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Sections 5100.2, 5103.8, 5104.1, 5109.3, 5112.1, 5112.2, 5112.5, 5113.5, 5116.1, 5116.2, 5116.4, 5116.5, 5116.7, 5116.8, 5116.10, 5116.11, 5118.9 and Part 5122, of Title 9 of the NYCRR would be amended, and section 5112.3 and 5116.3 would be repealed, as follows:

NYCRR Title 9, Executive

Subtitle T

New York State Gaming Commission

Chapter IV

Division of Gaming

Subchapter A

Video Lottery Gaming

Part

- 5100 General Provisions, Construction and Application of Rules**
- 5101 Information and Filings**
- 5102 General Provisions Regarding Licensing and Registration**
- 5103 Video Lottery Gaming Agents**
- 5104 Financial Stability of Video Lottery Gaming Agents**
- 5105 Video Lottery Gaming Key Employee and Employee Licensing**
- 5106 Video Lottery Gaming Vendor Licensing**
- 5107 Personnel Assigned to the Operation of Video Lottery Gaming Facilities**
- 5108 Internal Controls Governing the Operation of Video Lottery Gaming**
- 5109 Financial Controls for Video Lottery Gaming Agents**
- 5110 Requirements for Doing Business with Construction Contractors**
- 5111 Fees**
- 5112 Video Lottery Gaming Revenues**
- 5113 Suspensions and Revocations**
- 5114 Continuing Obligations of Video Lottery Gaming Agents**
- 5115 Video Lottery Gaming Agent Operation Certificate**
- 5116 [Collection, Distribution and Authorized Use of] Marketing [Allowance] and Promotion Program**
- 5117 Underage Gaming; Alcoholic Beverages; Firearms; Responsible Gaming; Undesirable Persons**
- 5118 Conduct and Operation of Video Lottery Gaming**
- 5119 Video Lottery Terminal Component Standards**
- 5120 Shipment; Possession Limitations**
- 5121 Surveillance and Security**
- 5122 [Collection, Distribution and Authorized Use of] Capital [Awards] Improvements**

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§ 5100.2. Definitions.

(a) Unless the context indicates otherwise, the following definitions are applicable throughout this subchapter.

* * *

(30) *Complimentary service* or *complimentary item* means a service or cash or non-cash item provided directly or indirectly by the video lottery gaming agent pursuant to a marketing plan approved by the commission at no cost or at a reduced price to a player. Complimentary services or items are subject to [the reimbursement rate provided by these regulations] this subchapter and guidance issued by the commission from time to time.

* * *

(70) *Marketing [allowance] expenses or expenditures* means [that percentage of net terminal income permitted by the act to be retained by the video lottery gaming agent to be used for] items related to the marketing, promotion and associated costs of [such] a video lottery gaming agent's video lottery gaming operations, consistent with the customary manner of marketing and promoting comparable operations in the industry, subject to the overall supervision of the commission.

(71) *Marketing [allowance account] and promotion program* means the [account] program established by each video lottery gaming agent [for the deposit by the commission of the applicable marketing allowance] and funded out of the vendor's fee.

* * *

(98) *Subcontractor* means any person who contracts with a licensed entity to provide [good] goods or services in furtherance of video lottery gaming.

* * *

§ 5103.8. Gaming facility insurance requirements.

* * *

(h) Limits. The video gaming agent shall obtain and maintain in full force and effect, the following insurance with limits not less than those described below, or as required by law, whichever is greater (limits may be provided through a combination of primary and umbrella/excess policies):

(1) Commercial general liability [Insurance] insurance with a limit of not less than \$5,000,000 each occurrence. Such insurance shall cover liability arising from premises operations, independent contractors, broad form property damage, personal and advertising injury, cross liability coverage, liability assumed in a contract (including the tort liability of another assumed in a contract) and explosion, collapse and

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underground coverage. If such insurance contains an aggregate limit, it shall apply separately on a per location basis.

* * *

§ 5104.1. Financial stability criteria.

(a) Criteria. Each video lottery gaming agent, and each of such agent's principals, shall establish and maintain during the pendency of such video gaming agent license the financial stability of such licensee to the satisfaction of commission. The commission may consider any relevant evidence of financial stability. A video lottery gaming agent shall be considered to be financially stable if such agent establishes by clear and convincing evidence that such agent meets each of the following standards:

* * *

(3) [Video] A video lottery gaming [agents must] agent shall maintain the video lottery gaming [facilities] facility and related amenities in good repair. Each video lottery gaming agent shall submit annually to the commission for review, any changes or updates to the capital [reinvestment] investment plan for the video lottery gaming facility together with the [then effective] then-effective capital [reinvestment] investment plan. The commission shall review such changes and updates to [insure] ensure that each video lottery gaming agent is investing portions of the vendor fee [and marketing allowance] permitted by the act in the [facilities] facility's infrastructure as is necessary to support viable and successful video lottery gaming in this [state] State. Each capital [reinvestment] investment plan submitted shall be in such form as required by the commission and shall discuss the improvements made to the facility since the submission of the last [reinvestment] investment plan. [Video] Each video lottery gaming [agents must] agent shall budget for repair and replacement reserves to maintain the [facilities] facility unless otherwise prohibited by law. The commission reserves the right to require video lottery gaming agents to create and fund replacement reserves at such amounts determined by the commission consistent with the requirements of the act.

* * *

(6) No video lottery gaming agent shall guarantee the debt of any person or business entity, whether by co-signature or otherwise, or assume the debt of any person or business entity; or enter into any agreement to place any encumbrance on of [its'] its video lottery gaming facility to secure the debts of such video gaming agent, any person or business entity, without the prior written approval of the commission.

* * *

§ 5109.3. Format and structure of accounting records.

(a) Maintenance. The video lottery gaming agent shall maintain complete, accurate, legible and permanent records of all transactions pertaining to such agent's revenues, expenses, assets, liabilities, and equity in conformance with generally accepted

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accounting principles. The failure of the video lottery gaming agent to maintain records according to such principles shall be a violation of these regulations.

(b) Specific requirements for records. The accounting records maintained by [the] a video lottery gaming agent shall be maintained using a [double entry] double-entry system of accounting with transactions recorded on the accrual basis and supported by detailed subsidiary records. Such subsidiary records shall include, at a minimum, all of the following:

* * *

(10) records supporting the utilization of any expenses funded by the marketing [allowance] and promotion program;

(c) Retention. Notwithstanding any of [these regulations] this subchapter to the contrary, all accounting records shall be kept for a period of not less than seven years from their respective dates.

* * *

PART 5112

Video Lottery Gaming Revenues

Section

- 5112.1 Identification of financial institutions
- 5112.2 Deposit of video lottery gaming revenues by agents
- 5112.3 [Deposit of marketing allowance by the commission] [Repealed]
- 5112.4 Duty to notify of accounting discrepancies
- 5112.5 Delinquent accounts

§ 5112.1. Identification of financial institution.

(a) Establishment of accounts. Prior to the commencement of the operation of any video lottery gaming facility, the video lottery gaming agent shall submit to the commission for approval the name and location of a financial institution authorized to do business in the State together with:

(1) the account number for the account designated by the video lottery gaming agent for the deposit of video lottery gaming revenues;

(2) the account number for the account designated by the video lottery gaming agent for the deposit [by the commission of the daily marketing allowance for such video lottery gaming facility] of the portion of the vendor fee to be used exclusively for capital investments; and

(3) the financial institution's routing information for collection and distribution of video lottery gaming revenue.

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(b) Financial institution. The financial institution shall be a bank or trust company, as defined by the State banking law, that is authorized to do business in the State and that maintains an office for the transaction of business within the State. The video lottery gaming agent shall authorize such bank or trust company to transfer revenue to the commission or the commission's duly authorized representative in a manner consistent with these regulations.

(c) Use of accounts. The accounts designated by the video lottery gaming agent pursuant to this Part shall be used exclusively for either:

- (1) the deposit and distribution of the daily video lottery gaming revenue; or
- (2) the deposit and distribution of [the daily marketing allowance] capital investments.

The video lottery gaming agent shall not commingle other funds into [said] such accounts.

(d) Required notice. Each video lottery gaming agent shall provide the commission 30 days advance notice of any proposed account changes in order to [insure] ensure the uninterrupted distribution of video lottery gaming revenue to the commission.

§ 5112.2. Deposit of video lottery gaming revenues by agents.

(a) Daily deposit. Each video lottery gaming agent shall be required to deposit daily into the dedicated bank account for video lottery gaming revenue the net proceeds from video lottery gaming for the previous day as determined by the video lottery gaming central system and related reports. Any withholdings for Federal, State, and local income taxes, or public assistance and child support intercepts, shall be included in the daily deposit. The commission shall remit such withholdings when received to the appropriate governmental agencies.

(b) Electronic funds transfer. The net proceeds of video lottery gaming required to be remitted daily to the commission by this Part shall be remitted through an Electronic Funds Transfer ([EFT] EFT) from the dedicated bank account for video lottery gaming revenue provided by the video lottery gaming agent. The commission may utilize the EFT to adjust certain administrative expenses, [video gaming agent marketing allowance,] prize payments or net machine income, as determined by the commission. To the extent that such daily EFT cannot be achieved due to the unavailability of bank services, the remission shall be made on the first day thereafter that such services are available. Failure to comply with this procedure for EFT may result in the immediate suspension of video lottery gaming at the video lottery gaming facility.

(c) Loss or theft. The commission is not responsible for the loss or theft of money prior to the distribution of such money to the commission.

(d) Prize lapse. Any prize that has not been paid out within a time period specified by the commission shall be remitted to the commission.

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§ 5112.3. [Deposit of marketing allowance by the commission.] [Repealed]

[The commission, upon receipt of the net proceeds of video lottery gaming pursuant to this Part for any gaming day, shall deposit, or cause the deposit of the applicable marketing allowance for such video lottery gaming facility to the account established for such purpose by each video lottery gaming agent. Withdrawals from such account by the video lottery gaming agent shall be made only in accordance with the provisions of these regulations.]

* * *

§ 5112.5. Delinquent accounts.

The commission may charge debt service in the amount of one and one-half percent monthly (18 percent per annum) on any monies due to the commission from video lottery gaming agents whose accounts are delinquent [over] for more than 30 days.

* * *

§ 5113.5. Penalties imposed by commission prior to reissuance of license.

The commission may require a person (or business entity) who (or that) is subjected to disciplinary proceedings, or who (or that) formerly held a license pursuant to [these regulations] this subchapter, to meet certain conditions before reissuing a license to that person or business entity, including, [but not limited to] without limitation, one of more of the following:

(a) restitution of money;

(b) restitution of property;

[(c) suspension or revocation of the payment to the video lottery gaming agent of any portion of the video lottery gaming marketing allowance;]

[(d)] (c) making periodic reports to the commission as required; and

[(e)] (d) payment of outstanding fines imposed by the commission.

[Any or all of the conditions imposed by the commission pursuant to this Part may be imposed jointly and/or severally.]

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PART 5116

[Collection, Distribution and Authorized Use of] Marketing [Allowance] and Promotion Program

Section	
5116.1	Video lottery gaming agent [receipt of] marketing [allowance] <u>and promotion program</u>
5116.2	Marketing and promotion plan
5116.3	[Establishment of the marketing allowance account] <u>[Repealed]</u>
5116.4	Marketing and promotion plan implementation
5116.5	Permitted marketing and promotion expenses
5116.6	Advertising
5116.7	Complimentary services and items
5116.8	Promotions
5116.9	Player rewards club
5116.10	Non-permitted marketing and promotion expenses
5116.11	Competitive bids

§ 5116.1. Video lottery gaming [agent receipt of] agent's marketing [allowance] and promotion program.

(a) Requirements for marketing plan. In accordance with the act, [there shall be made available to] each video lottery gaming agent [from the daily video lottery gaming revenue generated at each video lottery gaming facility a marketing allowance] shall dedicate a portion of its vendor fee to fund a marketing and promotion program to be used by [each] such video lottery gaming agent for [the reimbursement of] marketing, promotion and associated costs incurred by the video lottery gaming agent for such agent's video lottery gaming operations and pari-mutuel horse racing operations pursuant to an approved marketing plan pursuant to this Part, [as] so long as such costs associated with pari-mutuel horse racing operations simultaneously encourage increased attendance at such agent's video lottery gaming facilities.

[(b)] All such marketing, promotion and associated costs incurred by any video lottery gaming agent shall be:

- (1) consistent with the customary manner of marketing and promoting comparable operations in other states and as described in an approved marketing plan; and
- (2) subject to the overall supervision of the commission.

[(c)] Each video lottery gaming agent shall establish a marketing allowance account for the deposit of the marketing allowance as required by these regulations.]

[(d)] Withdrawals from the marketing allowance account established by each video lottery gaming agent shall be permitted to reimburse the video lottery gaming agent for those expenses identified in a marketing plan approved annually by the commission pursuant to this part.]

[(e)] (b) Violation for unapproved expenses. Any [withdrawal from the] marketing [allowance account] or promotion expense incurred by a video lottery gaming agent that

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is not approved by the commission or identified in a marketing plan approved by the commission shall be a violation of the video lottery gaming agent's license, the act and [these regulations] this Part.

[(f) Nothing in these regulations shall prevent a video lottery gaming agent from incurring marketing, promotional and associated costs in excess of the marketing allowance, provided that this excess is identified in the marketing plan.

(g) Marketing allowance funds shall be made available to each video lottery gaming agent via a reduction to the daily remittance proceeds due to the commission. The daily remittance report on the central system shall include such reduction. It shall be the responsibility of the video lottery gaming agent to deposit the marketing allowance daily into an account dedicated and restricted to reimbursement of marketing, promotion, and associated costs of the video lottery gaming facility.]

§ 5116.2. Marketing and promotion plan.

(a) Contents. Each video lottery gaming agent shall prepare annually a marketing and promotion plan (the ["marketing plan"] marketing plan) for the video lottery gaming facility. Each annual marketing plan shall be submitted to the commission for review and approval as described in this Part. An annual marketing plan shall include a summary of projected net machine income[,] and projected marketing [allowance, and projected] expenditures by category, in a standard worksheet format prescribed by the commission. The marketing plan worksheet shall include budgeted marketing expenditures by month and in total for each standard category. [Such worksheet] The commission shall [be reviewed by the commission] review such worksheet as part of the overall plan approval.

(b) Violation. The failure to submit any marketing plan when due to the commission shall be a violation of the video lottery gaming agent's license, the act and [these regulations] this Part.

(c) Requirements. Each annual marketing plan [must] shall:

(1) be prepared in accordance with the format prescribed by the commission; and

(2) fully describe, in a narrative form, subject to the approval of the commission, the marketing and promotional activities that the video lottery gaming agent proposes for [their] the applicable video lottery gaming facility for the subsequent 12-month period commencing on the first day of January of any calendar year. Such description [must] shall include the overall strategy of how the portion of the vendor's fee used to fund the marketing [allowance] and promotion program will be used for marketing, promotional and associated costs consistent with the customary manner of marketing and promoting comparable operations in the video lottery gaming entertainment industry in other states[, and] that are expected to be implemented at such video lottery gaming facility on a monthly, quarterly and annual basis[.]; the target market for such marketing and promotion[, and]; the anticipated effect (return on investment) of the marketing, promotional and associated costs described; any and all media buys advertising the video lottery gaming facility, whether directly or indirectly; and an itemization of the projected budget for all marketing and promotional expenses on a monthly, quarterly and annual basis.

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(d) Time for submission. Each annual marketing plan must be submitted to the commission for review and approval not earlier than 120 days and not later than 90 days prior to January 1 of any calendar year.

(e) Commission review. The commission shall review the annual marketing plan upon receipt and provide objections, questions or comments, if any, to the video lottery gaming agent within 45 days.

(f) Approval and implementation. If the marketing plan is approved by the commission without comment, then the video lottery gaming agent may proceed with the marketing plan's implementation commencing on the first day of January of any calendar year.

(g) Commission objection. In the event the commission objects or comments on the marketing plan, or any portion thereof, such objection, comment or question shall be delivered to the video lottery gaming agent in writing together with a disapproval notice of the submitted marketing plan in whole or in part.

(h) Amended plan after commission objection. Not later than 15 days from the receipt by the video lottery gaming agent of a marketing plan disapproval notice from the commission, or such longer time as the commission and the video lottery gaming agent may agree in writing, the video lottery gaming agent shall address the commission's objections or comments and submit an amended marketing plan to the commission for review. Upon submission of the amended marketing plan to the commission, a new 45-day time period for commission review will commence as described by this Part.

(i) Interim marketing plan. In the event the annual marketing plan is not approved by the commencement date of the marketing plan as agreed to by the commission for any year, the commission may, but shall not be required to, enter into an interim marketing plan agreement with the video lottery gaming agent for a period not to exceed 90 days from such commencement date. Such interim marketing plan shall be in such form as approved by the commission and govern the expenditure from the marketing [allowance account] and promotion program during such 90-day period for marketing, promotion and associated costs approved in such interim marketing plan. In the event the commission does not approve an interim marketing plan, or in the event an interim marketing plan expires, the video lottery gaming agent shall [not be entitled to reimbursement from the marketing allowance account until a marketing plan is approved by the commission] be in violation of this Part and the commission may impose fines.

(j) Adjustments. During any fiscal quarter covered by a marketing plan, the video lottery gaming agent may submit proposed adjustments, including an adjusted marketing plan worksheet and supporting documentation, to the marketing plan to the commission for review and approval. The commission shall have 15 days from the receipt of any proposed adjustment(s) to the marketing plan to review, approve or disapprove such adjustments in writing.

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§ 5116.3. [Establishment of the marketing allowance account.] [Repealed]

[(a) Each video lottery gaming agent shall establish a marketing allowance account with a financial institution in accordance with these regulations. Marketing allowance funds shall be deposited daily to the marketing allowance account but in no event more than five business days after the accrual of such allowance.

(b) By establishing the marketing allowance account, each video lottery gaming agent irrevocably pledges, assigns and grants the commission a security interest in and control over the marketing allowance account (as a deposit account) and all funds held or to be held therein, including, without limitation, all interest, dividends, cash, instruments and other property from time to time received, receivable or otherwise distributed, and all replacements, substitutions and proceeds of any of the foregoing. To perfect the commission's interest in the marketing allowance account, the commission may file such uniform commercial code financing statements and renewals thereof as necessary in the appropriate filing office(s).

(c) The commission is not responsible for the loss or theft of any money in the marketing allowance account.

(d) In the event the marketing allowance account contains a balance remaining at the end of any 12-month marketing plan period, and any such balance is not approved to be used for reimbursement of marketing and promotion costs as identified in a marketing plan approved by the commission for the immediately succeeding period, such balance shall be carried forward into the succeeding year and included in the marketing plan for that year.

(e) A video lottery gaming agent may submit a request for reimbursement of qualified marketing expenses by updating the marketing plan worksheet and submitting it to the commission for review and approval.

(f) The video lottery gaming agent shall arrange for monthly financial institution statements to be provided by the video lottery gaming agent's financial institution directly to the commission.]

§ 5116.4. Marketing and promotion plan implementation.

(a) Review of books and records. The commission or the commission's representative may, at the commission's discretion, review the books and records of the video gaming agent, to determine additional needs for assurance regarding utilization [and reimbursement] of the funds from the marketing [allowance] and promotion program. Each video gaming agent shall maintain sufficient documentation and a clear audit trail to support [the reimbursement of] any and all marketing [allowances] expenditures.

[(b) Any reimbursement of a marketing allowance, as determined by audit to be a non-qualified marketing expense, shall be immediately returned to the marketing allowance account by the video gaming agent and interim updates to the marketing plan shall incorporate expenditure of the additional allowance.

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(c) After a marketing plan is approved by the commission, the video lottery gaming agent will be permitted to receive reimbursements from the marketing allowance account of such sums equal to the marketing and promotional expenses incurred by such agent in accordance with the approved marketing allowance plan as expenses are accrued in accordance with generally accepted accounting principles. Reimbursements shall be made in accordance with a schedule approved by the commission.

(d) The video lottery gaming agent shall cause such agent's financial institution to agree that withdrawals shall be permitted from the marketing allowance account only pursuant to a commission approved disbursement request. Any withdrawal from the marketing allowance account not in accordance with this provision shall be a violation of the video lottery gaming agent's license, the act and these regulations.

(e) Each video lottery gaming agent shall submit, or cause to be submitted, monthly a completed marketing plan worksheet documenting or describing the marketing plan implementation by such agent to the commission by electronic methods. Such monthly worksheet shall be in such form and be submitted in accordance with a schedule approved by the commission.

(f)] (b) Violation for failure to submit monthly worksheet. The failure of the video lottery gaming agent to submit any monthly worksheet required by this Part shall be a violation of such agent's license, the act and [these regulations] this Part.

[(g) Each monthly worksheet shall contain cross references by date, amount and account codes to the relevant disbursement from the marketing allowance account so that such documentation and or other information can be reconciled with the approved marketing plan.

(h)] (c) Reports.

(1) The commission shall review each scheduled or required report submitted by [the] a video lottery gaming agent and audit the same against the approved marketing plan. Exceptions, discrepancies or questionable spending identified by the commission must be explained by the video lottery gaming agent in a timely manner to the satisfaction of the commission, but in no event later than 30 days from the date of the commission's initial inquiry. The failure of the video lottery gaming agent to adequately respond to any inquiry of the commission shall be a violation of [these regulations] this Part and may result in commission actions to include, without limitation, [those described in paragraph (1) of subdivision (j) of this section] the imposition of fines.

(2) [The] A video lottery gaming agent shall prepare each report in a professional manner detailing the marketing expenses [for which it is seeking reimbursement] to ensure that only qualified marketing expenses have been included [in such reimbursement request]. Qualified marketing expenses are defined in section 5116.5 of this Part and in guidance documents as [may be issued by] the commission may issue. Should the commission determine that [the] a video lottery gaming agent has submitted non-qualified expenses, [that do not qualify for reimbursement] appropriate penalties may be applied.

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[(i)] (3) The monthly marketing [allowance] and promotion program expense report shall, without limitation, summarize the expenditure made [from the marketing allowance account] and provide details and supporting documentation as determined by the commission in evidence of the expenditures [from such marketing allowance account].

[(j)] (d) Sanctions. In the event a video lottery gaming agent cannot explain adequately an expenditure or discrepancy [raised by] the commission [cannot be adequately explained by the video lottery gaming agent] raises, or in the event any violation of [these regulations] this Part remains uncured for a period of one through 30 days, the commission, in addition to any other remedy permitted by [these regulations] this Subtitle, may take any or all of the following actions:

(1) [require the video lottery gaming agent to reimburse the marketing allowance account an amount equal to the discrepancy] impose fines; and

(2) reimburse the commission for the cost of the commission's expenses related to researching and investigating such expenditure [or draw against the marketing allowance account].

[(k)] (e) Requirements after insufficient reporting. Within 45 days of the end of each quarter for an applicable marketing plan, in the event the monthly marketing expense reports are deemed insufficient at the sole discretion of the commission, the commission may require a video lottery gaming agent to provide the following information:

(1) a full and complete reconciliation of the previous quarter's marketing, promotion and associated costs incurred; and

(2) an accounting for the cash spending related to the marketing [allowance withdrawn from the marketing allowance account] expenses.

[(l)] (f) Annual report. [Annually each] Each video lottery gaming agent shall provide annually to the commission a report by an independent auditor of the content of the final annual statement of marketing expenses in a type and format prescribed by the commission.

[(m)] (g) Documentation required. Each video lottery gaming agent shall maintain sufficient documentation to support [the reimbursement of] any and all of such agent's marketing [allowance] expenses.

§ 5116.5. Permitted marketing and promotion expenses.

(a) Permissible expenses. The following qualified marketing expenses incurred by a video lottery gaming agent pursuant to an approved marketing plan [under these regulations] pursuant to this Part shall be permitted [reimbursable from the marketing allowance account]:

(1) advertising;

(2) complimentary services;

(3) promotions;

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- (4) group sales;
- (5) direct mail expenditures;
- (6) player's club expenses, except as otherwise provided in section 5116.9 of this Part;
- (7) entertainment costs;
- (8) personal Service Costs for the number and type of positions authorized by the commission as allowable;
- (9) such other marketing expenses for which advance approval is specifically requested in writing and subsequently approved by the commission or otherwise described in official guidance released by the commission from time to time and subject to audit by the commission.

(b) Caps. Nothing in the act or [these regulations will] this Part shall be construed as preventing the commission to cap allowable marketing, promotion and associated costs in any category of the permitted uses of the funds from the marketing [allowance] and promotion program.

(c) Cease and desist notice. To the extent that the commission believes that marketing [allowance] expenditures are inconsistent with the purpose and intent of the [marketing allowance or] marketing plan, the commission may issue a cease and desist notice to the video lottery gaming agent [in addition to withholding future reimbursements from the marketing allowance account].

[(d)] Upon receipt of any such cease and desist order issued by the commission, the video lottery gaming agent [will] shall immediately cease the identified action.

[(e)] (d) Hearing request following compliance with cease and desist notice. Provided that the video lottery gaming agent has complied with any cease and desist order issued by the commission, [the] a video lottery gaming agent may request a hearing on said action pursuant to [these regulations] this Subtitle.

* * *

§ 5116.7. Complimentary services and items.

(a) *Distribution of complimentary services.*

(1) Neither [the] a video lottery gaming agent nor any third party affiliate or non-affiliate shall offer or provide any complimentary service, item, cash or other item of value to any person except as set forth in the video lottery gaming agent's marketing plan as approved by the commission and as provided for in [these regulations] this Part.

(2) [The] A video lottery gaming agent shall establish and maintain a system of internal controls, [to be approved by the] subject to commission approval, for the authorization and issuance of all complimentary services and items, including cash and non-cash items. Such system of internal controls shall include, without limitation, the procedures by which [the] a video lottery gaming agent may delegate to such agent's employees the authority to approve the issuance of complimentary services and items, the

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controls in place to ensure complimentary services and items are utilized by those individuals offered such services and items, and the procedures by which conditions or limits placed upon such authority are established and modified, including limits based on relationships between the authorizer and recipient, the relationship between the [video lottery gaming facility,] the video lottery gaming agent or such agent's principals with the recipient, and shall further include effective provisions for audit purposes.

(3) For purposes of determining the level of dollar value of complimentary service to be deemed an acceptable use by the video lottery gaming agent from the marketing [allowance account] and promotion program:

(i) all complimentary services or items, whether or not offered or provided to players in the normal course of the video lottery gaming agent's business, shall be allowable costs under the marketing plan of the video lottery gaming agent at amounts based upon [reimbursement] rates established by the commission;

* * *

§ 5116.8. Promotions.

(a) Information about promotions. Each video lottery gaming agent shall include in [the] its marketing plan a description of each anticipated promotion, the cost of such promotion, the benefit for holding such promotion, the timing of such promotion, and any other information helpful to the commission in considering the approval of such promotion.

(b) Costs of promotions. The actual and necessary costs of each promotion shall be [reimbursed] funded from the marketing and promotion program [allowance account] as approved by the commission.

(c) Advertising content. The video lottery gaming agent shall submit such boards[,] and proposed images to the commission, as [required] the commission may require, for any advertising material for any promotion [as set forth in guidance documents issued by the commission].

(d) Competitive bidding. The commission may require competitive bidding at particular dollar levels of purchasing for any promotion.

* * *

§ 5116.10. Non-permitted marketing and promotion expenses.

The following expenses incurred by a video lottery gaming agent shall not be [reimbursable from] included in the marketing [allowance account] and promotion program under any circumstance:

(a) payroll expenses incurred in the ordinary course of operating the video lottery gaming facility that are not marketing related;

(b) general office equipment and services, such as telephone, office supplies, photocopying, subscriptions, travel and other dues that are not marketing related;

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(c) except as otherwise permitted by the Act, the actual cost of any management fee paid by the video lottery gaming agent to any vendor engaged to operate the video lottery gaming facility on a daily basis;

(d) expenses that are [ultimately] borne ultimately by licensed video lottery terminal vendors; or

(e) rebates of cash to any vendor, vendee or other third party.

§ 5116.11. Competitive bids.

The actual monthly cost of any marketing or promotion expense shall be permitted [to be reimbursed from the marketing allowance account] as set forth in the [approved] commission-approved marketing plan, provided that, if applicable, the video lottery gaming agent shall competitively bid any marketing or promotion expense or program in excess of \$50,000 and demonstrate to the commission's satisfaction that the cost for such vendor is the lowest available proposal that satisfied the technical requirements of the bid or demonstrated to the commission's satisfaction that costs in excess of those of the lowest bidder are outweighed by the benefits of the chosen bidder. Certain sole source and professional services may be excluded from the competitive bid requirements. Any firm or company exempt from competitive bidding must be at arm's length from the facility.

* * *

§ 5118.9. Hours of Operation.

The hours of operation of video lottery gaming at all licensed video lottery gaming facility locations shall be 20 consecutive hours per day, unless otherwise approved by the commission in writing after a video gaming agent applies for an exception at least 60 days in advance of a proposed change. In no event shall video lottery gaming be conducted past the time set forth in [subdivision b of Section 1617-a of the] Tax Law section 1617-a(e). Public access to the video lottery gaming floor must be restricted at all times video lottery gaming is not in operation. The failure of the video lottery gaming agent to comply with the hours of operation set forth in this section shall be a violation of these regulations.

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PART 5122

[Collection, Distribution and Authorized Use of] Capital [Awards] Improvements

Section

- 5122.1 [Video lottery gaming agent receipt of capital awards] Capital investments accounts
- 5122.2 [Deposit of] Deposits into capital [awards] investments account
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§ 5122.1. [Video lottery gaming agent receipt of capital awards] Capital investments accounts.

(a) Requirements. In accordance with the act, [there shall be made available to] each video lottery gaming agent [from the daily video lottery gaming revenue generated at each video lottery gaming facility a capital award to] shall maintain a segregated capital investments account. The funds from such account shall be used exclusively for capital project investments to improve the facilities of the [vendor track] video lottery gaming agent that promote or encourage increased attendance at the video lottery gaming facility, including, [but not limited to] without limitation, hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance the facility amenities; provided that such capital investments shall be [approved] subject to approval by the commission and that such video lottery gaming agent demonstrates that such capital expenditures will increase patronage at such agent's facilities and increase the amount of revenue generated to support State education programs.

[(b) Except as provided in the act, each agent shall be required to co-invest an amount of capital expenditure equal to such agent's cumulative vendor's capital awards. The amount of any vendor's capital award that is not used during any one- year period may be carried over into subsequent years ending before April 1, 2013. In the event that a vendor track's capital expenditures, approved by the commission prior to April 1, 2013 and completed prior to April 1, 2015, exceed the vendor track's cumulative capital award during the five year period ending April 1, 2013, the vendor track shall continue to receive the annual capital award after April 1, 2013 until such approved capital expenditures are paid to the vendor track subject to any required co-investment.

(c) [(b) Divestment. Any agent that has received a vendor's capital award[, choosing to divest the] or has withdrawn funds from its capital investments account that divests the capital improvement toward which the award or withdrawn funds was applied, prior to the full depreciation of the capital improvement, in accordance with generally accepted accounting principles, or ceases to use such asset for gaming purposes or transfers such asset to a related party, shall [reimburse the State in] deposit into the capital investments account amounts equal to the total of any such awards or withdrawals from the capital investments account or the fair market value of such asset, as Tax Law section 1612(b)(1-a)(iii) may require.

[(d) Any capital award not approved for a capital expenditure at a video lottery gaming facility by April 1, 2013 shall be deposited in the State lottery fund for education aid.

(e) [(c) Commission supervision. All such capital improvement and expenditures shall be subject to the overall supervision of the commission.

§ 5122.2. [Deposit of] Deposits into capital [awards] investments account.

(a) Deposits. [The commission shall make available to each video gaming agent, through the daily remittance process, the appropriate capital award.] Each video gaming agent

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shall be responsible to deposit the [capital award daily to] portion of its vendor fee set forth in Tax Law section 1612(b)(1) daily into a segregated capital investments account restricted for the collection and authorized use of such funds.

(b) Account statements. Each agent [receiving capital award funds] shall provide monthly bank statements for the segregated capital [awards] investments account to the commission for independent verification of [capital award] deposits and [reimbursement] withdrawals from the account.

(c) Loss or theft. The commission is not responsible for the loss or theft of any money in any account to which capital [award] investments funds are deposited.

§ 5122.3. Capital improvement plan.

[(a)] Each agent [eligible for capital award funds] shall prepare a capital improvement plan for the video lottery gaming facility. [The] Such capital improvement plan shall provide sufficient detail to describe anticipated capital projects for which the agent will seek [reimbursement from the capital award] permission to withdraw funds from the capital investments account. Such capital improvement plan shall be submitted electronically to the commission for review[,] and may be amended by the video lottery gaming agent from time to time as planned capital projects are modified.

[(b)] Each capital improvement plan, without limitation, shall briefly describe, in narrative form, the capital improvement projects the video gaming facility plans to commence during the five-year period ending April 1, 2013, that are to be completed prior to April 1, 2015.

(c) Capital improvements plans shall be due to the commission on a date prescribed by the commission. The failure to submit any capital improvement plan when due to the commission shall be a violation of the agent's license, the act and these regulations.]

§ 5122.4. Capital improvement plan implementation and withdrawals from the capital investments account [award reimbursement].

(a) Request for approval. Prior to the commencement of each capital [award] improvement project, the agent shall submit to the commission a request for project approval in a standard format as prescribed by the commission. Such request shall:

(1) describe the overall capital project, including the reasons for implementing the project, the estimated total project cost[,] and the estimated start and completion date for the project; and

(2) describe[,] how the capital project will increase attendance at the video gaming facility and increase the amount of revenue generated in support of education aid[;].

(b) [Payment from capital award funds shall only be approved by the] Time limits to request approval. The commission shall approve withdrawals from the capital investments account only for capital project construction or improvements commenced

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on or after April 1, 2008, or the portion of a project completed after April 1, 2008 for projects, or phases of projects, commenced before April 1, 2008.

(c) Requirements for approval. Not later than 15 days from receipt of a capital project request for approval, the commission shall review the request and provide the commission's approval or denial of the project. Each project shall qualify as an approved use of the funds from the capital [award] investments account if [it] such project meets the following guidelines:

(1) [The] the capital project includes the addition of tangible, permanent assets in the form of land, buildings, or equipment; or the project includes the restoration of such existing assets[.];

(2) [Project] project assets purchased or restored, are to be used in the operation of video gaming and are expected to have a useful life of two years or more, providing a reasonable benefit throughout the assets useful life[.];

(3) [The] the capital expenditure is of significant value, consistent with standard accounting policies for the recording of capital assets[.]; and

(4) [The] the capital project will increase patronage at the video gaming facility and increase the amount of revenue generated to support education aid.

[(5) The capital project will be completed prior to April 1, 2015.]

(d) Approved projects. [Approval] Commission approval of [the] a capital project [by the commission] shall entitle the video lottery gaming agent to [subsequent reimbursement from the capital award of for] withdraw the amount of associated costs [the] of such approved project from such video lottery gaming agent's the capital investments account, for which the video lottery gaming agent obtains substantiation that the costs are reasonable within the industry for the size and scope of the project. Competitive bidding shall be required for all [single component] single-component project costs in excess of \$50,000, provided, however, that certain [sole source] sole-source and professional services, such as architectural and engineering services and construction manager services where the construction manager does not perform construction work [themselves] itself, may be excluded from the competitive bid requirements. Any firm exempt from competitive bidding must be at arm's length from the [facility] video lottery gaming agent.

(e) Denial of approval. In the event the commission does not approve [the] a capital project request, the video lottery gaming agent shall be so notified in writing and any costs incurred for the project shall be the sole responsibility of [the] such video lottery gaming [facility] agent and shall not be [reimbursable] withdrawn from the capital [award] investments account.

(f) Withdrawal of funds for approved projects. Upon receiving the commission's approval of a capital project, [the] a video lottery gaming agent may at any time submit requests [for reimbursement of costs] to withdraw the amounts associated with the approved

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project. [Such] Any such request shall be submitted in writing to the commission and shall be accompanied by supporting documentation in the form of invoices and cancelled checks, or other documents as may be required to show proof of payment for capital expenditures associated with the approved project. Upon receiving the commission's approval [of a reimbursement request], [the] a video lottery gaming agent shall be authorized to withdraw the approved funds from the segregated capital [award] investments account.

(g) Review of books and records. The commission or the commission's representative may, at the discretion of the commission, review the books and records of [the] a video lottery gaming agent[,] to determine additional needs for assurance [regarding utilization] in regard to use of the capital award. Each agent shall maintain sufficient documentation and a clear audit trail to support the [reimbursement of any and all capital awards] expenditures from the segregated capital investments account.

(h) Violations. The failure of [the] a video lottery gaming agent to submit any report required by this Part shall be a violation of such video lottery gaming agent's license, the act and [these regulations] this Part. [In addition to any other remedy available to the commission pursuant to these regulations, any failure of the agent to submit any report as required by this Part shall permit the commission to withhold the capital award until such time as such report is submitted and approved. The commission may release such capital award with such continuing restrictions as the commission determines to be appropriate pursuant to these regulations.]

(i) Inquiries. Exceptions, discrepancies, or questionable spending [identified by] the commission identifies must be explained by the video lottery gaming agent in a timely manner to the satisfaction of the commission, but in no event later than 30 days from the date of the commission inquiry. A failure by the video lottery gaming agent to adequately respond to any inquiry of the commission shall be a violation of [these regulations] this Part.

(j) Detail of expenses. The agent shall prepare each report in a professional manner, detailing the use of funds from the capital [awards] investments account. Appropriate penalties may be applied if the commission determines that [the] a video lottery gaming agent has submitted expenses that do not qualify as a capital expense.

(k) Sanctions. In the event an expenditure or discrepancy [raised by] the commission raises cannot be adequately explained by the video lottery gaming agent, or in the event any violation of [these regulations] this Part remains uncured for a period of up to 30 days, the commission, in addition to any other remedy permitted by [these regulations] this Subtitle, may take any or all of the following actions:

(1) rescind or withhold [the] approval of capital [award or any portion thereof] projects, in which event no further [payment] withdrawal from the capital investments account shall be permitted until such violation is cured;

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(2) deny the cost and deduct the amount thereof from the balance of any [next] succeeding approved capital [award] improvement project;

(3) require the agent to reimburse the [commission for the] capital [award] investments account in an amount equal to the discrepancy; and

(4) reimburse the commission for the cost of the commission's expenses related to researching and investigating such expenditure.

(l) Insufficient expense reports. In the event any expense reports are deemed insufficient at the commission's sole discretion [of the commission], the commission may require an agent to provide the following information:

(1) a full and complete reconciliation of the capital improvement expenses and associated costs incurred; and

(2) an accounting for the cash spending related to the capital improvement funds.

(m) Documentation. Each agent shall maintain sufficient documentation to support the [reimbursement of any and all of] withdrawals made from such agent's capital investments account [improvement expenses].