



To: Robert K. Schmitz, Chairman Ohio State Racing Commission
Todd Book, Commissioner Ohio State Racing Commission
Gary G. Koch, Commissioner Ohio State Racing Commission
Mark Munroe, Commissioner Ohio State Racing Commission
Thomas R. Winters, Commissioner Ohio State Racing Commission

Through: William Crawford, Executive Director Ohio State Racing Commission

From: Michael Rzymek, Principal Assistant Attorney General,
Charitable Law Section
Charles Febus, Principal Assistant Attorney General,
Charitable Law Section

Re: Advance Deposit Wagering (ADW)

Date: February 13, 2017

I. Introduction

The purpose of this memo is to discuss Advance Deposit Wagering (ADW). ADW is a form of wagering in which the bettor must fund an account before being allowed to place bets on the outcome of horse races via online systems from any location. In Ohio, there are no statutory provisions which specifically allow or reject the use of ADW and it is generally unregulated. ADW is currently being used by tracks in Ohio as each commercial track has contracts with ADW companies. Other states have made statutory and rule changes to regulate ADW companies. This memo will discuss past instances where the Ohio State Racing Commission (Commission) has been involved in regulating ADW activities and issues the Commission should consider in regulating ADW activities.

II. The past cases involving the legality of ADW

R.C. 3769.03 gives the Commission authority to prescribe the forms of permissible wagering and the procedures to wager on horse racing. The Commission currently authorizes telephone wagering which is a form of ADW. In 1995, the Commission requested an opinion from the Attorney General regarding the legality of the telephone wagering rules. The Attorney General issued an opinion which held the adoption of the telephone wager rules was not within the Commission's authority and the Commission should rescind the rules. The Attorney General concluded that Ohio law only authorizes wagering in person at the permit holder location except for a few narrow exceptions. The Attorney General further stated that simulcast wagering and wagering at satellite facilities are the only narrow exceptions and that all wagering must occur in person at the race track. The telephone wagering rules, OAC 3769-3-32 thoroughbred and quarter horse racing and OAC 3769-13-32 harness racing, have not been rescinded by the Commission.

The Attorney General's office changed its position in 2000. The Attorney General's office acknowledged that the use of an online ADW system at Beulah Park fell within the Commission's authority. Based on this acknowledgement, the Commission authorized Beulah Park to develop and operate an online ADW system. The Attorney General later requested that the Commission immediately terminate this authorization until the Attorney General could issue a formal opinion. Before a formal opinion was issued, Beulah Park went to Court to allow the ADW online system to continue. The Court held Beulah Park was entitled to notice and a hearing before the online ADW system could be terminated. The case was not appealed. The Commission did not take any further action.

III. Current use of ADW wagering in Ohio

In an environment where there are no specific statutory restrictions on ADW wagering and the betting public wanting to use these companies, all of the Ohio commercial tracks currently accept wagers through ADW companies. Most if not all the commercial tracks have accepted wagers through ADW companies for more than five years. Some tracks have their own online wagering platforms which is usually part of a joint venture with a larger ADW company.

Some tracks have individual contracts with multiple out of state ADW companies. These ADW companies negotiate the rights to take wagers and provide live video of Ohio races. The wagers through ADW companies are accounted for in the pari-mutuel pool managed by the tracks.

The use of an ADW company to accept wagers on horse races has grown rapidly. Some of the growth is attributed to new and better technology which has enhanced the customer experience of betting and watching races from their computer or smart phone. Rebates offered to bettors by ADW companies is seen by many industry officials as a strong incentive for bettors to use the ADW platform to place wagers instead of the traditional in state betting options. Ohio does not collect a tax on wagers placed with ADW companies. Without the tax, there are more funds available for tracks, bettors and horsemen groups.

According to a Legislative Services Commission report (report), Ohio residents currently wager approximately one hundred million dollars a year through ADW companies on Ohio races. The amount wagered through ADW platforms is growing every year. The report further states that ADW wagers attributable to Ohio residents would have surpassed their wagers at in-state track or satellite facility in 2014. The report states, according to industry estimates, Ohio residents wagered about six dollars with ADW companies for every five dollars they wagered at an in-state track or satellite facility in 2015.

Under current law, taxes are paid on wagers at all tracks or satellite facilities. The taxes are usually around 3% to 4% depending on the total amount and type of wagers. Portions of the taxes go to the following state funds: Medicaid Services Long Term Care Fund, Thoroughbred Development Fund, Standardbred Development Fund, Racing Commission Operating Fund, Ohio Fairs Fund and Horse Racing Tax Fund which is used to fund agricultural societies in counties that have wagering facilities. These funds lose revenue when wagers are placed with ADW companies which do not pay state tax while wagers at in state facilities pay the 3% to 4% tax.

IV. Other states regulation of ADW companies

As wagers through ADW companies have increased, a number of states have begun to regulate ADW companies. In 2016, Pennsylvania, Minnesota and Kentucky have passed laws which regulate ADW companies. A review of these state laws shows some common provisions. These states have authorized the collection of a tax on the wagers at the same level as the tax is

being collected at the state's race tracks or other instate facilities authorized to accept wagers. These states have required ADW companies to obtain a license through the state agency that regulates horse racing to ensure the ADW companies are reputable because the technology necessary to set up an ADW company is readily available. The states have required each licensed ADW company to acquire a bond to provide added protection to ADW customers and the state should the ADW company go bankrupt.

Most of the ADW companies operating in Ohio are licensed in other states. Penn Gaming's ADW affiliate is licensed in Massachusetts, Pennsylvania and Oregon. So the companies have been through the licensing process.

V. Ohio law change required to expressly permit wagering through ADW companies

If the Commission wishes to move forward with regulation of ADW companies, a statutory change to R. C. 3769.08 would be recommended. In the pertinent part it states:

The pari-mutuel method of wagering upon the live racing programs and simulcast racing programs held at or conducted within such race track, and at the time of such horse-racing meeting, or at other times authorized by the state racing commission, shall not be unlawful. **No other place, except that provided and designated by the permit holder and except as provided in section 3769.26 of the Revised Code, nor any other method or system of betting or wagering on live racing programs and simulcast racing programs, except the pari-mutuel system, shall be used or permitted by the permit holder; nor, except as provided in section 3769.089 or 3769.26 of the Revised Code, shall the pari-mutuel system of wagering be conducted by the permit holder on any races except the races at the race track, grounds, or enclosure for which the person holds a permit.**

(emphasis added)

The statute is not well written and is confusing to read. It does not specifically allow or prohibit the wager on horse races through ADW companies. The statute, as currently written, seems to restrict or prohibit the use of ADW's as was stated in the 1995 Attorney General opinion regarding the telephone wager rules. Due to the increasing amount wagered through ADW companies, the statute should be changed to be clear on the legality of ADW companies to accept wagers on horse racing in Ohio.

If the Commission wishes to move forward with regulating ADW companies and wishes to include a tax on ADW wagers, it should have specific statutory authority. The specific authority to tax wagers through ADW companies would avoid a situation that has occurred in North Dakota. In a federal bankruptcy case, the eighth district court of appeals has ruled that North Dakota had no authority to collect millions of dollars in taxes from a now defunct advanced deposit wager company Racing Services Inc. (RSI). The Court ruled that approximately eleven million dollars must be return by state of North Dakota to RSI's bankruptcy estate because North Dakota law did not authorize the state to collect taxes on account wagering during the time period in question.

If the Commission wishes to move forward with the regulation of ADW companies, commission staff could meet with stakeholders to discuss statutory changes.