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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

December 8, 2004

Honorable Gregory C. Fajt, Secretary  
Department of Revenue  
Strawberry Square, 11th Floor  
Harrisburg, PA 17128

Re: Regulation #15-425 (IRRC #2438)  
Department of Revenue  
Local Option Small Games of Chance

Dear Secretary Fajt:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director

cvp

Enclosure

cc: Honorable Dennis E. Leh, Majority Chairman, House Finance Committee  
Honorable David K. Levdansky, Democratic Chairman, House Finance Committee  
Honorable Jane M. Earll, Chairwoman, Senate Finance Committee  
Honorable John N. Wozniak, Minority Chairman, Senate Finance Committee

# Comments of the Independent Regulatory Review Commission

on

## Department of Revenue Regulation #15-425 (IRRC #2438)

### Local Option Small Games of Chance

December 8, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Department of Revenue (Department) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on November 8, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

**1. Chapter 901. – Local Option Small Games of Chance. – Statutory authority; Reasonableness; Economic impact; Need for the regulation.**

*Applicability*

The existing regulations include provisions that require licensing authorities that do not adopt rules related to the administration of small games of chance to comply with Chapter 901. Those provisions are being deleted. The Department is now providing that certain sections of Chapter 901 are “. . . for the benefit of and suggested use by the licensing authorities.”

Section 319 of the Local Option Small Games of Chance Act (Act) (10 P.S. § 319) authorizes the Department to promulgate regulations on specific subject matters. Promulgating rules for licensing authorities is not one of the subject matters.

The Department explained the historical basis for recommending regulations for use by licensing authorities and acknowledged that it cannot enforce these regulations. Since the Department does not have the statutory authority to promulgate regulations for licensing authorities, we recommend that those provisions be deleted from this proposed rulemaking and the rest of Chapter 901 as well.

To provide guidance to licensing authorities, we suggest that the Department work with the licensing authorities to develop a model rule that addresses the provisions contained throughout the Chapter. This model rule could be distributed to the regulated community, and easily amended should the need arise.

*Enforcement*

The provisions contained in Subchapter I, relating to enforcement, pertain to the Department, licensing authorities and district attorneys. The Act does not grant enforcement authority to the Department. As currently written, Subchapter I reiterates Subsection 323(a) of the Act relating

to the powers of the district attorney. The remainder of the Subchapter provides guidance on actions that “may” be taken by the affected parties.

We question the need for including enforcement provisions in the regulation. The Department has acknowledged that the provisions contained in Subchapter I are designed for informative purposes. The purpose of a regulation is to place specific duties or obligations on an agency and the regulated community. Subchapter I does not perform this function and should be deleted.

If the Department believes the regulation should include enforcement provisions, we recommend that a section be added that simply references Section 323 of the Act.

#### *Suspension*

Sections 901.117, 901.151 and 901.214 relate to the denial, suspension or revocation of licenses. These all include the following provision: “There is no right to appeal a suspension.” Section 901.168, relating to appeals, is being amended to delete the right to appeal a suspension. The Chair of the Senate Finance Committee submitted comments on behalf of the Senate Committee questioning the rationale of this policy. We agree and also question the reasonableness and economic impact of it. If a certificate or license is suspended, that entity could no longer conduct business until they remedy the situation, even if they disagree with the basis for the suspension. This would financially harm the holder of a certificate or license.

We understand, through our discussion with the Department, another option is available. Rather than suspending a manufacturer’s or distributor’s license, the Department could send a notice of violation, describing the infraction and providing a time limit for its correction. This is a more reasonable approach, and it should be included in the final-form regulation.

#### *Submittal of final-form regulation*

Our comments related to *Applicability* and *Enforcement* recommend the deletion of many of the sections contained in this proposed rulemaking and the remainder of Chapter 901 relating to licensing authorities and eligible organizations. If the Department decides to retain these sections, we have addressed concerns with the proposed language in these sections in the comments that follow.

### **2. Section 901.1. Definitions. – Consistency with the act; Clarity.**

*“Fraternal organization,” “license,” “raffle” and “weekly drawing”*

These terms are inconsistent with the definitions found in Section 313 of the Act. For consistency, the final-form regulation should either include a citation to the Act for the definitions of these terms, or use the definitions of these terms found in the Act.

*“Veteran’s organization”*

The term “home association” is included in this definition. This term is unclear. Therefore, we recommend that this term be defined.

### **3. Section 901.23. Restriction of sales. – Need; Clarity.**

*Subsections (a), (b) and (c)*

Subsection (a), relating to manufacturers, instructs applicants to register with the Department. Subsections (b) and (c), relating to distributors and eligible organizations, respectively, require

them to obtain licenses, but do not explain where an applicant should apply. For consistency, the final-form regulation should add provisions to Subsections (b) and (c) that instruct applicants where to apply for licenses.

Additionally, Subsection (a)(3) requires manufacturers to indicate on sales invoices that the games of chance have been approved by the Department. Since only games of chance that have been approved by the Department can be legally sold in Pennsylvania, we question the need for this provision.

**4. Section 901.28. Inspection of premises. – Reasonableness; Clarity.**

Subsection (a) allows a licensing authority, the Department, or their authorized representative to conduct inspections of manufacturers, distributors and eligible organizations. We have two questions.

First, who are “authorized representatives” of the Department?

Second will the entity have advanced notice from the licensing authority, the Department or the Department’s authorized representative when its premises will be inspected?

**5. Section 901.31. Examination of records. – Reasonableness; Need; Clarity.**

Section 901.28(a)(3) limits the inspection of premises to matters, areas and records associated with games of chance. Under Section 901.31, is the examination of records limited to reports, books, accounts and inventory related to games of chance or all records? The final-form regulation should clearly indicate if this provision applies to all of the records of a manufacturer, distributor or eligible organization. If it does apply to all records, the Department should provide justification for inspecting material outside the scope of this regulation.

**6. Section 901.36. Federal withholding and reporting requirements. – Clarity.**

**Section 901.37. State withholding and reporting requirements. – Clarity.**

Section 901.36 references “Internal Revenue Service rules” for reporting and withholding gambling and lottery winnings. Section 901.37 references “Commonwealth rules” for reporting and withholding gambling and lottery winnings. The final-form regulation should provide more specific cross-references to the appropriate rules in both of these sections.

**7. Section 901.51. Powers and duties. – Consistency with the Act; Clarity.**

*Subsection (a)*

This section lists the powers and duties of the Department under the Act. Subsection (a)(6) states the Department has the power and authority to “Prescribe procedures for the suspension and revocation of licenses and certificates for violations of the act.” Under Section 901.1, relating to definitions, “license” includes both distributor licenses, which are issued by the Department, and small games of chance licenses, which are issued by a licensing authority. The Act does not give the Department the authority to suspend or revoke small games of chance licenses. Therefore, this section should be amended to clarify that the Department can only suspend or revoke distributor licenses.

*Subsection (b)*

This subsection begins with the phrase, “Although not limited to the following . . . .” This phrase, is nonregulatory language and should be deleted.

**8. Section 901.102. Registration and game approval forms. – Clarity.**

Under Subsection (b), a manufacturer seeking approval of a game of chance is required to submit a request to the Department. However, the criteria used to evaluate this request are not included in the regulation. The final-form regulation should include the criteria that will be used to evaluate requests.

**9. Section 901.103. Manufacturer registration application form contents. – Reasonableness; Clarity.**

This section establishes the information that must be contained in an application for registration as a manufacturer. Paragraph (12) requires a notarized affidavit for each dispensing machine indicating that the machine complies with the Act and the regulations of the Department. For clarity, the Department should indicate if this requirement applies to each machine or each type of machine sold by a manufacturer.

In addition, the Senate Committee questioned the need for a notarized affidavit. We agree and request that the Department explain the need for affidavits and especially notarized affidavits.

**10. Section 901.143. Restriction on distributorship interest. – Consistency with the act.**

This section explains the restrictions on being a distributor in the Commonwealth. However, Section 317(g) of the Act contains further criteria. The Department should either add these criteria to this section in the final-form regulation, or include citations to the Act where the other criteria can be found.

**11. Section 901.168. Stay of appeal. – Reasonableness; Clarity.**

Under Subsection (a), “Actions to revoke a registration, license or game approval will be stayed pending the decision of the Secretary when a petition has been filed with the Board.” Subsection (b) states, “During the pendency of the appeal, the certificate, game approval or license will be suspended.” These provisions are unclear. Will a manufacturer or distributor be able to conduct business while they appeal an action? The Department should clarify its intent in the final-form regulation.

**12. Section 901.188. Location. – Clarity.**

Subsection (b) establishes the places eligible organizations may conduct games of chance. It includes the term “historical basis.” The Senate Committee commented that this term is unclear. We agree and recommend that the term be explained in this section.

**13. Section 901.192. Denial, suspension and revocation of an eligible organization license. – Clarity.**

*Subsections (a), (b) and (c)*

These subsections relate to the “denial,” “suspension” and “revocation and denial” of an eligible organization’s license. The final-form regulation should include a cross-reference to the appeal procedures in Sections 901.214 and Section 901.215.

**14. Section 901.196. Limited occasion license requirements, limits and restrictions. – Clarity.**

Subsection (e) establishes a fee of \$10 for a limited occasion license. As noted by the Senate Committee, Section 901.184 already sets the fee. To avoid redundancy, the fee should be deleted from one of these sections.

**15. Section 901.215. Appeals. – Reasonableness; Clarity.**

Subsection (b) relates to the timely filing of an appeal. It states that the date an appeal is received at the licensing authority is the filing date. Why isn't the postmark date acceptable?

**16. Section 901.504. Persons who may conduct games. – Clarity.**

Section 901.503, relating to compensation, states, "A licensed eligible organization may not pay compensation to a person for conducting games of chance." Section 901.504 provides the list of those individuals that may conduct games for licensed eligible organizations. The list includes managers, officers, directors, bar personnel or bona fide members. We have two questions.

First, since bar personnel are usually paid by the licensed eligible organization, is there a conflict between this section and Section 901.503 concerning who can conduct games of chance? The Department should explain.

Second, would auxiliary members be allowed to conduct games of chance?

**17. Section 901.701. Games of chance permitted. – Clarity.**

*Subsection (b)*

Subsection (b) states, "A licensed eligible organization shall use games of chance proceeds exclusively for public interest purposes or for the purchase of games of chance permitted by the act or this part." Could licensed eligible organizations use games of chance proceeds to purchase prizes? The Department should explain.

**18. Section 901.702. Prize limits. – Clarity.**

Subsection (e) relates to prize limit exceptions for daily drawings. It provides an exception for daily drawings that are set up to pay out not less than 100% of the gross revenues generated from such drawing. The last sentence of this subsection states the following: "The limitation in subsection (b) may be exceeded only by the amount of the daily drawing paying 100% of its gross revenues." This sentence is unclear. The language in Section 315(g) of the Act is clearer. Therefore, the final-form regulation should replace the confusing language in Subsection (e)(2) with the language from Section 315(g) of the Act.

**19. Section 901.708. Persons who may conduct games of chance. – Clarity.**

Similar to our questions related to Section 901.504, we request that the Department explain if allowing bar personnel to conduct games of chance creates a conflict with Section 901.707, and how this section applies to auxiliary members.

## **20. Miscellaneous clarity.**

### *Nonregulatory language*

Sections 901.107, 901.137 and 901.185 use the term “should.” The word “should” is non-regulatory language that implies the action is optional. The final-form regulation should replace the word “should” with “shall.”

Sections 901.148 and 901.149 state that a distributor “will” notify the Department of certain information. According to Section 6.8 of the Pennsylvania Code & Bulletin *Style Manual*, the word “will” should be used when the agency pledges to act. The word “shall” should be used when anyone else has a duty to act. Because the distributor has an obligation to act, these sections should be amended accordingly.

Section 901.192 states that the licensing authority “shall” perform certain duties. In this circumstance the licensing authority is the agency. For the reasons noted above, this section should be amended by replacing “shall” with “will.”

Sections 901.905 and 901.906 relate to investigations. These sections state that the Department or licensing authority “may” investigate a manufacturer, distributor or licensing authority “when it has reason to believe that a violation of the act or this part has occurred or is occurring.”

Section 901.907 relates to notice of investigations. It states that the Department and licensing authorities “may” provide information concerning an investigation to each other and the district attorney. The word “may” indicates that these provisions are optional. Since the subject matter of these sections is investigations of violations of the Act, these provisions should be mandatory. Therefore, the word “may” should be changed to “shall” throughout these sections.

### *“In this part”*

This proposed rulemaking and the existing language of Chapter 901 use the phrase “in this part.” As noted by the Senate Committee, this phrase should be replaced with the appropriate section or subsection of the regulation. Although the comments of the Senate Committee relate to Section 901.117, we recommend that the phrase “in this part” be replaced throughout Chapter 901.

### *“Substantially harmed” and “timely remedied”*

Sections 901.117, 901.151, 901.192 and 901.214 relate to the suspension, denial or revocation of certificates or licenses of manufacturers, distributors and eligible organizations. These sections contain the phrases “substantially harmed” and “timely remedied.” As noted by the Senate Committee, the phrase “substantially harmed” lacks the ability to be measured and thus enforced. We agree with this comment and believe the phrase “timely remedied” also lacks the ability to be measured. The final-form regulation should define the phrase “substantially harmed” or provide examples of what is meant by this phrase. In addition, it should provide specific time periods in which the violations must be remedied.

### *Forms*

Variants of the phrase “forms prescribed by the Department” are used throughout the proposed rulemaking and the existing language of Chapter 901. We recommend that the specific forms be referenced by name or number throughout Chapter 901. Additionally, will these forms be available on the Department’s website?

### *Notification to district attorneys*

Sections 901.704, 901.709 and 901.751 require eligible organizations to notify district attorneys of certain actions. These sections do not specify when notification should take place. The final-form regulation should include time periods for these notifications.

### *Incomplete application forms*

Sections 901.102 and 901.132 pertain to application forms that must be submitted by manufacturers and distributors to the Department. The final-form regulation should include provisions that explain what will happen if the application forms are not complete.

### *Annual renewal applications of manufacturers, distributors and eligible organizations*

Sections 901.107, 901.137 and 901.185 have been amended to advise manufacturers, distributors and eligible organizations that they should file their annual applications a specific number of days prior to the expiration of their certificate or license. The original language of these sections required renewal applications to be filed by a certain date. The original language was clearer. Therefore, we recommend that the original language of these sections be retained.

### *Additional clarity concerns*

- In the titles of Sections 901.117 and 901.192, there should be commas between “Denial” and “suspension.”
- The title of Section 901.30 contains the phrase “and the like.” This phrase lacks clarity. The Department should either delete this phrase, or replace it with language found in this section. An example could be “prizes and services” or just “services.”
- Section 901.188 includes a reference to Section 901.181, which is now reserved.
- Section 901.212 includes references to Section 901.211, which is now reserved.
- Section 901.781(g) should include a cross-reference to Section 901.784, relating to claiming prizes.
- Section 901.791(f) should include a cross-reference to Section 901.794, relating to claiming prizes.
- The title of Section 901.905 is “Investigations of manufacturers, distributors and eligible organizations.” The text of this section only relates to investigations of eligible organizations. The title should be amended to “Investigations of eligible organizations.”



### Facsimile Cover Sheet

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Administrative Officer



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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

To: *Mary Sprunk*  
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Phone: 7-1382  
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Date: **December 8, 2004**  
Pages: 9

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**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #15-425 (IRRC #2438). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Mary R Sprunk* Date: *12/8/04*