



**MEETING AGENDA
JANUARY 26, 2016**

1. CALL TO ORDER AND ESTABLISHMENT OF QUORUM
2. CONSIDERATION OF MINUTES, MEETING OF DECEMBER 21, 2015
3. REPORT OF EXECUTIVE DIRECTOR
4. RULEMAKING
 - A. RE-PROPOSAL: SGC-39-15-00005-P THOROUGHBRED RESTRICTED TIME PERIODS FOR VARIOUS DRUGS
 - B. ADOPTION: SGC-46-15-00004-P POST RACE TESTING OF CLAIMED HORSES
 - C. ADOPTION: SGC-46-15-00007-P EQUINE DOPING MULTIPLE VIOLATOR MINIMUM PENALTY
 - D. ADOPTION: SGC-48-15-00006-P PER SE DRUG THRESHOLDS
5. ADJUDICATIONS
 - A. IN THE MATTER OF BEN JOSEPH
 - B. IN THE MATTER OF JEROME PALUMBO
 - C. IN THE MATTER OF ROY SEDLACEK
6. OLD BUSINESS/NEW BUSINESS
 - A. OLD BUSINESS

1. STAFF REPORT IN REGARD TO ALLEGATIONS ADVANCED BY THE
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS IN REGARD
TO THE PRACTICES OF KDE EQUINE, LLC ET AL.

2. USE OF WHIP RESEARCH

B. NEW BUSINESS

7. SCHEDULING OF NEXT MEETING

8. ADJOURNMENT

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**NEW YORK STATE
GAMING COMMISSION**

MINUTES

MEETING of DECEMBER 21, 2015

NEW YORK, NEW YORK

A meeting of the N.Y.S. Gaming Commission was conducted in New York, New York.

1. Call to Order

Executive Director Robert Williams called the meeting to order at 2:07 p.m. Establishment of a quorum was noted by Acting Secretary Kristen Buckley. In attendance were Commissioners John Crotty, Peter Moschetti, John Poklemba, Barry Sample and Todd Snyder. Commissioner Snyder was unanimously elected as presiding officer for the meeting.

2. Consideration of the Minutes from November 23, 2015

The Commission considered previously circulated draft minutes of the meeting conducted on November 23, 2015. The minutes were then accepted as circulated.

3. Rulemaking

a. Adoption: SGC-44-15-00019-P, Gelding Reporting Requirements

The Commission considered adoption of a proposed regulation that requires any alteration to the sex of a horse from that recorded on the certificate of foal registration, eligibility certificate or other official registration certificate be reported to both the racing secretary and the official horse identifier if the horse is entered to race at any race meeting.

ON A MOTION BY: Commissioner Sample
APPROVED: 5-0

b. Proposal: Emergency Rulemaking for 2016 Jockey Injury Compensation Fund Assessments and Plan (9 NYCRR Part 4046)

The Commission considered adoption of an emergency regulation that generally establishes a process for Commission consideration of a Jockey Injury Compensation Fund Assessment and Plan when the Fund fails to timely submit a plan and establishes a specific assessment and plan for 2016.

The emergency rule and plan would be utilized unless and until the Jockey Injury Compensation Fund submits an acceptable superseding plan.

ON A MOTION BY: Commissioner Moschetti
APPROVED: 5-0

c. Proposal: Rulemaking for 2016 Jockey Injury Compensation Fund Assessments and Plan (9 NYCRR Part 4046)

The Commission considered adoption of a proposed regulation that generally establishes a process for Commission consideration of Jockey Injury Compensation Fund Assessments and Plan when the Fund fails to timely submit a plan and establishes a specific assessment and plan for 2016.

ON A MOTION BY: Commissioner Crotty
APPROVED: 5-0

4. Adjudications

- a. In the Matter of Kevin Clarke.** The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed, on a 5-0 vote, to accept the Hearing Officer's recommendation that the applicant's license denial be upheld on the grounds of a rule violation.
- b. In the Matter of Victor Valderrama.** The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed, on a 5-0 vote, to accept the Hearing Officer's recommendation that the applicant's license denial be upheld.
- c. In the Matter of Delight Distribution.** The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed, on a 5-0 vote, to accept the

Hearing Officer's recommendation that the applicant's license be revoked and that suspension of the license until revocation be upheld.

5. Consideration of Gaming Facility Licensing.

a. Capital Region Gaming, LLC doing business as Rivers Casino & Resort at Mohawk Harbor.

- (1) The Commission considered finding Capital Region Gaming, LLC doing business as Rivers Casino & Resort at Mohawk Harbor suitable for gaming facility licensing per standards contained with sections 1317 and 1318 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Sample
APPROVED: 5-0

- (2) The Commission considered finding the application, as amended, submitted Capital Region Gaming, LLC doing business as Rivers Casino & Resort at Mohawk Harbor as meeting the minimum licensing thresholds set forth in section 1316 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Sample
APPROVED: 5-0

- (3) The Commission considered adopting the Lead Agency's SEQRA Findings Statement certifying that the requirements of 6 NYCRR Part 617 have been met, and consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

ON A MOTION BY: Commissioner Sample
APPROVED: 5-0

- (4) The Commission considered executing the Gaming Facility License Award for Capital Region Gaming, LLC doing business as Rivers Casino & Resort at Mohawk Harbor pursuant to section 1311 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Sample

APPROVED: 5-0

b. Lago Resort & Casino, LLC doing business as Lago Resort & Casino

- (1) The Commission considered finding Lago Resort & Casino, LLC doing business as Lago Resort & Casino suitable for gaming facility licensing per standards contained with sections 1317 and 1318 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Crotty

APPROVED: 5-0

- (2) The Commission considered finding the application, as amended, submitted Lago Resort & Casino, LLC doing business as Lago Resort & Casino as meeting the minimum licensing thresholds set forth in section 1316 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Moschetti

APPROVED: 5-0

- (3) The Commission considered executing the Gaming Facility License Award for Lago Resort & Casino, LLC doing business as Lago Resort & Casino pursuant to section 1311 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Crotty

APPROVED: 5-0

c. Montreign Operating Company, LLC doing business as Montreign Resort Casino

- (1) The Commission considered finding Montreign Operating Company, LLC doing business as Montreign Resort Casino suitable for gaming facility licensing per standards contained with sections 1317 and 1318 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Moschetti

APPROVED: 5-0

- (2) The Commission considered finding the application, as amended, submitted Montreign Operating Company, LLC doing

business as Montreign Resort Casino as meeting the minimum licensing thresholds set forth in section 1316 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Poklemba
APPROVED: 5-0

- (3) The Commission considered adopting the Lead Agency's SEQRA Findings Statement certifying that the requirements of 6 NYCRR Part 617 have been met, and consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

ON A MOTION BY: Commissioner Moschetti
APPROVED: 5-0

- (4) The Commission considered executing the Gaming Facility License Award for Montreign Operating Company, LLC doing business as Montreign Resort Casino pursuant to section 1311 of the N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law.

ON A MOTION BY: Commissioner Moschetti
APPROVED: 5-0

6. Old Business/New Business

a. Old Business.

- (1) Discussion of the Staff Report in Regard to Allegations Advanced by the People for the Ethical Treatment of Animals in Regard to the Practices of KDE Equine, LLC *et al* was deferred until the January meeting. Commissioners requested Equine Medical Director Scott E. Palmer attend the meeting.
- (2) Use of Whip Research. Commission Executive Director Robert Williams stated that the national Jockey's Guild provided information relative to whip use and identifying how different jurisdictions are now considering its use. Williams also noted that counsel's office was drafting a memorandum regarding use and practice and that such memorandum would be circulated before the next meeting.

b. New Business. No new business was offered for discussion.

7. **Scheduling of Next Meeting**

It was announced that the next meeting date would be January 26, 2015.

8. **Adjournment**

The meeting was adjourned at 2:41 p.m.

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Gaming Commission

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www.gaming.ny.gov

John A. Crotty, Commissioner
Peter J. Moschetti, Jr., Commissioner
John J. Poklemba, Commissioner
Barry Sample, Commissioner
Todd R. Snyder, Commissioner

Robert Williams, Executive Director
Edmund C. Burns, General Counsel

To: Commissioners

From: Edmund C. Burns

Date: January 19, 2016

Re: Proposed Revised for Thoroughbred Restricted Time Periods for Various Drugs (9 NYCRR §§ 4043.2(a)(1), 4043.2.(e)(14) and 4043.2(e)(20)).

For the Commission's consideration are proposed revisions to a rulemaking proposal that would amend the Thoroughbred racing restricted time periods for the permissible use of two drugs, dimethyl sulphoxide ("DMSO") and diclofenac. The Commission had proposed such amendments at its March 12, 2014 meeting. These proposed rules were not published in the *State Register* until September 30, 2015, pending further academic research. A copy of this notice is attached.

The purpose of the proposed amendments was to make the restricted time periods for DMSO and diclofenac consistent with the *per se* regulatory thresholds for 24 drugs that the Commission adopted and that became effective on December 31, 2014.

The Commission's existing rules permit the topical use of DMSO on race day. The Commission had proposed to replace this restriction with a new restricted time period limiting topical use administration to 48 hours while reducing the restricted time period for other administrations from one week to 48 hours.

The proposal to eliminate topical use of DMSO on race day arose from a concern that such use might lead to inadvertent violations of the new 48-hour regulatory threshold for other DMSO use. According to publicly available information at the time of the proposed rulemaking, a topical administration of DMSO might be detectable above the new threshold for 48 hours.

While no public comments were received with respect to the proposal to add diclofenac to the list of non-steroidal anti-inflammatory drugs permitted to be used until 48 hours before racing, the Commission received two public comments urging revision of the proposed restricted time periods for DMSO. The comments were from the Racing Medication and Testing Consortium ("RMTC") and the New York Thoroughbred Horsemen's Association, Inc. ("NYTHA").

The RMTC suggested that Commission staff examine additional, unpublished research concerning topical race day use of DMSO, while restricting oral and intravenous DMSO

REVISED PROPOSED RULEMAKING

Revised Proposal

The Proposed Rulemaking, “Thoroughbred Restricted Time Periods for Various Drugs” (I.D. No. SGC-39-15-00005-P), published in the September 30, 2015 *State Register* at pp. 20-21 would be republished with the following revision, as denoted in *italics*:

Section 4043.2 would be amended as follows:

4043.2. Restricted use of drugs, medication and other substances.

Drugs and medications are permitted to be used only in accordance with the following provisions.

(a) The following substances are permitted to be used at any time up to race time:

(1) topical applications (such as antiseptics, ointments, salves, *DMSO* [DMSO,] leg rubs, leg paints and liniments) which may contain antibiotics but do not contain benzocaine, [*DMSO*,] steroids or other drugs;

* * *

(e) The following substances are permitted to be administered by any means until 48 hours before the scheduled post time of the race in which the horse is to compete:

* * *

(14) the following nonsteroidal anti-inflammatory drugs (NSAID[']s): [Phenylbutazone (*e.g.*, Butazolidin); diclofenac; [F]flunixin (*e.g.*, Banamine); ketoprofen (*e.g.*, Orudis); meclofenamic acid (*e.g.*, Arquel); naproxon (*e.g.*, Naprosyn, Equiproxen), [ketoprofen (*e.g.*, Orudis)]; and phenylbutazone (*e.g.*, Butazolidin);

* * *

(20) an oral or intravenous administration of dimethyl sulfoxide (*i.e.*, DMSO);

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, section 104; Tax Law, sections 1601, 1604, 1612 and 1617

Subject: New York Lottery draw game rules, including rules implementing changes to Powerball lottery game.

Purpose: Implement nationwide changes to Powerball multi-state lottery game; make "Quick Pick" definition consistent for all draw games.

Text or summary was published in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00026-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Kristen Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, NY 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Thoroughbred Restricted Time Periods for Various Drugs

I.D. No. SGC-39-15-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of section 4043.2(a) and (e) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104 (1, 19) and 122

Subject: Thoroughbred restricted time periods for various drugs.

Purpose: To enhance the integrity and safety of thoroughbred horse racing.

Text of proposed rule: Section 4043.2 of 9 NYCRR would be amended as follows:

§ 4043.2. Restricted use of drugs, [medication] medications and other substances.

Drugs and medications are permitted to be used only in accordance with the following provisions.

(a) The following substances are permitted to be used at any time up to race time:

(1) topical applications (such as antiseptics, ointments, salves, [DMSO,] leg rubs, leg paints and liniments) which may contain antibiotics but do not contain benzocaine, DMSO, steroids or other drugs;

(e) The following substances are permitted to be administered by any means until 48 hours before the scheduled post time of the race in which the horse is to compete:

(14) the following nonsteroidal anti-inflammatory drugs (NSAID[']s): [Phenylbutazone (e.g., Butazolidin)] diclofenac, [F]lunixin (e.g., Banamine), ketoprofen (e.g., Orudis), meclofenamic acid (e.g., Arquel), naproxen (e.g., Naprosyn, Equiproxen), [Ketoprofen (e.g., Orudis)] and phenylbutazone (e.g., Butazolidin).

(20) dimethyl sulfoxide (i.e., DMSO).

Text of proposed rule and any required statements and analyses may be obtained from: Kristen Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: The New York State Gaming Commission ("Commission") is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law Sections 103(2), 104 (1, 19) and 122. Under Section 103(2), the Commission is responsible to supervise, regulate, and administer all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commis-

sion to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Section 122 continues previous rules and regulations of the legacy New York State Racing and Wagering Board, subject to the authority of the Commission to modify or abrogate such rules and regulations.

2. Legislative objectives: To enable the Commission to protect the integrity of pari-mutuel horse races and the health and safety of thoroughbred horses and human participants in pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: This rulemaking is necessary to adjust the Commission's restricted time period governing the administration of the drugs dimethyl sulfoxide (i.e., DMSO) and diclofenac, a non-steroidal anti-inflammatory drug ("NSAID"), to be consistent with regulatory thresholds for the drugs that have been adopted by the Commission.

The proposal would amend the restricted time period for DMSO to prohibit the administration of DMSO within 48 hours of a race. Currently, in 9 NYCRR, topical administration of DMSO is permitted at any time under Section 4043.2(a)(1) and other administrations of DMSO are not permitted until one week before a horse's next race under the restrictions of Section 4043.2(h). The Commission has adopted a regulatory threshold on race day for DMSO that is consistent with an administration of DMSO at least 48 hours before a horse's next race and reflects a determination that administrations of DMSO are permissible within one week of racing, provided that no administration occurs within the 48 hours before a horse's next race. The proposed amendment would add DMSO to the list, in subdivision (e) of Section 4043.2, of drugs that may be administered until 48 hours before racing. A 48-hour restricted time period for DMSO will also provide an assurance to thoroughbred horsepersons that compliance would protect them from violation of such threshold.

The proposal would also amend subdivision (e) Section 4043.2 to include the diclofenac to the list of permissible NSAIDs that appears at paragraph 14. This change will make the restricted time period for diclofenac, which currently is regulated for one week before racing pursuant to subdivision (h) of Section 4043.2, consistent with the regulatory threshold that the Commission has adopted for diclofenac. A 48-hour restricted time period will provide an assurance to thoroughbred horsepersons that compliance would protect them from violation of such threshold.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: There are no new or additional costs imposed by this rule upon regulated persons. The rule merely revises an existing rule in regard to allowable time of administration of various medications.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: There are no costs imposed upon the Commission, the State, or local government. The rule will be implemented using the Commission's existing regulatory and medication testing program. There will be no costs to local governments because they do not regulate pari-mutuel racing activities.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Commission has determined that no costs will be imposed based upon the fact that the rule does not create any new mandatory duty or obligation, utilizes an existing regulatory framework and medication testing program, and merely modifies a medication rule.

5. Local government mandates: None. The New York State Gaming Commission is the only governmental entity authorized to regulate pari-mutuel racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: None.

8. Alternatives: This rule amendment is to assure horsepersons that the Commission's restricted time periods are consistent with the separately proposed national regulatory laboratory thresholds for these equine drugs that have been recommended by the RMTc and the ARCI. No other alternatives were considered.

9. Federal standards: None.

10. Compliance schedule: Regulated persons will be able to achieve compliance with the rule upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rulemaking proposal.

This proposed amendments merely adjust the restricted time periods after the treatment of a thoroughbred race horse with diclofenac or dimethyl sulfoxide (i.e., DMSO) to most closely approximate the period after administration of such drugs that should be accorded before a horseperson races a thoroughbred horse, given the recent adoption of the national regulatory laboratory thresholds for such drugs. The rule is entirely limited to equine drug standards and testing, and merely modifies the restriction

on administration of an approved drug for race horses. This rulemaking will not have a positive or negative impact on jobs. These amendments do not impact upon State Administrative Procedure Act § 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reimbursement of Awards for Capital Improvement Projects at Video Lottery Gaming (“VLG”) Facilities

I.D. No. SGC-39-15-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of sections 5100.2(a)(2), 5122.1, 5122.3, 5122.4; and addition of section 5122.5 to Title 9 NYCRR.

Statutory authority: Tax Law, sections 1601 and 1617-a; Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2) and 104(1,19)

Subject: Reimbursement of awards for capital improvement projects at video lottery gaming (“VLG”) facilities.

Purpose: Clarify when VLG agent must reimburse State upon divestment of a capital improvement for which capital award was received.

Text of proposed rule: Pursuant to the authority granted by Section 104 of the Racing, Pari-Mutuel Wagering and Breeding Law and Section 1604, clause (H) of subparagraph (ii) of paragraph 1 of subdivision (b) of section 1612 and subdivisions a and c of Section 1617-a of the Tax Law, the New York State Gaming Commission hereby proposes this amendment of subdivision (a) of Section 5001.2 and Sections 5122.1, 5122.3 and 5122.4, and the addition of a new Section 5122.5, of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to read as follows:

§ 5100.2. Definitions.

(a) Unless the context indicates otherwise, the following definitions are applicable throughout this subchapter.

(2) *The act means article 34 of the Tax Law, commonly known and cited as the “New York State Lottery for Education Law.”*

[NOTE: paragraphs (2) through (125) would be renumbered as (3) through (126).]

§ 5122.1. Video lottery gaming agent receipt of capital awards.

(a) [In accordance with the act, there] *A vendor capital award for which a video lottery agent shall be eligible pursuant to Tax Law section 1612(b)(1)(ii)(H) shall be made available [to each video lottery gaming agent] from the daily video lottery gaming revenue generated at [each] such video lottery gaming agent’s facility [a capital award] to be used exclusively for [capital project investments to improve the facilities of the vendor track that promote or encourage increased attendance at the video lottery gaming facility, including, but not limited to, hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance the facility amenities; provided that such capital investments shall be approved by the commission and that such agent demonstrates that such capital expenditures will increase patronage at such agent’s facilities and increase the amount of revenue generated to support State education programs] the purposes set forth in Tax Law section 1612(b)(1)(ii)(H). Tax Law section 1612(b)(1)(ii)(H) sets forth co-investment requirements of such agents. The amount of any vendor’s capital award that is not used during any one-year period may be carried over into subsequent years only as permitted by Tax Law section 1612(b)(1)(ii)(H).*

(b) Except as provided in the act, each agent shall be required to co-invest an amount of capital expenditure equal to such agent’s cumulative vendor’s capital awards. The amount of any vendor’s capital award that is not used during any one-year period may be carried over into subsequent years ending before April 1, 2013. In the event that a vendor track’s capital expenditures, approved by the commission prior to April 1, 2013 and completed prior to April 1, 2015, exceed the vendor track’s cumulative capital award during the five-year period ending April 1, 2013, the vendor track shall continue to receive the annual capital award after April 1, 2013 until such approved capital expenditures are paid to the vendor track subject to any required co-investment.]

(c) Any agent that has received a vendor’s capital award, choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement, in accordance with

generally accepted accounting principles, shall reimburse the State in amounts equal to the total of any such awards.]

(d) Any capital award not approved for a capital expenditure at a video lottery gaming facility by April 1, 2013 shall be deposited in the State lottery fund for education aid.]

(e) (b) All such capital [improvement] *improvements* and expenditures shall be subject to the overall supervision of the commission.

§ 5122.3. Capital improvement plan.

(a) Each agent eligible for capital award funds shall prepare *annually* a capital improvement plan for the video lottery gaming facility. The capital improvement plan shall provide sufficient detail to describe anticipated capital projects for which the agent will seek reimbursement from the capital award. Such capital improvement plan shall be submitted electronically to the commission for review, and may be amended by the agent from time to time as planned capital projects are modified.

(b) Each capital improvement plan, without limitation, shall briefly describe, in narrative form, the capital improvement projects the video gaming facility plans to commence [during the five-year period ending April 1, 2013, that are to be completed prior to April 1, 2015] *over the next five years.*

(c) Capital improvements plans shall be due to the commission [on a date prescribed by the commission] *no later than July 1 of each year.* The failure to submit any capital improvement plan when due to the commission shall be a violation of the agent’s license, the act and these regulations.

§ 5122.4. Capital improvement plan implementation and award reimbursement.

(b) Payment from capital award funds shall [only] be approved by the commission *only* for capital project construction or improvements commenced on or after April 1, 2008, or the portion of a project completed after April 1, 2008 for projects, or phases of projects, commenced before April 1, 2008.

(c) Not later than [15] *60* days from receipt of a capital project request for approval, the commission shall review the request and provide the commission’s approval or denial of the project. Each project shall qualify as an approved use of the capital award if it meets the following guidelines:

(1) The capital project includes the addition of tangible, permanent assets in the form of land, buildings, or equipment; or the project includes the restoration of such existing assets.

(2) Project assets purchased or restored, are to be used in the operation of video gaming and are expected to have a useful life of two years or more, providing a reasonable benefit throughout the assets useful life.

(3) The capital expenditure is of significant value, consistent with standard accounting policies for the recording of capital assets.

(4) The capital project will increase patronage at the video gaming facility and increase the amount of revenue generated to support education aid.

(5) The capital project will be completed prior to [April 1, 2015] *the applicable date set forth Tax Law section 1612(b)(1)(ii)(H).*

(l) (l) In the event any [expense reports] *reimbursement requests* are deemed insufficient at the sole discretion of the commission, the commission may require an agent to provide the following information:

(1) a full and complete reconciliation of the capital improvement expenses and associated costs incurred; and

(2) an accounting for the cash spending related to the capital improvement funds.

§ 5122.5. *Reimbursement of capital award to State upon divestiture.*

(a) *Divestiture of a capital improvement. A video lottery gaming agent shall be deemed to have chosen to divest a capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H), when such video lottery gaming agent voluntarily*

(1) *sells, alienates, transfers, relinquishes possession of or otherwise disposes;*

(2) *destroys or otherwise wastes; or*

(3) *removes from use for the benefit of video lottery gaming;*

a capital improvement that had been purchased or created with funds in whole or in part from a vendor’s capital award. Notwithstanding anything else in this subdivision, a video lottery gaming agent shall not be deemed to have chosen to divest a capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H), if the commission determines in writing that such action was taken with the prior approval of the commission and was taken with the intent to increase patronage at such video lottery gaming agent’s facility and increase the amount of revenue generated to support State education programs.

(b) *Sale or transfer to affiliated entity. A video lottery gaming agent transferring a capital improvement to an affiliated entity that will become, in the place of such video lottery gaming agent, the video lottery agent at*



Gaming Commission

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Barry Sample, Commissioner
Todd R. Snyder, Commissioner

Robert Williams, Executive Director
Edmund C. Burns, General Counsel

To: Commissioners

From: Edmund C. Burns

Date: January 19, 2016

Re: Adoption of Rulemaking for the Post-Race Testing of Claimed Horses (9 NYCRR §§ 4038.5, 4038.17, 4109.3, 4109.5).

For the Commission's consideration is the adoption of the proposed rulemaking to discontinue the current mandatory post-race testing of claimed horses and to permit a claimant to request such testing, at the claimant's expense, on the claim form.

The Commission proposed this rulemaking on September 24, 2015. The proposal was published in the November 18, 2015 *State Register*. A copy of that notice is attached.

The purpose of the proposed amendments is to eliminate the burdensome State expense of testing every claimed horse, while providing a mechanism for allowing interested claimants who believe the testing is worth the expense to request that the claimed horse be included in post-race testing before delivery of the horse to the claimant.

The Commission received one public comment with respect to the proposal. The New York Thoroughbred Horsemen's Association, Inc. ("NYTHA") wrote to express its understanding that this proposal is made for purely economic reasons and its belief that the current rule has a deterrent value and serves a collective best interest. Nonetheless, NYTHA supports the feature in the proposal that allows a claimant voluntarily to request post-race testing at the claimant's request on the claim form and supports continuing (which the proposed rulemaking does) the option for a claimant to void a claim whenever the claimed horse tests positive for impermissible drugs after the claiming race.

NYTHA also notes that the Commission should consider whether a positive test from an elective drug test paid for by the claimant may be used for a disciplinary proceeding by the Commission, because such testing is conducted for the benefit of the claimant rather than to serve a regulatory purpose. Any positive result from a drug screening test is a regulatory concern of the Commission, which includes in its mission ensuring the integrity of horse racing competition and wagering. Commission staff anticipates that a positive drug screen test result would trigger fuller forensic testing, at Commission expense, that may result in discipline for Commission rules violations if warranted.



Commissioners
January 19, 2016
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attachments

cc: Robert Williams, Executive Director
Ronald Ochrym, Director, Division of Horse Racing and Pari-Mutuel Wagering
Dr. Scott Palmer, Equine Medical Director

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-19-15-00006-A

Filing No. 937

Filing Date: 2015-10-30

Effective Date: 2015-11-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify a position in the non-competitive class.

Text or summary was published in the May 13, 2015 issue of the Register, I.D. No. CVS-19-15-00006-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Assessment of Public Comment

The agency received no public comment.

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Require Claimant to Indicate on Claim Form Whether Commission at Claimant's Expense Shall Test a Claimed Horse for Drug Use

I.D. No. SGC-46-15-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of sections 4038.5, 4038.17, 4109.3 and 4109.5 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1), (19), 301(1), (2) and 902(1)

Subject: To require claimant to indicate on claim form whether commission at claimant's expense shall test a claimed horse for drug use.

Purpose: To preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

Text of proposed rule: Section 4038.5 of 9 NYCRR would be amended as follows:

§ 4038.5. Requirements for claim; determination by stewards.

(a) All claims shall be in writing, sealed in an envelope and deposited in a locked box provided for this purpose by the racing secretary or the racing secretary's designee, at least 10 minutes before post time. Claim slip forms must be completely filled out and must, in the judgment of the stewards, be sufficiently accurate to identify the claim, otherwise the claim will be void. No money shall accompany the claim. Each person desiring to make a claim, unless the person has such amount to the person's credit with the association, must first deposit with the association the whole amount of the claim, in a manner approved by the racing secretary or designee for which a receipt will be given. *Unless funds of the claimant available in the claimant's account with the association are sufficient, in the judgment of the stewards, to pay the cost of any post-race testing requested on the claim form by the claimant, the commission shall not conduct such testing. If such funds are sufficient, an amount sufficient to pay for the post-race testing requested on the claim form shall be frozen in such claimant's account to secure anticipated costs of testing.* All claims shall be passed upon by the stewards. The person determined at the closing time for claiming to have the right of claim shall become the owner of the horse when the start is effected, whether the horse is sound or unsound or injured before or during the race or after the race, except that:

(1) the claim is voidable at the discretion of the new owner pursuant to the conditions stated in section 4038.19 of this Part unless the age or sex of such horse has been misrepresented, and subject to the provisions of subdivision (b) of this section; and

(2) a claim shall be void for any horse that dies during a race or is euthanized on the track following a race; and

(3) a claim is voidable at the discretion of the new owner, for a period of one hour after the race is made official, for any horse that is vanned off the track after the race.

In the event more than one person should enter a claim for the same horse, the disposition of the horse shall be decided by lot by the stewards. Any horse so claimed shall then be taken to the test barn for delivery to the claimant after [the] any test sample is taken.

Section 4038.17 of 9 NYCRR would be amended as follows:

§ 4038.17. Horses claimed—testing.

If the claimant of a horse has requested post-race testing, at the expense of the claimant, on the claim form, then the stewards shall designate such horse [Each horse claimed in a race shall be designated by the stewards for post-race blood and urine testing] for post-race testing pursuant to subdivision (b) of section 4012.3 of this Article. The original trainer shall remain responsible for the claimed horse until [the] any on-track post-race sample collection has been completed.

Section 4109.3 of 9 NYCRR would be amended as follows:

§ 4109.3. Claiming procedure.

(a) Claimant's credit. The claimant must have to [his] *the claimant's* credit with the track an amount equivalent to the specified claiming price, the applicable sales tax, the cost of transferring the registration[,] and the fee for the test for equine infectious anemia. No claims shall be accepted unless such credit is certified in writing by an authorized track official and such written certification is included with the claim. *Unless the claimant also has to the claimant's credit an amount sufficient to pay the cost of any post-race testing requested on the claim form by the claimant, the commission shall not conduct such testing.* No track official of [said] the racing association shall give any information as to the filing of any claim or claim information to the public and horsemen until after the race has been run.

* * *

Section 4109.5 of 9 NYCRR would be amended as follows:

§ 4109.5. Horses claimed—testing.

If the claimant of a horse has requested post-race testing, at the expense of the claimant, on the claim form, then the judges shall designate such horse [Each horse claimed in a race shall be designated by the judges for post-race blood and urine testing] for post-race testing pursuant to subdivision (b) of section 4120.8 of this Article. The original trainer shall remain responsible for the claimed horse until [the] any on-track post-race sample collection has been completed.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: The New York State Gaming Commission ("Commission") is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 103(2), 104(1), (19), 301(1), (2), and 902(1). Under Section 103(2), the Commission is responsible to supervise, regulate and administer all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Under Section 301, which applies to only harness racing, the Commission is authorized to supervise generally all harness race meetings and to adopt rules to prevent the circumvention or evasion of its regulatory purposes and provisions, and directed to adopt rules to prevent horses from racing under the influence of substances affecting their speed. Section 902(1) authorizes the Commission to promulgate rules and regulations for an equine drug testing program that assures the public's confidence and continues the high degree of integrity in pari-mutuel racing and to impose administrative penalties for racing a drugged horse.

2. Legislative objectives: To enable the Commission to preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

3. Needs and benefits. This rule making is necessary to allow the Commission the flexibility to determine which claiming horses should be tested

at the expense of the Commission consistent with current enforcement needs and realities, while allowing a prospective owner of a claimed horse ("claimant") to arrange for the Commission to test the horse at the claimant's expense at the conclusion of the race. Both the harness and thoroughbred rules for testing all claimed horses were adopted in 1983 and require revision to reflect equine testing priorities.

Sections 4038.17 and 4109.5 will be amended to no longer require the stewards and judges to designate every claimed horse for post-race equine drug testing. The proposed amendments will require such testing by the Commission, however, if the claimant had requested such testing at the claimant's expense on the claim form. Sections 4038.5 and 4109.3 will be amended to provide a method for a claimant to post sufficient funds to pay for the cost of such requested testing, in the same manner as sufficient funds are posted to pay for a claimed horse, in advance of the race.

Under the current rules, the Commission must test all horses that are claimed, which is problematic given the cost of testing when weighed against realistic fiscal implications and the priorities of the Commission's equine drug testing program. All claimed horses have to be tested whether there is a basis for testing or not, the Commission has no flexibility in determining which claiming horses should be tested, and there is no discretion granted to withhold testing in the absence of any basis for testing a claiming horse. No other major racing jurisdiction has such a requirement.

In claiming, equine testing is not directly related to the integrity of the racing contest. A claiming horse is, in effect, offered for sale at a designated price within the range of the claiming race in which the horse is entered by its owner. The potential claimant of a horse in a claiming race must enter a claim before the race. When more than one claim is entered for a horse in a claiming race, the successful claimant is chosen by lot. By entering a horse in a claiming race, the current owner offers the horse for sale to any qualified person who enters a claim. There is no rationale for testing a claiming horse simply because it is sold.

The claimant can nullify a claim in the event of a positive drug test, and so the testing program serves as a distinct benefit to such new owner, who is a private party to what amounts to a sale. It is not uncommon, however, for a claimant to decide not to nullify a claim despite a positive drug test. In such cases, the equine drug testing program serves only to permit a claimant to nullify the claim for unrelated reasons, e.g., because the horse raced poorly.

The Commission's other equine testing rules are more directly related to the results, and therefore the integrity, of a race. Under thoroughbred rule 4012.3 and harness rule 4120.8, for example, equine drug testing is conducted on every winner and at least one other horse designated by the respective stewards or judges. Such equine testing rules will still apply to winners and another designated horse in claiming races if the proposed amendments are adopted.

The amendments to harness rule 4109.5 are also necessary to bring the harness rule into uniformity with the thoroughbred rule by including the clause, "The original trainer shall remain responsible for the claimed horse until the on-track post-race sample collection has been completed." This amendment is necessary to expressly assign a responsibility that, although it has been done in practice, has not been included in the harness rule.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendments will have no effect on the cost of testing by the Commission and will merely permit the reallocation of limited equine testing funds to other types of equine drug testing conducted by the Commission. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Commission relied on the studies and advice provided by Dr. George A. Maylin, the Director of the New York State Drug Testing and Research Program.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: None. No relevant rules or other legal requirements of the state and/or federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered an alternative suggestion by some regulated parties to preserve the current requirement for equine testing of claimed horses, and to create general fiscal savings by instead testing only one horse, randomly, in each race. This alternative was not considered feasible because random testing is not based on the performance of the horse in a race, such as a winning horse or a beaten favorite, nor was the alternative considered adequate to justify testing a horse

merely because it was claimed, rather than for objective reasons. In addition, while other racing states commonly choose to test the winner and another horse in each race, none routinely test claimed horses at the expense of the racing commission.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

These proposals would discontinue the Commission's practice of collecting a post-race sample from all claimed horses but permit every claimant to have a claimed horse tested at the request and expense of the claimant. The purpose of this proposal is to mitigate the burdensome administrative expense of testing every claimed horse when many claimants do not void a claim, which is their right, in the rare instance when such a sample tests positive. Free testing of every claimed horse is also not a service that is not offered by any other racing jurisdiction.

The racing stewards and judges will continue to select the winner and one other horse, using their judgment and based on the performance of the horse, to be sampled and tested for illicit drug use at the conclusion of each race. Claimants will continue to be able to void a claim if any such post-race sample tests positive for the presence of a prohibited substance.

This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Requirement of Specific Minimum Penalties for Certain Multiple Medication Violations

I.D. No. SGC-46-15-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Addition of Part 4045 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

Subject: Requirement of specific minimum penalties for certain multiple medication violations.

Purpose: To enhance the integrity and safety of thoroughbred horse racing.

Text of proposed rule: A new Part 4045, §§ 4045.1 to 4045.6, would be added to 9 NYCRR, to read as follows:

Part 4045. Minimum Penalty Enhancement.

§ 4045.1. Definitions.

The following terms, when used in this Part, have the following meanings:

(a) ARCI Penalty Guidelines means the penalty guidelines published in "Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule," Version 8.0 (revised December 2014) of the Association of Racing Commissioners International, Inc., which are hereby incorporated by reference.

(b) Equine drug rule means any law, rule, regulation or order that restricts the administration to, or presence in, a racehorse of a drug or other substance in New York or another racing jurisdiction.

(c) Final adjudication means a ruling or order of a racing commission that is not currently subject to an administrative or judicial stay, and if such ruling or order is subjected subsequently to a stay, then the ruling or order existing after any such stay ends.

(d) Precipitating equine drug rule violation means an equine drug rule violation committed in New York that causes or may cause, depending on the final adjudication of a ruling or order of a racing commission, the penalties of this section to apply.

(e) Racing commission means the agency regulating horse racing in a jurisdiction that has horse racing and pari-mutuel wagering.

§ 4045.2. General.

The commission shall suspend the occupational licenses of a habitual or persistent violator of equine drug rules as an additional penalty when there is a precipitating equine drug rule violation. This suspension shall constitute the bare minimum overall penalty enhancement that arises from



Gaming Commission

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John A. Crotty, Commissioner
Peter J. Moschetti, Jr., Commissioner
John J. Poklemba, Commissioner
Barry Sample, Commissioner
Todd R. Snyder, Commissioner

Robert Williams, Executive Director
Edmund C. Burns, General Counsel

To: Commissioners

From: Edmund C. Burns

Date: January 11, 2016

Re: Adoption of Minimum Penalty Enhancement Rule in Thoroughbred Racing (9 NYCRR Part 4045, §§ 4045.1 to 4045.7).

For the Commission's consideration is the adoption of the minimum penalty enhancement rule for Thoroughbred racing that the Commission proposed on December 22, 2014 and that was published in the November 18, 2015 *State Register*. A copy of such notice is attached.

This proposal is part of an effort to achieve national consensus on a minimum penalty system for repeat medication violators in Thoroughbred racing, proposed by the Racing Medication & Testing Consortium ("RMTC") and the Association of Racing Commissioners International, Inc. The Commission received public comments in favor of the proposal from the National Thoroughbred Racing Association, The New York Racing Association, Inc., New York Thoroughbred Horsemen's Association, Inc. and RMTC. No comments opposed the proposal.

[REDACTED]

attachment

cc: Robert Williams, Executive Director
Ronald Ochrym, Acting Director, Division of Horse Racing and Pari-Mutuel Wagering
Dr. Scott Palmer, Equine Medical Director

at the expense of the Commission consistent with current enforcement needs and realities, while allowing a prospective owner of a claimed horse ("claimant") to arrange for the Commission to test the horse at the claimant's expense at the conclusion of the race. Both the harness and thoroughbred rules for testing all claimed horses were adopted in 1983 and require revision to reflect equine testing priorities.

Sections 4038.17 and 4109.5 will be amended to no longer require the stewards and judges to designate every claimed horse for post-race equine drug testing. The proposed amendments will require such testing by the Commission, however, if the claimant had requested such testing at the claimant's expense on the claim form. Sections 4038.5 and 4109.3 will be amended to provide a method for a claimant to post sufficient funds to pay for the cost of such requested testing, in the same manner as sufficient funds are posted to pay for a claimed horse, in advance of the race.

Under the current rules, the Commission must test all horses that are claimed, which is problematic given the cost of testing when weighed against realistic fiscal implications and the priorities of the Commission's equine drug testing program. All claimed horses have to be tested whether there is a basis for testing or not, the Commission has no flexibility in determining which claiming horses should be tested, and there is no discretion granted to withhold testing in the absence of any basis for testing a claiming horse. No other major racing jurisdiction has such a requirement.

In claiming, equine testing is not directly related to the integrity of the racing contest. A claiming horse is, in effect, offered for sale at a designated price within the range of the claiming race in which the horse is entered by its owner. The potential claimant of a horse in a claiming race must enter a claim before the race. When more than one claim is entered for a horse in a claiming race, the successful claimant is chosen by lot. By entering a horse in a claiming race, the current owner offers the horse for sale to any qualified person who enters a claim. There is no rationale for testing a claiming horse simply because it is sold.

The claimant can nullify a claim in the event of a positive drug test, and so the testing program serves as a distinct benefit to such new owner, who is a private party to what amounts to a sale. It is not uncommon, however, for a claimant to decide not to nullify a claim despite a positive drug test. In such cases, the equine drug testing program serves only to permit a claimant to nullify the claim for unrelated reasons, e.g., because the horse raced poorly.

The Commission's other equine testing rules are more directly related to the results, and therefore the integrity, of a race. Under thoroughbred rule 4012.3 and harness rule 4120.8, for example, equine drug testing is conducted on every winner and at least one other horse designated by the respective stewards or judges. Such equine testing rules will still apply to winners and another designated horse in claiming races if the proposed amendments are adopted.

The amendments to harness rule 4109.5 are also necessary to bring the harness rule into uniformity with the thoroughbred rule by including the clause, "The original trainer shall remain responsible for the claimed horse until the on-track post-race sample collection has been completed." This amendment is necessary to expressly assign a responsibility that, although it has been done in practice, has not been included in the harness rule.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendments will have no effect on the cost of testing by the Commission and will merely permit the reallocation of limited equine testing funds to other types of equine drug testing conducted by the Commission. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Commission relied on the studies and advice provided by Dr. George A. Maylin, the Director of the New York State Drug Testing and Research Program.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: None. No relevant rules or other legal requirements of the state and/or federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered an alternative suggestion by some regulated parties to preserve the current requirement for equine testing of claimed horses, and to create general fiscal savings by instead testing only one horse, randomly, in each race. This alternative was not considered feasible because random testing is not based on the performance of the horse in a race, such as a winning horse or a beaten favorite, nor was the alternative considered adequate to justify testing a horse

merely because it was claimed, rather than for objective reasons. In addition, while other racing states commonly choose to test the winner and another horse in each race, none routinely test claimed horses at the expense of the racing commission.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

These proposals would discontinue the Commission's practice of collecting a post-race sample from all claimed horses but permit every claimant to have a claimed horse tested at the request and expense of the claimant. The purpose of this proposal is to mitigate the burdensome administrative expense of testing every claimed horse when many claimants do not void a claim, which is their right, in the rare instance when such a sample tests positive. Free testing of every claimed horse is also not a service that is not offered by any other racing jurisdiction.

The racing stewards and judges will continue to select the winner and one other horse, using their judgment and based on the performance of the horse, to be sampled and tested for illicit drug use at the conclusion of each race. Claimants will continue to be able to void a claim if any such post-race sample tests positive for the presence of a prohibited substance.

This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Requirement of Specific Minimum Penalties for Certain Multiple Medication Violations

I.D. No. SGC-46-15-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Addition of Part 4045 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

Subject: Requirement of specific minimum penalties for certain multiple medication violations.

Purpose: To enhance the integrity and safety of thoroughbred horse racing.

Text of proposed rule: A new Part 4045, §§ 4045.1 to 4045.6, would be added to 9 NYCRR, to read as follows:

Part 4045. Minimum Penalty Enhancement.

§ 4045.1. Definitions.

The following terms, when used in this Part, have the following meanings:

(a) ARCI Penalty Guidelines means the penalty guidelines published in "Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule," Version 8.0 (revised December 2014) of the Association of Racing Commissioners International, Inc., which are hereby incorporated by reference.

(b) Equine drug rule means any law, rule, regulation or order that restricts the administration to, or presence in, a racehorse of a drug or other substance in New York or another racing jurisdiction.

(c) Final adjudication means a ruling or order of a racing commission that is not currently subject to an administrative or judicial stay, and if such ruling or order is subjected subsequently to a stay, then the ruling or order existing after any such stay ends.

(d) Precipitating equine drug rule violation means an equine drug rule violation committed in New York that causes or may cause, depending on the final adjudication of a ruling or order of a racing commission, the penalties of this section to apply.

(e) Racing commission means the agency regulating horse racing in a jurisdiction that has horse racing and pari-mutuel wagering.

§ 4045.2. General.

The commission shall suspend the occupational licenses of a habitual or persistent violator of equine drug rules as an additional penalty when there is a precipitating equine drug rule violation. This suspension shall constitute the bare minimum overall penalty enhancement that arises from

a previous violation or violations of equine drug rules, wherever committed, and the commission shall continue to apply its own much broader and stricter standards when determining the appropriate penalty for the precipitating and other equine drug rule violations.

§ 4045.3. Points.

(a) When a precipitating equine drug rule violation occurs, the commission shall examine the equine drug rule violation history of the violator and assign a point value to other equine drug rule violations as set forth in this section.

(b) The commission shall assign six points, which shall accumulate permanently, for a violation involving a drug or other substance that:

(1) is classified as Penalty Class A in the ARCI Penalty Guidelines;

or
(2) is not classified in the ARCI Penalty Guidelines, but has a very high potential to affect race performance and no generally accepted veterinary use in racing horses, subject to any adjustments that apply as set forth in this section.

(c) The commission shall assign four points, which shall accumulate with points resulting from other violations committed within a three-year period, for a violation involving a drug or other substance that:

(1) is classified as Penalty Class B in the ARCI Penalty Guidelines;

or
(2) is not classified in the ARCI Penalty Guidelines, but has a high potential to affect race performance and

(i) has a high potential for abuse; or
(ii) has no generally accepted veterinary use in racing horses, subject to any adjustments that apply as set forth in this section.

(d) The commission shall assign two points, which shall accumulate with points resulting from other violations committed within a two-year period, for a violation involving a drug or other substance that is classified as Penalty Class C in the ARCI Penalty Guidelines, subject to any adjustments that apply as set forth in this section.

(e) The commission shall assign one point, which shall accumulate with points resulting from other violations committed within a one-year period, for a violation involving a drug or other substance that:

(1) is classified as Penalty Class D in the ARCI Penalty Guidelines;

or
(2) does not fall within any other subdivision of this section, subject to any adjustments that apply as set forth in this section.

(f) No points shall be assigned for a violation involving a drug or other substance that has no effect on the physiology of a racing horse except to improve nutrition or to treat or prevent infections or parasite infestations.

(g) No points shall be assigned for any violations that occurred before January 1, 2014.

(h) The point values set forth in subdivisions (c), (d) and (e) of this section are reduced by one-half for any drug or other substance that is listed in section 4043.3 of this Subchapter.

(i) If a violation involves more than one drug or substance, then the commission shall assign to such violation not less than the highest point value of any one of the drugs or substances and shall assign additional points for each drug or substance that could have the effect of substantially altering the nature or effect of such drugs or other substances on the horse.

(j) If multiple violations involving one drug or substance are committed before a licensee is notified of a positive laboratory test, then the commission may assign lesser points for the violations, although not less than the points for a single violation, when the responsible parties are able to show that the multiple violations occurred as the result of an honest and unavoidable mistake.

(k) The commission shall assign point values as of the date of a violation.

(l) Points assigned for an equine drug rule violation are not removed from a licensee's record when they serve as a basis to suspend a license. Points continue to accumulate for the time periods that are set forth in subdivisions (c), (d) and (e) of this section.

§ 4045.4. Administrative action.

The commission shall take the following administrative action after a final adjudication of the commission establishes that a licensee has committed a precipitating equine drug rule violation in New York:

(a) The commission shall calculate the points applicable to such licensee to determine whether to take any further administrative action pursuant to this Part.

(1) A licensee may be mailed a letter advising such licensee of the status of the equine drug violation record of such licensee and any possible future action that may be taken in the event of such licensee's accumulation of additional points.

(2) Although point values shall be assigned as of the date of each violation, the commission shall not initiate a suspension pursuant to this Part until after the final adjudication of each equine drug rule violation for which points are assigned pursuant to this Part.

(3) When a precipitating equine drug rule violation results in the licensee having accumulated three or more points based on final adjudica-

tions of equine drug rule violations, the commission shall find that a licensee is a habitual or persistent equine drug rule violator.

(b) The Director of the Division of Horse Racing and Pari-Mutuel Wagering shall suspend the occupational licenses of a habitual or persistent equine drug rule violator, at a minimum, as follows:

(1) if the licensee has accumulated 3 to 5.5 points as a result of equine drug rule violations, a suspension of 30 days;

(2) if the licensee has accumulated 6 to 8.5 points as a result of equine drug rule violations, a suspension of 60 days;

(3) if the licensee has accumulated 9 to 10.5 points as a result of equine drug rule violations, a suspension of 180 days; and

(4) if the licensee has accumulated 11 or more points as a result of equine drug rule violations, a suspension of one year.

(c) Such license suspensions shall in no way affect any administration action taken under any other provision of this Subchapter, including the imposition of a penalty for the precipitating or other equine drug rule violation in New York.

(d) The Director of the Division of Horse Racing and Pari-Mutuel Wagering, on behalf of the commission, may proportionately reduce such suspension, however, when convinced by clear and convincing evidence that the commission had already enhanced, based on one or more of the predicate equine drug rule violations, the penalty imposed on the licensee for the precipitating equine drug rule violation.

(e) The State Steward may, when authorized by the Director of the Division of Horse Racing and Pari-Mutuel Wagering, add the habitual or persistent equine drug rule violator suspension when issuing a ruling upon a precipitating equine drug rule violation.

§ 4045.5. Start of suspension.

A habitual or persistent equine drug rule violator suspension shall not take effect until the commission has notified the licensee in writing of the suspension and

(a) the licensee waives in writing the right to an adjudicatory hearing;

(b) the licensee does not, within 10 days, make a written application for an adjudicatory hearing before the commission; or

(c) an administrative stay for the adjudicatory hearing has expired and no further stay has been granted to the licensee.

§ 4045.6. Adjudicatory hearing.

(a) A habitual or persistent equine drug rule violator may, within 10 days of service upon such violator of a notice of a suspension imposed by this Part, file a written application for an adjudicatory hearing before the commission. A request that is not filed within 10 days shall be null and void and the licensee shall have waived any right to an adjudicatory hearing.

(b) If a licensee requests an adjudicatory hearing for a suspension imposed pursuant to this Part, the commission shall issue an administrative stay of the habitual or persistent equine drug rule violator suspension. Such stay shall be for 45 days from the date of service on the licensee of the notice of the suspension. The licensee may request, on motion with reasonable notice to the secretary of the commission, filed in writing, an extension of such stay for good cause shown that the licensee has not been able to participate in an evidentiary hearing within such period of time. The director of the Division of Horse Racing and Pari-Mutuel Wagering shall decide such motion on behalf of the commission, and the decision of such director shall be final. Upon the completion of the evidentiary hearing, another administrative stay of the suspension shall be issued until such time as the commissioners have taken final agency action.

(c) The adjudicatory hearing shall be conducted pursuant to Part 4550 of this Chapter.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, New York 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: The New York State Gaming Commission ("Commission") is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law sections 103(2), 104(1), 104(19) and 122. Under Section 103(2), the Commission is responsible to supervise, regulate, and administer all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Section 122 continues previous rules and regulations of the legacy New York State Racing and Wagering Board, subject to the authority of the Commission to modify or abrogate such rules and regulations.

2. Legislative objectives: To enable the Commission to enhance the integrity and safety of thoroughbred pari-mutuel racing.

3. Needs and benefits: This rulemaking will add a new Part 4045 to 9 NYCRR and require specific minimum penalties for certain multiple violations of equine drug rules.

Under this proposal, the Commission would impose a bare minimum license suspension, after the occurrence of an equine drug rule violation in New York, when the Commission determines that the offender meets the criteria to be considered a habitual or persistent violator.

The proposal assigns, in section 4045.3, a specific number of points for each type of equine drug violation, whether committed in New York or elsewhere. A drug that has a very high potential to affect race performance and no therapeutic reason to given to a horse, for example, would be assigned the most points. Points would remain on a person's license history for a period of time determined by the seriousness of the drug.

A minimum mandatory license suspension is assigned, in section 4045.4, based on the accumulation of such points within specified time periods. The minimum mandatory penalty enhancement would be 30, 60, 180 or 365 days, depending on how many points have accumulated against the licensee. A penalty enhancement would apply for only the most serious or persistent equine drug violators.

The Commission, when also determining the penalty for an equine drug rule violation that precipitates this action, may still consider previous rule violations, but shall proportionately reduce the minimum penalty enhancement when appropriate to avoid multiple penalty enhancements for the same previous rule violations.

The minimum penalty enhancement suspension would not begin until after any pending challenges to the underlying rule violations were resolved, as set forth in section 4045.5, and after a hearing, if timely requested, as provided in section 4045.6.

This rulemaking is a model rule of the Association of Racing Commissioners International, Inc. ("ARCI") and is anticipated to be adopted by racing commissions throughout the United States. The adoption of this proposed rule will help to discourage horsepersons from having recurring violations of equine drug rules.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: This amendment would not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. There will be no costs to local governments because they do not regulate pari-mutuel racing activities.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Commission has determined that no costs will be imposed because the rule does not create any mandatory new duty or obligation.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel horse racing activities.

6. Paperwork: The Commission will assess a bare minimum penalty enhancement, when applicable, when an equine drug rule is violated in New York. The affected party may request a hearing. The Commission already examines the basis of this assessment, i.e., the licensee's history of equine drug (and other) rule violations. A permanent record of such violations is maintained by the ARCI.

7. Duplication: None.

8. Alternatives: The Commission considered and rejected not proposing this rule. The Commission already examines a violator's history of past violations when determining the appropriate penalty for a current rule violation. It is possible, however, that the Commission might not impose a penalty that meets the floor established by the proposed bare minimum enhancement. Adopting this proposal is the most effective means to ensure that an appropriate bare minimum penalty will be imposed, and also supports a national effort to establish a uniform penalty floor in various racing jurisdictions.

9. Federal standards: None.

10. Compliance schedule: The proposed rule does not create any additional requirements with which regulated persons must comply.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

This proposal only authorizes the Commission to assess a minimum penalty enhancement when an equine drug violation occurs in New York and the offender has a specified significant history of such violations in New York or elsewhere. No regulated party will need a period to cure a pending matter because the penalty enhancement will apply only if an additional rule violation occurs in the future.

Such regulation will serve to enhance the integrity of racing and the health and safety of racehorses by serving as a deterrent to habitual and persistent equine drug rule violations. This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

Department of Health

NOTICE OF ADOPTION

Chronic Renal Dialysis Services (CRDS)

I.D. No. HLT-22-15-00016-A

Filing No. 964

Filing Date: 2015-11-03

Effective Date: 2015-11-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 757 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Chronic Renal Dialysis Services (CRDS).

Purpose: To update the CRDS provisions concerning Medicare and Medicaid Programs for coverage for End Stage Renal Disease Facilities.

Text or summary was published in the June 3, 2015 issue of the Register, I.D. No. HLT-22-15-00016-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Early Intervention Program

I.D. No. HLT-46-15-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of Subpart 69-4 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2559-B

Subject: Early Intervention Program.

Purpose: To conform existing program regulations to Federal regulations and State statute.

Public hearing(s) will be held at: 1:00 p.m. to 3:00 p.m., Dec. 21, 2015 at School of Public Health Auditorium, University at Albany, One University Place, Rensselaer, NY

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule (Full text is posted at the following State website: www.health.ny.gov): This notice of proposed rulemaking amends 10 NYCRR Subpart 69-4 governing the Early Intervention Program, to conform to federal regulations, 34 CFR Parts 300 and 303, issued by the U.S. Department of Education and amendments to Title II-A of Article 25 of the Public Health Law (PHL).

Section 69-4.1(b) is revised to include initial, as well as ongoing procedures in the definition of assessment. Dominant or native language as defined in § 69-4.1(j) is amended to clarify that when used with respect to an individual who is limited English proficient, dominant or native language means the language or mode of communication normally used by the individual; or in the case of a child, the language normally used by



Gaming Commission

One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500

www.gaming.ny.gov

John A. Crotty, Commissioner
Peter J. Moschetti, Jr., Commissioner
John J. Poklemba, Commissioner
Barry Sample, Commissioner
Todd R. Snyder, Commissioner

Robert Williams, Executive Director
Edmund C. Burns, General Counsel

To: Commissioners

From: Edmund C. Burns

Date: January 19, 2016

Re: Adoption of Rulemaking to Update Per Se Thresholds and Time Restrictions (9 NYCRR §§ 4038.5, 4038.17, 4109.3, 4109.5).

For Commission consideration is the adoption of the proposed rulemaking to update the Commission's horse racing rules that regulate the use of certain substances with *per se* thresholds and restricted time periods.

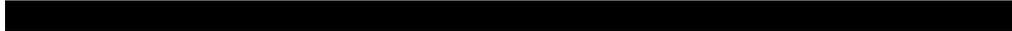
The Commission proposed this rulemaking on September 24, 2015. The proposal was published in the December 2, 2015 *State Register*. A copy of the notice of proposed rulemaking is attached. The Commission received two public comments.

The purpose of the proposed amendments is to align the Commission's laboratory thresholds for controlled therapeutic medications with the latest ones recommended by the Racing Medication & Testing Consortium ("RMTC") and approved by the Association of Racing Commissioners International, Inc. ("ARCI"), by adding a *per se* regulatory threshold for albuterol (a bronchodilator), cobalt (an abnormal oxygenation agent) and isofluprednone (a corticosteroid) and by joining ARCI in lowering the threshold for ketoprofen (a non-steroidal anti-inflammatory drug). The proposal also includes further amendments in regard to isofluprednone, corticosteroids and cobalt.

The Commission received two public comments, one from the New York Thoroughbred Horsemen's Association, Inc. ("NYTHA") and one from The New York Racing Association, Inc. NYTHA opposes the restricted time periods for albuterol and ketoprofen, stating that the RMTC has shorter withdrawal guidelines than the New York restricted time periods. Staff has not proposed to amend the existing restricted time periods for albuterol or ketoprofen, as the proposal adopts the national thresholds for such drugs, which are consistent with the existing restricted time periods in New York. Staff will, however, examine the NYTHA comment with respect to whether a future rulemaking might shorten the restricted time period for one or more drugs. At present, the Commission's restricted time period rules function well to provide an assurance that trainers may rely upon to ensure their compliance with the national thresholds in all states.

Commissioners
January 19, 2016
Page 2

The second comment, from NYRA, expresses full support for the rule as proposed.



attachments

cc: Robert Williams, Executive Director
Ronald Ochrym, Director, Division of Horse Racing and Pari-Mutuel Wagering
Dr. Scott Palmer, Equine Medical Director

mortgage bankers, mortgage brokers or exempt organizations. Additionally, in the case of servicers that operate in rural areas and are not otherwise exempted, the Superintendent has the authority to reduce, waive or modify the financial responsibility requirements for individuals that do a de minimis amount of servicing.

Rural Area Participation: Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Department of Financial Services (formerly the Banking Department) and exempt from the new registration requirement. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Per Se Thresholds and Related Rule Amendments for Cobalt, Ketoprofen, Isoflupredone and Albuterol

I.D. No. SGC-48-15-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of sections 4043.2(i), 4043.3 and 4120.3 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1), (19), 301(1), (2) and 902(1)

Subject: Per Se thresholds and related rule amendments for cobalt, ketoprofen, isoflupredone and albuterol.

Purpose: To preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

Text of proposed rule: Subdivision (i) of section 4043.2 of 9 NYCRR would be amended as follows:

§ 4043.2. Restricted use of drugs, medication and other substances.

Drugs and medications are permitted to be used only in accordance with the following provisions.

* * *

(i) In addition, a horse may not race for the following periods of time:
(1) for at least five days following a systemic administration of a prednisolone or dexamethasone;

(2) for at least seven days following a joint injection of a corticosteroid; and the following corticosteroids may be administered only by means of a joint injection: betamethasone, *isoflupredone*, any formulation of methylprednisolone and any formulation of triamcinolone;

(3) for at least 14 days following an administration of clenbuterol or *firocoxib*.

* * *

Section 4043.3 of 9 NYCRR would be amended as follows:

§ 4043.3. Equine drug thresholds; per se.

(a) A horse shall have raced in violation of this section if any of the following substances is found, by the laboratory conducting tests for the commission, to be present in a race-day urine or blood sample taken from such horse at a concentration in excess of a threshold listed below. The test result of such laboratory shall include an assessment of the measurement uncertainty and imprecision of the quantitative threshold for the substance.

(1) Acepromazine: 10 ng/ml HEPS in urine;

(2) *Albuterol*: 1 ng/ml in urine;

[(2)] (3) Betamethasone: 10 pg/ml in plasma;

[(3)] (4) Butorphanol:

(i) 300 ng/ml of total butorphanol in urine; or

(ii) 2 ng/ml of free butorphanol in plasma;

[(4)] (5) Clenbuterol:

(i) 140 pg/ml in urine; or

(ii) any clenbuterol in plasma;

(6) *Cobalt*: 50 ng/ml in plasma;

[(5)] (7) Dantrolene: 100 pg/ml of 5-hydroxydantrolene in plasma;

[(6)] (8) Detomidine:

(i) 1 ng/ml of any metabolite of detomidine in urine; or

(ii) any detomidine in plasma;

[(7)] (9) Dexamethasone: 5 pg/ml in plasma;

[(8)] (10) Diclofenac: 5 ng/ml in plasma;

[(9)] (11) DMSO: 10 mcg/ml in plasma;

[(10)] (12) *Firocoxib*: 20 ng/ml in plasma;

[(11)] (13) Flunixin: 20 ng/ml in plasma;

[(12)] (14) Furosemide: 100 ng/ml in plasma and a specific gravity of urine less than 1.010;

[(13)] (15) Glycopyrrolate: 3 pg/ml in plasma;

[(14)] (16) *Isoflupredone*: 100 pg/ml in plasma;

[(15)] (17) Ketoprofen: [10] 2 ng/ml in plasma;

[(16)] (18) Lidocaine: 20 pg/ml of total 3-hydroxylidocaine in plasma;

[(17)] (19) Mepivacaine:

(i) 10 ng/ml of total hydroxymepivacaine in urine; or

(ii) any hydroxymepivacaine in plasma;

[(18)] (20) Methocarbamol: 1 ng/ml in plasma;

[(19)] (21) Methylprednisolone: 100 pg/ml in plasma;

[(20)] (22) Omeprazole: 1 ng/ml of omeprazole sulfide in urine;

[(21)] (23) Phenylbutazone: 2 mcg/ml in plasma;

[(22)] (24) Prednisolone: 1 ng/ml in plasma;

[(23)] (25) Procaine penicillin: 25 ng/ml of procaine in plasma;

[(24)] (26) Triamcinolone acetonide: 100 pg/ml in plasma; and

[(25)] (27) Xylazine: 10 pg/ml of total xylazine and its metabolites in plasma.

(b) A laboratory finding that a horse has not exceeded a threshold set forth in this section shall not constitute a defense to a violation of any other section of this Subchapter.

(c) *Special provisions.*

(1) *Cobalt.* A person who is found responsible for a violation of this section for the substance cobalt, when the detected concentration of cobalt exceeds 300 ng/ml in plasma, shall incur the same penalty described in paragraph (2) of subdivision (b) of section 4043.12 of this Part.

(2) *Corticosteroid joint injection.* It shall not be a violation of this section for the drug betamethasone, isoflupredone or triamcinolone acetonide when:

(i) the laboratory positive resulted from an administration that was recorded in the contemporaneous veterinary records of the horse, reported to the commission in compliance with subdivision (b) of section 4043.4 of this Part before the horse raced, and administered to the horse in compliance with subdivision (i) of section 4043.2 of this Part at least seven days before the race; and

(ii) the commission had not previously issued a warning to the trainer that the commission laboratory reported finding such substance, in a urine or blood sample collected from any horse trained by such trainer, at a concentration in excess of the threshold set forth in subdivision (a) of this section.

Section 4120.3 of 9 NYCRR would be amended as follows:

§ 4120.3. Equine drug thresholds; per se.

(a) A horse shall have raced in violation of this section if any of the following substances is found, by the laboratory conducting tests for the commission, to be present in a race-day urine or blood sample taken from such horse at a concentration in excess of a threshold listed below. The test result of such laboratory shall include an assessment of the measurement uncertainty and imprecision of the quantitative threshold for the substance.

- (1) Acepromazine: 10 ng/ml HEPS in urine;
- (2) *Albuterol*: 1 ng/ml in urine;
- [(2)] (3) Butorphanol:
 - (i) 300 ng/ml of total butorphanol in urine; or
 - (ii) 2 ng/ml of free butorphanol in plasma;
- (4) *Cobalt*: 50 ng/ml in plasma;
- [(3)] (5) Dantrolene: 100 pg/ml of 5-hydroxydantrolene in plasma;
- [(4)] (6) Detomidine:
 - (i) 1 ng/ml of any metabolite of detomidine in urine; or
 - (ii) any detomidine in plasma;
- [(5)] (7) Diclofenac: 5 ng/ml in plasma;
- [(6)] (8) DMSO: 10 mcg/ml in plasma;
- [(7)] (9) Firocoxib: 20 ng/ml in plasma;
- [(8)] (10) Flunixin: 20 ng/ml in plasma;
- [(9)] (11) Furosemide: 100 ng/ml in plasma and a specific gravity of urine less than 1.010;
- [(10)] (12) Glycopyrrolate: 3 pg/ml in plasma;
- [(11)] (13) Ketoprofen: [10] 2 ng/ml in plasma;
- [(12)] (14) Lidocaine: 20 pg/ml of total 3-hydroxylidocaine in plasma;
- [(13)] (15) Mepivacaine:
 - (i) 10 ng/ml of total hydroxymepivacaine in urine; or
 - (ii) any hydroxymepivacaine in plasma;
- [(14)] (16) Methocarbamol: 1 ng/ml in plasma;
- [(15)] (17) Methylprednisolone: 100 pg/ml in plasma;
- [(16)] (18) Omeprazole: 1 ng/ml of omeprazole sulfide in urine;
- [(17)] (19) Phenylbutazone: 2 mcg/ml in plasma;
- [(18)] (20) Procaine penicillin: 25 ng/ml of procaine in plasma; and
- [(19)] (21) Xylazine: 10 pg/ml of total xylazine and its metabolites in plasma.

(b) A laboratory finding that a horse has not exceeded a threshold set forth in this section shall not constitute a defense to a violation of any other section of this Subchapter.

(c) *A person who is found responsible for a violation of this section for the substance cobalt, when the detected concentration of cobalt exceeds 300 ng/ml in plasma, shall incur the same penalty described in paragraph (2) of subdivision (d) of section 4120.17 of this Part.*

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: The New York State Gaming Commission (“Commission”) is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law (“Racing Law”) Sections 103(2), 104(1, 19), 301(1, 2) and 902(1). Under Section 103(2), the Commission is responsible for supervising, regulating and administering all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Under Section 301, which applies to only harness racing, the Commission is authorized to supervise generally all harness race meetings and to adopt rules to prevent the circumvention or evasion of its regulatory purposes and provisions and is directed to adopt rules to prevent horses from racing under the influence of substances affecting their speed. Section 902(1) authorizes the Commission to promulgate rules and regulations for an equine drug testing program that assures the public’s confidence and continues the high degree of integrity in pari-mutuel racing and to impose administrative penalties for racing a drugged horse.

2. Legislative objectives: To enable the Commission to preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

3. Needs and benefits: This rule making is necessary to align the Commission’s laboratory “per se” thresholds for controlled therapeutic medi-

cations with the latest ones approved by the Association of Racing Commissioners International, Inc. (“ARCI”) and to ensure that the restricted time periods for equine drug use are consistent with such thresholds.

The proposal would amend sections 4043.3 (Thoroughbred) and 4120.3 (harness) of 9 NYCRR to add two more thresholds and to modify an existing threshold. ARCI recommends adding a threshold for albuterol, a bronchodilator, and lowering the existing threshold for ketoprofen, an approved non-steroidal anti-inflammatory drug (“NSAID”). Both recommendations are consistent with the Commission’s existing time restrictions for albuterol (96 hours) and NSAIDs (48 hours) that ensure a horseperson will not inadvertently commit threshold violations.

ARCI also recommends adding a Thoroughbred threshold for isoflupredone, a corticosteroid that is used in corticosteroid joint injections. The proposal would make various amendments corresponding to the Commission’s thoroughbred regulations for such corticosteroids: requiring their use be reported to the Commission before racing, under section 4043.4(b), and restricting use to only joint injections and permitting no administrations within seven days of a race, under section 4043.2(i). The Commission does not have similar regulations for harness racing.

In addition, the proposal would establish a requirement that the Commission first warn a Thoroughbred trainer whose horse tests in excess of corticosteroid thresholds when the corticosteroid joint injection causing the threshold violation is shown in documentary evidence (pre-race report to Commission, veterinary records) to have been administered safely in compliance with the Commission’s seven-day restricted time period for Thoroughbred racehorses. The purpose of this provision is to avoid having a restricted time period that fails to assure a regulated party that compliance will result in no threshold violation. This provision would be added in a new subdivision (c) for sections 4043.3 and 4120.3.

The proposal would also increase the Commission’s regulation of cobalt. ARCI’s Scientific Advisory Committee recommends adopting two thresholds for cobalt, a dietary element: one (50 ng/ml) detects the intentional overuse of cobalt, a practice that has no valid purpose and cannot occur without using refined products, and another (300 ng/ml) imposes a blood-doping level of penalty when the violation has occurred undeniably. Cobalt is reportedly misused in a manner that causes serious central nervous system distress and blood-doping to a horse. The proposal would amend subdivision (a) of section 4043.3 to create the lower threshold, and a new subdivision (c) of section 4043.3 would establish the consequences of a violation of the higher threshold.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendments will not add any new costs. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: N/A.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: No relevant rules or other legal requirements of the state and/or federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered the adoption of a third cobalt threshold (25 ng/ml) that would disqualify the horse from its race and prevent the horse from racing until testing below such threshold. In such cases, however, the Commission believes it is necessary to investigate whether a lawful vitamin administration was the cause, making a mandatory threshold inappropriate. In addition, the reported misuses of cobalt typically involve administrations that result in a higher concentration for several weeks.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rule making proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

The proposal revises the Commission’s horse racing rules that regulate the use of certain substances with per se thresholds and restricted time periods to conform to recent national recommendations. Trainers have

been meeting these thresholds for many years in New York by complying with the Commission's longstanding restricted time period rules that restrict how long a horse must not race after being treated with various equine drugs and other substances. All horsepersons will be able to comply with these rules and competitors will not be able to violate the thresholds to the detriment of others. The thresholds are common with those in other states, making it easier to prepare a horse to race in multiple states. Special provisions will protect trainers and veterinarians who rely on the corticosteroid joint-injection restricted time periods, which assist a horseperson to comply with the national thresholds, and impose a serious penalty in undeniable cases of mistreating a horse with extremely large cobalt administrations.

The rule amendments serve to enhance the integrity of racing, the health and safety of racehorses and the drivers and jockeys. This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

This proposal will not adversely impact small businesses, local governments, jobs, or rural areas. It does not require a Regulatory Flexibility Analysis (for Small Businesses and Local Governments), Rural Area Flexibility Analysis, or Job Impact Statement.

Department of Health

EMERGENCY RULE MAKING

Protection Against Legionella

I.D. No. HLT-48-15-00004-E

Filing No. 973

Filing Date: 2015-11-13

Effective Date: 2015-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 4 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 225(5)(a)

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: Improper maintenance of cooling towers can contribute to the growth and dissemination of Legionella bacteria, the causative agent of legionellosis. Legionellosis causes cough, shortness of breath, high fever, muscle aches, headaches and can result in pneumonia. Hospitalization is often required, and between 5-30% of cases are fatal. People at highest risk are those 50 years of age or older, current or former smokers, those with chronic lung diseases, those with weakened immune systems from diseases like cancer, diabetes, or kidney failure, and those who take drugs to suppress the immune system during chemotherapy or after an organ transplant. The number of cases of legionellosis reported in New York State between 2005-2014 increased 323% when compared to those reported in the previous ten year period.

Outbreaks of legionellosis have been associated with cooling towers. A cooling tower is an evaporative device that is part of a recirculated water system incorporated into a building's cooling, industrial process, refrigeration, or energy production system. Because water is part of the process of removing heat from a building, these devices require biocides—chemicals that kill or inhibit bacteria (including Legionella)—as means of controlling bacterial overgrowth. Overgrowth may result in the normal mists ejected from the tower having droplets containing Legionella.

For example, in 2005, a cooling tower located at ground level adjacent to a hospital in New Rochelle, Westchester County resulted in a cluster of 19 cases of legionellosis and multiple fatalities. Most of the individuals were dialysis patients or companions escorting the patients to their dialysis session. One fatality was in the local neighborhood. The cooling tower was found to have insufficient chemical treatment. The entire tower was ultimately replaced by the manufacturer in order to maintain cooling for the hospital and to protect public health. In June and July of 2008, 12 cases of legionellosis including one fatality were attributed to a small evaporative condenser on Onondaga Hill in Syracuse, Onondaga County. An investigation found that the unit was not operating properly and this resulted in the growth of microorganisms in the unit. Emergency biocide treatment was initiated and proper treatment was maintained. No new cases were then detected thereafter.

Recent work has shown that sporadic cases of community legionellosis are often associated with extended periods of wet weather with overcast skies. A study conducted by the New York State Department of Health that included data from 13 states and one United States municipality noted a dramatic increase in sporadic, community acquired legionellosis cases in May through August 2013. Large municipal sites such as Buffalo, Erie County reported 2- to 3-fold increases in cases without identifying common exposures normally associated with legionellosis. All sites in the study except one had a significant correlation, with some time lag, between legionellosis case onset and one or more weather parameters. It was concluded that large municipalities produce significant mist (droplet) output from hundreds of cooling towers during the summer months. Periods of sustained precipitation, high humidity, cloud cover, and high dew point may lead to an "urban cooling tower" effect. The "urban cooling tower" effect is when a metropolitan area with hundreds of cooling towers acts as one large cooling tower producing a large output of drift, which is entrapped by humid air and overcast skies.

More recently, 133 cases of legionellosis, which included 16 fatalities, occurred in Bronx, NY (July-September, 2015). This event was preceded by an outbreak in Co-Op City in the Bronx, from December 2014 to January 2015, which involved 8 persons and no fatalities. Both of these outbreaks have been attributed to cooling towers, and emergency disinfection of compromised towers helped curtail these outbreaks. These events highlight the need for proper maintenance of cooling towers.

The heating, ventilation, and air-conditioning (HVAC) industry has issued guidelines on how to seasonally start a cooling tower; treat it with biocides and other chemicals needed to protect the components from scale and corrosion; and set cycles of operations that determine when fresh water is needed; and how to shut down the tower at the end of the cooling season. The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has recently released a new Standard entitled Legionellosis: Risk Management for Building Water Systems (ANSI/ASHRAE Standard 188-2015). Section 7.2 of that document outlines components of the operations and management plan for cooling towers. The industry also relies on other guidance for specific treatment chemicals, emergency disinfection or decontamination procedures and other requirement.

However, none of the guidance is obligatory. Consequently, poor practice in operation and management can result in bacterial overgrowth, increases in legionellae, and mist emissions that contain a significant dose of pathogenic legionellae. This regulation requires that all owners of cooling towers ensure proper maintenance of the cooling towers, to protect the public and address this public health threat.

Further, these regulations require all general hospitals and residential health care facilities (i.e., nursing homes) to develop a sampling plan, report the results, and take necessary actions to protect the safety of their patients or residents. The details of each facility's sampling plan and remedial measures will depend on the risk factors for acquiring Legionnaires' disease in the population served by the hospital or nursing home.

Most people in nursing homes should be considered at risk, as residents are typically over 50 years of age. In general hospitals, persons at risk include those over 50 years of age, as well as those receiving chemotherapy, those undergoing transplants, and other persons housed on healthcare units that require special precautions. Additional persons who might be at increased risk for acquiring Legionnaires' disease include persons on high-dose steroid therapy and persons with chronic lung disease. Certain facilities with higher risk populations, such as those with hematopoietic stem-cell transplant (HSCT) and solid organ transplant units, require more protective measures.

An environmental assessment involves reviewing facility characteristics, hot and cold water supplies, cooling and air handling systems and any chemical treatment systems. The purpose of the assessment is to discover any vulnerabilities that would allow for amplification of Legionella spp. and to determine appropriate response actions in advance of any environmental sampling for Legionella. Initial and ongoing assessment should be conducted by a multidisciplinary team that represents the expertise, knowledge and functions related to the facility's operation and service. A team should include, at a minimum, representatives from the following groups: Infection Control; Physical Facilities Management; Engineering; Clinicians; Laboratory; and Hospital Management.

These regulations, which originally became effective on August 17, 2015, implemented important requirements that protect the public from the threat posed by Legionella. To ensure that protection is maintained, the Commissioner of Health and the Public Health and Health Planning Council have determined it necessary to file these regulations on an emergency basis. Public Health Law § 225, in conjunction with State Administrative Procedure Act § 202(6) empowers the Council and the Commissioner to adopt emergency regulations when necessary for the preservation of the public health, safety or general welfare and that compliance with routine administrative procedures would be contrary to the public interest.