

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



### **Pennsylvania Gaming Control Board Regulation #125-92 (IRRC #2731)**

#### **Smoking in Licensed Facilities**

**January 7, 2009**

We submit for your consideration the following comments on the proposed rulemaking published in the November 8, 2008 *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. Whether the Board has the statutory authority to promulgate the regulation.**

Section 10(a) of the Clean Indoor Air Act (35 P.S. § 637.10(a)) (Act) states that the Department of Health shall promulgate regulations to implement the Act. Under this rulemaking, the Board has proposed a set of regulations intended to regulate smoking in licensed facilities. We note that the Board has cited Section 1202(b)(30) of the Pennsylvania Race Horse Development and Gaming Act (4 Pa.C.S. § 1202(b)(30)) (Gaming Act) and Sections 3 and 4 of the Act as its statutory authority to promulgate the rulemaking. Section 1202(b)(30) of the Gaming Act provides the Board with general rulemaking authority as it pertains to gaming. Section 3 of the Act gives the Board the jurisdiction to verify gross terminal revenues supplied by the Department of Revenue to the licensed facility and Section 4 of the Act requires slot machine licensees to post smoking and nonsmoking signs in its licensed facility.

The Board has not demonstrated that it has the statutory authority to promulgate regulations pertaining to smoking in licensed facilities. Of particular concern are §§ 441a.25 (a)—(g). Although the regulated community would benefit from a set of regulations that explains how the Act will be administered in licensed facilities, the Department of Health is the only agency that has explicit authority to promulgate such regulations under the Act. We ask the Board to further explain its statutory authority for this rulemaking in the Preamble to the final-form regulation.

Most of the commentators that provided input on this proposal support the Board's efforts to provide guidance on how the Act will be implemented. As noted above, we agree with the commentators and suggest that if this proposal cannot be implemented as a regulation, the Board proceed with the proposal as a non-regulatory document such as a statement of policy. This would provide the regulated community with the needed guidance while honoring the intent of the Act, which calls for the Department of Health to promulgate regulations pertaining to smoking.

**2. Section 441a.25. Smoking in licensed facilities. – Statutory authority; Implementation procedures; Clarity.**

*Gaming floor*

This term is defined under § 401a.3 of the Board's regulations as "Any portion of a licensed facility where slot machines have been installed for use or play." Will this general definition provide licensed entities and the Board enough guidance when determining the percentage of a floor that may be eligible for smoking? We note that regulations must be applied uniformly to all members of the regulated community and suggest that a more precise definition of "gaming floor" as it pertains to smoking areas be added to the final regulation.

*Subsection (d)*

This subsection allows licensees to increase the square footage of the gaming floor designated for smoking "in proportion to the percentage difference in revenue" between slot machines in a smoking area and a nonsmoking area. A commentator has noted that this phrase is vague. We believe a definition of this phrase or further explanation of how the calculation should be made be included in the final-form regulation.

*Subsection (e)*

This subsection sets forth the process a licensee must follow when it wants to make changes to designated smoking areas. We have two concerns. First, what is the Board's statutory authority to require verification of the licensee's compliance with the Act and this regulation before an increase, decrease or reconfiguration of the designated smoking area can take place?

Second, if the Board has this authority to require compliance verification, we recommend that time frames associated with the verification process be included in the final-form regulation.