The Commonwealth of Massachusetts
Massachusetts Gaming Commission

NOTICE OF MEETING and AGENDA
January 23, 2013 Meeting

Pursuant to the Massachusetts Open Meeting Law, G.L. c. 30A, §§ 18-25, notice is hereby given of a meeting of the Massachusetts Gaming Commission. The meeting will take place:

Wednesday, January 23, 2013
1:00 p.m.
Division of Insurance
1000 Washington Street
1st Floor, Meeting Room 1-E
Boston, Massachusetts

PUBLIC MEETING - #48

1. Call to order
2. Discussion of Policy Questions if time permits:
   27
   28
   29
   30
   47
   48
   50
   52
   34
   51
   53
   Additional questions if time permits.
3. Other business – reserved for matters the Chair did not reasonably anticipate at the time of posting

I certify that on this date, this Notice was posted as "Gaming Commission Meeting" at www.mass.gov/gaming/meetings, and emailed to: regs@sec.state.ma.us, melissa.andrade@state.ma.us, brian.gosselin@state.ma.us.

1/17/13
(date)

Stephen P. Crosby, Chairman

Date Posted to Website: January 18, 2012 at 1:00 p.m.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 27

Policy Question #27: When should regulations regarding check-cashing be issued and what should those regulations contain?

Legislative Summary:

G.L. c. 23K, § 27 addresses check cashing and credit issuance to patrons. First, the section prohibits a gaming establishment from cashing a check unless in accordance with regulations promulgated by the Commission. The Commission shall issue regulations prohibiting a gaming establishment from cashing a government issued check, and these regulations should be written in consultation with the department of transitional assistance, the department of labor and workforce development, the department of housing and community development or the applicable administering agency.

G.L. c. 23K, § 33(e) prohibits a junket from engaging in efforts to collect upon checks that have been returned by banks without full and final payment and prohibits the junket from acting on behalf of or under any arrangement with a gaming licensee or a gaming patron with regard to the redemption, consolidation or substitution of the gaming patron's checks awaiting deposit.

G.L. c. 23K, §35(g) prohibits gaming establishments from marketing or granting access to check cashing privileges to persons on any excluded persons list.

Strategic Plan Summary:

The strategic plan on pages 126-128 provides guidance on the procedures of issuing and collecting counter checks. Pages 140-150 of the strategic plan provide a summary of money laundering and best practices for preventing it.

Public Comment Summary:

- [Sterling Suffolk Racecourse LLC]—Questions 24 to 28 and 30 all pertain to a gaming establishment's internal control matters. SSR discussed the same procedures as for question 24.

Recommendation:

The regulations should be issued along with the RFA-2 regulations.

When writing the regulations we should create strict procedures to ensure that the check cashing is performed in accordance with the legislative intent. The regulations will help prevent abusive practices by licensees and reduce the chance of money laundering.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 28

Policy Question #28: When should regulations regarding approval of promotional gaming credits be issued and what should those regulations contain?

Legislative Summary:
G.L. c. 23K, § 27 (d) "The commission shall establish procedures and standards for approving promotional gaming credits; provided, however, that no such credit shall be reported as a promotional gaming credit by an operator of a gaming establishment unless the operator can establish that the credit was issued by the gaming establishment and received from a patron as a wager at a slot machine in the gaming establishment."

Strategic Plan Summary:
The strategic plan does not discuss a resolution to this question.

Public Comment Summary:

- [Sterling Suffolk Racecourse LLC]—Questions 24 to 28 and 30 all pertain to a gaming establishment's internal control matters. SSR discussed the same procedures as for question 24.
- [Foley Hoag LLP]—"Mohegan Sun encourages the Commission to consider regulations on promotional gaming credits early in the RFA #2 regulation process but also keep those regulations flexible to adapt to future needs when casinos open in the Commonwealth. Both New York and Connecticut have recognized that a certain amount of promotional free play is pro-competitive and enhances gaming revenues and benefits to the states, but at some point, free play, if left unregulated, can diminish revenues. In New York, up to 10% of free play is 'subsidized' and untaxed by the New York Lottery, and, in Connecticut, free slot play redeemed at the two tribal casinos in excess of 11% of net slot win for each month is subject to a contribution payment to the state at the same rate (25%) as net slot win."

Recommendation:
The regulations should be issued along with the RFA-2 regulations.

The Commission should approve a minimum amount of promotional gaming credit in order to enhance the competitive environment, but not so much as to destroy the viability of the casino industry.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 29

Policy Question #29: When should regulations regarding excluded persons be issued and what should those regulations contain?

Legislative Summary:
G.L. c. 23K, § 45 requires the Commission to issue regulations creating an excluded persons lists and a list of self-excluded persons, and provides the factors the Commission may look at for excluding persons. That section also deals with punishment, adjudicatory hearings, privacy of the list, and interstate compacts.

Strategic Plan Summary:
The strategic plan does not discuss a resolution to this question.

Public Comment Summary:

- [Sterling Suffolk Racecourse LLC]—Questions 24 to 28 and 30 all pertain to a gaming establishment's internal control matters. SSR discussed the same procedures as for question 24.

Recommendation:
The regulations should be issued along with the RFA-2 regulations.

In addition to the specific requirements of Chapter 23K, our regulations for the excluded persons list should exclude individuals for a period of 3 years, with an option to exclude for a longer period for exacerbating circumstances.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 30

Policy Question #30: When should regulations regarding provision of complementary services, gifts, cash or other items of value be issued and what should those regulations contain?

Legislative Summary:
G.L. c. 23K, § 28 governs complementary services to patrons and provides that "(a) No gaming licensee shall offer to provide any complimentary services, gifts, cash or other items of value to any person unless the complimentary item consists of a room, food, beverage, transportation or entertainment expenses provided directly to the patron and the patron's guests by the gaming licensee or indirectly to the patron and the patron's guests on behalf of a third party or the complimentary item consists of coins, tokens, cash or other complimentary items or services provided through a complimentary distribution program which shall be filed and approved by the commission upon the implementation of the program or maintained under regulation."

Strategic Plan Summary:
The strategic plan does not discuss a resolution to this question.

Public Comment Summary:

- [Sterling Suffolk Racecourse LLC]—Questions 24 to 28 and 30 all pertain to a gaming establishment's internal control matters. SSR discussed the same procedures as for question 24.

Recommendation:
The regulations should be issued along with the RFA-2 regulations.

Chapter 23K is very specific as to the types of complimentary gifts and services that a licensee may provide. All complimentary gifts and services should be in accordance with the complimentary distribution program we approve and we should create strict recordkeeping procedures to ensure that the distribution program is followed.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 47

Policy Question #47: Should the commission adopt the self-exclusion lists in effect in other jurisdictions?

Legislative Summary:
G.L. c. 23K, § 45(k) The commission shall pursue an interstate compact for the purposes of sharing information regarding the excluded persons list.

Strategic Plan Summary:
The strategic plan does not discuss a resolution to this question.

Public Comment Summary:

- [Paul Vignoli Jr.]—"Yes"
- [Sterling Suffolk Racecourse LLC]—SSR is not aware of any jurisdiction that shares its self-exclusion lists outside of its state. Self-exclusion lists are extremely confidential and are highly protected due to privacy concerns. While some jurisdictions have in the past discussed sharing self-exclusion lists, SSR is unaware of any jurisdiction that has done so. Some implications of sharing self-exclusion lists across jurisdictions that would need to be addressed are:
  1) Determining responsibility for the combined list;
  2) Updating and maintaining information on exclusions and reinstatements across jurisdictions;
  3) Addressing potential differences in reported information resulting from each jurisdiction not requiring the same information to be obtained from self-excluding patrons; and
  4) Assessing whether commissions have statutory authority to exclude a patron based upon a self-exclusion request made to a commission outside of their jurisdiction.
  SSR provided an example of treatment of self-exclusion lists in other jurisdictions in a Q&A from the Missouri Commission's site.
  SSR believes that the best regulations allow licensees to extend their self-exclusion lists across all of their brands (including locations outside of the original state). Caesars currently employs this policy across all of its brands.
  It is worth noting that some jurisdictions will not recognize an exclusion because the request initiated with a commission outside of the jurisdiction.

- [Shefsky & Froelich]—"We believe a robust self-exclusion policy is in the best interest of the Commonwealth and each host community. Self-exclusion lists similar to those used in other jurisdictions should be utilized."

Recommendation:

We should certainly share information regarding our excluded persons list as the legislation requires, but the list of self-excluded persons is confidential. There are many privacy concerns with sharing information on individuals that self-identify as requesting exclusion from gaming facilities. We should allow those individuals to place themselves on the self-exclusion lists in other states if they so desire, but not require it. Also, many casinos use the self-exclusion lists from one state to exclude those same individuals in their facilities located in another state. While this is good practice, it should not be mandated.

Massachusetts Gaming Commission

MEMORANDUM

Date: January 18, 2013
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 48

Policy Question #48: What criteria should be used to exclude individuals involuntarily from casinos?

Legislative Summary:

G.L. c. 23K, § 45 The commission, by regulation, shall provide for the establishment of a list of excluded persons who are to be excluded from a gaming establishment. In determining the list of excluded persons, the commission may consider, but shall not be limited to:

(i) whether a person has been convicted of a criminal offense under the laws of any state or the United States that is punishable by more than 6 months in a state prison, a house of correction or any comparable incarceration, a crime of moral turpitude or a violation of the gaming laws of any state;

(ii) whether a person has violated or conspired to violate this chapter relating to: (A) failure to disclose an interest in a gaming establishment for which the person is required to obtain a license; or (B) willful evasion of fees or taxes;

(iii) whether a person has a notorious or unsavory reputation which would adversely affect public confidence and trust that the gaming industry is free from criminal or corruptive elements; and

(iv) the potential of injurious threat to the interests of the commonwealth in the gaming establishment.

No person shall be placed on the list of excluded persons due to race, color, religion, national origin, ancestry, sexual orientation, disability or sex.

Strategic Plan Summary:

The strategic plan does not discuss a resolution to this question.

Public Comment Summary:

- [Sterling Suffolk Racecourse LLC]—"In colloquial terms, the Commission's exclusion list should include known cheaters and swindlers and members of organized crime cartels. The Nevada statute and regulations and the Mississippi regulations provide good examples of regulatory language.

Nevada includes persons convicted of felonies, crimes involving moral turpitude, and violations of gaming laws of other states. It also includes those who violate Nevada gaming laws related to disclosing an interest in a gaming establishment that would require a license or willful evasion of fees and taxes, as well as persons of notorious or unsavory reputation which would affect public confidence and trust in the gaming industry. Finally, Nevada includes persons who are excluded pursuant to a written order from a governmental agency. (Nev. Rev. Stat. 463.151; Nev. Reg. 28.010.)

Mississippi has a very similar list in its gaming regulations, to which it adds persons who are on a valid a current exclusion list from any other United States jurisdiction. Miss. Gaming Comm. Reg. V(3).

SSR notes that, independent of the Gaming Act, a gaming establishment, like any business owner, will have the right under Massachusetts common law to exclude from its property any patron it does not want on its premises. If the person does not comply, the establishment can enforce the ban through the Massachusetts trespass statute (M.G.L. c. 266, § 120)."

- [Philip Cataldo]—"People should be excluded only if they have committed a crime and the police have been called to arrest them. otherwise, why exclude them?"

Recommendation:

Chapter 23K provides very clear and thoughtful factors to exclude individuals from gaming facilities and we should use the same criteria. In addition to the four factors in the legislation, we may also want to consider whether the individual is on an excluded persons list in another state.

<u>Key Policy Question #50</u>: How should the role of the Commission be defined in the licensing process? What other departments (if any) have a role in the licensing of certain occupations? Will the Commission be licensing on the basis of suitability only, or skills and education as well? Will licensing be limited to occupations closely associated with the gaming area?

The relevant sections of the gaming law are M.G.L. c 23K § 2, 5 (11) and (12), 16 and 30.

In the definitions under Section 2, the following employees are defined and their need to be licensed or registered:

> "Gaming employee", an employee of a gaming establishment who: (i) is directly connected to the operation or maintenance of a slot machine or game taking place in a gaming establishment; (ii) provides security in a gaming establishment; (iii) has access to a restricted area of a gaming establishment; (iv) is connected with the operation of a gaming establishment; or (v) is so designated by the commission.
>
> "Gaming service employee", an employee of a gaming establishment who is not classified as a gaming employee or a key gaming employee, but is required to register with the commission.
>
> "Key gaming employee", an employee of a gaming establishment who is: (i) in a supervisory capacity; (ii) empowered to make discretionary decisions which regulate gaming establishment operations; or (iii) so designated by the commission.

Section 5 gives the Commission the authority to *(11) establish licensure and work permits for employees working at the gaming establishment and minimum training requirements; provided, however, that the commission may establish certification procedures for any training schools and the minimum requirements for reciprocal licensing for out-of-state gaming employees; and (12) require that all gaming establishment employees be properly trained in their respective professions.*

Section 30 establishes that no person shall be employed by a gaming licensee unless such person has been licensed by or registered with the commission. The section outlines the suitability measurements a license-required candidate must have prior to employment.

There does not seem to be any ambiguity as suggested by this question about what the licensing role is for the Gaming Commission. Obviously, IEB and other investigative agencies are critical to background checks and employee license approval process.

In deciding whether to license training schools, we would be establishing minimum training requirements. Through the MOU between the MGC and the Casino Careers Institute, our goal is to identify the base level of skills for potential employees as well.

We received no written submissions on this question.

Recommendation: We should review Section 30 closely with respect to information required of employees who only need to be registered such as the gaming service employee. Additionally, we can create minimum training requirements if we decide to license training schools.

KEY POLICY QUESTIONS

Question 51 Analysis

January 22, 2013

Question 51 says:

To address concerns regarding inappropriate pressures on casino companies, should the Commission require applicants and licensees to report to the Commission all resumes, recommendations, referrals, requests for donations, etc. they receive from any public official, with failure to do so resulting in a penalty?

As noted in the memorandum discussing Question 31, the relationship between municipal officials and business entities over which they have jurisdiction is heavily regulated by existing statutes. Among other things, it is illegal for a municipal employee to accept anything of value intended to influence an official act or omission, G.L. c. 268A, §2 (b) or to obtain unwarranted privileges based on his or her position, G.L. c. 268A, §23(b)(2). The State Ethics Commission, which has responsibility for enforcing the statutes, construes them broadly. Indeed, the Commission recently issued an extensive policy statement dealing with references and recommendations made by municipal and other government employees. That statement, a copy of which is attached, provides in part as follows:

> A recommendation will violate § 23(b)(2) if it is accompanied by pressure. Use of one's official position to exert pressure, directly or indirectly, on another to obtain or attempt to obtain employment for anyone is use of one's official position to secure an unwarranted privilege of substantial value in violation of§ 23(b)(2). An employment recommendation accompanied by pressure violates § 23(b)(2) because it gives the person recommended an unwarranted privilege of substantial value.
>
> To determine whether pressure has been applied in violation of § 23(b)(2), the Commission applies an objective test, i.e., when a public employee knows or has reason to know that a reasonable person would perceive the public employee's conduct as an attempt to use his position to obtain or confer an unwarranted privilege of substantial value, the Commission will find a violation of the statute. Whether pressure has been applied in a given situation is fact-intensive, and the Commission will examine all of the circumstances to make that determination.

To drive those points home, the Commission's advisory lists and summarizes at pages 5 – 6 a number of decisions in which it found violations of the statute under various circumstances.

The Ethics Commission's advisory illustrates two points. First, not all recommendations or references are improper or unethical. Second, however, all public officials must use great care in ensuring that any reference or recommendation for employment they make avoids an exertion of pressure and the appearance that pressure is being exerted. The advisory and the Ethics Commission's record show that the Commission is prepared to take action when public employees cross the line.

Insofar as other solicitations are concerned, acceptance of personal gifts is prohibited by several statutes, including those that outlaw bribery. Campaign contributions and other contributions are either prohibited or are heavily regulated by G.L. c. 23K, §§ 46, 47, and the Commission has decided to require applicants to disclose in their Phase 2 applications all such contributions made since the date the expanded gaming statute was enacted. And, in general, solicitation of non-political contributions is permitted only when specifically authorized by law. As the State Ethics Commission stated in its formal Ethics Opinion EC-COI-12-1:

> The conflict of interest law requires that there be express statutory or regulatory authority for public employee solicitations for governmental purposes. Section 3 prohibits public employee solicitation of gifts "otherwise than as provided by law for the proper discharge of official duty." Sections 23(b)(2)(i) prohibits solicitations "not otherwise authorized by statute or regulation," and Section 23(b)(2)(ii) prohibits the use of one's official position to obtain "unwarranted" privileges. In determining whether a privilege is "unwarranted," we have stated that conduct explicitly authorized by statute or regulation is not "unwarranted," while conduct prohibited by statute is "unwarranted." In sum, §§ 3 and 23 prohibit solicitations by public employees for governmental purposes absent statutory or regulatory authorization. This conclusion is consistent with our two prior opinions in this area.
>
> G.L. c. 44, § 53A authorizes acceptance of gifts by municipal employees on behalf of their municipality, and, by implication, solicitation of gifts to be used for municipal purposes. The municipal employee who is the subject of the present request may solicit donations from persons and entities that have business before him and other municipal employees in accordance with G.L. c. 44, § 53A, subject to the further limitations on such solicitations set forth below.

(Footnotes omitted.) Those limitations included a prohibition on any solicitation containing express or implied pressure to contribute. In addition, they include a requirement that the solicitation be disclosed. Again, quoting from the Commission's opinion:

> Section 23(b)(3) of the conflict of interest law prohibits a public employee from engaging in conduct which gives a reasonable basis for the impression

that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, or the position of any person. In one of our earlier opinions concerning solicitations by public employees for governmental purposes, we approved the agency's proposal to comply with this requirement by publicly disclosing the names of all donors to the Secretary of the Executive Office that included the soliciting agency, and to the Commission. The purpose of the disclosure was to dispel any appearance of favoritism towards the donors.

The requesting municipality should follow the disclosure procedure set forth in our earlier opinion, and require the municipal employee principally responsible for soliciting donations to the municipal trust fund to disclose the names of all those solicited in any manner, whether the solicitation was oral, written, electronic, or by some other means, by himself or other municipal employees. The disclosures should be made publicly and in writing pursuant to § 23(b)(3). These written disclosures should be updated at appropriate intervals and filed with the municipal clerk, who will maintain them as public records. This will dispel any appearance that donors, or those who do not donate, will influence the discretion or decisions of municipal employees in any way.

The extensive treatment given by statutes and regulations to recommendations, solicitations and contributions reflects the difficulties they they have caused and continue to cause and the adverse impact on public confidence in the integrity of governmental operations they continue to have. Disclosure can ameliorate and soften the impact. Therefore, I recommend that all gaming licensees be required to report to the Commission on a periodic basis (1) all requests, references or letters of recommendation for employment they receive from an elected or appointed public official, (2) all requests or solicitations they receive from any public official for monetary or non-monetary contributions and (3) all monetary or non-monetary contributions they make to an elected or appointed public official or to a public entity. Whether to extend those reporting requirements to other Commission licensees can be discussed at a later time.

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
John W. McCormack Office Building - One Ashburton Place - Room 619
Boston, Massachusetts 02108-1501

ADVISORY 13-1: MAKING AND RECEIVING RECOMMENDATIONS FOR EMPLOYMENT

Public employees are sometimes asked to use their public titles and letterhead to recommend applicants for employment. Public employees who participate in hiring decisions may receive recommendations for employment. This Advisory explains how the conflict of interest law, G.L. c. 268A, applies to making and receiving recommendations for employment.

I. *Recommending a Current or Former Co-Worker*

Making a recommendation using official title or letterhead.

Under c. 268A, § 23(b)(2), public employees may not use their official positions to give or attempt to give anyone an unwarranted privilege of substantial value,[1] which is not properly available to similarly situated individuals. Recommending someone with whom you work or have worked at your current agency, based on your personal knowledge of that person, to a potential employer permitted to receive such a recommendation, and without pressure, does not give the person recommended an unwarranted privilege in violation of § 23(b)(2).

More specifically, a public employee who is authorized by her public agency to make recommendations does not violate § 23(b)(2) by using her public position to recommend for employment a person who works with her at that agency, or who has worked with her in the past at that agency, or with whom she has had work dealings in her current public position. She may sign the recommendation using her public title, and the recommendation may be on official agency letterhead, as long as her knowledge of the job applicant arises from her employment with her current public employer. The recommendation must be based on her personal knowledge of the job applicant's work performance and ability, cannot be accompanied by pressure (Section III below), and cannot be directed at an employer prohibited from receiving public employee recommendations under G.L. c. 271, § 40 (Section V below).

This is the only type of employment recommendation that an appointed public employee may make using her public title and letterhead. An elected public employee

[1] "Substantial value" is defined as $50 or more, 930 CMR 5.05. Paid employment, or unpaid employment with benefits, is of substantial value. In addition, unpaid employment without benefits may be of substantial value because of the value of the work experience gained.

may make this type of employment recommendation, and may also recommend a constituent, as discussed below in Section II.

Private recommendations, without official title or letterhead.

A public employee may be asked to recommend a former co-worker with whom he worked at a different public agency, or a private company. The public employee may not sign such a letter using his current official title or use his current official letterhead, because it is not part of his current public duties to recommend a former co-worker. To do so would give the former co-worker an unwarranted privilege of substantial value, in violation of § 23(b)(2).[2] However, the public employee may send, in his personal capacity, a private letter of recommendation without using his official letterhead or title, and may refer to his prior position and title in that private letter in order to explain how he knows the former co-worker. Such recommendations should not be sent from the public employee's work email account. If the public employee initiates a telephone call to offer a private recommendation, the call should not be made from a work phone that will display the caller's phone number or agency name. If the public employee needs to leave a call-back number, it should be a personal telephone number and not a work phone number. In certain limited circumstances, the public employee may refer to his current position and title in the private letter, if his current position is relevant to some substantive aspect of the recommendation.

A public employee may recommend, in his personal capacity, a friend, acquaintance, or relative with whom he has no work connection in a purely private letter of recommendation that does not refer to his official position or title, and which is on personal, not official, letterhead. As noted above, the public employee should not use his work email account or initiate any calls using his work phone.

II. *Elected Officials Recommending Constituents*

Elected officials are often called upon to provide services to their constituents. The Commission has recognized that providing constituent services is, in general, a legitimate and time-honored activity of legislators and other elected officials.[3] Because appointed public employees do not have constituents, this section of this Advisory relates only to elected officials.

A constituent may request that an elected official recommend him for a job. As with any other official action by a public employee, recommending a constituent for employment is subject to § 23(b)(2). Such recommendations are not prohibited as long as they are not addressed to an employer prohibited from receiving them by G.L. c. 271, § 40 (see Section V below), or accompanied by pressure (Section III below), and as long as the elected official does not selectively provide recommendations only to some

[2] Use of official title on another's behalf gives that person a benefit of substantial value, *EC-COI-92-39.*
[3] *PEL 00-3.*

categories or classes of individuals, and not to other job applicants with comparable credentials.

Section 23(b)(2) prohibits providing or attempting to provide a benefit of substantial value selectively to a single individual, or to a discrete group.[4] In considering whether prohibited special treatment has been provided selectively, the Commission will consider whether the elected official has a standard practice for handling requests for recommendations from his constituents, and, if so, whether that standard practice was followed in the particular instance. Such a process should include: taking reasonable steps to learn the qualifications required for the job and how they compare with the applicant's skills; making clear in the recommendation the information on which the recommendation is based, and not going beyond that information in making the recommendation; providing the same treatment to any other constituent requesting a recommendation; not putting pressure on the potential employer, directly or indirectly or personally or through others; and not making recommendations prohibited by G.L. c. 271, § 40.

Example of a Permissible Constituent Recommendation:
A State Representative's usual practice when constituents whom she does not know personally ask her for job recommendations is to have a staff member review the qualifications for the job and the applicant's resume to check whether the applicant has the required qualifications. She then sends a letter to the hiring agency asking that they consider the constituent for the position. The Representative may have other routine contacts with the hiring agency while an application is pending, but during those contacts, she does not link the unrelated matter under discussion to the hiring of the applicant or engage in any other conduct that could reasonably be viewed by the agency employee as pressure to hire the recommended applicant. This recommendation does not violate the conflict of interest law because there is no selective treatment and no pressure.

Example of an Impermissible Constituent Recommendation Given to Some, But Not to Others Similarly Situated:
A City Councilor rarely provides employment recommendations in response to constituents' requests. However, his informal practice is that he will do so if one of his friends asks for a recommendation of a child or other relative who is a city resident. This is a violation of § 23(b)(2) because he is conferring an unwarranted privilege on the children or relatives of his friends, since he does not provide recommendations for similarly situated constituents who are not the children or relatives of his friends. The City Councilor may recommend his friends' children or relatives in his personal capacity by making the recommendation using his personal stationery and without reference to his official title, provided that such recommendations are not addressed to employers forbidden to receive such recommendations under G.L. c. 271, § 40.

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[4] *EC-COI-95-5; EC-COI-91-13; EC-COI-87-37.*

Immediate Family Members

An elected public employee may not use his position to recommend an immediate family member[5], pursuant to the sections of the conflict of interest law that prohibit public employees from participating in any particular matter in which an immediate family member has a financial interest.[6] Because a job applicant has a financial interest in employment, public employees may not participate in their official capacities in any hiring process in which an immediate family member seeks employment. An elected public employee is considered to "participate" in his official capacity in any matter into which he interjects himself in his official role.[7] Accordingly, an elected public employee who recommends an immediate family member for employment is participating in the hiring process in violation of the conflict of interest law.[8]

Appearance of a Conflict of Interest

Section 23(b)(3) of the conflict of interest law prohibits a public employee from acting in a manner that would create the appearance of a conflict of interest. Specifically, it prohibits acting in a manner that would cause a reasonable person who knew the facts to conclude that anyone can improperly influence the public employee or unduly enjoy his favor, or that the employee is likely to act or fail to act as a result of kinship, rank, position, or undue influence. The same section further provides that such an appearance of a conflict of interest will be dispelled if the elected public employee makes a public disclosure of the facts prior to acting.

An elected public employee's recommendation of a constituent with whom the public employee has no other relationship, pursuant to the elected public employee's standard practice for constituent recommendations, will not create an appearance of a conflict of interest pursuant to § 23(b)(3). However, a recommendation of a constituent with whom the elected public employee has some additional relationship -- a personal friend, non-immediate family member or someone with whom he has a private business relationship – can create such an appearance. In these situations, assuming that the elected official has not provided any preferential treatment because of the relationship and has not applied any direct or indirect pressure in making the recommendation, the elected public employee can avoid a violation of the conflict of interest law by making a prior public disclosure of the facts to eliminate any appearance of a conflict, pursuant to § 23(b)(3).[9]

Example of When a Disclosure Should be Made:

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[5] "Immediate family" is one's parents, siblings, spouse, and children, and the parents, siblings, and children of one's spouse. G.L. c. 268A, §1(e).
[6] G.L. c. 268A, §§ 6, 13, 19.
[7] *EC-COI-93-11; In Re Craven,* 1980 SEC 17, *aff'd* 390 Mass. 191 (1983).
[8] Purely private recommendations of family members are discussed above in Section I.
[9] Because campaign contributions are required to be disclosed pursuant to G.L. c. 55, an elected official who recommends a campaign contributor is not required to make an additional disclosure pursuant to § 23(b)(3), but may not give selective preferential treatment to the contributor. 930 CMR 5.10.

A State Representative customarily recommends constituents who ask for recommendations. When he is asked to provide such a recommendation, his routine practice is to have a staff member review the qualifications for the job and the applicant's resume to check whether the applicant has the required qualifications, and then send a letter to the hiring agency asking that they consider the constituent for the position. The child of one of the State Representative's constituents, who is also one of his oldest friends, requests a recommendation. The State Representative follows his usual practice in providing such a recommendation, and also files a written disclosure with the House Clerk and the Commission to eliminate any appearance that he might be unduly influenced by his old friend. This recommendation does not violate the conflict of interest law.[10]

III. *Recommendations Accompanied by Pressure*

A recommendation will violate § 23(b)(2) if it is accompanied by pressure. Use of one's official position to exert pressure, directly or indirectly, on another to obtain or attempt to obtain employment for anyone is use of one's official position to secure an unwarranted privilege of substantial value in violation of § 23(b)(2).[11] An employment recommendation accompanied by pressure violates § 23(b)(2) because it gives the person recommended an unwarranted privilege of substantial value.

To determine whether pressure has been applied in violation of § 23(b)(2), the Commission applies an objective test, i.e., when a public employee knows or has reason to know that a reasonable person would perceive the public employee's conduct as an attempt to use his position to obtain or confer an unwarranted privilege of substantial value, the Commission will find a violation of the statute. Whether pressure has been applied in a given situation is fact-intensive, and the Commission will examine all of the circumstances to make that determination.

Commission precedents finding violations of § 23(b)(2) where pressure was used by a public employee to attempt to enforce compliance with a request include the following:

- *In Re Travis*, 2001 SEC 1014: House Chairman of Joint Committee on Banks and Banking applied pressure in violation of § 23(b)(2) when he left telephone messages for employees of a bank that had declined his request for a donation, stating that "If we can't deal with this issue, I'm sure we'll have problems with others" and "It doesn't sit well with me and I certainly will remember this particular incident." The Representative

[10] We recognize that job applicants may be reluctant to have the fact that they are applying for a job publicly disclosed. However, in some circumstances a disclosure is needed to dispel the appearance of a conflict of interest, and protect the person making the recommendation from a violation of § 23(b)(3).
[11] *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff'g In Re Craven*, 1980 SEC 17; *In Re Travis*, 2001 SEC 1014.

had reason to know that he was attempting to use his official position to obtain an unwarranted privilege because (1) he was the House chair of a powerful committee; (2) he solicited a private donation from an entity that had or would have interests in legislative matters before his committee; (3) at the time he made his request, the bank had or would have interests in legislation that potentially had a significant impact on banking business; and (4) he initially solicited the donation in the context of a concluded business meeting where he was acting in his legislative capacity and had access to bank executives.

- *In Re Pezzella,* 1991 SEC 526, 528: Governor's Deputy Chief of Staff applied pressure in violation of § 23(b)(2) by making repeated telephone calls to an official appointed by the Governor encouraging her to decide a matter a certain way and referring to the Governor's power to appoint the official.

- *In Re Galewski*, 1991 SEC 504, 505: Municipal building inspector applied pressure in violation of § 23(b)(2) by requesting that developer sell him a desirable lot at the same time that he was conducting inspection of lots in developer's subdivision, and had issued only a temporary certificate of occupancy. Inspector knew or should have known that the effect of his conduct was to put pressure on the developer to make an unwarranted private accommodation to him.

- *In Re Zeppieri*, 1990 SEC 448, 449: Municipal licensing board chairman violated § 23(b)(2) by negotiating for an exclusive real estate listing from a license applicant at a time when an issue concerning the applicant's license was pending before the board.

- *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), *aff'g In Re Craven,* 1980 SEC 17: House Ways and Means Committee member applied pressure in violation of § 23(b)(2) by strongly pressing agency staff to award a grant to an entity he recommended, and indicating that the agency's budget might be adversely affected if the grant were not made.

These precedents demonstrate what common sense would in any case suggest: pressure in violation of § 23(b)(2) typically is applied through the spoken word, and far less frequently through the written word.[12] This does not mean, however, that the law prohibits oral recommendations, and permits only written recommendations. What the law prohibits is pressure. An oral recommendation unaccompanied by explicit or implicit pressure is permissible. A written recommendation amounting to or accompanied by pressure is impermissible. Written recommendations unaccompanied by any oral contact

[12] *In Re Piatelli*, 2010 SEC 2296, 2301-2 (telephone calls); *In Re Manning*, 2007 SEC 2076 (conversation); *In Re Murphy*, 2001 SEC 1003 (conversation); *In Re Singleton*, 1990 SEC 476, 477 (conversation); *In Re Cibley*, 1989 SEC 422 (telephone call).

do have an obvious advantage in that they do not require credibility determinations as to what was said or how it was said. A public official's denial that he intended oral remarks as threats will not carry the day if a reasonable person would find his remarks threatening. *In Re Travis*, 2001 SEC 1014, 1016; *In Re Galewski*, 1991 SEC 504, 505 n. 2; *In Re Singleton*, 1990 SEC 476.

In determining whether a public employee's oral or written recommendation is consistent with the conflict of interest law, the Commission will consider all the circumstances to determine whether the recommendation was accompanied by pressure, in violation of § 23(b)(2). In addition to the factors suggested by the precedents described above, other factors to be considered include, but are not limited to, the following:

- Did the public employee suggest, directly or indirectly, that factors other than the merits of the applicant and competing applicants for the position should be considered in making the hiring decision?

- Did the public employee suggest, directly or indirectly, that normal agency hiring procedures should be ignored or bypassed?

- Did the public employee recommend an individual for employment for a position that was not vacant or for a position that had not yet been created?

- Did a staff member or employee of the public official, or anyone else acting on behalf of the public official, take any action with respect to a recommendation that the public official himself would not be permitted to take? A public employee may not circumvent the conflict of interest law by directing or permitting others to do what he may not.

IV. *Receiving Employment Recommendations*

The sections of the conflict of interest law already discussed in this Advisory also apply to public employees receiving employment recommendations. Just as § 23(b)(2) prohibits providing a benefit selectively to a single individual, or to a discrete group, in the context of making recommendations, it also prohibits such treatment by those who receive recommendations.

State law, specifically G.L. c. 66, § 3A, defines the process by which all recommendations for public employment in the Commonwealth must be handled:

> Recommendations for employment submitted in support of candidates applying for employment by the commonwealth, or any political subdivision of the commonwealth, shall not be considered by a hiring authority until the applicant has met all other qualifications and requirements for the position to be filled; provided,

> however, that a hiring authority may, in accordance with said agency's regular practice for conducting reference checks, contact and speak with a reference provided to it by a candidate for employment, or contact and speak with any person who has submitted a written recommendation on behalf of a candidate for employment with said agency.[13]

A public employee who knowingly gives an employment applicant preferential treatment in violation of G.L. c. 66, § 3A by, for example, putting an applicant on the list of "finalists" based on an employment recommendation, even though the candidate has not met all the other qualifications for the position, violates § 23(b)(2) of the conflict of interest law, because the public employee has given the applicant an unwarranted privilege of substantial value.[14]

Furthermore, as explained above, public employees may not participate in any hiring process in which an immediate family member seeks employment. This means that a public employee whose immediate family member is an applicant for a job in the public employee's agency may not review resumes to select applicants to interview, participate in the interview process, participate in choosing the finalists or the successful candidate, or participate in the hiring process in any other way. Moreover, to comply with the law, it is not sufficient merely to refrain from reviewing the immediate family member's resume or conducting her interview; the public employee must stay out of the hiring process altogether, and must not take any actions concerning other, competing applicants for the position.

Finally, participating in a hiring process by acting on a recommendation, or in any other manner, when a friend, or a relative who is not an immediate family member, is one of the applicants, will raise an appearance of a conflict of interest under § 23(b)(3) of the conflict of interest law. This is also true with respect to other people with whom a public employee has a private relationship. A public employee may satisfy § 23(b)(3) by filing a written disclosure before participating in a hiring process that involves a friend, business associate, or non-immediate family member, as long as he is able to act fairly and objectively in performing his public duties. Our regulations set forth a process for such disclosures if such information is legally required to be kept non-public, 930 CMR 3.02.[15]

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[13] Additional requirements apply to the hiring processes of the Trial Court and Probation, G.L. c. 211, § 10D, c. 211B, § 10D, c. 276, § 83. Also, all applicants for state employment are now required to disclose, in writing, "the names of any state employee who is related to the [applicant] as: spouse, parent, child or sibling or the spouse of the [applicant's] parent, child or sibling." G.L. c. 268A, § 6B.

[14] Giving something to someone in violation of a statute amounts to giving an "unwarranted privilege" for purposes of § 23(b)(2). *Advisory 11-1; EC-COI-98-2.*

[15] For example, a public employee participating in a selection process in which the applicants' names are required to be kept confidential during the initial stage may be able to use the regulatory procedure.

V. *Some Employers May Not Receive Recommendations from Public Employees*

In addition to the conflict of interest law restrictions discussed above, a separate statute provides that some employers are "off-limits" for employment recommendations by public employees. Most public employees are expressly prohibited from recommending anyone for employment by any public service corporation, specifically including any "railroad, street railway, electric light, gas, telegraph, telephone, water or steamboat company," [16] or any "licensee conducting a horse or dog racing meeting" pursuant to G.L. c. 128A. G.L. c. 271, § 40. A recommendation knowingly made in violation of G.L. c. 271, § 40, or any other statute, gives the person recommended an unwarranted privilege of substantial value, in violation of § 23(b)(2).

VI. *Public Agencies and Elected Bodies May Adopt Their Own More Stringent Standards*

This Advisory sets forth the restrictions imposed by the conflict of interest law, G.L. c. 268A, on public employees' recommendations for employment. Public agencies and elected bodies may also adopt their own more stringent standards regarding such recommendations. G.L. c. 268A, § 23(e).

This Advisory is intended to assist public employees understand how the conflict of interest law applies to recommendations for employment. This Advisory is not a substitute for legal advice, nor does it mention every aspect of the law that may apply in a particular situation. Public employees can obtain free, confidential advice about the conflict of interest law from the Commission's Legal Division by submitting an electronic request on our website, www.mass.gov/ethics. Public employees may also call the Commission at (617) 371-9500 and ask to speak to the Attorney of the Day or submit a written request for advice to the Commission at One Ashburton Place, Room 619, Boston, MA 02108, Attn: Legal Division.

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[16] An entity is a "public service corporation" if it is "organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business;" subject to the requisite degree of governmental control and regulation; and it provides a public benefit. *Planning Board of Braintree v. Department of Public Utilities,* 420 Mass. 22, 26 (1995). The term is not limited to corporations, but may include municipal electric departments and other public utilities, and entities that provide public transportation. *Id.*

Question 52: What regulations, criteria, and other requirements should the Commission consider to ensure that a preventative approach is taken to work-related injuries and that casino workplace safety is maximized?

The relevant sections of the gaming law are M.G.L. c 23K § 18.

Under section 18, MGC must evaluate and issue findings as to the following objectives including implementing a workforce development plan. The MGC should recommend that such workforce development plan not only include strategies for attracting and retaining employees and allowing them to pursue career pathways within the casino but to offer strategies for providing a safe and injury-free workplace.

Additionally, any gaming licensee will automatically be required to comply with all existing federal Occupational Safety and Health Administration (OSHA) requirements as well as any specific state regulations. Our consultants suggested that MGC staff may not have adequate staffing resources to assess and evaluate additional workplace safety plans beyond those already required by law.

Recently, we heard firsthand testimony from union leadership and a former casino employee that highlighted the potential workplace injuries that can result from conducting recurring tasks. The MGC should be mindful that related breaks and other workplace safety measures can also be items subject to collective bargaining agreements.

In the job description for our Director of Workforce and Supplier Development and Diversity Initiatives, we did include a requirement that this position also focus on policy matters related to workplace safety. The commission through this position should remain aware of new workplace safety practices either required by other jurisdictions or agreed upon between other casino operators and their employees.

We received 1 submission on this question.

Respondent	Comment
UAW (International Union, United Automobile, Aerospace & Agricultural Implement Workers of America	Workplace safety can be grouped with several of the questions in the Commission's preliminary draft, including questions 4,5,22, and 25

Recommendation: The Commission should consider requiring an applicant to discuss their workplace safety strategies as part of any requested workforce development plans required in the license application.

Key Policy Question #33: Should the community college process that we are endorsing and supporting be the exclusive mechanism for qualifying applicants for key gaming licenses? No.

Key Policy Question #34: If the answer to question 33 is no, should the Commission regulate private training schools?

The relevant sections of the gaming law are M.G.L. c 23K § 5 (11) and (12).

The above referenced section gives the Commission the authority to *(11) establish licensure and work permits for employees working at the gaming establishment and minimum training requirements; provided, however, that the commission may establish certification procedures for any training schools and the minimum requirements for reciprocal licensing for out-of-state gaming employees; and (12) require that all gaming establishment employees be properly trained in their respective professions.*

Regulation of private and public casino/gaming training schools varies by jurisdiction. Pennsylvania and Indiana do regulate public and private training schools.

Pennsylvania Gaming Control Board (PGCB) regulations require dealer applicants to have dealing experience or training within five years prior to submitting an application. The PGCB provides a list detailing which dealer training schools have been evaluated for compliance with their regulations. PGCB regulates minimum training standards for dealers and minimum experience requirements for supervisors, minimum proficiency requirements, and employee training by certificate holders and how to submit training programs to the Board. Pennsylvania has some approved schools operated between the casinos and nearby community colleges.

Indiana also prescribes an application and approval procedure for training schools. An applicant that is not a higher education institution or is not accredited under their higher education act must obtain and maintain a training license. Regulations in both states do prescribe minimum requirements of training and related hours for each type of training.

At this time, the MGC should continue to work with the Division of Public Licensure. Under M G.L. c. 112, § 263, DPL is authorized to (1) license qualified private occupational schools and sales representatives; (2) adopt rules and regulations governing the licensure and operation of private occupational schools; (3) approve curriculum, instructors, and staff; (4) investigate complaints and conduct inspections; (5) discipline licensees for noncompliance; and (6) sanction unlicensed individuals and entities for operating without a license

Throughout our discussions with the Casino Career Institute/Community Colleges, we discussed steps the commission should consider to help protect residents from training schools that could harm the consumer. In the meantime, MGC and DPL have agreed upon the following language to be included in DPL licensure approvals for any gaming training school applications that they may receive.

- ❑ **Gaming School Disclaimers:** As a condition of licensure, the school must prominently display the following disclaimers on its enrollment contract, catalogue, and advertising:

- ❑ "The courses offered by this school may not satisfy requirements yet to be established by the Massachusetts Gaming Commission for employment in a Massachusetts casino."

- ❑ "Employment at a Massachusetts gaming establishment is not available at this time and it is not known when such jobs will be available. When gaming employment becomes available in Massachusetts, graduates of the school may need to meet additional requirements set by the Massachusetts Gaming Commission (e.g., be at least 21 years of age, criminal background check (CORI), drug test, fingerprinting, citizenship, speak/read/write English effectively).

We received 1 written submission on this question:

Respondent	Comment
Shevsky Froelich/City of Springfield	"No. We do not believe that the MGC should regulate such private or other public training schools as we believe the market will determine whether graduates from such schools are appropriately qualified."

Recommendation – The MGC should adopt similar training school approval regulations and minimum training requirements as we are allowed by statute in cooperation with the Division of Public Licensure. Any regulations would also be available for public comment.

<u>Key Policy Question #53 Part One</u>: Should the Commission consider a rule or policy that prohibits public entities from either becoming applicants or financing an applicant?

The relevant sections of the gaming law are M.G.L. c 23K § 2 Definition of "Institutional Investor" (8) and (13).

Though the definition of public entity can defined very broadly, under Section 2 there is a definition of institutional investor for a gaming license applicant that includes "any of the following entities having a 5 per cent or greater ownership interest in a gaming establishment or gaming licensee: a corporation, bank, insurance company, pension fund or pension fund trust, retirement fund, including funds administered by a public agency,…". This language clearly allows a public pension fund the opportunity to be an institutional investor for a gaming license applicant.

With the RFA-1 application period closed as of January 15th, 2013, no public entity submitted an application. It would not allow fair competition for the MGC to consider allowing a public entity, beyond the public pension funds or retirement funds administered by a public agency, to participate as an applicant in any future license application process. Presumably, the MGC required application fee and investment requirement would most likely be prohibitive to a public entity seeking to become an applicant.

The statute already does prohibit a casino licensee from being an applicant for the state and local tax incentives under the Massachusetts Economic Development Incentive Program (EDIP), which could be viewed as financing an applicant.

<u>Key Policy Question #53 Part Two</u>: Under what conditions (if any) could a public entity be the beneficiary of gaming revenues / profits?

Public entities including host and/or surrounding communities and public utility entities will in essence by the beneficiary of gaming revenues/profits through any funding provisions of the host and surrounding community agreements and/or utility service agreements. Additionally, the gaming revenues/profits will also be used by the licensee to pay all required tax or assessment obligations to the host community and the Commonwealth. The statute also clearly defines the funds and allocations of the tax receipts from the gross gaming revenue and license fees.

We received no written submissions on this question.

Respondent	MOU's, Eval and Enforce	Comment

Recommendation: The commission takes no action to draft regulations with respect to this question at this time.