

## NOTICE OF ADOPTION

**Consequences for Commission Licensees, Agents, and Other Regulated Parties Who Violate Prohibition on Underage Wagering**

I.D. No. SGC-12-16-00009-A

Filing No. 509

Filing Date: 2016-05-24

Effective Date: 2016-06-08

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

**Action taken:** Amendment of sections 4003.39, 4122.6, 4404.10, 4602.1, 4622.2, 4622.3, 5001.27, 5007.5, 5007.13, 5013.3 and 5117.1 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104, 108 and 116; Tax Law, sections 1601, 1604, 1610 and 1612; General Municipal Law, sections 195-a and 486

**Subject:** Consequences for Commission licensees, agents, and other regulated parties who violate prohibition on underage wagering.

**Purpose:** To further enforce the age restriction laws for gambling by imposing fines, suspensions and/or license revocation.

**Text or summary was published** in the March 23, 2016 issue of the Register, I.D. No. SGC-12-16-00009-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, Acting Secretary, New York State Gaming Commission, One Broadway Center, Schenectady, NY 12305, (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 2021, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The Gaming Commission received two comments, one from the New York Gaming Association (NYGA) and one from six collaborating trade associations representing convenience stores, grocery stores, gas stations, taverns and other retail establishments that are licensed to sell New York Lottery products in regard to this proposed rulemaking. The Commission has considered each of the comments received and decided that no changes were appropriate at this time.

NYGA stated that the proposed regulations are not necessary, inadvisably remove Commission discretion to determine penalties, are unduly harsh in not allowing consideration of mitigating circumstances and impose unreasonable new burdens on operators. In general, NYGA opposed fixed penalties for violations that do not allow for the exercise of Commission discretion. NYGA asserted that facts and circumstances can vary significantly and that "unintentional" violations should not be punished as severely as violations involving "genuine misconduct or fault." NYGA suggested that the importance of advance notice of possible penalties could be addressed through suggested, rather than mandated, penalties. In particular, NYGA stated that the proposed fines for allowing underage wagering at race tracks are excessive, especially with no provision for circumstances in which a minor produces false identification. NYGA noted that with respect to underage violations at video lottery facilities, the proposed penalties would be unduly harsh in circumstances in which apparent violations are remedied quickly (for example, within minutes, or when a minor crosses the gaming floor to use a restroom). NYGA also stated that it would be unfair for multiple violations to accrue from a single incident.

The Commission considered NYGA's comments and did not make any amendments to the proposed rulemaking in response. The Commission is considering whether affirmative defenses similar to those existing in regard to video lottery would be appropriate in other regulated forms of gaming and, if so, will suggest a proposed rulemaking to address those concerns. With regard to the examples of minors on video lottery gaming floors, the Commission would retain discretion to determine whether a violation occurred. Only when it is determined that a violation occurred would the prescribed sanctions apply. For example, in the event the proposed rules were adopted, a minor quickly entering and exiting a gaming floor to use a restroom might, under the circumstances, not be charged as a violation at all. Similarly, an incident in which two minors accompany an adult on a gaming floor might, under the circumstances, be charged as one violation, which would result in one level of fine, not two levels concurrently, as NYGA suggests might be possible.

The second public comment was submitted jointly by the Food Industry Alliance of New York State, the Empire State Restaurant & Tavern Association, the Bodega Association of the United States, the New York State Association of Service Station and Repair Shops, the New York Association of Convenience Stores and the Long Island Gasoline Retailers Association (the "Joint Comment"). The Joint Comment stated that the proposed penalty structure for selling lottery tickets to minors seems to be reasonable. The Joint Comment opposed enforcement of the proposed penalties in regard to lottery vending machines until the Commission retrofits each lottery vending machine with an identification-card reader. The writers of the Joint Comment believed that it is too difficult to monitor a vending machine. The Joint Comment urges that a hearing process should afford lottery retailers an opportunity to defend themselves. The Joint Comment recommends that it be made unlawful for a person over the age of 18 to provide a lottery ticket to an underage customer. The Joint Comment states that language clarifying the meaning of the multiple-violation penalty structure would be beneficial. The Joint Comment states that the regulations should set forth which agency or agencies will be authorized to carry out underage lottery sale enforcement, that retailers should "know up-front what the rules of engagement are" and that an enforcement plan should be detailed and published for comment before put into practice.

The Commission considered the Joint Comment and did not make any amendments to the proposed rulemaking.

Improved technology would be useful to promote compliance in regard to lottery ticket vending machines, but is not necessary. Furthermore, the Commission would retain discretion to determine whether a violation had occurred at all in regard to a violation involving a lottery ticket vending machine.

With regard to hearings for lottery retailers, the Commission is considering whether affirmative defenses similar to those existing in regard to video lottery would be appropriate in other regulated forms of gaming and, if so, will suggest a proposed rulemaking to address that concern, which would include hearing procedures.

With regard to the provision of lottery tickets by purchasers who are over the age of 18 to underage persons, the legislature has made the policy choice that persons under the age of 18 may receive lottery tickets and be entitled to lottery prizes, see Tax Law § 1613(b) (providing for procedures for paying prizes to minors), even though lottery tickets may not be sold to persons under the age of 18. See Tax Law § 1610(a).

With regard to the multiple-violation penalty structure, the Commission believes that the intent is clear to measure the potential penalty for a subsequent violation from the time of the initial violation from which the time period is measured. For example, if violations occur on January 1, 2017, June 1, 2017 and April 1, 2018, to use the example in the Joint Comment, the January 1, 2017 violation would result in a written warning, the June 1, 2017 violation would result in a \$500 fine (as a second violation within one year of January 1, 2017) and the April 1, 2018 violation would result in a \$500 fine (as a second violation within one year of June 1, 2017). The Commission will consider the advisability of providing examples in written direction to retailers.

With regard to enforcement implementation, the Commission does not believe that the description of enforcement methods is an appropriate matter for regulation.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Voidable Claims Based on Race Day Samples**

I.D. No. SGC-23-16-00006-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 4038.19(a) and 4109.7(a) of Title 9 NYCRR.

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

**Subject:** Voidable claims based on race day samples.

**Purpose:** To enhance the safety and integrity of horse racing while generating a reasonable return for government.

**Text of proposed rule:** Subdivision (a) of Section 4038.19 of 9 NYCRR would be amended as follows:

§ 4038.19. Certain voidable claims.

(a) [Post race] *Race-day* positive. Should the analysis of a [post-race] *race-day* blood or urine sample taken from a claimed horse result in a [post-race] positive test, or if the *race-day* test results of a previous race have not been cleared by the date of the claim and result in a [post-race]

positive test, the claimant's trainer shall be promptly notified by the stewards and the claimant shall have the option to void said claim within five days of such notice by [the claimant's] such trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or the claimant's trainer. In the event the claim is voided, the horse shall be returned to the owner of the horse who subjected the horse to claiming in the race from which the positive test resulted.

\* \* \*

Subdivision (a) of Section 4109.7 of 9 NYCRR would be amended as follows:

§ 4109.7. Certain voidable claims.

(a) [Post-race] *Race-day* positive. Should the analysis of a [post-race] *race-day* blood or urine sample taken from a claimed horse result in a [post-race] positive test, or if the *race-day* test results of a previous race have not been cleared by the date of the claim and result in a positive test, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by such trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or such claimant's trainer.

\* \* \*

**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), and 301(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.

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 amend the Commission's claiming rules to permit a claimant of any horse to void the claim when samples collected the day of the claiming race test positive for an impermissible drug administration. The rule making will also permit a claimant of a Standardbred horse to void the claim based on an equine drug positive in the race before the claiming race, when such positive test result is revealed only after the claiming race, as already permitted by the Commission's rules for Thoroughbred racing.

The current rules permit a claimant of a Thoroughbred or Standardbred horse to void a claim when samples collected from the horse after racing, called post-race samples, show in later laboratory testing that the claimed horse was raced in the claiming race in violation of Commission rules restricting the use of drugs and certain other substances in race horses. 9 NYCRR §§ 4038.19(a) and 4109.7(a). This permits a claimant to avoid owning a horse that was illegally drugged while under the care and control of the previous owner and trainer. Such illegal drugging can contribute to a false impression of the health and racing ability of the horse, key considerations that a prospective claimant considers before entering a claim for a horse. Allowing the claimant to void a claim when laboratory tests later reveal such impermissible drug use ensures greater fairness in the claiming transactions. It also serves as a disincentive to owners or trainers who might attempt to secure a higher price for a claiming horse by manipulating its health and performance with drugs. Such misconduct not only misrepresents the horse's condition, it sometimes endangers the health of the horse and other participants in the claiming race.

The Commission has adopted per se regulatory thresholds this year that apply to all samples collected on race day, even before the race. The positive test results based on such race-day samples should also permit a claimant to void a claim because of impermissible drug administrations to the claimed horse.

The proposal would amend the governing rules to allow a claimant to void a claim when any sample collected on race day, not just post-race samples, are later tested and demonstrate that the claimed horse was impermissibly drugged.

The proposal would also amend subdivision (a) of section 4109.7 to permit the claimant of a Standardbred horse to void a claim based on an equine drug positive from the race preceding the claiming race, when such positive drug test result is revealed only after the claiming race. The race before a claiming race is influential to prospective claimants, who should be able to void a claim, entered before the start of the next (claiming) race, upon learning only later that the prior race was misleading because of impermissible drug administrations to the horse.

This protection was extended to the claimants of Thoroughbred horses in 2006, and has worked well to provide additional protection to claimants and a further disincentive to those who might seek to manipulate horses with drugs.

Finally, the proposal makes various changes in style to clarify the rules.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new 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 no alternatives to the adoption of this rule.

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.

The amendments would permit a claimant, who currently can void a claim when post-race samples test positive after the claiming race, to void a claim when any race-day sample tests positive after the claiming race. The Commission recently adopted regulatory thresholds that apply to any sample collected on race day. The proposal will ensure that a claimant may void the claim of a drugged horse when such drugging is revealed by any test of the Commission.

The amendments would also update the Standardbred rule to correspond to the rule for Thoroughbred claims, by allowing a claimant to void a claim upon learning after the claiming race that the claimed horse in its preceding race was raced while drugged.

These amendments 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**

### **Criteria for the Licensing, Conduct and Operation of Independent Testing Laboratories**

**I.D. No.** SGC-23-16-00014-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 5318; and amendment of sections 5100.2 and 5118.6 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1307(1), 1303, 1326(1) and 1335(8); Lottery for Education Law (Tax Law, art. 34), section 1617-a(c)

**Subject:** Criteria for the licensing, conduct and operation of independent testing laboratories.

**Purpose:** To govern the licensing, conduct and operation, testing and reporting requirements of independent testing laboratories.