

JED M. NOSAL
Counsel

Direct Dial: 617.856.8272
Direct Fax: 617.289.0708

E-Mail: jnosal@brownrudnick.com
<http://www.brownrudnick.com>

One
Financial
Center
Boston
Massachusetts
02111
tel 617.856.8200
fax 617.856.8201

April 24, 2015

VIA EMAIL

Massachusetts Gaming Commission
84 State Street
Boston, MA 02109

RE: Blue Tarp reDevelopment Comments on 205 CMR 139.00

To Whom It May Concern:

In response to the Massachusetts Gaming Commission's (the "Commission") publication and notice of Public Hearing in connection with 205 CMR 139.00, *Continuing Disclosure and Reporting Obligations of Gaming Licensees*, Blue Tarp reDevelopment LLC ("MGM Springfield"), submits the following comments on the proposed Regulation to the Commission.

Comments on 205 CMR 139.00: Continuing Disclosure and Reporting Obligations of Gaming Licensees

Confidentiality of Certain Reports

205 CMR 139 requires the filings of materials and reports with the Commission that will contain highly sensitive, competitive and proprietary information including but not limited to: a system of financial accounting (section 139.02(1)); standard financial and statistical reports (sections 139.03(d), (f)-(k)); monthly internal financial statements and budgets (section 139.04); financial projection and stability filings (sections 139.05(2-6)); annual audits (section 139.06); tax returns (section 139.07); minutes of board and committee meetings (section 139.08); governing documents (section 139.09); a compliance plan and updates (section 139.10); audits and audit responses (section 139.12); and a capital expenditure plan (section 139.13). Despite the nature of these highly sensitive, competitive and proprietary materials, 205 CMR 139.00 contains no provision for ensuring the confidentiality of these records and information.

Like many other jurisdictions where casino gaming has been authorized, the Commission seeks these records in connection with its general supervisory responsibilities. But, unlike such other jurisdictions, the Commission has not provided the related protections that traditionally come with such requested access to these highly sensitive materials, i.e., a regulatory framework that establishes appropriate safeguards and confidentiality protections to ensure that such materials are not subject to public disclosure. Absent the ability to provide assurances of confidentiality and specific provisions and procedures for treating these materials as confidential, MGM Springfield respectfully opposes the required production of the reports and information that are the subject of proposed section 139.

Section 139 and the Commission's Confidential Records Regulation, 205 CMR 103, do not expressly recognize the confidentiality of the subject reports and information submitted to the Commission as part of ongoing compliance obligations. Consequently, compliance with section 139 would arguably subject highly sensitive, commercial and proprietary information to potential public disclosure, put licensees at a competitive disadvantage and subject publicly traded holding companies to unacceptable and unprecedented exposure. For example, the release of board and committee minutes (which might include information regarding potential material transactions, business plans and other nonpublic financial information) of a publicly traded holding company could potentially create havoc in the financial markets and potentially expose the company to unnecessary litigation. Release of compliance and audit committee meeting minutes will potentially result in the release of otherwise confidential information regarding the status of internal investigations and reviews, some of which may involve outside law enforcement and other regulators (and would certainly undermine those investigations which are still in process).

Until such time as the Commission provides for appropriate policies and procedures to ensure the confidentiality of these records, it should not require such filings. At most, the Commission can require that the information and reports be maintained by the Massachusetts licensee or its holding company, as the case may be, for inspection and review. Section 138.14 contemplates such an approach and makes clear that records must be maintained and produced for inspection by the Commission and IEB. If after such inspection, the Commission or IEB requires records for further review or investigation, these records can thereafter be produced to the Commission and protected from public disclosure pursuant to a nondisclosure agreement between the Licensee and the Commission pursuant to G.L. c. 23K, sec. 21(a)(7). As such, MGM Springfield requests that sections 139.02(1); 139.03(d), (f)-(k), 139.04, 139.05(2-6), 139.07, 139.08, 139.09, 139.10; 139.12; and 139.13 be amended to remove the obligation to "file" or "provide" these reports and records and substitute in its place an affirmative obligation to "maintain these records and reports for inspection". In addition, Section 139 should be further amended by incorporating a procedure for disclosing certain confidential records upon request consistent with the provisions of G.L. c. 23K, sec. 21(a)(7).

205 CMR 139.01

This section requires a licensee to keep up to date records regarding the equity structure and ownership of the gaming licensee. Subsections (5), (7) and (9) should be amended to limit the record maintenance obligations for publicly traded companies to record owners, stockholders and stockholders of affiliates, record equity holders and only require the maintenance of records for equity transfers by such record equity holders. Under federal securities law, only persons who beneficially own 5% or more of a publicly traded company's equity securities are required to disclose their ownership to the issuer thereof.

205 CMR 139.02(1)

This section requires the licensee to maintain and submit to the Commission for approval, a system of financial accounting that results in the licensee accurately reporting its assets, liabilities, equity, income and expenses. Such records are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield will maintain these records and make them available for inspection.

205 CMR 139.03(d), (f)-(k)

This section requires the filing of various financial and statistical reports including reports on patron demographics, complementary services, player/reward/loyalty card programs, licensed and registered employees, vendor disbursements, issuance of counter checks, daily remittance reports and quarterly and gross gaming revenue reports. Such records are commercially sensitive and proprietary, the disclosure of

which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield will maintain these records and make them available for inspection.

205 CMR 139.03(g)¹

This section requires a report of “the amount of money spent and lost by patrons who have been issued a player card or rewards card or who participated in a cashless wagering system”. Although required by statute, the Commission should clarify the following in connection with this requirement: Does the inclusion of “money spent and lost” relate to only a patron’s gaming activity or does it include non-gaming activities as well (e.g., on room, food and beverage and other incidentals)? In other words are two, separate and distinct reports required, i.e., (1) money spent and lost in the casino and (2) money spent on room, food and beverage and other incidentals? If the latter, and money spent on room, food and beverage and other incidentals is required to be reported, such a requirement would be impossible to comply with from a practical point of view given that such patron expenditures are not generally tracked with the same precision as a patron’s gaming activity. For that matter, there are even limits to the tracking of gaming activity.

With respect to slot activity, such tracking wholly depends on whether the patron inserts his or her loyalty card in the machine each time he or she games. If not, there would be no record of such gaming activity. For table game play, the patron would need to present his or her card to table games staff to be tracked. However, unlike the precision present in the electronic tracking of slot machine play, table game play relies on human observation and thus errors naturally and unavoidably occur.

A separate but related issue is whether, in determining the amount of money lost by a patron while gaming, are licensees expected to deduct from that number any allowances provided to the customer? For example, it is not unusual for a customer who has a marker limit to be given an allowance (usually 10%-15%) against the amount that they lost to retain their patronage.

All of the foregoing issues should be further clarified in determining the scope of the report(s) required by section 139.03(g).

205 CMR 139.04

This section requires that a licensee submit unaudited, monthly internal financial statements that at a minimum provide detailed income and expense statements within five days of completion and in no event later than the end of the subsequent month. Such records are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield will maintain these records and make them available for inspection.

205 CMR 139.05(2-6)

This section requires that certain reports be filed to establish that a licensee is financially stable including: (i) financial projections for the upcoming calendar year (ii) information material to a showing of financial stability (iii) compliance certificates when provided to lenders pursuant to any loans or debt instruments; (iv) details of any loans, covenants, borrowings, installment contracts, guarantees, leases, capital contributions, or any other debt; and (v) any event of default, or potential default event, related to any debt obligation

¹ Please note that there are two (2) subsection (g)’s in the current draft.

maintained by the gaming licensee, affiliate, or holding company. Such records are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield or its publicly traded holding company, as applicable, will maintain these records and make them available for inspection.

205 CMR 139.06(1)

This section requires a gaming licensee to submit to the Commission, at its own expense, an independent annual audit of its fiscal year. The audit requirement itself is duplicitous and redundant given that the Commission will separately perform an audit under proposed 205 CMR 139.10; presumably at the gaming licensee's expense.

This section also requires that a gaming licensee rotate accounting firms/partners at least every five years. There is no objection to a requirement that the audit partner within a particular accounting firm, who is assigned to the company's audit, be rotated at least every five years. However, a requirement that a publicly traded holding company periodically rotate accounting firms is unprecedented as a gaming regulatory requirement or otherwise. Independent audits of publicly traded companies are regulated by the Security and Exchange Commission (SEC) including specific auditor independence requirements. *See* 17 CFR Parts 210 and 240. Replacing a publicly trading company's accounting firm is no small matter. It requires, among other things, notice to the SEC and the company's shareholders. An arbitrary requirement to rotate an accounting firm does not enhance independence under the federal rules and may introduce inefficiencies into the audit process by compelling a change in auditors where there are no issues or concerns with independence. Moreover, for a large publicly traded company that must prepare consolidated audited financial statements, the Massachusetts mandate may require a change at the holding company level impacting all company operations. In fact, when a similar rotation requirement was proposed by the Public Company Accounting Oversight Board (PCAOB), the U.S. House of Representatives, in 2013, passed a bill to amend the Sarbane-Oxley Act prohibiting the PCAOB from requiring companies to "use specific auditors or require the use of different auditors on a rotating basis."²

In addition, these records are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield will maintain these records and make them available for inspection.

205 CMR 139.07

If requested by the Commission, this section requires a gaming licensee, holding company, intermediary company, qualifying subsidiary or entity qualifier thereof, to provide the Commission with copies of its Federal and/or State Tax Returns and any related forms. These records are confidential under respective federal and state laws. *See generally*, 26 U.S. Code § 6103 and 830 CMR 62C.21.1. As such, this section should be revised to explicitly state that tax records, if requested and disclosed shall be confidential pursuant to applicable federal and state law.

² See "PCAOB Abandons Auditor Rotation," <http://ww2.cfo.com/auditing/2014/02/pcaob-abandons-auditor-rotation/>, last accessed April 21, 2015.

205 CMR 139.08(1)

This section requires the licensee to submit copies of meeting minutes of its board of director meetings as well as compliance and audit committees within 45 days of a meeting. MGM Springfield does not contest the Commission's interest in access to these records. As set forth above, minutes of the board of directors and those of the audit and compliance committee are some of the most sensitive records maintained by a publicly traded company, the disclosure of which may compromise internal investigations and place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield or its publicly traded holding company, as applicable, will maintain these records and make them available for inspection.

This section also allows a licensee to file meeting minutes in draft form with the final version submitted after its adoption. MGM Springfield previously requested certain provisions in the Internal Control Regulations be amended including 205 CMR 138.04(2)(g)(7) and 205 CMR 138.04(2)(h) to allow the filing of draft minutes within the proscribed timeframe with a supplemental filing upon the minutes being finalized. MGM Springfield requests that the Internal Controls Regulations conform to section 139's reporting process that affirmatively recognizes the filings of drafts.

205 CMR 139.08(2)

This section requires a gaming licensee to file a schedule for its board and committee meetings on an annual basis. Board of director meetings and meetings of the audit and compliance committee can change throughout the year making any such schedule obsolete. Section (1) above requires that minutes of these meetings be filed within 45 days of the meeting to ensure timely reporting of the substance of the meeting regardless of the calendar date of the meeting. MGM Springfield requests that this requirement be removed from the regulation as it is unnecessary.

205 CMR 139.09

This section requires a licensee to submit copies of any amendments to, restatements of, or superseding versions of the governing documents of the gaming licensee or holding company within seven days of formal adoption. Governing documents and amendments are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield or its publicly traded holding company, as applicable, will maintain these records and make them available for inspection.

205 CMR 139.10

This section requires a gaming licensee to file with the Commission copies of any amendments to its written compliance plan within seven days of formal adoption. The policies and procedures developed by the Compliance Committee are governed by section 138.04(2)(g) of the Commission's Internal Controls Regulations. The requirement for filing amendments to the plan should be incorporated into section 138.04(2)(g). MGM Springfield therefore requests that this section be eliminated and incorporated into section 138.04(2)(g). Further, a licensee's compliance plan and amendments are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section and/or under the Internal Controls Regulations. MGM Springfield or its public traded holding company, as applicable, will maintain these records and make them available for inspection.

205 CMR 139.12

This section implements G.L. c. 23K, section 65 and requires the Commission audit on an annual basis, the accounts, programs, activities, and functions of a gaming licensee and/or any aspect of the gaming establishment. Although a statutory requirement, the Commission should provide the licensees additional direction on the form and the substance of these audits and how they will be considered in the context of the annual audits submitted by the licensees to avoid redundancy. *See* 205 CMR 139.06. In addition, the Commission should clarify if these additional audits will be done internally or externally and who will bear the cost for the Commission's audits.

Further these audits, the scope of which is still undefined, are likely to contain commercially sensitive and proprietary information the disclosure of which will place the licensee at a competitive disadvantage. MGM Springfield opposes these audits as proposed without adequate policies and procedures to ensure that records produced in connection with these audits and the audit findings and responses will be treated as confidential.

205 CMR 129.13

This section requires licensees to submit a capital investment plan to the Commission for the gaming establishment. Such plans are commercially sensitive and proprietary, the disclosure of which will place the licensee at a competitive disadvantage. Without adequate policies and procedures to ensure that these records will be treated as confidential, MGM Springfield opposes producing these materials as proposed under this section. MGM Springfield will maintain these records and make them available for inspection

Thank you for your attention to this matter.

Sincerely,

BLUE TARP REDEVELOPMENT LLC

by its Attorneys,

BROWN RUDNICK LLP



Jed M. Nosal

FOX ROTHSCHILD, LLP



Patrick J. Madamba

cc: Karen Wells, Director, IEB
Catherine Blue, General Counsel
Loretta Lillios, Chief Enforcement Counsel
Todd Grossman, Deputy General Counsel
John Ziemba, Ombudsman