Vendor Permission to Conduct Business Prior to Certification or Registration

The Pennsylvania Gaming Control Board (Board), under its general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1321 (relating to additional licenses and permits and approval of agreements), amends Chapter 437a (relating to vendor certification and registration) to read as set forth in Annex A.

Purpose of the Final-Form Rulemaking

This rulemaking amends § 437a.9 (relating to permission to conduct business prior to certification or registration) which allows the Bureau of Licensing to authorize a vendor to provide goods or services to a slot machine applicant or licensee while the vendor’s application for certification or registration is being reviewed. Under this amendment, the Bureau of Licensing could rescind that permission if the Office of Enforcement Counsel has issued a Notice of Recommendation for Denial to an applicant for certification or registration.

Explanation of Amendments to Chapter 437a

Currently, a vendor may request permission to provide goods or services to a slot machine applicant or licensee while their application is being reviewed. The Board feels this practice is reasonable and necessary due to the demands of slot machine licensees to conduct business with hundreds of vendors on a day-to-day basis. Due to the volume of vendor applicants and the limited resources of the Board and its staff, it may take as long as six months to complete the review of an application from a business and render a decision on its suitability to be a part of the gaming industry in Pennsylvania.

Under this rulemaking, if the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to a vendor applicant that has received this interim permission, the Bureau of Licensing could rescind that permission, and the applicant would have to cease providing goods or services to the slot machine applicant or licensee. The Bureau of Licensing would
also notify the affected slot machine applicants or licensees that they may no longer do business with the vendor applicant.

Comment and Response Summary

Notice of proposed rulemaking was published at 39 Pa.B. 1003 (February 21, 2009).

The Board received comments from HSP Gaming, LP (HSP); Chester Downs and Marina, LLC (Chester); Greenwood Gaming and Entertainment, Inc. (Greenwood) and Downs Racing, LP (Downs). On April 22, 2009, The Independent Regulatory Review Commission (IRRC) also filed comments. These comments were considered by the Board and are discussed below.

All of the commentators asserted that the regulation should allow for a period of time after receiving a notice under this section during which a vendor applicant could continue to conduct business with a slot machine facility. The purpose of such a period would be to permit the vendor applicant to wind up its work with the slot machine licensee, and provide the slot machine licensee a reasonable time to secure a replacement vendor.

It is not the intent of this rulemaking to impose additional costs on slot machine licensees. The Board acknowledges that abrupt work stoppages or the interruption of supplies or services could increase the costs for slot machine licensees that have contracted with vendors in good faith. To avoid this result, the Board has changed the proposed regulation to permit the Bureau of Licensing to include a prospective date in its notice by which the vendor applicant must cease conducting business with the slot machine licensee. This will give the Bureau of Licensing the ability to establish a winding-up period based on the type of work or services being provided by the vendor applicant, and the reason for the Office of Enforcement Counsel’s Notice of Recommendation for Denial.

HSP and Downs expressed concern that under the proposed regulation the vendor applicant has no opportunity to cure the concerns identified in the Office of Enforcement Counsel’s Notice of Recommendation for Denial. The Board disagrees with this assessment of the vendor applicant’s remedies under the regulation.

A vendor applicant that receives a Notice of Recommendation for Denial would have the right to request an administrative
hearing to contest the issues outlined in the notice. This hearing would be held in accordance Title 2 Pa.C.S. (relating to administrative law and procedure), 1 Pa. Code, Part II (relating to general rules of administrative practice and procedure), and the Board’s own regulations; 58 Pa. Code, Part VII, Subpart H (relating to practice and procedure).

At this hearing, the vendor applicant would have the opportunity to present evidence and examine witnesses before a hearing officer. The recommendation of the hearing officer made pursuant to the record established during this administrative hearing would then be reviewed by the Board. The Board has the option of accepting some or all of the hearing officer’s recommendations, conducting a de novo hearing, or making an adjudication based on the record. See 58 Pa. Code § 494a.5 (relating to review). A final order of the Board denying the applicant’s certification or registration is appealable to the Commonwealth Court. See 58 Pa. Code § 494a.11 (relating to appeals).

Greenwood, Downs and IRRC expressed concern that rescission of permission granted pursuant to § 437a.9 deprives the vendor applicant of its right to due process. The industry commentators suggested that the vendor applicant must be given an opportunity for a hearing prior to the rescission of that permission. In its comments, IRRC asked the Board to clarify how the proposed regulation affected the vendor applicant’s due process rights.

The Board disagrees that a vendor applicant is due a hearing prior to the permission granted under §437a.9 being rescinded. The grant of permission to a vendor applicant to do business with a slot machine licensee prior to certification or registration is completely within the discretion of the Board. A vendor provisionally conducting business with a slot machine licensee pursuant to such permission has merely an expectation of a favorable decision by the Board on its application. Since this expectation is not equivalent to the protected interest that attaches when a vendor attains certification or registration, rescinding permission granted under § 437a.9 without a prior hearing does not offend the vendor applicant’s due process rights.

Greenwood and Downs also questioned whether the proposed rulemaking represented an impermissible co-mingling of the prosecutorial and adjudicative functions of the Board. These commentators felt that requiring the vendor applicant to cease
doing business with the slot machine facility upon action of the Office of Enforcement Counsel was counter to the standards set by the Pennsylvania Supreme Court in Lyness v. State Board of Medicine, 605 A.2d 1204 (1992). In that case, the Court held that if an administrative agency has both prosecutorial and adjudicative authority over a regulated community, then due process demands that walls of division be constructed between the two arms of that agency so that the threat or appearance of bias in the administration of its authority is eliminated. IRRC also asked the Board to address this issue.

The Board agrees that the proposed rulemaking could have been construed in a manner that would render it inconsistent with the rule established by Lyness. For this reason, the final-form rulemaking clarifies that the permission granted by the Bureau of Licensing pursuant to § 437a.9 can only be rescinded by the Bureau of Licensing.

Finally, both Greenwood and IRRC recommended that the rulemaking expressly require that notice to the vendor applicant and the slot machine licensee regarding the rescission of permission be made in writing and posted. The Board agrees with this suggestion and the final-form rulemaking requires notice by the Bureau of Licensing be made to both the vendor applicant and the slot machine licensees by registered mail.

**Affected Parties**

This rulemaking will affect applicants for vendor certification or registration that have been granted permission to provide goods or services to a slot machine applicant or licensee while their application is being reviewed. It may also affect slot machine applicants and licensees.

**Fiscal Impact**

**Commonwealth**

The final-form rulemaking will have no fiscal impact on the Board or other agencies of this Commonwealth.

**Political Subdivisions**

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

**Private Sector**
A vendor who has been granted permission to provide goods or services while their application is being reviewed could lose that privilege. If the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to a vendor applicant, the Bureau of Licensing may require that the applicant cease providing goods or services to an applicant for or holder of a slot machine license.

Similarly, the slot machine applicant or licensee will have to find a different vendor to provide the goods or services that the vendor applicant had been providing.

**General Public**

This final-form rulemaking will have no fiscal impact on the general public.

**Paperwork requirements**

The Bureau of Licensing may need to issue additional notices to a vendor applicant and the slot machine licensee or applicant with which it is conducting business. The issuance of a Notice of Recommendation for Denial to an applicant by the Office of Enforcement Counsel is part of the current application process.

**Effective Date**

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

**Contact Person**

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

**Regulatory Review**

In accordance with section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 11, 2009, the Board submitted a copy of this proposed rulemaking, published at 39 Pa.B. 1003 (February 21, 2009), 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 House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5.1(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. § 745.5.1(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 section 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:

(1) The regulations of the Board, 58 Pa. Code Chapter 437a, are amended by amending § 437a.9 to read as set forth in Annex A.

(2) The Chairman of the Board shall certify this order and Annex A and deposit them with the Legislative reference Bureau as required by law.

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

Gregory C. Fajt
Chairman
§ 437a.9. Permission to conduct business prior to certification or registration.

(b) If the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to an applicant for certification or registration authorized to conduct business with a slot machine applicant or licensee under subsection (a), THE BUREAU OF LICENSING MAY RESCIND THE PERMISSION GRANTED TO THE APPLICANT FOR CERTIFICATION OR REGISTRATION TO CONDUCT BUSINESS WITH A SLOT MACHINE APPLICANT OR LICENSEE UNDER SUBSECTION (A). IF THE PERMISSION IS RESCINDED, the applicant for certification or registration shall immediately cease conducting business with the slot machine applicant or licensee BY THE DATE SPECIFIED IN THE NOTICE OF THE RECISSION BY THE BUREAU OF LICENSING UNDER SUBSECTION (C).

(c) When the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to an applicant for certification
or registration authorized to conduct business with a slot
machine applicant or licensee under subsection (a), the THE
Bureau of Licensing will notify the APPLICANT FOR CERTIFICATION
OR REGISTRATION AND THE slot machine applicant or licensee BY
REGISTERED MAIL that the authorization PERMISSION for the
applicant for certification or registration to conduct business
with the slot machine applicant or licensee under subsection (a)
has been rescinded and that the slot machine applicant or
licensee shall immediately cease conducting business with the
applicant for certification or registration BY THE DATE
SPECIFIED IN THE NOTICE.

(d) Permission to conduct business under this section will
be for 6 months.

[c] (e) The Board may extend the relief for additional 6-
month periods upon a showing of good cause by the slot machine
applicant or licensees.