

Comments of the iDevelopment and Economic Association on the
New York State Gaming Commission Proposed Rulemaking for Sports Wagering Advertising
and Marketing

I.D. No. SGC-31-23-00010-P

September 29, 2023

I. Introduction

The members of iDevelopment and Economic Association (“iDEA”), by and through its counsel, submit these comments on the New York State Gaming Commission’s Proposed Rulemaking for Sports Wagering Advertising and Marketing, I.D. No. SGC-31-23-00010-P (the “Rule”).

iDEA is a trade association organized exclusively to support and conduct research, education, advocacy, and informational activities to increase public awareness of the online gaming industry and the associated economic benefits. iDEA seeks to “grow jobs and expand the online interactive entertainment business in the United States through advocacy and education.”¹ iDEA’s members represent all sectors of internet gaming and entertainment, including operations, development, technology, marketing, and law. Members share the common goal of expanding American consumers’ access to secure and regulated online gaming.

As of the date of this submission, iDEA is comprised of twenty-two members: Anaxi, Bet365, Better Collective USA, Inc., Boyd Interactive, Catena Media, Continent 8 Technologies, Digital Gaming Corporation, DraftKings, Entain, Evolution Gaming, Fanatics Sportsbook, FanDuel, Gamesys, Gamewise, GeoComply, Ifrah Law, Kindred, Light & Wonder, Playtech, Saiber, Sportradar, and Worldpay.

iDEA appreciates the opportunity to submit these comments on the Rule. As a preliminary matter, iDEA applauds the State of New York’s decision to legalize sports betting following the United States Supreme Court’s decision in *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018) (striking down the federal Professional and Amateur Sports Protection Act (“PASPA”) on grounds that it violated the anti-commandeering doctrine). iDEA supports the efforts to provide for the legalized and licensed sports betting market in New York state. iDEA also supports the efforts to ensure that residents of New York are not unduly burdened by sports wagering promotions and are duly informed of responsible gaming information and resources.

Nonetheless, iDEA submits that the proposed Rule can be improved. Both industry stakeholders and consumers in New York will benefit from the removal of unnecessary restrictions

¹ About iDEA, <https://ideagrowth.org/about/> (last visited Sept. 12, 2023).

on third-party advertising contracts and amending impractical and unclear requirements for advertisers.

Moreover, for the reasons explained below, iDEA urges the Commission to (i) remove the restrictions on how third-party advertisers may be compensated; and (ii) provide more specific regulations for advertisers, to not unintentionally exclude marketing affiliates, which play a critical role in the sports betting ecosystem by directing consumers to legal regulated sports.

II. Commission's Concerns and Rationale

a. Commission Concerns

It is our understanding that the Rules were proposed because of the Commission's concerns that vulnerable persons, namely college students, were being targeted with direct marketing materials. iDEA shares this concern and highly values responsible marketing of the sports wagering industry.² However, iDEA does not support the proposed Rule because it will have zero impact on remediating this concern as explained below and, instead, will have negative effects on the New York sports wagering market.

b. The Rule Rationale is Misplaced and Not Captured by the Rule

The Rule states that its rationale for the revenue share prohibition is as follows:

Responsible play would be encouraged by prohibiting licensees to enter into agreements with third parties, known as affiliates marketing partners to conduct advertising and marketing where the manner of compensation for such services is prohibited by Racing, Pari-Mutuel Wagering and Breeding Law section 1341(1), thus appropriately disincentivizing such third parties from targeting those most vulnerable to problem gambling tendencies.³

This rationale is arbitrary and capricious, it is not backed by any evidence that the solution solves the perceived problem. Marketing affiliates do not engage in direct marketing – they do not “target” any specific group of persons, and most certainly not the most vulnerable to problem gambling tendencies. Further, regardless of the compensation model, marketing affiliates only get

² See *Online Gaming and Sports Betting iDEA Responsible Advertising Code*, iDEA iDEVELOPMENT & ECONOMIC ASSOCIATION, (adopted May 2023), https://ideagrowth.org/wp-content/uploads/2023/05/iDEA_Responsible-Advertising-Code_May-2023.pdf.

³ *Regulatory Impact Statement*, found on page 23 of the August 2, 2023, NY State Register document.

paid for customer referrals after the customer is verified by the operators and determined to be eligible. Affiliates receive no benefit or compensation in connection with a restricted or ineligible person. Therefore, they have zero incentive to ever engage in the conduct that the Commission is alleging.

Importantly, in the revenue share compensation model marketing affiliates never know who the customers are – meaning they have no ability to retarget their content. Once a customer engages with the marketing affiliate’s content in a manner to trigger their compensation, only the sports wagering operator will know anything about who that customer is. In the revenue share model, operators only provide marketing affiliates with randomized identification numbers for their customers and the associated compensation figures tied to that customer. Operators provide no other information to marketing affiliates. Prohibiting revenue share compensation will have no impact on the individuals targeted by marketing materials because the marketing affiliates are not engaged in the business of direct or targeted marketing and have no ability to target the vulnerable.

Further, responsible gaming experts have pointed out that marketing affiliates are beneficial for the industry because of their responsible gaming resources and information provided on their websites.⁴ It is vital that the Commission understand and appreciate that marketing affiliates’ content is found by customers that are *proactively* searching the Internet for related content. Marketing affiliates are not engaged in the business of targeting people they think are more likely to place wagers. Their content is found on the Internet organically by individuals who have questions or concerns on where to place a wager.⁵ This proposed Rule will not appropriately disincentive third parties from targeting those most vulnerable to problem gambling tendencies. It is for these reasons that the Rule’s Rationale is entirely arbitrary and capricious.

III. Recommendation

a. Recommendations for Amending Section 5329.37(a)(6)

⁴ See *Responsible Gambling Resources & Tools For Sports Bettors*, THE ACTION NETWORK (last visited Sept. 22, 2023), <https://www.actionnetwork.com/general/responsible-gambling>; *Responsible Gambling*, LEGAL SPORTS REPORT (last visited Sept. 22, 2023), <https://www.legalsportsreport.com/responsible-gambling/>; *Responsible Gambling Center*, GAMBLING.COM (last visited Sept. 22, 2023), <https://www.gambling.com/responsible>.

⁵ The conduct marketing affiliates engage in is like those provided by Consumer Reports that a potential consumer would find and review once they were interested in the product within the Consumer Report.

Many states that have legalized sports betting do not regulate the compensation structures available to affiliates. In fact, most states have limited to no regulations at all regarding marketing affiliates, with many not requiring affiliates to register or obtain a license. In other states, marketing affiliates (particularly those in revenue share arrangements) operate through a registration process with the applicable gaming regulator. It is our recommendation that the Commission strike proposed rule section 5329.37(a)(6), and instead focus on ways it can effectively register or regulate the conduct of such affiliates.

As has been done in other legalized states, we suggest that if the Commission seeks oversight on certain compensation structures, then it may regulate and monitor them through licensing requirements. For example, of the legalized states, Colorado, Louisiana, Michigan, New Jersey, Pennsylvania, and Tennessee have explicit elevated licensing requirements for affiliates receiving a revenue share compensation as opposed to the cost-per-acquisition (“CPA”) compensation. Other states such as Kansas and Maryland only require licenses if a vendor/affiliate’s annual expected revenue from the state exceeds a certain dollar threshold. All other states with registration or licensing requirements demand the same level of registration/licensing from affiliates regardless of their compensation structure: Arizona, Indiana, Virginia, and West Virginia.

Additionally, Ohio’s regulatory process for advertising and affiliates is a productive model for New York. Ohio has perhaps the most stringent advertising requirements and restrictions. However, all advertising activities, including those of affiliates, are regulated via operators. In other words, Ohio may issue penalties on operators for the conduct of their affiliate partners. Also, Ohio has the authority to seek a termination of any contractual relationship between the affiliate and operator.⁶

Given that the Commission’s rationale for the prohibition is a concern that vulnerable persons will be targeted, we recommend that they provide clear and more pointed rules on what individuals (*e.g.*, people on the excluded persons list, underage persons, etc.) may not be targeted

⁶ Addressed in the Sports Gaming Licensing Overview FAQ regarding Advertising, Marketing, and User Recruitment section, found at: <https://casinocontrol.ohio.gov/licensing-renewal/02-sports-gaming/01-licensing-overview/01-licensing-overview> (last visited Sept. 14, 2023).

with sports wagering marketing related content. Further, if the primary concern is the targeting of college students, then perhaps the Commission should set forth a rule on what/if any content or advertisements can be disseminated regarding New York universities. The Commission's stated concerns in the proposed Rule could be addressed through the licensing of affiliates, or, like Ohio, enforcing Commission rules through operators.

Marketing affiliates are vital to a legalized sports wagering market. Through appropriate licensing or regulation all the Commission's third-party advertising concerns will be assuaged. Therefore, we recommend striking proposed Rule 5329.37(a)(6) and instead providing a more structured regulatory scheme for advertising and affiliates.

b. Recommendations for Amending Section 5329.37(a)(4)

It is also our recommendation that the Commission amend proposed rule 5329.37(a)(4). As currently written, the rule is overly broad. The rule needs to be amended to provide clarity on its intention – that it is not meant to completely exclude affiliates from the New York market.

Proposed Rule 5329.37(a)(4) currently reads as follows: “No person who, or entity that, is not a casino sports wagering licensee or sports pool vendor shall advertise sports gambling in the State, unless the advertisement disclaims conspicuously that the wagering offerings are not available in the State.”

It is our understanding that the Commission does not intend to say that only casino sports wagering licensees or sports pool vendors can advertise sports gambling in the state – since they included other rules regarding marketing affiliates. However, the broadness of this rule seemingly excludes affiliates from those permitted to advertise in the state. Therefore, it is our recommendation that Rule 5329.37(a)(4) be amended to read as follows: “No person who, or entity that, is not a casino sports wagering licensee or sports pool vendor or affiliate marketing partner shall advertise sports gambling in the State, unless the advertisement disclaims conspicuously that the wagering offerings are not available in the State.”⁷

⁷ Additional recommended language is italicized and underlined.

The above addition of “or affiliate marketing partner” will make it clear that the Commission’s intent is not to exclude marketing affiliates from the New York market. Additionally, this is a great way to effectively regulate advertisements that are not associated with a regulated sports pool vendor.

IV. Discussion on Proposed Rule’s Section 5329.37

a. Proposed Rule on Marketing Affiliates

The current proposed Rule, Section 5329.37(a)(6), prohibits revenue share compensation to affiliates, “[n]o casino sports wagering licensee or sports pool vendor may enter into an agreement with an affiliate marketing partner when the manner of compensation for such services is prohibited by Racing, Pari-Mutuel Wagering and Breeding Law section 1341(1).”

The Rule prohibits revenue share compensation by binding the online sports wagering rules to Article 13 of the New York Racing, Pari-Mutuel Wagering and Breeding Law’s regarding Destination Resort Gaming. In effect, the Rule requires operators and advertisers to comply with the following language:

Unless otherwise provided in this subdivision, no agreement shall be lawful which provides for the payment, however defined, of any direct or indirect interest, percentage or share of: any money or property gambled at a gaming facility; any money or property derived from gaming activity; or any revenues, profits or earnings of a gaming facility.⁸

Additionally, the Rule’s Section 5329.37(a)(4), is unclear as to the persons/entities it is attempting to restrict from disseminating sports gambling advertisements. The rule states, “[n]o person who, or entity that, is not a casino sports wagering licensee or sports pool vendor shall advertise sports gambling in the State, unless the advertisement disclaims conspicuously that the wagering offerings are not available in the State.”

b. Current Impact of the Rule on Marketing Affiliates

⁸ N.Y. Rac. Pari-Mut. Wag. & Breeding L. § 1341.

Restricting revenue share payments from licensed sports betting operators to marketing affiliates will be detrimental to New York consumers and the licensed industry the Commission seeks to promote.

Under a CPA deal, affiliates are paid a one-time high dollar fee for each customer they direct to an operator's platform. This model is becoming economically infeasible for operators because of the uncertainty of the high dollar spending required on one customer as opposed to the feasible spending required of a revenue share arrangement. Revenue share agreements allow a diversity of information sources for consumers and help smaller licensed operators compete in the marketplace. There is no other viable alternative option for affiliate compensation. Furthermore, it is not feasible to change the affiliate compensation model because the entire Internet is built around it.

In effect, an elimination of the revenue share affiliate model will create a market where only the largest affiliates and operators can participate and succeed, leaving no room for small, new, or emerging businesses.⁹ This is in direct conflict with the Rule's Regulatory Flexibility Analysis, Rural Flexibility Analysis and Job Impact Statement: "The proposed rules will not have any adverse impact on small businesses".¹⁰ The Regulatory Flexibility Analysis failed to disclose and consider that small business affiliates and operators are now severely disadvantaged. The same restrictions in Illinois have impacted small and emerging businesses in Illinois and will do so if put into effect in New York.

Unfortunately, New York citizens will bear the true burden of no revenue share affiliate compensation structures. The likely negative impact of a revenue share ban will be borne on those individuals with a true interest in being educated and placing a sports wager in the legal New York marketplace. The smaller the affiliate presence in the state the harder it will be for New Yorkers to find reliable educational materials on the Internet and learn about those choices from diverse advertisers. Alternatively, they will only be able to find promotional materials for the larger

⁹ This is because only the largest operators can afford the CPA model, and only the largest affiliates have established themselves to ensure delivery of the customers the operators are seeking via a CPA model.

¹⁰ *Regulatory Flexibility Analysis, Rural Flexibility Analysis and Job Impact Statement*, found on page 23 of the August 2, 2023, NY State Register document.

operators and have less information available to them on where they can or should legally place their wagers.

Consumers may, instead, be directed to offshore, unregulated sportsbooks.¹¹ States without a robust marketing affiliate industry lose consumers to offshore sportsbooks because of their years' worth of spend and effort promoting their content on the Internet. Once affiliates enter a market, they focus efforts and invest large amounts on promoting their content to be favored on the Internet. The more regulated affiliate content is encouraged and promoted on the Internet, the more likely the industry can stamp out offshore books from appearing in potential consumers' searches.

Additionally, by prohibiting revenue share, operators will instead focus their marketing budgets away from effective and beneficial pull advertising, such as agreements with marketing affiliates, and focus spends on push advertising. With the likely result being more constant tv, radio, and billboard ads geared to all New York residents, not just those with a true interest in being educated and placing a wager. Additionally, as explained above, offshore sportsbooks will be more likely to prosper, and the market is likely to become consolidated and anti-competitive.

V. **Background on Marketing Affiliates and the New York Laws**

a. **What/Who is a Marketing Affiliate and their Advertising Strategy**

Marketing Affiliates or affiliates are entities that promote or direct customer traffic to licensed gaming operators. Affiliates usually provide and publish informational content of interest to *consumers interested in sports wagering*. Consumers looking for sports betting options turn to affiliate websites, such as [Actionnetwork.com](https://www.actionnetwork.com), [Gambling.com](https://www.gambling.com), and [Legalsportsreport.com](https://www.legalsportsreport.com), to assist them in finding the legal options available to them and evaluating deals or best odds being offered at any given time. For clarity, marketing affiliate content is intended only for those with a pre-existing interest in wagering content. Affiliate websites provide links and informative content such as expert reviews, comparisons of the products offered by gaming operators, available player

¹¹ See generally *From the Sidelines the Mainstream: GeoComply's NFL 2023 Week 1 sports betting performance report*, GeoComply Blog (Sept. 13, 2023), <https://www.geocomply.com/blog/from-the-sidelines-to-the-mainstream-geocomplys-nfl-2023-week-1-sports-betting-performance-report/#:~:text=GeoComply%20recorded%20242.3%20million%20geolocation,legal%20options%20across%20the%20country> (noting that in non-regulated markets with the abundant presence of reliable and legal market affiliates offshore sportsbook content is more easily accessed and found by consumers).

incentives, and other content such as gaming industry news and “how to” guidance. The affiliate sites may also include information and resources on responsible gaming, including compulsive gambling self-tests. Affiliates act as gateways to the legal gaming operators with whom they choose to work.

As opposed to traditional “push” advertising, affiliates engage in “pull” marketing. Push advertising, such as TV ads, radio ads, social media ads, etc., is designed to entice consumers to a product. Otherwise stated, push advertisements push or encourage consumers to buy or engage with a certain business unprompted. It advertises to the general population, regardless of age, demographics, and product/service interest. Affiliates, however, do not generally engage in direct or push marketing.

Conversely, pull advertising, a strategy used by nearly all affiliates, is designed to provide information to consumers who are *proactively searching* for sports betting information. A prime example is a travel website such as Expedia or Travelocity. When a potential traveler visits these websites, they already intend to book a trip. They are using these websites to evaluate all their options and learn about new offers or places they could stay. Like potential travelers visiting these websites, consumers that visit affiliate websites primarily do so through unpaid channels, including search engine optimization. Search engine optimization is the process of optimizing websites to make them more appealing to search engines, so they rank favorably in search engines’ results pages for certain queries. It would be rare for a consumer to be shown advertisements from a marketing affiliate unless they were interested in making a wager or learning more about legal sports wagering.

In an affiliate/operator contractual relationship, affiliates receive performance-based marketing compensation, such as revenue share and CPA. Operators prefer and only compensate affiliates on a performance metric basis, because they allow for the most efficient marketing spend. Without such predictability and ensured results from affiliates, operators would have little to no reason to outsource marketing efforts. Some form of performance-based marketing is permissible in all states where sports wagering is legal except Connecticut, which restricted CPA and revenue share, and Illinois and Massachusetts, which restrict revenue share.¹² A revenue share model,

¹² Note that neither Connecticut nor Illinois requires vendor registration or affiliate licensing.

however, is not too different from CPA. In a CPA model, affiliates receive a one-time payment for each customer that “clicks through” from the affiliate site to the operator’s platform. This is a “one time” payment to the affiliate, irrespective of the customer’s spend on the operator’s site. In the revenue share model, operators have the option to pay affiliates over time for that same customer based upon the revenue that customer brings. The type of compensation is “agnostic” to the consumer – in other words, the consumer “clicks through” from the affiliate site to the operator’s regulated wagering site, and engages in sports wagering, without further interaction with the affiliate. Some have a misconception about the revenue share affiliate compensation model – that it entices affiliates to promote their content to certain individuals more than others. However, this is not true and impossible. As explained above, the marketing affiliates are incapable of knowing who these individuals are and targeting them with any further content. Only the operator is aware who the customer is and what their wagering behavior is.

b. Benefits of Marketing Affiliates in a Legalized Market

Affiliates provide a critical resource in a legalized and competitive market for two key reasons. First, one of, if not the ultimate, major challenge all legalized states face is helping consumers engage with legal sports betting operators instead of existing, entrenched offshore operators who have been active in states like New York for decades. Offshore illegal sportsbooks have been able and continue to advertise freely to customers in all 50 states. Even today, offshore sportsbooks continue to obtain a significant share of customers. Offshore sportsbooks and those that advertise on their behalf, despite best efforts of the entire regulated sports betting industry, frequently appear in search results like “New York online sports betting” because they have been investing for years in the content appearing in relevant Internet searches. A top priority and goal of affiliates is to reduce or fully eradicate offshore sportsbooks, ensuring that customers who wish to participate in a regulated and approved market do so only by directing interested consumers to New York licensed operators.

Second, affiliates assist in facilitating and providing a competitive sports betting market. Restrictions on revenue share compensation limits competition by ensuring that only the biggest

sportsbooks with the largest marketing budgets will be successful.¹³ For instance, some smaller operators are unable to work with affiliates in Illinois, which prohibits revenue share, because their marketing spend is too low to pay affiliates a CPA. Revenue share restrictions can also exclude new affiliate entrants, which may significantly hamper diversity efforts. New affiliate entrants are often only able to obtain deals with operators through revenue share arrangements.

Marketing affiliates are a neutral informational source for consumers to explore all licensed options in the market. Without affiliates present in a legalized market, it is harder for consumers to be educated on brands that are less front facing or with smaller advertising budgets; thereby consolidating the power at the top and stifling the natural abilities for the market to be competitive. Such consolidation will hurt the New York's legalized sports betting economy over time as most of the market share remains concentrated to one or two operators, with the true victims being New York consumers who will be uninformed and left with fewer choices.

c. Section 1341(1) of the Racing, Pari-Mutuel Wagering and Breeding Law Should Not be Applied

The New York Racing, Pari-Mutuel Wagering and Breed Law was written and intended to be used only to legislate casino and retail properties. It is inapplicable to the online sports wagering industry in New York and should not be referred to within the Rules that regulate the New York online sports wagering market. Article 13, which the Rule cites to, focuses on Destination Resort Gaming – the gaming activity that takes place on/in/via casinos.

When online sports wagering was first launched this law existed. However, the New York Gaming Commission did not enforce it or mention it when affiliates and operators first engaged in negotiations for services in New York. If the Law was applicable to online sports wagering, the experienced and astute NY Gaming Commissioners would have enforced it in such a way. By promulgating this section of the Rule, the Commission has exceeded its authority and acted wrongfully.

¹³ Note that this may be part of the reason that Connecticut has not struck its restrictions. Connecticut law only currently permits three online sports betting operators.

If there were any relevant New York Racing, Pari-Mutuel Wagering and Breeding Law provisions that the Commission could reasonably bind to the Rules it would only be Section 1367-a – the part of the Law legislating mobile sports wagering. However, the Rule does not do so, and instead arbitrarily brings in a section of the Law intended for casino vendors.

Notably, the Law’s Section 1367-a(4)(j) states, “[a]ll sports wagering shall be conducted in compliance with *this section and section thirteen hundred sixty-seven* of this title.”¹⁴ This language is proof that the legislature did not want or intend any other provisions of the Law to apply to sports wagering, otherwise they would have dictated so. The legislature made it clear, through this language, that only Sections 1367 and 1367-a are intended to apply to sports wagering.

Section 1367 is the general sports wagering law in New York and mandates certain requirements for developing rules and regulations for sports wagering: “In developing rules and regulations applicable to sports wagering, the commission shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework.”¹⁵ The Rule set forth by the Commission is in direct violation of this requirement. No other state arbitrarily ties a restriction in the casino/retail wagering market to automatically apply to other types of wagering. Additionally, of the 37 states that have legalized sports betting, 34 permit revenue share compensation. The Commission did not examine other state regulations and adopt a similar regulatory framework since nearly 92% of states that have legalized online sports betting do not prohibit revenue sharing affiliate arrangements. Therefore, if this Rule is in effect the Commission will not have adopted a similar regulatory framework, as required under the general sports wagering law. Further, at minimum, it is arbitrary that the Commission failed to address the lack of examination and evaluation of other states in their Rule or Impact Statements.

The Rule’s Registry Impact Statement states in item 7 that, “[t]he rules do not duplicate, overlap, or conflict with any existing State or federal requirements.” As explained above, this is not the case. The Rule conflicts with the Law’s sections 1367 and 1367-a. As a result, the revenue share prohibition is in direct conflict with the Rule’s enumerated impact statement.

¹⁴ N.Y. Rac. Pari-Mut. Wag. & Breeding L. § 1367-a(4)(j) (*emphasis added*).

¹⁵ N.Y. Rac. Pari-Mut. Wag. & Breeding L. § 1367(4).

Conclusion

iDEA thanks the Commission for considering its comments concerning improvements to the Rule. Please do not hesitate to contact the undersigned for additional information or clarification on the issues raised herein.