION

*Question 1 - Is a lottery draw game, as defined under Ark. Code Ann. § 23-115-102, whereby the results of the lottery drawings are communicated to player via monitors located on the premises of licensed lottery retailers, a permissible lottery game under the Arkansas Scholarship Lottery Act?*

Section 23-115-102 does not define a lottery draw game. This section instead expresses the legislative intent of the Arkansas Scholarship Lottery Act.<sup>1</sup> You may be referring to A.C.A. § 23-115-103, the Act’s definitional section, wherein it defines “lottery” to include “a draw game”:

- (A) “Lottery” means a game of chance approved by the Arkansas Lottery Commission and operated under this chapter.
- (B) “Lottery” includes without limitation:
  - (i) An instant ticket;
  - (ii) A *draw game*;
  - (iii) Participation in a multistate or multisovereign game; and

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<sup>1</sup> The Act, codified at A.C.A. §§ 23-115-101 through-1102 (Supp. 2011), implements Amendment 87 to the Arkansas Constitution, which amended Article 19, section 14 of the Arkansas Constitution to authorize the General Assembly to “enact laws to establish, operate, and regulate State lotteries.” Ark. Const. art. 19, § 14(a) (Supp. 2011). The proceeds of such lotteries must be used to pay the lotteries’ operating expenses and to fund or provide for higher education scholarships and grants. *Id.* at (b).

(iv) A raffle.<sup>2</sup>

“Draw game” is undefined, but the Operational Rules for conducting the Arkansas Scholarship Lottery<sup>3</sup> define “drawing”:

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<sup>2</sup> A.C.A. § 23-115-103(12) (Supp. 2011) (emphasis added). “Lottery” is defined in full under the Act as follows:

(A) “Lottery” means a game of chance approved by the Arkansas Lottery Commission and operated under this chapter.

(B) “Lottery” includes without limitation:

(i) An instant ticket;

(ii) A draw game;

(iii) Participation in a multistate or multisovereign game; and

(iv) A raffle.

(C) “Lottery” does not include:

(i) Casino gambling;

(ii) A video lottery;

(iii) Pari-mutuel wagering on horse racing or greyhound racing governed by the Arkansas Horse Racing Law, § 23-110-101 et seq., or the Arkansas Greyhound Racing Law, § 23-111-101 et seq., whether the pari-mutuel wagering is on live racing, simulcast racing, or races conducted in the past and rebroadcast by electronic means;

(iv) Wagering on electronic games of skill under the Local Option Horse Racing and Greyhound Racing Electronic Games of Skill Act, § 23-113-101 et seq.; or

(v) Conducting or participating in charitable bingo and raffles under the Charitable Bingo and Raffles Enabling Act, § 23-114-101 et seq.[.]

For definitions of “casino gambling” and “video lottery,” see A.C.A. § 23-115-103(3) and (26).

<sup>3</sup> See *Operational Rules of the Arkansas Scholarship Lottery*, available at <http://myarkansaslottery.com/about/rules-and-enabling-legislation-0> (last visited August 28, 2013). These rules were promulgated by the Arkansas Lottery Commission (ALC) which has rule-making authority under the Act. See A.C.A. §§ 23-115-205 and -207.

“Drawing” means the procedure used to select the winning numbers or combination of numbers in accordance with the game rules of the particular lottery game.<sup>4</sup>

A “draw game” is therefore an approved lottery game that involves a process for selecting winners among players who have selected numbers or a combination of numbers in the course of playing the game.<sup>5</sup>

Both the Act and the Operational Rules address certain matters related to “drawings,” including the “means of conducting” them, as well as their method, location, and frequency.<sup>6</sup> But according to my review, neither the Act nor the Rules specifically address the method or means of communicating results to players. It appears instead that the ALC has general authority to regulate in this area, pursuant to its power to “adopt rules regulating the conduct of lotteries in general,”<sup>7</sup> as well as its authority to adopt rules specifying “[a]ny other matters necessary, desirable, or convenient toward ensuring the efficient and effective operation of lotteries, the continued entertainment and convenience of the public, and the integrity of the lotteries.”<sup>8</sup>

In response to your particular question, therefore, it seems clear that determining the particular means of communicating results of drawings to players is a matter generally falling within the ALC’s regulatory authority. Additionally, I find

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<sup>4</sup> *Id.* at Section 1.13.

<sup>5</sup> An “online game” is a particular type of game that involves a drawing process.

“Online Game” means a state or multi-state lottery game in which a player pays a fee to a lottery retailer and selects or uses a computer terminal to select a combination of digits, numbers, or symbols, the type and amount of play, and the *drawing* date, and receives a computer-generated ticket with those selections printed on it.

*Id.* at Section 1.24 (emphasis added).

<sup>6</sup> A.C.A. § 23-115-207(a)(4), (7), and (8) (authorizing the ALC to adopt rules regarding “[t]he method and location of selecting or validating winning tickets or shares[,]” “[t]he frequency of lotteries and drawings...[,]” and “[t]he means of conducting drawings”); *Operational Rules*, Sections 2(k) and (l) (authorizing the ALC Director to determine “the location, times, and days of prize drawings and promotions[,]” and “the manner and frequency of online game drawings[.]”)

<sup>7</sup> A.C.A. § 23-115-207(a).

<sup>8</sup> *Id.* at (a)(11).

nothing in either the Act or the Rules to suggest that the method or means of communicating results is relevant to a game's permissibility under the Act.

***Question 2 - In light of Ark. Code Ann. § 23-115-904, is a lottery draw game marketed under the title "keno" a permissible lottery game under the Arkansas Scholarship Lottery Act?***

The permissibility of a game "marketed under the title 'keno'" does not turn on A.C.A. § 23-115-904. The Act does not authorize or prohibit any individual game or any particular type of game based upon the game's title. And the application of section 23-115-904 leaves unaddressed the question whether any particular game in fact qualifies as a "lottery" under the Act.

This statute makes the criminal anti-gambling statutes, and all other laws that are inconsistent with the Act, inapplicable to those who participate in lotteries authorized under the Act:

(a) Section 5-66-101 et seq. and all other laws and parts of laws inconsistent with this chapter are expressly declared not to apply to any person engaged in, conducting, or otherwise participating in lotteries.

(b) A person is not guilty of any criminal offense set forth in § 5-66-101 et seq. or any other law relating to illegal gambling to the extent the person relied on any rule, order, finding, or other determination by the Arkansas Lottery Commission that the activity was authorized by this chapter.<sup>9</sup>

This statute is clearly designed to protect persons participating in approved lotteries who might otherwise be subject to prosecution for illegal gambling. It thereby acknowledges that some types of lotteries conducted under the Act may fall under the anti-gambling statutes.<sup>10</sup> In my opinion, however, this statute does not bear directly on any particular game's permissibility under the Act. The latter inquiry – whether a particular game may be conducted as a lottery under the Act –

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<sup>9</sup> A.C.A. § 23-115-904 (Supp. 2011).

<sup>10</sup> Indeed, I note that the undefined term "keno" is identified as a prohibited "gaming device" under A.C.A. § 5-66-110 (Repl. 2005). While I cannot be certain, this may explain your question's reference to a game marketed under that title.

is one that involves reviewing the game's specific features, and as such must be undertaken in the first instance by the ALC. I lack both the resources and the authority to undertake that task.<sup>11</sup>

***Question 3 - Are there any provisions of the Arkansas Scholarship Lottery Act that restrict or otherwise regulate the frequency of lottery game drawings?***

The ALC is specifically authorized to adopt rules regarding the frequency of drawings.<sup>12</sup>

***Question 4 - Does a lottery draw game or instant ticket game offered by the Arkansas Scholarship Lottery and marketed under the title "bingo" constitute "conducting or participating in charitable bingo and raffles under the Charitable Bingo and Raffles Enabling Act, § 23-114-101 et seq.?"***

No. The Charitable Bingo and Raffles Enabling Act implements Amendment 84 to the Arkansas Constitution, which allows the operation of bingo or raffles by an

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<sup>11</sup> Determining a particular game's permissibility may further require constitutional analysis. The Arkansas Constitution prohibits "lotteries." Ark. Const. art. 19, § 14(f) ("Except as herein specifically provided, lotteries and the sale of lottery tickets are prohibited.") In a line of decisions spanning a century, the courts have emphasized that a prohibited "lottery" is a game in which the result is controlled purely by chance. *See, e.g., Scott v. Dunaway*, 228 Ark. 943, 944, 311 S.W.2d 305 (1958) ("It is essential to a lottery that the winners be determined by chance alone.")

Amendment 87, on the other hand, creates a limited exception to the Article 19 ban on lotteries by authorizing "State lotteries." Ark. Const. art. 19, § 14(a). Amendment 87, however, does not define "State lotteries." And the courts have not yet determined the precise scope of this exception. *See, e.g., Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008) (in a ballot title case, refusing to speculate on the precise contours of permissible "State lotteries" as distinct from impermissible "lotteries.")

At issue, then, is just what the voters intended when they granted the General Assembly authority to "enact laws to establish, operate, and regulate State lotteries." To date, it has not been judicially established that voters intended to sanction any and all games controlled purely by chance. I believe prudence dictates in these circumstances that any new game of chance closely associated with traditional casino gaming should receive close scrutiny. To be sure, the Arkansas Scholarship Lottery Act appears to vest the Arkansas Lottery Commission with considerable discretion to determine what games may be conducted, and the Commission's interpretation of the Act will be accorded considerable deference. *See generally Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429; *Brookshire v. Adcock*, 2009 Ark. 207, 307 S.W.3d 22. But until we have the benefit of case law interpreting both Amendment 87 and the Act, there will remain some question which games the Commission may approve without running afoul of the continuing constitutional prohibition on "lotteries."

<sup>12</sup> A.C.A. § 23-115-207(a)(7) (authorizing the ALC to adopt rules regulating "[t]he frequency of lotteries and drawings or selection of winning tickets or shares.")

“authorized bingo and raffles organization.”<sup>13</sup> Consistent with Amendment 84, A.C.A. § 23-114-102 defines “authorized organization” as:

an organization eligible for a license to conduct games of bingo and raffles that is a *nonprofit tax-exempt religious, educational, veterans, fraternal, service, civic, medical, volunteer rescue service, volunteer firefighters organization, or volunteer police organization* that has been in continuing existence as a nonprofit tax-exempt organization in this state for a period of not less than five (5) years immediately prior to conducting the game of bingo or raffles.<sup>14</sup>

The State of Arkansas obviously is not an “authorized organization,” under this enabling legislation to Amendment 84.

As noted above, the State’s authority to offer a lottery draw game or an instant ticket game derives from Amendment 87 to the Arkansas Constitution and its enabling legislation, the Arkansas Scholarship Lottery Act. Pursuant to that Act, the State – through the Arkansas Lottery Commission – may approve different types of lotteries.<sup>15</sup> As stated in response to Question 2 above, determining whether a particular game may be conducted as a lottery is a task to be undertaken in the first instance by the ALC.

The foregoing opinion, which I hereby approve, was prepared by Deputy Attorney General Elisabeth A. Walker.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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<sup>13</sup> Ark. Const. amend. 84(a)(1).

<sup>14</sup> A.C.A. § 23-114-102(1)(A) (Supp. 2011) (emphasis added).

<sup>15</sup> See A.C.A. § 23-115-207(a)(1) (authorizing the ALC to adopt rules specifying “[t]he types of lotteries to be conducted[.]”)