



PENNSYLVANIA GAMING CONTROL BOARD
P.O. Box 69060
HARRISBURG, PENNSYLVANIA
17106-9060

2731.

RICHARD M. SANDUSKY
Director of Regulatory Review
Phone: (717) 214-8111
Fax: (717) 346-8350
Email: rsandusky@state.pa.us

Chairman
MARY DIGIACOMO COLINS

Commissioners
RAYMOND S. ANGELI
JEFFREY W. COY
JAMES B. GINTY
KENNETH T. MCCABE
SANFORD RIVERS
GARY A. SOJKA

Ex-Officio Members
ROBERT M. MCCORD
STEPHEN STETLER
DENNIS WOLFF

March 16, 2009

Mr. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

**RE: Regulation #125-92 (IRRC #2731)
Smoking in Licensed Facilities**

Dear Mr. Kaufman:

In our discussions with the IRRC staff of this final-form regulation, it was noted that the preamble did not address IRRC's suggestion that if this regulation can not be implemented as a regulation, the Board proceed with the proposal as a non-regulatory document such as a statement of policy.

To respond to that concern, the Board has added the following language to the attached revised preamble.

Additionally, the Board has not adopted IRRC's suggestion that the Board proceed with the proposal as a non-regulatory document, such as a statement of policy, for two reasons. First, as stated above, the Board believes that it does have authority to promulgate this proposal as a regulation. Second, with the possible exception of the sample calculation that was added to § 441a.25(d), this proposal sets forth requirements that would be binding on the slot machine licensees. Statements of policy are used to establish guidelines with which an affected party, in this case, slot machine licensees, may or may not comply. The purpose of this proposal is to establish requirements, consistent with the statutory requirements of the Clean Indoor Air Act, with which all slot machine licensees must comply. Therefore, the Board believes that adopting this proposal as a statement of policy would be inappropriate.

RECEIVED
MAR 16 2009
10 15 AM EST

Mr. Kim Kaufman
March 16, 2009
Page 2 of 2

Copies of this revised preamble have also been delivered to the House and Senate Committees. If you or the staff have any additional questions pertaining to this regulation please do not hesitate to contact me at 717-214-8111 or by email at rsandusky@state.pa.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Sandusky". The signature is fluid and cursive, with a large initial "R" and "S".

Richard M. Sandusky
Director of Regulatory Review

cc: House and Senate standing Committee Chairs

RULES AND REGULATIONS

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA.CODE CHS. 441a AND 467a]

Smoking in Licensed Facilities

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and specific authority contained in 4 Pa.C.S. § 1202 and in sections 3,4 and 6 of the Clean Indoor Air Act (35 P.S. §§ 637.3, 637.4 and 637.6) (act) amends Chapters 441a and 467a (relating to slot machine licenses; and commencement of slot operations) to read as set forth in Annex A.

Purpose of the Final-form Rulemaking

This final-form rulemaking adds a new § 441a.25 (relating to smoking on the gaming floor) and amends § 467a.1 (relating to gaming floor plan) to implement the provisions of the act.

Explanation of Amendments to Chapters 441a and 467a

The new § 441a.25 sets forth the procedures and requirements that slot machine licensees must comply with as a result of the passage of the act.

Subsection (a) mirrors the provisions of the act which restrict smoking to no more than 25% of the gaming floor on September 11, 2008, the effective date of the act, and limit the maximum amount of the gaming floor that may eventually be designated as smoking to 50% of the gaming floor.

Subsection (b) reflects the requirement of the act that slot machine licensees request a gross terminal report from the Department of Revenue on December 10, 2008, and subsection (c) reflects the slot machine licensees' right to request subsequent reports on a quarterly basis.

Subsection (d) parallels the language of the act that permits proportionate increases in the amount of the gaming floor designated for smoking areas when there is a difference in the average gross terminal revenue for slot machines in the smoking areas as opposed to the slot machines in the nonsmoking areas.

Subsection (e) sets forth the process slot machine licensees are required to use whenever they want to make a change to the designated smoking areas. Changes to designated smoking areas will be submitted to the Board's Executive Director, who will verify that the changes are consistent with the provisions of the act and the Board's regulations. Once this is done, the slot machine licensee will be notified and may proceed with the changes.

Subsection (f) reflects the provision of the act that allows a slot machine licensee who is operating a temporary licensed facility to use the same percentage of square footage designated for smoking areas in the temporary licensed facility in the permanent licensed facility. For example, if a slot machine licensee is authorized to designate 35% of the gaming floor in the temporary licensed facility as smoking, the slot machine licensee will be able to designate 35% of the gaming floor in the permanent facility as smoking.

Subsection (g) requires signage that clearly delineates where smoking may or may not be permitted on the gaming floor and requires that signs be posted at all public entrances which indicate that smoking is permitted in designated areas. While the act only requires "smoking permitted" signs at entrances, such signs at a licensed facility could give patrons the misimpression that they can smoke anywhere in the licensed facility. Because licensed facilities are only partially exempt from the smoking ban, language reflecting that fact is needed at the entrances to licensed facilities.

Subsection (h) requires slot machine licensees to provide training to their employees on where smoking is and is not permitted and on what the employees should do if they see an individual smoking in a nonsmoking area.

Lastly § 467a.1 has been amended to add designated smoking areas as one of the items that must be depicted on gaming floor plans.

Comment and Response Summary

Notice of proposed rulemaking was published at 38 Pa.B. 6158 (November 8, 2008).

The Board received comments from Chester Downs and Marina, LLC (Chester), Downs Racing, L.P. (Downs), Greenwood Gaming and

Entertainment, Inc. (Greenwood), HSP Gaming, L.P. and Holdings Acquisition Co., L.P. (HSP), Sands Casino Resort/Bethlehem (Sands) and Washington Trotting Association, Inc. (WTA) during the public comment period. On January 7, 2009, the Independent Regulatory Review Commission (IRRC) also filed comments on the proposed rulemaking. All of these comments were reviewed by the Board and are discussed in detail below.

Chester and Greenwood both commented that prior approval of changes to the percentage of the gaming floor designated for smoking is not required or authorized by the act. For this reason, they suggest that subsections (d) and (e) be deleted. Greenwood also argues that the Board lacks authority to do any regulations pertaining to the act. IRRC also questioned the Board's authority to do regulations related to the act and recommended that absent that authority, the Board should consider doing a statement of policy to provide guidance to slot machine licensees.

The Board disagrees with the commentators' suggestion that the Board lacks the authority to require that slot machine licensees not increase the percentage of the gaming floor designated for smoking prior to verification by the Board that the conditions prescribed in the act have been met. We agree that section 3(b)(11) of the act allows a slot machine license to expand the designated area of the gaming floor in proportion to the percentage difference in revenue. However, that same section also vests the Board with the jurisdiction "to ensure compliance with the requirements under this paragraph." To ensure that an increase in the area of the gaming floor designated for smoking is consistent with the difference in gross terminal revenue in the smoking and non-smoking areas, the Board must know what changes a slot machine licensee is going to make to the gaming floor before the changes are made.

The Board notes that the language of section 3(b)(11) does not specify whether the verification should occur prior to or after a change has been made to the designed smoking areas of the gaming floor. However, if the General Assembly had intended that the verification occur after a change was made, there would have been no need to include the verification language in section 3(b)(11) in the act. As one of the commentators noted, section 5(b)(1)(ii) of the act gives the Board the authority to investigate and initiate enforcement actions for violations of the act. If no prior verification was intended, the language in section 5(b)(11) would have been sufficient to provide the Board

with the authority to address changes to the gaming floor that were not in compliance with the act.

The Board must also note that under its existing regulations, the plan for the gaming floor must be approved by the Board prior to commencement of gaming operations and that any changes to the gaming floor must be approved before they are made. Requiring prior verification of compliance with what is permitted under the act is consistent with this regulatory scheme.

For these reasons the Board has not revised the prior approval provisions in § 441a.25(d) and (e).

Additionally, the Board has not adopted IRRC's suggestion that the Board proceed with the proposal as a non-regulatory document, such as a statement of policy, for two reasons. First, as stated above, the Board believes that it does have authority to promulgate this proposal as a regulation. Second, with the possible exception of the sample calculation that was added to § 441a.25(d), this proposal sets forth requirements that would be binding on the slot machine licensees. Statements of policy are used to establish guidelines with which an affected party, in this case, slot machine licensees, may or may not comply. The purpose of this proposal is to establish requirements, consistent with the statutory requirements of the Clean Indoor Air Act, with which all slot machine licensees must comply. Therefore, the Board believes that adopting this proposal as a statement of policy would be inappropriate.

The Board also disagrees with the comments questioning the Board's authority to do any regulations pertaining to the act. The commentators' position is based on the language in section 9(a) which states "The department shall promulgate regulations to implement this act." The Board agrees that this language provides authority for the Department of Health to carry out its responsibilities under the act. We do not agree that it gives the Department of Health exclusive authority to do regulations to implement the act. The act places a number of responsibilities on the Board, the Department of Revenue and other licensing agencies. All of these entities have broad rulemaking authority, so there was no need to add explicit rulemaking authority in the act to allow these entities to adopt regulations. Furthermore, if the General Assembly had intended to make the Department of Health the only Commonwealth agency that could promulgate regulations to implement this act, it

would have written section 9(a) differently. Nowhere in this section, does the act give "sole" or "exclusive" authority to the Department of Health to do regulations to implement this act. To attempt to interpret the language in section 9(a) in this manner would lead to an absurd result. It is inconceivable to think that the General Assembly would place numerous responsibilities on agencies other than the Department of Health and then bar those agencies from doing regulations to carry out those responsibilities.

Accordingly, the Board believes that the intent of section 9(a) is simply to give the Department of Health authority to promulgate regulations to carry out its responsibilities under the act. The authority for the Board to promulgate these regulations and to carry out its responsibilities under the act lies in sections 3, 4 and 6 of the act and in section 1202 of the Pennsylvania Race Horse Development and Gaming Act.

IRRC and Sands questioned whether the existing definition of what constitutes the gaming floor provides enough detail to provide for consistency in the calculation of the square footage for the designated smoking areas.

While the Board's definition of "gaming floor" in § 401a.3, is somewhat broad, other provisions in the Board's regulations already require a slot machine licensee to precisely identify what constitutes their gaming floor. Under § 467a.1 (relating to gaming floor plan), a slot machine licensee must submit a floor plan which shows the perimeter and the total square footage of the gaming floor. Furthermore, a slot machine licensee may not commence gaming operations until the floor plan has been approved by the Board. Therefore, each slot machine licensee will know what areas are included in their gaming floor and the exact square footage of their gaming floor. For this reason, the Board does not believe that there is any need to add a new definition or amend the existing definition.

HSP suggested that the Board revise the wording of the title of proposed § 441a.25 and revise subsection (a) to simply cite section 11 of the act (relating to preemption of local ordinances).

Since the act only permits smoking on portions of the gaming floor, the Board agrees with the suggested rewording of the title of § 441a.25. However, the Board does not believe the suggested revision to subsection (a) would improve the clarity of the regulation. The language in proposed subsection (a)

excludes licensed facilities in "a city of the first class that has prohibited smoking in public places" from the provisions of this rulemaking. The Board believes this language is clearer than a general reference to Section 11 of the act

IRRC, Chester, HSP, Sands and WTA all suggested that the clarity of subsection (d) would be improved by adding a formula or sample calculation for increasing the area of the gaming floor that can be designated as smoking.

The Board agrees with this suggestion and has added an example. This example is consistent with how the slot machine licensees calculated their allowable increases after receiving the December reports from the Department of Revenue.

IRRC, HSP and Sands also suggested that subsection (e) should include a time period within which the Executive Director will complete the verification process.

The Board intended that the verification process be completed in as short a time as possible. Accordingly, the Board has added the following language to subsection (e): "The Executive Director will complete the review of the revised gaming floor plan within 15 days of the submission of the notice."

While not part of the proposed regulation, the Board asked for comments on whether or not individual labels should be required on each slot machine indicating whether or not the slot machine is in a designated smoking area.

Downs, Greenwood, HSP, Sands and WTA all submitted comments opposing individual smoking/nonsmoking labels on slot machines. They oppose such a requirement because: it would disrupt the aesthetic environment; the proposed signage requirements are sufficient; with the high volume of machine relocations and replacements, individual signs would be expensive, both in terms of cost and staff time to install and replace individual labels; and casino personnel on the gaming floor will be able to assist customers if needed.

Based on these comments, the Board does not believe adding a requirement to put labels on each slot machine is warranted at this time. Instead, the Board will monitor the effectiveness of the proposed signage requirements. If there are significant compliance problems going forward, the Board may propose additional signage requirements based upon actual experience.

Affected Parties

This final-form rulemaking will affect any slot machine licensee that permits smoking in designated areas on the gaming floor.

Fiscal Impact

Commonwealth

Under the final-form rulemaking, the Bureau of Gaming Operations and the Board's Executive Director will be required to review requests filed by slot machine licensees desiring to change the size or location of the designated smoking areas in their licensed facilities. These requests will be handled by existing staff so the Board does not foresee that there will be any new costs or savings to the Board as a result of this rulemaking.

The Department of Revenue will also be required to supply reports that will indicate the revenue from slot machines in the designated smoking areas and revenue from slot machines in the non-smoking areas. These will be generated using the existing central control computer system, so there should not be any significant new costs incurred by the Department of Revenue.

Political Subdivisions

This final-form rulemaking will have no fiscal impact on political subdivisions of the Commonwealth.

Private Sector

Affected slot machine licensees will experience costs related to submitting changes to their gaming floor plans to designate areas where smoking is permitted; for posting signs indicating where smoking may or may not occur; and training their employees.

The actual costs will vary by licensed facility depending on how frequently a slot machine licensee elects to make changes to their gaming floor. Costs per change are anticipated not to exceed \$2500 per change.

Violations of these regulations could subject the slot machine licensee to fines between \$250 to \$1000 under the act and other disciplinary action by the Board.

General Public

This final-form rulemaking will have no fiscal impact on the general public. However, under the act, individuals who smoke in areas designated as nonsmoking will be subject to fines of \$250 to \$1000.

Paperwork requirements

Slot machine licensees will have to submit a request and revised floor plan any time they want to make a change to their designated smoking areas.

Effective Date

This final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Contact Person

The contact person for questions about this final-form rulemaking is Richard Sandusky, Director of Regulatory Review, at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 28, 2008, the Board submitted a copy of this proposed rulemaking, published at 38 Pa.B. 6158 (November 8, 2008) and a copy of the Regulatory Analysis Form to IRRC and to the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee (Committees).

Under section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), the final-form rulemaking was deemed

approved by the Committees on **INSERT DATE**, 2009. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)) IRRC met on **INSERT DATE**, 2009 and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt these amendments was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(a) The regulations of the Board, 58 Pa. Code Chapters 441a and 467a are amended by adding § 441a.25 and amending § 467a.1 to read as set forth in Annex A.

(b) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

MARY DIGIACOMO COLINS,
Chairperson