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

May 2, 2007

Honorable Thomas Wolf, Secretary  
Department of Revenue  
Strawberry Square, 11th Floor  
Harrisburg, PA 17128

Re: Regulation #15-436 (IRRC #2596)  
Department of Revenue  
Pennsylvania Gaming Cash Flow Management

Dear Secretary Wolf:

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 me.

Sincerely,

Kim Kaufman  
Executive Director

wbg

Enclosure

cc: Honorable Patrick M. Browne, Chairman, Senate Finance Committee  
Honorable John N. Wozniak, Minority Chairman, Senate Finance Committee  
Honorable David K. Levdansky, Majority Chairman, House Finance Committee  
Honorable Steven R. Nickol, Minority Chairman, House Finance Committee

# Comments of the Independent Regulatory Review Commission

on

## Department of Revenue Regulation #15-436 (IRRC #2596)

### Pennsylvania Gaming Cash Flow Management

May 2, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the March 3, 2007 *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 Department of Revenue (Department) to respond to all comments received from us or any other source.

#### **1. Economic or fiscal impact of the regulation.**

Section 5.2 of the Regulatory Review Act (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).

It is clear that there will be costs to the Commonwealth for the administration of this rulemaking. It is equally clear that there will be costs imposed upon the regulated community, especially as it relates to the reimbursement of Commonwealth expenses. However, the RAF does not provide any detail on what those costs are or will be. 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 1001.3. Definitions. – Clarity.**

*Credit against tax* – This definition and § 1001.4(a), pertaining to calculations of credit against tax, implement Section 1209(c) of the Pennsylvania Race Horse Development and Gaming Act (Act) (4 Pa.C.S. § 1209(c)). We recommend that the definition be amended to include a reference to this section of the Act.

#### **3. Section 1001.5. Administration and distribution of moneys held by licensed gaming entities and the Commonwealth. – Statutory authority; Implementation procedures; Clarity.**

##### *Subsection (a)*

This subsection references “any other fund as specified in this chapter.” If any other funds are specified in this chapter, we recommend that they be identified in this subsection.

*Subsection (b)(1)*

Deposits and transfers to Treasury by licensed gaming entities are the subject of this subsection. We have two recommendations. First, the term "Office of the Budget" is referenced in this subsection and Subsections 1001.8(c)(1) and 1001.10(d). The term "Governor's Budget Office" is referenced in Subsection 1001.8(b). We recommend that the term "Office of the Budget" be used and suggest that the term be defined.

Second, under this subsection, licensed gaming entities will be required to transfer a certain amount of money to the Treasury Department "as calculated by the CCS." In order to establish a binding norm on both the regulated community and the Department, we recommend that method of calculating the amount due be included in the final-form regulation. This could be achieved by referencing the various sections of the Act that relate to assessments.

*Subsection (b)(5)(i)*

This subsection pertains to the annual minimum distribution as specified in Section 1403(c)(3) of the Act (4 Pa.C.S. § 1403(c)(3)). It states, in part, the following: "...the required minimum shall be prorated for that portion of the municipality's fiscal year that the Board determines that the licensed gaming entity was actually in operation." Annual minimum distribution is defined as: "Other than for a Category 3 license, 2% of the gross terminal revenue of the licensed gaming entity or \$10 million, whichever is greater."

Representative Nickol, Minority Chairman of the House Finance Committee, questioned the statutory basis for proration of the required minimum and whether this proration only applies to the first year of a licensed gaming entities operation. Sands Bethworks Gaming LLC (Sands Bethworks) also questioned the Department's authority to prorate the \$10 million and asked how this provision will be implemented if the licensed gaming entity and the municipality operate under different fiscal years. We share these concerns and ask the Department to explain its statutory authority for the proration of the required minimum, the rationale behind it and the method of implementation.

*Subsection (b)(5)(iii)*

One provision of this subsection states that the licensed gaming entity must remit required annual minimum distribution payments to the Department. Another provision states that distributions specified in the chapter must be made by the licensed entity to the Department *or* the respective municipality. When would a licensed gaming entity distribute money directly to a municipality? If distributions are not made from a licensed entity to a municipality, then the second provision should be deleted.

- 4. Section 1001.6. Administration of amount deposited by licensed gaming entities with Treasury to pay Commonwealth gaming related costs and expenses (\$5 million). – Statutory authority; Implementation procedures; Costs to the private sector; Adverse effects on competition; Policy decision of such a substantial nature that it requires legislative review; Clarity.**

*Subsection (d)*

This subsection states, in part, the following:

To fulfill the licensed gaming entity's obligations under this section, nothing prohibits the Board from drawing against any

source of the licensed gaming entity, with the exception of any licensed gaming entity account that holds gross terminal revenue to be deposited with Treasury in accordance with § 1001.5.

What authority does the Department have to allow or prohibit the Pennsylvania Gaming Control Board (Board) from taking a particular action? If the provision above can be found in the Act, we question the need for including it in this rulemaking.

*Subsection (e)(1)*

This subsection pertains to the assessment of expenses directly related to a particular licensed gaming entity. We have two concerns. First, the term “periodic” is used to describe when these assessments will be issued. This term is vague. The final-form regulation should be amended to include a specific time period relating to the issuance of these assessments by the Department.

Second, this subsection states that the Department will issue assessments related to expenses incurred by the Board, Department, Office of Attorney General, the Pennsylvania State Police and *any other Commonwealth entity* charged with administrative duties under the Act. Section 1402(a) of the Act (4 Pa.C.S. § 1402(a)) allows the Department to recoup the costs incurred by the four agencies listed above. What is the Board’s statutory authority for issuing assessments to recoup the costs of other state agencies? We note that the general term “Commonwealth” is used in §§ 1001.6(e)(2) and (3). Does this term mean any Commonwealth agency or just the four that are listed in the Act?

*Subsection (e)(2)*

This subsection states that expenses incurred and assessed by the Commonwealth will be deducted from a licensed gaming entity’s account as specified by Section 1401 of the Act. Section 1401(c) of the Act refers to weekly deposits. Will the assessments provide any detail on how the amounts due were calculated? Providing this level of detail would produce an open regulatory process that is viewed as fair. We recommend that the final-form regulation be amended to provide for detailed assessment notices that explain how amounts due were calculated.

*Subsection (e)(3)*

Under this subsection, the general administrative costs of the Commonwealth not specifically assessed to a particular licensed gaming entity will be paid by each licensed gaming entity “at the discretion of the Secretary.” It is our understanding that the Department currently imposes a 1.5% assessment against each operating licensed gaming entity’s gross terminal revenue. This assessment is issued and paid on a weekly basis. This current system of assessment is not codified in statute or regulation.

We have four concerns. The Act provides little guidance on how the general administrative costs of the Board, the Department, the State Police and the Attorney General will be funded. We recognize that the primary intent of the Act is the protection of the public through the regulation and policing of all activities involving gaming in order to prevent practices that are unlawful (4 Pa.C.S. § 1102(a)(1)) and that adequate funding is necessary to carry out this objective. Because the protection of the public requires adequate funding and since the Act is vague on how this funding will occur, we believe that this regulation represents a policy decision of such a substantial nature that it requires further legislative input and direction. We urge the Department

to consult and work closely with the General Assembly to gain a better understanding of legislative intent as this proposal goes forward.

Second, Representative Nickol and two licensed gaming entities question the Department's statutory authority for providing such latitude to the Secretary of Revenue. We ask the Department to identify and justify its statutory authority for this provision.

Third, we question what fiscal impact this provision will have on the regulated community. The broad language of the Act and this regulation make it impossible for licensed gaming entities to predict what costs they will incur and how those costs will be imposed. Without this knowledge, it will be difficult for a licensed gaming entity to effectively conduct its business.

Finally, the provision in question has the potential to create an uneven playing field for all the licensed gaming entities. Using the current assessment system of 1.5% of gross terminal revenue as an example, licensed gaming entities that are currently open and paying the assessment could end up funding all of the general administrative costs of the four state agencies. Licensed gaming entities that have larger gross terminal revenues would have to subsidize the entities that have smaller gross terminal revenue. How will the Department implement an assessment system that is fair to all licensed gaming entities?

**5. Section 1001.8. State Gaming Fund transfers. – Statutory authority; Implementation procedures; Clarity.**

*Subsection (b)*

This subsection relates to the establishment of restricted receipt accounts. It gives the Governor's Budget Office the authority to establish restricted receipt accounts to facilitate the transfer of money to and from the State Gaming Fund. Similar to a concern noted above, what authority does the Department have to allow or prohibit the Governor's Budget Office from taking a particular action? If the provision above can be found in the Act, we question the need for including it in this rulemaking.

*Subsection (c)*

Subsection (c) pertains to quarterly distributions to counties or municipalities. We have three concerns. First, this subsection provides details on how payments will be made to counties, but does not provide any details on how payments to municipalities should be made. This information should be added to the final-form rulemaking.

Second, Subsection (c) references Management Directive 305.4 (relating to payments to counties). Subsection (c)(1) then provides more detail on how to remit payments to counties that appear to be addressed under Management Directive 305.4. If Management Directive 305.4 is amended, it will conflict with the instructions in Subsection(c)(1). We recommend that either the reference to the Management Directive or the detailed instructions found in Subsection (c)(1) be deleted.

Third, Subsection (c)(2) states the following: "The Department will determine the annual inflation adjustment and will publish notice of the inflation adjustment in the *Pennsylvania Bulletin* by January 1 of each year." We recommend that the final-form regulation specify what the Department is adjusting and how the adjustments will be calculated.

*Subsection (d)*

This subsection addresses tax and credit against tax. Subsection (a) states that this section applies to the transfer of money to and from the State Gaming Fund. Do the provisions contained in Subsection (d) apply only to the transfer of money to and from the State Gaming Fund, or would they also apply to transfers involving the State Gaming Economic Development Tourism Fund and the Pennsylvania Race Horse Development Fund? If it applies to all of the Funds, then the final-form regulation should be amended accordingly.

*Subsection (e)*

This subsection relates to the imposition of penalties. It states that the failure to transmit the required amount to "... the Department's Collection Account or **any other fund of the Commonwealth...**" (emphasis added) will result in the imposition of certain penalties. What is the Department's authority to impose penalties under this regulation for failure to transmit money to any fund except those related to gaming? We recommend that the Department either list the other funds or deleted the language noted above.

**6. Miscellaneous Clarity.**

- Sections 1001.1, 1001.2 and 1001.5 note that this regulation establishes procedures for the administration and distribution of net slot machine revenue. The sections do not make reference to the collection of net slot machine revenue. We recommend that the sections be amended to note that this regulation also pertains to the collection of tax.
- The title to § 1001.5 Subsection (b) references deposits and transfers to Treasury by licensed gaming entities. Subsections (b)(5)(iii) and (iv) relate to distributions of local share assessments. To improve the clarity of the entire section, we recommend that Subsection (b)(iii) and (iv) be moved to a new Subsection (c).

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### Facsimile Cover Sheet



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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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**To:** Mary Sprunk  
**Agency:** Department of Revenue  
**Phone:** 7-1382  
**Fax:** 2-1459  
**Date:** May 2, 2007  
**Pages:** 7

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #15-436 (IRRC #2596). 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:

*5/2/07*