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NEW JERSEY RACING COMMISSION
Off-Track Wagering and Account Wagering
Adopted Repeals and New Rules: N.J.A.C. 13:74-2.4,
2.5, and 2.6

Adopted Repeals: N.J.A.C. 13:74-2.7 and 2.8

Proposed: November 5, 2018, at 50 N.J.R. 2217(a).

Adopted: October 24, 2019, by New Jersey Racing Commission,
 Judith A. Nason, Acting Executive Director.

Filed: October 24, 2019, as R.2019 d.120, with **non-substantial**
changes not requiring additional public notice and comment (see
 N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 5:5-131.

Effective Date: December 2, 2019.

Expiration Date: March 18, 2022.

Summary of Public Comments and Agency Responses:

The official comment period ended on January 4, 2019. The following is a summary of the comments received and the responses of the New Jersey Racing Commission (Commission). The Commission received comments from Dennis A. Drazin, Esq., President and CEO of Darby Development, LLC and from James C. Meyer, Esq., on behalf of Freehold Raceway Off Track, LLC (FROT) and ACRA Turf Club, LLC (ACRA).

1. COMMENT: Mr. Drazin comments that the "original intention of the Legislation which led to the N.J.A.C. Regulations made it clear that in the event the NJSEA leased the racetracks to a private entity" the lease would "satisf[y] the benchmark provisions ..." Mr. Drazin informs the Commission that the New Jersey Sports and Exposition Authority (NJSEA) and the New Jersey Thoroughbred Horsemen's Association (NJTHA) have repeatedly "taken the position that ... the Legislature clearly intended ... that the benchmark for a leasee of the track was satisfied once the NJSEA leased the racetracks to the NJTHA." Mr. Drazin comments that N.J.S.A. 5:5-130.e states that a permit holder "shall be deemed to have made progress towards establishing its OTW facilities if the racetracks under the permit holder's control" were leased to a private entity.

RESPONSE: The Commission disagrees with the statutory interpretation proffered in Mr. Drazin's comment. Proposed N.J.A.C. 13:74-2.4 establishes benchmarks for the statutory requirement at N.J.S.A. 5:5-130.b(1) that a permit holder must demonstrate that it "continues to make progress on an annual basis." The State racetrack lease exemption referenced in the comment only applied to the initial statutory mandate, now moot, which required each permit holder to demonstrate to the Commission within 180 days from the effective date of P.L. 2011, c. 205 (effective January 17, 2012 but retroactive to December 31, 2011) that it has made progress since the signing of the participation agreement "toward establishing the permit holder's share of the 15 off-track wagering facilities ..." *Ibid.* Pursuant to the statute, failure to demonstrate progress toward establishing its share of OTWs since the signing of the participation agreement resulted in the permit holder having to make a cash deposit, bond, or irrevocable letter of credit in the amount of \$1 million for each unopened OTW within the permit holder's share. At its June 20, 2012 meeting, after reviewing the submissions of each permit holder, the Commission determined that none of the permit holders were subject to the deposit requirement because each had demonstrated the necessary initial progress toward establishing its share of OTWs. The Commission informed each permit holder that in order to retain its rights to the unopened OTWs within its share, each permit holder must comply

with the requirements of the statute by "continuing to make progress on an annual basis."

Previous-N.J.A.C. 13:74-2.5 (as of the publication of this notice of adoption, prior versions of N.J.A.C. 13:74-2.4, 2.5, 2.6, 2.7, and 2.8 have been repealed and replaced with newly adopted N.J.A.C. 13:74-2.4, 2.5 and 2.6. For ease of reference, the previous, now-repealed versions will be identified as "Previous-N.J.A.C. 13:74 ..." and the newly adopted rules will be identified as "N.J.A.C. 13:74 ..."), which established the benchmarks for the initial determination as to whether a permit holder has made progress since the signing of the participation agreement toward establishing its share of OTWs, is now repealed as it is moot. As stated above, the State racetrack lease exemption applied only to the benchmarks originally set forth in previous-N.J.A.C. 13:74-2.5. The State racetrack lease exemption does not apply to the new benchmarks established at N.J.A.C. 13:74-2.4.

2. COMMENT: Mr. Drazin states that the "NJSEA and the State of New Jersey should not be at risk of losing valuable assets that were included in the lease" to the Monmouth Park and New Meadowlands permit holders. Mr. Drazin asserts that "it certainly was not intended that if there was a default in the lease provisions and the NJSEA took back the operation of the track, that the NJSEA should lose their asset (OTW rights)." Mr. Drazin then repeats his interpretation of the legislative intent as his basis for stating his objection "to the establishment of new benchmarks to measure progress which carries with it the risk of losing OTW rights if an additional initial license is not applied for by December 31, 2020." Mr. Drazin concludes his comment by stating that the "NJTHA has a valid lease with the State (NJSEA), including these rights."

RESPONSE: As noted in the Response to Comment 1 above, the State racetrack lease exemption does not apply to the benchmarks requiring the continuation of progress on an annual basis. The Legislature imposed this progress mandate on the permit holders. After the NJSEA leased the racetracks, it ceased to be a permit holder and the obligation was transferred to the NJTHA, along with the transfer of the NJSEA's rights, pursuant to the terms of the lease, to the off-track wagering facilities. These benchmarks are adopted pursuant to statutory mandate. The Commission, therefore, disagrees with Mr. Drazin's statutory interpretation.

3. COMMENT: Mr. Drazin points out that the benchmarks were to be developed "in consult with the New Jersey Economic Development Authority ..."

RESPONSE: The Commission consulted with the New Jersey Economic Development Authority on November 11, 2017, when developing the new benchmarks.

4. COMMENT: Mr. Drazin claims that part of the NJTHA's failure to build additional OTWs are objections lodged by New Meadowlands Racetrack, LLC pursuant to a joint agreement "restricting OTW's within a twenty mile radius [of the Meadowlands] unless the New Meadowlands consents." Mr. Drazin claims that several sites for OTWs were proposed but all were rejected by New Meadowlands Racetrack, LLC.

RESPONSE: Mr. Drazin references a private agreement between the NJTHA and New Meadowlands Racetrack, LLC. Any disputes related to this private agreement do not fall within the jurisdiction of the Commission and are outside the scope of this rulemaking.

5. COMMENT: Mr. Drazin comments that a complication arises with the forfeiture provision because if a permit holder forfeited its share of OTWs, a horsemen's organization would be able to acquire that share and would not be subject to the 20-mile restriction imposed by the private agreement. Further, Mr. Drazin claims that the Commission has informed the NJTHA that it would not have the same opportunities to acquire a permit holder's forfeited share of OTWs as the Standardbred Breeders and Owners Association (SBOA) or Thoroughbred Breeders' Association (TBA) because of the NJTHA's status as a permit holder. Mr. Drazin believes that the horsemen's organizations should be treated equally and that "the NJTHA should have the same rights to obtain a permit holder's forfeited share as the SBOA."

RESPONSE: Any geographical restrictions imposed upon the NJTHA by private agreement are not the result of any rule or action of the Commission. The NJTHA is able to apply to acquire a forfeited share of OTWs yet to be opened when allowed by the statute. However, it appears Mr. Drazin is referencing the provision at N.J.A.C. 13:74-1.3(d), which is

being adopted elsewhere in this issue of the New Jersey Register, that would preclude the NJTHA from obtaining the rights to an unopened OTW if the NJTHA was the permit holder that forfeited the rights to that OTW. This provision of N.J.A.C. 13:74-1.3 was originally adopted on March 4, 2013. See 44 N.J.R. 2455(a); 45 N.J.R. 470(a). Although the Commission is making technical and grammatical changes to this rule elsewhere in this issue of the New Jersey Register, this provision remains unchanged. As a result, this comment is untimely and outside the scope of this rulemaking.

6. COMMENT: Mr. Drazin objects to N.J.A.C. 13:74-2.6 claiming that the "law regarding OTW did not contemplate or intend for a well suited entity acquiring the rights of the NJSEA due to its lessee failing to make progress on developing its OTW share at the time of the NJRC Commissioner's vote."

RESPONSE: N.J.S.A. 5:5-130 establishes the requirement that forfeited shares of OTWs ultimately be made available to well-suited entities upon the conditions set forth in the statute. Therefore, as stated in the Response to Comment 2, the State racetrack lease exemption does not apply.

7. COMMENT: Mr. Drazin asserts that the "Administrative Procedures Act was not appropriately followed" because the NJTHA did not receive a copy of the proposed rules prior to the Commission voting on whether to publish the notice of proposal in the New Jersey Register. Mr. Drazin argues that failing to make copies of the proposed rules available prior to the Commission's vote deprived the "NJTHA of the ability to make a meaningful objection to the proposed publication."

RESPONSE: The Commission disagrees with Mr. Drazin's contention. The Commission met with the permit holders, including the NJTHA, on July 8, 2014, and again on June 20, 2017, to discuss the OTW benchmarks and obtain their input. The Commission put the racing industry on notice that the benchmarks were going to be proposed at its September 20, 2017 public meeting. Once published in the New Jersey Register, the public is given 60 days to file comments.

8. COMMENT: James C. Meyer, Esq., on behalf of FROT and ACRA, proposes that "new section N.J.A.C. 13:74-2.4(b) be amended to provide for a five-year process for establishing an OTW facility, as opposed to the proposed three-year process ..." FROT and ACRA assert that, while still meeting the legislative goal of increased purses and revenue, a five-year process will "provide a more feasible goal that can be met by the horseracing industry," "provide a more realistic opportunity for holders of OTW rights to comply with the ... progress benchmarks," is still "timely and expeditious," and that such a process "is consistent with the broad statutory authority granted to the Commission," all while balancing the issues with "opening unlicensed OTW facilities" with the "Forfeiture Amendment's goal of ... timely and expeditious establishment of OTW facilities." FROT and ACRA then recommend specific amendments to the dates set forth in the rulemaking, suggesting that the deadlines for each step be extended to December 31, 2022, 2023, and 2024, respectively.

RESPONSE: The Commission believes the new benchmarks are reasonable as they establish the actions that must be taken in each calendar year leading up to the opening of each OTW facility. The Commission interprets N.J.S.A. 5:5-130 as requiring that progress be made each year. The Commission does not believe that giving a permit holder three years to submit an application, as suggested by FROT and ACRA, complies with the statutory mandate requiring that the permit holders shall continue to make progress on an annual basis. As a result, the Commission does not believe the suggested amendments are necessary.

9. COMMENT: Mr. Meyer recommends that N.J.A.C. 13:74-2.4(b)1ii be amended to include language allowing for the applicant to "obtain an option on a lease as part of the OTW license application process ..."

RESPONSE: The rule, as written, would not exclude a lease with option to purchase. As a result, the Commission does not believe the suggested amendment is necessary.

10. COMMENT: Mr. Meyer seeks clarification of language at N.J.A.C. 13:74-2.4(d) "regarding the permit holders' rights to appeal forfeiture, when those rights are triggered, and when the Commission will consider those rights exhausted for purposes of transferring a permit holder's forfeited share of unopened OTW facilities."

RESPONSE: A permit holder's rights to appeal a forfeiture of its share of unopened OTW facilities are triggered when the Commission makes a

determination at a public meeting that the permit holder has forfeited its share. The rights of a permit holder to appeal the forfeiture are exhausted when no viable appeals remain.

11. COMMENT: Mr. Meyer asserts that language at N.J.A.C. 13:74-2.4(c) "creates ambiguity regarding the deadline for which an extension may be sought." Mr. Meyer supports his argument by explaining that the term "process of opening" is unclear and may refer to only the final benchmark year in which a permit holder must open an OTW for operation. Mr. Meyer contends that the intent of the proposed regulation would allow a permit holder to "seek extension of any one of the application-related and opening-related deadlines, not just an extension of only the deadline for opening an OTW facility." Mr. Meyer then proposes amended language to be inserted into N.J.A.C. 13:74-2.4(c) that would better encompass the entire OTW benchmark process.

RESPONSE: Mr. Meyer makes a valid observation that the proposed language at N.J.A.C. 13:74-2.4(c) may be ambiguous to the reader. The Commission has set forth three specific deadlines, each to be met by December 31 of subsequent years. Any one, and only one, of those three deadlines may be extended upon request of the permit holder, so long as good cause is shown. As a result of this comment, the Commission has changed the proposed language to reflect the changes recommended by Mr. Meyer.

12. COMMENT: Mr. Meyer asserts that the language of N.J.A.C. 13:74-2.4(c) may create further ambiguity in relation to the "number of extensions that may be sought." Mr. Meyer points out that the notice of proposal Summary accompanying the proposed new section "appears to suggest that N.J.A.C. 13:74-2.4(c) was intended to provide an opportunity for a one-year extension of an application-related deadline and a one-year extension of the opening deadline." (emphasis in original). Mr. Meyer proposes an amendment that would permit either "more than one, one-year extension of any of the benchmark deadlines, or the continuation of an extension as long as good cause continues to exist, as determined by the Commission on an annual basis." Mr. Meyer argues that N.J.S.A. 5:5-130 "grants the Commission broad authority to determine the standards for the annual making progress benchmarks and places no limitation on the ability of the Commission to extend, or waive enforcement of, making progress deadlines."

RESPONSE: The language in the notice of proposal Summary accompanying the proposed new section does not grant any permit holder the right to seek more than one extension per OTW facility. There is no distinction between an "application-related deadline" and an "opening deadline." The Commission considers all three benchmark deadlines in the proposed rule as part of the "process of opening" an OTW. The usage of the word "also" in the notice of proposal Summary pertains to all permit holders holding the rights to more than one unopened OTW. For example, if a permit holder has the obligation to open three additional OTWs, the term "also," as used in the notice of proposal Summary, precludes that permit holder from requesting more than a single one-year extension per OTW.

The Commission, therefore, declines to implement the suggested amendments, which could allow for substantial postponement of the opening of OTWs, as they are contrary to the statutory requirements.

13. COMMENT: Mr. Meyer proposes an amendment at N.J.A.C. 13:74-2.4(c) "to create a standard for good cause that includes a non-exhaustive list of bases for finding good cause." Mr. Meyer argues that the "purpose of the Forfeiture Amendment and the making progress benchmarks is to increase revenue and purses for the horseracing industry" and that the benchmarks should not be enforced "if revenue at existing OTWs, or at a permit holder's racetrack, is declining." Mr. Meyer asserts that declining revenues at existing OTWs and racetracks should constitute good cause for withholding enforcement of the progress benchmarks. Mr. Meyer argues that enforcement of the benchmarks should be "tied to market forces and conditions and dependent on whether OTWs are ... generating increased revenues ..." Mr. Meyer then concludes by stating that declining revenues should be specifically listed as a "good cause" for receiving an extension of a benchmark deadline along with the creation of a non-exhaustive list of circumstances creating a "good cause."

RESPONSE: The Commission does not agree that the statute exempts permit holders from continuing to make progress on an annual basis if

they can demonstrate declining revenue at existing OTWs and racetracks or other market forces and conditions. The Commission declines to implement the suggested amendments, as the determination of what constitutes good cause lies within the discretion of the Commission upon application of the permit holder on a case-by-case basis.

14. COMMENT: Mr. Meyer suggests the Commission amend N.J.A.C. 13:74-1.3(d) and 2.2 "to expressly include permit holders that are not also horsemen's organizations as a potential well-suited entity." Mr. Meyer states that it is only fair that "permit holders should have an opportunity to bid on forfeited shares of unopened OTW facilities" and that "[t]his right should be made express in N.J.A.C. 13:74-1.3(d)."

RESPONSE: The Commission's rules do not prohibit a permit holder from being considered a well-suited entity for purposes of applying for a horsemen's organization's forfeited share of OTWs yet to be opened. As a result, the Commission declines to implement the suggested amendment.

Summary of Agency-Initiated Changes:

The Commission is making a change upon adoption to the language at N.J.A.C. 13:74-2.4(b)1, 2, 3, and 4 that specifies dates by which the progress benchmarks must be fulfilled. The intent of the Commission, when drafting N.J.A.C. 13:74-2.4(b), was to establish timeframes within which the permit holders would have to satisfy specific milestones towards opening an OTW within their respective shares. The language of the initial rule was transmitted for review to the Office of Administrative Law ("OAL"), at which point representatives of the Commission and OAL discussed the notice of proposal. The OAL suggested the language be edited to include specific dates by which the permit holders would have to complete each benchmark. The Commission initially accepted these recommendations and the edited language became a part of the rule. However, prior to adoption, the Commission decided to remove the specific dates from the rule and revert to the language used in the initially filed notice of proposal. This change is being made because the initial language better expresses the Commission's intent and will be easier to implement than language containing specific dates.

The change is not substantive in nature as the same entities affected by the proposed new rules will remain affected upon adoption and those entities will not have their obligations enlarged or curtailed upon adoption as such obligations will remain unaltered from those imposed in the rulemaking.

Likewise, the choice to change the language at N.J.A.C. 13:74-2.4(b)1, 2, 3, and 4 does not change what is being prescribed, proscribed, or otherwise mandated by the rule because the amendment is simply a matter of language preference and makes no changes to the practical application of the new rules. Finally, the choice to amend the language in N.J.A.C. 13:74-2.4(b)1, 2, 3, and 4 does not "enlarge or curtail the scope of the proposed rule and its burden on those affected by it" for the same reasons. There is no burden on those affected by the change to the rulemaking due to the change being a restatement of language that has the same practical effect as that in the proposed new rules.

Federal Standards Statement

A Federal standards analysis is not required as there are no Federal standards or requirements applicable to the adopted new rules.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

SUBCHAPTER 2. APPLICATION FOR INITIAL OFF-TRACK WAGERING LICENSE; APPLICATION FOR RENEWAL OF OFF-TRACK WAGERING LICENSE

13:74-2.4 Progress benchmarks that must be satisfied for a permit holder to maintain its share of unopened off-track wagering facilities

(a) This section shall become effective on ***the*** January 1*[, 2020]* ***after this section becomes effective and enforceable***.

(b) A permit holder shall retain its share of off-track wagering facilities to be established if the permit holder demonstrates, to the satisfaction of the Commission, that it continues to make progress on an annual calendar basis towards opening its share of off-track wagering facilities. The

following requirements shall commence on ***[January 1, 2020,]* *the date this section becomes effective and enforceable*** and continue until all of the off-track wagering facilities within the permit holder's share are licensed and fully operational as provided below:

1. By December 31*[, 2020]* ***of the year in which this section becomes effective and enforceable***, the permit holder must file an application for an initial license for at least one off-track wagering facility within the permit holder's share. After filing the application for an initial off-track wagering license, the permit holder shall also demonstrate compliance with each of the following requirements:

i. The applicant has submitted to the Commission all information and documentation required by N.J.A.C. 13:74-2.1;

ii. The applicant has demonstrated to the Commission that the proposed off-track wagering facility is in a suitable location and the applicant has obtained fee title ownership of the proposed property or has obtained a leasehold interest in the proposed property for a period of not less than five years;

iii. The applicant must submit a detailed project development budget to the Commission to prove that applicant has obtained sufficient financial resources to pay for the design, construction, development, and other costs necessary to establish the proposed off-track wagering facility;

iv. The applicant has demonstrated to the Commission that the operational capacity and market feasibility of the proposed off-track wagering facility will benefit the horse racing industry in this State; and

v. The applicant shall supply information on key individuals necessary to operate the proposed off-track wagering facility in order to demonstrate that the applicant has the requisite staff to operate the facility.

2. By December 31*[, 2021]* ***of the second year in which this section becomes effective and enforceable***, the permit holder's application must be deemed complete by the Commission. Prior to the application being deemed complete, the applicant must submit all the necessary documentation referenced in (b)1 above and rectify any deficiencies in the application via delivery of all supplemental documentation and information requested, and in the timeframe stated, by the Commission.

3. By December 31*[, 2022]* ***of the third year in which this section becomes effective and enforceable***, the applicant must open the off-track wagering facility for business and begin accepting wagers; and

4. Each permit holder shall comply with the consecutive annual requirements of (b)1 through 3 above until that permit holder has opened all of the off-track wagering facilities within its share or the unopened off-track wagering facilities within its share will be subject to forfeiture. For example, by December 31*[, 2023]* ***of the fourth year in which this section becomes effective and enforceable***, the permit holder must file an application for an initial license for at least one other off-track wagering facility within the permit holder's share.

(c) A permit holder may, at any time in the process of ***applying for an initial license and*** opening an off-track wagering facility, request a one year extension of a single benchmark deadline if it can show good cause for being unable to complete the particular benchmark. A permit holder cannot receive more than one extension during the process of ***applying for an initial license and*** opening each individual off-track wagering facility.

(d) The failure to meet the benchmarks in this section shall constitute a basis for the denial of the initial off-track wagering license for which was applied. The failure to meet the benchmarks in this section shall result in the Commission ordering that the permit holder shall forfeit its share of unopened off-track wagering facilities to be established as required by N.J.S.A. 5:5-130.b(1). A permit holder's share of unopened off-track wagering facilities to be established cannot be transferred until that permit holder has exhausted its right to appeal the forfeiture.

13:74-2.5 Progress benchmarks that must be satisfied for a horsemen's organization to maintain its acquired share of off-track wagering facilities

(a) The horsemen's organizations shall become eligible to petition the Commission to obtain the right to apply for a permit holder's forfeited share of off-track wagering facilities when the permit holder's right to appeal that forfeiture is exhausted. When the permit holder's right to appeal is exhausted, the Commission shall notify, in writing, the

horsemen's organizations that are eligible to petition to obtain the right to apply. From the date of this written notice, the horsemen's organizations shall have one year to petition the Commission for the right to apply for the permit holder's forfeited share of unopened off-track wagering facilities. The petition shall include general information about the financial and managerial ability of the horsemen's organization to open and operate the remaining off-track wagering facilities in the permit holder's forfeited share. A horsemen's organization may include supplemental information and documentation in support of its petition. The Commission may request additional information before rendering a decision on the petition(s) received. The Commission will review all such petitions and determine which petitioner will be awarded the right to apply for the forfeited share. The horsemen's organization granted the right to acquire the permit holder's forfeited share must file an application pursuant to N.J.A.C. 13:74-2.2 and demonstrate to the satisfaction of the Commission that it continues to make progress on an annual calendar basis towards opening the off-track wagering facilities it has acquired in accordance with the requirements in (a)1 through 5 below, which shall commence on the date the Commission approves the petition of a horsemen's organization:

1. By December 31 of the year in which the horsemen's organization's petition is approved, the horsemen's organization must file an application for an initial license for at least one off-track wagering facility within its acquired share. This deadline may be extended, at the request of the horsemen's organization, to December 31 of the following year if the horsemen's organization's petition was approved on a date after June 30 or for other good cause shown. After filing the application for an initial off-track wagering license, the horsemen's organization shall also demonstrate compliance with each of the following requirements:

i. The applicant has submitted to the Commission all information and documentation required by N.J.A.C. 13:74-2.2;

ii. The applicant has demonstrated to the Commission that the proposed off-track wagering facility is in a suitable location and the applicant has obtained fee title ownership of the proposed property or obtained a leasehold interest in the proposed property for a period of not less than five years;

iii. The applicant has obtained sufficient financial resources to pay for the design, construction, development, and other costs necessary to establish the proposed off-track wagering facility. The applicant shall provide to the Commission, a detailed project development budget informed by a qualified professional design and construction team and documentation that the applicant has either placed monies into escrow or secured an irrevocable letter of credit in an amount equal to or greater than the project development budget; and

iv. The applicant has demonstrated to the Commission that the operational capacity and market feasibility of the proposed off-track wagering facility will benefit the horse racing industry in this State. The applicant shall provide to the Commission:

(1) A five-year financial pro forma detailing the projected revenues and expenses of the proposed off-track wagering facility in sufficient detail to support an acceptable market rate of return on the project; and

(2) Detailed information on key individuals necessary to operate the proposed off-track wagering facility, which shall demonstrate that the applicant has the requisite staff to operate the facility.

2. By December 31 of the year after the application is submitted, the horsemen's organization's application must be deemed complete by the Commission. Prior to the application being deemed complete, the applicant must submit all the necessary documentation set forth in (a)1 above and rectify any deficiencies in the application via delivery of all supplemental documentation and information requested, and in the timeframe stated, by the Commission;

3. By December 31 of the year following the year in which the application was deemed complete, the off-track wagering facility referred to in the benchmark requirements of (a)1 and 2 above shall be opened for business and begin accepting wagers;

4. Each horsemen's organization shall comply with the consecutive annual requirements of (a)1 through 3 above until that horsemen's organization has opened all of the off-track wagering facilities within its acquired share or the unopened off-track wagering facilities within its acquired share will be subject to forfeiture. For example, by December 31

of the year after the horsemen's organization opened an off-track wagering facility for business, the horsemen's organization must file an application for an initial license for at least one other off-track wagering facility within its acquired share; and

5. Should no horsemen's organization petition to acquire a permit holder's forfeited share within one year of the Commission's written notice that a permit holder's right to appeal the forfeiture of its share has been exhausted, the Commission shall begin the process of making an off-track wagering facility within the forfeited share available to a well-suited entity pursuant to N.J.A.C. 13:74-2.6.

(b) The failure to meet the benchmarks in this section shall constitute a basis for the denial of the initial off-track wagering license for which the horsemen's organization applied. The failure to meet the benchmarks in this section shall result in the Commission ordering that the horsemen's organization shall forfeit its share of unopened off-track wagering facilities to be established. A horsemen's organization's share of unopened off-track wagering facilities to be established cannot be transferred until that horsemen's organization has exhausted its right to appeal the forfeiture.

13:74-2.6 Progress benchmarks that must be satisfied for a well-suited entity to maintain its right to open an off-track wagering facility

(a) A well-suited entity shall file an application for the grant of an off-track wagering license upon the Attorney General's approval of the successful bidder in accordance with N.J.A.C. 13:74-2.2(a)2v. However, the well-suited entity approved by the Attorney General must demonstrate to the satisfaction of the Commission that it continues to make progress on an annual calendar basis towards opening the off-track wagering facility for which its bid was successful. The following requirements shall commence on the date the Attorney General approves the well-suited entity:

1. By December 31 of the year in which the well-suited entity's bid is approved, the well-suited entity must file an application for an initial license for operation of the off-track wagering facility it was chosen to operate. This deadline may be extended at the request of the well-suited entity to December 31 of the following year if the well-suited entity was approved by the Attorney General after June 30 or for other good cause shown. After filing the application for an initial off-track wagering license, the well-suited entity shall also demonstrate compliance with each of the following requirements:

i. The applicant has submitted to the Commission all information and documentation required by N.J.A.C. 13:74-2.2;

ii. The applicant has demonstrated to the Commission that the proposed off-track wagering facility is in a suitable location and the applicant has obtained fee title ownership of the proposed property or obtained a leasehold interest in the proposed property for a period of not less than five years;

iii. The applicant has obtained sufficient financial resources to pay for the design, construction, development, and other costs necessary to establish the proposed off-track wagering facility. The applicant shall provide to the Commission:

(1) A detailed project development budget informed by a qualified professional design and construction team. The budget shall include all hard and soft costs associated with the project to bring the off-track wagering facility into operation and the applicant shall bear the burden of establishing that the budget is a reasonable, informed, and realistic projection of all applicable costs; and

(2) Documentation that the applicant has either placed monies into escrow or secured an irrevocable letter of credit in an amount equal to or greater than the project development budget that is sufficient to finance the licensure, construction, and commencement of operation of the off-track wagering facility that is the subject of the application. All committed capital shall be supported by financial statements prepared by a certified public accountant and shall demonstrate the applicant's commitment of such funds to the establishment of the off-track wagering facility. Any third-party capital shall be supported by documentation of a fully-executed and binding irrevocable letter of credit;

iv. The applicant has demonstrated to the Commission that the operational capacity and market feasibility of the proposed off-track

wagering facility will benefit the horse racing industry in this State. The applicant shall provide to the Commission:

(1) A third-party market study completed by a qualified firm, which demonstrates the market feasibility of the proposed off-track wagering facility;

(2) A five-year financial pro forma detailing the projected revenues and expenses of the proposed off-track wagering facility in sufficient detail to support an acceptable market rate of return on the project; and

(3) Detailed information on key individuals necessary to operate the proposed off-track wagering facility, which shall demonstrate that the applicant has the requisite staff to operate the facility;

2. By December 31 of the year after the application is submitted, the well-suited entity's application must be deemed complete by the Commission. Prior to the application being deemed complete, the applicant must submit all the necessary documentation set forth in (a)1 above and rectify any deficiencies in the application via delivery of supplemental documentation and information requested, and in the timeframe stated, by the Commission; and

3. By December 31 of the year following the year the application is deemed complete, the off-track wagering facility referred to in the benchmark requirements of (a)1 and 2 above shall be opened for business and begin accepting wagers.

(b) Should a well-suited entity fail to meet the benchmarks established by this section, the well-suited entity's right to open an off-track wagering facility shall be forfeited and the Commission shall begin the process of making the forfeited off-track wagering facility available to another well-suited entity pursuant to N.J.A.C. 13:74-2.2. A well-suited entity's right to open an off-track wagering facility cannot be put up for bid until that well-suited entity has exhausted its right to appeal the forfeiture.

(c) As set forth in N.J.A.C. 13:74-2.2(a)2, the successful bid of a well-suited entity shall be considered a non-refundable filing fee should the well-suited entity fail to open the off-track wagering facility for which it was approved by the deadlines set forth in (a) above.