

# Comments of the Independent Regulatory Review Commission



## Department of Revenue Regulation #15-460 (IRRC #3234)

### iLottery Games

July 2, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the May 4, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Revenue (Department) to respond to all comments received from us or any other source.

#### **1. Whether the regulation conforms to the intention of the General Assembly.**

The Department states that this regulation is mandated by Act 42 of 2017 (Act 42) which granted the Department the authority to implement and operate iLottery. 4 Pa.C.S. § 503. Act 42 defines “iLottery game” as “Internet instant games and other lottery products offered through iLottery. The term does not include games that represent physical, Internet-based or monitor-based interactive lottery games which simulate casino-style lottery games, specifically including poker, roulette, slot machines or blackjack.”

A commentator asserts that “virtually all, if not all, of the iLottery games currently offered by the Department offer the same appearance, feel and patron-experience as casino games.” This commentator further asserts that the proposed regulation does not provide any parameters for what features or game characteristics simulate a “casino-style lottery game,” nor does the proposed regulation establish a mechanism to evaluate games to ensure that they meet the statutory definition of an iLottery game.

We ask the Department to explain in the Preamble to the final-form regulation how it will evaluate iLottery games to ensure that iLottery games conform to the intention of the General Assembly.

#### **2. Determining whether the regulation is in the public interest; Statutory authority.**

Act 42 allowed the Department to promulgate a temporary regulation that expires no later than two years following publication in the *Pennsylvania Bulletin*. 4 Pa.C.S. § 503(b). The temporary regulation was not subject to the Commonwealth Documents Law (CDL) (45 P.S. § 1201 – 1208) and the RRA (71 P.S. §§ 745.1 – 745.15).

The conversion of the temporary regulation to a permanent regulation requires compliance with the CDL and the RRA. Section 5.2 of the RRA directs the Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact, need and reasonableness. To make that determination, the Commission must analyze the proposed regulation and the reasons for the regulation. The Commission also considers the information an agency is required to provide in the Regulatory Analysis Form (RAF) under Section 5(a) of the RRA. 71 P.S. § 745.5(a).

The explanation of the regulation in the Preamble and the information in the RAF are not sufficient to allow the Commission to determine if the regulation is in the public interest. The Preamble only describes amendments to the temporary regulation and does not explain sections that were not revised from temporary to proposed. However, the entire proposed regulation is new language for purposes of the RRA. In the Preamble and RAF submitted with the final-form regulation, we ask the Department to provide more detailed information as required under Section 5(a) of the RRA, providing a description of each section of the final-form regulation including sections that were not revised from temporary to proposed, as well as changes from proposed to final-form.

Also, we ask the Department to provide additional information in the RAF related to the following:

- The Department should provide information specific to iLottery in response to Question #10, which asks the Department to describe who will benefit from the regulation; and
- Since the Department states in response to Questions #18, #19 and #21 that there are costs, the Department should explain why it responded “\$0” to Question #23, which asks for an estimate of the costs associated with implementation and compliance for state government.

Finally, we note that Act 42 requires regulation of an iLottery self-exclusion program. 4 Pa.C.S.A. § 503(i). The Department did not include this subsection in the statutory authority listed in RAF Question #8 and the Preamble. We ask the Department to include all applicable provisions of Act 42 in the statutory authority statements in the RAF and Preamble to the final-form regulation.

### **3. Compliance with the provisions of the regulation of the Commission.**

The Annex of the proposed regulation was not submitted in accordance with the Commission’s regulation in 1 Pa. Code § 305.1a(b) (relating to formatting the text of a proposed regulation). As this Commission does not review a temporary regulation, this chapter is considered new and should not have been formatted as specified in 1 Pa. Code § 305.1a(a). However, an agency is required under 1 Pa. Code § 307.3a(a) (relating to formatting the text of a final regulation) to use the official text of a proposed rulemaking as published in the *Pennsylvania Bulletin* when preparing the final-form regulation. Accordingly, the Department should indicate revisions to the Annex of the final-form regulation as required under 1 Pa. Code § 307.3a(b).

#### 4. Section 876.2. Definitions. – Clarity; Need.

##### *Drawing*

The definition of “drawing” contains substantive provisions in the second and third sentences regarding timing and methods to conduct a drawing as determined by the Secretary of the Department. Substantive provisions in a definition are not enforceable. We ask the Department to move these sentences to a section of the final-form regulation establishing how drawings are conducted.

##### *Lotto game*

“Lotto game” is defined as an “iLottery game in which a registered iLottery player chooses ‘X’ numbers from a field of ‘Y’ numbers” and wins by matching “a designated combination of numbers, letters, symbols, or a specified combination thereof, with the winning numbers, letters or symbols . . .” (Emphasis added.) It is unclear whether a player chooses numbers only or a combination of numbers, letters or symbols. Further, the definition includes examples of lotto games in which multiple “Y” numbers are chosen from “a single set of numbers.” We ask the Department to clarify the terminology used to describe a lotto game in the final-form regulation.

##### *Play*

The definition of “play” states that the term “may also be referred to as a chance or a share.” Throughout the regulation, the terms “chance” and “share” are only used in conjunction with “play” and are not used independently. We ask the Department to explain the need for including the additional terms, or to delete references to “chance” and “share” in the final-form regulation.

#### 5. Miscellaneous clarity.

- We identified the following issues in Section 876.9(b)(1) (relating to iLottery terms and conditions):
  - Subparagraph (vii)(B) cites being charged with or convicted of an offense in 4 Pa.C.S. (relating to amusements) as a reason for closing or suspending a registered iLottery player’s account. We ask the Department to explain why the specific sections of this statute are not listed or to include specific citations in the final-form regulation as it did for offenses in 18 Pa.C.S. (relating to Crimes Code).
  - Subparagraph (xi) contains a typographical error in the cross-reference to Section 876.2(c). This cross-reference should be corrected to Section 876.2c.
  - Subparagraph (xvii) describes withdraws from a lottery account. The second instance of “funds” was not proposed to be amended to “moneys” as indicated in the Preamble to the proposed regulation. We ask the Department to ensure that the correct terminology is used in the final-form regulation.

- Section 876.10a(4) (relating to lottery account requirements) uses “Department” while the Preamble indicates that “Bureau,” referring to the Pennsylvania State Lottery, should be used. We ask the Department to ensure that the correct terminology is used in the final-form regulation. This comment also applies to Section 876.12(e) (relating to prizes).
- Section 876.12(f) states that “[p]rize winning plays will be determined . . . .” Did the Department intend to address both prizes *and* winning plays?