GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
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Legal Counsel Division

MEMORANDUM

TO: **Jonathan Berman**
Assistant General Counsel
Alcoholic Beverage Regulation Administration

FROM: **Brian K. Flowers**
Deputy Attorney General
Legal Counsel Division

DATE: **October 25, 2019**

SUBJECT: **Legal Advice Concerning Whether "Dragon's Ascent" Machines are Gambling Devices (AL-19-696)**

This memorandum responds to your request that this Office provide legal advice to the Alcoholic Beverage Regulation Administration ("ABRA") on whether the Dragon's Ascent gaming machine is a gambling device under District and federal law. The Dragon's Ascent gaming machine contains no element of chance, and is therefore not a gambling device.

Background

Penn Social LLC, self-described as a "sports bar, arcade, & event venue" in the District,[1] and a holder of an ABRA license, has petitioned ABRA for approval to install Dragon's Ascent gaming machines, created by Pace-O-Matic, Inc. ABRA held a public hearing on the petition on October 9, 2019, at which representatives for Penn Social and Pace-O-Matic were present. As described to ABRA,[2] and stated and demonstrated at the public hearing, players insert cash up to $20 into the Dragon's Ascent machine, and attempt to capture dragons by shooting them. Players can earn money based on how selectively and effectively they shoot the dragons. As described in screen disclosures to the game:

> Each shot costs the amount in pennies displayed in the center of the gun turret.

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[1] Penn Social, https://www.pennsocialdc.com/ (last visited Oct. 18, 2019).
[2] Letter from Stephen J. O'Brien, counsel, Penn Social LLC, to ABRA (Sept. 6, 2019).

> You can increase the amount spent on each shot using the Power Up button. . . .
> Award values for a captured dragon are always a multiple of the total amount spent to capture that dragon. This means you can change your shot cost value at any time during play.
> . . . .
> The bigger and more powerful the dragon, the more he will be worth, but the harder he will be to capture (meaning, more shots must hit him).
> Capturing a dragon rewards you credit value. The minimum and maximum award possible is displayed on the accompanying award chart.
> Some dragons have special powers and provide special rewards, like Gold Rush, Free Shots or Super Multipliers.
> . . . .
> Your gun and the magic shots are constantly changing colors through a preset sequence. The dragons are presented in various colors that match a portion of the color cycle. If your shot is the same color as the dragon it hits, you maximize a special Color Match Bonus Award. The more shots that match, the higher the bonus when the dragon is captured. . . .
> The power of your shots can get a boost from the Shot Power vial to the left of the gun turret. When the vial is full, the shot has the greatest power. Combine Shot Power with Color Matching for the biggest awards and the least number of shots![3]

Essentially, players pay for a reservoir of shots to shoot dragons, then win money depending on how effectively they shoot the dragons among fourteen variables, such as color, shot power, and multipliers.[4] The game consists of seven fixed scenarios, which repeat and can be learned by an attentive player. A player can win back more money than the player put in. Dragon's Ascent does not utilize a random number generator or a compensating algorithm to change the odds of winning; the sequences and rewards are always fixed, and there is no element of chance in determining the player's reward per shot. Players may cash out at any time and receive the cash value of their credits from the establishment operator. The game comes in smaller two-person cabinets or larger eight-person tables.

Counsel for Penn Social represented at the ABRA hearing that it would have a number of safeguards in place to ensure the proper and controlled operation of the machines in the District.

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[3] Letter from Thomas F. Fricke, attorney, to B. Greg Cline, General Counsel, Pace-O-Matic Inc. 7-8 (March 27, 2019) (attached as part of the Letter from Stephen J. O'Brien, *supra* note 2).

[4] An expert synopsis described the Dragon's Ascent variables as follows:

> The *Cross-Fire Skill Dragon Master System* contains fourteen features that the participant must manage to score and win effectively. They are as follows: (1) Aim and Shoot; (2) Lock-On; (3) Color Cycles; (4) Shot Power (A Volatility Enhancement Script); (5) "Health Power"; (6) the "Super Multiplier"; (7) the "Follow Me" target; (8) the "Treasure Chest" target; (9) the "Gold Rush" target; (10) the "Shadow Dragon" obstacle target; (11) the missed shot return of credits; (12) the "Stolen Capture" return of credits; (13) the return of credits when a target leaves the playfield without capture; and (14) the "Free Shot" feature.

Letter from Nick Farley, President, Nick Farley & Assocs., to Thomas F. Fricke, attorney 2-3 (April 19, 2019) (attached as part of the Letter from Stephen J. O'Brien, *supra* note 2).

Penn Social requires persons to be 21 years of age or older to be admitted to its venue.[5] Pace-O-Matic would have a dedicated enforcement team of former Metropolitan Police Department officers to ensure that the machines are licensed and operating properly, and an application to scan unique codes on each device to immediately determine whether the device is licensed. Each institution would be limited to a total of 3 machines or 16 playable stations.

Given that players can win back more money than they put in, Penn Social and Pace-O-Matic were questioned as to how they would make any money off of the game. Counsel for Penn Social responded that the games were profitable based on volume; the games themselves made some money but not a lot, and the establishments operating the games saw increases of approximately 20% in food and beverage spending with the games on site. Counsel further stated that the games returned between 60 to 95% of the money spent back to players in winnings.

Pace-O-Matic recently had games approved for use by Virginia and Pennsylvania authorities, on the grounds that they were predominantly games of skill.[6] However, the Dragon's Ascent game presented is distinct from those games, and purports to be a 100% skill game, with no element of chance. According to counsel for Penn Social, Dragon's Ascent machines have been approved by the relevant authorities and are operating in Florida, Nebraska, and Texas, and have been approved for use in Hawaii and Kansas.

At issue in the ABRA hearing were: 1) whether installing the Dragon's Ascent game at Penn Social would substantially change the nature of the operation of the licensed establishment under D.C. Official Code § 25-762; and 2) whether the Dragon's Ascent game constitutes an illegal gambling device under District and federal law. We address the question of whether the Dragon's Ascent game is an illegal gambling device.

Analysis

I. Gambling Laws in the District

Gambling devices are forbidden in the District by both a local act of Congress[7] and the federal Johnson Act.[8] D.C. Official Code § 22-1704 provides that "[w]hoever shall in the District set up or keep . . . any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, . . . shall be punished by

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[5] In instances where Penn Social was rented out for special events involving persons under the age of 21, Penn Social represented that it would cover up the machines and not allow them to be operated.

[6] *See In re Pace-O-Matic, Inc. Equipment,* No. M.D. 965-2013, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203 (Beaver Cnty., Pa. Ct. Common Pleas Dec. 13, 2014); Letter from Thomas W. Kirby, Deputy Chief, Department of Alcoholic Beverage Control, Commonwealth of Va., to Jeffrey L. McGinness, Pace-O-Matic (July 7, 2017). *But see* Kimberly Pierceall, *Tic-Tac-No? Queen of Virginia games banned in Charlottesville*, The Virginian-Pilot (June 18, 2019, 11:30 AM), https://www.pilotonline.com/business/article_ddbebf50-8ee3-11e9-b71d-d784feab79fb.html (Charlottesville Commonwealth Attorney declaring Pace-O-Matic games to be illegal gambling devices).

[7] An Act To establish a code of law for the District of Columbia, effective March 3, 1901 (31 Stat. 1331; D.C. Official Code § 22-1704 *et seq.*).

[8] An Act To Prohibit transportation of gambling devices in interstate and foreign commerce, effective January 2, 1951 (64 Stat. 1134; 15 U.S.C. § 1171 *et seq.*).

imprisonment . . . and . . . may be fined." "Gambling device" is not defined, although "gaming table" is. D.C. Official Code § 22-1707 provides that "[a]ll games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of §§ 22-1704 to 22-1706; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against."

In *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944), the court expounded upon the intent and elements of the prohibition on gambling devices in the District:

> [T]he purpose of Congress in the enactment of the local law was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward. Hence it is obvious that a crap table, a dice table, a horse race device, keno, a lottery, book making, or a six-wheel or a chuck-a-luck table or a faro table, at which money is bet and won or lost, are all gambling devices as are also many other like schemes or devices. But in all the primary consideration in this jurisdiction is whether the machine or device, whatever its scope or nature, is the inducing cause to gambling for money or property. To gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a gambling device is . . . whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property. The elements, chance and money or property, are therefore fundamental ingredients.

Id. at 98. Although "gambling device" is not expressly defined, *Washington Coin* makes clear that the test in determining whether something is a gambling device is whether it is designed for the purpose of playing a game of chance for money or property.[9]

In *Boosalis v. Crawford*, 99 F.2d 374 (D.C. Cir. 1938), the court established the standard for when a game is considered a game of chance in the context of "claw machines." Claw machine players could move the claw over the top of prizes, the machine would then lower the claw, and the players would get the prize if the claw picked it up. *Id.* at 375-76. The lower court had found that "in respect of a player . . . , except to the extent that he could, by turning the locator-handle, suspend the claw in the vicinity of a desired article, the operation of the machine was beyond his control." *Id.* at 376. The court held that even on the assumption that "skill played a part in suspending the claw in the vicinity of a desired article, . . . on the whole of the operation of the machines . . . , chance predominated over skill or was present in such manner as to thwart the exercise of skill. Under such facts, the device operates as a game of chance." *Id.* The test established in *Boosalis* for whether a game is a game of chance is thus whether chance predominates over skill, or thwarts the exercise of skill.

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[9] *See also Nat'l Conference on Legalizing Lotteries v. Farley,* 96 F.2d 861, 863 (D.C. Cir. 1938) ("[A] lottery is composed of three elements: Prize, consideration, and chance. The first two may exist in a game of skill; the last always converts the contest into a lottery or a gamble. The question then is whether the winning of the prizes under the instant scheme depends upon chance.").

In addition to local District laws, the federal Johnson Act bars the possession or use of gambling devices in the District. The Johnson Act provides that "[i]t shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia." 15 U.S.C. § 1175(a). It defines "gambling device" as "any other machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property." 15 U.S.C. § 1171(a)(2).[10] "In the District of Columbia, . . . the Johnson Act makes it unlawful to 'possess' or 'use' any 'gambling device.'" *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n,* 14 F.3d 633, 635 n.3 (D.C. Cir. 1994); *see also Brizill v. D.C. Bd. of Elections & Ethics,* 911 A.2d 1212, 1215 (D.C. 2006) ("[S]ection 1175 of the Johnson Act . . . clearly applies to the District of Columbia.").

In construing whether something is a gambling device under the Johnson Act, the court in *United States v. 24 Digger Merch. Machines*, 202 F.2d 647 (8th Cir. 1953), stated that "comparison of the elements of chance and skill is immaterial. The statute refers to a machine so designated that it will deliver property 'as the result of the application of an element of chance'. Where a substantial element of chance is involved, . . . the fact that skill in operating the particular machine is helpful in attaining the end sought does not take the machine out of the type defined by the statute." *Id.* at 650-51. Under the Johnson Act, every gaming machine whose outcome involves a substantial element of chance is a gambling device, regardless of the degree of skill required to win.

In summary, a device is a gambling device that violates D.C. Official Code § 22-1704 if chance predominates over skill or thwarts the exercise of skill, and is a gambling device that violates the Johnson Act if it relies on a substantial element of chance. These standards overlap significantly, and have been used in the same contexts;[11] a game must satisfy both to be legal in the District.

II. Cases Interpreting Other Games

In a previous memorandum, we surveyed recent court decisions on what constituted a game of skill.[12] We briefly reiterate some of the relevant holdings discussed in that memorandum, but note that the Dragon's Ascent game is qualitatively different from those games.

In *Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 72 A.D.3d 1144 (N.Y. 2010), the court considered a two-stage game where players had one second to select a symbol to solve a puzzle

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[10] At least since the enactment of the Indian Gaming Regulatory Act, approved October 17, 1988 (102 Stat. 2467; 25 U.S.C. § 2701 *et seq.*) ("IGRA"), the definition of "gambling device" in the Johnson Act includes electronic versions of games of chance. *See* 25 C.F.R. § 502.8 ("*Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game . . . ."); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) ("[C]omplete, self-contained electronic or mechanical facsimiles of a game of chance . . . may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . ." (citing 25 C.F.R. § 502.8)); *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 827 F. Supp. 26, 31 (D.D.C. 1993) ("[I]t is plainly evident that IGRA's 'facsimiles' are the Johnson Act's 'gambling devices.'").

[11] *See, e.g., United States v. 10, More or Less, Digger Machines,* 109 F. Supp. 825 (E.D. Mo. 1952) (applying the *Boosalis* analysis to the Johnson Act).

[12] Memorandum from Arthur J. Parker, Acting Deputy Attorney General, Legal Counsel Division, Office of the Attorney General, to Jonathan Berman, Assistant General Counsel, ABRA (Feb. 14, 2019).

and win 104% of the money deposited, and then played a second puzzle-solving stage where the prizes were randomly determined. *Id.* at 1144-45. The court found that it was a game of chance, as "[w]hile solving the puzzle in any phase may require skill, the outcome in the post-Moxie phase—which includes the amount of the prize—'depends in a material degree upon an element of chance.' The prize is selected at random by the machine . . . ." *Id.* at 1146.

In *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6 (Iowa 2018), the court addressed nudge-style games where three reels are spun in a pattern determined by the machine, and players had to "nudge" one of the wheels up or down to complete the pattern. *Id.* at 10. The devices had a payout structure that could be set between 92% and 98%, but positive prizes were only available in less than 1/3 of the outcomes, and a player with perfect skill would still steadily lose at least 2% of the time. *Id.* The court held that the games were gambling devices, because "whether a player wins on the Superior Skill games relies primarily more on chance than on skill or knowledge," and even "with perfect skill and knowledge, a player cannot win every time." *Id.* at 18.[13]

In contrast, in *Am. Amusements Co. v. Neb. Dep't of Revenue*, 807 N.W.2d 492 (Neb. 2011), the court upheld a version of a video "tic-tac-toe" game[14] on the grounds that it required skill and "a winning combination is possible with respect to each puzzle." *Id.* at 495. In that case, players had a short amount of time to solve the puzzle, and the court upheld a finding that "the puzzles were not presented so fast that a player could not exercise skill in the selection of the puzzle to be played," and thus "[t]he selection of the puzzle is thus determined by player skill, not by chance." *Id.* at 503-04. The state also argued that the game was "determined by chance because of the infrequent presentation of winning puzzles," where "'[w]inning' in this context means a puzzle that pays the player more credits than the player puts at risk." *Id.* at 504. The court rejected that argument, finding that although "[t]he odds of coming away with more money than a player risks on a puzzle are remote"[15] and "a player must exert considerable patience while waiting for the 'winning' puzzles to appear," "[n]evertheless . . . Bankshot is more controlled by the player than not, and thus is predominantly a game of skill." *Id.*

Generalizing from these cases, even if a game involves some element of skill, it will be found to be a gambling device if the prizes are determined by elements of chance. If it is possible for a perfectly skilled player to win every time, then the game is not a gambling device.

III. Conclusions

The test for whether something is a gambling device under D.C. Official Code § 22-1704 as stated in *Boosalis* is whether "chance predominated over skill or was present in such manner as to thwart the exercise of skill." 99 F.2d at 376. The interpretation of the Johnson Act in *24*

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[13] *See also Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 762 S.E.2d 666, 686 (N.C. Ct. App. 2014 (Ervin, J., dissenting), *rev'd*, 773 S.E.2d 55 (N.C. 2015) (adopting dissenting opinion)) ("The machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits.").

[14] *See generally Am. Amusements,* 807 N.W. 2d at 495 (describing the tic-tac-toe game).

[15] "Of the 10,325 puzzles in Table A, 1,187 pay more than the credits put at risk on the puzzle. That number is 155 in Table B and 12 in Table C." *Id.* at 504.

Digger Merch. Machines, although it is an Eighth Circuit case and not directly binding on the District, held that "comparison of the elements of chance and skill is immaterial" and that a device is a gambling device whenever "a substantial element of chance is involved." 202 F.2d at 650-51.

According to the information presented to ABRA and the representations made at the hearing, there is no element of chance anywhere in the Dragon's Ascent game. Rather, the game appears to make money by layering a complex series of variables and requiring more patience than the average game player is likely to demonstrate. Still, it is possible for a player to "win" or make money every single time, if the player is dedicated and patient enough. No part of the outcome of Dragon's Ascent is dependent on chance; the player's reward for each shot is a direct factor of the player's choices and the fixed game algorithm. As stated in *Washington Coin,* "the elements, chance and money or property, are therefore fundamental ingredients" of a gambling device, 142 F.2d at 98, and the element of chance is not present in the Dragon's Ascent game. Accordingly, the Dragon's Ascent game, as described and presented to ABRA, is not a gambling device in violation of D.C. Official Code § 22-1704 or the Johnson Act.

If you have any questions about this memorandum, please contact Matt James, Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5565.

BKF/mdj