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December 1, 2014

Ms. Susanne George
Bureau of Gambling Control
Department of Justice
P.O. Box 168024
Sacramento, CA 95816

Re: Amendments to Gaming Activity Authorization Regulations

Dear Ms. George:

I write on behalf of Artichoke Joe's with comments on the proposed amendments to section 2071 of the Bureau's regulations.

The proposed amendments would set limits on the fees cardrooms can charge, but these limits are not necessary to effectuate any statute and thus are not authorized under the Government Code. Further, the proposals are not consistent with existing law.

In addition, the proposed amendments would constitute price controls, but such controls are not necessary to comply with any legal limits on gambling. The legality of the games that would be affected by these limits is not based on prices charged and the controls cannot be justified as necessary to attain compliance with legal limits.

Moreover, unlike usual situations where the state controls prices in order to protect consumers, the proposed limits would not help consumers. In fact, it would harm consumers. Under the current fee structure, fees have been shifted to the third-party proposition players, thereby lowering the cost to the consumer. These regulations would in effect force clubs to lower fees charged to proposition players (i.e. businesses) and to raise fees charged to players, and thus are fundamentally anti-consumer.

These objections are discussed in general in Section I below, and with regard to the specific proposals in Section II.

I. Lack of Statutory Authority/Necessity

The Government Code sets limitations on the authority of state agencies to promulgate regulations. Section 11349.1 requires that a regulation be necessary to effectuate the purposes of the statute it implements. The proposed regulations do not comply with that limit.

The document describing the proposed regulations, entitled "Summary of Proposed Regulations" identifies three statutory mandates which the regulations are intended to effectuate, but all three are based on misreadings of pertinent statutes. Each of the three claimed mandates is discussed in a separate subsection below.

A. Approval of collection rates

The Summary claims that statutes require the Bureau to approve collection rates, but that is not correct. The Summary incorrectly summarizes section 19826 of the Gambling Control Act as follows:

> Business and Professions Code section 19826(g) vests to the Bureau the responsibility of approving the play of any controlled game, including placing restrictions and limitations on the play of the game *and the approval of collection rates for each gaming activity.* [Italics added.]

Similarly, page 2 reads:

> Statute vests to the Bureau the responsibility to approve the play of any controlled game including placing limitations or restriction on how any game is played, *and to approve collection rates.*

While these passages begin by summarizing the statute correctly, the last parts, in italics, are not contained in the statute. Section 12826 of the Act reads:

> The department shall have all of the following responsibilities:
> ...
> (g) Approve the play of any controlled game, including placing restrictions and limitations on how a controlled game may be played.

There is nothing in this passage or in any other statute about approval of collection rates. Play of the game and collection are clearly two distinct transactional events and the law seeks to separate the cardroom from the game. The separation is very clear where fees are collected by time and a cardroom employee collects fees from each player every half-hour. But the fees are separate from the play even when collected every hand. Section 19826 requires approval only of game play, not of collection rates. The summary in essence adds a phrase, and attempts to add a responsibility which the Legislature did not assign.

The Summary justifies the attempt to regulate collection rates based on this incorrect reading of the statute:

> Current Bureau regulations do not specifically address collection rates for games that include the player-dealer position and dual rates for the player and the player-dealer positions. A regulatory change is necessary to effectively identify collection rate criteria so as to ensure compliance with collect [sic] rate maximums proscribed [sic] in statute.

The conclusion that these regulations are "necessary" is based on an incorrect premise. The fact is that section 19826(g) does not require or even authorize approval of collection rates, and the proposed regulation is not necessary and thus not authorized.

The summary also incorrectly states that statutes prescribe "collection rate maximums." Neither section 337j(f) nor any other statute set limits on collection rates or require regulators to set limits. The Legislature has not authorized the Bureau to regulate cardroom rates. Cardrooms are not public utilities and the rate-setting does not comply with the Government Code criteria.

B. Promotion of acceptance of the deal

The Summary next claims that statutes require that player acceptance of the deal when offered be increased and the regulations fulfill that mandate. However, again, the statute contains no such requirement. The Summary reads:

> In addition, Bureau regulations do not adequately address how to effectuate existing statute to provide a better likelihood that more players may accept the deal as it is continuously and systematically rotated amongst all the players.

However, the statutes requires only that the deal be offered in a continuous rotation around the table, not that acceptance of the offer be increased. Penal Code §330.11 provides that if a game is "continuously and systematically rotated" amongst each of the players of the game at the table, it would not constitute a banking game. Nothing in the statute requires that players at a game accept the deal when offered or that acceptance of the deal by the players should be promoted.

Further, the Bureau has confirmed that interpretation of the statute. In correspondence from December 2007, the Bureau wrote:

> To fulfill [the] legislative intent [of section 330.11] the Bureau of Gambling Control has mandated that all game rules include a provision that the player-dealer position must continuously and systematically be offered to all seated players. ... [¶] If, after a player acts as the player-dealer for two consecutive hands, the casino offers this opportunity to all other seated players in a manner that is verifiable by observers and surveillance cameras the requirement that the opportunity to act as the player-dealer be continuously and systematically offered to all seated players has been satisfied. ... [¶] [T]he fact that, at times, all players but one may decline the player-dealer position, does not render the game an illegal banking game....

Moreover, all that Penal Code §330.11 provides is a safe harbor for when a player-dealer game does not constitute a banking game. It does not define when a player-dealer game does constitute a banking game. In this regard, the Summary contains another misstatement. It claims that Penal Code §330.11 was added by AB 1416 and authorized cardrooms to operate controlled games utilizing a player-dealer position. That is not correct. First, AB 1416 did not authorize games with

player-dealer positions. That was done by court rulings in 1988. Rather, AB 1416 attempted to provide when player-dealer games become banked games. Second, and most important, just a year later, in 2001, the Legislature amended section 330.11 into a safe-harbor provision. It repealed the sentence defining when a player-dealer game would constitute a banked game and left in provisions specifying when such a game would not constitute a banking game. For this reason, the statute serves exclusively as a safe harbor. It leaves unresolved the possibility that a game is a banked game *only* when the house plays. (See *Sullivan v. Fox* (1988) 189 Cal.App.3d 678,, 679 ["Section 330 embodies several differing approaches to gambling regulation....[T]he Legislature adopted the 'banking or percentage' game test as a flexible means of reaching two evils perceived by the Legislature. The fist pertains to situations where the *house* is actually involved in play, its status as the ultimate source and repository of funds dwarfing that of all other participants in the game."]

The regulation as proposed would be harmful to consumers. Most players do not want to take the player-dealer position because of the possibility of losing much money than can be lost by the other players. The player-dealer usually risks enough to cover all the bets, and that is usually seven times the amount of their usual bets. If dealt a bad hand, they can lose the whole bet. While over the long-term, if they cover all bets and play often, they will likely come out even or even ahead, but along the way, they will likely have deeper losses. Ordinary players naturally shy away from that. The proposed regulations are designed to push ordinary players to gamble more and to engage in more risky gambling. That is not consistent with state policies regarding gambling. Proposition players are organized, funded and operated to handle this risk, ordinary players are not, and the Bureau's proposal to encourage this is misguided.

C. Identification of criteria allowing waiver of collection fee

The Summary claims that a third purpose of the regulations is to "identify criteria upon which a collection fee may be waived as allowed for in Penal Code [sic]." This refers to section 337j(f), but that statute addresses a completely different situation and neither requires nor authorizes the imposition of limits on fees.

Penal Code §337j(f) provides that a cardroom "may waive collection of the fee or portion of the fee in any hand or round or play after the hand or round has

begun..." However, that statute was enacted to address completely different situations. One, it used to occur that a player-dealer's bet might not be sufficient to provide action all around the table. Player dealers place bets in fixed amounts, and there may be no money left to settle bets against those players at the end of the circle. When that happens, players feel they did not get what they paid for, and some cardrooms waive the game fee. Two, in poker games, if the game is short-handed because it just started or because players have left the table, fees might be waived. This statute confirmed the legality of these practices.

The practice being addressed here is not a "waiver" of a published fee, but establishment of a fee structure that imposes the game fee on only the player-dealer. There is no waiver going on at all; rather the fee is imposed only on the one player.

Further, this is similar to a well-established practice. For decades, the fee structure used in traditional poker games has been to collect the fee from just one player. In the traditional poker games, one player at the table puts up a blind which constitutes the fee for the whole table for that round of play. No other player pays a fee. That type of fee structure has been in use since the 1980s and took the place of fees based on time. The fee would no longer be collected from each player as that was too time-consuming and slows the pace. Players prefer faster paced games. That fee structure has never been considered as a "waiver" of fees; nor its legality questioned.

Similarly in player dealer games, the fee for the hand is being charged all to one player. This is not a waiver of the fee.

Further, even if this were considered a "waiver" of the fee, nothing in the statute limits the right of the house to waive its fee or requires setting of criteria for the waiver. Section 337j(f) simply provides no basis for these regulations.

II. Comments on Specific Proposals

A. Option 1

Option 1 would establish a mandatory proportion between fees paid by player-dealers and fees paid by other players of 3 to 1. The fee charged to the

player-dealer could not exceed three times the fee paid by the other players. Currently, there is no limit on fees and no mandatory proportion between fees charged to various players.

As discussed above, Option 1 would not be necessary to effectuate any statute, and thus does not satisfy the limits on Bureau authority under the Government Code. The Summary virtually admits the problem. It reads, "Option 1 incorporates several parameters outlined in legislation that did not pass in 2014 (Assembly Bill 820)." The fact that the legislation did not pass means that the proposed regulation has no statutory basis.

Moreover, Option 1 would not be consistent with existing statutes. Penal Code §337j(f) allows for five collection rates. It reads, "Flat fees on each wager may be assessed at different collection rates, but no more than five collection rates may be established per table." This statute does not limit the five fees in any way. There is no proportional limit to them. Further, at the time this was enacted, fees were usually in whole dollar amounts, usually starting at $1. Many clubs including Artichoke Joe's, did not have chips for partial dollar amounts. Even if this legislation allowed for some proportion, which we dispute, at the very least, it would need to allow for a five-to-one ratio. A three-to-one proportion clearly frustrates the legislation.

Another problem with this option is that, as discussed above, it is anti-consumer. It would protect proposition player businesses at the expense of consumers. Currently, the ratio between low and high fees sometimes is much greater than 3 to 1. Fees charged the player-dealer can be much more than the fees paid by players. If this Option were adopted, cardrooms would need to raise fees to players in order to offset decreases in fees to player-dealers. This would harm players and thus is anti-consumer.

B. Option 2

Option 2 would limit fees by restricting the increase from one rate to the next to the amount of the lowest fee. If the lowest fee were $1, no increase could exceed $1. Given that five rates are allowed, this would restrict the maximum fee to five times the smallest fee.

Again, as discussed under section I, Option 2 would not be authorized by statute or necessary to effectuate any statute, and thus would not be legal. Neither section 337j(f) nor any other statute imposes any limits on the five flat rates that are allowed. No statute imposes any ratio between rates or limits how much the rate can increase.

Further, as with Option 1, the regulation seems to favor proposition player services at the expense of consumers. The effect of adoption of the regulation would be to force cardrooms to raise rates on the average consumer so that the proposition player could pay lower rates. The summary attempts to argue that this "might" benefit all players by making the player-dealer position "less cost prohibitive." However, that argument is not based on any empirical research. As discussed above, players do not take the player-dealer position because of the amount of money that can be lost, not because of the fees. Lowering the fee will not affect many players, and it will hurt many of those who do accept the player-dealer position because of the steep losses players in this position can suffer.

C. Option 3

Option 3, like option 2, would limit fees by restricting the increase from one rate to the next to the amount of the lowest fee. If the lowest fee were $1, no increase could exceed $1. Given that five rates are allowed, this would restrict the maximum fee to five times the smallest fee. In addition, this option would require that all players at the table be charged the same fee for the same level of wager.

The limits on increases in fees is not authorized by law for the same reasons as in option 2. Further, it would benefit the proposition players at the expense of ordinary players.

The requirement that all players be charged the same fee for the same level of wagers ignores an important difference between the player dealer and the other players. The player-dealer takes on all players. If there are 8 players at a table, the player dealer and seven other players, it is as if there are seven games. All seven are settled separately, and the time the dealer takes to settle the game is spent half for the player-dealer and half for the other seven players combined. To require that the player dealer pay the same fee ignores that the player-dealer by nature requires more services. Existing law has always allowed cardrooms to charge differently

based on levels of service offered (*Sullivan* at 679), and the regulation conflicts with this existing law.

III. The Bureau's attempt to placate Indian tribes is misguided

These proposals stem from complaints made by Indian tribes against cardroom practices, and the Bureau's attempts to placate those Indian tribes is contrary to good regulation.

As discussed above, the regulations are not authorized under criteria imposed by the Government Code.

Second, the regulations would have the effect of harming consumers. The regulations favor big business, namely proposition player businesses, at the expense of consumers. Price controls are usually imposed in order to benefit consumers. However, these price controls are imposed for the opposite reason, to increase prices. The Bureau should not be in the business of favoring one industry and one race over another; nor should it seek to favor that business and race by harming state consumers. But that is exactly what is being proposed.

IV. Regulations need to be amended to reflect current game approval procedures

Current regulations do not reflect current game approval procedures, and what really is needed are amendments to reflect those procedures.

Section 2071(a), as adopted in 1999, requires applicants for an initial license to submit a report of gaming activities proposed to be offered at the cardroom, but does not require any approvals be issued. Subsection (b) provides that licensed cardrooms, anytime after initial licensure, "***may*** request the Bureau to authorize a gaming activity which has not been previously authorized by the Bureau, for use at that establishment." Thus, subsection (b) is discretionary, and does not require a cardroom to obtain pre-approval before offering a new game.

On February 6, 2003, the Division of Gambling Control (as the Bureau was then called) issued an Advisory which instituted a requirement that games be pre-approved. It read, "It shall be an unsuitable method of operation to engage in, or

offer, any gaming activity without prior notification to, and written authorization from the Division, as required by the Division's regulation section 2071." Although the Advisory relied on section 19826(g), which places the responsibility on the Bureau to "approve the play of any controlled game," the Advisory clearly was inconsistent with section 2071 and serves as a type of underground regulation. It is well past time to bring the regulation up to date.

* * *

We appreciate the opportunity to review the draft regulations, and we appreciate your consideration of these comments.

Sincerely,

Alan Titus