GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

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MEMORANDUM

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

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

DATE: **June 13, 2019**

SUBJECT: **Legal Analysis – Impact of Sports Wagering Legislation on Title 25 of the D.C. Official Code (AL-19-409)**

You asked us whether adding sports wagering kiosks or mobile terminals at an establishment holding an alcoholic beverage retailer's license would constitute a "substantial change" requiring advance approval from the Alcoholic Beverage Control Board. Our understanding is that by "sports wagering kiosks or mobile terminals," you mean small or large electronics ranging from a free-standing kiosk to a device about the size of an iPad.[1] We conclude that adding devices like these would ordinarily constitute a "substantial change" requiring advance Board approval, but that such an assessment would need to be made on a case-by-case basis.

This advance approval requirement for substantial changes comes from D.C. Official Code § 25-762. Under that statute, anyone holding an alcoholic beverage license, including someone holding a retailer's license,[2] must "obtain the approval of the Board" before "mak[ing] a change in the interior or exterior, or a change in format, of any licensed establishment, which would

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[1] For common examples, you referred us to sites such as https://kiosk.com/market-solutions/gaming-kiosks/ (last visited June 13, 2019).

[2] *See* D.C. Official Code §§ 25-112 and 25-113 (on-premises and off-premises retail licenses).

substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license."[3] No statute or regulation defines what it means to "substantially change" the nature of an establishment's operation, but subsection (b) of section 25-762 says that "[i]n considering whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment, including" certain kinds of changes listed in subsection (b). Examples on that list include increasing the establishment's occupancy,[4] expanding its operation to another floor,[5] or creating or expanding an area for live entertainment.[6]

The changes listed in subsection (b) are ordinarily, but not always, substantial. They are not always substantial changes because subsection (b) says simply that they are types of changes the Board should "consider," as part of its assessment of whether proposed changes are "potentially of concern to the residents of the area." The legislative history of subsection (b) echoes this reading. An early version of this language would have required the Board to approve *all* changes that fit within certain identified categories, no matter how trivial the change. When the Board objected, the Committee on Consumer and Regulatory Affairs redrafted the relevant language so that "only changes which the Board deems substantial and potentially of concern to the community" would be subject to Board review.[7] The statute therefore calls for a case-by-case inquiry as to whether a proposed change will be substantial enough to be of potential concern to the community. At the same time, our understanding is that the types of changes listed in subsection (b) ordinarily will be considered "substantial changes" that call for Board approval and community input. You have indicated that this is how the Board has consistently interpreted subsection (b), and the context of Title 25 supports this reading. For example, if an on-premises retailer wishing to participate in a community festival wants, for one day, to expand its premises or provide entertainment – both listed as potential examples of "substantial change" in subsection (b)[8] – that change is considered a "substantial change" requiring Board approval.[9]

Since the types of changes listed in subsection (b) will ordinarily be considered substantial changes, it follows that adding sports wagering kiosks or mobile terminals would ordinarily be considered a substantial change. That is because adding these kiosks or terminals would fall under subsection (b)(14): "[p]rovid[ing] mechanical or electronic entertainment devices if these did not exist previously or provid[ing] for the installation of additional devices." The statute does not define what a "mechanical or electronic entertainment device" is, but under the ordinary meaning of that language, it would include sports wagering kiosks or mobile terminals.[10] In

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[3] *Id.* § 25-762(a).

[4] *Id.* § 25-762(b)(1).

[5] *Id.* § 25-762(b)(3).

[6] *Id.* § 25-762(b)(4).

[7] Comm. on Consumer and Regulatory Affairs, "Report on Bill 13-449, the 'Title 25, D.C. Code Enactment and Related Amendments Act of 2000,'" at 56, Nov. 20, 2000, *available at* http://dcclims1.dccouncil.us/images/00001/20090909091939.pdf (last visited June 13, 2019).

[8] *See* D.C. Official Code § 25-762(b)(1)-(3), (6).

[9] *Id.* § 25-506(c).

[10] We apply the ordinary meaning of this language because, "[i]n the search for statutory meaning, we give

ordinary usage, a "device," as used here, is "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function."[11] Sports wagering kiosks or mobile terminals would be pieces of equipment designed specifically to entertain customers by allowing them to engage in sports wagering. Accordingly, a retailer wishing to add them is likely seeking to make a "substantial change" to the licensed establishment and, if so, must obtain Board approval.

We considered whether the Sports Wagering Lottery Amendment Act of 2018,[12] which establishes a distinct licensing structure for entities wishing to conduct sports wagering, requires a different answer. It does not. Nothing in that act exempts an alcoholic beverage licensee wishing to conduct sports wagering in a Board-licensed establishment from following the statutory requirements applicable to its alcoholic beverage license.[13] Accordingly, nothing in that act exempts a retail license holder from its statutory obligation to seek Board approval before adding sports wagering devices that would substantially change its Board-approved operations.

If you have any questions, please contact Assistant Attorney General Joshua Turner at 442-9834, or me at 724-5524.

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nontechnical words and phrases their ordinary meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (internal citation omitted); *see Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning") (citing *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995)). We have identified nothing in the statute or its history to suggest that these terms were intended to bear a specialized or technical meaning.

[11] *Device*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

[12] Effective May 3, 2019 (D.C. Law 22-312; 66 DCR 1402).

[13] This memorandum does not address the distinct, more difficult, question of whether and to what extent the sports wagering statute limits the conditions the Board may impose on sports wagering in a Board-licensed establishment.