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Via Email (BGC\_Regulations@doj.ca.gov)

Director Stephanie Shimazu  
ATTN: Susanne George  
Bureau of Gambling Control, California Department of Justice  
P.O. Box 168024  
Sacramento, California 95816-8024

**RE: BGC Regulations Workshop Re Rotation of Player-Dealer Position**

Dear Director Shimazu,

The United Auburn Indian Community hereby submits these written comments in response to the Bureau of Gambling Control's notice of regulatory workshops to receive input on rotation of the player-dealer position prior to the initiation of the formal rulemaking process. In addition, we will continue to comment as this regulatory process moves forward.

**I. Background & Issue**

The United Auburn Indian Community first submitted on October 3, 2012, a request that your office investigate certain gaming practices at California cardrooms, which the Tribe believes are violating the California Constitution, the Penal Code and the Gambling Control Act, as well as its implementing regulations, to the detriment of our tribal gaming business.

These practices included the failure to rotate the player-dealer position in compliance with California law as well as BGC approved game rules, the overwhelming majority of which explicitly require rotation after every two hands. In fact, these practices included and continue to include to the present day the failure to rotate the player-dealer position in most instances *ever*.

As a general industry standard, the position held by third party proposition services (referred to in many of the game rules and internally as "the bank") does not rotate to a different player-dealer at the table *at all*. At California gambling establishments subject to state law ("cardrooms"), Class III-style banking card games of baccarat and blackjack continue to play in most instances with no rotation *at all*. The banking card game plays out until completion with no rotation. The next new game is dealt at the table with no rotation.

## II. Workshop on Rotation

Pursuant to the plain language of California Penal Code Section 330.11, the player-dealer position can only be used where the published game rules require all three of the following:

- (1) The player-dealer position “must be continuously and systematically rotated amongst each of the participants during the play of the game”;
- (2) “Ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game”; **and**
- (3) “Preclude the house, another entity, a player or an observer from maintaining or operating as a bank during the course of the game.”

Section 330.11 further provides that: “For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player *if* the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position.” (Emphasis added).

A review of rotation of the player-dealer position will require necessarily that the position itself as played in each game is authorized by Penal Code Section 330.11. Any interpretation of the meaning of “continuously and systematically rotated amongst each of the participants during the play of the game” will necessarily need to take into account and comply with the three statutory requirements of the player-dealer position as well as California constitutional, statutory, and case law that establishes, as a matter of law, what is and what is not a prohibited “banking game” within the meaning of California law.

For this reason, we have included with our comments at this preliminary workshop stage an analysis and summary prepared by our attorneys of California law pertaining to banking games at California gambling establishments and any player dealer position, including the California Constitution, case law, and legislative history of Penal Code Section 330.11. We believe this analysis and summary, attached at **Tab A**, will be helpful and instructive as any interpretative language for the meaning of “continuous and systematic rotation” for non-banking card games is considered.

## III. Overview of Fundamental Problems

As a general fundamental problem in the current environment, the “California-style” card games at California gambling establishments (“cardrooms”) look and feel like the Class III banking table games played at tribal casinos. In many cases, the similarities of the games include: the high stakes, the speed, the bonus bets, the free play, and the game type, such as banking baccarat and blackjack. Assuming *arguendo* a purpose is to distinguish the games played at California cardrooms from those played at tribal casinos, these key points would need to be considered and addressed.

Additionally, **the following questions should be considered and answered.**

How does the BGC document its finding for each game featuring a player-dealer position that does not mandate acceptance by every player that the game rules “render maintenance of or operation of a bank impossible by other means?”

In some cardroom games, the player-dealer position occupied by the third party proposition service does not play a hand, so cannot be considered a player and is referred to commonly as the “bank.” How can the player-dealer position rotate “amongst each of the participants in the game” if the occupant of the position is not a participant by playing a hand in the game? Similarly, how can the proviso of Section 330.11 apply to not “mandate acceptance of the deal *by every player* if the division finds the rules of the game render maintenance of or operation of a bank impossible by other means”?

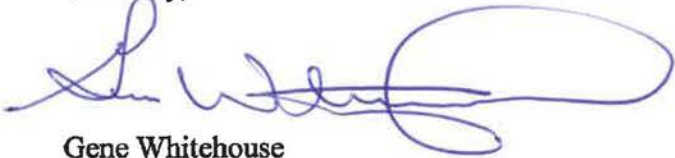
Are the odds of each game reviewed to ensure that if the offer to take the position is not accepted by every player, then the rules of the game render the maintenance of or operation of a bank impossible by other means? Can one entity or player have the *inherent advantage* to win due to occupying the player-dealer position? Can one entity, participant, or player be “*taking on all comers, paying all winners, and collecting from all losers?*”

Finally, the resounding assertion at the workshops to date by the cardroom industry is to urge the BGC not to issue any regulation. We agree that no new regulation may be necessary. BGC enforcement of the black letter law and existing approved game rules requiring rotation every two hands would be sufficient.

#### **IV. Conclusion**

We appreciate this opportunity to provide written comments and will continue to comment as the process moves forward.

Sincerely,



Gene Whitehouse  
Chairman

**TAB A: Recitation of California Law Pertaining to Banking Games at California Gambling Establishments and Any Player-Dealer Position**

It is axiomatic that the California Constitution, at Article 4 Section 19, prohibits banking card games for any gambling establishment in California, other than an Indian tribe authorized by a Tribal-State Gaming Compact.

The California Constitution, as interpreted by the California Supreme Court, the California appellate court in the Oliver case, and Section 330.11 of the Penal Code make clear that **any player-dealer position must continuously and systematically rotate.**

This requirement for any player-dealer position to continuously and systematically rotate is to avoid the creation of a prohibited banking game, described by the California Supreme Court as a game where: One player or entity “participates in the action as the one against the many, taking on all comers, paying all winners, and collecting from all losers, doing so through a fund generally called the bank.” (HERE v. Davis, (1999) 21 Cal.4<sup>th</sup> 585)(internal citations omitted).

The California Supreme Court in HERE specifically held that a banking game prohibited by the Constitution and statute includes games “banked by someone other than the owner of the gambling facility,” citing, Oliver v. Los Angeles County, (1998) 66 Cal.App.4<sup>th</sup> 1397.

A player-dealer position had been used in California cardrooms since the early 1980s and a line of California court cases considered whether this method of play was a prohibited banking game.

In Huntington Park Club v. Los Angeles County (1988) 206 Cal. App.3d 241, the appellate court found that Pai Gow was not a banking game because during the play of the game, “the dealer position continuously and systematically rotates among *each* of the participants.” Thus, the court found, “the record does not establish that either plaintiffs (the house) or any other entity maintains or operates a ‘bank.’”

However, in Oliver v. Los Angeles County (1998) 66 Cal. App.4<sup>th</sup> 1397, subsequently adopted by and given constitutional stature by the Supreme Court in the HERE case above, the same appellate court considered the game of Newjack, where the rules of play allowed players to decline the rotation of the bank, thus allowing a player to be the player-dealer for “more than two consecutive hands.” The court found that it is “the *potential* for a banked game under Newjack’s rules, and not the current mode of play, which determines whether Newjack is a banking game.”

The Oliver court held:

“We now hold that a game will be determined to be a banking game if under the rules of that game, it is possible that the house, another entity, a player, or an observer can maintain or operate as a bank during the play of the game. *In Newjack, the player-dealer position does not have to rotate among players.* If the other players decline to accept the player-dealer position, one player can act as a player-dealer for repeated hands and such a player need not go broke after a few hands. *A player with a significant amount of money to bet can hold the position of player-dealer for a long time, and thus keep the inherent playing advantage for him or herself. The effect would be a banked game because it could be said of such a player that he or she is ‘taking on all comers, paying all winners, and collecting from all losers.’ Sullivan [v. Fox (1987)] 189 Cal.App.3d at 678, 235 Cal. Rptr. 5.)* Because the rules permit such an occurrence, we hold Newjack is a banking game and therefore, as presently constituted, prohibited under section 330.”

(*Id.* at 1409-1410) (emphasis added).

Following the HERE and Oliver court cases, efforts began in the Legislature to amend the Penal Code to add a provision addressing the player-dealer position. Ultimately, Penal Code section 330.11 was added, which now provides:

**“Banking game” or “banked game” does not include a controlled game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game.** For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player *if* the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position.”  
(Emphasis added).

The history of this legislation enacting Penal Code Section 330.11 is instructive. In his floor statement to the Assembly, the author of AB 1416, Assembly Member Herb Wesson stated:

“This bill attempts to clarify that card clubs may offer games that feature a player-dealer position, so long as the rules of the game require a continuous and systematic rotation of the player-dealer position . . . This bill clarifies that these

game are not “banked games.” Moreover, this bill does not legalize 21 or any other new card game.”

The Attorney General similarly advised the Governor that with respect to AB 1416 that “...the judicially-ascribed meaning of “banking game” has been constitutionalized (citing, HERE v. Davis, (1999) 21 Cal.4<sup>th</sup> 585) and cannot be narrowed by statute” and noted he “understood that an urgency measure will be introduced early in the next session to correct these deficiencies... [and the Division] can probably continue to deter violations of the constitutional prohibition in the brief interim.” AB 1416 was signed by the Governor with the message that, “I have been assured by the author of this bill that such clean-up legislation will be introduced early in the next session.”

Accordingly, AB 54 (Wesson) was introduced and passed, resulting in the current language of Section 330.11.

Subsequent legislative efforts in 2008 attempted to weaken the required mandatory consistent and systematic rotation of the player-dealer position by requiring only that the deal be “offered” around the table to all seated players, AB 1664 (Yee), failed.