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**Comments of James S. Calvin, President  
New York Association of Convenience Stores**

*concerning*

**“Regulation of Courier Services that Purchase and Claim  
Certain Lottery Tickets and Prizes as Agents for Customers”**

***New York State Gaming Commission***

***ID No. SGC-17-18-00002-P***

On behalf of the thousands of convenience stores from Pittsford to Potsdam to Patchogue that are licensed to responsibly sell New York Lottery products in a controlled setting, a highly skeptical New York Association of Convenience Stores respectfully submits the following comments on the above-captioned rulemaking.

**Statutory Authority?**

There are serious doubts as to whether the Gaming Commission has the necessary statutory authority to create the envisioned “courier service” license category.

New York State Tax Law Section 1604, Subsection b, expressly authorizes the Lottery Division to “license agents to sell tickets for the state lottery,” but nowhere does the law authorize the Division to license entities as agents of lottery customers.

Tax Law Section 1605 states that the Lottery Division “may license as agents to sell lottery tickets such persons as in its opinion will best serve public convenience.” However, as defined in the proposed regulation, courier services would not *sell* lottery tickets; they would *buy* lottery tickets on behalf of customers.

**New Standard: Age Verification**

The proposed regulation would create a troubling new standard for verifying the age of a lottery customer.

Retail stores physically check the customer’s ID to verify age. In fact, under a campaign titled “We Check ID,” the Lottery Division requires such stores to provide age verification training to all personnel and display “We Check ID” stickers and signage at the point of sale.

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As remote re-sellers conducting business online, however, courier services won't be able to physically check a customer's driver's license or other identification.

Instead, under the rulemaking, courier services would utilize "native or third-party age verification procedures" to "verify that each person registering for an account with such licensee is not under the age of 18." They would file with the Gaming Commission "a detailed explanation of the steps taken to prevent persons under the age of 18 from placing a request for courier services through such licensee's network."

Age verification conducted remotely using credit card information and/or other online resources is far less reliable than live, face-to-face interaction. If the Gaming Commission crosses this threshold, it will establish a new, lower standard for age verification that brick-and-mortar retailers may wish to emulate, rendering moot the entire "We Check ID" program.

### **Double Standard: Penalties for Underage Sales**

Under Section 1610 of the Tax Law, if a licensed lottery agent sells a ticket to someone under 18, in addition to fines, they are guilty of a misdemeanor. If a licensed courier service purchases a lottery ticket to someone under 18, in addition to fines, there is no criminal exposure. There should be a level playing field.

### **Coining a New Benchmark: "Minimal Cannibalization"**

The Notice of Proposed Rulemaking surmises that courier service activity will cause "minimal cannibalization of sales from existing lottery retailers." There is no explanation of how that conclusion was reached, or what "minimal" is intended to mean. Less than one percent? Five percent? Ten? NYACS suggests that *any* amount of cannibalization merits an in-depth analysis of the impact on small business sales, employment, and viability. Without undertaking such an analysis, the Commission asserts that "No adverse impact on small businesses is anticipated."

In fact, the Gaming Commission did not even entertain the possibility that brick-and-mortar lottery retailers would be negatively impacted. Suppose an active courier service in a given Brooklyn neighborhood were to capture 25 percent of the lottery draw game business in that neighborhood. What would be the impact on brick-and-mortar retailers on those blocks? The courier service perhaps would still come in the store to buy the tickets, but 25 percent fewer lottery customers coming through the door would drive down the store's sales of whatever non-lottery products those lottery customers typically purchased during their visit.

### **Lottery Ticket, Redefined**

Existing Section 5000.2(k) of the New York Codes, Rules and Regulations defines lottery ticket as "any Lottery ticket approved by the commission for sale to the general public."

Under the proposed rulemaking, a lottery ticket would no longer need to be tangible. The new definition under Section 5000.2(o) would be "a representation, the form of which is prescribed by the commission, of the lottery play or plays sold to a player."

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This strikes us as an ill-advised step by the Gaming Commission in the direction of online lottery sales, which in our opinion would inflict “maximum cannibalization” upon brick-and-mortar lottery retailers without significantly increasing net proceeds for education.

### **Double Standard: Charging an Extra Fee**

The Gaming Commission proposes to remove from Section 5000.2 the following existing restriction: “No person shall sell a ticket at a price greater than that fixed by the commission...” and replace it with the following:

*“Price charged. Tax Law section 1609(a) governs restrictions on the price charged for lottery tickets and who may sell lottery tickets. In addition, a courier service may charge a convenience charge to a courier customer for services approved by the commission pursuant to Part 5014 of this subchapter. Any such fee shall be deemed to be independent of a ticket price and shall be subject to the requirements of section 5014.19 of this Chapter.”*

The Gaming Commission is correct that Tax Law Section 1609(a) governs prices charged for lottery tickets. Specifically, it says that “No ticket shall be sold at a price greater than that fixed by the division nor shall a sale be made by any person other than a licensed lottery sales agent.”

Yet the proposed rulemaking contradicts both of those restrictions by permitting courier services to make sales, and allowing them to charge an extra fee that brick-and-mortar lottery sales agents are not permitted to charge. Neither is expressly authorized by Section 1609(a).

Lottery retailers today receive the same 6-cent commission on a \$1 scratch-off ticket they received at the inception of New York Lottery 50 years ago. They begged the Lottery Division for a higher commission rate in order to offset their sharply higher operating costs. Each time, the answer has been a flat no. Yet the Gaming Commission proposes to grant courier services permission to tack on “a reasonable service charge” to the price of a re-sold ticket. In fairness, shouldn’t brick-and-mortar retailers be permitted to do the same?

### **Double Standard: Criteria for New Licensees**

The document “NYS Lottery Retailers Overview,” issued by the Lottery Division, says in part that in considering applications for new retail lottery locations, the commission “must be assured of the retailer’s ability to create new Lottery sales.” No such requirement is contained in the criteria for courier service licensing. Why not?

The document goes on to state that “If a new location merely redistributes sales from existing locations, it is not considered a justifiable investment.” It sounds to us like courier services would merely redistribute sales from existing locations.

Moreover, a retail lottery establishment can have its license suspended “for failing to sell a sufficient number of lottery tickets required by the licensing agreement between the lottery sales agent and the commission,” yet under this rulemaking, courier services would be shielded from such risk.

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## **Double Standard: The Temporary License**

The rulemaking would permit the Gaming Commission to issue a “temporary courier service license to an applicant on a provisional basis pending completion of an initial application review process.”

We are aware of no such courtesy ever being extended by the Gaming Commission to brick-and-mortar retailers applying to become lottery sales agents.

## **Additional Questions**

- Since licensed couriers would be providing a service, would such service be subject to state and local sales tax?
- As a condition to the acceptance of a courier service license, licensees would have to agree to “indemnify and hold harmless the State, the commission and any of the employees of the State or the commission from any and all claims, damages, claims for damages, causes of action or suits that may arise.” Shouldn’t courier services also be required to indemnify the licensed sales agents from whom they purchase lottery tickets on behalf of their customers?
- The \$600 prize payout provision is designed in part to protect the lottery sales agent from having to keep large amounts of cash on hand to pay big lottery prizes. What’s to stop a courier service from bringing multiple smaller winning tickets totaling thousands of dollars into one lottery retail outlet for redemption at any given time, defeating the intent of the threshold?
- Section 1605 of the New York State Tax Law states in part that “no license shall be issued to any person to engage in business exclusively as a lottery sales agent.” Will that policy also apply to courier services?

## **Conclusion**

The New York Association of Convenience Stores is dismayed that the Gaming Commission has proposed regulations that would:

- Attempt to sanction the rogue practice of re-selling New York Lottery tickets over the Internet without undertaking a full and objective analysis of the impact on existing small businesses.
- Introduce inappropriate double standards and compromise age verification principles in order to appease a small number of unlicensed entities wishing to re-sell lottery tickets online.
- Confer upon “courier services” privileges never before granted to brick-and-mortar lottery retailers whose decades of commitment and hard work have grown New York Lottery into a \$10 billion enterprise.

Thank you for the opportunity to comment.