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State Administration and Veterans' Affairs Interim Committee
65th Montana Legislature

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TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: May 31, 2018

RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 2-63-575

AGENCY/BOARD: State Lottery Commission

RULE CLASSIFICATION: (e.g. substantive/interpretive/emergency/temporary): Substantive

SUBJECT: Miscellaneous Lottery Rules

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Proposed Amendment

SUMMARY OF RULE(S): The State Lottery Commission proposes to amend 14 rules concerning miscellaneous lottery provisions.

The Commission proposes to amend definitions set by rule to delete a reference to a provisional license being issued during a renewal, update the meaning of a license to include the ability to sell terminal-issued tickets, and correct an erroneous statutory reference. The Commission also proposes to insert the term "lottery ticket" as a broad term to refer to all lottery tickets and to update several references regarding the two types of tickets (scratch tickets and terminal-issued tickets) to the more generic "lottery tickets" throughout.

In addition, the Commission proposes to require the Director of the State Lottery to adopt rules for all lottery games, rather than just scratch games (this would not include games done by machine-issued tickets), including how prizes are structured. Regardless of whether rulemaking is performed directly by the Commission (which meets only every three months) or as delegated by the Commission under this rule to the Director, there is no exception for the Lottery to bypass the Montana Administrative Procedure Act (MAPA) process. Therefore, under the current rule or the rule as proposed, the Director would still be required to follow the MAPA process when adopting rules on behalf of the Commission.

The Commission proposes to require a retailer to complete an online application and pay the licensing fee electronically through an online application called eStop. In addition, the Commission proposes to specify that a retailer is required to submit a license application available on the Montana Lottery website. The rule specifies that a traditional license application fee is \$50, and it is \$75 for a Montana sports action license which is "collected for and transferred to the Board of Horseracing." The Commission notes that "[t]here are no proposed cost increases; these are existing fees. The lottery believes it to be helpful to include the fees in rule so that customers know what the fees are." The statutes implemented by the section only reference one fee. Specifically, 23-7-301, MCA, states: "License applicants shall pay a \$50 fee to cover the cost of investigating and processing the application." The \$75 fee does not appear in the lottery statutes, but the fee is authorized by the Board of Horseracing under separate statutory and rule-making authority. Specifically, the \$75 fee is authorized in rule by the Board of Horseracing for a parimutuel facility conducting parimutuel wagering on fantasy sports. *See* ARM 8.22.3902. However, from the text of the rule, the fee appears out of context. At first glance, it would appear to be a new fee requiring proper statutory authorization and the accompanying MAPA requirements for a fee adoption, increase, or decrease. To prevent confusion about the \$75 fee and after staff discussion with the Department of Administration, the Department of Administration has agreed to simply cross-reference the fee authorized under separate authority in ARM 8.22.3902.

The Commission proposes to amend one rule to require a retailer to sign official application forms indicating that the retailer is familiar with and agrees not to violate the associated laws and rules. The amendment would strike references to an official log because "the Montana Lottery maintains physically signed documents from each retailer indicating compliance."

The Commission proposes to amend the rule concerning commissions for retailers by allowing commissions for terminal-issued tickets in addition to existing commissions for scratch tickets. According to the Commission, this allows Montana sports action retailers the ability to receive commissions, rather than limiting commissions solely to traditional retailers. The proposed rule states that "[r]etailers who sell terminal-issued tickets designated in lottery policy may increase the terminal-issued commission for participating games up to an additional 5 percent" ARM 2.63.407 as proposed.

The Commission proposes to require a licensee to notify the director of any change in bank account information to alleviate problems with weekly accounting sweeps, and it would require retailers to bring timely notification of accounting errors, bank account changes, or disputes to the attention of the lottery. The Commission also proposes to allow the director to revoke the license of a person who takes intentional actions to gain advantage over the lottery sales locations while benefiting financially from the sale of the tickets.

The Commission already determines the price of scratch tickets, and it proposes to allow the Commission to determine the price of terminal-issued tickets as well. Similarly, terminology changes will require retailers to bear the burden of loss for terminal-issued tickets. They already bear the burden of loss for scratch tickets. Likewise, the proposed amendments will apply the policy the for redemption of scratch tickets to terminal-issued tickets.

The Commission also proposes to delete duplicative material, incorrect or obsolete terminology, and make other minor changes in style.

Finally, as noted above, there are several areas in current and proposed rules by the lottery in which policy or rules for the lottery games are mentioned. Under section 23-7-202, the Commission is required to "determine policies for the operation of the state lottery . . . set policies, determine types and forms of lottery games to be operated by the state lottery, and transact other necessary business." In addition, the Commission must "determine the price of each ticket or chance and the number and size of prizes . . . [and] provide for the conduct of drawings of winners of lottery games." Under MAPA, everything defined as rules (for MAPA purposes) are required to go through the rulemaking process. This includes "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule." Section 2-4-102, MCA. The lottery has adopted broadly applicable rules under their rulemaking powers. *See* ARM Title 2, chapter 63. But the lottery also prescribes day-to-day policies and rules concerning the extensive number of lottery games outside of the MAPA process. For instance, the lottery has over 50 scratch games a year. From a purely legal standpoint, MAPA's definition of a "rule" may broadly require the MAPA process even for the day-to-day policy decisions relating to individualized lottery games, but it is not clear that the Legislature intended the impracticality that would result from this application of MAPA. The Legislature specifies that the lottery must adopt (MAPA-compliant) rules "relating to lottery staff sales incentives or bonuses and sales agents' commissions and any other rules necessary to carry out [the Lottery Act of 1985]." But, as stated above, the Legislature also authorized the Commission to "set policies [and] determine types and forms of lottery games." The Department of Administration has stated that applying MAPA to the day-to-day game instructions would prevent "getting games to market and operating efficiently, which would conflict with the Legislature's direction to operate the Lottery in an efficient and profitable manner." Therefore, to clear up any statutory ambiguity between the Lottery Act of 1985 and MAPA requirements, the Legislature may wish to clarify that the referenced policies and determinations including game instructions, etc. are exempted from the

MAPA process.

NOTES: The public comment period ends on June 8, 2018, and the rules are proposed to be adopted on June 12, 2018.

FULL TEXT OF NOTICE: The full text of the notice proposal may be found at http://www.mtrules.org/gateway/Cycle_Home.asp?CID=2721.

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