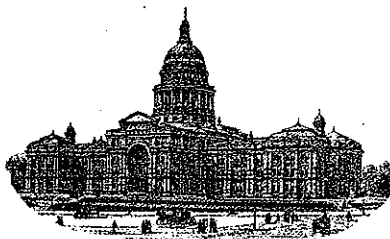


TEXAS HOUSE OF REPRESENTATIVES

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OPINION COMMITTEE



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March 10, 2010

FILE # ML-46391-10

I.D. # 46391

The Honorable Greg Abbott
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

RQ-0875-GA

Dear Attorney General Abbott:

The purpose of this communication is to provide additional clarification to my previous request for opinion (RQ-0771-GA). On October 29, 2008 the Texas Lottery Commission ("the Commission") initiated rulemaking to adopt a new rule to more specifically define who is eligible for a bingo manufacturer's or distributor's license. Subsequent to the initial publication of the proposed rule the Commission modified the language and on October 16, 2009 initiated rulemaking for a proposed new rule 16 TAC §402.104 ("Rule 402.104") that set out definitions of "professional gambler" and "gambling promoter."

There is significant concern that the proposed definitions in Rule 402.104 have the effect of modifying the plain language and meaning of the terms "professional gambler" and "gambling promoter" as used in the Texas Bingo Enabling Act as written and intended by the Texas Legislature.

Under the Bingo Enabling Act "a person who is or has been a professional gambler or gambling promoter" is not eligible for a bingo manufacturer's or distributor's license. See Tex. Occ. Code §2001.2002 (2) and §2001.207 (2).

Under the Texas Lottery Act, a professional gambler is prohibited from holding a license. See Tex. Gov. Code §466.155(a)(1)(B). Texas Lottery Commission rule 16 TAC §401.153(b)(2) defines professional gambler as "a person whose profession is, or whose major source of income derives from, playing games of chance for profit."

The Commissions proposed new rule defines "professional gambler" and "gambling promoter" differently.

§402.104 Professional Gambler and Gambling Promoter.



(a) The term "gambling promoter" means a person who has:

(1) engaged in conduct in Texas proscribed by Title 10, Chapter 47, §47.03 of the Texas Penal Code; or

(2) been convicted in any state, or governing jurisdiction outside of the United States under a law that is fundamentally equivalent to promotion of gambling as proscribed by Title 10, Chapter 47, §47.03 of the Texas Penal Code.

(b) The term "professional gambler" means a person who:

(1) has engaged in conduct in Texas proscribed by Title 10, Chapter 47, §§47.02, 47.03, 47.04, or 47.05 of the Texas Penal Code as the primary source of income. (The term "primary source of income" as used in this paragraph, means more than 50 percent of the person's income on an annual basis.); or

(2) has been convicted under the laws of any state, or governing jurisdiction outside of the United States of being a professional gambler, as defined by the law of that jurisdiction; or

(3) has, on three or more occasions been convicted of a gambling offense in any state or governing jurisdiction;

(c) In adopting the definitions in subsections (a) and (b) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct for which an exception to criminal prosecution applies, or any conduct for which a person may be entitled to an affirmative defense, including, but not limited to those affirmative defenses allowed under §47.09 of the Texas Penal Code.

(d) In adopting the definitions in subsections (a) and (b) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct which would be excepted from prosecution because the conduct was excepted from a definition under Texas Penal Code §47.01, which is essential to prosecution

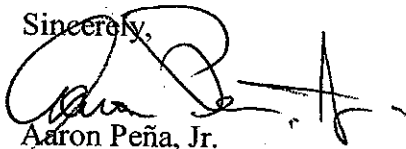
I believe that the adoption of the Commission's proposed new rule with divergent definitions of "gambling promoter" and "professional gambler" would contravene the plain meaning of those statutory terms as set out in the Bingo Enabling Act and is inconsistent with the term "professional gambler" as set out in the Texas Lottery Act and its associated rules. The ramifications of such "interpretive deviation" are of great significance to the State of Texas.

I seek your opinions regarding the following questions:

- (1) Whether the Commission's proposed Rule 402.104 is valid under the law?
- (2) Whether the Commission's proposed definitions of "gambling promoter" and "professional gambler" in Rule 402.104 conflict with the plain meaning of those terms as used in Tex. Occ. Code §2001.202(2) and §2001.207(2)?
- (3) Whether Tex. Occ. Code §2001.202(2) and §2001.207(2) refer to a person that has committed an unlawful act as set out in the Commission's proposed Rule 402.104?
- (4) Whether Tex. Occ. Code §2001.202(2) and §2001.207(2) only refer to a person whose actions or activity are limited to within the State of Texas as set out in the Commission's proposed Rule 402.104(a)(1) & (b)(1)?

Thank you for your consideration of this important matter. Please do not hesitate to contact me if you have any questions or need further information.

Sincerely,



Aaron Peña, Jr.
State Representative