

# RULES AND REGULATIONS

## Title 61—REVENUE

### DEPARTMENT OF REVENUE

#### [61 PA. CODE CHS. 71 AND 85]

#### Master Settlement Agreement

The Department of Revenue (Department), under the authority contained in section 3 of the Tobacco Settlement Agreement Act (35 P. S. § 5673), in the definition of the term “units sold”; and in section 6 of The Fiscal Code (72 P. S. § 6), by this order amends Chapter 71 (relating to general provisions) and deletes § 85.2 (relating to master settlement agreement) to read as set forth in Annex A.

#### *Purpose of this Final-Form Rulemaking*

This final-form rulemaking provides guidance to cigarette stamping agents with regard to the Tobacco Settlement Agreement Act (35 P. S. §§ 5671—5675) (act).

#### *Explanation of Regulatory Requirements*

Section 71.31 (relating to definitions) defines several terms for use in the section and in § 71.32 (relating to additional cigarette stamping agent responsibilities). Section 71.32 sets forth cigarette stamping agent report requirements as necessitated by the act.

With the adoption of §§ 71.31 and 71.32, the Department is deleting the pronouncement set forth in § 85.2.

#### *Affected Parties*

Cigarette stamping agents will be affected by this final-form rulemaking.

#### *Comment and Response Summary*

Notice of proposed rulemaking was published at 31 Pa.B. 2582 (May 19, 2001). The proposal is being adopted with changes as set forth in Annex A.

No comments were received from the public during the public comment period. No comments were received from the House and Senate Finance Committees. The Department did receive comments from the Independent Regulatory Review Commission (IRRC).

Amendments to the proposed rulemaking in response to comments are as follows:

(1) In its comments, IRRC noted that the term “person” is used in the regulations but not defined in § 71.31. For clarity, IRRC’s comment suggests that the term be added with a reference to the act. The Department agrees that the term should be added and has done so in the final-form rulemaking; however, the Department has chosen to set forth the applicable statutory definition instead of simply referencing the act. The rationale for this approach will be discussed under a separate paragraph relating to comments for which no revision was made.

(2) IRRC raises two concerns concerning § 71.32. First, a cross reference in § 71.9 (relating to cigarette stamping agent report requirements) to § 71.32(a) should be made to alert stamping agents of the additional reporting requirement. The Department agrees with the comment and has amended § 71.9(a) accordingly.

IRRC’s second concern relates to the wording in § 71.32(a)(2) requiring a listing of “suppliers, other than nonparticipating tobacco product manufacturers. . . .” Read in conjunction with the proposed definition of

“nonparticipating tobacco product manufacturers,” the stamping agent could interpret § 71.32(a)(2) to require them to report on both participating and nonparticipating tobacco product manufacturers. IRRC suggests the provision be clarified to clearly state who must be included in a report. In response to this concern, the Department reviewed § 71.32(a)(2) and deleted wording that may have caused confusion.

(3) IRRC raised a number of concerns about proposed § 71.33, including the Department’s statutory authority to promulgate a section which outlines functions of the Attorney General and the reiteration of existing statutory language. The inclusion of the section in the proposed rulemaking allowed the Department to provide a comprehensive regulatory package regarding the various elements of the act including the responsibilities of the tobacco product manufacturers. After reviewing the concerns raised by IRRC, the Department deleted the section from this final form rulemaking

In conjunction with the deletion of proposed § 71.33, the Department also deleted the definitions of “qualified escrow fund” and “units sold” from § 71.31 in this final-form rulemaking because the definitions were for use in § 71.33.

An amendment initiated during the Department’s internal review of the rulemaking is as follows:

In § 71.32(c), the proposed rulemaking stated that the books, records, other papers and documents that are required to be kept shall be made available in the English language. This provision would enable an inspector to conduct an on-the-spot inspection without enlisting the aid of an interpreter. However, the provision could be interpreted to require even the agent’s internal records to be kept in English. For the foreign-born license holders, this provision could pose a problem. The Department has therefore deleted the English language requirement from the subsection.

A comment that did not result in an amendment to the regulation is as follows:

As referenced in this preamble, IRRC’s comment with regard to the definitions in § 71.31 noted that because the definitions repeat or modify the statutory definitions set forth in the act, the text of each definition should be deleted and replaced with a reference to the definition in the act. Although the Department recognizes IRRC’s concern regarding the reiteration of statutory definitions in a regulation, the reiteration in this case is appropriate to provide adequate information to the users of the regulation. In addition, the act is codified in Title 35 of *Purdons Statutes*, Health and Safety, not Title 72 of *Purdons Statutes*, Taxation and Fiscal Affairs, which is the title referenced for other matters regarding cigarette stamping agents.

#### *Fiscal Impact*

The Department has determined that this final-form rulemaking will have no significant fiscal impact on the Commonwealth. Costs to the Department to implement the requirements of the act will include one or two clerical positions, as well as related equipment and supplies totaling \$70,252 for fiscal year 2001-2002 and adjusted thereafter for normal salary increases or changes, or both, in the cost of benefits.

*Paperwork*

This final-form rulemaking will not require significant additional paperwork for the public or the Commonwealth. Additional paperwork and recordkeeping requirements are the result of the provisions of the act.

*Effectiveness/Sunset Date*

This final-form rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. The regulations are scheduled for review within 5 years of final-form publication. No sunset date has been assigned.

*Contact Person*

The contact person for an explanation of the final-form rulemaking is Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 4, 2001, the Department submitted a copy of the notice of proposed rulemaking, published at 31 Pa.B. 2582, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment. In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the Committees on February 24, 2003. The final-form rulemaking was deemed approved by IRRC under sections 5.1(e) and 6(a) of the Regulatory Review Act (71 P. S. §§ 745.5a(e) and 745.6(a)) effective March 6, 2003.

*Findings*

The Department finds that:

(1) Public notice of intention to amend the regulations has been 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 amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code Chapters 71 and 85, are amended by amending § 71.9; by adding §§ 71.31 and 71.32; and by deleting a statement of policy in § 85.2 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

GREGORY C. FAJT,  
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. 1789 (April 5, 2003).)

**Fiscal Note:** 15-416; (1) General Fund; (2) Implementing Year 2001-02 is \$70,252; (3) 1st Succeeding Year 2002-03 is \$73,252; 2nd Succeeding Year 2003-04 is \$76,252; 3rd Succeeding Year 2004-05 is \$79,252; 4th Succeeding Year 2005-06 is \$82,252; 5th Succeeding Year 2006-07 is \$85,252; (3) 2000-01 Program—\$136,161,000; 1999-00 Program—\$131,267,000; 1998-99 Program—\$119,089,000; (7) General Government Operations; (8) recommends adoption. The costs, reflected in this Fiscal Note, implement the requirements of Act 54 of 2002. These figures are included in the Governor's Executive Budget.

**Annex A**

**TITLE 61. REVENUE**

**PART I. DEPARTMENT OF REVENUE**

**Subpart B. GENERAL FUND REVENUES**

**ARTICLE III. CIGARETTE AND BEVERAGE TAXES**

**CHAPTER 71. GENERAL PROVISIONS**

**GENERAL**

**§ 71.9. Cigarette stamping agent report requirements.**

(a) *Report due date.* Every licensed cigarette stamping agent shall establish a fiscal or calendar monthly reporting period. The cigarette stamping agent shall file with the Department on or before the 20th day following the end of each fiscal or calendar month a cigarette tax report covering the preceding month on a form prescribed by the Department (see also § 71.32(a) (relating to additional cigarette stamping agent responsibilities) regarding additional reporting requirements).

(b) *Penalties.* A cigarette stamping agent who violates this section shall be subject to a \$100 fine for the first offense, a \$200 fine for the second offense and a \$300 fine for the third and any further offense.

**MASTER SETTLEMENT AGREEMENT**

**§ 71.31. Definitions.**

The following words and terms, when used in this section and § 71.32 (relating to additional cigarette stamping agent responsibilities), have the following meanings, unless the context clearly indicates otherwise:

*Affiliate*—A person who, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more.

*Cigarette*—A product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains any of the following:

(i) A roll of tobacco wrapped in paper or in any substance not containing tobacco.

(ii) Tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

(iii) A roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is

likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (i).

(iv) A roll-your-own, which means any tobacco which, because of its appearance, type, packaging or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this subparagraph, 0.09 ounce of roll-your-own tobacco shall constitute one individual cigarette.

*Nonparticipating tobacco product manufacturer*—A tobacco product manufacturer who does not participate in the Master Settlement Agreement (published at 30 Pa.B. 5619 (October 28, 2000)) entered into on November 23, 1998, by the Commonwealth and leading United States tobacco product manufacturers in the action entitled *Commonwealth v. Philip Morris Inc., et al.*, Philadelphia County, April term, No. 97-2443, January 13, 1999, 40 Pa.D. & C. 4th 225 (1999).

*Person*—Any individual, unincorporated association, company, corporation, limited liability corporation, joint stock company, group committee, agency, syndicate, trust or trustee, receiver, fiduciary, partnership or conservator. Whenever used in this section or § 71.32 to establish or impose penalties, the word “person” when applied to a partnership, unincorporated association or other joint venture means the partners or members thereof and when applied to a corporation means all officers and directors thereof.

*Tobacco product manufacturer*—

(i) A person that after June 22, 2000, directly and not exclusively through any affiliate does one of the following:

(A) Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where the importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to the cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of the cigarettes does not market or advertise the cigarettes in the United States).

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States.

(C) Becomes a successor of a person described in clause (A) or (B).

(ii) The term does not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls under subparagraph (i)(A), (B) or (C).

**§ 71.32. Additional cigarette stamping agent responsibilities.**

(a) The Tobacco Settlement Agreement Act (35 P.S. §§ 5671—5675), requires that the Department collect and maintain data relating to the number of Pennsylvania State Cigarette Excise Tax stamps affixed to packages of cigarettes. As part of the monthly cigarette tax report required by § 71.9(a) (relating to cigarette stamping agent report requirements), every licensed cigarette stamping agent shall complete and attach to the report a schedule, in the form as is prescribed by the Department, to account for and reconcile the number of Pennsylvania

Cigarette Excise Tax stamps affixed to packages of cigarettes by the agent during the monthly period covered by the associated cigarette tax report. The schedule shall contain the following information:

(1) A listing of the name and address of each nonparticipating tobacco product manufacturer from which the cigarette stamping agent made direct purchases of packages of cigarettes that were actually manufactured by the manufacturer, and the number of Pennsylvania Cigarette Excise Tax stamps affixed to the packages of cigarettes purchased from each manufacturer.

(2) A listing of the name and address of all suppliers from which the cigarette stamping agent made purchases of cigarettes, including cigarettes purchased from one tobacco product manufacturer that were actually manufactured by another manufacturer. This listing shall include all purchases of cigarettes made by the cigarette stamping agent during the month, other than directly from the actual manufacturer of the cigarettes.

(3) For each individual supplier listed under paragraphs (1) and (2), a listing of all brands of cigarettes purchased from the supplier and the number of Pennsylvania Cigarette Excise Tax stamps affixed to cigarette packages by the cigarette stamping agent with respect to each brand.

(4) For each brand of cigarettes listed for each supplier under paragraph (3), the following additional information, if known:

(i) The name and address of the tobacco product manufacturer of the cigarettes.

(ii) The name and address of the person or entity first responsible for the cigarettes being designated or identified for sale in the United States.

(b) Every cigarette stamping agent shall keep complete and accurate records of cigarettes sold and shall preserve and keep for 4 years all invoices, bills of lading, sales records, copies of bills of sale, inventory at the close of each period for which a report is required and other pertinent papers and documents relating to the manufacture, purchase, sale or disposition of cigarettes.

(c) The books, records, other papers and documents that are required to be kept shall, at all times during the usual business hours of the day, be subject to inspection by the authorized agents and employees of the Office of Attorney General or the Department of Revenue.

(d) A monthly report that is not accompanied by the schedule prescribed by this section shall be considered incomplete. Extensions of time for filing purposes may be granted at the discretion of the Department.

(e) The failure of a licensed cigarette stamping agent to comply with this section by not furnishing the schedule required by subsection (a), or by not furnishing complete and accurate information as required by the schedule, shall be deemed a violation of section 1276(a) of the TRC (72 P.S. § 8276(a)) and the agent's license shall be subject to suspension or revocation under section 1276(b) of the TRC.

**CHAPTER 85. CIGARETTE TAX  
PRONOUNCEMENTS—STATEMENTS OF POLICY**

**§ 85.2. (Reserved).**

[Pa.B. Doc. No. 03-665. Filed for public inspection April 11, 2003, 9:00 a.m.]

DEPARTMENT OF REVENUE  
 [61 PA. CODE CH. 815]  
 Daily Number and Big Four Game

The Secretary of Revenue (Secretary), under the authority contained in section 303 of the State Lottery Law (72 P.S. § 3761-303), by this notice of final-omitted rulemaking amends §§ 815.45 and 815.235 (relating to time, place and manner of conducting drawings).

Because of time constraints associated with the establishment, operation and administration of lottery games, the Department of Revenue (Department), under section 204 of the act of July 31, 1968 (P.L. 769, No. 240) (CDL) (45 P.S. § 1204) and the regulation thereunder, 1 Pa. Code § 7.4 (relating to omission of proposed rulemaking), finds that notice of proposed rulemaking is under the circumstances impracticable and, therefore, may be omitted.

The Department's justification for utilizing the final-omitted rulemaking process is based upon the time constraints associated with the establishment, operation and administration of lottery games. The efficient and successful operation of the Lottery requires that the Lottery implement the latest innovations and trends in the lottery industry. The inability to adapt marketing strategies quickly may lead to a reduction in Lottery revenues. The necessity of the Lottery to react quickly to market forces has been recognized in the past as an appropriate justification for utilizing the proposed rulemaking omitted process as evidenced by the approval of these types of regulations in the past.

*Purpose of the Final-Omitted Rulemaking*

The amendments to §§ 815.45 and 815.235 will allow the Department to employ emerging technologies to enhance a drawing methodology that has not changed since the introduction of the Daily Number game in 1977 and the Big Four game in 1980. At that time, bingo hall ping-pong ball drawing machines were considered the most familiar to players and could produce a reliable result. Since that time, technology and the players have changed dramatically. Lottery players are now routinely utilizing electronics to obtain money, pay for gas, purchase merchandise and pay bills. The Department is interested in exploring new drawing styles that can take advantage of this change in the marketplace.

An example of an "other selection methodology" the Department could use is a random number generator. A random number generator is a secure manner to generate numeric results using a certified computer program loaded on a piece of computer equipment. Currently Delaware and Indiana are utilizing the random generator without negative impact. In addition, the Department successfully employed this technology with the online game Hearts and Diamonds which ran from 1994 to 1996.

*Explanation of Regulatory Requirements*

Sections 815.45(c) and 815.235(c) are amended by adding language to allow the Department to select the Daily Number and Big Four Number with the aid of mechanical devices or any other selection methodology as authorized by the Secretary.

*Fiscal Impact*

The Department has determined that the final-omitted rulemaking will have a one-time cost of approximately \$100,000 to the Commonwealth.

*Paperwork*

The final-omitted rulemaking will not generate additional paperwork for the public or the Commonwealth.

*Effectiveness/Sunset Date*

The final-omitted rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. The sections are scheduled for review within 5 years of final publication. No sunset date has been assigned.

*Contact Person*

The contact person for an explanation of the final-omitted rulemaking is Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

*Regulatory Review*

Under section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5a(c)), on February 20, 2003, the Department submitted a copy of the final-omitted rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. On the same date, the final-omitted rulemaking was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101—732-506).

Under section 5.1(d) of the Regulatory Review Act, the final-omitted rulemaking was deemed approved by the Committees on March 26, 2003. IRRC met on March 27, 2003, and approved the final-omitted rulemaking under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)).

*Findings*

The Department finds that the regulations are necessary and appropriate for the administration and enforcement of the authorizing statute. Under section 204 of the CDL, the Department also finds that the proposed rulemaking procedures in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) are impracticable because of the time constraints associated with the establishment, operation and administration of lottery games.

*Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code Chapter 815, are amended by amending §§ 815.45 and 815.235 to read as set forth in Annex A.

(b) The Secretary shall submit this order and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

GREGORY C. FAJT,  
 Secretary

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. (April 12, 2003).)*

**Fiscal Note:** 15-422. (1) General Fund; (2) Implementing Year 2002-03 is \$100,000; (3) 1st Succeeding Year 2003-04 is \$0; 2nd Succeeding Year 2004-05 is \$0; 3rd

Succeeding Year 2005-06 is \$0; 4th Succeeding Year 2006-07 is \$0; 5th Succeeding Year 2007-08 is \$0; (4) 2001-02 Program—\$46,840,000; 2000-01 Program—\$4,5235,000; 1999-00 Program—\$44,115,000; (7) Lottery Administration—General Operations; (8) recommends adoption. These costs are included in the 2002-2003 budget.

**Annex A**

**TITLE 61. REVENUE**

**PART V. STATE LOTTERIES**

**CHAPTER 815. PLANS, GAMES AND DRAWINGS**

**Subchapter C. DAILY NUMBER GAME**

**§ 815.45. Time, place and manner of conducting drawings.**

(a) *Time of drawings.* Daily Number game drawings will be held on a daily basis or as determined and publicly announced by the Secretary.

(b) *Place of drawings.* Each drawing shall be conducted in the central office of the Lottery, unless it directs that a drawing or a part thereof be conducted at some other location.

(c) *Manner of conducting drawings.* The objective of The Daily Number Game drawing is to select, at random, one three-digit number with the aid of mechanical devices or any other selection methodology as authorized by the Secretary. This one three-digit number will be used in determining Daily Number Game winners.

(d) *Special drawings.* The Secretary may designate and announce through available media special drawings to be held in addition to those previously scheduled. In that event, a ticket purchased for that day's drawing shall be valid for the special drawing held on the same date. A ticket purchased for that day's drawing shall also be

eligible for the prizes as provided in this subchapter. Money for the prizes to be paid to winners of special drawings, under § 815.46 (relating to determination of prize winners), will be paid from funds authorized for the payment of prizes.

**Subchapter K. THE BIG FOUR GAME DRAWING**

**§ 815.235. Time, place and manner of conducting drawings.**

(a) *Time of drawing.* Big Four game drawings will be held on a daily basis or as determined and publicly announced by the Secretary.

(b) *Place of drawings.* A drawing will be conducted in the central office of the Lottery unless it directs that a drawing or a part thereof be conducted at some other location.

(c) *Manner of conducting drawings.* The objective of the Big Four game drawing is to select, at random, one four-digit number with the aid of mechanical devices or any other selection methodology as authorized by the Secretary. This one four-digit number will be used in determining Big Four game winners.

(d) *Special drawings.* The Secretary may designate and announce through available media special drawings to be held in addition to those previously scheduled. In this event, a ticket purchased for that day's drawing is valid for the special drawing held on the same date. A ticket purchased for that day's drawing is also eligible for the prizes as provided in this subchapter. Money for the prizes to be paid to winners of special drawings, under § 815.236 (relating to determination of prize winners), will be paid from funds authorized for the payment of prizes.

[Pa.B. Doc. No. 03-666. Filed for public inspection April 11, 2003, 9:00 a.m.]