Advertising
(Formerly CGCC-GCA-2022-05-R, Expired December 29, 2023)

COMMENTS AND RESPONSES FOR PROPOSED REGULATIONS

45-DAY WRITTEN COMMENTS

The California Gambling Control Commission (Commission) previously commenced the formal rulemaking process for regulations concerning Advertising on December 30, 2022, via the publication of the notice of the proposed action in the California Regulatory Notice Register. Pursuant to Government Code section 11346.4, subdivision (b), the effective period of that notice of proposed action expired on December 29, 2023, because the proposed action was not completed and transmitted to the Office of Administrative Law within the one-year period. As a result, the Commission will need to issue a new notice for this proposed action in the future. Prior to doing so, the Commission will consider the following summaries and proposed responses to written comments received during the 45-day written comment period of the previous proposed action, as well as proposed modifications to the previous version of the regulation text.

The Commission received the following written comments, objections, and recommendations regarding the text of the proposed action during the 45-day written comment period of the previous proposed action, which commenced December 30, 2022, and ended February 13, 2023:

A. GENERAL COMMENTS MADE ON THE PROPOSED REGULATIONS NOT SPECIFIC TO ANY SECTION.

The following comments were made in general on the proposed regulation text and are not directed at any specific regulatory section.

1. California Gaming Association (CGA), representing various California cardrooms:

CGA objects to the proposed regulations and believes they are fundamentally flawed, not consistent with or necessary under the Gambling Control Act (Act)[1], exceed the Commission's statutory authority, violate constitutional rights to free speech, and impose unnecessary costs and burdens to cardrooms without improving public welfare or safety. CGA indicates the proposed regulations could have damaging effects on the industry, which supports over 30,000 jobs and provides hundreds of millions of dollars in local tax revenues that fund essential municipal services. According to CGA, the proposed regulations are "an instrument of an anti-cardroom agenda" intended to restrict the industry's marketing based on attacks from its competitors, which threatens jobs and local services at a time when many cardrooms are still recovering from COVID shutdowns.

CGA urges the Commission not to approve the proposed regulations and instead, to direct staff to make the changes requested in Mr. Fried's written comment letter,

[1] Business and Professions Code, Division 8, Chapter 5, section 19800 et seq.

which CGA indicates are consistent with the Commission's authority under the Act and state and federal constitutional laws regarding freedom of commercial speech.

Recommended Response: This comment was considered but not incorporated. However, some of Commission staff's proposed modified changes to the regulations are based on changes requested in Mr. Fried's written comment letter (see responses to comments D.1.a.i., D.4.a.iii., E.2.a., E.3.a., F.1.a., F.2.a.).

For the portion of the comment indicating the proposed regulations violate constitutional rights to free speech, please see responses to comments D.2.c.i. and D.2.c.iii.

Concerning the economic impact portion of this comment, please see response to comment A.3.a.

The Commission has "all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes" of the Act under Business and Professions Code (BPC) section 19824. Further, BPC section 19841(f) requires the Commission to adopt regulations that provide for the disapproval of advertising by licensed gambling establishments that is determined by the Department of Justice, Bureau of Gambling Control (Bureau)[2] to be deceptive to the public. As such, the proposed regulations are consistent with the Act and are required pursuant to the Commission's statutory mandates.

Lastly, the proposed regulations were not developed to restrict the industry's marketing on the basis of competitors' interests or an "anti-cardroom agenda." Rather, the purpose of the proposed regulations is to comply with the requirements of the Act, better protect the health, safety, and general welfare of the public, and maintain integrity within the cardroom industry.

2. **Eugene Volokh, representing CGA (Part C. of Comment Letter):** According to Mr. Volokh, the proposed advertising regulations are unconstitutionally inconsistent and underinclusive. Mr. Volokh cites *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 488-489, a legal case regarding a regulation that banned the disclosure of alcohol content on beer labels, but required such disclosure in the case of wines and spirits, indicating the case provides an example of an underinclusive speech regulation that does not meaningfully advance any state interest because it is filled with "exemptions and inconsistencies" and that "the irrationality of this unique and puzzling regulatory framework ensures that the [regulation] will fail to achieve" its goal. Mr. Volokh believes the same rationale invalidates the proposed regulations with regard to prohibiting Nevada-related words and the website age affirmation requirements, for the reasons given in Mr. Fried's written comment letter (pages 18-23 and 31-33).

[2] In the Act, "department" refers to the Department of Justice. Although 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, pursuant to BPC section 19810.

Recommended Response: This comment was considered but not incorporated. Please see responses to comments D.1.a.ii., D.2.c.i., D.2.c.ii., D.2.c.iii., and E.3.a.

3. **David M. Fried, representing the California Grand Casino and the Oaks Card Club:** Mr. Fried raised concerns regarding whether the Administrative Procedure Act[3] was properly followed for the proposed regulations. Specifically, Mr. Fried raised the following concerns:

   a. Mr. Fried expressed that the administrative record of the proposed regulations lacks required information on economic impacts and that statements made in the Initial Statement of Reasons (ISOR) and the Department of Finance Economic Impact Statement (Form STD. 399) regarding the expected business impacts of the regulation are unsupported by data or evidence.

   Specifically, Mr. Fried indicated the economic analysis of the proposed regulations in the ISOR and the Form STD. 399 do not indicate adverse impacts on business revenues from restricted marketing and advertising. However, Mr. Fried noted that in response to a Public Records Act[4] request, the Commission produced records showing that one licensee, in response to the Commission's economic impact survey, reported its revenues could be substantially impacted by the proposed regulations.

   Mr. Fried opined that the proposed regulations directly and adversely impact business revenues—including impacts to investable capital, jobs and the ability to compete with other businesses—and indicated that information showing that the proposed regulations would cause adverse business impacts must be included in the administrative record.

   Recommended Response: This comment was considered but not incorporated. With respect to cost burdens and impacts on jobs and local revenues, the proposed regulations do not prohibit the industry from advertising. Rather, the requirements apply to advertising in which cardrooms and Third-Party Providers of Proposition Player Services (TPPPS) voluntarily engage. Although the proposed regulations do contain advertising content and dissemination requirements intended to protect the safety and welfare of the public and maintain the integrity of the controlled gambling industry, the basis of any estimated potential job or revenue impacts resulting from these requirements would be purely speculative and reliant upon arbitrary assumptions regarding cause-and-effect behavior change in persons viewing the advertisement. Commission staff is unaware of evidence regarding how the specific content of gambling advertisements would affect behavior.

   To complete the fiscal and economic impact assessment for the ISOR and the Form STD. 399, Commission staff conducted an industry survey to identify

[3] Government Code, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340)
[4] Government Code, Title 1, Division 10 (commencing with section 7920.000)

anticipated costs associated with the proposed regulations. The Commission received only five responses out of the 64 businesses who were contacted to complete the survey and would be impacted by the regulations. Of the five survey responses received, only one cited estimated costs associated with potential revenue impacts as a result of the proposed regulations. However, this respondent did not provide justification for the amounts cited for estimated revenue reductions. Additionally, it appeared the respondent misunderstood a provision of the proposed regulations to be more restrictive than it is in actuality, as the respondent indicated the regulation would require cardrooms to state, "we do not offer Nevada-style banked games" in advertisements, but such a statement is only required by the proposed regulations if the cardroom opts to include this statement rather than one of the other five options provided for references to game names in cardroom advertisements. As such, it would be inappropriate and speculative to base industry-wide, indirect revenue impact estimates on one survey response that lacked supporting justification for the estimated impacts listed and apparently interpreted one provision of the regulations to be more restrictive than it is in actuality. Furthermore, notwithstanding potential impacts on industry jobs and revenue, the Commission notes that BPC section 19841(f) requires the Commission to adopt regulations that provide for the disapproval of advertising by licensed gambling establishments that is determined by the Bureau to be deceptive to the public.

As previously indicated, the Commission will need to issue a new notice for this proposed action due to the expiration of the previously proposed action. If the Commission directs staff to modify the text of the previously proposed regulations in a way that may impact their fiscal and economic impact, the Commission will conduct another industry survey to identify anticipated costs associated with the proposed regulations. The results of this future survey will be taken into consideration when Commission staff completes the fiscal and economic impact assessment for the future ISOR and Form STD. 399.

b. Mr. Fried indicated that the Commission has not met its requirement under the Administrative Procedure Act to consider alternatives to the proposed regulations. Mr. Fried expresses that earlier versions of the proposed regulations, which did not contain disclaimer or censorship provisions, were considered by the Gaming Policy Advisory Committee (GPAC) and Commission. However, the ISOR states that the regulations are necessary to implement BPC section 19841(f) and that no alternatives to the regulations were considered that would sufficiently carry out the purposes of the statute, which Mr. Fried indicates is contradicted by the administrative record.

Further, Mr. Fried indicates that prior comments made by the industry suggested the following: "(a) deleting the censorship and disclaimer provisions; (b) allowing cardrooms to use any portion of the approved game name in ads; (c) allowing cardrooms to use the approved game name or game

approval number; (d) changes to the direct marketing provisions; (e) placing whatever notices are required about the games on the cardroom website rather than in each ad; (f) modifications to the age verification and age gate sections; (g) limiting the prohibited 'depiction' of games to images unambiguously related to unapproved games; (h) removing the overbroad application of the regulation to poker games; and (i) adding due process protections to the disapproval process."

Mr. Fried contended that the Commission must address these alternatives, and that they should be included in the proposed regulation text as options for the Commissioners.

Recommended Response: This comment was considered but not incorporated. Prior to commencing the formal rulemaking process, the industry provided various comments regarding draft text for the proposed advertising regulations. The Commission considered all comments made during the informal, pre-rulemaking phase and incorporated a number of those comments in the proposed regulations. A number of these proposals were also presented to the Commissioners in public meetings as options for the proposed regulations during the informal, pre-rulemaking phase. The version of the proposed regulations that was noticed for the 45-day comment period that commenced on December 30, 2022, reflected the options selected by the Commission in previous public meetings. Commission staff will include such historical information on the informal iterations of these proposed regulations in the formal rulemaking file for the regulations.

B. AMEND SECTION 12002. GENERAL DEFINITIONS.

This section provides general definitions for overall use in the California Code of Regulations, Title 4, Division 18.

1. **Subsection (c)** [page 1, beginning on line 21 of the proposed regulation text] provides the definition of "advertisement" to clarify and specify the meaning of the term used throughout the proposed regulations.

   a. **Yolanda Morrow, representing the Department of Justice, Bureau of Gambling Control (Bureau):** The definition incorporates a statement of inclusion as the sole reference to a term for definitional purposes. For clarity and consistency with Section 12002(b), the Bureau proposed the following amendment:

   (c) "Advertisement" ~~includes~~ means any written or verbal statement, illustration, or depiction that is disseminated to the public which is calculated to induce participation in a controlled game or gaming activity at one or more gambling establishments, including, without limitation, any written, printed, graphic, or other material, billboard, sign, or other outdoor display, periodical literature, publication, or in a radio or

television broadcast, social media business page, or in any other media.

Recommended Response: This comment was accepted.

C. ADOPT SECTION 12096. SPECIFIC TPPPS BUSINESS REQUIREMENTS.
This section provides specific advertising requirements and responsibilities for all TPPPS business licensees.

1. **Subsection (a), paragraph (1)** [page 4, beginning on line 4 of the proposed regulation text] specifies a TPPPS business licensee will not create, purchase, place, or disseminate any advertisement for a cardroom business licensee unless it has a TPPPS contract with that cardroom business licensee and the advertisement costs and scope of advertising services to be performed are included in the TPPPS contract.

    a. **Yolanda Morrow, representing the Bureau:** The proposed provision is not anticipated to change the Bureau's overall TPPPS contract review process; however, it may require a more complex and comprehensive assessment of TPPPS contracts and cardroom payments relating to advertising. Ms. Morrow indicated the Bureau is open to discussing the potential challenges that may arise from these proposed regulations.

    Recommended Response: This comment was accepted. The Commission will continue to maintain its close working relationship with the Bureau to address any potential challenges in implementing the proposed regulations. The Commission notes that the proposed requirement is consistent with existing regulations under paragraph (1) of subsection (c) of Section 12270, which requires TPPPS contracts to identify the total charge for advertising and to include a detailed list of the items provided or received related to advertising.

D. ADOPT SECTION 12097. ADVERTISING CONTENT AND DISSEMINATION.
This section establishes content and dissemination requirements for gambling advertisements.

1. **General comments on subsection (c)** [page 4, beginning on line 24], which establishes specific content requirements for all advertisements, **and subsection (e)** [page 5, beginning on line 13], which states that an advertisement must not be deceptive to the public and specifies what constitutes a deceptive advertisement.

    a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part II. of Comment Letter):** Mr. Fried provided the following arguments to support his opinion that BPC section 19841(f) does not provide the Commission with adequate regulatory authority to support the proposed regulation text in Sections 12097(c) and (e):

        i. In Part II.A. of his Comment Letter, Mr. Fried argued that BPC section

19841(f) does not provide authority for the Commission to determine for the Bureau, which advertising statements are deceptive. The first sentence of BPC section 19841(f) states the regulation will: "Provide for the disapproval of advertising by licensed gambling establishments that is determined by the department to be deceptive to the public" (emphasis added). According to Mr. Fried, this means that the Commission can adopt regulations that provide an administrative process for the disapproval of advertising by the Bureau, but the Bureau is the agency that is charged with determining if an ad is deceptive.

Mr. Fried indicates that when a statute gives different, even coordinated, responsibilities to two agencies, one agency cannot assume the other agency's authority, and he cites *Association for Retarded Citizens v. Department of Developmental Services,* (1985) 38 Cal.3d 384, 391-392: "the regional centers and DDS have distinct responsibilities in the statutory scheme: ... that of DDS is to promote the cost-effectiveness of the operations of the regional centers, but not to control the manner in which they provide services.".

Recommended Response: This comment was accepted, in part. Commission staff recommends modifications to subsection (e) to clarify that the Bureau has the ultimate responsibility to determine whether an advertisement is deceptive, in accordance with regulatory criteria established by the Commission. Please see the response to comment D.4.a. for Commission staff's recommended modifications to subsection (e).

The Commission has broad authority under the Act to adopt regulations for the administration and enforcement of the Act. The Act specifies the Commission has "all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes of [the Act]" and to "adopt regulations for the administration and enforcement of [the Act]." (BPC sections 19824 and 19840.) Further, the Commission's regulations must "restrict, limit, or otherwise regulate any activity that is related to the conduct of controlled gambling, consistent with the purposes of [the Act]." (BPC section 19841(o), emphasis added.) Advertising is an "activity" related to the conduct of controlled gambling, and therefore, is within the Commission's authority to regulate.

BPC section 19841(f) requires the Commission to adopt regulations that provide for the disapproval of advertising that is determined by the Bureau to be deceptive to the public. The statute does not limit the Commission's authority to only adopting regulations that provide an administrative process for the disapproval of advertising. Further,

while the statute provides examples of advertisements that are considered to be presumptively deceptive (advertisements that appeal to children/adolescents or that offer gambling as a means of becoming wealthy), the Bureau is still tasked with determining whether an advertisement is deceptive. The Commission's proposed regulations provide the criteria, while the Bureau is ultimately tasked with reviewing advertisements and determining whether they are deceptive based on that criteria. Absent providing criteria in the regulation to specify what constitutes a deceptive advertisement, the Bureau would have no basis for its determination, making the regulations difficult if not impossible to enforce and potentially resulting in underground regulations. Simply limiting the regulations to an administrative process is not enough to meet the requirements of the Act and the Administrative Procedure Act. Therefore, the Commission must adopt regulations that provide specific criteria for the Bureau to utilize in determining whether an advertisement is deceptive.

ii. In Part II.B. of his Comment Letter, Mr. Fried argued that the proposed regulations impermissibly expand the categories of deceptive ads provided in statute with two additional categories: those which do not use an approved game name and those that use the words "Nevada style" or "Vegas style." BPC section 19841(f) provides: "Advertisement that appeals to children or adolescents or that offers gambling as a means of becoming wealthy is presumptively deceptive." According to Mr. Fried, when the Legislature includes specified matters or things in a statute, an agency cannot construe the statute to include other matters or things, and he noted the following:

> ... under the doctrine of *expressio unius est exclusio alterius*, "the expression of one thing in a statute ordinarily implies the exclusion of other things." (*In re J. W.* (2002) 29 Cal.4th 200, 209 [126 Cal. Rptr. 2d 897, 57 P.3d 363] (*J. W.*).) Penal Code section 23 allows an entity like the Contractors State License Board to make recommendations about *probation*, but not about bail conditions.

Mr. Fried also cited *Naidu v. Superior Court,* (2018) 20 Cal.App.5th 300, 307 (citing *Gray v. Superior Court,* (2005) 125 Cal.App.4th 629). An agency - even one charged with broad responsibilities - has no authority to expand a specific statutory list. *Bearden v. U.S. Borax, Inc., supra* at 436-437; *People v. Koester,* (1975) 53 Cal.App.3d 631, 642; *Morse v. Municipal Court,* (1974) 13 Cal. 3d 149, 159.

Mr. Fried expressed that if the Legislature wanted to identify additional types of ads as presumptively deceptive, to authorize the Commission to declare other types of ads deceptive, or to have cardroom ads distinguish player-dealer games, the Legislature would

have done so. Mr. Fried further noted that when the Legislature adopted Penal Code section 330.11 and made changes to the Act for player-dealer games, it could have included advertising requirements to distinguish player-dealer games from banked games; however, the Legislature did not do so. According to Mr. Fried, there is no evidence of any legislative intent, purpose, or delegation of authority for regulations that require cardroom advertising to make this distinction, and the Commission therefore lacks the statutory authority to deem additional types of ads deceptive.

Recommended Response: This comment was considered but not incorporated. Existing requirements provide that before a cardroom can offer a game or gaming activity for play, the game or gaming activity must first be approved by the Bureau, including the name. The proposed regulations provide several options for referencing the names of games and gaming activities in advertisements to ensure that these references are not deceptive or misleading to the public. These options include referencing a game, group of games, or gaming activity by the Bureau-approved name, Bureau-approved alternative name, or any gaming activity name with the Bureau-approved identification number. Additionally, the regulations allow for a cardroom to use names other than those that are Bureau-approved if the advertisement states one of the following: (1) "California game" or "California games," (2) "California style," (3) "This cardroom does not offer Nevada-style banked games," or (4) Any other safe harbor statement(s) published by the Bureau at its discretion. Absent meeting these requirements, an advertisement would be misleading because California cardrooms are only allowed to offer player-dealer style games.

Further, pursuant to the California Constitution and the Penal Code, gambling establishments are prohibited from offering banking or percentage games like casinos of the type currently operating in Nevada and New Jersey. The terms "Nevada Style" and "Vegas style" are misleading in cardroom advertisements because these types of statements can mislead the public into thinking that a gambling establishment offers prohibited house-banked games.

While BPC section 19841(f) lists two types of ads that are presumptively deceptive, this does not limit the Commission's authority to establish by regulation additional types of ads that may be considered deceptive. The Legislature has found and declared that "unregulated gambling enterprises are inimical to the public health, safety, welfare, and good order." (BPC section 19801(d).) The Legislature has also found and declared that "public trust and confidence can only be maintained by strict and comprehensive regulation of all persons, locations, practices, associations, and

activities related to the operation of lawful gambling establishments…" (BPC section 19801(h), emphasis added). Advertising is a "practice" or "activity" related to the operation of lawful gambling establishments, and as such, it is within the Commission's authority to regulate the ways a game or gaming activity may be referenced in an advertisement to ensure that these references are not deceptive or misleading to the public. Furthermore, the argument that the inclusion of two examples of presumptively deceptive advertisements in BPC section 19841(f) precludes other categories of advertisements from being determined deceptive is not supported by the legal cases cited in Mr. Fried's comment letter, nor the language in BPC section 19841(f) that broadly requires the Commission's regulations to provide for the disapproval of advertising that is determined by the Bureau to be deceptive to the public.

iii. In Part II.C. of his Comment Letter, Mr. Fried expressed that the proposed regulations erroneously make an absolute and final determination that certain types of ads are deceptive. Mr. Fried argued that BPC section 19841(f) does not deem any ads to be categorically deceptive, nor does it grant the Commission the authority to make categorical determinations of what is deceptive. Rather, the statute identifies two types of ads as "presumptively" deceptive, which Mr. Fried indicated means that the advertiser has a chance to rebut any presumption at a hearing.

According to Mr. Fried, a determination of whether an ad is deceptive must apply deceptive advertising laws to the facts of each case, including the other content in the ad and the context in which words appear and are used. Mr. Fried expressed that a blanket regulatory classification disregards other content and context, and categorical rules can be grossly over and under inclusive.

Recommended Response: This comment was considered but not incorporated. Please see the responses to comments D.1.a.i. and D.1.a.ii.

iv. In Part II.D. of his Comment Letter, Mr. Fried expressed that the proposed regulations conflict with the second sentence of BPC section 19841(f) because they are inconsistent with the advertising standards of the California Horse Racing Board (CHRB) and the California State Lottery (Lottery). Mr. Fried provided several interpretations of "consistency" as containing few differences, not only absence of a direct contradiction.

Consistency is judged not only by what regulations do, but also by what they do not do. The CHRB and Lottery rules do not require

disclosures stating that neither of these other forms of wagering are banked by the operator. Similarly, neither agency restricts the use of certain comparative statements to Nevada-style gaming by censoring the use of specific words.

The Lottery is required to avoid deceptive advertising as defined in general advertising laws and post responsible gambling messages. However, Mr. Fried noted there are no comparable Lottery provisions preventing the use of "Nevada style" or "Vegas style," no rules barring slot machine themes, or rules requiring disclaimers about wagering formats, even though the Lottery cannot offer banked games. *Western Telcon, Inc. v. California State Lottery,* (1996) 13 Cal.4th 475. Mr. Fried provided examples of Lottery advertising of scratcher games that uses terms associated with casino and slot machine games.

Similarly, the CHRB advertising regulations address problem gambling and age advisories. Bettors do not bet against the track. BPC section 19590; *People v. Sullivan,* (1943) 60 Cal.App.2d 539, 544. Yet, Mr. Fried indicated CHRB regulations are not concerned with disclosing horse racing's pari-mutuel betting format where the odds on a horse can change after a bet is placed because winning wagers are paid from a pool of wagers rather than banked with fixed odds.

Mr. Fried indicated BPC section 19841(f) does not state that the regulations shall not directly conflict with the CHRB and Lottery regulations. Rather, it requires the Commission's regulations to be "consistent" with them, which Mr. Fried argued means "adhering to the same principles." Mr. Fried expressed that consistency among the advertising regulations adopted by the Commission, the Lottery, and CHRB promotes equal treatment and equal protection under the law. Mr. Fried opines that the proposed regulations are not consistent with the other agencies' regulations, and therefore they contradict the authorizing statute and cannot be adopted, citing, "In short, agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope." *Slocum v. State Bd. of Equalization*, (2005) 134 Cal. App. 4th 969, 974.

Recommended Response: This comment was considered but not incorporated. The Lottery has not adopted any regulations concerning advertising. The CHRB has several regulations related to advertising; however, many of these regulations are inapplicable to controlled gambling, such as the requirements for advertising signage on jockey clothing or the prohibition on the use of a stable name registration for advertising purposes. Although the Commission's proposed regulations exceed the scope of the regulations adopted by the CHRB

and the Lottery, the argument that the regulations are therefore not consistent with the regulations adopted by the CHRB and the Lottery is unpersuasive due to the misinterpretation of the phrase "consistent with" in BPC section 19841(f).

The Administrative Procedure Act defines "consistency" as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law" (Government Code section 11349(d)). The Commission's proposed regulations are in harmony with, and are not in conflict with or contradictory to regulations of the CHRB or the Lottery.

Additional support for the interpretation of the phrase "consistent with" in BPC section 19841(f) as "in harmony with, and not in conflict with or contradictory to," is provided by the legal record. A court's primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, 164 Cal.App.4th 1, 8 (Cal. Ct. App. 2008) (*Muzzy Ranch*). Courts begin by examining the statutory language, giving the words their usual, ordinary meaning. *Id.* "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible . . . each sentence must not be read in isolation but in the light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." *Id.* "If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs." *Id.* Courts will "seek to adopt a construction that will render the statute 'reasonable, fair and harmonious with its manifest purpose.'" Id. at 11.

In *Muzzy Ranch*, appellant argued that the requirement that the Travis Air Force Base Land Use Compatibility Plan (TALUP) be "consistent with" the Air Installation Compatible Use Zone Planning (AICUZ) meant that the TALUP must literally "adopt" or "incorporate" the provisions of the AICUZ. *Id.* The court stated that appellant's construction of the statute "finds some support in dictionary definitions of 'consistent' as 'coherent and uniform' or 'marked by harmony, regularity, or steady continuity throughout.'" *Id.* at 8-9 (citing the American Heritage Dictionary and Webster's Third New International Dictionary).

The court continued, "however, the word is also commonly defined as meaning "compatible" or "coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities." *Id.* at

9. The court noted that, "Webster's emphasizes that when the word means 'compatible' it is usually used with "with." *Id.* "As pertinent, 'compatible' means 'capable of existing together without discord or disharmony.'" *Id.* The court held that "although the consistency requirement could be interpreted to mean that the safety and noise standards in a TALUP land use plan must be identical to those in the relevant AICUZ, use of the phrase 'consistent with' suggests that the standards in the plan need only be compatible with those in the AICUZ." *Id.*

The Administrative Procedure Act definition of "consistency" as "in harmony with, and not in conflict with or contradictory to" and the court's analysis in *Muzzy Ranch* that "consistent with" means "compatible" and not "uniform" are appropriately applied to the Commission's proposed advertising regulations for the following reasons:

- BPC section 19841(f) uses the phrase "consistent with," which favors an interpretation that means "compatible" or "not in conflict with or contradictory to," and not "uniform." As discussed in *Muzzy Ranch*, Webster's emphasizes that when the word "consistent" means "compatible," it is usually used with "with." *Id.* Here, Section 19841(f) uses the phrase "consistent with" and not just "consistent." As a result, the use of the phrase "consistent with" suggests that the advertising regulations adopted by the Commission need only be compatible with those adopted by the CHRB and the Lottery.

- There are no regulations that have been adopted by the Lottery. If the commenter's interpretation of "consistent with" meaning "having only immaterial or insubstantial deviations" or "adhering to the same principles" is applied to BPC section 19841(f), then the Commission could not adopt regulations related to advertising because the Lottery has not adopted any regulations. This would be an irrational result.

- The regulations related to advertising adopted by the CHRB address issues not intended to be covered by Commission regulations. The CHRB has adopted regulations on a variety of issues related to advertising, including the requirements and limitations for advertising signage on jockey clothing and the prohibition on the use of a stable name registration for advertising purposes. Controlled gambling does not have jockeys or stables. If the commenter's interpretation of "consistent with" meaning "having only immaterial or insubstantial deviations" is applied, the Commission would

have to adopt regulations related to advertising that do not, and cannot, take place in controlled gambling. Again, this would be an irrational result.

- The Legislature did not intend to bind the Commission to adopt advertising regulations identical to those adopted by the CHRB and the Lottery. If the Legislature wanted to bind the Commission to the regulations adopted by the CHRB and the Lottery regarding the regulation of advertising, it could have done so. The Legislature could have used language requiring the Commission to adopt regulations "identical to those adopted by the CHRB and the Lottery." The Legislature did not. Instead, the Legislature merely required that the regulations for advertising shall be "consistent with" the advertising regulations of the CHRB and the Lottery.

- The primary purpose of BPC section 19841(f) is to provide for the disapproval of deceptive advertising by the Bureau, which would be impossible if the Commission could not adopt regulations that go beyond the scope of the regulations adopted by the CHRB and the Lottery.

The first part of BPC section 19841(f) provides that the Commission shall adopt regulations to "provide for the disapproval of advertising by licensed gambling establishments that is determined by the department to be deceptive to the public." This is the Legislature's mandate for the Commission. The CHRB and the Lottery have not adopted regulations providing for the disapproval of advertising. As a result, if the commenter's interpretation of BPC section 19841(f) prevails, it would be impossible for the Commission to address its statutory requirement to provide for the disapproval of advertising because its regulations could not go beyond the scope of the regulations adopted by the CHRB and the Lottery. The commenter's interpretation of BPC section 19841(f) would undermine the primary mandate of BPC section 19841(f), which would be an irrational result.

Neither the CHRB nor the Lottery expressly addresses deceptive advertising. The primary purpose of BPC section 19841(f) is to provide for the disapproval of deceptive advertising. Additionally, BPC section 19841(f) includes examples of presumptively deceptive advertising. If the commenter's interpretation of BPC section 19841(f) were correct, the Commission's regulations could not expressly address deceptive advertising. This is an irrational result.

The Commission's proposed regulations are compatible with, and not conflicting or inharmonious with the regulations adopted by the CHRB

and the Lottery, which follows the court's sensible analysis in *Muzzy Ranch*. The Lottery has not adopted regulations. The only CHRB regulations that appear to be relevant to the Commission's advertising regulations are the requirements that (1) all advertisements contain a statement that persons under 21 are not allowed access to the minisatellite wagering site; and (2) all advertisements contain contact information for a recognized problem-gambling support organization. The Commission has included similar requirements in its proposed advertising regulations, which is consistent with the CHRB regulations.

The remainder of the Commission's proposed advertising regulations is still compatible with the regulations of the CHRB and the Lottery. Neither the CHRB nor the Lottery have adopted any regulations that conflict with, are inconsistent with, or are incompatible with the proposed regulations of the Commission.

v. In Part II.E. of his Comment Letter, Mr. Fried expressed that the Commission cannot rely on its general regulatory authority to require cardroom ads to distinguish player-dealer games.

According to Mr. Fried, because BPC section 19841(f) is specific to advertising, it controls over any general provision relating to the Commission's authority. "A specific statute on a subject controls over a general provision." *Platzer v. Mammoth Mountain Ski Area,* (2002) 104 Cal.App.4th 1253, 1260. A "specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." *San Francisco Taxpayers Assn. v. Board of Supervisors,* (1992) 2 Cal.4th 571, 577.

Further, Mr. Fried indicated the Commission cannot rely on its general regulatory authority to overcome or add to the specific provisions in BPC section 19841(f). *Sabatasso v. Superior Court*, (2008) 167 Cal. App. 4th 791, *modified* (Oct. 22, 2008); *see also, Bearden, supra* at 439 (rejecting the agency justification for regulation based on broad or other agency authority). This is true even where the agency has very broad powers. *Agnew v. State Bd. of Equalization,* (1999) 21 Cal.4th 310, 321. According to Mr. Fried, no general delegation of authority to the Commission can overcome the specific limits in BPC section 19841(f).

Recommended Response: This comment was considered but not incorporated. Mr. Fried cited various court cases to support his opinion that the Commission cannot rely on its general regulatory authority to

require cardroom ads to distinguish player-dealer games. However, the citations provided by Mr. Fried are generalized and the factual situations in those cases are not directly relevant to the Commission's proposed regulations, nor its statutory authority, whether broad or specific. BPC section 19841(f) is far from a self-executing statute. Rather, it is susceptible to interpretation and requires regulations to be implemented that provide clarity and specificity for sufficient enforcement.

vi. In Part II.F. of his Comment Letter, Mr. Fried expressed that BPC section 19841(f) specifically authorizes advertising regulations, requires that they be consistent with the rules for other agencies, and lists which types of ads are presumptively deceptive. Mr. Fried argued the proposed regulations are not consistent with the rules for other agencies or reasonably necessary to implement section 19841(f), and therefore the proposed regulations lack authority and are void. "If, in interpreting the statute, the court determines that the administrative action under attack has, in effect, '[altered] or [amended] the statute or [enlarged] or [impaired] its scope,' it must be declared void." *Assn'n for Retarded Citizens, supra*, 38 Cal. 3d at 391 (citations omitted).

Recommended Response: This comment was considered but not incorporated. Please see responses to comments D.1.a.i., D.1.a.ii., D.1.a.iv, and D.1.a.v.

2. **Subsection (c), paragraph (4)** [page 4, beginning on line 30 of the proposed regulation text] requires that any reference to a game in an advertisement must use one of three specified ways of referencing the game. Specifically, the game advertised must be referred to by either: (A) the name of the Bureau-approved game; (B) the Bureau-approved alternative name for the Bureau-approved game or group of games; or (C), if the game or group of games is identified by a name other than that which is in accordance with items (A) and or (B), the advertisement must state either "California game" or "California games," "California style," "This cardroom does not offer Nevada-style banked games," or any other safe harbor statement(s) published by the Bureau at its discretion.

   a. **Yolanda Morrow, representing the Bureau:** The Bureau proposed the following change to subsection (c), paragraph (4), subparagraph (A) for consistency with subparagraphs (B) and (C):

      (c) All advertisements must include:
      …
      (4) In any reference to a game, either:
      (A) The name of the Bureau-approved game or group of games;
      (B) The Bureau-approved alternative name for the Bureau-approved game or group of games; or,

(C) If the game or group of games is identified by a name other than that which is in accordance with items (A) and or (B), the advertisement must state one of the following:
(i) "California game" or "California games";
(ii) "California style";
(iii) "This cardroom does not offer Nevada-style banked games"; or,
(iv) Any other safe harbor statement(s) published by the Bureau at its discretion.

Recommended Response: This comment was accepted. Additionally, Commission staff proposes a non-substantive punctuation edit to subsection (c), paragraph (4), subparagraph (C), as follows:

(c) All advertisements must include:
…
(4) In any reference to a game, either:
(A) The name of the Bureau-approved game or group of games;
(B) The Bureau-approved alternative name for the Bureau-approved game or group of games; or,
(C) If the game or group of games is identified by a name other than that which is in accordance with items (A) and/or ~~and or~~ (B), the advertisement must state one of the following:
(i) "California game" or "California games";
(ii) "California style";
(iii) "This cardroom does not offer Nevada-style banked games"; or,
(iv) Any other safe harbor statement(s) published by the Bureau at its discretion.

b. Eugene Volokh, representing CGA (Part D. of Comment Letter): Mr. Volokh indicated the disclaimer requirements in the proposed regulations unduly and needlessly interfere with advertisements that are not misleading.

Further, Mr. Volokh indicated the advertisement disclaimer requirements in the proposed regulations are unconstitutional because they unduly interfere with the speaker's own message. Mr. Volokh indicates that in *NIFLA v. Becerra* (2018) 138 S.Ct. 2361, a legal case regarding a requirement that certain medical providers display various disclaimers on their ads, the court held (*id.* at 2377) that this requirement was "unduly burdensome" and therefore unconstitutional, even under the commercial speech standard set forth in *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626 (*Zauderer*). "Even if California had presented a non-hypothetical justification for the unlicensed notice, the [law] unduly burdens protected speech." (*Id.*) A billboard that contained even a short message from the medical provider, the court noted, would also have to include a disclaimer that would end up "drown[ing] out the facility's own message." (*Id.* at 2378.)

According to Mr. Volokh, requiring cardrooms to include vague additional words in an advertisement (e.g., "California game," "California style") when identifying a game or group of games by a name other than the Bureau-approved game name, would also require the cardroom to provide additional explanation in the advertisement, "further drown[ing] out" the message the cardroom wants to send. (*See Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.* (1986) 475 U.S. 1, 16 (plurality opin.) [noting that a speaker may "feel compelled to respond" to government-mandated compelled speech, which further exacerbates the burden of the speech compulsion].) Further, Mr. Volokh indicated what the courts have allowed in requiring disclaimers in commercial speech only applies to "purely factual . . . information" (*NI-FLA*, *supra*, 138 S. Ct. at 2372 (quoting *Zauderer*, *supra*, at 651)), and the terms "California game" and "California style" are not "purely factual" and are matters of opinion and characterization.

Recommended Response: This comment was considered but not incorporated. The requirements of Section 12097(c)(4) are intended to provide flexibility in the language used to advertise a game while preventing the use of untrue or misleading statements or references to games prohibited by Penal Code section 330 and to casinos of the type currently operating in Nevada, which are prohibited by section 19 of Article IV of the California Constitution except as specified on tribal lands subject to compacts. There is no vagueness in the term "California game" because the term is defined in the Commission's existing regulations. Section 12002, subsection (h), which would be relabeled as subdivision (j) in the proposed regulations, defines "California game" as "a controlled game that features a player-dealer position, as described in Penal Code section 330.11." Further, the term "California style," while not defined in statute or Commission regulations, is a commonly used term throughout the cardroom industry.

c. <u>David Fried, representing the California Grand Casino and the Oaks Card Club (Part III.A. of Comment Letter)</u>: Mr. Fried argued that the proposed regulation text in Section 12097(c)(4)(C) violates commercial speech rights and suggested that it should be removed entirely. Specifically, Mr. Fried provided the following arguments to support his opinion that the proposed regulation text in Section 12097(c)(4)(C) violates commercial speech rights:

i. In Part III.A. of his Comment Letter, Mr. Fried expressed that commercial speech is protected under the United States Constitution and the California Constitution, citing U.S. Const., amend. I; *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc*., (1976) 425 U.S. 748, and Cal. Const. Art. 1, Sec. 2, sub (a). *Gerawan Farming, Inc. v. Lyons,* (2000) 24 Cal.4th 468. Mr. Fried indicates that casino advertising is entitled to First Amendment protection, and the power to regulate gambling does not include the power to prohibit or

regulate truthful speech about gambling. *Greater New Orleans Broad. Ass'n v. United States,* (1999) 527 U.S. 173, 193 (*Greater New Orleans*) ("...the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone.").

According to Mr. Fried, if the commercial speech is actually or inherently misleading on its face it may be banned outright. However, a state may not prohibit information that is only potentially misleading. *Peel v. Atty. Registration & Disciplinary Comm'n,* (1990) 496 U.S. 91, 109, 111 ("*Peel*") (holding joined by the plurality opinion and concurring judges). The government can regulate potentially misleading commercial speech only if: (1) the regulation serves a *substantial* government interest, (2) the regulation *directly and materially* advances the government's substantial interest, and (3) the regulation is *narrowly tailored* to serving that interest. (*Central Hudson*). Advertising restrictions on "vice" activities like alcohol or gambling are subject to the same standard. *44 Liquormart v. R.I.,* (1996) 517 U.S. 484, 510-13.

Mr. Fried notes that the necessity for and effectiveness of commercial speech regulation must be based on substantial evidence. "In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New Orleans* at 183. "If the protections afforded commercial speech are to retain their force," *Zauderer* at 648-649, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation,* (1994) 512 U.S. 136, 146 ("*Ibanez"*); *Turner Broad. Sys. v. FCC,* (1994) 512 U.S. 622, 666 ("This obligation to exercise independent judgment when First Amendment rights are implicated [requires us] … to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.").

According to Mr. Fried, for an ad to be deceptive under false advertising laws, the ad must mislead a reasonable consumer as to a material fact. *Consumer Advocates v. Echostar Satellite Corp.,* (2003) 113 Cal. App. 4th 1351. Mr. Fried indicates that statements of opinion and subjective statements are expected in ads and are not deceptive or misleading advertising, and only incorrect factual claims can serve as the basis for deceptive advertising. *Consumer Advocates,* 113 Cal. App. 4th at 1361; *see also, Gertz v. Robert Welch,* (1974) 418 U.S. 323, 339-340 (opinions are protected speech). Mr. Fried indicates that an ad for "the best t-shirt in the U.S.A." is not false advertising, but the

claim that the t-shirt is “made in the U.S.A.” could be.

In sum, Mr. Fried indicates:

- Commercial speech is protected unless it is false or misleading.
- For an ad to be misleading, the ad must mislead a reasonable consumer as to a fact that is material to the consumer's decision. Subjective statements and opinions are not facts.
- If commercial speech is misleading on its face, the government can prohibit it or mandate disclaimers.
- If commercial speech is only potentially misleading, the government must seek narrower limitations. Under *Central Hudson*, the government bears the burden to show that restrictions on commercial speech serve a substantial government interest, the regulation must be narrowly tailored and directly and materially advance that substantial interest, and the government must have substantial evidence to support the need for and usefulness of the regulation.

Recommended Response: This comment was considered but not incorporated. Although the First Amendment does provide protection for commercial speech, it does not protect the expression of deceptive commercial speech. Additionally, BPC section 17508 provides that it is unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim. False or misleading claims are also not constitutionally protected forms of commercial speech and do not receive any First Amendment protections.

A distinguishing factor in the court’s holding in *Greater New Orleans* compared to the Commission’s proposed advertising regulations is that the Commission’s proposed advertising regulations are not intended to prohibit advertising. Rather, the purpose of the proposed regulations is to fulfill the statutory mandate that the Commission adopt regulations that allow for the Bureau to disapprove deceptive advertising.

Deceptive advertising or making false or misleading claims in advertisements is not protected by the First Amendment. For commercial speech to be protected, it “at least must concern lawful activity and not be misleading.” *Id.* at 183. Controlled gambling is a lawful activity in California, and therefore advertising for controlled gambling is subject to commercial free speech protections. However, deceptive advertising is not protected.

The purpose of the statutory mandate in BPC section 19841(f) is to protect the public by requiring the Commission to adopt regulations that provide for the Bureau to disapprove deceptive advertising. This is

a public protection measure that is not meant to infringe upon the gambling establishment's First Amendment right to advertise.

As discussed in *Greater New Orleans*, the court stated that in a number of cases involving restrictions on speech that was "commercial" in nature, it relied upon the four-part test in *Central Hudson* to resolve First Amendment challenges. *Id.* The four-part test in *Central Hudson* is further discussed in *Greater New Orleans* as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

The government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Id.*

The first prong of the *Central Hudson* test is whether the commercial speech (advertising) concerns lawful activity and is not misleading. To the extent that the Commission's proposed advertising regulations only address deceptive or misleading advertising, the regulated advertisements would not be afforded First Amendment protections. However, to the extent that the Commission's proposed advertising regulations go beyond regulating misleading speech, the first prong of *Central Hudson* is met because advertising by cardrooms concerns the lawful activity of controlled gambling.

The second prong of *Central Hudson* asks whether the asserted governmental interest is substantial. There is sufficient evidence to support that the Commission's interest in regulating deceptive advertising is substantial. The California Legislature has found and declared that "unregulated gambling enterprises are inimical to the public health, safety, welfare, and good order" (BPC section 19801(d)). The Legislature also mandated that the Commission adopt regulations to "restrict, limit, or otherwise regulate any activity that is related to the conduct of controlled gambling," which would presumably include advertising (BPC section 19841(o)). Finally, the Legislature mandated that the Commission adopt regulations to "provide for the disapproval of advertising by licensed gambling establishments that is determined by the [Department of Justice] to be deceptive to the public" (BPC section 19841(f)).

Assuming the first two prongs of *Central Hudson* are met, to satisfy the third prong, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 188. The fourth prong asks "whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Id.* The government is not required to employ the least restrictive means conceivable, but "it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Id.*

To the extent the Commission's proposed advertising regulations only regulate deceptive advertising, the *Central Hudson* test would not apply. However, to meet the final two prongs of *Central Hudson*—specifically to meet its burden in identifying substantial government interest and justifying that the requirements directly advance that governmental interest—Commission staff explained in the ISOR that the proposed requirements for referencing games or gaming activities are necessary to prevent references in advertisements to games prohibited by Penal Code section 330 and activities prohibited by the California Constitution. These statutes prohibit gambling establishments from offering any banking or percentage games like casinos of the type currently operating in Nevada and New Jersey, giving the Commission additional material reasons to place specific advertising restrictions on referencing games or gaming activities offered at gambling establishment.

ii. In Part III.B. of his Comment Letter, Mr. Fried expressed that the ISOR for the proposed regulations does not cite supporting evidence for claims that some cardroom advertisements do not use the Bureau-approved game names or use the terms "Nevada style" or "Vegas style," which "can mislead the public into thinking that a gambling establishment offers house-banked games..." (ISOR pages 2, 12). Mr. Fried indicates the proposed regulations presume: (1) what assumptions consumers may make from particular words, including generic game names and images; (2) that the alleged assumptions are material to the average consumer; and (3) that the proposed disclaimers will be effective. According to Mr. Fried, these assumptions do not pass the *Central Hudson* test and are false based on a recent survey (Survey)[5] and the available empirical evidence.

[5] *Survey Results: Knowledge of Gambling Rules and Terms Among California Residents*, Nov. 11, 2022 (James Cragun, PhD)

Recommended Response: This comment was considered but not incorporated.

For responses to the portion of the comment concerning the *Central Hudson* test, please see the Commission's response to comment D.2.c.i.

A primary difference between Nevada casinos and California cardrooms is that the latter are precluded from offering house-banked games. It is commonly understood by patrons of gambling establishments that in a Nevada casino, patrons wager against the house. Therefore, use of the terms "Nevada style" or "Vegas style" in cardroom advertising could reasonably mislead the public into thinking that a gambling establishment offers house-banked games.

iii. In Part III.C. of his Comment Letter, Mr. Fried argued that the proposed regulations violate commercial speech rights for the following reasons:

- <u>The Speech is About a Lawful Activity and Not Misleading (Part III.C.1. of Comment Letter).</u>

  Game Names and Images (Part III.C.1.A. of Comment Letter)
  Mr. Fried argued that a cardroom advertisement is not inherently misleading only because it does not use a Bureau-approved game name to reference a game.

  First, Mr. Fried indicated that using a generic game name or image in an advertisement (e.g., "Three Card Poker") does not affirmatively state or imply that the game is house banked, nor is it inherently deceptive with regard to the game's wagering format. Both generic game names and Bureau-approved game names are silent about the player-dealer wagering format.

  Second, Mr. Fried indicated that using a generic image or game name does not render an ad deceptive, any more than using the approved game name makes the ad non-deceptive. The ISOR does not provide justification or evidence to support why the absence of a Bureau-approved game name in an advertisement implies the game is a banked game, nor why use of a Bureau-approved game name results in consumer understanding that the game is a player-dealer game.

  Third, Mr. Fried indicated the sole justification for the regulation appears to be based on the assumption that consumers will make assumptions about the games' betting format based on seeing a

generic game name or image in an advertisement. Even if this were true, it does not mean the advertisement is misleading. Courts have rejected false advertising claims that rely on the consumer's own assumptions rather than actual false statements in the advertisements. For example, in *Hill v. Roll Internat. Corp.,* (2011) 195 Cal.App.4th 1295, 1296, the court rejected plaintiff's claim that a green symbol on the company's bottle, which bore no name, mark, logo or symbol, caused her to believe that a third party had approved the water and it was environmentally superior to other bottled water. The court found that there was nothing affirmatively misleading and nothing actionable. Similarly, the California Court of Appeal rejected a suit against a retailer for using its brand names on outlet clothing of allegedly lesser quality as compared to the same branded clothing in retail stores because there was no false statement in the advertisement that the quality was the same at both locations; this was simply the plaintiff's assumption. *Rubenstein v. The Gap, Inc.,* (2017) 14 Cal.App.5th 870, 876.

Fourth, Mr. Fried indicated a misrepresentation must be material to a reasonable consumer to be deceptive; meaning, not only does the advertisement contain a factual misrepresentation, but the misrepresentation is important to the average consumer's decision of where to play cards. There is no evidence that a reasonable consumer has to learn about the betting format of the games before being interested in visiting a cardroom. Mr. Fried provided an example of online business reviews for a cardroom, indicating that in more than 1,600 reviews, none of the 24 most commonly used words and phrases related to the betting format of the games.

Mr. Fried indicated a quantitative behavioral scientist was hired to conduct a survey in October 2022, which consisted of California residents ages 21 or older, without prior or current employment in the gambling industry, and who had not previously visited a California cardroom (Survey).[6] When participants were asked about the importance of several factors in their decision of where to gamble, the betting rules for the games ranked last and far behind the other factors (Survey Question 10). Only eight percent of respondents said that wagering against the other players would discourage them from playing cards at a California cardroom (Survey Question 18).

According to Mr. Fried, because there is no evidence that the wagering format of the games is material to consumer choice, the

[6] *Survey Results: Knowledge of Gambling Rules and Terms Among California Residents*, Nov. 11, 2022 (James Cragun, PhD). The survey results were included as an attachment to Mr. Fried's comment letter.

ads cannot be deceptive and the proposed regulations lack necessity. Mr. Fried referred to *State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park,* (1969) 271 Cal.App.2d 638, 642, striking down an agency regulation based on deceptive advertising concerns because "... it is doubtful that any person reading the advertisements would think about these matters one way or another."

Fifth, Mr. Fried indicated the regulation's assumptions are inconsistent with past experience, arguing that if betting formats mattered to consumers and regulatory action was necessary, the Commission would have received a voluminous amount of complaints concerning the way player-dealer games have been advertised for the past 40 years without the proposed regulatory constraints. Mr. Fried indicated that despite requests from the cardroom industry and a former Commissioner, the rulemaking record lacks any complaints about deceptive advertising except those from tribal attorneys.

Accordingly, Mr. Fried argued the proposed regulations provide insufficient evidence to show cardroom ads are misleading and thus, do not demonstrate their necessity. It is not within an agency's expertise to determine what the reasonable consumer understands or prioritizes. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Kaufman v. ACS Systems, Inc.,* (2003) 110 Cal.App.4th 886, 907.

Mr. Fried compared the proposed regulations to *Coors Brewing*, in which a federal agency prohibited the disclosure of the alcohol content in beer advertising to suppress the threat of "strength wars" among brewers. The Supreme Court invalidated this regulation as a violation of commercial speech rights because the agency record consisted only of "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.,* (1995) 514 U.S. 476, 490.

"Nevada Style" and "Vegas Style" (Part III.C.1.B. of Comment Letter)
Mr. Fried argued the terms "Nevada style" and "Vegas style" are not *per se* deceptive, as discussed below.

First, Mr. Fried indicated the word "style" can refer to cardroom amenities related to gaming and gaming activities. For example, the statement, "we offer a Nevada style gaming experience," does not state nor equate with the claim that the games are house banked.

Mr. Fried cited the results of the Survey regarding consumers' understanding of the meaning behind the terms "Nevada Style," "Vegas Style," and "[this cardroom] does not offer 'Nevada style' banked games," indicating that a vast majority of the survey respondents did not understand the meaning behind these phrases with respect to the type of games offered at a California cardroom (Survey Questions 12 and 13).

Second, Mr. Fried indicated that saying one thing is in the "style" of another is usually a statement of opinion, used to imply some unspecified similarity – not an exact copy. To illustrate this point, Mr. Fried provided several examples of how the statements prohibited by the proposed regulations could be used in a sentence to express an opinion that draws distinctions between California and Nevada gaming, such as the statements, "we offer a Nevada style gaming experience," "cardroom X or game Y is more fun than Vegas style gambling," and "our games have more action than Nevada style games."

Mr. Fried expressed that statements of opinion are subjective and not factual representations and therefore, cannot qualify as deceptive advertising. *Consumer Advocates, supra* 113 Cal.App.4th at 1361. The usual opinions, puffery and positive statements found in advertisements are not misleading factual statements. *Taleshpour v. Apple Inc.,* (N.D.Cal.) 2021 U.S.Dist.LEXIS 62877, at *28. According to Mr. Fried, in censoring "style" comparisons, the regulation suppresses a protected opinion because an assessment of what is in the "style" of something is invariably subjective.

Third, Mr. Fried indicated that the proposed regulations also prohibit cardrooms from making truthful and factual comparisons, and provided some examples of when cardroom player odds can be better in comparison to Nevada-style games. Mr. Fried expressed that preventing the government from suppressing truthful statements in advertising is the essence of what protections for commercial speech are intended to do. *Peel*, 496 U.S. at 100.

Fourth, Mr. Fried indicated the regulation would prohibit the use of certain words categorically and without regard to usage or context, which is necessary to determine if the prohibited words are being used in a statement of opinion or fact, and if used in a statement of fact, whether the statement is truthful. Mr. Fried quoted *Towne v. Eisner,* (1918) 245 U.S. 418, 425 (Oliver Wendell Holmes, Jr.)

(decision superseded by statute), regarding the importance of the circumstances and time in which a word is used.

According to Mr. Fried, a judicial proceeding upon the facts and presentation of evidence is ordinarily used to determine if the words in an advertisement make it factually misleading. Mr. Fried indicated that conversely, the proposed regulations would deem certain words categorically deceptive without regard to whether they are used as opinion or truthfully, making the proposed regulations fatally flawed. *King v. Burwell*, (2015) 576 U.S. 473, 486 ("But oftentimes the 'meaning - or ambiguity - of certain words or phrases may only become evident when placed in context.'" (*quoting FDA v. Brown & Williamson Tobacco Corp*., (2000) 529 U.S. 120, 132)).

According to Mr. Fried, the proposed regulations are subject to the *Central Hudson* test because they impair speech that is not on its face or inherently misleading. *Peel,* 496 U.S. at 100. If the same advertising could relate to both legal and illegal activity, Mr. Fried indicated the courts treat the advertising as relating to lawful activity and evaluate the legality of the regulation under *Central Hudson*. *See, Educ. Media Co. at Virginia Tech v. Swecker*, (4th Cir. 2010) 602 F.3d 583, 589.

- There is no substantial state interest in requiring a disclaimer or prohibiting certain words (Part III.C.2. of Comment Letter).

  Mr. Fried expressed that under *Central Hudson*, the state has the burden to "demonstrate that the harms it recites are real" to support casino advertising restrictions. *Greater New Orleans* at 188. Mr. Fried indicated that the player-dealer betting format is not an inherently harmful condition or dangerous commodity requiring a warning label in advertisements. Mr. Fried reiterated that there is no substantial evidence to justify the proposed regulations' censorship or other restrictions on speech (e.g., restrictions on the use of generic game names or images, or the use of comparative or opinion statements) and therefore, the proposed regulations do not serve a substantial state interest and lack the necessity required by the Administrative Procedure Act.

- The proposed regulations do not materially advance a legitimate state interest (Part III.C.3. of Comment Letter).
  Mr. Fried provided that under *Central Hudson*, the regulation also must materially achieve the state's intended purpose of preventing consumers from being misled.

The terms in the proposed regulations are too vague to advance any meaningful purpose (Part III.C.3.A. of Comment Letter).
According to Mr. Fried, there is no evidence to justify the disclaimers ("California game" or "California style") required by the proposed regulations. These terms are too vague and there is no evidence to support that a California consumer would know that these terms identify player-dealer games. Mr. Fried argued that if a consumer knows what a "California style" game is, they already know cardrooms offer player-dealer games and an advertising disclaimer is unnecessary. In support of these comments, Mr. Fried cited the results of three Survey questions concerning consumers' understanding of the terms "California game," "California style," "Nevada style," "Vegas style," and "[this cardroom] does not offer 'Nevada style' banked games" (Survey Questions 11, 12, and 13), indicating the vast majority of Survey respondents did not understand those phrases. Additionally, Mr. Fried cited various written publications to support his argument that required government disclaimers are ineffective, provide no material benefit, and increase consumer confusion. Mr. Fried concluded that because the proposed regulations do not directly and materially advance the stated purpose, they fail the *Central Hudson* test.

The proposed regulations do not advance the state's asserted interest in reducing consumer confusion because they do not apply to comparable gambling operations (Part III.C.3.B. of Comment Letter).
Mr. Fried expressed that the proposed regulations do not materially advance the state's interest in reducing consumer confusion because they apply only to one small segment of the gambling market. Mr. Fried described the wagering formats of other gambling markets in California, including horse racing, the Lottery, tribal casinos, and daily fantasy sports; indicating that although these other gambling operators have betting and wagering limits, none are subject to mandatory advertising disclosure requirements concerning betting or wagering limits. According to Mr. Fried, because no other gambling operators in the state are required to disclose their betting formats or game rules, nor are they prohibited from making comparisons to "Nevada style" gaming, the proposed regulations are unconstitutional because they are inconsistent with the requirements of other gambling markets. Mr. Fried indicates that the proposed regulations are grossly under inclusive and discriminate against cardrooms.

Mr. Fried referenced certain court cases to support his opinion

that the proposed regulations are unconstitutional:

- In *Greater New Orleans*, *supra,* the court emphasized that the government could not restrict commercial casino advertising because tribal casinos faced no similar restrictions. "[T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Id.* at 193-195.
- Speech regulations that are inconsistent and under inclusive undermine the claim that a regulation meaningfully advances any state interest. *Rubin, supra,* 514 U.S. at 488-489 (the regulation banned the disclosure of alcohol content on beer labels, but not in the case of wines and spirits).
- With respect to applying *Central Hudson* to noncommercial speech, when a regulation discriminates among viewpoints and speakers, the regulation is said to be "content based" and presumptively unconstitutional and invalid. According to Mr. Fried, content-based restrictions on commercial speech that discriminate against a particular viewpoint or speaker usually meet the same fate. *Sorrell v. IMS Health Inc.,* (2011) 564 U.S. 552, 571 ("the outcome is the same").

- <u>The proposed regulations are not narrowly tailored to fit the asserted government interest (Part III.C.4. of Comment Letter).</u> The final requirement of the *Central Hudson* test is that the regulation must be narrowly tailored to the government's purpose. According to Mr. Fried, the proposed regulations fail to meet this requirement due to containing a categorical prohibition on statements being made in advertisements that compare cardrooms to Nevada or Vegas style gambling, even if the statement draws a truthful distinction or simply expresses a non-actionable statement of opinion. According to Mr. Fried, the Supreme Court has emphasized that in determining whether an ad is deceptive, an individual determination is more narrowly tailored than a categorical regulation. *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, (2003) 538 U.S. at 619-620.

- <u>The disclaimers are invalid (Part III.C.5. of Comment Letter).</u> Mr. Fried expressed that even if there was substantial evidence that advertisements using generic game names and images are "potentially deceptive," the mandatory disclaimers are invalid under four criteria from *Zauderer* at 626, 638, 651:
  - First, the proposed disclaimers are not reasonably related to preventing deception of consumers because their required use is irrationally tied to referencing approved game names

that do not communicate anything about the betting format, which produces wildly inconsistent and arbitrary results. *Greater New Orleans* at 190.

- Second, based on the Survey responses and the lack of substantial evidence, the proposed disclaimers do not redress the alleged problem because the disclaimers are ineffective and not understood by consumers. Disclaimers in time-limited advertisements (e.g., billboards and short video ads), would likely be even less effective.
- Third, the disclaimers are not "purely factual and uncontroversial." Rather, the disclaimers use vague characterizations (e.g., "California game" or "California style") that confuse consumers. According to Mr. Fried, disclaimers fail the legal test when the subject of the mandatory disclosures is controversial. *Nat'l Inst. of Family & Life Advocates v. Becerra,* (2018) 585 U.S.__, 138 S.Ct. 2361, 2377, 201 L.Ed.2d 835, 853. Mr. Fried indicates whether the betting format of the games is material to consumer decisions, and the proposed regulations' aim to distinguish cardrooms from their competitors in advertising, are controversial.
- Fourth, the disclaimers impose a substantial burden on licensees because the cardroom advertiser may have to provide additional content to explain the disclaimer, imposing an unconstitutional burden. *See, Pacific Gas & Electric Co. v. Public Utilities Com.,* (1986) 475 U.S. 1, 15-16 (plurality); *Public Citizen, Inc. v. La. Atty. Disciplinary Bd.,* (5th Cir. 2011) 632 F.3d 212, 229.

- A regulation cannot vest the Bureau with unfettered discretion (Part III.C.6. of Comment Letter).
  Mr. Fried expresses that under the proposed regulations, the only option a cardroom has to avoid a disclaimer in an advertisement is to use an approved game name or an alternative name approved by the Bureau; however, there are no existing criteria for the approval of either. According to Mr. Fried, the proposed regulations lack clarity under the Administrative Procedure Act and violate the First Amendment. "[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship..." *Lakewood v. Plain Dealer Pub. Co.,* (1988) 486 U.S. 750, 757 (citing numerous cases). *See Near v. Minnesota ex rel. Olson*, (1931) 283 U.S. 697, 713–14.

Recommended Response: This comment was considered but not incorporated.

For the comments regarding the necessity of the regulations, the *Central Hudson* test, please see the response to comment D.2.c.i. For comments alleging the Commission does not have the authority to categorically determine which advertisements are deceptive (e.g., prohibiting the use of Nevada-style and Vegas-style) and that the regulations are unconstitutional because they do not materially advance a legitimate state interest, please see responses to comments D.1.a.i., D.1.a.ii, and D.4.a.

Regarding comments pertaining to consumer response to advertisements, please see the response to comment D.2.c.ii.

Regarding comments alleging the proposed regulations do not advance the state's interest in reducing consumer confusion because they do not apply to comparable gambling operations such as horse racing, the Lottery, tribal casinos, and daily fantasy sports, Commission staff notes that with some exceptions related to tribal casinos, the Gambling Control Act does not govern these types of gambling operations. In particular, BPC section 19841(f) establishes a mandate for the Commission's regulations to provide for the disapproval of advertising *by licensed gambling establishments* that is determined by the Bureau to be deceptive to the public (emphasis added). Therefore, the Commission has a statutory obligation to promulgate regulations addressing deceptive advertising by licensed gambling establishments, and this authority does not extend to the other gambling operations cited by the commenter.

Regarding comments alleging the use of required terms such as "California style" is overly vague, please see the response to comment D.2.b.

Regarding the comment alleging the proposed regulation inappropriately vests the Bureau with unfettered discretion, as mentioned in the response to comment D.2.b., the requirements of Section 12097(c)(4) are intended to provide flexibility in the language used to advertise a game while preventing the use of untrue or misleading statements or references to games. Commission staff notes that the proposed regulations provide three options for references to game names in cardroom advertisements, and one of those options permits advertisements to use any game name as long as it additionally includes one of four disclaimers. Additionally, choosing whether to reference game names in cardroom advertising is at the discretion of the cardroom. Commission staff disagrees with the commenter's characterization of this provision as providing the Bureau unfettered discretion, lacking clarity, or resulting in censorship.

3. **Subsection (c), paragraph (5)** [page 5, beginning on line 1] establishes requirements for any reference to a gaming activity in an advertisement.

    a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part V. of Comment Letter):** Mr. Fried noted that Bureau-approved games are issued approval numbers (known as "GEGA" numbers), which are published and searchable on the Bureau's website. As such, Mr. Fried suggested that the proposed regulations should be amended to require that advertisements contain one of the following when referencing a game, either: (1) the Bureau-approved game name, or (2) if only a part of the approved game name or a generic game name is used, the Bureau approval number ("GEGA") number must be included. In conformity with Mr. Fried's suggestion to remove Section (c)(4)(C) from the proposed regulation text (please see comment D.2.c.), Mr. Fried suggested the following modifications to Section (c)(5) of the proposed regulations:

        (c) All advertisements must include:
        …
        (4~~5~~) In any reference to an approved game or gaming activity, either:
        (A) The name of the Bureau-approved game or gaming activity; or,
        (B) ~~Any gaming activity name with t~~The Bureau-approved identification number for the game or gaming activity.

        Recommended Response: This comment was considered but not incorporated. As mentioned in the response to comment D.2.b., the requirements related to game names in the proposed regulations are intended to provide flexibility in the language used to advertise a game while preventing the use of untrue or misleading statements or references to games prohibited by Penal Code section 330 and to casinos of the type currently operating in Nevada, which are prohibited by section 19 of Article IV of the California Constitution except as specified on tribal lands subject to compacts. Taken in conjunction with the commenter's suggestion to remove Section (c)(4)(C) from the proposed regulations (please see the response to comment D.2.c.), the recommended changes in this comment effectively authorize cardrooms to use any game name as long as they include the Bureau-approved identification number for the game or gaming activity. This proposed change would be counter to the intent of the game name provisions of the proposed regulations to prevent the use of untrue or misleading statements and references to games that are prohibited in California cardrooms.

4. **Subsection (e)** [page 5, beginning on line 13] states that an advertisement must not be deceptive to the public and specifies what constitutes a deceptive advertisement.

    a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Parts II. and IV. of Comment Letter):** Mr. Fried argued that

BPC section 19841(f) does not provide the Commission with adequate regulatory authority to support the proposed regulation text in Section 12097(e). Specifically, Mr. Fried provided the same arguments outlined in comments D.1.a.i. through D.1.a.vi to support his opinion that BPC section 19841(f) does not provide the Commission with adequate regulatory authority to support the proposed regulation text in Section 12097(e).

However, Mr. Fried also provided the following suggested modifications to the proposed regulation text in Section 12097(e) (Part V. of Comment Letter):

> (e) An advertisement must not be deceptive to the public. An advertisement is presumptively deceptive if it does any of the following:
> …
> ~~(3) Uses any of the following terms when describing any of the games or gaming activities offered at the gambling establishment:~~
> ~~(A) "Nevada style"; or,~~
> ~~(B) "Vegas style".~~
> (4) Makes any material false or misleading claims.
> (5) Depicts, illustrates, portrays, or refers to a game ~~prohibited by Penal Code section 330.~~ that was not at the time of the advertisement approved by the Bureau. A depiction, illustration or reference which can relate to an approved game is not presumptively deceptive.

Specifically, Mr. Fried provided the following arguments for his suggested changes to this subsection (Parts III and IV of Comment Letter):

i. Mr. Fried argued that the proposed regulation text in Section 12097(e)(3) violates commercial speech rights and suggested that it should be removed entirely. Specifically, Mr. Fried provided the same arguments outlined in comments D.2.c.i. through D.2.c.iii. to support his opinion that the proposed regulation text in Section 12097(e)(3) violates commercial speech rights.

ii. Mr. Fried expressed that under California law, only material false or misleading claims can be legally deceptive. The misstatement or deceptive element must have a material effect on the decision of a reasonable consumer. Gutierrez v. Carmax Auto Superstores California, (2018) 19 Cal.App.5th 1234, 1258.

Mr. Fried opined that because the provision does not refer to the existing laws that require materiality, the word "material" should be added to the proposed regulations before "false or misleading claims" to ensure subparagraph (4) does not unintentionally create a new definition of "false or misleading."

iii. Mr. Fried expressed that the proposed provision overlooks an existing

safe harbor in BPC section 19943.5, which states:

> If a gambling enterprise conducts play of a controlled game that has been approved by the department pursuant to Section 19826, and the controlled game is subsequently found to be unlawful, so long as the game was played in the manner approved, the approval by the department shall be an absolute defense to any criminal, administrative, or civil action that may be brought, provided that the game is played during the time for which it was approved by the department...

Mr. Fried opines that the existing safe harbor would also apply to any administrative proceedings related to the advertising of a Bureau-approved game while the game is approved, even if the approved game is later found to be in violation of Penal Code section 330. As such, Mr. Fried indicated subsection (5) must be amended to refer to the Bureau's approval of games rather than Penal Code section 330.

Additionally, Mr. Fried expressed that because the same image can be used to advertise a game as a player-dealer game or as a banked game, subsection (5) is overbroad and can chill protected speech. As such, Mr. Fried indicates the proposed regulations should be amended to avoid their application to generic images that can apply to either approved or unapproved games.

Recommended Response: This comment was accepted, in part. The Commission proposes the following amendments to Section 12097(e):

§ 12097. Advertising Content and Dissemination.
…
(e) An advertisement must not be deceptive to the public. The Bureau must consider the following criteria in determining whether an ~~An~~ advertisement is deceptive ~~if it does any of the following~~:
(1) The advertisement depicts ~~Depicts~~ gambling as a means to become wealthy or resolve a financial burden.
(2) The advertisement targets ~~Targets~~ or appeals to children or adolescents or encourages persons under 21 years of age to engage in controlled gambling. Examples of this include, but are not limited to:
(A) The advertisement uses ~~Using~~ depictions, images, appearances, or voice-over services of anyone under 21 years of age.
(B) The advertisement uses ~~Using~~ objects such as toys, inflatables, movie characters, cartoon characters, or any other display, depiction, or image designed in a manner likely to be substantially or predominately appealing to minors or anyone under 21 years of age.
(C) The advertisement is used ~~Advertising~~ on the premises of any day care center, youth center, preschool, or school providing instruction in any

grades kindergarten to 12, or at any function for a school providing instruction to any grades kindergarten to 12, or at any function that is held primarily for persons under the age of 21.
(3) The advertisement uses either ~~Uses any~~ of the following terms when describing any of the games, groups of games, or gaming activities offered at the gambling establishment, unless the use of the term draws a distinction between the term and the games or gaming activities offered at the gambling establishment:
(A) "Nevada style"; or,
(B) "Vegas style".
(4) The advertisement makes ~~Makes~~ any false or misleading claims.
(5) The advertisement depicts, ~~Depicts,~~ illustrates, portrays, or refers to a game, group of games, or gaming activity that has not been approved by the Bureau for the cardroom advertised ~~prohibited by Penal Code section 330~~.

Regarding the portion of this comment alleging that the Commission lacks regulatory authority to support the proposed regulation text in Section 12097(e), please see responses to comments D.1.a.i., D.1.a.ii., and D.1.a.v..

Regarding the portion of the comment alleging that Section 12097(e)(3) violates commercial speech rights, please see responses to comments D.2.c.i. and D.2.c.iii.

Regarding the portion of the comment pertaining to materiality of false or misleading claims, BPC section 17508 provides that it is unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, without mention of "material" claims. The legal case cited, *Gutierrez v. Carmax Auto Superstores California,* (2018) 19 Cal.App.5th 1234, 1258, is distinct from this provision of the proposed regulations because it relates to whether failure to disclose a fact constitutes a deceptive practice under the Consumer Legal Remedies Act, which requires that the omission is "contrary to a material representation actually made by the defendant."

b. Eugene Volokh, representing CGA (Parts A and B of Comment Letter):
Mr. Volokh indicated that Section 12097(e)(3) restricts non-misleading commercial speech because "Nevada-style" and "Vegas-style" are not actually or inherently misleading terms. Mr. Volokh indicates commercial speech is generally protected by the First Amendment and the government "may not… completely ban statements that are not actually or inherently misleading." (*Peel v. Attorney Reg. & Discip. Comm'n* (1990) 496 U.S. 91, 110 (plurality opin.); *id.* at 111 (Marshall, J., concurring in the judgment) [agreeing with the plurality on this]). Mr. Volokh notes that courts "cannot allow rote invocation of the words 'potentially misleading'" to justify restricting speech. (*Ibanez v. Fla. Dep't of Bus. & Prof. Reg.* (1994) 512 U.S. 136, 146; *see also Alexander*

v. Cahill (2d Cir. 2010) 598 F.3d 79, 91; *Dwyer v. Cappell* (3d Cir. 2014) 762 F.3d 275, 282 n.5; *Mason v. Fla. Bar* (11th Cir. 2000) 208 F.3d 952, 956), and "conclusory assertion[s]" do not suffice. (*Pearson v. Shalala* (D.C. Cir. 1999) 164 F.3d 650, 659.) Instead, Mr. Volokh indicates it is the government's "burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" (*Ibanez, supra*, 512 U.S. at 146 [speaking of harms stemming from allegedly misleading commercial speech].)

Mr. Volokh indicates that describing a card game or gaming experience as "Nevada style" or "Vegas style" cannot be misleading because it is a matter of opinion. According to Mr. Volokh, the word "style" is a general term that does not assert any particular game rules, which is supported by the studies cited in Mr. Fried's written comment letter (pages 14 - 21). Mr. Volokh suggests use of the phrases "Nevada style" and "Vegas style" conveys the message, "If you like Vegas, you'll like us," which suggests general similarities without specifying what those similarities are, and represents an expression of opinion that is policed by customer reaction and cannot be policed by the government.

Additionally, Mr. Volokh indicates the proposed regulations restrict non-misleading references to "Nevada style" and "Vegas style," such as "Not Nevada style" and "Better than Nevada style," phrases which would be precluded by the proposed regulations but would not mislead the public into thinking a cardroom offers forbidden house-banked games for play.

Mr. Volokh compared the proposed regulation to the ban on all advertising by electric utilities "that promotes the use of electricity," struck down in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.* (1980) 447 U.S. 557, 570 *(Central Hudson)*. In this case, the government sought to justify the ban as "necessary to further the State's interest in energy conservation." (*Id.*) However, the court noted that "the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use." (*Id.*) The ban, the court observed, "prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public." (*Id.*)

Recommended Response: This comment was accepted, in part. Please see response to comment D.4.a.

Notably, the message provided by Mr. Volokh that states, "If you like Vegas, you'll like us," is not prohibited by the noticed version of the proposed regulations (ver. August 26, 2022). Rather, the regulation would explicitly

prohibit using the statements "Nevada style" or "Vegas style" when describing any of the games or gaming activities offered at the gambling establishment.

E. ADOPT SECTION 12098. AGE CONFIRMATION IN ADVERTISING.

This section establishes age confirmation requirements for advertising involving direct communication or dialogue, and for accessing gambling establishment websites and social media landing pages.

1. **General comments** made on this section [page 6, beginning on line 1 of the proposed regulation text].

   a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part VI. of Comment Letter):** Mr. Fried acknowledged BPC section 19841(f) authorizes the regulation of advertising that "appeals to children." Mr. Fried added that the reason tobacco advertising using the Joe Camel theme and cartoonish figure was sanctioned by the Federal Trade Commission was because it was aimed at children. However, Mr. Fried argued that cardroom advertising is different because while it may be accessible to underage persons, it is not designed or intended to appeal to them. According to Mr. Fried, in failing to make this distinction, the proposed regulations exceed the scope of BPC section 19841(f).

   Mr. Fried indicated that there is far less of a need for age restrictions on cardroom advertising compared to other age-restricted types of commerce, such as alcohol or tobacco products, which are tangible products that can be transferred to underage persons. In contrast, Mr. Fried noted that if a person wants to play at a cardroom, the cardroom can verify their age in person by checking their identification. Mr. Fried argued that the proposed regulations impose greater burdens on cardrooms than other age-restricted businesses—such as alcohol sales, tobacco sales, cannabis sales, licensed online wagering sites, and other gambling operators—despite the fact that cardrooms are the smallest segment of age-restricted commerce and have a greater ability to restrict their services to individuals of legal age.

   Lastly, Mr. Fried expresses the proposed regulations and ISOR do not consider or provide an understanding of how they would apply to and impact different types of advertising channels (e.g. pay-per-click ads, banner ads, video ads, social media, email marketing), and lack evidence showing the required steps would be effectual.

   Recommended Response: Please see responses to comments E.2.a. and E.3.a.

2. **Subsections (a) through (c)** [page 6, lines 2 through 15 of the proposed regulation text].

Subsection (a) requires that the owner category licensee must use age affirmation to verify that the recipient is 21 years of age or older prior to any advertising involving direct communication or dialogue. Further, the provision specifies what forms of communication must utilize age verification methods (communication through in-person, telephone, physical mail, or electronic).

Subsection (b) provides that age verification is not required if the owner category licensee can verify that the intended recipient has previously been verified to be 21 years of age or older, and the communication is sent only to the intended recipient.

Subsection (c) requires an owner category licensee to use a method of recipient age affirmation or self-attestation before a potential customer is added to a mailing list, subscribed, or otherwise consents to receive direct communications controlled by the owner category licensee.

a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part VI. A. of Comment Letter):** Mr. Fried suggested the following modifications to Section 12098, subsections (a) through (c) (Part VI.A.6. of Comment Letter):

> **§ 12098. Age Confirmation in Advertising.**
> (a) Prior to any advertising from the owner category licensee involving direct communication or dialogue directed to a particular individual, the owner category licensee must use age affirmation or self-attestation, or other reasonable means to verify or substantiate a good faith belief that the intended recipient is 21 years of age or older. For the purposes of this section, direct communication or dialogue may occur through any form of communication, including in-person, telephone, physical mail, or electronic. Direct communication or dialogue does not include responding to an inquiry received by the licensee. This section does not apply to digital advertising that uses an age filter to target advertising to persons 21 years or older.
>
> ~~(b) A method of age verification is not necessary for a communication if the owner category licensee can verify that the owner category licensee has previously had the intended recipient verify the recipient is 21 years of age or older by a method of age affirmation and the owner category licensee sends the communication to the intended recipient.~~
>
> (~~c~~b) An owner category licensee must use a method of recipient age affirmation or self attestation, or provide notice to a person that they must be 21 or older, before having a potential customer added to a mailing list, subscribe, or otherwise consent to receiving direct communication or dialogue controlled by an owner category licensee.

Specifically, Mr. Fried provided the following arguments for his suggested changes to these subsections:

i. "Directed to a particular individual" (Part VI.A.1. of Comment Letter). The ISOR states subsection (a) is intended to relate to communications which are "focused on a particular individual." Mr. Fried suggested this language should be added to the proposed regulation text to conform the text to the regulation's intention.

Mr. Fried indicated the proposed regulations lack clarity because "direct" is not defined, and therefore, subsection (a) would apply to all "direct" advertising using "any form of communication," which may include billboards and television ads displayed directly to the public for which age affirmation is not possible.

Mr. Fried expressed that "direct" digital advertising can use age targeting or filtering, but does not use age affirmation for determining ad placements. He explained that cardrooms do not purchase ads on specific websites and the process for how a display or banner ad makes it onto a website within a specific geographic area using algorithms and filtering based on consumer digital profiles (behavior, interests, and demographics like age) based on IP addresses. Respectively, the cardroom only knows the ad it has purchased is targeted toward consumers meeting this criteria based on their available data; however, the cardroom cannot verify the age of each recipient on a vendor's list.

Similarly, Mr. Fried indicated that for direct mail and email vendors, the cardroom does not see the vendor's mailing list. Rather, the cardroom instructs the vendor to limit the recipients to persons 21 and over and the vendor creates a mailing list using data meeting these criteria. According to Mr. Fried, the cardroom cannot verify the age of the recipients on the list if that requires each recipient to opt in and certify that they are 21 or years of age or older.

ii. "Age Affirmation of self-attestation" (Part VI.A.2. of Comment Letter).
Mr. Fried expressed the terms "age verification," "age affirmation," and "self-attestation" used in Section 12098 of the proposed regulations are used inconsistently and lack clarity because they are not defined. Mr. Fried notes that subsection (c) requires the terms "age affirmation or self-attestation," which suggests they are not the same, but subsection (a) only requires "age affirmation." Mr. Fried questioned whether the reference to "age affirmation" without mention of "self-attestation" in subsection (a) requires cardrooms, prior to direct marketing, to verify each person's age independently without

being able to accept the person's own representation, which he indicated would be unreasonable.

iii. "Other reasonable means to verify or substantiate a good-faith belief" (Part VI.A.3. of Comment Letter).
Mr. Fried expressed that the proposed regulations must allow for other reasonable means of recipient age verification by the cardroom *or its vendor or by substantiation of a good-faith belief*. Without the ability to rely on vendors and on digital information commonly used in digital advertising to target consumers based on age, Mr. Fried indicated that cardrooms would effectively be restricted from several major advertising channels that other gambling operators in the state can use.

Mr. Fried argued that cardrooms must be allowed to target ads based on demographic criteria that only the vendor may have access to, and which may not involve individual age affirmation. Mr. Fried opined that this type of filtering by vendors should suffice because the only way for a person to participate in a game is to come into a cardroom where the cardroom can verify the person's age.

iv. "Intended Recipient" (Part VI.A.4. of Comment Letter).
Mr. Fried expressed that because a licensee may intend to advertise to a person aged 21 or over via their home address, digital account or phone, but the ad may reach someone else, the word "intended," which is included in subsection (b), should be added to subsection (a).

v. Exception if the person contacts the owner-licensee (Part VI.A.5. of Comment Letter).
Mr. Fried expressed that many people contact cardrooms via phone or social media with questions about food service, game promotions, etc. Mr. Fried indicated that as written, subsection (a) could require cardrooms to ask the person's age prior to responding because the answer may fall within the definition of advertising, which he opined would be burdensome to employees and off-putting to customers. As such, Mr. Fried suggested changes to clarify that the provision is aimed at affirmative attempts cardrooms make to advertise, rather than responses to the public.

Recommended Response: This comment was accepted, in part. Commission staff recommends the following modifications to subsections (a) through (c) of this Section:

§ 12098. Age Confirmation in Advertising.
(a) Prior to any advertising from the owner category licensee involving direct communication or dialogue directed to a particular individual, the owner category licensee must use age affirmation, self-attestation, or other

reasonable means to verify or substantiate a good-faith belief that the intended recipient is 21 years of age or older. For the purposes of this section, direct communication or dialogue may occur through any form of communication initiated by or for the owner category licensee, including in-person, telephone, physical mail, or electronic. This Section does not apply to digital advertising that uses an age filter to target advertising to persons 21 years of age or older.

(b) A method of age verification is not necessary for a communication if the owner category licensee can verify that the owner category licensee has previously had the intended recipient verify the recipient is 21 years of age or older by a method of age affirmation or self-attestation and the owner category licensee sends the communication to the intended recipient.

(c) An owner category licensee must use a method of recipient age affirmation or self-attestation, or provide notice to a person that they must be 21 years of age or older, before ~~having~~ a potential customer joins ~~added to~~ a mailing list, subscribes, or otherwise consents to receiving direct communication or dialogue controlled by an owner category licensee.

3. **Subsection (d)** [page 6, beginning on line 16 of the proposed regulation text] provides, where possible, any website or social media landing page operated by or for an owner category licensee must require the visitor to affirm he or she is 21 years of age or older before being allowed access to the website or social media landing page.

   a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part VI. B. of Comment Letter):** Mr. Fried expressed that subsection (d) imposes ineffectual and differential requirements on businesses, and suggested removal of subsection (d) for the following reasons:

      i. Social media sites don't use age affirmation on each landing page.
      Mr. Fried expressed that social media sites do not provide a method for users to affirm their age at each landing page they visit. Instead, users register on social media platforms with their age, and some social media platforms, such as Facebook and Instagram, allow business owners to place age filters on their landing pages. As such, Mr. Fried suggested the proposed regulations' reference to age affirmation and an age gate at a landing page is misplaced.

      ii. Age filtering and age gates are ineffectual.
      Mr. Fried expressed that age gates on social media sites are not effective for the following reasons:

- Site registrations operate on the honor system – anyone can select any date of birth;
- Most sites allow unregistered users to view/preview content without being logged in; and
- According to a 2012 Pew Research Study: "Large numbers of youth have lied about their age in order to gain access to websites and online accounts."[7]

Further, Mr. Fried stated that the ISOR assumes that age gates or age affirmation are effective, but the record lacks any such evidence.

iii. <u>This section damages cardroom marketing and advertising.</u>
According to Mr. Fried, social media platforms that allow businesses to age filter a landing page may impose conditions that damage marketing efforts. Specifically, Mr. Fried indicated that Facebook and Instagram limit age-restricted posts to only be re-posted on other age-restricted pages, and age-restricted pages are not allowed to join groups (e.g., interest groups for playing poker, poker tournaments, community activities, and events).[8] Mr. Fried expressed that subsection (d) would damage cardroom marketing efforts on social media platforms and leaves cardrooms at risk for future potential changes to social media company policies/technology, which could impose new limitations and consequences. Further, Mr. Fried provided an example of how age filters can reduce marketing/advertising value and reach/visibility (going viral) by being suppressed by the platform's algorithms if interaction quotas are not met.[9] Mr. Fried also expresses that the ISOR does not contemplate the proposed regulations' impact on cardroom marketing resulting from the lost ability to join social media groups or have their posts shared.

Mr. Fried also expressed that age gates on business websites impose a cost by adding an additional notice/step to existing notices/steps (e.g., California Consumer Privacy Act data and website cookie notices) to enter a website using a mobile phone, which may cause user frustration and result in users exiting the site.

iv. <u>This section violates Commercial Speech rights and lacks consistency with other laws.</u>
Mr. Fried expressed that subsection (d) of the proposed regulations does not materially advance the state's interest nor is it narrowly tailored, for the following reasons:

[7] https://www.pewresearch.org/internet/2013/05/21/teens-social-media-and-privacy/ (page 76).
[8] https://www.facebook.com/help/778445532225441. Instagram (owned by Meta) usually follows the same policies.
[9] https://comboapp.com/services/marketing/types-of-digital-advertising

- It only affects cardrooms (the smallest segment of the age-restricted businesses in California).
- The same requirement is not imposed by the state on businesses with greater risk of participation by minors and on businesses that Mr. Fried indicated spend exponentially more on advertising. For example, Mr. Fried indicated that the Lottery, CHRB, the California Department of Alcoholic Beverage Control, and the California Department of Cannabis Control do not require age gates on websites or social media. Mr. Fried added that California tribal casinos, Daily Fantasy Sports businesses, and restaurants/bars serving alcohol do not have age gates on their websites. Instead, these businesses check age when conducting a transaction or opening an account.

Mr. Fried concluded that speech regulations that are inconsistent and under inclusive undermine the claim that regulation is needed or that it meaningfully advances any state interest. Rubin, 514 U.S. at 488-489.

v. <u>This section violates BPC section 19841(f).</u>
Mr. Fried expressed that subsection (d) of the proposed regulations violates BPC section 19841(f) because it restricts cardroom websites and social media pages that do not specifically appeal to children, and the regulation is not consistent with CHRB and the Lottery's regulations, which do not require age gates or age affirmation on websites.

According to Mr. Fried, Advance Deposit Wagering, alcohol, and tobacco sales conducted over the internet are not comparable to the Commission's regulations; however, the ISOR states subsection (d) is "consistent with the requirements for other age-restricted industries" without providing any comparable examples. Mr. Fried expressed that subsection (d) attempts to implement what should be left to the Legislature, which can conduct more in-depth fact-finding, address similarly situated businesses in similar ways, and impose common standards on internet and social media platforms.

vi. <u>This section lacks necessity and clarity.</u>
Mr. Fried reiterated that the ISOR does not explain why an age gate is needed on a cardroom website or social media landing page when no cardroom commerce is conducted online. According to Mr. Fried, if the state is concerned that exposure to gambling is harmful to children, then the ISOR needs to explain why there are lottery tickets in convenience stores next to the candy, and why Daily Fantasy Sports and tribal casino ads run during professional sporting events such as football and baseball games that kids attend and view.

Recommended Response: This comment was accepted. The Commission maintains that the Act and BPC section 19841(f) provide adequate authority for the provision in subsection (d) (please see responses to comments in D.1.a.). Additionally, it would be inappropriate for the ISOR to opine on aspects outside of the Commission's regulatory authority, such as the placement of lottery tickets in convenience stores. However, upon further examination of requirements related to age gating for similar industries, Commission staff recommends the removal of subsection (d) as shown below:

§ 12098. Age Confirmation in Advertising.

…

~~(d) Where possible, any website or social media landing page operated by or for an owner category licensee must require the visitor to affirm he or she is 21 years of age or older before being allowed access to the website or social media landing page.~~

F. ADOPT SECTION 12099. DISAPPROVAL OF ADVERTISING.

This section explains the procedure for the Bureau to notify an owner category licensee if the Bureau determines an advertisement is deceptive and provides potential disciplinary and enforcement actions that a licensee may be subject to for failing to correct an advertisement.

1. **General comments** made on this section [page 6, beginning on line 24 of the proposed regulation text].

   a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part VIII. of Comment Letter):** Mr. Fried expressed that this section attempts to apply the Commission and Bureau's existing administrative procedures for letters of warning and disciplinary proceedings to the advertising disapproval procedures, which are insufficient for addressing advertising and violate the rule against prior restraints on speech.

   Mr. Fried indicated that, consistent with the existing processes and timelines for disciplinary and licensing hearing referrals, the process for a licensee to address a notice of disapproval for advertising will be subject to substantial delays, potentially exposing the licensee to additional penalties for repeated violations, loss of licensure, or causing the licensee to desist from commercial speech that they may be legally entitled to exercise.

   Mr. Fried indicated that the only other option for a licensee is to sue the Bureau for a declaratory judgement and injunction under BPC section 19804. However, suing the Bureau is costly and subject to other delays, causing many cardrooms to comply even with a defective Bureau notice. Furthermore, during this process, the cardroom will continue to accrue administrative fines or may have to engage in self-censorship.

As such, Mr. Fried opined that the options available to a licensee "chill" free speech by forcing the licensee to restrict their speech based on a notice joined with potential fines and licensing risks, before the notice has been subject to a judicial hearing. According to Mr. Fried, one of the primary reasons for protecting free speech is to avoid self-censorship when a speaker fears monetary penalties or having to close down. *See, New York Times Co. v. Sullivan,* (1964) 376 U.S. 254, 279 (the fear of libel judgments with a low standard of proof leads to self-censorship); *Smith v. Cal.* (1959) 361 U.S. 147, 153 (booksellers would engage in self-censorship to avoid liability under a statute); *Near v. Minnesota ex rel. Olson,* (1931) 283 U.S. 697, 712 ("put[s] the publisher under an effective censorship.").

Mr. Fried stated that in California, the prior restraint rule applies to commercial speech. *Parris, supra,* 109 Cal.App.4th at 297. Consequently, Mr. Fried argued there must be a prompt hearing on the validity of the Bureau's disapproval of an ad. "[A] noncriminal process of prior restraints upon expression avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Carroll v. President & Comm'rs of Princess Anne,* (1968) 393 U.S. 175, 181. According to Mr. Fried, this is true even for speech that later might be enjoined after a trial or hearing upon a finding that the speech is defamatory -- but prevents that speech from being censored or circumscribed before the facts are judged in a judicial proceeding. *Balboa Island Village Inn, Inc. v. Lemen,* (2007) 40 Cal.4th 1141, 1158.

Mr. Fried provides the example of *Freedman v. Maryland,* (1965) 380 U.S. 51, in which the defendant wished to challenge the constitutionality of a state statute requiring advanced submission of all movies to the State Board of Censors. The Supreme Court found that the statute lacked sufficient safeguards and was therefore an invalid prior restraint. Mr. Fried indicated that while *Freedman* involved a requirement that speech be pre-screened, the Court's decision focused on the lack of any timely neutral judicial hearing on the government's position, and Mr. Fried cited excerpts from the court's decision.

Mr. Fried suggested the addition of new subsection (f) that would defer a restraint on speech until after the legal sufficiency of the Bureau notice has been determined, which he indicated is consistent with the holding in *Freedman*:

> (f) A licensee shall have 7 days following its receipt of the Bureau's notice of disapproval ("Bureau Notice") to notify the Bureau that the licensee disputes the Bureau Notice ("Notice of Dispute"). If the Bureau receives the Notice of Dispute within the time allowed, the deadline to comply in the Bureau Notice will be stayed for 30 days. Within 15 days after the Bureau's receipt of the Notice of Dispute, the Bureau and the licensee will

confer over the Bureau Notice, and by the twentieth day the Bureau will notify the licensee if the Bureau decides to withdraw the Bureau Notice. If after the twentieth day the licensee files a judicial action to contest the Bureau Notice, the deadline to comply in the Bureau Notice shall be stayed pending further court order. The licensee will not be penalized for non-compliance while the deadline to comply is stayed.

Recommended Response: This comment was accepted, in part. Commission staff disagrees with the commenter's characterization of the proposed regulations as imposing prior restraint on commercial speech. Prior restraint is generally understood as a government action prohibiting speech or other expression *before the speech happens*, and typically refers to restrictions on the press. In contrast, the proposed regulations authorize the Bureau to issue a notice of disapproval to the owner category licensee if *an existing advertisement* does not comply with requirements related to advertising. Therefore, there is no occurrence of prior restraint placing a prohibition on speech before it has happened.

Additionally, Commission staff notes that the commenter's proposed provision could create an incentive for a licensee served with a notice of disapproval to bring litigation against the Bureau, even if the licensee's advertisement is clearly deceptive. Furthermore, the proposed provision could result in an indefinite stay of Bureau notices of disapproval without a court ruling to grant a stay, which would permit cardrooms to continue deceptive advertisements indefinitely, counter to the intent of BPC section 19841(f) and the proposed regulations.

However, Commission staff agrees there may be value in establishing a process for owner category licensees to rebut the Bureau's initial notice of disapproval and request reconsideration. As such, Commission staff recommends the following modifications to subsections (a) through (d) of this Section:

§ 12099. Disapproval of Advertising.
(a) If the Bureau determines an advertisement is deceptive in accordance ~~not compliant~~ with this article, the Bureau may issue a notice of disapproval to the owner category licensee. The notice of disapproval must include, at minimum, the following:
(1) A legal citation of the violation;
(2) A description of each part of the advertisement that is not compliant with this article; ~~and,~~
(3) A specified deadline to correct the advertisement~~.~~; and,
(4) An explanation of the owner category licensee's right to submit written support to rebut the notice of disapproval, consistent with subsection (b).
(b) An owner category licensee may submit written support to the Bureau to rebut the notice of disapproval within seven calendar days following the

Bureau's issuance of the notice of disapproval. Following receipt of timely written support submitted to rebut the notice of disapproval, the Bureau will consider the information provided and will notify the owner category licensee of one of the following:
(1) The Bureau's determination to uphold the notice of disapproval, including the deadline to correct the advertisement specified in the notice of disapproval;
(2) The Bureau's determination to uphold the notice of disapproval, and to grant an extension to the deadline to correct the advertisement; or,
(3) The Bureau's determination to rescind the notice of disapproval.
(c~~b~~) If a notice of disapproval is issued in accordance with subsection (a) and the noncompliant advertisement is not corrected by the deadline specified by the Bureau, the Bureau may take additional disciplinary action as it deems appropriate.
(d~~c~~) Any notice of disapproval and failure to correct the advertisement pursuant to subsection (a), instances of repeated violations of this article, and any subsequent action by the owner category licensee and/or ~~and or~~ Bureau, must be included in the Bureau report for consideration during an owner category licensee's initial or renewal license application and may be considered a factor in determining suitability for licensure.
(e~~d~~) Nothing in this article will be construed to limit the Bureau from filing a disciplinary action under Chapter 10 of this division and/or ~~and or~~ under Business and Professions Code sections 19930 and 19931.

b. Eugene Volokh, representing CGA (Part E of Comment Letter): Mr. Volokh expressed that the proposed regulations provide unconstitutional prior restraints on commercial speech because they would authorize administrative cease-and-desist orders that forbid speech in advertisements, prior to a trial on the merits of which the speech is found to be constitutionally unprotected. (*E.g.*, *Standard Oil Co. of California v. FTC* (9th Cir. 1978) 577 F.2d 653, 662; *Pestrak v. Ohio Elections Comm'n* (6th Cir. 1991) 926 F.2d 573, 578, *abrogated as to other matters*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016); *Weaver v. Bonner* (11th Cir. 2002) 309 F.3d 1312, 1323.) Mr. Volokh indicated such is also true for judicial orders concerning defamation cases: "*following a trial* at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1155-56 [emphasis added].)

According to Mr. Volokh, while there is some doubt about whether the prior restraint doctrine applies to commercial speech under federal law, it does apply under California law. "However the Supreme Court may ultimately resolve that issue in terms of First Amendment jurisprudence, under the California Constitution imposition of a prior restraint on commercial speech bears the same presumption of unconstitutionality and carries the same heavy

burden of justification as does a prior restraint on other forms of protected expression." (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 297.) (*See also Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 502 (stating that the California Constitution "does indeed grant a right against prior restraint," in a case that was expressly focused on the constitutional protection offered commercial speech); *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1482 (concluding that the prior restraint doctrine is applicable regardless of whether the speech involved is commercial speech).)

Further, Mr. Volokh noted that the U.S. Supreme Court has allowed certain temporary administrative prior restraints, but only if certain rigorous safeguards are provided, citing the following:

- "[T]he burden of proving that the [speech] is unprotected expression must rest on the censor." (*Freedman v. Maryland* (1965) 380 U.S. 51, 58.)
- "[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the [speaker] must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either [allow the speech] or go to court to restrain [the speech]." (*Id.* at 58-59 (cleaned up).)
- "Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." (*Id.* at 59.)
- "[T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous [prohibition on speech]." (*Id.*)
- Even a judicial process must also provide "immediate appellate review," or "must instead allow a stay" of the speech-restrictive order. (*National Socialist Party of Am. v. Skokie* (1977) 432 U.S. 43, 44.)

Mr. Volokh noted the proposed regulations do not offer the above safeguards and do not require the Bureau to "within a specified brief period, either [allow the speech] or go to court to restrain [the speech]." The regulations also do not require that the Bureau's restraints on speech be temporary. Mr. Volokh added that if the person responsible for an advertisement disagrees with the Bureau's decision, the burden is on that person to go to court, and there is no "assur[ance of] a prompt final judicial decision" or of "immediate appellate review."

Recommended Response: Please see the response to comment F.1.a.

2. **Subsection (e)** [page 7, lines 4 and 5 of the proposed regulation text] clarifies that the Advertising regulations in Article 5 are not intended to imply or create a private cause

of action based on any actions of the Bureau or Commission regarding the creation of, and/or failure to timely correct, an advertisement found to be deceptive by the Bureau.

a. **David Fried, representing the California Grand Casino and the Oaks Card Club (Part VII. of Comment Letter):** Mr. Fried suggests subsection (e) be relocated to Section 12095, General Requirements, because the provision is intended to apply to the entire regulation.

   Recommended Response: This comment was accepted. Commission staff suggests the following nonsubstantive amendment to relocate Section 12099(e) to Section 12095(c) for better clarity:

   § 12095. General Requirements.
   …
   (c) Nothing in this article will be construed to create or imply a private cause of action.

   § 12099. Disapproval of Advertising.
   …
   ~~(e) Nothing in this article will be construed to create or imply a private cause of action.~~