



CALIFORNIA CITIES GAMING AUTHORITY

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January 27, 2021

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

Re: California-Style Blackjack Regulations – Draft Concept Language

Dear Ms. George:

I write in response to Director Stephanie K. Shimazu's letter of January 5, 2021 and the Draft Concept Language for the proposed regulations enclosed with that letter. The proposed regulations would expand the California Department of Justice's Bureau of Gambling Control's authority beyond approving "the play of any controlled game" and would permit the Bureau to prohibit controlled games that are lawful. In particular, the proposed regulations would prohibit all blackjack-like games permitted by state law and approved by the Bureau.

I represent the California Cities Gaming Authority ("CCGA"), a joint powers authority of cities that authorize and regulate card rooms. The CCGA objects to the proposed regulations on three grounds. First, the proposed regulations would expand the Bureau's authority beyond that provided by statute and would violate separation of powers. Second, a prohibition of blackjack-like games that are not technically blackjack would improperly make games that are legal under statute illegal under the proposed regulations. Finally, the proposed regulations would have a serious negative effect on cardrooms in California, without a showing of any benefit to the public that would outweigh that effect.

General Rules Governing Regulations

An administrative regulation must "be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code, § 11342.1.) Whenever a state agency has authority to adopt regulations to carry out the provisions of a statute, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

Further, apart from these statutory limits, an administrative agency's rule-making power does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. (*GMRI, Inc. v. California Dept. of Tax & Fee Administration* (2018) 21 Cal.App.5th 111, 124.) The agency may not use a rule or regulation to vary or enlarge the terms of a legislative enactment. (*Ibid.*) The agency may not compel that to be done which lies outside the statute's scope, and that cannot be said to be reasonably necessary or appropriate to subserving or promoting the statute's interests and purposes. (*Ibid.*) "[A] regulation which impairs the scope of a statute must be declared void." (*Ibid.*)

Finally, Article III, section 3 of the California Constitution requires separation of powers, limiting the authority of one of the three branches of government to arrogate to itself the core functions of another branch. (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297.) Although the separation of powers doctrine permits the Legislature to delegate some quasi-legislative or rulemaking authority to administrative agencies, the agency "has only as much rulemaking power as is invested in it by statute." (*Id.* at p. 299.)

Under these rules, the Bureau cannot promulgate regulations that are outside of its rulemaking authority, or that contradict statutory law. The proposed regulations exceed the Bureau's authority to promulgate rules and contradict statutory law.

The Proposed Rules Expand the Bureau's Authority beyond That Authorized by Statute

Like poker games that the Department of Justice has approved, the games proposed to be prohibited under the proposed regulations—blackjack-like games—are "controlled games" under the Gambling Control Act, Business & Professions Code section 19800 et seq. (Bus. & Prof. Code, § 19805, subd. (g); Pen. Code, § 337j, subd.(e)(1).) The Department of Justice, and thus the Bureau, is granted authority only to "[a]pprove the play of any controlled game, including placing restrictions and limitations on how a controlled game may be played." (Bus. & Prof. Code, § 19826, subd. (g).)

On the other hand, the Act grants the California Gaming Control Commission exclusive authority to adopt regulations that provide for the approval of game rules to ensure the fairness to the public and compliance with state laws, restrict activity that is related to the conduct of controlled gambling, and define the method of operation of games. (Bus. & Prof. Code, §§19840, 19841, subds. (b), (o), (p).) This scheme therefore delegates to the Commission the authority to regulate controlled games; and delegates to the Bureau the authority to approve the play of any controlled game contained in the regulations the Commission promulgates.

The proposed regulations would expand the Bureau's authority from approving the play of any controlled game to prohibiting controlled games permitted by state law. That is beyond the Bureau's authority as prescribed by statute.

Prohibiting Approved Games

The proposed regulations would also violate statutory law, because they prohibit games that the law currently allows.

Business & Professions Code section 19842, subdivision (a), forbids the Commission from prohibiting, on a statewide basis, the play of any game (or restrict the manner in which any game is played) unless the Commission (in a proceeding pursuant to the article) finds that the game or manner in which the game is played violates United States, California, or local law.

Nothing in the Gambling Control Act gives the Department of Justice or the Bureau the power to prohibit games that the Commission has no power to prohibit. To the contrary, under Business & Professions Code section 19943.5, if a controlled game that the Bureau has approved under Business & Professions Code section 19826 is subsequently found to be unlawful (presumably by a court of law), the Department's approval of that game is an absolute defense to any gambling enterprise that conducted play of the game. As noted above, the games to be prohibited are games that the Bureau has previously approved to be played, and thus permitted controlled games under Penal Code section 337j(e)(1).

The proposed regulations banning blackjack-like games would therefore usurp the Commission's circumscribed authority to prohibit games; bypass the statutorily-prescribed proceeding for the Commission to find that games or the play of games violate the law; and withdraw the Bureau's approval of those games without a finding that the games are unlawful. The regulations are therefore contrary to statutory law.

Prohibiting blackjack-like games conflicts with Penal Code section 330. It is established that all card games that are not prohibited by statute are permitted; and that Penal Code section 330 sets forth the only card games that are prohibited. (*Hotel Employees and Restaurant Employees Intern. Union v. Davis* (1999) 21 Cal.4th 585, 593; *Monterey Club v. Superior Court of Los Angeles* (1941) 48 Cal.App.2d 131, 148-149.) Section 330's list includes "twenty-one." "Twenty-one" is blackjack. (77 Ops. Cal. Atty. Gen. 108.) The proposed regulations go beyond pure "twenty-one" or "blackjack." They would bar games that modify the blackjack rules—i.e., blackjack-like games. (See proposed changes to § 2073, subd. (b).) Furthermore, Proposed Section 2074 allows blackjack-like games but only if they are modified as prescribed therein, which also conflicts with Penal Code Section 330.

Thus, the proposed regulations bar games that statutory law allows.

Negative Effect Outweighs Benefit

Finally, the proposed rules would have a serious negative impact upon municipalities and card rooms in California. Many of the card games currently played in California card rooms are a variation of blackjack. Barring card rooms from conducting these games would have a devastating impact on those businesses and a corresponding cascading effect on the cities that derive revenue from those card rooms.

Do these proposed regulations provide any benefit to the public that outweighs the burden they impose? None is evident from either the proposed regulations themselves or Ms. Shimazu's January 5, 2021 letter. Neither the regulations nor the letter describes any problem created by blackjack-like games. Neither source explains what warrants the drastic step of banning those games.

The timing of these proposed regulations could hardly be worse. The world including California is in the midst of a once-in-a-century pandemic. The repeated closedowns and limited reopenings the State and the various counties have imposed on card rooms have threatened their existence and drained the funds from the cities that license those card rooms to operate and that depend on card room revenues. In turn, these harsh realities injure the citizens of those cities, who, beset by multiple lockdowns, need municipal services more than ever.

The burden the proposed regulations would impose therefore far outweigh any problem they might remedy.

Request for Further Information

If, despite the objections listed above, the Bureau intends to initiate the formal rulemaking process for the proposed regulations, the CCGA requests that the Bureau provide information about the following subjects:

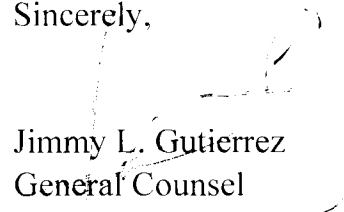
- What is the statutory source of the Department's and Bureau's authority to adopt the proposed regulations? (The statutes cited in the proposed regulations do not answer that question, in light of the considerations set forth above.)
- Why are the proposed regulations needed?
- What economic effect will the proposed regulations have on California card rooms and the municipalities that derive revenue from those card rooms?
- How does the remedy of the proposed regulations outweigh the burden the proposed regulations will impose on card rooms, their employees and cities?

Conclusion

The proposed regulations exceed the Bureau's authority, conflict with statute, and impose a burden on card rooms, their employees and municipalities without conferring any apparent benefit.

The CCGA therefore objects to the proposed regulations.

Sincerely,



Jimmy L. Gutierrez
General Counsel