

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 23, 2022

Sam Bregman, Chair
New Mexico Racing Commission
4900 Alameda Blvd. NE, Suite A
Albuquerque, New Mexico 87113

Re: Accounts for the Deposit of Gaming Funds for Purses

Dear Mr. Bregman:

You have requested an opinion regarding the failure of the New Mexico Horsemen's Association ("NMHA") to comply with recent amendments adopted by the Racing Commission ("Commission") to its rules governing accounts established for the deposit of gaming funds for purses. In particular, you ask:

1. May NMHA refuse to transfer gaming funds to racetrack associations as required by 15.2.2.9 NMAC (as amended on 5/24/2022)?
2. Are the gaming funds described in Section 60-2E-47(E) of the Gaming Control "public funds" as contemplated by the Audit Act?
3. Is NMHA a "depository of public funds" as contemplated by Section 12-6-9 of the Audit Act?¹

As discussed below, based on our examination of the applicable constitutional, statutory and case law authority and information provided in the request, we conclude, that: (1)

¹ Your request also asks whether NMHA's refusal to transfer the gaming funds to racetrack associations constitutes conversion, embezzlement or some other wrongful act. A response to that question would require an inquiry into the specific facts and circumstances of NMHA's actions, which is outside the scope of our statutory authority to give written opinions "upon any question of law." NMSA 1978, § 8-5-2(D). In addition, attorney general opinions are available to the public and are not covered by attorney-privilege. For these reasons, we recommend that questions regarding the Commission's response to a specific violation or potential violation of its rules should be discussed with the Commission's legal counsel, including whether it should be referred to the appropriate district attorney for handling as a criminal matter.

NMHA has no apparent legal authority to refuse to transfer gaming funds it holds to racetrack associations as required by the Commission's rules; (2) the gaming funds described in NMSA 1978, Section 60-2E-47(E) do not constitute "public funds"; and (3) NMHA is not a "depository of public funds" under Section 12-6-9 of the Audit Act.

Commission Rules Applicable to Gaming Funds for Purses

The Gaming Control Act imposes a gaming tax on the net revenues or "net take" of gaming operator licensees, including racetracks, from gaming activities. NMSA 1978, §§ 60-2E-3(FF), 60-2E-47. In addition to the gaming tax, a gaming operator licensee that is a racetrack is required to "pay twenty percent of its net take to purses to be distributed in accordance with rules adopted by the state racing commission." *Id.* § 60-2E-47(E).

As directed under Section 60-2E-47(E), the Commission has adopted a rule governing a racetrack's distribution of the required twenty percent of the net take. 15.2.2.9 NMAC. The Commission recently adopted amendments to the rule, effective May 24, 2022. Prior to the amendments, the rule, in pertinent part, required NMHA to "establish interest-bearing accounts, designated as gaming funds for purses," into which racetrack associations that are gaming operators were required to deposit "twenty percent of the daily net take as defined in the gaming control act." 15.2.2.9(B)(1) NMAC (2003). The rule required NMHA to make weekly distributions from the accounts to racetracks for purses used to pay the winners at race meets, and to "keep accurate, complete and legible records with reports to the commission." 15.2.2.9(A)(5), (B)(2) NMAC (2003).

As amended, the Commission's rule now requires the racetrack associations to establish and manage the interest-bearing accounts for the deposit of gaming funds for purses, make the necessary distributions and comply with the recordkeeping and reporting requirements. 15.2.2.9(B) NMAC (2022). The rule effectively makes the associations directly responsible for the accounts containing the gaming funds, and NMHA no longer has any responsibilities related to the accounts.

According to your request, despite the amendments to the Commission's rules governing the gaming funds for purses, NMHA has refused to transfer money from the gaming fund accounts it previously managed to the racetracks for payment to purses at race meets. You have provided correspondence from NMHA discussing its refusal to make the transfers. Letter from Gary C. Mitchell, Gary C. Mitchell, P.C. to Richard P. Bustamante (May 27, 2022). Among other things, the letter conditions NMHA's willingness to make the transfers on the implementation of "safeguards" NMHA believes are necessary to protect the purse money. The letter does not address the recent amendments to Rule 15.2.2.9 or their effect on NMHA's authority to continue holding the purse money.

New Mexico courts reviewing an administrative agency's rulemaking authority generally hold that a rule "has the force of law" if it "was promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute." *City of*

Las Cruces v. Public Emp. Lab. Relations Bd., 1996-NMSC-024, ¶ 5, 917 P.2d 451. “If not in conflict with legislative policy, legislatively authorized rules and regulations have the force of law.” *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 7, 803 P.2d 243.

As discussed above, Section 60-2E-47(E) of the Gaming Control Act requires that a racetrack “pay twenty percent of its net take to purses to be distributed in accordance with rules adopted by the [Commission].” Section 60-2E-47(E) does not provide guidance on how the gaming funds for purses should be paid, maintained or distributed, but leaves those details to the Commission. We believe the Commission properly acted within the authority granted by Section 60-2E-47(E) when it adopted Rule 15.2.2.9. As a “legislatively authorized” rule “not in conflict with “legislative policy,” Rule 15.2.2.9 has “the force of law.” Because the rule no longer provides NMHA with authority to manage the gaming funds for purses, we conclude that NMHA’s refusal to transfer the purse money to the racetracks violates the rule.

Depositories of Public Funds

The Audit Act authorizes the state auditor to:

- A. require depositories of public money to furnish reconciliation sheets for the purpose of checking the deposits of public funds;
- B. inspect the books and records of any depository concerning public funds; and
- C. examine employees of a depository under oath concerning the correctness of the reconciliation or any entry upon the books or records of the depository relating to public funds.

NMSA 1978, § 12-6-9 (1969).

The state auditor’s rule for conducting financial audits under the Audit Act provides guidance regarding the intended meaning of the terms “public funds” and “depositories of public money” as used in Section 12-6-9. *See* 2.2.2 NMAC. The rule provides that “all monies coming into all agencies (i.e., vending machines, fees for photocopies, telephone charges, etc.) shall be considered public monies and be accounted for as such.” 2.2.2.10(P) NMAC. The audit report for an agency “shall include a list of individual deposit and investment accounts held by the agency,” including the “name of depository (i.e., bank, credit union, state treasurer, state investment council, etc.). 2.2.2.10(P)(3)(a). The Audit Act and the rule define “agency” to include “any department, institution, board, bureau, court, commission, district or committee of the government of the state” and “any political subdivision of the state.” NMSA 1978, § 12-6-2(A); 2.2.2.7(A)(4) NMAC.

Whether NMHA is a “depository of public money” under Section 12-6-9 depends on whether the gaming funds for purses constitute “public money.” The state auditor’s rules essentially describe “public money” as any money coming into a state or local government

agency. This description is consistent with the understanding of the term “public money” as used in state’s public money statutes. *See* NMSA 1978, § 6-10-3 (2011) (providing that “[a]ll public money in the custody or under the control of any state official or agency obtained or received from any source ... shall be deposited into the state treasury”); N.M. Att’y Gen. Op. No. 88-25 (1988) (a fee imposed by state museum on program participants was “public money” required to be deposited with the state treasurer under Section 6-10-3). *See also* N.M. Att’y Gen. Op. No. 06-02 (2006) (concluding that a mutual domestic water association’s revenues from levies imposed on association members constituted “public money” because the funds were held by public officers and intended for a public purpose).

As to whether the gaming funds for purses described in Section 60-2E-47(E) of the Gaming Control Act are “public funds” as contemplated by the Audit Act, we believe that question and whether the NMHA is a depository of public funds may be more appropriately directed to and addressed by the Office of the State Auditor as the state agency that applies the Audit Act.. *See Morningstar Water Users v. Pub. Util.*, 1995-NMSC-62, ¶11, 120 N.M. 579, 583 (“... disputes over statutory language should be resolved by looking to the “agency that ... applies that statute” and “the court will begin by according some deference to the agency's interpretation.”).

Please be advised that our response to your opinion request is a public document and is not protected by attorney-client privilege. If this office may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Sally Malave
Assistant Attorney General
Director, Open Government Division

Cc: Brian Colón, New Mexico State Auditor
Ismael Trejo, NMRC Executive Director