OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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SPORTS AND GAMING:
Off-Site Account Wagering

Mr. Marc Laino
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Dear Mr. Laino:

I have your predecessor's letter wherein he posed the following questions:

1. Can Illinois licensed wagering facilities legally accept off-site account wagers from persons in Illinois?

2. Can Illinois licensed wagering facilities legally accept off-site account wagers from persons in another State?

3. Can persons in Illinois legally place off-site account wagers with wagering entities located in other States?

4. Can an off-site wagering entity in another State legally broadcast wagering information, by cable, satellite or otherwise, to persons in Illinois?

5. Can Illinois organization licensees send audio and video signals of their races and/or wagering information relating thereto to a legal wagering entity in

another State that accepts off-site account wagers from outside of the State in which it is located?

For the reasons hereinafter stated, it is my opinion that licensed wagering facilities in Illinois cannot accept off-site account wagers from either persons in Illinois or persons in another State, nor can persons in Illinois legally make off-site account wagers with wagering entities located in another State. Further, it is my opinion that an off-site wagering entity in another State can be prohibited from sending wagering information to persons in Illinois only if it can be proven that such information is actually being used for illegal gambling. With respect to the final question, it is my opinion that Illinois organization licensees may contract to send their signals to legal wagering entities in other States that accept off-site account wagers, provided that, with respect to such wagering, both the Illinois licensee and the other entity comply with the provisions of the Interstate Horseracing Act (15 U.S.C. § 3001 et seq. (2000)).

Gambling is generally prohibited in Illinois, except to the extent permitted by specific statutes. (720 ILCS 5/28-1 (West 2000).) Pari-mutuel wagering on horse races in accordance with the provisions of the Illinois Horse Racing Act of 1975 (230

ILCS 5/1 et seq. (West 2000)) is excepted from the statutory prohibition upon gambling. (720 ILCS 5/28-1(b)(3) (West 2000).)

When pari-mutuel wagering on horse races was first legalized by the General Assembly, a patron could wager on a horse race only if he or she were physically present on the premises of the racetrack where the race was taking place. (See Laws 1927, p. 28, § 10, effective July 1, 1927.) In 1979, following the enactment of the Federal Interstate Horseracing Act (Pub. L. No. 95-515, 92 Stat. 1811 (1978)), wagering upon interstate horse races was also authorized to be conducted from the premises of an organization licensee's racetrack. (Public Act 81-207, effective August 20, 1979.) Subsequently, inter-track and off-track betting on horse races, at licensed locations, was authorized by the General Assembly (see Public Act 84-1468, effective July 1, 1987), as was wagering on interstate simulcast races at both racetracks and at off-track facilities ("inter-track wagering location licensees"). (See Public Act 89-16, effective May 30, 1995.)

Pari-mutuel wagering is currently governed by section 26 of the Illinois Horse Racing Act (230 ILCS 5/26 (West 2000)), which provides, in part:

> "(a) Any [organization] licensee may conduct and supervise the pari-mutuel system of wagering, as defined in Section 3.12 of

this Act, on horse races conducted by an Illinois organization licensee or conducted at a racetrack located in another state or country and televised in Illinois in accordance with * * * this Act. * * *

(b) No other method of betting, pool making, wagering or gambling shall be used or permitted by the licensee. * * *

(b-5) An individual may place a wager under the pari-mutuel system from any licensed location authorized under this Act provided that wager is electronically recorded in the manner described in Section 3.12 of this Act. Any wager made electronically by an individual while physically on the premises of a licensee shall be deemed to have been made at the premises of that licensee.

* * *

(h) The Board may approve and license the conduct of inter-track wagering and simulcast wagering by inter-track wagering licensees and inter-track wagering location licensees subject to the following terms and conditions:

* * *

(6) All wagering under such license is subject to this Act and to the rules and regulations from time to time prescribed by the Board, and every such license issued by the Board shall contain a recital to that effect.

(7) An inter-track wagering licensee or inter-track wagering location licensee may accept wagers at the track or location where it is licensed, or as otherwise provided under this Act.

* * *

(12) The Board shall have all powers necessary and proper to fully supervise and control the conduct of inter-track wagering and simulcast wagering by inter-track wagering licensees and inter-track wagering location licensees, including, but not limited to the following:

(A) The Board is vested with power to promulgate reasonable rules and regulations for the purpose of administering the conduct of this wagering and to prescribe reasonable rules, regulations and conditions under which such wagering shall be held and conducted. Such rules and regulations are to provide for the prevention of practices detrimental to the public interest and for the best interests of said wagering and to impose penalties for violations thereof.

* * * "

According to the information that has been provided, the term "account wagering" refers to a system pursuant to which a person placing bets, instead of making wagers with cash, deposits money in an account with a wagering facility and is permitted to place wagers on horse races against his or her account. The wagering facility holding the account deducts the amounts wagered from the bettor's account when the wager is made, and deposits into the account any amounts the individual wins. "On-site account wagering", in which the bettor must be physically present at the wagering facility holding his account when

placing bets, is permitted in most States, including Illinois. (See 11 Ill. Adm. Code, Part 321 (2000).) "Off-site account wagering", pursuant to which the bettor need not be present at the wagering facility, but may place bets by telephone, computer or other electronic means, is presently permitted in only a few States.

The rules promulgated by the Racing Board, as they relate to account wagering, are codified at 11 Ill. Adm. Code, Part 321. Section 321.20 thereof (11 Ill. Adm. Code § 321.20 (2000)) provides:

> "a) The licensee may offer to open for its patrons:
>
> 1) short-term accounts that are operational only for the performance(s) during which they were opened and only at the site where they were opened, through which wagers are placed by the account holder at a self-service terminal;
>
> 2) long-term accounts that are operational for all performances offered by the licensee, through which wagers are placed by the account holder at a self-service terminal operated by the licensee's totalizator operator; and
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> 3) voucher accounts that are operational for any performance offered by the licensee, through which wagers are placed by the account holder at any ticket issuing terminal operated by the licensee's totalizator operator.

> b) The patron may choose to credit winning payouts in cash and may choose to close or cash-in the account at any time."

The term "patron" refers to someone who is present on the grounds of a licensee for the purpose of wagering or to observe racing. (11 Ill. Adm. Code 210.10 (2000).) Because a "patron" may wager against his or her account only at ticket issuing terminals, which can be located only at licensed wagering facilities, it is clear from the terms of the rule that only on-site account wagering is authorized thereby. Therefore, with respect to the first two questions posed, because Illinois licensed wagering facilities are authorized, pursuant to the provisions of the Illinois Horse Racing Act and the rules promulgated in accordance therewith, to permit account wagering only with respect to persons who are physically present at the facility, it is my opinion that such facilities may not accept off-site account wagers from either persons in Illinois or persons in other States.

With respect to the third and fourth questions, the provisions of the Illinois Horse Racing Act do not specifically address whether persons in Illinois may make off-site account wagers with wagering entities located in other States, whether those companies may solicit and accept wagers from persons in Illinois or whether those companies may transmit wagering infor-

mation to persons in Illinois. Consequently, such conduct is governed, if at all, by the laws regulating gambling.

Section 28-1 of the Criminal Code of 1961 (720 ILCS 5/28-1 (West 2000)) provides, in part:

"(a) A person commits gambling when he:

* * *

(2) Makes a wager upon the result of any game, contest, or any political nomination, appointment or election; or

* * *

(11) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information; except that nothing in this subdivision (11) prohibits transmission or receipt of such information for use in news reporting of sporting events or contests; or

(12) Knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet.

> (b) Participants in any of the following activities shall not be convicted of gambling therefor:
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> * * *
>
> (3) Pari-mutuel betting as authorized by the law of this State;
>
> * * * "

Subsection 28-1(a)(12) of the Code, which was recently added, clearly prohibits either persons in Illinois or those who may be licensed in other States from making Internet wagering available to persons in Illinois. Although subsection 28-1(b)(3) of the Code excepts from the statutory prohibition pari-mutuel betting conducted in accordance with Illinois law, I have already concluded that off-site account wagering is not authorized under Illinois law. Section 28-1 does not contain any exception for conduct that may be permitted by the laws of another State. Further, subsection 28-1(a)(11) prohibits the transmission of information regarding wagers by telephone, telegraph, radio, semaphore or similar means. These provisions effectively prohibit persons in Illinois from placing wagers by use of a telephone, radio, the Internet or interactive television. Subsection 28-1(a)(11) appears to apply without regard to where the recipient of the wager is located, or whether that person is licensed

or otherwise authorized to receive wagering information by the laws of another State.

Subsection 28-1(a)(11) would likewise prohibit cable television transmissions to persons in Illinois for the purpose of facilitating gambling activities. Because the transmission of wagering information for other purposes is not prohibited, however, proof that the transmission is used for gambling purposes would be required. This distinction is illustrated by the opinions in two companion cases, Kelly v. Illinois Bell Telephone Co. (N.D. Ill. 1962), 210 F. Supp. 456, aff'd, 325 F.2d 148 (1963) and Telephone News System, Inc. v. Illinois Bell Telephone Co. (N.D. Ill. 1962), 210 F. Supp. 471, aff'd, 376 U.S. 782, 84 S. Ct. 1134 (1964). In each of these cases, the plaintiff sought to enjoin the discontinuance of its telephone service pursuant to the provisions of the Federal Wire Act (see 18 U.S.C. § 1084 (2000)) based upon violations of the Illinois law prohibiting the transmission of information regarding wagering. In Kelly v. Illinois Bell Telephone Co., the plaintiffs published racing information sheets and transmitted similar information to other newspapers and to the Telephone News System. The court held that Illinois' statutory prohibition is limited in its application to persons having some direct or indirect relation to gambling activity. Because there was no proof in that case that the

plaintiff had any relation to gambling activity, an injunction was granted. In Telephone News System, Inc. v. Illinois Bell Telephone Co., however, the plaintiff's business consisted of making recordings of racing results which were played when an advertised telephone number was dialed. Proof in the case included testimony from persons who had used the information supplied in the recorded messages for gambling purposes. The court held that, although the plaintiff was not engaged in the business of betting or wagering, within the meaning of the Wire Act, it had nonetheless violated the Illinois statute. Based upon these cases, it must be concluded that the mere transmission of horse racing and wagering information to persons in Illinois by an out-of-State entity does not violate subsection 28-1(a)(11) of the Criminal Code, unless the transmission is clearly connected to a gambling activity.

With respect to Federal law, the Wire Act (18 U.S.C. § 1084 (2000)), referred to in these cases, provides, in part:

> "**(a)** Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers,

> shall be fined under this title or imprisoned not more than two years, or both.
>
> **(b)** Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.
>
> **(c)** Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.
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> * * * "

Subsection 1084(d) of the Act provides a procedure whereby common carriers are required to discontinue service to persons who violate State, Federal or local law by the transmission of gambling information.

Because the exception in subsection 1084(b) is written in such a way as to permit transmission of information assisting in the placing of wagers on a sporting event from one State where betting on that sporting event is legal to another, and because wagering on horse races is not illegal <u>per se</u> in Illinois, it is not clear whether a person in Illinois who places a wager by telephone, Internet or similar means would violate not only State law, but the Federal Act, as well. The exception refers to

whether it is legal to wager upon specific events, not to the manner or the place from which such wagers may be made.

It has been suggested that Illinois cannot prohibit persons in this State from placing off-site account wagers with entities licensed in other States based upon the commerce clause of the United States Constitution. (U.S. Const., art. I, sec. 8, cl. 3.) In my opinion, the commerce clause does not prohibit Illinois from regulating wagering by persons located herein, including the interstate transmission of wagering information used for illegal gambling purposes.

There are two aspects to commerce clause preemption of State legislation. The first is applicable when Congress affirmatively regulates a particular field, thereby excluding the States from doing so. (See, e.g., Jones v. Rath Packing Co. (1977), 430 U.S. 519, 525, 97 S. Ct. 1305.) The second aspect prevents the States from unjustifiably interfering with or discriminating against interstate commerce. See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality (1994), 511 U.S. 93, 98, 114 S. Ct. 1345, 1349.

Congress has not sought to regulate the field of interstate wagering on horse races to the exclusion of the States. The Interstate Horseracing Act is the only Federal enactment concerning the subject. That Act does not address off-

site account wagering, nor does it address telecasting of races.

The first section of the Act provides:

> "**(a)** The Congress finds that-
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> **(1)** the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders;
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> **(2)** the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and
>
> **(3)** in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.
>
> * * * "

(15 U.S.C. § 3001 (2000).)

The intent of Congress with respect to the Act was described in Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc. (6th Cir. 1994), 20 F.3d 1406, 1414, as follows:

> " * * *
>
> When Congress enacted the Act, off-track wagering was already in place as a legal alternative to betting at the track where the race was being run. Congress recognized that the unrestricted proliferation of off-track wagering would hurt the horseracing industry by decreasing attendance at racetracks which, in turn, would reduce the number of horses needed to compete and the number of individuals employed in the industry. Moreover,

> unrestricted off-track wagering threatened the viability of small racetracks which provide a marketplace for horses of lesser quality and aspiring jockeys.
>
> Though the bills first introduced in Congress sought to eliminate interstate off-track wagering in its entirety, Congress soon recognized that horseracing and off-track wagering could coexist if regulated. Congress therefore opted for the compromise found at 15 U.S.C. § 3004(a) which allows interstate off-track wagering if, and only if, the interested parties consent.
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> * * *

"

Thus, by the enactment of the Interstate Horseracing Act, Congress sought to place limits upon interstate wagering on horse races, and to affirm the right of each State to regulate the forms of gambling permitted within its borders. State laws which limit account wagering by persons within the State, and which prohibit off-site account wagering entities from doing business within the State, are entirely consistent with the Federal Act.

Further, Illinois laws limiting gambling by persons in Illinois do not unjustifiably interfere with or discriminate against interstate commerce. Firstly, Illinois laws prohibit the placing of off-site account wagers whether the entity with whom the wager is placed is within or without this State. These laws do not discriminate either against interstate activity or in

favor of Illinois activity. Secondly, the regulation of gambling activity is clearly within the police power of the State. Laws limiting gambling activity have consistently been upheld against challenges based upon commerce clause grounds. (See, e.g., Dunn v. Nevada Tax Comm'n (1950), 67 Nev. 173, 216 P.2d 985; Ames v. Kirby (1904), 71 N.J.L. 442, 59 A. 558; State v. Harbourne (1898), 70 Conn. 484, 40 A. 179.) The purpose of the statutes upheld in these cases, like current Illinois law, was the regulation of gambling activity within those States, which affects interstate commerce only indirectly.

In each instance in which Congress has exercised its authority under the commerce clause to legislate with respect to interstate gambling operations, it has done so expressly to enhance the ability of the States to regulate such activity. For example, 18 U.S.C. § 1301 (2000) was amended to prohibit interstate sales of interests in State lottery tickets, absent agreement among the States. (Pub. L. No. 103-322, § 320905, 108 Stat. 2126 (1994)); see Pic-a-State Pa, Inc. v. Commonwealth of Pennsylvania (3rd Cir. 1994), 42 F.3d 175, cert. denied, 517 U.S. 1246, 116 S. Ct. 2504 (1996).) The Wire Act provides a Federal procedure for enforcement of State laws relating to the transmission of wagering information. The Interstate Horseracing Act limits interstate pari-mutuel wagering to that which may be

consented to by participating racetracks and State racing commissions. Clearly, these cases do not suggest any Federal intention to preempt State legislation which limits the extent to which persons in that State may engage in interstate off-site account wagering.

The final question posed concerns whether an Illinois organization licensee can transmit its races or information relating to wagering concerning those races to a wagering entity in another State, which is permitted to accept off-site account wagers from outside of the State in which it is located. Subsection 26(f) of the Illinois Horse Racing Act (230 ILCS 5/26(f) (West 2000)) provides, in part:

" * * *

> (f) Notwithstanding the other provisions of this Act, an organization licensee may contract with an entity in another state or country to permit any legal wagering entity in another state or country to accept wagers solely within such other state or country on races conducted by the organization licensee in this State. * * *
>
> An organization licensee may permit one or more of its races to be utilized for pari-mutuel wagering at one or more locations in other states and may transmit audio and visual signals of races the organization licensee conducts to one or more locations outside the State or country and may also permit pari-mutuel pools in other states or countries to be combined with its gross or

net wagering pools or with wagering pools established by other states.

* * * "

Further, the Interstate Horseracing Act provides that an interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from the track hosting the race, the horsemen's group at that track, the racing commission governing the host track and the racing commission governing the off-track betting office. The Interstate Horseracing Act does not specifically address the transmission of audio or visual signals of Illinois races. (See Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc. (6th Cir. 1994), 20 F.3d 1406, 1412.) It may be assumed, however, that the primary purpose of a contract to send such signals would be to facilitate wagering in the recipient's State.

Pursuant to subsection 26(f) of the Illinois Horse Racing Act, a wagering entity in another State can accept wagers on Illinois races "solely within such other state". It is therefore necessary to determine where, as a matter of law, telephone or off-site wagers are deemed to be accepted.

In United States v. Truesdale (5th Cir. 1998), 152 F.3d 443, certain residents of Texas were held not to have violated a Texas statute prohibiting bookmaking by setting up and operating

a wagering business in Jamaica and the Dominican Republic. The court concluded, in part, that bets were accepted only in the off-shore facilities and not in Texas. Similarly, in Saratoga Harness Racing, Inc. v. City of Saratoga Springs (1976), 55 A.D.2d 295, 390 N.Y.S.2d 240, aff'd, 44 N.Y.2d 980, 408 N.Y.S.2d 331 (1978), the court considered where bets were placed, for the purpose of imposing local taxes. The court stated:

> " * * *
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> * * * The location of the bettor at the time he places his bet is immaterial in the same sense that no reasonable person would consider that the famous betting parlors of London (assuming they are permitted to take bets from non-Britishers) are conducting betting in any other country from which someone might place a bet by telephone or cable. * * *
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> * * * "
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> Saratoga Harness Racing, Inc. v. City of Saratoga Springs (1976), 55 A.D.2d 295, 298, 390 N.Y.S.2d 240, 242.

Under this reasoning, it appears that a bet is deemed to be placed where the recipient receives the wager. Consequently, an Illinois organization licensee would not be prohibited from contracting with an entity in another State to transmit its races or wagering information to the other entity for use for wagering, including off-site account wagering, in the other State, provided that the other entity accepts wagers only in the

State in which it is licensed and that the requirements of the Federal statute are met. Because the Federal statute requires that the Illinois Racing Board consent to any such wagering with respect to a race conducted by an Illinois licensee, the Board has the authority either to permit or to prohibit such agreements.

In summary, it is my opinion that licensed wagering facilities in Illinois cannot legally accept off-site account wagers either from persons in Illinois or persons in other States, because off-site account wagering is not authorized by the provisions of the Horse Racing Act and the acceptance of off-site account wagers would therefore violate subsection 28-1(a)(2) of the Criminal Code of 1961. Further, persons in Illinois cannot legally place off-site account wagers electronically because doing so would violate subsections 28-1(a)(11) and/or (12) of the Criminal Code of 1961, even if such wagers were placed with an entity that is licensed and operating in another State. The mere sending of wagering information to a person in Illinois by cable or other signal, however, is not prohibited without proof that such information is actually being used for purposes of gambling. Lastly, Illinois organization licensees can legally send signals of their races to entities licensed in another State to conduct pari-mutuel wagering, including off-site

account wagering, provided that the entity accepts wagers only within the State by which it is licensed, and that all parties comply with the provisions of the Interstate Horseracing Act.

Sincerely,

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ATTORNEY GENERAL