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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2017 OAL DETERMINATION NO. 2
(OAL MATTER NO. CTU2017-0112-01)

REQUESTED BY: TURLOCK POKER ROOM & GOLD GAMING CONSULTANTS

CONCERNING: Department of Justice, Bureau of Gambling Control's
"Notification Regarding Rules of Games Featuring A
Player-Dealer Position," dated June 30, 2016.

DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The challenged rule is the "Notification Regarding Rules of Games Featuring a Player-Dealer Position," addressed to California Gambling Establishment Representatives, dated June 30, 2016 and issued by the Department of Justice, Bureau of Gambling Control (Bureau). It is attached as Exhibit A and will be referred to as the "Notification."

DETERMINATION

OAL determines that the Notification meets the definition of a "regulation" that should have been adopted pursuant to the APA, but was not. It is, therefore, an underground regulation.

¹ As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

FACTUAL BACKGROUND

On January 12, 2017, Turlock Poker Room and Gold Gaming Consultants (Petitioners) submitted a petition to OAL challenging the Notification as an underground regulation.

OAL accepted the petition for consideration on March 13, 2017. The petition was published in the California Regulatory Notice Register on March 24, 2017. Comments from the public were solicited until April 24, 2017. Numerous comments were received from gaming establishments and individuals employed at gaming establishments, all of which reflected opposition to the underlying policy decision of the Bureau in the issuance of the challenged rule. The commenters also contend that the policy articulated in the Notification creates a significant economic impact due to the new rules in the Notification. The Notification deviates from a previous interpretation of Penal Code section 330.11 by the Bureau and the commenters object to the deviance from the previously set standards for the approval of games involving the rotating dealer-player position. The Bureau declined to submit a response to the petition.

The Notification is addressed to "All California Gaming Establishments." It provides that a review was conducted by the Bureau with respect to the play of games featuring a rotating player-dealer position. It states that the Bureau is issuing a notification of the revised practice "relating to the rotation of the player-dealer position in games permitted by Penal Code section 330.11." It further states that Penal Code section 330.11 "provides in relevant part that acceptance of the deal by every player is not mandated if the Bureau finds that the rules of the game render the maintenance or operation of a bank impossible by other means." It then goes on to state:

Accordingly, in considering rules for games featuring a player-dealer position that do not mandate acceptance of the deal by every player, the Bureau will deny approval to rules that do not do all of the following:

1. Provide for an offer of the player-dealer position to each player seated at the table immediately upon completion of every second consecutive hand, or more frequently if desired. The offer must be clearly visible to surveillance cameras and audible, so that each player at the table is aware of the opportunity made available by the offer.
2. Provide that no one person or entity may hold or otherwise be involved in the player-dealer position continuously for 60 minutes. The player-dealer position must rotate completely away from a person or entity within a 60-minute period, to a different person or entity from the one who occupied the position during the hand immediately preceding the rotation. The 60-minute period commences upon acceptance of the player-dealer position.

3. Provide that upon failure of fulfillment of any of the requirements of play identified in paragraph 2, the game must end, and that a new game cannot begin for at least two minutes.
4. Provide for immediate notification to all players that the game has ended, cards or tiles cannot be dealt, and wagers cannot be made. The dealer tray must be covered during this time to indicate the game has ended.
5. Provide for the shuffling of all cards or tiles upon the opening of a new game.

The Notification further indicates that the gaming establishments are to review current game rules for the games that are already approved as to compliance with the new Notification. If the rules for any of the games listed in the attachment to the Notification (which was indicated to be a list of "games featuring a player-dealer position currently approved for play in [their] gambling establishment"), are not in compliance with the Notification, then the gaming establishment is to provide the Bureau with proposed modified rules for each game no later than September 30, 2016. Games could continue if proposed new rules are postmarked by September 30, 2016, "under the currently approved rules until the Bureau makes a determination on the proposed modified game rules." It further provides that no fee was required and that the Bureau would exercise its authority under section 2071(c) of title 11 of the California Code of Regulations and issue temporary (12 month) approvals to continue to monitor game play to ensure compliance with items 1 through 5, above. Finally, it provides that approval will be withdrawn and the game may no longer be offered if there is not full compliance with 1 through 5, above, and receipt by the Bureau of proposed modified game rules by the deadline (September 30, 2016).

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

- (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA

(Gov. Code §11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³

The Notification was addressed to “All California Gaming Establishments” and appears to have been sent to all gaming establishments under the jurisdiction of the Bureau, or to at least all those who offer games with a rotating player-dealer position. The Notification is intended to be generally applicable to all gaming establishments that offer a rotating player-dealer position, which is a clearly defined class. The first element of *Tidewater*, therefore, is met.

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department Of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

California Penal Code Section 330 makes it a crime for any person to cause to be conducted “any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device”. (Pen. Code § 330) Under Penal Code section 330, all of the eleven specified games, as well as any banking or percentage games, are prohibited. “A ‘banking game’ is one in which the ‘house’ or ‘bank’ is a participant in the game, taking on all comers, paying all winners, and collecting from all losers. . . [citations omitted].” (*Oliver v. City of Los Angeles*, 66 Cal.App. 4th 1397, 1407, 78 Cal.Rptr. 2d 641 (1998).)

Penal Code section 330.11 provides that a banking game “does not include a controlled game if the published rules of the game feature a player-dealer position that is “continuously and systematically rotated amongst each of the participants during the play of the game.” Penal Code Section 330.11 states:

“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 division 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.)

The Notification challenged by the current petition contains, among other requirements, five specific requirements that must be met when the rules for games featuring a rotating player-dealer position do not mandate acceptance of the deal by every player. The Notification specifically refers to interpretation of Penal Code Section 330.11 and the provision that “acceptance of the deal by every player is not mandated if the Bureau finds that the rules of the game render the maintenance or operation of a bank impossible by other means.” The Notification goes on to articulate the five specific criteria to make that decision as to whether the rules of the game “render the maintenance or operation of a bank impossible by other means.” The Bureau states that it will deny approval of a game if its rules do not meet the five stated requirements or if the Bureau did not receive (or have a postmark of) a games’ modified rules by September 30, 2016. The Bureau is clearly implementing, interpreting and making more specific Penal Code Section 330.11 in the Notification.

The requirements set forth in the Notification, therefore, meet the definition of “regulation” in Government Code section 11342.600.

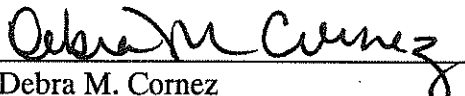
The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*” (Emphasis added.)

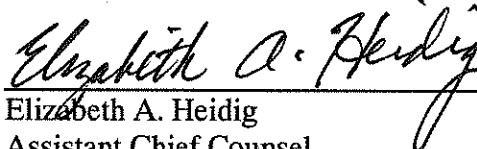
The Bureau has not identified an express statutory exemption from the APA that would apply to the requirements articulated in the Notification, nor did OAL find such an exemption.

CONCLUSION

In accordance with the above analysis, OAL determines that the Notification meets the definition of “regulation” that should have been adopted pursuant to the APA, but was not. It is, therefore, an underground regulation.

Date: July 24, 2017


Debra M. Cornez
Director


Elizabeth A. Heidig
Assistant Chief Counsel

Copy: Wayne J. Quint, Jr., Bureau Chief
Paris Modha, Deputy Attorney General

EXHIBIT A

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



BUREAU OF GAMBLING CONTROL
P.O. Box 168024
Sacramento, CA 95816
Phone: (916) 227-3584

June 30, 2016

TO: ALL CALIFORNIA GAMBLING ESTABLISHMENTS

RE: **NOTIFICATION REGARDING RULES OF GAMES FEATURING A PLAYER-DEALER POSITION**

Dear Gambling Establishment Representative:

A letter published February 19, 2016, notified all gambling establishments that a review of the Bureau of Gambling Control's (Bureau) inspection and game review process was being conducted with respect to the play of games featuring a rotating player-dealer position as permitted by Penal Code section 330.11. The February 19, 2016, letter informed all gambling establishments that a prior letter issued December 20, 2007, which had addressed the Bureau's inspection practice with respect to compliance with Penal Code section 330.11, was suspended pending this review, and stated that on or before June 30, 2016, a notification of the revised practice would be issued relating to the rotation of the player-dealer position in games permitted by Penal Code section 330.11.

The Bureau has now completed an extensive review of the play of games currently offered at gambling establishments throughout the State. A number of gambling industry stakeholders have provided input and all suggestions and comments received have been considered.

Penal Code section 330.11 provides in relevant part that acceptance of the deal by every player is not mandated if the Bureau finds that the rules of the game render the maintenance or operation of a bank impossible by other means. Accordingly, in considering rules for games featuring a player-dealer position that do not mandate acceptance of the deal by every player, the Bureau will deny approval to rules that do not do all of the following:

1. Provide for an offer of the player-dealer position to each player seated at the table immediately upon completion of every second consecutive hand, or more frequently if desired. The offer must be clearly visible to surveillance cameras and audible, so that each player at the table is aware of the opportunity made available by the offer.
2. Provide that no one person or entity may hold or otherwise be involved in the player-dealer position continuously for 60 minutes. The player-dealer position must rotate completely away from a person or entity within a 60-minute period, to a different

person or entity from the one who occupied the position during the hand immediately preceding the rotation. The 60-minute period commences upon acceptance of the player-dealer position.

3. Provide that upon failure of fulfillment of any of the requirements of play identified in paragraph 2, the game must end, and that a new game cannot begin for at least two minutes.
4. Provide for immediate notification to all players that the game has ended, cards or tiles cannot be dealt, and wagers cannot be made. The dealer tray must be covered during this time to indicate the game has ended.
5. Provide for the shuffling of all cards or tiles upon the opening of a new game.

Enclosed is a list of games featuring a player-dealer position currently approved for play in your gambling establishment. Gambling establishments are encouraged to review current game rules for all listed games for compliance with this notification. If the rules of any listed game are not in compliance with paragraphs 1 through 5 of this notification, proposed modified rules for each game must be received by the Bureau or postmarked **no later than September 30, 2016**. Games for which proposed modified game rules are received by the deadline may continue to be offered by the gambling establishment under the currently approved rules until the Bureau makes a determination on the proposed modified game rules. No application fee or deposit will be required for submission of proposed modified game rules for the games on the enclosed list. The Bureau will exercise its authority to issue temporary approvals (Cal. Code Regs., tit. 11, § 2071, subd. (c)) for 12 months to continue to monitor game play to ensure that rotation is occurring and banking is precluded, as specified in the above items 1 through 5.

If the rules of any listed game are not in full compliance with paragraphs 1 through 5 of this notification, and the Bureau does not receive proposed modified game rules by the deadline, the current approval for that game will be withdrawn and the game may no longer be offered.

Submit proposed modified game rules to the address or email address below:

Bureau of Gambling Control
Attn: Game Review Unit
P.O. Box 168024
Sacramento, CA 95816
Email: BGCGames@doj.ca.gov

June 30, 2016
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The Bureau will not approve any other game modifications, new game approvals, or gaming activities until further notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Wayne J. Quint, Jr.", written in a cursive style.

WAYNE J. QUINT, JR.
Bureau Chief

For KAMALA D. HARRIS
Attorney General

Enclosure

cc: Third-Party Providers of Proposition Player Services