

RULES AND REGULATIONS

TITLE 58. RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS 441 and 463]

Response to Public Comment

Subpart C. SLOT MACHINE LICENSING

CHAPTER 441. SLOT MACHINE LICENSES

§ 441.18. Change in ownership or control of slot machine licensee and multiple slot machine license prohibition.

Comment:

Section 441.18. Our regulatory subcommittee discussed at length the proposed language and the language of Section 1330 of the Act. After a spirited discussion, there were clearly two points of view, one limited multiple ownership the other providing for unlimited multiple ownership of additional 33.3% ownership interests. We believe it would be helpful in avoiding future challenges to this regulation, to make available the reasoning of the Board, including any legal opinions rendered to the Board, supporting the multiple ownership provisions of this proposed regulation.

Response:

The Board has stated its position at the public meeting on September 28, 2005. The Board believes that the regulation furthers the legislative intent of the act, which is enunciated in section 1102 of the act.

Comment:

Section 441.18(a). Regulations 427.2(a)(7) and 441.4(a)(11) refer only to ownership interests (directly and indirectly), not to ownership "or a financial interest." It does not appear that the term "financial interest" is defined in the Act or in the regulations except for the definition limited to Section 1512 of the Act. The three regulations should be consistent and, if the term "financial interest" is retained, a definition should make clear the difference between an ownership interest and a financial interest. Certain members of the subcommittee are concerned that contracting parties may be deemed to have a "financial interest" in a license. For example, certain licensees may lease slot machines or may participate in wide area network mega jack-pot programs, where, in each case, the provider of the machines or network receives a percentage of slot play or gross gaming revenue.

§ 441.18(a): Pursuant to a change in ownership or control of a slot machine licensee under section 1328 of the act

and in accordance with section 1330 of the act (relating to multiple slot machine license prohibition), a slot machine licensee, including its affiliates, intermediaries, subsidiaries and holding companies, is prohibited from possessing an ownership or financial interest {*Is financial interest defined anywhere? See and compare regulations 427.2(a)(7) and 441.4(a)(ii) - See Comment 2*} in any other slot machine licensee or in any other person eligible to apply for a Category 1 slot machine license or its affiliates, intermediaries, subsidiaries or holding companies that exceeds 33.3%.

§ 441.18(b) - should read: (b) Nothing in subsection (a) shall be construed to prevent a slot machine licensee from possessing ownership or financial interests of 33.3% or less, in multiple slot machine licensees or in persons eligible to apply for a Category 1 slot machine license or [its affiliate, intermediary, subsidiary] **their respective affiliates, intermediaries, subsidiaries** or holding **companies.**

Response:

The Board agrees and has amended the regulations, specifically section 441.18(d) to incorporate the suggestions of this comment.

Comment:

We believe that the Board has correctly interpreted Sections 1328 and 1330 of the PA Race Horse Development and Gaming Act (the "Act") to allow slot machine licensees simultaneously to hold an ownership interest in two or more slot machine licenses when a change in ownership or control as defined by Section 1328 takes place. The language of the proposed regulation, which closely tracks the language of Section 1330, accurately reflects the intent of the General Assembly. See 1 Pa C.S. § 1921(b). Section 1330 is the portion of the Act that primarily addresses the issue of multiple ownership interests. Had the General Assembly intended to limit slot machine licensees to ownership or financial interests in only two or fewer licenses, the General Assembly would have plainly stated that intention in Section 1330. Nothing in Section 1330, Section 1328 or the rest of the Act suggests that such a narrow reading of the Act is appropriate, nor would a narrow reading comply with the rule of statutory construction that provisions of a statute such as the Act "shall be liberally construed to affect their objects and to promote justice." 1 Pa. C.S. § 1928(c).

An overly strict construction of Sections 1328 and 1330 would needlessly circumscribe the substantial discretion that the General Assembly has given the Board to

determine who will be permitted to operate a licensed facility. See 4 Pa C.S. § 1202(b)(7), 1204, 1325(a), 1327. The Board has been given this broad discretion so that it can strike the appropriate balance to best ensure that licenses are held by those persons who have the ability and experience to make Pennsylvania's nascent gaming industry a success and maximize revenue for the Commonwealth while maintaining reasonable restrictions on the control of multiple licensed gaming facilities and safeguarding the industry's integrity. See 4 Pa. C.S. § 1102(3), (5), (6); id. § 1313 (d), (e). Adopting a regulation that limits licensees and all of their affiliates, subsidiaries, intermediaries and holding companies collectively to ownership interests in two or fewer licenses when a change or control or ownership takes place could prevent the Board from fully exercising its discretion to ensure that the 14 available licenses are held by the best operators, and leads to disruptions in revenue if licensees or their affiliates later merge. The Board will undoubtedly exercise its discretion wisely to prevent monopolization.

The Board has properly interpreted Section 1330 to allow a slot machine licensee to possess ownership or financial interests of 33.3% or less in additional licenses. In addition, although the proposed regulation

does not explicitly addresses this issue, we respectfully submit that Section 1330 is not implicated unless the applicant for a second license, or its affiliate, subsidiary, intermediary or holding company holds an ownership or financial interest in the first slot machine license of over 50%. The plain words of Section 1330 speak of the first licensee as a whole legal entity - a "slot machine licensee, its affiliate, intermediary, subsidiary or holding company" - and not fraction thereof. Had the General Assembly intended to trigger the prohibition when an entity held less than a majority interest in a slot machine licensee, it would have specified that anyone who has an ownership or financial interest in one license may not have an ownership or financial interest in excess of 33.3% in a second. See Holland ex rel. Holland v. Marcy, 817 A.2d 1082, 1091 (Pa. Super. 2002) (quoting Felix Frankfurter) ("As a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.") Again, the Board has ample discretion to ensure that this interpretation is not abused. See 4 Pa. C.S. § 1325.

Finally, we respectfully submit that the term "ownership or financial interest" is best interpreted to

mean an interest in the nature of equity ownership, rather than contractual interests in the nature of management contracts, options to purchase ownership interests or loans. This is demonstrated by the fact that Sections 1328 and 1330 measure an ownership or financial interest as a percentage of the entity, a unit of measure that only has relevance to the ownership of securities or similar shares of ownership. See, e.g., 1328(a)(1). This interpretation is supported by Section 1512(b) of the Act, which defines a "financial interest" as owning or holding securities. See Housing Auth. of County of Chester v. Pennsylvania State Civil Serv. Comm'n, 730 A.2d 935, 945-46 ("When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute."); Dynamic Sports Fitness Corp. v. Community YMCA of E. Del. County, 768 A.2d 375, 381 (Pa. Cmwlth. 2001). This interpretation is also consistent with the common usage of the term "interest," see 1 Pa. C.S. § 1903 (words should be construed according to their common and approved interest), which is defined as a right, title or legal share in property, see Merriam Webster's Collegiate Dictionary⁶ (10th ed.); see also Black's Law Dictionary (8th ed.) (defining a "financial interest" as

"[a]n interest involving money or its equivalent; esp. an interest in the nature of an investment").

Response:

The Board agrees with this comment and is incorporating this recommendation into the regulation.

Comment:

This section addresses multiple ownership of slot machine licenses. It limits its coverage to situations in which a change of ownership has occurred. As we read the present working of the regulation, it allows acquisition by any category of licensee of up to 33.3% of another licensee, regardless of category. It also allows acquisition by any category of licensee of up to 33.3% of any other person eligible to apply for a Category 1 license. We understand this to mean, in more colloquial terms, that any slot machine operator can acquire up to one-third of any other operator or up to one-third of any racetrack eligible to become an operator. We do not think that such a rule is in keeping with the language of the Pennsylvania Race Horse Development and Gaming Act (the "Act"), nor is it an authorized or effective implementation of the purposes and policies of that Act.

As a matter of law, any analysis begins with the acknowledge concept that no agency can promulgate a

regulation that contradicts the statutory authority pursuant to which the regulation emanates. See, e.g., Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962). Here, the statutory authority comes from the Act. In particular, it stems from the legislative licensing scheme established in the Act at Sections 1301, 1302, 1304, and 1305. These sections, when read in *pari materia*, clearly create a structure within which no licenses may be held by the same party in more than one Category. The specific wording of those Sections dictates such an interpretation.

First of all, Section 1301 authorizes the three categories of licensure. In doing so, in its first sentence, it says, "There shall be three **distinct** classifications of slot machine licenses, designated by category, **each** permitting a licensed racing entity or person to apply for **a** qualifying license category and, upon issuance by the Board in its discretion, to place and operate slot machines at **a** licensed facility." The import of this language is clear. It intends to separate the licenses into distinguishable and discrete types, each unconnected. It similarly specifies that persons may hold licenses in the singular, not the plural, thus not contemplating licensure in more than one category.

But, as stated before, if the language of Section 1301 is not enough to determine the intent of the Legislature in this regard, we have Sections 1302, 1304, and 1305 to finish the matter.

Section 1302 establishes the eligibility for Category 1 licenses. It does so by limiting eligibility to a very carefully defined class - those persons who already hold licenses to conduct thoroughbred or harness race meetings at certain similarly defined locations. By doing so, the Legislature has the unalterably prevented any person who does not fit within those closely cropped criteria from holding that Category of license. This is in keeping with the format established in Section 1301 that each Category have its own criteria and its own licenses.

This becomes even clearer as we examine Sections 1304 and 1305. Those Sections establish the eligibility for Categories 2 and 3 licenses. Section 1304 says that a person may be eligible to apply for a Category 2 license only if "the applicant, its affiliate, intermediary, subsidiary or holding company **is not otherwise eligible to apply for a Category 1 license...**" (emphasis added). In addition, Section 1305, in establishing who may apply for a Category 3 license, limits that to persons, or their

affiliates, who have **"not applied for or been approved or issued a Category 1 or 2 license..."** (emphasis added).

It would have been difficult for the Legislature to have been more transparent. No person, by law, may obtain a Category 2 license if it may also obtain a Category 1 license and no person, by law, may obtain a Category 3 license if it also may obtain either a Category 1 or a Category 2 license. The Categories are separate and distinct by statute. Any regulation that would render them otherwise would be *ultra vires* and unenforceable.

Finally, we do not see the limitation of this proposal to only changes of ownership as being a meaningful one. It does nothing to mitigate the problems inherent in the concept of the proposal in the first place. We assume, for purposes of these comments, that the silence of this rule with regard to whether or not an operator in one category can own one-third of another casino in another category prior to opening bans that type of ownership. Regardless, even if this is the case, the rule in its present form would allow cross-ownership the day after opening. The limitation to change in ownership, therefore, merely delays, by whatever small measure, the deleterious effects of the essence of the proposal. It does not eliminate them.

For all of these reasons, we respectfully request that the proposal regulation be withdrawn. In its place, we offer the attached alternative. This alternative makes clear that licensure by any party in more than one Category is prohibited. In doing so, we believe that it better represents the language of the Act and the intent of the Legislature.

Response:

The Board declines to accept this recommendation.

Comment:

(a) Pursuant to a change in ownership or control of a slot machine licensee under section 1328 of the act and in accordance with section 1330 of the act (relating to multiple slot machine license prohibition), a slot machine licensee **in any Category under the Act**, including its affiliates, intermediaries, subsidiaries and holding companies, is prohibited from possessing an ownership or financial interest **that exceeds 33.3% in more than one slot machine licensee** [in any other slot machine licensee] or in any other person eligible to apply for [a] **another slot machine license in the same Category under the Act**, [Category 1 slot machine license] or its affiliates, intermediaries, subsidiaries or holding companies [that exceeds 33.3%.]

(b) Nothing in subsection (a) shall be construed to prevent a slot machine licensee **within one Category** from possessing ownership or financial interests of 33.3% or less, **of one (1) additional slot machine license within the same Category of licensure under the Act**, [in multiple slot machine licensees or in persons eligible to apply for a Category 1 slot machine license] or its affiliate, intermediary, subsidiary or holding company.

(c) **Provided: however, under no circumstances shall a slot machine licensee, in any Category under the Act, including its affiliates, intermediaries, subsidiaries or holding companies, possess an ownership or financial interest in any slot machine licensee in any other Category under the Act.**

The PTHA suggests that Section 441.18(a) and (b) of the Gaming Regulations be changed to clearly reflect the intent of the Gaming Act and to clarify the prohibitions and ownership limitations of slot machine licensees. Section 1330 prohibits a slot machine licensee, its affiliate, intermediary, subsidiary or holding company from possessing an ownership or financial interest that is more than 33.3% of another slot machine licensee or person eligible to apply for a Category 1 license, its affiliate, intermediary, subsidiary or holding company. Although the

ownership limitations of Section 1330 specifically refer to Category 1, the PTHA suggests that such limitations extend to Category 2 and 3 slot machine licensee ownership.

The legislative intent of the Act precludes the cross ownership of Category 1, 2, and 3 slot machine licenses. Pursuant to Section 1304 of the Act, a person may be eligible to apply for a Category 2 license if the applicant, its affiliate...is not otherwise eligible to apply for a Category 1 license. Section 1305 deems a person eligible to apply for a Category 3 license if the applicant, its affiliate. . .has not applied for or been approved or issued a Category 1 or 2 license. Clearly, the intent of the Act is to preclude ownership of multiple categories of slot machine licenses and to encourage a healthy competitive environment in the gaming industry in PA, rather than establishing regulations that allow for the creation of a monopoly by a few licensed entities.

Because the PTHA and other owners and trainers of horses throughout the Commonwealth of Pennsylvania receive distributions solely from the revenue generated at Category 1 licensed facilities and not from revenue generated by slot machine revenue at Category 2 and 3 licensed facilities, cross ownership of Category 1, 2 and 3 licensees could detrimentally affect the sum total of

distributions to the PTHA members. For example, if a licensed entity operates or holds a 33.3% interest in a Category 1 and Category 2 licensed facility, the licensed entity, may at its sole discretion, market, advertise or induce its patrons, in particular its highrollers to patronize its Category 2 licensed facility and not its Category 1 licensed facility. As a result, the total of the licensed gaming entity's gross terminal revenue at both locations generated for that particular day will remain the same; however, the total gross terminal revenue generated by the operating Category 1 licensee may be severely diminished. As a result, distributions to the PTHA members and other owners and trainers of horses throughout the Commonwealth of Pennsylvania could be severely harmed and the intent of the legislation to provide a portion of the revenue receipts to organizations like the PTHA and other owners and trainers of horses throughout the Commonwealth of Pennsylvania will have been lost.

Conclusion: As the Board makes major steps toward licensing the gaming sites throughout the Commonwealth of Pennsylvania, the PTHA would like to emphasize that while the primary objective of the Act is to protect the public through the regulation and policing of all activities...the secondary purpose of the Act is to provide for the

authorization to install and operate slot machines to enhance live horse racing, breeding programs, entertainment and employment in the Commonwealth of Pennsylvania. See 4 Pa. C.S.A. 1102(1)-(2). A further intended objective of the Act is the authorization of limited gaming to positively assist the Commonwealth's horse racing industry, support programs intended to foster and promote horse breeding and improve the working conditions of personnel who work and reside in and around the stable and backside areas of racetracks. See 4 Pa. C.S.A. 1102(4). The PTHA objectives as an association mirror the intention of the Act, to assist the live horse racing industry and assure that live racing is preserved throughout the Commonwealth of Pennsylvania.

Response:

The Board declines to accept this recommendation.

Subpart E. SLOT MACHINE TESTING, CERTIFICATION AND CONTROL

CHAPTER 463. POSSESSION OF SLOT MACHINES

§ 463.1. Possession of slot machines generally

Comment:

§ 463.1(b) - The following persons and any employee or agent acting on their behalf may, subject to any terms and conditions imposed by the Board, possess slot machines in

the Commonwealth for the purposes provided herein provided that the slot machines are kept in such locations as shall be specifically approved in writing, **or in such electronic format as it approved by the Board, [see § 463.2]** by the Board and that any slot machines located outside of a licensed facility not be used for gambling activity:

(1) An applicant *{how can an applicant have these powers?}* for, or holder of:

Response:

The Board declines to accept the recommendation with regard to Board issued approvals in electronic format. While the subject regulations contemplate acceptance by the Board of electronically filed slot machine movement notices and slot machine master lists, it is anticipated, at least in the near term, that Board issued written approvals to possess slot machines or to utilize specific secure locations for the storage of same pursuant to § 463.1(b) will be handled more formally.

The Board has revisited the issue of slot possession by an applicant for a slot machine, manufacturer or supplier license and accepts the recommendation that slot possession be limited to holders of slot machine, manufacturer or supplier licenses. Section 463.1(b) of the proposal has been revised accordingly.

Comment:

It is respectfully requested that language be added in Section 463.1(b)(1) to explicitly authorize an applicant for or holder of a slot machine license to possess slot machines for the additional purpose of training or teaching. The addition of this concept would be consistent with the provisions of subsection (b)(20) which authorizes educational institutions to possess slot machines "... for the purpose of teaching slot machine design, operation, repair or servicing."

Response:

The Board accepts the recommendation as the proposal's original reference to possession " . . . for the purpose of maintaining for use or actually using such machines . . . " was intended to cover the training of employees. In order to clarify this point and to maintain consistency within the proposal, § 463.1(b)(1) of the proposal has been revised to incorporate an explicit reference to training.

§ 463.3 slot machine authorized locations.

Comment:

Each slot machine on a gaming floor shall be placed at an authorized [location] **area** identified [by number] on a gaming floor plan approved by the Board pursuant to section

1322 of the act (relating to slot machine accounting controls and audits) and shall also be identified **by number and location** on a Slot Machine Master List., **which may be changed, from time to time, upon written notice to the Director of Laboratory/Technical Operations.**

Response:

The Board declines to accept the revisions proposed but has substantially revised this section to clarify its intent. Specifically, the revised proposal establishes that a gaming floor is comprised of one or more slot machine areas, as that term is utilized in section 1309 of the act (relating to slot machine license applications), which areas are further subdivided into slot machine locations identified by number on a gaming floor plan approved by the Board pursuant to section 1322 of the act (relating to slot machine accounting controls and audits). The intent of the proposal is to require that slot machines be identified, where appropriate, on the slot machine master list by two reference numbers, specifically, a slot machine location number corresponding to the approved floor plan and an asset number. Further, the proposal has been revised to incorporate a definition of an asset number in order to remove any confusion as to the meaning of that term.

Comment:

It is respectfully requested that the Board consider adding a provision that provides that a licensee may place slot machines in locations off the gaming floor but within its facility for promotional activities and events such as contests or tournaments. The use of slot machines for these purposes would not be "gambling activity" as there is no "wagering" involved. For these types of events the slot machines are equipped with tournament games or chips and are configured for tournament play. In a number of jurisdictions tournaments and contests are held off the gaming floor for a variety of reasons such as space constraints. Areas in which these events are held include convention space. Adding a provision specifically authorizing the use and placement of slot machines off the casino floor for this type of promotional activity would appear to be appropriately placed in Section 463.3.

Response:

The Board declines to accept the recommendation. As the Board has not as yet completed its examination of the promotional tournament issue, the Board believes that a specific reference in § 463.3 to tournament play off the gaming floor is premature.

§ 463.5. Slot machine master list

Comment:

(a) Prior to the commencement of operations at a licensed facility, each slot machine licensee shall file with the Board's Director of Gaming Laboratory/**Technical Operations**, in writing or in such electronic format as is approved by the Board, a comprehensive list of slot machines possessed by the licensee on its gaming floor, in Board approved restricted areas off the gaming floor but within the licensed facility, and in Board approved storage locations in Pennsylvania off the premises of the licensed facility. Such list shall be denoted as a Slot Machine Master List and shall contain the following information which, for those slot machines located on the gaming floor, shall be presented for each slot machine in consecutive order by [authorized location] **authorization** number:

Documentation summarizing slot machine movements within a licensed facility shall be submitted to the Board's Director of Gaming Laboratory/**Technical Operations**, in writing or in such electronic format as is approved by the Board, on a daily basis.

(c) On the first Tuesday of each month following the initial filing of a Slot Machine Master List, each slot machine licensee shall file with the Board's Director of

Gaming Laboratory/**Technical** Operations, in writing or in such electronic format as is approved by the Board, an updated Slot Machine Master List documenting all slot machines possessed by the licensee on its gaming floor, in Board approved restricted areas off the gaming floor but within the licensed facility, and in Board approved storage locations in Pennsylvania off the premises of the licensed facility. Such updated list shall be in a form, and contain the information, required in subsection (a).

(d) Manufacturer licensees, supplier licensees, educational institutions, **Board authorized** manufacturers and suppliers not licensed within the Commonwealth and regulatory and law enforcement agencies having authority to possess slot machines pursuant to section 463.1 (relating to possession of slot machines generally) who cause slot machines to be transported or moved shall file with the Board's Director of Gaming Laboratory/**Technical** Operations, in writing or in such electronic format as is approved by the Board, a comprehensive list of slot machines possessed by said person. Such list shall be denoted as a Slot Machine Master List and shall be filed within three business days of the initial receipt of slot machines and shall contain the following information:

(e) On the first Tuesday of each month following the initial filing of a Slot Machine Master List, those persons enumerated in section (d) shall file with the Board's Director of Gaming Laboratory/**Technical** Operations, in writing or in such electronic format as is approved by the Board, an updated Slot Machine Master List. Such updated list shall be in a form, and contain the information, required in subsection (d).

Response:

The Board declines to accept the recommendation with regard to the title of its Director of Gaming Laboratory Operations. For a period of time, the Board's website inadvertently included an incorrect title for our lab director which included the reference to "Technical". The website has been corrected and the draft proposal accurately references the title for this position.

For the reasons articulated above with regard to slot machine location, the Board declines to accept the recommendation with regard to authorization number and reiterates its intention to require use of a location number corresponding to the approved floor plan and an asset number.

The Board accepts the recommendation to add a reference in § 463.5 to "Board authorized" manufacturers

and suppliers in order to amplify the existing reference to authorized to possess pursuant to § 463.1.

Comment:

Section 463.5(a)(2)(iii) would require a licensee to create a slot machine master list to provide certain information regarding its slot machines including noting whether a particular unit ". . . is a progressive or wide area progressive slot machine." The master list would be undated monthly. The configuration of a slot machine as a progressive, part of a wide area progressive or a stand alone unit can be changed. Are such configuration changes permissible between master list updates?

Response:

Configuration changes will be permitted between master list updates. The specific regulatory requirements attendant to these configuration changes are under development and will be published and subject to a separate comment period.

§ 463.6. Notice to central computer system

Comment:

In addition to the recordkeeping requirements required hereunder, prior to the placement of a slot machine on the gaming floor, any movement of that slot machine from or to

authorized [locations] **areas** within a licensed facility or removal of a slot machine from the gaming floor, the slot machine licensee shall provide the Department with notice of the slot movement, in a form and pursuant to a time frame prescribed by the Department, in order to insure activation or disabling, as appropriate in the central computer system and the retrieval of real time meter information from the slot machine coincident with the movement.

Response:

For the reasons articulated above with regard to slot machine location, the Board declines to accept the recommendation with regard to authorization number. The proposal has been revised to clarify that movements between slot machine locations on the gaming floor will trigger a notice requirement with the Department of Revenue to insure activation or disabling in the central control computer system, as appropriate.