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August 25, 2008

VIA HAND DELIVERY

Mickey Kane
Clerk
Pennsylvania Gaming Control Board
2601 N. 3rd Street
Suite 502
Harrisburg PA 17110

Re: Comments on Regulation No. 125-91

Dear Ms. Kane:

Enclosed for filing please find the original and three copies of the Comments of Downs Racing, L.P. regarding Proposed Rulemaking - 58 Pa. Code Chapters 401a and 434a.

Very truly yours,



Mark S. Stewart
For WolfBlock LLP

MSS/jls
Enclosures

cc: Richard Sandusky
Director of Regulatory Review (w/enc)

HAR:82206.1/MOH005-222463

INDEPENDENT REGULATORY
REVIEW COMMISSION

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**BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD**

In re: Regulation No. :
Proposed Rulemaking – 58 Pa. Code :
Chapters 401a and 434a :

DOWNNS RACING, L.P.'S COMMENTS TO PROPOSED RULEMAKING

Downns Racing, L.P. t/d/b/a Mohegan Sun at Pocono Downs (“MSPD”), respectfully submits these comments to the Pennsylvania Gaming Control Board's (“Board”) proposed regulations published on July 26, 2008 at *Pennsylvania Bulletin*, 38 Pa.B. 3980, regarding Onsite Shopkeeper Certification.

I. General Comments

The proposed rulemaking unnecessarily expands the Board’s current regulatory regime, creating a new category of regulated entities called onsite shopkeepers. These entities are defined as “a person, other than a slot machine licensee, who engages or proposes to engage in any commercial activity at the licensed facility and who is not otherwise required to be licensed, certified or registered.” Proposed Section 401a.3. The proposed regulations differentiate such shopkeepers from vendors, who provide goods or services to a slot machine licensee. Onsite shopkeepers are typically restaurants, bars, retail establishments, jewelers, etc. Frequently, these tenant businesses are well-known or highly-regarded franchises or brand names.

While tenant businesses and franchises have heretofore been treated as vendors, the proposed regulations separate them out for disparate treatment and impose the heavy burden of certification on all such businesses, regardless of the amount of business transacted by them. The proposed regulations are blind to the economic realities facing these businesses, which

operate on very tight profit margins, and require a heightened level of registration in regard to their employees that exceeds those required of vendors.

MSPD strongly urges the Board to withdraw the proposed regulations until the Board has the opportunity to conduct an industry collaborative as to its concerns over onsite shopkeepers and the need for *any* regulation of these businesses. Overall, the proposed regulations suffer from significant flaws, including: (1) a lack of enabling authority under the Race Horse Development and Gaming Act¹; (2) a complete dearth of public benefit behind the regulations to outweigh the substantial regulatory costs; and (3) a failure to recognize the historical purpose behind vendor or non-gaming business regulation that leaves the Board out of step with its regulatory peers and the trends in modern gaming regulation.

Ultimately, the proposed regulations will greatly impede the ability of Pennsylvania's slot machine licensees to maintain a multi-faceted entertainment complex, attract the most popular businesses and brands to their casinos, and compete with casinos in neighboring jurisdictions where such regulatory encumbrances are not imposed. This fact will undermine the Pennsylvania gaming experience, and will detract from the economic development, tourism, revenue generation and job creation policies enunciated by the General Assembly in enacting the Gaming Act.² As a result, Pennsylvania's fledgling gaming industry, the Commonwealth and its citizens will all be harmed.

- A. The Board lacks the enabling authority under the Gaming Act to promulgate the proposed regulations.

Nothing in the Gaming Act addresses the issue of onsite shopkeepers, sets forth any standard by which such entities and their employees should be judged, or expresses any

¹ 4 Pa. C.S. § 1101 *et seq.* (the "Gaming Act").

² 4 Pa. C.S. §§ 1102(2), (6).

indication that the General Assembly contemplated the need for the Board to regulate such businesses. This absence is made all the more significant by the fact that the Legislature enumerated some 30 different specific powers of the Board. Within the powers vested in the Board by the Legislature is the authority to regulate vendors. Section 1202(b)(20) of the Gaming Act instills in the Board the power “to determine at its discretion the suitability of any person who furnishes or seeks to furnish to a slot machine licensee directly or indirectly any services or property related to slot machines or associated equipment or through any arrangements under which that person receives payment based directly or indirectly on earnings, profits or receipts from slot machines or associated equipment.” Additionally, Section 1321(a) of the Gaming Act provides in pertinent part that:

(a) Requirements.— . . . [T]he board may require a license or permit, and set a fee for the same, for . . . any person who satisfies any of the following criteria:

(2) The person is presently not otherwise required to be licensed under this part and provides any goods, property or services, including, but not limited to, management contracts for compensation to a slot machine licensee at the licensed facility.³

However, onsite shopkeepers plainly do not fall within this vendor authority. Such businesses do not provide any goods, services or property to slot machine licensees. Rather, they sell goods and services to the consuming public, and just so happen to do so at stores located in a licensed facility. To date, the Board has stretched its vendor authority well beyond the breaking point by regulating these tenant businesses and franchises as vendors. The issue has never arisen until now, though, because Pennsylvania’s casinos have been predominantly temporary facilities without the independent restaurants, retail and other tenant businesses and franchises that are

³ 4 Pa. C.S. § 1321(a)(2).

becoming important elements of the permanent facilities.⁴ The Board's proposed retooling of its vendor definition to appropriately track its enabling authority and the proposed creation of the new onsite shopkeeper definition is an acknowledgement of and attempt to circumvent the limits of its vendor authority.⁵

Thus, having no specific authority to regulate onsite shopkeepers, the regulations must be within the Board's general delegation of authority over gaming in order to be valid. That general grant of authority from the General Assembly vests the Board, in pertinent part, with "sole regulatory authority over the conduct of gaming or related activities as described in this part."⁶ However, by its plain text, this general grant of authority does not encompass the regulation of onsite shopkeepers. Such entities are not involved in the "conduct of gaming." Nor can the business of onsite shopkeepers be considered to be a related activity of gaming that is described in "this part," *ie.*, the Gaming Act. Onsite shopkeepers operate restaurants, sell clothing, jewelry or other retail goods, etc. They are frequently franchises, chains and brands that operate throughout the nation, if not the world, in non-gaming locales. Nothing about these businesses

⁴ While MSPD did not concur in the treatment of the tenant businesses and franchises in its recently opened permanent facility as vendors, it succumbed to the Board's regulatory demands due to the vital need to open its facility on time in July 2008.

⁵ As explained by this discussion, the inclusion of "tenant businesses or franchises located within licensed facilities" in the current definition of a vendor is improper and its proposed deletion should be adopted. 58 Pa. Code § 401a.3 (Vendor (ii)(F)). To the extent such entities remain within the vendor definition, the referenced tenant businesses and franchises would still be required to satisfy the primary definition of a vendor; *ie.*, "a person who provides goods or services to a slot machine licensee or applicant" 58 Pa. Code § 401a.3 (Vendor (i)). As onsite shopkeepers do not satisfy the primary definition, they cannot be considered as vendors regardless of the enumerated "to include" list in the current regulation.

⁶ 4 Pa. C.S. § 1202(a)(1).

constitutes a related activity of gaming and, as noted, onsite shopkeepers are not even mentioned, much less described, in the Gaming Act.

Accordingly, lacking specific or general authority to regulate onsite shopkeepers and their employees, the Board should refrain from promulgating the proposed regulations.

- B. The public benefit to be realized from the proposed regulations is greatly outweighed by the regulatory costs.

MSPD respectfully submits that the proposed regulations are completely devoid of any public benefit. As detailed below, the stated aims of protecting the integrity of gaming and ensuring patron safety simply are not implicated to any material degree by onsite shopkeepers. These businesses are not owned by the slot machine licensees, and do not even do business with the slot machine licensees other than by leasing their storefronts. The businesses and their employees have no relation to gaming or any of its activities. They are typically franchises and brands operating in numerous other locales without any risk to patrons or any need for regulation of their operations or licensure of their employees.

For example, one of MSPD's onsite shopkeepers is a Ben & Jerry's ice cream shop. The proposed regulations would result in the irrational dichotomy of MSPD's Ben & Jerry's store being subject to full-scale, invasive certification, with its ice cream scoopers required to be fingerprinted and complete non-gaming employee registrations, while another Ben & Jerry's shop that opens across the street from MSPD's casino would be completely free of such regulation. As detailed herein, the regulatory requirements and costs imposed by the proposed rulemaking are burdensome. Whatever minimal public benefit that will be derived from the regulations simply cannot outweigh those substantial burdens and costs.

- C. The proposed regulations are not consistent with the historic purpose behind vendor regulation and the modern trends of gaming regulation in other jurisdictions.
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It is well established that the primary goal of the regulation of vendors is the prevention of the influence of organized crime in the gaming industry.⁷ Having addressed organized crime's direct participation in gaming through rigorous background and suitability investigations, regulators turned to casino services industries, where businesses sell hundreds of thousands of dollars of goods and services to casinos, to keep such criminal elements from "coming in the back door" to influence casino operators or enable the evasion of taxes or laundering of money.⁸

Thus, gaming regulators developed registration and certification schemes for businesses that sell goods or services to casinos. Even in this context, though, many states do not impose any licensing requirements on those vendors engaged in the sale of non-gaming related goods and services. According to a recent survey by the American Gaming Association, those states include Nevada, Colorado, Illinois, Indiana, Iowa, Mississippi, and Missouri.

While the proper scope of vendor regulation is debatable, onsite shopkeepers clearly do not invoke the same concerns or warrant the same treatment. As noted, and by definition, such entities sell no goods or services to slot machine licensees. They receive no payments or other monies from slot machine licensees. Unlike a locally based linens company, which receives significant sums of money from a casino for its services and may represent an opportunity for organized crime influence, onsite shopkeepers are typically well-known and well-established

⁷ See, e.g., Testimony of James R. Hurley, Chairman, New Jersey Casino Control Commission, before the Senate Judiciary Committee, Subcommittee on Technology, Terrorism & Government Information (March 23, 1999).
<http://judiciary.senate.gov/oldsite/32399jrh.htm>.

⁸ *Id.*

chains or franchises, often publicly-traded or with identifiable ownership, that generate their revenue not from sales to the casino but to everyday consumers. These businesses simply do not trigger the issues raised by vendors.

Gaming regulators in other jurisdictions have recognized this fact. No other gaming jurisdiction imposes such licensing requirements on the employees of retail and food & beverage tenants as those set forth in proposed Sections 434a.5(b) and (c). In fact, the Nevada Gaming Control Board (“NGCB”) expressly excludes “bartenders, cocktail waitresses or other persons engaged exclusively in preparing or serving food or beverages” from all licensure requirements.⁹ The NGCB does require the licensure of hosts or other persons who have the authority to extend credit or complimentary services.¹⁰

While the New Jersey Casino Control Commission (“NJCCC”) requires the tenant businesses and franchises occupying space in their casinos to obtain casino service industry non-gaming licenses, the NJCCC does not impose *any* licensing requirements upon the employees of those tenants. In fact, the only food & beverage employees of the casinos who are required to obtain a casino services registration from the NJCCC are those employees who serve alcohol.

MSPD respectfully suggests that the Board should consider the regulatory treatment applied to onsite shopkeepers by these other jurisdictions and refrain from promulgating the proposed regulations.

⁹ NRS 463.0157(2) (relating to “Gaming employee” defined).

¹⁰ See NRS 463.0157(1)(n).

II. Specific Comments

A. General onsite shopkeeper requirements and onsite shopkeeper certification applications – proposed 58 Pa. Code § 434a.1 and 434a.2

The following tenant businesses and franchises maintain space within MSPD's recently-opened permanent licensed facility and would fall within the Board's new onsite shopkeeper category: Ruth's Chris Steak House, Rustic Kitchen Bistro & Bar, Bar Louie, Johnny Rockets, Wolfgang Puck Express, Ben & Jerry's, Hot Dog Hall of Fame, Betty & Joe's – Baker and Coffee Maker, Brookstone, Marshall Rousso, Misura and Crossing Vineyards Wine and Cheese Shop.

Proposed Section 434a.1 would require all onsite shopkeepers, regardless of size or the amount of business they do with the slot machine licensee, to be certified. Under the existing vendor regulations, vendors that do less than \$200,000 and greater than \$15,000 in business annually with a casino (or less than \$500,000 in business with all casinos) are registered, not certificated; therefore, proposed Section 434a.1 eliminates the option of vendor registration for tenant businesses or franchises located within the licensed facility.¹¹ The application process for vendor registration is less involved and expensive than that for vendor certification. The onsite shopkeeper application requirements provided in proposed Section 434a.2 are virtually the same as for vendor certification.

If the Board insists on regulating onsite shopkeepers, MSPD urges it to treat tenant businesses and franchises that have contracted with slot machine licensees in the same manner as vendors in that they be required to apply for registration or certification based on the amount of business they conduct at the casino. The Board should develop appropriate monetary thresholds

¹¹ Pursuant to 58 Pa. Code § 437a.1(b)(3) vendors, who would otherwise be required to be registered with the Board, must be certified, if their employees have access to a casino's restricted areas or the gaming floor.

for shopkeeper registration versus certification that are cognizant of the economic realities facing such businesses and the significant additional regulatory costs of certification, ensuring that such costs are only imposed on tenants doing sufficient levels of business at the casino to warrant them. The universal treatment of all tenant business and franchises as established in the proposed regulations regardless of the amount of business transacted at the casino is unfair and will adversely impact tenants. Under existing regulations, these same tenants are treated as vendors,¹² and those who do less than \$200,000.00 annually in business with a casino are subject only to registration. With no apparent rationale or evidence of enhanced public benefit, these tenants are penalized by the proposed regulations since both the fee and disclosure requirements are greater for shopkeeper certification than vendor registration. Ultimately, the burdensome regulatory requirements imposed by the proposed regulations will deter companies from bringing their business to Pennsylvania's casinos -- harming licensees, the Commonwealth and the public.

B. Certified onsite shopkeeper responsibilities – 58 Pa Code § 434a.5(b) and (c)

The most burdensome and costly provisions of the proposed onsite shopkeeper regulations are those relating to the registration of the onsite shopkeepers' employees. Proposed Section 434a.5(b) requires certified onsite shopkeepers to have all of their employees, whose duties require them to come into contact with patrons, to obtain a non-gaming employee registration. In addition, proposed Section 434a.(c) leaves open the option for the Board to require other employees of the onsite shopkeeper to be registered, if the Board deems their registration necessary "for the protection of the integrity of gaming," regardless of whether they come into contact with gaming patrons.

¹² As explained above, this treatment is improper under the Gaming Act.

For a number of reasons, including those set forth below, MSPD takes great issue with these proposed regulations:

1. Cost

It is a fact that MSPD's tenant businesses and franchises will operate on very tight margins. The tenants did not anticipate, nor can they afford to incur the registration fee of \$60.00 for each of their employees. This will be an especially costly requirement for three of MSPD's restaurant tenants, Ruth's Chris Steakhouse, Rustic Kitchen and Bar Louie, who will each be employing approximately 75 employees. As with any new restaurant, these establishments can expect an employee turnover rate at or above 100%, which would translate into an annual employee licensing cost of approximately \$9,000.00 for each vendor.

Employee turnover in the retail industry is equally high. Like most retailers, MSPD's retail tenants will be hiring temporary employees to supplement their permanent staff during the holiday season. Pursuant to proposed Section 434a.5(b), these temporary employees would be required to submit a full non-gaming employee registration application including fingerprinting. Such a requirement places an unnecessary financial and administrative burden on the retail tenants in light of the fact that these individuals will be employed there for only a few weeks. There is absolutely no public benefit to warrant such regulatory costs.

2. Administrative Burden

MSPD's tenant businesses and franchises also do not have the on-site human resources personnel to administer the ongoing non-gaming employee registration process. This process is not insubstantial, and includes accessing SLOTSlink, obtaining fingerprints and photographs from the Pennsylvania State Police for all employees, submitting all materials for each employee to the Board's Bureau of Licensing, and taking all of the follow up actions required with the both

the Board and the applicant's business operations whenever problems arise with an employee's registration. This burden will be particularly heavy for restaurant and retail businesses which not only have high employee turnover, but also require flexibility in the hiring and immediate staffing of personnel.

3. Risk to Patron Safety

To require retail and food and beverage employees, including waitresses, bartenders, sales associates and cashiers, to be registered with the Board as non-gaming employees simply because they interact with patrons is a threshold which is onerous and unnecessary in light of the objective that the Board seeks to accomplish – namely, ensuring the integrity of gaming and the safety of the gaming public. The Board's concern that retail and food & beverage employees can commit some sort of fraud against patrons is misplaced since none of those employees have knowledge of patrons' casino play, as they do not have access to the slot monitoring or player tracking systems and, as a result, do not have authorization to grant complimentary services based on slot play. No personal information obtained as part of a patron's player's club application will be shared with the tenants for marketing purposes or otherwise. Further, it is likely that many of the patrons of a casino's retail or food & beverage outlets will not be "gaming patrons," but will be visiting the property for the exclusive purpose of dining at one of the restaurants/bars or shopping at one of the retail outlets.

The employees of tenant restaurant and retail businesses located at casinos pose absolutely no greater threat to the public than they do at any of these businesses or franchises at non-casino locations. An employee at a Johnny Rockets, 1950s style restaurant, at a shopping mall is not a risk to public safety. The fact that the same franchise is located in the perimeter of a casino does not transform that same employee into a public safety threat. Obviously, the

Commonwealth does not impose such regulatory burdens on Johnny Rockets businesses and employees at the mall. There is no policy reason or public benefit that justifies doing so at a casino.

4. Integrity of Gaming Operations

Similarly, there is no greater risk to the integrity of MSPD's slot operations or to the collection of funds due to the Commonwealth because an employee of a tenant business happens to work in the same building as the gaming floor. The tenants' employees do not work on the gaming floor and will have no reason to go onto the gaming floor or into restricted areas or to come into contact with any slot machine or associated equipment. In fact, the design of MSPD's permanent facility is such that all retail and restaurant space occupied by tenants is separated from the gaming floor and all restricted areas servicing gaming operations by a 20 foot wide-walkway and a 3 ½ foot physical barrier which surrounds the gaming floor.

MSPD recommends that the Board require an employee of a tenant business or franchise to submit a gaming or non-gaming employee application only if one of the following apply: (1) the employee's duties include accessing the gaming floor or restricted areas; (2) the employee's duties include touching slot machines and/or associated equipment; (3) the employee's duties include accessing the casino's slot monitoring system or player tracking system; or (4) the employee is authorized to grant complimentary services which are based on slot play. As onsite shopkeeper employees plainly satisfy none of these criteria, the Board should refrain from imposing any registration or licensure obligation on them.

III. Conclusion

MSPD appreciates and shares the Board's commitment to ensuring patrons safety and protecting the integrity of slot operations at the state's casinos; however, both the financial and administrative burdens associated with licensing virtually every employee of these tenants far

outweighs any possible benefit of this licensing requirement. MSPD is aware of no other vendors certified or registered with the Board that are required to register such a high number of their employees. Should these proposed regulations become permanent, both current and future tenants will be deterred from occupying space within Pennsylvania's casinos. As a result, Pennsylvania's casinos will suffer competitive harm, the Commonwealth will see diminished revenues, and the public will be deprived of the highest quality entertainment experience.

Accordingly, MSPD objects to the proposed regulations, and requests that the Board adopt the forgoing comments and remove all sections of the proposed regulations referring to onsite shopkeepers, including 58 Pa. Code § Chapters 401a and 434a. Additionally, the proposed elimination of the reference to "tenant businesses and franchises located within licensed facilities" from the definition of "vendor" in Section 401a.3 should be enacted as such entities plainly do not qualify under the primary definition of a vendor in either the existing or proposed regulation and are beyond the vendor regulatory authority in the Gaming Act.

Respectfully submitted:



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Date: August 25, 2008