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**(1926 - 2019)

December 30, 2019

Ms. Suzanne George
Bureau of Gambling Control
P.O. Box 168024
Sacramento, CA 95816-8024

Re: Rotation regulations

Dear Ms. George:

I write on behalf of Artichoke Joe's with comments on the concept language for a regulation governing the rotation of the player-dealer position in games that feature such a player. We find a number of legal defects in the concept language, as discussed below, and we would oppose adoption of such a regulation.

I. THE BUREAU LACKS AUTHORITY TO PROMULGATE THIS REGULATION

The Gambling Control Act ("GCA" or "Act") does not grant the Bureau the authority to promulgate regulations substantively governing game rules. Rather, that authority is given to the Commission. Further, the authority granted to the Commission is limited. Section 19842 of the Act provides that the Commission may not prohibit, on a statewide basis, the play of any game or restrict the manner in which the game is played, unless the Commission, in a rule-making proceeding, finds that the game or the manner in which the game is played, violates a federal or state law.

The proposed regulation cites section 19826 as authority for the concept regulation. However, when that regulation is viewed in the context of other provisions in the Act, it is clear that it does not provide authority to the Bureau to adopt this regulation.

Section 19841 of the GCA directs the Commission to address certain subjects in regulations, and one of these is game rules. Subdivision (b) requires the Commission to adopt regulations to "provide for the approval of game rules and

equipment by the department to ensure fairness to the public and compliance with state laws." Fairness to the public and compliance with state laws implicate substantive issues, clearly delegating rule-making authority over the substance of game rules to the Commission. As already noted above, section 19842 then limits the Commission's authority: the Commission cannot prohibit a game or restrict the manner in which the game is played unless the Commission finds that the game or the manner in which it is played violates federal or state law.

In contrast, Section 19826(g) charges the Bureau with the responsibility to "[a]pprove the play of any controlled game, including placing restrictions and limitations on how a controlled game may be played." This sounds very different. It is a charge to for review games rules for compliance with the law, but does not give the Bureau the authority to interpret the law. Section 19826(f) grants the Bureau authority to "adopt regulations reasonably related to its functions and duties as specified in this chapter." But if this were intended to give the Bureau authority to govern the substance of game rules, section 19842 would have named the Bureau along with the Commission. Because section 19842 names only the Commission, it is clear the Legislature gave that authority only to the Commission.

Nor is this analysis affected by Penal Code 330.11. That section allows players not to accept rotation of the "deal" "if the division finds that the rules of the game" render the maintenance or operation of a bank impossible by other means. This language requires findings by the Bureau, but does not grant authority to the Bureau to adopt regulations interpreting the term "bank." Nor does it alter the allocation of authority in the GCA. We further note that when this section was enacted in 2000, the Commission had not yet been inaugurated, and the Division was the sole regulator.

For all these reasons, the Bureau does not have authority to promulgate regulations setting requirements for rotation.

II. THE REGULATION IS NOT CONSISTENT WITH STATUTORY LAW

The regulatory language would not be consistent with statutory and case law on banking games. We review that history below.

A. Penal Code 330

Penal Code §330 was enacted in 1872 and has always prohibited "banking games." However, the statute never defined the term. In 1889, the Supreme Court reversed a conviction under the statute for lack of proof of one element, and in the course of the trial, an expert witness testified to the definition of banking game: "A banking game, as I understand it, is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost. The fund which is provided for that purpose is generally called the bank, and the person who conducts it the banker." *People v. Carroll* (1889) 80 Cal. 153. One judge, Justice McFarland, would have held that the statute was void for vagueness forcefully writing:

> "...if the provision of the statute in question was so indefinite that the court could not tell the jury what facts would constitute a crime under it–that is, what the law of the case was–without the aid of a witness to tell *it*, then no conviction could be had under it.... That the general term 'banking game' has no definite meaning strikingly appeared on the trial of this case, –1. The witnesses who were erroneously examined on the subject differed in their opinions; and 2. The court itself did not know what it meant. Can a man be held to answer a criminal charge upon such a vague accusation? And the evils suggested as likely to arise from this view can be easily remedied. If the legislature desires to make the playing of a banking game a crime, let is simply put into the statute what it means by that term, so that *the court* can tell the jury what constitutes the offense."
> *Ibid.* [italics in original]

Over the years, the definition of the term "banking game" became better known and established, and by 1953, the terms "house," "exhibitor," "operator" and "bank" were all used interchangeably, as the house (or exhibitor or operator) always served as the bank. See *People v. Ambrose* (1953) 122 Cal.App.2d Supp. 966, 970 ["In a banking game the banker or exhibitor pays all the winnings and suffers all the losses; he is the one against the many, which is the supreme test of a banking game."]

B. *Sullivan v. Fox*

About 1984, player-dealer games were developed and introduced in the cardrooms, and for the first time, the house did not serve as the banker. Rather, players play a role similar to that of a banker, and the house conducts the game without being a player in the game. The player-dealer position is offered systematically and continuously around the table to all players. However, players are not required to accept the player-dealer position. (They were always allowed to pass the position.) The player-dealer takes on all the other players at the table, but there is a significant difference, namely, the player-dealer places a fixed bet. Therefore, the player takes on the other players only to the extent his or her fixed bet allows. These games immediately raised issues how the definition of banking games applied to them.

The first appellate decision to consider that issue was *Sullivan v. Fox* (1987) 189 Cal.App.3d 673, a case in which Artichoke Joe's was a party. The First District Court of Appeal noted the game rules described above, that "[t]he participant designated to receive the dealer hand is required to place a fixed wager," and that "[t]he dealer position continually and systematically rotates amongst each of the participants."

The court could have treated banking and percentage as two separate and independent aspects of illegal games and could have taken a simple approach and held that the player-dealer position was so similar to the banker as to make the games banking games. Instead, the court took a very different approach. The court focused on the concerns of the Legislature and held that the purpose of the statute is to prohibit the house from "deriv[ing] benefit from commercial gambling." The court held that there were two ways the house could derive these benefits, one, when it participates in the game as a player, and the other when it is not participating directly in the game but deriving benefit indirectly by taking a percentage of the winnings. The court called these the "two evils." It found that the two prohibitions, against "banking games" and "percentage games," address these two evils, together fully addressing the concern of deriving benefit from commercial gambling.

The term "banking game" did not apply to player-dealer games, and the court did not try to stretch the definition to apply. The court wrote:

> "Banking game has come to have a fixed and accepted meaning: the 'house' or 'bank' is a participant in the game, taking on all comers, paying all winners, and collecting from all losers."

The fact that a single article "the" is used before "house" and "bank" indicates that the court was using these terms interchangeably, as courts had for 100 years. The court did not even discuss whether pai gow might be a banking game because the answer was obvious. The house was not a player and so the game could not be a banking game. In this analysis, the existence of rotation was not even a factor for the *Sullivan* court.

The *Sullivan* court then went on to consider whether the game was a percentage game, and here, the court was writing on a blank slate. Whereas the definition of "banking game" had been well established in case law, that was not so for "percentage game." Further, while the term "banking game" was narrowly defined in this context, the court's construct allowed for a very broad definition of "percentage game." Whereas banking games involve the *direct* participation of the house in the game, the term percentage game involved the *indirect* participation of the house in the game. Explaining about the "two evils", the court continued:

> "The first 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. This is covered by section 330's prohibition against banking games. The other situation finds the house in a more passive role. Where *the house is not directly participating in game play*, it can still be involved if it collects a percentage from the game. ... *The house has no interest in the outcome of play*.... *Its actual participation is nil, thereby distinguishing it from the banking game situation*...."

Thus, *Sullivan* construed section 330 as creating a duality, and the terms banking game and percentage game to be complementary. One applies when the house is directly involved in play as a participant in the game, and the other when the house is not directly participating in game play. Both terms focus on the house and are determined by the house's type of involvement in play. The house can charge fees for its services but cannot wager in the game and cannot have an interest in the wager. The two terms prohibit the two ways that the house could benefit from commercial gambling.

Under the *Sullivan* definition, whether or not the player-dealer position rotates is irrelevant. As long as the house is not directly involved in play, the game is not a banking game.

C. *Sullivan* progeny

The *Sullivan* decision was soon followed in a number of cases and became a cornerstone of the law. About seven months later, the First District considered the same issue in *Walker v. Meehan* (1987) 194 Cal.App.3d 1290. In that case, the County did not even argue that the game was a banking game. However, in considering the percentage game issue, the court summarized *Sullivan's* construction of the two terms:

> "The *Sullivan* opinion analyzes the language of Penal Code section 330 and concludes that a banking game is a game that is played with the house ***as a participant*** in the game, taking on all players, and paying all winnings and losses from the "bank." The court also defined a percentage game as any game in which the house collects money calculated as a portion of the wagers made or sums won in play." (Emphasis Added.)

The *Walker* court agreed that the evil sought to be controlled by section 330 in both banking games and percentage games is the house's "interest in the game." (*Walker* at 1296). Perhaps most noteworthy is the dissenting opinion, filed by Judge Newsom (father of the current Governor, Gavin Newsom), who was "of the opinion that Penal Code section 330 is void for vagueness, in that it does not adequately or reasonably define the conduct sought to be prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement."

Walker was followed the next year by *Huntington Park Club Corp. v. County of Los Angeles* (1988) 206 Cal.App.3d 241. The Second District considered the legality of pai gow, and adopted the *Sullivan* definition of percentage game, and found that the game as played was a percentage game. The court then considered whether the game was a banking game, and adopted the *Sullivan* definition of that also. The County argued that the term banking game is not limited to the situation where the house is the bank, but the court held that under the facts as presented, it did not reach the issue.

In *City of Bell Gardens v. County of Los Angeles* (1991) 231 Cal.App.3d 1563, the Second District considered a second case on whether player-dealer games were banking games. In response to the ruling in *Huntington Park*, the cardrooms had stopped charging percentage fees and started charging flat fees. The Sheriff now challenged the player-dealer games as being banking games and claimed that the player-dealers were operating a bank. The court relied on the holding in *Huntington Park* that players serve as dealer on rotating basis, and then held that the appeal was frivolous.

D. The *Tibbetts* Case and Legislative Adoption of the *Sullivan* definition

In 1990, the First District considered the legality of a different type of game, Texas Hold'Em in *Tibbetts v. Van de Kamp*, 222 Cal.App.3d 389. This is not a player-dealer game, but the court offered one of the best summaries of the law on banking and percentage games. The court wrote:

> "A banking game is one which the '"house" or '"bank"' ***is the principal participant*** in the game, taking on all players, paying all winners and collecting from all losers. A percentage game is one in which the '"house"' ***does not directly participate*** in the game, but collects a percentage from it which may be computed from the amount of bets made, winnings collected, or the amount of money changing hands. [citing *Sullivan*]." (Emphasis added.)

In June 1991, just prior to the *Bell Gardens* decision, the Legislature amended section 330 to delete "stud-horse poker" from the list of prohibited games, and expressly affirmed that it was conforming the law to the holding in the *Tibbetts* case. Given that *Tibbetts* had summarized the *Sullivan* definition of "banking game" this clearly establishes Legislative acquiescence in that definition. "It is well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." *Marina Point, Ltd v. Wolfson*, 30 Cal.3d 721, 734. Here, where the Legislature expressly affirmed it was conforming the law to the *Tibbetts* case, that acquiescence is express.

E. *Oliver v. County of Los Angeles*

Seven years after the Bell Gardens decision, the Second District again considered the legality of player-dealer games in *Oliver v. County of Los Angeles* (1998) 66 Cal.App. 1397, a case concerning a different game, Newjack, similar to blackjack, and this time the court takes a very different approach than the court in Sullivan.

The court starts by quoting the relevant passages from *Sullivan*, summarizing the rules, and writing, "on the face of these rules, the casino does not operate as a bank for the game of Newjack." The court then holds that nevertheless the rules on rotation "make it possible for a player-dealer to function as a bank." (p. 646) According to declarations submitted by the county, the deal would often stay with a play who had large amount of money, and would rotate only when that was exhausted. "In the instant case, **we expand this analysis** and 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 a bank or operate as a bank during the play of the game." The court distinguished *Huntington Park* where the player dealer position continually and systematically rotated from this case where the position "does not *have* to rotate among the players." The court held, "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 then be said of such a player that he or she is 'taking on all comers, paying all winners, and collecting from all losers.'" (p. 647)

Three justices on the Supreme Court voted to review the decision, falling one vote short of the four votes it takes to grant a petition for review.

The *Oliver* case clearly is at odds with, not an extension of, *Sullivan,* and creates a split of authority. In *Sullivan*, the whole focus of the statute is the house, and construction of the statute was based on the duality of whether the house was a direct participant or an indirect participant. There is no place in that construction for the *Oliver* extension of the statute to cover players.

Further, this new definition of the term "banking game" is deeply flawed for a number of reasons:

- The definition of the term banking game had been construed by the courts and the Legislature had acquiesced in that definition. A banking game is a game in which the house banks the game. The Second District was not at liberty to rewrite the law and apply a different definition.

- Another element of a banking game (besides lack of direct house participation) is lacking. A banking game is where the banker takes on all comers and pays all winners. However, in the player-dealer games, the player-dealer posts a fixed bet, and sometimes, that bet does not cover all the bets of the other players, so that the player-dealer cannot be said to taking on all comers. The decision notes this issue in footnote 5 and responds only that the other characteristics of a banking game were present. Where all elements are necessary, that is not a good answer, but further, that was not true. Lack of house participation was also lacking.

- The *Oliver* court was concerned that the player dealer would keep the "Inherent playing advantage." However, any such advantage is a trait of percentage games, not banking games. The *Oliver* court is confusing and conflating these different issues.

- At least two of the public policy concerns are not present where the house is not a participant in the game. One, if the house is not a participant in the game, it can serve in the role of a neutral referee. The house employs dealers and floormen to accomplish the all-important task of maintaining game integrity. Even if the player-dealer position stays with one player, the house is serving all players as an independent referee. Acceptance of the position by more than one player is not needed to maintain the independence of the house. In contrast, when the house is the banker, there is no independent referee who conducts the game and maintains the game's integrity. Rather the house has an interest in the outcome of the game and is not a neutral referee. The employees are hired to protect the house's bankroll, not to protect game integrity. Two, if the player-dealer position rotates, all players are offered an equal opportunity to be player-dealer. They are given a choice whether to take this position or not. Taking the position offers an advantage and rewards, but it entails bigger risks. This is not always desired, and so players are given the choice. Tribal critics of player-dealer games completely ignore that mandating rotation means foisting greater risks on players. Giving the player a choice serves both to allow the

player to obtain the advantage (and take the greater risk) or avoid taking the greater risk (and not accepting the advantage). The *Oliver* court failed to consider how these games present much different public policy concerns and why it makes no sense to classify them as banking games.

- The *Oliver* decision ignores the focus of *Sullivan*, that the statute is intended to prohibit the house from deriving profit from commercial gambling.

- *Oliver*, trying to come under the language from *Sullivan*, reasons that "player-dealers *do* participate in the game and they *do* have an interest in its outcome, which are traits of a banking game." *Oliver*, at p. 1408, fn. 5. However, all players participate in the game and all players have an interest in the game's outcome. Even if game rules required every player to accept the rotating player-dealer position, that would be so. So this argument is nonsensical.

- *Sullivan* construed the terms "banking game" and "percentage game" to be complimentary. Banking game was construed narrowly but percentage game was construed broadly. If banking game is construed broadly, the broad interpretation of "percentage game" is thrown into question.

G. Legislative Reaction

The poorly-decided *Oliver* decision, coming just as the GCA took effect and as Indian gaming was being introduced in the state, created chaos, and from 1998 to 2001, the industry and the Legislature struggled to deal with it. Artichoke Joe's immediately argued that *Oliver* created a split in authority, but that did not help the cardrooms in Los Angeles. No one pointed out that the Legislature had acquiesced in the *Sullivan* interpretation. Nor did anyone consider the different public policy implications of the player-dealer games from regular banked games. In July 1999, the Legislature passed AB 1417, which would have codified the definition of banking game as set forth in *Oliver* but also would have allowed retention of the player-dealer position for five hands, stating an intent to modify the results of *Oliver*. Governor Davis vetoed the Legislation, writing, "on the advice of Attorney General Bill Lockyer" he was asking the Legislature to insert a licensing and oversight procedure for persons or businesses "who would perform the functions on the bank." He said that with those changes, he would sign the bill.

A few months later, in September 1999, the Legislature passed AB 1409, largely the same as AB 1417 but also including authority for the Commission to license "third party" players. The Legislature declared that the act was intended "to effectuate the holding in Oliver v. County of Los Angeles." A month later, Governor Davis vetoed AB 1409. He made mistaken assertions that the bill would expand gambling but also wrote that the bill was premature in that Prop. 1A would be on the ballot in March 2000, allowing voters to vote on tribal gaming. "Let the voters speak before addressing any further gaming issues."

The following year, the voters passed Prop. 1A allowing Indian tribes to conduct casino games on tribal lands in the state, and the Legislature passed AB 1416. Like AB 1417 (the first bill), this third attempt codified the definition of banking games in *Oliver*, but then it created a safe harbor for player-dealer games if the position must continuously and systematically rotate among each of the players. The bill stated that it did not intend to mandate acceptance of the deal by every player if the division finds that the rules render maintenance or operation of a bank impossible by other means. Like AB 1409 (the second attempt), this bill also contained a provision for licensing "a third party provider of proposition player services." The Legislature also adopted findings and declarations that the player-dealer games were played in California prior to the Constitutional enactment in 1984 prohibiting casinos "of the type currently operating in Nevada and New Jersey" and that such games had been approved in the four court cases, *Sullivan, Walker, Huntington Park Club*, and *Bell Gardens*.

Artichoke Joe's was very critical of the adoption of a definition of banking game which would replace the definition in *Sullivan*, and made that known. The Attorney General was critical of the definition of banking game for other reasons. Governor Davis signed the bill but issued a signing statement that the bill includes language that may be inconsistent with authoritative decisional law and will require clean-up.

Because of the criticism of AB 1417, in 2001, the Legislature passed a fourth bill on banking games, AB 54. The Legislature repealed the language codifying the *Oliver* definition of banking game, repudiating that definition. However, it left in place the safe harbor for player-dealer games. The Legislature also amended its findings about rotation. Instead of saying that the courts had approved the practice of rotation, the finding was amended to read that nothing in

the court cases found rotation to be inconsistent with current law. The Attorney General said that his concerns had been satisfied, and the Governor signed the bill.

AB 54 was the final word from the Legislature. The effect of this was to repudiate *Oliver*, reinstate the *Sullivan* definition of "banking game," to cover games in which the house is a participant and has a direct interest in the outcome, but also to leave in place the safe harbor to the extent needed.

H. Other Developments

In 1999, while the Legislature was in the midst of its proceedings to address Oliver, the Supreme Court decided, *Hotel Employees and Restaurant Employees v. Davis*, 21 Cal.4th 585, concerning Proposition 5, a statutory initiative to approve player-pooled electronic games at Indian casinos. The Supreme Court ruled the initiative unconstitutional, holding that player-pooled games were banked games. The tribes had argued that the games were not house banked because the casino's cannot profit from surpluses in the player pool, which is dedicated to payment of prizes. The Court first responded that banking game may be banked by someone other than the owner of the gambling facility, citing *Oliver*. The Court then ruled that the tribal operator can profit from a prize pool because the tribe retains "an interest in the outcome of play," the test for banking games. The more the pool collects from losers and the less it pays to winners, the lower the operator's costs (the house will not need to provide seed money) and the more likely it will be able to obtain repayment of seed money provided in the past. The less the pool collects, the higher the operator's costs. Although the court cited to *Oliver*, it was in dicta, not in its holding. Further, the court shows no awareness of the split in authority between *Sullivan* and *Oliver*. "When the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic, its dictum should be followed." *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169. That was not the case here. The court was not aware of a split in authority and was not resolving the split, and its dicta has no weight.

In 2007, the Bureau issued a letter stating that Legislature intended that all players be afforded the opportunity to be player-dealer, but the fact that all players but one decline the player-dealer position does not render the game an illegal banking game. That letter was in place for over eight years.

In February 2016, the Bureau suspended the 2007 letter pending review even though there had been no change in the statute nor any change in the rotation practices. In June 2016, the Bureau circulated a "Notification Regarding Rules of Games Featuring a Player-Dealer Position" requiring games rules to be changed to institute new rotation practices. On July 25, 2017, the Office of Administrative Law issued a Determination that the Notification was an illegal underground regulation.

I. Conclusion

Given that the Legislature adopted then repealed a definition of banking game based on *Oliver*, that definition has been repudiated and is not valid. Given the Legislature's prior acquiescence in *Tibbetts*, and its definition of banking game based on *Sullivan*, that definition should apply. Under that definition, if the house is not a participant in the game with a direct interest in the outcome of the game, the game is not a banking game. The proposed regulation is inconsistent with that definition, and thus inconsistent with the statutes.

III. THE REGULATION IS CONTRARY TO PUBLIC POLICY

The concept regulation is also contrary to public policy. The Gambling Control Act recognizes that gambling is addictive (§19801(c)) and it states explicitly that its purpose in not "to expand opportunities for gambling." §19801(f). Yet this regulation seeks exactly that. It would compel all players to accept the player-dealer position, a requirement that would compel players to make much bigger wagers and take much bigger risks. The player-dealer usually covers all wagers at the table. If there are seven other players at the table, the player-dealer will usually place a bet sufficient to cover the bets of all the other players. If the player-dealer is then dealt a weak hand, the player-dealer can lose that amount in one fell swoop. In contrast to TPPPs, which are organized, funded and operated to take this risk, most players do not want to risk so much money in a single hand. By essentially forcing players to take this position, the regulation would force ordinary players to take bigger risks than their current comfort level and push them to gamble more and to engage in more risky gambling. It would probably lead to more, not less, problem gambling, and more people having financial problems. That is not consistent with long-standing public policies of the state.

IV. THE REGULATION IS CONTRARY TO BETTER CONTROL OVER GAMBLING

The regulation would lessen rather than improve controls over gambling. Third-party proposition players are licensed, meaning that their sources of funds have been vetted. Regular players are not licensed and their source of funds was not vetted. This is one reason that the regulators adopted extensive rules to license third-party proposition players. If this regulation were adopted and regular players were required to take the player-dealer position, there would be a lot less control over the money flowing through cardrooms. Such a regulation would likely result in players secretly pooling monies together to play the games, and would likely result in more questionable monies in the cardrooms.

Also note that the Commission is currently proposing to do away with licensing gambling businesses, those people who pool monies and bank games but do not have a contract with the cardroom, and to prohibit that activity. If the Bureau requires the player-dealer position to be accepted and the Commission prohibits pooling of monies, players will likely go underground, either playing at unlicensed locations or secretly pooling their monies. Either way, the result is worse, rather than better, control over cardroom gaming.

V. THE REGULATION IS CONTRARY TO BETTER CONTROL OVER MONEY-LAUNDERING

If the regulation were passed to require the player-dealer position to be held more by regular players and less by state licensed TPPPs, it will lessen controls over money-laundering. It will encourage players to pool money, and create an opportunity for criminals to secretly pool money and launder it through casinos. This is completely contrary to Anti-Money Laundering laws, to public policy and to prior laws seeking more, not less, control over persons banking the games.

VI. THE INDIANS TOOK A CONTRARY POSITION ON BANKING WHEN SEEKING APPROVAL OF CASINO GAMES

The complaints about lack of rotation of the player-dealer position come from Indian tribes, but as the letter from the California Gaming Association has pointed out, prior to the enactment of Propositions 5 and 1A, tribes conducted non-banked card games at Indian casinos and had the same rotation practices as the cardrooms at that time.

These same Indian tribes took a contrary position to their current position on banking games when they were seeking approval of casino games. In 1998, Indian tribes qualified a statutory initiative for the ballot to approve player-pooled banked games. In doing so, they depicted cardroom games in a completely different light than they do now. At that time, as they sought to expand gambling greatly in the state, the Voter Information Guide provided background on gambling then existing in California, and read, "Other state laws allow gambling in card rooms. Card games (such as poker) can be played only if the card room does *not* have a stake in the outcome of the game." That formulation is right out of *Sullivan* (not *Oliver*) and the rule that a banking game is a game in which the house is directly involved.

After Proposition 5 was struck down by the California Supreme Court in the *HERE* case, the Indian tribes qualified another initiative for the ballot, this time a Constitutional initiative known as Proposition 1A. Again the Voter Information Guide for that Proposition described existing gaming and again described the prohibited banking games narrowly:

> With regard to *card* games, state law prohibits: (1) several specific card games (such as twenty-one), (2) "banked" games (where the house has a stake in the outcome of the game), and (3) "percentage" games (where the house collects a given share of the amount wagered).
>
> State law allows card rooms, which can operate any card game not otherwise prohibited.

This coincided with the narrow *Sullivan* rule, not the broad *Oliver* rule. Under that rule, player-dealer are not banking games because the house does ***not*** have "a stake in the outcome of the game"

The position of the tribes today is much different than that presented to the voters in these Propositions. Today, the Indian tribes argue that these games are illegal banking games even though the house does not have a stake in the outcome of the game.

In 1998 and 2000, many voters were wary of, if not opposed to, attempts to expand gambling, and so it served the interests of the Indian tribes to depict California law as not having a very restrictive definition of banking game. That

way, the proposed introduction of casino gaming on tribal lands would not appear to be as great an expansion of gambling. Having benefitted from that interpretation of the law then, now the Indian tribes are changing their interpretation of the law for competitive purposes and attempting to argue for a broad definition of the term "banked game" and to restrict cardroom games. This change in legal position should not be entertained.

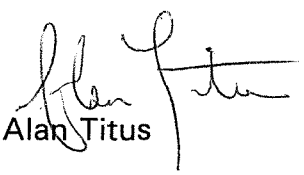
VII. CONCLUSION

There has been no change in rotation practices in the industry since this was introduced in the mid-80s. Players in player-dealer games were never required to accept the player-dealer position. They were always allowed to pass the position. The Bureau is disrupting a practice that has long been in place. This regulation would devastate the industry and jeopardize many jobs. It would have far-reaching impacts on owners and employees, and on communities where cardrooms currently exist.

Last, we note that even though rotation practices have not changed in decades, the practice of "no collection," not taking a fee from any players at the table except the player-dealer, is a relatively new phenomenon, and has not been litigated. Further, we note that the practice of "no collection" changes the analysis of public policy concerns given above, even though rotation is the same. When a fee is collected from each player, the house is serving as a neutral referee in the game, but when there is "no collection" the house is dependent solely on the player-dealer for its fee, and its neutral position is not so clear. Rather, the house might have some interest in the outcome of the game, and may be biased in favor of the player-dealer. If the Bureau were to propose regulations, they should address the new "no collection" practices, not old and well-established rotation practices.

We appreciate your consideration of these comments.

Sincerely,



Alan Titus