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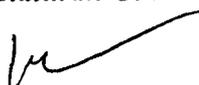
**OFFICE OF THE ATTORNEY GENERAL**

May 26, 2013

**EMAIL and HAND DELIVER**

**LEGAL MEMORANDUM**

**To:** Honorable Dennis Rodriguez, Jr.  
Committee on Health & Human Services,  
Health Insurance Reform, Economic Development  
and Senior Citizens  
*I Mina'trentai Dos Na Liheslaturan Guåhan*

**From:** Attorney General of Guam 

**Re:** **Bill No. 20-32 (COR) as Substituted by the Committee on Health & Human Services, Health Insurance Reform, Economic Development, and Senior Citizens; "The GMHA Healthcare Trust and Development Act of 2013"; Ref.: LEG 13-0230**

While the Office of the Attorney General was present and testified during the meeting of the committee of the whole on May 24, 2013, because we were not present the previous day of the public hearing on Bill 20-32 (COR) as Substituted by the Committee on Health and Human Services, Health Insurance Reform, Economic Development, and Senior Citizens. we submit this memorandum.<sup>1</sup>

Although we support the Bill's intent to identify a funding source to assist Guam's public hospital, there are sections of the Bill that are problematic if the Bill were to become law and therefore we are compelled to submit the following comments to Bill No. 20-32. A copy of the version of the Bill that was reviewed is attached for your convenience.

We will briefly recap a little of the history on the revocation of the gaming device licenses. Department of Revenue and Taxation (DRT) had been issuing amusement devices licenses for gaming devices prior to 2008. But in the months prior to May 29, 2008, the Director of DRT, in

<sup>1</sup> We attended the March 11, 2013 hearing. Our office was notified via email by Senator Rodriguez's office using our present URL, guamag.org. We responded addressing a memorandum submitted to this committee by Attorney June Mair, counsel for Takecare Insurance Company Inc. On Friday, May 24, 2013, we became aware of a hearing on a substituted Bill 20-32 that had occurred on Thursday at 12:30 p.m. While we were aware a hearing was going to be scheduled, we received no notice of one. We later learned that a notice of the Thursday hearing was sent to our old URL, guamattorneygeneral.com

consultation with the Office of the Attorney General, determined that certain devices that DRT had licensed were illegal gaming devices. These devices included the devices known as Liberty, Liberty II and Super Liberty owned by Guam Music, Inc.(GMI), and Uncle Sam, Pharaoh, and Symbolix owned by others. Later, upon instructions from the then Lieutenant Governor, DRT again issued licenses for the gaming devices.

As a result of DRT issuing the licenses, the Attorney General brought a suit against DRT to force it to follow the law and revoke the licenses it had issued (SP141-08). The Court ordered DRT to revoke the licenses forthwith. Then GMI intervened in SP141-08 asking the court to stop DRT from revoking the licenses. But DRT had already complied with the court order by revoking GMI's licenses. Shortly thereafter, GMI brought a second lawsuit asking the court to order DRT to issue it licenses for its gaming devices. Thus, in both cases, GMI had no licenses for its devices and was asking the court to order DRT to issue licenses for its gaming devices. Both cases were recently dismissed by the parties.

The dismissal of the two GMI cases did nothing to change the mandate of the law prohibiting the licensing of gaming devices. Indeed, the dismissal of the two Superior Court cases means GMI is no longer attempting to get the court to force DRT to issue licenses for its gaming devices. At the time of the dismissal of the two cases, GMI did not have licenses for its gaming devices and, therefore, could not place the devices in gaming rooms for use by the public. DRT had previously revoked GMI's licenses because the law prohibits DRT from issuing licenses for gaming devices. With the dismissal of the cases, GMI gave up its attempt to get the courts to order DRT to issues the licenses.

This dismissal of the cases did not change the law that makes the licensing of gaming devices illegal. The law remained the same as it was when DRT refused to issue the licenses in May of 2008 because DRT had determined the devices were illegal gaming devices and when DRT obeyed the court's August 18, 2008 decision and order in SP141-08 and forthwith revoked the licenses. There is no rational basis to conclude that dismissal of the two cases meant DRT could issue licenses for GMI's or anyone else's gaming devices.

#### **Section 97102(b)(i) and (ii) of the Bill**

The substituted Bill essentially replaces the four percent (4%) assessment on all healthcare insurance premiums paid in Guam with a new revenue source for the GMHA Healthcare Trust and Development Fund ("Fund"). Section 97102(b) provides that the Fund will be financed by "licensing fees, GRT and income tax collected from gaming companies and a 4% assessment fee income from gaming devices as provided by 3 GAR § 7001 et seq."

The section further provides:

This includes those electronic gaming devices referred to in §7114(a)(5) and licensed per 11 GCA, Chapter 22, Article 2. These devices shall be known as the Liberty, Symbolix, and Match Play electronic gaming devices and only those

registered with the Department of Revenue and Taxation prior to August 1, 2001 pursuant to 3 GAR §7114(a)(5).

Notwithstanding any other provision of law, the collection of a special four percent (4%) assessment fee on income on all gaming devices authorized to be licensed pursuant to 11 GCA §22202(f) and 3 GAR §7114(a)(5), to be known as the "GMHA Trust Fund Fee".

### **Conflict in Law**

At the present time, Guam law prohibits the licensing of gaming devices. Title 11 G.C.A. § 22202 prohibits the licensing of slot machines or amusement devices set to make progressive or automatic payouts. It further provides that no gambling device as defined in 9 G.C.A. § 64.20(b)<sup>2</sup> shall be licensed.

The rules and regulations referred to in Section 97102(b) conflict with Guam law as they permit the type of gambling that is now prohibited by 11 G.C.A. § 22202 and 9 G.C.A. § 64.20(b).

Title 3 GAR § 7114(a) states, in relevant part:

The following are the only limited gaming activities authorized in Guam under this Act [i.e., under this regulation]:

\* \* \*

(5) Electronic gaming devices that have been registered, or were at any time previously registered, by the Department of Revenue and Taxation pursuant to 11 Guam Code Annotated, Chapter 22, Article 2, prior to August 1st 2001.

This regulation authorizing the licensing of the "electronic gaming devices" directly conflicts with the prohibition against licensing such devices found in 9 GCA § 64.20(b). When an agency regulation conflicts with a duly enacted law, the law and not the regulation must be followed. Of course, the Legislature may amend the law by enacting the conflicting regulation into law.

### **Rules and Regulations Improperly Promulgated**

<sup>2</sup> 9 G.C.A. § 64.20(b) provides:

[G]ambling device means any coin operated device which, when operated, may return winnings (other than free games not redeemable for cash) of value to the user based partially or completely upon chance, by the operation of which a person may become entitled to receive winnings of value. It does not include pinball and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not. It does include any slot machines, video poker machines and other machines or devices which afford the opportunity of winnings, payouts, malfunction refunds to the player, or giving the player or user anything of value under any guise or form based partially or completely upon chance.

(emphasis added).

Furthermore, there is no record that these rules and regulations complied with the Administrative Adjudication Law ("AAL") and as such are unenforceable. Title 5 G.C.A. § 9301 requires a public hearing and an economic impact statement before any rule is adopted. Neither a record of a public hearing nor an economic impact statement was submitted to the Legislature with the proposed rules and regulations. Since the agency did not adhere to these requirements in the AAL, the rules and regulations cannot be implemented as having the full force and effect of the law.

### **Unlawful Delegation of Legislative Authority**

The most widely used test to determine the validity of a delegation of power is the adequacy of the standards declared by the legislature to guide the delegate's decisions about what rules to issue. 1 Sutherland Statutory Construction § 4:16 (7<sup>th</sup> ed.) A law vesting discretionary power in an administrative officer must properly define the terms under which the discretion is to be exercised, and intelligible standards must be provided to guide the officer in the execution of the delegated power, but criteria so narrow as to govern every detail necessary in the execution of the delegated power is not necessary. Forest Preserve Dist. of Du Page County v. Brown Family Trust, 323 Ill. App. 3d 686, 257 Ill. Dec. 484, 753 N.E.2d 1110 (2d Dist. 2001).

Public No. 26-52:4 simply authorized DRT "to create a comprehensive regulatory scheme to regulate all gaming activities on Guam; *provided*, that the rules and regulations shall restrict gaming activities to those authorized and licensed on Guam as of August 1, 2001." This delegation of authority to promulgate rules to regulate all gaming activities on Guam did not provide adequate standards to guide the agency about what rules to issue. Since the law did not provide adequate standards to DRT to create rules to regulate gaming activities on Guam, 3 GAR § 7001 et seq. is unenforceable as an invalid delegation of legislative authority.<sup>3</sup>

### **Section 6 of the Bill**

Sections 97102(b) and 6 of the Bill attempt to legalize gaming devices that are currently deemed as illegal gambling devices. While it is the prerogative of the Legislature to legalize these gaming devices, the proposed language in Section 97102(b) and Section 6 of the legislation are ambiguous and subject to different interpretations as was discussed during the committee of the whole last Friday.

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<sup>3</sup> This is why the Compiler of Laws made the following 2012 note when publishing the regulations in 3 GAR § 7001 et seq.:

However, section 4 of Public Law 26-52 did not authorize the Department of Revenue and Taxation to repeal and reenact existing Guam law. Section 4 of Public Law 26-52 authorized the Department of Revenue and Taxation only to "promulgate necessary rules and regulations to create a comprehensive regulatory scheme to regulate all gaming activities on Guam." Public Law 26-52:4 (Oct. 17, 2001). The gaming control regulations are not codified in the Guam Code Annotated, but placed in this chapter. (emphasis added). 3 GAR, Ch. 7, 2012 Head Note. Hence, the "rules and regulations" from DRT that are cited from the Compiler's website are not law and have no force and effect if they conflict with existing law.

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By listing the electronic gaming devices known as the Liberty, Symbolix and Match Play, it appears to be the Legislature's intent to make these specifically named gaming devices legal. This is even more apparent in Section 6 which amends 11 G.C.A. § 22202 by adding the gaming devices known as Liberty and Match Play to the list of amusement devices that DRT is permitted to license.<sup>4</sup>

The Bill creates an ambiguity by referencing DRT regulations that conflict with existing law. As the Compiler of Laws points out (see footnote 2), DRT has no authority to repeal and reenact existing law. The ambiguity is whether the Bill intends to enact into law, by reference, language from these regulations. In other words, the ambiguity is whether the intent of the Bill is to change the amusement device licensing law in order to allow, by reference, the licensing of the gaming devices listed in the Bill. However, it could also be argued that the two Sections refer to invalid regulations and as such have no legal effect. This ambiguity could mean that the revenue source may not be a viable funding source for lending institutions.

### Miscellaneous

Please note that the Bill attached had a technical error. The Section to create the GMHA Healthcare Trust and Development Fund and to enact the *GMHA Healthcare Trust and Development Act of 2013* is contained in Section 1 of the Legislative Findings and Intent but not in the actual legislative enactments.

### Conclusion

In our opinion, Section 97102(b)(i) and (ii) and Section 6 of Bill No. 20-32 (COR) are legally problematic and unenforceable for the reasons discussed above. They are ambiguous and do not clearly indicate whether the named gaming devices would become legal. References to 3 GAR § 7001 et seq. create an ambiguity which can be cured by deleting such references. If it is the intent of the Bill to legalize and tax certain gaming devices, the Bill could clearly provide for this in 11 G.C.A. § 22202 and repeal existing conflicting laws including Guam's gambling laws.

OFFICE OF THE ATTORNEY GENERAL  
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By:   
J. Patrick Mason  
Deputy Attorney General

cc: All Senators of the *I Mina'trentai Dos Na Liheslaturan Guåhan*

<sup>4</sup> It should be noted that at least one other operator or company that operates amusement or gaming devices recently complained to the Office of the Attorney General that Bill 20-32 may create a monopoly for another operator.