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TEXAS LOTTERY COMMISSION

Gary Grief, Acting Executive Director

William L. Atkins, Director Charitable Bingo Operations

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OPINION COMMITTEE

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November 8, 2005

The Honorable Greg Abbott
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0413-GA

Dear General Abbott:

As chairman of the Texas Lottery Commission (the commission), I am seeking your opinion about the authority of the commission to adopt a recently proposed rule governing on-line lottery games, under which the commission would develop on-line games in much the same way the commission has historically developed instant games.

In considering this issue, you may find it helpful to have general background information about on-line games and instant games.¹ Instant games, often referred to as "scratch-off games," are games in which a player removes a covering on a ticket to reveal symbols that indicate whether the ticket is a winning ticket.² Sales of instant tickets account for the majority of the

¹ The distinction between instant games and on-line games was not recognized in any way in the Texas Lottery Act before 2003. During the 2003 legislative session the Legislature adopted a bill amending the provision in the State Lottery Act that governs unclaimed prizes. Acts 2003, 78th Leg., ch. 781, § 1. Previously, the law provided that a person could not claim a prize more than 180 days "after the date on which the prize winner was selected." Now the law provides that a person may not claim a prize in an *instant* game more than 180 days after the game ends and that a person may not claim a prize in an *on-line* game more than 180 days after the applicable drawing. Gov't Code § 466.408

² Although all current instant games are scratch-off games, future instant games could possibly have a different format.

commission's ticket sales. In the past fiscal year, more than 73 percent of ticket sales were attributable to instant games, generating more than \$2.5 billion in sales.

The commission rule governing instant games sets out a procedural framework under which agency staff determines the specific features of each instant game and publishes game procedures in the *Texas Register* before tickets in the game are sold. 16 T.A.C § 401.302(b)(1). This has been the commission's long-standing practice, and it allows for the efficient and frequent introduction of new instant games and changes to existing instant games.

Currently, all on-line games rely on a computer system to administer players' selection of numbers in connection with a subsequent drawing.³ The commission's traditional approach to on-line games has been less dynamic than its approach to instant games, and the commission has only infrequently added a new on-line game or made changes in the features of existing on-line games. In an effort to increase interest in on-line games, however, the commission plans to change its traditional approach by introducing more frequent, and sometimes temporary, changes to on-line games.

Because on-line games have historically been relatively static, the commission's practice has been to establish the specific details of on-line games by adopting rules under the Administrative Procedure Act. See 16 T.A.C. §§ 401.305 (Lotto Texas); 401.307 (Pick 3); 401.308 (Cash Five); 401.312 (Texas Two Step); and 401.315 (Mega Millions). Because the commission plans to change its approach to on-line games, however, the commission has voted to propose⁴ a new on-line game rule that is similar to the current instant game rule. A copy of the proposed rule is enclosed. The proposed rule sets out a procedural framework under which agency staff would develop game procedures for each on-line game, and it specifies the types of details that would be required to be included in game procedures. Under the proposed rule, game procedures would be published in the *Texas Register* before tickets for the game could be sold. *Id.* The proposed on-line game rule differs from the current instant game rule in that some aspects of the game procedures would require commission approval. Before we consider final adoption of the proposed rule, I would like your opinion as to whether the commission has correctly interpreted the State Lottery Act to allow the commission to adopt a rule that authorizes the executive director to exercise discretion about specific game features.

The State Lottery Act provides that the commission and the executive director have "broad authority" over lottery games.⁵ Gov't Code § 466.014. Several provisions of the act

³ Currently, the commission operates five on-line games: Lotto Texas, Pick 3, Cash Five, Texas Two Step, and Mega Millions.

⁴ At a public meeting on October 31, 2005, the commission voted to propose the rule. As of this writing, the commission has not filed notice of the proposed rule with the Secretary of State. See generally Gov't Code § 2001.023.

⁵ The Legislature does not commonly use the term "broad authority" to describe the powers and duties of a state board or of an executive director. See, e.g., Alcoholic Beverage Code §§ 5.11, 5.31 (Alcoholic Beverage Commission); Gov't Code §§ 411.004, 411.006 (Department of Public Safety); §§ 492.013, 493.006 (Criminal Justice Department); §§ 801.111, 801.202 (State Pension Review Board); §§ 815.101, 815.202 (Employees Retirement System); § 2152.103 (executive director of Building and Procurement Commission); Labor Code §§ 301.0015, 301.041 (Texas Workforce Commission); Parks & Wildlife Code §§ 11.011, 11.17 (Parks and Wildlife

indicate that the Legislature specifically anticipated that the executive director of the commission would be responsible for making decisions about the details of lottery games. For example, the provision governing installment payments provides, “*If the director determines that prize money is to be paid in installments*, the comptroller shall invest funds from the state lottery account as necessary to ensure the payment of the installments.” (Emphasis added.) Gov’t Code § 466.403. Another provision states, “The executive director or a lottery operator may not establish or operate a lottery game in which the winner is chosen on the basis of the outcome of a sports event.” *Id.* § 466.024. By prohibiting the executive director from establishing certain types of games, this provision makes clear that the Legislature assumed that the executive director would otherwise have the authority to “establish” games. *See also id.* § 466.251 (executive director shall prescribe the form of tickets.)

The State Lottery Act does anticipate that the commission will adopt rules governing games. *See* Gov’t Code § 466.252. *See also id.* § 466.015 (providing that the commission “must” adopt certain types of rules and that the commission “may” adopt rules regarding certain game features). The proposed on-line rule, like past on-line game rules, would detail the rights and responsibilities of a person who purchases an on-line ticket.⁶ In our opinion, however, the State Lottery Act does not require that every feature of a lottery game be specified in a rule adopted under the Administrative Procedure Act. Such a requirement would significantly disrupt the commission’s current business practices in regard to instant games, practices that the commission has followed since its inception.

Although we believe that the State Lottery Act governs the commission’s authority in connection with game rules, we also note that, in regard to rulemaking generally, the courts have recognized that agency rules may leave room for policy determinations. *Lambright v. Texas Parks and Wildlife Department*, 157 S.W.3d 499 (Tex. App.—Austin, 2005); *City of Alvin v. Public Utility Com’n of Texas*, 143 S.W.3d 872 (Tex. App.—Austin, 2004); *BFI Waste Systems of North American, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570 (Tex. App.—Austin, 2002). In a 2003 decision, the Third Court of Appeals commented approvingly on the Racing Commission’s practice of specifically identifying prohibited drugs in agency guidelines rather than in agency rules by saying, “It makes sense that the Commission listed specific drugs in guidelines instead of rules because agencies have greater flexibility in revising guidelines than rules.” *Keeton v. Texas Racing Com’n*, not reported in S.W.3d, 2003 WL 21939996 (Tex. App. — Austin, 2003). The court also stated, “If every agency policy or procedure had to be promulgated through notice and comment rulemaking agencies would be deprived the powers delegated to them.” *See generally* Attorney General Opinion No. GA-0240 (implicitly acknowledging the validity of a rule of the Board of Pardons and Paroles that allowed the executive director to make reasonable exceptions to other board rules); *See also* 31 T.A.C. §§ 59.2, 59.3 (setting range of park entrance fees and delegating authority to set specific fees or waive fees to executive director), § 59.4 (delegating establishment of reservation system to

Department); Utilities Code §§ 12.103, 14.001 (Public Utility Commission); Vernon’s Texas Civil Statutes, art. 179e, §§ 2.13, 3.02 (Racing Commission).

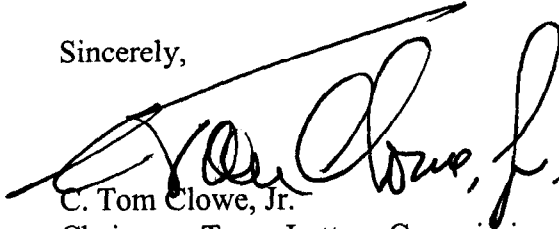
⁶ This type of rule has been important in resolving issues about private rights that arise in connection with a ticket purchase.

executive director), § 59.62 (executive director may implement classifications and guidelines for park lands), 59.132 (executive director may establish operational rules for parks); § 59.133 (executive director may establish opening and closing times for state parks).⁷ See generally *Brazoria County v. Texas Comm'n on Environmental Quality*, 128 S.W.3d 728 (Tex. App.—Austin, 2004) (agency statute can authorize agency to apply different procedural rules to different agency actions).

In light of the foregoing authorities, in particular the statutes that specifically govern the operation of the lottery, we are of the opinion that the commission has authority to adopt rules that authorize the executive director to exercise discretion about specific game features. Because we propose to change our current practice in regard to on-line games, however, we are seeking your opinion about the commission's authority to adopt such a rule.

Thank you for your attention to this matter. If you need additional information, please contact Sarah Woelk at 344-5358.

Sincerely,



C. Tom Clowe, Jr.
Chairman, Texas Lottery Commission

Enc: proposed on-line game rule

⁷ The State Preservation Board has not adopted rules governing the operations of the Texas State History Museum. See Gov't Code §§ 443.0041 (State Preservation Board subject to APA) and 445.002 (State Preservation Board shall govern museum under chapter 443); 13 T.A.C. ch. 111 (rules of State Preservation Board). The operation of the museum is similar to the development of lottery games inasmuch as it is an activity that develops products for customers as opposed to regulating activities or distributing public benefits.

DRAFT

The Texas Lottery Commission (Commission) proposes a new rule at Title 16, Part 9, Chapter 401, <*>401.304 relating to On-Line Game Rule. The purpose of the proposed new section is to set forth a new single rule that applies to all on-line games.

Kathy Pyka, Controller, has determined there will be no significant fiscal impact for state or local government as a result of the new rule <*>401.304. Any costs to the State could be absorbed by current resources. For each year of the first five years the new rule is in effect, the fiscal impact is the following: FY 05, \$0, FY 06, \$0; FY 07, \$0; FY 08, \$0, FY 09, \$0. Additionally, there will be no effect on individuals, small businesses, micro businesses or local or state employment.

Michael Anger, Director of the Lottery Operations Division, has determined that for each of the first five years the new rule as proposed is in effect, the public will benefit because the proposed rules will allow for more expeditious introduction to the public of new on-line games or on-line games that offer new playstyles or play options.

Comments on the proposed new rule may be submitted to Sarah Woelk, Assistant General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630. Comments must be received within 30 days after publication of this proposed new rule in order to be considered.

The new rule is proposed pursuant to Government Code, Section 466.015 which authorizes the Commission to adopt all rules necessary to administer the State Lottery Act and to adopt rules governing the establishment and operation of the lottery.

<p>Government Code, Chapter 466 is affected by the proposed new rule.

<p>This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

*n

<*>401.304 On-Line Game Rule

(a) On-Line Games. On-line games shall be conducted under applicable statutes, rules, and game procedures and under any further instructions issued by the executive director or his or her designee.

(b) Game Procedures.

(1) Subject to paragraph (b)(6), the executive director or his or her designee shall approve game procedures for each on-line game.

(2) Game procedures for an on-line game must be published in the Texas Register before tickets for the game are sold to the public.

(3) Changes to game procedures for an on-line game must be published in the Texas Register before tickets subject to the changed rules are sold to the public.

(4) Game procedures must contain, at a minimum, the following information:

(A) The name of the game;

(B) A description of the game matrix and the playstyle;

(C) The price of a play;

(D) The means of selecting the winning combination of symbols or numbers;

(E) The frequency of drawings;

(F) A description of the playslips, if any, used for the game;

(G) The prize structure;

(H) A description of the circumstances, if any, in which proceeds from sales for a particular drawing are carried forward to a subsequent drawing.

- (I) The percentage, if any, of ticket sales allocated to a prize reserve fund;
 - (J) The information that must be shown on a ticket;
 - (K) Whether and under what circumstances a ticket sale may be cancelled;
 - (L) Whether and under what circumstances a multidraw ticket may be sold;
 - (M) Whether and under what circumstances a ticket for advance play may be sold;
 - (N) Requirements for draw breaks, if any;
 - (O) Which claims, if any, must be presented at commission headquarters;
 - (P) Any payment options available; and
 - (Q) Any temporary promotional, bonus or add-on feature associated with the game.
- (5) The executive director or his or her designee shall make games procedures available to the public upon request.
- (6) The executive director must obtain approval from the commission before approving game procedures or changes to game procedures that involve any of the following:
- (A) The introduction of a new on-line game;
 - (B) A change in a game matrix or the playstyle;
 - (C) A change in the means of selecting the winning combination of symbols or numbers;
 - (D) A change in the price of a play, other than a change made in connection with a temporary promotional, bonus or add-on feature.;
 - (E) A change in the frequency of drawings;
 - (F) A change in the prize structure, other than a change made in connection with a temporary promotional, bonus or add-on feature;
 - (G) A change in the percentage, if any, of ticket sales allocated to a prize reserve fund; and

(H) A change in payment options available.

(7) The executive director, or his or her designee, must post on the commission website, notice of any change for which the executive director will seek commission approval, at least 15 calendar days before the commission considers the matter.

(c) Plays and Tickets.

(1) A ticket may be sold only by a retailer and only at the location listed on the retailer's license. A ticket sold by a person other than a retailer is not valid.

(2) An unsigned ticket is payable to the holder or bearer of the ticket if the ticket meets all of the conditions set out in paragraph (f)(1).

(3) It is the exclusive responsibility of the player to verify the accuracy of the player's selections and other data printed on a ticket.

(4) Playslips must be completed manually. A ticket generated from a playslip that was not completed manually is not valid.

(5) A retailer may enter a player's selections if the player is present in the licensed retail location.

(6) No part of a sale in an on-line game may take place away from the terminal. For purposes of this section, a sale in an on-line game includes the exchange of consideration, the exchange of the playslip if one is used, and the generation of a ticket.

(d) Drawings.

(1) The executive director or his or her designee shall approve drawing procedures to randomly select the winning symbols or numbers for each on-line game.

(2) The drawing procedures for an on-line game must ensure the random selection of winning symbols or numbers.

(3) The drawing procedures for an on-line game must set forth the type of drawing equipment to be used.

(4) Drawing procedures must include provisions for the use of backup drawing equipment in the event the primary drawing equipment malfunctions or fails or is unavailable for any reason.

(e) Claims.

(1) Unless the game procedures for a specific game require otherwise, to claim an on-line game prize of less than \$600 a claimant may present the apparent winning ticket either in person to a retailer or to the commission in person or by mail.

(2) To claim an on-line game prize of \$600 or more a claimant must present the apparent winning on-line ticket to the commission either in person or by mail. High-level prizes in certain on-line games may be required to be claimed in person at commission headquarters.

(3) Claimants must follow all commission procedures for claiming a prize.

(4) A ticket that does not meet all of the validation requirements is ineligible for any prize.

(5) The commission or a retailer will pay a prize only if the apparent winning ticket meets all applicable validation requirements and only if the claimant complies with all applicable claims procedures.

(6) The commission shall promptly notify the claimant if the commission determines that a ticket submitted with a claim is not a winning ticket.

(7) The commission shall not return a ticket to a claimant, regardless of whether the commission pays a prize or denies the claim.

(f) Validation.

(1) A ticket presented for validation is subject to the following validation requirements.

(A) The ticket must have been issued before the applicable drawing and in accordance with applicable game procedures.

(B) All printing on the ticket must be legible.

(C) Except as provided by paragraph (f)(2), the ticket must not be mutilated, altered, unreadable, reconstituted, misregistered, defective, incomplete, or tampered with in any manner.

(D) The ticket must not be counterfeit or forged, in whole or in part. A ticket must not be a duplicate ticket.

(E) The ticket must have been purchased from an authorized retailer and must have been issued on official Texas Lottery paper stock.

(F) The commission must determine that the ticket was not stolen.

(G) The commission must determine that the ticket was not previously paid.

(H) The ticket data must have been recorded on the on-line system before the drawing, and the ticket data must match the computer record data in every respect.

(I) The ticket must pass all commission security checks.

(2) The commission may pay a prize for an on-line ticket that is partially mutilated or not intact if the ticket meets all other validation requirements.

(g) Prizes.

(1) A ticket is the only valid receipt for claiming a prize. A copy of a ticket or a playslip has no pecuniary or prize value and does not constitute evidence of a ticket purchase or of symbols or numbers selected.

(2) A person may win only one prize in connection with a single play and is entitled to the highest prize won by a play.

(3) The commission shall recognize only one person, either an individual or an entity, as the claimant of a particular prize.

(4) A retailer may pay to the bearer of a valid winning on-line ticket a prize of \$599 or less.

(5) All tickets validated by a retailer must be paid by that retailer.

(6) The commission shall pay a prize only upon presentation of proper identification. A claimant must provide either a social security number, an employer identification number issued by the Internal Revenue Service, or other documentation as approved by the executive director or by his or her designee.

(7) A retailer may pay prizes in cash or by certified check, money order, or by business check if a business check is acceptable to the claimant. A retailer that pays a prize with a check which is dishonored may be subject to license suspension or revocation.

(8) A retailer shall not charge a claimant any fee for payment of the prize or for cashing a business check drawn on the licensed retailer's account.

(9) A retailer shall not require a claimant to purchase a product in connection with a claim for a prize.

(10) All prizes are subject to tax withholding, offsets, and other withholdings as provided by law as well as withholdings for any delinquent taxes or other amounts owed to the state of Texas.

(11) A retailer may not pay a prize claimed by a minor. A minor must submit a claim for a prize to the commission.

(h) Agreement to Abide by Rules. In playing an on-line game and submitting an on-line ticket for validation, a person agrees to abide by applicable laws, rules, regulations, policies, and decisions of the executive director.

(i) End of Game. The executive director or his or her designee, at any time, may announce the termination date for an on-line game. No tickets for the game may be sold after the termination date.

(j) Liability for defective tickets. Liability for a defective ticket, if any, is limited to replacement of the ticket with another unplayed ticket in the same game (or a ticket of equivalent sales price from any other current lottery game) or refund of the sales price, at the discretion of the executive director.