

CALIFORNIA GAMBLING CONTROL COMMISSION
FINAL STATEMENT OF REASONS
CGCC-GCA-2014-02-R

HEARING DATE:

June 18, 2014

SUBJECT MATTER OF PROPOSED REGULATIONS:

Application Withdrawals and Abandonments, and Hearing Procedures

SECTIONS AFFECTED:

California Code of Regulations, Title 4, Division 18: Sections 12002, 12006, 12012, 12015, 12017, 12035, 12050, 12052, 12054, 12056, 12058, 12060, 12062, 12064, 12066, 12068, 12218.5 and 12234

UPDATED INFORMATION:

The Initial Statement of Reasons, as published on February 21, 2014, is included in the file and is hereby incorporated by reference as if fully set forth herein. The information contained therein is updated as follows:

PROPOSED ACTION:

This proposed action makes the following specific changes within Division 18 of Title 4 of the California Code of Regulations:

SECTION 12002. GENERAL DEFINITIONS

This proposed action would add nine terms to Section 12002. In addition, five subsections would be updated, and others would be renumbered accordingly.

1. A new subsection (a) adds the term “Administrative Procedure Act Hearing” or “APA hearing” which defines evidentiary hearings which occur pursuant to Business and Professions Code¹ sections 19825 and 19930 and which proceed pursuant to the Administrative Procedure Act² (APA) and Section 1000 et seq. of Title 1 of the California Code of Regulations. This definition provides needed separation between the more formal APA hearing and the default Gambling Control Act (GCA) hearing defined below.

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

² Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code

2. A new subsection (b), “Advisor of the Commission,” would be any employee of the Commission not designated as advocate to the Commission. This provides clarity to other provisions related to *ex parte* communications and presentations at an evidentiary hearing.
3. A new subsection (c), “Advocate of the Commission,” provides for Commission staff assigned to present the facts of a case during a hearing. This provides clarity to other provisions related to *ex parte* communications and presentations at an evidentiary hearing.
4. Subsection (e) [former subsection (b)] is modified to eliminate language that is no longer applicable in regard to Bureau practices. In the Gambling Control Act (Act), “Department” refers to the Department of Justice (Department). While the Act assigns certain powers and authority to the Department, in actual practice the responsibility for fulfilling the obligations imposed upon the Department is delegated to the Bureau of Gambling Control (Bureau), pursuant to section 19810. Language has been added to make this clarification.
5. A new subsection (f) adds the term “Bureau report” to help delineate a point in time under the Act when the Bureau has completed certain efforts in regards to an application. This is beneficial to the Commission, the applicant and the Bureau from an operational perspective.
6. Subsection (i) [former subsection (e)] is modified to update the definition of “Conviction” to conform to current Penal Code section 1000.1.
7. Subsection (j) [former subsection (f)] is modified to update the definition of “Deadly Weapon” to conform with amendments to the Penal Code which changed the pertinent code section from 12020 to 16430.
8. A new subsection (k) adds the term “Employee of the Commission” to differentiate between employees of the Commission and “Members of the Commission” for purposes of prohibitions on *ex parte* communications. Providing a distinction helps clarify the applicability of the provisions of the Act regarding *ex parte* communications at different points in the application process as well as helping to deter inappropriate communications.
9. Subsection (m) [former subsection (h)] is modified to add the abbreviation “GCA” to the existing definition of Gambling Control Act for clarification.
10. A new subsection (n) adds the term “GCA hearing” which is the default evidentiary hearing available to an applicant under the Act. This evidentiary hearing occurs pursuant sections 19870 and 19871. This definition provides the basis for clarity between the two types of hearings (GCA and APA).
11. A new subsection (o) adds the term “Interim License” which is a term more fully developed later in these regulations and in prior regulations adopted by the Commission. Essentially, it is a license of finite duration during the pendency of some ongoing or future event such as an evidentiary hearing, pending accusation, or application process. This definition is necessary to define a category of license which now covers both interim gambling licenses, which were

addressed in an approved prior rulemaking package, and interim renewal licenses which are addressed in this rulemaking package.

12. A new subsection (p) defines “Member of the Commission” as an individual appointed to the Commission by the Governor pursuant to sections 19811 and 19812. Similar to subsection (h), this helps clarify the application of the provisions of the Act regarding *ex parte* communications, who can communicate with whom, and when they can communicate.
13. A new subsection (s) adds the term “Temporary License” which is a license that the Commission may issue prior to the consideration of an application. A temporary license is generally subject to conditions that the Commission may deem appropriate on a case-by-case basis. These licenses have been granted in the past and are specifically referenced in section 19824, but have not been specifically addressed in current regulations.

SECTION 12006. SERVICE OF NOTICES, ORDERS AND COMMUNICATIONS

This Section describes how the Commission will communicate with applicants and is the default manner for all notices proposed in this action.

1. A new subsection (a) specifies that when this section is cited, notices will be sent to an applicant, a licensee or a designated agent by certified mail at their mailing address. This helps make clear what the parties can expect in advance as well as provide guidance to Commission staff.
2. A new subsection (b) specifies that notice is effective upon mailing of the communication. This helps make clear to parties when the relevant time frames under these regulations and the Act begin to run so that everyone can act accordingly.

SECTION 12012. EX PARTE COMMUNICATION

This proposed action addresses and defines *ex parte* communications. The Act³ imposes prohibitions on communication between “Members of the Commission” and an applicant or an agent of an applicant under certain conditions. These prohibitions are ambiguous. Section 12012 is added to clarify and provide guidance regarding prohibited communications to members of the Commission, employees of the Commission, Bureau staff, the applicant, and interested parties. Specifically, the proposed regulation does the following:

1. A new subsection (a) states that any communication upon the merits of an application by a party with the Commission without first providing notice to all parties so that there will be opportunity to participate in the communication is an *ex parte* communication or *ex parte*.
2. A new subsection (b) clarifies that the *ex parte* limitations of section 19872, subdivisions (a) and (b), apply as soon as an application is filed with the Bureau until the Bureau report is issued. This clarification is necessary to provide a finite starting and ending point to the *ex parte* limitations, which provides reasonable guidelines for all parties.

³ Specifically, section 19872

3. A new subsection (c) clarifies that the *ex parte* limitations of section 19872, subdivisions (a) and (c), apply when the Bureau report is issued until a decision is final pursuant to Section 12066. This clarification is necessary to provide a finite starting and ending point to the *ex parte* limitations, which provides reasonable guidelines for all parties.

New subsections (b) and (c) were written based upon the *ex parte* provisions included in subdivisions (a) through (c) of section 19872. Those subdivisions [(a) through (c)] each mention a different time period and refer to different groups involved, or potentially involved in the hearing proceedings. The subsections are summarized:

- Subdivision (a) applies to communications between a member of the Commission and an applicant while an application is being investigated; when it is pending disposition before the Bureau (Department); and, while an application is pending disposition before the Commission.
- Subdivision (b) applies to communications by an applicant or an interested person with a member of the Commission while an application is being investigated by the Bureau and while it is pending disposition before the Bureau. In the regulations, the conclusion of the period of “pending disposition before the Bureau” is reflected by the issuance of the Bureau report. Therefore, this subdivision can be read to provide a restriction on communications by an applicant or an interested person with a member of the Commission before the issuance of the Bureau report. As the subdivision does not mention the time period of pending disposition before the Commission, it would not apply after the issuance of the Bureau report.
- Subdivision (c) applies to communications by the Department, applicant or an interested person with a member of the Commission while an application is pending disposition before the Commission. In the regulations, the beginning of the period that includes Commission consideration is when the Bureau provides the Commission with its report. Therefore, this subdivision can be read to provide a restriction on communications by the Department, applicant or an interested person with a member of the Commission after the issuance of the Bureau report. As the subdivision does not mention the time periods of “being investigated by the Bureau” or “pending disposition before the Bureau,” it would not apply before the issuance of the Bureau report.

With this break down it is clear that there are three different groups being limited in their communications with the members of the Commission and three different time frames being referenced. Subdivision (a) clearly links all three periods and restricts Commission communication with the applicant. Subdivisions (b) and (c), however, apply to different time periods and provide different restrictions. As used in the proposed action, the issuance of the Bureau report reflects that point in time when the Bureau has, for the most part, finished its review and has transferred the application to the Commission for disposition. Therefore the new subsections (b) and (c) are crafted to acknowledge that subdivision (a) of section 19872 applies before and after the issuance of the Bureau report, while subdivision (b) only applies before the issuance of the Bureau report and subdivision (c) only applies after the issuance of the Bureau report.

4. A new subsection (d) excludes the following from *ex parte* communications:

- New paragraphs (1) and (2) provide an exception to *ex parte* for communications related to procedural matters or communications on the record at a properly noticed non-evidentiary hearing meeting. The exclusion of communications made on the record follows the exemption allowed by subdivision (f) of section 19872 and is included in the proposed regulation in order to maintain a consistent location of all exceptions. The exclusion of communications regarding procedure is required so that a party may ask clarifying questions of Commission staff related to the hearing process as defined in the proposed regulations and so that procedural clarification need not become a complicated part of the process.
- New paragraph (3) provides an exception to *ex parte* for communications that are provided by the applicant to an advisor to or member of the Commission while an application is pending disposition before either the Bureau or the Commission, which is simultaneously provided to the Bureau or advocate of the Commission. The exclusion of this form of communication is provided as clarification to subdivision (e) of section 19872 which provides that communications “without notice and opportunity for all parties to participate” are *ex parte*. As that subdivision defines what is *ex parte*, this proposed exclusion identifies communications that are not *ex parte*.
- New paragraph (4) provides an exception to *ex parte* for communications that are provided by the Bureau or advocate of the Commission to an advisor to or member of the Commission while an application is pending disposition before the Commission, which is simultaneously provided to the applicant. The exclusion of this form of communication is provided as clarification to subdivision (e) of section 19872 which provides that communications “without notice and opportunity for all parties to participate” are *ex parte*. As that subdivision defines what is *ex parte*, this proposed exclusion identifies communications that are not *ex parte*.
- New paragraph (5) provides an exception to *ex parte* for communications that are provided by an interested party while an application is pending disposition before either the Bureau or the Commission to an advisor to or member of the Commission, which is also provided to the Bureau or advocate of the Commission and applicant. The exclusion of this form of communication is provided as clarification to subdivision (e) of section 19872 which provides that communications “without notice and opportunity for all parties to participate” are *ex parte*. As that subdivision defines what is *ex parte*, this proposed exclusion identifies communications that are not *ex parte*.
- New paragraph (6) provides an exception for the Bureau to provide confidential information to the Commission without it also being provided to the applicant. The exception provided in this paragraph attempts to balance the requirement that information must be made available to all parties with the requirement for the Commission to keep specific information confidential. Additionally, the new paragraph establishes that the Bureau first provides a redacted copy of documents. The redaction would be done by the Bureau, allowing them to ensure that the most sensitive information not be provided to the applicant. Only in a second request could the redacted information be provided to the Commission. The applicant could then request a third party (a judge) review in order to

ensure that any information provided to the Commission needs to be protected and is relevant to the Commission's needs.

It is important to note that the Commission does not generally seek access to information that the applicant does not already have. However, the plain reading of the statutes allow for Commission access to all of the Bureau's files. The intent of this section was not to abrogate the applicant's due process right to a fair hearing but to provide notice of the confidential evidence presented and opportunity to respond to it. To address the abuse issue, by either the Bureau or another law enforcement agency, the proposal includes an outside entity's review prior to any further review by the Commission, and in a timeframe that allows 14 days for a request to be made, with unlimited time being provided once requested until judicial remedies have been exhausted.

In order to protect due process it is important that those individuals making a decision on an application are not allowed to become biased through communications with a party to the application, either the Bureau or the applicant. This improper communication is defined by section 19872 as *ex parte*. This definition provides two qualifiers in determining if a communication is *ex parte* or not: (1) the communication is upon the merits of the application; and, (2) the communication is made without notice and opportunity for all parties to participate. The regulations are necessary as they provide clarity on when a communication does not fall under these two qualifications, either because the communication is not upon the merits of the application [such as related to procedure] or when the opportunity to participate in the communication has been provided to all parties [such as during a properly noticed meeting or when all parties are simultaneously provided with the communication].

5. A new subsection (e) clarifies that the *ex parte* limitations of Government Code sections 11430.10 through 11430.80 apply when an evidentiary hearing has been selected either by the Commission or the Executive Director, until the decision is final or when the Bureau has filed an accusatory pleading under Section 12554.

This clarification is necessary because of the complicated nature of the *ex parte* statutes that apply or could potentially apply to the hearing process and to provide a finite starting and ending point to the *ex parte* limitations, which provides reasonable guidelines for all parties.

The split nature is caused by the language in both the Government Code and the Act. The Government Code has its *ex parte* provisions apply when a proceeding is pending. Under subdivision (c) of Government Code section 11430.10, a proceeding is pending "from the issuance of the agency's pleading or from an application for an agency decision whichever is earlier." The first clause is irrelevant to the Commission's practice as there is no "agency pleading." For the second clause, the California Law Revision Commission (CLRC)

comments found in connection to this section indicate that “application for an agency decision” actually means “application for a hearing”⁴

In addition, interpreting the language of Government Code section 11430.10 to apply when an application is submitted would cause two problems. First, this would have the effect of rendering section 19872 irrelevant and that is not consistent with general principals of statutory interpretation. Rather, these statutes must be harmonized to give effect to the Legislature’s intent, not simply allowing one to supplant the other. Second, an application made under the Act does not necessarily result in or require a hearing.

6. A new subsection (f) specifies what must happen if an applicant communicates on an *ex parte* basis. The information must be provided to the Bureau or advocate of the Commission, the communication may be used as a basis to deny the applicant’s application, and any subsequent meeting may be delayed. This helps alleviate any prejudice that the *ex parte* communication may have caused and also eliminates any incentive for the applicant to try to gain an advantage.
7. A new subsection (g) provides operational guidance to Commissioners concerning what happens if a member of the Commission participates in an *ex parte* communication; the communication must be publically disclosed along with any information or documents being provided to the other party or parties as soon as possible. Any scheduled meeting may be rescheduled to provide sufficient time to allow all parties to fully participate in the communication. In addition, the member of the Commission may voluntarily withdraw. This provision provides guidance to the parties and the Commission as to what will happen should an inappropriate communication occur.
8. A new subsection (h) specifies that the Commission and its advisors are also subject to *ex parte* rules in their communications upon the merits of the application with either the applicant, the Bureau or an advocate of the Commission. This clarifies that *ex parte* limitations are in effect for communication in both directions with the Commission and its staff.

SECTION 12015. WITHDRAWAL OF APPLICATIONS

This proposed action would renumber Section 12047 as Section 12015. This renumbered section continues the current application withdrawal procedures and expands upon them. The application process can be lengthy, especially for those applying to be owners of a cardroom, and requires a significant investment in time and funds for the applicant, the Bureau, and the Commission. If at any point in the process, the applicant no longer wishes to proceed with the application, it is beneficial to all parties to have a procedure by which the application process can be ended. The Act, in section 19869, provides for a request to withdraw an application and differentiates between a withdrawal granted “with prejudice” and one granted “without prejudice.”

⁴ Furthermore, the principal consultant to the CLRC comments, Professor Michael Asimow who performed background studies and described the adjudicatory process in a law review article referenced by the CLRC, has indicated to Commission staff that “application for an agency decision” does mean “application for a hearing.”

1. Subsection (a) defines the time during which an applicant may seek to withdraw his or her application. This subsection is amended to clarify the submission and processing procedures for a request for withdrawal. Additionally, this subsection provides for review and approval or disapproval by the Commission. This subsection provides helpful guidance to the industry, Bureau and Commission staff as to the relevant expectations at any given point in time for withdrawal procedures.

In addition, a non-substantive conforming change is being included to require requests for withdrawal to be submitted to and acknowledged by the Bureau instead of the Commission. This change is necessary to conform to a recent statutory change.

The Governor's Reorganization Plan No. 2 of 2012 (GRP No. 2) became effective July 3, 2012 with an operative date of July 1, 2013. GRP No. 2 made numerous changes to the Act that consolidated the support, investigatory, auditing, and compliance functions of the Commission and transferred these duties to the Department. The Department, instead of the Commission, is now required to receive and process applications for licenses, permits, or other approvals, and to collect related fees. The Commission retains its policy-making authority, the authority to approve licenses, and the authority to monitor revenues for specific Tribal funds.

During the implementation of GRP No. 2 and conforming statutory changes,⁵ it became apparent that an additional technical statutory change was needed in order to fully implement the reorganization. Assembly Bill (AB) 2763⁶ made a conforming, technical change in section 19869 necessary to conform to GRP No. 2. AB 2763 amended section 19869 to require that a request for the withdrawal of an application be submitted to the Department rather than the Commission.

Section 12015, as amended, is inconsistent with, and has been superseded by, this recent statutory change. In particular, subsection (a) of this regulation continued to require that requests to withdraw applications be submitted to the Commission.

The Commission has no discretion to adopt a change that differs in substance from this proposed action which makes a conforming change in subsection (a) of Section 12015 by changing references from the Commission to the Bureau, as appropriate, related to the reassignment of responsibilities. These regulatory changes are consistent with and mandated by the recent amendments to the Act resulting from AB 2763.

Leaving the requirement for submission of requests for withdrawal of applications unchanged would conflict with the statutory provisions of the Act as described above. This would result in unnecessary confusion and complication in interpreting, applying and enforcing this regulatory provision. The only logical and practical solution available to the

⁵ Senate Bill (SB) 76 (Committee on Budget and Fiscal Review, Chapter 32, Statutes of 2013) and SB 820 (Committee on Governmental Organization, Chapter 353, Statutes of 2013)

⁶ AB 2763 (Committee on Accountability and Administrative Review, Chapter 401, Statutes of 2014)

Commission is to amend subsection (a) of Section 12015 to conform to the statutory changes enacted through AB 2763.

With respect to the foregoing, the Commission finds as follows:

Given the changes in responsibilities in the Act resulting from the amendments made by AB 2763, there is clearly a need to provide clarification in subsection (a) of this regulation. The subsection now incorrectly refers to the submission of a request to the Commission. There is a compelling need to implement, interpret and make specific the provisions of section 19869 by the adoption of a regulation that makes reference to the proper entity responsible for specific functions.⁷

With respect to references to the Commission, subsection (a) of Section 12015 is not in harmony with, and conflicts with the provisions of section 19869 as amended by AB 2763.⁸ As discussed above, the amended statutory provision changes the responsibilities of the Commission and the Bureau. This inconsistency could lead to unnecessary confusion.

The proposed changes will not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulation (CCR) provision. The proposed change simply conforms to the changes made to section 19869 by AB 2763.

2. A new subsection (b) states that the Commission may grant a request either with or without prejudice, at its discretion, based upon the relevant facts of the application and request. This ensures that the Commission can act in the best interest of the public as directed in statute.
3. Subsection (c) [former subsection (a)] is amended to require any unused portion of the background investigation deposit be returned by the Bureau if the request to withdraw is granted. The background deposit is intended to reimburse the Bureau for their expenses related to a background investigation. However, if an application is withdrawn and no further background investigation is required, any unexpended deposit balance should be returned to the applicant. This provides guidance to the Bureau and is informative to the applicant.
4. Subsection (d) [former subsection (b)] clarifies that, if a request for withdrawal is granted with prejudice, the applicant is not eligible to re-apply for licensure until after one year from the date the requested is granted. This prohibition is imposed by section 19869 and is included in the regulation for clarity.
5. Subsection (e) [former subsection (c)] requires the Bureau to continue and conclude its investigation of an applicant in the event a request to withdraw an application is denied, as

⁷ Government Code §11349(a) and Title 1, California Code of Regulations, §10.

⁸ Government Code §11349(d).

allowed by section 19869. The subsection is amended to provide clarity to the Bureau's actions.

6. A new subsection (f) clarifies that, consistent with other sections, an applicant who withdraws their application shall not have a right to an evidentiary hearing on the Commission's decision.

SECTION 12017. ABANDONMENT OF APPLICATIONS

This proposed action would renumber Section 12048 as Section 12017. This renumbered section continues the practice of allowing the abandonment of applications under limited specified circumstances.

1. A new subsection (a) defines the process whereby the Chief of the Bureau may deem an application abandoned based on certain criteria, including when an applicant is essentially no longer cooperating in the application process or when an applicant has provided notice that the application is no longer being pursued. This section is intended to provide a helpful mechanism to address applications which do not warrant continued Bureau investigation due to lack of cooperation, interest, or other circumstances that may warrant abandonment, such as the applicant's death or unemployment. The timeline of 30 days for the applicant to respond to the Bureau is pre-existing in Section 12048.
2. A new subsection (b) defines a process whereby the Executive Director, after the Bureau has issued its report and has not recommended denial, may deem an application abandoned based on certain criteria, including when an applicant is essentially no longer cooperating in the application process or when an applicant has provided notice that the application is no longer being pursued. This subsection is intended to provide a helpful mechanism to address applications which do not warrant Commission consideration due to lack of cooperation, interest, or other circumstances that may warrant abandonment, such as the applicant's death or unemployment. The timeline of 30 days for the applicant to respond to the Bureau is pre-existing in Section 12048.
3. A new subsection (c) defines a process where the Commission, after the Bureau has issued its report, may deem an application abandoned based on certain criteria, including when an applicant is essentially no longer cooperating in the application process or when an applicant has provided notice that the application is no longer being pursued. This subsection is intended to allow the Commission to consider applications that warrant consideration due to lack of cooperation, interest, or other circumstances that may warrant abandonment, such as the applicant's death or unemployment.
4. A new subsection (d) defines the treatment of any unused portion of the background investigation deposits related to an abandoned application. This provides important details about the abandonment process.

5. A new subsection (e) clarifies, consistent with other sections, that an applicant whose application has been abandoned shall not have a right to an evidentiary hearing on the abandonment decision.

SECTION 12035. ISSUANCE OF INTERIM RENEWAL LICENSE

This proposed action adds a new interim renewal license category which extends a current license approval to allow for an evidentiary hearing to occur without an applicant becoming unlicensed prior to Commission action. By holding this interim renewal license, an applicant is responsible for any existing conditions and for those fees normally required of an applicant/licensee.

1. A new subsection (a) states that an interim renewal license shall be issued after the Commission or Executive Director has elected to hold an evidentiary hearing upon a renewal application or where an accusation has been filed. The applicant's previously issued license will, at some point, expire, leaving him or her without a valid license and legally unable to continue in the licensed activity. The interim renewal license is issued to address this gap in licensure while the evidentiary hearing is pending.
2. A new subsection (b) provides the specifics and nature of the interim renewal licenses; including, any restrictions or limitations, the fees required and how the licensee interacts with any ongoing procedures of the Commission. By providing this interim renewal license, an applicant currently working with a valid license, but whose current application is being heard through an evidentiary hearing, will not find their current license expire (and therefore be unable to work) prior to the conclusion of their hearing. This protects the applicant, provides clarity to the process and allows the Commission adequate time to consider and decide upon an application.

SECTION 12050. BUREAU RECOMMENDATION AND INFORMATION

The Act, in subdivision (a) of section 19826, allows the Bureau to recommend the denial or limitation, conditioning, or restriction of any license, permit, or approval, after the completion of a background investigation. This proposed action details the manner in which any recommendation shall be provided to the applicant and how the information may be considered by the Commission.

1. A new subsection (a) requires the Bureau to provide the applicant with the Bureau's report, any recommendation, and any other documents or information at the same time it is provided to the Commission. This requirement ensures that all parties are informed, are provided the same information, and can all properly address the Commission at a Commission meeting.
2. A new subsection (b) clarifies that the authority to make a decision on the suitability of an applicant ultimately rests with the Commission and neither the Commission nor an Administrative Law Judge is bound by the Bureau's recommendation. It is important to clarify how any provided recommendations apply in that decision making process. Without direct guidance through this regulation it is possible that some may view a recommendation similarly to other agency actions to approve or deny an application in advance of an appeal

heard at an APA hearing. That is not appropriate under the Act. A Bureau recommendation is based on a review of the background of an applicant based on the Bureau's collective experience and training. It does not however carry any binding or precedential weight towards the application of the Commission's discretion and thereby the Administrative Law Judge's decision making process.

SECTION 12052. COMMISSION MEETINGS; GENERAL PROCEDURES; SCOPE; RESCHEDULING OF MEETING

This proposed action provides general procedures regarding the hearing process.

1. New subsections (a) and (b) clarify Commission authority and specify that this article does not apply to disciplinary proceedings. This helps all parties understand their rights and obligations.
2. A new subsection (c) lists the specific notices that applicants are to receive in advance of a meeting and what those notices are to contain. This is to ensure that each applicant is informed and has an opportunity to address the Commission if they so choose. The timeline of 10 days for notifying the applicant is consistent with the requirements of the Bagley-Keene Open Meeting Act (Government Code section 11120, et seq.) In addition, this subsection incorporates a Notice of Defense Form (CGCC-ND-002). This new form is provided to the applicant to complete, and once returned to the Bureau and Commission, provides important guidance the evidentiary hearing process. The applicant may accept any proposed conditions, waive their participation in the evidentiary hearing or may indicate their interest in continuing and participating in an evidentiary hearing. Should the applicant waive participation in their evidentiary hearing, the subsection provides guidance for how the Commission may choose to consider the application. Should the applicant indicate a desire to participate in the hearing, a space is provided where any legal counsel's or other representative's information can be provided to the Commission and Bureau.
3. A new subsection (d) codifies existing practices which allow the Executive Director to reschedule matters before a meeting and the Commissioners to reschedule matters at a meeting. It does not change the current operation of the Commission. The ability of the Commission to reschedule is an important administrative function that assists in maintaining other requirements, such as the requirement that a quorum be available in order to make certain decisions related to an application, or to assist in scheduling requirements for a meeting. The ability to reschedule is also a necessary function to protect an applicant's due process rights and the rights of the other parties by ensuring sufficient time to respond to new issues or information that may be revealed as part of the overall process.

SECTION 12054. CONSIDERATION AT REGULAR (BAGLEY-KEENE) COMMISSION MEETINGS

This proposed action provides procedural guidance by laying out the various decisions the Commission may make at a non-evidentiary meeting in regards to an application.

1. A new subsection (a) describes the actions Commissioners may take at a non-evidentiary hearing meeting, including approval of an application, sending a matter to a hearing under

Section 12056 (an evidentiary hearing), extending a license as necessary under subdivision (c) of section 19876, tabling or continuing an item, approving the withdrawal of an application, deeming a license abandoned, and granting an interim renewal license if appropriate. This list is intended to be informative and provides all parties with a non-exhaustive list of the possible actions that may occur during the meeting process.

2. A new subsection (b) states that evidentiary hearings are not available to an applicant when the Commission approves or denies a withdrawal request or makes a finding of abandonment under paragraphs (5) and (6). This is to improve efficiency and clarity in the application process. If a party wanted to contest the rejection of the withdrawal or abandonment via an evidentiary hearing they are still able to avail themselves of the normal licensing process which affords them an opportunity for an evidentiary hearing.

SECTION 12056. EVIDENTIARY HEARING

This proposed action defines the manner by which the Commission or Executive Director determines between an APA and GCA evidentiary hearing format once the Commission has elected to hold an evidentiary hearing. Additional procedural information is also provided.

1. A new subsection (a) states that a GCA hearing, as described in sections 19870 and 19871, is the default evidentiary hearing path, unless otherwise specified by the Commission or the Executive Director. Additionally, it will be determined if the Bureau or designated Commission staff will act as the complainant. This provides helpful procedural guidance to the applicant as to how an evidentiary hearing is selected.
2. New subsection (b) reiterates the requirement that certain elements of a Bureau report remain confidential, as specified in the Act. This is meant to comport with the limitations of the Act and does not provide any new basis for withholding information.
3. New subsection (c) makes clear that under an APA or a GCA hearing, each side bears their own costs. This simply provides guidance to public expectations regarding the licensure process.

SECTION 12058. APA HEARINGS

This proposed action provides procedural guidance for when the Commission or Executive Director elects to hold the evidentiary hearing through the processes of the APA.

1. New subsection (a) states that the Commission will determine whether an APA hearing will be held before an Administrative Law Judge sitting on behalf of the Commission or before the Commission itself with an Administrative Law Judge presiding, in accordance with Government Code section 11512, and that notice of the hearing will be provided pursuant to the APA. This subsection provides procedural guidance to all parties.
2. New subsection (b) states that the burden is on the applicant at all times to prove his or her qualifications under the Act. This reiterates the mandate in the Act that the applicant must prove they are suitable for licensure.

3. New subsection (c) states that the complainant will prepare and file a Statement of Issues according to Government Code section 11504, whether they made a recommendation or not. This provides guidance to all parties.
4. New subsection (d) discusses the process at the end of an evidentiary hearing for the Commission to reach a decision. This provides guidance to the applicant and the Commission.
5. New subsection (e) clarifies that only the Executive Director or the Commission can delay or cancel any scheduled hearing date. This is a clarifying provision that says the Commission controls its calendar and the disposition of the applications under its review.

SECTION 12060. GCA HEARINGS

This proposed action would implement the evidentiary hearing process pursuant to sections 19870 and 19871. This process provides a clear method for the applicant to show the Commission that they meet the requirements of the Act and are of good character, honesty and integrity.

1. New subsection (a) creates a path for the Executive Director to schedule an application for a GCA hearing without an initial Bagley-Keene public meeting. The Commission still retains the option of sending a matter that has been scheduled for a GCA hearing to an APA hearing. The 90-day timeline is intended to balance the needs of the applicant by providing sufficient time to procure representation (if desired) and prepare a case for presentation before the Commission. Additionally, it provides an expeditious resolution which benefits all applicants and the public in general; and, it is also consistent with the spirit of the Act.
2. New subsection (b) provides guidelines for when the Commission elects to hold an evidentiary hearing pursuant to Section 12054. This timeline provides for an evidentiary hearing to be conducted and for the notice to be sent no later than 60 calendar days in advance of the GCA hearing. This timeline has the benefit of including the non-evidentiary hearing meeting timeline (a minimum of 30 days) prior to the evidentiary hearing and therefore, by having this additional time period of 60 days, this timeline matches the timeline of subsection (a). It is important that the applicant be given proper notice and time to prepare and that the two methods of directing an application to an evidentiary hearing be substantially similar to provide any applicant with sufficient time to prepare.
3. New subsection (c) requires the Commission to designate a presiding officer who may be either a member of the Commission's legal staff or an Administrative Law Judge. This provides important clarification under the Act and a procedural requirement for the Commission.
4. New subsection (d) allows the applicant or the complainant to request, in writing to the Executive Director, a continuation of the GCA hearing. This allows for a delay as necessary to eliminate any potential burden on the parties and provides flexibility for the Commission.

5. New subsection (e) requires the complainant and applicant to exchange certain information and documents in advance of the GCA hearing. The complainant is required to exchange at least 45 days prior to the GCA hearing, while the applicant is required to exchange at least 30 days prior to the GCA hearing. This provides guidance to both parties as to procedure. Current regulations include a requirement that the complainant provide information to the applicant at least 30 days prior to a hearing and that the applicant provide information to the complainant at least ten days prior to a hearing. The Bureau has stated that a ten day receipt window is insufficient time for the preparation of a response or rebuttal. In addition, comments from the public suggest that a staggered exchange system is required in order to provide an applicant the ability to formulate its case for approval. The specific 45 and 30 day time periods were selected with a mind toward the goal of maintaining an unprotracted hearing process but still providing reasonable time for preparation.
6. New subsection (f) provides that the presiding officer rules on the admissibility of evidence and that any ruling is final. This includes that relevant evidence will be admitted and that there are no applicable technical rules which would bar evidence from being admitted so long as reasonable persons would rely on it. This also includes when and how pre-hearing conferences may occur as well as what issues may be discussed during the conferences. This provides guidance to both parties and the presiding officer. The ability to hold a pre-hearing conference is necessary to maintain a streamlined GCA hearing process, as parties are able to receive procedural information and resolve evidentiary issues prior to the hearing; issues that if covered at the hearing may result in a longer hearing or necessitate continuances.
7. New subsection (g) allows the Commission to prohibit the admission of certain evidence upon a showing of prejudice. This provides guidance to both parties so as to discourage certain potential discovery abuses to obtain an unfair advantage.
8. New subsection (h) requires the complainant to commence the GCA hearing by presenting the facts and information in the Bureau's report, the background investigation, and the basis for any recommendation. The complainant is not required to make any recommendation or seek any particular outcome, unless it so chooses, but simply to provide the Commission with the facts and law related to the application along with the background investigation so that the Commission can make an informed decision. This provides helpful procedural guidance to the complainant and applicant. Subdivision (a) of section 19870 provides that the Commission must consider the recommendation of the complainant, but does not provide any guidance to the complainant for what that recommendation must be. In addition, the proposed requirement to have the complainant present the report first is helpful to the process as it allows the applicant something to respond to instead of having to prove everything related to their suitability, pursuant to sections 19856 and 19857, including matters that might not be at issue.
9. New subsection (i) reiterates that the burden remains with the applicant to prove their suitability under the Act.

10. New subsection (j) makes clear that applicants may represent themselves or retain an attorney or lay representative. This is meant to identify the representation options for the evidentiary hearing proceeding.
11. New subsection (k) discusses the rights the complainant or applicant has during a GCA hearing including calling witnesses, introducing documentary evidence, cross-examining witnesses, and impeaching witnesses. The applicant may also be called to testify. This provides helpful procedural guidance to the parties. This is necessary as paragraph (2) of subdivision (a) of section 19871, which provides these rights, does not define who the parties are that receive the rights. The proposed language clarifies that it is the complainant and the applicant who are the parties in a GCA hearing.
12. New subsection (l) requires that oral evidence be taken upon oath or affirmation, administered by the Executive Director, a member of the Commission, or an Administrative Law Judge. This provides helpful procedural guidance by specifying who shall administer the oath as required pursuant to paragraph (1) of subdivision (a) of section 19871.
13. New subsection (m) discusses the process at the end of an evidentiary hearing for the Commission to reach a decision. This provides guidance to the parties and continues the existing practice of subparagraph (G) of paragraph (2) of subsection (b) of the current Section 12050. This is necessary to establish another key element in the adjudicatory process.

SECTION 12062. ISSUANCE OF GCA HEARING DECISIONS

This proposed action describes the procedural method and requirements by which the Commission proposes its decision following a GCA evidentiary hearing.

1. New subsection (a) requires that a member of the Commission's legal staff prepare and submit to the Commission a proposed decision with a detailed statement of reasons within 30 days of the conclusion of the hearing. Currently subparagraph (G) of paragraph (2) of subsection (b) of Section 12050 provides 30 days for both the preparation of the detailed statement of reasons and for issuance by the Commission. This timeline was frequently insufficient considering the requirements of both preparing the documents and proper noticing of a meeting for the Commission to deliberate. This subsection provides guidance to the parties and the Commission. This provision would not prevent an earlier issuance if all the time is not required. This subsection is necessary to ensure a clear and sufficient amount of time is available for the writing of the proposed decision.
2. New subsection (b) requires the Commission to issue its decision, in compliance with section 19870, within 45 days of the issuance of the proposed decision. In conjunction with subsection (a), this timeline provides sufficient time to properly draft and notice a meeting to discuss the detailed statement of reasons. The decision shall be served upon the applicant at the applicant's address of record by certified mail. This provides guidance to the parties and the Commission. This would not prevent an earlier issuance if all the time is not required. This is necessary to ensure a clear and sufficient amount of time is available for the

consideration and possible revision of the decision and to provide sufficient time to schedule and notice the Commission meeting at which the decision will be adopted.

3. New subsection (c) requires all decisions to specify an effective date and allows the inclusion of directions as to any stay provisions or orders to divest. This provides guidance to the parties and the Commission for the implementation of proposed sections 12064, 12066 and 12068. This is necessary to ensure that there is a date certain for the purposes of compliance with any order and to establish the date upon which the times to appeal, request reconsideration, or seek judicial review commence.
4. New subsection (d) restricts voting on the decision to only members of the Commission who heard the evidence presented in the hearing, unless such restriction would prevent the existence of a quorum. In such case, another member may be allowed to vote after a review of the record and any additional briefing or hearing deemed necessary. This provides guidance to the parties and the Commission by providing a clear requirement that only those Commissioners who have participated in the hearing, and are knowledgeable of the evidence, will be eligible to participate in its decision and that only in cases where a quorum is not available will additional Commissioners be allowed to participate in the decision and then only after they are sufficiently knowledgeable of the evidence. This provides a balance between the legal requirement of having a quorum for the issuance of decisions and an acknowledgement that direct participation in the hearing process provides a better understanding than a review of the record. In addition, this continues the existing provision of subparagraph (G) of paragraph (2) of subsection (b) of current Section 12050. This is necessary to avoid the necessity of a rehearing if a quorum cannot be established due to the unavailability of a Commissioner. While rare, this situation could occur when a Commissioner's appointment expires, a Commissioner is ill or incapacitated, or in the case of the death of a Commissioner.

SECTION 12064. REQUESTS FOR RECONSIDERATION

This proposed action defines the procedure by which an applicant can request reconsideration from the Commission after an evidentiary hearing but before any decision becomes final. This proposal continues the existing practice of paragraph (6) of subsection (c) of the current Section 12050. In addition, the practice of reconsideration is consistent with the process established within the APA and is necessary to preserve the applicant's due process rights when new evidence comes to light. After a decision becomes final, the Commission loses jurisdiction and an applicant's only recourse becomes judicial review.

1. New subsection (a) allows an applicant to request reconsideration of an issued decision within 30 days of service of that decision. This timeline is consistent with existing provisions in paragraph (6) of subsection (c) of the current Section 12050.
2. New subsection (b) specifies the conditions under which an applicant may request reconsideration, based upon either newly discovered evidence or legal authorities that could not reasonably have been presented at the hearing or before the Commission's issuance of a

decision; or, other good cause for which the Commission may decide, in its sole discretion, merits reconsideration.

3. New subsection (c) authorizes the Executive Director to initially determine whether a request for reconsideration is complete and should be placed on the Commission's agenda for consideration. This provides important guidelines for the handling of a request including; that the approved request is to be placed on the Commission's agenda within 60 days of its receipt, and requires the applicant to be given at least 10 days advance notice [consistent with the requirements of the Bagley-Keene Open Meeting Act (Government Code section 11120, et seq.)] of the Commission meeting at which the request will be considered. This paragraph also states that the applicant will be notified of the Commission's decision on the request within 10 days following the meeting. These timelines provide sufficient time for procedural requirements to be met, such as ensuring a date in which all parties are able to attend, but also provide for a prompt resolution to the reconsideration.
4. New subsection (d) states that a decision will be stayed while the request is under review by the Commission. This is needed to provide guidance so that the provisions of Section 12068 are not being implemented while reconsideration is in process.
5. New subsection (e) clarifies that the granting or denying of a reconsideration request shall be at the sole discretion of the Commission. This provides procedural clarification.

SECTION 12066. FINAL DECISIONS; JUDICIAL REVIEW

This proposed action provides procedural guidance to applicants related to when a decision of the Commission becomes final and what judicial remedy may be available.

1. New subsection (a) provides that a decision to approve a request to withdraw an application or a finding of abandonment of an application is final, upon either a decision by the Commission or 30 days after a notice of abandonment is issued by either the Executive Director or the Bureau. The timeline of 30 days is consistent with the timelines of paragraph (2) of subsection (a) of Section 12017 and paragraph (2) of subsection (b) of Section 12017.
2. New subsection (b) provides that the decision of the Commission following a GCA or APA hearing shall become final: 30 days after service of the decision, if reconsideration has not been granted; or immediately after the Commission affirms its decision or issues a reconsidered decision, if reconsideration has been granted. This timeline is consistent with subdivision (a) of Government Code section 11521, which provides a maximum of 30 days for an application for reconsideration to be submitted.
3. New subsection (c) reiterates that the decisions of the Commission are subject to judicial review under Code of Civil Procedures section 1085 and that the right to petition for a judicial review and the time for filing are not affected by a failure to request reconsideration. This provides procedural guidance to the applicant.

SECTION 12068. DECISIONS REQUIRING RESIGNATION OR DIVESTITURE

This proposed action relocates much of subsection (c) from former Section 12050 to this section. It remains in substantially the same form.

1. New subsection (b) provides instruction for how an officer, director, manager, member, employee, agent, representative, or independent contractor of a limited liability company must act following a decision of the Commission that denies a license, or approves the issuance of a license with the imposition of conditions, limitations or restrictions. Section 19852 was amended⁹ to add subdivision (f), adding owners, officers, managers and members of limited liability companies to the list of individuals required to obtain a state gambling license. When section 19852 was amended, corresponding changes to subsection (c) of the current Section 12050 should have been made. This revision now corrects that oversight by making this provision consistent with section 19852, as amended in 2010.

SECTION 12218.5. WITHDRAWAL OF REQUEST TO CONVERT REGISTRATION TO LICENSE

This proposed action would repeal this section. With a reframing of general withdrawal provisions in Section 12015, this section is no longer needed.

SECTION 12234. WITHDRAWAL OF REQUEST TO CONVERT REGISTRATION TO LICENSE

This proposed action would repeal this section. With a reframing of general withdrawal provisions in Section 12015, this section is no longer needed.

REQUIRED DETERMINATIONS:

LOCAL MANDATE:

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

BUSINESS IMPACT:

The Commission has made a determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This determination is based on the following facts or evidence/documents/testimony:

This proposed action imposes no mandatory requirement on businesses. The regulation simply provides a clear process to follow should a party's application be sent to an evidentiary hearing for consideration before the Commission. Any costs associated with pursuing a license would be voluntarily assumed upon the filing of an application. The proposed process provides for numerous opportunities for an applicant to request to end the process and therefore avoid further costs.

⁹ AB 293 (Mendoza, Chapter 233, Statutes of 2010)

ECONOMIC IMPACT ASSESSMENT/ANALYSIS:

IMPACT ON JOBS/NEW BUSINESSES:

The Commission has determined that this regulatory proposal will not have a significant impact on the creation of new jobs or businesses, the elimination of jobs or existing businesses, or the expansion of businesses in California.

The basis for this determination is that this proposed action imposes no mandatory requirement on businesses or individuals and does not significantly change the Commission's current practices and procedures. The proposed action simply provides a clear process to follow once a party has decided to submit an application for Commission consideration.

BENEFITS OF PROPOSED REGULATION:

This proposed action will have the benefit of providing a clear evidentiary hearing procedure and *ex parte* guidelines. This evidentiary hearing process will help to provide applicants with a clear understanding of the process their application will follow, from review of the Bureau through consideration by the Commission at a non-evidentiary hearing through the evidentiary hearing process. Moreover, it will facilitate the production and presentation of all documents, testimony and other information which may be relevant and material to a Commission decision thereby enhancing the fairness of the decision and the legitimacy and transparency of the decision making process.

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative to the regulations would be more effective in carrying out the purpose for which the action is proposed, would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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

- (1) Utilize the APA Evidentiary Hearing Process Exclusively: The first alternative considered and rejected by the Commission was to only utilize the procedures of the APA for the purposes of denying or conditioning a license. This option would allow the Commission to be more of an approving agency and, mainly reviewing the proposed decision of the Administrative Law Judge and separating the Commission from any possible investigatory role that an interactive hearing process could allow. This alternative is inconsistent with the Gambling Control Act, which originally intended applications to only be reviewed through an evidentiary hearing process conducted by the Commission pursuant to the Act.
- (2) A Single Ex Parte Provision: The second alternative considered and rejected by the Commission was to utilize the *ex parte* provisions of the APA starting at the point of submission of an application to the Bureau. Such an interpretation of the APA would render section 19872 irrelevant. The provisions of the APA envision its *ex parte*

provisions becoming effective upon a request for hearing, which for the purpose of the proposed procedures is not at the point of application submittal. In addition, section 19872 contains nuances in its application that would be overridden should the APA be applied immediately upon submission of an application.

- (3) Commission Considers Disqualification for *Ex Parte* Communications: The third alternative considered and rejected by the Commission was to utilize a disqualification process for Commissioners who participate in an *ex parte* communication similar to the APA. This process would mean that if a Commissioner participated in a prohibited communication and did not recuse him or herself, the applicant could request that the Commission consider and decide if the nature of the communication warranted the Commissioner being disqualified. As the GCA hearing process is designed to be a less formal hearing process, it would be inconsistent to have the Commissioners discuss disqualification.
- (4) Provide Time for Judicial Consideration: The fourth alternative considered and rejected by the Commission was to allow time for an applicant to request judicial consideration of disqualification when a Commissioner participates in an *ex parte* communication. This process would mean that if a Commissioner participated in a prohibited communication and did not recuse him or herself, the applicant could request the Commission delay further consideration for a period to allow the applicant to request judicial review. This judicial review is already allowed regardless of any authorizing regulation, plus the regulations already allow for a rescheduling of an upcoming hearing due to an *ex parte* communication. A specific provision such as considered in this alternative, would be redundant.
- (5) Bureau Presents Facts in all Cases: The fifth alternative considered and rejected by the Commission was to have the Bureau present its report and the facts of the case as part of GCA and APA hearings. The Bureau would not be required to take an advocacy position with regards to the application, but could if it so desired. This alternative was rejected as the Bureau disagreed that in APA hearings it could present the facts without taking an advocacy position and the Bureau felt it was a conflict to present at an APA hearing when a recommendation for approval or no recommendation had been included as part of the Bureau report.
- (6) APA Hearing Limited by Bureau Recommendation: The sixth alternative considered and rejected by the Commission was to restrict the referral of an application to an APA hearing to only those cases in which the Bureau recommended denial. The Bureau still presents its report and the facts of the case as part of both a GCA and an APA hearing. This alternative was rejected as the Act provides no limits on the utilization of the APA and it was not desirable to limit the Commission's flexibility to consider an application at either a GCA or APA hearing.
- (7) Commission Staff Presents at APA: The seventh alternative considered and rejected by the Commission was to have the Bureau present its report and the facts of the case as part of GCA and APA hearings, but to have Commission staff present at an APA hearing in

cases where the Bureau has recommended approval or has made no recommendation as part of the Bureau report. Other agencies utilize their own staff to present a case at an APA evidentiary hearing. However, Business and Professions Code sections 19870 and 19871 do not specify that the Bureau must present at the hearing, nor does it prevent Commission staff from presenting. The Act only requires that the Commissioners consider the relevant information and testimony. Therefore there is no statutory reason to limit the Commission's flexibility in selecting what staff will present the information.

COMMENTS, OBJECTIONS OR RECOMMENDATIONS / RESPONSES:

The following public comments/objections/recommendations were made regarding the proposed action¹⁰ during the public comment periods:

I. 45 DAY PERIOD WRITTEN COMMENT PERIOD

The following written comments/objections/recommendations were received regarding the text of the proposed action during the 45-day written comment period that commenced February 21, 2014 and ended April 7, 2014:

A. AMEND SECTION 12002. GENERAL DEFINITIONS.

This proposed action would amend Section 12002 within Article 1. Section 12002 includes general definitions used throughout the Division.

1. Subsection (a), would define an "Administrative Procedure Act Hearing" or "APA Hearing" to mean an evidentiary hearing which is conducted pursuant to the requirements of Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and section 1000 et seq. of Title 1 of the California Code of Regulations. An APA hearing includes those evidentiary hearings which proceed pursuant to sections 19825 as well as 19930 and under Chapter 10 of this division.

a. **Robert Mukai, The Indian and Gaming Law Section (IGLS) of the Attorney General's Office:** Mr. Mukai commented that it should be simple enough to define an APA hearing as a hearing held pursuant to the provisions of the APA. Mr. Mukai suggested that the second sentence of the proposed definition is unnecessary and that the other references are either unneeded or incorrect. Mr. Mukai then offers that APA hearings could also be held pursuant to sections 19870 and 19871.

Response: This comment was considered but was rejected. First, the second sentence of the definition provides guidance as to what APA hearings the Commission is referring to and authorized to conduct under the Act. This eliminates any ambiguity in using the terms which are broadly applicable beyond the Act and used in a variety of administrative matters. Second, APA hearings

¹⁰ The descriptions of the proposed changes are based on the regulation text originally published October 18, 2013.

could not be conducted according to sections 19870 and 19871 due to the different level of statutory requirements. While the reverse may be possible, the intent of this regulation is to clearly craft two separate pathways to a Commission decision that is expeditious and fair to the applicant and public.

2. Subsection (d), defines “Bureau report” to mean a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application.
 - a. **Alan Titus, Artichoke Joe’s**: Mr. Titus commented that the definition is unclear. Mr. Titus noted that section 19868 requires that the Bureau Chief investigate and if recommending either conditions or denial prepare and file written reasons with the Commission. The definition does not tie back to the section 19868 requirement, and in addition other sections of the proposed text allow for supplemental reports to be filed by the Bureau. Should the Bureau change its recommendation through any supplementary report the original recommendation would not have been a final determination. The Bureau should be allowed to revise its recommendation, and doing so is not inconsistent with the Act.

Response: This comment was considered but was rejected. The use of the terms “final action by the Department” and “final determination by the Chief” are not intended or designed to provide any restriction to the Bureau from continuing to participate in the application process. These references provide a clear delineation of which agency, the Bureau or the Commission, bears the responsibility for handling the application. There is a point in time where the Bureau provides a “recommendation of the chief” as required under section 19871. This time period is critical as it represents not only the shift of responsibility; but, is needed for other timelines, such as withdrawal requests and *ex parte* restrictions.

It is possible that during public meetings and hearings the Commission may request additional investigation by the Bureau. This additional investigation may precipitate additional reports or cause the Bureau to revise its recommendation. This is at the request of the Commission and therefore does not fall under the initial requirement of issuing the Bureau report or any initial recommendation.

3. Subsection (i), would define “Employee of the Commission” to mean staff employed by the Commission including the Executive Director and all staff under the direction of the Executive Director.
 - a. **Robert Mukai, IGLS**: Mr. Mukai suggested that individuals are employed “by” the Commission and not “at” the Commission. Mr. Mukai expressed concern that other individuals are employed “at” the physical premises of the Commission, but who are not Commission employees.

Response: This comment was accepted, and the proposed action was modified to accommodate it.

4. Subsection (n), would define “Member of the Commission” to mean an individual appointed to the Commission by the Governor pursuant to sections 19811 and 19812, and does not include an employee of the Commission.
 - a. **Robert Mukai, IGLS:** Mr. Mukai commented that any definition for “member of the Commission” must include employees of the Commission that serves in an advisory capacity to a Commissioner in any adjudicative proceeding.

Response: This comment was considered but was rejected. It is acknowledged that for many adjudicative proceedings there are few differences between the deciding body (Commission) and any advisors (employees of the Commission). However, as there are some instances, such as for disqualification, where a difference is required, the definitions have been crafted to separate the two entities. This has not prevented the proposed text from imposing relevant restrictions on both groups consistent with the requirements of treating advisors the same as the deciding body for many adjudicative functions.

B. ADOPT SECTION 12006. SERVICE OF NOTICES, ORDERS AND COMMUNICATIONS.

This proposed action would establish new a Section 12006 within Article 1. Section 12006 provides a consistent method of providing notices to applicants that can be cited within other regulation sections.

1. Subsection (a) specifies that notices will be sent to an applicant, the licensee or designated agent by certified mail at the address of record. This helps make clear what parties can expect in advance as well as provide guidance to Commission staff of what must occur.
 - a. **Robert Mukai, IGLS:** Mr. Mukai commented that there is no definition of “address of record.” In addition Mr. Mukai expressed a concern that the inclusion of too many alternative addresses is vague and confused and is likely to result in mischief. Mr. Mukai recommended including a definition for “address of record” for this purpose.

Response: This comment was considered but was rejected. As amended, Section 12004 requires that any change in contact information, including “...residence address, address of record or mailing address...” be reported to the Commission within ten days of the change.

C. ADOPT SECTION 12012. EX PARTE COMMUNICATIONS.

This section is added to address and clarify *ex parte* communications. The Act¹¹ imposes prohibitions on communication between “members of the Commission” and an applicant or an agent of an applicant under certain conditions. These prohibitions are ambiguous. Section 12012 is added to clarify and provide guidance regarding prohibited communications between members of the Commission, Commission staff, Bureau staff, and the regulated industry.

1. The following comments were made on Section 12012 in general:

- a. **Robert Mukai, IGLS**: Mr. Mukai commented that the proposed limitations do not cover communications that are about an application that has not yet been submitted to the Bureau but which shall be at some future time.

Response: This comment was considered but was rejected. Section 19872 does not provide for any restrictions during a period pre “investigated by the Department.” Nor would the Government Code apply as an application for a hearing would not have been submitted. Therefore, there does not seem to be any legal standing to impose *ex parte* restrictions prior to the actual submission of an application.

2. Subsection (a) provides that “*ex parte* communication” means a communication without notice and opportunity for all parties to participate.

- a. **Alan Titus, Artichoke Joe’s**: Mr. Titus expressed a concern that the definition for *ex parte* is too vague and does not capture the essence of the type of communication being prohibited. The restrictions should not be limited to proceedings involving applications or just “material matters” or to who makes any communication.

Response: This comment was considered but was rejected. The definition of *ex parte* is consistent with subdivision (e) of section 19872.

3. Subsections (b) and (c) provide for the specific periods when the limitations of section 19872, subdivisions (a) through (c), inclusive, apply.

- a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that section 19872 does not provide for the regulation’s exception to the *ex parte* prohibition for “communications without notice and opportunity for all parties to participate in the communication.”

Response: This comment was considered but was rejected. Subdivision (e) provides that *ex parte* means a communication without “notice and opportunity for all parties to participate in the communication.” The inverse would provide

¹¹ Specifically Business and Professions Code section 19872

that *ex parte* does not mean a communication with “notice and opportunity for all parties to participate in the communication.” Therefore, each falls out of the notice and opportunity either requiring the item to not be upon the merits of the application or have been properly noticed.

- b. **Alan Titus, Artichoke Joe’s**: Mr. Titus expressed concern that the various provisions of the *ex parte* regulations apply at different times. He noted that there is no explanation for having different rules during different periods of the process. Mr. Titus proposes that the same prohibitions should apply from the time an application is submitted until a decision is final. In addition, Mr. Titus expressed a desire that there should be no communications on the merits of an application between a party and the Commission.

Response: This comment was considered but was rejected. Subdivisions (a) though (c), inclusive, of section 19872 refer to the time periods each subdivision is effective. These references include, “while...being investigated by the Department” and “pending disposition before...” the Bureau or Commission. Proposed subsections (b) and (c) seek to clarify the various timelines expressed in the three subdivisions of section 19872. To create some new structure, or prevent communication in any form, while possibly providing clarity across the process, would ignore the structure contained in the statute.

- c. **Stacey Luna-Baxter, Bureau and Alan Titus, Artichoke Joe’s**: Ms. Luna-Baxter expressed concern that the regulation, as crafted, allows for communications between the Commission and the Bureau, an allowance that section 19872 does not provide.

Mr. Titus expressed a concern that the regulation fails to prevent communications between the Bureau and the Commission while the investigation is proceeding. Mr. Titus states that subdivision (c) of section 19872 prevents this specific communication and states that this is because “pending disposition before the Commission” begins upon an application being submitted to the Bureau.

Response: These comments were considered but were rejected. Of the *ex parte* provisions included in subdivisions (a) through (c) of section 19872, only subsection (c) mentions a restriction of communication with the Department and that restriction is limited to where there is an “application...pending disposition before the Commission.” Unlike Mr. Titus’ statement, an application is not “pending disposition before the Commission” when an application is submitted to the Bureau. Prior to the implementation of the GRP No. 2, applications were first submitted to the Commission and then would transition to the Bureau for review. At that time “pending disposition before the Commission” would apply upon the submittal of an application, as the application had come to the Commission. However, post GRP No. 2, applications are first submitted directly to the Bureau. The Commission does not receive any prior notice that an application is being

considered by the Bureau, so the application is not “pending disposition before the Commission” at that time.

- d. **Alan Titus, Artichoke Joe’s**: Mr. Titus expressed a concern that the restriction of subdivision (b) of section 19872 only applies while an application is “pending disposition before the Department.”

Response: This comment was considered but was rejected. The Legislature, pursuant to GRP No. 2, altered who receives applications. Applications are no longer received by the Commission, but rather applications are being received by the Bureau. The Legislature could have modified the text of section 19872 at that time to comport with the understanding of the comment, but did not do so, indicating that they had a different understanding of section 19872.

- e. **Alan Titus, Artichoke Joe’s**: Mr. Titus expressed a concern that the proposed structure does not mirror the *ex parte* structure governed by Government Code section 11430.10 in other administrative contexts. Mr. Titus observes that the proposed structure sets a lower standard and that Government Code section 11430.10 should be used as a minimum standard for due process.

Response: This comment was considered but was rejected. First, the split nature is not caused by the regulation proposal but rather by the respective *ex parte* statutes themselves. Government Code section 11430.10(c) defines when a proceeding is pending as “from the issuance of the agency’s pleading or from an application for an agency decision whichever is earlier.” The first clause is irrelevant to the Commission’s practice as there is no “agency pleading.” For the second clause, at first glance, the comments would seem to be correct; however, the CLRC comments found in connection to this section clearly indicated that “application for an agency decision” actually means “application for a hearing” and not what these comments essentially imply - “application for license.”¹² If this were the case, then every single state agency, including the licensing agencies within the Department of Consumer Affairs (DCA), the Department of Motor Vehicles, and others, would be required to adhere to strict APA *ex parte* guidelines from the moment an applicant walked in the door. The interpretation as “application for a hearing” is also consistent with the overarching intent of the APA where APA hearings are generally, though not always, quasi appellate in nature, reviewing an underlying agency decision. Here, there is no such underlying agency decision, as all approvals must go before the Commission. The Legislature no doubt in its wisdom therefore deemed it necessary to craft different standards from the APA, and include them in the Act under sections 19870, 19871, and, specifically, 19872.

¹² Furthermore, the principal consultant to the CLRC comments, Professor Michael Asimow who performed background studies and described the adjudicatory process in a law review article referenced by the CLRC, has indicated to Commission staff that “application for an agency decision” does mean “application for a hearing.”

In addition, while interpreting the language of Government Code section 11430.10 as an “application for hearing” could be interpreted to refer to the “meeting” as defined by sections 19870 and 19871 (defined here as a GCA hearing), there are two problems with this. First, interpreting this “meeting” as the “hearing” referred to above would apply the APA *ex parte* rules under Government Code section 11430.10. This would have the effect of rendering section 19872 irrelevant and is not consistent with general principals of statutory interpretation. Rather, these statutes must be harmonized to give effect to the Legislature’s intent, not simply allowing one to supplant the other. Second, an application made under the Act does not necessarily result in or require a “meeting,” and certainly not the above referenced “application for a hearing,” to result in a license approval. Such a dynamic would be inefficient, costly and detrimental to the applicant and public.

4. Paragraph (1) of subsection (d) provides that communications related to undisputed issues of practices and procedures are not considered *ex parte* communications.
 - a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that section 19872 does not provide for this exception to the *ex parte* prohibition for “communications without notice and opportunity for all parties to participate in the communication.”

Response: This comment was considered but was rejected. The exceptions provided in this paragraph only relate to issues “not based upon the merits of an application.”

5. Paragraph (2) of subsection (d) provides that communications made at a public hearing or meeting and which concern a properly noticed matter are not *ex parte*.
 - a. **David Fried**: Mr. Fried inquired if the comments made during a public comment portion of a non-evidentiary hearing meeting would be considered noticed.

Response: This comment was considered and accepted. Every meeting noticed by the Commission includes a period to allow for comments not related to an item on the agenda. These comment periods are noticed, and any comments made during these periods, even on the subject of a pending application, would not be considered *ex parte*. The requirement to provide these comment periods is covered under the Bagley-Keene Open Meeting Act (Government Code section 11120, et seq.).

- b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that section 19872 does not provide for this exception to the *ex parte* prohibition for “communications without notice and opportunity for all parties to participate in the communication.”

Response: This comment was considered but was rejected. The exception follows subdivision (f) of section 19872, in allowing communications made at a public hearing.

6. Paragraphs (3), (4) and (5) of subsection (d) provide that the sharing of information or documents with the Commission by either the Bureau, applicant or other interested party must be provided to both the Bureau and applicant at the same time they are provided to the Commission.

- a. **Stacey Luna-Baxter, Bureau and Alan Titus, Artichoke Joe's:** Ms. Luna-Baxter expressed concern that section 19872 does not provide for this exception to the *ex parte* prohibition for “communications without notice and opportunity for all parties to participate in the communication.”

Mr. Titus expressed concern that the provision that information or documents provided simultaneously does not match the requirement in subdivision (e) of section 19872 of “notice and opportunity for all parties to participate in the communication.”

Response: These comments were considered but were rejected. These paragraphs consider the concept of allowing all parties to participate in a communication, which is addressed in subdivision (e) of section 19872, and provides clarity that information that may be exchanged outside of a public meeting is allowed as long as everyone receives the information simultaneously. It is not to the benefit of any party to create a process where parties may not meet outside of a hearing, including through electronic methods or over the phone.

- b. **Alan Titus, Artichoke Joe's:** Mr. Titus expressed concern that the provision of information could include testimony. Mr. Titus does not feel it is appropriate to exempt testimony provided outside of a noticed hearing. In addition, Mr. Titus does not see the purpose of any information being provided to members of the Commission when staff is available to handle any requests or process filings.

Response: This comment was considered but was rejected. The distribution of information as a personal conversation could not be simultaneously provided to another party except in a medium in which the other party would be able to participate, such as over the phone. In addition, pursuant to subdivision (a) of section 19871, oral evidence can only be taken upon oath or affirmation which would require someone with the authority to administer such an oath.

In addition, for the purposes of *ex parte*, members of the Commission and employees of the Commission (presumably acting as advisors) are seen as a single entity by the law. Therefore, there is no way to separate staff from the Commissioners for the suggested purpose. While there are other needs for which employees of the Commission have been defined as separate from members of the Commission, this is not one of those situations and so both must be included here.

- c. **Robert Mukai, IGLS**: Mr. Mukai suggested revising the language from “based upon the merits of an application” to “relating to the merits of an application.”

Response: This comment was considered but was rejected. However, to bring the proposed language more in line with the language in statute, the word “based” was removed in the various usages in the proposed text.

7. Paragraph (5) of subsection (d) provides that communications made by an interested person are not *ex parte* if the communication is simultaneously provided to both the Bureau and the applicant.

- a. **Robert Mukai, IGLS**: Mr. Mukai recommended that “any other interested person” be revised to “any other person.” Mr. Mukai asserted that “any other person” is defined in the Act or other existing regulation. Mr. Mukai commented that the particular interest of the person should not be relevant to the *ex parte* nature of the communication, that any communication is prohibited. Mr. Mukai suggested clarifying that an employee or agent of the Commission is not a “person” for this purpose.

Response: This comment was considered but was rejected. Section 19872 references “person[s]” with an “interest” in a proceeding. Interested person is just a derivation of these two words. For reference, the similar *ex parte* sections of the APA use the term “interested person” seemingly without definition. Any person sufficiently involved in an application who would also communicate with either an employee of the Commission or a Commissioner would, by default, be an “interested” person based upon the common definition of the word.¹³

8. Paragraph (6), subsection (d), provides an exception to *ex parte* communications to allow confidential information provided to the Commission to remain confidential.

- a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that section 19872 does not provide for this exception to the *ex parte* prohibition for “communications without notice and opportunity for all parties to participate in the communication.”

Response: This comment was considered but was rejected. The exception provided in this paragraph attempts to balance the requirement that information in a hearing must be made available to all parties with the requirement of the Commission to keep specific information confidential.

- b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter asserted that the provision of section 19822, subdivision (b), provides that the files of the Department are open

¹³ From Encarta Dictionary: English (North America), [From Microsoft Word, 6/20/2013]. 1. curious or concerned: paying attention to something or devoting time to something because of curiosity, concern or enjoyment. 2. wanting something: involved or wanting to be involved in something *interested parties.

to inspection by members of the Commission at the Bureau's offices, and not that the documentation must be provided to the Commission.

Response: This comment was considered but was rejected. While section 19822 does state "members of the commission," the Act necessarily considers the Commission and the Department to be acting through surrogates. The Act specifically envisions the appointment of the Executive Director and any other staff necessary for its mission (section 19816). Furthermore, it should be noted that for the purposes of an adjudicative body and what information may or may not be provided there is no difference between the acting body and the advisors to that acting body. Employees of the Commission are restricted in the same manner as members of the Commission, including in their inability to disclose confidential information pursuant to subdivision (d) of section 19821. In addition, there is no limitation in subdivision (b) of section 19822 that indicates that the Commissioners may only view the documents at the Bureau's office. Requiring the Bureau to provide the relevant documents helps alleviate any perceived bias or prejudicial impact with the members of the Commission or Commission staff access Bureau files while a matter is pending disposition because it limits the scope of access to just the specific information requested.

- c. **Stacey Luna-Baxter, Bureau:** Ms. Luna-Baxter expressed concern that the sharing of confidential information with the Commission or a redacted version to an applicant may harm the integrity of its relationships with law enforcement partners. In addition, the sharing of such information could put at risk sensitive information such as information about victims, witnesses, confidential informants and suspects that otherwise may not have been provided to the applicant. In addition, Ms. Luna-Baxter noted that the Bureau preforms its investigation and provides its report so that only non-confidential information about the application may be used to support any action being considered. To provide some of the information in these confidential documents, such as uncharged offenses would have a prejudicial effect with the possible cost of releasing victim information.

Response: This comment was considered but was rejected. While the Commission appreciates the Bureau's relationships with fellow law enforcement agencies, any information provided to the Bureau by those agencies has never been subject to any confidentiality restriction that excludes the Commission. Pursuant to subdivision (b) of section 19822, any files provided by law enforcement agencies are already available to the Commission for review. In addition, to the extent that the law enforcement agency desires confidentiality from Commission review, subdivision (a) of section 19822 provides that the law enforcement agencies records are open to the Bureau for review and such sharing does not invalidate the confidential or privileged status of the information. Based upon these two requirements, that sharing with the Bureau is without loss of confidentiality and the Bureau must share with the Commission, and, when combined with subdivision (d) of section 19821, it is reasonable to conclude that

the Bureau sharing information with the Commission does not violate any confidential or privileged status.

In addition, the proposed process contained within paragraph (6) is designed to alleviate the exact concerns expressed in this comment. While requested documents would be redacted, the redaction would be done by the Bureau, allowing them to ensure that the most sensitive information not be provided to the applicant. Only after a second request could the redacted information be requested by the Commission. The applicant could then request a third party (a judge) review in order to ensure that any information provided to the Commission needs to be protected and is relevant to the Commission's needs.

- d. **Alan Titus, Artichoke Joe's and Robert Mukai, IGLS**: Mr. Titus expressed concern that this paragraph essentially allows the Bureau to make *ex parte* communications to the Commission. Despite the statute allowing the Bureau's papers to be open to the Commission, once a hearing is set on an issue there are going to be other due process issues that will come up and the Commissioners should not have full access to the Bureau's files.

In addition, Mr. Titus proposes that this provision may cause the Bureau to offer assurances to a witness that information provided may be maintained confidential. The Bureau may do this for the express purpose of abusing this allowance and controlling the presentation to the Commission. If this occurred it would limit the applicant's rights. Finally, Mr. Titus expressed concern that 14 days is insufficient for any judicial review.

Mr. Mukai expressed concern that the providing of information without providing to the applicant as well would allow for an *ex parte* communications to the Commission. In addition, Mr. Mukai proposes that the allowance of judicial measures is insufficient to overcome this concern.

Response: These comments were considered but were rejected. Initially, it is important to note that the Commission does not generally seek access to information that the applicant does not already have. However, the plain reading of the relevant statutes allows Commission access to all of the Bureau's files. When read together with the balance of the Act, it is necessary to preserve the Commissioners' access to information which they believe is necessary to reach a decision on the suitability of applicants for licenses and other approvals. The intent of this section is not to abrogate the applicant's due process right to a fair hearing but to provide notice of the confidential evidence presented and opportunity to respond to it. To address the abuse issue, by either the Bureau or another law enforcement agency, the proposal includes an outside entity's review prior to any further review by the Commission, and in a timeframe that allows 14 days for a request to be made, not completed, with unlimited time being provided once requested until judicial remedies have been exhausted.

9. Subsection (e) provides that the limitations on *ex parte* communications imposed by Government Code sections 11430.10 through 11430.80 begin at the election to hold an evidentiary hearing and provides a list of those possible election methods.
- a. **Robert Mukai, IGLS**: Mr. Mukai recommended the removal of paragraph (3) as the APA's *ex parte* proscriptions apply of their own force to accusations pending under section 19930. In addition, Mr. Mukai suggested that the reference to Section 12554 is unnecessary as Section 12554 is only in effect when section 19930 is as well.

Response: This comment was considered but was rejected. In a section intended to show when *ex parte* limitations are in effect, it would be inconsistent and unclear to intentionally leave out one section even if that section does initiate *ex parte* provisions on its own.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the inclusion of paragraph (3) confuses other parts of the section as only paragraph (3) makes reference to section 19930. Mr. Titus suggested that if paragraph (3) is the only part of Section 12012 to apply to accusatory pleadings it should be separated into its own subsection.

Response: This comment was considered but was rejected. As noted in the comment, subsections (b) and (c) of Section 12012 are based on a process that is not applicable to accusatory pleadings and directly reference the status of an application. In addition, subsection (a) of Section 12012 links directly to this section, while Government Code sections 11430.10 through 11430.80 provide their own definitions as appropriate. Subsection (d) of Section 12012 makes direct reference to subsections (b) and (c) and subsections (f) and (g) of Section 12012 make reference to an applicant which is not relevant to an accusatory pleading.

10. Paragraph (1) of Subsection (g) provides that if a member of the Commission participates in an *ex parte* communication certain disclosure steps are required, and a voluntary disqualification of the member would be allowed if it would not leave the Commission without a quorum to act on the application.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed a concern that the language is unclear and does not reflect if the restriction covers only communications made by Commissioners or also those received by Commissioners.

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

(g)(1) A member of the Commission who [is involved in a communication](#)es on an *ex parte* basis with an applicant, the Bureau, or other interested persons must publicly disclose the communication, and

provide notices to both the applicant and Bureau pursuant to Section 12006. The notice shall contain any information or document(s) conveyed and shall be provided to the applicant and the Bureau as soon as possible so that they may participate in the communication. Any meeting or hearing following the provision of this communication may be delayed as necessary to allow for the full participation of all parties. The member of the Commission may voluntarily withdraw from consideration of an application as long as the withdrawal would not prevent the existence of a quorum qualified to act on the particular application.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed a concern that the requirement to publically disclose is insufficient and that any requirement should require a more specific requirement, such as in writing.

Response: This comment was considered but was rejected. Any public disclosure by a Commissioner, if not done in a written form, would be at a noticed hearing and would therefore have an accompanying transcript which would provide a written record of the disclosure.

- c. **Robert Mukai, IGLS**: Mr. Mukai suggested that the language should be modified to allow for either the applicant or the Bureau to request a voluntary withdrawal.

Response: This comment was considered but was rejected. There is nothing to prevent either the applicant or the Bureau, or any other individual, from speaking at a hearing and requesting a voluntary withdrawal over an *ex parte* issue. A regulatory provision detailing such is unnecessary. What is necessary is for all parties, including the Commissioners to know that a voluntary withdrawal is available should a disclosure warrant such an action and what the restrictions on such an action would be.

11. Paragraph (2) of Subsection (g) provides that a Commission member may be disqualified by an act of the Commission if requested by the applicant.

- a. **Robert Mukai, IGLS**: Mr. Mukai suggested that both the applicant and the Bureau should be able to request the Commission consider the disqualification of a member.

Response: This comment was considered but was rejected. Subdivision (d) of section 19872 provides two possible outcomes for an inappropriate communication; using the communication as a basis for (1) denial, and (2) disqualification. Should the applicant be responsible for the *ex parte* communication, denying the application is appropriate and could be a recourse requested by the Bureau. In the event that the Bureau participates in an *ex parte* communication, it would not be appropriate to deny the application. Therefore, the applicant needs some other recourse. The subdivision suggests only one other

recourse, that of disqualification and so the ability for the applicant to request disqualification was proposed. With the ability to request denial for a violation, it does not seem that the Bureau needs the additional recourse of requesting the disqualification of a Commissioner, even in cases where the Bureau has initially not recommended denial. It should be noted that for less extreme communications, the option of requesting a continuance is proposed and available to both the Bureau and applicant.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus suggested that it would be more appropriate for an Administrative Law Judge to consider a request for a Commission member to be disqualified (that one Commissioner should not consider the removal of another).

Response: This comment was considered but was rejected. The value of these comments is greatly appreciated. Airing issues related to *ex parte* communications and possible disqualification of a Commission member could be difficult. However, it is paramount to note that the APA already requires members to determine whether to disqualify another member under Government Code section 11512, subdivision (c). According to the specific recommendations, there is no statutory authorization allowing an Administrative Law Judge to determine whether a member should be disqualified. Furthermore, having a staff member make that decision, including the Executive Director, Chief Counsel, or the presiding officer, would be problematic as it would be difficult, if not impossible, to ensure proper independence.

12. Alternative 1; Paragraph (2) of Subsection (g) provides that a Commission member may be disqualified by judicial order at the request of the applicant.

- a. **Robert Mukai, IGLS**: Mr. Mukai suggested this option is unnecessary as without it an applicant is already entitled to request judicial intervention.

Response: This comment was considered but was rejected. The proposal provides guidance and adds consistency.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that it is not clear if the courts would have the authority to hear this type of matter.

Response: This comment was considered but was rejected. Section 19804 and other sections allow for judicial review of Commission decisions and discretion.

13. Alternative 2; Paragraph (2) of Subsection (g) would not be included and the only method for disqualification of a Commissioner would be through a voluntary disqualification.

- a. **Robert Mukai, IGLS**: Mr. Mukai expressed that this option is most consistent with normal practices and would still allow for judicial remedy to be requested.

This option also preserves collegial relations by not forcing Commissioners to consider the disqualification of a fellow member.

Response: This comment was considered and ultimately accepted in the Commission's adoption of the proposed action.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed that he would not support this option, as a Commissioner might not appreciate the appearance of prejudice or actual prejudice.

Response: This comment was considered and ultimately rejected in the Commission's adoption of the proposed action.

- c. **David Fried**: Mr. Fried expressed that he would support this option, but would recommend a revision to allow the courts to disqualify a Commissioner at any time, even after the Commission has rendered a decision.

Response: This comment was considered and was ultimately accepted, in part in the Commission's adoption of the proposed action. As an applicant may currently seek a judicial writ, the proposal does not need to include a reference to judicial relief or provide a specific time period to allow for the proceedings to be completed before the continuation of the hearing process.

14. Subsection (h) would provide that communications originating from an employee of the Commission must also be conveyed to both the applicant and the Bureau if the communication is upon the merits of an application.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus questions the necessity of this subsection. Mr. Titus noted that the Commission is usually a recipient of information and it is unclear what information the Commission would convey.

Response: This comment was considered but was rejected. Mr. Titus is correct, in that the Commission should most often be a recipient of information that is upon the merits of an application. However, if for some reason the Commission does have information of any nature that it needs to convey, this subsection provides clarity that the Commission must follow the same guidelines as anyone else and insure that both the applicant and Bureau receive the communication following the same *ex parte* standards.

D. ADOPT SECTION 12015. WITHDRAWAL OF APPLICATIONS.

Previous Section 12047 is moved to Section 12015. This new section continues the current application withdrawal procedures and clarifies them. The application process can be lengthy, especially for those applying to be owners of a cardroom, and requires a significant investment in time and funds for the applicant, the Bureau, and the Commission. If at any point in the process, the applicant no longer wishes to proceed

with the application, it is beneficial to all parties to have a procedure by which the application can be terminated. The Act, in section 19869, provides for a request to withdraw an application and differentiates between a withdrawal granted “with prejudice” and one granted “without prejudice.”

1. Subsection (c) specifies that unused portions of any background investigation deposit shall be returned if the withdrawal request is granted.
 - a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended removing this section as it is redundant to the Bureau’s own regulations, Title 11, CCR Section 2037(a).

Response: This comment was accepted, in part. It is not the intent of the Commission’s regulations to subvert the Bureau’s regulations governing deposits. However, section 19869 specifically states that “no fee or other payment relating to any application is refundable by reason of withdrawal of an application” unless the “Commission otherwise directs.” This section therefore merely affirms in the positive a refund of unexpended amounts which may otherwise be precluded from return by the Bureau’s regulations. No change is required to the regulation.

E. ADOPT SECTION 12017. ABANDONMENT OF APPLICATIONS.

Previous Section 12048 is moved to Section 12017. This new section continues the practice of allowing the abandonment of applications under specified circumstances.

1. Paragraph (2) of subsection (a) specifies that when an application has been deemed abandoned by the Bureau, the Bureau shall notify the applicant and provide a copy to the Commission. The notice shall state the reasons for abandonment and allow for reconsideration by the Bureau if the applicant responds within 30 days.
 - a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed a concern that in the case of third-party players an application is linked to the employer, and so notice pursuant to subparagraph (B) of paragraph (1) would come from the employer and not the applicant. Additionally, providing notice of abandonment to the applicant would not be fruitful, as the applicant cannot be independently licensed.

Response: This comment was accepted, in part, and the proposed action modified to accommodate it. The submittal of notification pursuant to subparagraph (B) may be provided to a designated agent of the applicant. Therefore, the proposed action was revised as follows:

(2) If an application has been deemed abandoned, a notice of abandonment shall be sent to the applicant [or his, her or its designated agent](#), with a copy to the Commission, stating the reasons for abandonment of the application and that the Bureau will consider the

application abandoned unless the applicant contacts the Bureau within 30 days from the date of the notice.

2. Subsection (d) specifies that unused portions of any background investigation deposit shall be returned if the withdrawal request is granted.
 - a. **Stacey Luna-Baxter, Bureau:** Ms. Luna-Baxter recommended removing this section as it is redundant to the Bureau's own regulations, Title 11, CCR Section 2037(a). Additionally, Ms. Luna-Baxter requested the removal of the phrase, "if possible."

Response: This comment was accepted, in part. It is not the intent of the Commission's regulations to subvert the Bureau's regulations governing deposits. As the abandonment regulation proposal utilizes the Commission's general rulemaking authority, it is important to affirm in the positive a refund of unexpended amounts which may otherwise be precluded from return by the Bureau's regulations. No change is required to the regulation. Additionally, in cases of abandonment which could be due to a failure of an applicant to respond to the Bureau, it may not actually be possible to refund any unexpended portion of the deposit. Providing a specific requirement that funds *must* be refunded may place an impossible requirement upon the Bureau.

F. ADOPT ARTICLE 2. PROCEDURES FOR HEARINGS AND MEETINGS ON APPLICATIONS.

Article 2 will contain the regulation sections in which the process for Commission meetings and hearings for the purposes of considering and approving licenses and other applications will be detailed.

1. The following comments pertain to this article in general:
 - a. **David Fried:** Mr. Fried questioned how these regulations would apply to current proceedings. Mr. Fried suggested the following additional language:

[These regulations shall apply to any proceeding now pending or which has not resulted in a final decision, unless as of the effective date of these regulations the applicant or person has obtained, or the application of these regulations to that person would interfere with, a vested right pursuant to state law.](#)

Response: This comment was considered but was rejected. While synergy is needed, it is better handled on a case-by-case basis based on which specific stage each application is currently at in the process. In addition, this allows the transition process to work for each application by working with the applicant, Bureau and IGLS.

G. ADOPT SECTION 12050. BUREAU RECOMMENDATION AND INFORMATION

The current Section 12050 is amended, divided, and renumbered as Sections 12056, 12058 and 12060. The Act, in subdivision (a) of section 19826, allows the Bureau to recommend the denial or limitation, conditioning, or restriction of any license, permit, or approval, after the completion of a background investigation. The new Section 12050 details the manner in which any recommendation shall be provided to the applicant and how the information may be considered by the Commission.

1. Paragraph (1) of Subsection (a) specifies that when the Bureau report is issued with a recommendation to deny or limit a license that the Bureau must provide to the applicant specific documentation.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that there is no regulation defining the content of the Bureau report. Mr. Titus expressed that the report cannot be a substitute for a hearing. Mr. Titus requested the addition of an earlier process where the applicant may comment on any evidence in the report and that the lack of such a process creates a situation where the applicant is not able to respond to the report until long after the Commissioners have been exposed to prejudicial materials.

Response: This comment was considered but was rejected. Nothing precludes the applicant from submitting documents or comments earlier than the prescribed processes. The applicant will receive the report at the same time as the Commission.

- b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended the deletion of this section as section 19868 details the requirements and this section does not clarify any perceived ambiguity in the statute.

Response: This comment was considered but was rejected. The proposed regulations provide specificity to the requirements of section 19868, subdivision (b), by detailing what documents and information shall be provided to the applicant upon any recommendation that is not for approval.

2. Paragraph (2) of Subsection (a) specifies that when the Bureau report is issued confidential information need not be included.

- a. **Robert Mukai, IGLS and Alan Titus, Artichoke Joe's**: Mr. Mukai recommended the deletion of this section as section 19868 already makes it clear that this information need not be provided.

Mr. Titus requested clarification if paragraph (2) provides exceptions to paragraph (1). If an exception is provided, Mr. Titus noted that this would create a situation where confidential information is not being shared with the applicant but could still be utilized by the Commission when making a decision.

Response: These comments were accepted, in part. Paragraph (2) is intended to provide an exception to the requirement to provide information to the applicant. This provision does not provide for the Commission to receive information that is unavailable to the applicant and discussion of that concern is better discussed in the relevant regulatory section. To accommodate these comments, in part, and to provide additional clarity, the proposed action was modified as follows:

(2) The documents or information provided under paragraph (1) ~~Bureau~~ need not ~~include provide~~ anything ~~documents or information~~ inconsistent with paragraph (6) of subsection (d) of Section 12012 ~~Business and Professions Code section 19868, subdivisions (b)(3) and (c)(2).~~

3. Subsection (b) specifies that the Commission or an Administrative Law Judge sitting for the Commission, will determine what, if any, significance recommendations by either the Bureau or the Commission's staff shall have on the merits of the application.
 - a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS:** Ms. Luna-Baxter recommended the deletion of this section as the Bureau recommendation is already considered by both Commissioners and any Administrative Law Judge and this subsection is therefore unnecessary.

Mr. Mukai recommended that this subsection be deleted as it serves no purpose.

Response: These comments were considered but were rejected. The Commissioners must make a decision regarding the suitability of applicants and it is important to clarify how any provided recommendations apply in that decision making process. Without direct guidance through this regulation it is possible that some may view a recommendation similarly to other agency actions to approve or deny an application in advance of an appeal heard at an APA hearing. That is not appropriate under the Act. A Bureau recommendation is based on a thorough review of the background of an applicant based on the Bureau's collective experience and training. It does not however carry any binding or precedential weight towards the application of the Commissioner's discretion and thereby the Administrative Law Judge's decision making process.

H. AMEND SECTION 12052. COMMISSION MEETINGS; GENERAL PROCEDURES; SCOPE, RESCHEDULING OF MEETING.

The new Section 12052 provides general procedures regarding the hearing process.

1. Subsections (a) and (b) clarify Commission authority and that this article does not apply to disciplinary proceedings. This helps all parties understand their rights and obligations.

- a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS**: Ms. Luna-Baxter recommended the deletion of these two subsections as they do not deal with the scope created by the title of this section.

Mr. Mukai recommended the deletion of both of these subsections. Mr. Mukai believes that the disclaimer in subsection (a) is incorrect, and that by adopting these regulations the Commission will be limiting both authority and discretion. Additionally, Mr. Mukai believes that the disclaimer in subsection (b) is not necessary as it is already clear that the proposed rules cannot apply to accusations.

Response: These comments were considered but were rejected. While it is possible that regulations in general may limit the authority and discretion of the adopting body, the regulations in this package generally do not do so. In short, these regulations have no impact on how the Commissioners review an application or an applicant's suitability. Commissioner's must still look to their role under the Act and specific statutes, such as sections 19856, 19857 and 19859, and apply their discretion in furtherance of the public interest. All that is delineated by these regulations are hearing and related procedures which largely comport with current practice. Finally, to the extent these sections are perceived as limiting the Commission's authority or discretion in regards to this procedure, they should be viewed subject to this comment, not as an exception to it.

Additionally, subsection (b) provides clarity by spelling out the process to a lay reader.

2. Subsection (c) provides notice requirements that are based on the type of item the application will be agendized for.
 - a. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that the proposed 10-day timeline would apply to notices for both the non-evidentiary hearing meeting and to an evidentiary hearing and that in the case of the evidentiary hearing, subsections (a) and (b) of Section 12060 provide other timelines that make the 10-day timeline unnecessary.

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

(c) An applicant for any license, permit, finding of suitability, renewal, or other approval shall be given notice of the meeting at which the application is scheduled to be heard ~~at least 10 days prior to the meeting date~~. Notice shall be given pursuant to Section 12006.

(1) If the application is scheduled at a non-evidentiary hearing meeting, the notice shall be provided at least 10 days prior to the meeting date and shall inform the applicant of the following:...

- b. **Robert Mukai, IGLS**: Mr. Mukai noted there is nothing in this paragraph that indicates who is responsible for issuing the notice.

Response: This comment was considered but was rejected. It is the Commission's responsibility to provide proper noticing for its own meetings and specific identification of that is not required.

3. Subparagraph (C) of paragraph (1) of Subsection (c) provides that any individual making an oral statement at a non-evidentiary hearing meeting may be required to be placed under oath.
- a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that this requirement is improper and does not provide sufficient notice that an individual could be placed under oath to undergo additional preparation and have legal counsel present.

Response: This comment was considered but was rejected. Whether making unsworn comments or providing testimony under oath, an applicant is expected to reply truthfully. It is unclear why one presentation type would require additional preparation. An applicant may choose to have an appointed representative present at any presentation or may choose to not answer until counsel is present. Furthermore, this regulation itself provides sufficient notice of the possibility.

4. Subparagraph (E) of paragraph (2) of Subsection (c) provides that a notice of defense will be included in the notice of evidentiary hearing if it has not already been provided.
- a. **Robert Mukai, IGLS**: Mr. Mukai expressed a concern that the requirement to submit "unless already provided by Commission staff or the Bureau" is unclear. In addition, as the Notice of Defense form is practically a waiver of an evidentiary hearing, the title is incorrect and could cause confusion.

Response: This comment was considered but was rejected. It is possible that the applicant could be provided the Notice of Defense form prior to the notice of hearing being mailed. If that occurs, then there is no reason to provide another copy, and should staff be unclear if the applicant has received a previous copy of the form, one could still be provided with the notice of hearing. What is important is that the applicant be provided the form no later than the notice of hearing, not that the applicant be provided the form only with the notice of hearing.

Additionally, the name of the form is immaterial to the specific content of the form. The directions provide clarity in what the form accomplishes. No additional change is required.

5. Subparagraph (F) of paragraph (2) of Subsection (c) provides that waiving an evidentiary hearing may result in either a default decision by the Commission or the

Commission holding an evidentiary hearing on the date previously noticed without the applicant's attendance.

- a. **Robert Mukai, IGLS**: Mr. Mukai expressed a concern that the subparagraph does not clearly explain what could happen if a waiver of an evidentiary hearing is submitted and recommended the following revision:

(F) That the waiver of an evidentiary hearing, or failure of the applicant to appear at the evidentiary hearing, may result in (a) a default decision being issued by the Commission based upon the Bureau report, any supplemental reports by the Bureau, and any other documents or testimony already provided or which may be provided to the Commission, or (b) ~~that~~ the hearing ~~being may be~~ held as originally noticed without applicant participation.

Response: This comment was accepted and the proposed action was modified to accommodate it:

(F) That the waiver of an evidentiary hearing, failure by the applicant to submit a Notice of Defense, or failure by the applicant to appear at the evidentiary hearing, may result in:

1. ~~a~~A default decision being issued by the Commission based upon the Bureau report, any supplemental reports by the Bureau, and any other documents or testimony already provided or which may be provided to the Commission, or

2. ~~that~~ ~~t~~The hearing ~~being may be~~ held as originally noticed without applicant participation.

6. Subsection (e) provides that individuals at non-evidentiary hearings who provide testimony may be required to do so under oath.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that there is insufficient notice to require an applicant to provide sworn testimony. With needed advanced preparation, an individual may feel her or she is unable to decline to testify under oath without incurring the enmity of the Commission and yet not be prepared or have counsel present and therefore risk waiving constitutional rights.

Response: This comment has been previously addressed in comment I.H.3.a.

- b. **Robert Mukai, IGLS**: Mr. Mukai suggested that this subsection is inconsistent with section 19871 which requires oral evidence to be taken upon oath or affirmation, and therefore this subsection should not provide the option for unsworn testimony.

Response: This comment was accepted and the proposed action was modified to accommodate it. Subsection (l) of Section 12060 specifies that for evidentiary

hearings oaths must be administered. Subsection (e) is intended to provide clarity that in other cases oaths may be required, versus unsworn public comment. However, as this subsection seems to have created confusion, and the requirement is already included for non-evidentiary hearing meetings in subparagraph (C) of paragraph (1) of subsection (c), subsection (e) was removed.

I. ADOPT SECTION 12054. APPROVAL; COMMISSION ELECTED HEARINGS.

This section provides a delineation of a non-exhaustive list of possible Commission actions at a non-evidentiary hearing meeting.

1. Subsection (a) specifies the options the Commission has in taking action at a non-evidentiary hearing meeting in regards to an application

a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS:** Ms. Luna-Baxter recommended allowing the Commission to apply conditions and deny an application for mandatory reasons at non-evidentiary hearings and recommended the following revisions:

(1) Issue [or condition](#) a license, temporary license, interim license, registration, permit, [finding of suitability](#), renewal or other approval.

(2) [Deny a license when an application meets the criteria of a mandatory denial as outlined in Business & Professions Code sections 19858 and 19859 subsections \(c\), \(d\) and \(g\).](#)

Mr. Mukai asserted that section 19870 allows for the denial or conditioning of a license without an evidentiary hearing. Mr. Mukai provides legal case history in support of a denial before evidentiary hearing not being a violation of due process.

Response: These comments were considered but were rejected. First, these comments presuppose that a mandatory denial is always a clear issue and does not warrant the taking of evidence at an evidentiary hearing. However, a cursory review of section 19859 reveals a host of ambiguities ripe for debate and discussion. A limitation, as the comments envisioned, would need exceptions and other relief valves which would likely render any benefits moot. Second, and most importantly, an applicant is entitled to a “meeting” under sections 19870 and 19871 regardless of whether there are discretionary or mandatory bases for denial. The applicant still has the right to introduce evidence, cross-examine opposing witnesses and offer rebuttal evidence even if the Commission is precluded by section 19859 from approving the application.

In addition, section 19870 does not provide for the exception Mr. Mukai asserted. It states “...after considering the recommendation of the chief and any other testimony and written comments as may be presented *at the meeting...*” (emphasis added). Section 19870 clearly contemplates a meeting of some sort.

Mr. Mukai argues that this meeting requirement is met by a non-evidentiary hearing meeting; however, section 19871 provides further guidance on what “the meeting” might mean when it states, “The commission meeting described in section 19870 shall be conducted in accordance with regulations of the commission and as follows:...” Section 19871 then goes on to provide very specific requirements such as submitting rebuttal evidence and calling witness to give testimony under oath. It would not simplify or clarify the process if the regulations allowed for the rights set forth in section 19871 to be conducted at both an evidentiary hearing and a non-evidentiary hearing meeting, nor would it provide any cost savings as the Bureau could be expected to provide for witnesses and introduce exhibits for each application considered at any non-evidentiary hearing meeting, nor would it be fair to the applicant to prepare a full case when such may not be necessary. Finally, the Commission is required in section 19870 to prepare and file a detailed statement of its reasons for any denial which necessarily requires evidence and testimony on the record. It is simpler to defer any applications that require this additional level of scrutiny to a later meeting to allow both the Bureau and the applicant to focus to a higher level once it has been determined that such is required.

The court cases cited by Mr. Mukai refer to the practices of other agencies such as the State Bar of California and the DCA. These agencies have very specific statutory schemes which are quite different from the Act. Under the DCA’s statutory scheme, for example, an agency receives applications, performs investigations and then either approves or denies an application without any commission meeting or evidentiary hearing. Only after this initial denial does their scheme require a hearing through the APA process and review by a board or commission. Mr. Mukai’s argument asserted that this scheme is sufficiently similar to the Act that it and the court cases related to it apply to the requirements of the Act. The DCA scheme includes the investigating agency both investigating and making a decision with a board or commission acting only as an appeal review, while the Act has the investigating agency (Bureau) only investigating with the Commission making any and all decisions pertaining to facts, law and suitability. These two schemes are statutorily different, distinct and dissimilar enough that they are not comparable, nor are any other requirements, such as the court cases cited.

- b. **David Fried**: Mr. Fried questioned why the applicant is not allowed to request an evidentiary hearing.

Response: This comment was considered but was rejected. There is no provision for the applicant to request an evidentiary hearing; however, when the Commission is considering what action to take at an open meeting, anyone is able to participate in the discussion including the applicant. In addition, as the proposed process only requires an evidentiary hearing to be held when an application is not being approved, there may be limited reasons for an applicant to desire an evidentiary hearing.

2. Paragraph (2) of subsection (a) specifies the Commission may elect to hold an evidentiary hearing and shall identify the issues related to the applicant's suitability it would like to consider.

- a. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the requirement that the Commission identify issues lacks clarity and is badly conceived. Mr. Mukai is concerned that requiring such identification is an unwise limitation of agency discretion.

Response: This comment was considered but was rejected. There will be situations where the Bureau has recommended approval, or has provided no recommendation and after review of the application the Commissioners decide that there is an issue preventing them from approving the application and they would like to hold an evidentiary hearing to discuss these issues and receive additional information. If the Commission didn't identify any issues, then the applicant would be required to establish their suitability in every aspect of their life; while the proof of suitability is the burden of the applicant, it is not good for the process to require every aspect of the applicant to be detailed when the simple identification of relevant key issues could both simplify and speed up the evidentiary hearing process. In cases where the Bureau has recommended denial, and the Executive Director has not directly scheduled the application for evidentiary hearing, the Commissioners can simply identify the Bureau report as being the issue they wish to discuss.

J. ADOPT SECTION 12056. EVIDENTIARY HEARINGS.

The Act provides two ways by which the Commission may consider matters. Sections 19870 and 19871 describe the manner by which the Commission shall conduct meetings and section 19825 allows the Commission to require any matter that the Commission is authorized to consider in a hearing or meeting of adjudicative nature to be conducted according to the APA. In order to expedite the handling of applications, this regulation defines the "meeting" required by sections 19870 and 19871 as a GCA evidentiary hearing.

1. Subsection (a) specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, but that it may instead direct the hearing to the APA.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that there is no criteria to determine when an application would be handled as a GCA or APA hearing nor does the Initial Statement of Reasons provide any guidance.

Response: This comment was considered but was rejected. The application of a GCA hearing as primary over an APA hearing is consistent with the Act. The first requirement is that the hearing be held pursuant to sections 19870 and 19871 of the Business and Professions Code, while the authorization for the use of the APA (Business and Profession Code section 19825) allows for matters requiring a

hearing to instead be heard pursuant to the APA. Additionally, section 19825 provides no conditions or requirements for this replacement, and so none have been imposed through the proposed regulations. Due to this, the application of the APA will be handled on a case-by-case basis.

- b. **Robert Mukai, IGLS**: Mr. Mukai proposes the following language to provide clarity and consistency:

(a) If the Commission elects to hold an evidentiary hearing, the hearing will be a GCA hearing conducted pursuant to Section 12060, unless the Executive Director, or the Commission [acting pursuant to Business and Professions Code section 19825](#), determines [that the hearing matter](#) should be conducted as an APA hearing ~~underpursuant to~~ Section 12058.

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

(a) If the Commission elects to hold an evidentiary hearing, the hearing will be [conducted as](#) a GCA hearing ~~conducted underpursuant to~~ Section 12060, unless the Executive Director, or the Commission [acting pursuant to Business and Professions Code section 19825](#), determines [that the hearing matter](#) should be conducted as an APA hearing ~~underpursuant to~~ Section 12058.

2. Alternative 3; Subsection (a) specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, and that it may only direct the application to an APA hearing if the Bureau has recommended denial.
- a. **David Fried**: Mr. Fried contended that the Commission should have the discretion to choose an APA hearing regardless of the Bureau's recommendation.

Response: This comment was considered, but the Commission ultimately did not adopt this alternative. Therefore, no response is necessary.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed a concern that the limitation of the APA process to just when the Bureau recommended denial is the exact opposite of the Legislature's intent. Mr. Titus argues that with a GCA hearing the Commission is required to consider the recommendation of the Bureau, but that there is no requirement for the Bureau's recommendation to be considered at an APA hearing allowing the APA hearing to act as a fresh venue for the Commission to hear evidence without having to consider the recommendation of approval.

Response: This comment was considered, but the Commission ultimately did not adopt this alternative. Therefore, no response is necessary.

- c. **Robert Mukai, IGLS**: Mr. Mukai noted that this alternative is preferable and recommended revision to the language to mirror his previous comments.

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

(a) If the Commission elects to hold an evidentiary hearing, the hearing will be conducted as a GCA hearing ~~conducted underpursuant to~~ Section 12060, unless the Bureau is recommending denial and the Executive Director, or the Commission acting pursuant to Business and Professions Code section 19825, determines that the hearing matter should be conducted as an APA hearing ~~underpursuant to~~ Section 12058.

3. Subsection (b) specifies that any requirements in the evidentiary hearing rules that require disclosure do not apply to confidential information. In addition, any confidential information that the Commission may receive through the *ex parte* exception of Section 12012(b)(2)(D) must be provided to the applicant, though it may be redacted. It also clarifies that exculpatory or mitigating information may not be withheld from the applicant.

- a. **David Fried**: Mr. Fried suggested that the subsection should add the following:

(b) ...However, if the confidential information redacted by the Bureau is potentially exculpatory or mitigating information, the Bureau will notify the Commission and the applicant of that fact. An applicant that wishes to challenge the Bureau's redaction or withholding of any information shall have 14 days from learning that the information has been redacted or withheld to file an action compelling disclosure.

Response: This comment was considered but was rejected. The current regulations already allow for redacted information or documentation to be considered by the Commission. If the Bureau were to redact potentially exculpatory or mitigating information, this regulation already requires notification to the applicant. The Commission could request access to the information pursuant to paragraph (6) of subsection (d) of Section 12012.

- b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the ability of the Commission to consider information unavailable to the applicant is a denial of due process for the applicant. Mr. Titus also commented that it was against the licensing scheme enacted by the Legislature which sets one agency with the role of investigating allegations [Bureau] and the other [Commission] with an unprejudiced adjudicative role based on admissible evidence.

Response: This comment was considered but was rejected. Mr. Titus' comments, also provided pursuant to the *ex parte* provision, are adequately addressed in response to comment I.C.8.d. The comment pertaining to the

licensing scheme is not relevant as the proposed regulations do not invest investigatory authority in the Commission, but simply allow Commissioners to ask questions and participate in the evidentiary hearing process.

4. Subsection (c) clarifies that each party is responsible for any costs associated with their side of an evidentiary hearing, with the exception that the Bureau may require additional deposit amounts for any necessary supplemental investigations.

- a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended that this subsection be deleted. While the Bureau is able to request additional funds, it is unlikely that the applicant would be receptive to a request in advance of the hearing to cover any additional investigatory costs. Ms. Luna-Baxter also asserted that costs associated in participation for the hearing are eligible for reimbursement.

Response: This comment was considered but was rejected. As drafted, the language allows for additional costs for investigations to be reimbursable to the Bureau. If an applicant is unable or unwilling to pay for additional costs associated with any additional investigation requested by the Commission, the issue should be raised to the Commission without delay.

In addition, the Act does not allow for the reimbursement of costs associated with the evidentiary hearing itself and therefore those costs, as indicated in this section, must be borne by the parties. While section 19930 does state under subsection (d) that costs of investigation and prosecution are reimbursable and does use the terms applicant and “deny a license,” there are three problems with directly applying it to this section.

First, section 19930, subdivisions (d) through (f), inclusive, were modeled after section 125.3. That section does not provide a basis for cost recovery for a denial proceeding but speaks to enforcement or disciplinary proceedings against a current licensee not an applicant for a license. This is consistent with the DCA’s practices and interpretation.

Second, the legislative history seems to be against allowing costs in this instance. By example the last two analyses before the Senate and Assembly on Senate Bill (SB) 1812 (Vincent, Chapter 487, Statutes of 2003) which added subdivision (d) to section 19930 stated:

Without explicit language in the Act, the Division is unable to seek reimbursement from violators, who should bear the enforcement costs.

The sponsor adds that most licensing programs have authority to recover enforcement costs, using the example of licensing boards within the State DCA, which have an express right to recover reasonable costs of investigation and enforcement once a licensee has been found to have violated applicable

law (section 125.3). If enacted, this bill places the Division on the same kind of footing. (Emphasis added.)

The key is “on the same footing,” not a greater footing.

Third, because of the forgoing and the apparent uncertainty caused by the use of the terms “denial” and “application,” there are presented two options. On the one hand section 19930 could be interpreted in a wholly new manner which was not sought by the Legislature, but which is unlike similar statutes in the Business and Professions Code, and is contrary to practices of DCA, not to mention questionable from the perspective of ensuring the Commissioners receive the relevant facts on an application and protecting an applicant’s right to a hearing. On the other hand, a harmonized interpretation of the language in subdivision (d) of section 19930, with section 125.3 of the Business and Profession Code and related sections (sections 3753.5(a), 4990.17, and 5107(b)), provides a clear legislative intent for SB 1812. The latter is more appropriate.

K. ADOPT SECTION 12058. APA HEARING.

This section specifies some initial processes to be followed by the Commission should an APA Hearing be selected. The majority of the process is contained within the APA’s own laws and regulations.

1. The following comments pertain to this section, in general:

- a. **Robert Mukai, IGLS**: Mr. Mukai recommended that this entire section, except subsection (d), should be deleted as duplicative of the normal APA process.

Response: This comment was considered but was rejected. This section is necessary to explain the process for the APA hearing to the applicant and other parties.

2. Subsection (d) specifies that the Bureau is not required to recommend or seek any particular outcome, but to only present the facts and law related to the applicant and the background investigation.

- a. **Robert Mukai, IGLS**: Mr. Mukai indicated that in prior discussions between the Commission’s staff and the Bureau it was indicated that the desire of the Bureau to not be forced to support a position contrary to its recommendation was only true during APA hearings but that during a GCA hearing the Bureau is willing to act as the complainant at all times, even when having previously recommended approval.

Response: This comment was considered but was rejected. Subsection (a) of Section 12056 provides that the complainant role will be decided as part of the determination that a hearing will be held. At that time, the Bureau will be able to

voice any concerns it may have with being responsible for presenting its report and the facts of that case. This allows Mr. Mukai's concern to be considered, along with any other concerns the Bureau may have at the time of consideration of a specific application.

L. ADOPT SECTION 12060. GCA HEARINGS.

This section specifies the process of a GCA Hearing, including a minimum timeline from when a GCA hearing is selected to when documents need to be exchanged. The section also includes other procedural matters such as what documents must be exchanged, who the presiding officer shall be and who is responsible for presenting each position.

1. Subsections (a) and (b) provide the minimum timelines for the scheduling of a GCA hearing once it has been determined that an application will be subject to one. Subsection (a) authorizes the Executive Director to directly schedule an application prior to the application being addressed by the Commission at a non-evidentiary hearing meeting and provides a minimum 90-day time period. Subsection (b) provides a minimum 60-day timeframe once the Commission has elected to hold an evidentiary hearing.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the notice periods in advance of a hearing are not the same. Mr. Titus noted that the time necessary to prepare for a hearing will be the same either way.

Response: This comment was considered but was rejected. Subsections (a) and (b) provide only minimum time periods between the determination that an evidentiary hearing will be held and the possible beginning of the hearing. Both time frames provide the same approximate timeframe, not from the determination that a hearing will be held, but from the issuance of the Bureau's report. In this way, the regulations attempt to provide a consistent time frame working under the assumption that it takes, at a minimum, 30 days from the Bureau providing its report to the Commission for the application to be scheduled for Commission consideration.

2. Subsection (c) specifies that the Executive Director selects the presiding officer and that it shall be either a properly segregated member of the Commission's legal staff or an Administrative Law Judge (ALJ).

1. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern in the selection of an attorney employed by the Commission to serve as a hearing officer. Mr. Titus raised three specific concerns.

1. ALJs have specific training and experience in the issues and tasks of a hearing officer. A staff attorney will rarely have this type of experience. The regulations do not even allow a staff attorney to administer an oath.

2. A hearing officer needs to be independent. A staff attorney, while in a position to counsel the Executive Director and the Commission is not in a position to direct them and is instead directed by them. A staff attorney may therefore be unable to make decisions that would add to either the cost or workload of the Commission.
3. A hearing officer needs to be impartial and free of the appearance of bias. Staff attorneys are career employees of the Commission and could be influenced in decisions made based on the effects it could have on their career path. The appearance of bias should be avoided.

Mr. Titus noted that while the proposal does limit communication prior to the evidentiary hearing, it is insufficient as it does not protect during the hearing. Additionally, it relies on self-enforcement and there is no ability to monitor and enforce.

Response: This comment was considered but was rejected. The Commission's legal staff has sufficient training and experience. Hearing officers for evidentiary hearings do not need to be ALJs. There are ample examples in case law to support staff acting in this capacity.

3. Subsection (d) specifies that the applicant or Bureau may request a continuance which can be approved by either the Executive Director or the Commission.
 - a. **Alan Titus, Artichoke Joe's**: Mr. Titus recommended that the presiding officer be in control of the hearing dates.

Response: This comment was considered but was rejected. It is up to the Commission to set its own calendar and the Executive Director is in charge of this administrative function. It should not be the responsibility of the presiding officer to set the Commission's calendar or bind the Commissioners' schedules.

4. Subsection (e) specifies the manner in which the Bureau and applicant will conduct a pre-hearing exchange of documents, and witness lists and statements. For the Bureau this exchange is in addition to the one required under Section 12052 when the Bureau has recommended denial. The timelines for this exchange require the Bureau to provide to the applicant 45 days in advance of the hearing date with the applicant providing 30 days prior.
 - a. **David Fried**: Mr. Fried suggested an additional, mutual 15-day exchange prior to the hearing date for any supplementary information.

Response: This comment was considered but was rejected. Parties can voluntarily submit the information or ask the presiding officer to issue an order to allow for it as necessary on a case-by-case basis.

- b. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the requirement in paragraph (4) is overbroad. Mr. Mukai opined that any comments or writings that are not reports or statements of parties or witnesses would not need to be exchanged and those that do are sufficiently covered by paragraphs (1) through (3), inclusive.

Response: This comment was considered but was rejected. If there is any information that is relevant it needs to be provided and this paragraph provides a final catchall.

- c. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that while the current regulation for the exchange of documents is insufficient, the proposed regulation would be unfair to the applicant. After this initial exchange by the Bureau the applicant should have time to prepare their case. This preparation could take as few as 45 days but could easily take 60 days or even more. The Commission should be liberal about granting the applicant the time needed to prepare a response. Mr. Titus asserted that the Commission has no economic stake and no particular reason to cut short the time needed by an applicant and that the applicant has little reason to stall the process.

Mr. Titus additionally noted that the proposed process differs from the APA in significant respects.

Response: This comment was considered but was rejected. The parties are able to exchange information earlier, as necessary, before the hearing on their own agreement. However, where more time is needed the parties are able to request a continuance from the Commission. The Commission has an interest in promptly determining the suitability of an applicant. It is the Commission's responsibility to ensure that licenses are not held by unqualified persons (section 19822), and while this is not a reason to prematurely hold a hearing without every party having a reasonable chance to prepare their case, it is a reason to provide tight minimum timelines and then to extend upon need instead of requiring expansive timelines that would be followed even in situations where they are not needed by either party. Long timelines, combined with the automatic issuance of an interim renewal license provides plenty of incentive for an applicant to stall the process, as to do so would ensure a longer chance to operate under the temporary license.

Additionally, there is no need for this process to mirror every aspect of the APA even if the proposal has taken from the APA in other areas.

- d. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that the documents and information required to be exchanged, while largely similar to those addressed in Government Code section 11507.6, fail to include all aspects, including the names and addresses of witnesses. Section 11507.6 also notes that witness list need not be limited to just those who will be called to testify and requires statements from

not just witnesses but “persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding.”

Section 11507.6 additionally requires the disclosure of “[i]nvestigative reports made by or on behalf of the agency...to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing...”

Mr. Titus recommended that the proposal be modified to include the missing provisions of section 11507.6. To do otherwise would be to limit the rights of the applicant by not recognizing the minimum protections established by the APA.

Finally, Mr. Titus noted that current regulation provides that “exculpatory or mitigating information shall not be withheld” and no such protection was included in the proposed revisions.

Response: This comment was considered but was rejected. The Legislature established the Act separately from the APA and allows the Commission to separately utilize the APA if it so chooses. The GCA hearing process is not intended or required to mimic the APA in all respects.

5. Subsection (h) specifies that the Bureau shall present all facts and information contained in the Bureau’s report, the results of its investigation and the basis for any recommendation. The Bureau is not required to defend any position related to the application.
 - a. **Alan Titus, Artichoke Joe’s and Robert Mukai, IGLS:** Mr. Titus commented that this subsection is unclear. As the Commissioners already have the Bureau’s report, and thus the facts and information in the report, Mr. Titus noted that the hearing should involve evidence supporting the facts and information contained in the report. Mr. Titus asserted that the focus should be on whether the applicant has met their burden of proof but does not detail what the applicant must prove. Additionally, Mr. Titus recommended the following change:

(h) The Bureau shall present all facts and information in the Bureau’s report, the results of its background investigation, and the basis for their recommendation already filed with the Commission according to sections 19868 so that the Commission can make an informed decision on whether the applicant has met his or her burden of proof. The Bureau may but is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

Mr. Mukai commented that there are situations where the Bureau does not issue a report or a recommendation and suggested the following revision:

(h) The Bureau shall present all facts and information in the Bureau's report, if any, the results of its background investigation, and the basis for ~~its~~~~their~~ recommendation, if one was already filed with the Commission according to Business and Professions Code sections 19868, to enable ~~that~~ the Commission to make an informed decision on whether the applicant has met his or her burden of proof. The Bureau is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

Response: These comments were accepted and the proposed action was modified as follows to accommodate them:

(h) The Bureau shall present all facts and information in the Bureau's report, if any, the results of its background investigation, and the basis for their recommendation, if one was already filed with the Commission according to Business and Professions Code sections 19868, to enable ~~that~~ the Commission to can make an informed decision on whether the applicant has met his, ~~or~~ her, or its burden of proof. The Bureau may but is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

6. Subsection (i) specifies that the burden of proof is on the applicant to prove their qualifications to receive an approval under the act.
 - a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that the repeated reference to the burden of proof being on the applicant creates confusion. Mr. Titus noted that although the burden might be on the applicant, the Bureau makes the charges and the applicant responds to them. Therefore, the applicant is more like a defendant in a licensing proceeding.

Response: This comment was considered but was rejected. The Bureau does not make charges. The Bureau conducts a background investigation and presents the results to the Commission. This is not an accusation.
7. Subsection (j) specifies that the applicant may choose to be represented or to retain an attorney or lay representative.
 - a. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the allowance of representation by a lay representative may raise issues concerning the unauthorized practice of law. Mr. Mukai recommended Commission staff consult with the State Bar of California on this issue. Mr. Mukai also suggested that additional limitations be applied to lay representatives.

Response: This comment was considered but was rejected. Commission staff has consulted with the State Bar of California on this issue and has confirmed

what was already known. Lay representatives are permissible in administrative hearings and the proposed standards are sufficient as written.

M. ADOPT SECTION 12062. ISSUANCE OF GCA HEARING DECISIONS.

This section specifies the process of how a GCA decision is drafted and approved including who may participate in any discussion and voting.

1. Subsection (a) specifies that the presiding officer shall prepare for the Commission a proposed decision within 30 days of the conclusion of the GCA hearing.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that any staff attorney who is going to write a decision needs to have never been exposed to any inadmissible evidence or acted as the presiding officer, must have attended the hearing and watched and heard the witnesses, may not have discussed the case with others or prejudged the case prior to discussing it with the Commissioners and finally, the staff attorney may not have been involved in the case in any way that might have caused them to be prejudged.

Response: This comment was considered but was rejected. An ALJ both hears the case, rules on the admissibility of evidence, and writes the proposed decision. A presiding officer (staff attorney) acts in a somewhat lesser role than an ALJ, but is equally able to draft any decision that will be ultimately approved by the Commission.

N. ADOPT SECTION 12066. FINAL DECISIONS; JUDICIAL REVIEW.

This section specifies the process under which the Commission's decision becomes final, subject only to judicial review.

1. Subsection (c) specifies that any judicial review will be subject to Business and Profession Code section 19870, subdivision (e) and that not seeking reconsideration does not affect the right to petition for judicial review.

- a. **Robert Mukai, IGLS**: Mr. Mukai suggested that the word "appeal" is incorrect as Commission decisions are reviewed by writ.

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

(c) An ~~appeal~~[request for review](#) of a denial or imposition of conditions by the Commission shall be subject to judicial review as provided in Business and Professions Code section 19870, subdivision (e). Neither the right to petition for judicial review nor the time for filing the petition shall be affected by failure to seek reconsideration.

O. ALTERNATIVE 4. APA IS ALWAYS AN OPTION BUT PRESENTER CHANGES DEPENDING ON BUREAU RECOMMENDATION.

This option proposes to change various sections and would allow for Commission staff to serve as the presenter of facts in APA hearings for applications where the Bureau has not recommended denial.

1. Subsection (b) of Section 12002, defines “Advisor to the Commission” to mean any employee of the Commission except those designated as advocates of the Commission.
 - a. **Robert Mukai, IGLS**: Mr. Mukai noted that while the definition is Advisor to the Commission, the usage in the rest of the proposed regulation is advisor of the Commission.

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

(g) “Advisor ~~of~~ the Commission” shall be all employees of the Commission except those designated as an advocate of the Commission.

2. Paragraphs (3), (4) and (5) of subsection (d) of Section 12012 provides the sharing of information or documents by either the Bureau or advocate of the Commissions, applicant or other interested party must be provided to both the Bureau and applicant simultaneously as when they are provided to the Commission.
 - a. **Robert Mukai, IGLS**: Mr. Mukai commented that by equating an advisor of the Commission with the Bureau for the purposes of *ex parte*, the two employees of the Commission will be prevented from communicating on any topic.

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

(a) For purposes of this section, “*ex parte* communication” or *ex parte* means a communication upon the merits of an application without notice and opportunity for all parties to participate in the communication.

To ensure communication between the Bureau and Commission is not blocked on other issues, the same revision is proposed for the non-alternative subsection (a).

3. Subsection (a) of Section 12056 specifies that the Commission’s default selection for an evidentiary hearing is a GCA hearing, and that if the Bureau has not recommended denial, the Commission shall designate its own staff to act as advocates of the Commission.

- a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that using Commission staff to act in the presenter role during an APA hearing contradicts the Act as it places Commission staff into a position of investigator and prosecutor, a position reserved for the Bureau. In addition, because the Commission is so small, this option creates additional *ex parte* concerns. Mr. Titus suggested that the Bureau should present the evidence regardless of a recommendation and does not understand the Bureau's insistence in avoiding this role.

Response: This comment was considered but was rejected. The Act does not discuss a role for either the Bureau or Commission staff when it comes to the presentation of facts. Section 19871 makes reference to a party but does not directly identify the Bureau. Agencies can provide for a segregation of functions. This is quite common in unitary agencies.

Ultimately, this alternative was not adopted by the Commission.

II. JUNE 18, 2014 REGULATION HEARING

The following oral comments/objections/recommendations were received regarding the text of the proposed action during the regulations hearing held June 18, 2014:

A. AMEND SECTION 12002. GENERAL DEFINITIONS.

This proposed action would amend Section 12002 within Article 1. Section 12002 includes general definitions used throughout the Division.

1. Subsection (d), defines "Bureau report" to mean a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application.
 - a. **Alan Titus, Artichoke Joe's**: Mr. Titus suggested that the definition should be corrected to read:

(d) "Bureau report" means a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application ~~as~~and defined in Business and Professions Code section 19869 as "final action by the Department."

Response: This comment was considered but was rejected. As drafted the proposed action is accurate and grammatically correct and the suggested change is unnecessary.

After further consideration during the review of the 15-day comments on the modified text, it was decided that a clarifying grammatical, editorial change could be made. Because the phrase "as defined in section 19869 as 'final action by the Department'" is intended to modify "a final determination," that phrase was

moved to immediately follow the word “determination,” so this subsection now reads:

(d) “Bureau report” means a final determination, as defined in Business and Professions Code section 19869 as “final action by the Department.” by the Chief of the Bureau regarding his or her recommendation to the Commission on any application ~~as defined in Business and Professions Code section 19869 as “final action by the Department.”~~

B. ADOPT SECTION 12012. EX PARTE COMMUNICATIONS.

This section is added to address and clarify *ex parte* communications. The Act¹⁴ imposes prohibitions on communication between “members of the Commission” and an applicant or an agent of an applicant under certain conditions. These prohibitions are ambiguous. Section 12012 is added to clarify and provide guidance regarding prohibited communications between members of the Commission, Commission staff, Bureau staff, and the regulated industry.

1. Subsections (b) and (c) provide for the specific periods when the limitations of section 19872, subdivisions (a) through (c), inclusive, apply.
 - a. **Jim Parrinello, Artichoke Joe’s**: Mr. Parrinello expressed concern that these subsections allow for *ex parte* communications between the Bureau and the Commission prior to the issuance of the Bureau’s report without the knowledge of the applicant. Mr. Parrinello states that this is incorrect for several reasons:
 - It is not allowed under Business and Professions Code 19872.
 - It creates unfairness in the process.

Additionally, Mr. Parrinello commented that the proposed regulation sets up artificial time distinctions. Mr. Parrinello suggested that, from the applicant’s perspective, the application is really before the Commission when the application is filed with the Bureau and does not reflect the proposed periods between the filing of the application until Bureau begins its investigation and when the Bureau submits its report until the Commission acts. This is in part because the Bureau is unable to dispose of the application, only the Commission can act upon it.

Response: This comment was considered but was rejected. A similar question was responded to previously in comment I.C.3.c.; however, section 19872, subdivisions (a) through (c), provide for the specific *ex parte* restrictions. In proposing subsections (b) and (c) of Section 12012 a breakdown of the three subdivisions of section 19872 is helpful to determine the specific limitations required by statute.

¹⁴ Specifically, Business and Professions Code section 19872

- Subdivision (a) applies to communications between a member of the Commission and an applicant while an application is being investigated; when it is pending disposition before the Department (Bureau); and, while an application is pending disposition before the Commission. As Mr. Parrinello has suggested, this limitation applies for the entire process.
- Subdivision (b) applies to communications between an applicant or an interested person and a member of the Commission while an application is being investigated by the Bureau and while it is pending disposition before the Bureau. In the regulations, the conclusion of the period of “pending disposition before the Bureau” is reflected by the issuance of the Bureau report. Therefore, this subdivision can be read to provide a restriction on communications between an applicant or an interested person and a member of the Commission before the issuance of the Bureau report. As the subdivision does not mention the time period when the application is pending disposition before the Commission, it would not apply after the issuance of the Bureau report.
- Subdivision (c) applies to communications between the Department, applicant or an interested person and a member of the Commission while an application is pending disposition before the Commission. In the regulations, the beginning of the period that includes Commission consideration is when the Bureau provides the Commission with its report. Therefore, this subdivision can be read to provide a restriction on communications between the Department, applicant or an interested person and a member of the Commission after the issuance of the Bureau report. As this subdivision does not mention the time periods when an application is either being investigated by the Bureau or is pending disposition before the Bureau, it would not apply before the issuance of the Bureau report.

With this break down it is clear that there are three different groups being limited in their communications with the members of the Commission and three different time frames being referenced. Subdivision (a) of section 19872 clearly links all three periods and restricts Commission communication with the applicant. Subdivisions (b) and (c), however, apply to different time periods and provide different restrictions. As used in the proposed action, the issuance of the Bureau report reflects that point in time when the Bureau has, for the most part, finished its review and has transferred the application to the Commission for disposition. Therefore, subsections (b) and (c) of Section 12012 were crafted to acknowledge that subdivision (a) of Section 19872 applies before and after the issuance of the Bureau report, while subdivision (b) only applies before the issuance of the Bureau report and subdivision (c) only applies after the issuance of the Bureau report.

2. Paragraph (2) of subsection (d) provides that communications made at a public hearing or meeting and which concern a properly noticed matter are not *ex parte*.
 - a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello, referring to comment I.C.5.a., expressed concern that allowing comments made at any public meeting to not be considered *ex parte* could be open to abuse. A general open comment period does not provide notice to all parties that such a related communication is going to occur. Understanding that limiting public comment during the open comment period may be an issue, Mr. Parrinello suggested that staff could notify the affected party who will then be able to listen to the recording of the proceeding and understand what occurred.

Response: This comment was considered but was rejected. While Mr. Parrinello's concern is noted, it would not be appropriate to limit public comments during public comment periods at a properly noticed public meeting. The records of comments made at noticed meetings are currently available for inspection and are provided on the Commission's website at: http://www.cgcc.ca.gov/?pageID=meetings_detail. Moreover, subdivision (f) of section 19872 specifically authorizes public comments. If comments made during an open public comment period are determined to be *ex parte* communication, then the cure provisions of paragraph (1) of subsection (f) and subsection (g) of Section 12012 would apply. It isn't necessary to include anything further.

3. Paragraphs (3), (4) and (5) of subsection (d) provide that the sharing of information or documents by either the Bureau, applicant or other interested party must be provided to both the Bureau and applicant at the same time they are provided to the Commission.
 - a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that the simultaneous provision of information or documents as proposed in these paragraphs are not allowed by section 19872.

Response: This comment was previously considered and responded to in comment I.C.6.a.

4. Paragraph (6), subsection (d), provides an exception to *ex parte* communications to allow confidential information provided to the Commission to remain confidential.
 - a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed a concern that this provision allows for *ex parte* communications between the Bureau and the Commission involving confidential information that is not allowed under section 19872. Additionally, the allowance of 14 days for the applicant to seek judicial relief, while welcome, does not solve the legal problem.

Response: This comment was previously considered and responded to in comment I.C.8.a.

- b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter noted that the Bureau does not agree with the Commission's interpretation of the Act that information provided by another law enforcement office to the Bureau can be provided to the Commission's staff.

Response: This comment was previously considered and responded to in comments I.C.8.b. and I.C.8.c.

C. ADOPT SECTION 12050. BUREAU RECOMMENDATION AND INFORMATION

The current Section 12050 is amended, divided, and renumbered as Sections 12056, 12058 and 12060. The Act, in subdivision (a) of section 19826, allows the Bureau to recommend the denial or limitation, conditioning, or restriction of any license, permit, or approval, after the completion of the background investigation. The new Section 12050 details the manner in which any recommendation shall be provided to the applicant and how the information may be considered by the Commission.

1. Paragraph (2) of Subsection (a) specifies that when the Bureau report is issued confidential information need not be included.
 - a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that it is unfair for the Commission to be provided confidential information without the applicant having some opportunity to view the information and respond. It is against basic fairness for the Commission to receive information that would prejudice it against an application without the applicant even knowing about it or having the opportunity to respond.

Response: This comment was considered but was rejected. Mr. Parrinello expressed a concern that is addressed in comments I.C.3.c., and II.B.1.a. However, Mr. Parrinello's concern is not relevant to this provision. This provision only clarifies that when issuing its report, the Bureau does not need to include any confidential information, providing an exception to the requirements regarding which documents must be provided. At this point in the process, the Bureau should not be providing the Commission with any confidential documents that are not also being provided to the applicant.

D. ADOPT SECTION 12054. APPROVAL; COMMISSION ELECTED HEARINGS.

This section provides a delineation of a non-exhaustive list of possible Commission actions at a non-evidentiary hearing meeting.

1. Subsection (a) specifies the options the Commission has in taking action at a non-evidentiary hearing meeting in regards to an application.
 - a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter requested that the Commission not limit its ability to take an action of denial at a non-evidentiary hearing meeting. The Bureau believes that such an action can be taken by the

Commission and not doing so results in significant resources being wasted by Bureau staff, IGLS staff and Commission staff. Denial at this stage does not take away an applicant's due process.

Response: This comment was considered but was rejected. The majority of this comment is addressed in comment I.I.1.a. Additionally, Ms. Luna-Baxter suggested that the proposed action would require additional State resources to implement. Staff believes that the State resources would in fact be less. The comment proposes a 1-2 meeting process whereby the Commission would first meet and issue a decision of denial. The applicant would then either do nothing, concluding the process or request an evidentiary hearing.

The proposed action considers a 0-1 meeting process for "mandatory denials." The proposed action would add an authorization for the Executive Director to directly schedule an application for an evidentiary hearing, bypassing the non-evidentiary hearing meeting. Once directly scheduled, the applicant would then be provided with the opportunity to end the process through the proposed "Notice of Defense" form, or else confirm their desire to participate in an evidentiary hearing. Should the applicant either not respond or indicate that they are not interested in participating in an evidentiary hearing, the application could proceed to a default decision based upon the merits of the Bureau report, similar to current non-evidentiary hearing meeting consideration. Therefore, there could be a cost savings to the Bureau and IGLS in these matters as, in some cases, little preparation may be required following the issuance of the Bureau report. Those applicants who confirm their desire to participate in an evidentiary hearing would likely have requested a hearing following a non-evidentiary hearing meeting denial decision anyway.

E. ADOPT SECTION 12056. EVIDENTIARY HEARINGS.

The Act provides two ways by which the Commission may consider matters. Sections 19870 and 19871 describe the manner by which the Commission shall conduct meetings and section 19825 allows the Commission to require any matter that the Commission is authorized to consider in a hearing or meeting of adjudicative nature to be conducted according to the APA. In order to expedite the handling of applications, this regulation defines the "meeting" required by sections 19870 and 19871 as a GCA evidentiary hearing.

1. Subsection (b) specifies that any requirements in the evidentiary hearing rules that require disclosure do not apply to confidential information. In addition, any confidential information that the Commission may receive through the *ex parte* exception of Section 12012(b)(2)(D) must be provided to the applicant, though it may be redacted. It also clarifies that exculpatory or mitigating information may not be withheld from the applicant.

- a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello reiterated his position as expressed in comment II.C.1.a. in connection with this subsection.
Response: This comment was considered but was rejected. Mr. Parrinello expressed a concern that is addressed in comments I.C.3.c. and II.B.1a. However, Mr. Parrinello's concern is not relevant to this provision. This provision only clarifies that when providing standard information, the Bureau does not need to include any confidential information. At this point in the process, the Bureau should not be providing the Commission with any confidential documents that are not also being provided to the applicant.

F. ADOPT SECTION 12060. GCA HEARINGS.

This section specifies the process of a GCA Hearing, including a minimum timeline from when a GCA hearing is selected to when documents need to be exchanged. The section also includes other procedural items such as what documents must be exchanged, who the presiding officer shall be and who is responsible for presenting each position.

1. Subsection (c) specifies that the Executive Director selects the presiding officer and that it shall be either a properly segregated member of the Commission's legal staff or an ALJ.
- a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed a concern that due to the size of the Commission's legal staff, segregating someone to perform the functions of a presiding officer may be difficult. Acknowledging that the Office of Administrative Hearings (OAH) is often backed up, making getting the assistance of an ALJ potentially hard, Mr. Parrinello makes the following suggestions as alternatives to using Commission legal staff.
- Using retired state lawyers
 - Using retired ALJs from OAH

Further, acknowledging that his options include a financial cost, Mr. Parrinello suggested including one of these options in the regulations upon the request of the applicant and at the expense of the applicant.

Response: This comment was considered but was rejected. The Commission has proven through the 15 GCA hearings that have been conducted (as of July 1, 2014) utilizing Commission legal staff as the presiding officer that it can provide proper segregation within its legal staff. Unlike the ALJ in the APA process, a GCA presiding officer serves a limited role in the hearing process. The GCA presiding officer does not issue a proposed decision and only aids the Commission on procedural hearing matters before and during the hearing. Currently subparagraph (D) of paragraph (2) of subsection (b) of Section 12050 allows for a presiding officer to be an attorney designated by the Commission, with no exclusion of Commission staff. There has not been an issue in properly segregating this staff member's activities as hearing officer from their other functions at the Commission.

Further, to utilize someone through the contract process or the hiring of a retired annuitant would create a financial burden for the Commission; and, could delay the hearing due to availability limitations. Utilizing a Commission legal staff person, as is the current practice, eliminates these concerns and financial hardship.

2. Subsection (e) specifies the manner in which the Bureau and applicant will conduct a pre-hearing exchange of documents, and witness lists and statements. For the Bureau, this exchange is in addition to the one required under Section 12052 when the Bureau has recommended denial. The timelines for this exchange require the Bureau to provide to the applicant 45 days in advance of the hearing date with the applicant providing 30 days prior.
 - a. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern about the timing of document exchange, specifically, that the exchange timeline is triggered off of the scheduled hearing date and not the decision to go to hearing. Additionally, 15 days for the applicant to review the Bureau's information and provide its own is insufficient.

Response: This comment was previously considered and responded to in comment I.L.4.c.

- b. **Jim Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern about the kinds of information that must be provided as part of the pre-hearing exchange. Mr. Parrinello noted that the requirements here are more narrow than those in an APA proceeding.

Response: This comment was previously considered and responded to in comment I.L.4.d.

III. 15 DAY CHANGE WRITTEN COMMENT PERIOD

The following written comments/objections/recommendations were received regarding the modified text of the proposed action during the 15-day written comment period that commenced July 9, 2014 and ended July 24, 2014:

A. ADOPT SECTION 12012. EX PARTE COMMUNICATIONS.

This section is added to address and clarify *ex parte* communications. The Act¹⁵ imposes prohibitions on communication between "members of the Commission" and an applicant or an agent of an applicant under certain conditions. These prohibitions are ambiguous. Section 12012 is added to clarify and provide guidance regarding prohibited communications between members of the Commission, Commission staff, Bureau staff, and the regulated industry.

¹⁵ Specifically Business and Professions Code section 19872

1. Paragraph (2) of Subsection (g) provides that a Commission member may be disqualified by an act of the Commission if requested by the applicant.
 - a. **David Fried**: Mr. Fried commented that he supports allowing either the Commission or a judge deciding if a Commissioner should be disqualified.

Response: This comment is not germane to the modified text of the proposed action. The only modification is a minor non-substantive editorial, grammatical change that does not alter the meaning of the original text.

B. ADOPT SECTION 12015. WITHDRAWAL OF APPLICATIONS.

Previous Section 12047 is moved to Section 12015. This new section continues the current application withdrawal procedures and clarifies them. The application process can be lengthy, especially for those applying to be owners of a cardroom, and requires a significant investment in time and funds for the applicant, the Bureau, and the Commission. If at any point in the process, the applicant no longer wishes to proceed with the application, it is beneficial to all parties to have a procedure by which the application can be terminated. The Act, in section 19869, provides for a request to withdraw an application and differentiates between a withdrawal granted “with prejudice” and one granted “without prejudice.”

1. Subsection (f) specifies that an applicant who withdraws an application does not have the right to an evidentiary hearing.
 - a. **Robert Mukai, IGLS**: Mr. Mukai suggested that “their” be replaced by “his [her, or its].

Response: This comment is not germane to the modified text of the proposed action. There are no modifications made to subsection (f). However, in order to make this provision consistent, the following non-substantive grammatical change was made:

(f) An applicant who withdraws ~~his, her or its~~**their** application shall not have a right to an evidentiary hearing pursuant to Section 12056.

C. ADOPT SECTION 12035. ISSUANCE OF INTERIM RENEWAL LICENSES

The term “interim license” is referenced briefly in section 19841, but no definition or other information is included in the statute. The Commission has already created a category of “interim gambling license” for use during specific qualifying events. This proposal adds a definition of “interim license” to Section 12002, and clarifies that an “interim license” includes both (1) an interim gambling license issued pursuant to Section 12349, and (2) an interim renewal license issued pursuant to Section 12035, created in this proposal.

2. Paragraph (1) of Subsection (a) specifies that if the Commission has elected to hold and evidentiary hearing an interim renewal license shall be issued.
 - a. **David Fried:** Mr. Fried inquired if an applicant can request an evidentiary hearing.

Response: This comment is not germane to the modified text of the proposed action. There were no modifications made to subsection (a).

D. AMEND SECTION 12052. COMMISSION MEETINGS; GENERAL PROCEDURES; SCOPE, RESCHEDULING OF MEETING.

The new Section 12052 provides general procedures regarding the hearing process.

1. Subparagraph (B) of paragraph (1) of Subsection (c) provides that when an application is considered by the Commission at a non-evidentiary hearing, the notice letter shall advise the applicant that a result of the application's consideration could be the application being rescheduled for consideration at an evidentiary hearing.
 - a. **David Fried:** Mr. Fried inquired if an applicant can request an evidentiary hearing.

Response: This comment is not germane to the modified text of the proposed action. None of the modifications to this subsection relate to the manner in which the type of hearing (GCA or APA) is determined.

E. ADOPT SECTION 12056. EVIDENTIARY HEARINGS.

The Act provides two ways by which the Commission may consider matters. Sections 19870 and 19871 describe the manner by which the Commission shall conduct meetings and section 19825 allows the Commission to require any matter that the Commission is authorized to consider in a hearing or meeting of adjudicative nature to be conducted according to the APA. In order to expedite the handling of applications, this regulation defines the "meeting" required by sections 19870 and 19871 as a GCA evidentiary hearing.

1. The following comments were made on Section 12056 in general:
 - a. **David Fried:** Mr. Fried inquired if an applicant can request an evidentiary hearing.

Response: This comment is not germane to the modified text of the proposed action. The modifications to the text of this section are only minor non-substantive editorial, grammatical changes that do not affect the meaning of the original text.

2. Alternative 3; Subsection (a) specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, and that it may only direct the hearing to the APA if the Bureau has recommended denial.
 - a. **David Fried:** Mr. Fried contended that the Commission should have the discretion to choose an APA hearing regardless of the Bureau's recommendation.

Response: This comment is not germane to the modified text of the proposed action. The modifications to the text of this section are only minor non-substantive editorial, grammatical changes that do not affect the meaning of the original text.

F. ADOPT SECTION 12060. GCA HEARINGS.

This section specifies the process of a GCA Hearing, including a minimum timeline from when a GCA hearing is selected to when documents need to be exchanged. The section also includes other procedural items such as what documents must be exchanged, who the presiding officer shall be and who is responsible for presenting each position.

1. Subsection (e) specifies the manner in which the Bureau and applicant will conduct a pre-hearing exchange of documents and witness lists and statements. For the Bureau, this exchange is in addition to the one required under Section 12052 when the Bureau has recommended denial. The timelines for this exchange require the Bureau to provide to the applicant 45 days in advance of the hearing date with the applicant providing 30 days prior.
 - a. **David Fried:** Mr. Fried expressed concern that the 30 day and 15 day timelines will cause problems and disputes with initial disclosures. Mr. Fried suggested that the parties have an additional, mutual 20-day exchange prior to the hearing date for any supplementary information.

Response: This comment is not germane to the modified text of the proposed action. There are no modifications made to subsection (e).

2. Subsection (f) specifies that a presiding officer shall rule on the admissibility of evidence. Additionally, the presiding officer may conduct a pre-hearing conference where various items may be discussed and a pre-hearing order can be issued.
 - a. **David Fried:** Mr. Fried suggested that the hearing officer should have the authority to address whether discovery orders are appropriate and to order continuances.

Response: This comment is not germane to the modified text of the proposed action. There is only one minor non-substantive editorial, grammatical change in a subparagraph and that change does not alter the meaning of the original text.

3. Paragraph (1) of subsection (g) specifies that the Commission may prohibit testimony or the introduction of other evidence if that evidence was not provided pursuant to the proscribed exchange period.
 - a. **David Fried**: Mr. Fried suggested the Commission's preclusion of testimony or evidence should apply to disclosures under subsection (e) or (f).

Response: This comment is not germane to the modified text of the proposed action. There are no modifications made in subsection (g).

G. ADOPT SECTION 12066. FINAL DECISIONS; JUDICIAL REVIEW.

This section specifies the process under which the Commission's decision becomes final subject only to judicial review.

1. Subsection (c) specifies that any judicial review will be subject to Business and Profession Code section 19870, subdivision (e) and that not seeking reconsideration does not affect the right to petition for judicial review.
 - a. **Robert Mukai, IGLS**: Mr. Mukai expressed a concern that this provision lacks clarity and suggested the following revision:

(c) A [decision of the Commission denying an application or imposing conditions on a license](#) ~~request for review of a denial or imposition of conditions by the Commission~~ shall be subject to judicial review as provided in Business and Professions Code section 19870, subdivision (e). Neither the right to petition for judicial review nor the time for filing the petition shall be affected by failure to seek reconsideration.

Response: This comment was considered and accepted. This is a minor non-substantive editorial, grammatical change that is consistent with the intended meaning of the originally proposed language, as well as the existing corresponding provision found in subsection (d) of the current Section 12050.

H. ADOPT SECTION 12068. DECISIONS REQUIRING RESIGNATION OR DIVESTITURE.

This section specifies how an applicant is separated from a business entity if denied by the Commission.

1. Subparagraph (2) of subsection (b) specifies that if a denied applicant is an owner, director, manager or member of a limited liability company, the limited liability company shall remove the denied person from office.
 - a. **Robert Mukai, IGLS**: Mr. Mukai noted that the provision is missing a word and proposes the following revision:

(2) If the denied applicant is an officer, director, manager or member of a limited liability company that is licensed, registered, or found suitable by the Commission, the limited liability [company](#) shall remove that person from office according to the date specified in the Commission's decision and shall so notify the Commission in writing.

Response: This comment was considered and accepted. This is a minor non-substantive editorial change to correct a clerical error.

I. ALTERNATIVE 4. APA IS ALWAYS AN OPTION BUT PRESENTER CHANGES DEPENDING ON BUREAU RECOMMENDATION.

This alternative proposes to change various sections and would allow for Commission staff to serve as the presenter of facts in APA hearings for applications where the Bureau has not recommended denial.

1. The following comment was made regarding Alternative 4 in general:

- b. **Robert Mukai, IGLS:** Mr. Mukai expressed concern that even though the Bureau has agreed to present their report and the facts of the case during a GCA hearing, Alternative 4 does not allow for Commission staff to alternatively present in lieu of the Bureau's participation. Mr. Mukai suggested that the alternative could be improved by expanding Commission staff's ability to participate as the presenter for any application where the Bureau has notified the Commission that it is unwilling to present.

Response: This comment is not germane to the modified text of the proposed action. There are only minor non-substantive editorial, grammatical changes in the text of Alternative 4 and those changes do not alter the meaning of the original text.

Ultimately, the Commission did not adopt this alternative.

J. ALTERNATIVE 5. COMMISSION STAFF CAN ALSO BE ELECTED TO PRESENT AT GCA HEARING.

This alternative proposes to change various sections and would allow for Commission staff to serve as the presenter of facts in any hearing for an application consideration.

1. Subsection (a) of Section 12056 specifies that when electing to hold an evidentiary hearing, the hearing shall be, by default, a GCA hearing. Additionally, the Executive Director or the Commission must elect either the Bureau or Commission staff to act as the complainant.
- a. **Robert Mukai, IGLS:** Mr. Mukai objected to this alternative because in selecting the Bureau as the complainant, the proposal provides no regulatory restriction to either the Commission or the Executive Director. Mr. Mukai noted

that the selection process could cause the Bureau to present even when it has recommended something other than denial.

Response: This comment was considered but was rejected. Mr. Mukai is correct in his observation that there is no limit in the election of the Bureau similar to the one present in Alternative 4. This proposal does not envision a fiat determination by the Commission or Executive Director against the desire of the Bureau, but instead a deliberative process that could consider the Bureau's recommendation, current Commission staffing levels, various workload considerations and the nature of the application.

2. Subsection (a) of Section 12060 provides the minimum timeline for the scheduling of a GCA hearing once the Executive Director has determined that an application will be subject to one. The Executive Director is authorized to directly schedule an application prior to the application being addressed by the Commission at a non-evidentiary hearing meeting and provides a minimum 90 day time period.
 - a. **Robert Mukai, IGLS:** Mr. Mukai expressed a concern that this subsection is inconsistent with the determination of the complainant as assigned in subsection (a) of Section 12056. Mr. Mukai noted that the notification in this subsection is to the Bureau in all cases and provides no reference to noticing the complaint.

Response: This comment was considered but was rejected. Mr. Mukai is correct in his observation that the regulation does not provided a specific requirement of notifying the complainant. Whether the Bureau is acting as complainant or not it is appropriate to provide the Bureau and IGLS with all pertinent timeline information. When Commission staff has been assigned the complainant role it is possible that IGLS will still be providing legal representation, as is the current practice. Additionally, the Bureau will still play a role in assisting the Commission staff in their role as the complainant. Even if IGLS is not representing Commission staff, IGLS still acts as legal counsel to the Bureau, so it is appropriate to provide notice both to the Bureau and IGLS. While Section 12060 does not provide a specific requirement to notify the applicant's legal representative, the Notice of Defense form includes a section that allows an applicant to notify the Commission of any representative they wish included in communications. There does not need to be a specific regulatory requirement for internal communications when Commission staff has been designated as the complainant.

IV. COMMENT RECEIVED OUTSIDE THE PUBLIC COMMENT PERIODS

The comments listed below were not received during any of the abovementioned public comment periods. While they are included in the rulemaking file, they have not been summarized or responded to.

1. Letter dated April 21, 2014 from Robert Mukai, IGLS. While this letter was received outside of any public comment period, many of the suggested non-substantive, editorial and grammatical changes were made.
2. Letter dated June 17, 2014 from Stacey Luna-Baxter, Bureau.
3. Letter dated September 22, 2014 from Sara J. Drake, IGLS.
4. Oral comments of Stacey Luna-Baxter, Bureau, at the September 23, 2014 Regulations Adoption Meeting. (September 23, 2014 audio recording at approximately 00:10:58 and 00:12:53)