

# **Comments of the Independent Regulatory Review Commission**

**on**

## **Pennsylvania Gaming Control Board Regulation #125-45 (IRRC #2561)**

### **General and Operative Provisions; Board Procedures**

**November 9, 2006**

We submit for your consideration the following comments on the proposed rulemaking published in the September 9, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Gaming Control Board (Board) to respond to all comments received from us or any other source.

#### **1. Determining whether the regulation is in the public interest.**

The Pennsylvania Horse Race Development Act (Act) (4 Pa.C.S.A. §§ 1101-1904) allowed the Board to promulgate temporary regulations until July 5, 2006. The temporary regulations were not subject to two statutes that guide agencies when promulgating regulations. Those statutes are the Commonwealth Documents Law (CDL) (45 P.S. §§ 1201-1208) and the Regulatory Review Act (RRA) (71 P.S. §§745.1-745.15). The Act requires all temporary regulations to be promulgated as permanent regulations by July 5, 2007. The conversion of temporary regulations to permanent regulations requires compliance with both the CDL and the RRA.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under §745.5(a) in the regulatory analysis form (RAF).

The Preamble to this rulemaking states that the Board proposes to replace four chapters of its temporary regulations with permanent regulations. The explanation of the regulations in the Preamble and the information contained on the RAF is not sufficient to allow this Commission to determine if the regulation is in the public interest. While we commend the Board for involving the regulated community in the development of the temporary regulations, we note that a complete explanation of the need for each chapter and section was not provided in that process. Furthermore, there is no detailed fiscal impact and cost benefit analysis in the RAF. Without this information, we cannot determine if this proposed regulation is in the public interest. In the Preamble and RAF submitted with the final-form rulemaking, the Board should provide more detailed information required under §745.5(a) of the RRA.

## CHAPTER 401. PRELIMINARY PROVISIONS

### 2. Section 401.2. Construction. – Statutory authority; Implementation procedures.

Subsection (b) allows the Board to permit deviations from a requirement of Part VII of Title 58. Part VII pertains to all of the Board's regulations, both substantive and procedural. Under Subsection (c), 1 Pa. Code § 31.2 (relating to liberal construction) would be superseded by this section. 1 Pa Code § 31.2 pertains only to rules of administrative practice and procedure. What is the Board's statutory authority for granting a waiver from a substantive requirement? Absent specific statutory authority, Subsection (b) should be deleted in its entirety and Subsection (c) should be amended to only reference Subsection (a).

If the Board has statutory authority to grant waivers of substantive requirements, the procedures for requesting and considering a waiver must be included in the final-form regulation. In addition, the final-form regulation must address who can request such a waiver and what criteria the Board will apply to determine if a waiver will be granted.

### 3. Section 401.3. Definitions. – Statutory authority; Implementation procedures; Clarity.

#### *Gaming employee*

Paragraph (i)(J) references personnel with SLOTS Link security administrator access and responsibilities. The term "SLOTS Link" is not clear. This term should be defined in the final-form regulation.

Under Paragraphs (ii) and (iii), certain employees of a manufacturer will be considered "gaming employees." The definition of "gaming employee" found in § 1103 of the Act (4 Pa.C.S.A. § 1103) references only slot machine and supplier licensees. What is the Board's statutory authority for including certain employees of licensed manufacturers in this definition?

Paragraph (iv) states that "other employees as determined by the Board" may be considered a "gaming employee." This provision lacks specificity and would make compliance with the regulation difficult for the regulated community. The final-form regulation should either delete this paragraph or list who the other employees are.

#### *Key employee*

This definition deviates from the statutory definition found in the Act in that paragraph (ii) of the regulatory definition includes manufacturer and supplier licensees. What is the Board's statutory authority for including these licensees in the definition of "key employee"?

In addition, the statutory definition (§ 1103 of the Act (4 Pa.C.S.A. § 1103)) of this term includes the position of "director of cage and or credit operations." Under Paragraph (i), why was "credit operations" not included in the regulatory definition?

### *Licensed entity*

This term is defined as: "A person, other than a natural person, licensed by the Board under this part." The phrase "other than a natural person" is not included in the statutory definition. The statutory definition includes the phrase "other person" and the definition of "person" in the Statutory Construction Act (1 Pa.C.S.A. §§ 1901-1991) includes "natural person." What is the Board's statutory authority to exclude a "natural person" as a licensed entity?

### *Manufacturer's serial number*

This definition states that the manufacturer's serial numbers will be affixed to the outside of the slot machine cabinet in a location approved by the Board. This is a substantive provision. Substantive provisions in definitions are not enforceable. We recommend that this provision be moved to a more appropriate section in the body of the regulation. The final-form regulation should also include the process the Board will use to approve locations of numbers affixed to slot machines.

### *Occupation permit*

The statutory definition of this term is: "A permit authorizing an individual to be employed or work as a gaming employee at a licensed facility." The regulatory definition excludes the phrase "at a licensed facility." Will a gaming employee not working at licensed facility be required to obtain an occupation permit? If so, what is the Board's statutory authority for imposing this requirement?

### *Vendor certification and vendor registration*

The Board has explained that the difference between these terms is the amount of expected goods and services the vendor may annually provide to a facility. In order for the regulated community to know whether they should apply for registration or certification, we recommend that the final-form regulation include the monetary amounts that trigger the need to obtain vendor registration or vendor certification.

## **CHAPTER 403. BOARD OPERATIONS AND ORGANIZATION**

### **4. Section 403.6. Temporary emergency orders. – Implementation procedures; Clarity.**

#### *Subsection (c)*

This subsection lists specific circumstances when a temporary emergency order may be issued. Subsection (c)(1) states that a person "charged with or convicted of a felony, a criminal gaming offense, or crime of dishonesty or false statement or other disqualifying offense" may be subject to a temporary emergency order. The phrase "other disqualifying offense" lacks clarity. This phrase should be deleted or the offenses should be listed in the final-form regulation.

*Subsection (g)*

Subsection (g) references §491.3 (relating to service by the Board). Section 491.3 is a temporary regulation. The temporary regulations will cease to exist as of July 5, 2007, unless they are promulgated as permanent regulations by that date. We recommend that the Board delete references to temporary regulations unless the pertinent temporary regulations have been promulgated as permanent regulations prior to the Board's submittal of this final-form regulation. Other sections of this rulemaking that contain references to temporary regulations are: §§ 403.5(k)(2); 403.5(q); 403.5(r)(3) and 405.6(a).

*Subsection (j)*

This subsection pertains to the procedure for an informal hearing before the Executive Director or designee. Under Subsection (j)(5), how much time does the Executive Director have to render a decision and how will the person be notified of the decision? We recommend that the final-form regulation include provisions that address both of these concerns. This would allow a person that is the subject of a temporary emergency order to have a clear understanding of how this process works.

*Subsection (m)*

Under Subsection (m)(1), the Board may adopt a resolution ratifying or modifying the temporary emergency order. The Board has explained that the appeal process is contained in Chapter 494. The fact that a person has appeal rights and the procedure for filing an appeal should be referenced in the final-form regulation.

## **CHAPTER 405. BUREAU OF INVESTIGATIONS AND ENFORCEMENT**

### **5. Section 405.1. General duties and powers. – Statutory authority; Clarity.**

Paragraph (2) allows the Bureau of Investigation and Enforcement (Bureau) to investigate “licensees, permittees, registrants, certified vendors and other persons for potential violations of the act.” Section 1517(a)(1) of the Act (4 Pa.C.S.A. § 1517(a)(1)) allows the Board to investigate “all licensees, permittees and applicants.” We question the Board’s statutory authority to investigate a person not subject to some form of Board approval. This should be explained in the Preamble to the final-form regulation.

### **6. Section 405.2. Information. – Statutory authority; Clarity.**

Subsection 405.2(c) states that other state and local law enforcement agencies “shall” provide information requested by the Bureau relating to an applicant. Section 1517(f) (4 Pa.C.S.A. §1517(f)) of the Act states that these agencies “may” obtain or provide that information. To be consistent with the Act, the word “shall” should be changed to “may.”

**7. Section 405.6. Enforcement action. – Clarity.**

This section allows the Office of Enforcement Counsel to initiate an enforcement action against a person holding a license, permit certification or registration issued by the Board. The term “enforcement action” is not defined. This term should be explained in the final-form regulation.

**CHAPTER 407. PUBLIC ACCESS TO BOARD FILES**

**8. Section 407.1. Case files. – Reasonableness; Implementation procedures.**

This section establishes the procedures the Board will follow when a request for confidential information has been made. A commentator has requested that a provision be added to this chapter that would require the Board to notify the applicant or holder of a license, permit, certification or registration of the request prior to the release of that holder’s confidential information. We believe this is a reasonable request that would allow the holder to better manage its business interests and recommend that the Board consider adding language that would allow for proper notification.

**9. Miscellaneous clarity.**

To be consistent with the rest of § 403.6, the phrase “or designee” should be added to § 403.6(h).