

The State of Texas
House of Representatives

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Representing
Hunt, Hopkins, and
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OPINION COMMITTEE

Dan Flynn
State Representative • District 2

FILE # ML-47607-14
I.D. # 47607

July 22st, 2014

RQ-1212-GA

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548
opinion_committee@texasattorneygeneral.gov

Re: Request for an opinion regarding the Texas Racing Commission's authority to authorize historical racing machines.

Dear Attorney General Abbott:

On June 27, 2014, the Texas Racing Commission published Proposed Rules that would authorize what are known as "historical racing" machines at racetracks in Texas. 39 Tex.Reg. 4873, 4873-4884 (Jun. 27, 2014).¹ These machines use previously run races to derive outcomes, yet they look and play like slot machines.² Players need only push a single button to play, and the machine can make all of the wagering choices for the player. The machines involve house-banked rather than pari-mutuel wagering, as the games award minimum-value prizes and players are not wagering against each other on the same race. As the Co-Chairman of the House Select Committee on Transparency in State Agency Operations, I respectfully request your opinion on the Texas Racing Commission's authority to authorize these machines.

Background

The Texas Racing Act provides that the Texas Racing Commission "shall adopt rules for conducting greyhound or horse racing in this state involving wagering and shall adopt other rules

¹ These games are also known as "instant racing" machines.

² I have attached several articles that include pictures of historical racing machines.

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to administer this Act that are consistent with this Act.” Tex. Rev. Civ. Stat. art 179e § 1.02. The Act states that the Commission “shall adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering” and that “[a] person may not accept ... a wager ... unless the wager is authorized by this Act.” *Id.* § 11.01(a).³

The Act, however, only authorizes pari-mutuel wagering on live and simulcast racing. Historical racing is not live or simulcast and does not fit within the Act’s definitions of race or of pari-mutuel wagering. *See id.* §§ 1.03(18), (19), (61)-(63), (74). In historical racing players do not even bet on the same races as one another, as required by the Act, and the machines do not pool bets into the Act’s enumerated types of pari-mutuel pools, instead providing minimum-value prizes and progressive carry-over pools. *See* Pat. No. 6,450,887 (Sept. 17, 2002);⁴ AMTOTE.COM, *Instant Racing*.⁵ I do not believe the Commission has the authority under the Texas Racing Act to authorize non-pari-mutuel wagering on events that are neither live nor simulcast.

In addition to believing the Commission’s Proposed Rules on historical racing are beyond the statutory authority of the Commission, I believe that if the Commission authorized historical racing it would violate Article III, section 47(a) of the Texas Constitution, which prohibits lotteries. Your office has previously opined that a lottery is established if chance predominates over skill. Tex. Att’y Gen. Op. JM-1267 (Dec. 20, 1990). In historical racing, chance predominates because players use a “quick pick” or “handi-helper” option to play by simply pushing a button, allowing the machine to select horses for the player. Pat. No. 6,450,887; Pat. Application No. PCT/US2013/056799.⁶ Players have the option of examining data regarding the race, but this data is extremely limited and players are not betting against one another on the

³ The Proposed Rules also cite section 3.021 of the Texas Racing Act as authority. *See* 39 Tex.Reg. at 4873, 4875-78, 4881-82. However, your office has already clarified that section 3.021 cannot confer unrestricted authority on the Commission. Tex. Att’y Gen. Op. JM-1134 (Jan. 8, 1990).

⁴ Available at <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fnetahtml%2FPTO%2Fsearch-bool.html&r=2&f=G&l=50&col=AND&d=PTXT&sl=%22instant+racing%22&OS=%22instant+racing%22&RS=%22instant+racing%22>.

⁵ Available at <http://www.amtote.com/content/instant-racing>.

⁶ Available at <http://patentscope.wipo.int/search/en/detail.jsf;jsessionid=0DBC14C297C2D227C6548C554C0D4A00.wappInB?docId=WO2014035968&recNum=1&maxRec=&office=&prevFilter=&sortOption=&queryString=&tab=PCTDescription..>

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same race. Also, because payout is determined by timing, *see* AMTOTE.COM, players have little incentive to take the time to analyze the limited data available. Thus, chance would still predominate even if players do not use the “quick pick” option.

I also believe that historical racing machines would constitute illegal gambling devices. Texas law prohibits the use and possession of gambling devices, which are defined as “any electronic, electromechanical, or mechanical contrivance” that, save certain exceptions for bona fide amusement devices, “affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill.” Tex. Penal Code § 47.01(4); *see also State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993); Tex. Att’y Gen. Op. GA-0130 (Sept. 23, 2003). Even if some skill were involved in the play of historical racing machines, awards are still determined at least partially by chance, making them illegal gambling devices.

Issues for Consideration

I respectfully request your opinion regarding the following issues: (1) whether the Texas Racing Commission has the authority to authorize non-pari-mutuel wagering on events that are not live nor simulcast; (2) whether historical racing, as proposed by the Commission, falls within the definition of pari-mutuel wagering in the Texas Racing Act; (3) whether historical racing machines would violate the Texas Constitution’s prohibition on lotteries; and (4) whether historical racing machines would be considered gambling devices prohibited by the Texas Penal Code. I thank you in advance for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Flynn", followed by a horizontal line.

The Honorable Dan Flynn
State Representative
Co-Chair, House Select Committee on Transparency in State Agency Operations