



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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SPORTS AND GAMING:  
Operation of Keno by the  
Illinois Department of Revenue

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Gentlemen:

I have your letters inquiring whether the Governor may, pursuant to the provisions of the Illinois Lottery Law (the Lottery Law) (20 ILCS 1605/1 *et seq.* (West 2004)), authorize the Illinois Department of Revenue, Lottery Division (the IDOR) to operate the game known as Keno. For the following reasons, it is my opinion that neither the Governor nor the IDOR has the

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authority to establish the proposed Keno game (the proposed Keno game) as an extension of the State's legalized gaming activities without obtaining specific legislative authority.

### **Background**

#### **I. Summary**

On January 10, 2006, Governor Blagojevich unveiled his plan to add Keno to the games offered by the IDOR as a means of funding school construction bonds that are a part of the Governor's broader public works initiative or capitol spending plan. The details of the proposed Keno game are described in a January 20, 2006, IDOR memorandum (IDOR Memo).<sup>1</sup> The scheme envisioned by the IDOR appears to be similar to the game known as casino Keno operated in the State of Michigan:

[P]articipants in Keno try to match between 1 and 10 numbers to a set of 20 numbers randomly selected, out of the integers 1 through 80. The game is usually played approximately every 5 minutes. An operator (or casino) provides the player with a "playslip" with the numbers 1 through 80 on it. The player first chooses and marks on the playslip how many numbers, from 1 to 10 he or she wishes to play. This number is commonly referred to as the "spot." To play the "7 spot", for example, is to select 7 numbers from the field of 1 to 80. The player then selects the numbers to be played. Approximately every 5 minutes, a computer randomly draws 20 numbers from the integers 1 through 80. It is these 20 numbers that the participant hopes match the selections on the ticket. Payoffs in Keno are preset according to a schedule. The payoff for a given wager depends only on the spot played and the number of

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<sup>1</sup>Memorandum from David Dorner, Senior Counsel-IT, Illinois Department of Revenue, to Mark Hellner, General Counsel, Illinois Department of Revenue (January 20, 2006).

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numbers matched. For example, on a \$1 wager the payoff could be a \$1 (for the 4-spot/2-match category) or \$250,000 (for the 10-spot/10-match category).

In Keno, a winner's payoff does not depend on the number of players participating in a particular draw, on the aggregate amount wagered on the draw by all players, or on how many other players made the same winning selection or other winning selections. The "prizes" established for each winning category are not shared among all winners; instead Keno pays a fixed payoff to each winner no matter how many winners are in a given draw.  
IDOR Memo.

In summary, a participant in the proposed Keno game buys a ticket. Each ticket has 80 squares numbered 1 to 80 arranged in a matrix. The player chooses a set of up to 10 numbers and a dollar value for the amount he or she desires to wager on a draw. The player's selections are registered on a computer terminal by a licensed lottery agent. A central computer randomly selects numbers, which are displayed on video monitors at the authorized Keno game locations. Players win by matching some or all of the numbers displayed on the video screen with the numbers they have selected. Winning numbers are displayed on the video monitors every five to ten minutes with each new game. Payouts to winners are fixed (not pari-mutuel) based on the number of winning numbers selected by the player and the amount of the player's wager.

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The IDOR anticipates licensing certain retail establishments, such as bars, restaurants, and taverns, as Keno agents. Those establishments would be licensed to sell Keno tickets and would also be full service lottery agents.

## **II. Gambling Restrictions Under the Criminal Code of 1961**

Section 28-1 of the Criminal Code of 1961 (the Code) (720 ILCS 5/28-1 (West 2004)) generally prohibits gambling, with limited exceptions. Prohibited forms of gambling include "lotteries" and "policy games," as those terms are defined under the Code. 720 ILCS 5/28-2(b), (c) (West 2004). Lotteries are excepted from the prohibition against gambling "when conducted by the State of Illinois in accordance with the Illinois Lottery Law[.]" 720 ILCS 5/28-1(b)(6) (West 2004).

Section 28-1 of the Code (720 ILCS 5/28-1 (West 2004)) provides, in pertinent part:

(a) A person commits gambling when he:

*(1) Plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section; or*

\* \* \*

*(7) Sets up or promotes any lottery \* \* \*; or*

*(8) Sets up or promotes any policy game[.]* (Emphasis added.)

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Under the language of subsection 28-1(a) of the Code, a person commits the offense of gambling by setting up or promoting a lottery or policy game, or playing a game of chance for the distribution of money, prizes, or other things of value among persons who have paid or promised consideration for a chance to win them. As used in the Code, the term "lottery" means:

*any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name. (Emphasis added.) 720 ILCS 5/28-2(b) (West 2004).*<sup>2</sup>

In contrast, the phrase "policy game" is defined to refer to:

*any scheme or procedure whereby a person promises or guarantees by any instrument, bill, certificate, writing, token or other device that any particular number, character, ticket or certificate shall in the event of any contingency in the nature of a lottery entitle the purchaser or holder to receive money, property or evidence of debt. (Emphasis added.) 720 ILCS 5/28-2(c) (West 2004).*

There is a clear distinction between a lottery and a policy game, and the Illinois General Assembly, therefore, has defined them separately. Both possess the basic indicia of gambling, that being the opportunity to win something of value by chance by persons who have

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<sup>2</sup> In *People v. Eagle Food Centers, Inc.*, 31 Ill. 2d 535 (1964), the Illinois Supreme Court determined that the statutory definition of the term "lottery" simply codified the common law elements thereof. The court further stated that "there are three elements essential to the existence of a lottery, viz., chance, consideration and a prize; and \* \* \* that there is no lottery if any one of these elements or ingredients is missing." *Eagle Food Centers*, 31 Ill. 2d at 538; Ill. Att'y Gen. Op. No. 98-010, issued July 13, 1998. This definition of lottery is consistent with other states that have similarly defined a "lottery" to include the elements of prize, chance, and consideration.

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paid consideration for the opportunity to participate. Indeed, as reflected in its definition, the winners in a policy game are generally chosen by a drawing or the occurrence of some outside event, as are the winners in a lottery.

The distinction between a lottery and a policy game is based not on the manner of play, but on the nature of the betting involved in playing the games. In a lottery, the operator has no interest or stake in the outcome of the game, but merely awards the prize to the winner or winners. A prize is distributed from the amounts paid in, based on a chance event, to all who win. The operator, who typically takes a percentage off the total amounts pooled, has a financial interest in maximizing the number of players. In contrast, the operator of a policy game has an interest in the outcome of the game. Payouts to winners are not, as in the case of a lottery, structured as a distribution from amounts paid in, but instead are fixed, preset payouts. The operator has the chance to retain the wager if it wins, but also risks a loss. Because it pays all winners and suffers all losses, the operator of a policy game is a participant as surely as those who place wagers on the outcome.

The exception to the general prohibition against gambling for lotteries conducted by the IDOR does not extend to any and all games that the IDOR may choose to operate, but only to lotteries which the General Assembly has defined separately from "policy game[s]." 720 ILCS 5/28-1(a)(1) (West 2004).

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### III. The Lottery Law

The Lottery Law was enacted to "implement and establish within the State a lottery to be operated by the State[.]" 20 ILCS 1605/2 (West 2004), as amended by Public Act 94-585, effective August 15, 2005.<sup>3</sup> Section 7.1 of the Lottery Law authorizes the IDOR to:

*promulgate such rules and regulations governing the establishment and operation of a State lottery as it deems necessary to carry out the purposes of this Act.* (Emphasis added.) 20 ILCS 1605/7.1 (West 2004).<sup>4</sup>

Matters to be included in the rules promulgated by the IDOR include, among other things, the types of lotteries to be conducted, the numbers and sizes of the prizes for winning tickets, and the manner of payment of prizes to the holders of winning tickets. 20 ILCS 1605/7.2 (West 2004).

### IV. IDOR Analysis

The IDOR Memo contends that, because the General Assembly has authorized the establishment of a State lottery and has delegated to the IDOR the broad authority to promulgate rules regarding the type of lotteries to be conducted, the IDOR has the authority to establish the

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<sup>3</sup> The General Assembly originally created the Department of the Lottery to implement and regulate the State lottery. 20 ILCS 1605/4 (West 2004). Through Executive Order 2003-9, the Governor abolished the Department of the Lottery and transferred all powers, duties, rights, and responsibilities vested in the Department of the Lottery pursuant to the Lottery Law to the Illinois Department of Revenue.

<sup>4</sup> The term "lottery" as used in the Lottery Law is defined to mean "the lottery or lotteries established and operated pursuant to this Act." 20 ILCS 1605/3(a) (West 2004). The Code provides the requisite substantive definitions.

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proposed Keno game as an extension of the current State lottery. This analysis is based on the premise that the proposed Keno game is a form of lottery in this State because, in other states, courts have categorized Keno in that way. In my view, however, and as further explained below, the IDOR's analysis does not acknowledge the distinctions under Illinois law between a lottery, which may be undertaken by the IDOR in accordance with the Lottery Law, and a prohibited "policy game."<sup>5</sup>

It is possible that there might be alternatives to the proposed Keno game that could fall within the narrow definition of the term "lottery." Any such alternatives should follow the guidelines set forth in the following analysis.

### Analysis

#### **I. The Extent of the Authority of an Administrative Agency**

Administrative agencies possess only those powers that are expressly granted to them by statute, together with those powers that may be implied necessarily therefrom to effectuate the powers which have been granted. *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 186-87 (2003); *Lake County Board of Review v. Property Tax Appeal Board*, 119 Ill. 2d 419, 427 (1988). The IDOR has been granted the statutory authority to

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<sup>5</sup>Based on January 23, 2006, communications between representatives of the Attorney General's office and William Quinlan, the Governor's Chief Legal Counsel, and Mark Hellner, General Counsel of the Illinois Department of Revenue, and notwithstanding the January 20, 2006, IDOR Memo, it appears that the Governor and the IDOR may not have finally settled on a specific Keno game or mode of payout, although they have not provided an alternative to the proposed Keno game described in the IDOR Memo.

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operate the State lottery and to adopt rules setting forth the types of lottery games that may be conducted. 20 ILCS 1605/7.1, 7.2 (West 2004). If the proposed Keno game constitutes a "lottery," then the IDOR possesses the requisite authority to establish and offer the game under current Illinois law. If, however, the game constitutes something other than a "lottery," then the IDOR would require additional statutory authorization in order to conduct the game lawfully. The IDOR has no authority under the current law to operate any form of gambling which is not a "lottery." Resolution of your inquiry, therefore, turns on the nature of the game of Keno and, in particular, the proposed Keno game.

## II. "Lottery" versus "Policy Game"

The Code generally prohibits all forms of gambling, except to the extent that the activities fall within one of the enumerated exceptions to the prohibition. 720 ILCS 5/28-1 (West 2004). Exempted from the prohibition against gambling is participation in a lottery conducted by the IDOR pursuant to the Lottery Law. 720 ILCS 5/28-1(b)(6) (West 2004). The distinction between a lottery and other forms of gambling is incorporated in the provisions of the Code. The Code specifically distinguishes between a "lottery" and a "policy game."<sup>6</sup>

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<sup>6</sup> See generally *Cagle v. State*, 147 Tex. Crim. 354, 357, 180 S.W.2d 928, 930 (Tex. Crim. App. 1944) (A policy game is the game of betting upon the appearance of numbers, the bettor betting against the keeper that certain numbers selected by the bettor will appear out of a list of numbers drawn by the keeper by chance or otherwise); 38 C.J.S. *Gaming* §2 (1996) (policy is "a form of gambling in which bets are made on numbers to be drawn by lottery, a method of gambling by betting as to what numbers will be drawn in a lottery").

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Under the Code, lottery and policy games are distinguishable based on the nature of the betting and the operation of the games.<sup>7</sup> The distinguishing feature between a lottery and a policy game is that a lottery involves the distribution of one or more prizes, whereas a policy game involves bilateral wagering. If a game is structured so that the operator has an interest in the outcome of the game because the amount that will be paid out depends on whether each player won or lost, that game is not a lottery, but is a "policy game." The General Assembly has authorized the IDOR to operate lotteries; it has not authorized the operation of policy games.<sup>8</sup>

The proposed Keno game is not a lottery because the payout to the winners does not depend on how much money was wagered by others, either in total or on the same winning numbers. Because of the fixed payout, the IDOR has an interest in the outcome of each draw. Depending on the outcome, the IDOR may have to pay off many winners, few winners, or none at all, and may retain all amounts from losing wagers. The amount retained by the IDOR will depend on the outcome of the game. The total amount paid out by the IDOR on a proposed Keno game is not, as in a lottery, either fixed in advance or determined by the total amount wagered. It

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<sup>7</sup> The current definitions for "lottery" and "policy game" were added to the Criminal Code in 1961 (*see* 1961 Ill. Laws 1985, 2035). The definition of "lottery" expressly indicates that the term includes a chance to win a prize based on consideration paid. In contrast, a "policy game" refers to a chance to win a wager on the drawing of numbers based on consideration paid. Absent from the definition of a "policy game" is any reference to the award of a prize.

<sup>8</sup> I would further note that the game of Keno has been classified in both the Riverboat Gambling Act (230 ILCS 10/4 (West 2004)) and the Charitable Games Act (230 ILCS 30/8 (West 2004)) as a permitted form of gambling under those Acts. The game of Keno is classified in those Acts with such casino-style gambling games as poker, roulette, blackjack, craps, and the like. In contrast, the Lottery Law makes no reference to Keno as a form of lottery.

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instead depends on how many players win the game and how many lose, as well as how much the winning players have wagered.<sup>9</sup>

Although the Illinois courts have not addressed the distinction between a lottery and a policy game, there is useful precedent from other jurisdictions. Of particular note is the *Western Telcon* case, in which the California Supreme Court was presented with an analogous question and conducted a similar analysis. In that case, the California Supreme Court was asked to determine whether the California State Lottery could, consistent with its statutory authority, operate casino-style Keno. The court noted the distinctions between a lottery and a banking game and stated:

A lottery must involve distribution of one or more prizes, rather than mere bilateral wagering. "A prize must be distinguished from a bet between two persons upon an uncertain future event." [Citation.] When two parties wager against one another on the outcome of a game, they engage only in gaming.

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<sup>9</sup>A number of other jurisdictions have concluded that the game of Keno is a permissible lottery game under the laws of those jurisdictions. See, e.g., *Dalton*, 5 N.Y.3d at 264, 835 N.E.2d at 1192; *West Virginia Economic Development Authority*, 214 W. Va. at 289, 588 S.E.2d at 667; *Harris*, 869 S.W.2d at 62; *A.B. Long Music Co.*, 429 S.W.2d at 394; *Brundage*, 7 Mich. App. at 375, 150 N.W.2d at 831; *Mabrey*, 245 Iowa at 434-35, 60 N.W.2d at 892-93; Tex. Att'y Gen. Op. No. GA-0103, issued September 23, 2003; Ky. Att'y Gen. Op. No. 99-8, issued November 15, 1999; Tenn. Att'y Gen. Op. No. 97-033, issued March 31, 1997; Md. Att'y Gen. Op. No. 92-038, issued November 13, 1992; R.I. Att'y Gen. Op. No. 91-11-28, issued November 19, 1991; Mont. Att'y Gen. Op. No. 55, issued January 12, 1988; Neb. Att'y Gen. Op. No. 155, issued November 3, 1983; Or. Att'y Gen. Op. No. 8081, issued December 23, 1981; see also 54 C.J.S. *Lotteries* §7 (1987). These decisions, however, are of little help in resolving this question because they do not address the distinction between a lottery in which a prize is awarded and other forms of gambling in which a wager is made against the operator. These cases generally focus primarily on the issue of whether the elements of chance or consideration were present. Several also rely on older opinions that analyzed an archaic form of Keno, similar to bingo, that has little in common with the form of Keno with which we are presented.

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[Citation.] ["It is betting on the game that constitutes gaming, and those game or gamble who thus bet."].) The bettors do not thereby conduct a lottery, for neither of them has offered up any property as a prize to be distributed to others.

A wager between two parties may be won by either of them. Each of the two has a chance to win the stake of the other and retain his or her own stake; neither puts up any property to be disposed of or shared by *others* according to chance. In contrast to a wager, a "purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and, if he abide by his offer, that he must lose it, and give it over to some of those contending for it, is reasonably certain." [Citations.] In other words, as CSL explains in its brief, "[a] lottery operator does not 'wager' or hazard his property against that of others. *Whether* the property offered by the lottery operator will be distributed is not the issue, as it is in gaming; in a lottery, the only issue is *to whom* will the property be distributed--and the lottery operator, earning his revenue as a portion of the ticket sales, is not himself a contender for the prize." (Italics in original, fn. omitted.)

\* \* \*

Superficially, some banking games may resemble some forms of lottery. \* \* \* In both there is one operator; in both, typically, there are many participants. In both lotteries and banking games each of the participants may win or lose money depending on a chance outcome.

These two categories of gambling are nonetheless exclusive of one another, and can be surely distinguished, not by the manner of play, but by *the nature of the betting itself*. [Citation.] \* \* \* (Italics in original.) *Western Telcon, Inc.*, 13 Cal. 4th at 485-88, 917 P.2d at 655-58.

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The IDOR Memo dismisses the *Western Telcon* case by noting that California prohibits "banking games" and concluding that because Illinois does not define or specifically prohibit a "banking game," *Western Telcon* "may not be persuasive authority in Illinois."<sup>10</sup> In this instance, however, the use of the term "banking game" instead of "policy game" is a distinction without a difference. The proposed Keno game would make preset payouts. A payout does not depend on the number of players participating in a particular draw, on the aggregate amount wagered on the draw by all players, or on how many other players make the same winning selection. The payout established for each winning category is not shared among all winners. Instead, the proposed Keno game pays a fixed payout to each winner no matter how many winners are in a given draw. This is precisely the type of game that the General Assembly intended to prohibit by using the term "policy game," and that the California Supreme Court concluded was an illegal banking game under California law. Hence, the reasoning in *Western Telcon* is fully supportive of the conclusion I reach in this opinion.

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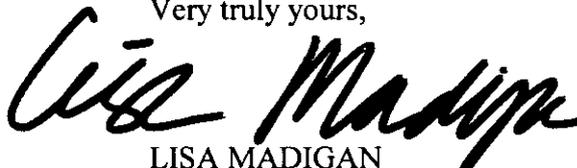
<sup>10</sup>A "banking game" means "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. 502.11 (2005). Keno is a "house percentage banking game" in which the house pays all winners and collects from all losers. The house essentially acts as a player in the game which "takes on" all other players. Thus, the house has a stake in the outcome of the game. *Sisseton-Wahpeton Sioux Tribe v. United States*, 804 F. Supp. 1199, 1202 (D.S.D. 1992); see also 25 C.F.R. 502.4 (2005) (class III gaming includes "[a]ny house banking game" such as keno; see also 38 C.J.S. *Gaming* §2 (1996)). The IDOR has suggested its Keno proposal is not a banking game because provision will be made to ensure that the State does not suffer a loss in the aggregate on Keno wagers. The *Western Telcon* court dismissed this theory. *Western Telcon*, 13 Cal. 4<sup>th</sup> at 491, 917 P.2d at 659-60; see also Cal. Att'y Gen. Op. No. 96-1003, issued December 31, 1998.

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**Conclusion**

Based on this analysis, I conclude that the proposed Keno game is a prohibited policy game which neither the Governor nor the IDOR has the authority under current law to establish as an extension of the State's lottery. If the IDOR wishes to establish the proposed Keno game, then the Code or the Lottery Law must be amended to authorize it.

Very truly yours,

  
LISA MADIGAN  
ATTORNEY GENERAL