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INDEPENDENT REGULATORY
REVIEW COMMISSION

March 17, 2009

Arthur Coccodrilli
Chairman, Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

Re: Pennsylvania Gaming Control Board
Final-form Regulation # 125-92
(Smoking in Licensed Facilities)

Dear Chairman Coccodrilli:

This letter is written on behalf of the Pennsylvania Department of Health (Health) in support of the Pennsylvania Gaming Control Board's (Board) final-form Regulation, # 125-92.

Health does not interpret Pennsylvania Clean Indoor Air Act, 35 P.S. § 637.1 *et seq.* (Act) to give it sole authority to promulgate regulations. Section 10(a) of the Act states that Health shall promulgate regulations to implement the Act. The Act conveys upon Health broad authority to promulgate regulations to implement the Act but it does not convey exclusive authority to Health. There are other agencies which have responsibilities under the Act. Each such agency must necessarily have the authority to promulgate specific regulations pertaining to the Act which are intrinsic to their enforcement authority. In this case, since it is the Board that has enforcement responsibilities of the Act at its licensed establishments, the Board must necessarily have authority to promulgate regulations.

The promulgation of these regulations clearly falls within the implied authority of the Board both pursuant to the Act and the Pennsylvania Race Horse Development and Gaming Act. (See Prudential Property and Casualty Insurance Company v. Muir, 513 A.2d 1129 (Pa. Cmwlth. 1986), *appeal denied*, 522 A.2d 1106 (Pa. 1987).) (Although the Uninsured Motorist Clause Act does not give the Insurance Commissioner express authority to promulgate regulations, there is an implied power in a public administrative agency to make or adopt regulations with respect to matters within the province of such agency, provided such regulations are not inconsistent with law.)

In reviewing the regulations of the Board, the Independent Regulatory Review Commission (IRRC) has identified several areas of concern relating to authority of the Board to promulgate these regulations.

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The first area deals with the regulation of how gaming establishments configure their gaming floors for smoking and non-smoking areas (Section 441a.25 (a) – (f)). The Act addresses the allowance of gaming establishments to increase the gaming floor areas which may be designated as smoking based upon information from the Pennsylvania Department of Revenue. The Act does not address the specifics of how such space is designated or increased nor how the Board's oversight of gaming floor space is affected. Such details are necessary; however, they are outside the scope of Health's expertise, and are most properly addressed by regulations promulgated by the Board.

The second area deals with the requirement that signage be posted at every public entrance to the licensed facility if a licensee permits smoking in designated areas of the licensed facility. (Section 441a.25(g)) The Act at section 4 requires that a smoking or no smoking signs, or the international "no smoking" symbol be prominently posted and properly maintained where smoking is regulated, and that a "Smoking permitted" sign be prominently posted and maintained at every entrance to a public place where smoking is permitted. The Act sets forth the minimum requirements. It does not set forth the exclusive requirement for signage. There is nothing in the Act which prohibits another regulating agency from imposing additional requirements through that agency's own regulatory authority. In this case, given the elaborate layouts of gaming establishments, requiring "Smoking Permitted" signs at entrances might be unnecessarily confusing to patrons since there are many areas within the establishments where smoking is prohibited. Adding the phrase "in designated areas" is a clarification that is specific to gaming establishments which the Board deems necessary for proper enforcement of the Act. It is a reasonable and rational requirement and one which does not conflict with the Act. It is within the authority of the Board to promulgate this regulation for purposes of enhancing patron understanding of where smoking is permitted within the establishments it regulates.

The third area deals with training of employees. (Section 441a.25(h)). This area of regulation is not addressed by the Act. How regulated entities are required to train their employees is wholly within the scope of the regulating agency, in this case the Board. (4 Pa. C.S.A. § 1202.)

Health does have jurisdiction to promulgate regulations under the Act that apply to all establishments covered by the Act, including gaming establishments. However, in regards to the enforcement of the Act within gaming establishments, it is the Board that has exclusive jurisdiction. No other agency has enforcement authority over gaming establishments and, therefore, the Board would necessarily have the authority to promulgate these specific regulations. These regulations do not conflict with the Act and are clearly permitted under the Act and the general authorizing statute of the Board.

Thank you for your consideration.

Sincerely,



Keith B. Fickel
Senior Counsel