

CALIFORNIA GAMBLING CONTROL COMMISSION  
**FINAL STATEMENT OF REASONS**  
CGCC-GCA-2007-07-R

**HEARING DATE:** *(No Hearing Scheduled or Requested)*

**SUBJECT MATTER OF PROPOSED REGULATIONS:** Statewide Involuntary Exclusion List.

**SECTIONS AFFECTED:** Title 4, California Code of Regulations, Section 12362.

**UPDATED INFORMATION:**

The Initial Statement of Reasons is included in the file and is incorporated as if fully set forth in this section. The information contained therein is updated as follows:

The Gambling Control Act (Act)<sup>1</sup> requires the Gambling Control Commission (Commission) to provide for the creation and maintenance of a list of involuntarily excluded persons and to provide for hearings for persons placed on this list.<sup>2</sup> Other states, such as Nevada, have similar lists, sometimes referred to as “Black Lists,” and known cheaters or others who threaten the public or the gaming industry are placed on these lists. Many members of industry have urged the Commission to enact a regulation to provide a way to exclude persons on a statewide basis who pose a threat to the public, gambling establishment employees, or the gaming industry.

This proposed regulation, together with the accompanying form, implements the Commission’s statutory mandate and provides a means for a key employee or owner of a gambling establishment to petition for the exclusion of these “bad elements.” These excluded persons could be known cheaters, habitually drunk or drugged persons, violent or threatening persons, or persons convicted of crimes involving moral turpitude. However, it is left to the licensee or requestor’s discretion as to when it may be appropriate to request that a particular individual be added to the Statewide Involuntary Exclusion List.

This proposed regulation clarifies that an individual may not be excluded from a gambling establishment based on protected class status. However, an exception is included for problem or pathological gamblers who may be voluntarily self- restricted or self- excluded pursuant to Article 6 (commencing with section 12460) of Chapter 7, or involuntarily excluded pursuant to the proposed regulation, as a gambling addiction could be viewed as a disability and thus a protected class. A nonsubstantive change was made in the text in order to conform the language

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<sup>1</sup> Business and Professions Code, section 19800 et seq.

<sup>2</sup> Business and Professions Code section 19844.

of the regulation to the language of Civil Code section 51 which describes protected classes and is applicable in this instance.

This proposed regulation establishes a process and a form for licensees and governmental officials to use in requesting the inclusion of an individual on the Statewide Involuntary Exclusion List. The process includes requirements for notification to the individual to be excluded and provides that exclusion shall remain in effect until the individual is removed from the list by action of the Commission.

The first page of the request form is modeled after the Commission's voluntary Self-Exclusion form (CGCC-037 (Rev. 04/08)), so that the information can be easily transmitted to gambling establishments in a consistent format. Information about the individual is needed to notify the individual of exclusion as well as to notify all gambling establishments and provide enough information to enable them to identify and exclude the individual. Photos should be able to be reproduced from surveillance cameras, or may be provided by other government agencies requesting exclusion. The form contains a proviso to complete "as much information as possible" since full names, dates of birth, or photos may not be available in all instances.

The proposed regulation gives an excluded individual the right to contest the Commission's notice of exclusion, include hearing provisions. This is designed to maximize due process of the individual while fulfilling the Commission's duty to protect the public. Provisions regarding presenting evidence, being represented by counsel, and burden of proof aid an individual to present his or her case. Petitions to be removed from the list after a year has passed are included for instances where an excluded individual may be able to show rehabilitation or otherwise prove that he or she no longer poses a threat. A mechanism for removing deceased individuals is also provided, so that gambling establishment employees are not burdened by reviewing unnecessary exclusion profiles.

The proposed regulation provides for the maintenance of the Statewide Involuntary Exclusion list by the Bureau. The Bureau is also given responsibility for making the list available to all gambling establishments and sharing the list with law enforcement personnel.

The proposed regulation requires that licensees implement policies and procedures intended to prevent excluded persons from entering their gambling establishments and for the ejection or removal of persons when recognized as a known excluded person. These policies and procedures must also include provision for notification of the Bureau of incidents of attempted entry, entry or removals of known excluded persons. Clarification is included that specifies that a licensee's policies and procedures are not required to include provisions for patrons providing proof of identification before entering a gambling establishment, or the use of physical force in ejecting or removing excluded persons.

The proposed regulation provides for the discipline of a licensee by the Commission if the licensee knowingly fails to take prompt, reasonable action to eject or exclude an individual, or fails to notify the Bureau of any entry or attempt to enter by an excluded person. Attempts by excluded persons to enter must be communicated to the State so that trends may be noticed and proper alerts or advisories sent out. The discipline shall be pursued in accordance with Chapter

10 of Division 18 of Title 4. A nonsubstantive change was made by deleting references to the dollar amount of specified fines, as those dollar amounts were not sufficiently supported by the rulemaking record

In conclusion, the proposed regulation specifies that no right or cause of action against a gambling establishment or government official by and excluded party is created, nor are the existing statutory privileges and immunities of Business and Professions Code section 19846 abrogated, limited or expanded. Nonsubstantive changes were also made in subsections (a) and (r) by deletion of references to common law, because those references were unclear and unnecessary.

### **REQUIRED DETERMINATIONS:**

#### **Local Mandate:**

A mandate is not imposed on local agencies or school districts.

#### **Business/Small Business Impact:**

The Commission has determined that the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This determination applies to small businesses if any licensed gambling establishment qualifies as a small business.

#### **Consideration of Alternatives:**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Commission would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

### **OBJECTIONS OR RECOMMENDATIONS / RESPONSES:**

The following comments/objections/recommendations were made in writing during the public comment period regarding the proposed action:

**1. Andrew A. Schneiderman, Vice President and General Counsel, Commerce Casino, in a letter dated February 25, 2008, offered the following comments and recommendations on behalf of the Golden State Gaming Association (GSGA):**

- a. Mr. Schneiderman states that the GSGA has long supported the implementation of a statewide exclusion list.

*This expression of general support was accepted and considered in the adoption of the proposed action.*

- b. Mr. Schneiderman expressed concern that the regulations may create an unintended basis for civil liability. They do not specifically provide civil immunity to licensees or law enforcement representatives who act in good faith. This could discourage participation by licensees and law enforcement. The regulation should be revised to provide for civil immunity (in subsection (a)).

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

Provisions have been added in modifications to the text of Section 12362 in subsections (b) and (r) to provide for immunity for those individuals who exclude and who petition for exclusion. Specific reference is made to the protections afforded under subdivision (a) of section 19846 of the Business and Professions Code, and subsection (r) has been added to clarify and reinforce the applicability of section 19846.

- c. Mr. Schneiderman states that the exclusion procedures should be reserved for individuals who are a significant threat. It does not seem appropriate to exclude individuals who are intoxicated or engage in a single act of disorderly conduct. He suggests that infractions such as disorderly conduct, begging, intoxication, prostitution, or any public offense be removed as grounds for seeking statewide exclusion.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

The text of subsection (b) was modified to make specific reference to the grounds for exclusion specified in Business and Professions Code sections 19844 and 19845, subdivision (a), paragraph (7). The statutory provisions adequately describe the grounds for exclusion and ejection, and allow licensees sufficient discretion in determining when it may be appropriate to request that a particular individual be added to the Statewide Involuntary Exclusion List. To eliminate any confusion, the request form (CGCC-12362 (New 10/08)) was also amended by the deletion, on page 2, of the examples of when the form should be used.

- d. Mr. Schneiderman suggests that the Commission's notice of statewide exclusion should state the grounds for exclusion.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

Subsection (d) was amended to include, in the third sentence, the specific requirement that the notice of exclusion "shall state the grounds for exclusion."

- d. Mr. Schneiderman suggests that the regulation should require prompt and reasonable (as opposed to immediate and unlimited) action to remove an excluded individual.

The regulation should be amended to make it clear that licensees are not required to identify each patron entering the premises to determine if they are on the Statewide Involuntary Exclusion List, or to physically eject persons on the list.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

Subsection (p) was amended to require licensees to establish and implement policies and procedures intended to keep persons included on the exclusion list from entering the premises of the gambling establishment; to provide for the ejection or removal of persons from the premises when the person is recognized or known to be on the exclusion list; and, to provide for notification of the Bureau of any incidents of attempted entry, entry, or removal of known excluded persons. These amendments also specifically state that licensees' policies and procedures need not include a requirement that patrons provide proof of identification before entering the gambling establishment, or a requirement that physical force be used in ejecting or removing an excluded person. The method of ejection is not specified in statute or this regulation and is therefore left to the discretion of the licensee to determine, based on the particular circumstances of a situation requiring ejection.

In addition, the disciplinary provisions previously included in subsection (p) were separated and placed in a new subsection (q). Clarification was added to indicate that discipline could be based on a licensee's knowing failure to "*take prompt, reasonable action to*" eject or exclude an individual or to notify the Bureau, rather than the Commission, of any excluded person's entry or attempt to enter.

**2. Alan Titus of Robb and Ross, representing Artichoke Joe's, in a letter dated February 26, 2008, offered the following comments and recommendations:**

- a. Mr. Titus expressed general support for the creation of a legal procedure to exclude certain individuals from gambling establishments.

*This expression of general support was accepted and considered in the adoption of the proposed action.*

- b. Mr. Titus states that subsection (a) authorizes the ejection of patrons, but it is not clear whether the regulation authorizes the use of physical force. Cardrooms should have the right to use physical force, but should not be required to do so as that can be dangerous.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

[Please refer to comment/response 1. e., above.]

- c. Mr. Titus questioned whether the request form (CGCC-12362), which has a date of “(New 03/07),” should be dated “3/08.”

*This comment/recommendation was rejected because:*

The form, as originally published, was correct as to its creation/revision date of 3/07. However, changes have been made to the form in order to conform to the modified text of the proposed regulation resulting from the public comments received. The revision date has now been changed to “10/08” to more accurately reflect the version of the form actually being adopted.

- d. Mr. Titus states that subsection (c) provides that ejection cannot be based on an individual’s disability, but an addiction [to gambling] could be viewed as a disability. The Commission is allowed to list someone who is a threat to the public interest, and that could include someone with a gambling addiction. These provisions could clash.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

Subsection (c) was amended to provide a specific exception for problem or pathological gamblers who may be voluntarily excluded pursuant to Article 6 (commencing with Section 12460) of Chapter 7, or involuntarily excluded pursuant to Section 12362.

- e. Mr. Titus states that the requirement to exclude in subsection (p) is inconsistent with Business and Professions Code section 19845, subdivision (a), which specifies the reasons for which a licensee may remove a patron. Paragraph (7) of subdivision (a) permits removal because the patron is “a person who the commission ... has determined should be excluded from licensed gambling establishments in the public interest.” Section 19845 is permissive as it uses the term “may” and does not say, “shall be excluded.” While section 19844 allows the Commission to discipline a licensee for not excluding a person known to be on the list, neither that section nor any other section imposes an affirmative duty upon a licensee to exclude or remove listed persons.

*This comment/recommendation was rejected because:*

Section 19845 generally authorizes licensees to remove from their premises certain specified persons and this authorization might well be viewed as permissive. However, section 19845 is not the statutory authority for the proposed regulation, but merely a reference section. The proposed regulation is authorized, in part, pursuant to section 19844, which in subdivision (a) requires the Commission to “provide for the formulation of a list of persons who are to be excluded or ejected from any gambling establishment.” [Emphasis added.] The statutory language at least implies an affirmative duty to exclude or eject, and the Commission, through the adoption of Section 12362, is interpreting that exclusion or ejection to be mandatory. This

interpretation is also supported by the language of subdivision (e) of section 19844, which provides for the discipline of a licensee, who “knowingly fails to exclude or eject ... any person included on the list of persons to be excluded or ejected.”

- f. Mr. Titus states that subsection (p) requires licensees to exclude any individual on the list from entering the establishment, but does not qualify that obligation; it does not condition the requirement on recognition of the person. There should be no implication of a requirement to exclude even if the person is not recognized. The provision governing discipline seems to acknowledge this, as it applies only when a licensee “knowingly” fails to exclude. These provisions should be consistent and it should be made clear that there is no duty to inquire as to people’s identities.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

[Please refer to comment/response 1. e., above.]

- g. Mr. Titus also states that subsection (p) requires a licensee to immediately eject a listed person if found inside the gambling establishment, but it is not clear whether this requires the use of physical force. The use of physical force should not be required as it can be dangerous to those involved and/or near-by, and can be very disturbing. The licensee needs to be able to exercise some discretion in dealing with these situations in order to minimize any risk to or disturbance of the gambling establishment’s patrons.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

[Please refer to comment/response 1. e., above.]

- h. Further, Mr. Titus states that subsection (p) requires licensees to notify the Commission of any excluded person’s entry or attempt to enter the gambling establishment premises, but notes that the comparable provisions relating to voluntary self-restriction and self-exclusion (Sections 12463(a)(4)(B) and 12464(a)(3)) require notification of the Bureau. He suggests that these similar requirements should be consistent with respect to which agency – Commission or Bureau – should be notified.

*This comment was accepted and the proposed action was modified as follows to accommodate it:*

[Please refer to comment/response 1. e., above.]

There were no further comments, objections or recommendations received within the initial 45-day public comment period regarding the proposed action.

Modified text of the proposed regulation together with a notice of an additional 15-day written public comment period was distributed pursuant to Title 1, California Code of Regulations, Section 44, on October 9, 2008. The additional written comment period was held from October 10 through October 27, 2008. There were no written comments/objections/recommendations received during this additional written comment period regarding the modified text of the proposed action.

No public hearing was scheduled or held, and no request for a hearing was received.