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## INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

March 25, 2009

Frank Donaghue, Acting Executive Director  
Pennsylvania Gaming Control Board  
Strawberry Square  
Verizon Tower, 5th Floor  
Harrisburg, PA 17106-9060

Re: Regulation #125-92 (IRRC #2731)  
Pennsylvania Gaming Control Board  
Smoking in Licensed Facilities

Dear Mr. Donaghue:

The Independent Regulatory Review Commission disapproved your regulation on March 19, 2009. Our order is enclosed and will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us).

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact me at 783-5506.

Sincerely,

Kim Kaufman  
Executive Director

wbg

Enclosure

cc: Honorable Jane M. Earll, Chair, Senate Community, Economic and Recreational Development  
Committee

Honorable Wayne D. Fontana, Chair, Senate Community, Economic and Recreational Development  
Committee

Honorable Dante Santoni, Jr., Chair, House Gaming Oversight

Honorable Curt Schroder, Chair, House Gaming Oversight

**INDEPENDENT REGULATORY REVIEW COMMISSION  
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held March 19, 2009

Arthur Coccodrilli, Chairman  
George D. Bedwick  
Nancy Sabol Frantz, Esq.  
Karen A. Miller

Regulation No. 125-92 (#2731)  
Pennsylvania Gaming Control Board  
Smoking in Licensed Facilities

On October 28, 2008, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Pennsylvania Gaming Control Board (Board). This rulemaking amends 58 Pa. Code Chapters 441a and 467a. The proposed regulation was published in the November 8, 2008 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on February 11, 2009.

This final-form regulation is the Board's attempt to implement the Clean Indoor Air Act of 2008, 35 P.S. § 637.1 *et seq.* (Act) as it relates to smoking in licensed facilities. The Board has cited Sections 3, 4 and 6 of the Act (35 P.S. §§ 637.3, 637.4 and 637.6) and §1202(b)(30) of the Pennsylvania Race Horse Development and Gaming Act (4 Pa.C.S § 1202(b)(30)) (Gaming Act) as its statutory authority for the regulation.

Section 5.2 of the Regulatory Review Act requires the following of this Commission:

“In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.”  
(71 P.S. § 745.5(b)(a))

We find that the Board does not have the statutory authority to promulgate this regulation and that the regulation is not consistent with the intention of the General Assembly for the following reasons.

First, Section 2 of the Act (35 P.S. § 637.2) defines “Department” as the “The Department of Health of the Commonwealth” and Section 10 (a) of the Act (35 P.S. § 637.10(a)) states the following: “The department shall promulgate regulations to implement this act.” We believe that this language is clear and the intent of the General Assembly was for the Department of Health (Department) to write the rules to implement the Act. We note that where the legislature intends to authorize the promulgation of regulations, it has done so explicitly. *Main Line Health, Inc. v. CAT Fund*, 738 A.2d 66 (Pa. Cmwlth. 1999), *affirmed* 77 A.2d 1048 (Pa. 2001).

In the Preamble to the final-form regulation, the Board contends that if the General Assembly had intended to make the Department the only agency that could promulgate

regulations to implement the Act, it would have written Section 10(a) differently. The Board notes that nowhere in Section 10(a) does it state that the Department has “sole” or “exclusive” authority to promulgate regulations to implement the Act. We find this rational to be flawed. Under Section 1921(b) of Pennsylvania’s Statutory Construction Act (SCA), “[w]hen the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” (1 Pa C.S.A. § 1921(b)) We believe a plain reading of Section 10(a) is perfectly clear. The intent of the General Assembly was for the Department to promulgate regulations to implement the Act. The fact that the Department has not promulgated regulations does not transfer that authority to another agency.

If a piece of legislation is not explicit, the SCA provides guidance on how the intent of the General Assembly could be ascertained. Section 1921(c) of the SCA states that the intention of the General Assembly could be ascertained by examining, among other things, contemporaneous legislative histories. As noted above, we do not believe Section 10(a) of the Act is ambiguous. However, a review of the legislative history surrounding the passage of the Act sheds light on what the intent of the General Assembly was, as it pertains to promulgating regulations, when the Act was debated. The following legislative journals from the 2007 Regular Session of the Pennsylvania General Assembly indicate that the members recognized that licensed facilities, taverns and various other facilities would be affected, but that the Department of Health would be charged with promulgating regulations to implement the Act:

- Senate Journal - June 26, 2007 (page 790)
- House Journal – July 13, 2007 (pages 1910 and 1918)
- House Journal – July 15, 2007 (page 1989)
- House Journal – July 16, 2007 (pages 2060, 2075 and 2077).

When the Commission was considering this regulation at its public meeting on March 19<sup>th</sup>, staff from the Board indicated that a letter submitted by the Department of Health supporting the rulemaking was further indication that the Board has the authority to promulgate the regulation. In that letter, the Department cited *Prudential Property and Casualty Insurance Company v. Muir*, 513 A.2d 1129 (Pa. Cmwlth. 1986), *appeal denied*, 522 A.2d 1106 (1987) as evidence that the Board has implied power to adopt regulations with respect to matters within its province. We note that this case was overturned by the Pennsylvania Supreme Court in *Insurance Federation of Pennsylvania, Inc. v. Commonwealth, Department of Insurance*, 585 Pa. 630, 889 A.2d 550 (Pa. 2005).

Second, as noted above, the Board has cited Sections 3, 4 and 6 of the Act as part of its statutory authority to promulgate this regulation. Section 3(b)(11) provides an exception to the smoking ban for licensed facilities. It requires the Board to verify data provided by the Department of Revenue to licensed facilities. Section 4 pertains to signage requirements related to the smoking ban. Section 6 pertains to violations of the Act. While we acknowledge that Sections 3 and 6 would require the Board to take certain actions, they do not provide the authority to promulgate regulations pertaining to the Act. Indeed, various state licensing agencies are required to perform certain duties under the Act. Allowing each of those agencies to promulgate regulations to implement the Act would create a confusing regulatory environment for the regulated community. In regard to Section 4, we find that the Board has failed to explain why this section provides the authority to promulgate regulations.

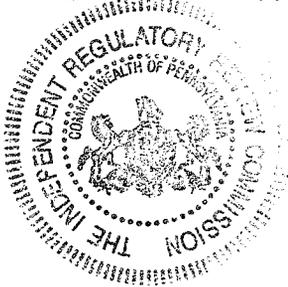
We are also concerned with §§ 441a.25(d) and (e) of the regulation. These subsections attempt to implement Section (b)(11) of the Act and require licensed entities to obtain approval of the Board's executive director before an expansion of the smoking area of a gaming floor can occur. Section (b)(11) only gives the Board the authority to verify certain data provided by the Department of Revenue to a licensed entity. It does not provide the Board the authority to require licensed entities to obtain any approval before an expansion of the smoking area can occur.

Finally, the Board has cited its general rulemaking authority in the Gaming Act as part of its statutory authority for this regulation. Again, we disagree. Section 1202(b)(30) of the Gaming Act provides the Board with the authority to "promulgate rules and regulations necessary for the administration of this part." The "part" being referred to is Part II, pertaining to "Gaming" of Title 4 of Pennsylvania Consolidated Statutes, which refers to "Amusements." The authority to promulgate regulations to administer gaming does not extend to the authority to promulgate regulations to implement the Act.

We have determined this regulation is not consistent with the statutory authority of the Pennsylvania Gaming Control Board and the intention of the General Assembly. Therefore, based upon the information presented to us and after considering the criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

**BY ORDER OF THE COMMISSION:**

This regulation is disapproved.



A handwritten signature in black ink, appearing to read "K. Kaufman", is written over a horizontal line.

Kim Kaufman, Executive Director