

JIMMY L. GUTIERREZA Law Corporation

December 16, 2019

Stephanie Shimazu
Director of Bureau of Gambling Control
Department of Justice
P.O. Box 168024
Sacramento, CA 95816-8024

Re: Proposed Regulation on Rotation of the Player Dealer Position

Dear Ms. Shimazu:

I write in response to your December 3, 2019 letter and the proposed regulation enclosed with the letter. The proposed regulation governs rotation of the player-dealer position in controlled games.

I represent the California Cities Gaming Authority, a joint powers authority ("hereinafter CCGA"). CCGA objects to the proposed regulation on the ground that it conflicts with Penal Code section 330.11 and Business & Professions Code section 19805, subdivisions (c) and (ag). CCGA further objects that propounding the regulation would violate the separation of powers.

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 that 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.)

The Proposed Regulations Conflict with Statutes Governing Player-Dealer Positions

Presumably, the Bureau would promulgate the proposed regulation as part of its duties to implement the Gambling Control Act, Business & Professions Code section 19800 et seq. (“the Act”). (See Bus. & Prof. Code, § 19826, subd. (f) [Department of Justice’s responsibility “[t]o adopt regulations reasonably related to its functions and duties as specified in this chapter”].) However, the Bureau fails to show that it has the authority to adopt regulations on the rotation of the player-dealer position.

Business & Professions Code section 19805, which sets forth the definitions that apply to the Act, includes this definition of a “banking game” or “banked game”:

“(c) “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 department 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.)

Business & Professions Code section 19805 also defines a “Player-dealer”:

“Player-dealer” and “controlled game featuring a player-dealer position” refer to a position in a controlled game, as defined by the approved rules for that game, in which seated player participants are afforded the temporary opportunity to wager

against multiple players at the same table, provided that the position is rotated amongst the other seated players in the game.”

Penal Code section 330.11, which defines “banking game” or “banked game” for purposes of Penal Code section 330 (listing prohibited games), sets forth a definition essentially identical to the one above. In particular, section 330.11 also states 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.”

Contrary to these two statutes, the proposed regulation requires acceptance of the deal by every player, even if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. Subdivision (a)(2) of the proposed regulation requires excluding from the game any player who refuses to accept the player-dealer position when it is that player’s turn. Under subdivision (a)(3), if no one accepts the player-dealer position from the person who last occupied it, the game must stop. Further, the regulation does not except a situation where the Bureau finds that the maintenance or operation of a bank is rendered impossible by virtue of the game rules. Subdivision (a)(4) permits the application to submit information to the Bureau to establish that maintaining the bank is impossible by virtue of the game rules; but subdivision (a)(3) requires that the game be halted even if the applicant has sought such a ruling. And nothing in the regulation exempts the applicant from mandating acceptance of the deal by every player, *even if* the Bureau finds that maintaining or operating a bank under the rules of the game is impossible by other means.

The proposed regulation therefore conflicts with these statutes. If the regulation is adopted as is, it would be void. (*GMRI, Inc.*, *supra*, 21 Cal.App.5th 111, 124.)

The Proposed Regulation Violates the Separation of Powers

As shown above, Business & Professions Code section 19805, subdivisions (c) and (ag) and Penal Code section 330.11 set forth a comprehensive definition of when controlled games with rotating player-dealer positions amount to illegal “banking” or “banked” games. These definitions implement the restrictions set forth in Penal Code section 330, and bar the main evil the Legislature intended section 330 to prevent: games in which the House has an interest in the game, because it is acting as banker. (See *Walker v. Meehan* (1987) 194 Cal.App.3d 1290, 1296 [analyzing section 330].)

The courts have repeatedly held that section 330 sets forth the Legislature’s position on banked games; and that the interpretation of the Legislature’s intent in section 330 is an issue of law for the courts. (E.g., *Walker, supra*, at p. 1301 [“the definition of

‘banking or percentage game’ . . . is, without question, one of law”]); *Tibbetts v. Van de Kamp* (1990) 222 Cal.App.3d 389, 395 [“The interpretation of the provisions of section 330 is a question of law to be determined independently by this court”], 396 [“the regulation of gambling in general and of poker games in particular in California is a matter for the Legislature, not the judiciary”]; *Oliver v. County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1403 [whether a game qualifies as a banking game is an issue of law].)

The proposed regulation purports to amend, Business & Professions Code section 19805, subdivisions (c) and (ag) and Penal Code section 330.11’s definition of a “banking” or “banked” game where player-dealers are involved. It would impose additional requirements upon player-dealer rotation. It seeks to further define the rotation necessary. It requires excluding players who refuse the player-dealer position. It stops the game if no one accepts the player-dealer position, even where the statutes would permit the game to continue if the Bureau were to find that the maintenance or operation of a bank is impossible by other means. This amendment to these statutes exceeds the Bureau’s power to promulgate regulations reasonably related to its functions and duties under the Act. It arrogates to the Bureau the Legislature’s power to define permitted banking. It renders illegal conduct that would otherwise be legal under the statutes. That violates separation of powers. (See *Carmel Valley Fire Protection Dist.*, *supra*, 25 Cal.4th 287, 297, 299.)

The proposed regulation also invades the judiciary’s power to interpret the Legislature’s definition of a “banking game.” As the case law shows, the definition of a “banking game” under the statutes is an issue of law for the courts.

For both reasons, the proposed regulation would exceed the Bureau’s power to promulgate regulations.

Conclusion

The proposed regulation would contradict the Legislature’s statutorily-expressed definition of permissible player-dealer games. It would usurp the Legislature’s power to define such games, and the courts’ power to interpret the Legislature’s definition. For these reasons, the CCGA’s position is that the proposed regulation should not proceed through the rule-making process.

Sincerely,

By: 
Jimmy L. Gutierrez