



Massachusetts Gaming Commission Meeting Minutes

Date/Time: December 12, 2022, 1:30 p.m.
Place: Massachusetts Gaming Commission

VIA CONFERENCE CALL NUMBER: 1-646-741-5292
PARTICIPANT CODE: 112 172 7116

The Commission conducted this public meeting remotely utilizing collaboration technology. The use of this technology was intended to ensure an adequate, alternative means of public access to the Commission's deliberations for any interested member of the public.

Commissioners Present:

Chair Cathy Judd-Stein
Commissioner Eileen O'Brien
Commissioner Bradford Hill
Commissioner Nakisha Skinner
Commissioner Jordan Maynard

1. [Call to Order](#) (00:05)

Chair Judd-Stein called to order the 410th Public Meeting of the Massachusetts Gaming Commission ("Commission"). Roll call attendance was conducted, and all five commissioners were present for the meeting.

2. [Investigations and Enforcement Bureau](#) (00:50)

a. Encore Boston Harbor Service Exemption Request

Chief of the Licensing Division, Karalyn O'Brien stated that Encore Boston Harbor ("EBH") had submitted three gaming service employee exemption requests. She then introduced Licensing Supervisor, David MacKay. Mr. MacKay stated that EBH had requested the Commission allow three new exemptions under a statutory provision enacted in 2017 that authorized the Commission to exempt certain job positions from the registration requirements found in General Law Chapter 23K. The *Exemption Requests* were included in the Commissioner's Packet on pages 3 through 16.

Mr. MacKay stated that the first position EBH sought an exemption for was the Lead Kitchen Stewards Porter, which monitored and maintained cleanliness and organization of the kitchen and was a promotional track for the existing Kitchen Stewards Porter position. He stated that the next two positions were for a full-time and part-time equivalent for a Car Detailer position responsible for cleaning vehicles to company standards or client-specific specifications and keeping records on the condition of the vehicle.

Mr. MacKay stated that for each position, EBH responded “no” to all criteria identified on the gaming licensee certifications, and that the positions would have no supervisory responsibilities. Chair Judd-Stein asked if the full-time and part-time car detailer positions would be separate positions. Mr. MacKay confirmed and stated that there were two distinct position numbers.

Commissioner Skinner moved that the Commission exempt the Lead Kitchen Stewards Porter, Car Detailer, and Car Detailer SE Part-Time positions at Encore Boston Harbor from the Commission’s Registration requirements, in accordance with 205 CMR 134.03(1)(b) for the reasons discussed today, and described in the Commissioner’s Packet. The motion was seconded by Commissioner Hill.

Roll call vote:

Commissioner O’Brien: Aye.

Commissioner Hill: Aye.

Commissioner Skinner: Aye.

Commissioner Maynard: Aye.

Chair Judd-Stein: Aye.

The motion passed unanimously, 5-0.

3. [Promo Play](#) (06:00)

a. Discussion Regarding Promo Play for Sports Wagering

Chair Judd-Stein stated that the computation of gross sports wagering receipts and whether promotional play was deducted was treated differently across jurisdictions. She explained that there were considerations of public revenues, operator’s business models, responsible gaming policies, and public health.

Regulatory Compliance Manager Sterl Carpenter presented on promotional play with topics including: the definition of promotional play; recently available promotional offers; states that allowed promotional bets to be deducted from the taxable win; and Colorado’s changes to its promotional play deductions. The *Promotional Play Presentation* was included in the Commissioner’s Packet on pages 17 through 32.

Chair Judd-Stein introduced outside counsel Annie Lee and Lon Povich from the law firm Anderson and Krieger. Ms. Lee stated that General Law Chapter 23N defined sports wagering operator’s adjusted gross sports wagering receipts as total gross receipts from sports wagering minus the total of all winnings paid to participants and all excise taxes paid pursuant to federal

law. She stated that there was an additional carveout that the total of all winnings shall not include the cash equivalent of any merchandise or thing of value awarded as a prize.

Ms. Lee stated that Chapter 23N was silent on the definition of gross sports wagering receipts, unlike G.L. Chapter 23K which defined gross gaming revenue in the gaming context as the total of all sums actually received by the licensee, provided further that issuance to or wagering by patrons of the gaming establishment of any promotional gaming credit shall not be taxable for the purposes of determining gross revenue.

Ms. Lee noted that the legislative history showed that the legislature contemplated excluding promotional play from gross sports wagering receipts but did not ultimately adopt that language. She stated that the house bill excluded promotional play from total gross receipts, but the act submitted to the Governor by the Senate did not exclude promotional play. She stated that the language in the Act was reconciled in the Legislature, and that promotional play credit was not an exemption to gross sports wagering receipts. She stated that this interpretation was not exclusive, but a better interpretation was that promotional play included in the operator's gross sports wagering receipts.

Chair Judd-Stein asked if there were any questions relative to the policy discussion.

Commissioner O'Brien stated that she had policy considerations in terms of what guardrails and limitations the Commission could be implemented related to promotional play. Chair Judd-Stein asked if Commissioner O'Brien had concerns about the implications of the tax rate.

Commissioner O'Brien expressed an interest in discussing policy questions such as further regulating promotional play and what could be offered. Chair Judd-Stein noted that the issue in question was whether the adjusted sports wagering receipts included promotional play in terms of taxation. Commissioner O'Brien stated that she was satisfied on that issue with promotional play not being deducted from gross sports wagering receipts.

Commissioner Hill stated that he wanted to hear from the Commission staff on this issue.

Commissioner Skinner stated she was prepared to move onto policy discussion but would like to hear the staff's recommendations. Chair Judd-Stein stated that she was not sure if the staff was fully prepared for the policy discussion of limitations on promotional play. Commissioner O'Brien stated that she envisioned the Commission would have to circle back on that discussion at a later point. Commissioner Maynard noted his appreciation for Anderson and Krieger's presentation and stated that the Commission had received comments from its licensees expressing a different view. He noted that he would also like to hear the staff's opinions on the issue.

Chief Financial and Accounting Officer ("CFAO") Derek Lennon stated that the interpretation of not deducting promotional play would maximize tax revenue, but was not consistent with how G.L. 23K handled the tax application of promotional play. He stated that excluding promotional play from adjusted gross sports wagering receipts would maximize profits to the businesses, but also create incentive to minimize tax revenue.

CFAO Lennon noted that other states had chosen to do a partial deduction where the operators could only deduct a certain amount of promotional play from the adjusted gross sports wagering

receipts. Addressing Commissioner O'Brien's concerns. CFAO Lennon noted that the Sports Wagering Division could regulate the approval of promotional play, but that the staff team was more prepared to discuss taxation at this meeting.

CFAO Lennon resumed his presentation, with topics included promotional play scenarios, taxation formulas for the options available, and the operator's ability to carry over losses.

Chair Judd-Stein noted that promotional play was not deducted under the current law, and sought clarification if one of the scenarios presented would be if the Commission adopted a regulation that would allow a full deduction of promotional play. CFAO Lennon stated that the legal analysis left room for alternative interpretations on how to approach the issue. Chair Judd-Stein noted that the third option was to collect taxes on a percentage of promotional play.

CFAO Lennon explained that in general marketing, a five to ten times multiplier was expected in promotion. Chair Judd-Stein asked if this was in reference to the return on investment for operators. CFAO Lennon replied that it was. Chair Judd-Stein asked what the revenue would be in the sample if the Commission chose not to deduct promotional play from the adjusted gross sports wagering receipts. CFAO Lennon noted that operators often offer less promotional play if it is not deducted from taxation.

Chair Judd-Stein explained that promotional play had come up in the sports wagering whitepaper in the advertising and marketing context and asked Director of Research and Responsible Gaming Mark Vander Linden to comment. Director Vander Linden stated that pieces highlighted in the November 20, 2022, Risky Wagering series in the New York Times specifically addressed promotional play. He stated that promotional play is often targeted to young adults who are more susceptible to accepting free promotional play without the understanding of what promo play is. He noted that more information is laid out in the New York Times series.

Director Vander Linden stated that he had performed a quick literature review related to promotional play and cited a 2017 Journal of Gambling Study, titled *The Structural Features of Sports and Race Betting Inducements: Issues for Harm Minimization and Consumer Protection* by Hing et al. He stated that the study indicated that there were several structural features of sports wagering inducements that poorly align with harm minimization or informed player choice strategies.

Director Vander Linden stated that twelve features were mentioned in the study, but the four he found most relevant were that wagering inducements were likely to maintain or exacerbate harmful betting amongst problem gamblers; that terms and conditions of sports wagering inducements did not usually enable informed player choice due to terms and conditions being vague or not present; consumers were not likely to see responsible gaming messaging during sports wagering inducement offers; and that the study found younger adults were more likely to be routinely exposed to advertisements about sports wagering inducements.

Director Vander Linden stated that other research supported those findings. He noted that Virginia had moved from deducting promotional play to taxing it. He stated that it was important

to consider promotional play's effect on taxation in Massachusetts, and that it could fund different sources such as the Public Health Trust Fund.

Chair Judd-Stein stated that there were broad implications with respect to public protections. Commissioner Hill asked if other jurisdictions had initially allowed promotional play and discontinued it at a future point. Regulatory Compliance Manager Carpenter explained that Virginia had begun with a full deduction, which it was now eliminating, and that Colorado had tiered down the taxation of promotional play because they were not receiving the tax rate the state desired.

Chair Judd-Stein asked if it was the regulator or the legislature that had made the change in the two states mentioned. Regulatory Compliance Manager Carpenter stated that the state legislatures had passed the laws, but that the Virginia legislature had contacted the regulator regarding the taxation amount.

Commissioner Maynard inquired whether the regulators were required to make a decision in any other states. Mr. Povich stated that the legal analysis was regarding the legislative intent regarding Massachusetts General Law Chapter 23N and that the outside counsel team had not reviewed other states. Regulatory Compliance Manager Carpenter stated that while the legislatures had enacted the changes in Virginia and Colorado, the regulators in those states identified promotional play as this issue when working with the legislature.

Chair Judd-Stein requested information regarding whether any jurisdictions statutes affirmatively stated promotional play was taxable. She noted that in the jurisdictions she had looked at, the assumption was that promotional play was not deductible and that the deduction had to be affirmatively written. She reiterated that the team from Anderson and Krieger stated a better interpretation of the law was to include promotional play in the operator's gross sports wagering receipts.

Chair Judd-Stein stated that the Legislature knew how to treat promotional play as a deduction, as they had done that under casino law in General Law Chapter 23K. She stated that the House language was clear that promotional play was to be deducted, but that language was removed in the Senate bill that was signed into law. She stated that the lawmakers' intent was clear, and that the Legislature had weighed the relative factors and effects of promotional play on vulnerable populations. She expressed worry that should the Commission decide to interpret the law differently they would become a tax setting agency.

Commissioner O'Brien agreed with Chair Judd-Stein and noted that the operators had a chance to lobby and present these arguments to the legislature. Commissioner O'Brien stated that the Commission has a lot of discretion and authority but that she did not believe the Commission had the authority to effectively change the tax rate.

Commissioner Skinner agreed but stated that some of the information relied on could be used to support the opposite conclusion. She stated that if the Legislature did not intend to defer this question to the Commission, they could have affirmatively excluded the deduction of promotional play in their legislation. She asked if Commissioner Hill could provide insight due

to his former experience as a legislator, and inquired if it was generally acceptable for members of the Legislature to give public comment on agency regulations.

Commissioner Hill stated that when the bill passed the house two years prior, the language included the deduction of promotional play from the gross sports wagering income, as it was believed it would help the businesses. He noted that the Senate did not adopt the language, due to a lot of discussion during the last day before presenting the bill to the governor. He stated that he wanted to get the licensees up and running and for the state to get its due. He expressed concerns that the taxation of promotional play could be a negative for licensees. Commissioner Skinner thanked him for his feedback.

Commissioner Maynard stated that he was interested in seeing how other jurisdictions handled the issue, and that he was not prepared to make a decision. Chair Judd-Stein asked if the Commission had requests for information that would help to understand the legislative intent and what other jurisdictions do. She stated that she has not seen a statute that included an affirmative inclusion of promotional play in the definition of gross sports wagering receipts.

Chair Judd-Stein asked if any other legislatures gave discretion to the gaming regulator to alter the tax rate of promotional play independently. Mr. Povich stated that the discussion and debate by the Massachusetts legislature reinforces the legislative history cited by Anderson and Krieger, but a legal argument could be made in defense of that policy. He noted that a better reading of the law includes promotional play credits in adjusted sports wagering receipts and noted he would do additional research. Mr. Povich stated that it may be difficult to find information on the legislative history of other jurisdictions.

Commissioner O'Brien stated that she did not require any further information for her analysis, and that she did not need additional information to make a conclusion. Commissioner Skinner agreed and stated she did not need additional information from Legal. Commissioner Hill stated that the Commission staff would be able to provide any further information he needed. Commissioner Maynard stated that he did not want to waste any more resources digging into this question. He stated that he would have to think about the issue before voting.

Chair Judd-Stein asked if the reserved opportunity to vote would be tabled until a later meeting. Commissioner Hill requested that a vote wait until more information was available. Commissioner Maynard agreed. Chair Judd-Stein requested that any information in response to his requests be shared with the Commission, and that Director Vander Linden would also have an opportunity to supply additional information.

Commissioner Skinner asked if there was any other information available that would assist with the question of legislative intent. Mr. Povich stated that there was no recorded legislative history in Massachusetts and no congressional record. He stated that the Commission had an advantage as Commissioner Hill could provide details on the back-and-forth of the legislation and that the Commission's staff monitoring the bill was a great asset.

Commissioner Hill stated that he would like to reach out the legislators who wrote the bill and ask them to put something in writing regarding their intent, but was not sure if he was ethically

allowed to do so. General Counsel Todd Grossman stated that there was not a prohibition against asking legislators questions, but they should be informed that the information may be shared publicly.

Commissioner O'Brien stated that she was not sure the Commission would get a full picture of the discussion and intent through this method and stated that she did not think it was an appropriate way to handle this interpretation. Commissioner Maynard stated he was taught to not look at legislative history to be dispositive. He inquired whether, in the existing language in the bill that passed, regulators had the right to interpret the tax issue. He said that he was happy to make decisions where the Commission had authority, but this issue was a grey area, and he would have to think about it more.

Mr. Povich stated that the Commission could enact regulations consistent with the statute. He stated that not creating a deduction for promotional play credits was consistent, and that the better view of the interpretation was to act consistently with the statute, given the legislative history.

Chair Judd-Stein stated that the public comments from the operators proposed a regulation that rewrites the section defining adjusted sports wagering receipts. She stated that their recommendation was to include the exact language the Senate had removed, which would rewrite the law. She noted that she was open to other interpretations, but the solution provided would insert language that had been removed by the Legislature. She stated that she wanted the Commission's process to be consistent and that the vote would be tabled so the Commission could receive further guidance.

4. [Commissioner Updates](#) (1:35:00)

Commissioner Skinner noted that a public comment from Fanatics dated November 22, 2022, was not in the packet, and wanted to ensure the comment would be circulated to the entire Commission if it had not already done so. Deputy General Counsel Caitlin Monahan stated that all relevant comments should have been in the packet when the Commission discussed 205 CMR 240 previously, but that she would double check that all public comments were included.

5. [Other Business](#) (1:37:36)

Hearing no other business, Chair Judd-Stein requested a motion to adjourn.

Commissioner Hill moved to adjourn. The motion was seconded by Commissioner O'Brien.

Roll call vote:

Commissioner O'Brien: Aye.

Commissioner Hill: Aye.

Commissioner Skinner: Aye.

Commissioner Maynard: Aye.

Chair Judd-Stein: Aye.

The motion passed unanimously, 5-0.

List of Documents and Other Items Used

1. [Notice of Meeting and Agenda](#) dated December 6, 2022
2. [Commissioner's Packet](#) from the December 12, 2022, meeting (posted on massgaming.com)