

NYS Gaming Commission - Public Meeting Transcript

May 22, 2023 1 p.m.

317 Lenox Avenue, 6th Floor Conference Room, New York, NY

Executive Director Robert Williams: New York State Racing, Pari-Mutuel Wagering and Breeding Law § 102 provides that the New York State Gaming Commission shall consist of seven members appointed by the governor by and with the advice and consent of the Senate. Four members confirmed by the New York State Senate are necessary to afford the Commission an ability to establish a quorum and undertake action. This present meeting of the Commission is now called to order.

This meeting is being conducted by video conferencing in two locations, New York and Schenectady. Both locations have been appropriately noticed and accommodate public attendance.

Ms. Secretary, will you please call the roll?

Acting Secretary Kristen Buckley (via video): John Crotty

Commissioner John Crotty: Here.

Kristen Buckley: Peter Moschetti. Brian O'Dwyer.

Chair Brian O'Dwyer: Here.

Kristen Buckley: Marissa Shorenstein

Commissioner Marissa Shorenstein: Here.

Kristen Buckley: Jerry Skurnik

Commissioner Jerry Skurnik: Here.

Executive Director Williams: Ms. Secretary, please have the record reflect the quorum of established members is present, thus enabling the transaction of business.

Please note that Commissioner Moschetti is in Schenectady. Bilateral visual and oral communications between the two meeting locations have been established.

Chair O'Dwyer: Minutes of the Commission meeting conducted on March 27, 2023 have been provided to the members in advance. At this time, I'd like to ask the members if there are any edits, corrections, or amendments.

Hearing none, Ms. Secretary, please let the record reflect the minutes were accepted.

I now call on Mr. Williams for the report of the Executive Director.

As provided, New York State Racing, Pari-Mutuel Wagering and Breeding Law authorizes the Commission to promulgate rules and regulations that it deems necessary to carry out its responsibilities. To that regard, the Commission will from time to time, promulgate amendments pursuant to the State Administrative Procedure Act. We have two rule proposals. Mr. Williams?

Executive Director Williams: There have been a few developments within our industry that I would like to share the state budget's been completed the horse racing integrity and Safety Authority anti-doping and medication program has started, stopped and is starting again, Vernon Downs Casino Hotel has indicated they would be closing in the future. Points Bet that has made an important announcement regarding their future and I'd also like to provide some background information regarding the Pletcher meloxicam drug positive and then I'll conclude with the status of the request for applications questions and answers in round one.

First, when we last gathered, I outlined the gaming components of the New York State Senate and Assembly one-house resolutions regarding the Fiscal Year 2023-2024. The State Budget has since been finalized.

Overall, there were five Parts that were gaming related, from Chapter 56, there were Parts JJ and OO; from Chapter 58 there was Part R, and from Chapter 59, there were Parts X and BB.

Part JJ, Chapter 56 amended the manner of composition of the board of directors of the Western Regional Off-Track Betting Corporation. Historically, the Western Board was comprised of 17 members, one each from participating counties and one each from the Cities of Buffalo and Rochester, with the appointments being made by the county governing body. The revised appointment law maintains the 17 members but allocates their voting strength based upon a weighted percentage by population. Accordingly, Erie County will have 24 votes; Monroe County, 20 votes; Buffalo, 10 votes, the cities of Niagara and Rochester, 8 votes; Chautauqua County, 5 votes; Oswego County, 4 votes; Cattaraugus, Cayuga, Steuben and Wayne Counties each have 3 votes; Livingston and Genesee Counties each have 2 votes; and Wyoming, Orleans, Seneca, Schuyler Counties each have a single vote. County executives and city mayors will take over the responsibility for making new appointments for their

respective municipalities. For counties without an executive, the appointment is left to their boards of supervisors.

Part OO, Chapter 56 allows Capital and Catskill Regional Off-Track Betting Corporations to access certain of their capital acquisition funds for the purposes of expenditures necessary to accept authorized wagers; pay past due statutory obligations to New York licensed or franchised racing corporations or associations; pay past due contractual obligations to other racing associations or organizations for the costs of acquiring a simulcast signal; pay past due statutory payment obligations to the New York State Thoroughbred Breeding and Development Fund Corporation, and the Agriculture and New York State Horse Breeding Development Fund, and past due obligations due the state.

Prior to a corporation being able to utilize the funds, they must attest that surcharge monies are being held separate and apart from any amounts retained and have been and will continue to be paid to the localities as prescribed by law. Once this condition is satisfied, the corporation must submit an expenditure plan to the Commission for review, which must include the corporation's outstanding liabilities, projected revenue for the upcoming year, a detailed explanation of how the funds will be used, and any other information necessary to detail such plan as determined by the Commission. Upon review, the Commission will decide as to whether the requirements have been satisfied, and if so, authorize access and use.

Part R, Chapter 58 dedicates \$1.5 billion in licensing fees if three downstate casino licenses are awarded, and a share of an estimated \$231 to \$413 million in incremental annual tax revenue from the casinos for MTA operations.

Part X, Chapter 59 authorizes The New York Racing Association, Inc. to enter into a repayment agreement with the State for the repayment of funds provided by the State for the renovation of Belmont Park racetrack. The legislation allows a \$455 million loan to NYRA, secured by revenues they presently receive from machine gaming activity at Aqueduct Racetrack. The loan will allow NYRA to replace the existing grandstand and clubhouse. The present structure, last renovated in 1968, will likely be replaced by a smaller facility with modern amenities and hospitality offerings.

Part BB, Chapter 59 is a functional annual extension of sunset provisions regarding a multitude of provisions related to the simulcasting of horse races and certain tax structures.

When we last gathered, I mentioned that the Horseracing Integrity and Safety Authority Anti-Doping & Medication Program implementation was scheduled to start that day as, on March 27, 2023, the Federal Trade Commission had approved the HISA rules. Recall, HISA Program administration was to be effectuated by their

selected vendor, the Horseracing Integrity and Welfare Unit, which was established last year by Drug Free Sport International, a privately held corporation which offers drug testing and compliance services.

Anyway, the federal Administrative Procedure Act requires the tolling of 30 days between when the final behavioral rule is issued and when it may take effect. Accordingly, when horsemen's organizations in Texas challenged the implementation on March 31, 2023, the U.S. District Court for the Northern District of Texas enjoined HISA, finding a procedural administrative violation. HIWU immediately pulled their staff nationwide and the Commission filled the void by returning to take and test biologic samples.

As we approached the expiration of the 30-day standdown, the Federal Trade Commission announced that it would allow the HISA rules to become effective on May 22, 2023, which is today. So, HIWU is back in business, undertaking the responsibility for the biologic sampling of horses competing in thoroughbred racing in New York, as well as out-of-competition testing for horses eligible to compete. HIWU and HISA will also be undertaking the testing of the samples, evaluation of results, and investigation and prosecution of transgressions.

Commission barn staff, who had transitioned from employment with the Commission and were engaged with HIWU as independent contractors performing similar duties, only to re-transition to the Commission, have again re-re-transitioned to HIWU as independent contractors.

On May 8, 2022, Vernon Downs Casino Hotel owner Jeffrey Gural circulated an internal memorandum to all Vernon employees stating his intention to file state Worker Adjustment and Retraining Notification (WARN) Act paperwork. He indicated an intention to close the racino in August, the racetrack in September, and the hotel in December.

Three days later, he made good on proffered intention, filing a WARN Act notice with the State Department of Labor.

Mr. Gural once again has blamed the State by pointing to the Legislature's refusal to eliminate the statutory employment requirement which would allow him to receive an additional 7.5 percent of the State's administrative fee retention. In fact, this additional vendor fee is forfeited for any period that the Vernon fails to maintain full-time equivalent employment levels of at least 90 percent of its 2016 levels. The employment thresholds were also necessary for Vernon to be eligible to receive an additional vendor fee equal to 6.4 percent of its Net Machine Income.

There has been some public confusion that the Commission has discretion to waiver the employment requirements. We do not. Both the initial implementing law [\[Part I](#)

of Chapter 61 of the Laws of 2017] and its practical extension [Part R of Chapter 39 of the Laws of 2019; Part EE of Chapter 59 of the Laws of 2019], allow the additional compensation so long as the required employment levels are satisfied.

As a reminder, in 2017 Gural issued WARN Act notices as part of what ended up being a successful effort to obtain legislative relief.

As you may have read, Thoroughbred trainer Todd Pletcher received a 10-day suspension and \$1,000 fine for violation of the Commission's rule regarding the presence of a prohibited substance in a racehorse. His horse, *Forte*, which won the Hopeful Stakes (G1) at Saratoga was also disqualified. Specific to this incident, *Forte's* primary blood sample detected the presence of meloxicam, a regulated non-steroidal anti-inflammatory drug. The presence of such drug is not permitted at any level. Mr. Pletcher has administratively appealed the Steward's decision. Racing media interest in the matter was substantial, as *Forte* was the 2022 Eclipse Award winner as Two-Year-Old Male and had been the Kentucky Derby favorite. The major focus of attention has been the length of time between incident and resolution. In large measure, the delay was due to split-sample testing and the efforts of Mr. Pletcher's attorney to delay the process.

Recall, it was November 2017 that a split-sample program was initiated in New York at the specific request of the New York Thoroughbred Horsemen's Association. Under the program, in the event of a positive test, horsemen have the option of sending a split-sample to an independent laboratory to verify test results. Before I venture further, while I am discussing the practice and procedure in this case, please be aware that it is also applicable in harness racing. Additionally, the Commission has jurisdiction over biologic samples collected through yesterday, as today the Horseracing Integrity & Welfare Unit, the vendor of the Horseracing Integrity and Safety Authority is set to relaunch HISA's Anti-Doping and Medication Control Program today. The Commission retains responsibility for biologic sampling and testing in harness racing, as HISA has yet to address that industry.

By practice and procedure, when there is a possible rule infraction or violation, the Stewards set a time to meet, providing an affected party the informal opportunity address the matter. Following the meeting, the Stewards collectively evaluate potential rule infractions and, if appropriate, the State Steward will issue a ruling. In the present case, following being informed of the positive meloxicam finding, Mr. Pletcher retained counsel who sought to have the split-sample tested. Unfortunately, Mr. Pletcher's attorney took nearly two months to select a qualified laboratory to conduct the testing. Then, following return of the sample confirmation, Mr. Pletcher's counsel sought and received multiple adjournments of the Stewards meeting. The Commission Steward offered three dates for the meeting, one of which was accepted. Three days before the scheduled meeting, Mr. Pletcher's counsel

requested a postponement. The Steward then offered five additional dates, with the *proviso* that if the meeting did not occur by the last date, the Stewards would deem Mr. Pletcher had declined the opportunity to appear and move forward with the meeting *in absentia*. Two days before the last date, Mr. Pletcher's counsel again sought an adjournment, offering no substitute date. The State Steward declined Mr. Pletcher's counsel's request, and the meeting proceeded.

Changes to the split-sample procedures have been instituted to reduce the ability of an affected party to game the system. Absent extraordinary circumstances, a trainer advised of a positive drug violation will now be afforded no more than two-weeks to identify and make arrangements for the split-sample to be tested. Additionally, upon notification of a split-sample result being returned, the stewards' hearing must be conducted within three weeks. If a trainer cannot appear within three weeks' time, they will be deemed as to have constructively waived their appearance before the Stewards and the matter will be adjudicated.

Returning to the meloxicam positive, according to the National Institute of Health, the drug is approved for use in horses in multiple countries as an oral suspension or injectable; however, an equine formulation is not available in the United States.

Anyway, under the classification structure of both the Association of Racing Commissioners International and the Horseracing Integrity and Safety Authority, the drug is a Class B drug for purposes of penalty. The ARCI recommend a minimum suspension of 15 days absent mitigating circumstances, while HISA recommends a 15-day suspension while considering mitigating and aggravating circumstances. Both call for disqualification of the horse from the race. As I mentioned, the penalty imposed upon Mr. Pletcher was horse disqualification, plus a 10-day suspension and \$1,000 fine.

The Commission has not issued a penalty for a meloxicam positive in a Thoroughbred horse since 2013, when Dennis Lalman, was suspended for 15 days, which was reduced to seven days after he waived his right to appeal. Lalman's horse was also disqualified. There was also one meloxicam positive in harness racing, this too occurring in 2013 at Yonkers Raceway. There, the judge imposed a suspension and a fine, being 30 days and \$500, which were both halved when the trainer John Grasso declined to appeal, and the horse was placed last.

Finally, you should be aware that the procedural processing of split-samples has remained constant since initiation. The Commission does not announce medication infractions until considered by the judges or stewards. As of Friday morning, there were three Thoroughbred and two Standardbred split-samples outstanding at a qualified, accredited independent laboratories. The Commission is awaiting return of their findings.

Recently, PointsBet advised that Fanatics Betting and Gaming had agreed to acquire PointsBet's U.S. assets for \$150 million. The deal is expected to allow Fanatics to gain access to at least 15 states, including New York. PointsBet will retain its Canadian and Australian business operations. Fanatics is a large sports apparel and collectibles company, who were part of a non-winning bid for the Commission-issued Mobile Sports Wagering Platform Provider and Operator Licensees in 2021. Fanatics launched its first retail sportsbook in Maryland in January, and in March launched a beta version of a mobile sports platform in Tennessee and Ohio.

Staff have been working with Fanatics and their representatives to provide licensing documentation and pre-opening requirements prior to license consideration. Please note that there will be no transfer of a license. Rather, Fanatics is seeking to become the new owner of the ongoing-license-holding entity, PointsBet New York LLC dba PointsBet.

The transaction itself requires staff review and Fanatics will begin the process of background investigation of it, its related entities, and persons who are designated as qualifiers. Published reports indicate that they have a goal of the start of the upcoming NFL season for Fanatics to assume control of the PointsBet entity, with PointsBet anticipating a shareholder vote on the deal in late June.

Given that Fanatics is new to the New York gaming market and the ownership transfer will be complete, I recommend approval of this transaction be considered at the Commissioner level.

Finally, with regards to the current Request For Applications Question and Answers, in late February I indicated the response process for the first round of questions and answers was expected to take three weeks.

I was incorrect. While the responses are taking longer than expected, it is important to remember that the Q&A's are a critical step in the RFA process, allowing for the clarification of requirements and to make necessary amendments to the RFA.

Taking the time to do this right is crucial, and to be clear – there is no statutory or RFA-mandated deadline for the response to each round of questions – it was purposefully left open-ended to allow the staff and Gaming Facility Location Board members to properly evaluate each question and answer to ensure accuracy and consistency in response. With that said, Staff continues to diligently review, answer and refine the more than 600 questions that were submitted as part of the first round and draft responses to each.

Several of the submitted questions have multiple parts that need to be dissected. Additionally, many questions are similar in content, requiring a parsing of meaning

and intent to ensure a consistent response. And all of the answers to the questions, given the scope of the process and the weight the answers carry, deserve thorough and robust consideration.

I appreciate the patience of the potential applicants and potentially impacted local government entities, who undoubtedly understand the necessity to get our responses correct, and they understand that there is no expectation as to when the first round of questions will be complete.

Once the first round is completed, we will notify the public by publishing responses on the Gaming Facility Location Board website at nycasinos.ny.gov.

Chair O'Dwyer: Thank you Mr. Williams. I simply give you my thank and and my thanks of the commission members in setting the record straight in regards to Mr. Pletcher and I think it's very important and was quite unfortunate uh some of the reporting that came out um the board and the commission and our staff needs to be commended for the way that they handled it. I understand there was the timed efforts but they did everything they could to give Mr Fletcher considerable due process and I'm glad that you were able to correct the record in that regard.

Commissioner Crotty: Can I ask, Mr. Chairman, do we have any other horses now that have tested positive and are awaiting a split sample?

Executive Director Williams: I think I mentioned the are three that are out there on the thoroughbred and two non the standardbred.

Commissioner Crotty: Do you have timeline on resolving them?

Executive Director Williams: I don't have the specifics on any of those cases.

Chair O'Dwyer: I suspect Mr Crotty given the situation, commissioner, that we will be very diligent in terms of making sure that those things are adjudicated much more promptly.

N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law § 104.19 authorizes the Commission to promulgate rules and regulations that it deems necessary to carry out its responsibilities. To that regard, the Commission will from time-to-time promulgate rules and rule amendments pursuant to the State Administrative Procedure Act. Today we have one rule for adoption consideration and one for re-proposal consideration.

Executive Director Williams: For Commission consideration is the adoption of regulations to govern the content of casino license applications. The rulemaking proposes amendments to reflect the statutory requirements of Title 2-A of Article 13

of the Racing, Pari-Mutuel Wagering and Breeding Law concerning the application process for additional casino licenses. The Notice of Proposed Rulemaking was published in State Register of February 23, 2023, meaning the public comment period expired on April 24, 2023. No comments were received.

Staff recommends that the Commission adopt this proposed rulemaking.

Chair O'Dwyer: Commissioners, any questions on the adoption of amendments to Rules governing the content of Gaming Facility License Applications?

Hearing non, may I have a Motion to adopt this rule?

Commissioner Shorenstein: So moved.

Second?

Commssioner Skurnick: Second

Discussion on the Motion?

All in favor? Opposed?

The Motion carries.

Next item please.

At the February 27, 2023 meeting, the Commission authorized the proposal of rules to regulate advertising, marketing and promotions concerning sports wagering. The proposal is undergoing customary review before publication in the State Register.

Included in the proposal is a prohibition against compensating marketing and advertising third parties based on volume of patrons, wagers placed or the outcome of wagers. Upon further consideration, staff believe the proposed regulation would effectively prohibit affiliate marketing businesses from being compensated, which was unintended. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law section 1341(1) generally prohibits agreements in which the payment of any direct or indirect interest, percentage or share of any money or property gambled at a gaming facility, any money or property derived from gaming activity, or any revenues, profits or earnings of a gaming facility, however fixed-sum compensation is permitted.

Accordingly, staff propose to allow for compensation of affiliate marketers, consistent with New York law. Additionally, staff recommend an additional

amendment requiring disclosure of business practices on the websites of such affiliate marketing sites.

Staff recommends that the Commission authorize the proposal of this rulemaking, as revised. If the Commission authorizes, staff will resubmit the revised language as superseding text in the regulatory review process.

Chair O'Dwyer: Commissioners, any questions on the re-proposal of rules regarding Sports Wagering Advertising?

I would like to make the following uh comment on that which is that what we're doing today is allowing third-party marketing and I understand that that is probably something that that has been done in other jurisdictions I personally will be looking very very carefully at the marketing in the next six months to do a year as to see whether that in fact is appropriate and that the advertising is done in such a way as to be to be efficacious but at the same time that will be cognizant of the questions of problem gambling that we have been so we uh better come to the forefront. If I find that within the next six months to a year that there has been significant problems with the type of advertising that's coming down I will come back to the staff and to my fellow Commissioners and ask that we revisit that rule and prohibit third party advertising. I'm for it at this point in time but I think it needs as we'd all know that this is something new we need to look at that see how it goes and then reevaluate it at the appropriate time.

Does anyone else have any questions or comments hearing none I'll take a motion.

Commissioner Crotty: Congratulations to you Mr, Chairman on spearheading and putting this initiative together it wouldn't have happened without your uh some of the thoughts on it I think it removes us in a good direction.

Chair O'Dwyer: Thank you Mr. Crotty.

May I have a Motion to re-propose this rule?

Second?

Discussion on the Motion?

All in favor? Opposed?

The Motion carries.

Chair O'Dwyer: Alright. The motion carries. The next item of scheduled business regards hearings and adjudications. Today, we have one adjudication. Mr. Williams?

Robert Williams: On December 22, 2022, the Bureau of Licensing issued a Notice of License Suspension to Naji M. Mahmoud doing business as NA Market at 943 Midland Avenue in the City of Syracuse. The notice informed Mr. Mahmoud of a suspension for engaging in conduct that constitutes a fraud, deceit, misrepresentation or conduct prejudicial to public confidence in the state lottery. Specifically, the notice cited Commission Rules 5001.19(a)(4) and 5001.19(a)(6), which authorize suspension or revocation of a lottery sales agent license for violation of the acts, rule and regulations of the Commission or the licensing agreement with the sales agent or if the Commission finds that the lottery sales agent's experience, character and general fitness are such that the lottery sales agent's participation as a lottery sales agent is inconsistent with the public interest or convenience.

The notice stated that the action was taken because the licensee was found by the Department of Taxation and Finance to be in possession of unstamped or unlawfully stamped packages of cigarettes. Following notice and opportunity, Taxation and Finance revoked Mr. Mahmoud's Certificate of Registration as a Retail Dealer of Cigarettes and Tobacco Products for a period of one year beginning on December 1, 2022.

The Commission notice stated that the lottery sales agent license suspension would be for one year or until the end of any suspension of a license to sell cigarettes that may be ordered by Taxation and Finance.

A hearing was conducted on March 2, 2023.

The Hearing Officer submitted a report to the Commission's Secretary dated May 9, 2023, recommending that Mr. Mahmoud's lottery license be suspended for a period of one year beginning December 1, 2022.

The Commission considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1.

Chair O'Dwyer: The Commission duly deliberated and considered this matter and determined, upon a vote of 4-1, Commissioner Moschetti voting in the negative to sustain the Hearing Officer's Report and Recommendation. Is there any new or old business?

Before we adjourn.

I'd like to Mark the departure of commissioner Christopher Riano who recently resigned for personal reasons. I'm certain I speak for my fellow Commissioners and staff that we will miss him the enthusiasm and the kind words and the analysis of that he brought to this to the commission. He will be sorely missed. Also I'd like to mark the impending retirement this week of Brian Barry from the division of racing in pari-mutuel wagering. Mr. Barry has been with the commission or its predecessors for over four decade, 43.7 years and has in recent years been responsible for the recruitment staffing and scheduling of senior personnel at racetracks. This is a thankless position but integral to the conduct of racing I want to note that the Barry family has been involved with the public service embracing it arena for nearly 50 years as Brian's Father Bill who was a personal friend of mine and one of the Giants of the Irish American community preceded Brian's tenure having served for a few years as chairman of the Racing and Wagering board during Governor High Carey's Administration.

I'd also like to note for myself just a few more things one is one of the things that I think the executive director did not mention which I'm very clear to very close to my heart is in giving the appropriation to NYRA of the 400 plus million dollars specifically within the legislation was an oversight of the workers housing in both Saratoga and in Belmont, which means going forward the franchise board and the state of New York will have a specific oversight for the first time to make sure that workers housing is clean healthful and appropriate. I think that's a major change in a major step for the commission and for the state and very most grateful to our governor and to the leaders of the legislature for putting that within the legislation it will make a major difference in the lives of the back stretch workers going forward.

Finally I just want to discuss the question of where we are going to be looking at the at Fanatics um just to make sure that they are appropriate. That's being bumped up from staff to the commission. That procedure will also be used when we finally get to the question of the new casinos. As you may recall while the site selection committee makes the final determination of the three licenses once that's done then the then this commission then must make a determination as to whether those three entities should be licensed to operate a casino in in New York. I just want to put everybody on notice that that is not going to be a rubber stamp by this commission. A lot of people who may have backgrounds that may need to be looked at will be looked at and we will be very very careful to make sure that once again that the casinos are operated with the greatest integrity with that that's all I have does any of the other commissioners of anything?

I'll take a motion for adjournment.

Commissioner Skurnik: So moved.

Chair O'Dwyer: The meeting is adjourned. Thank you all.

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