

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

**on**

## **Pennsylvania Gaming Control Board Regulation #125-47 (IRRC #2563)**

### **Diversity**

**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 two chapters of its temporary regulations with permanent regulations. The explanation of the regulation 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.

**2. Section 481.1. Statement of purpose, policy and applicability. – Statutory authority.**

Subsection (b) states that it is the policy of the Board to promote and ensure that regulated entities conduct all aspects of their operations in a manner that assures diversity of opportunity. This would include the provisions of goods and services utilized by regulated entities. Under Section 1212(a) of the Act (4 Pa.C.S.A. § 1212(a)), only slot machine licensees are required to meet the “provisions of goods and services” requirement. What is the Board’s statutory authority for requiring all regulated entities to assure diversity of opportunity “through the provisions of goods and services”?

**3. Section 481.3. Diversity participation. – Clarity.**

This section states that a regulated entity may use the list of minority and women’s business enterprises certified by the Department of General Services to establish the eligibility of an enterprise for the purpose of promoting and ensuring minority and women’s business participation. The inclusion of the word “may” in this provision implies that other methods for establishing the eligibility of a business would be acceptable. If other methods are available, they should be listed in the regulation. If other methods are not available, the word “may” should be changed to “shall.”

**4. Section 481.4. Establishment of diversity plan. – Statutory authority; Possible conflict with or duplication of statutes or regulations; Implementation procedures; Reasonableness; Clarity.**

*Subsection (a)*

This subsection states the following:

Each regulated entity shall include in its application for licensure or certification a diversity plan that establishes a separate goal of diversity in the ownership, participation and operation of, and employment at the regulated entity. The Board will determine whether the stated goals set forth in each diversity plan are reasonable and represent a good faith effort to assure that all persons are accorded equality of opportunity in contracting and employment by the regulated entity and its contractors, subcontractors, assignees, lessees and agents.

We have two concerns. First, we question why the Board is deviating from the language of the Act and the temporary regulations that allow an applicant to agree to develop a diversity plan. Section 1325(b)(1) of the Act (4 Pa.C.S.A. § 1325(b)(1)) states that a license or permit shall not be granted or renewed unless the Board finds that the applicant has developed and implemented or agreed to develop and implement a diversity plan. Section 423.3(a)(1)(i) of the Board’s temporary regulations contains similar language to Section 1325 (b)(1) of the Act.

Second, what criteria will the Board use to determine if the diversity plan is reasonable? The criteria should be included in the final-form regulation.

*Subsection (b)*

This subsection states that a regulated entity may demonstrate achievement of its “diversity goals” through one of two methods. One method is contracting or transacting directly with minority and women’s business enterprises. The other is contracting with a nonminority business enterprise under terms and conditions that establish a participation plan. We have three concerns. First, the term “diversity goal” should be defined in the final-form regulation.

Second, this section does not establish criteria that would allow the regulated entity to determine if they are satisfying the Board’s requirement of contracting or transacting enough business with the appropriate enterprises. In order for the regulated entity to know what the Board expects, the final-form regulation should include provisions that specify how the Board will determine if the entity has achieved its diversity goals.

Third, Subsection (b)(1) uses the phrase “contracting or transacting.” Subsection (b)(2) only uses the term “contracting.” For consistency, we recommend that one phrase or term be used.

**5. Section 481.6. Diversity audits. – Implementation procedures; Clarity.**

This section allows the Board to perform audits to ensure compliance with this chapter. We recommend that the final-form regulation include procedures that will be used to notify the regulated entity of the audit.