ALAN WILSON
ATTORNEY GENERAL

June 6, 2011

The Honorable P. J. Tanner
Sheriff, Beaufort County
P. O. Box 1758
Beaufort, SC 29901

Dear Sheriff Tanner:

Your letter to this office references correspondence from a restaurant owner on Hilton Head Island who has been approached by Products Direct, LLC. The owner states that Products Direct, LLC wishes to place Sweepstakes Promotional electronic games in his establishment. You ask for an opinion on the legality of these machines in South Carolina.

Law/Analysis

We begin our analysis by noting that in rendering an opinion, this office has consistently recognized that it cannot make factual findings. See Ops. S.C. Atty. Gen, April 29, 2005; May 5, 2003. We stated in Op. S.C. Atty. Gen., November 15, 1985: "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able in a legal opinion to adjudicate or investigate factual questions."

The Legislature has designated the judicial procedure to be used in determining the legality of a particular video machine by virtue of the enactment of S.C. Code Ann. §12-21-2712. This provision states that "[a]ny machine, board, or device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county . . . who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it immediately be destroyed."

The South Carolina Supreme Court recognized this procedure and commented at length upon it in State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), and Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004). In 192 Video Game Machines, the Court concluded "the magistrate's examination of the seized machines must include an opportunity for the owner of the machines to be heard concerning their legality." Id., 525 S.E.2d at 882. In the Court's view, due process requires "a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the [machine] . . . should not be forfeited and disposed of as provided by law.'" Id.

Moreover, the Court in 192 Video Games rejected any argument that a legal opinion rendered by the Circuit Solicitor to the effect that the machines in question could be legally stored, served to validate the machines in any way. To the contrary, the Court emphasized that the question of the legality of a machine is a matter to be determined by the magistrate pursuant to the procedure established by §12-21-2712 and that in the case before it, "the magistrates [correctly] set out what statute was violated and how the machines violated it." Id., 525 S.E.2d at 883.

In Two Chess Challenge II, the Court reaffirmed its conclusions in State v. 192 Game Machines. Moreover, the Court emphasized anew its earlier ruling that §12-21-2712 imposes upon the magistrate the duty to determine whether a particular machine or machines seized violates §12-21-2710, holding that such determination must be made on an individual machine basis. The Court clarified the §12-21-2712 forfeiture process as follows:

> [i]n the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." The broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

Two Chess Challenge II, 606 S.E.2d at 473.

Thus, the question of whether any particular machine is an illegal gambling device proscribed by §12-21-2710 as contraband *per se* must be determined initially by law enforcement and ultimately by the fact finder (magistrate) in a court of law. Accordingly, we reaffirm what we stated in our opinion of April 29, 2005, that "this Office cannot in an opinion resolve the factual questions necessarily surrounding the legality or illegality of a particular video game machine."

We turn now to your inquiry, which we deem as primarily a legal question. The issue here is whether a machine which contains games which simulate the play of card games, such as poker, or keno, bingo, etc. are illegal *per se* pursuant to §12-21-2710. Absent any information to the contrary, we will presume that such a machine contains other games that are not illegal. Your question thus requires a construction of §12-21-2710. Therefore, the scope of this opinion will address that question rather than the facts surrounding a particular machine.

Section 12-21-2710 provides, in pertinent part, as follows:

> [i]t is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value, for the play of poker, blackjack, keno, lotto, bingo or craps, or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind. . . . [Emphasis added].

Accordingly, we will initially address the meaning of the phrase "or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto or craps. . . ."

A number of principles of statutory construction are pertinent to this issue. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be interpreted in light of the statute's intended purpose. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Moreover, a statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). A court must apply the clear and unambiguous terms of a statute according to their literal meaning. Id.

In the opinion of April 29, 2005, we noted that §12-21-2710 was amended by 2000 S.C. Acts No. 125 (the "Act"). The Legislature, as part of §1 of the Act (which reenacted §12-21-2710 in its entirety), inserted after the words "slot machine," and before the words "or any punch board, pull board, or other device pertaining to games of chance" the following clause: "or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value," and the clause, "or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps. . . " [Emphasis added]. These insertions represented a major strengthening of §12-21-2710 which, as noted above, designate gambling devices as contraband *per se* and subject to seizure and destruction.

Furthermore, we have previously stated that a court will consider "relevant information about the historical background of the enactment of a statute in the course of making decisions about how it is to be construed and applied." Op. S.C. Atty. Gen., January 9, 1978 [quoting Sutherland, Statutory Construction, §48.03]. The background leading up to passage of the Act is explained by the South Carolina Supreme Court in Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000). There, the Court traced the entire history of video gambling in South Carolina, culminating in the enactment of the Act by the Legislature. The Court described these events as follows:

> [f]or nearly seventy years, gaming machines have been illegal in this State and subject to forfeiture as contraband. In 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices. 1931 S.C. Act No. 368. . . . In 1982, however, the General Assembly enacted an exemption for "video games with free play feature" which were a relatively recent technological development. 1982 S.C. Act No. 466. . . . In State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), we held nonmachine

cash payouts from these video gaming machines were legal under a pre-existing statute, S.C. Code Ann. §16-19-60 (Supp. 1999). . . .

In the ensuing years, South Carolina witnessed the dramatic growth of video gaming into a multi-billion dollar industry that became the subject of much public debate. Despite the repeated introduction of legislation aimed at repealing the exemption for video gaming machines . . . no legislation was passed until 1993. In July of that year, the General Assembly provided for local option referenda to be held on a county by county basis to determine whether nonmachine cash payouts for video gaming should become illegal. 1993 S.C. Act No. 164, Pt. II, §19H. In November 1994, twelve counties voted in favor of making such payouts illegal. The local option referenda, however, were ultimately struck down by this Court in 1996 as unconstitutional special legislation. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). Cash payouts once again became legal throughout the State.

In November 1998, this Court upheld the statutory scheme regulating video gaming machines against a challenge that this type of gaming device constituted an unconstitutional lottery. Johnson v. Collins Entertainment Co., 333 S.C. 96, 508 S.E.2d 575 (1998).

Finally, in an extra session called by the Governor in June 1999, the General Assembly enacted 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part I of the Act would become effective July 1, 2000. This part of the Act repeals §16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. §12-21-2710 (2000) to remove the exemption for video gaming machines, thereby rendering the possession or operation of these machines illegal.... Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State. . . .

Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction, in October 1999, this Court struck down the referendum but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999). Accordingly, on July 1, under §§12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

Westside Quick Shop, 534 S.E.2d at 271-72.

Thus, in amending §12-21-2710 by virtue of the passage of the Act, we have advised that the Legislature sought to make "any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value illegal *per se*. At the same time, the Act repealed §16-19-60, which the Court had earlier held in Blackmon to exempt such machines from illegality. Section 16-19-60, as stated, exempted "video games with free play feature." Thus, those machines commonly known as "video poker" machines were clearly outlawed by the statute and deemed to be contraband *per se*.

However, the Act went further than banning what was commonly known video poker machines, which typically had a "free play feature." Section 12-21-2710, as amended by the Act, also declared to be contraband *per se* two other categories of devices. These are: (1) "other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps" and (2) "any machine or device licensed pursuant to §12-21-2720 and used for gambling. . . ." It is the first additional clause - declaring illegal a device "for the play of poker," etc. - with which we are concerned here.

Clearly, as we have previously advised, this prohibition is one separate and apart from the preceding clause relating to "any video game machine with a free play feature operated by a slot. . . ." The phrases are separated by the word "or," which typically signifies the disjunctive. See, *e.g.*, Mungo v. Smith, 289 S.C. 560, 568, 347 S.E.2d 514 (1986) ["In its elementary sense, the word 'or' as used in a statute is a disjunctive indicating that the various members of the sentence are to be taken separately. 73 Am.Jur.2d, Statutes, §241 (1974). Where the statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive 'or,' application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either"]. Moreover, while punctuation in general is not controlling, it should not be disregarded to create an ambiguity where none exists. Cf. Lewis v. Carnaggio, 257 S.C. 54, 183 S.E.2d 899 (1971).

Furthermore, we refer to Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 582 (2000), where the court discussed the canon "*expressio unius est exclusio alterius*," or "to express or include one thing implies the exclusion of another." Here, in amending §12-21-2710, the Legislature omitted the phrase "free play feature" in describing the devices prohibited in the clause "other device operated by a slot in which is deposited a coin or thing of value for the play of poker . . .," etc. Yet, such phrase was used in the preceding clause. Both clauses use the phrase "operated by a slot in which there is deposited a coin or thing of value." The use of the term "free play feature" in one clause and its omission in the next is further evidence that the latter clause was independent of and different from the preceding one.

In addition, the South Carolina Supreme Court has interpreted §12-21-2710 as making those items specifically enumerated therein as illegal *per se* upon a showing that the device is in itself what the statute prohibits. For example, in State v. Four Video Slot Machines, 317 S.C. 397, 453 S.E.2d 896 (1995), the Court rejected any argument that a slot machine with a free play feature was exempted from the reach of §12-21-2710 by former §16-19-60. The Court reasoned:

> [h]ere, the General Assembly has declared slot machines unlawful. Respondent's construction of the statute equating the slot machines in question with a "video game with free play feature" is untenable.

Id., 453 S.E.2d at 897.

In Sun Light Prepaid Phonecard Co. v. State of South Carolina and SLED, 360 S.C. 49, 600 S.E.2d 61 (2004), the Court held that phone cards and phone card dispensers were illegal *per se* pursuant to §12-21-2710. In Sun Light, the Court described the phone cards in question as follows:

> [t]he phone cards, including the game pieces, are pre-printed by the manufacturer before they are placed in a dispenser. The cards are printed on rolls containing 7,500 cards. Attached to each phone card is a game piece that gives the customer a chance to win a cash prize. The entire card contains a paper cover, which, when pulled back, reveals a toll-free number and pin number for activating the phone service as well as an array of nine symbols in a 8-liner format. If the game piece contains symbols arranged in a certain order, the customer wins a prize. The computer that prints the card randomly generates winners on the cards. Seventy percent of the revenue from the cards is paid out in prizes and the rest is a hold percentage. A hold percentage is the net profit received by the sellers of the cards. The dispensers do not adjust to ensure the hold percentage is received; however, the amount of the hold percentage is predetermined based on the printing of the phone card rolls.
>
> After printing, the roll of pre-printed phone cards are placed inside the dispenser and the dispenser cannot work without a roll of phone cards inside. Each card sells for $1 and gives the customer two minutes of long distance telephone service. The customer can use the two minutes of time by dialing a toll-free number and entering a PIN number. The customer can also recharge the card and put additional long distance time on the card at the rate of 14.9 cents per minute
>
> Appellants contend the purpose of the game piece is to promote the sale of the phone cards. The prizes are paid to the winning customer either by the cashier in the store or by mail, but not by the dispenser itself. A customer does not need to purchase a phone card to obtain a free game piece. A free game piece could be obtained from the operator of the dispenser by mail. Instructions on how to obtain a free game piece were posted on the side of the machine and on the video screen of the machine.

Id., 600 S.E.2d 62-63. The dispenser aspect of the game was further described by the Court as operating in the following way:

> The phone card dispensers are housed within a standard slot machine cabinet. The dispensers contained several features present in a gambling machine as opposed to a vending machine that simply dispenses a product: (1) the dispensers contain a video screen that has a gambling theme in that, if the user so chooses, the user can see reels turn as if the winner is chosen by the machine;... (2) if the machine dispenses a winning game piece, celebration music is played, whereas no music plays if the game piece is a loser; (3) the machine has a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached; (4) the machine contains two hard meters, one is an in-meter that records the amount of money going into the machine, and the other is labeled "WON" and records the value of the prizes issued by the machines; (5) the machine, although it accepts $1, $5, $10, $20, $50 and $100 bills, does not have a mechanism for returning change; and (6) the machines could be linked, a feature of a gambling device...
>
> Further, although the sweepstakes promotion was set to run for 22 months, the long distance service on the phone cards was valid only for six months from the time the first phone card pin number was used. There was testimony that appellants, the manufacturer, and the distributor did not keep any records of the phone time used or what pin numbers have been sold via the cards. Also, some stores contained more than one phone card dispenser. According to the least and purchase agreements, Phonecards R Us, Sun Light, and another company not involved in this case, were under contract to sell 117 million and 360 thousand (117,360,000) cards a year in the state of South Carolina. The South Carolina population in early 2000, the time of the seizures, was only about three million people. A marking study had not been conducted to determine whether there would be such a high demand for the phone cards. Finally, the phone company from which the long distance service was purchased could not legally provide intrastate service in South Carolina because it had not been licensed to do so.

Id., 600 S.E.2d at 63.

The Sun Light Court thus concluded that the phone card portion of the game was contraband *per se* pursuant to §12-21-2710, because it was a "pull board or other device pertaining to games of chance." In the Court's words:

> [a]lthough the phone cards are an integral component of the dispensers, the phone cards would be illegal if they were issued over the counter as opposed to being placed in the dispensers. As the trial court found, §12-21-2710 declares illegal any pull board or other device pertaining to games of chance. The phone card itself contains an element of chance and is a type of gambling device known as a pull-tab. Appellants' expert stated that if the card did not include the long distance phone service but only the sweepstakes portion, the card

> would be a gambling device. Given the characteristics of the phone cards, the phone portion of the cards is mere surplusage to the game piece. Accordingly, the trial court properly determined the phone cards themselves were illegal gambling devices.

Id., 600 S.E.2d at 64.

With respect to the dispensers themselves, such devices were deemed by the Court to violate §12-21-2710 for a different reason. The Court concluded:

> . . . the trial court correctly determined the phone card dispensers are like slot machines and not traditional vending machines. The dispensers have a gambling-themed video screen, play celebration music when a customer is a winner, have a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached, contain a meter that records the value of the prizes paid out, and do not give change. None of these features is present in a traditional vending machine that is exempted from §12-21-2710.

Id. We do not, however, interpret Sun Light to hold that a promotion itself can make legal an otherwise illegal game of chance. The Court would have to speak to that issue beyond what the Court held in Sun Light.

Based upon the foregoing, it is clear the purpose of §12-21-2710 is to designate all devices "pertaining to games of chance" as gambling devices. Such devices are deemed by law to be contraband *per se*, and thus subject to forfeiture and destruction. As the Court recognized in Westside Quick Shop, the forfeiture process "serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." Westside Quick Shop, 534 S.E.2d at 273.

Certain devices, such as slot machines, video game machines with a free play feature operated by a slot, punch boards and pull boards are expressly outlawed by the statute. Also included in this list of banned devices are those "operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps." We advised in our opinion of April 29, 2005, that "[t]he devices expressly named in §12-21-2710 are deemed to be inherently 'pertaining to a game of chance,' and thus prohibited. In addition, any 'other device pertaining to games of chance' is also designated by the Legislature as contraband *per se*."

As the South Carolina Supreme Court expressly recognized in Squires v. SLED, 249 S.C. 609, 612, 155 S.E.2d 859 (1967), "[i]t is clear that the Legislature, by the enactment of [§§12-21-2710 and 12-21-2712] did condemn any devices pertaining to games of chance." In so doing, the Legislature enumerated certain devices, such as a slot machine, punch board, or pull board, as devices which are inherently "pertaining to games of chance." By enacting the Act, the Legislature added certain other devices including any video game machine with a "free play feature." The Act also added to the list of

devices deemed contraband per se any "device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps . . . ." Those devices enumerated are deemed by the Legislature to be inherently games of chance.

Accordingly, any machine simulating the play of poker, blackjack, keno, lotto, bingo or craps has been designated as inherently illegal pursuant to §12-21-2710. Just as the Court held in Sun Light, that phone card dispensers "are like slot machines and not traditional vending machines" and thus violate §12-21-2710, any machines containing games which simulate the game of poker, etc., are also violative of §12-21-2710. Your letter does not specify what particular games are offered in conjunction with the machines in question. If the games are, for example, the simulation of poker or some variation thereof, our opinion is that § 12-21-2710 expressly prohibits such a game. In short, any device which simulates the game of poker is expressly proscribed by §12-21-2710. If, on the other hand, a machine simulates some other card game, and none of the other express prohibitions contained in §12-21-2710 are applicable (such as slot machine), as we stated previously, law enforcement officers, and ultimately the magistrate, will have to determine whether the particular game is one "pertaining to games of chance."

We note that §12-21-2710 does provide an exception for certain devices. In §12-21-2710 it states that ". . . the provisions of this section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance." [Emphasis added]. If, however, the award of promotional prizes and cash in the case of a machine is determined by random chance, this exception is not applicable. If a machine contains "games" which § 12-21-2710 proscribes, the machine is rendered contraband *per se*. The machine is not "legalized" because it might be used for a legal purpose.

Additionally, we note the South Carolina Supreme Court in Sun Light held that, because the game pieces were not a "legitimate promotion or sweepstakes," the dispensers and phone cards were not exempt under §61-4-580. Sun Light, 600 S.E.2d at 65. Section 61-4-580 provides, in pertinent part, as follows:

> No holder of a permit authorizing the sale of beer or wine or a servant, agent or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
>
> (3) permits gambling or games of chance except game promotion including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
>
> (a) the game promotion is conducted or offered in connection with the sale, promotion or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
>
> (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize;

> (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

In previous opinions of this Office, we rejected the argument that Section 61-4-580 immunizes a gambling device from South Carolina's gambling laws. See Ops. Atty. Gen., March 8, 2002; January 8, 2001. In the latter opinion, we stated: "Section 61-4-580 was designed to provide merely a safe harbor for beer and wine permit holders from administrative licensing sanctions, but not a zone of amnesty for video gambling criminal sanctions . . . [i]f the elements of gambling are present . . . §61-4-580 does not protect [the] game from criminal penalties . . . [a]dministrative licensing penalties and criminal penalties are totally separate and apart from one another and have no effect on each other." The same logic would apply to the issue here, as §61-4-580 would not make legal those devices which the Legislature, as previously discussed, has designated as contraband *per se*.

Further, any claim that a machine is somehow made legal because "no purchase is required" to play is simply incorrect. We have stated that the presence of consideration is irrelevant when the machine itself is contraband *per se*. Op. S.C. Atty. Gen., March 8, 2002. Such a machine is deemed illegal, regardless of its intended use or operation. See 192 Coin-Operated Game Machines, 525 S.E.2d at 879. We refer to our opinion dated March 20, 2009, wherein we addressed whether a solicitation campaign by a charitable organization met the consideration element of a lottery under South Carolina law. We explained the campaign as follows:

> [p]otential donors visiting the website of the charitable organization have the opportunity to donate $25 to the charitable purpose. In return for donating $25, the donor will be entered into a drawing for a house. The donor will be entered into the drawing one time for each $25 donation. Individuals who do not wish to donate $25 may obtain a free entry form by sending in a written request with their contact information and a self-addressed, stamped envelope. There is no limit on the amount of free entries by individuals into the giveaway and all proceeds go to charity. The individual must return the entry form to the charitable organization by certified mail. Winners are determined by a random drawing from all eligible entries.

We concluded in the opinion that the solicitation campaign constituted a lottery, because:

> there are present the element of a prize, i.e., the house, the element of chance, *i.e.*, the random drawing in which the winner of the house is determined, and the element of consideration, *i.e.*, the $25 payment "donation" for the opportunity to enter or the obtaining of a "free entry form" by the sending in of a written request with contact information and a self-addressed stamped envelope. While clearly the $25 dollar payment would constitute monetary consideration sufficient for purposes of determining a lottery exists, in the opinion of this office, the alternative whereby an individual may receive a "free

> entry form" in the manner addressed would also not prevent the scheme from being considered a lottery. In the opinion of this office, the ability to obtain a "free entry form" is a mere ruse designed to attempt to eliminate the element of consideration and, therefore, the determination that the referenced scheme is a lottery.

In addition, attempting to disguise machines by arguing they are promotional sweepstakes used to promote a legitimate product does not make legal those devices which the Legislature has expressly designated as contraband *per se*. The Court in Sun Light distinguished between a scheme related to the sale of a legitimate product and a ruse used as a front to gamble. In that case, sellers of prepaid, long distance telephone cards brought an action following the State's seizure of cards and electronic phone card dispensers as being in violation of State statutes governing illegal gambling devices. The Court noted that the main difference between the referenced dispensers and legitimate vending machines:

> . . . is that the vending machines dispense promotional game products that are legitimate because their companies are attempting to promote the sale of those products. The phone card dispensers, on the other hand, do not issue game pieces that are part of a legitimate promotion or sweepstakes. The product being sold to consumers is not the long distance phone service but a game of chance.

Sun Light, 600 S.E.2d at 64. Again, the Court would have to expand upon its ruling in Sun Light before any conclusion could be reached that a promotion makes legal an otherwise illegal *per se* game of chance.

With a valid promotional sweepstakes scheme, the prize is readily identifiable from the information provided. The patron is not required to wager anything on a chance to win a prize. By introducing a gambling device into the process, however, we believe that it changes the basis of the scheme, as it introduces an element of chance. There is no legitimate promotion when there is payment for access for the operation of gambling devices, deemed illegal *per se* pursuant to §12-21-2710. This in fact distinguishes the games involving machines from mere promotional sweepstakes occasionally used by fast food chains, or in connection with candy, sodas, miscellaneous food or other established retail products. In the latter case, these product promotions usually are limited in time and the odds of winning significant prizes are sufficiently low so that winning is only an incidental reason for purchasing the merchandise.

A number of courts have contrasted the obvious distinction between promotions designed to sell a legitimate product and promotions which serve simply as an opportunity to play illegal gambling *per se* machines. In Mississippi Gaming Comm. v. Six Electronic Video Gambling Devices, 792 So.2d 321 (Miss. App. 2001), for example, the court recognized the clear distinction between genuine, legitimate sweepstakes and a phone card access to video gambling devices labeled a "sweepstakes promotion." There, the court noted that analysis "is based on whether the risk to win is a lottery avoids entirely different issue of whether the means to win is by a slot machine." Id., 792 So.2d at 327 [Emphasis in original]. The court's analysis was as follows:

> [o]ur conclusion means that the machine itself is the problem, not the merchandise that is being dispensed. Had the cards been sold over the counter at the same truck stop, absent better evidence than was introduced by the State in [Mississippi Gaming Comm. v. Treasured Arts, Inc., 699 So.2d 936 (Miss. 1997)], the card might not constitute a lottery. We find nothing irrational or improper about the different results. Slot machines have long been prohibited independently of the ban on lotteries. The slot machine "experience" has been legislatively identified as deserving of criminal sanction, so have lotteries and an array of other forms of gambling. Not all awards of prizes are lotteries. However, machines that dispense prizes varying from zero to five hundred dollars upon the insertion of a coin, the existence and value of the prizes dependent upon chance, are slot machines.

Id.

In Sniezek and F.A.C.E. Trading, Inc. v. Colorado Dept. of Revenue, 113 P.3d 1280 (Colo. App. 2005), the court addressed the legality of a machine which dispensed "Ad-Tabs," paper stickers that contained a coupon on one side and a cash prize game on the other with differing amounts of money to be redeemed at the establishment where it was purchased. A game piece could also be obtained from F.A.C.E. by requesting one through the mail. The coupons on the other side provided a discount for merchandise that could be obtained when the customer tendered the coupon and purchase price to F.A.C.E. or another merchant. On occasion, more than one coupon was required to purchase the merchandise. Id., 113 P.3d at 1281. F.A.C.E. argued that, because the customer was purchasing a coupon that has value in excess of the purchase price, the customer was not risking anything. The court disagreed, finding the Ad-Tabs and machines constituted illegal gambling devices. The court explained:

> . . . the items to be purchased with the coupons are not displayed anywhere near or on the machine, nor does a customer know what the coupon is for before purchasing the Ad-Tab. Thus, the customer does not know what product the coupon will enable him or her to purchase, what the price for the product will be, or whether more Ad-Tabs must be purchased to qualify. Hence, the customer takes a risk upon the purchase of the Ad-Tab. In addition, the machine advertises the chance to win money, and the emphasis in the advertisement is the "win cash" slogan, as opposed to the purchase of merchandise. For these reasons, we conclude that plaintiffs' machine is designed to promote the sale of the "win cash" feature of the Ad-Tab, not the coupon feature, and that the coupon is merely incidental to the game portion of the ticket.

Id. at 1282.

The Sneizek court cited to the decision of the Indiana Court of Appeals in F.A.C.E. Trading Inc. v. Carter, 821 N.E.2d 38 (Ind. App. 2005). In addressing the illegality of the Ad-Tabs, the Carter court

rejected F.A.C.E.'s contention that they were not an illegal because an individual could enter the game without risking any consideration, property, or money. The court stated:

> [a]lthough FACE claims that it is merely selling discount coupons, it is clear . . . that the real enticement is the game in which purchasers may win up to several hundred dollars. . . . [W]e find that the element of consideration is not eliminated merely because of the "no purchase necessary" print on the coupon side of the Ad-Tab. It is apparent that the opportunity to win money or other property arises specifically as the result of the operation of an element of chance. In particular, when a purchaser places money into the Ad-Tabs dispensing machine, they select an Ad-Tab based upon what type of game is displayed on each card, not what discount coupons are available. Moreover, the record clearly supports that when the cards are displayed with the game side facing out, purchasers would not even know what discount coupons are available.

Id., 821 N.E.2d at 42.

Additionally, the Carter court made the distinction between promotions run by companies such as McDonald's and Coca Cola to support the sale of consumer products, and the methods utilized in connection with the sale of the Ad-Tabs discount coupons. It affirmed the ruling of the trial court as follows:

> [a] distinction exists between promotion of a primary business of selling a meal or a drink for valuable consideration together with a chance to win a business related prize, in kind or, albeit, as a sweepstakes prize which attracts sales, and promotion of a non-primary business related and incidental activity for valuable consideration together with a chance to win a prize unrelated to either the primary business activity or attraction of sales. The difference in the distinction is in the essence of the product: [t]he former promotes sales of the primary business product, *e.g.*, food, while the latter promotes the prize and the product (coupon) is unrelated to either the primary business purpose of the promoter, of the distributor, or of [FACE]. The court fails to discern any claim that [ ] [FACE] is engaged in the primary business of marketing for the businesses which advertise in the Ad-Tabs, or that [FACE]'s primary source of revenue is from those businesses as opposed to the sale of Ad-Tabs.

Id. at 42.

So, too, in South Carolina, §12-21-2710 prohibits any device "pertaining to games of chance of whatever name or kind." So long as these games are games of chance, they are illegal *per se*. Sun Light, 600 S.E.2d at 64; see Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) [holding ". . . where the return to the player is dependent upon an element of chance the generally prevailing opinion seems to be

that a slot machine is a gambling device even though the player is assured of his money's worth of some commodity and hence cannot lose"].

In our April 29, 2005, opinion, we also addressed an earlier opinion dated July 27, 2000. There, the question presented was whether "video gambling machines would still be illegal *per se* if they were converted to other uses such as PAC-MAN or as a device for internet gambling. We concluded that such conversion did not serve to make legal an otherwise illegal *per se* gambling device. In the opinion, we stated the following:

> [t]he Supreme Court in Westside Quik Shop v. Stewart and Condon [supra] made the answer to SLED's question very clear. In Westside, the Court stated that "on July 1. . . . these machines will become contraband subject to forfeiture and destruction regardless of their use or operability."
>
> . . . Citing, State v. 192 Game Machines, [supra]. Consistent with the Westside ruling is our opinion to you, dated May 8, 2000, wherein we advised that "the General Assembly did not intend to play games here. . . . An illegal video game machine will remain illegal regardless of what parts are removed therefrom or what parts remain thereof." And as the Supreme Court said earlier in Squires v. S.C. Law Enforcement Division, 249 S.C. 609, 155 S.E.2d 859 (1967), "we think it would abort the legislative purpose to hold that an assembled gambling device is the only one that is condemned and subject to seizure and destruction. . . ."
>
> Finally, the Supreme Court in State v. 192 Game Machines anticipated that the video gambling industry would attempt to circumvent the statute by converting gambling devices to other types of machines. There, the Court summarized the gambling operators' argument as follows: "Today, with the advent of the computer, a video game machine is simply a box containing a computer which can be configured to play a variety of games, from poker to PAC-MAN; therefore the machine itself should not be considered illegal." The Court rejected this argument, stating that "possession of these machines is illegal regardless of their intended use or operation."

Thus, it is clear that, notwithstanding other non-illegal "games" contained as part of a machine, if a machine simulates the game of poker, etc., or is some other device specifically designated as illegal *per se* by §12-21-2710, or offers games "pertaining to games of chance," such machine violates §12-21-2710 and is *per se* illegal.

Most recently, in Ward v. West Oil Co., Inc., 387 S.C. 268, 692 S.E.2d 516 (2010), the South Carolina Supreme Court held that pull-tab cards and game machines dispensing them were illegal gambling devices under statute prohibiting "pull boards," although the dispensers did not resemble slot machines. The Court determined the sole function of the game cards was to provide a game of chance, in the form of a cash prize, to players who deposited a dollar in the card dispenser, and that payout amount

and profits were predetermined by the deck of cards placed in the machines. West Oil Co., 692 S.E.2d at 521. The Court explained its reasoning as follows:

> [a]lthough the card dispensers did not resemble "slot machines" as those at issue in Sun Light, we find this fact is not dispositive. We hold the card dispensers and the cards were intrinsically connected in a way that deemed them illegal under this Court's decision in Sun Light.
>
> As in Sun Light, the "pull-tab" cards created an element of chance when placed in the dispenser. As testified to by Ward, each dispenser contained 4,800 game pieces that were "pre-rated." He explained that certain cards were designated as "winners" of various sums of money. Therefore, the payout amount and profits were predetermined by a deck of cards placed in the dispensing machines. The machine was designed to payout $3,350 per deck of game cards, which translated into a 69.8 payout percentage. The "Pots of Gold" game had one $1,000 winner and the "Jackpot" game had two.
>
> Furthermore, as described by R & B in its brief, there was an element of chance in the customer's selection of the tickets in that the dispenser contained eight columns or stacks of tickets. Under each column, there is a selector button which is pushed to receive a ticket. Thus, there is an added level of chance in terms of which column is selected.
>
> Therefore, we conclude the "pull-tab" game machines constituted illegal gambling devices under section 12-21-2710.

West Oil Co., 692 S.E.2d at 521-22 [citing 38 C.J.S. Gaming §10 (Supp.2010), defining "gambling device" and stating: "[a]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance, no matter how small the intrinsic value"; "they are gaming devices if used or intended for gaming, but otherwise they are not, and generally the courts will look behind the name and style of the device to ascertain its true character"; State v. 158 Gaming Devices, 304 Md. 404, 499 A.2d 940, 951 (1985) ("The three elements of gambling - consideration, chance and reward - are thus clearly present in a device which, for a price, and based upon chance, offers a monetary or merchandise reward to the successful player")].

Conclusion

As we previously noted, this Office cannot resolve in an opinion the alleged illegality or legality of a specific machine. Nor can we investigate incidents of illegal gambling. If a law enforcement officer possesses probable cause that a machine or device violates §12-21-2710, then he or she must seize such machine or device and take it to the magistrate, who is then empowered to rule upon the alleged illegality of the machine on a machine-by-machine basis.

Assuming any machine simulates the game of poker, we advise that §12-21-2710 expressly prohibits such a device as *per se* illegal. This express prohibition was added by Act No. 125 of 2000, which amended §12-21-2710 to include as contraband per se any "device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps. . . ." This clause stands separate and apart from §12-21-2710's preceding clause (also added by the Act) which proscribes video game machines "with a free play feature operated by a slot in which is deposited a coin or thing of value. . . ." In other words, the statute prohibits not only machines commonly known as "video poker" machines, but separately prohibits as *per se* illegal those machines which simulate the play of poker, as well as those other specific devices enumerated in §12-21-2710 (*i.e.*, slot machines, pull tabs etc.).

Additionally, if a law enforcement officer determines that a video game machine does not simulate the game of poker, but some other "card game," then he or she must determine whether any other express enumeration contained in §12-21-2710 is applicable (such as slot machine, etc.). If no expressly enumerated device is apparent, then the officer must determine if the game is one "pertaining to games of chance." In any of these instances, the machine is *per se* illegal.

It is also our opinion that any machine which contains a game or games prohibited by §12-21-2710 is illegal *per se*, notwithstanding the existence of other games which also might be programmed for play on the same machine. The South Carolina Supreme Court has emphasized that a device which violates §12-21-2710 makes possession of such machine "illegal regardless of . . . intended use or operation." We have referenced here numerous cases which have distinguished between promotions designed to sell a legitimate product and those which open the door to the opportunity to play illegal *per se* gaming machines. Such a distinction will, of course, turn upon the individual factual circumstances which only the courts may resolve. Suffice it to say that an illegal *per se* machine may be used for other purposes such as a promotional sweepstakes is irrelevant. An illegal *per se* machine is not rendered legal because it may be used for legal purposes. Further, an illegal *per se* machine is not rendered legal where it allows a means to participate without the actual payment of money by providing the ability to obtain a "free" entry form, because the participant in fact gets nothing except an opportunity to engage in a pure game of chance.

Finally, we advise that §12-21-2710 explicitly provides (as it has since 1931) that "[i]t shall be unlawful for any person to keep on his premises or operate . . . any device pertaining to games of chance of whatever name or kind. . . ." See Squires, 155 S.E.2d at 861 ["It is clear that the Legislature, by the enactment of the statutes here involved, did condemn any devices pertaining to games of chance"]. The same language was held by the South Carolina Supreme Court to make unlawful as a "game of chance" a particular machine even "though there was no pay off on the machine or apparatus for pay off ... [and] no free games were awarded and [the] only element of chance was the score that might be made." Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630, 632 (1941). This decision recognized that games of chance, regardless of their actual or intended use, are uniquely suited for wagering and gambling. In Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 25 (1939), the Court stated that "[e]ven if the . . . machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs [citation omitted]." The South Carolina Supreme Court, as well as this office, has

repeatedly said that any devices pertaining to games of chance are condemned.[1] The Court has stated that such machines are inherently illegal and clearly contraband *per se*. Games of chance, regardless of their actual or intended use, are uniquely suited for wagering and gambling. It thus goes without saying that no machine may be used to circumvent the State's gambling laws, and no violation of the State's gambling laws will be tolerated.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[1]We note the Squires Court held that the device does not have to be either operative or in complete repair before it is subject to destruction. The mere possession or ownership of the device is prohibited. All parts and subassemblies are also subject to seizure and destruction. Squires, 155 S.E.2d at 860-61; see 192 Coin-Operated Game Machines, 525 S.E.2d at 878-79 [refusing to overrule Squires].