



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: November 17, 2021

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: 2-63-621

AGENCY/BOARD: State Lottery and Sports Wagering Commission

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

SUBJECT: Lottery Definitions, Places of Sale, Applications and Fees, Commission, Revocation or Suspension of License, and Prizes

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

SUMMARY OF RULE(S):

The State Lottery and Sports Wagering Commission (Commission) proposes to amend six rules relating to lottery and sports wagering definitions, places of sale, applications and fees, commissions, revocations and suspensions of licenses, and prizes.

The Commission proposes to amend one rule concerning sales agent commissions by striking the 6% base commission for sports wagers provided in rule and replacing it with a provision stating that the "sales agent commission for sports wagers will be set by the State Lottery and Sports Wagering Commission." The Commission states that it is doing this in "response to requests from sports wagering sales agents" to set commissions "in response to quickly changing business needs." The Commission's goal is clearly to set sales agent commissions outside of the Montana Administrative Procedure Act (MAPA) process. However, the statutes authorizing the Commission to make rules clearly state that the Commission must set sales agents' commissions in rule: "The commission shall . . . adopt rules relating to lottery and sports wagering and sales agents' commissions . . ." Section 23-7-202, MCA. If the Lottery chooses to implement additional incremental sales commissions, these must also be set by rule: "[T]o further the sale of

lottery products and sports wagering, the state lottery and sports wagering commission may adopt rules providing additional commissions to sales agents based on incremental sales." Section 23-7-301, MCA.

Even if the Montana State Lottery Act of 1985 and Sports Wagering Lottery Amendment of 2019 did not expressly require sales agent commissions to be provided by rule, there is no provision in MAPA excluding the Commission from following its provisions with respect to sales agents' commissions. MAPA requires each policy that qualifies as a "rule" to go through MAPA's rule-making 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." Section 2-4-102, MCA. Express exceptions to MAPA's requirements are provided in 2-4-102(11)(b). For instance, 2-4-102(11)(b)(vi) provides "game parameters approved by the state lottery commission relating to a specific lottery game." This subsection goes on to specify that it "does not exempt generally applicable policies governing the state lottery that are otherwise subject to the Montana Administrative Procedure Act." Likewise, MAPA also specifically states that "[n]o subsequent legislation shall be considered to supersede or modify any provision of [MAPA], whether by implication or otherwise, except to the extent that such legislation shall do so expressly." Section 2-4-107, MCA. Because there is no exception for the Lottery to bypass the MAPA process simply by providing, in rule, that it will bypass the rule process, the proposed amendment presents a potential legal issue.

The Commission proposes to amend one rule by removing the requirement that a place of business offering sports wagering must have an alcoholic beverage license in accordance with *Arete Group v. Montana Lottery*. In that case, Judge Seeley granted declaratory relief, prohibiting the Montana Lottery from enforcing the rule requirement that an applicant must have an alcoholic beverage license because, by adding the requirement, the Lottery restricted sports wagering licenses to exclude a class of gambling operators, "contraven[ing] the Legislature's intent and fail[ing] to give effect to all provisions of the Sport Wagering Act."

The Commission proposes an amendment to a definition rule to change a reference from a "retailer" to a "sales agent" for consistency with related statutes and rules.

The Commission proposes to amend a rule concerning sales agent applications by removing a reference to a specific IT system (eStop) used for applications and fees because the specific IT system may be changed or rebranded.

The Commission proposes to amend a rule concerning the revocation or suspension of licenses by repealing a provision allowing the director of the Lottery to decline to renew a license that could be revoked or suspended under rule because, as explained by the Commission, "lottery licenses do not need to be renewed periodically."

The Commission proposes to amend a rule concerning prizes to remove a provision providing that a claimant's name is public information in accordance with the privacy protections for

lottery players provided in Chapter 116, L. 2021. That chapter provides that the "personal information about a player who participates in lottery games and sports gambling . . . is confidential"

Additional proposed changes throughout the proposed amendments include minor changes for readability and grammar.

Please note, this proposal notice was initially published in the Montana Administrative Register on November 5, 2021, but it was republished on November 19, 2021, by the Department of Administration to comply with the committee notification provisions provided in Chapter 519, L. 2021, that took effect on October 1, 2021.

NOTES: A public hearing will not be held. The public comment period ends on December 17, 2021.

FULL TEXT OF NOTICE: The full text of the proposal notice and the amended proposal may be found at <https://rules.mt.gov/gateway/ShowNoticeFile.asp?TID=10625>.