

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

Independent Regulatory Review Commission

SECTION I: PROFILE

(1) Agency:

Pennsylvania Gaming Control Board

(2) Agency Number:

Identification Number: 125-141

IRRC Number: 2888

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(3) Short Title:

Preliminary Provisions and Bureau of Investigations and Enforcement

(4) PA Code Cite:

58 Pa.Code Chapter 401a. and 405a.

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact:

Susan A. Yocum
Assistant Chief Counsel
Pennsylvania Gaming Control Board
P.O. Box 69060
Harrisburg, PA 17101-8323
Phone: (717) 265-8356/ Fax: (717) 703-2988
Email: syocum@state.pa.us

Secondary Contact:

None

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

Proposed Regulation

Final Regulation

Regulatory Analysis Form

- Final Omitted Regulation
 Emergency Certification Regulation;
 Certification by the Governor
 Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

In accordance with revisions made to the Pennsylvania Race Horse Development and Gaming Act (Gaming Act) with the passage of Act 1 in January 2010, the Board is proposing to amend Chapters 401a. (relating to preliminary provisions) and 405a. (relating to bureau of investigations and enforcement) regarding ex parte communications and the separation of the adjudicatory functions of the Board or a presiding officer of the Board from the investigatory and prosecutorial functions of the Office of Enforcement Counsel (OEC) and the Bureau of Investigations and Enforcement (Bureau).

(9) Include a schedule for review of the regulation including:

- | | |
|---|------------------------------------|
| A. The date by which the agency must receive public comments: | <u>30 days after publication</u> |
| B. The date or dates on which public meetings or hearings will be held: | <u>N/A</u> |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | <u>3rd Quarter 2011</u> |
| D. The expected effective date of the final-form regulation: | <u>Upon final publication</u> |
| E. The date by which compliance with the final-form regulation will be required: | <u>Upon final publication</u> |
| F. The date by which required permits, licenses or other approvals must be obtained: | <u>N/A</u> |

(10) Provide the schedule for continual review of the regulation.

No formal review schedule has been established. Instead, the Board is constantly reviewing its regulations and proposing amendments as the need arises.

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SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

§ 1202(b)(25) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1202.1 (relating to code of conduct) and § 1516.1 (relating to prosecutorial and adjudicatory functions).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

There are no other applicable federal or state statutes, regulations or court decisions that mandate adoption of these changes contained in this rulemaking.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Several amendments to the Gaming Act were made with the passage of Act 1 in January 2010. The proposed changes reflect the statutory changes and reflect the Board's ongoing duty to ensure that the Bureau is a distinct entity and to prevent the commingling of the adjudicatory functions of the Board and the prosecutorial and investigative functions of the Bureau and the OEC.

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(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

There are no studies or research upon which this rulemaking is based.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The Board does not anticipate that anyone will be adversely affected by this regulation.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

This rulemaking affects presiding officers and members of the Board, the Office of Chief Counsel advising the Board as well as the Bureau and OEC.

Regulatory Analysis Form

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

This proposed rulemaking will have no fiscal impact on the regulated community.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

This proposed rulemaking will have no fiscal impact on local governments.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

This proposed rulemaking will have no fiscal impact on state government.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	N/A	N/A	N/A	N/A	N/A	N/A
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	N/A	N/A	N/A	N/A	N/A	N/A
Total Savings	N/A	N/A	N/A	N/A	N/A	N/A
COSTS:						
Regulated Community	N/A	N/A	N/A	N/A	N/A	N/A
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	N/A	N/A	N/A	N/A	N/A	N/A

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Total Costs						
REVENUE LOSSES:						
Regulated Community	N/A	N/A	N/A	N/A	N/A	N/A
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	N/A	N/A	N/A	N/A	N/A	N/A
Total Revenue Losses	N/A	N/A	N/A	N/A	N/A	N/A

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
N/A				

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

There are no anticipated costs associated with this regulation.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

The changes contained in this proposed rulemaking reflect amendments made to the Gaming Act with the passage of Act 1 in January 2010. No other persons or groups were involved in the development and drafting of the regulation.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No other regulatory schemes were considered.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no corresponding Federal requirements.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

This regulation will not affect the regulated community but deals instead with operations of the agency. This regulation will therefore not affect the regulated community nor will it affect Pennsylvania's ability to compete with other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This proposed rulemaking will not affect any regulations of other state agencies or other regulations of the PGCB other than the chapters amended as set forth in Annex A.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

There are no paperwork or reporting requirements for the regulated community associated with this rulemaking.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

No special provisions have been added.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
BUREAU

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(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality.
Attorney General

Amy M. Elliott

By: _____
(Deputy Attorney General)

FEB 03 2011

DATE OF APPROVAL

Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct
copy of a document issued, prescribed or promulgated
by:

Pennsylvania Gaming
Control Board

FISCAL NOTE NO.: 125-141

DATE OF ADOPTION: 1/6/11

BY: *Gregory C. Felt*
Gregory C. Felt, CHAIRMAN

Copy below is hereby approved as to form and legality
Executive or Independent Agencies

BY: *R. Douglas Sherman*
R. Douglas Sherman, Chief Counsel

1/6/11
DATE OF APPROVAL

(Deputy General Counsel)
(Chief Counsel - Independent Agency)
(Strike inapplicable title)

Check if applicable. No Attorney General Approval or
objection within 30 days after submission.

PROPOSED RULEMAKING
COMMONWEALTH OF PENNSYLVANIA

58 PA. CODE, SUBPART A
CHAPTER 401a and 405a

PROPOSED RULEMAKING

PENNSYLVANIA GAMING CONTROL BOARD

58 PA.CODE CHAPTERS 401a.and 405a.

**Preliminary Provisions and Bureau of Investigations and
Enforcement**

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b) (25) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1202.1 (relating to code of conduct) and § 1516.1 (relating to prosecutorial and adjudicatory functions) proposes to amend Chapter 401a. and 405a. to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

In accordance with revisions made to the Gaming Act with the passage of Act 1 in January 2010, the Board is proposing to amend Chapters 401a. (relating to preliminary provisions) and 405a. (relating to bureau of investigations and enforcement) regarding ex parte communications and the separation of the adjudicatory functions of the Board or a presiding officer of the Board from the investigatory and prosecutorial functions of the Office of Enforcement Counsel (OEC) and the Bureau of Investigations and Enforcement (Bureau).

Explanation of Chapter 401a.

Section 401a.3 (relating to definitions) amends the definition of an ex parte communication for consistency the amended statute.

Section 401a.5 (relating to adjudicatory function of the Board; ex parte communications) was added to specify that the adjudicatory capacity of the Board or presiding officer shall not be commingled with the prosecutorial or investigatory functions of the Bureau or OEC.

This section also addresses the prohibition on a Board member, presiding officer or an attorney from the Office of Chief Counsel who is advising the Board from engaging in ex parte communications with any person including an applicant, licensee, the Bureau or an attorney for the OEC. If a Board

member, presiding officer or attorney from the Office of Chief Counsel does engage in an ex parte communication, the communication must be documented and notification of the communication and an opportunity to respond must be given to all parties. In addition to documenting the ex parte communication in a log, a member or presiding officer may be required to recuse himself. Section 401a.5(e) addresses the procedure for recusal of a presiding officer or Board member who engages in an ex parte communication that creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially.

Explanation of Chapter 405a.

Section 405a.1 (relating to general duties and powers) was amended to reiterate that the Bureau is independent of the Board, the Office of Hearings and Appeals and the Office of Chief Counsel and that the Bureau alone will dictate the scope and course of a background investigation without direction or limitation by the Executive Director or the Chief Counsel of the Board.

In section 405a.3 (relating to Office of Enforcement Counsel), subsection (a)(7) was added to reflect the additional authority given to OEC to petition the Board for the appointment of a trustee in accordance with section 1332 of the act (relating to appointment of trustee). Section 405a.4 was amended for clarity.

Affected Parties

This rulemaking affects presiding officers and members of the Board, the Office of Chief Counsel advising the Board as well as employees of the Bureau or OEC.

Fiscal Impact

Commonwealth. It is not anticipated that this rulemaking will have a fiscal impact on the Gaming Control Board.

Political Subdivisions. This proposed rulemaking will have no fiscal impact on political subdivisions of the Commonwealth.

Private Sector. This proposed rulemaking will have no fiscal impact on the private sector.

General Public. This proposed rulemaking will have no fiscal impact on the general public.

Paperwork Requirements.

There are no paperwork requirements associated with this rulemaking.

Effective Date

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

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking, within 30 days after the date of publication in the *Pennsylvania Bulletin* to Susan A. Yocum, Assistant Chief Counsel, Pennsylvania Gaming Control Board, P.O. Box 69060, Harrisburg, PA 17106-9060, Attention; Public Comment on Table Game Equipment, Regulation # 125-141.

Contact Person

The contact person for questions about this proposed rulemaking is Susan Yocum, Assistant Chief Counsel, at (717) 265-8356.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), on February 14, 2011, the Board submitted a copy of this proposed rulemaking and a copy of the Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee. A copy of this material is available to the public upon request and is available on the Board's website at www.pgcb.state.pa.us.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections

must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

GREGORY C. FAJT,
Chairperson

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart A. GENERAL PROVISIONS

CHAPTER 401a. PRELIMINARY PROVISIONS

§ 401a.3. Definitions.

Ex parte communication--

(i) Any off-the-record [communications regarding] communication engaged in or received by a member or presiding officer of the Board regarding the merits of or any fact in issue relating to a pending matter before the Board or presiding officer or which may reasonably be expected to come before the [board] Board or presiding officer in a contested on-the record proceeding.

(ii) The term does not include off-the-record communications by [and] or between a member or presiding officer of the Board [members, staff and employees of the Board], the Department, the Pennsylvania State Police, the Attorney General or other law enforcement [officials necessary for their official duties under this Part] official prior to the beginning of the proceeding solely for the purpose of seeking clarification or correction to evidentiary materials intended for use in the proceedings. Additionally, the term does not include

communications between the Board or a member and the Office of Chief Counsel.

* * * * *

§ 401a.5. Adjudicatory Function of the Board; Ex parte communications.

(a) The Board or a presiding officer acts in an adjudicatory capacity when considering any matter presented for a decision by the Board or presiding officer in a contested on-the-record proceeding. To ensure the integrity and impartiality of the Board or presiding officer acting in an adjudicatory capacity, there will be no commingling of the adjudicatory functions of the Board or presiding officer and the investigatory or prosecutorial functions of the Bureau or Office of Enforcement Counsel.

(b) When acting in an adjudicatory capacity regarding the facts at issue or merits of a matter pending before the Board or presiding officer, or which may reasonably be expected to come before the Board or presiding officer in a contested on-the-record proceeding, a member or presiding officer of the Board or an attorney from the Office of Chief Counsel who is advising the Board on the matter may not engage in an ex parte communication with any person including the Bureau or the Office of Enforcement Counsel.

(c) An ex parte communication received or engaged in by a member or presiding officer of the Board will be recorded in a log which will be available for public inspection at the Board's office during normal business hours and will be posted on the Board's internet website. The log shall include:

(1) The name of the individual documenting the ex parte communication.

(2) The date and time of the ex parte communication.

(3) The names of all individuals involved in the ex parte communication.

(4) The subject discussed.

(d) In addition to documenting an ex parte communication in accordance with subsection (c), notification of the substance of the communication and an opportunity to respond will be provided to all parties to a hearing or other proceeding directly affected by the anticipated vote or action of the Board or presiding officer related to the ex parte communication.

(e) A member or presiding officer of the Board may be required to recuse himself if substantial reasonable doubt exists as to the individual's ability to act objectively, independently or impartially in a hearing or proceeding as follows:

(1) A member or presiding officer of the Board who engaged in or received an ex parte communication will recuse

himself from any hearing or other proceeding related to the ex parte communication if the context and substance of the ex parte communication creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially.

(2) A member or presiding officer of the Board who engaged in or received an ex parte communication who elects not to recuse himself from a hearing or other proceeding will state his reasons for not recusing himself on the record prior to the commencement of the hearing or proceeding.

(3) A member or presiding officer of the Board who has identified any other reason which creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially will recuse himself from any hearing or other proceeding related thereto.

(4) If a legislative appointee recuses himself from any hearing or other proceeding under this section, any qualified majority vote required under this part will consist of all of the remaining legislative appointees and at least two gubernatorial appointees.

(5) Failure of a presiding officer, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse

himself from a hearing or other proceeding when required under subparagraph (1) shall be grounds for appeal to the board.

(6) Failure of a member, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse himself from a hearing or other proceeding when required shall be grounds for appeal to a court of competent jurisdiction if the board action being appealed could not have occurred without the participation of the member.

(f) Nothing in this subsection will preclude a member of the Board from consulting with other members individually if the consultation complies with 65 Pa.C.S. Chapter 7 (relating to open meetings) or with employees or independent contractors whose functions are to assist the Board in carrying out its adjudicative functions.

* * * * *

CHAPTER 405a. BUREAU OF INVESTIGATIONS AND ENFORCEMENT

§ 405a.1. General duties and powers.

(a) Except for administrative purposes, the Bureau is a distinct entity, independent of the Board, the Office of Chief Council and the Office of Hearings and Appeals.

(b) The Bureau has the powers and duties set forth in section 1517 of the act (relating to enforcement) including:

(1) The investigation and review of applicants seeking a license, permit, certification or registration.

(2) The investigation of licensees, permittees, registrants, certified gaming service providers and other persons for potential violations of the act, including potential violations referred to the Bureau by the Board or other persons.

(3) The monitoring of slot machine operations to ensure compliance with the act, this part and the integrity of gaming, including internal controls, exclusion list enforcement, underage gaming and drinking, individual complaints, information systems, integrity and security issues.

(4) The inspection and examination of all premises where slot machine operations are conducted, gaming devices or equipment are manufactured, sold, distributed or serviced or where records of these activities are prepared or maintained as provided in section 1517(e) of the act. Inspections may include the review and reproduction of any document or record.

(5) The conduct of audits of slot machine operations as necessary to ensure compliance with the act and this part. An audit may include, but is not limited to, reviews, examinations and inspections of:

(i) Accounting, administrative and financial records and procedures utilized by the licensed entity.

(ii) Internal control procedures and management control procedures.

(iii) Security and surveillance departments.

(iv) Corrective action taken by the licensee to resolve reported deficiencies.

(v) Reports issued by an independent certified public accountant or independently registered public accounting firm pertaining to the adequacy of the licensee's system of internal controls over financial reporting.

(vi) The licensee's responses, if any, to the reports noted in paragraph (v).

(vii) Other matters required by the Board or the Bureau.

(6) The referral of possible criminal violations under the act to the Pennsylvania State Police.

(7) Be a criminal justice agency under 18 Pa.C.S. Chapter 91 (relating to criminal history record information).

(c) The Bureau will determine the scope of a background investigation, which may not be directed or limited by the Executive Director or Chief Counsel of the Board.

* * * * *

§ 405a.3. Office of Enforcement Counsel.

(a) The Office of Enforcement Counsel within the Bureau has the following powers and duties:

(7) Petition the Board for the appointment of a trustee under section 1332 of the act (relating to appointment of trustee).

* * * * *

§ 405a.4. Conduct.

(a) As provided in section 1202.1(c.1) of the act (relating to code of conduct), [An] an attorney representing the Bureau or Office of Enforcement Counsel, or an employee involved in the hearing process, may not [discuss the case] engage in an *ex parte* communication with a member or presiding officer of the Board, [with a presiding officer assigned to the case,] the Chief Counsel or an attorney [assigned to the case] from the Office of Chief Counsel [or a Board member] who is advising the Board.

(b) A member or presiding officer of the Board, the Chief Counsel or an attorney [assigned to the case] from the Office of Chief Counsel [or a Board member] who advises the Board may not [discuss or] exercise [a] supervisory responsibility or exert influence over any employee of the Board or Bureau with respect to an enforcement proceeding or hearing with which the employee is involved.

* * * * *

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 125-141

DATE: 2/14/11

SUBJECT: Subpart A, Chapters 401a & 405a

AGENCY: Pennsylvania Gaming Control Board (PGCB)

TYPE OF REGULATION

- Proposed Regulation
- Final-Form Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

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FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
1. <u>2/14/11</u>	<u>Wallace</u> Senator Jane Earll	Senate Community, Economic & Recreational Development
2. <u>2/14/11</u>	<u>debrae mackenzie</u> Senator Wayne Fontana	Senate Community, Economic & Recreational Development
3. <u>2/14/11</u>	<u>Nathan Miller Epler</u> Representative Curt Schröder	House Gaming Oversight
4. <u>2/14/11</u>	<u>Kendalle DWilt</u> Representative Rosita Youngblood	House Gaming Oversight
5. <u>2/14/11</u>	<u>K. Cooper</u>	Independent Regulatory Review Commission
6. _____	_____	Attorney General
7. <u>2/14/11</u>	<u>Michelle Mishols</u>	Legislative Reference Bureau