

LAW AND PUBLIC SAFETY

(a)

NEW JERSEY RACING COMMISSION

Off-Track and Account Wagering

Readoption of Special Adopted Amendments:

N.J.A.C. 13:74-1.1, 1.2, 2.1, and 2.2

Readoption of Special Adopted New Rules: N.J.A.C. 13:74-2.2 and 2.4

Adopted Amendments: N.J.A.C. 13:74-2.2 and 2.3

Adopted New Rules: N.J.A.C. 13:74-2.5 and 2.6

Proposed: January 3, 2012 at 44 N.J.R. 42(a).

Adopted: October 3, 2012 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.

Filed: October 4, 2012 as R.2012 d.183, with substantial and technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 5:5-186.

Effective Date: November 5, 2012.

Expiration Date: September 20, 2014.

Summary of Public Comments and Agency Responses:

By letter dated March 1, 2012, Francis E. McDonnell, Esq. filed comments on behalf of Freehold Raceway and Atlantic City Race Course to the proposed readoption of special adopted amendments to N.J.A.C. 13:74-1.1, 1.2, 2.1, and 2.2; the proposed readoption of special adopted new rules N.J.A.C. 13:74-2.2 and 2.4; and the proposed amendments to N.J.A.C. 13:74-2.2 and 2.3. These rule amendments and new rules, which were published to implement changes to the Off-Track and Account Wagering Act, N.J.S.A. 5:5-127 et seq. (Act) made by the Legislature in P.L. 2011, c. 26, were published at 44 N.J.R. 42(a) on January 3, 2012. The 60-day comment period closed on March 3, 2012.

A summary of the 13 comments submitted by Mr. McDonnell in the March 1, 2012 letter and the Commission's responses to them are set forth herein. After setting forth these comments, Mr. McDonnell argues at length about the negative impact that statutory amendments to the Act have had upon his clients and the legality of these amendments. Mr. McDonnell also urges the Commission to review carefully recently announced lease agreements for the Meadowlands Racetrack and Monmouth Park. The Commission is not legally required to, and does not, respond herein to arguments challenging legislation enacted into law as these arguments are not directed to the proposed readoption of the new rule and rule amendments.

COMMENT 1: The commenter asserts that the failure to acknowledge and account for the Master Off-Track Wagering and Account Wagering Participation Agreements, which were executed in 2003, "is [g]laringly

absent from the statutory changes." The commenter states that these agreements took three years of negotiation with the New Jersey Sports and Exposition Authority (NJSEA) and private racing operators and they "create the template for a 40 year term in which the development of OTWs and Account Wagering would proceed." According to the commenter, "[i]gnoring these agreements or attempting to alter these agreements by statute or regulation raises serious constitutional and other legal issues."

RESPONSE: The Commission has no response to the commenter's assertion that the statutory changes to the Act fail to acknowledge and account for the Master Off-Track Wagering and Account Wagering Participation Agreements. The statutory changes were enacted by the Legislature and the Commission does not have the authority to alter them.

To the extent that the comment can be read to apply to the reoption of these rules and amendments, the Commission disagrees with the commenter's assertion that the rules fail to acknowledge and account for the off-track wagering participation agreement which is referenced in the Commission's rules by the term "participation agreement." The amendments to N.J.A.C. 13:74-1.1 amend the definition of this term so that it is consistent with the legislative amendments made by P.L. 2011, c. 26 to the definition of this term. In addition, the amendments to N.J.A.C. 13:74-2.1(b)2 and (k)3, the latter now recodified in this adoption as N.J.A.C. 13:74-2.1(j)3, also address the participation agreement. In these amendments, the Commission added language to clarify that in filing an application for an initial off-track wagering license, the Authority must include a copy of a fully-executed participation agreement "which is consistent with current law." Finally, the commenter is correct that these rules and amendments do not address the participation agreement applicable to account wagering. These rules and amendments apply to off-track wagering and not account wagering. The Commission's rules which regulate account wagering are located elsewhere in Chapter 74 of Title 13. See, for example, N.J.A.C. 13:74-3.1, 3.2, and 7.1 to 7.18.

COMMENT 2: The commenter states that the definition of "'Off-Track Wagering Licensee' should include the permit holders and their assignee or assignees, in addition to the NJSEA." According to the commenter, the original off-track wagering participation agreement created the mechanism for ensuring that the participating permit holders who invested millions of dollars in off-track wagering facilities (OTWs) have the security of knowing that they have rights to their licenses. The commenter indicates that this participation agreement allowed for the assignment of the OTW license to the permit holders once the NJSEA met its burden in the initial application process and that the licenses for the Toms River and Vineland OTW locations have been assigned by the NJSEA to the permit holders of these sites. For these reasons, the commenter asserts that "permit holders" should be included in the definition of "off-track wagering licensee."

RESPONSE: The Commission rejects the commenter's statement that the definition of "off-track wagering licensee," as amended in N.J.A.C. 13:74-1.1, should include the term "permit holders." The definition in the Commission's rule conforms to the statutory definition of this term set forth in N.J.S.A. 5:5-129. In its rule, the Commission has accurately defined "off-track wagering licensee" to mean "the Authority or its assignee or assignees or another entity to which the Commission has granted its approval to conduct an off-track wagering facility as provided for in the Act." To the extent that the Authority assigns an off-track wagering license to a permit holder, that permit holder is included within the definition. The Commission therefore rejects the commenter's position that "permit holder" must be included within this definition.

COMMENT 3: The commenter questions why the definition of "participation agreement" does not state the actual date of the Master Off-Track Wagering agreement which he indicates is September 8, 2003.

RESPONSE: The Commission rejects this comment. The definition of "participation agreement" in N.J.A.C. 13:74-1.1 conforms to the statutory definition of the same term. The definition the rule as written accurately identifies the agreement and the Commission disagrees that inclusion of the date upon which the agreement was reached is necessary.

COMMENT 4: The commenter states that the words "to the Authority" in the heading of N.J.A.C. 13:74-2.1 should be stricken from the rule. According to the commenter, "[t]he procedure for the grant of an

initial off-track wagering license is a simultaneous process in which both the Authority and the permit holder applicant apply at the same hearing." The commenter states that "once the Authority has completed its presentation the permit holder/applicant presents its application and an assignment of the Authority's license to the off-track applicant occurs." The commenter indicates that this is the procedure that was used when the current off-track wagering licenses for Toms River and Vineland were assigned to Freehold Raceway and ACRC by the Authority.

RESPONSE: The Commission rejects this comment. Pursuant to the Act, only the Authority is authorized to file an application for an initial off-track wagering license for a facility proposed by the Authority or proposed by a permit holder or permit holders subject to the participation agreement. See N.J.S.A. 5:5-130. As a result, the heading of the rule accurately describes the scope of the rule. Under current law, a permit holder subject to the participation agreement is not legally authorized to file an application for an initial off-track wagering license on its own behalf. For these reasons, the Commission rejects this comment.

COMMENT 5: The commenter states that the language "that is consistent with current law" should be deleted from N.J.A.C. 13:74-2.1(b)2 because it is "superfluous" and "unnecessary." The commenter points out that the participation agreement and the separate participation agreement applicable to account wagering have been reviewed and approved by the Commission and Attorney General. The commenter asserts that "[i]f any changes are to be made to the existing agreements it is implicit that they must be compliant with the law."

RESPONSE: The Commission rejects this comment. When the Authority files an application for an initial off-track wagering license on behalf of itself or a permit holder subject to the participation agreement, it must include a copy of a fully-executed participation agreement that "meets the requirements of the Act." N.J.S.A. 5:5-130(b). The Commission therefore rejects the commenter's position which argues the language "that is consistent with current law" is superfluous or unnecessary. The commenter's references to the participation agreement applicable to account wagering is irrelevant in this context as this rule only applies to off-track wagering.

COMMENT 6: The commenter states that it would be helpful if a definition for the term "first-class dining" contained in N.J.A.C. 13:74-2.1(c) could be provided "that relates to quality food and beverage." The commenter points out that defining this term "would avoid future problems for all licensees in meeting an illusory threshold that is not patron-based." According to the commenter, "our extensive experience in Pennsylvania and New Jersey has shown that patrons of OTWs don't necessarily desire higher-priced, or 'fine' dining." The commenter asserts that "'[f]irst-class dining', unless defined conservatively, will not serve the needs of the patrons and will be a costly requirement for operators."

RESPONSE: The Commission rejects this comment. N.J.S.A. 5:5-131(a)(5) requires that at the time of filing an application for an off-track wagering license, the applicant shall submit to the Commission a certification which specifies "the type of food and beverages available, which shall include," but not be limited to the provision of first-class dining facilities. . . . Once the application has been determined to be complete, the Commission must hold a public hearing in the municipality in which the proposed off-track wagering facility is to be located within 45 days to examine specific details regarding the proposed facility. Pursuant to N.J.S.A. 5:5-133(a), the Commission shall make a final determination on the license application following the public hearing and it "shall approve the application if it determines that the plan for the proposed facility includes appropriate standards of quality for the premises and services it will provide and that the applicant has demonstrated by clear and convincing evidence that establishment of the proposed off-track wagering facility will not be inimical to the interests of the public and the horse racing industry in this State." Any determination by the Commission shall be submitted to the Attorney General for review and approval. *Ibid.* As a result, N.J.A.C. 13:74-2.1(c) is consistent with law as written because the determination whether the applicant will provide "first-class dining" is fact-specific, required by the Act and must be examined within the context of the application and public hearing process.

COMMENT 7: The commenter states that the January 1, 2012 deadline set forth in the proposed amendment to N.J.A.C. 13:74-2.1(h)1,

now recodified in this adoption as N.J.A.C. 13:74-2.5, "is burdensome to all present permit holders and in fact exempts the new lessees of the Meadowlands and Monmouth Park racetracks." The commenter asserts that this "brings up the double standard and unequal treatment of certain permit holders in the state and raised significant legal and constitutional issues." The commenter adds that "the potential erasure of all the permit holders' 'shares' of licenses is oppressive and illegal and we vehemently oppose any attempt to nullify, withdraw or transfer these permits from us." According to the commenter, "'progress' on one license at a time is more realistic, before such drastic and illegal action is taken, given the extremely short time-frame imposed by the Legislature." The commenter submits that "permit holders are exempt from the licensure and escrow/deposit requirements of the law pursuant to the 'making progress' language" in N.J.S.A. 5:5-130(b)(1). According to the commenter, "N.J.S.A. 5:5-130(b)(1) provides that forfeiture of all licenses is avoided by 'making progress toward obtaining an off-track wagering license and establishing an off-track wagering facility...' and not all facilities, as provided in the rule." (Emphasis in original.)

RESPONSE: The Commission rejects the comment, which in large part voices objection to the statutory changes mandated by P.L. 2011, c. 26. The January 1, 2012 deadline, was established by the Legislature in P.L. 2011, c. 26, § 3, which amended this legislation in P.L. 2011, c. 205, § 1, to establish a deadline consistent with the effective date of that legislation, which is December 31, 2012. The commenter's contentions of unequal treatment, legal arguments, potential loss of OTW facilities within the permit holders' shares, and the reference to the escrow/deposit requirements take issue with the statutory changes enacted by the Legislature.

COMMENT 8: The commenter states that the language "Any amendments to ... the Participation agreement(s)" should be added to N.J.A.C. 13:74-2.1(k)3, now recodified as N.J.A.C. 13:74-2.1(j)3 in this adoption, and the language "and is consistent with current law" in this paragraph should be deleted. In making this statement, the commenter specifically references the reasons already set forth in Comment 4. The commenter's reference is in error as he likely means to reference the reasons set forth in Comment 5.

RESPONSE: The Commission rejects the comment for the reasons already set forth in the Response to Comment 5. In addition, the Commission points out that the requirement in N.J.A.C. 13:74-2.1(j)3 that "the participation agreement meets the requirements of the Act..." includes validly-executed amendments to the agreement.

COMMENT 9: The commenter states that it is unclear whether the time lines set forth in N.J.A.C. 13:74-2.1(o) run from the original Act or the effective date of the Act as amended. The commenter questions whether current law authorizes a maximum of 15 OTWs or now allows an additional 15 OTWs for a total maximum of 30 OTWs. The commentator also questions whether "the 8-license build-out limitation" includes the existing three OTWs or does it authorize eight additional OTWs. The commenter states that the eight-license build-out limitation "seems inconsistent with the benchmarks that all licensees need to show progress."

RESPONSE: The Commission rejects the comment which addresses the existing rules of the Commission which are not part of the special adoption, readoption, or amendments other than to recodify N.J.A.C. 13:74-2.1(o) as subsection (n) without any changes in text.

COMMENT 10: The commenter states that there should be a provision in N.J.A.C. 13:74-2.2 "that requires compensation to the existing permit holders to the taking of its 'share' by one of these groups or by a 'bidder' under the statute." The commenter indicates that Freehold Raceway and Atlantic City Race Course, as private operators, "have already invested tens of millions of dollars in the New Jersey racing industry in good faith and have been mischaracterized as the cause of the industry's malaise, despite the fact that we have operated at significant disadvantages versus NJSEA-operated racetracks and have had to absorb operational losses without the benefit of taxpayer subsidies." The commenter asserts that N.J.A.C. 13:74-2.2 should be stricken because the "horsemen's groups" and "well-suited entities" "should not be permitted to file an application for a license until the Commission has ruled that an existing permit holder has not made progress on a license." The commenter states that allowing these two

groups to do so "will be inequitable to existing permit holders and will be an unnecessary administrative burden on the Commission." The commenter adds that "[a]ny opportunity for these groups to file applications must be conditioned upon payment of the present day value of their existing OTW allocations." According to the commenter, "these new 'applicants' must be required to adhere to the existing geographic and other provisions of the current Participation Agreements."

Finally, the commenter states that "there is no provision for compensation to permit holders for their loss of economic rights ... and the Commission must be mindful of the significant investment of the current operators." The commenter points out that provisions have been added to law that give the horsemen's groups the authority to file license applications and receive bid fees "despite their having no economic investment in the racetracks and existing OTWs." The commenter concludes by stating that "[i]f a preferential scheme is to be devised, the existing operators should receive such preferences and not favored groups who stand to benefit by these new laws and regulations."

RESPONSE: The Commission rejects the comment. First, the commenter seeks changes to N.J.A.C. 13:74-2.2 in connection with the alleged preferential treatment and loss of economic rights that are not authorized by current law and are, therefore, beyond the Commission's regulatory authority. Second, the commenter's suggestion that horsemen's organizations or well-suited entities will apply for a license they are not entitled to receive is completely speculative. The filing of any such application is adequately deterred under the provisions of the rule in N.J.A.C. 13:74-2.2(a)1 and 2, respectively, that require that an application shall be accompanied by a nonrefundable filing fee of \$2,500, in the case of horsemen's organizations, or the amount of the successful bid, in the case of well-suited entities. Third, the Commission rejects the contention that any application filed by a horsemen's organization or well-suited entity "must be conditioned upon payment of the present day value of their existing OTW allocations." In making this contention, the commenter seeks changes to the rule that are unauthorized by current law and his comment is hereby rejected. Finally, the terms of the participation agreement must be negotiated by the parties to the agreement and the Commission does not seek to regulate the contents of this private agreement by rule other than to require that the participation agreement meets the requirements of the Act and is consistent with law.

COMMENT 11: The commenter states that N.J.A.C. 13:74-2.3(d) should be changed to allow a permit holder or other entity that is a party to the participation agreement to file an application to renew an off-track wagering license. According to the commenter, the historic practice has been that the permit holders subject to the participation agreement file their own renewal applications and the NJSEA sends a concurrent approval letter to the Commission stating that the permit holder filing the application has met its financial obligations. The commenter asserts that the rule should be changed to recognize this practice.

RESPONSE: The Commission rejects the comment. Pursuant to the Act, only the Authority is authorized to file an application to renew an off-track wagering license held by a permit holder. N.J.S.A. 5:5-133(b) specifically provides that "[w]ith the approval of the commission, the authority may assign an off-track wagering license to a permit holder, provided that the authority shall retain responsibility for license renewals."

COMMENT 12: The commenter states that the language "and is consistent with current law" should be deleted from N.J.A.C. 13:74-2.3(d)2 and (j)3 for the reasons in Comment 4. The commenter's reference is in error as he likely means to reference the reasons set forth in Comment 5. Referencing N.J.A.C. 13:74-2.3(h), the commenter asks how a license for an off-track wagering facility that is not operational can be renewed.

RESPONSE: The Commission rejects the comment for the reasons already set forth in the Response to Comment 5. In response to the commenter's question, the Commission points out that to receive an off-track wagering license, an off-track wagering facility is not required to be operational.

COMMENT 13: The commenter states that the language "became eligible" in N.J.A.C. 13:74-2.4(a) "should be defined to be not earlier than the Commission's ruling that a permit holder has not 'made progress.'" The commenter also states that the language "Commencing

on January 1, 2012" in N.J.A.C. 13:74-2.4(b) should be deleted because "[i]t is premature to permit an application to be filed until a ruling has been made by the Commission that a permit holder has not made 'progress.'" The commenter again questions, this time in connection with N.J.A.C. 13:74-2.4(b), how a license for an off-track wagering facility that is not operational can be renewed.

RESPONSE: The Commission rejects the comment. Once again, the commenter's suggestion that a horsemen's organization will apply for a license they are not entitled to receive is completely speculative. The Commission also references its Responses to Comments 10 and 12.

Summary of Agency-Initiated Changes:

N.J.A.C. 13:74-1.1: The Commission has voted to adopt N.J.A.C. 13:74-1.1 as proposed. The Commission also voted to file a notice of proposal to amend N.J.A.C. 13:74-1.1 with the OAL, which is appearing elsewhere in this issue of the New Jersey Register, to define the term "share" of off-track wagering facilities.

N.J.A.C. 13:74-2.1: The Commission voted to adopt N.J.A.C. 13:74-2.1 as proposed with the following two, minor changes. First, N.J.A.C. 13:74-2.1(h) has been relocated from the rule into new rule N.J.A.C. 13:74-2.5 which is headed "Benchmarks for determining whether a permit holder has made progress since the signing of the participation agreement toward establishing the permit holder's share of the 15 off-track wagering facilities." N.J.A.C. 13:74-2.1(h) has been relocated because of the importance of the benchmarks set forth therein and their placement into a new rule will allow them to be easily located for reference. Second, because of the relocation of N.J.A.C. 13:74-2.1(h), N.J.A.C. 13:74-2.1(i) through (o) will be recodified as subsections (h) through (n) with no change in text from the proposal.

N.J.A.C. 13:74-2.2: The Commission voted to adopt N.J.A.C. 13:74-2.2 as proposed with the following substantial and technical changes. First, because of the complexity of the rules, the Commission has added provisions to N.J.A.C. 13:74-2.2(a)2ii, (a)2ii(1), and (a)2ii(2), and 2.2(h) which cross-reference other relevant rule provisions to clarify the complex factors the Commission will consider. N.J.A.C. 13:74-2.2(a)2 addresses applications for an initial OTW license filed by a well-suited entity pursuant to a successful bid. In N.J.A.C. 13:74-2.2(a)2ii, the Commission added a cross reference to N.J.A.C. 13:74-2.6(f) to clarify that "An initial off-track wagering license shall become available for public bid 'pursuant to N.J.A.C. 13:74-2.6(f)' upon the Commission reaching the following determinations...." N.J.A.C. 13:74-2.6 is being proposed by the Commission as a new rule by notice of proposal elsewhere in this New Jersey Register. Although the implementation of N.J.A.C. 13:74-2.6 will necessarily be delayed by the legally-required proposal process, the Commission does not anticipate that the delay will be problematic because no "well-suited entity" will have obtained the rights to apply for an OTW license prior to the adoption of this rule.

Regarding the other cross-references, in N.J.A.C. 13:74-2.2(a)2ii(1), the Commission deletes the reference to N.J.A.C. 13:74-2.1(h), which has been recodified as N.J.A.C. 13:74-2.5, and adds cross-references to N.J.A.C. 13:74-2.4(d), 2.5, 2.6(b)2, 2.6(c), or 2.7, which contain provisions by which the Commission may determine that one or more of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 shall no longer be considered part of the Authority's or permit holder's share. As is the case with N.J.A.C. 13:74-2.6, N.J.A.C. 13:74-2.7 is also being proposed by the Commission as a new rule by notice of proposal elsewhere in this New Jersey Register. Once again, although the implementation of N.J.A.C. 13:74-2.7 will necessarily be delayed by the legally-required proposal process, the Commission does not anticipate that the delay will be problematic because no "well-suited entity" will have obtained the rights to apply for an OTW license prior to the adoption of this rule.

In N.J.A.C. 13:74-2.2(a)2ii(2), the Commission again deletes the reference to N.J.A.C. 13:74-2.2(h), which has been superseded by more specific rule provisions which set forth benchmarks applicable to the transfer of rights to OTWs from horsemen's organizations to well-suited entities. In addition to deleting the reference to N.J.A.C. 13:74-2.2(h), the Commission adds the cross-references to the benchmarks in these rules, which are N.J.A.C. 13:74-2.4(a), 2.4(a)2, and 2.4(a)3, and proposed new rule N.J.A.C. 13:74-2.7. Finally, in N.J.A.C. 13:74-2.2(h), the rule, as

proposed, cross-references the requirements in N.J.A.C. 13:74-2.4(a). The Commission added the cross-reference N.J.A.C. 13:74-2.4(a)1 to clarify the requirement that the application must also be determined to be complete.

Second, the Commission has added two agency-initiated, technical changes to N.J.A.C. 13:74-2.2(h) by including provisions taken directly from P.L. 2011, c. 205, which was enacted after this rule was proposed. N.J.A.C. 13:74-2.2(h) states the requirement that in evaluating an application for an OTW license filed by a horsemen's organization, the Commission shall determine whether the applicant has met the statutory requirement of "apply[ing] for a license pursuant to N.J.S.A. 5:5-133 within a reasonable time frame from the date the horsemen's organization became eligible to apply...." See N.J.S.A. 5:5-130(b)(2). In enacting P.L. 2011, c. 205, the Legislature established separate requirements for horsemen's organizations that have and have not received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1). The Commission has added these statutory changes to this subsection to clarify the requirements a horsemen's organization must establish in each case.

N.J.A.C. 13:74-2.3: The Commission voted to adopt N.J.A.C. 13:74-2.3 as proposed with the following technical changes. First, because of the complexity of the rules, the Commission has added five provisions to N.J.A.C. 13:74-2.3(h) which cross-reference the location of the required benchmarks the various applicants seeking to renew an OTW license must meet. In N.J.A.C. 13:74-2.3(h)1, the Commission added that "[i]n evaluating an application filed by the Authority on behalf of itself or on behalf of a permit holder and the Authority or permit holder has not been required to make a deposit or post a bond, or irrevocable letter of credit pursuant to N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has made progress on an annual basis in establishing the off-track wagering facility pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.4(b)." N.J.A.C. 13:74-2.3(h)2 states that "[i]n evaluating an application filed by the Authority on behalf of itself or on behalf of a permit holder and the Authority or permit holder has been required to make a deposit or post a bond, or irrevocable letter of credit pursuant to N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has made substantial progress in the Commission's judgment pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility within one year of making the deposit, or posting the bond, or irrevocable letter of credit." This requirement that the Authority or permit holder must "make substantial progress" in the Commission's judgment pursuant to benchmarks established by the Commission toward establishing the off-track wagering facility within "one year from the date the funds were allocated to it by the commission" was explicitly established by the Legislature in P.L. 2011, c. 205, § 1 (codified at N.J.S.A. 5:5-130(b)(1)).

Similarly, N.J.A.C. 13:74-2.3(h)3 and 4 address the evaluation of an application filed by "a horsemen's organization which has not received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1)" and "a horsemen's organization that has received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1)," respectively. N.J.A.C. 13:74-2.3(h)3 now indicates that the Commission must determine whether the horsemen's organization "has made progress on an annual basis in establishing the off-track wagering facility pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.4(a)." N.J.A.C. 13:74-2.3(h)4 indicates that the Commission must determine whether the horsemen's organization "complied with N.J.A.C. 13:74-2.4(a)3 and has made substantial progress in the commission's judgment pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility within one year from the date the funds were allocated to it by the commission." This requirement that the horsemen's organization must "make substantial progress" in the commission's judgment pursuant to benchmarks established by the Commission toward establishing the off-track wagering facility within "one year from the date the funds were allocated to it by the commission" was explicitly established by the Legislature in P.L. 2011, c. 205, § 1 (codified at N.J.S.A. 5:5-130(b)(2)).

Finally, N.J.A.C. 13:74-2.3(h)5, which addresses the evaluation of an application filed by a well-suited entity, states that "the Commission shall determine whether the off-track wagering licensee has made progress in the commission's judgment pursuant to the benchmarks set forth in

N.J.A.C. 13:74-2.8." As is the case with N.J.A.C. 13:74-2.6 and 2.7, N.J.A.C. 13:74-2.8 is also being proposed by the Commission as a new rule by notice of proposal elsewhere in this issue of the New Jersey Register. Once again, although the implementation of N.J.A.C. 13:74-2.8 will necessarily be delayed by the legally-required proposal process, the Commission does not anticipate that the delay will be problematic because no "well-suited entity" will have obtained the rights to apply for an OTW license prior to the adoption of this rule.

Second, in N.J.A.C. 13:74-2.3(h), the Commission has changed the January 1, 2012 deadline established by P.L. 2011, c. 26, to December 31, 2011, a change mandated by P.L. 2011, c. 205, § 2.

N.J.A.C. 13:74-2.5: The Commission voted to adopt N.J.A.C. 13:74-2.5 with the following technical changes. As discussed above, the Commission relocated proposed N.J.A.C. 13:74-2.1(h) to N.J.A.C. 13:74-2.5 for the sake of clarity and easy reference. N.J.A.C. 13:74-2.5 sets forth "benchmarks for determining whether a permit holder has made progress since the signing of the participation agreement toward establishing the permit holder's share of the 15 off-track wagering facilities." The agency-initiated changes include specific statutory requirements enacted in P.L. 2011, c. 205 as well the inclusion of cross-references to applicable benchmarks for the sake of clarity.

N.J.A.C. 13:74-2.6: The Commission voted to adopt N.J.A.C. 13:74-2.6, Requirement that deposit, a bond, or irrevocable letter of credit be posted or deposited to retain rights to off-track wagering facilities that have not received an initial license on or before December 31, 2011, which sets forth statutory changes enacted by the Legislature in P.L. 2011, c. 205, § 1 (codified at N.J.S.A. 5:5-130(b)(1)).

Federal Standards Statement

A Federal standards analysis is not required because the readopted and adopted amendments and new rules are authorized by the provisions of the Off-Track and Account Wagering Act, P.L. 2001, c. 199, as amended by P.L. 2011, c. 26, and are not subject to any Federal requirements or standards.

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

SUBCHAPTER 1. GENERAL PROVISIONS

13:74-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

... "Act" means the Off-Track and Account Wagering Act, P.L. 2001, c. 199, as amended.

... "Applicant" means the New Jersey Sports and Exposition Authority or another entity that submits an application to the Commission for a license to establish and conduct an off-track wagering facility pursuant to the Act.

... "Horsemen's organization" means the New Jersey Thoroughbred Horsemen's Association, the Standardbred Breeders' and Owners' Association of New Jersey, the Thoroughbred Breeders' Association of New Jersey or another organization or group representing a majority of horsemen who participate in horse race meetings conducted within this State.

... "Off-track wagering licensee" means the Authority or its assignee or assignees or another entity to which the Commission has granted its approval to conduct an off-track wagering facility as provided for in the Act.

... "Participation agreement" means the written contract entered into prior to February 23, 2011, the effective date of P.L. 2011, c. 26, that provides for the establishment or implementation of either an off-track wagering facility or facilities or an account wagering system. Each such contract shall set forth the manner in which the off-track wagering facility or

facilities or the account wagering system shall be managed, operated and capitalized, as well as how expenses and revenues shall be allocated and distributed by and among the Authority and the other eligible participants subject to the agreement.

... "Well-suited entity" means a person, persons, association, corporation, partnership, organization or other entity authorized to apply for an off-track wagering license pursuant to N.J.S.A. 5:5-130(c), which meets the standards, criteria and qualifications set forth in N.J.A.C. 13:74-2.2 by clear and convincing evidence as determined by the Commission.

13:74-1.2 Rules of the Racing Commission

Except as otherwise provided in the Act or this chapter, racing and the conduct of pari-mutuel wagering in off-track wagering facilities, or in connection with account wagering, shall be subject to the rules of the Racing Commission. These rules shall be applicable to all persons licensed by the Commission and every patron of an off-track wagering facility or of the account wagering system.

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

13:74-2.1 Prerequisites to and procedures for grant of initial off-track wagering license to the Authority

(a) The Authority shall make an application for an initial off-track wagering license on a form prescribed by the Commission, accompanied by a non-refundable filing fee of \$2,500. An initial application, accompanied by the non-refundable filing fee, shall be filed for each off-track wagering facility proposed by the Authority on behalf of itself or a permit holder or permit holders subject to the participation agreement entered into prior to February 23, 2011, the effective date of P.L. 2011, c. 26.

(b) An application for an initial off-track wagering license shall not be considered complete unless:

1. The permit holder or permit holders at Monmouth Park and the thoroughbred and standardbred permit holder or permit holders at the Meadowlands Racetrack have scheduled at least the minimum number of live race dates required by P.L. 2001, c. 199, as amended (N.J.S.A. 5:5-156).

2. The Authority includes within the application a copy of a fully executed participation agreement that is consistent with current law, the terms of which encompass the license period, which it has entered into with all parties or successors in interest that held a valid race permit in 2000 (who are each in compliance with said permit, who are each in compliance with any minimum live race dates requirements of the Act, and who each are in good standing with the Racing Commission and State);

3. (No change.)

4. If the Authority or a permit holder subject to the participation agreement is the owner of the land, building, and premises of the proposed off-track wagering facility, it shall include a statement evidencing that it has reached an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located, establishing the payment in-lieu-of taxes the Authority or the permit holder must pay to the municipality for the first five years of the operation of the off-track wagering facility pursuant to N.J.S.A. 5:5-151.1.

5. The Authority demonstrates through the application that the requirements of the Act have been satisfied; and

6. (No change in text.)

(c) The initial application form, as prescribed by the Commission, shall include disclosure requirements concerning, but not limited to, the physical plan, location and the proposed hours of operation of the proposed off-track wagering facility subject of the specific application including the space relationship between wagering and non-wagering related amenities, the number of jobs expected to be created at the proposed facility, the gross revenues expected to be generated by the facility, the fire evacuation plan for the proposed facility, the type of food

and beverages to be available, which shall include provisions for first-class dining and, if alcoholic beverages are to be offered at the proposed facility, documentation that the requirements of the Act, as amended by P.L. 2011, c. 26, have been satisfied.

(d)-(f) (No change.)

(g) In evaluating an application for an off-track wagering license, the Commission shall consider the proximity of the applicant's proposed site to other planned or existing off-track wagering facilities and to racetracks in this State. If, in the opinion of the Commission, the establishment of the facility at its proposed location would be inimical to the interests of another planned or established off-track wagering facility, or to a State racetrack, the Commission shall reject the application and require the applicant to consider alternative sites for the proposed facility.

*(h) In evaluating an application for an off-track wagering license filed by the Authority on behalf of itself or on behalf of a permit holder subject to the participation agreement entered into prior to the effective date of P.L. 2011, c. 26, the Commission shall determine whether the Authority or the permit holder, respectively, has made progress toward establishing its share of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 since the signing of the participation agreement.

1. Any of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 that have not received a license pursuant to N.J.S.A. 5:5-133 on or before January 1, 2012 shall no longer be considered as part of the Authority's or respective permit holder's share and shall be available to be established by a horsemen's organization in this State as provided by N.J.S.A. 5:5-130(b)(2).

2. Notwithstanding (h)1 above, the Commission may allow the Authority or permit holder, respectively, to retain the rights to establish an off-track wagering facility within its share after January 1, 2012, if the Commission finds that the Authority or permit holder is making progress as of that date toward obtaining an off-track wagering license and establishing the facility in accordance with the benchmarks set forth in (h)2i below and the Authority or permit holder demonstrates on an annual basis that it continues to make progress in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.4.

i. In determining whether the Authority or a permit holder subject to the participation agreement has made progress toward obtaining an initial off-track wagering license for, and the establishment of, an off-track wagering facility within its share, the Commission will consider the following benchmarks:

(1) The Authority or a permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities if it has entered into an agreement, in connection with good faith negotiations over the sale or lease of a racetrack under its control, to transfer allocated off-track wagering licenses or facilities to an individual or entity that is a bona fide prospective purchaser or lessee, or if no such agreement has yet been reached, the Authority or permit holder has demonstrated to the satisfaction of the Commission either:

(A) The execution of such an agreement is imminent based upon the portions of such an agreement agreed upon in principle by the parties as evidenced by a memorandum of understanding or similar accord; or

(B) It engaged in substantial, good faith negotiations in an attempt to reach an agreement, in connection with the sale or lease of a racetrack under its control, to obtain, establish, or transfer one or more off-track wagering licenses or facilities, no agreement was reached as a result of these negotiations and the Authority or permit holder is in the process of making alternative arrangements intended to solicit new persons or entities that possess a good faith interest in the negotiation and execution of any such agreement.

1. In order for the Commission to deem that sufficient progress has been made to meet the requirements of the benchmark in (h)2i(1)(B) above, the Authority or permit holder shall bear the burden of establishing to the satisfaction of the Commission that the planned, alternative arrangements have a reasonable likelihood of soliciting new sources of interest and resulting in negotiations and the eventual execution of an agreement to obtain, establish, or transfer one or more off-track wagering licenses or facilities.

II. To ensure that Authority or permit holder remains in compliance with the benchmark in (h)2i(1)(B) above, the Commission may require the filing of periodic or regular reports; or

(2) If the Authority or permit holder does not meet the requirements set forth in (h)2i(1) above, it can demonstrate to the Commission that:

(A) It has identified a suitable location for the proposed off-track wagering facility;

(B) It has entered into an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located establishing the payment in-lieu-of taxes the Authority or the permit holder must pay to the municipality for the first five years of the operation of the off-track wagering facility pursuant to N.J.S.A. 5:5-151.1; and

(C) The Authority or permit holder can demonstrate that it has met one of the following benchmarks, it has:

(I) Obtained fee title ownership of the proposed property;

(II) Obtained a leasehold interest in the proposed property for a period of not less than five years;

(III) Entered into an option agreement with a property owner to acquire either (h)2i(2)(C)(I) or (II) above; or

(IV) Executed a letter of intent with the current property holder in sufficient detail to demonstrate the material factors of a purchase or lease or agreement.*

[(j)] *(h)* The Commission may refuse to issue a license if it shall find that the applicant has failed to demonstrate its suitability for licensure by clear and convincing evidence. The Authority or permit holder shall bear the burden of demonstrating to the Commission by clear and convincing evidence that the person or persons applying for licensure on behalf of the Authority or permit holder possess the necessary qualifications to obtain licensure for an off-track wagering facility in accordance with standards and criteria that shall include, but not be limited to:

1. Proof of financial resources sufficient to enable the Authority or permit holder to establish and conduct a quality off-track wagering facility or facilities 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. All requirements and considerations set forth in N.J.A.C. 13:74-5.8.

[(j)] *(i)* (No change in text.)

[(k)] *(j)* Between 30 days and 60 days following closing of the record on the public hearing described in *[(j)]* *(i)* above, the Commission shall make a final determination on the application. The Commission shall approve the application if it determines that the Authority by clear and convincing evidence has demonstrated, through its application and internal control procedures, that:

1.-2. (No change.)

3. The participation agreement meets the requirements of the Act and is consistent with current law to the satisfaction of the Commission and Attorney General; and

4. The proposed off-track wagering facility site is in an appropriate location.

[(l)] *(k)* An off-track wagering license shall be issued only if the permit holders in this State schedule at least the minimum number of race dates required by N.J.S.A. 5:5-156.

Recodify proposed (m)-(o) as *(l)-(n)* (No change in text.)

13:74-2.2 Prerequisites to and procedures for grant of initial off-track wagering license to a horsemen's organization or a well-suited entity

(a) A horsemen's organization or a well-suited entity, as provided for in P.L. 2011, c. 26, §3 (N.J.S.A. 5:5-130(c)), shall make an application for an initial off-track wagering license on a form prescribed by the Commission.

1. An application filed by a horsemen's organization shall be accompanied by a non-refundable filing fee of \$2,500.

2. An application filed by a well-suited entity shall be accompanied by a license fee in the amount of the successful bid pursuant to N.J.S.A. 5:5-130(d)(2), which shall be distributed 50 percent to the New Jersey Thoroughbred Horsemen's Association and 50 percent to the Standardbred Breeders and Owners Association of New Jersey for programs designed to benefit the New Jersey horsemen.

i. To be qualified to submit an application for an initial off-track wagering license as a well-suited entity, a person, persons, association, corporation, partnership, organization, or other entity must be selected as a successful bidder in the bidding process set forth in this subsection.

ii. An initial off-track wagering license shall become available for public bid *pursuant to N.J.A.C. 13:74-2.6(h)* upon the Commission reaching the following determinations:

(1) The Commission has determined, pursuant to N.J.A.C. 13:74-2.1(h)*2.4(d)*, 2.5, 2.6(b)2, 2.6(c), or 2.7,* that one or more of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 shall no longer be considered part of the Authority's or permit holder's share; and

(2) The Commission has determined*[, pursuant to (h) below,]* that no horsemen's organization has applied for the available off-track wagering license pursuant to N.J.S.A. 5:5-133 within a reasonable time frame from the date that horsemen's organizations became eligible to apply *in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.4(a); a horseman's organization that has applied for an initial off-track wagering license has failed to make progress on an annual basis pursuant to the benchmarks in N.J.A.C. 13:74-2.4(a)2; or a horseman's organization that has received the sum of \$1 million has failed to obtain a license in compliance with N.J.A.C. 13:74-2.4(a)3 or a horsemen's organization that has received the sum of \$1 million has failed to make substantial progress in establishing the off-track wagering facility in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.7 within one year from the date the funds were allocated to it by the Commission*.

iii. In placing an available off-track wagering license up for bid, the Commission may utilize the services of the Division of Purchase and Property (Division), which is in and of the Department of the Treasury, to advertise, solicit, accept, and evaluate formal sealed bids pursuant to the Division's rules set forth in N.J.A.C. 17:12. The Commission may consult with the Division during the bidding process and ensure that the bidding process:

(1) Includes procedures for the establishment of a minimum bid threshold for the selection of a successful bidder;

(2) Notifies bidders that the awarding of a bid to a successful bidder shall be contingent upon that bidder's ability to establish its eligibility to be licensed as an off-track wagering licensee in compliance with N.J.S.A. 5:5-130 and (j) below;

(3) Requires that, in addition to submitting a monetary bid, a bidder shall submit a conceptual plan describing the off-track wagering facility the bidder intends to establish, the amenities it will offer, and its proposed or intended location; and

(4) Informs bidders that a successful bid shall be conditional upon the successful bidder's compliance with all the provisions of the Act and the applicable rules promulgated by the Commission.

iv. Upon receipt of any evaluation or recommendations, the Commission shall select the successful bidder. In selecting the successful bidder, the Commission shall consider and balance the following factors:

(1) The monetary value of the bid in comparison to other bids submitted;

(2) The level of quality of the proposed facility and the amenities it will offer in striving to be a first-rate experience for the customer that includes the provision of first-class dining facilities;

(3) The potential of the proposed facility and amenities to generate greater interest in the horse racing industry and the sport of horse racing in the State; and

(4) The proximity of the bidder's proposed or intended location for the off-track wagering facility and its impact on other planned or existing off-track wagering facilities and racetracks in the State.

v. The Commission's selection of the successful bidder and the basis for its decision shall be submitted to the Attorney General, for review and approval, within 14 days following the Commission's determination. The Commission's determination shall be deemed approved by the Attorney General if not affirmatively approved or disapproved by the Attorney General within 14 days of the date of submission. The decision of the Attorney General shall be deemed a final decision.

vi. The Commission's selection of a successful bidder and the Attorney General's approval of the successful bidder shall grant that bidder the right to file an application for the issuance of an initial off-

track wagering license. Any grant of an initial off-track wagering license is contingent upon the bidder's full compliance with the application process and the bidder's ability to meet the eligibility standards set forth in this section. The Commission's selection of a successful bidder and the Attorney General's approval shall not be construed as granting that bidder the right to receive an initial off-track wagering license.

3. An initial application, accompanied by the non-refundable filing fee, shall be filed for each off-track wagering facility proposed by the applicant pursuant to this section.

(b) An application for an initial off-track wagering license filed pursuant to this section shall not be considered complete unless:

1. The applicant demonstrates through the application that the requirements of the Act have been satisfied;

2. If the applicant for an initial off-track wagering license pursuant to this section is the owner of the land, building and premises of the proposed off-track wagering facility, it shall include a statement evidencing that it has reached an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located establishing the payment in-lieu-of taxes the applicant must pay to the municipality for the first five years of operation of the off-track wagering facility as required by N.J.S.A. 5:5-151.1, pursuant to P.L. 2011, c. 26, §7; and

3. The applicant has completely answered each question within the application and complied with the requirements of this section.

(c) The initial application form, as prescribed by the Commission, shall include disclosure requirements concerning, but not limited to, the physical plan, location and the proposed hours of operation of the proposed off-track wagering facility subject of the specific application, including the space relationship between wagering and non-wagering related amenities, the number of jobs expected to be created at the proposed facility, the gross revenues expected to be generated by the facility, the fire evacuation plan for the proposed facility, the type of food and beverages to be available, which shall include the provision of first-class dining facilities and, if alcoholic beverages are to be offered at the proposed facility, whether the requirements of the Act, as amended *[by P.L. 2011, c. 26]*, have been satisfied.

(d) The initial application form shall have attached a written internal controls procedure, which shall set forth the procedures to be implemented to effectively operate and manage the proposed off-track wager facility, and the procedures to be implemented to effectively maintain the integrity of wagering and the proceeds from wagering within the proposed off-track wagering facility. The internal control procedures shall include a procedure to foster and insure that the off-track wagering licensee complies with the requirement of the Act, which creates a right of first refusal as to certain individuals for certain employment opportunities within off-track wagering facilities.

(e) The initial application form shall be accompanied by a certification, signed and dated by a high managerial agent of the applicant, attesting that the disclosures within the application and within its attachments are true, accurate and complete.

(f) The initial application for an off-track wagering facility may be filed with the Commission at any time following the effective date of the Act, as amended *[by P.L. 2011, c. 26]*, and any initial license granted pursuant to such application shall be for a period of one year.

(g) In evaluating an application for an off-track wagering license, the Commission shall consider the proximity of the applicant's proposed site to other planned or existing off-track wagering facilities and to racetracks in this State. If, in the opinion of the Commission, the establishment of the facility at its proposed location would be inimical to the interests of another planned or established off-track wagering facility, or to a State racetrack, the Commission shall reject the application and require the applicant to consider alternative sites for the proposed facility.

(h) In evaluating an application for an off-track wagering license filed by a horsemen's organization *that has not received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1)*, the Commission shall determine whether the horsemen's organization has applied for a license pursuant to N.J.S.A. 5:5-133 within a reasonable time frame from the date the horsemen's organization became eligible to apply utilizing the benchmarks set forth in N.J.A.C. 13:74-2.4(a) *and (a)1*. If the Commission determines that the organization did not apply for a license

within a reasonable time frame, the horsemen's organization shall no longer be considered eligible to license, establish and operate the off-track wagering facility. ***In evaluating an application for an off-track wagering license filed by a horsemen's organization that has received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the horsemen's organization has applied for a license pursuant to N.J.S.A. 5:5-133 within one year from the date the funds are allocated to it by the Commission to obtain a license for the off-track wagering facility.***

(i) In evaluating an application for an off-track wagering license filed by a horsemen's organization or a well-suited entity pursuant to N.J.S.A. 5:5-130(b) and 130(c), the Commission shall assess the qualifications of the organization or entity and, in doing so, apply substantially similar standards and criteria to those the Commission applies to the Authority, its assignees, if any, and other permit holders and licensees in the State. These standards and criteria shall enable the Commission to determine by clear and convincing evidence in the opinion and discretion of the Commission that the person or persons applying for licensure on behalf of the organization or entity are well-suited to receive licensure. The Commission may refuse to issue a license if it shall find that the applicant has failed to demonstrate its suitability for licensure by clear and convincing evidence. These standards and criteria shall include, but not be limited to:

1. Proof of financial resources sufficient to enable the organization or entity to establish and conduct a quality off-track wagering facility or facilities 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. All requirements and considerations set forth in N.J.A.C. 13:74-5.8.

(j) Following a determination that the application for an initial off-track wagering license is complete, the Executive Director shall within 14 days review the application in accordance with the Act to insure that the application is in due form and meets the requirements of law in all respects. Upon the Executive Director being satisfied that these requirements are met, and consistent with the public notice requirements of the Act, the Commission, within 45 days of the receipt of the completed application, certification and non-refundable filing fee, shall, at the cost of the applicant, hold a public hearing in the municipality in which the proposed off-track facility is to be located.

(k) Between 30 days and 60 days following closing of the record on the public hearing described in (j) above, the Commission shall make a final determination on the application. The Commission shall approve the application if it determines that the applicant by clear and convincing evidence has demonstrated, through its application and internal control procedures, that:

1. The plan for the proposed facility, including its size, seating capacity, parking and services to be provided reflects appropriate standards of quality including, but not limited to, first-class dining;
2. The grant of a license to establish the proposed off-track wagering facility will not be inimical to the interest of the public and the horse racing industry in this State; and
3. The proposed off-track wagering facility site is in an appropriate location;

(l) If the entity receiving the off-track wagering license is not a permit holder in this State, the grant of the license shall be contingent upon the licensee showing simulcast New Jersey races and allowing wagering thereon at the off-track wagering facility, subject to the rules and regulations of the Commission including, but not limited to, N.J.A.C. 13:74-8.2.

(m) An off-track wagering license shall be issued only if the permit holders in this State schedule at least the minimum number of race dates required by N.J.S.A. 5:5-156.

(n) The Commission's determination on the application shall be submitted to the Attorney General, for review and approval, within three business days following the Commission's determination. The determination of the Commission shall be deemed approved by the Attorney General if not affirmatively approved or disapproved by the Attorney General within 14 days of the date of submission. The decision of the Attorney General shall be deemed a final decision. The

Commission shall issue the license upon approval of the Attorney General.

(o) Any off-track wagering license issued to the applicant shall specify the effective dates of the license, the location of the off-track wagering facility subject of the license, the periods of time during the calendar year and the maximum hours of operation during which off-track wagering is permitted at the facility and prescribe any other conditions or terms the Commission deems appropriate, including, but not limited to, the requiring of an annual audit of the off-track wagering licensee's books and records pertaining to off-track wagering, as well as the imposition of a condition consistent with N.J.A.C. 13:74-11.2.

(p) The Commission shall issue no more than 15 off-track wagering facility licenses, and no more than eight such licenses may be granted in the two-year period commencing on the effective date of the Act.

13:74-2.3 Prerequisites to and procedures for grant of renewal of an off-track wagering license

(a) These procedures shall apply where the applicant has been granted an initial license for an off-track wagering facility within a particular municipality, which initial license has not lapsed, where the grant of that initial license occurred pursuant to the provisions of the Act and N.J.A.C. 13:74-2.1 and 2.2, and where the applicant or its successor in interest makes proper application for the renewal of an initial or previously renewed license for an off-track wagering facility itself subject of an initial license grant.

(b) A renewal license for an off-track wagering facility, as issued by the Commission, shall run for a one year period commencing January 1 and ending on December 31 of the same year. Where, however, an initial one year off-track wagering license granted pursuant to the procedure set forth in N.J.A.C. 13:74-2.1 or 2.2 shall by operation of the calendar expire on a date which would result in a lapse of such license if these dates were to be complied with, the Commission on a one-time basis and at no additional cost to the off-track wagering licensee may renew the initial license period to the last day of December of the year in question.

(c) A renewal application for an existing off-track wagering facility license shall be made by the off-track wagering licensee on a form prescribed by the Commission, accompanied by a non-refundable filing fee of \$1,250 and shall be filed no later than October 15 of the year prior to that for which the license renewal is sought.

(d) A renewal application filed by the Authority on behalf of itself or on behalf of a permit holder that is a party to the participation agreement shall not be considered complete unless:

1. The permit holder or permit holders at Monmouth Park and the thoroughbred and standardbred permit holder or permit holders at the Meadowlands Racetrack have scheduled at least the minimum number of live race dates required by P.L. 2001, c. 199 (N.J.S.A. 5:5-156) as amended;
2. The application includes a copy of a fully executed participation agreement as required by the Act and the Authority or permit holder demonstrates that:

i. The participation agreement meets the requirements of the Act and is consistent with current law to the satisfaction of the Commission and Attorney General and that each party to the participation agreement is:

- (1) In compliance with the participation agreement;
- (2) In compliance with all permits;
- (3) In compliance with all applicable minimum live race date requirements in the Act;
- (4) Licensed by the Commission or otherwise qualified to participate in off-track wagering; and
- (5) In good standing with the Commission and State.

(e) (No change in text.)

(f) The renewal application shall include as attachments a written internal controls procedure as required by N.J.A.C. 13:74-2.1(d) and 2.2(d).

(g) (No change in text.)

(h) In evaluating an application for the renewal of an off-track wagering license to be issued after ***[January 1, 2012]* *December 31, 2011, the effective date of P.L. 2011, c. 205,*** for a facility that has not commenced operation in compliance with the Act, the Commission shall determine whether the off-track wagering licensee has made progress

[on an annual basis] in establishing the off-track wagering facility pursuant to the **applicable** benchmarks set forth in N.J.A.C. 13:74-2.4.

***1. In evaluating an application filed by the Authority on behalf of itself or on behalf of a permit holder and the Authority or permit holder has not been required to make a deposit or post a bond, or irrevocable letter of credit pursuant to N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has made progress on an annual basis in establishing the off-track wagering facility pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.4(b).**

2. In evaluating an application filed by the Authority on behalf of itself or on behalf of a permit holder and the Authority or permit holder has been required to make a deposit or post a bond, or irrevocable letter of credit pursuant to N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has made substantial progress in the Commission's judgment pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility within one year of making the deposit, or posting the bond, or irrevocable letter of credit.

3. In evaluating an application filed by a horsemen's organization which has not received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has made progress on an annual basis in establishing the off-track wagering facility pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.4(a).

4. In evaluating an application filed by a horsemen's organization that has received the sum of \$1 million as provided in N.J.S.A. 5:5-130(b)(1), the Commission shall determine whether the off-track wagering licensee has complied with N.J.A.C. 13:74-2.4(a)3 and has made substantial progress in the Commission's judgment pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility within one year from the date the funds were allocated to it by the Commission.

5. In evaluating an application filed by a well-suited entity, the Commission shall determine whether the off-track wagering licensee has made progress in the Commission's judgment pursuant to the benchmarks set forth in N.J.A.C. 13:74-2.8.*

(i) (No change in text.)

(j) Following the Commission's consideration of the renewal application, and prior to the expiration date of the initial license or previously renewed license under which the off-track wagering facility is then operating, the Commission subject to the review and approval of the Attorney General shall issue to the off-track wagering licensee an off-track renewal license if appropriate. An off-track renewal license shall be issued to the off-track wagering licensee where it demonstrates by clear and convincing evidence that:

1.-2. (No change.)

3. The participation agreement meets the requirements of the Act and is consistent with current law to the satisfaction of the Commission and Attorney General; and

4. (No change.)

(k) (No change in text.)

13:74-2.4 Benchmarks for the determination of progress applicable to the establishment of an off-track wagering facility prior to its operation

(a) An application for the grant of an initial off-track wagering license filed by a horsemen's organization pursuant to N.J.S.A. 5:5-130(b)(2) shall not be considered by the Commission unless the application is filed within a reasonable time frame from the date the horsemen's organization became eligible to apply for an initial license. For purposes of this section, the phrase "reasonable time frame" shall mean that any such application must be filed with the Commission within one year of the date that the horsemen's organization became eligible to apply for the particular initial license. Additionally, the filed application shall, within one year of the date that the horsemen's organization became eligible to apply for the particular initial license, be determined to be complete by the Racing Commission's Executive Director. Where an application is not filed within one year of the date that the horsemen's organization became eligible to apply for an initial license, or where such application

is filed within such time frame but is determined not to be complete by the Racing Commission's Executive Director within that same time period, the application shall be denied by the Commission consistent with (d) below.

1. In order for its application to be found to be complete, and in addition to the other requirements of this chapter, the horsemen's organization shall demonstrate through its application that it has met the following benchmarks:

i. It has identified a suitable location for the proposed off-track wagering facility;

ii. It has entered into an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located establishing the payment in-lieu-of taxes the Authority or the permit holder must pay to the municipality for the first five years of the operation of the off-track wagering facility pursuant to N.J.S.A. 5:5-151.1; and

iii. The horsemen's organization can demonstrate that it has met one of the following benchmarks, it has:

(1) Obtained fee title ownership of the proposed property;

(2) Obtained a leasehold interest in the proposed property for a period of not less than five years;

(3) Entered into an option agreement with a property owner to acquire either (a)iii(1) or (2) above; or

(4) Executed a letter of intent with the current property holder in sufficient detail to demonstrate the material factors of a purchase or lease or agreement.

(b) Commencing on January 1, 2012, any applicant filing an application for an initial off-track wagering license or for the renewal of a license for an off-track wagering facility that is not operational must demonstrate compliance with each of the following requirements:

1. Within one year from the date the application is filed, the applicant shall comply 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, 2.2 or 2.3, as applicable;

ii. The applicant has demonstrated to the Commission that the proposed off-track wagering facility is in a suitable locations and the applicant has:

(1) Obtained fee title ownership of the proposed property;

(2) Obtained a leasehold interest in the proposed property for a period of not less than 5 years;

(3) Entered into an option agreement with a property owner to acquire either (b)iii(1) or (2) above; or

(4) Executed a letter of intent with the current property holder in sufficient detail to demonstrate the material factors of a purchase or lease or agreement;

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 and begin operation. 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

(2) A detailed source of capital equal to the project development budget. All committed capital shall be supported by financial statements prepared by a CPA and shall demonstrate the applicant's ability to commit such funds to the establishment of the off-track wagering facility. Any third-party capital shall be supported by commitment letters or other documentation demonstrating that such entities are prepared to invest such capital; 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 third-party market study completed by a qualified firm, which demonstrates the market feasibility of the proposed off-track wagering facility;

(2) A 10-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; and

2. Within one year from the date the Commission issues an off-track wagering license, the off-track wagering facility shall be fully operational for the simulcasting of horse races and the acceptance of pari-mutuel wagers.

(c) Upon receiving a request by an applicant or licensee for an extension of time in which to comply with the requirements of (b)2 above, the Commission may, in its discretion, grant an extension if it determines that the applicant or licensee has made all reasonable efforts to comply therewith but has been precluded from doing so by exigent circumstances beyond its control.

1. The duration of an extension shall be determined by the Commission in its discretion on a case-by-case basis.

2. Notwithstanding (c) above, all off-track wagering facilities shall be fully operational for the simulcasting of horse races and the acceptance of pari-mutuel wagers within two years from the date the off-track wagering license was issued and the Commission shall not grant any extension that would be inconsistent with this requirement.

(d) The failure of an applicant or licensee to meet the benchmarks in this section shall constitute a basis for the denial of an initial off-track wagering license or the renewal of an off-track wagering license, respectively. The only extensions that may be applied for and considered by the Commission, pursuant to this section, shall be time extension requests of (b)2 above, as authorized by (c) above.

***13:74-2.5 Benchmarks for determining whether a permit holder has made progress since the signing of the participation agreement toward establishing the permit holder's share of the 15 off-track wagering facilities**

(a) A permit holder subject to the participation agreement entered into prior to the effective date of P.L. 2011, c. 26 shall have made progress toward establishing its share of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 since the signing of the participation agreement.

1. The Commission may allow a permit holder to retain its share of off-track wagering facilities that have not received a license pursuant to N.J.S.A. 5:5-133 on or before the effective date of P.L. 2011, c. 205 without making a deposit or posting a bond or irrevocable letter of credit on or before June 28, 2012, as required by N.J.S.A. 5:5-130(b)(1), if the Commission finds that the permit holder is making progress as of that date toward obtaining an off-track wagering license and establishing an off-track wagering facility in accordance with the benchmarks set forth in (a)1i(1) and (2) below and the permit holder demonstrates on an annual basis that it continues to make progress in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.4(b).

i. In determining whether the permit holder has made progress toward obtaining an initial off-track wagering license for, and the establishment of, an off-track wagering facility within its share, the Commission will consider the following benchmarks:

(1) A permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities if it has entered into an agreement, in connection with good faith negotiations over the sale or lease of a racetrack under its control, to transfer allocated off-track wagering licenses or facilities to an individual or entity that is a bona fide prospective purchaser or lessee, or if no such agreement has yet been reached, the permit holder has demonstrated to the satisfaction of the Commission either:

(A) The execution of such an agreement is imminent based upon the portions of such an agreement agreed upon in principle by the parties as evidenced by a memorandum of understanding or similar accord; or

(B) Negotiations concerning such an agreement have been unsuccessful and the permit holder has plans for soliciting new sources of interest or entering into new negotiations that, in the judgment of the Commission, have a reasonable likelihood of resulting in a successful conclusion.

I. In order for the Commission to deem that sufficient progress has been made to meet the requirements of the benchmark in (a)1i(1)(B) above, the permit holder shall bear the burden of establishing to the satisfaction of the Commission that the plans for soliciting new sources of interest or entering into new negotiations have a reasonable likelihood of resulting in a successful conclusion.

II. To ensure that the permit holder remains in compliance with the benchmark in (a)1i(1)(B) above, the Commission may require the filing of periodic or regular reports; or

(2) If a permit holder does not meet the requirements set forth in (a)1i(1) above, the permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities if it can demonstrate to the Commission that as of the date upon which a deposit, bond, or irrevocable letter of credit is due:

(A) It has identified a suitable location for a proposed off-track wagering facility;

(B) It has entered into an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located establishing the payment in-lieu-of taxes the Authority or the permit holder must pay to the municipality for the first five years of the operation of the off-track wagering facility pursuant to N.J.S.A. 5:5-151.1; and

(C) The permit holder can demonstrate that it has met one of the following benchmarks, it has:

I. Obtained fee title ownership of the proposed property;

II. Obtained a leasehold interest in the proposed property for a period of not less than five years;

III. Entered into an option agreement with a property owner to acquire either (a)1i(2)(C)I or II above; or

IV. Executed a letter of intent with the current property holder in sufficient detail to demonstrate the material factors of a purchase or lease or agreement.

13:74-2.6 Requirement that deposit, a bond, or irrevocable letter of credit be posted or deposited to retain rights to off-track wagering facilities that have not received an initial license on or before December 31, 2011

(a) Any of the 15 off-track wagering facilities authorized by N.J.S.A. 5:5-136 that have not received an initial license pursuant to N.J.S.A. 5:5-133 on or before December 31, 2011, the effective date of P.L. 2011, c. 205, shall each be subject to a cash deposit, a bond, or an irrevocable letter of credit to be posted or deposited by the permit holder in the amount of \$1 million for each facility in the permit holder's share that remains to be licensed, which deposit shall be paid to the Commission on or before June 28, 2012.

(b) A permit holder that has made a deposit or posted a bond, or irrevocable letter of credit pursuant to (a) above in connection with an off-track wagering facility in the permit holder's share that remains to be established shall obtain a license and make substantial progress in the Commission's judgment pursuant to the progress benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility within one year of making the deposit, or posting the bond, or irrevocable letter of credit.

1. A permit holder that has obtained a license and made substantial progress in full compliance with (b) above in the Commission's judgment shall have the deposit, bond or irrevocable letter of credit returned to it at the end of the one-year period.

2. If, within this one-year period, a permit holder fails to obtain a license for the off-track wagering facility or fails to make substantial progress in full compliance with (b) above in the Commission's judgment, the amount deposited or posted by the permit holder shall be distributed by the Commission to the representative horsemen's organization in this State for use in establishing an off-track wagering facility or facilities pursuant to N.J.S.A. 5:5-130(b)(2).

3. Pursuant to N.J.S.A. 5:5-130(b)(2), a representative standardbred horsemen's organization shall have the right to establish any off-track wagering facility not established by the permit holder at Freehold Raceway and to receive any deposits, bonds, or irrevocable letters of credit forfeited by that permit holder.

(c) Any off-track wagering facility within a permit holder's share that has not received an initial license on or before December 31, 2011 and for which a deposit, bond, or irrevocable letter of credit is not made or posted by the permit holder on or before June 28, 2012 shall no longer be considered as part of the permit holder's share and the off-track wagering facility shall be available to be established by a horsemen's organization in this State as provided by N.J.S.A. 5:5-130(b)(2).

1. Pursuant to N.J.S.A. 5:5-130(b)(2), a representative standardbred horsemen's organization shall have the right to establish any off-track wagering facility not established by the permit holder at Freehold Raceway.

2. Any horsemen's organization that has not received the amount deposited or posted by a permit holder pursuant to N.J.S.A. 5:5-130(b)(1) shall make application for an off-track wagering license pursuant to N.J.S.A. 5:5-133 in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.4(a). If the Commission determines that a horsemen's organization failed to comply fully with the benchmarks set forth in N.J.A.C. 13:74-2.4(a), the horsemen's organization shall no longer be considered eligible to license, establish and operate the off-track wagering facility.

(d) Notwithstanding subsection (a) above, if the Commission determines that a permit holder is making progress toward obtaining an off-track wagering license and establishing an off-track wagering facility according to the benchmarks set forth in N.J.A.C. 13:74-2.5, the Commission may allow a permit holder to retain its share of off-track wagering facilities to be established without making a deposit or posting a bond or irrevocable letter of credit provided the permit holder continues to make progress on an annual basis in accordance with the benchmarks set forth in N.J.A.C. 13:74-2.4(b).

(e) A horsemen's organization that has received an allocation of funds from the Commission pursuant to N.J.S.A. 5:5-130(b)(1) shall obtain a license in compliance with N.J.A.C. 13:74-2.4(a)3 and shall make substantial progress in the Commission's judgment pursuant to the progress benchmarks set forth in N.J.A.C. 13:74-2.7 toward establishing the off-track wagering facility or facilities within one year from the date the funds are allocated to the horsemen's organization by the Commission.

1. If, within this one-year period, the horsemen's organization fails to obtain a license for the off-track wagering facility or fails to make substantial progress in full compliance with (e) above in the Commission's judgment, the horsemen's organization shall return to the Commission the funds allocated to it in their entirety at the end of the one-year period, and the Commission shall return such funds to the permit holder originally making the deposit, or posting the bond or irrevocable letter of credit, to be used for capital improvements at the permit holder's racetrack.

2. If, within this one-year period, the horsemen's organization fails to obtain a license for the off-track wagering facility or fails to make substantial progress in full compliance with (e) above in the Commission's judgment, the off-track wagering facility shall no longer be considered to be eligible to be established by a horsemen's organization pursuant to N.J.S.A. 5:5-130(b)(2) and shall be available to be established by a well-suited entity pursuant to the bidding procedure set forth in N.J.A.C. 13:74-2.2(a)2.

(f) Any off-track wagering facility that, pursuant to (b)2 or (c) above, is no longer part of a permit holder's share and is no longer eligible to be established by a horsemen's organization pursuant to (c)2 or (e)2 above shall be available to be established by a well-suited entity in accordance with the bidding procedure set forth in N.J.A.C. 13:74-2.2(a)2, upon proper application pursuant to N.J.A.C. 13:74-2.2, and in accordance with the provisions in N.J.S.A. 5:5-34 and the Act.*