



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-14

The Honorable Leslie Osborn
Oklahoma State Representative District 47
2300 N. Lincoln Blvd., Room 246
Oklahoma City, Oklahoma 73105

October 31, 2018

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Do the requirements of 62 O.S.2011, § 211 apply to the Oklahoma Horse Racing Commission?**
- 2. If the answer to Question #1 is yes, which streams of revenue are subject to the ten-percent contribution requirements of 62 O.S.2011, § 211?**

I.
BACKGROUND

The Oklahoma Horse Racing Commission (the “Commission”) was created in 1983 for the purpose of regulating horse racing in Oklahoma. *See* 3A O.S.2011, § 203.7. The Oklahoma Horse Racing Act (“OHRA”) vests the Commission with plenary power to promulgate rules and regulations “for the forceful control” of horse racing in the State. *Id.* The Commission thus has broad authority to, among other things, (i) administer the OHRA and promulgate rules thereunder, (ii) supervise horse racing events,¹ including wagering thereon, and the issuance and regulation of horse racing licenses, (iii) promulgate rules governing the rates charged for race track admission and for services performed and items sold at race tracks, (iv) approve all construction on property owned by an organization licensee, (v) investigate and impose penalties against licensees, and (vi) adjudicate controversies arising from enforcement of the provisions of the OHRA. *Id.* § 204. The Commission also has specific statutory power to license and employ stewards who are

¹ Horse racing events are known as race meetings, and are defined in pertinent part as “the entire period of time not to exceed twenty (20) calendar days separating any race days for which an organization license has been granted to a person by the Commission to hold horse races at which the pari-mutuel system of wagering is conducted, to hold non-pari-mutuel horse races or to conduct accredited work or training races.” 3A O.S.2011, § 200.1(A)(13).

present at horse racing events to enforce Commission rules and regulations and the provisions of the OHRA. *Id.* § 203.4.

Prior to 2017, “[a]ll funds received by the Commission from fees, fines, reimbursements, and sale of materials” were deposited into the State’s General Revenue Fund. 3A O.S.2011, § 204.1A(D). However, there were two exceptions to this mandate. First, assessments on organization licensees for equine drug testing were deposited into the Equine Drug Testing Revolving Fund. *Id.* § 204.1B. Second, the State-Tribal Gaming Act authorized the Commission to charge an application fee of \$50,000 to organizations seeking a license to conduct casino-style gaming at horse tracks, a separate fee to cover the costs of regulating such gaming, and fees for issuing occupation gaming licenses, conducting background investigations, and fingerprinting. 3A O.S.Supp.2012, § 282. These fees were to be deposited into the Oklahoma Horse Racing Commission Gaming Regulation Revolving Fund and used for the purpose of regulating gaming conducted by the organization licensee. *Id.* § 282(E).

Separately, wagering on horse races generates tax revenue through an 18 percent retention on all money wagered, of which one-ninth is remitted to the Oklahoma Tax Commission (“OTC”). *See* 3A O.S.2011, § 205.6. Prior to 2017, the one-ninth remitted to OTC was apportioned to the General Revenue Fund. Of the remainder, five-ninths was retained by the organization licensee and three-ninths was paid out as purses for participating horses. *See id.* § 205.6(B)(1).

In 2017, the Legislature amended certain provisions of the OHRA and State-Tribal Gaming Act. Section 204.1A of the OHRA—which required “[a]ll funds received by the Commission from fees, fines, reimbursements, and sale of materials” to be deposited into the State’s General Revenue Fund—was repealed and a new Section 204.1C was added to establish the Oklahoma Horse Racing Commission Operational Expenses Revolving Fund (the “OHRC Fund”). *See* 2017 Okla. Sess. Laws ch. 116, §§ 1, 8. In addition, Sections 204.2 and 205.2 of the OHRA were amended to redirect revenue from license fees from the General Revenue Fund to the OHRC Fund. *See id.* §§ 3, 4. Finally, Section 205.6(B)(1) of the OHRA was amended to similarly redirect the one-ninth of the 18 percent wagering retention. *See id.* § 5. With regard to the State-Tribal Gaming Act, Sections 263 and 282 were amended to direct some tax proceeds from horse racing tracks with gaming to the OHRC Fund. *See id.* § 6. The Gaming Revenue Revolving Fund was eliminated and certain gaming fees were redirected to the OHRC Fund. *See id.*

II. DISCUSSION

You ask first whether, in light of the 2017 amendments described above, the Oklahoma Horse Racing Commission is subject to the requirements of Title 62, Section 211. That statute provides as follows:

Unless otherwise provided by law all self-sustaining boards created by statute to regulate and prescribe standards, practices and procedures in any

profession, occupation or vocation shall pay into the General Revenue Fund of the state ten percent (10%) of the gross fees charged, collected and received by such board.

62 O.S.2011, § 211. By its plain text, the statute applies only to (i) self-sustaining boards,² that (ii) are created by statute, and (iii) “regulate and prescribe standards, practices and procedures in *any* profession, occupation or vocation.” *Id.* (emphasis added)

A. With a single exception, fees collected by the Oklahoma Horse Racing Commission pursuant to the Oklahoma Horse Racing Act and the State-Tribal Gaming Act are subject to the requirements of Title 62, Section 211.

Taking the last two elements first, the Commission is plainly created by statute, *see* 3A O.S.2011, § 201, and, as detailed above, has broad regulatory authority over occupations and organizations involved in horse racing.³ *See* 3A O.S.2011 & Supp.2017, §§ 203.4 – 205.4. And with the 2017 amendments, the third element is satisfied; the Commission is now a self-sustaining board no longer funded through annual legislative appropriations. *See* 3A O.S.Supp.2017, § 204.1C.

However, as indicated by its introductory clause—“Unless otherwise provided by law”—the mandate of Section 211 yields to contrary law. For instance, some statutes that have created boards that would be subject to Section 211 include express exemptions from its requirements. *See, e.g.*, 52 O.S.Supp.2017, § 420.11(C) (“Section 211 of Title 62 . . . shall not apply to the funds and fees collected by the Liquefied Petroleum Gas board.”), 71 O.S.Supp.2017, § 1-612(I) (“Section 211 of Title 62 . . . shall not apply to the Oklahoma Department of Securities or the Oklahoma Securities Commission.”). Neither the OHRA nor the State-Tribal Gaming Act contain any similar express exemption.

Even in the absence of an express exemption, a board that would be subject to Section 211 may nevertheless be exempt from its requirements where complying with those requirements would conflict with other statutory provisions. For example, in Attorney General Opinion 2003-19 this office was presented with a specific statute requiring the Real Estate Commission to pay into the General Revenue Fund ten percent of the “*license* fees collected and received.” A.G. Opin. 2003-19, at 110 (emphasis in original). The

² While Section 211 refers only to “boards,” this office has analyzed the application of Section 211 with respect to State “commissions” without making any distinction between the two. *See* A.G. Opins. 2010-6 (Oklahoma Uniform Building Code Commission), 2003-9 (Oklahoma Real Estate Commission), 1970-147 (Peanut Commission).

³ Although it is certainly true that some occupations licensed by the Commission may be subject to separate licensing or regulation by other government entities, the licenses issued by the Commission bestow the unique privilege of conducting business in the horse racing and gaming professions in Oklahoma. For those professions, the Commission plainly “regulate[s] and prescribe[s] standards, practices, and procedures” that govern members’ conduct. *See, e.g.*, 3A O.S.Supp.2017, § 204.2 (setting forth Commission’s licensing authority and applicable standards of conduct for “horse owners, trainers, jockeys, agents, apprentices, grooms, exercise persons, veterinarians, valets, blacksmiths, concessionaires, stewards, starters, timers, judges, supervisors of mutuels, guards, and such other personnel designated by the Commission whose work, in whole or in part, is conducted upon racetrack grounds which are owned by an organization licensee”).

opinion found that the specific statute controlled over the general language of Section 211, which applies to “**gross** fees charged, collected and received,” (emphasis added) and concluded that the Real Estate Commission would not be required to pay **non-license** fee revenues into the General Revenue Fund. *Id.* at 113. Attorney General Opinion 1990-19 reached a similar conclusion with regard to the Board of Public Accountancy. The relevant statute provided that “the Board shall pay into the General Revenue Fund of the state ten percent (10%) of **all annual registration** fees so charged, collected and received, and no other portion shall ever revert to the General Revenue Fund or any other fund of the state.” A.G. Opin. 1990-19, at 31 (quoting 59 O.S.1981, § 15.7) (emphasis added). Accordingly, the opinion concluded that only registration fees, rather than gross fees, collected by the Board were required to be transferred to the General Revenue Fund. *Id.* at 32.⁴

Turning again to the OHRA, the Legislature in restructuring the Commission’s funding through the 2017 amendments provided as follows:

There is hereby created in the State Treasury a revolving fund for the Oklahoma Horse Racing Commission to be designated as the “Oklahoma Horse Racing Commission Operational Expenses Revolving Fund”. The fund shall be a continuing fund, not subject to fiscal year limitations or reconciliation, and shall consist of all monies received by the Oklahoma Horse Racing Commission from revenues apportioned to the fund by Sections 205.6 and 263 of Title 3A of the Oklahoma Statutes, together with all monies from fines, fees, reimbursements, assessments and sale of materials which are collected or received by the Commission and all monies retained by the Commission under the provisions of Title 3A of the Oklahoma Statutes.

3A O.S.Supp.2017, § 204.1C.

The OHRA authorizes the Commission to charge two types of licensing fees. **First**, occupation licenses are issued to, among others, horse owners, trainers, jockeys, grooms, veterinarians, stewards, supervisors of mutuels, and other persons designated by the Commission who work, in whole or in part, on racetrack grounds owned by an organization licensee. 3A O.S.Supp.2017, § 204.2(A). The fee for an occupation license shall not exceed \$100 if renewed annually or \$300 if renewed triennially. *Id.* § 204.2(B). “Of the original application fee for an occupation license, the amount of the fingerprinting fee shall be deposited in the OSBI Revolving Fund. The remainder shall be apportioned to the [OHRC Fund].” *Id.* § 204.2(E). **Second**, organization licenses allow the licensee to conduct horse racing and wagering. *Id.* § 205.2(A). Fees for organization licenses range from \$200 per racing day to \$5000 for each race meeting. *Id.* The fees received by the Commission for organization licenses “shall be apportioned to the [OHRC Fund].” *Id.* § 205.2(K).

⁴ *Cf.* 59 O.S.Supp.2017, § 475.9(A) (“[A]t the end of each fiscal year the [State Board of Licensure for Professional Engineers and Land Surveyors] shall pay into the General Revenue Fund of the state an amount equal to ten percent (10%) of **all licensure and certification** fees in compliance with Section 211 of Title 62 of the Oklahoma Statutes.” (emphasis added)).

The OHRA contains no language regarding Section 211 of Title 62 and, following the 2017 amendments, it makes no mention of depositing fees into the General Revenue Fund. However, with regard to occupation license fees, the OHRA specifically states that the portion attributable to the fingerprinting fee shall go to the OSBI Revolving Fund. *See* 3A O.S.Supp.2017, § 204.2(E). As noted in Attorney General Opinions 2003-19 and 1990-19, where two statutes address the same subject, one specific and one general, the specific statute will control over the general. *See also In re Okla. Gas and Electric Co. v. Corp. Comm'n*, 2018 OK 31, ¶ 28, 417 P.3d 1196, 1205. Therefore, with the exception of the amount of the fingerprinting fee that shall be deposited in the OSBI Revolving Fund, fees authorized by the OHRA are subject to Section 211. Likewise, the gaming application, gaming regulation, gaming occupation license, investigative, and fingerprinting fees collected by the Commission pursuant to the State-Tribal Gaming Act are subject to Section 211.

B. Non-fee revenue collected by the Oklahoma Horse Racing Commission is not subject to the requirements of Title 62, Section 211.

You next ask which of the Commission's revenue streams are subject to Section 211. Having already established that the licensing and gaming fees authorized by the OHRA and the State-Tribal Gaming Act are subject to Section 211 with one exception, this question focuses on whether any *other* funds received by the Commission are subject to that section. By its plain text, Section 211 applies to "the *gross fees* charged, collected and received by such board." 62 O.S.2011, § 211 (emphasis added). The term "fees" is not defined in the OHRA, Commission rules, or by Section 211 itself. In the absence of a contrary definition, words are to have the same meaning in law as would be attributed to them in ordinary and usual usage. *Ashikian v. State ex rel. Okla. Horse Racing Comm'n*, 2008 OK 64, ¶ 14, 188 P.3d 148, 156.

In the context of Section 211, the pertinent definition of fee is "a charge fixed by law or by an institution for certain privileges or services." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 833 (3d ed. 2002). So for example, the licenses required under the OHRA bestow the privilege of legally engaging in those professions as they relate to the Oklahoma horse racing industry and, as discussed above, the associated fees, with one minor exception, are therefore subject to Section 211. By contrast, the funds received by the Commission from the OTC that derive from the retention on horse race wagering are not fixed charges for a privilege or service and are therefore *not* subject to Section 211.⁵ Likewise, when the Commission imposes fines for violations of the OHRA or Commission rules or orders, *see* 3A O.S.2011, § 204(A)(17), that amounts to monetary punishment, not a charge for a privilege or service. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852 (3d ed. 2002) (defining "fine" as "the monetary penalty imposed for infraction of a rule or obligation"). Fine revenue is therefore not subject to Section 211.

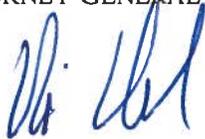
⁵ For the same reason, the tax proceeds the Commission receives under Section 263 of the State-Tribal Gaming Act are not fees subject to Section 211. *See* 3A O.S.Supp.2017, § 263.

It is, therefore, the official Opinion of the Attorney General that:

1. The Oklahoma Horse Racing Commission is a self-sustaining agency, *see* 3A O.S.Supp.2017, § 204.1C, that regulates and prescribes standards, practices, and procedures in professions, occupations, and vocations involved in horse racing and gaming at horse race tracks in Oklahoma. *See* 3A O.S.2011, §§ 203.5, 203.7, 204; 3A O.S.Supp.2017, § 204.2.
2. Except for the amount attributable to the cost of fingerprinting for occupational licenses authorized by the Oklahoma Horse Racing Act, *see* 3A O.S.Supp.2017, § 204.2(E), the Oklahoma Horse Racing Commission must pay ten percent of the fees it collects into the General Revenue Fund pursuant to 62 O.S.2011, § 211.
3. The term “fees” as used in 62 O.S.2011, § 211 refers to charges fixed by law for certain privileges or services. With regard to the Oklahoma Horse Racing Commission, fees include license fees authorized under the Oklahoma Horse Racing Act and application, regulation, and gaming license fees authorized under the State-Tribal Gaming Act as well as other fees the Commission is authorized by law to charge. *See* 3A O.S.Supp.2017, §§ 204.2, 205.2, 282.
4. Revenue the Oklahoma Horse Racing Commission receives from taxes on horse race wagering and other gaming pursuant to 3A O.S.Supp.2017, §§ 205.6 and 263 is not subject to 62 O.S.2011, § 211. Similarly, revenue derived from fines, reimbursements, assessments, and sale of materials is not subject to 62 O.S.2011, § 211.



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