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December 10, 2001

Robert W. Spear, Commissioner
Department of Agriculture, Food & Rural Resources
28 State House Station
Augusta, ME 04333-0028

Re: *Rule-making Authority*

Dear Commissioner Spear:

You have asked for an opinion from this office as to whether the Maine Harness Racing Commission may authorize telephone wagering at facilities licensed by the Commission through rules adopted pursuant to Title 8 M.R.S.A. §§ 275-B and 275-C (1997 & Supp. 2000) absent express statutory approval of telephone wagering. For the reasons that follow, I have determined that the Commission lacks the authority to authorize telephone wagering.

The Maine Law Court has reaffirmed what is clear from Maine's statutory framework—all gambling in Maine is illegal unless expressly permitted by statute. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983). Accordingly, I have examined the extent of wagering activity expressly authorized by our Legislature. There is no such express authorization found in Maine statute, including Title 8, Chapter 11 (Harness Racing); Title 8, Chapter 14-A (Lottery); Title 17, Chapters 13-A (Beano or Bingo); Title 17, Chapter 14 (Games of Chance); or Title 17-A, Chapter 39 (Unlawful Gambling). Nor do the provisions you cite, Title 8 M.R.S.A. § 275-B and § 275-C, contain such an express authorization. To the contrary, an analysis of these statutes provides additional support for the conclusion that Maine law does not authorize telephone wagering.

Title 8 M.R.S.A. §§ 261-A *et seq.* (Chapter 11) authorizes harness racing within the State of Maine. Chapter 11 authorizes wagering in the form of the sale of pari-mutuel pools or common pari-mutuel pools. Section 275-B, "Sale of pari-mutuel pools," provides as follows:

> The following persons may sell pari-mutuel pools on horse racing in accordance with this chapter and rules adopted by the commission.

1. **Racetracks.** A person licensed pursuant to section 271 to conduct harness horse racing with pari-mutuel betting may sell pari-mutuel pools *within the enclosure of the racetrack where the licensed race or race meet is conducted.*

2. **Off-track betting facility.** A person licensed pursuant to section 275-D to operate an off-track betting facility may sell pari-mutuel pools *at that licensed facility.*

(Italics provided). Section 275-C, "Common pari-mutuel pools," provides, in relevant part,

1. **Authority.** A person authorized to sell pari-mutuel pools on horse racing may sell common pari-mutuel pools for simulcast races. *The sale must be conducted within the enclosure of the licensee's racetrack or at the licensee's off-track betting facility.*

(Italics provided).

The issue turns on whether sections 275-B and 275-C require all aspects of the sale to take place while the parties to the sale are physically present within the enclosure of the racetrack or physically at the off-track betting facility. The Law Court has repeatedly stated that the first canon of statutory construction is to "look first to the plain meaning of the statutory language as a means of effecting the legislative intent." If the meaning of the statute is plain, it must be interpreted "to mean exactly what is says." *Harding v. Wal-Mart Stores, Inc.*, 2001 ME 13, ¶9, 765 A.2d 73, 75 (internal citations omitted).

The terms of sections 275-B and 275-C, which authorize the sale of pari-mutuel and common pari-mutuel pools, also limit where these sales take place. Each statute includes language requiring that the sale take place "within the enclosure of the licensee's racetrack or at the licensee's off-track betting facility." 8 M.R.S.A. §§ 275-B(1) and 275-C(1). The Legislature could easily have crafted the statutes without this limitation, but did not, and this language cannot be disregarded. "Unless the statute itself reveals a contrary legislative intent, the plain meaning of the language will control its interpretation. To that end, the particular words used in the statute must be given their plain, common and ordinary meaning." *Child Development Services—Cumberland County et al. v. Attorney General*, 2000 ME 177, ¶6, 760 A.2d 630, 631 (citations omitted). The Law Court has often relied on dictionary definitions where the statutory scheme provides no definition specific to the laws under scrutiny. *Rockland Plaza Realty Corporation v. City of Rockland, et al.*, 2001 ME 81, ¶12. "Sale" is defined as "the act of selling; exchange of property of any kind, or of services, for an agreed sum of money or other valuable consideration." Webster's New World Dictionary 1256 (Second College Edition 1980). Pursuant to the plain language of the statute, the sale of the pari-mutuel pools, in other words, the exchange of the purchaser's money for the chance to win a larger return, must take place "within the enclosure of the licensed track or at the licensee's off-track betting facility."

The fact that the sale must take place within the enclosure of the licensed track or at the licensed off-track betting facility is in keeping with entire regulatory scheme of Chapter 11.

Limitations such as those found in sections 275-D(7) ("Operation of facility"; limitations on access of minors to premises) and 278 ("Minors"; minors not admitted to pari-mutuel enclosures) would make no sense and become unenforceable should the statute be read to allow wagers to be placed from *outside* the premises of the track or off-track betting facility by electronic, telephonic or other means. The statute must be interpreted "in the context of the statutory scheme in which it is found." *In re Wage Payment Litigation*, 2000 ME 162, ¶4, 759 A.2d 217, 221. Because the plain meaning of the text, viewed both alone and in context, resolves these interpretive issues, there is no need to resort to extrinsic factors to determine the Legislature's intent. *Id.* (citations omitted). My review of the plain language of the statutes leads me to conclude that the law requires the physical presence of the seller and purchaser at the licensed racetrack or licensed off-track betting facility. This requirement precludes telephone wagering.

The argument may be made that requiring a purchaser to maintain an account at the licensed track or off-track betting facility, so that the purchaser's consideration for the wager is already at the track or facility prior to the purchase of the pari-mutuel pool (or placing of the wager), places the location of the sale entirely within the track or facility. This argument disregards the nature of the transaction that occurs when an individual places a call or otherwise communicates with the track or facility from a different location. Quite simply, there is no sale or wager without the communication from the purchaser or bettor. It is that communication that initiates the transaction. If that communication, which constitutes an offer to place a wager, make a bet or purchase a pari-mutuel pool, comes from outside the track or OTB, the sale is not being made "within the enclosure of the licensed track or at the licensee's off-track betting facility."

Courts in other jurisdictions have rejected arguments permitting the use of the telephone or other electronic means of placement of a bet or the transmission of a wager (in the language of the Maine statute, the "sale of pari-mutuel pools") in a number of different contexts. While these decisions are not binding in the interpretation of Maine statutes, their reasoning and conclusions are instructive. *See, e.g., United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001) (In an appeal from conviction for violations of federal Wire Act, 18 U.S.C. § 1084, the court rejected the argument that defendant's company, World Sports Exchange, did not transmit wagers via telephone or internet from New York even though WSE required bettors to establish accounts with WSE in Antigua.); *United States v. Ross*, 1999 WL 782749, 1999 U.S. Dist. LEXIS 22351, No. 98-Cr. 1174-1 (S.D.N.Y. Sept. 16, 1999) (In applying 18 U.S.C. § 1084, the court distinguished bets placed over the telephone from information assisting in the placing of bets or wagers, and rejected defendant's claim that no bet comes into existence until payment is made.); *AT&T Corp. v. Coeur D'Alene Tribe*, 45 F.Supp.2d 995, 1000-05 (D. Idaho 1998) (Where National Indian Lottery would rely on interstate toll-free telephone number so that players could order chances while outside the limits of the Reservation, it is not gaming "on Indian lands," even though purchaser has account with the Tribe on the Reservation. The lottery was thus subject to state law rather than Indian Gaming Regulatory Act.); *Rice v. Connolly*, 488 N.W.2d 241, 246-48 (Minn. 1992) (The court found that bets not physically placed at a racetrack cannot be "on-track" pari-mutuel bets "no matter how they are transmitted to track, electronically recorded, or accepted into pool of funds;" and that legislation authorizing off-track teleracing and regulations allowing telephone account wagering system were beyond scope of authorized wagering.), *rehearing denied*, 1992 Minn. LEXIS 247 (Sept. 2, 1992).

Guided as I am by the plain language of the statutes, I conclude that bets can only be placed by persons physically located within the enclosure of the racetrack or at the licensed off-track betting facility, and that bets communicated to the track or facility from another location, by whatever means, are not authorized by the Maine Legislature. The existence of rulemaking authority does not change that result.

The Maine Legislature delegates rule-making authority to state agencies. The Maine Administrative Procedure Act requires agencies "to refer with particularity" to the statute that serves as the basis for any rule. 5 M.R.S.A. § 8052(8). Rules function to implement and interpret statutes, but not to expand the parameters of the law set out by the Legislature. Maine courts are required to declare invalid any rule that "exceeds the rule-making authority of the agency." 5 M.R.S.A. § 8058(1). Title 8 M.R.S.A. § 268 and § 279-A grant the Harness Racing Commission rule-making authority. Telephone wagering is not mentioned in these statutes, and is thus not specifically authorized by them. The Harness Racing Commission thus has no authority to adopt rules regulating telephone wagering, except to the extent that any such rules prohibit the activity.

Please let me know if you have further questions.

Sincerely,

G. Steven Rowe
Attorney General