

CALIFORNIA GAMBLING CONTROL COMMISSION
FINAL STATEMENT OF REASONS
CGCC-GCA-2010-01-R

HEARING DATE: August 24, 2010

SUBJECT MATTER OF PROPOSED REGULATIONS: Reactivation of Expired Gambling Licenses; Surrender; Abandonment

SECTIONS AFFECTED: Title 4, California Code of Regulations, Sections 12002, 12345, 12347, and 12348

UPDATED INFORMATION:

The Initial Statement of Reasons is included in the file and is incorporated by reference as if fully set forth herein. The information contained therein is complete and no changes have been made to the proposed regulations that would warrant any changes in that information, except as follows:

Proposed Action:

The proposed regulations establish the following:

1. A consequence for late submittal of an application for renewal of a state gambling license;
2. Definitions and procedures for the surrender or abandonment of a state gambling license; and,
3. A mechanism to reinstate state gambling licenses that were previously surrendered or had expired without being renewed, subject to specified conditions.

Part 1: Consequence for Late Submittal of Renewal Applications

Business and Professions Code¹ section 19876 requires applications for a renewal of a state gambling license to be filed with the Commission no later than 120 calendar days prior to the expiration of the current license. Licenses are issued for a 24-month term, and the Commission's current practice is to send a letter 150 days in advance of the expiration date of a license to remind the licensee about the upcoming deadline. Title 4, CCR, Section 12345 also specifies that a complete renewal application is due 120 days in advance of the expiration of the current license, and defines a complete application as including all required fees. However, no consequences currently exist for failing to submit a timely application. This proposed action would implement a consequence for a late submittal as follows:

¹ All statutory references hereafter are to the Business and Professions Code, unless otherwise specified.

- *Section 12345, subsection (g)*: If a licensee fails to submit a complete renewal application at least 120 days in advance of the date of expiration, and consequently, the Bureau of Gambling Control (Bureau) and the Commission cannot complete their review and approval of the application prior to the expiration date, the licensee must cease gambling operations as of the expiration date of the license. Gambling operations may not resume until the Commission approves the renewal of the license.

This consequence is explicitly authorized by subsection (e) of section 19876, which states “[i]f an owner licensee fails to renew the gambling license as provided in this chapter, the commission may order the immediate closure of the premises and a cessation of all gambling activity therein until the license is renewed.” Current Commission practice extends the license for licensees whose renewal applications have not been fully reviewed by Bureau and Commission staff prior to the expiration date. This practice applies both to licensees who submitted their application on time (and therefore are not responsible for the delay in review) and those who fail to submit renewal applications by the statutory deadline. This regulation will not apply to those licensees who submit their renewal applications at least 120 days in advance of the license expiration. In such cases, if Bureau staff cannot complete their review of the application, the Commission will continue to extend the license for the period of time the Bureau estimates will be required to complete the investigation.

During the development of this regulation, the Commission considered imposing a monetary penalty for late submittal of applications; however, it is unclear whether such a penalty would be authorized by statute. Furthermore, a monetary penalty for late renewal application submittal does not provide nearly as strong an incentive for timely submittal as the threat of closure. In 2009, 34 licensees submitted renewal applications after the 120-day deadline, ranging from one day to 119 days past the statutory deadline (that is, submitted 119 days in advance of the license expiration to the day before expiration). The average late submittal was 23 days after the 120-day deadline. However, only three applications required an extension of the previous license in order to give the Bureau and the Commission sufficient time to complete their reviews. Allowing extensions of the license imposes a significant administrative burden on the Commission staff, as documentation for Commission meetings needs to be developed each time the item is placed before the Commissioners for consideration. At a minimum, this would occur twice – once to extend the license, and again to consider approving or denying the renewal application. Establishing a strong incentive to submit timely renewal applications should decrease the administrative burden. Unless the Commission imposes a consequence for the failure to comply with this requirement, licensees will have no incentive to file a timely renewal. The proposed regulation, consistent with the Commission’s statutory authority, imposes a clear consequence. It is not fair to those licensees who do comply with the required submission dates to be treated no different from those who do not.

More importantly, the Commission is charged with ensuring that gambling establishments are not inimical to public health, safety, and welfare, and that operations are not conducted in a manner that will undermine public trust. The Commission and the Bureau review each renewal application to make such determinations. If an owner-licensee does not submit a timely renewal application, and Commission and Bureau staff cannot complete their reviews, the Commission cannot carry out its assigned duty to ensure public health, safety, welfare, and trust.

Part 2: Surrender or Abandonment of a State Gambling License (FUTURE)

The Gambling Control Act² (Act) contemplates the possibility of an owner-licensee surrendering its license. Section 19877 states, in part, that “the failure of an owner licensee to file an application for renewal before the date specified in this chapter may be deemed a surrender of the license.” This is the only mention of “surrender” in the Act. Under the Commission’s broad rulemaking authority, the Commission has the ability to implement regulations providing procedures for surrendering of a license, and specifying the consequences of doing so. The proposed regulation also provides the Commission with the authority and discretion to reject a proposed surrender. Defining the process for and consequences of a surrender will give clear guidance to both the Commission and the regulated industry. Specifically, the proposed action would do the following:

- Section 12002, subsection (j) adds a definition of “surrender” to the general definitions to state that “surrender means to voluntarily give up all legal rights and interests in a license, permit, registration, or approval.”
- Section 12345, subsection (h) deems a state gambling license “abandoned” if a renewal application has not been received within 10 days after the expiration date of the previous license. As previously mentioned, licensees are provided with ample notice of the upcoming expiration of a license. Failure to submit a timely renewal application places a significant administrative burden on the Bureau and the Commission, and can cause a delay in the processing of other applications that were submitted on time. Allowing the Commission to deem a license abandoned after a certain time period will reduce the administrative burden.
- Section 12347, subsection (a) allows an owner-licensee to propose to surrender the license any time prior to expiration. A surrender must be requested in writing, and the matter considered before the full Commission at a properly-noticed, public hearing. A proposed surrender must be approved by the Commission in order to be effective. The Commission may reject a surrender if the surrender is not considered to be “in the public interest,” which will be determined on a case-by-case basis, on the merits of each individual request. Depending on the circumstances, it may be that the Commission wishes to deny a request for license surrender in a case in which disciplinary actions are pending. Rather than tie the Commission’s hands, this regulation retains the discretionary authority entrusted to the Commission under the Act.

² Business and Professions Code, Division 8, Chapter 5, Section 19800 et seq.

- *Section 12347, subsection (b)* describes the consequences of surrendering or abandoning a gambling license, as follows:
 - *Paragraphs (1) and (2)* prohibit the license from being reactivated or used to operate any gambling establishment in the state. Allowing a license to be surrendered or deemed abandoned is intended to provide clarity and finality regarding the status of the license and the gambling establishment in light of the moratorium provision of the Act³. By explicitly prohibiting the reinstatement of a surrendered or abandoned license, the Commission hopes to prevent the type of confusion that currently surrounds gambling establishments that are no longer in operation.
 - *Paragraph (3)* explicitly applies the moratorium provision of the Act to any gambling establishment whose owner surrenders or abandons the license. As discussed in further detail in the section below, the Commission and the industry have had a great deal of confusion over the meaning of section 19963. Paragraph (3) will help to eliminate that confusion with regard to future license surrenders or abandonments.

Part 3: Reinstatement of Surrendered or Expired Gambling Licenses (PAST)

After the passage of the Act in 1998, all gambling establishments registered with the then-Division of Gambling Control within the Department of Justice (now referred to as the Bureau of Gambling Control) to conduct controlled gambling were required to apply for state gambling licenses issued by the Commission, although the Commission was not yet operational. During the interim between the passage of the Act and the establishment of the Commission in 2001, owners of gambling establishments were issued a “provisional license.” Provisional licenses were then converted to state gambling licenses through a process established in regulation.

During the conversion to state gambling licenses issued by the Commission, numerous gambling establishments ceased operations. Many owners failed to submit an application for a state gambling license; submitted an application, but subsequently withdrew it; or, received a state gambling license and allowed the license to lapse.

Typically, allowing a license to lapse or withdrawing an application would not be of serious concern to a regulatory agency or the regulated industry. However, in 2000, the Legislature instituted a moratorium on the approval of new cardrooms (AB 1416, Wesson, Chapter 1023, Statutes of 2000). Specifically, AB 1416 added section 19963 to state:

- (a) In addition to any other limitations on the expansion of gambling imposed by Section 19962 or any provision of this chapter [the Act], the commission may not issue a gambling license for a gambling establishment that was not licensed to operate on December 31, 1999, unless an application to operate that establishment was on file with the department [Department of Justice] prior to September 1, 2000.

³ Business and Professions Code section 19963

It is critical to note that this provision cannot be interpreted literally, because, under the Act, owners (either natural persons or business entities) are licensed, not gambling establishments (a “gambling establishment,” by statutory definition,⁴ is a building). Traditionally, when faced with an unclear statute with multiple interpretations, state agencies turn to the legislative history of the implementing legislation. In the case of section 19963, no published legislative history (in the form of information in a contemporaneous legislative bill analysis or letter to the Daily Journal, for example) exists to guide the Commission in its interpretation of the statute. The Commission is left to determine, under its broad regulatory authority and using the general principles of statutory interpretation, exactly what the statute prohibits or allows.

One possible interpretation of section 19963 is that a license cannot be issued to operate a gambling establishment unless *that establishment had a licensed owner* as of December 31, 1999, or an owner whose application was on file with the Department of Justice prior to September 1, 2000. While this interpretation clearly prohibits entirely new gambling establishments from opening, the status of gambling establishments that met the statutory deadline but have since ceased operations is not addressed. Should a gambling establishment be considered wholly independent of its licensed owner and the statute interpreted to mean that any person can apply to open any gambling establishment, as long as that establishment had a licensed owner as of the required date? Or are the establishment and the licensed owner more closely intertwined?

Further complicating matters, the term “gambling establishment” has long been defined in the Act as “one or more rooms where any controlled gambling or activity directly related thereto occurs,” clearly referencing the physical space used in controlled gambling. Prior to the passage of AB 293 (Mendoza, Chapter 233, Statutes of 2009), the term “gambling enterprise” was not defined in the Act; however, the term was used numerous times throughout the Act to refer to, as it is now defined, an entity that conducts controlled gambling. The term “gambling establishment,” while defined as a building, was also used to refer to the entity licensed to conduct controlled gambling, as well as the physical location of controlled gambling. For example, section 19844 provides for “the formulation of a list of persons who are to be excluded or ejected from any *gambling establishment*” (emphasis added) – clearly a reference to the physical location. However, section 19846 stated that “a *gambling establishment* that ejects or excludes an individual...is not subject to civil liability....” As a building cannot be held civilly liable, this is a clear reference to the business entity, rather than the building. With this example as precedent, section 19963 should be interpreted to mean “...the commission may not issue a gambling license for a gambling *enterprise* that was not licensed as of....”

The Commission has decided upon an interpretation of section 19963 that combines the two factors previously discussed. A *gambling enterprise* that was licensed as of December 31, 1999, or had a license application on file prior to September 1, 2000, may apply to reactivate the license to operate the gambling establishment with which it was associated on December 31, 1999. The proposed action will allow a very limited opportunity to reactivate a state gambling license and reopen the associated gambling establishment. A license can only be “reactivated” by its last holder, and the applicant to reactivate a license has very strict timelines and criteria to

⁴ Business and Professions Code section 19805(o)

meet in order for the application to be considered. Specifically, the proposed regulatory action includes the following elements:

- Section 12348, subsection (a) provides that a state gambling license, which includes a provisional license as well as a license issued by the Commission, that was surrendered or had expired without being renewed *prior to* the effective date of this section can be reactivated within the following guidelines:
 - Paragraph (1): Limits the ability to reactivate the license to the last licensed owner of a gambling establishment that meets the requirements of section 19963.
 - Paragraph (2): Requires the interested applicant to notify the Commission in writing within 30 days of the effective date of the regulation of their intent to apply for reinstatement of the license. Issuance of an initial license is time-consuming for Commission and Bureau staff. In order to accurately plan upcoming workload obligations, the Commission and Bureau need to be aware of the approximate number of applications that may be generated by this regulation. Furthermore, the local community and businesses nearby the proposed location for a reopened gambling establishment need to be able to make planning decisions which may be affected by the re-establishment of a cardroom.
 - Paragraph (3): Requires the applicant to have all required forms, fees, and documentation submitted to the Commission within 12 months of the effective date of this section. For the same reasons as listed above regarding Paragraph (2), a final date to apply to reopen a closed gambling establishment is critical. The Commission, the Bureau, local governments, and nearby businesses need to be able to engage in planning that takes into account the possibility of a reopened gambling establishment.
- Section 12348, subsection (b) specifies the documentation that is required to be submitted in addition to the initial application forms and fees:
 - Paragraph (1): A copy of the last state license issued, whether provisional or a state gambling license, or other documentation satisfactory to the Commission proving that the applicant is the last licensed owner of the establishment. Pursuant to Section 19856, the burden of proving his or her qualifications to receive any license is on the applicant. This paragraph requires the applicant to prove eligibility for licensure under this section.
 - Paragraph (2): A written document addressing the circumstances under which the previous license was surrendered, abandoned, or allowed to expire without being renewed, and the applicant's prior efforts, if any, to have the license renewed. The Commission does not intend to establish circumstances that absolutely disqualify an applicant for licensure (unless, of course, those circumstances establish grounds for mandatory denial under section 19859); nor does the Commission intend to disqualify any applicant that has not attempted to renew the

license in the intervening time. However, the totality of the circumstances surrounding the surrender, expiration, or abandonment of the prior license, and any efforts to renew the license, can provide useful information to the Commission in deciding whether the reactivation of the license is in the public interest. Any decisions made pursuant to this paragraph will be made on an individual, case-by-case basis according to the particular circumstances and merits of each application.

- *Paragraphs (3) and (4)*: A copy of the current applicable local gambling ordinance and an opinion from the chief legal counsel of the local jurisdiction, certifying that the reopening of the gambling establishment is authorized by local ordinance. The Commission has the responsibility to only approve gambling establishments in local jurisdictions with gambling ordinances that meet certain guidelines (section 19860). The burden rests with the applicant to prove that the local gambling ordinance meets the requirements of the Act.
- *Paragraphs (5) and (6)*: Proof from the local governing body (e.g. city council or county board of supervisors) and the chief law enforcement officer of the local jurisdiction (e.g., the Chief of Police or County Sheriff) affirming support for the gambling establishment's reopening. In many jurisdictions, the law enforcement body and the governing body have shared responsibilities regarding licensing and oversight of gambling establishments. These paragraphs are intended to ensure the support of both affected parties. Furthermore, the signed statements are to be dated no earlier than the effective date of this section so that the indicated support reflects the opinion of the *current* governing body and law enforcement officer.
- *Paragraph (7)*: An economic feasibility study that demonstrates that the proposed gambling establishment will be economically viable, and that the owners have sufficient resources to enable them to comply with all laws and regulations. This requirement is based upon section 19862(a)(2), which states that the Commission may deny a license to an "applicant that fails to conduct an economic feasibility study that demonstrates ...that the proposed gambling establishment will be economically viable, and that the owners have sufficient resources to make the gambling establishment successful." A cardroom that does not comply with regulatory requirements and tax laws creates a significant administrative burden for the Commission, the Bureau, and local jurisdictions. Prior to approving a license, the Commission wants to ensure that the owner has the financial resources to comply with all laws.
- *Section 12348, subsection (c)* requires that the Commission consider specified factors when deliberating on an application to reactivate a license and reopen a closed gambling establishment. Specifically, the Commission would be required, but not limited, to consider the following:
 - *Paragraph (1)*: Generally, whether the issuance of the license is inimical to public health, safety, or welfare, and whether issuance of the license will undermine

public trust in gambling operations. The Act, in section 19856(c), explicitly requires this consideration.

- Paragraph (2): The circumstances under which the previous license was surrendered or allowed to expire without being renewed, including (A) any extenuating circumstances; (B) whether the surrender may have been an attempt to avoid adverse action against the license; (C) whether the surrender was voluntary; (D) any prior efforts by the applicant to have the license renewed or reinstated. The Commission does not intend to set up any criteria in this section which would mandate that the Commission act in a certain manner. Rather, this information is intended to provide the Commission with a clearer picture of the totality of the circumstances of the applicant's prior conduct during and after the active license period, and the information will be considered on an individual, case-by-case basis.
- Paragraph (3): Any changes in the legal status or composition of the previously-licensed entity. The policy set forth in this proposed regulation is to allow the last holder of a surrendered or expired license a limited opportunity to reactivate that license. The overwhelming majority of those licenses were held by sole proprietors; fewer than 10 were held by corporations or partnerships. In order to ensure that the applicant to reactivate a license is, in fact, the *same* person that previously held the license, the Commission needs to be able to consider any changes to the status or composition of a corporation or partnership.
- Paragraph (4): The potential effect a reopened gambling establishment may have on the incidence of problem gambling. Problem gambling is a major concern of the Commission. If sufficient evidence is presented to the Commission that indicates the reopened gambling establishment may exacerbate problem gambling issues in the community, the Commission may decide to deny the license.
- Paragraph (5): The potential impact a reopened gambling establishment may have on the local economy, including revenues to the local jurisdiction and the number of jobs that may be created. California is in the middle of a serious economic crisis, which has resulted in high levels of job loss and sharp declines in local revenue. Even a small gambling establishment provides employment opportunities and creates revenue for the local jurisdiction and the state. In addition to any negative consequences a reopened gambling establishment may pose, the Commission also wishes to consider the *positive* aspects.
- Paragraph (6): The economic impact on existing gambling establishments within a 20-mile radius of the proposed location for the reopened establishment. Section 19811(d) provides the Commission with authority over, among other things, the concentration of gambling establishments, and in allowing a gambling establishment to reopen, the Commission does not wish to cause harm to an existing establishment. Many of the now-closed establishments are located in jurisdictions that are not located near a large population center that could support

several gambling establishments. To the extent that the addition of another gambling establishment may seriously impact the revenues of an existing establishment, the Commission may wish to deny the license.

The decision to set the distance at 20 miles was based upon a provision in section 19605, prohibiting a satellite wagering facility from being located closer than 20 miles from any other satellite wagering facility. This provision of law indicates that gambling facilities may have an adverse impact on other facilities closer than 20 miles away. The Commission is not prohibited from considering the economic impact on gambling establishments further than 20 miles away, but would not be required to take them into consideration.

- *Section 12348, subsection (d)* requires the reopened gambling establishment to be located in the same local jurisdiction in which it was previously licensed. Current practice of the Commission is to disallow the relocation of gambling establishments between jurisdictions, based on the moratorium provisions of section 19962.
- *Section 12348, subsection (e)* prohibits the issuance of temporary licenses to applicants under this section. Temporary licenses are issued prior to the receipt of a full background investigation of the applicant by the Bureau, and are intended to be issued only in circumstances in which the issuance of a temporary license is necessary to continue the operation of an existing, active gambling establishment. The Commission intends to conduct a full examination of the application to renew or reinstate an inactive gambling license. Issuance of a temporary license prior to the completion of the full review would be incompatible with the intent of this section.
- *Section 12348, subsection (f)* declares that any license that is eligible for reactivation under this section for which a complete application is not submitted within the required deadlines shall be deemed abandoned and shall be subject to the provisions of Section 12347(b). The issue of the status of gambling establishments that had a licensed owner as of December 31, 1999, but have subsequently closed, has been on-going for several years. It is time to lay the issue to rest and provide finality to owners of existing gambling establishments and to local jurisdictions.

REQUIRED DETERMINATIONS:

Local Mandate:

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

Business/Small Business Impact:

These regulations will not have a significant statewide adverse economic impact on businesses. This initial determination is based on the following facts or evidence/documents/testimony:

These regulations will allow specified closed cardrooms, primarily small cardrooms, to submit an application to reopen, potentially creating jobs and revenue for the local jurisdiction and the state. To the extent that these regulations would allow a cardroom to reopen in the same

jurisdiction as an existing cardroom, the existing cardroom might experience some revenue loss. However, as the cardrooms that may be eligible to reopen are primarily small cardrooms, the Commission expects the impact on neighboring cardrooms to be minor. Furthermore, in determining whether to allow a closed cardroom to reopen, the Commission will specifically consider the economic impact the reopened cardroom may have on any existing cardrooms within a 20-mile radius.

Consideration of Alternatives:

No reasonable alternative to the proposed regulations would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulations.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

1. Once expired, a license cannot be reactivated / Once closed, a gambling establishment cannot reopen

During the lengthy, informal public comment and review periods, many members of the regulated industry espoused the view that once a license has expired or is surrendered, and the associated gambling establishment has ceased operation, the license cannot be reactivated or renewed and the gambling establishment cannot be reopened. Several of these statements cited the fact that the Act does not *explicitly* authorize the reactivation of an expired license, and, therefore, without explicit authorization to allow it, the Commission is required to prohibit it. However, explicit statutory authority is not required in order for an agency to adopt regulations, as long as the regulations are not in conflict with the statute and are reasonably necessary to carry out the purposes of the statute. (Government Code section 11342.2) In addition, an Office of Administrative Law regulation, Title 1, CCR, Section 14(a)(2), includes in an agency's authority to adopt a regulation any "statutory power that grants a power to the agency which impliedly permits or obligates an agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted." (emphasis added) Section 19876(e) allows the Commission to order the immediate closure of any premises if the owner licensee fails to renew the license, and to order the cessation of all gambling activity *until the license is renewed*. This subdivision provides the necessary implied authority for the Commission to adopt the proposed regulation allowing expired licenses to be renewed.

After determining that this interpretation was not *required*, the Commission next examined whether it was *desirable*. A blanket prohibition on the reactivation of an expired license, and therefore a prohibition on reopening a closed gambling establishment, would retroactively assign a legal consequence that was not clearly in effect at the time of the surrender of or failure to renew the license. State agencies cannot adopt regulations with a retroactive effect, and this interpretation was rejected.

2. A closed gambling establishment can be reopened by any interested party
Another commonly-held opinion voiced during the informal public comment and review period was that section 19963 simply provides a “cap” on the number of gambling establishments allowed in the state; as long as the total number of gambling establishments in the state did not exceed the number as of December 31, 1999, any person could reopen any closed establishment. The Commission rejected this view due to the intertwined nature of a gambling establishment and its licensed owner, as previously discussed.
3. The status of each closed cardroom should be considered on a case-by-case basis
Part of the Commission’s rationale for promulgating these regulations is so that the regulated industry, the local jurisdictions, the Commission, and the Bureau can have some finality as to the status of the cardrooms that had a licensed owner as of December 31, 1999, or whose owner had an application on file prior to September 1, 2000, but are no longer in operation. Addressing the status of each cardroom on a case-by-case basis will stretch out the uncertainty regarding each club indefinitely.

Furthermore, the Commission has determined that there are certain criteria that will be imposed in each and every case; for example, approval from the local governing body and the local law enforcement official. In order to apply these criteria to all applications, the Commission must promulgate regulations. To do otherwise would be an illegal underground regulation.

OBJECTIONS OR RECOMMENDATIONS / RESPONSES:

A) 45-Day Public Comment Period ending July 19, 2010

The following comments/objections/recommendations were made in writing during the initial 45-day public comment period regarding the proposed action:

1) Section 12002, subsection (j)

a. Alan Titus of Robb & Ross – representing Artichoke Joe’s: The provided definition of term "surrender" is inconsistent with Business and Professions Code section 19877, which allows the Commission to deem the failure to timely file a renewal application as a surrender of the license. A “deemed surrender” is not voluntary, so the statute uses the term surrender to include *involuntary* surrender, as well as *voluntary* surrender. The regulation is therefore in conflict with the statute and could cause confusion.

Response: This comment is rejected. The language in section 19877 describes the circumstance of an involuntary surrender, but this does not preclude the manner in which the proposed regulation applies the concepts and consequences of surrender and abandonment.

In the context of section 19877, the phrase “may be deemed” means that the Commission may view or regard the fact that an owner has not filed a timely renewal application as a surrender of the license. It does not limit how the concept of surrender can be defined or applied; it simply provides an explicit basis for the Commission to consider the omission

of failing to file a timely renewal as a surrender. Rather than characterizing this circumstance as an “involuntary surrender,” a term which is not specifically used or defined in the statute, the proposed regulation uses “abandon,” a clear, descriptive, and easily understood term. In addition to defining terminology, the proposed regulation also establishes a process for the voluntary surrender of a license in an effort to provide clarity to the regulated community. The consequences of a surrender or abandonment under Section 12347 of the proposed regulation are identical.

The Commission has the authority to take the actions described in the proposed regulations. Moreover, the terminology used is clearly defined and consistent with the Act.

2) Section 12345, subsection (d)

a. Titus: The regulation requires an applicant for renewal to submit additional deposit with the Bureau if required. The Bureau already has a regulation to address this issue; this regulation is duplicative.

Response: This comment is rejected. It is not relevant to the proposed action. The comment is in regards to an existing regulation that is not included in the proposed action.

3) Section 12345, subsection (e)

a. Titus: The proposed regulation would require the Bureau to submit a written report on its investigation to the Commission, but would make submission of a recommendation permissive instead of mandatory. This is inconsistent with the Act which requires the Bureau to submit a recommendation, whether that be of approval or denial.

Response: This comment is rejected. It is not relevant to the proposed action. The comment is in regards to an existing regulation that is not included in the proposed action.

4) Section 12345, subsection (g)

a. Titus: The requirement that a cardroom must close if an application is submitted late is unnecessarily harsh and contravenes long-standing Commission policy and practice. Presumably, the extra staff report extending the license is fairly basic. In requiring the facility to temporarily shut down, the regulation creates much more work and state expense. It puts people out of work, adds people to unemployment rolls, and increases state expenses for unemployment benefits, all to no end.

Response: This comment is rejected. The Commission will not require every owner-licensee that submits a renewal application late to close down operations; this regulation only applies to those owners whose applications are submitted sufficiently late that the Bureau of Gambling Control cannot complete their required review prior to the expiration of the license. Although the Act requires an application for renewal to be submitted 120 days in advance of the license’s expiration date, there is no penalty for failure to submit on time. This proposed regulation is intended to provide significant incentive for licensees to comply with their statutory obligations.

The statutory framework requires that a renewal application be filed 120 days prior to the expiration of the existing license. The purpose for this requirement is to ensure that the Bureau and Commission have sufficient time to properly investigate and evaluate the applicant. Failure to comply with this requirement is a violation of the Act which would subject the licensee to the disciplinary process. The Commission has and will continue to advise a licensee of the renewal deadline 150 days prior to the expiration of the license. This allows the licensee 30 days to submit their renewal application. However, unless the Commission imposes a consequence for the failure to comply with this requirement, licensees will have no incentive to file a timely renewal. The proposed regulation, consistent with the Commission's statutory authority, imposes a clear consequence. It is unfair for those licensees who fail to submit timely applications to be treated no differently than those licensees who comply with their statutory responsibilities.

5) Section 12345, subsection (h)

a. Titus: The Commission has no authority to authorize the filing of a renewal application up to 10 days past the expiration of the previous license. The Legislature allows for late filings when it wants to. Here, the Legislature has not allowed for late renewal, and the Commission has no power to contravene the Legislature. The fact that Business and Professions Code section 19876 does not allow late renewal cannot be disputed. The legislative history reveals how subdivision (e) ended up in the Act. AB 2803 (Isenberg, 1994) would have allowed late renewals up to 30 days. The bill was later amended and the provision allowing late renewal for 30 days was deleted. Although the bill was never enacted, the exact same language was continually included in legislation until it ended up in SB 8, passed in 1997.

Response: This comment is rejected. The Commission is not required to have *explicit* authority in statute in order to adopt a regulation. Government Code section 11342.2 provides that a regulation is valid if not in conflict with the statute being implemented, and if reasonably necessary to carry out the purposes of the statute being implemented. An Office of Administrative Law regulation, Title 1 CCR Section 14(a)(2), includes in an agency's authority to adopt a regulation any "statutory power that grants a power to the agency which *impliedly* permits or obligates an agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted." (Emphasis added.) Explicit statutory authority is not required in order for an agency to adopt regulations, as long as the regulations are not in conflict with the statute and are reasonably necessary to carry out the purposes of the statute.

Although section 19876 does not explicitly authorize the late filing of an application, subdivision (e) states that "[i]f an owner licensee fails to renew the gambling license as provided in this chapter, the commission may order the immediate closure of the premises and a cessation of all gambling activity therein until the license is renewed." AB 2803, as described in Mr. Titus' letter, was under discussion in the Legislature prior to the enactment of the Gambling Control Act. If the Legislature had wished to correct this "oversight" of allowing for closure of a gambling establishment until the license is renewed but no longer allowing a 30-day grace period for late renewal, there was ample opportunity to do so at the time the Act was passed. However, as this language has since

become law, the Commission is bound by the language actually in statute, which *impliedly* permits late renewals.

b. Rich Ramirez, City Manager, City of American Canyon and William Ross, attorney, on behalf of the City of American Canyon: Both commenters request that the regulation be modified to require the Commission to provide ample notice to the local jurisdiction prior to a cardroom being closed due to late submittal of an application.

Response: This comment is rejected. Local jurisdictions have sufficient authority to obtain information about licensure periods and can initiate communication with the cardroom and the Commission to determine whether a renewal application has been filed. If this is a matter of interest to the local jurisdiction, they should take responsibility for staying informed. The Commission is required under the Act to publicly disclose, upon request, any application that has been filed. A local jurisdiction can contact the Commission and inquire as to the status of a cardroom's renewal application.

6) Section 12347, subsection (a)

a. Titus: The Act contains no provision authorizing the Commission to require licensing of someone who has closed a cardroom. Business and Professions Code section 19850 authorizes the Commission to license every person who operates a cardroom; section 19852 further enumerates specific individuals that can be licensed. The Commission does not have authority to reject surrender of a license simply because discipline is pending. If license fees continue to be owed to the state, this regulation becomes confiscatory.

Response: This comment is rejected. Nothing in the Act prohibits the Commission from implementing the regulation as proposed. If the State has an interest in pursuing disciplinary action against a licensee, the Commission has the authority to reject a proposed surrender and to require the disciplinary action be seen through to its conclusion. For comparison, Business and Professions Code section 19869 prohibits an applicant from withdrawing his or her application after the Bureau of Gambling Control has made its final report to the Commission, thereby requiring the Commission to take final action in order to have a denial of an application on record. Similarly, the Commission may wish to reject a proposed surrender and continue with any disciplinary proceedings in order to have the outcome on record.

The statute limits the licensee's claim to a vested right in the license. A state gambling license, once issued, is not the property of the license holder, but is always subject to the discretionary authority granted to the Commission by the Act⁵. Refusing to accept the return of a license in order to finalize disciplinary action is within the Commission's authority to protect public safety, health, and welfare, and to ensure the integrity of the gambling industry.

⁵ Business and Professions Code section 19801(k): "Any license or permit issued, or other approval granted pursuant to this chapter, is declared to be a revocable privilege, and no holder acquires any vested right therein or thereunder.")

7) Section 12347, subsection (b)

a. Titus: Paragraph (3) under subsection (b) is vague and ambiguous. It is not clear what is meant by the "gambling business." The ISOR states that it is not applicable to the assets of the business, but the actual language does not clearly allow sale of assets. The ISOR does not mention the business name; would that asset be saleable? It is not clear why sale of the business needs to be prohibited. The regulations can simply make clear that sale of the business will never include sale of the license. Business sales involve one of two types: either sale of stock (or the equivalent) or sale of assets.

Response: This comment is accepted. The Initial Statement of Reasons notes the following in regards to this provision: "It should be noted that this provision is not intended to prohibit the sale of the assets of the business, such as gaming tables, equipment, or any real property; it is intended to prevent the future operation of the business as a cardroom licensed by the state."

The intent expressed in the Initial Statement is not clear in the language of text; therefore, this provision has been deleted.

8) Section 12348, subsection (a)

a. David Fried, attorney, on behalf of the Oaks Card Club and the California Grand Casino: The suggestion that we simply throw open all the expired licenses to the public or local government is without merit.

Response: This comment is accepted. This comment expresses support for the Commission's rejection of one possible interpretation of Business and Professions Code section 19963.

b. Fried: The regulation should be clear that the applicant must be the last owner of "the" gambling establishment, not "a" gambling establishment. The application should be for the same business.

Response: This comment is accepted. Clarifying language was included as part of the 15-day proposed modified changes.

c. John Lam, Assistant City Attorney, City of Bell Gardens: The proposed regulation is inconsistent with and in direct conflict with the moratorium. The moratorium prohibits the issuance of new licenses and the reactivation of a surrendered or abandoned right is the legal equivalent of issuing a new license.

Response: This comment is rejected. The moratorium in no way prohibits the issuance of new licenses; in fact, the Commission routinely issues new licenses when a cardroom is purchased. Because a state gambling license cannot be transferred or sold,⁶ when a new owner purchases a cardroom, a new license is issued to that person.

⁶ Business and Professions Code section 19871

The moratorium prohibits the Commission from issuing a license to operate a gambling establishment, unless that establishment was licensed to operate as of December 31, 1999, or the owner had an application on file prior to September 1, 2000. The regulation would allow the Commission to renew a license to operate a gambling establishment that meets the requirements of section 19963.

The Commission also notes that other provisions of the Act anticipate that licenses may expire and not result in an ability of the existing owner of the cardroom to apply for renewal of that license. Section 19876, which deals with renewal, anticipates expiration (non-renewal) and gives the Commission several options, including allowing the license to be renewed. Subdivision (d) provides that an owner-licensee who continues to operate a cardroom after expiration of the existing license “is liable to the state for all license fees and penalties that would have been due upon renewal.” Subdivision (e) provides: “If an owner fails to renew the gambling license as provided in this chapter, the commission may order the immediate closure of the premises and a cessation of all gambling activity therein until the license is renewed.” Section 19877 provides that the commission may deem the failure to renew a license a surrender of the license. Section 19879 provides for the sale of an interest in a gambling establishment upon license denial.

d. Lam: The proposed regulations are inconsistent with and in direct conflict with the moratorium and are therefore invalid and unenforceable. Whether a regulation is consistent with the statute authorizing its adoption depends on whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. If a regulation is not within the scope of authority conferred, it is void.

Response: This comment is rejected. The Commission is vested with very broad rulemaking authority. Because Business and Professions Code section 19963 is silent on many issues, the Commission is well within its authority under the Administrative Procedures Act and the Gambling Control Act to provide an interpretation of the statute.

Government Code section 11342.2 provides that a regulation is valid if not in conflict with the statute being implemented and if reasonably necessary to carry out the purposes of the statute being implemented. An Office of Administrative Law regulation, Title 1 CCR Section 14(a)(2) includes in an agency’s authority to adopt a regulation any “statutory power that grants a power to the agency which impliedly permits or obligates an agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.” (Emphasis added.) Explicit statutory authority is not required in order for an agency to adopt regulations, as long as the regulations are not in conflict with the statute and are reasonably necessary to carry out the purposes of the statute.

When considering the limitations of the “moratorium” provisions of the Gambling Control Act, it is important to view the application of those provisions in their full statutory context. As the Third District Court of Appeal has indicated, the language of a statute should be read “in light of the nature and purpose of the statutory scheme.” (*Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365,

1375.) In determining the meaning and application of section 19963, it is of paramount importance to carefully read the language of the statute. Nothing in section 19963 requires as a prerequisite for issuance of a license to operate a gambling establishment that the license be current and not expired. What is required is that the establishment had been licensed to operate on December 31, 1999 or had an application for licensure on file prior to September 1, 2000.

e. Lam: The primary focus of the moratorium is to limit the expansion of gambling. In order to do so, section 19963 establishes a baseline for the total number of cardrooms allowed. Once a license is surrendered or abandoned, the total number of gambling enterprises allowed decreases. No new license may be issued to any entity.

Response: This comment is rejected. This is just one interpretation of section 19963. The Commission considered this interpretation during the lengthy informal comment periods that preceded the formal rulemaking process, and rejected it for reasons detailed in the Initial Statement of Reasons. Nothing in the statute suggests that the Legislature intended a gradual but inevitable decline in the number of gambling establishments in local jurisdictions. Neither the condition or existence of the physical premises, nor the current status of the license determines whether an applicant was the last license holder of a gambling establishment originally licensed within the parameters of section 19963.

f. Lam: The Commission's argument that a blanket reactivation would retroactively assign a legal consequence that was not in effect at the time of surrender is unpersuasive and inaccurate. The general law relating to the legal abandonment of a vested right was well settled at the time of the effective date of the Moratorium. Therefore, such legal consequence is equitable and enforceable.

Response: This comment is rejected. The Commission is not asserting that the individuals with expired or surrendered licenses can reactivate a vested right, as the Act explicitly states no vested right is attached to a gambling license. However, because no specific consequences of surrendering or failing to renew a license were clearly in place at the time the action was taken, in the interest of fairness, the Commission has made a policy decision to allow for a very small window of time in which a person can submit an application to reactivate the license.

g. Harlan Goodson, attorney, on behalf of Mr. Tom Farrage: Sections 19963 and 19962 must be read together to understand intent of 19963. Expansion of gambling is not tied to the person or persons licensed to operate the establishment. The moratorium should be read to establish a baseline number of cardrooms authorized to operate.

Response: This comment is rejected. This interpretation of section 19963 was considered by the Commission during the lengthy informal comment periods that preceded the formal rulemaking process, and rejected for reasons detailed in the Initial Statement of Reasons. The statute does not mention a "baseline number of cardrooms," but simply focuses on the status of the license associated with a gambling establishment on a specified date to determine whether the Commission may grant that establishment a

license. While the numerous other statutory factors also come into play, the status of the license on the operative dates specified in section 19963 is a necessary prerequisite. The notion of a “baseline number” has no basis in the statute.

h. Goodson: Limiting the ability to reopen to the original licensee effectively alters what constitutes an expansion of gambling by tying expansion to the “original licensee” and therefore misinterprets the intent of section 19963 which was to establish a base-line number of gambling establishments authorized as of a date certain without placing limitations on ownership or operation.

Response: This comment is rejected. Business and Professions Code section 19961 defines “expansion of gambling” for the purposes of Article 13 of the Act, which includes section 19963. Section 19961 defines “expansion of gambling” as *a change in local gambling ordinance* that results in one of the following:

- (1) An increase of 25 percent or more in the number of gambling tables in the city, county, or city and county.
- (2) An increase of 25 percent or more in the number of licensed card rooms in the city, county, or city and county.
- (3) An increase of 25 percent or more in the number of gambling tables that may be operated in a gambling establishment in the city, county, or city and county.
- (4) The authorization of any additional form of gambling, other than card games, that may be legally played in this state, to be played at a gambling establishment in the city, county, or city and county.
- (5) An increase of 25 percent or more in the hours of operation of a gambling establishment in the city, county, or city and county.

The definition of expansion of gambling is directed solely at local gambling ordinances, not actions by the Commission. Limiting the reactivation of a license to the last licensed owner of a cardroom has no effect on the definition of expansion of gambling.

The proposed regulation is based on a reasonable interpretation of the statute. The fact that other interpretations may exist does not detract from the reasonableness of the Commission’s interpretation as reflected in the proposed regulation, or from the Commission’s discretionary authority to make such an interpretation. The Commission considered alternate interpretations and rejected them during the lengthy informal comment periods that preceded the rulemaking process.

i. Goodson: The authorization of controlled gambling is a matter of local jurisdiction. Local governments and voters have primary authority to authorize or expand gambling.

Response: This comment is rejected. The Act does place some authority to authorize gambling with local governments and voters. However, the moratorium provisions of sections 19962 and 19963 have overridden the ability of local governments to authorize additional gambling in their jurisdictions. The language of section 19963 clearly prohibits the Commission from granting a license to a gambling establishment which

does not meet the requirements set forth in that section. While other sections pertain to local authority, this section focuses squarely on the Commission and its authority to grant a state gambling license.

j. Goodson: The determination as to who owns or operates a cardroom is a matter of local control. The Commission only has the authority to determine suitability of an individual selected by the local government. This regulation puts the Commission in the shoes of local government to effectively “choose” who may apply to reopen a closed cardroom.

Response: This comment is rejected. The comment does not cite to any statutory language for support of this concept. A fair reading of the statute demonstrates that authority is distributed between state and local governmental entities. Consistent with this allocation of authority and responsibility, the proposed regulation mandates that applicants demonstrate local approval of their submission. However, while local governments have the discretion within their pertinent ordinance to deny an applicant, the Act provides no authority or mechanism requiring a local government to select a candidate to open a cardroom. Furthermore, Business and Professions Code section 19964 prohibits a local government from issuing a gambling license to any person unless that person holds a state gambling license issued by the Commission, clearly establishing the Commission’s primary authority to determine who operates a cardroom.

k. Goodson: This regulation fails to acknowledge that the local government retains the statutory authority to authorize the reopening of a cardroom without violating the moratorium.

Response: This comment is rejected. It is unclear to what authority the commenter is referring. The Act provides no authority for a local government to authorize the reopening of a cardroom in a manner which otherwise conflicts with the specific provisions of sections 19960 through 19963.

l. Goodson: The regulation ignores the precedent set by the Outpost case (in which a bankruptcy court declared a specified individual the successor in interest to the previous owner of the cardroom). Mr. Farrage is the successor in interest to the Cibola Club and should be treated in the same manner as the successor in interest to the Outpost Casino.

Response: This comment is rejected. The proposed regulation is not inconsistent with the manner in which the Commission resolved licensure issues related to the cardroom formerly known as “Outpost Casino.” The “Outpost” matter involved a gambling establishment which had an active license when the owner, Mark Luciano (Luciano) entered the bankruptcy process. The Commission addressed five specific issues and resolved them in the following manner: (1) Luciano had a license when he filed for bankruptcy; (2) Luciano’s license became part of the bankruptcy estate; (3) The automatic stay mandated by federal bankruptcy law stayed actions of the Commission; the police powers exception did not apply, therefore, Commission actions taken after the bankruptcy filing did not have the effect of terminating Luciano’s license; (4) A business license can become part of a bankruptcy estate; and, (5) the Bankruptcy Court, in approving the sale of the license, was careful to recognize the authority of the

Commission to grant or deny the application for a license, based on state law considerations. That case was handled like so many others in which an ownership interest in a gambling enterprise was transferred. The transfer of interest, which permits the entity with that interest to apply for a license, was accomplished in this case by a federal bankruptcy court while the license was active.

The case cited by the commenter regarding Mr. Tom Farrage and the Cibola Club is easily distinguishable from the “Outpost” case in that the license for the Cibola Club is not active and was not active when an application for a license or approval of a transfer of interest was before the Commission. The fact that the license is not now active does not mean that the Commission may not consider an application under the proposed regulation from the last licensee. However, it does limit the relevance of the “Outpost” case to the Cibola Club.

m. Goodson: The regulation should be amended to allow either a “person or entity approved by the local government” or “a successor-in-interest to the original licensee” as persons permitted to apply to reactivate a license.

Response: This comment is rejected. Allowing an heir or other successor in interest to apply for licensure was considered during the lengthy informal comment periods and ultimately rejected by the Commission. The Commission determined that, in the interest of fairness, the last holder of the license would be eligible to apply to reactivate the license because the consequences of surrendering or allowing a license to expire were not explicit at the time. As discussed in the Initial Statement of Reasons, the Commission has interpreted the moratorium provision of Business and Professions Code section 19963 to mean that the commission may not issue a gambling license for a gambling *enterprise* that was not licensed as of the required dates. An heir or other successor in interest is not the same as the previously licensed gambling enterprise.

A “person or entity approved by the local government” was also considered and rejected by the Commission during the informal comment period. The proposed regulation allows holders of licenses a small window of time in which to reactivate. It would be inconsistent with the policy of the Commission, as stated in the Initial Statement of Reasons and put forth in this proposal, to allow *any* person to apply for a license to which he or she has no previous connection.

n. Lam: The moratorium does not allow the Commission to issue or reactivate the gambling licenses of “qualified enterprises” (those establishments licensed as of December 31, 1999, or those having an application on file with the department as of September 1, 2000) for an indefinite period of time after the license has been surrendered or abandoned.

Response: This comment is rejected. Nothing in section 19963 requires as a prerequisite for issuance of a license to operate a gambling establishment that the license be current and not expired. What is required is that the establishment had been licensed to operate on December 31, 1999 or had an application for licensure on file prior to September 1, 2000. However, the language cannot be taken absolutely literally for the

simple reason that owners, not gambling establishments, are licensed. To give effect to the statute, we suggest that it must be read to mean that the commission may issue a license to operate a gambling establishment if that gambling establishment had an owner-licensee who was licensed or had a license application on file by the operative dates.

The Commission also notes that other provisions of the Act anticipate that licenses may expire and not result in an inability of the existing owner of the cardroom to apply for renewal of that license. Section 19876, which deals with license renewal, anticipates expiration (non-renewal) and gives the Commission several options, including allowing the license to be renewed. Subdivision (d) provides that an owner-licensee who continues to operate a cardroom after expiration of the existing license “is liable to the state for all license fees and penalties that would have been due upon renewal.” Subdivision (e) provides: “If an owner fails to renew the gambling license as provided in this chapter, the commission may order the immediate closure of the premises and a cessation of all gambling activity therein until the license is renewed.” Section 19877 provides that the commission may deem the failure to renew a license a surrender of the license. Section 19879 provides for the sale of an interest in a gambling establishment upon license denial

o. Lam: Once surrendered or abandoned, the vested right is permanently lost and the Commission does not have the express or implied authority to enact regulations which would reactivate the vested right. The proposed regulations are inconsistent with legal precedent. Case law rejects the argument that a surrendered or abandoned right may be renewed or reactivated once it has been abandoned.

Response: This comment is rejected. The Gambling Control Act⁷ specifically states that the holder of a gambling license acquires no vested right. In promulgating this regulation, the Commission is not permitting a former license holder to assert any vested right to the licenses. Rather, the Commission is attempting to address a long-standing situation regarding the status of abandoned, surrendered, or expired license. In order to do so legally, without retroactively assigning consequences to a prior action taken, the Commission must allow a small window of time in which former license holders may reactivate their license. Once that window of time passes, the Commission is assigning consequences prospectively to the actions of surrendering or abandoning a license.

The Act does not define a circumstance when a license is abandoned. In fact, the term is not used in the Act. One of the primary objectives of the regulation is to fill this statutory void in a manner that is consistent with the specific provisions of the Act and the pertinent principles of administrative law. The commenter’s argument is based on the premise that a right was “legally abandoned” without referencing anything in the statute or an existing regulation which establishes abandonment.

Additionally, none of the cases cited by the commenter support the argument that the proposed regulation is prohibited by law. The cited cases simply support the proposition that the Commission has a legal basis to deny an application to reactivate a license.

⁷ Business and Professions Code section 19801(k)

p. Lam: The fact that the Commission is allowed to order the closure of a gambling enterprise if the license holder fails to renew the license, or to order the cessation of gambling activities if the license is not renewed, does not confer the broad, sweeping authority to reactivate a gambling license which has been surrendered or abandoned by the original holder now being asserted.

Response: This comment is rejected. The Commission is not asserting any authority based on the fact that it can order the closure of the gambling establishment or the cessation of gambling activities. The authority asserted by the Commission is based upon the phrase “*until the license is renewed.*”⁸ The statute allows for late renewal, and that renewal is not statutorily limited in any way.

q. Lam: The Commission believes it has implied authority to reactivate any gambling license whether expired, lapsed, surrendered, or abandoned for any period of time, provided that the license was issued to a "qualified enterprise." Such interpretation is in conflict with the moratorium by substantially enlarging the scope of the Commission's authority under the Act.

Response: This comment is rejected. The moratorium restricts the Commission's authority in one way only; it limits to whom the Commission may issue a license. Pursuant to the moratorium, the Commission may only issue a license to operate a gambling establishment if that gambling establishment had a licensed owner as of December 31, 1999, or an owner with an application on file prior to September 1, 2000. The Commission's authority to reactivate or renew an expired gambling license comes from the following sources:

- Business and Professions Code section 19811: “Jurisdiction, including jurisdiction over operation and concentration, and supervision over gambling establishments in this state and over all persons or things having to do with the operations of gambling establishments is vested in the Commission.”
- Business and Professions Code section 19824: “The Commission shall have all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes of this chapter...”
- Business and Professions Code 19841(c): The Commission shall adopt regulations to “implement the provisions of this chapter relating to licensing and approvals.”
- Business and Professions Code 19876(e): “If an owner licensee fails to renew the gambling license as provided in this chapter, the Commission may order the immediate closure of the premises and a cessation of all gambling activity therein *until the license is renewed.*” (emphasis added)

⁸ Business and Professions Code section 19876

The Commission has very broad authority to implement and interpret the Act. This regulation in no way expands the Commission's authority beyond that already provided by the Legislature.

r. Lam: The more reasonable interpretation is that the Commission's implied authority to renew or reactivate an expired or lapsed license extends only to those licenses which have not been surrendered or abandoned by its holder and where the holder retains a vested right in the lapsed or expired license. This would occur where the gambling license has expired or lapsed for a reasonable duration, which would not evidence the intent to abandon or is not voluntarily surrendered.

Response: This comment is rejected. The interpretation that the Commission may only renew or reactivate a license which has not been surrendered or abandoned may indeed be a reasonable one. However, it is not the *only* reasonable interpretation. The interpretation made by the Commission, that for a short period of time, an expired or surrendered license may be renewed or reactivated, is also reasonable and well within the Commission's authority under the Gambling Control Act.

However, it should be noted that although the Commission is not limiting reactivation to just those situations under which no evidence of the intent to abandon or to voluntarily surrender the license exists, the circumstances under which the license became inactive will be taken into consideration by the Commission when deciding whether or not to grant reactivation of the license.

s. Lam: The Commission's authority to reissue or renew an expired or lapsed license should be limited to cases where cessation of gambling activity resulted from direct Commission action to stop gambling activity, not where cessation is the result of the voluntary acts of the license holder evidencing an intent to abandon the vested right.

Response: This comment is rejected. Regardless of whether or not the Commission's authority to renew or reissue an expired or lapsed *should* be limited to only those cases described by the commenter, under the Act in its current form, our authority is not limited to just those cases. At this time, the Commission has seen no reason to restrict its authority and discretion in the manner described by the commenter.

t. Lam: The proposed regulations would be inequitable to existing gambling enterprises. These cardrooms have endured and survived the worst economic recession since the Great Depression. Those that remained in good standing would be subject to greater competition. Such a result is inequitable and provides an unfair advantage to those establishments allowed to reactivate long abandoned gambling licenses.

Response: This comment is rejected. The proposed regulation explicitly requires the Commission to take into account the potential economic impact on neighboring cardrooms. The Commission would be well within its authority to deny a reactivation of a license if the reopening of the cardroom would cause economic harm to existing gambling establishments. It should also be noted that some gambling establishments that

may be eligible for reopening under this proposed regulation may be located in jurisdictions in which there are no competing cardrooms.

u(1). Lam: In order to be considered consistent, lawful, and enforceable, the applicability must be narrowed to those enterprises which have not abandoned or otherwise surrendered their gambling license. Each license holder wishing to reactivate a license should be required to go before the Commission at a public hearing and demonstrate facts showing the license was not legally surrendered or abandoned. The Commission should be required to make finding supported by substantial evidence showing that the holder did not legally surrender or abandon the license. Only if the license was not legally abandoned, then renewal may be permitted.

u(2). Fried: In cases in which the owner voluntarily surrendered or chose not to renew, no new license should be issued. The owner voluntarily relinquished their license, without an expectation or vested legal right to receive a new license. Granting these persons a license would violate the Act. The regulations should be amended to include: "Persons who voluntarily surrendered or did not renew their prior license, absent extenuating circumstances, are not entitled to a re-issued or new license."

u(3). Titus: The regulation is inconsistent with expectations of the parties. When former license holders surrendered their licenses or allowed them to expire, they understood they retained no rights to the license. They have no expectation to a right to reactivate their license.

Response: These comments are rejected. To state that a license holder who voluntarily surrendered or abandoned the license will now be subject to consequences that did not exist at the time of the surrender or abandonment would inappropriately and illegally retroactively assign consequences to a previous action. The Commission cannot know what was in the minds of individuals that surrendered the license, and it is not reasonable to assume that each person understood that his or her ability to operate a cardroom was permanently revoked. This regulation provides a small window of time in which we will allow the former license holders to attempt to reactivate the license, with the knowledge that if he or she fails to do so, the ability to operate a cardroom is unavailable as long as the moratorium remains in effect. Furthermore, the circumstances under which the license became inactive will be taken into consideration by the Commission when deciding whether or not to grant reactivation of the license.

v(1). Mark Kelegian, President, Crystal Casino and Oceans 11 Casino: The proposed regulation should be amended to exclude renewal of any license that has been denied or revoked by the Commission.

v(2). Joy Harn, Vice President and General Counsel, The Bicycle Casino: Permitting individual licenses or gambling establishments whose licenses were properly denied, revoked, or otherwise disciplined to now re-apply for a new license or seek to renew their license only encourages those licenses to circumvent the long-standing provisions of the Act. If this were allowed, any licensee whose license was denied or revoked or who intentionally or carelessly failed to petition the Superior Court will now be awarded a "second bite at the apple." The

proposed language should be amended to exclude the opportunity for renewal of any license that has been denied or revoked by an order of the Commission.

Response: These comments are rejected. The regulation is limited *only* to licenses that were surrendered or expired without being renewed. Licenses that were denied or revoked are not eligible for reactivation under this proposed regulation.

w. Titus: The proposed regulation is inconsistent with the Act. Business and Professions Code section 19876 limits the term and provides for renewals every two years; section 19873 prohibits transfers; section 19963 imposes moratorium on new licenses. These provisions combine to prohibit licensing of a new operation by calling it "reinstatement" of the former license of a closed facility.

Response: This comment is rejected. Nothing in this proposed regulation is inconsistent with the Commission's authority under the Act. As previously mentioned, the Commission's authority to reactivate or renew an expired gambling license comes from the following sources:

- Business and Professions Code section 19811: "Jurisdiction, including jurisdiction over operation and concentration, and supervision over gambling establishments in this state and over all persons or things having to do with the operations of gambling establishments is vested in the Commission."
- Business and Professions Code section 19824: "The Commission shall have all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes of this chapter..."
- Business and Professions Code 19841(c): The Commission shall adopt regulations to "implement the provisions of this chapter relating to licensing and approvals."
- Business and Professions Code 19876(e): "If an owner licensee fails to renew the gambling license as provided in this chapter, the Commission may order the immediate closure of the premises and a cessation of all gambling activity therein *until the license is renewed.*" (emphasis added)

The Commission has very broad authority to implement and interpret the Act. Although section 19876 sets the term for a license at two years, subdivision (e) permits the Commission to renew a license past the expiration date. Section 19873 does indeed prohibit the transfer of a license; the proposed regulation limits who may seek the reactivation or renewal of an expired license to the last license holder – no license transfer is involved. Section 19963 institutes a moratorium on the creation of new cardrooms; it is not a moratorium on the issuance of new licenses. The Commission routinely issues new licenses when an existing cardroom is purchased. Nothing in section 19963, or any other section of the Act, requires as a prerequisite for issuance of a license to operate a gambling establishment that the license be current and not expired.

The sole requirement imposed by section 19963 is that a license was in effect for that gambling establishment as of December 31, 1999, or a license application was on file prior to September 1, 2000.

x. Titus: Some California licensing acts allow for reinstatement of expired licenses and others allow for inactivation and reactivation of licenses. The Legislature specifies when certain licenses can be renewed late or when expired licenses can be reinstated. There are at least 45 licensing programs in the B&P Code that allow for renewal or reinstatement of expired licenses and at least 13 instances in the B&P Code where the Legislature has explicitly provided for inactivation of licenses. The Legislature did not authorize either a renewal or reinstatement in this Act. A reinstatement or reactivation of a license can only be allowed if the Legislature explicitly authorizes reinstatement. Without specific authorization to allow reinstatement or reactivation, once a license expires, an owner would have to apply for a new license. Allowing the renewal of a license which was long ago surrendered or expired would violate the licensing provisions and would constitute issuance of a new license in violation of 19963.

Response: This comment is rejected. The authority granted to the Commission by Business and Professions Code section 19824 is very broad, authorizing the Commission to exercise “all powers *necessary and proper* to enable it fully and effectually to carry out the policies and purposes of this chapter...” (emphasis added). This is significantly broader authority than is provided to other licensing boards and commissions, and allows the Commission to implement programs not specifically enumerated in the Act. The fact that other licensing entities have specific statutory authority regarding inactive licenses in no way diminishes the Commission’s authority to implement regulations allowing reactivation of expired licenses or other programs related to late renewals or expired licenses under its broad statutory authority to “carry out the policies and purposes” of the Act.

Further, nothing in the Act supports the position that once a license has expired, a person would need to apply for a new license. As previously mentioned on several occasions, the Act impliedly permits late renewals, which provides the Commission sufficient authorization to adopt the regulation as proposed.

y. Titus: It is very clear that once a cardroom closes and goes out of business, any attempt to “revive” the business is really an attempt to open a new business. The only time a new business could be considered a “reopening” would be if it was owned by the same owners (not just entity, but shareholders, partners, etc.) under the same name, in the same location, and with no additional tables. Any changes would mean a new business. This regulation allows “reinstatement” but little continuity with the former operation is required. The license could be reactivated by new shareholders, in a new facility at a new location with a new name and new employees, and more tables. That would not be a continuing operation. The proposed regulation requires reactivation by the “last licensed owner” but in the case of a corporate licensee or other business entity, the shareholders need not be the same.

Response: This comment is rejected. The regulation requires that the applicant to renew the license be the last holder of the license. The majority of the licenses under discussion

in this regulation were held by sole proprietors. Approximately 10 licenses were held by entities other than a sole proprietor. In these cases, the Commission will consider, pursuant to Section 12348(c)(3) of the proposed regulation, any changes in the legal status or composition of the licensed entity in order to determine, on a case-by-case basis, whether the applicant can be considered “the last licensed owner.”

According to Commission records, there are seven corporations that owned now-closed cardrooms. Four of these corporations were held by one shareholder; one had two shareholders; one had three shareholders; and one had an unknown number of shareholders. To the extent that any of these corporate entities apply to renew their gambling license, the Commission will determine whether they are, in fact, the same entity that previously held the license.

In addition, the suggestion that a cardroom must reopen under the same name, in the same location, and with no additional tables in order to be considered the same cardroom is contrary to long-standing Commission practice. The Commission has always allowed gambling establishments to change locations within the same jurisdiction, change the business name, and add or reduce tables within the boundaries set by the Act and the applicable local ordinance. To accept the argument that an establishment would be considered a “new cardroom” if it changed locations, changed its name, or added or decreased tables, would be to prohibit currently operating cardrooms from doing any of these things as well.

z. Titus: Business and Professions Code section 19963 was intended to prevent exactly this type of expansion of gaming, as can be seen in the historical context.

Response: This comment is rejected. The proposed regulation would not provide an expansion in gambling over that which is allowed by section 19963. Nothing in the statute suggests that the Legislature intended a gradual but inevitable decline in the number of gambling establishments in local jurisdictions.

aa. Titus: The regulation creates internal inconsistency in the statute. Licenses of cardrooms closed during or before 1999 could not be reactivated, but licenses of cardrooms closed after 1999 could be. The difference would be based on an arbitrary date.

Response: This comment is rejected. The Legislature established a boundary in Business and Professions Code section 19963. The Commission is obligated by law to abide by this boundary. For the Commission’s purposes, the difference is not arbitrary, but rather based upon a specific statutory requirement.

bb. Titus: The proposed regulation violates the intent of AB 1416, as demonstrated by the enclosed letter from Senator Perata to Governor Davis dated April 13, 2000. Clearly, the moratorium was intended to apply to what was then called “dormant” cardroom licenses and what is today called “expired” licenses. Activation of a dormant license was equated with opening a new cardroom.

Response: This comment is rejected. The letter referenced by this commenter was sent in April 2000 from Senator Perata, Chair of the Governmental Organization Committee to Governor Davis. The letter described “three levels of legislative/executive action which will assist the cardroom industry to survive and compete in the changed gaming environment in California.” Level 1 priorities were those considered necessary to keep the industry alive; Level 2 priorities were needed for cardrooms to effectively compete in the short term; and Level 3 priorities were those needed to ensure long term stability and competitiveness.

Extension of the moratorium was considered a Level 2 priority. In regard to the moratorium, the letter reads:

“Many of the cardrooms believe that the card player market is finite and will not sustain the addition of new cardrooms. They believe that new cardrooms will result in all cardrooms losing revenue and in some cardrooms losing economic viability. They believe that a moratorium should be placed on new cardrooms or the activation of dormant licenses. This would be a restriction on, rather than an expansion of gaming in California, and would be consistent with your desire to restrict the expansion of gaming in the State.”

The letter does not specifically mention AB 1416 in regard to the imposition of a moratorium on new gambling establishments. AB 1416 is mentioned only in the context of the creation of a player-dealer position, an issue considered by Senator Perata to be of Level 1 priority.

If we accept that this letter is an attempt to solicit support from the Governor on AB 1416 specifically in regards to the moratorium on new cardrooms, and not merely a wish list from an industry interested in protecting its monopoly, it is worth noting that, at the time the letter was written, AB 1416 included a moratorium that was set to expire January 1, 2006 (it was later amended to expire January 1, 2007). In conjunction with the statement that the moratorium was needed to ensure viability of cardrooms *in the short term*, it can be argued that AB 1416 never intended the moratorium to be continually extended, as has happened in practice. To say that this regulation violates the intent of AB 1416 would then be inaccurate, as AB 1416 intended the moratorium on new cardrooms to be a short term measure.

Furthermore, although Senator Perata may have interpreted that the reactivation of dormant licenses was equivalent to the opening of a new cardroom, the intent of the legislation to equate the two is not evident. The language of section 19963 does not equate the two circumstances. The letter does not express or constitute an expression of legislative intent or finding. The actual legislative history of the bill, specifically the committee and floor analyses that were available to legislators voting on the bill, never mentions the imposed moratorium, other than a brief summary. The analyses contain no information about the intent, purpose, or expected consequences of implementing a moratorium. No other actual legislative history (e.g., a letter to the Daily Journal) exists. This has left the Commission without direction from the Legislature as to the

interpretation of an unclear statute. Without such direction, the Commission must rely on its own authority and discretion to implement the provisions of the moratorium. The interpretation chosen by the Commission – that although the establishment of a new cardroom is prohibited by law, the moratorium does not speak to the renewal of an expired or surrendered license – is not contradicted by the moratorium provision or any other provision of the Act.

9) Section 12348, subsection (b)

a. Fried: The regulation allows the Commission to take into account the circumstances under which the prior license was surrendered or failed to be renewed, but it does not require the circumstances meet any test or standard. The Commission cannot deny a license for someone on the basis of a "circumstance" when the regulation does not make the circumstance a requirement. Without a test or standard defining why the circumstances of the prior surrender or lapse of the license matter, a Commission decision denying a license or granting a license for lack of extenuating circumstances will be subject to legal attack as arbitrary. An applicant may also attack a decision denying the license as the product of an underground regulation.

Response: This comment is rejected. The Commission has extremely broad authority to determine the suitability of an applicant to hold a gambling license. The circumstances under which the license was surrendered or expired will be given the same consideration as any other information provided to the Commission as a result of the background information, chiefly in regards to determining whether the applicant is a person of good character, honesty, and integrity, as provided for in Business and Professions Code section 19857.

In the Act, the Commission is granted the authority to make determinations as to whether an applicant is a person of good character, honesty, and integrity. The Commission makes these determinations on a case-by-case basis, given the totality of the application presented to it. The Act provides no guidance as to how these qualities shall be determined, and leaves the determination wholly up to the Commission's discretion. The consideration of the circumstances surrounding the surrender or expiration of the prior license will be considered in the same manner as all other information presented as a result of the background investigation.

b. Titus: There is an inconsistency with the language. (b)(4) and (6) refer to "reopening of the gambling establishment" and subsection (c) refers to "reactivation of the license." The ISOR also uses this terminology interchangeably. The regulations do not provide for inactivation of a license, so "reactivation" makes no sense. "Reopening the gambling establishment" is inappropriate unless the actual facility is being reopened.

Response: This comment is rejected. The terms are not used interchangeably in the text; the two terms are used to express two different concepts. The Commission action will be to reactivate the license; the reopening of the cardroom is a result of the Commission action, not the direct action by the Commission. Therefore, the use of the phrase "reactivation of the license" in subsection (c) is appropriate. Furthermore, the Commission's concern regarding the local government officials is that they approve the

reopening of the cardroom, hence the requirement in subsection (b) that the chief legal officer of the jurisdiction and the local governing body provide evidence in support of the “reopening of the gambling establishment.”

10) Section 12348, subsection (f)

a. Titus: Subsection (f) refers to paragraph (4) of subsection (a). No paragraph (4) exists.

Response: This comment is accepted. This drafting error was changed accordingly in the 15-day modified text.

11) General

a. Ross and Ramirez: The City of American Canyon requests that the Commission use its rulemaking authority to require cardrooms to provide 60 days notice of closure to the local jurisdiction.

Response: This comment is rejected. The request made by these commenters is outside of the bounds of this proposed action. This proposed action provides a process for surrendering a gambling license, defines an abandonment of a gambling license, sets the consequences for surrendering or abandoning a gambling license, and provides for the reactivation of specific gambling licenses. Including a requirement that cardrooms provide 60 days notice of closure to the local jurisdiction goes beyond the scope of the Notice of Proposed Action, and is not a requirement that could have been reasonably foreseeable based upon that Notice.

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

B) Commission Hearing August 24, 2010

The following comments/objections/recommendations were made orally at the August 24, 2010, Commission hearing regarding the proposed action:

- 1. Alan Titus, Robb & Ross – representing Artichoke Joe’s:** Regarding Section 12002 – the definition of “surrender” is inconsistent with the statute. The statute doesn’t preclude what the regulation does, but a definition should include the possibility of an involuntary surrender.

Response: This comment is rejected. There is no need to include “involuntary surrender” in the definition of “surrender.” For the purposes of the regulation, “surrender” is a voluntary action for which the consequences are specified in the proposed regulation. If the Commission deems a license surrendered under the statute, it will be viewed in the same manner as a voluntary surrender. The need to legally distinguish between the two is unclear. The consequences of a license surrender – whether “voluntary” or “deemed” – are the same.

2. **Rod Blonien:** Regarding Section 12345 - Assemblymember Portantino has authored a bill, AB 2596, to allow the Commission to assess a fee if an application is submitted late. The Commission may wish to postpone final action on the proposed regulation in order to incorporate provisions of that bill.

Response: This comment is rejected. AB 2596 would give the Commission authority to set a late fee, by regulation, of up to 300% of the regular application fee. Nothing in the bill precludes or is in conflict with the proposed action. To the extent the bill becomes law, the Commission will promulgate regulations as may be necessary to implement it. There is no need to delay this regulatory action to accommodate legislation not yet enacted.

3. **Titus:** Regarding Section 12435(e) – the regulation allows the Bureau to submit a recommendation with their report, but the statute *requires* the Bureau to submit a recommendation.

Response: This comment is rejected. It is not relevant to the proposed action. The comment is in regards to an existing regulation that is not included in the proposed action.

4. **Blonien:** Regarding Section 12347 – the word “agendize” is used, but this term may not be a word.

Response: This comment is rejected. “Agendize” is a widely used term of art commonly understood to mean “to place an item on an agenda for consideration.”

5. **Blonien:** Regarding Section 12348 – there should be something in this section that would absolutely preclude someone who has been convicted of a felony and surrendered their license from applying. There is nothing that knocks them out altogether. Although there are other provisions of the Act that say if you are a convicted felon, you cannot be licensed, there should be something in the regulation that prevents people from going through all of the steps, only to realize they cannot be licensed.

Response: This comment is rejected. The Act absolutely precludes any individual with a felony conviction from holding a state gambling license. The burden is on the applicant to understand the minimum qualifications for holding a license. Applicants for reactivation are subject to all of the provisions and procedures under the Act that apply to any applicant for a state gambling license. It would be unnecessarily duplicative to include all of those requirements in the regulation.

6. **Blonien:** Regarding Section 12348 – There should be a consideration for those situations where someone has passed away and their family would like to reopen the cardroom.

Response: This comment is rejected. Allowing an heir or other successor in interest to apply for licensure was considered during the lengthy informal comment periods and ultimately rejected by the Commission. The Commission determined that, in the interest

of fairness, the last holder of the license would be eligible to apply to reactivate the license because the consequences of surrendering or allowing a license to expire were not explicit at the time. As discussed in the Initial Statement of Reasons, the Commission has interpreted the moratorium provision of Business and Professions Code section 19963 to mean that the commission may not issue a gambling license for a gambling *enterprise* that was not licensed as of the required dates. An heir is not the same as the previously licensed gambling enterprise. The Commission has long had procedures in place to transition from an owner licensee to the heir upon death, and there have been several instances in which such an action has occurred. The Commission is not responsible for an heir's failure to take advantage of this process, which would have been communicated to him or her at the time of the licensee's death.

- 7. Harlan Goodson, on behalf of Mr. Tom Farrage:** Regarding Section 12348 – by limiting the application to the prior owner, the Commission actually puts itself in the place where it is deciding who it is that will apply and who it is that will have a gambling establishment. The Commission is cutting off the local jurisdiction's ability to exercise the jurisdiction it has held for 160 years, to be the decider as to whether or not gaming will occur, and if it does, who it is that will conduct that gaming.

Response: This comment is rejected. As discussed previously, the Act does place some authority to authorize gambling with local governments and voters. However, the moratorium provisions of sections 19962 and 19963 have overridden the ability of local governments to authorize additional gambling in their jurisdictions. The language of section 19963 clearly prohibits the Commission from granting a license to a gambling establishment which does not meet the requirements set forth in that section. While other sections pertain to local authority, this section focuses squarely on the Commission and its authority to grant a state gambling license.

Furthermore, a fair reading of the entire Act demonstrates that authority is distributed between state and local governmental entities. Consistent with this allocation of authority and responsibility, the proposed regulation mandates that applicants demonstrate local approval of their submission. However, while local governments have the discretion within their pertinent ordinance to deny an applicant, the Gambling Control Act provides no authority or mechanism requiring a local government to select a candidate to open a cardroom. Furthermore, Business and Professions Code section 19964 prohibits a local government from issuing a gambling license to any person unless that person holds a state gambling license issued by the Commission, clearly establishing the Commission's primary authority to determine who operates a cardroom.

- 8. Goodson:** Regarding Section 12348 – The legislative intent of Business and Professions Code section 19963 was that there would be a finite number of cardrooms that could be operated at local discretion, subject to the approval of the Commission. That number could not go beyond the number that met the criteria established in AB 1416.

Response: This comment is rejected. As discussed previously, no expression of legislative intent regarding section 19963 exists. The statute does not specify a finite

number of cardrooms allowed to operate in the state, but simply focuses on the status of the license associated with a gambling establishment on specified date to determine whether the Commission may grant that establishment a license. While the numerous other statutory factors also come into play, the status of the license on the operative dates specified in section 19963 is a necessary prerequisite.

- 9. Tom Farrage:** Regarding Section 12348 – Request that the regulation be amended to include a successor in interest, or create an exception to the regulation allowing the reopening of a previously closed club when there is a downtown redevelopment project of historical importance with overwhelming local approval.

Response: This comment is rejected. As discussed under Comment 6 above, allowing an heir or other successor in interest to apply for licensure was considered during the lengthy informal comment periods and ultimately rejected by the Commission. The Commission determined that, in the interest of fairness, the last holder of the license would be eligible to apply to reactivate the license because the consequences of surrendering or allowing a license to expire were not explicit at the time. As discussed in the Initial Statement of Reasons, the Commission has interpreted the moratorium provision of Business and Professions Code section 19963 to mean that the commission may not issue a gambling license for a gambling *enterprise* that was not licensed as of the required dates. An heir, or other successor in interest, is not the same as the previously licensed gambling enterprise.

Furthermore, the Commission sees no reason to carve out special exemptions for specific types of projects. It is the Commission's responsibility to craft a policy that is applied fairly and equitably.

- 10. Farrage:** Regarding Section 12348 – request the Commission address the approximately 44 closed cardrooms on a case-by-case basis to ensure a fair and equitable outcome.

Response: This comment is rejected. Part of the Commission's rationale for promulgating these regulations is so that the regulated industry, the local jurisdictions, the Commission, and the Bureau can have some finality as to the status of the cardrooms that had a licensed owner as of December 31, 1999, or whose owner had an application on file prior to September 1, 2000, but are no longer in operation. Addressing the status of each cardroom on a case-by-case basis will stretch out the uncertainty regarding each club indefinitely.

Furthermore, the Commission has determined that there are certain criteria that will be imposed in each and every case; for example, approval from the local governing body and the local law enforcement official. In order to apply these criteria to all applications, the Commission must promulgate regulations. To do otherwise would constitute the use of an illegal underground regulation.

- 11. Titus:** Section 12348 – there is no authority to allow for reinstatement, the Act does not allow for this, and that your attempt to do so will exceed any powers you have.

Response: This comment is rejected. The authority granted to the Commission by Business and Professions Code section 19824 is very broad, authorizing the Commission to exercise “all powers *necessary and proper* to enable it fully and effectually to carry out the policies and purposes of this chapter...” (Emphasis added) As previously discussed, the Commission has implied authority to allow renewals past the expiration date of the license, which in this action has been termed a “reinstatement.”

12. Titus: Section 12348 – What is the definition of the “last holder of the license?” The regulation should be more developed to define what is meant by “last holder.”

Response: This comment is rejected. The “last holder of the license” means exactly that - the last person (whether a natural person or business entity) to whom the license was issued. Because of the myriad ways a business entity can be organized, it is not feasible to elucidate the exact definition of “last holder” for every conceivable type of business entity. The regulation requires the Commission to consider any changes in the legal status or composition of a business entity that may lead to the entity no longer being considered “the last holder of the license.” It will be up to the Commission’s discretion to determine, on a case-by-case basis, whether an applicant is, in fact, the last holder of the license.

12. David Fried, on behalf of Oaks Card Club and California Grand Casino: There are two statements in the staff report that are contradictory. First, that there is no vested right to a license; and second, if we didn’t allow the previous license holder to come in and apply, it would inappropriately and illegally assign retroactive consequences to a previous action. The fact is, there can be things that have retroactive consequences, but if you don’t have a vested right to something, it is not impermissible or illegal. It is only impermissible and illegal to have a retroactive regulation or law when you had a vested right to something.

Response: This comment is rejected. The Commission agrees with the commentator that, under the Act, a licensee does not have a vested right to a license.⁹ Furthermore, *Rosenblatt v. California State Board of Pharmacy* 69 Cal.App.2d 69, holds that “The general rule, established by the great weight of authority, appears to be that a license from the state issued in the exercise of its police power permitting the doing of that which without the license would be unlawful, is not a contract and does not convey a vested right.” *Rosenblatt*, 60 Cal.App.2d at 73-74.

The proposed regulation establishes a process by which an eligible applicant may submit an application for licensure. The Commission will consider the application and make a decision based on the information submitted by the applicant and in accordance with the factors specified in the regulation and the statutory standards set forth within the Gambling Control Act which are applicable to all licensure decisions. That the regulation determines who is eligible to apply and establishes a process where the Commission has the discretion to deny an application is consistent with the proposition that a prior licensee does not have a vested right to a license.

⁹ Business & Professions Code section 19801(k)

However, the issue of whether it is legally permissible to promulgate a retroactive regulation is somewhat more complex. Although the retroactive application of a law is not per se unlawful, it is generally disfavored absent, among other things, clear legislative intent. While it is true that “retroactive application of a new measure may conflict with constitutional principles if it deprives a person of a vested right without due process of law,” that is not the only circumstance under which a retroactive statute or regulation could be found unlawful.

In *Californians for Disability Rights v. Mervyn’s LLC*, 39 Cal.4th 223, the California Supreme Court explained the presumption in favor of prospective application of laws as emanating from the principle that “legislation must be considered as addressed to the future, not to the past.” *Mervyn’s*, 39 Cal.4th at 62.

“In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [citations omitted.] We consider the effect of a law on a party’s rights and liabilities.... Does the law ‘change the legal consequences of past conduct by imposing new or different liabilities based on such conduct [?]’ Does it substantially affect existing rights and obligations[?]” *Californians for Disability Rights v. Mervyn’s LLC* 39 Cal.4th 223 (2006)

The Court cited the following illustrative cases in which impermissible retroactivity was found involving statutes which would have “(a) expanded contractors’ tort liability for past conduct by imposing broader duties than existed under the common law (*Elsner, supra*, 34 Cal.4th 915, 937-938, 22 Cal.Rptr.3d 530, 102 P.3d 915); (b) subjected tobacco sellers to tort liability for acts performed at a time when they enjoyed the protection of an immunity statute (*Myers, supra*, 28 Cal.4th 828, 840, 123 Cal.Rptr.2d 40, 50 P.3d 751); and (c) subjected persons to increased punishment for past criminal conduct, or to punishment for past conduct not formerly defined as criminal (*Tapia, supra*, 53 Cal.3d 282, 297-299, 279 Cal.Rptr. 592, 807 P.2d 434). In each of these cases, application of the new law to pending cases would improperly have changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. (See *Elsner*, at p. 937, 22 Cal.Rptr.3d 530, 102 P.3d 915.)”

As these cases demonstrate, the focus of the court’s analysis is not limited to identifying the existence of a vested right. In *Sheyko v. Saenz*, 112 Cal.App.4th 675 (2003), the Third District Court of Appeals synthesized Supreme Court guidance in this area as follows:

“A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. [citations omitted] The test of retroactivity is whether [a statute] operates retroactively to materially alter the legal significance of a prior event... The problem is to discern the materiality of events with respect to the policy advanced by the presumption of prospectivity. The source of the presumption is the ‘general consensus that notice or warning of the rule should be given in advance of the actions whose effects are to be judged.’ [citation] Application ...

is retroactive only when it gives a different and potentially unfair legal effect to actions taken in reliance upon preenactment law.” *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 609

In the specific context of regulations, the California Supreme Court provided the following guidance on permissible and impermissible retroactivity:

“[E]ven if the rate regulations as to rollbacks might be deemed ‘retroactive,’ they cannot be deemed impermissibly so. ‘Primary retroactivity’ – to coin a phrase – obtains when regulations ‘alter ... the past legal consequences of past actions.’ [Citations.] That is not present here. ‘Secondary retroactivity’ occurs when regulations affect the future legal consequences of past transactions. That is indeed present. But, such secondary retroactivity is an entirely lawful consequence of much agency rulemaking and does not by itself render a rule invalid. [Citation.] That it is an ‘entirely lawful consequence’ means just that: it does not itself offend any law, including the United States and California Constitutions and their due process clauses.” *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216.

In the rule making context, primary retroactivity is impermissible; secondary retroactivity is not.

The proposed regulation does not have a primary retroactive impact on licensees by altering the past legal consequences of past actions. To the extent it considers past actions in determining future licensing decisions, it is a permissible instance of secondary retroactivity.

However, a regulation which establishes new definitions or concepts and determines that, based on this new terminology, licenses which met these definitions in the past are now and have been ineligible to apply for licensure would change the legal consequence of past conduct and, therefore, be impermissibly retroactive.

There were no further written or oral comments, objections, or recommendations received at the hearing regarding the proposed action.

C) 15-Day Public Comment Period – Modified Text (comment period ending September 10, 2010)

1. Alan Titus, Robb & Ross – on behalf of Artichoke Joe’s: Section 12347 (b)(3) [formerly 12347(b)(4)] – the remaining language provides that section 19963 precludes “that cardroom” from being reopened in that jurisdiction or in any other jurisdiction. The deletions during the 15-day availability of modified text create uncertainty about the use of the term “cardroom.” The regulation is not clear as to what comprises a cardroom. Can someone else “reopen” a cardroom in the same jurisdiction as the closed cardroom? Could an owner licensee of one cardroom move from another jurisdiction and reopen the closed “cardroom?”

Response: This comment is rejected. In the policy that will be set by this proposed action, a gambling establishment and the licensed owner are intertwined – for which the term “cardroom” can be used as a term of art to describe. The portion of the proposed regulation addressing the past surrender of or failure to renew gambling licenses creates a scheme in which the gambling establishment and the licensed owner are intertwined. Just as, under this proposal, a third party cannot “dust off” an old gambling establishment and gambling license that was not issued to him or her and reestablish a cardroom, so would be the case for future surrenders or abandonments. Once the license to operate the gambling establishment is surrendered or declared abandoned, there is no opportunity for any other person to “reopen” that cardroom, as long as the moratorium is in effect, as “cardroom” also includes the licensed owner. In fact, under this proposal, there is no opportunity for the last licensee to “reopen” that cardroom once the license has been surrendered or declared abandoned, as long as the moratorium is in effect.

As to whether a licensee could move a cardroom in current operation from one jurisdiction to one in which a gambling establishment previously existed but whose owner surrendered or abandoned the gambling license, that policy question is beyond the scope of this regulatory action. The Commission’s interpretation of the moratorium on gambling expansion has led to the conclusion that the Commission is unable to allow relocations between jurisdictions.

2. Titus: Subsection 12348(a)(2) requires the notification to the Commission of a desire to apply for reinstatement be in writing. This section creates an issue whether the notice is subject to the Public Records Act. The notice of intent to file an application should be treated as an “application” for purposes of mandatory disclosure under the Gambling Control Act. Any other interpretation would frustrate the letter and spirit of Business and Professions Code section 19821. The regulation will require applicants to obtain approvals from local officials, and the Legislature intends the public to know when such activities that could be viewed as expansion of gambling are occurring.

Response: This comment is rejected. The Commission already has a process in place to address Public Records Act (PRA) requests. Under the Act, the Commission has a broad exemption from the PRA and is only mandated to disclose applications. The Act also provides specific information that is exempt from disclosure even if a PRA request is received. Although the notifications of intent to apply to reactivate a license may not be considered mandatory disclosures under the Act, neither do they fall into the category of mandatory denial. Once a request for release of the notifications has been received, the Commission will determine the appropriate course of action, taking all factors into consideration, including whether disclosure will be in the best interests of the public, local jurisdictions, and existing gambling establishments that may be affected.

Mr. Titus’ letter also included comments which were not relevant to the modified text. Those comments will not be summarized or responded to.

The following written comments were received by the Commission during 15-day public comment period, but were not relevant to the modified text. Therefore these comments are being included in the rulemaking file without summary or response:

1. Rod Blonien, letter dated August, 30, 2010.
2. Martin Horan, Assistant Bureau Chief, Bureau of Gambling Control, CA Department of Justice, letter dated September 8, 2010.
3. Harlan Goodson, on behalf of Tom Farrage, letter dated September 10, 2010.

There were no further written comments, objections, or recommendations received within the 15-day public comment period regarding the proposed action.

There were no further written or oral comments, objections or recommendations received during any of the public comment periods regarding the proposed action.

D) Written Comments Made Outside of the Public Comment Period

The following written comments were received by the Commission outside the 45-day and 15-day public comment period. Therefore these comments are being included in the rulemaking file without summary or response:

1. Rod Blonien – letter dated July 19, 2010. Received July 20, 2010.

There were no further written or oral comments, objections, or recommendations received outside any of the public comment periods regarding the proposed action.