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Re: Comments of the California Gaming Association on "California-Style Blackjack Regulations—Draft Concept Language" (Jan. 5, 2021)

Dear Director Shimazu:

I write on behalf of the California Gaming Association (the "CGA" or the "Association") in response to your request for analysis and comment on the "California-Style Blackjack Regulations—Draft Concept Language" released on January 5, 2021. The Bureau has for many years approved blackjack-style games for play in licensed cardrooms because those games are legal under California law. Nothing in the concept language offers any reason to believe otherwise. The Association believes the framework and substance of the concept language is fundamentally flawed and contrary to existing law. The Association strongly discourages the Bureau from devoting further resources to this regulatory approach.

1. Introduction

As you know, the California Gaming Association is the 501(c)(6) trade association for California cardrooms, with a membership representing the majority of the active cardroom tables in California. Cardrooms are private establishments that offer a safe, secure, and regulated venue for legal gaming activities. They are the oldest venue for gaming in California, tracing back more than a century. (See Bus. & Prof. Code § 19801, subd. (b).) Today, the cardroom industry plays a vital role for California and for Californians. In 2019, it accounted for about $5.6 billion in economic output and $500 million in statewide tax revenue, while providing jobs to 32,425 Californians, with total wages amounting to over $1.6 billion. (CGA, *Cardroom Impact*, https://californiagamingassociation.org/cardroomimpact/.)

We appreciate the opportunity to comment on this concept language, and your willingness on prior occasions to meet with me and other representatives of the Association regarding these and other issues. Although we have fundamental disagreements with the concept language (discussed in more detail below), we are pleased that the concept language reflects the Bureau's recognition that it does not have authority to simply withdraw existing game approvals. This step by the Bureau also acknowledges the need to comply with administrative procedure, and to respect cardrooms' due process rights with respect to their existing licensed activities.

Nonetheless, the premise of the concept language is misguided on several levels. The Bureau has executive and prosecutorial responsibilities under the Gambling Control Act (the "GCA"). But under the GCA, it is not the Bureau's job to make categorical decisions about what kinds of games may or may not be offered for play in the State. That task is assigned to the California Gambling Control Commission (the "Commission"), and ultimately vested in the Legislature, which has a long history of enacting and repealing laws prohibiting the play of specific games. The concept language therefore raises the most basic of questions about the relationship between the Bureau and the Commission. The concept language also reflects a troubling assumption that the Bureau holds the prerogatives of every organ of government: the power to write the rules, pursue the enforcement of those rules, and adjudicate cardrooms' compliance with those rules. These issues are discussed in Sections 2 and 3 below.

In Section 4 below, we summarize why the concept language errs in equating the modern game of blackjack with the nineteenth century game of "twenty-one" prohibited in Penal Code § 330. This is a subject we have discussed with you in the past, and remain available to discuss in further detail. Section 5 below discusses the implications of the concept language for tribal gaming

operations. Finally, Section 6 provides comments on a few specific provisions of the concept language, though the Association's comments are limited due to the preliminary nature of the language.

None of these issues is academic. They concern jobs, investments, and communities tied to cardrooms throughout the State—interests that the Legislature has protected through the framework of the GCA. As explained further below, we respectfully suggest that the approach of this concept language is flawed, and the Bureau should not pursue it further.

2. The Bureau Lacks Authority to Prohibit the Play of a Category of Game by Making a Rule

a. The bedrock requirement of administrative rulemaking is that the agency making a rule have "[a]uthority" to do so. (Gov't Code, § 11349.1, subd. (a)(2).) The concept language would prohibit a game—blackjack—on a statewide basis. But the provisions of the GCA that speak to prohibitions of games are addressed to the Commission, not the Bureau. (Bus. & Prof. Code, § 19842, subd. (a) [describing limits on Commission's ability to "prohibit, on a statewide basis, the play of any game"].) The Bureau lacks authority to promulgate the rule reflected in the concept language.

The Bureau's responsibilities are executive and prosecutorial in nature; they are not naturally read to embrace policy decisions to prohibit games. (Bus. & Prof. Code, § 19826 [defining the Bureau's responsibilities under the GCA—to, *e.g.*, "receive and process", "monitor", "investigate", "initiate disciplinary actions", "approve"—but not mentioning policymaking about permissible games].)* In contrast to the limited responsibilities and powers of the Bureau, the Commission is vested with "[j]urisdiction … over all … things having to do with the operations of gambling establishments." (Bus. & Prof. Code, § 19811, subd. (b).) The GCA assigns responsibilities to the Commission "without limitation," in contrast to assigning enumerated responsibilities to the Bureau. (Compare Bus. & Prof Code, § 19823, subd. (a) [Commission], with Bus. & Prof Code, § 19826 [Bureau].)

The responsibility assigned to the Bureau that is closest to the concept language is "placing restrictions and limitations on how a controlled game may be

* The Bureau also has the power to "adopt regulations," but that is not an independent grant of authority, because regulations must be "reasonably related to [the Bureau's] functions and duties as specified in the [GCA]." (Bus. & Prof. Code, § 19826, subd. (f).) Again, deciding what categories of games may or may not be played in California is not a "function[]" or dut[y]" assigned to the Bureau.

played." (Bus. & Prof. Code, § 19826, subd. (g).) But "restrictions and limitations" fall far short of outright prohibition, and addressing "how" a game may be played is in a different category from deciding *whether* it may be played at all, as the concept language proposes to do. Moreover, those "restrictions and limitations" must be compatible with the GCA as a whole. The GCA by design vests responsibility in the Commission and local governments—not the Bureau—to determine both how and whether a game can be played. (See, *e.g.*, Bus. & Prof. Code, § 19801, subd. (*l*), § 19803, subd. (b), § 19841, subd. (b) & (*o*), § 19842.) The Bureau's proper authority under Section 19826, subd. (g) is to place restrictions or limitations on the play of a game in line with the policy decisions made by those bodies. For example, if a local government only allows blackjack to be played at certain hours and within certain wagering limits, then the Bureau, in approving an application to offer the game in that locality, would restrict the play of the game so that it complied with the local restriction. But the Bureau's role is not to make its own policy respecting what games can be offered.

b. Although the concept language does not state that concept Section 2074 would effectuate the prohibition of "twenty-one" in Penal Code § 330, our prior communications lead us to infer that this may be the Bureau's intent. If so, the overall approach of the concept language has several additional flaws.

First, Business & Professions Code § 19842, subd. (a) is clear that prohibiting a game because "the game … violates … a law of this state" is a role assigned to the Commission, not the Bureau.

Second, although the concept language addresses the Bureau's responsibilities over processing game approvals, the Bureau is also a prosecutor, and thus the concept regulation carries the implication that the prosecutor is attempting to dictate the content of criminal law. As Justice Kruger has observed, "in civil cases, [courts] often … give significant weight to an administrative agency's interpretation of a civil statute that the agency administers (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1), whereas [courts] have no comparable practice in criminal cases." (*People v. Pennington* (2017) 3 Cal. 5th 786, 804 [Kruger, J., concurring in part and dissenting in part].)

Third, as with any criminal statute, Penal Code § 330 is subject to the rule of lenity, which requires any ambiguity in criminal laws to be interpreted in favor of the persons subjected to them. (*Tibbetts v. Van De Kamp* (1990) 222 Cal.App.3d 389, 395; *see also* 1 Witkin, Cal. Crim. Law 4th (2012), § 37, p. 70.) If the concept language reflects the Bureau's interpretation of Penal Code § 330, then that interpretation cannot be consistent with the rule of lenity, because the Bureau itself has approved blackjack-style games for decades, until at least as recently as

2017, and has never operated on such an extraordinarily restrictive interpretation of Penal Code § 330.

3. The Concept Language's Approach to Withdrawing Existing Game Approvals Is Contrary to Law

a. Section 2075 of the concept language contemplates that the Bureau will review or revoke existing game approvals. The Bureau lacks authority to adopt that procedure because judging the withdrawal of an existing game approval is a function that the GCA assigns to the Commission, not the Bureau; although the Bureau can *initiate* a withdrawal, the Commission must adjudicate it. (For the same reason, existing Section 2071, subd. (d)–(e), which the concept language also revises, are beyond the Bureau's authority.)

In broad terms, the GCA assigns investigative and prosecutorial responsibilities to the Bureau, and prescriptive and adjudicatory responsibilities to the Commission. Of particular relevance here, the statute envisions the Commission's involvement in an approval-revocation proceeding. (See Bus. & Prof. Code, § 19826 [defining the Bureau's responsibilities under the Gambling Control Act—to "receive and process", "monitor", "investigate", "initiate disciplinary actions", "adopt regulations", "approve"—but not mentioning revoking game approvals]; Bus. & Prof. Code, § 19930, subd. (a)–(b) [providing for Bureau investigation, followed by Bureau accusations with the Commission]; Bus. & Prof. Code, § 19932 [providing for judicial review of Commission decisions].)

The Commission's regulations also weigh against the Bureau's unilateral authority to withdraw game approval. (See 4 CCR § 12550 ("Nothing in [the Commission's disciplinary regulations] precludes the Bureau, in its discretion, from issuing warning notices, notices to cure, advisory letters regarding violations or possible violations of law, or from withdrawing such upon further investigation."; making no mention of Bureau authority to withdraw game approval); 4 CCR § 12552, subd. (c) (envisioning a prosecutorial role for the Bureau; "Any settlement of an accusation shall be submitted by the Bureau for approval by the Commission ....").

b. Moreover, the process described by the concept language fails to respect cardrooms' due process rights (under both the Fourteenth Amendment and the California Constitution) to a fair hearing before a neutral decisionmaker before being deprived of a valuable property interest in continued approval of blackjack games. (See *Barry v. Barchi* (1979) 443 U.S. 55, 64–65 [due process right to be heard before revocation of business license]; *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294–95 [same]; *Chicanos por la Causa, Inc. v. Napolitano* (9th

Cir. 2009) 558 F.3d 856, 867 [same], *aff'd sub nom. Chamber of Commerce of United States v. Whiting* (2011) 563 U.S. 582.)

Although the concept language does not describe the details of the process to be afforded in particular cases, the revocation of an existing game approval by default (described in Section 2075, subd. (d) of the concept language) appears to involve no process beyond service of a unilateral notice from the Bureau that an existing business license is revoked. Such a no-process revocation of an existing business license is clearly unconstitutional. The procedures outlined in the GCA, under which revocations proceed to a neutral hearing before the Commission, are not optional statutory paths—they are the embodiment of the fair and neutral process that is due to cardrooms, to their employees, and to their communities.

4. No Sound Rationale Exists for Prohibiting Blackjack-Style Games

Even setting aside the problematic framework and procedures of the concept language, the substance of the language is unsound. The concept language does not explain whether the prohibition of blackjack is an attempt to reflect the prohibition of "twenty-one" in Penal Code § 330, or is instead a freestanding assertion of authority to prohibit the play of an otherwise lawful game by refusing to approve it because of its rules. For example, the concept language refers to *People v. Gosset* (1892) 93 Cal. 641—a case about Penal Code § 330—but the concept language nowhere refers to Penal Code § 330 itself. Either way, the concept language is unsound, though for different reasons.

a. On the one hand, if the concept language is an attempt to describe the rules of "twenty-one," then it is objectively incorrect: The nineteenth century game of "twenty-one" prohibited in Penal Code § 330 is not the same game as blackjack described in the concept language.

The Court of Appeal in *Tibbetts* rejected the notion that "all card games … which have evolved since 1885 and which continue to evolve are prohibited" under Penal Code § 330. (222 Cal.App.3d at 396.) *Tibbetts* held that interpreting a reference to a prohibited game in Penal Code § 330 requires examining how that game was played when it was added to the statute (in the case of "twenty-one," in 1885). The mere fact that some people may today equate 21 and blackjack in casual modern usage cannot answer that legal question of statutory construction. Nor is it relevant that blackjack may have evolved from "twenty-one" as it was played in the 1800s; the *Tibbetts* court specifically criticized a similar line of argument with respect to poker games, 222 Cal.App.3d at 396. Poker games may have a common ancestor, but as *Tibbetts* held, the prohibition of one form of poker

in Penal Code § 330 does not mean all poker games are prohibited—or even that a game with some features in common with a prohibited game is prohibited

Rather, the comparison is one of substance that turns on the rules of play and mathematics of the games. In 1885, the term "blackjack" was not in use, and the "blackjack" hand consisting of an ace and ten-value card with an added payout did not come into existence until the twentieth century. Comparing Hoyle's rules for "twenty-one" from around 1885 with the modern rules for blackjack reveals numerous significant differences in how the players and dealer were able to bet, in the decisions they could make about the play of their hands, and in the in-game payouts and outcomes.

Today, dozens of blackjack-style games that the Bureau has approved are played, with many different combinations of point value and other rules that even further distinguish those games from the game of "twenty-one." Indeed, many of the games offered today are *patented* precisely because they are novel; the concept language's implication that those games are no different from "twenty-one" contradicts the U.S. Patent and Trademark Office's determination that they are distinguishable from earlier games. In short, much as the *Tibbetts* court observed in distinguishing the poker game before it from one referred to in a prior version of Penal Code § 330, "twenty-one" and blackjack have "different mathematics, different odds, different strategies, [and] different betting opportunities and sequence," *Tibbetts*, 222 Cal.App.3d at 395.

Representatives of the Association have offered the Bureau research on this subject, and we have also provided you game rules for "twenty-one" as it was played in the nineteenth century. We have also asked (without response) for the Bureau to provide a set of game rules for "twenty-one" that it believes is prohibited by Penal Code § 330. The Bureau has not responded, but if the Bureau can provide those rules, we would be glad to explore this subject in greater detail.

b. On the other hand, if the concept language is simply a freestanding concept for how the Bureau might ban a game played by certain rules, then we fail to see the regulatory need. (See Gov't Code § 11349.1, subd. (a)(1) [requiring that rules be made only of "Necessity"].) There is nothing intrinsically objectionable about the rules of blackjack, or any relevant policy consideration that could distinguish blackjack from other player-dealer games played at cardrooms. And, conversely, assuming for argument's sake that blackjack should be prohibited for some regulatory reason, then it is unclear why "California-style blackjack" variations would alleviate whatever concern requires prohibiting blackjack.

We recognize that the Bureau might, in a hypothetical case, refuse to approve a game application because its particular rules and manner of play were contrary to the policy of the GCA—for example, if it featured art design and rules of play that "promoted or legitimized [gambling] as entertainment for children," Bus. & Prof. Code § 19801, subd. (c). But nothing about blackjack resembles such a hypothetical or implicates any other principle on which a game might be prohibited to serve regulatory objectives. Indeed, the Bureau could not fairly contend otherwise, having approved the play of blackjack-style games at licensed California cardrooms for decades. And as the Association's representatives have stated before, we remain unaware of a single complaint from a member of the public about the lawfulness or appropriateness of blackjack-style games in California (other than lobbying by Indian Tribes pursuing their own economic interests through unfounded legal arguments). Any further discussion of this concept language would benefit from a frank explanation of what regulatory objective the Bureau believes the concept language would serve.

5. Any Regulatory Process Should Examine the Impact of the Bureau's Approach on Tribal Gaming

If the Bureau intends the concept regulations to define the content of California's criminal prohibition of "twenty-one" in Penal Code § 330, then the Bureau must apply that interpretation with equal force to tribal gaming activity. This has implications for how the Bureau conducts any regulatory process relating to this concept language.

Under Public Law 280, California "ha[s] jurisdiction over offenses committed by … Indians in [Indian Country within California] to the same extent that [California] has jurisdiction over offenses committed elsewhere within [California], and the criminal laws of [California] shall have the same force and effect within such Indian country as they have elsewhere within [California]." (18 U.S.C. § 1162, subd. (a).) Penal Code § 330 is such a criminal law. (See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 210.) Penal Code § 330 therefore applies to tribal gaming activities, unless it has been repealed or limited by another law.

Tribal casinos across the State offer blackjack as defined in the concept language. Although various laws and tribal gaming compacts generally refer to Tribes' rights to conduct banking and percentage card games, we are unaware of any provision of law expressly authorizing the play of "twenty-one," notwithstanding the prohibition in Penal Code § 330. Permission to operate banking and percentage card games cannot overcome a prohibition on "twenty-one," when the prohibition on "twenty-one" and the prohibition on banking and

percentage games are separate features of Penal Code § 330, with independent force. (See *Gosset*, 93 Cal. at 643 ["Faro, no doubt, is a banking game; but dealing or conducting it is an offense under the Code, whether a banking game or not."].)

In our view, Penal Code § 330 does not prohibit Tribes from offering blackjack because blackjack is not the same game as "twenty-one" (nor is it any of the other prohibited games listed in Penal Code § 330, such as faro, monte, or roulette). But if the Bureau were to commit to a different view—*i.e.*, that "twenty-one" is the game of blackjack defined in the concept regulations—then the State would need to undertake parallel enforcement against tribal gaming. Any regulatory process asserting that a game offered by cardrooms and tribal casinos around the State is prohibited should address how that regulatory process will affect criminal enforcement at tribal casinos.

6. Drafting Comments

A discussed above, neither the framework nor the substance of the concept language offers a viable path forward. Moreover, the Association does not understand what regulatory objective the concept language relating to blackjack might serve. And, as your transmittal letter to stakeholders notes, there is no formal rulemaking process underway on the subject of the concept language. For those reasons, our current comments on the concept language itself are limited. If the Bureau were to articulate the regulatory goals that the concept language is intended to promote, then the Association could comment on the parameters that have been used to define blackjack, and to distinguish permissible variants.

California-style Blackjack. Concept Section 2074 defines a family of games that would be referred to as "California-style blackjack." As written, it is unclear whether *any one* of the rule variations set forth in concept Section 2074 is sufficient to make a game "California-style blackjack," or instead *all three* of the rule variations are required to make the game "California-style blackjack."

"Round of Play" and Collection Rule. Concept Section 2010, subd. (h) defines the term "round of play." The only use of that defined term is in concept Section 2070, subd. (e), which makes it an unsuitable method of operation to fail to determine collection fees in an appropriate manner. It is unclear what these amendments are intended to accomplish, but as written they create at least two points of confusion.

First, Penal Code § 337j, subd. (f) already prescribes "dispositive" statutory rules regarding fee collection. We assume that, irrespective of concept Section 2070, subd. (e), the Bureau would regard a violation of that statute as an

unsuitable method of operation under Section 2070, subd. (a). In its current form, Section 2070, subd. (e) generally tracks the language of Penal Code § 337j, subd. (f). For those reasons, Section 2070, subd. (e) currently may have little or no independent effect in practice. Concept Section 2070, subd. (e), however, departs from Penal Code § 337j, subd. (f). This departure is problematic because that statute is "dispositive of the law relating to the collection of player fees in gambling establishments"; the Bureau is not free to alter that law. At the very least, though, the Bureau's use of different language in concept Section 2070, subd. (e) from what is used in Penal Code § 337j, subd. (f) raises questions about whether the two provisions would embody different standards. For example, the statute refers to a "hand or round" (implying that "hand" is not the same thing as a "round"), but the concept language removes references to a "hand" (implying that a "hand" and a "round" are the same thing). If the Bureau believes any change is needed, the Association respectfully suggests that the Bureau should first elaborate on its regulatory goals so that we can offer more meaningful input on how those changes could be codified.

Second, the definition of "round of play" is phrased in terms that may make sense in the context of a player-dealer table game with a collection. But those terms are confusing when used in the context of round games such as poker with a per-pot collection or a time-based collection. For example, in most poker games there are multiple betting rounds (*i.e.*, multiple "placement[s] of wagers") and in poker there is no "player dealer" who places a "fixed and limited wager"—all terms on which concept Section 2010, subd. (h) relies.

* * *

Thank you again for the opportunity to comment on the concept language. Although the Association does not believe the concept language can form the basis for lawful regulations by the Bureau, the Association would welcome the opportunity to further discuss the process and thinking behind the concept language to find an alternative path forward.

Very truly yours,

Benjamin J. Horwich

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