MASSACHUSETTS GAMING COMMISSION
PUBLIC MEETING #284

December 19, 2019
10:00 a.m.
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA

NOTICE OF MEETING and AGENDA
December 19, 2019

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:

Thursday, December 19, 2019
10:00 a.m.
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA

PUBLIC MEETING - #284

1. Call to order

2. Approval of Minutes
   a. December 5, 2019 – **VOTE**

3. Administrative Update – Ed Bedrosian, Executive Director
   a. General Update

4. Investigations and Enforcement Bureau – Karen Wells, Director; Loretta Lillios, Chief Enforcement Counsel
   a. Clarification of Regulation 205 CMR 134.09 – Sealed Records – **VOTE**

5. Administrative Update – Ed Bedrosian, Executive Director
   a. Draft Region C RFI Questions/Public Comments **VOTE**

6. Research and Responsible Gaming – Mark Vander Linden, Director; Dr. Rachel Volberg
   a. Social and Economic Impact Research Procurement Update - **VOTE**

7. Racing – Dr. Alex Lightbown
   a. Chief Steward Susan Walsh – Racing Officials Association Program Pete Pedersen Award Winner

8. Research and Responsible Gaming – Teresa Fiore, Program Manager; Mark Vander Linden, Director
   a. GameSense Update

9. Ombudsman – John Ziemba; Joe Delaney, Construction Project Oversight Manager, Mary Thurlow, Project Manager; Jill Griffin, Dir. of Workforce, Supplier & Diversity Development
   a. Community Mitigation Amendment Requests
      i. 2019 Revere Non-Transportation Planning Grant **VOTE**
      ii. Holyoke Community College for MA Casino Training Institute **VOTE**

10. Ombudsman /Research and Responsible Gaming – John Ziemba/Mark Vander Linden
    a. Local Community Mitigation Advisory Sub-Committee on Addiction Services - **VOTE**

11. Commissioners Items –
    a. Massachusetts Gaming Commission 2019 Annual Report – Commissioner Zuniga
    b. GEU Overtime Budget Update – Commissioner Cameron

12. Budget Issues – Derek Lennon, Chief Financial and Accounting Officer; Commissioner O'Brien; Todd Grossman, Interim General Counsel; Trupti Banda, HR Manager
    a. Pay approval for Interim Chair **VOTE**

13. 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 "Massachusetts Gaming Commission Meeting" at www.massgaming.com and emailed to: regs@sec.state.ma.us, melissa.andrade@state.ma.us.

12/16/19
Date

Enrique Zuniga, Commissioner

Date Posted to Website: December 16 , 2019 at 5:00 p.m.

Massachusetts Gaming Commission
Meeting Minutes

Date/Time: December 5, 2019 – 10:00 a.m.

Place: Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Present: Chair Cathy Judd-Stein
Commissioner Eileen O'Brien
Commissioner Bruce Stebbins
Commissioner Gayle Cameron

Absent: Commissioner Enrique Zuniga

Time entries are linked to the corresponding section in the Commission meeting video.

Call to Order
See transcript page 1

10:00 a.m. Chair Cathy Judd-Stein called to order public meeting #283 of the Massachusetts Gaming Commission. She noted that the order of today's agenda has changed to move the Racing Division's agenda items to #6, and the Investigations and Enforcement Bureau (IEB) agenda item will be #7.

Approval of Minutes
See transcript page 1 - 18

10:04 a.m. *Commissioner Stebbins moved to approve the minutes from the Commission meeting of November 21, 2019, subject to correction for typographical errors and other nonmaterial matters. Commissioner Cameron seconded the motion. The Chair stated that she would like to include Mr. Mathis' report regarding accommodations and meal taxes to alleviate the concern of MGM potentially cannibalizing local business.*
The motion passed 4 – 0 with requested amendments.

Finance Division
See transcript pages 2 – 10

10:08 a.m. **Massachusetts Gaming Commission Vendor Diversity Update - VeraCloud**
CFO Derek Lennon introduced VeraCloud's Founder Doug Rutnic, and President Todd Bida. Mr. Rutnic and Mr. Bida gave a slide presentation summarizing the company's mission for the Commission, which is to identify, recruit, and engage diverse, local vendors for inclusion in public contracting opportunities to meet and exceed diversity goals. They discussed examples of successful results from working so far with the Commission as well as with Plainridge Park Casino. They also discussed VeraCloud's strategies that they have implemented with the Commission.

10:24 a.m. Commissioner Cameron asked if the VeraCloud system tracks results, in terms of feedback to aid applicants' performance in the future. Mr. Rutnik responded that yes, VeraCloud provides an open feedback channel that has been utilized and observed to teach prospective vendors about current and future opportunities.

10:26 a.m. The Chair raised a concern regarding the need for clarity around filling out a Request for Proposal (RFP) in terms of the Massachusetts requirement that a company must gain and record a supplier diversity partner.

10:36 a.m. Mr. Bida thanked the Commission for the opportunity to serve it and the Commonwealth, and Commissioner Cameron stated that she hopes others utilize this essential and helpful niche that VeraCloud has identified.

Administrative Update
See transcript pages 10 – 18

10:39 a.m. **General Update**
Executive Director Ed Bedrosian provided a general update to the Commission, stating that for the close of this year's racing season, he and Commissioners Stebbins and Zuniga had lunch with the seasonal racing staff to thank them. He also reported on the Gaming Enforcement Unit (GEU) staffing and overtime issues and clarified some of the overtime costs being incurred for security that will be reflected in the budget. He then added that there is a statutory audit happening at Encore by the Commission's finance unit.

10:43 a.m. **Draft Region C RFI Questions**
Next, Mr. Bedrosian provided an update on the staff's development of possible questions for a potential Request for Information (RFI) concerning Region C as requested by the Commission. He noted that counsel for Mass Gaming & Entertainment has also submitted their questions to the Commission to be considered as part of an RFI.

10:49 a.m. An RFI is generally used to help inform a future procurement process but does not mandate it. There was discussion around the issue of timing where the RFI could be utilized as a vehicle to potentially conducting a market study. Public comments on questions were also discussed. Commissioner O'Brien raised a concern regarding the questions on an RFI compared to questions that would go out for public comment, as there are different audiences for these questions.

10:59 a.m. The Chair stated that expertise through an RFI might be helpful to aid the Commission in its structure of a request for a market study to properly assess the implications for the commonwealth. She clarified that the Commission has an obligation to the commonwealth as opposed to just the region. She then stated that she is particularly interested in the questions around the impact on Region C in the absence of the Commission issuing a license. There was a discussion around the initial Region C evaluation in response to the Chair asking if the Commission should do a single market study or parcel it out.

Commissioner Stebbins noted that the Commission should make sure the RFI does not exclude anybody, who responds from participating in an RFR or an RFP, should the Commission take that next step.

11:10 a.m. Mr. Bedrosian stated to the Commission that the public is always welcome to submit comments at any time, regardless of the format the Commission chooses to facilitate the process of evaluation and analysis of Region C.

Commissioner Stebbins then stated that once the analysis is complete through the RFP phase, it may then be an opportune time to have a public hearing to share more substantive information with the public.

The Chair asked Mr. Bedrosian to update Commissioner Zuniga upon his return to get his additional thoughts on the matter.

Legal Division
See transcript pages 18 – 29

11:12 a.m. **Tribal Litigation and Federal Legislation Update**
Acting General Counsel Todd Grossman and Associate General Counsel Justin Stempeck provided the Commission with a status of the Mashpee Wampanoag tribal litigation and federal legislation regarding the tribe.

Mr. Grossman led the Commission through a slide presentation that provided a broad overview of the law and background information to help guide the Commission in their decision making relative to Region C.

11:25 a.m. Mr. Stempeck addressed three federal cases with slides (Littlefield et al. v. United States Department of the Interior, Littlefield, et al. v. Mashpee Wampanoag Indian Tribe, and Mashpee Wampanoag Tribe v. Bernhardt) that highlight key

factors relevant to this case. He then summarized relevant circumstances surrounding those cases.

11:36 a.m. Mr. Grossman and Mr. Stempeck then discussed KG Urban Enterprises v. Deval Patrick et al., where the plaintiff claimed that the act discriminated based on race and violated equal protection clauses. They summarized the case, and Mr. Grossman stated the Commission's position on the matter.

11:44 a.m. Mr. Stempeck and Mr. Grossman made a note to the Commission that there is an issue related to the interpretation of Section 91 of the Gaming Act and certain language of the Tribe's compact with the Commonwealth that was brought to light that will be revisited in the future. The Commission's essential position at the time was that Section 91 of the Gaming Act mandates action in certain circumstances, but it doesn't preclude action otherwise in the discretion of the Commission. Further, the compact language does not serve as a barrier to Commission action either.

Racing Division
See transcript pages 29 – 35

12:09 p.m. **Suffolk Downs Request for Approval of Simulcast Import Locations**
Suffolk Downs' Chief Operating Official Chip Tuttle has submitted a request for approval of simulcast import locations dated November 8, 2019. Earlier this year, the Commonwealth's racing and simulcasting statutes were extended to January 15, 2020. Subsequently, Suffolk Downs did not apply for live racing dates, necessitating a separate approval by the Commission.

The Racing Division recommends that the Commission approve Suffolk Downs' request for approval of the simulcast import locations listed in their November 8, 2019 letter.

12:24 p.m. *Commissioner Stebbins moved that the Commission approve Suffolk Downs' request for simulcast import locations for the year 2020 as identified in the list provided in the Commissioners' Packet. Commissioner O'Brien seconded the motion.*
The motion passed 4 – 0.

Suffolk Downs Request for Approval of Account Wagering Providers
Mr. Tuttle has also submitted a request for approval of the following Account Deposit Wagering (ADW) providers: XpressBet LLC, TVG, Twin Spires, NYRAbets, and FanDuel Racing dated November 8, 2019. The Commission has approved all in the past except FanDuel Racing, which will use the TVG infrastructure.

12:13 p.m. Chip Tuttle reviewed slides with the Commission at the request of the Chair regarding FanDuel Racing to provide a background on the company. He

explained that they are trying to expose fantasy horse racing to customers on the existing FanDuel platform.

12:17 p.m. Commissioner Cameron clarified the Commission's licensing requirements regarding ADW's. As part of the license, they have been approved in the past. There was discussion around the process and of opportunity to look further into these companies.

12:23 p.m. Commissioner Stebbins asked if Mr. Tuttle has had a chance to go through the FanDuel platform to analyze any tutorials that would ensure ease of use to individuals newer to the betting process. Mr. Tuttle stated that he has not as the site is only in beta at this time, but he will do so.

The Racing Division recommends that the Commission approves the Suffolk Downs request for approval of XpressBet LLC, TVG, Twin Spires, NYRAbets, and FanDuel Racing as their Account Wagering providers.

12:24 p.m. *Commissioner Stebbins moved that the Commission approve Suffolk Downs' request for XpressBet LLC, TVG, Twin Spires, NYRAbets, and FanDuel Racing as Account Deposit Wagering providers. Commissioner Cameron seconded the motion.*
The motion passed 4 – 0.

Suffolk Downs Request for Promotional Fund Consideration and Reimbursement
Financial Analyst Chad Bourque presented Suffolk Downs' request for consideration and reimbursement of payment from the promotional trust fund in the amount of $192,971.10. He verified that all funds requested were used for advertising purposes and that the correct amount is being requested. Mr. Bourque recommends that the Commission approve Suffolk Downs' request.

12:26 p.m. *Commissioner Cameron moved that the Commission approve Suffolk Downs' Request for Consideration and Reimbursement in the amount of $192,971.10 to the Suffolk Promotional Trust Fund. Commissioner Stebbins seconded the motion.*
The motion passed 4 – 0.

Plainridge Park Casino (PPC) Request for Capital Improvement Fund Consideration
Next, Mr. Bourque presented PPC's request for consideration for the Capital Improvement Trust Fund in the amount of $40,338. Also included with the request is an opinion letter from Dixon Salo, who is the architect, charged with ensuring that the items being requested for funds being requested are necessary, and he is recommending that the consideration be approved.

12:28 p.m. *Commissioner Cameron moved that the Commission approve Plainridge Park Casino's Request for Consideration in the amount of $40,338.00 for the Capital Improvement Fund to purchase a replacement tractor at Plainridge Racecourse. Commissioner Stebbins seconded the motion.*
The motion passed 4 – 0.

Investigations and Enforcement Bureau
See transcript pages 35 – 40

12:31 p.m. **MGM Springfield Qualifiers**
Chief Enforcement Counsel Loretta Lillios requested that the Commission approve Mr. Patrick Madamba, Vice President and Legal Counsel of MGC Resorts International as a qualifier for MGM Resorts.

12:36 p.m. *Commissioner Cameron moved that the Commission find Patrick Madamba suitable as a Qualifier for Blue Tarp reDevelopment, LLC. Commissioner O'Brien seconded the motion.*
The motion passed 4 – 0.

Ms. Lillios then requested that the Commission approve Mr. Paul Salem, Member of the MGM Resorts International Board of Directors as a qualifier for MGM Resorts.

12:39 p.m. *Commissioner Cameron further moved that the Commission find Paul Salem suitable as a Qualifier for Blue Tarp reDevelopment, LLC. Commissioner Stebbins seconded the motion.*
The motion passed 4 – 0.

Modification of Vendor-Independent Director Application
Next, Ms. Lillios introduced a new Independent Director Qualifier Application form that would require the submission of federal tax transcripts for the prior four years and questions posed to the inside directors regarding settlements, allegations of misconduct, and a general question regarding matters impacting suitability.

The IEB and the Division of Licensing recommend that the Commission approve the use of the Independent Director Qualifier Application Form for those independent directors designated as qualifiers for Primary Gaming Vendor companies.

12:49 p.m. Licensing Manager Bill Curtis clarified for the Commission that there are 24 Primary Gaming Vendors. Ms. Lillios stated that they will return in six months with a progress report on this application process.

12:50 p.m. *Commissioner Stebbins moved Commission approve the "Independent Director Qualifier Application" as included in the Commissioners' Packet. This form shall be completed and submitted by independent directors designated as qualifiers for*

Gaming Vendor – Primary applicants and licensees, pursuant to 205 CMR 134.04(4)(b)2.d. Commissioner Cameron seconded the motion. The motion passed 4 – 0.

The Chair stated that the Commission will not be reviewing Commissioner Zuniga's annual report today.

Ombudsman
See transcript pages 40 – 51

1:35 p.m. **Final Community Mitigation Fund Guidelines**
Ombudsman John Ziemba presented the final version of the 2020 Community Mitigation Fund Guidelines to the Commission for approval. He reviewed with the Commission the target spending amounts for 2020, regional target spending allocations, and the continuation/modification of prior year priorities concerning the fund.

1:40 p.m. Construction Project Oversight Manager Joe Delaney discussed the prospect of multi-year grants, as well as a new type of award, the Transportation Construction Project Grant. Next, Mr. Delaney reviewed the matching funds with the Commission.

1:44 p.m. Director of Workforce, Supplier and Diversity Jill Griffin discussed Workforce Program spending. She stated that along with posting the guidelines out for public comment, she sent the guidelines specific to the Commission's workforce partners and other training entities. Upon discussion with stakeholders, Ms. Griffin received positive feedback on the guidelines. She expressed that the message this time around is that the Commission is encouraging collaboration between the organizations in the entire region. She also stated that this initiative is being incentivized.

Mr. Ziemba stated that if the Commission approves the guidelines today, he will post them next week.

1:48 p.m. Commissioner Stebbins commented on the engaged involvement of committee members and stated that the meetings are more detailed and strategic. He would like to see something built into the application that directs applicants to have subsequent meetings with licensees to ensure that applicants are considering ongoing workforce development needs concerning the licensees. Mr. Ziemba will amend the application to reflect this.

2:02 p.m. *Commissioner Stebbins moved that the Commission approve the final Community Mitigation Fund guidelines for the 2020 Community Mitigation Fund applications. Commissioner O'Brien seconded the motion. The motion passed 4 – 0.*

Horse Racing Legislation Update
Director of Racing Dr. Alex Lightbown presented a draft letter to the Commission regarding a further time-limited extension of the Commonwealth's current racing and simulcasting statutes beyond the January 15, 2020 expiration date. This letter would be signed by the Chair and Commissioners and sent to the Senate, House, and Joint Committee on Consumer Protection and Professional Licensure to request such an extension of the HB 13 bill.

2:06 p.m. Commissioner Stebbins asked to edit the first paragraph of the letter. The Commission concluded that the legislature should supply a deadline for an extension. Commissioner O'Brien also suggested edits. The Chair suggested adding a clause stating that even a temporary shutdown could create continued uncertainty for the industry. Dr. Lightbown and Mr. Ziemba will edit and circulate the letter for signature.

Workforce, Supplier and Diversity Development
See transcript pages 51 – 53

2:14 p.m. **Workforce Development RFR – Small Business Technical Assistance**
Director of Workforce, Supplier and Diversity Development Jill Griffin presented a memo to the Commission regarding a Request for Response (RFR) for small business technical assistance. She stated that this week, staff put out the RFR to ensure success in the expanded gaming industry for Massachusetts companies. Proposals are due through COMMBUYS Friday, January 3, 2020, by 3:00 p.m.

There was a discussion around extending the deadline due to the holiday. Ms. Griffin will look into extending the date on the RFR.

2:45 p.m. *With no further business, Commissioner Cameron moved to adjourn the meeting. Commissioner Stebbins seconded the motion.*
The motion passed 4 – 0.

List of Documents and Other Items Used

1. Notice of Meeting and Agenda dated December 5, 2019
2. Draft Commission Meeting Minutes dated November 21, 2019
3. Presentation – VeraCloud dated December 4, 2019
4. Memo re: Potential Questions for a Request for Information Concerning a Region C Procurement dated December 2, 2019
5. Presentation – Tribal Litigation Update dated December 5, 2019
6. Letter re: Mass Gaming & Entertainment LLC and Region C dated November 29, 2019
7. Letter re: Summary and Status of Litigation Regarding the Trust Status of the Mashpee Wampanoag Tribe's Reservation dated November 12, 2019

8. Memo re: Suffolk Downs Request for Approval of Simulcast Import Locations dated December 5, 2019
9. Letter from Chip Tuttle to Dr. Lightbown dated November 8, 2019
10. Memo re: Suffolk Downs Request for Approval of Account Deposit Wagering Providers dated December 5, 2019
11. Letter from Chip Tuttle to Dr. Lightbown dated November 8, 2019
12. Presentation: FanDuel Group
13. Memo re: Request for Consideration & Reimbursement | Suffolk Promotional Trust Fund dated December 2, 2019
14. Memo re: Request for Consideration | Harness Horse Capital Improvement Trust Fund dated December 2, 2019
15. Memo re: Application Form for Independent (Outside) Directors of Gaming Vendor – Primary Companies dated December 3, 2019
16. Draft of Independent Director Qualifier Application dated December 3, 2019
17. Memo re: 2020 Community Mitigation Fund Guidelines dated December 5, 2019
18. Chart: Projected Revenue Placed in the Community Mitigation Fund through October 2019
19. Public Comment Letters re: Workforce Guidelines
20. Redline of Community Mitigation Fund Guidelines dated December 4, 2019
21. Final Draft of Community Mitigation Fund Guidelines dated December 2, 2019
22. Draft Racing Bill Letter to Legislature dated December 5, 2019
23. Memo re: RFR for Small Business Technical Assistance dated December 6, 2019
24. Draft of MGC Annual Report 2019 dated November 27, 2019

/s/ Bruce Stebbins
Secretary

MEMO

To: Chair Judd-Stein, Commissioner Cameron, Commissioner O'Brien, Commissioner Stebbins, and Commissioner Zuniga

From: Karen Wells, IEB Director
Loretta Lillios, Chief Enforcement Counsel

Date: October 3, 2019 (updated October 15, 2019)

RE: Clarification on 205 CMR 134.09

The IEB is seeking input and clarification from the Commission regarding a provision in 205 CMR 134.09(1) relating to sealed adult criminal records. The regulatory provision in questions states:

> Records of criminal appearances, criminal dispositions, and/or any information concerning acts of delinquency that have been sealed shall not be considered for purposes of making a suitability determination in accordance with 205 CMR 134.00 and M.G.L. c.23K.

The plain language of this regulatory provision treats sealed juvenile records differently from sealed adult criminal records. Under the regulation, it is clear that the IEB is prohibited from considering "any information concerning acts of delinquency" for the purpose of making suitability determinations. By contrast, the regulation's express prohibition for adult criminal cases extends only to "records of criminal appearances [and] criminal dispositions" that have been sealed.

The regulation's reach with respect to records of sealed adult criminal cases aligns with G.L. c. 276, § 100A (Sealing of criminal conviction files), and § 100C (Sealing of files in non-conviction cases). These statutes prohibit the admissibility into evidence of sealed records (with certain exceptions)[1] in hearings before any boards or commissions, see G.L. c. 276, § 100A, and allow applicants for occupational or professional licenses with a sealed record to answer "no record" with respect to any inquiry regarding prior arrests, criminal court appearances, or convictions, see Id., and G.L. c. 276, § 100C.[2]

Sometimes, however, during the course of an investigation, the IEB discovers information wholly apart from sealed "records of criminal appearances [and] criminal dispositions" that reveals information on the underlying conduct that led to the criminal case

[1] Of particular note, records of cases resulting in criminal convictions for certain firearm offenses are not eligible for sealing. See G.L. c. 276, § 100A, excluding violations of convictions under G.L. c. 140, § 121 through 131H from sealing. Further, records of certain sex offenses are not eligible for sealing. Id.

[2] With respect to sealed records in juvenile cases, 205 CMR 134.09(1) extends more protection in sealed juvenile cases than G.L. c. 276, § 100B (Requests to the commissioner of probation to seal delinquency files).

which was later sealed. Such information may come from any number of sources, such as, by way of example, the investigator's review of open source material, inquiries made to law enforcement databases, or communications with the applicant him or herself. In such circumstances, the IEB comes into possession of potentially derogatory information about an applicant without having accessed any sealed records at all. Consequently, the question remains whether such information should be utilized by the IEB in reaching a determination on suitability.

Below are three hypothetical examples that highlight circumstances where information that may be relevant to suitability is obtained during the course of an investigation, apart from any sealed record.

Hypothetical #1:

An Applicant for a Gaming Employee License as a table games dealer has a sealed criminal record which contains a misdemeanor larceny conviction from four years ago and an identity theft charge that was reduced to a misdemeanor conviction from just under five years ago.[3] After having her record sealed nine months ago she was arrested for shoplifting shortly thereafter. The Applicant admitted to sufficient facts at arraignment and received a continuance without a finding ("CWOF") of guilt on the shoplifting charge. (A CWOF is not a conviction and does not trigger automatic disqualification for licensing purposes.) The investigator learns of the larceny and the identity theft cases though a google search which revealed media articles from the local newspaper where the events occurred. Law enforcement database searches also corroborate the incidents.

Questions presented: Should the IEB consider the information about the underlying conduct from the misdemeanor larceny and identity theft matters (but not the convictions themselves, as they cannot be verified) obtained through open sources but not through the sealed records of convictions themselves during the suitability evaluation? Should the investigator be permitted to ask the Applicant about the matters?

Hypothetical #2:

An Applicant for a Key Gaming - Standard License as a security department manager has a sealed criminal record of convictions for narcotics trafficking and assault and battery to collect a loan from eight years ago.[4] The record was sealed a year ago (seven years after the conviction). He was again arrested and convicted of assault and battery nine months ago and received a sentence of six months probation. A law enforcement database search leads the investigator to the narcotics and the first A&B charges, and the investigator finds that the Applicant was arrested at that time with two known gang members. The investigator also finds photographs of

[3] Under the gaming law and regulations, an unsealed conviction of a felony or other crime involving embezzlement, theft, fraud or perjury is disqualifying, but two categories of casino employees (gaming service employee registrants and applicants for gaming employee licenses) may show rehabilitation for such convictions occurring 10 years or more prior to the submission of the application. See G.L. c. 23K, § 16(b); 205 CMR 134.10(3)(a).

[4] These convictions, being felonies, would be disqualifying if unsealed. Unlike registrants and applicants for a gaming employee license, applicants for a key license are not eligible to demonstrate rehabilitation for disqualifying offenses. Id.

the Applicant with what appears to be narcotics on the Applicant's Facebook page where another known gang member is pictured. A review of the police report from the recent A&B arrest indicates that the Applicant was arrested at that time with three other known gang members during a bar fight at a local nightclub.

Questions presented: Should the IEB consider information about the underlying conduct from the narcotics and assault and battery to collect a loan incident obtained through law enforcement databases but not through the sealed records when evaluating suitability? Should the IEB consider information from that incident as it pertains to evidence of a pattern of association with unsuitable persons?

Hypothetical #3:

During the course of the background review of a Gaming Service Employee working as a bar porter, the Registrant, unsolicited by the Investigator, disclosed that three years ago, when he was 18 years old, he was convicted of larceny under $1,200 after he and a friend stole a package from a neighbor's front porch that had been delivered by UPS. The record of the larceny conviction was sealed a week before he submitted his Registration Form to the commission.

Questions presented:

The IEB would not consider the sealed record and furthermore would not move to revoke the registration if allowed to consider the conduct underlying the incident that led to the conviction which was later sealed. Is that consistent with the Commission's policy directive regarding sealed records?

****Note:**

It should be noted that "expunged" records stand on different footing from "sealed records." As a threshold matter, the relevant gaming regulation (205 CMR 134.09(1)) addresses only "sealed" - and not "expunged" records. In addition, records "sealed" pursuant to G.L. c. 276, §§ 100A through 100C remain available to criminal justice agencies, see G.L. c. 276, § 100D, and "sealed" records also may be considered in imposing sentence in a subsequent criminal case, see G.L. c. 276, §§ 100B, 100C. By contrast, "expunged" records require the "permanent erasure or destruction of a record so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency." See G.L. c. 276, § 100E. Finally, in an appeal from an order of the Racing Division's hearing officer, the Commission previously determined that a "suspension based upon [an] expunged conviction shall not be used to deny a license in the Commonwealth of Massachusetts even if the suspension is still in effect in [another] jurisdiction." As a basis for this decision, the Commission stated that it "believes that the purpose of an expungement is to treat the matter involved as if it never occurred." See In the Matter of Richard A. Wojcio, Racing Division No. 2014-005, page 3.

The IEB looks forward to the Commission's input and clarification on this matter.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title II PROCEEDINGS IN CRIMINAL CASES

Chapter 276 SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION

Section 100A REQUESTS TO SEAL FILES; CONDITIONS; APPLICATION OF SECTION; EFFECT OF SEALING OF RECORDS

Section 100A. Any person having a record of criminal court appearances and dispositions in the commonwealth on file with the office of the commissioner of probation may, on a form furnished by the commissioner and signed under the penalties of perjury, request that the commissioner seal the file. The commissioner shall comply with the request provided that: (1) the person's court appearance and court disposition records, including any period of incarceration or custody for any misdemeanor record to be sealed occurred not less than 3 years before the request; (2) the person's court appearance and court disposition records, including any period of incarceration or custody for any felony record to be sealed occurred not less than 7 years before the request; (3) the person had not been found guilty of any criminal offense within the commonwealth in the case of a misdemeanor, 3 years before the request, and in the case of a felony, 7 years before request, except motor vehicle offenses in which the penalty does not exceed a fine of $50; (4) the form

includes a statement by the petitioner that he has not been convicted of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses, as aforesaid, and has not been imprisoned in any state or county in the case of a misdemeanor, within the preceding 3 years, and in the case of a felony, within the preceding 7 years; and (5) the person's record does not include convictions of offenses other than those to which this section applies. This section shall apply to court appearances and dispositions of all offenses; provided, however, that this section shall not apply in case of convictions for violations of sections 121 to 131H, inclusive, of chapter 140 or for violations of chapter 268 or chapter 268A, except for convictions for resisting arrest.

In carrying out the provisions of this section, notwithstanding any laws to the contrary:

1. Any recorded offense which was a felony when committed and has since become a misdemeanor shall be treated as a misdemeanor.

2. Any recorded offense which is no longer a crime shall be eligible for sealing forthwith, except in cases where the elements of the offense continue to be a crime under a different designation.

3. In determining the period for eligibility, any subsequently recorded offenses for which the dispositions are "not guilty", "dismissed for want of prosecution", "dismissed at request of complainant", "nol prossed", or "no bill" shall not be held to interrupt the running of the required period for eligibility.

4. If it cannot be ascertained that a recorded offense was a felony when committed said offense shall be treated as a misdemeanor.

5. Any violation of section 7 of chapter 209A or section 9 of chapter 258E shall be treated as a felony.

6. Sex offenses, as defined in section 178C of chapter 6, shall not be eligible for sealing for 15 years following their disposition, including termination of supervision, probation or any period of incarceration, or for so long as the offender is under a duty to register in the commonwealth or in any other state where the offender resides or would be under such a duty if residing in the commonwealth, whichever is longer; provided, however, that any sex offender who has at any time been classified as a level 2 or level 3 sex offender, pursuant to section 178K of chapter 6, shall not be eligible for sealing of sex offenses.

When records of criminal appearances and criminal dispositions are sealed by the commissioner in his files, he shall notify forthwith the clerk and the probation officer of the courts in which the convictions or dispositions have occurred, or other entries have been made, of such sealing, and said clerks and probation officers likewise shall seal records of the same proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings, and except that in any proceedings under sections 1 to 39I, inclusive, of chapter 119, sections 2 to 5, inclusive, of chapter 201, chapters 208, 209, 209A, 209B, 209C, or sections 1 to 11A, inclusive, of chapter 210, a party having reasonable cause to believe that information in a sealed criminal record of

another party may be relevant to (1) an issue of custody or visitation of a child, (2) abuse, as defined in section 1 of chapter 209A or (3) the safety of any person may upon motion seek to introduce the sealed record into evidence. The judge shall first review such records in camera and determine those records that are potentially relevant and admissible. The judge shall then conduct a closed hearing on the admissibility of those records determined to be potentially admissible; provided, however, that such records shall not be discussed in open court and, if admitted, shall be impounded and made available only to the parties, their attorneys and court personnel who have a demonstrated need to receive them.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment or for housing or an occupational or professional license may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution." The attorney general may enforce the provisions of this paragraph by a suit in equity commenced in the superior court.

The commissioner, in response to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, shall in the case of a sealed record or in the case of court appearances and adjudications in a case of delinquency or the case of a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution, report that no record exists.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title II PROCEEDINGS IN CRIMINAL CASES

Chapter 276 SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION

Section 100C SEALING OF RECORDS OR FILES IN CERTAIN CRIMINAL CASES; EFFECT UPON EMPLOYMENT REPORTS; ENFORCEMENT

Section 100C. In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files. The provisions of this paragraph shall not apply if the defendant makes a written request to the commissioner not to seal the records of the proceedings.

In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files. The clerk shall forthwith

notify the commissioner of probation and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior arrests or convictions of the applicant shall include in addition to the statement required under section one hundred A the following statement: "An applicant for employment, housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court appearances." The attorney general may enforce the provisions of this section by a suit in equity commenced in the superior court.

The commissioner or the clerk of courts in any district or superior court or the Boston municipal court, in response to inquiries by authorized persons other than any law enforcement agency or any court, shall in the case of a sealed record report that no record exists. After a finding or verdict of guilty on a subsequent offense such sealed record shall be made available to the probation officer and the same, with the exception of a not guilty, a no bill, or a no probable cause, shall be made available to the court.

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Section 100E DEFINITIONS APPLICABLE TO SECS. 100E THROUGH 100U

Section 100E. As used in sections 100E through 100U, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

"Attorney general", the attorney general of the commonwealth.

"Commissioner", the commissioner of probation.

"Consumer reporting agency", any person or organization which, for monetary fees, dues, or on a cooperative, not-for-profit basis, regularly engages in whole, or in part, in the practice of assembling or evaluating criminal history, credit or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

"County agency", any department or office of county government and any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.

"Court", the trial court of the commonwealth established pursuant to section 1 of chapter 211B and any departments or offices established within the trial court.

"Criminal court appearance", an arraignment on, all pre-trial and other post arraignment judicial proceedings related to and the disposition of, a criminal offense.

"Criminal justice agencies", those agencies at all levels of government, which perform as their principal function, activities relating to: (i) crime prevention, including research or the sponsorship of research; (ii) the apprehension, prosecution, adjudication, incarceration or rehabilitation of criminal offenders; or (iii) the collection, storage, dissemination or usage of criminal offender record information.

"Department", the department of criminal justice information services established pursuant to section 167A of chapter 6.

"Disabled person", a person with an intellectual disability, as defined by section 1 of chapter 123B, or who is otherwise mentally or physically disabled and, as a result of such mental or physical disability, is wholly or partially dependent on others to meet daily living needs.

"Disposition", the final conclusion of a charge during or after the initial criminal court appearance or juvenile court appearance.

"District attorney", the district attorney in the jurisdiction where the matter resulting in a record that is the subject of a petition originated.

"Elderly person", a person who is 60 years of age or older.

"Expunge", "expunged", or "expungement", the permanent erasure or destruction of a record so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency. If the record contains information on a person other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased.

"Judicial proceedings", any proceedings before the court resulting in a record.

"Juvenile court appearance", an arraignment on, all pre-trial and other post arraignment judicial proceedings related to and the disposition of, an offense in the juvenile court.

"Municipal agency", any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.

"Offense", a violation of a criminal law for which a person has been charged and has made a criminal court appearance or a juvenile court appearance for which there is a disposition and a record.

"Office", the office of the commissioner of probation.

"Order", an order of expungement.

"Person", a natural person, corporation, association, partnership, or other legal entity.

"Petition", a petition to expunge a criminal record.

"Petitioner", a natural person with a criminal record who has filed a petition.

"Public records", shall have the same meaning as the definition of public records in clause twenty-sixth of section 7 of chapter 4.

"Record", public records and court records including, without limitation, paper or electronic records or data in any communicable form compiled by, on file with or in the care custody or control of, without limitation, the court, the office, the department or criminal justice agencies, which concern a person and relate to the nature or disposition of an offense, including, without limitation, an arrest, a criminal court appearance, a juvenile court appearance, a pre-trial proceeding, other judicial proceedings, disposition, sentencing, incarceration, rehabilitation or release; provided, however, that the term record shall not include information contained in the domestic violence record keeping system, evaluative information, intelligence information or statistical and analytical reports and files in which persons are not directly or indirectly identifiable.

"State agency", any department of state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title II PROCEEDINGS IN CRIMINAL CASES

Chapter 276 SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION

Section 100G PETITION FOR EXPUNGEMENT OF RECORD OF CONVICTION

Section 100G. (a) A petitioner who has a record of conviction may, on a form furnished by the commissioner and signed under the penalties of perjury, petition that the commissioner expunge the record. Upon receipt of a petition, the commissioner shall certify whether the petitioner is eligible for an expungement under sections 100I and 100J. If the petitioner is not eligible for an expungement under sections 100I and 100J the commissioner shall, within 60 days of the request, deny the request in writing. If the petitioner is eligible for an expungement under sections 100I and 100J the commissioner shall, within 60 days of the petition, notify in writing the district attorney of the petition and that the petitioner is eligible for an expungement under sections 100I and 100J. Within 60 days of receipt of notification from the commissioner of the filing of the petition and that petitioner is eligible for an expungement

pursuant to sections 100I and 100J, the district attorney shall notify the commissioner in writing of their objections, if any, to the petition for the expungement.

(b) Upon receipt of a response from the district attorney, if any, or within 65 days of the commissioner's notification to the district attorney pursuant to subsection (a), whichever occurs first, the commissioner shall forthwith forward the petition, along with the objections of the district attorney, if any, to the court wherein the petitioner was convicted.

(c) If the district attorney files an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court shall, within 21 days of receipt of the petition pursuant to subsection (b), conduct a hearing on the petition. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 100I and 100J.

(d) If the district attorney does not file an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court may approve the petition without a hearing. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 100I and 100J.

(e) The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the criminal record was created, to the commissioner and to the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

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Chapter 276 SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION

Section 100L DUTY OF CLERK OF COURT AND COMMISSIONER OF CRIMINAL JUSTICE INFORMATION TO EXPUNGE COURT RECORDS AND POLICE LOGS UPON ORDER ISSUED PURSUANT TO SECS. 100F, 100G, 100H OR 100K

Section 100L. (a) Upon receipt of an order by a court pursuant to section 100F, section 100G, section 100H or section 100K the commissioner, the clerk of court where the record was created and the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6 shall:

(1) expunge the record within the care, custody or control of the office, clerk's office or department; and

(2) order all criminal justice agencies to expunge all publicly available police logs maintained pursuant to section 98F of chapter 41 within their care, custody or control.

(b) Any criminal justice agencies receiving an order from the commissioner or the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6 pursuant to subsection (a), shall forthwith expunge all publicly available police logs maintained pursuant to section 98F of chapter 41 within their care, custody or control. Upon receipt of the order all criminal justice agencies shall, upon inquiry from any party, including without limitation, criminal justice agencies, a county agency, a municipal agency or a state agency, inform said party that no record exists.

UNITEHERE!
LOCAL 26

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November 27th, 2019

Chair Cathy Judd-Stein
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Chair Judd-Stein & Massachusetts Gaming Commissioners,

We ask that the Massachusetts Gaming Commission (MGC) do everything in its power to enact a policy to ensure there is no use of information under any circumstances that led to a criminal case which was later sealed in determining suitability of job applicants at Massachusetts gaming facilities.

When the Commonwealth was considering expanded gaming over a decade ago the reason was clear: expand economic opportunity for Massachusetts residents. Utilizing outside information would lock thousands of working families out of career opportunities which directly contradicts the spirit and letter of Massachusetts General Laws Chapter 23K: *"the Commonwealth must provide for new employment opportunities in all sectors of the economy, particularly opportunities for the unemployed ...."*. A policy banning the use of such information should be enacted by the MGC to confirm the spirit and intention of both 205 CMR 134.00 and M.G.L. c.23K and put a stop to any interpretation which would be harmful to the Massachusetts workforce.

The MGC has always ensured that expanded gaming has benefited Massachusetts residents. UNITE HERE Local 26 has had a positive and fruitful dialogue with the MGC since day one on ways to expand these opportunities to every neighborhood in the Commonwealth. UNITE HERE Local 26 believes in second chances. We stand opposed to anything that shuts the door on economic opportunity for Massachusetts residents. Thank you for your consideration on this important matter.

Sincerely,

Brian Lang, President
UNITE HERE Local 26

GREATER BOSTON
LEGAL SERVICES
...and justice for all

December 16, 2019

Jill Griffin, Director Workforce and Diversity
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Re: Use of sealed criminal records

Dear Ms. Griffin:

I am the director of the CORI & Re-entry Project at Greater Boston Legal Services and I am writing to comment on use of sealed records and investigative methods that have the effect of excluding and discouraging many individuals with past CORI, especially from communities of color, from applying for casino jobs.

Casino hiring practices need to align with applicable anti-discrimination laws as well as the goals of the Legislature in enacting expanded gaming and CORI related reforms in 2010 and 2018. The Gaming Commission legislation intended to "provide for new employment opportunities in all sectors of the economy, *particularly opportunities for the unemployed*" and to promote the "development of workforce training programs that serve the unemployed" in need of these jobs. G.L. c. 23K, §§ 1, 18 (emphasis added). Similarly, CORI reform was intended to enable people "to overcome the inherent collateral consequences of a criminal record and achieve meaningful employment opportunities." *Commonwealth v. Pon*, 469 Mass. 296, 297 (2014). The overuse of arrest and criminal record disqualifiers by state employers and licensing agencies shuts countless job applicants out of the economy, and in particular, people of color due to racial disparities in the criminal justice system.

I. The Gaming Commission should comply with the spirit and letter of the law that bars use of sealed records in hiring determinations.

The CORI sealing statute has long permitted job applicants to say they have "no record" when applying for jobs after they seal their records. G. L c. 276, § 100A. Moreover, "sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions," except at sentencing in a subsequent criminal case and in 209A and certain family related court hearings. G. L c. 276, § 100A. The Legislature has gone to great lengths to block inquiries related to sealed cases and arrests that did not end in a conviction. The law, as mostly recently amended, requires that not only job applications, but housing and occupational licensing applications with inquiries about criminal histories, must warn applicants

that they can say that they have "no record" if their criminal records are sealed. G. L c. 276, § 100A.[1]

In 2018, the Legislature also strengthened chapter 151B, § 4, the anti-discrimination law, to specify that it is an unlawful practice for an employer to ask about sealed or expunged records, or to use such records to exclude or discriminate against an applicant. Chapter 151B was also updated to be consistent with new shorter three-year waiting periods for sealing of misdemeanor convictions even when records are not yet sealed. It is an unlawful employment practice for an employer to ask about a misdemeanor conviction unless conviction or completion of incarceration was more than three years ago, or to use the records to exclude, limit, or discriminate against a person for his or her failure to furnish information if the misdemeanor conviction is more than three years old. G.L. c. 151B, § 4. Finally, G.L. c. 151B, § 4 has long prohibited excluding a person "by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted [.]"

Permitting investigators to search for and report on facts underlying a sealed record would eviscerate the benefits of sealing the record and the shorter sealing waiting periods as enacted by the Legislature. The shorter waiting periods are consistent with studies showing that as time passes, the risk of re-offending for people with a criminal history approaches the same risk as that of people without records committing a crime. The risk of a person committing a new offense typically peaks within one or two years after a crime and then declines.[2] Certain convictions, such as offenses that require registration as a sex offender, are never sealable offenses which indicate that the Legislature has already made determinations as to which convictions will remain open and relevant to the public, employers and others. G.L c. 276, § 100A; G.L c. 6, § 178G. Thus, at a minimum, investigators should not be investigating incidents related to a criminal conviction unless the case is not yet sealed.[3]

II. Opening a backdoor to sealed CORI will have a racially disparate impact on applicants for casino and gaming positions.

It is critical that the Gaming Commission abandon use of investigations to uncover facts underlying a sealed criminal record or an arrest that did not end in a conviction because consideration of facts related to these matters will skew the composition of the casino workforce. These

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[1] MASS. GEN. LAWS ch. 276, § 100A, as amended by St. 2018, c. 69, §§ 189-194, requires that an application for employment, housing or an occupational license state: "An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions."

[2] *See* Megan C. Kurlychek, Robert Baume, & Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Criminal Behavior?, 5 CRIMINOLOGY & PUB. POL'Y 483, 498-500 (2006). Most recidivism occurs within three years of the last criminal occurrence. Alfred Blumstein & Kiminori Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, 263 NAT'L INST. OF JUST. J. 10, 11 (2009).

[3] G.L. c. 23K § 4 grants the Gaming Commission authority to obtain data from the Federal Bureau of Investigation (FBI), but reliance on FBI background checks is often unfair to an applicant because FBI records are usually incomplete, may include sealed record information, and/or reflect that a case was filed, but contain no information about the outcome of the case. *See* Maurice Emsellem and Madeline Neighly, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT, Nat'l Emp't Law Project (2013), *available at* http://www.nelp.org/content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf (finding 50 percent of the FBI's records fail to include information on the final disposition of the case).

investigations also will exclude a large sector of the workforce composed of people most in need of jobs, including people who are unemployed due to a past criminal record. People of color are more likely to be arrested, incarcerated, and to have criminal records. *See, e.g.* Marc Mauer, RACE TO INCARCERATION, 138-141 (2006); Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA, 30-31, 49-50 (2006). Having a criminal record has long term consequences that perpetuate poverty and economic disadvantages, particularly in communities of color. *See generally*, Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities,* 12 Geo. J. on Poverty L. & Pol'y 299 (2005).

Using criminal records as a deciding factor instead of conducting individualized assessments of applicants erodes confidence in the Commonwealth's commitment to fair hiring practices and racial equality. In a post-Ferguson world where the fairness of the legal system is more frequently called into question, there is great awareness that people of color are disproportionately involved in the criminal justice system and often poor. While Massachusetts takes pride in its overall low incarceration rates compared to many other states, the ratios for incarceration of black and Latinx individuals are higher than the national average. In 2014, the Massachusetts incarceration rate was 7.5 times higher for blacks than whites while the ratio for the U.S. was 5 to 1.[4] Our state incarceration rate was 4.3 times higher for Hispanics than whites — much higher than the 1:4 ratio for Hispanics nationwide.[5] In Massachusetts, only seven percent of the total population is black, but 26 percent of the incarcerated population is black.[6] Latinx individuals make up ten percent of Massachusetts's total population, but are 24 percent of the incarcerated population.[7] Thus, people who blacks and Latinx are only 17 percent of the Massachusetts population, but constitute 50 percent of those who are incarcerated.

A recent report of the ACLU, *Black, Brown and Targeted*, also documents the persistence of racially discriminatory policing practices. The ACLU studied Boston Police Department's (BPD) "Field Interrogation, Observation, Frisk and/or Search" (FIOFS Reports).[8] FIOS are generated when an officer records an interrogated, observed, stopped, frisked, or searched someone. Controlling for crime, alleged gang affiliation, and other non-race factors, the analysis found that people who were black were involved in 63 percent of these police encounters, despite making up only 24 percent of Boston's population.[9] Because of racial disparities, use of investigative techniques to inquire about

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[4] The national average is also high, but racial disparities are more pronounced in our state.

[5] Sentencing Project, *State by State Data* (2014), available at: http://www.sentencingproject.org/the-facts/#map. The Council of State Governments Justice Center (CSG) similarly indicated that blacks and Hispanics combined were 54 percent of the Massachusetts prison population in 2014, but only 16 percent of the Massachusetts resident population. Whites were 75 percent of the Massachusetts population, but had a lower rate of incarceration (43 percent) as compared to the combined number of incarcerated blacks and Hispanics (54 percent). CSG, Working Group Meeting 1, slide 22 (January 12, 2016). 2013 CARI data also showed that blacks had a higher conviction rate of 16 percent while only being 6 percent of the Massachusetts population. Hispanics had a 15 percent conviction rate, but were only 10 percent of the population. CSG, Working Group Meeting 2, slide 17 (April 12, 2016).

[6] Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons 4 (2016) (citing Carson E. A. (2015). *Prisoners in 2014*. Washington DC: Bureau of Justice Statistics).

[7] Prison Policy initiative, Massachusetts Profile, available at: https://www.prisonpolicy.org/graphs/2010percent/MA_Hispanics_2010.html

[8] ACLU, Black, Brown and Targeted 1 (2014).

[9] *Id.* Racial disparities are not a new issue. *See e.g.* Carol Rose, *Racial Profiling is Alive and Well*, Boston Globe, A-11 (July 22, 2009) ("Targeting black men as 'suspicious' has long been a problem in Massachusetts Law Enforcement."); Bill Dedham, *Police Chiefs Decry Profiling Study, Racial Disparities Found in Traffic Stops,* Boston Globe (May 4, 2004)(three-fourths of 341 Massachusetts police departments had significant disparities in ticketing or searching of minority motorists); Aleksander Tomic & Jahn Hakes, *Case Dismissed: Police Discretion and Racial Differences in*

conduct related to a sealed criminal record or an arrest that did not end in a conviction, will tip the scales in favor of hiring white job applicants over black and Latinx applicants.

III. The Gaming Commission should promote non-discriminatory hiring practices.

The U.S. Equal Employment Opportunity Commission (EEOC) has stated that blanket hiring policies that automatically reject any job applicant with a criminal record are discriminatory and violate civil rights laws. This is because using criminal records as a reason not to hire workers has a disparate impact on racial minority groups. The EEOC issued Guidance on hiring practices in 2012 which cautions employers that they should conduct an individualized assessment before rejecting a person with a criminal record. Factors to consider include the age of the offense, the nature and seriousness of the offense, the age of the person at the time of the offense and completion of the sentence, rehabilitation efforts, success in the same type of job without incident after the offense, and the relationship between the type of offense and the job. The EEOC guidance issued in 2012 explains this topic in more detail and is on its web site: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

The Gaming Commission should consider modeling its hiring process, in part, on the City of Boston CORI ordinance and regulations that attempt to promote equal opportunity hiring. The City of Boston CORI ordinance requires that its staff not conduct CORI screening for non-sensitive jobs, and conduct CORI checks only at the last stage of hiring for sensitive jobs using an EEOC type analysis.[10] If casinos can attract a diverse pool of applicants, a similar hiring policy without automatic disqualifiers would likely promote a more racially balanced workforce.

IV. Criminal records do not equate with bad job performance.

Despite the positive results of various recidivism studies, a criminal record and its stigma continue to create barriers to employment long after an individual poses a significant risk of re-offending. Studies demonstrate most employers will not hire applicants with criminal records.[11] This means that it matters whether or not an investigator can report on information related to sealed criminal records. Although gainful employment is the pathway to a better life and reduces recidivism,[12] jobs are out of reach for countless individuals with criminal records.[13] However, there is a dearth of research linking past criminal records to poor performance in the workplace.[14] A few years ago, researchers from Harvard University and the University of Massachusetts presented findings from their study of former felons in the military.[15] The study found that termination rates

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Dismissals of Felony Charges, 10 A.m. L. & Econ. Rev. 110, 110-111 (2008) (study suggests "more aggressive policing of blacks" and "higher rates of false arrest of blacks for felony charges"

[10] The CORI ordinance and regulations are available at: https://www.cityofboston.gov/fairhousing/hrc/cori.asp.

[11] Scott Decker et al., Criminal Stigma, Race, Gender and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 57 (Jan.2014), https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf

[12] Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks 47 Am. Soc'y Criminology 331 (2009).

[13] Rebecca Vallas and Sharon Dietrich, ONE STRIKE AND YOU'RE OUT (2014).

[14] "Unfortunately, virtually no empirical evidence exists with which to assess the workplace risk or potential of individuals with criminal records, leaving. . . debates [about hiring people with records] largely theoretical." Jennifer Hickes Lundquist, Devah Pager, Eiko Strader, *Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers*, NAT'L INST. OF CORRECTIONS (2016), https://nicic.gov/does-criminal-past-predict-worker-performance-evidence-america-s-largest-employer-2016.

[15] Jennifer Lundquist *et al, supra*, at note 15.

for negative reasons, e.g., misconduct or poor performance, were no higher for enlistees with criminal records than those without records. Enlistees with felony criminal records were also promoted faster and more often attained the rank of sergeant than enlistees without criminal records.[16] These preliminary findings suggest that hiring people with felony convictions, following an individualized, holistic screening process, can result in advantageous outcomes. Professor Jennifer Lundquist, one of the researchers, suspects that people may have "more loyalty to an employer who hires [them] and gives [them] a second chance."[17]

V. The goals of job creation and employment of the unemployed should heavily influence the Commission's policies related to screening of applicants.

The intent of the gaming statute was to expand opportunities for jobs. If there is ambiguity in the law as to screening of applicants, the mandate to offer more jobs to the unemployed should guide the interpretation of the statute or otherwise, a major purpose of the statute as well as criminal justice reform, will be defeated.

Thank you for your time, effort, and consideration of these comments.

Respectfully submitted,

Pauline Quirion
Director, CORI & Re-entry Project
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[16] *Id.*

[17] Jena McGregor, *Why Former Felons May be Good Employees*, WASH. POST (May 6, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/05/06/why-former-felons-may-be-good-employees/?utm_term=.664ad7f4bc67.

ADDENDUM

Mass. Gen. Laws ch. 151B, § 4
Excerpt pertaining to criminal arrests and sealed cases

It shall be an unlawful practice:

. . .

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, **or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276.**

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 ½. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

M.G.L. c 276 § 100A

§ 100A. Requests to seal files; conditions; application of section; effect of sealing of records

Effective: October 13, 2018

Currentness

Any person having a record of criminal court appearances and dispositions in the commonwealth on file with the office of the commissioner of probation may, on a form furnished by the commissioner and signed under the penalties of perjury, request that the commissioner seal the file. The commissioner shall comply with the request provided that: (1) the person's court appearance and court disposition records, including any period of incarceration or custody for any misdemeanor record to be sealed occurred not less than 3 years before the request; (2) the person's court appearance and court disposition records, including any period of incarceration or custody for any felony record to be sealed occurred not less than 7 years before the request; (3) the person had not been found guilty of any criminal offense within the commonwealth in the case of a misdemeanor, 3 years before the request, and in the case of a felony, 7 years before request, except motor vehicle offenses in which the penalty does not exceed a fine of $50; (4) the form includes a statement by the petitioner that he has not been convicted of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses, as aforesaid, and has not been imprisoned in any state or county in the case of a misdemeanor, within the preceding 3 years, and in the case of a felony, within the preceding 7 years; and (5) the person's record does not include convictions of offenses other than those to which this section applies. This section shall apply to court appearances and dispositions of all offenses; provided, however, that this section shall not apply in case of convictions for violations of sections 121 to 131H, inclusive, of chapter 140 or for violations of chapter 268 or chapter 268A, except for convictions for resisting arrest.

In carrying out the provisions of this section, notwithstanding any laws to the contrary:
1. Any recorded offense which was a felony when committed and has since become a misdemeanor shall be treated as a misdemeanor.
2. Any recorded offense which is no longer a crime shall be eligible for sealing forthwith, except in cases where the elements of the offense continue to be a crime under a different designation.
3. In determining the period for eligibility, any subsequently recorded offenses for which the dispositions are "not guilty", "dismissed for want of prosecution", "dismissed at request of complainant", "nol prossed", or "no bill" shall not be held to interrupt the running of the required period for eligibility.
4. If it cannot be ascertained that a recorded offense was a felony when committed said offense shall be treated as a misdemeanor.
5. Any violation of section 7 of chapter 209A or section 9 of chapter 258E shall be treated as a felony.
6. Sex offenses, as defined in section 178C of chapter 6, shall not be eligible for sealing for 15 years following their disposition, including termination of supervision, probation or any period of incarceration, or for so long as the offender is under a duty to register in the commonwealth or in any other state where the offender resides or would be under such a duty if residing in the commonwealth, whichever is longer; provided, however, that any sex offender who has at any time been classified as a level 2 or level 3 sex offender, pursuant to section 178K of chapter 6, shall not be eligible for sealing of sex offenses.

When records of criminal appearances and criminal dispositions are sealed by the commissioner in his files, he shall notify forthwith the clerk and the probation officer of the courts in which the convictions or dispositions have occurred, or other entries have been made, of such sealing, and said clerks and probation officers likewise shall seal records of the same proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings, and except that in any proceedings under sections 1 to 39*I*, inclusive, of chapter 119, sections 2 to 5, inclusive, of chapter 201, chapters 208,

209, 209A, 209B, 209C, or sections 1 to 11A, inclusive, of chapter 210, a party having reasonable cause to believe that information in a sealed criminal record of another party may be relevant to (1) an issue of custody or visitation of a child, (2) abuse, as defined in section 1 of chapter 209A or (3) the safety of any person may upon motion seek to introduce the sealed record into evidence. The judge shall first review such records in camera and determine those records that are potentially relevant and admissible. The judge shall then conduct a closed hearing on the admissibility of those records determined to be potentially admissible; provided, however, that such records shall not be discussed in open court and, if admitted, shall be impounded and made available only to the parties, their attorneys and court personnel who have a demonstrated need to receive them.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation **may answer 'no record' to an inquiry herein relative to prior arrests or criminal court appearances.** In addition, any applicant for employment or for housing or an occupational or professional license may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution." The attorney general may enforce the provisions of this paragraph by a suit in equity commenced in the superior court.

The commissioner, in response to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, shall in the case of a sealed record or in the case of court appearances and adjudications in a case of delinquency or the case of a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution, report that no record exists.

Credits

Added by St.1971, c. 686, § 1. Amended by St.1973, c. 533, §§ 2, 3; St.1973, c. 1102, § 4; St.1974, c. 525; St.1975, c. 278; St.2010, c. 256, §§ 128 to 130, eff. May 4, 2012; St.2018, c. 69, §§ 186 to 192, eff. Oct. 13, 2018.

M.G.L. 276 § 100A, MA ST 276 § 100A
Current through Chapter 88 of the 2019 1st Annual Session

End of Document

Action for Equity

December 16, 2019

Jill Griffin, Director Workforce and Diversity
Massachusetts Gaming Commission
101 Federal St. 12th Floor
Boston, MA 02110

Dear Jill:

Thank you for this opportunity to comment on a MGC consideration of a provision in 205 CMR 134.09 (1) related to sealed adult criminal records. We would also like to thank Pauline Quirion, Director, CORI & Re-entry Project, Greater Boston Legal Services, for her assistance in our review of these issues.

As you know, the Jobs Action Network's Community Pipeline is a campaign of Action for Equity. Members of the Network include: Alternatives for Community and the Environment, Asian-American Resource Workshop, Bowdoin Geneva Neighborhood Association, Cape Verdean Association of Boston, Chelsea Collaborative, Codman Square Neighborhood Development Corp., Dorchester-Roxbury Labor Committee, Fairmount Job Referral Network, Greater Four Corners Action Coalition, La Comunidad Inc./One Everett, MassCOSH, Monserrat Aspirers, Inc., New England United for Justice, ROC Boston, and the Somerville Community Corporation.

The network represents the breadth of the community who live and work in Boston, Everett, Chelsea and Somerville; with allies across the region. Majority of the residents many of the organizations and community partners represent are people of color, immigrant families, low income and low wage workers, tenants, small landlords and concerned families.

Many of our partners are currently conducting CORI sealing services and support as a part of their services and direct worker engagement. Many of our partners were also a part of the State Wide effort to ensure cori sealing was made possible and that laws impacting CORI sealing were advocated for as a means to breaking barriers to employment, housing and educational opportunities.

We would like to make the following statement on behalf of the Jobs Action Network, a program of Action for Equity, and refer you to the comments by Pauline Quirion. In addition, we would like to request that if the Gaming Commission considers any steps that allow review of open source materials related to sealed adult records, that there be further opportunity for public testimony at which we would request an opportunity to speak.

367 Washington St.
Dorchester, MA, 02124
action4equity.org
Tel (617) 620-9904

Action for Equity

We stand firmly **opposed** to using any open source information related to a sealed record as a basis for disqualifying anyone from being licensed by the Gaming Commission. We believe that the legal process establishing sealing was intended to prevent the particular sealed case from following and limiting individuals in future years. This has been particularly important because of the disparate impact of the criminal justice system on communities of color and Black communities in particular. We do not believe removing that benefit for this type of situation was intended.

1. The process of sealing a record **already** requires an evaluation of seriousness and risk:
    a. The most egregious crimes are already not eligible for sealing—no sealed records will be hiding them.
    b. There are time limits without further legal issues required for sealing—so a sealed record offers confirmation that there have been no further issues.
2. Using records of any sort related to a sealed event is a way around a legal procedure—sealing—that is intended to protect the individual from exactly the impact you are considering.
3. The intention of the creation of the potential for sealing records, among other things, is exactly to counter the disparate impacts of the criminal justice system on specific communities. The Massachusetts Gaming Commission should not be re-imposing that disparate impact.
4. Open source records have not been evaluated for accuracy. Social media is rife with malicious accusations specifically intended to cause harm, as when an abuser bullies a victim by asserting on social media that the victim has done something, knowing it will impact their employment. The Gaming Commission should not open the door to unreliable information related to cases that have been sealed.

We appreciate your careful consideration of these issues. If you find, as we hope, that information related to sealed records is not to be used to determine basic suitability, there is a further issue of establishing investigation procedures that will be used uniformly by all investigators. If the situation arises, as it already has, that an investigator sees information but no record and no mention of it on a person's application, what is the next step?

Thank you for your consideration of our views and the comments of Pauline Quirion.

Sincerely,

On behalf of Jobs Action Network:

Antonio Amaya, La Comunidad Inc.

Dinanyili Paulino, Chelsea Collaborative

Mimi Ramos, New England United for Justice

Weezy Waldstein, Action for Equity

Angela Williams-Mitchell, Angela Williams-Mitchell, Roxbury Good Jobs Standards and Community Stabilization Jobs Committees

DATE: December 16, 2019

TO: Chair Cathy Judd-Stein
Commissioner Gayle Cameron
Commissioner Eileen O'Brien
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga

FROM: Edward Bedrosian, Executive Director

RE: Potential Region C Questions for either an RFI and/or Public Comment

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Background

In the Commission's ongoing commitment to evaluate whether or not to re-open Region C to a new competitive category 1 licensing process, it discussed potential questions for a request for information ("RFI") during a public hearing on December 5th, 2019. During that deliberation, the Commission reviewed the following relevant sections of the *Act Establishing Expanded Gaming in the Commonwealth*:

- MGL c. 23K, §1(2): (Findings and Declaration) "*establishing the financial stability and integrity of their sources of financing, is an integral and essential element of the regulation and control of gaming under this chapter*;";
- MGL c. 23K, §4 (12): (Powers of the Commission) "*develop criteria, in addition to those outlined in this chapter, to assess which applications for gaming licenses will provide the highest and best value to the commonwealth and the region in which a gaming establishment is to be located*";
- MGL c. 23K, §18 (11): (Objectives to be Advanced in Determining Granting of License; Statement of findings) *"maximizing revenues received by the Commonwealth*";
- MGL c. 23K, §19(a): (Issuance of Category 1 Licenses) "*The Commission **may** issue not more than 3 category 1 licenses based on the applications and bids submitted to the commission*." (Emphasis added).

At that meeting the Commission was also updated on the current status of the Mashpee Wampanoag Tribe's efforts to keep land in trust in Taunton and Mashpee. The update included an explanation of litigation about the federal land-in-trust determination in both the First Circuit and District of Columbia district courts. The Commission was also updated on the status of Congressional efforts to keep land-in-trust for the Mashpee Wampanoag Tribe.

The Commission also discussed two different paths for requesting information and comment. The first, which the Commission has used routinely in the past, would be to issue a "request for public comment". Public comment tends to attract a wide base of responses and can be very informative with policy based questions.

The second method the Commission discussed would be to issue a "request for information" (RFI). "RFIs traditionally are used to identify industry standards, best practices, potential performance measures, and price structures".[1] An RFI presupposes, but does not mandate, a subsequent procurement process.

For the Commission's consideration, here are some proposed questions for either public comment or an RFI.

Public Comment Questions

- Should the Commission consider re-opening region C?
- What, if any role, should the potential for Tribal Gaming in Region C have in the Commission's consideration to re-open Region C?
- Should the Commission engage in a new gaming market study before making a determination whether or not to re-open Region C? If so, what types of issues should be the focus (e.g.- cannibalization, saturation, etc.)?
- Should the Commission consider the current performance of the existing casinos in deciding whether to re-open Region C?
- Is the Commission's authority to re-open Region C in any way restricted by Section 91 of the Act or by the language of the Compact between the Tribe and the Commonwealth?

[1] https://www.mass.gov/doc/conducting-best-value-procurements-handbook/download, p. 30

- Does the uncertainty of land-in-trust status have a material impact on the ability of commercial developers to obtain financing for a prospective project?
- Should a public hearing be conducted in Region C to allow members of the public to comment on these matters directly to the Commission?

Request for Information Questions:

- What is the best way to structure a request for a gaming market study in Region C to ensure that the impacts of a casino on both Region C and the Commonwealth as a whole are measured?
- What factors should a gaming market study in Region C consider? Is it possible to measure the impact that the absence of any casino in Region C has on the region and the Commonwealth?
- Given the context of the Massachusetts' gaming market, when would be the best time for a Region C gaming market study?
- What if any impact should the potential introduction of sports betting have on any market study?

If the Commission decides that public comment or an RFI is an appropriate next step to help determine whether or not or when to issue a new RFA-1 for Region C, agreement upon which questions to issue either as public comment or an RFI is necessary.

Next Steps

The Commission could decide to wait before engaging in either a request for public comment or an RFI. The Commission could decide to issue a request for public comment first and evaluate those responses before deciding to issue an RFI. Finally, the Commission could decide to issue both a request for public comment and an RFI at the same time.

Brockton, Massachusetts
"City of Champions"
Moises M. Rodrigues – Mayor

Cathy Judd-Stein, Chair
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA

Dear Madame Chair and Commissioners:

I write to follow-up on my September 30, 2019 letter to express my frustration and disappointment with your response to date, and to request that you do better.

In my 9/30/19 letter, I urged you to promptly issue a request for applications (RFA) for a Region C gaming license and to determine before the end of the year whether any community and developer other than Brockton and Rush Street were prepared to develop a resort casino in keeping with the requirements set forth in the 2011 gaming statute. Surely three months should have been enough to accomplish this task but we are nearing the end of December, and the Commission has made no progress in Region C.

Rather than issue an RFA, you have discussed something called an RFI or "request for information," which neither I nor my procurement advisors have ever heard of. You have described this so-called RFI as a possible precursor to an RFP, but not as a definite precursor. And you have described the RFP to which the RFI *might* be a precursor as an RFP for a market study, *i.e.*, not an RFA for an actual commercial casino license. To a layperson like myself, and even to your own in-house experts, it is not clear what any of this means. What is clear, however, is that the Commission has failed to act and the RFI has still yet to be issued. There have been several meetings debating what this means, and what form it should take, with no end – and no action – in sight.

Based on everything that has been said up until now at your public meetings since September 30, it appears as if: (i) the earliest the so-called RFI would issue would be January or February of 2020; (ii) the RFI would principally ask potential market analysts what the optimal time might be to do a market study, and what the geographic scope of that study should be; (iii) responses to the RFI would be due in 8-12 weeks, *i.e.*, in March or April or May of 2020; (iv) after receiving the RFI responses, the Commission would discuss whether or not to issue an RFP for a market study; (v) if the Commission were to decide to issue an RFP for a market study, those responding would have three months to respond, and the Commission would then take additional time to select a winner; (vi) if and when the winner of the RFP did its work, which would take additional months, the Commission would then discuss whether to issue an RFA for a commercial resort casino license in Region C; and (vii) if and when that RFA process was initiated, it would then take additional years before a license issued, and additional time before ground was broken for the building of a Region C casino resort.

Under the process you have established, starting with the RFI, it will be years before you even start debating whether or not to entertain applications for the development of a casino in Region C, and even more years, if ever, before a resort casino is built. Under the process you have developed, it is hard to imagine that I will see my city or any other city or town in Region C enjoy

the benefits – jobs and revenue – that the 2011 gaming statute promised every region in the Commonwealth.

While you debate and meander about precisely what questions to ask in an RFI, and what the exact right time might be to do a market study, you ignore several crucial facts:

1. The market study you have been discussing has already been done. It was done by the Innovation Group at the request of Neil Bluhm and Rush Street, and it was presented to the Commission in early September 2019.
2. The Innovation Group's market study shows that a casino in Brockton would be more than economically viable. It shows that a casino in Region C would generate more than $60 million in net revenue annually to the Commonwealth, *i.e.*, revenue over and above what is now being generated by MGM and Encore.
3. On the basis of the Innovation Group study, Mr. Bluhm and his business partners are prepared to spend well over $700 million of their own money building a resort casino in Brockton, and they are prepared to start building (and spending) today.
4. Mr. Bluhm has met with me and other city leaders, and he has shown flexibility in his plans, and a desire to be a real collaborator with the City of Brockton.
5. As the Commission engages in endless debate, Brockton and Region C fall further and further behind the other regions of the state.

Mr. Bluhm and his colleagues have been patient up until now, but at some point their patience will run out. They have presented Brockton with the economic opportunity of a lifetime, but the Commission seems intent on squandering this opportunity. This is an issue of fundamental fairness and equity. Everett has benefitted from the gaming act. Springfield has benefitted. Why not Brockton, a City with the 4th largest school district facing major financial hurdles each year?

I ask that you show some accountability by responding to this letter. I ask that you not ignore this letter like you ignored my 9/30/19 letter. Specifically, I request that as soon as reasonably possible you:

1. Explain what, if anything, is inadequate about the Innovation Group's market study that was given to you in early September 2019. Explain why it is a study that no one should rely upon. Explain why you believe you are in a better position to determine how and when Mr. Bluhm should spend his money than he is.
2. Explain why the Commission hasn't even bothered to try to find out over the past two years whether any developers other than Mr. Bluhm and Rush Street have any interest in developing a casino project in Region C that meets the requirements of the gaming statute. (In July 2018, shortly after Mass Gaming & Entertainment's (MGE) lawyers first asked you to reconsider MGE's earlier application for a license to build a casino in Brockton, former Commissioner Crosby suggested that you put out a "solicitation of interest" to find out if any other developers would want to compete with MGE. He noted at the time that if no one else were interested, it would expedite and inform the Commission's decision about reconsidering MGE's proposal. That common-sense suggestion

was made over a year and a half ago. Why has the Commission not yet acted on it?

3. Explain why the Commission appears content to wait endlessly to see if the Mashpee Wampanoag Tribe prevails in any of its lawsuits or ever manages to get its proposed federal legislation passed – a proposal that does not benefit Brockton nor the Commonwealth.

If you can't find any reasonable fault with the Innovation Group's market study, and you don't have a good reason to continue not to determine if other suitable developers are interested in bidding for a Region C license, I would ask that you then immediately do what was originally requested I asked you to do in my 9/30/19 letter, namely, issue an RFA for a commercial resort casino license in Region C. The only conclusion we can draw regarding the inaction of the Gaming Commission is that it is biased against Brockton, and not treated as fair as other communities that have been involved in this process.

My request is for an RFA, not a RFI to be followed some day by a RFP for a market study to be followed after that, if ever, by an RFA for a commercial license. If the Commission don't have good answers to the simple questions I have posed, I am asking that you proceed to an RFA promptly.

If, as we suspect, no suitable candidate other than Rush Street responds to the RFA, I would ask that you expedite reconsideration of MGE's application, including the changes it has made to its resort proposal. This would be the right thing to do for Brockton, and for the entire southeast region. Do what the 2011 gaming statute and your own mission statement mandate – make the most of the opportunity before you to create thousands of jobs for residents of Brockton and generate tens of millions of dollars in revenue for the Commonwealth and the City of Brockton.

I look forward to your response.

Very truly yours,

Moises Rodrigues, Mayor of the City of Brockton

cc: Governor Charlie Baker
Lieutenant Governor Karyn Polito
Senate President Karen Spilka
House Speaker Robert DeLeo

DATE: December 2, 2019

TO: Chair Cathy Judd Stein
Commissioner Gayle Cameron
Commissioner Eileen O'Brien
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga

FROM: Edward Bedrosian, Executive Director

RE: Potential Questions for a Request for Information Concerning a Region C Procurement

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Background

The Commission has asked staff to help develop appropriate questions for a potential request for information ("RFI") concerning region C.[1] In addition to proposed staff questions; attorneys for Rush Street Entertainment have also submitted proposed questions for an RFI. (See included letter from Attorneys David Apfel and Roberto Braceras, dated November 29, 2019)

If the Commission decides an RFI is an appropriate next step to help determine whether or not or when to issue a new RFA-1 for region C, agreement upon which questions to include in the RFA-1 would be necessary.

Potential Questions

1. **Market Study**:
    a. What obligation under the Expanded Gaming Act does the Commission have to consider market conditions just in region C or in the overall Commonwealth or, even, in the northeast region?

[1] A request for information (RFI) is a process to collect information from various potential suppliers that can help inform next steps in a procurement process. https://en.wikipedia.org/wiki/Request_for_information

i. Given that Massachusetts is in the introductory time of casino gambling, when would be the appropriate time for a market study?
ii. What impact, if any, would the introduction of sports betting have on either a region C specific or Commonwealth wide analysis?
iii. What impact, if any, would any of the pending legislative proposals, including changing the Commission's discretion to issue a second category 2 license in region C or the expansion of table games at Plainridge Park Casino, have on any market study?
iv. What impact, if any, would the current status of the Mashpee Wampanoag's tribal casino in region C have on any market study?

2. **Impact on Region C**:
    a. Is there a way to measure the economic impact of a casino in region C without a specific proposal?
        i. If so, is there a way to measure a region C casino's ability to recapture gaming revenue from neighboring states?
    b. Is there a way to measure the economic impact of the absence of a casino in region C or the impact on the Commonwealth without a specific proposal?

3. **Potential Mitigation in Region C**:
    a. Does the Expanded Gaming Act allow for the Commission to mitigate the "absence" of a category 1 casino in Region C?
    b. If not, how would the Expanded Gaming Act need to be changed to allow the Commission to mitigate the "absence" of a category 1 casino in region C?

<u>Next Steps</u>

If the Commission decided an RFI is the appropriate next step, staff would work with the legal division and a potential procurement team to put an RFI together. It would be the intent of the RFI that a respondent to the RFI would not be precluded from responding to any subsequent procurement as a result of the RFI.

The Commission could also decide it is premature to issue an RFI and/or decide to issue any questions purely for "public comment" versus a formal RFI process.

GOODWIN

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November 29, 2019

VIA EMAIL AND HAND DELIVERY

Chairman Cathy M. Judd-Stein and Commissioners
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Re: Mass Gaming & Entertainment LLC and Region C

Dear Chair Judd-Stein and Commissioners Cameron, O'Brien, Stebbins, and Zuniga:

We write on behalf of our clients, Neil Bluhm, Rush Street Gaming, and Mass Gaming & Entertainment, in anticipation of this coming Thursday's public meeting of the Commission at which you are scheduled to discuss two items bearing on the future of Region C: (i) the current status of the Mashpee Wampanoag Tribe's (the "Mashpee" or the "Tribe") litigation and legislation efforts; and (ii) the so-called "RFI" or Request for Information that Executive Director Bedrosian and his staff have been drafting, and that you apparently intend to disseminate publicly at some point soon. Most fundamentally, our clients remain interested in and committed to their plan to develop a resort casino in Brockton. But as we have previously indicated, our clients are concerned with the pace and lack of urgency with which the Commission has approached Region C. Our clients are ready to begin development and provide thousands of well-paying jobs, and tens of millions of dollars in licensing fees and tax revenues to Brockton and the Commonwealth today. In the meanwhile, while the Commission deliberates, Rhode Island and Connecticut continue to obtain a monthly windfall of millions of dollars in gaming revenue from Commonwealth residents, at the direct expense of the Commonwealth. With all this in mind, we ask that whatever else you do with Region C, you recognize that ongoing delay comes at a tremendous human and financial cost. We ask that you move the process forward quickly.

With respect to the anticipated RFI, we request that you ask the following questions, all of which are designed to determine under what circumstances, if any, suitable developers other than our clients would be prepared to apply for a Category 1 gaming license in Region C:

1. If the Commission issued a new Request for Application ("RFA") for a Category 1 gaming license in Region C would you submit an application? In answering this question, please take into account that per statute and the Commission's regulations, the minimum eligibility requirements for applicants for Category 1 gaming licenses in the Commonwealth include:(i) paying an initial non-refundable application fee of $400,000; (ii) paying an $85 million licensing fee; (iii) investing a minimum of $500 million in the resort-casino project; and (iv) submitting all company officers, directors, beneficial owners, and key employees to a rigorous and thorough suitability and background investigation.

2. If your answer to question #1 was "no," please explain why, and please explain what would need to change before you would entertain submitting an application for a category 1 gaming license in Region C.

3. Do you believe that the Massachusetts Gaming Commission should conduct a new market study of gaming in the state and the region before proceeding with a RFA for a commercial resort casino license in Region C? Please explain.

4. At least one resort casino developer has very recently commissioned a market research team to conduct an analysis of the gaming market in Massachusetts and the region. The market study that was conducted indicates that there has been a softening in the local gaming market over the past several years, and that the development of a resort-casino in Region C would not be as profitable as experts thought several years ago, but that it would still be quite profitable, while also producing significant net gaming revenues for the Commonwealth, and significant revenue, economic development, and jobs for the host community and the region more generally. The developer who commissioned this recent study is prepared to put over $700 million of its own money at risk on the basis of the results of the study it commissioned. Is there any reason why the Commission should not rely on the results of this study? Please explain.

With regard to pending tribal litigation and legislation, there are two ongoing litigation matters and two proposed Congressional bills to consider. The first of the two litigation matters is pending in the U.S. Court of Appeals for the First Circuit and is captioned *David Littlefield, et al. v. Mashpee Wampanoag Indian Tribe*, Case No. 16-2484 (the "Massachusetts Litigation"). The other litigation matter is an Administrative Procedure Act ("APA") case that is pending in U.S. District Court in the District of Columbia. That matter is captioned *Mashpee Wampanoag Tribe v. David Bernhardt (in his official capacity as Sec. of the Interior) and the U.S. Department of the Interior, and David Littlefield, et al. (as intervenor-defendants)*, Civil Action No. 18-2242 (the "DC Litigation"). The two legislative initiatives are: (i) H.R. 312 which is titled the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act"; and (ii) H.R. 375 which has been dubbed the "Carcieri Fix," as it is intended to undo the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) which held that the only Native American tribes that could benefit from the government's land-into-trust process are those that were "under federal jurisdiction" in 1934.

This letter is not the time or place to discuss the parties' legal arguments in the pending litigation matters or to discuss the current procedural posture of either the litigations or the legislative initiatives. We trust that the Commission's staff will provide you with accurate, neutral and disinterested information in this regard. Here, we simply note certain indisputable facts that should lead any reasonable, objective observer to conclude that: (i) there is virtually no chance that the Tribe will ever succeed in gaining land-in-trust status or qualifying to develop a tribal casino in Region C; (ii) although the Tribe's current efforts will all inevitably fail, it will be years before all such efforts are finally and fully resolved; (iii) any further delay by the Commission to act on Region C in deference to the Tribe will invite litigation on constitutional equal protection grounds – *see, e.g.*, *KG Urban Enters., LLC. v. Patrick*, 693 F.3d 1, 25 (1st Cir. 2012) (expressly noting that the defense against an equal protection constitutional claim brought by parties interested in developing a commercial casino in Region C "would

become weaker with the passage of time"); and (iv) allowing the status of the Tribe's litigation and legislative efforts to in any way dictate the timing of a Commission decision to move forward with a commercial RFA process in Region C would be tantamount to a decision to abandon this region, and confirm its status as the forgotten step-child of the Commonwealth.

The indisputable facts that we ask the Commission to consider in its deliberations regarding what role, if any, the Tribe's ongoing litigation and legislative efforts should play in the Commission's decision-making regarding Region C include the following:

- In the district court decision that led to the Tribe's current appeal in the Massachusetts Litigation, U.S. District Court Judge William Young, reversed the U.S. Department of the Interior's earlier decision to grant the Mashpee land-in-trust status, holding that Interior's decision was clearly wrong, indeed, "not a close call." *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016).

- After appealing Judge Young's decision in the Massachusetts Litigation, the United States, which had originally joined the Tribe in the appeal, withdrew from the case, and acquiesced to Judge Young's opinion.

- The Tribe has repeatedly moved to stay the appeal in the Massachusetts Litigation. In fact, for three years the Tribe did nothing in the Massachusetts Litigation other than maneuver to stay the matter. After noticing its appeal in 2016, the Tribe first filed substantive papers this past summer (August 2019) when it was forced to do so after the First Circuit, on the Court's own initiative, questioned whether or not the Court even had jurisdiction to consider the Tribe's appeal. The question of the Court's jurisdiction remains a live issue, and will be decided by the First Circuit in conjunction with the Court's consideration of the merits (or lack thereof) of the Tribe's substantive appeal in 2020.

- After the Tribe's effort to obtain land-in-trust status was remanded by Judge Young to the U.S. Department of the Interior, the Department agreed with Judge Young's decision, and in a lengthy 2018 opinion, which took nearly a year and one-half to issue, it rejected the alternative ground for land-in-trust status advanced by the Tribe. *See* U.S. Dep't of the Interior, Record of Decision, Letter from Tara Sweeney, Assistant Secretary for Indian Affairs, to The Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe (Sept. 7, 2018).

- The DC Litigation is the Tribe's appeal of Interior's September 7, 2018 decision rejecting the Tribe's alternative land-in-trust theory. The Tribe has brought its case under the APA. Independent of the merits, which we believe are squarely on the side of Interior, there can be no dispute that APA appeals always stand a steep uphill fight given the deference accorded to agencies as a matter of law. *See, e.g.*, *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392, 1401 (Fed. Cir. 2017) (noting that Interior has "primary jurisdiction" to which courts defer on issues of tribal recognition); *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016) (explaining that the court is "bound to defer to the [Interior Board of Indian Appeals'] reasonable interpretation of" the Indian Reorganization Act).

- In a September 3, 2019 submission to the First Circuit in the Massachusetts Litigation, the Tribe candidly stated that its efforts to overturn Interior's September 7, 2018 decision through the DC Litigation "could possibly require additional years of litigation."

- The Tribe currently owes its casino partner, the Genting Corporation of Malaysia, over $500 million. *See, e.g.,* Tanner Stening, "Allegations Against Mashpee Wampanoag Tribal Leaders Come to Head" (Taunton Gazette, Sept. 9, 2019), https://www.tauntongazette.com/news/20190909/allegations-against-mashpee-wampanoag-tribal-leaders-come-to-head.

- It has been widely reported that there is an ongoing extensive federal grand jury investigation into the financial workings of the Mashpee, including how, in the absence of any actual building development, it has spent the hundreds of millions of dollars that it has received in loans from Genting. *See, e.g.*, Tanner Stening, "Current, Former Mashpee Wampanoag Tribe Treasurers Subpoenaed" (SouthCoast Today, Sept. 5 2019), https://www.southcoasttoday.com/news/20190905/current-former-mashpee-wampanoag-tribe-treasurers-subpoenaed; "FOLLOW THE MONEY – 3rd tribal financial officer subpoenaed," http://reelwamps.com, dated August 7, 2019.

- Tribal members are actively engaged in an effort to remove Chairman Cedric Cromwell, Vice Chairwoman Jessie "Little Doe" Baird, and Treasurer Gordon Harris from office, based on allegations of wrongful conduct concerning the Tribe's debt of over $500 million to Genting.

- On the legislative front, although both H.R. 312 and H.R. 375 received favorable votes in the House back in May 2019, neither bill has advanced at all in the Senate. Even Tribal proponents of the bills have acknowledged that the "road ahead is difficult." *See* Memo from Chairman of the National Indian Gaming Association ("NIGA") to NIGA Member Tribes, dated May 16, 2019. Other, more independent, observers have noted the impossibility of either bill passing in the Senate in either 2019 or 2020, especially givin the context of substantial bipartisan opposition and a presidential election cycle. *See, e.g.*, Bill Prognosis Analysis, GovTrack.us. 2019 (both bills have a "3% chance of being enacted"); Brittany Webb, "A Clean Carcieri Fix: The Legislation Congress Will Not Pass" (Legislation and Policy Brief, Nov. 25, 2019) (senate action on H.R. 375 "unlikely to occur during a Presidential election cycle"); Phillip Conneller, "Mashpee Wampanoag Tribe Treasurers Subpoenaed by Federal Grand Jury" (Casino.org, Sept. 5, 2019) (H.R. 312 has a "slim chance of success in the Senate"). Indeed, the existence of substantial Democratic opposition in the Senate has led many to opine that even if the Democrats were to retake the White House and the Senate in 2020 (two very big "ifs"), even then there would not be sufficient Senate support to enact either H.R. 312 or 375. *See, e.g.*, Letter from Senators Reed and Whitehouse to Minority Leader Schumer, dated July 11, 2018 (copy attached as Ex. A); Letter from Rhode Island Governor Gina Raimondo to Representative Bishop, Chairman of the House Committee on Natural Resources, dated July 30, 2018 (copy attached as Ex. B). And, of course, even if somehow either H.R. 312 or 375 were to find traction following the 2020 elections (with both bills, of course, needing to be re-drafted and re-filed, and with the legislative process beginning afresh in the new Congress), at least another year and a half would be lost

followed by additional years in the inevitable litigation that would follow any conceivable enactment of either bill.

- H.R. 312 has even been criticized by the Mashpees' sister-tribe, the Aquinnah Wampanoag, which, in a January 2019 letter to the Commission, expressed its "serious concerns" with the bill.

In sum, the indisputable facts make clear that the chance of the Tribe prevailing in either of its current court actions is nearly impossible, and, if anything, the Tribe's prospects for legislative "progress" in the Senate is even more remote. In fact, there would appear to be a greater likelihood that Tribal leaders who have pushed for land-in-trust status and tied their fortunes to Genting and the development of a casino in Region C, will face criminal charges, and/or that they will be recalled or demoted by their own constituency, than there is any chance of a tribal casino in Region C ever being developed.

Any decision by the Commission to wait and see how the tribal litigation and legislation play themselves out over time would appear to be the equivalent of a decision never to take action in Region C. Simply put, the sliver of a chance, if any, that the Tribe may ever ultimately prevail in court or in Congress should not be used as an excuse not to move forward promptly in Region C.

If the Commission is concerned with the risk of oversaturation of the New England gaming market, it should conduct a market study, but there is no reason to use the Tribe and the Tribe's circumstances as a reason for delay. As for a market study, we have previously provided you with several such studies that have been performed by the Innovation Group, the most recent having been completed within the past three months. We are happy to have the most recent study updated, and to provide you with copies of other studies that Rush Street and its business partners have commissioned. Likewise, our clients would be happy to cooperate however you see fit in a new study or in updating its most recent study using whatever parameters or criteria the Commission might request. At bottom, our clients' interests are very much aligned with the Commission's in not wanting to invest many hundreds of millions of dollars in a resort casino development project unless the project is going to be profitable, and produce meaningful net revenue for the Commonwealth, and significant revenue, economic development and jobs for the host community and surrounding communities in Region C. If the market were oversaturated, our clients would not have an interest in pursuing its investment in Massachusetts. Our clients are just as interested in answering the question of oversaturation as the Commission. If that is the Commission's real concern, we would support moving forward with another study notwithstanding the studies that have been done to date.

As always, if you have questions regarding any of the above, please feel free to reach out directly to either of us.

Very truly yours,

David J. Apfel

Roberto M. Braceras

cc: Ed Bedrosian, Executive Director, MGC
Catherine Blue, General Counsel, MGC
Neil Bluhm

Exhibit A

United States Senate

WASHINGTON, DC 20510

July 11, 2018

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

Dear Minority Leader Schumer:

We write to express our serious opposition to S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. This legislation, introduced by Senator Markey and Senator Warren, would reaffirm a decision by the Department of the Interior to take land into trust for the Mashpee Wampanoag Tribe in Massachusetts. In doing so, the legislation would circumvent the 2009 Supreme Court decision in Carcieri v. Salazar, a case involving the Narragansett Tribe in Rhode Island in which the Court held that the Secretary of the Interior could not take land into trust for tribes that were not under federal jurisdiction in 1934.

If signed into law, S. 2628 would allow the Mashpee Wampanoag Tribe to construct and operate a Malaysian-backed Indian casino in Taunton, Massachusetts. As a result, federally-recognized tribes in Rhode Island would argue that they hold the same standing as the Massachusetts tribe and request that similar legislation be introduced on their behalf. As you know, we have long opposed doing so due to potential conflicts with the 1978 Rhode Island Indian Claims Settlement Act, which ensures that settlement lands remain subject to Rhode Island state law.

We respectfully request that this legislation not advance to the Senate floor for consideration. We will be obliged to use all avenues to block this legislation if there is an attempt to move it.

Sincerely,

Jack Reed
United States Senator

Sheldon Whitehouse
United States Senator

Exhibit B

DAVID N. CICILLINE
1ST DISTRICT, RHODE ISLAND

2244 RAYBURN BUILDING
WASHINGTON, D.C. 20515
(202) 225-4911
(202) 225-3290 (FAX)

1070 MAIN STREET, SUITE 300
PAWTUCKET, RI 02860
(401) 729-5600
(401) 729-5608 (FAX)

Congress of the United States
House of Representatives
Washington, DC 20515

CO-CHAIR, DEMOCRATIC POLICY AND COMMUNICATIONS COMMITTEE

COMMITTEE ON THE JUDICIARY

RANKING MEMBER, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY

COMMITTEE ON FOREIGN AFFAIRS

SUBCOMMITTEE ON EUROPE, EURASIA, AND EMERGING THREATS

SUBCOMMITTEE ON MIDDLE EAST AND NORTH AFRICA

August 9, 2018

The Honorable Robert Bishop, Chairman
House Committee on Natural Resources
123 Cannon House Office Building
Washington, DC 20515

Chairman Bishop,

My governor, Gina Raimondo, has asked me to deliver the attached letter expressing her strong opposition to H.R. 5244, the Mashpee Wampanoag Trip Reservation Reaffirmation Act. Thank you for your attention to this issue and your consideration of her concerns.

Sincerely,

David N. Cicilline

State of Rhode Island and Providence Plantations
State House
Providence, Rhode Island 02903-1196
401-222-2080

Gina M. Raimondo
Governor

July 30, 2018

The Honorable Robert Bishop
U.S. House of Representatives
Chairman, House Committee on Natural Resources
1017 Federal Building
324 25th Street
Ogden, UT 84401

Dear Mr. Bishop:

On behalf of the State of Rhode Island, I write to express serious concerns regarding H.R. 5244, the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act" (the Act). If passed, the Act would allow the Mashpee to by-pass the well-settled Indian Reorganization Act (the IRA) and have land taken into trust for purposes of operating a resort casino in Taunton, Massachusetts. The Act would directly undermine decisions of the United States Supreme Court, the United States District Court for the District of Massachusetts and the current view of the Department of the Interior (the "Department") that the Secretary of the Interior is not authorized to take land into trust for the Mashpee or any other tribe that was not under federal jurisdiction as of 1934. The Act would also require that any federal lawsuit challenging this trust acquisition – including an action pending right now – be "promptly dismissed."

The IRA was enacted almost a century ago to allow the Secretary to acquire property and take that property into trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. Prior Secretaries took the position that IRA's grant of authority to take land in trust was virtually unlimited. Rhode Island successfully fought a ten-year legal battle with the Department to limit the Secretary's power to take land in trust under the IRA. *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009) (limiting the Secretary's authority to take land in trust only for those tribes under federal jurisdiction as of 1934). The IRA applies only to three specifically-defined categories: "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood." 25 U.S.C. § 5129. Under the first definition of "Indian," trust applicants must show that they are of Indian descent and are members of a recognized Indian tribe that was under federal jurisdiction as of the date of passage of the IRA, June 18, 1934. The second definition of Indian refers back to the first, meaning applicants must be "descendants of . . . members [of any recognized Indian tribe now under Federal jurisdiction]." *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391, 396, 398 (D. Mass. 2016), *appeal pending*, No. 16-2481 (1st Cir. 2016). Thus, the IRA only authorizes the Secretary to convert land to trust for

Indians under federal jurisdiction at the time of passage, along with any other Indians who were at least one-half Indian descent. U.S. Dep't of the Interior, Office of the Solicitor, Letter to the Secretary of the Interior re: "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act" (Mar. 12, 2014) ("M-Opinion") at 12.

Recognizing this, in 2016, a Massachusetts federal district court overturned a 2015 Department decision to take land into trust for the Mashpee. The court instructed the Department that the second definition of "Indian" was not ambiguous and that the Mashpee clearly did not fit within it. *Littlefield*, 199 F. Supp. 3d at 396 (rejecting the Secretary's claim that she was authorized to take land in trust for the Mashpee as "not a close call"). The court further held that, despite their subsequent acknowledgement by the federal government, the Mashpee do not fall under the IRA because they were not "under federal jurisdiction in 1934." *Id.* at 396-97. Since the Mashpee are not eligible under IRA, the Secretary lacked the authority to take land into trust for their benefit. *Id.* at 397. The court overturned the Department's decision and remanded the matter back for further review of the Mashpee's application. *Id.* at 400. In June 2017, the Department shared a draft revised decision with the Mashpee and the citizens who had brought the *Littlefield* action denying the Tribe's land-in-trust request.

Undercutting the plain language of the IRA and clear precedent has the potential of creating chaos and conflict for state governments.

If enacted, the Act would undercut the Supreme Court's decision in *Carcieri*, reverse the federal district court's decision in *Littlefield*, and affirm the former Secretary's illegal decision-making process in the Mashpee case. Worse, Interior's discredited rationale could form the basis for other illegal fee-to-trust conversions by the Secretary in the future. Codifying the Secretary's wrongful interpretation of the IRA poses real problems for many jurisdictions. It could open the door to other fee-to-trust conversion in states, like Rhode Island, whose tribes are excluded from the trust provisions of the IRA.

Federally recognized tribes in these states will argue that they stand in no different position from the Mashpee and that the Secretary's discredited rationale should apply to them as well. Federal trust acquisitions strip the states of their jurisdiction over land, encourage tax free and tax-advantaged sales on trust property and give rise to complex jurisdictional "checkerboarding" problems. The acquisition of land in trust is often a necessary precondition to the establishment of a federal Indian casino. Trust acquisitions should, therefore, strictly conform to the plain language of, and limitations set forth in, the IRA. They should not be based on a firmly discredited legal rationale to which even the current Secretary of the Interior does not adhere.

I understand that a subcommittee hearing was held to review this legislation on Tuesday, July 24, 2018. However, the following questions were not addressed during the hearing:

1) If the Act passes, would not every tribe that is excluded from the trust provisions of the IRA seek passage of a similar bill?

2) Does this Act not throw out the well-settled eligibility criteria determined appropriate by Congress under the IRA for tribes to receive land in trust?

3) Doesn't the Act violate the U.S. Supreme Court's decision in *Carcieri v. Salazar* since it dispenses with the requirement that the Mashpee be under federal jurisdiction as of 1934?

4) The Act seeks to reinstate a decision of the Department of the Interior that a federal court overturned. What public policy is served by overturning the well-reasoned decision of a federal court that is based on Supreme Court precedent?

5) The Act prohibits the filing or maintenance of any legal action relating to the Department's decision to acquire land in trust for the Mashpee and requires the dismissal of pending actions, including the *Littlefield* case now pending in the First Circuit. How is it that the Act does not violate the U.S. Supreme Court's precedent that Congress may not pass a law that directs the outcome of a single case?

Thank you for your consideration.

Sincerely,

Gina M. Raimondo
Governor

TO: Chair Judd-Stein, Commissioners Cameron, O'Brien, Stebbins, Zuniga

FROM: Mark Vander Linden, Director of Research, Responsible Gaming

DATE: December 19, 2019

RE: MGC Research Services Award

M.G.L. c. 23K, § 71directs the Massachusetts Gaming Commission (MGC) to develop an annual research agenda in order to understand the social and economic effects of expanding gaming in the commonwealth and to obtain scientific information relative to the neuroscience, psychology, sociology, epidemiology and etiology of gambling. Since 2014, efforts to fulfill this mandate have resulted in a comprehensive baseline understanding of conditions prior to casino introduction and numerous studies that have given the MGC and key stakeholders a greater understanding of the effects that casinos in Massachusetts have on residents, towns and communities.

The original procurement to study the social and economic impacts of expanded gaming expired at the end of FY19. In June 2019, the MGC released an RFR to solicit bids for a multi-year, multi-method, multi-disciplinary, multi-phase comprehensive research project on the economic and social impacts of the introduction of casino gambling in Massachusetts. This RFR presented the MGC an opportunity to build upon the existing research efforts and continue the implementation of the Gaming Research Strategic Plan adopted in 2018. Despite a wide release, the UMass Amherst School of Public Health and Health Sciences and the UMass Donahue Institute who is the current contractor was the only respondent. Together several partners, they form Social and Economic Impacts of Gambling in Massachusetts (SEIGMA) research team.

A procurement team comprised of MGC staff and four additional persons with social and economic research expertise reviewed the proposal. Following four rounds of review and revisions, the team unanimously endorsed the proposed scope and budget presented by the SEIGMA team.

The thoughtful proposal produced by the SEIGMA team strives to provide a comprehensive understanding of key measures of interest to the MGC and stakeholders. The proposed work incorporates priorities of the Commission such as community engagement, knowledge translation and flexibility to respond to new and emerging issues by including 2-4 ad hoc studies annually. The average annual budget spanning 5 ½ years is $1millon but in FY22 there will be an additional $1.4million needed in order to field the follow-up general population survey.

The strength of their proposal rests on 8 overarching features within their research approach:

1) **A highly skilled and experienced team** who over the past six years, has produced 29 reports and academic publications.
2) **Continuity with the existing research** which would build on the multi-faceted, multi-year socioeconomic impact studies conducted to date.
3) **Collaborative orientation** whereby major stakeholders provide regular input to the project.
4) **Strengthening community-engaged research** which ensures uptake of research results by groups at the greatest potential of benefiting from research.
5) **'State of the art' analytical framework** which was developed for the first iteration of SEIGMA work.
6) **Comprehensive analysis** establishes the impacts of casino gambling over time both at the state and regional levels.
7) **Focus on policy-relevant findings** so that regulators can inform policy which ensures that the benefits of gambling are maximized and harms minimized.
8) **Ongoing evaluation** which produces comprehensive reports every 2-3 years as opposed to a pre/post casino opening study as was described in the original scope.

The initial 18-months of their proposed work will touch on a range of social and economic measures. Reports and data collection efforts sorted by operator and region include;

MGM Springfield	Encore Boston Harbor	Plainridge Park Casino
Springfield Follow-Up Targeted Population Survey Report		
	Encore Construction Report	
MGM Patron & License Plate Survey Report	Encore Patron & License Plate Survey and Report	
MGM New Employee Survey Report	Encore New Employee Survey and Report	
MGM Operating Report	Encore Operating Report	PPC Operating Report
Lottery Impacts Report, Springfield		
Key informant interviews	Key informant interviews	
Focus Groups	Focus Groups	

I recommend that the MGC extend a contract to UMass SEIGMA based on the procurement team's recommendations and seek approval from the Commission to do so.

GameSense Program Update

December 19, 2019

GameSense is a responsible gaming program designed to ensure that gambling remains a safe form of entertainment. It aims to advance an effective, sustainable and socially responsible approach to gambling for both casino patrons and staff.

GameSense is built on a stepped-care approach, which recognizes that different players are susceptible to varying degrees of harm. These diverse audiences necessitate not only different prevention and intervention strategies, but also different content and delivery.

MGC and MCCG continue to monitor the effects and reach of GameSense activities and services. .

Stepped Care Approach

Amy Gabrila
MGM·Sr.GSA

One of the first GameSense Advisors, Amy brings over 21 years of table game experience to her role. She possesses a robust knowledge of the industry as a whole and provides particular expertise in educational activity development.

Charlie Ordille
PPC·Sr.GSA

Throughout his 38 year career in the gaming industry, Charlie has observed both the positive and the negative effects that casino gaming can have, not only on individuals but also on families, friends and the community. Charlie is a US Marine Corp veteran.

Raymond Fluette
EBH·Sr.GSA

Ray joined GameSense with 22 years of Casino Table Games experience. An expert in leadership and problem-solving, Ray played a critical role in launching Gamesense at EBH and continues to grow the program every day.

Josh Molyneaux
EBH·GSA

After launching his career in gaming, Josh observed first-hand how persons with a gambling problem are often overlooked. This, combined with his passion for helping others, lead him to his current role with GameSense. Josh holds a BA in Applied Psychology.

David Tang
EBH·GSA

With a background in gaming, David believes that a gaming-neutral could change the way society views and works with persons struggling with gambling. David is well suited for his role as he has first hand experience of the harms that can be caused by a love one with a gambling disorder.

GameSense

2019 Responsible Gaming Education Week -Wrap Up-

For the past four years, GameSense has participated in the nationwide advocacy week known as Responsible Gaming Education Week (RGEW). The objective of this week is to promote responsible gaming as an integral part of casino gaming.

This year featured the themes of "Watch Your Time" and "Have a Game Plan", which are both meant to encourage personal control and limit player transition from low-risk to higher levels of gambling-related harm.

>6K patrons were engaged during RGEW

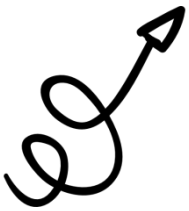
GameSense Advisors reached over 6,000 patrons through educational activities.

MGM launched an education activity designed to aid in the understanding of how a random number generator works. The activity was designed by Senior GSA Amy Gabrila and was piloted with casino staff before its guest-facing release.

Further emphasizing the theme of "Watch your time", visitors who participated in the various RGEW educational activities received a digital watch which was cobranded and purchased by GameSense and each licensee.

Different communication strategies were deployed to further awareness

- PPC used their Facebook to post a daily RGEW message.
- EBH displayed RGEW messages on table game monitors.
- MGM asked GameSense to host back of house tabling events which reached 235 casino staff.



Paid digital advertising lead to an increase in GameSenseMA website visits, particular for older adults.

- GameSenseMA social media platforms began highlighting individual GameSense Advisors (above) and Taxi tops remained active Boston (below).

TO: Commissioners

FROM: John Ziemba, Joe Delaney

CC: Edward Bedrosian, Executive Director

DATE: December 11, 2019

RE: 2019 Revere Non-Transportation Planning Grant

MGC received a request to make a minor modification to the 2019 City of Revere Non-Transportation Planning Grant. This $50,000 grant was for the preparation and distribution of a video promoting the City of Revere as a tourist destination. The project scope called for $40,000 to be spent on the development of the video, with $10,000 being spent on marketing and distribution.

The City is asking to reduce the production cost of the grant to $35,000 with a commensurate increase in the marketing and distribution budget to $15,000. The reasons are twofold: the City believes that given recent festivals and events require less original video content to be created; and with nearly 900 hotel rooms in the development pipeline, more coordination with respect to marketing will be required among ten hotels than would be necessary among the current five properties.

The review team felt that this minor modification is reasonable and recommends approval.

Memorandum

To: Mary Thurlow, Massachusetts Gaming Commission

CC: Robert O'Brien, Revere Director of Strategic Planning and Development

From: Paul Rupp, consultant to City of Revere

Date: 9/13/2019

Re: Revere 2019 Non-Transportation Planning Grant

As the City of Revere prepares the scope to be submitted to the Massachusetts Gaming Commission in accordance with the terms of the grant award, the City respectfully requests that it be permitted to make a slight adjustment to the $50,000 grant budget.

Specifically, the City asks that it be allowed to reduce the $40,000 allocated to production and distribution of its tourism video to $35.000 and concurrently to increase the amount allocated to undertake marketing and video promotion from $10,000 to $15,000.

There are two reasons for this modest reallocation. First, the City believes that given recent festivals and events, a bit less original video content needs to be created for the video. Secondly, with nearly 900 hotel rooms in the development pipeline (more than doubling the total number if keys) coming on-line sooner than anticipated, somewhat more coordination with respect to video marketing and promotion will be required among ten hotels than would be necessary among the current five properties.

The City is anxious to begin this project and hopes the Commission will approve this minor adjustment to the grant scope which merely reallocates budget line items but does not change the overall scope of the effort or alter the end product.

TO: Chairwoman Judd-Stein, MGC Commissioners

FROM: Crystal Howard, Jill Lacey Griffin, John Ziemba, Mary Thurlow

CC: Ed Bedrosian, Todd Grossman

DATE: December 13, 2019

RE: 2019 Workforce Development Grant:
Amendment Request for Massachusetts Casino Career Training Institute

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Request Summary: Holyoke Community College for the Massachusetts Casino Career Training Institute ("MCCTI") requests a budget amendment which proposes to redistribute $15,000, which was originally approved by the Commission for scholarships, to instead be utilized as payment for recruitment and tuition offset in order to run two potentially low enrolled courses at the gaming school. MCCTI indicates that approval of this amendment request would provide blackjack and carnival games courses, free of charge, for 5-9 students, each.

MCCTI Budget Amendment Request:
The gaming school requests approval to utilize a total of $15,000 of the scholarship allocation at MCCTI to cover the cost of gaming instructors and recruitment coordinators for two courses in January (one daytime and one evening course) that are low-enrolled and would otherwise be canceled. The school has already started promoting these programs and will continue to promote the classes in attempt to fill them, but approval of this request allows the courses to run if there are fewer than 10 individuals enrolled.

MCCTI Request Justification:

- MCCTI continues to struggle with low enrollment and is continuously working on recruitment, but still wants to run courses to feed MGM's pipeline of dealers.
- This amendment request allows the courses to run with only 5-9 students, if necessary, to ensure the courses are not canceled.
- MGM instructors have specified willingness to teach a course with at least 5 students
- A typical scholarship for a student is $399 or $100 for blackjack – roughly $600 when including carnival games.

- Each cohort of Blackjack / Carnival Games costs $7,500, inclusive of recruitment efforts, allowing for five (5) cohorts to run during the grant year. The breakout of cost for each cohort is $5,400 for instructors, $2,100 for recruitment and case management.

- If ten individuals are enrolled, the course will run as normal and scholarship funds will then be used as originally intended, for MA residents who qualify.

Staff Analysis: MGC staff found that the proposed changes meet the general goals and original purpose of the funding set aside in MCCTI's budget for gaming school scholarships via the 2019 Community Mitigation Fund. As each student in these courses would be receiving the education at no cost, the proposed amendment continues to ensure that low-income residents have access to high-paying, in-demand casino occupations. In fact, since gaming school students do not always receive scholarships in an amount that cover the full cost of the course, these students are benefitting from having their course offering covered at 100%. Additionally, with MCCTI experiencing such challenges toward recruitment, the courses will benefit from having a recruitment coordinator dedicated to filling the seats available for the January cohorts. This strategy allows for MGM to continue having a pool of qualified dealers as low-enrolled courses would not be canceled.

TO: Chair Judd-Stein, Commissioners Cameron, O'Brien, Stebbins and Zuniga

FROM: Mark Vander Linden

CC: John Ziemba

DATE: December 19, 2019

RE: Sub-Committee on Addiction Services of the Gaming Policy Advisory Committee

As noted below, Section 68 of the Expanded Gaming Act establishes a Gaming Policy Advisory Committee for the purpose of discussing matters of gaming policy. This section also specifies a subcommittee on addiction services for the purpose of developing recommendations for regulations to be considered by the Commission in addressing issues related to addiction services as a result of the development of gaming establishments in the commonwealth including, by not limited to, prevention and intervention strategies.

> " (c) There shall be a subcommittee on addiction services under the gaming policy advisory committee consisting of 5 members, 1 of whom shall be a representative from the department of public health's bureau of substance abuse services; 1 of whom shall be a representative from the Massachusetts Council on Compulsive Gambling, Inc., 1 of whom shall be a representative of the Commission and 2 of whom shall be appointed by the governor with professional experience in the area of gambling addictions. The subcommittee shall develop recommendations for regulations to be considered by the Commission in addressing issues related to addiction services as a result of the development of gaming establishments in the commonwealth including, by not limited to, prevention and intervention strategies."

During the MGC public meeting on October 24 2019, the Commission voted to appoint me as the Commission representative on the Sub-Committee on Addiction Services. Since that time I have reached out to Marlene Warner, Executive Director of the Massachusetts Council on Compulsive Gambling and Deidre Calvert, Chief of the Bureau of Substance Abuse Services of the Department of Public Health to serve on this Committee. We are working with the Governor's Office to identify candidates for consideration for the two Governor's appointments.

As a related matter, I respectfully request that the MGC transfer my appointment to the Committee to Commissioner Zuniga. As the Commission well knows, Commissioner Zuniga has been deeply involved in MGC's efforts to promote responsible gaming and mitigate problem gambling. If this transfer is approved, I will staff and advise the Sub-Committee on Addiction Services.