



January 2, 2025

Via Email to jbutler@maryland.gov

James Butler, Assistant Deputy Director, Chief of Staff
Maryland Lottery and Gaming Control Agency
1800 Washington Boulevard, Suite 330
Baltimore, MD 21230

RE: Proposed Regulations related to Sports Wagering

Assistant Deputy Director Butler:

In response to the regulations related to Sports Wagering proposed by the Maryland Lottery and Gaming Control Agency ("MLGCA"), which were published in the December 2, 2024 Issue of the Maryland Register, DraftKings Inc. ("DraftKings") submits the following comments and questions for consideration. As a leading sports wagering operator in the United States, DraftKings has first-hand experience with regulatory frameworks that address this vertical and submits this comment based on its operational knowledge in multiple regulated jurisdictions.

36.10.13.39 Promotional Play

Comment: DraftKings respectfully requests the MLGCA consider striking the following proposed provision in its entirety as this type of regulatory action goes beyond the authority the Maryland General Assembly has delegated to the MLGCA when passing sports wagering. First, the definition of "proceeds" under Maryland's sports wagering law, Md. Code Ann., State Gov't § 9-1E-01(h), explicitly allows for the deduction of promotional credits. Specifically, the statute states:

(h) 'Proceeds' means the amount of money wagered on a sporting event, less: (1) the amount returned to successful bettors; (2) the cash equivalents of any merchandise or thing of value awarded as a prize to successful bettors; (3) free bets and promotional credits redeemed by bettors; and (4) all excise taxes paid by a sports wagering licensee in accordance with federal law." (Emphasis added.)

In the statute's only other reference to promotions, the General Assembly granted the MLGCA the "power to regulate the conduct of sports wagering" including "the types and values of promotional items that may be given away to encourage sports wagering." MD Code, State Government, § 9-1E-04 (b)(6)(iii). Taken together, the statutory language clearly provides for and evinces a legislative intent that promotional items "may be given away to encourage sports wagering," and that "free bets and promotional credits redeemed by bettors" will be deducted in the calculation of taxable proceeds.

In COMAR 36.10.13.39(A)-(B), the MLGCA enacted rules that exercise its statutory authority to regulate the "types" ("promotional play if it is not awarded as a cashable credit") and "values" ("up to \$5,000 per bettor per day without executive approval") of promotional play that operators may issue to encourage sports wagering. However, we believe an effort to eliminate



promotional play altogether falls outside of the scope of authority that the General Assembly delegated to the MLGCA, and directly contravenes both legislative language and the legislative intent that such promotions and deductions will be a component of the sports wagering framework.

The Court of Appeals for Maryland has noted that “*when the Legislature grants broad power to an Executive Branch agency to promulgate regulations in a given area, the agency's regulations are valid unless they contradict the Legislature's express language or purpose in enacting the statute.*” *Benson v. State*, 389 Md. 615, 645, 887 A.2d 525, 542 (2005) (emphasis added). It is our reading that the Legislature did not grant the MLGCA broad powers as it pertains to the deduction of promotional play redeemed by players, but rather only the power to regulate the “types” and “values” of the promotional credits issued. However, even if the MLGCA had broad powers in this area, to eliminate the deduction of sports wagering promotional credits altogether would directly contradict the General Assembly by rendering moot the express statutory language providing that promotional gaming items “*may be given away*” to bettors and that free bets and promotional credits will be “*redeemed by bettors*” and deducted in the calculation of taxable proceeds.

The General Assembly has shown that it will specifically delegate to the MLGCA the authority to place limitations on the deduction of promotional credits where such limitation is intended. For instance, in the state’s laws governing Video Lottery Terminals, Md. Code Ann., State Gov’t §9-1A-01(u), the General Assembly explicitly authorized the MLGCA to limit, by regulation, the percentage of free promotional play issued by a video lottery facility after the first fiscal year of operations. That same act separately provided for the MLGCA to regulate the “*the types and values of promotional items that may be given away to encourage play of video lottery terminals and table games.*” See MD Code, State Government, § 9-1A-04(d)(6). While substantially identical language was used in the sports wagering law to limit the “*types and values*” of promotional items given away to encourage sports wagering, the General Assembly did not copy over any statutory language limiting the percentage of promotional play that may be deducted in sports wagering. We believe it to be clear that the General Assembly did not intend for the MLGCA to broadly cap sports wagering promotional credits, let alone to eliminate them altogether.

It is our understanding the MLGCA believes their authority comes from a provision within the sports wagering statute that states, “*Except as otherwise provided in this Subtitle, the Commission shall regulate sports wagering and the conduct of sports wagering to the same extent that the Commission regulates the operation of video lottery terminals and table games under Subtitle 1A of this Title.*” See MD Code, State Government, § 9-1E-04(A). The MLGCA contends that because they maintain the statutory authority to limit video lottery facility’s promotional play deduction, they can also limit sports wagering operators to the same extent.

However, at the Maryland Lottery and Gaming Control Commission meeting on December 19, 2024, the Commission voted to withdraw proposed amendments to Regulation .36 and .15 of COMAR Title 36, which would have eliminated the ability of a video lottery facility to deduct promotional play redeemed by players from its taxable casino operation revenues. Therefore, if using that logic, the extent of the MLGCA's authority to limit sports wagering operators' ability to deduct promotional play should only extend to the extent they regulate video lottery facilities' ability to deduct a portion of their promotional play, which remains permissible following withdrawal of rules in December. Further and continuing to use that logic, removing an operators' ability to deduct a portion of their promotional play would be an overreach of the



MLGCA, as their authority to do so would go beyond the extent that it regulates video lottery facilities.

Lastly, the fact the General Assembly specifically provided for the deduction of free bets and promotional credits in the sports wagering law without granting the MLGCA authority to eliminate or impose a cap on such deductions speaks to the important role of promotional play in establishing and maintaining a sports betting ecosystem that achieves the revenue goals of the voters in authorizing sports betting on the ballot and the General Assembly in implementing a sports betting framework by law. Promotional play builds a strong and revenue-generating sports betting ecosystem because it is an effective customer acquisition tool and is key in converting sports bettors from the illegal, offshore sports wagering market to the legal, regulated market. Furthermore, operators do not receive any revenue for bets made with free credits, so the deduction of promotional play enshrined in Maryland's sports wagering law also reflects a common-sense position that amounts not received as revenue should not be taxed as revenue.

For the reasons outlined above, DraftKings respectfully requests the MLGCA withdraw this proposed regulation and revert their treatment of promotional play deductions back to its current status, as reflected in the suggested language below.

MLGCA-proposed Language:

F. [~~Limitation on Free~~] No Deduction From Proceeds for Promotional Play.

~~[(1) Through the first full fiscal year of a sports wagering licensee's operations, a licensee's proceeds exclude money given away by the licensee as free promotional play and used by bettors to make a sports wager.~~

~~(2) After the first full fiscal year of a sports wagering licensee's operations, the amount of money given away as free promotional play in a fiscal year may not exceed a percentage of the licensee's proceeds received in the prior fiscal year that equates to 20 percent of total sports wagering proceeds that the sports wagering licensee generated in the prior fiscal year.~~

~~(3) After the first fiscal year of sports wagering activity, the 20 percent cap specified under §F(2) of his regulation includes all revenues generated by casino sports wagering and gaming activities.~~

~~(4) An amount of money given away as free promotional play in a fiscal year exceeding the percentage defined in §F(2) of this regulation of the sports wagering licensee's proceeds of the prior fiscal year shall be allocated as proceeds.] No percentage of promotion play may be deducted from proceeds.~~

DraftKings-proposed Language:

F. Limitation on Free Promotional Play.



(1) Through the first full fiscal year of a sports wagering licensee's operations, a licensee's proceeds exclude money given away by the licensee as free promotional play and used by bettors to make a sports wager.

(2) After the first full fiscal year of a sports wagering licensee's operations, the amount of money given away as free promotional play in a fiscal year may not exceed a percentage of the licensee's proceeds received in the prior fiscal year that equates to 20 percent of total sports wagering proceeds that the sports wagering licensee generated in the prior fiscal year.

(3) After the first fiscal year of sports wagering activity, the 20 percent cap specified under §F(2) of his regulation includes all revenues generated by casino sports wagering and gaming activities.

(4) An amount of money given away as free promotional play in a fiscal year exceeding the percentage defined in §F(2) of this regulation of the sports wagering licensee's proceeds of the prior fiscal year shall be allocated as proceeds.

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Thank you for your consideration of DraftKings' comment regarding the MLGCA's proposed rulemaking for Sports Wagering. Please feel free to reach out should you or anyone else at the MLGCA have any questions about our submission or our experience in other regulated jurisdictions.

Sincerely,

DraftKings Inc.