

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*

such location may request in writing that the commission not deem such video lottery agent to have chosen to divest such capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H). The commission may grant such a request in its discretion.

(c) *Notice of removal from service of a capital asset.* A video lottery gaming agent shall notify the commission in writing in each instance that an asset acquired in whole or in part with capital award funds is removed from service for any reason, either temporarily or permanently. Such notice shall be given as soon as practicable, but in no event more than 15 days after such asset has been removed from service.

(d) *Time for reimbursement.* When a video lottery gaming agent chooses to divest a capital improvement prior to the full depreciation of such capital improvement in accordance with generally accepted accounting principles and such capital improvement had been funded in whole or in part by a vendor's capital award, the reimbursement to the State required by Tax Law section 1612(b)(1)(ii)(H) shall be made according to such schedule as the commission may determine in its discretion and announce in writing to such video lottery gaming agent. The commission shall schedule such payment to be made no later than 90 days from the date such video lottery gaming agent notifies the commission of the divestiture.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen Buckley, New York State Gaming Commission, One Broadway Center, P.O. 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 this rule by Tax Law Sections 1601 and 1617-a, and by Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 103(2) and 104(1, 19). Tax Law Section 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively to aid to education. Tax Law Section 1617-a authorizes the licensing of Video Lottery Gaming ("VLG") at certain racetracks in the State of New York. Racing Law Section 103(2) provides that the Commission is responsible to operate and administer the state lottery for education, as prescribed by Article 34 of the Tax Law. Racing Law Section 104(1) provides the Commission with general jurisdiction over all gaming activities within the State and over any person, corporation or association engaged in such activities. Section 104(19) of such law authorizes the Commission to promulgate any rules it deems necessary to carry out its responsibilities.

2. **Legislative objectives:** To provide clarification regarding the circumstances that may require a video lottery agent to reimburse the State upon divestment of a capital improvement for which the video lottery agent had received funding pursuant to Tax Law Section 1612(b)(1)(ii)(H). This rulemaking supports the mandate of establishing a state lottery, the net proceeds of which are to be applied exclusively for the purpose of providing aid to pupils with special educational needs and pupils with handicapping conditions, and supplemental aid to all school children.

3. **Needs and benefits:** The proposed rulemaking would amend the Commission's regulations related to the capital award program established by Tax Law Section 1612(b)(1)(ii)(H), which allows eligible video lottery agents to receive a capital award from the State to be used for qualifying capital improvements to video lottery facilities that may promote or increase attendance and the amount of revenue generated to support state education programs. If a video lottery agent receives a capital award from the State in connection with a capital improvement made to the video lottery agent's facility, the law provides that a video lottery agent "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."

Several video lottery agents have requested guidance on the Commission's interpretation of divestment of a video gaming capital award and how the reimbursement requirement might be applied in various circumstances. The proposed rule would describe what constitutes divestment of a capital asset within the meaning of the statute and would give the Commission discretion to approve in writing an action in regard to a capital asset that otherwise would require reimbursement of a capital award. Under the proposal, if such action is 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, or occurred in a transfer of assets to an affiliate and remained in service of the video lottery program, reimbursement would not be required. The new Rule 5122.5 would also require notice of when a capital asset is removed from service and permit the Commission to establish a

schedule of no more than 90 days for reimbursement, when reimbursement is required.

The proposal would also require the annual submission of a facility's capital improvement plan, supply a needed definition in the video lottery regulations, eliminate language in Rule 5122.1 that duplicates statute or is obsolete, increase from 15 to 60 days the time within which Commission review of a capital project is required and make several technical changes.

4. Costs:

a. **Costs to regulated parties for the implementation and continuing compliance with the rule:** No additional costs to video lottery agents are anticipated. The proposal will prevent a video lottery agent from being penalized for replacing, enhancing or repurposing a capital award-subsidized improvement before full depreciation if the video lottery agent determines such action may increase facility patronage or is necessary to avert a decrease in facility attendance.

b. **Costs to the agency, the State, and local governments for the implementation and continuation of the rule:** No additional operating costs are anticipated. The proposal would remove any disincentive for making necessary changes to capital award-subsidized improvements at video lottery facilities, which may be necessary to prevent a decline in attendance and resulting revenue earned for education.

c. **Sources of cost evaluations:** The Commission evaluated the impact of the new rule with input from video lottery agents.

5. **Local government mandates:** The proposed amendment does not impose any new programs, services, duties or responsibilities upon any country, city, town, village school district, fire district or other special district.

6. **Paperwork:** There are no changes in paperwork requirements.

7. **Duplication:** There are no relevant State programs or regulations that duplicate, overlap or conflict with the proposed amendment.

8. **Alternatives:** The Commission considered making no changes to its regulations regarding the capital awards program. However, the Commission determined that uniform guidance on the application and interpretation of the Tax Law provision would be useful to regulated video lottery agents.

9. **Federal standards:** The proposed amendment does not exceed any minimum standards imposed by the federal government.

10. **Compliance schedule:** The proposal will not impact daily operation of video lottery gaming in a significant manner, and divestment of capital award-subsidized improvements does not happen often. The Commission is confident that its agents will continue to promptly comply with the Commission's instructions involving the capital awards program.

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 because it will have no adverse effect on small businesses, local governments, rural areas, or jobs.

The proposed rulemaking would provide clarification regarding the circumstances that may require a video lottery agent to reimburse the State upon divestment of a capital improvement for which the video lottery agent had received a capital award funding. This rulemaking will not result in significant technological changes. The proposed amendment does not impose any new programs, services, duties or responsibilities upon any country, city, town, village school district, fire district or other special district. No local government activity is involved. The proposal will prevent a video lottery agent from being penalized for replacing, enhancing or repurposing a capital award-subsidized improvement if the video lottery agent determines such action may increase facility patronage or is necessary to avert a decrease in facility attendance. There will be no new reporting, record keeping or other compliance requirements on small businesses or local governments or rural areas. The proposed amendments will not adversely affect employment opportunities or jobs.

Based on the foregoing, no regulatory flexibility analysis for small businesses and local governments, rural area flexibility analysis, or a job impact statement is required for this proposed rule making.