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# PILOT PROGRAM REPORT

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## Overview of the Pilot Program Act

In P.L. 2011, c. 228 (copy attached), the Legislature enacted the Pilot Program Act, which is codified at N.J.S.A. 5:5-186, authorizing pari-mutuel wagering on horse racing at a limited number of taverns, restaurants and similar venues in certain counties of the State through the use of electronic wagering terminals. The Act allows the Commission to issue one license to an entity that has entered into an agreement for the sale or lease of a State-owned racetrack to establish “not more than 20 electronic wagering terminals” at “not more than 12 qualified taverns, restaurants, and similar venues” so that patrons can place wagers on in-state and out-of-state horse races. N.J.S.A. 5:5-186(a). The taverns, restaurants or similar venues must be located in the northern part of the State in Bergen, Hudson, Essex, Passaic, Union, Morris, Somerset, Hunterdon, Warren, Sussex, northern Middlesex or northern Ocean counties. N.J.S.A. 5:5-186(b).

The Pilot Program license must be issued to an entity that has entered into an agreement for the sale or lease of a State-owned racetrack and the license shall be “[i]n lieu of a maximum of one off-track wagering license that remains to be utilized or implemented by the New Jersey Sports and Exposition Authority or any lessee of the authority.” N.J.S.A. 5:5-186(a). Pursuant to N.J.S.A. 5:5-186(b), the Pilot Program license shall be subject to all conditions of the Master Off-Track Wagering Participation Agreement. This participation agreement, required by the Off-Track and Account Wagering Act at N.J.S.A. 5:5-130(a), must be executed by racetrack permit holders to be authorized to participate in off-track wagering.

The Pilot Program Act requires that the monies wagered through the electronic wagering terminals are distributed consistently with the statutory provisions applicable to off-track wagering set forth in N.J.S.A. 5:5-64, N.J.S.A. 5:5-147, N.J.S.A. 5:5-148 and N.J.S.A. 5:5-151. Pursuant to N.J.S.A. 5:5-186(c), 1% of the Pilot Program licensee’s share of revenues shall be paid to the host municipality as a local impact fee for general municipal purposes.

Intended as an experiment, the Pilot Program Act expires three years after the issuance of the Pilot Program license. N.J.S.A. 5:5-186(a) mandates that the Pilot Program license “shall be temporary, subject to review and renewal on an annual basis, and shall expire within three years of issuance of the initial license.” The Legislature requires that:

Within three years of the issuance of the license under the pilot program, the commission shall issue a report to the Governor, and to the Legislature . . . containing an evaluation of the pilot program. The

report shall also provide the commission's opinion as to whether the pilot program should be continued and, if so, recommendations for further improvement and implementation. The pilot program shall end upon the expiration of the license issued under the program unless the Legislature enacts a law to continue the program.

N.J.S.A. 5:5-186(e). As discussed below, the Commission issued the Pilot Program license on June 19, 2015. This report, which is being filed in compliance with the requirements of N.J.S.A. 5:5-186(e), provides the Commission's opinion as to whether the Pilot Program should be continued and its recommendation for further improvement and implementation.

### **Issuance of the Pilot Program License**

On or about July 3, 2014, the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), which has leased Monmouth Park, a State-owned racetrack, filed a Pilot Program license application with the Commission to establish one electronic wagering terminal at Jamie's Cigar Bar and Restaurant, Inc., which is located at 915 Bloomfield Avenue, Clifton, New Jersey in Passaic County. Jamie's Cigar Bar is a full-service, high-quality restaurant serving an extensive lunch and dinner menu that provides alcoholic beverage and cigar smoking services to its patrons. The NJTHA entered into a Joint Venture Agreement with SocialGaming Technologies, Inc. ("SGTI"), which developed the electronic wagering terminal intended for use.

The Commission voted to grant the license to the NJTHA at its May 13, 2015 public meeting. After approval by Acting Attorney General John J. Hoffman, the Commission issued the Pilot Program license (copy attached) to the NJTHA on June 19, 2015. Thereafter, however, the NJTHA informed the Commission that SGTI, the entity that had agreed to provide the electronic wagering terminal, was no longer in business and had withdrawn from the Pilot Program project. As a result, the Pilot Program location at Jamie's Cigar Bar never became operational and no wagering has ever taken place there.

Although the NJTHA filed an application in 2016 seeking to renew the Pilot Program license and proposing the use of an electronic wagering terminal developed by Sportech PLC, the application was deficient in numerous respects. The application was never deemed complete and staff considers it to be abandoned as neither the NJTHA nor Darby Development, LLC rectified the deficiencies identified by the Commission.

### **Legal Challenges to the Pilot Program**

There have been two unsuccessful challenges to the constitutionality of the Pilot Program Act. Both were filed by ACRA Turf Club, LLC, which holds the license for off-track wagering facilities located in Vineland (now closed) and Egg Harbor Township, and by Freehold Raceway Off-Track, LLC, which holds the licenses for off-track wagering facilities in Toms River and Gloucester Township.

First, ACRA Turf Club, LLC and Freehold Raceway Off-Track, LLC filed litigation in the United States District Court seeking to enjoin the Commission from implementing the Pilot Program Act and from enforcing certain amendments to the Off-Track and Account Wagering Act, which are not relevant to this report. In ACRA Turf Club, LLC et al. v. Zanzuccki, Civil Action No. 3:12-CV-02775-MAS-DEA, the plaintiffs asserted that the Pilot Program Act violated their constitutional rights pursuant to the Contracts, Takings, Equal Protection and Due Process Clauses. Plaintiffs challenged their exclusion from the Pilot Program by the provision which limits the availability of the Pilot Program license to an entity that has entered into an agreement for the sale or lease of a State-owned racetrack and the geographic limitation to Bergen, Hudson, Essex, Passaic, Union, Morris, Somerset, Hunterdon, Warren, Sussex, northern Middlesex and northern Ocean counties.

After the District Court denied a preliminary injunction, the parties moved for summary judgment. Ultimately, the court granted the Commission's cross-motion for summary judgment, finding that the Pilot Program did not violate the plaintiffs' constitutional rights. The plaintiffs appealed to the Third Circuit Court of Appeals, which affirmed the decision of the District Court on February 1, 2018.

Second, after the Commission issued a Final Determination and Order, dated June 5, 2015, granting the Pilot Program license to the NJTHA, ACRA Turf Club, LLC and Freehold Raceway Off-Track, LLC filed an appeal with the Appellate Division of the Superior Court of New Jersey challenging the grant of the license. However, the Appellate Division dismissed the appeal as moot because the license issued on June 19, 2015 had expired on June 18, 2016 without the Pilot Program ever becoming operational. See In the Matter of the NJRC Approving the Application of the NJTHA for a Pilot Program License, Docket No. A-5170-14T1, unpublished slip op. (App. Div. January 17, 2017).

## **Summary of Comments from the Racing Industry**

To obtain input from the racing industry for the preparation of this report, the Commission allowed permit holders and off-track wagering licensees to submit written comments setting forth their positions as to whether the Pilot Program should be continued. The Commission received written comments (copies attached) from Darby Development, LLC ("Darby"), which manages Monmouth Park on behalf of the NJTHA, and from FR Park Racing L.P., which does business as Freehold Raceway and Freehold Raceway Off-Track, LLC ("Freehold").

Darby asks the Commission to recommend that the Pilot Program be continued. Darby outlines the "unforeseeable obstacles" the NJTHA and Darby faced in attempting to implement the Pilot Program. Recounting the withdrawal of SGTI, Darby states that it had to identify a new company which could configure an electronic wagering terminal that complies with the requirements of the Act. Darby hopes that the Legislature will amend the law to allow wagers to be placed on tablets and cellular devices without counting them toward the maximum limit of "not more than 20 electronic wagering terminals." Asserting that the limited duration of the Pilot Program deterred interest, Darby asks that any new legislation not be temporary in nature.

Next, Darby cites the now-concluded litigation filed by ACRA Turf Club, LLC and Freehold Raceway Off-Track, LLC, which unsuccessfully challenged to the constitutionality of the Pilot Program Act. According to Darby, "this litigation created a 'chilling impact' concerning early tavern/restaurant interest." Darby indicates that it has agreed with Freehold Raceway to support a statewide expansion of the Pilot Program to all counties except Middlesex, Monmouth and Ocean and to make the program available to all permit holders. Darby also believes that the number of permissible taverns and the number of electronic wagering terminals should be increased. Finally, citing certain taverns' concern as to whether their respective municipalities would approve their participation in the Pilot Program, Darby recommends that a provision similar to N.J.S.A. 5:5-131(h) ("an off-track wagering facility shall be a permitted use in all commercial and industrial districts of a municipality") should be included in new legislation.

Freehold supports the expansion of the Pilot Program Act to allow the participation of all racetrack permit holders. Freehold confirms that it has been actively working with Darby over the past several months on possible legislative solutions to achieve this aim. Finally, Freehold states that a new Pilot Program Act, which corrects the prior limited nature of the Act, "should be pursued and supported by all stakeholders."

### Recommendations of the Commission

Although the Pilot Program never became operational, the Commission believes that legislation should be enacted to continue the program. Any expansion of opportunities to wager on horse racing will be of benefit to the racing industry which desperately needs new sources of revenue to supplement purses, increase live race dates and enable New Jersey to better compete with neighboring jurisdictions that have the benefit of certain forms of casino gaming at their racetracks. As set forth in the Summary of Comments from the Racing Industry, the entities which operate Monmouth Park and Freehold Raceway support the continuation of the Pilot Program.

The Commission recommends that the Pilot Program be expanded to authorize the participation of all of the permit holders and allow them to partner with taverns, restaurants and similar venues located throughout the State of New Jersey in accordance with the geographic areas allocated to each in the Master Off-Track Wagering Participation Agreement, dated September 8, 2003. The Commission also recommends that the maximum number of taverns, restaurants and similar venues and the maximum number of electronic wagering terminals be substantially increased over the current limit of 12 and 20, respectively.

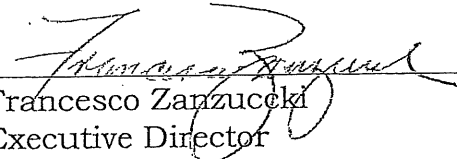
Finally, the Commission recommends long-term authorization for wagering on horse racing at taverns, restaurants and similar venues for a period of time of at least 10 years. The Commission would also support permanent authorization for such wagering if the Legislature believes it warranted.

The Commission takes no position on other improvements recommended by the industry, such as the inclusion of a provision similar to N.J.S.A. 5:5-131(h), and defers to the expertise and discretion of the Legislature.

Respectfully,

NEW JERSEY RACING COMMISSION

By: \_\_\_\_\_

  
Francesco Zanzucchi  
Executive Director

Date: June , 2018

# Appendix



**Exhibit A**

## CHAPTER 228

AN ACT concerning the placement of horse racing wagers at certain locations and supplementing the "Off-Track and Account Wagering Act," P.L.2001, c.199 (C.5:5-127 et seq.).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.5:5-186 Pilot program for placement of horse racing wagers at certain locations.

1. Notwithstanding the provisions of the "Off-Track and Account Wagering Act," P.L.2001, c.199 (C.5:5-127 et seq.), or any other law, rule, or regulation to the contrary, the New Jersey Racing Commission shall implement a pilot program to license a lessee or purchaser of a State-owned racetrack to provide patrons with the ability to place wagers on horse races through electronic wagering terminals to be located at a limited number of eligible taverns, restaurants, and similar venues where food, alcoholic beverages, or both, are served to the public for on-premises consumption, subject to regulation and control by the commission and as further provided by this act, P.L.2011, c.228 (C.5:5-186).

a. In lieu of a maximum of one off-track wagering facility license that remains to be utilized or implemented by the New Jersey Sports and Exposition Authority or any lessee of the authority under the "Off-Track and Account Wagering Act," P.L.2001, c.199 (C.5:5-127 et seq.), as amended and supplemented, the commission shall issue one license to be awarded to an entity that has entered into an agreement with the authority for the sale or lease of a State-owned racetrack for the establishment at not more than 12 qualified taverns, restaurants, and similar venues, of not more than 20 electronic wagering terminals in total in this State to enable patrons to place wagers on in-State and out-of-State horse races, which wagers shall be placed by eligible patrons who are physically present at those locations. Only one license shall be issued under this pilot program, except that the licensed entity may enter into an agreement with another licensed entity that has also entered into an agreement with the authority for the sale or lease of a State-owned racetrack, to jointly undertake and share the proceeds from the licensed activities under the pilot program, which agreement shall be subject to the approval of the authority. The license issued under this pilot program shall be temporary, subject to review and renewal on an annual basis, and shall expire within three years of issuance of the initial license. When issuing the license, the commission shall require the licensed entity to sign a waiver showing that the licensee understands the terms and conditions of the license.

b. The pilot program authorized pursuant to this act, P.L.2011, c.228 (C.5:5-186), shall be implemented only in the northern part of the State, in Bergen, Hudson, Essex, Passaic, Union, Morris, Somerset, Hunterdon, Warren, Sussex, and northern Middlesex and Ocean counties. The commission shall develop an application form and process, solicit completed applications to be submitted jointly by a lessee or purchaser of a State-owned racetrack and that entity's selected taverns, restaurants, and similar venues located within the aforementioned geographic region, and evaluate each applicant's eligibility using specified criteria which shall include, but not be limited to:

(1) proof of financial resources sufficient to enable the applicant to establish and conduct the electronic wagering terminals with appropriately staffed and managed operations;

(2) evidence of good character, honesty, competency and integrity;

(3) the absence of a conviction for a crime involving fraud, dishonesty or moral turpitude;

and

(4) any additional standards and criteria the commission may establish by rule or regulation.

In evaluating an application for a license, the commission shall ensure that each selected applicant has met all required eligibility criteria. In awarding the license, the commission shall also consider the proximity of the applicant's venue to planned or existing racetracks, off-track wagering facilities, and simulcasting facilities in this State. If, in the opinion of the commission, the issuance of a license for the establishment of electronic wagering terminals at the applicant's venue would be inimical to the interests of a planned or established racetrack, off-track wagering facility, or simulcasting facility, the commission shall deny the license even when the applicant has otherwise met all eligibility criteria.

A license issued under this section shall at all times remain the property of the permit holder and shall be subject to all conditions of a participation agreement pursuant to section 4 of P.L.2001, c.199 (C.5:5-130), as amended and supplemented. The permit holder shall be responsible for entering into agreements with qualified taverns, restaurants and similar venues. The permit holder and qualified tavern, restaurant or similar venue shall jointly submit to the commission any applications and information as required by the commission in determining eligibility for a license. The permit holder may terminate agreements for individual licenses with notice to the commission.

c. To effectuate the provisions of this act, P.L.2011, c.228 (C.5:5-186), the commission shall promulgate rules and regulations necessary to:

(1) determine the number of locations at which electronic wagering terminals shall be established under the program, provided that the license shall be limited to a maximum of 12 locations, which maximum number of locations shall be reduced by one per each off-track wagering facility in the authority's share that is newly-established during the implementation of the pilot program, and provided further that not more than 20 electronic wagering terminals shall be established in total in this State;

(2) evaluate the types of electronic wagering terminals and equipment that may be used in wagering, and the number of such machines to be established at each licensed venue, subject to approval by the commission;

(3) develop geographic proximity and impact criteria to determine whether a proposed location would be inimical to the interest of planned or existing racetracks, off-track wagering facilities, and simulcasting facilities in this State, and which criteria shall be used to deny a license as provided under subsection b. of this section;

(4) authorize the licensee to enter into contracts with vendors, operators, and other entities, as the case may be, for the establishment and operation of the approved electronic wagering terminals;

(5) ensure that amounts wagered through the electronic wagering terminals are properly distributed to winning bettors, the licensed venue, and others in a manner similar to that provided under section 44 of P.L.1940, c.17 (C.5:5-64), section 21 of P.L.2001, c.199 (C.5:5-147) for sums wagered on in-State races, and sections 22 through 25 of P.L.2001, c.199 (C.5:5-148 through C.5:5-151) for sums wagered on out-of-State races, except that a local impact fee of 1% of the licensee's share of revenues shall be paid to the host municipality for general municipal purposes;

(6) provide that an amount of the revenues from electronic wagering terminals shall be distributed for the funding of horse racing purses in accordance with the statutes cited under paragraph (5) of this subsection;

(7) ensure that persons under the age of 18 years shall not be permitted within the space in the venue where electronic wagering terminals are placed, and that necessary safeguards are in place to prevent minors from wagering; and

(8) regulate any other aspects of the electronic wagering operation the commission deems appropriate.

d. Notwithstanding any other provision of this act or the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, the commission shall, within 90 days of the effective date of this act and after notice provided in accordance with this subsection, authorize the temporary adoption of any rule concerning the conduct of wagering under this act, P.L.2011, c.228 (C.5:5-186). Any temporary rulemaking authorized by this subsection shall be subject to such terms and conditions as the commission may deem appropriate. Notice of any temporary rulemaking action taken by the commission pursuant to this subsection shall be published in the New Jersey Register, and provided to the newspapers designated by the commission pursuant to subsection d. of section 3 of P.L.1975, c.231 (C.10:4-8), at least seven days prior to the implementation of the temporary rules. Nothing herein shall be deemed to require the publication of the text of any temporary rule adopted by the commission or notice of any modification of any temporary rulemaking initiated in accordance with this subsection. The text of any temporary rule adopted by the commission shall be available in each venue participating in the temporary rulemaking and shall be available upon request from the commission. The temporary rules promulgated pursuant to this subsection shall not be effective for more than 180 days unless promulgated in accordance with normal rule-making procedures.

e. Within three years of the issuance of the license under the pilot program, the commission shall issue a report to the Governor, and to the Legislature as provided under section 2 of P.L.1991, c.164 (C.52:14-19.1), containing an evaluation of the pilot program. The report shall also provide the commission's opinion as to whether the pilot program should be continued and, if so, recommendations for further improvement and implementation. The pilot program shall end upon the expiration of the license issued under the program unless the Legislature enacts a law to continue the program.

2. This act shall take effect immediately, and shall be retroactive to December 31, 2011.

Approved January 17, 2012.

**Exhibit B**