

**OPINION NO. 90-032****Syllabus:**

1. The Department of Liquor Control may, pursuant to R.C. 4303.20 and 6 Ohio Admin. Code 4301:1-1-53(D), issue a temporary F permit to a charitable organization, as defined in R.C. 2915.01(H), that sponsors and conducts, for fund-raising purposes, wagering upon videotaped horse races, provided such organization, in conducting and supervising such wagering, complies with each of the conditions and requirements set forth in R.C. 2915.02(D)(2)(a)-(e), and provided, further, that no person receives any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of such wagering.
2. The Department of Liquor Control may, pursuant to R.C. 4303.202 and 6 Ohio Admin. Code 4301:1-1-53(D), issue a temporary F-2 permit to a charitable organization, as defined in R.C. 2915.01(H), that sponsors and conducts, for fund-raising purposes, wagering upon videotaped horse races, provided such organization, in conducting and supervising such wagering, complies with each of the conditions and requirements set forth in R.C. 2915.02(D)(2)(a)-(e), and provided, further, that no person receives any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of such wagering.

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**To: John R. Hall, Director, Department of Liquor Control, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 25, 1990**

You have requested my opinion regarding wagering on videotaped horse races as a fund-raising activity by organizations that have applied to the Department of

Liquor Control for temporary F or F-2 liquor permits. Your letter states as follows:

With increasing frequency the Department of Liquor Control has been receiving applications for temporary F or F-2 liquor permits from organizations desiring to hold fundraisers centered around wagering on videotaped horse races. In general, a promoter will contact the organization offering to provide, for a set fee, videotapes of actual horse races. Participants place their bets on the number of the horse they believe will win the race without any additional information being provided about the horses or the race. Those selecting the winning horse receive a cash prize. I have enclosed promotional materials which more fully describe the activity.

Liquor Control Commission Rule 4301:1-1-53 in essence prohibits gambling on liquor permit premises which is not expressly permitted by law. Revised Code Section 2915.02 allows the conducting of certain schemes or games of chance by charitable organizations exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code. Conditions under which games of chance may be conducted are more restrictive than those for schemes of chance.

Additionally, Revised Code Chapter 3769 sets out, inter alia, the conditions under which pari-mutuel wagering on horse racing is permitted. Legislation was introduced in the 117th General Assembly (H.B. 386) which would have permitted pari-mutuel wagering on live telecasts of horse races conducted in Ohio; however, this legislation was not enacted. It is unclear, given the provisions of Chapter 3769, whether pari-mutuel wagering on videotaped horse races is permissible regardless of whether such are considered games or schemes of chance.

In light of the foregoing, you have asked the following question: "Does Ohio law permit pari-mutuel wagering on videotaped horse races, and, if so, by whom and under what conditions?"

Although your specific question asks about the legality of pari-mutuel wagering on videotaped horse races generally, a member of your staff has informed me that you would like me to address that question within the context of the particular fund-raising activity described in your letter in order that the Department of Liquor Control will be better able to make an informed judgment of whether it may, in accordance with R.C. 4303.20, R.C. 4303.202, and 6 Ohio Admin. Code 4301:1-1-53(D), issue temporary F or F-2 liquor permits to qualifying organizations that sponsor or engage in such activity. In that regard R.C. 4303.20 states that a permit F may be issued to any charitable organization to sell beer for a period lasting not to exceed five days, and that the special function for which such a permit is issued shall include social, recreational, benevolent, charitable, fraternal, political, patriotic, or athletic purposes, but shall not include any function the proceeds of which are for the profit or gain of any individual. R.C. 4303.202 further authorizes the issuance of an F-2 permit, to be effective for no more than forty-eight consecutive hours, to a not for profit association or corporation to sell beer or intoxicating liquor by the individual drink at an event to be held on premises in a political subdivision or parts thereof where the sale of beer or intoxicating liquor on that day is otherwise permitted by law. R.C. 4303.202(A). Such not for profit association or corporation must be operated for a charitable, cultural, fraternal, or educational purpose. *Id.*

On the other hand, rule 4301:1-1-53 imposes certain limitations and restrictions with respect to conducting on liquor permit premises activities that are proscribed as criminal gambling offenses by the provisions of R.C. Chapter 2915 (gambling). Thus, subdivision (A) of rule 4301:1-1-53 generally provides that conviction in any court of competent jurisdiction of any holder of any permit, or of his agent or employee, or of any person, for keeping, exhibiting for gain, operating gambling devices, or conducting or permitting on such premises any games of chance, shall be grounds for suspension or revocation of such permit or permits. Subdivision (B) of rule 4301:1-1-53 provides more specifically that no person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the

permit holder any gambling device as defined in R.C. 2915.01(F) which is or has been used for gambling offenses as defined in R.C. 2915.01(G).<sup>1</sup> However, an important qualification to the prohibition set forth in subdivision (B) with respect to charitable organizations appears in subdivision (D) of the rule. That qualification states that rule 4301:1-1-53

shall not be construed to prohibit a game or contest sponsored and conducted in accordance with division (D) of section 2915.02 of the Revised Code, provided that such game or contest strictly complies with all of the provisions of division (D) of section 2915.02 of the Revised Code and shall not prohibit the conducting of schemes of chance and certain games of chance by charitable organizations as defined in division (H) of section 2915.01 of the Revised Code so long as there is strict compliance with division (D) of section 2915.02 of the Revised Code.

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<sup>1</sup> R.C. 2915.01 states, in part, as follows:

As used in sections 2915.01 to 2915.12 of the Revised Code:

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(F) "Gambling device" means:

- (1) A book, totalizer, or other equipment for recording bets;
- (2) A ticket, token, or other device representing a chance, share, or interest in a scheme of chance, except a charitable bingo game, or evidencing a bet;
- (3) A deck of cards, dice, gaming table, roulette wheel, slot machine, punch board, or other apparatus designed for use in connection with a game of chance;
- (4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes.

(G) "Gambling offense" means any of the following:

- (1) A violation of section 2915.02, 2915.03, 2915.04, 2915.05, 2915.06, 2915.07, 2915.08, 2915.09, 2915.10, or 2915.11 of the Revised Code;
- (2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States substantially equivalent to any section listed in division (G)(1) of this section;
- (3) An offense under an existing or former municipal ordinance or law of this or any other state or the United States, of which gambling is an element;
- (4) A conspiracy or attempt to commit, or complicity in committing any offense under division (G)(1), (2), or (3) of this section.

(H) "Charitable organization" means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, senior citizen's, youth athletic, or youth athletic park organization. An organization is tax exempt if the organization is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding either the making of an application for a bingo license under section 2915.08 of the Revised Code or the conducting of any scheme of chance or game of chance as provided in division (C) of section 2915.02 of the Revised Code.

R.C. 2915.02, to which rule 4301:1-1-53(D) refers, proscribes as criminal offenses the gambling activities therein enumerated that are carried on as a business, or for personal gain or profit. See R.C. 2915.02(A)(1)-(5). R.C. 2915.02 thus states, for example, that no person shall "[e]stablish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit," R.C. 2915.02(A)(2), or "[e]ngage in betting or in playing any scheme or game of chance, except a charitable bingo game, as a substantial source of income or livelihood," R.C. 2915.02(A)(4). See R.C. 2915.01(C)-(E) (defining respectively "[s]cheme of chance," "[g]ame of chance," and "[s]cheme or game of chance conducted for profit," as used in R.C. 2915.01-.12). R.C. 2915.02(D) further states, however, that R.C. 2915.02 does not apply to schemes of chance and games of chance conducted by tax exempt charitable organizations in accordance with the guidelines and conditions delineated in R.C. 2915.02(D)(1) and R.C. 2915.02(D)(2) respectively.

For the purpose of this opinion, therefore, I shall confine my analysis and discussion of this matter to the question of whether Ohio law permits wagering on videotaped horse races as a fund-raising activity in the manner and circumstances described in both your letter and in the promotional materials for such activity that you have included therewith. In that regard, the promotional materials indicate that the wagering in question ordinarily comprises one aspect of a larger fund-raising and entertainment event that may also include dinner and dancing, or other forms of entertainment. Charitable organizations typically hold these fund-raising events either at their own banquet or social halls, or at other private or public facilities that they rent or lease. Thus, the wagering that is conducted in conjunction with these social events occurs neither at a race track of a person who holds a permit issued by the State Racing Commission authorizing that person to conduct horse racing, nor under the supervision of such a permit holder. The promoter of this fund-raising activity does, however, provide each organization with appropriate fixtures and related furnishings that, when assembled, are intended to simulate the appearance of the pari-mutuel window setting that one would find at a horse racing track where such wagering is permitted.<sup>2</sup> For each race a patron may purchase a ticket that corresponds to the horse that he believes will win that race. If the horse he has selected wins, the patron is awarded a cash prize of a predetermined amount.

The first question that must be resolved with respect to your request is whether the fund-raising activity at issue here, insofar as it utilizes certain aspects of both horse racing and pari-mutuel wagering, is governed by the provisions of R.C. Chapter 3769. R.C. Chapter 3769 addresses the regulation of horse racing in Ohio,

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<sup>2</sup> The production company whose promotional letter accompanies your request entitles its particular program "A Night With the Pacers." The letter further describes that program, and its actual operation, as follows:

A NIGHT WITH THE PACERS is UNLIKE ANY OTHER PROGRAM OF IT'S [sic] KIND. It is best described as "THE GAME SHOW OF HARNESS RACING". Our PROFESSIONAL MULTI-MEDIA EVENT consists of 10 RACES with each RACE having 8 HORSES in the field. The program is PERSONALIZED, that is to say, ALL OF THE HORSES ARE OWNED AND NAMED BY PATRONS OF YOUR ORGANIZATION. The patron's name is printed in the "RACE PROGRAM" next to the name of their respective horse(s), the PERSONALIZATION FACTOR now comes into perspective. As the HORSES race around the track (on our GIGANTIC 9' x 12' motion picture screen) a RACE ANNOUNCER will "LIVE CALL" each of the horses BY THE NAMES your patrons have given them. This "LIVE CALL" technique, combined with an EXCITING FULL COLOR TWO MINUTE HARNESS RACE, creates such a FRENZY that your audience will actually have the realistic sensation of being "AT THE TRACK"! It should be noted that...HARNESS RACES are TWO MINUTES LONG and are utilized rather than THOROUGHBREDS (:30 seconds long) because it allows the RACE ANNOUNCER the time to "CALL THE FIELD" 3 or 4

and certain activities that are conducted in conjunction therewith, the most notable being pari-mutuel betting or wagering. R.C. 3769.01 states, in pertinent part, that no person, association, corporation, or trust shall hold, conduct, assist, or aid and abet in holding or conducting any meetings, at which horse racing is permitted for any stake, purse, or award "unless such person, association, corporation, or trust secures a permit to conduct a horse-racing meeting and complies with sections 3769.01 to 3769.14 of the Revised Code." R.C. 3769.02 establishes the State Racing Commission as the governmental agency responsible for ensuring proper compliance with the permit requirement of R.C. 3769.01 and administering and enforcing the other provisions of R.C. Chapter 3769 that pertain thereto. R.C. 3769.03 further recites in that regard the general duties, powers, and responsibilities that are conferred upon the State Racing Commission. As pertains herein, R.C. 3769.03 states that the State Racing Commission "shall prescribe the rules and conditions under which horse racing may be conducted, and may issue, deny, suspend, diminish, or revoke permits to conduct horse racing as authorized by [R.C. 3769.01-.14]," and "may prescribe what forms of wagering are permissible, the number of races, the procedures on wagering, and the wagering information to be provided to the public."<sup>3</sup> See R.C. 3769.04 (application procedure for horse racing permit); R.C. 3769.05 (horse racing permit fee); R.C. 3769.06 (issuance, suspension, or revocation of horse racing permit); R.C. 3769.07 (horse racing permit restrictions; displaying and exhibiting permit).

R.C. 3769.08 addresses in greater detail wagering upon horse races that are conducted by persons who have been issued permits to hold such races by the State Racing Commission, and expressly authorizes such wagering in the manner and upon the conditions therein stated. R.C. 3769.08(A) reads as follows:

Any person holding a permit to conduct a horse-racing meeting may provide a place in the race meeting grounds or enclosure at which the permit holder may conduct and supervise the pari-mutuel system of wagering by patrons of legal age *on the horse races conducted by such permit holder.*

Such pari-mutuel method of wagering *upon the horse races held at or within such race track*, and at the time of such horse-racing meeting shall not be unlawful. No other place, except that provided and designated by the permit holder, nor any other method or system

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times, rather than ONLY once, thereby, stimulating the audience to a FRENZY OF EXCITEMENT!

The letter also states that the foregoing program "comes complete" with the following equipment and fixtures:

1. 10 FULL COLOR RACES
2. 9'X12' or 8'X8' or 6'X6' SCREEN
3. 400 WATT THEATRE SOUND SYSTEM
4. MULTI-MEDIA SOUND/SLIDE SYSTEM
5. SOUND EFFECTS, BACKGROUND MUSIC
6. HIGH INTENSITY ARC LAMP MOTION PICTURE PROJECTION SYSTEM
7. FULLY DRAPED AND COVERED PROJECTION TABLE
8. UP TO 48' PARI-MUTUEL WINDOW COMPLEX, DRAPED WITH SIGNS, AND 116' OF 4-CHANNEL CHASER LIGHTS SURROUNDING THE WINDOWS
9. 10 - 12" ENGRAVED TROPHIES
10. 100 - 8 1/2" X 11" IMPRINTED 3 COLOR FLIERS
11. 10 - 11" X 22" 2-COLOR POSTERS
12. ALL PARI-MUTUEL TICKETS (SAMPLE ATTACHED)
13. PRINTED PROGRAM TEMPLATE (FORMAT)
14. ALL RELATED TRAVEL EXPENSES (Emphasis in original.)

<sup>3</sup> Such rules have been promulgated by the State Racing Commission, and appear at 5 Ohio Admin. Code Chapters 3769-1 through 3769-18.

of betting or wagering, except the pari-mutuel system, shall be used or permitted by the permit holder; nor, except as provided in section 3769.089 of the Revised Code, shall the pari-mutuel system of wagering be conducted by the permit holder on any races except the races at the race track, grounds, or enclosure for which the person holds a permit. Each permit holder may retain as commission an amount not to exceed eighteen per cent of the total of all moneys wagered. (Emphasis added.)

With one exception, therefore, R.C. 3769.08(A) limits the conducting of pari-mutuel wagering to horse races that are run at the race track, grounds, or enclosure of a person who holds a horse racing permit. The single exception is that provided for in R.C. 3769.089, which states that the State Racing Commission shall, upon request by any permit holder, "permit electronically televised simulcasts of horse races at the permit holder's enclosure on racing days authorized by the permit holder's permit during the hours on a racing day when racing is being conducted pursuant to the permit holder's permit." Such televised simulcasts may be of horse races conducted at facilities either inside or outside Ohio, but such televised simulcasts at the enclosure of a permit holder who is authorized to conduct thoroughbred, harness, or quarter horse racing shall be limited to races that actually occur "on that racing day." *Id.* Finally, R.C. 3769.089 also authorizes a permit holder to "conduct and supervise pari-mutuel wagering on any horse race so televised, under the same conditions as it conducts and supervises pari-mutuel wagering on other races as authorized by [R.C. Chapter 3769]."

It is apparent that the fund-raising activity with which you are concerned does not come within the purview of either R.C. 3769.08 or R.C. 3769.089, and thus is not subject to the regulatory jurisdiction of the State Racing Commission. R.C. 3769.08 and R.C. 3769.089 authorize and regulate pari-mutuel wagering that occurs in conjunction with (1) live horse races conducted at or within the race track, grounds, or enclosure of an Ohio horse racing permit holder, R.C. 3769.08, and (2) live horse races that occur at or within the race track, grounds, or enclosure of an Ohio horse racing permit holder by way of an electronically televised simulcast, on racing days authorized by the permit holder's permit during the hours on a racing day when racing is being conducted pursuant to the permit holder's permit. See *Grandview Raceway v. Limbach*, 47 Ohio St. 3d 57, 57, 547 N.E.2d 971, 971 (1989) (addressing a question regarding the horse racing tax levied by the provisions of R.C. 3769.08 and R.C. 3769.089, and noting that "[a] simulcasted race is a 'live' race of some stature run at another track and televised for the patrons present at the recipient track. It is listed on the recipient track's program and becomes a part of that track's program"). R.C. 3769.08 and R.C. 3769.089 do not, therefore, apply to any wagering activities that occur other than in conjunction with live horse races. As pertains herein, for example, R.C. 3769.08 and R.C. 3769.089 do not govern or otherwise regulate wagering upon horse races that are presented to betting patrons by way of a film or videotape format. Accordingly, charitable organizations that sponsor or conduct for fund-raising purposes wagering upon videotaped horse races are not, by so doing, subject to the conditions and requirements of R.C. Chapter 3769 that pertain to pari-mutuel wagering on horse races.

The remaining inquiry, therefore, is whether the foregoing fund-raising activity is otherwise permitted by the terms of R.C. 2915.02(D) and 6 Ohio Admin. Code 4301:1-1-53(D). If so, then the Department of Liquor Control may issue temporary F or F-2 permits to qualifying organizations that sponsor that activity. In that regard, rule 4301:1-1-53(D) states that rule 4301:1-1-53's prohibitions against gambling on liquor permit premises shall not be construed to prohibit the "conducting of schemes of chance and certain games of chance by charitable organizations as defined in [R.C. 2915.02(H)] so long as there is strict compliance with [R.C. 2915.02(D)]." (Emphasis added.)

R.C. 2915.02(D) reads in turn as follows:

[2915.02] does not apply to:  
(1) *Schemes of chance* conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the

organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the internal revenue code, provided that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code;

(2) *Games of chance*, if all of the following apply:

(a) The games of chance are not craps for money, roulette for money, or slot machines;

(b) The games are conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(c) The games are conducted at festivals of the organization that are conducted for a period of four consecutive days or less and not more than twice a year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games or on premises leased from a governmental unit;

(d) All of the money or assets received from these games of chance after deduction only of prizes paid out during the conduct of the games of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(e) The games are not conducted during, or within ten hours of, a bingo game conducted for amusement only pursuant to section 2915.12 of the Revised Code.

No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any scheme or game of chance. (Emphasis added.)

Thus, schemes of chance and games of chance may be conducted by charitable organizations in the manner and upon the conditions set forth in R.C. 2915.02(D)(1) and R.C. 2915.02(D)(2) respectively. Common to both are several requirements: (1) such schemes or games of chance may be conducted only by charitable organizations that have received from the Internal Revenue Service currently effective determination letters stating that those organizations are exempt from federal income taxation under I.R.C. §501(a) and described in I.R.C. §501(c)(3); (2) all money or assets received from such schemes or games of chance, after deduction only of prizes paid out in connection therewith, must be used by, or given, donated, or otherwise transferred to, any organization that is described in I.R.C. §509(a)(1), (2), or (3), and is either a governmental unit or an organization that is exempt from federal income taxation under I.R.C. §501(a) and described in I.R.C. §501(c)(3); and (3) such schemes or games of chance may not be conducted during, or within ten hours of, a bingo game that is conducted for amusement purposes only pursuant to R.C. 2915.12. R.C. 2915.02(D)(2) further imposes certain restrictions with respect to games of chance that do not otherwise apply in the case of schemes of chance that are conducted pursuant to R.C. 2915.02(D)(1). In that regard, games of chance may not be craps for money, roulette for money, or slot machines, R.C. 2915.02(D)(2)(a); and must be conducted at festivals of the charitable organization conducted for a period of four consecutive days or less and not more than twice a year, and upon premises either owned by the organization for a period of no less than one year immediately preceding the conducting of the game of chance or leased

from a governmental unit, R.C. 2915.02(D)(2)(c). Finally, the concluding paragraph of R.C. 2915.02(D) expressly prohibits the receipt of any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, by any person for operating or assisting in the operation of any scheme or game of chance. Cf. R.C. 4303.20 (a special function of a charitable organization for which a temporary F permit is issued shall not include any function the proceeds of which are for the profit or gain of any individual). See also R.C. 1.59(C) (the term "[p]erson," as used in any statute, unless another definition is provided in such statute or a related statute, includes an "individual, corporation, business trust, estate, trust, partnership, and association").

R.C. 2915.01 defines the terms "[s]cheme of chance" and "[g]ame of chance," as used in R.C. 2915.01-12, as follows:

(C) "Scheme of chance" means a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.

(D) "Game of chance" means poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance.

Accordingly, if the wagering activity in question constitutes a "[s]cheme of chance," as defined in R.C. 2915.01(C), then the charitable organizations that sponsor such activity must satisfy the requirements described in R.C. 2915.02(D)(1). If the wagering activity in question constitutes a "[g]ame of chance," as defined in R.C. 2915.01(D), then the charitable organizations that sponsor such activity must satisfy the requirements described in R.C. 2915.02(D)(2). Further, in either case no person is to receive, directly or indirectly, any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation for operating or assisting in the operation of such scheme or game of chance.<sup>4</sup> Provided there is strict compliance with the foregoing requirements of R.C. 2915.02(D), including that pertaining to the receipt of any form of compensation by any person for operating or assisting in the operation of a scheme or game of chance, the Department of Liquor Control may, in accordance with the terms of R.C. 4303.20, R.C. 4303.202, and rule 4301:1-1-53(D), issue those organizations temporary F or F-2 permits.

In this instance, I am inclined to classify the wagering activity in question as a game of chance for purposes of R.C. 2915.02(D). R.C. 2915.01(C) defines a "[s]cheme of chance" as a "lottery, numbers game, pool, or other scheme in which a participant gives a valuable *consideration* for a *chance* to win a *prize*." (Emphasis added.) R.C. 2915.01(D) in turn defines a "[g]ame of chance," in pertinent part, as a "game in which a player gives anything of *value* in the hope of *gain*, the outcome of which is determined largely or wholly by *chance*." (Emphasis added.) Thus, a "[s]cheme of chance" and a "[g]ame of chance," as defined in R.C. 2915.01(C) and R.C. 2915.01(D) respectively, share the elements of valuable consideration, chance, and gain or prize. The single feature that distinguishes a game of chance from a scheme of chance appears to be a certain element of either choice, or skillful participation, albeit unspecified, on the part of the bettor, which is present or occurs in conjunction with, or as part of, the event or action that is the

<sup>4</sup> According to the materials that accompany your opinion request, charitable organizations generally agree to pay a set fee for their use of the equipment and furnishings that are necessary to conduct this particular wagering activity, as well as for any personal assistance or services that are offered with respect thereto. Receipt of such a fee appears to contravene R.C. 2915.02(D)'s prohibition against the receipt by any person, directly or indirectly, of any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation for operating or assisting in the operation of a scheme or game of chance, and arguably implicates R.C. 4303.20's directive that a temporary F permit shall not be issued for any function the proceeds of which are for the profit or gain of any individual.



subject of such person's wager. In *State v. Beane*, 52 Ohio Misc. 115, 118, 370 N.E.2d 793, 795 (Mun. Ct. Franklin County 1977), for example, the court states the following with respect to the definitions that appear in R.C. 2915.01(C) and (D):

If there is any recurring feature that separates "scheme of chance" from "game of chance" in this court's analysis, it would seem to lie in an element of control, sometimes nebulous, on the part of the participant.

In a "scheme" the player has no apparent conscious control over his input. He buys his ticket or slip in the blind as to the potential result of that purchase. On the other hand, in a "game" such as craps for money, or roulette, the participant can make his bet selectively and base that selection upon a calculation of ascertainable odds. Even on a punch board operation, the player may choose the area on the board where his choice may be dictated by a hunch or guess.

If these be valid criteria, then it is clear that the Legislature did intend to discriminate between scheme and game with the possible effect of screening out the potential attraction of professional gambling to the charitable purposes contemplated in R.C. Chapter 2915.

*Cf., e.g., Garono v. State*, 37 Ohio St. 3d 171, 175, 524 N.E.2d 496, 500 (1988) ("[t]he fact that an element of skill may be involved in a game does not override the fact that elements of chance exist and, therefore, the game can be classified as a game of chance"); *Progress Vending, Inc. v. Department of Liquor Control*, 59 Ohio App. 2d 266, 394 N.E.2d 324 (Franklin County 1978) (syllabus) ("[a] gaming device which allows the outcome of its operation to be determined largely by the skill of the user does not constitute a 'game of chance' as defined by 2915.01(D) and its possession or display does not violate R.C. 2915.02, effective January 1, 1974"). The wagering activity at issue here does appear to involve elements of control and choice on the part of each bettor sufficient to warrant a characterization of that activity as a game of chance. In that regard each bettor may, for each race, choose from among a field of several horses and may make his wager upon whichever horse (or horses) he believes will be more likely than not to win that race. The bettor's choice may be based upon nothing more than a hunch or guess, or perhaps an affinity for the name of the horse he selects, but it is, nonetheless, a deliberate choice closely analogous to that made by one who purchases a chance on a punch board.<sup>5</sup> To that extent, therefore, such wagering activity constitutes a "[g]ame of chance," as defined in R.C. 2915.01(D). Accordingly, a charitable organization that sponsors such wagering for fund-raising purposes must comply with each of the conditions and requirements set forth in R.C. 2915.02(D)(2)(a)-(e) if it wishes to receive, for use in conjunction therewith, a temporary F or F-2 permit from the Department of Liquor Control.

I am, however, unable to offer you a conclusive opinion whether the Department of Liquor Control should issue temporary F or F-2 permits to organizations that sponsor this type of wagering as a fund-raising activity. First, such a determination depends, in large part, upon particular questions of fact peculiar to each permit applicant that can be resolved only by the Department on a case-by-case basis. See, e.g., 1988 Op. Att'y Gen. No. 88-008 at 2-27 (factual determinations cannot be made by means of an opinion of the Attorney General); 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three) (providing, in part, that R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion); 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("it is inappropriate for me to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals"). Secondly, the decision to grant or deny temporary F or F-2 permits is one that, pursuant to R.C. 4303.20 and R.C. 4303.202 respectively, has been conferred exclusively upon the Department of

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<sup>5</sup> *Webster's New World Dictionary* 1152 (2nd coll. ed. 1978) defines a "punchboard" as a "board or card with holes containing concealed slips or disks to be punched out, used in games of chance, raffles, etc.: the slips bear numbers, names, prize designations, or the like."

Liquor Control. In my capacity as Attorney General, therefore, I have no authority to make such a decision on behalf of the Department. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-008 at 2-33; Op. No. 86-076 at 2-422; 1985 Op. Att'y Gen. No. 85-007 at 2-25. *See generally State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923); *State ex rel. Commissioners of Franklin County v. Guilbert*, 77 Ohio St. 333, 83 N.E. 80 (1907).

It is, therefore, my opinion, and you are advised that:

1. The Department of Liquor Control may, pursuant to R.C. 4303.20 and 6 Ohio Admin. Code 4301:1-1-53(D), issue a temporary F permit to a charitable organization, as defined in R.C. 2915.01(H), that sponsors and conducts, for fund-raising purposes, wagering upon videotaped horse races, provided such organization, in conducting and supervising such wagering, complies with each of the conditions and requirements set forth in R.C. 2915.02(D)(2)(a)-(e), and provided, further, that no person receives any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of such wagering.
2. The Department of Liquor Control may, pursuant to R.C. 4303.202 and 6 Ohio Admin. Code 4301:1-1-53(D), issue a temporary F-2 permit to a charitable organization, as defined in R.C. 2915.01(H), that sponsors and conducts, for fund-raising purposes, wagering upon videotaped horse races, provided such organization, in conducting and supervising such wagering, complies with each of the conditions and requirements set forth in R.C. 2915.02(D)(2)(a)-(e), and provided, further, that no person receives any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of such wagering.