

February 2, 2016

Robert Schmitz, Chairman
State Racing Commission
77 South High Street, 18th Floor
Columbus, Ohio 43215-6108

SYLLABUS:

2016-003

1. A video lottery sales agent may enter into an agreement authorized by R.C. 3769.087(C) that provides for payment of a percentage of the video lottery sales agent's commission to a horsemen's association for the benefit of breeding and racing in Ohio. The percentage of the video lottery sales agent's commission paid under the agreement shall be as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state and within the range specified in R.C. 3769.087(C).
2. Absent an agreement between a video lottery sales agent and a horsemen's association authorized by R.C. 3769.087(C), the State Racing Commission shall direct by rule that a percentage of the video lottery sales agent's commission, as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state and within the range specified in R.C. 3769.087(C), be paid to the State Racing Commission for the benefit of breeding and racing in Ohio.



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OPINION NO. 2016-003

Robert Schmitz, Chairman
State Racing Commission
77 South High Street, 18th Floor
Columbus, Ohio 43215-6108

Dear Chairman Schmitz:

On behalf of the State Racing Commission you have requested advice about the meaning and application of language in R.C. 3769.087(C) that addresses the disposition of commissions paid to horse racing permit holders in their capacity as video lottery sales agents. The statute requires that certain percentages of those commissions be reserved by the video lottery sales agents “for the benefit of breeding and racing in this state.”

The statute contemplates that these reserved commission percentages will be paid to the State Racing Commission in accordance with rules it adopts and promulgates, unless the video lottery sales agents, and the applicable horsemen’s associations recognized by the State Racing Commission to represent the video lottery sales agents, otherwise reach an agreement.¹ You state that questions have been raised about the nature and scope of authority conferred by R.C. 3769.087(C) upon the State Racing Commission to control the collection and disbursal of the moneys from the video lottery sales agents’ commissions that are to be reserved for the benefit of breeding and racing in Ohio. In your letter you describe the arrangements horsemen’s associations have made with the horse racing permit holders (*i.e.*, video lottery sales agents) for the ostensible purpose of complying with the directives of R.C. 3769.087(C):

It has been brought to the attention of the [State Racing Commission] that the horsemen’s associations interpret R.C. 3769.087(C) as allowing them to create contracts with the particular race track licensee/[video lottery terminal] (VLT) sales agent that not only permits them to negotiate the VLT percentage, but also to bypass the [State Racing Commission] by having the funds paid directly from the race track licensee to the association without any regulatory oversight.

¹ In this matter the applicable horsemen’s associations are the Ohio Harness Horsemen’s Association, Inc. and the Horsemen’s Benevolent and Protective Association-Ohio Division, Inc. (horsemen’s associations).

It is my understanding that the VLT[] systems are managed and regulated by the Ohio Lottery Commission on racetracks licensed by the [State Racing Commission]. There is no language authorizing state VLT funds to pass from the permit holder directly to a particular horsemen's association. Consistent with the [State Racing Commission's] obligation to provide oversight of funding mechanisms that benefit racing, the Commission believes the VLT funds at question are state monies, and should be similarly controlled as the other racing related funds and disbursed by the [State Racing Commission] for the proper purpose.

You seek advice on whether the State Racing Commission "has the statutory authority to address how the VLT funds designated for the benefit of breeding and racing in Ohio will be managed to include control and disbursal of VLT funds." We begin our consideration of your inquiry by summarizing the provisions of the Revised Code and Ohio Administrative Code that authorize the operation of video lottery terminals at the facilities of horse racing permit holders.

Authorization for the Operation of Video Lottery Terminals

In 2009 the General Assembly recognized and confirmed the authority of the State Lottery Commission to operate video lottery terminals (VLTs) when it enacted Am. Sub. H.B. 1, 128th Gen. A. (2009) (eff., in part, July 17, 2009).² In that same legislation the General Assembly enacted R.C. 3770.21, division (A)(1) of which presently defines a "[v]ideo lottery terminal" as "any electronic device approved by the state lottery commission that provides immediate prize determinations for participants on an electronic display that is located at a facility owned by a holder of a permit as defined in rule 3769-1-05 of the Administrative Code." See Am. Sub. H.B. 386, 129th Gen. A. (eff., in part, June 11, 2012) (amending R.C. 3770.21(A) to include the qualifying language about the facility of a holder of a permit as defined in administrative rule). And 8A Ohio Admin. Code 3769-1-05 declares that a "permit" is "a permit issued by the [State Racing Commission] to conduct a horse racing meeting in Ohio." See R.C. 3769.01 (horse racing permit required). Thus, video lottery terminals are to be operated exclusively at the facilities of horse racing permit holders licensed as video lottery sales agents by the Director of the State Lottery Commission.³

² Am. Sub. H.B. 1, 128th Gen. A. (2009) (eff., in part, July 17, 2009), amended R.C. 3770.03(A) to provide, in part, that the State Lottery Commission shall promulgate rules under which a statewide lottery may be conducted, "which includes, and since the original enactment of this section has included, the authority for the commission to operate video lottery terminal games. Any reference in [R.C. Chapter 3770] to tickets shall not be construed to in any way limit the authority of the commission to operate video lottery terminal games."

³ See R.C. 3770.03(A)(1); 8C Ohio Admin. Code 3770:2-2-01(R) ("[p]ermit holder" means an entity authorized by the state racing commission to conduct one or more horse racing

Pursuant to the mandate in R.C. 3770.03(A), *see* note 2, *supra*, the Director of the State Lottery Commission has adopted and promulgated rules for the operation of video lottery games in chapters 3770:2-1 through 3770:2-12 of the Ohio Administrative Code, *see* note 3, *supra*. Regarding commissions for video lottery sales agents, rule 3770:2-3-08(A) declares, in pertinent part, that “[e]ach video lottery sales agent shall receive a commission of sixty-six and one-half per cent which shall be calculated as a percentage of video lottery terminal income” and the “director shall establish procedures for the payment of commissions due to video lottery sales agents.” Rule 3770:2-3-03(F) explicitly recognizes that the relationship between the State Lottery Commission and a video lottery sales agent “is one of trust and a video lottery sales agent collects funds as a fiduciary on behalf of and in trust for the lottery through the sale of video lottery tickets for which a video lottery sales agent receives compensation.”

Composition and Structure of R.C. 3769.087

R.C. 3769.087 is one of several statutes within R.C. Chapter 3769 (horse racing) that address, *inter alia*, the disposition of wagering receipts by horse racing permit holders. Division (A) of R.C. 3769.087 directs horse racing permit holders to retain certain percentages of moneys wagered on each racing day on all wagering pools other than win, place, and show, and pay the amount so retained to the Tax Commissioner, as a tax, for deposit into several categories of funds established in the state treasury for various purposes related to horse racing and breeding. The statute requires the Tax Commissioner to pay specified percentages of those same moneys into the nursing home franchise fee permit fund, the Ohio fairs fund, the Ohio thoroughbred race fund, the Ohio standardbred development fund, and the State Racing Commission operating fund. R.C. 3769.087(A)(1)-(5).

Division (B) of R.C. 3769.087 requires horse racing permit holders to retain a percentage of moneys wagered on each racing day on all wagering pools other than win, place, and show and pay the amount so retained to the Tax Commissioner as a tax. The Tax Commissioner is

meetings under [R.C. Chapter 3769]”); 8C Ohio Admin. Code 3770:2-2-01(BB) (“[v]ideo lottery applicant’ means a person who is a permit holder or who has applied to be a permit holder and who applies for a video lottery license in accordance with [R.C. Chapter 3770] and division 3770:2 of the Administrative Code”); 8C Ohio Admin. Code 3770:2-2-01(HH) (“[v]ideo lottery sales agent’ and/or ‘sales agent’ is a permit holder authorized to conduct live racing in accordance with [R.C. Chapter 3769], and which is licensed by the director to sell video lottery games through video lottery terminals, and who continues to be a permit holder while authorized by the director to sell video lottery games”); 8C Ohio Admin. Code 3770:2-2-01(MM) (“[v]ideo lottery terminal or VLT’ means any electronic device approved by the state lottery commission that provides immediate prize determinations for participants on an electronic display that is located at a facility owned by permit holder”); 8C Ohio Admin. Code 3770:2-3-03(C) (“[n]o video lottery license shall be issued to an entity that is not a permit holder”).

required to pay the amount of this tax to the State Racing Commission operating fund created by R.C. 3769.03 in the state treasury. R.C. 3769.087(B).⁴

The focus of your question, division (C) of R.C. 3769.087, states, in pertinent part, as follows:

Unless otherwise agreed to by the video lottery sales agent and the applicable horsemen's association recognized by the state racing commission to represent such persons, within ninety days after September 29, 2013, for video lottery sales agents operating as such on September 29, 2013, or within six months after the date a video lottery sales agent begins operating as such for video lottery sales agents not operating as such on September 29, 2013, the state racing commission shall direct through rule that a percentage of the lottery sales agent's commission as determined by the state lottery commission for conducting video lottery terminal gaming on behalf of the state be paid to the state racing commission for the benefit of breeding and racing in this state. The percentage so determined shall not be less than nine per cent or more than eleven per cent of the video lottery terminal income, and shall be a sliding scale based upon capital expenditures necessary to build the video lottery sales agent's facility. The aggregate of one hundred per cent of video lottery terminal income minus the lottery sales agent's commission percentage as determined by the state lottery commission plus the percentage of the lottery sales agent's commission, as determined by the state racing commission or otherwise agreed to by the video lottery sales agent and the applicable horsemen's association recognized by the state racing commission to represent such persons, for the benefit of breeding and racing in this state shall not exceed forty-five per cent of the video lottery terminal income.⁵ (Footnote added.)

You explain that horsemen's associations have entered into agreements with Ohio permit holders licensed as video lottery sales agents, pursuant to R.C. 3769.087(C). In these agreements the horsemen's associations and the permit holders have negotiated the percentage of the permit holders' video lottery sales agent commissions that will be reserved for the benefit of breeding

⁴ The General Assembly enacted the directives that now appear in R.C. 3769.087(A) in 1981-1982 Ohio Laws, Part II 2433, 2452 (Am. Sub. H.B. 330, eff. July 13, 1981), and the directives similar to those that now appear in R.C. 3769.087(B) in 1993-1994 Ohio Laws, Part III 5588, 5601 (Am. Sub. H.B. 361, eff. Sept. 27, 1994).

⁵ R.C. 3769.087(C) also directs the State Lottery Commission to adopt a rule requiring the reservation of a percentage of video lottery sales agents' commissions for payment to the State Lottery Commission to fund state programs that provide gambling addiction and other addiction services. Your request does not ask about this language.

and racing in Ohio. The agreements specify commission percentages that are within the nine per cent to eleven per cent range set by the General Assembly in R.C. 3769.087(C).

The agreements further provide that the reserved commission percentages are to be paid by the video lottery sales agents directly to the horsemen's associations, rather than to the State Racing Commission. The State Racing Commission believes that this feature of the agreements circumvents the Commission's authority to manage and oversee the disposition of the moneys that are meant for the benefit of breeding and racing in Ohio. You ask us to advise you whether Ohio permit holders licensed as video lottery sales agents are required to pay the commission percentages reserved for the benefit of breeding and racing in Ohio to the State Racing Commission, rather than to the horsemen's associations with which the video lottery sales agents have entered into agreements under R.C. 3769.087(C). To answer this question we shall first examine the language of R.C. 3769.087(C) set forth above to try to arrive at what reasonably may be said to be the legislative intent of that language. If we determine that the language of the statute is less than certain and definitive in that regard, we will consult the pertinent principles of interpretation to aid us in determining the wishes of the General Assembly.

Parsing the Language of R.C. 3769.087(C)

The horsemen's associations assert that video lottery sales agents' commission percentages meant to benefit breeding and racing in Ohio do not have to be paid to the State Racing Commission. The horsemen's associations believe the language of R.C. 3769.087(C) authorizes the payment of those moneys directly to them. This view is premised upon the clause that begins the first sentence of R.C. 3769.087(C), "[u]nless otherwise agreed to by the video lottery sales agent and the applicable horsemen's association," and the language immediately thereafter that instructs the State Racing Commission to direct by rule that the specified percentages of video lottery sales agents' commissions shall be paid to the Commission.

The dictionary identifies "unless" as a conjunction or preposition signifying an exception. *Merriam-Webster's Collegiate Dictionary* 1370 (11th ed. 2005) states that "unless," used as a conjunction, can mean "except on condition that: under any other circumstance than" or "without the accompanying circumstance or condition that: but that." Used as a preposition, "unless" can mean "except possibly: EXCEPT." *Merriam-Webster's Collegiate Dictionary* at 1370. An "exception," in turn, is defined as "a case to which a rule does not apply," *id.* at 435.

The exception specified here, which follows the term "unless," is an agreement between a video lottery sales agent and a horsemen's association. The General Assembly has chosen to recognize the possibility of such an agreement by means of a gerund construction, "agreed to," which is prefaced by "otherwise," an adverb defined variously as "in a different way or manner," or "paired with an adjective, adverb, noun, or verb to indicate its contrary or to suggest an indefinite alternative." *Merriam-Webster's Collegiate Dictionary* at 879.

The language following the "unless" clause in the first sentence of R.C. 3768.087(C) authorizes the State Racing Commission to direct by rule the percentages of video lottery sales agents' commissions that are to be paid to the Commission to benefit breeding and racing in

Ohio. This language also serves the purpose of describing the general nature of the agreement between a video lottery sales agent and a horsemen's association. That is, an agreement between a video lottery sales agent and a horsemen's association shall address the use of a video lottery sales agent's commission percentages to benefit breeding and racing in Ohio. It also is reasonable to infer that the agreement may direct the payment of the video lottery sales agent's commission percentages to the horsemen's association that is a party to the agreement. Even as the statute requires payment of a video lottery sales agent's commission percentages to the State Racing Commission unless an agreement has been executed between the video lottery sales agent and the horsemen's association, it follows that the statute authorizes an agreement between a video lottery sales agent and a horsemen's association that calls for payment of those commission percentages by the video sales agent directly to the horsemen's association.

Reading the "unless" clause in R.C. 3769.087(C) as an exception to the language granting authority to the State Racing Commission to direct by rule payment of video lottery sales agents' commission percentages to the Commission means that such a rule will apply in the absence of a valid agreement between a video lottery sales agent and a horsemen's association that directs the payment of those commission percentages to the horsemen's association. It is our opinion that this is the result intended by the General Assembly as conveyed by the plain language of the statute. Execution of this type of agreement between a video lottery sales agent and a horsemen's association is a case to which a rule adopted by the State Racing Commission directing payment of a video lottery sales agent's commission percentages to the Commission will not apply. This reading of the "unless" clause in R.C. 3769.087(C) finds support in the interpretive principles that every part of a statutory provision is intended to be effective, R.C. 1.47(B), the General Assembly will not be presumed to have engaged in a vain and useless exercise in enacting the language of a statute, *State ex rel. Cleveland Elec. Illum. Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960), and all parts of a statute are to be harmonized if at all possible, *State ex rel. Myers v. Indus. Comm'n*, 105 Ohio St. 103, 136 N.E. 896 (1922) (syllabus, paragraph one).

Circumventing the Authority of the State Racing Commission and Ensuring the Security of Public Moneys

You assert that an agreement between a video lottery sales agent and a horsemen's association under R.C. 3769.087(C) cannot be permitted to circumvent the authority of the State Racing Commission to require payment to it of video lottery sales agents' commission percentages that are to be used to benefit breeding and racing in Ohio. You also assert that payment of video lottery sales agents' commission percentages directly to a horsemen's association undermines public policy by enabling private sector entities to control the allocation and disposition of public moneys without adequate oversight and supervision by the State Racing Commission.

The State Racing Commission is an agency of state government created by the will of the General Assembly pursuant to Article II of the Ohio Constitution. R.C. 3769.02. The General Assembly also is the source of the Commission's licensing, regulatory, and enforcement powers.

1995 Op. Att’y Gen. No. 95-034, at 2-178 (“[a]s a creature of statute, the Commission has only those powers and duties conferred upon it by statute”); 1982 Op. Att’y Gen. No. 82-044, at 2-125 (“[a]s a creature of statute, the Ohio Racing Commission has only those powers which are expressly granted by statute and those which may be implied from the express statutory grants”). It is the prerogative of the General Assembly to confer, qualify, or rescind those powers as it finds appropriate. The General Assembly may further define the nature and scope of those powers and contract or expand their exercise.

In enacting R.C. 3769.087(C) the General Assembly has determined that video lottery sales agents and horsemen’s associations may exercise their right to contract for the purpose of agreeing among themselves that the video lottery sales agents’ commission percentages, within the range designated by the General Assembly, shall be paid to the horsemen’s associations for the benefit of breeding and racing in Ohio. In so doing the General Assembly has not authorized the State Racing Commission to be a party to these agreements, approve the allocation and disposition of the commission percentages agreed to by the video lottery sales agents and the horsemen’s associations, or require that the commission percentages be paid directly to the State Racing Commission. The General Assembly has not stated that the State Racing Commission shall serve as a conduit through which the commission percentages shall be paid to the horsemen’s associations or undertake periodic financial or performance audits of the agreements. That the General Assembly has so exercised its legislative authority is neither unreasonable nor capricious.

You are correct in noting that “the VLT[] systems are managed and regulated by the Ohio Lottery Commission on racetracks licensed by the [State Racing Commission].” The State Racing Commission, however, also “believes the VLT funds at question are state monies, and should be similarly controlled as the other racing related funds and disbursed by the [State Racing Commission] for the proper purpose.”

The language of R.C. 3769.087(C) acknowledges the authority of the State Lottery Commission to manage and regulate the operation of video lottery terminals by Ohio’s horse racing permit holders in their capacity as video lottery sales agents. In exercising this authority the Director of the State Lottery Commission has adopted and promulgated rule 3770:2-3-08(A) authorizing the payment of a commission to each video lottery sales agent in the amount of sixty-six and one-half per cent calculated as a percentage of video lottery terminal income. This rule also provides that the Director of the State Lottery Commission “shall establish procedures for the payment of commissions due to video lottery sales agents.”

The Director has established and implemented those procedures as part of the State Lottery Commission’s financial processing operating standards for video lottery sales agents,

which became effective on August 1, 2014.⁶ These standards require a video lottery sales agent to make weekly deposits of game proceeds into the agent's designated lottery account at a bank that is a designated public depository. This account is electronically debited or credited by the State Lottery Commission on a weekly basis. The standards direct that, at the end of each week, the State Lottery Commission will reconcile wagering activity for the previous week and create an invoice identifying the amount of commission due and owing to the video lottery sales agent. An invoice report is generated by the State Lottery Commission and submitted to the video lottery sales agent for processing.

A video lottery sales agent deposits into his lottery account the total amount of moneys wagered at the agent's video lottery terminals. Each week the State Lottery Commission and the video lottery sales agent reconcile these amounts for the previous week. The wagering receipts due, by law, to the State Lottery Commission are transferred electronically. The video lottery sales agent retains in his account a commission in the amount of sixty-six and one-half per cent calculated as a percentage of video lottery terminal income. The mechanism established by the State Lottery Commission for paying a video lottery sales agent a percentage of video lottery terminal income as a commission does not require that the amount of the commission, in whole or in part, pass through an account of the State Lottery Commission before it is paid to the video lottery sales agent.

The same is true of the mechanism established by the State Lottery Commission for paying a licensed lottery sales agent a percentage of lottery ticket sales income as a commission. R.C. 3770.03(B)(3) provides that the rules of the State Lottery Commission shall address the "amount of compensation to be paid licensed lottery sales agents." 8A Ohio Admin. Code 3770-4-09(A) addresses payment of compensation to and reimbursement of expenses of licensed lottery sales agents: "[E]ach sales agent shall receive a commission based upon the sales agent's gross game sales at the rate specified by the director for each license. The director shall establish procedures for the prompt payment to each sales agent of their sales commission and cashing bonus."

In rule 3770-4-06 the Director of the State Lottery Commission has set forth instructions regarding the return and settlement of tickets by lottery sales agents and the collection of lottery sales revenue. Division (D)(1) of this rule requires that lottery sales agents "deposit to the credit of the lottery fund, in accounts which shall be used exclusively for lottery-related transactions at lawfully designated banking institutions, all moneys due the lottery by such sales agents from the sale of such games, less an amount retained as compensation for sale of such games." Division (D)(1) further authorizes the Director to "order that sales agents deduct the amounts they pay in authorized prize payments and any commissions or bonuses to which agents are entitled from the amounts received in gross game sales prior to their deposit in accounts." As in the case of

⁶ These financial processing operating standards appear on the website of the State Lottery Commission at <https://www.ohiolottery.com/Retailers/VLT-Central/VLT-Racetracks>.

commissions paid to video lottery sales agents, there is no requirement that commissions paid to licensed lottery sales agents pass through an account of the State Lottery Commission before they are paid to the lottery sales agents.

The General Assembly has conferred authority upon the State Lottery Commission and its Director to institute these processes for the payment of commissions to licensed lottery sales agents and video lottery sales agents. To our knowledge the General Assembly has not expressed its disapproval of these processes or enacted legislation to have them modified. That the General Assembly has not intervened throughout the many years that the State Lottery Commission has approved lottery sales agents retaining lottery sales commissions out of their gross sales revenues, and without the State Lottery Commission acting as a clearinghouse that transmits the commissions to the thousands of lottery sales agents operating in Ohio on behalf of the State Lottery Commission, suggests that those processes are efficient and effective, and have worked well in preventing the defalcation of public moneys.

Informed by the experience of the State Lottery Commission, it is neither novel nor unprecedented that in R.C. 3769.087(C) the General Assembly has endorsed memorializing a similar kind of process in an agreement between a video lottery sales agent and a horsemen's association. R.C. 3769.087(C) authorizes a video lottery sales agent to enter into an agreement with a horsemen's association that provides for payment of a percentage of the video lottery sales agent's commission, as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state, and within the range specified in the statute, to the horsemen's association for the benefit of breeding and racing in Ohio. The General Assembly does not require that the agreement provide a process for paying the percentage of the video lottery sales agent's commission to the State Racing Commission before that percentage is paid to the horsemen's association that is a party to the agreement. Had the General Assembly wished that to happen, it would have included a directive to that effect within the statute. It is reasonable for the General Assembly to presume that Ohio's video lottery sales agents and Ohio's horsemen's associations are aware of their obligations under the law and will work within the law to fulfill those obligations.

In the absence of an agreement authorized by R.C. 3769.087(C) between a video lottery sales agent and a horsemen's association, the State Racing Commission shall direct by rule that a percentage of the video lottery sales agent's commission, as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state and within the range specified in R.C. 3769.087(C), be paid to the State Racing Commission for the benefit of breeding and racing in Ohio.

Conclusions

Based upon the foregoing, it is my opinion and you are advised that:

1. A video lottery sales agent may enter into an agreement authorized by R.C. 3769.087(C) that provides for payment of a percentage of the video lottery sales agent's commission to a horsemen's association for the benefit of breeding and racing in Ohio. The percentage of the video lottery sales agent's commission paid under the agreement shall be as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state and within the range specified in R.C. 3769.087(C).
2. Absent an agreement between a video lottery sales agent and a horsemen's association authorized by R.C. 3769.087(C), the State Racing Commission shall direct by rule that a percentage of the video lottery sales agent's commission, as determined by the State Lottery Commission for conducting video lottery terminal gaming on behalf of the state and within the range specified in R.C. 3769.087(C), be paid to the State Racing Commission for the benefit of breeding and racing in Ohio.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General