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Via Email and Mail

February 5, 2020

Director Stephanie Shimazu
Bureau of Gambling Control
California Department of Justice
PO Box 168024
Sacramento, CA 95816-8024

Re: December 18, 2019 Department Workshop on Rotation of Player-Dealer Position Concept Language

Dear Director Shimazu:

The California Gaming Association (CGA) is submitting these additional comments regarding the "concept language" and comments made at the December 18 workshop.

I.

At the workshop, tribal attorneys praised the draft regulations as a good "first step." Given how sweeping these regulations would be, if they are only a first step, then it appears these tribes will be satisfied only with the complete evisceration of cardrooms.

The tribes' legal arguments begin with a contrived and disingenuous reading of existing law and precedent. They contend that: (1) even one hand played in a player-dealer game is a banked game, (2) having a TPPPS participate makes the game a banked game, and (3) the Constitution prohibits player-dealer games. We group these arguments together because each ignores the same fundamental truths:

- Four Court of Appeal decisions have held that player-dealer games are not banking games. *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987); *Bell Gardens v. City of Los Angeles*, 231 Cal. App .3d 1563, 1568 (1991); *Huntington Park v. Cty. of Los Angeles*, 206 Cal. App. 3d 241, 250 (1988); *Walker v. Meehan*, 194 Cal. App. 3d 1290 (1987).

- *Bell Gardens* specifically approved player-dealer game rules where each person had the "opportunity" to be the player-dealer. 231 Cal.App.3d at 1566.

- Business and Professions Code § 19805(ag) also defines a player-dealer game as one where each seated participant has the "opportunity" to be the player-dealer.

- *Oliver v. Cty. of Los Angeles* 66 Cal. App. 4th 1397, 1409 (1988) ("*Oliver*"), disapproved of player-dealer game rules only where, if every other player repeatedly refused to take the position when offered, the possibility existed that a single person could keep the position "for a long time" with the inherent advantage of the player-dealer position.

- The California Supreme Court in *Hotel Employees v. Davis* 21 Cal. 4th 585, 606-07 (1999), cited *Sullivan* and *Oliver* with approval. The court struck down a tribal player pool system where there was no opportunity for others to participate in the dealer position because "this fund is the only permitted source of payouts."

- *Hotel Employees* also made clear that the 1984 constitutional amendment was not intended to prohibit player-dealer games. 21 Cal. 4th at 605. The Court explained, in particular, that the amendment did *not* affect the "type of casino then operating in California"—casinos that have "commonly been called a 'card room.'" *Id.* That reasoning necessarily protects player-dealer games. The Supreme Court's citation to *Sullivan* and *Oliver* demonstrates that the Court understood that card rooms operate player-dealer games not "affected" by the 1984 amendment. And, as the Legislature has expressly found, cardrooms were already operating player-dealer games "prior to the amendment." 2000 Cal. Legis. Serv. Ch. 1023 (A.B. 1416). In short, *Hotel Employees* establishes that player-dealer game rules that comply with the Court of Appeal decisions were and remain are lawful in California.

- The Legislature specifically approved the use of third party services in player-dealer games in A.B. 1416 and with the enactment of Business and Professions Code Section 19984. The Department of Justice supported this legislation.

- When A.B. 1416 was adopted, the Legislature and Department understood full well that the third party services would occupy the player-dealer position. They also understood that third party services would sometimes occupy the player-dealer position for more than two hands in a row, as the requirement that the position rotate every two hands was removed from the bill and never became part of Penal Code Section 330.11 or Business and Professions Code Section 19805(c).

- Banking is defined as taking on all comers, paying all winners, and collecting from all losers. *Any game rule* (or collection of rules) that prevents any person

from doing some or all of these things makes the game not a banking game. There may be many ways to satisfy this standard.

While some tribes may still resist the notion of having player-dealer games at all, their legal arguments clearly conflict with existing law and court decisions.

II.

The new "concept language" is a stalking horse for those who simply seek to abolish player-dealer games. The concept language cites *Oliver* and Business and Professions Code section 19805 as substantive authority, but neither supports the detailed provisions in the concept language. Indeed, in nearly every respect, the concept language exceeds the Bureau's authority and conflicts with existing case law and statutes.

Oliver does not say that the deal must rotate every two hands or to every person. Indeed, there is no apparent relationship at all between *Oliver* and the concept language, which forces rotation every two hands, penalizes players who decline to assume the player-dealer position, prohibits backline wagering, prohibits players betting together, and prohibits two third party services from sitting at the same table. Not one of these elements has any foundation in *Oliver* or other case law.

Nor is the concept language supported by statute. Business and Professions Code Section 19805(c) and (ag) and Penal Code Section 330.11 together state that player-dealer games are not banking games if (1) the player-dealer position continuously and systematically rotates, (2) player-dealers can lose only a fixed sum, and (3) the game rules otherwise prohibit banking. They also state that not every player has to take the player-dealer position if these conditions are satisfied. Accordingly, the first element of the test—rotation—is satisfied by giving the "opportunity" to take the player-dealer position to each player, consistent with the holding of *Bell Gardens* and the plain text of Section 19805. Moreover, the third element requires that game rules preclude the house or another person from operating as a bank "during the course of the game." Cal. Penal Code § 330.11 The "course of the game" cannot be judged every two hands and should be construed consistent with *Oliver*'s holding that banking is judged by whether a player holds the player-dealer position "for a long time."

In addition, the prohibition on backline wagering is flatly inconsistent with Business and Professions Code Section 19843, which expressly authorizes that practice. It is also contrary to the Court of Appeal decisions upholding player-dealer games that permitted backline or shared betting. *See, e.g.*, *Huntington Park*, 206 Cal. App. 3d at 245 ("More than one participant may wager on a hand."). Prohibiting backline and shared wagers is also at cross purposes with the ultimate statutory objective of allowing controlled gambling while prohibiting banking games. Nevermind rotation from one hand to another, a game in which multiple patrons participate in the player-dealer position *in the same hand* cannot possibly be a banking game because no one person is "taking on all comers, paying all winners, and collecting from all losers." *Sullivan*, 189 Cal. App. 3d at 678. Indeed, the judiciary has explained time and again that the "supreme test of a banking game" is whether it involves "the one against the many." *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462, 474 (1999). By definition, a game with backline or shared wagering on the player-dealer position does not meet that test.

The "concept language" conflicts with existing law in numerous respects:

Concept Language	Legal Conflicts
1. Must rotate every two hands or the game stops.	• Forced rotation is not required in any statute or court decision, and the Courts of Appeal have approved player-dealer games without this requirement. • *Bell Gardens* and Business and Professions Code Section 19805(ag) each specifically reference game rules which give each player the "opportunity" to be the player-dealer. • A requirement that the player-dealer position rotate every two hands was removed from A.B. 1416; the statutes cannot be "interpreted" by the Bureau to impose a rule that the Legislature rejected. • Forcing rotation every two hands conflicts with *Oliver*, which asks instead on whether a person holds the position "for a long time." • This rule flies in the face of two decades of Bureau game approvals. The Bureau has approved not only offer-only game rules, but also game rules that provided additional requirements for rotation. Cardrooms are of course free to submit game rules that require rotation as frequently as they like or include other measures that may be more restrictive than what is legally required. Some cardrooms' choice to do so cannot, of course, limit what the law permits.
2. Every player must take the player-dealer position for a game to meet the Bureau's approved criteria.	• This rule is not required by any statute or court decision. *Bell Gardens* specifically referenced each player having the "opportunity" to be the player-dealer, not the obligation. • Business and Professions Code Section 19805(ag) also refers to each player having the "opportunity" to be the player-dealer. • Penal Code Section 330.11 and Section 19805(c) state that the Legislature does not intend to require forced acceptance of the deal. • This requirement flies in the face of two decades of game approvals and nearly four decades of practice. • If there is even one intervening player-dealer, the person who was the player-dealer formerly has not held the position continuously. • No legal authority exists for punishing individual players for declining to take the player-dealer position.

Concept Language	Legal Conflicts
3. Backline wagers are outlawed in the player-dealer position.	• Business and Professions Code Section 19843 allows backline wagers. • The Court of Appeal decisions in *Huntington Park* and *Sullivan* recognized backline wagers and did not find that such wagers on the player-dealer position were illegal. • When multiple persons wager in the player-dealer position, no single person enjoys all the wagering action, which by definition means the game is not being played as a banking game.
4. Players cannot pool funds and wager together.	• There is no legal authority for prohibiting pooling funds in a player or player-dealer position. This rule is wholly unrelated to the concerns at issue in Oliver. • When multiple persons wager together, no single person enjoys all the wagering action, which by definition means the game is not being played as a banking game.
5. Only one third party service can play at each table.	• No legal authority exists for prohibiting two services at the same table, provided the two services do not share funds. • Indeed, the Commission's regulations are written so that representatives of more than one third party service may play at a single table: Third party contracts are required to provide only "[t]hat no more than one owner, supervisor, or player *from each provider* of proposition player service shall simultaneously play at a table." Cal. Code Regs. tit. 4, § 12200.7(b)(5) (emphasis added). Similarly, "a gambling establishment may contract with more than one [third party service] at the same time." Cal. Code Regs. tit. 4, § 12200.7(g). • Having two services would facilitate rotation and thereby provide a solution to the potential problem of one person holding the player-dealer position for a long time. The concept language's prohibition of this practice hinders, rather than advances, the Legislature's goal of eliminating banking games.

III.

The Association respectfully submits that the concept language is not a permissible or advisable path forward: it is contrary to the California Constitution, the Gambling Control Act, and the line of Court of Appeal decisions upholding player-dealer games as they have long been played. And it would represent an existential threat to the cardroom industry, resulting in needless economic devastation for cardroom employees and communities across the State. Accordingly,

the Association submits that, if the Bureau intends to move forward with a new enforcement regime, it should leave aside the concept language and instead act with the following considerations in mind.

First, a critical element of a typical player-dealer game is the rotation of the opportunity to be player-dealer, continuously and systematically. That rule was imposed in the game upheld in *Bell Gardens*, and the Bureau has long assured that rotation-based player-dealer games have the same rule before they receive regulatory approval. In 2016, the Bureau proposed to further enforce that requirement by mandating that all cardrooms ensure that each offer of the deal be both audible and visible to surveillance cameras. That type of mandate is both consistent with the governing law, and appropriately tailored to the Bureau's enforcement responsibilities.

Second, the Bureau has for a few years suggested that it would be beneficial to specify a maximum time interval for any game in which only one player at the table appears willing to occupy the player-dealer position. That view appears to be based on the statement in *Oliver* that a player-dealer game could become impermissible if a single "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*." 66 Cal. App. 4th at 1409 (emphasis added). The Association does not believe that a maximum time interval is required in every instance, but it recognizes that a maximum time interval can be one way to preclude banking (and therefore satisfy Penal Code Section 330.11 and Section 19805(c)).

When it announced game approval standards in 2016, the Bureau tried to chart a moderate and incremental course—one that would build upon its current practices without a wholesale revision to the player-dealer games that pre-existed the legislative and judicial developments described above. *See* Notification Regarding Rules of Games Featuring a Player-Dealer Position (June 30, 2016). This approach meant that either more than one person would take the player-dealer position within a defined amount of time, or else the game would end before any one person "c[ould] hold the position of player-dealer for a long time ..." *Oliver*, 66 Cal. App. 4th at 1409. Those guidelines, however, were never implemented. The Bureau has never cited any substantive flaw in the guidelines it proposed. Rather, the issue was purely procedural: the Office of Administrative Law concluded that the Guidelines were an impermissible underground regulation. The Bureau was required to undertake a formal rulemaking process, but nothing in the court decisions or statutes requires or even supports departing from the 2016 guidelines in favor of the concept language.

The Bureau could return to that approach and establish a maximum time interval based on *Oliver*. Under such an approach for player-dealer games, the Association submits that a "long time" should be measured in hours—not minutes, and certainly not two hands. Most patrons visit a cardroom or casino with the intention of remaining for several hours and participating in games for extended periods of time, across multiple decks. Indeed, a person would not drive to a cardroom 30 minutes away or fly to one several hours away and expect to play for 30 minutes. Cardroom customers typically play at a single table for more than an hour, and it is not uncommon to stay two or three. Even home card game sessions (poker, bridge, or hearts, for instance) are expected to last for several hours. Accordingly, in the context of gaming, a "long time" should correspond to no less than an hour of game play, as the Bureau proposed in 2016.

Third, the Bureau should revise its posture toward backline and shared betting. The Bureau's ultimate task is to ensure that no "banking game" is offered for play—*i.e.*, that no game permits any one person to "tak[e] on all comers, pay[] all winners, and collect[] from all losers." *Sullivan*, 189 Cal. App. 3d at 678. Viewed in that way, the Association respectfully submits that backline and shared betting behind the player-dealer position is part of the solution—not part of the problem. As explained, when the wager of the player-dealer position is shared among multiple patrons, the game by definition is not "the one against the many," *Kelly*, 72 Cal. App. 4th at 474, but is instead the many against the many—the opposite of a banking game.

Fourth, the Bureau should heed the well-established maxim that a regulatory agency should do no more than necessary to achieve its statutory objective. The Bureau should not set forth standards that render player-dealer games impossible to operate. *See* Cal. Bus. & Prof. Code § 19801(b) (legislative findings that gambling establishments have operated in California for more than 100 years, employ tens of thousands of people, contribute hundreds of millions of dollars in taxes and fees, and are "entitled to full protection of the laws of the state"). As just addressed, there are numerous steps that the Bureau can take that would fulfill its obligations while preserving player-dealer games and the cardrooms that host them. Needlessly going further without any statutory basis, as the concept language proposes to do, would harm tens of thousands of California families that depend on cardrooms jobs, and the many communities across the State that depend on tax revenue from cardroom gaming. The law recognizes that regulatory agencies must think twice before inviting such severe economic disruption. *See* Cal. Gov't Code §§ 11342.548; 11346.3.

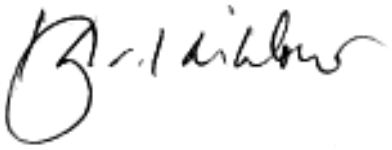
IV.

For these reasons and those in our December 12, 2019 letter, we oppose the "concept language" and any regulations that result in the withdrawal of approvals for existing games.

Aside from tribes pursuing their own economic interests through unfounded legal arguments, we remain unaware of a single complaint from a member of the public about the lawfulness of player-dealer games in California. Rather, we support the many comments you have received from elected officials, community leaders, cardroom employees and many Native Americans opposed to the proposed regulations because of the impacts these regulations would have on their lives and communities. The elected officials who spoke at the hearing represent hundreds of thousands of Californians, and they were particularly clear in stating how these regulations would harm their cities and citizens. The Bureau should not ignore their clear message.

The Association welcomes the opportunity to further discuss the Bureau's rulemaking process and find an appropriate path forward.

Sincerely,



Kyle Kirkland
President