STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIA ENTERTAINMENT CENTER, LLC,

Petitioner,

vs. Case No. 15-7010RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

DAYTONA BEACH KENNEL CLUB, INC.,

Petitioner,

vs. Case No. 15-7011RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

JACKSONVILLE KENNEL CLUB, INC.,

Petitioner,

vs. Case No. 15-7012RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

MELBOURNE GREYHOUND PARK, LLC,

Petitioner,

vs. Case No. 15-7013RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

BONITA-FORT MYERS CORPORATION,

Petitioner,

vs. Case No. 15-7014RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

INVESTMENT CORPORATION OF PALM BEACH,

Petitioner,

vs. Case No. 15-7015RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner,

vs. Case No. 15-7016RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

TAMPA BAY DOWNS, INC.; AND TBDG ACQUISITION, LLC, d/b/a TGT POKER AND RACEBOOK,

Petitioners,

vs. Case No. 15-7022RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

FINAL ORDER

A final hearing was conducted in this case on July 19, 2016, in Tallahassee, Florida, before E. Gary Early, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioners Dania Entertainment Center, LLC; Daytona Beach Kennel Club, Inc.; Jacksonville Kennel Club, Inc.; Melbourne Greyhound Park, LLC; Bonita-Fort Myers Corporation; Investment Corporation of Palm Beach; and West Flagler Associates, Ltd.:

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STATEMENT OF THE ISSUES

The issues for disposition in this case are whether proposed rules 61D-11.001(17) and 61D-11.002(5), Florida Administrative Code, which consist of the repeal of said rules, constitute an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes; and whether the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering's (Respondent), failure to prepare a statement of estimated regulatory costs constituted a material failure to follow the applicable rulemaking procedures or requirements set forth in chapter 120.

PRELIMINARY STATEMENT

On December 14, 2015, Dania Entertainment Center, LLC; Daytona Beach Kennel Club, Inc.; Jacksonville Kennel Club, Inc.; Melbourne Greyhound Park, LLC; Bonita-Fort Myers Corp.; Investment Corp. of Palm Beach; West Flagler Associated, Ltd.; Tampa Bay Downs Inc.; and TBDG Acquisition, LLC, d/b/a TGT Poker & Racebook (collectively "Petitioners"), filed petitions to challenge the validity of the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5), and the proposed adoption of rule 61D-11.005(9).[1/] The petitions were consolidated on December 18, 2015, and set for final hearing on January 13 and 14, 2016.

On December 23, 2015, the parties filed a joint motion to place the consolidated cases in abeyance and, as grounds therefore, indicated that Respondent was preparing a notice of change to revise the proposed rules. The motion was granted and the final hearing was continued and the case abated.

On January 15, 2016, Respondent published a Notice of Change/Withdrawal that withdrew proposed rule 61D-11.005(9). The proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) was unchanged. On February 4, 2016, Petitioners filed amended petitions challenging the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5). The case was thereafter set for final hearing on April 13 and 14, 2016.

On February 10, 2016, Respondent filed motions to dismiss each of the amended petitions, arguing that the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) "will [not] have the effect of rule or [] prohibit any activity." Responses were filed and, after due consideration, the motions were denied.

The final hearing was again continued for good cause shown and rescheduled for July 19 and 20, 2016.

On July 15, 2016, the parties filed their Joint Prehearing Stipulation, and concurrently filed a Joint Motion for Oral Argument in Lieu of Evidentiary Hearing, by which the parties agreed to the authenticity and admissibility of all exhibits listed in the Joint Prehearing Stipulation as constituting the evidentiary record. Accordingly, the parties advised that an evidentiary hearing was no longer necessary and requested that the final hearing be limited to oral argument on the legal issues framed by the Joint Prehearing Stipulation. That motion was granted, and oral argument was held on July 19, 2016.

In the Joint Prehearing Stipulation, the legal issues were framed by Petitioners as:

> Specifically, the Proposed Rules are an invalid exercise of delegated legislative authority under section 120.52(8), Florida Statutes, because: (1) the Division has materially failed to follow the applicable rulemaking procedures or requirements set forth in chapter 120, Florida Statutes [section 120.52(8)(a)]; (2) the Division has exceeded its grant of rulemaking

> authority [section 120.52(8)(b)]; (3) the Proposed Rules, as interpreted by the Division, enlarge, modify or contravene the specific provisions of the law implemented [section 120.52(8)(c)]; (4) the Proposed Rules, as interpreted by the Division, impose regulatory costs which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives [section 120.52(8)(f)]; and (5) the Proposed Rules, as interpreted by the Division, are unconstitutional.[2/]

The issue of the constitutionality of the proposed rules being beyond the jurisdiction of the Division of Administrative Hearings is not determined in this Final Order, though the record of this proceeding may form the basis for the issue to be raised on appeal. Key Haven Assoc. Enters., Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund, 427 So. 2d 153 (Fla. 1982).

At the final hearing, the parties presented legal argument. Joint Exhibit 1 was received in evidence, consisting of the deposition testimony of Jonathan Zachem, Respondent's Division Director. Petitioners' Exhibits 1 through 44 were received in evidence, which included the deposition testimony of Joe Dillmore, Respondent's Deputy Division Director; Lisa Helms, Respondent's Cardroom Coordinator; Steve Kogan, Respondent's Chief of Investigations; Chuck Taylor, an investigator with Respondent; and Ken Lawson, Secretary of the Department of Business and Professional Regulation. Respondent's Exhibits 1 through 3 were received in evidence, which included the

deposition testimony of Jamie Shelton, President of Jacksonville Kennel Club. The deposition testimony has been given weight as though the witnesses offered live testimony. The stipulated facts have been accepted and considered in the preparation of this Final Order.

On July 28, 2016, Petitioners filed a Supplement to Motion for Official Recognition requesting that the undersigned take official recognition of the State of Florida's Response to Motion for Summary Judgment filed in the United States District Court, Northern District of Florida in case number 4:15-CV-00516-RH-CAS. No objection was filed. The motion is granted.

The parties did not order a transcript. The parties were to file post-hearing submittals by August 3, 2016. Upon motion, that date was extended to August 5, 2016. Each party timely filed Proposed Final Orders.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Respondent is the state agency charged with regulating pari-mutuel wagering pursuant to chapter 550, Florida Statutes, and cardrooms pursuant to section 849.086, Florida Statutes.

2. Each Petitioner currently holds a permit and license under chapter 550 to conduct pari-mutuel wagering and a license under section 849.086 to conduct cardroom operations.

Petitioners offer designated player games at their respective cardrooms.

3. The rules proposed for repeal, rules 61D-11.001(17) and 61D-11.002(5), relate to the play of designated player games.

4. Rule 61D-11.001(17) provides that "'[d]esignated player' means the player identified by the button as the player in the dealer position."

5. Rule 61D-11.002(5) provides that:

> Card games that utilize a designated player that covers other players' potential wagers shall be governed by the cardroom operator's house rules. The house rules shall:
>
> (a) Establish uniform requirements to be a designated player;
>
> (b) Ensure that the dealer button rotates around the table in a clockwise fashion on a hand to hand basis to provide each player desiring to be the designated player an equal opportunity to participate as the designated player; and
>
> (c) Not require the designated player to cover all potential wagers.

6. Both rules were adopted on July 21, 2014. Both rules list sections 550.0251(12), and 849.086(4) and (11) as rulemaking authority, and section 849.086 as the law implemented.

Designated Player Games

7. A designated player game is a subset of traditional poker games in which a designated player plays his or her hand against each other player at the table, instead of all players

competing against each other. The term "designated player game" is used synonymously with "player banked games."[3/] However, a designated player is not a cardroom operator.

8. In traditional "pool" poker games, each player bets into a central pool, with the winning hand(s) among all of the players collecting from the pool of bets, minus the cardroom rake.

9. In designated player games, each player at the table makes an individual bet, and compares their hand against the designated player's hand. If the player's hand is better than the designated player's hand, then the designated player pays the player from the designated player's stack of chips. If the designated player's hand is better than the player's hand, then the designated player collects the player's wager. At an eight-seat table, it is as though there are seven separate "player versus designated player" games.

10. Designated player games were first played at the Ebro (Washington County Kennel Club) cardroom in 2011. The game, known as "double hand poker," was demonstrated to Respondent, and subsequently approved for play. Though the internal control that describes the rules of game play was not offered in evidence, a preponderance of the evidence demonstrates that the game used a designated player. After Respondent's approval of Ebro's double hand poker, Respondent entered an order rescinding its approval due to concerns that the use of a designated player resulted in

the establishment of a banking game. That decision was challenged, and subsequently withdrawn, with the result being that "Ebro may immediately resume play of Double Hand Poker as approved by the division."

11. In 2012, the Palm Beach Kennel Club cardroom began offering "tree card poker" with a designated player. Although tree card poker had been approved by Respondent, the designated player element had not. Thus, since the game was not being played in accordance with the approved internal control, it was unauthorized.

12. Respondent investigated the playing of tree card poker at Palm Beach Kennel Club. A video demonstration was provided that showed two hands of tree card poker being played with a designated player. The video depicted a single designated player playing his hand against each other player at the table, and paying or collecting wagers based on each individual hand. After having reviewed the demonstration video, Respondent ultimately determined that the use of a designated player did not violate the prohibition against banking games as defined.

The Adoption of the Designated Player Rules

13. As requests for approval of internal controls for games using designated players became more common, Respondent determined that it should adopt a rule to establish the

parameters under which designated player games would be authorized.

14. On December 16, 2013, after having taken public comment at a series of rulemaking workshops, Respondent published proposed rule 61D-11.002(5) which provided as follows:

> 61D-11.002 Cardroom Games.
>
> * * *
>
> (5) Card games that utilize a designated player that covers other players' wagers shall:
>
> (a) Allow for only one designated player during any single hand;
>
> (b) Not require the designated player to cover all wagers that could be made by the other players in the game;
>
> (c) Not allow other players to cover wagers to achieve winnings that the designated player could have won had he or she covered the same wagers;
>
> (d) Not allow or require a player to buy in for a different amount than any other player in the game in order to participate as the designated player; and
>
> (e) Rotate a button or other object to designate which player is the designated player. The button or other object shall rotate clockwise around the table to give each player the opportunity to participate as the designated player.

15. On February 14, 2014, a challenge to the proposed rule was filed that objected to restrictions on the manner in which designated player games could be conducted. The rule challenge

hearing was continued, and the case placed in abeyance pending negotiations between the parties.

16. On March 14, 2014, Respondent filed a Notice of Change to the proposed rule 61D-11.002, which added the following provisions to proposed rule 61D-11.002:

> (6) The designated player shall:
>
> (a) Cover the table minimum for each participating player; and
>
> (b) Pay each player an amount above the table minimum equal to their pro rata share of the pot in the event the designated player cannot cover all wagers.

17. A public hearing on the changes to the proposed rule was held on May 8, 2014. As to the designated player provisions of the proposed rule, Respondent received the following comment:

> [I]f we could modify this . . . taking the existing paragraph 5 and come up with three new criteria, one being uniform requirements for a designated player included within the house rules; allowing for the dealer button to rotate on a hand-by-hand basis for qualified designated players; also, not requiring the designated player to cover all potential wagers, but nonetheless allowing the house rules to set a designated minimum buy-in amount or just a chip count. I think if we had those particular parameters, we would allow the preservation of this game to continue in its current fashion . . . .
>
> And . . . we're going to avoid [] any argument that the department has somehow created a banked card game, because the biggest thing here is that we're not

> requiring that the designated player meet all the theoretical payouts of the game.

18. On May 19, 2014, written comments were submitted on behalf of several pari-mutuel facilities. Those comments included proposed language that is identical to the rule that was ultimately adopted, and included the following:

> Multiple jurisdictions have determined a key element to banked card games is the house requiring all wagers be covered. We propose this language to distinguish between lawful games and impermissible banked games.

19. On June 9, 2014, Respondent filed a Notice of Change that adopted the industry's proposed language, and changed proposed rule 61D-11.002 to its present form.

20. On June 13, 2014, the challenge to proposed rule 61D-11.002(5) was voluntarily dismissed, and the case was closed. On July 21, 2014, rule 61D-11.002(5) became effective.

21. There can be little doubt that Respondent understood that it was, by its adoption of rule 61D-11.002(5), recognizing player banked games in which a designated player plays his or her hand against each other player at the table. The rule is substantial evidence that, as of the date of adoption, Respondent had determined that designated player games did not violate the prohibition against "banking games" as that term is defined in section 849.086.

Internal Controls

22. Over the course of several years, beginning generally in 2011 and extending well into 2015, Respondent was presented with internal controls from cardrooms around the state for playing designated player games. Internal controls are required before a particular game may be offered, and describe the rules of the game and the wagering requirements.

23. The internal controls submitted by the Jacksonville Kennel Club; the Daytona Beach Kennel Club; the West Flagler Associates/Magic City Poker Room; and the Naples/Ft. Myers Greyhound Track Cardroom, described games in which designated players played their hand against those of the other players at the table, and paid and collected wagers from the designated player's chip stack based on the rank of the designated player's hand against the individual players. The games described did not involve pooled wagers, and clearly described player banked games.

24. Respondent approved the internal controls for each of the four facilities.

25. The process of approving internal controls occasionally included the submission of video demonstrations of the games described in the internal controls for which approval was being sought. Approval of internal controls was never done without the review and assent of Respondent's legal department or the division director.

26. With regard to the rules of the designated player games that underwent review and approval by Respondent, "all of them are about the same, few differences."

27. From 2011 through mid-2015, Respondent approved internal controls for playing one-card poker, two-card poker, three-card poker, Florida Hold 'Em, and Pai Gow poker using designated players at numerous cardroom facilities.

28. A preponderance of the evidence establishes that Respondent was aware of the fact that, for at least several facilities, "eligible" designated players were required to meet minimum financial criteria, which ranged from a minimum of $20,000 in chips, up to $100,000 in chips. In the case of the Daytona Beach Kennel Club cardroom, internal controls called for a designated player to submit an application, agree to a background check, and submit a deposit of $100,000. Respondent approved those internal controls.

DBPR Training

29. In August 2015, Mr. Taylor was invited by the Bestbet cardroom in Jacksonville[4/] to participate in a training session it was offering for its employees. Mr. Taylor is an investigator for Respondent, and visited the pari-mutuel facilities at least once per week. Mr. Taylor was invited by the facility to get an overview of how the cardroom games that had been approved by Respondent, including designated player games, were played.

30. The games that were the subject of the training were substantially similar to those depicted in the April 2012 training video, and those he had observed during his weekly inspections. The designated player games for which training was provided had been approved by Respondent.

31. In September 2015, training in designated player games was provided at Respondent's Tallahassee offices to several of its employees. Mr. Taylor perceived the training "as an overview to give us an idea of what we are going to see." Neither Mr. Taylor nor any other participant in the training offered any suggestion that the training was being provided in anticipation of a shift in Respondent's practice of approving the internal controls for designated player games.

Current Rulemaking

32. On September 23, 2014, Respondent published a Notice of Development of Rulemaking. The notice cited 15 of the 30 subsections of chapter 61D-11 as being the subject areas affected by the notice, and provided that "[t]he purpose and effect of the proposed rulemaking will be to address issues discovered in the implementation and practical application of cardroom rules adopted on July 21, 2014." There is nothing in the notice to suggest that Respondent had modified its position on designated player games, and its continued approval of institutional controls approving such games is strong evidence that it had not.

33. On August 4, 2015, Respondent published a Notice of Meeting/Workshop Hearing for a rule workshop to be held on August 18, 2015. The Notice listed each rule in chapter 61D-11 as the "general subject matter to be considered," including those related to games of dominos. Respondent asserted that it had "posted a version of amended cardroom rules that included the [repeal of rule 61D-11.005] on its website," though such was not published, nor did Respondent provide a record citation in support of its assertion.

34. On October 29, 2015, Respondent published its proposed amendments to chapter 61D-11.

35. Rule 61D-11.001(17), which defines the term "designated player" as "the player identified by the button as the player in the dealer position," was proposed for repeal.

36. Rule 61D-11.002(5), as set forth above, which had established the standards for designated player games, was proposed for repeal.

37. Rule 61D-11.005 was proposed for amendment to add subsection (9), which provided that "[p]layer banked games, established by the house, are prohibited."

38. On December 2, 2015, the Division held a public hearing on the proposed amendments. During the public hearing, Mr. Zachem made it clear that the intent of the proposed amendments was to change the Division's long-standing and

consistently applied construction of section 849.086 as allowing designated player games to one of prohibiting designated player games, and in that regard stated that:

> The rules pertaining to designated player games are now going to be correlated with the statute that is the prohibition against designated player games. The statute does not allow designated player games. There has to be a specific authorization for a type of game in statute, and there is none in 849.086 pertaining to designated player games . . . . When some of these definitions in other areas were created, I don't think that the concept of what these games could even become was fathomed by the division.

Given the process by which internal controls for designated player games were approved by Respondent, including written descriptions and video demonstrations of play, the suggestion that Respondent could not "fathom" the effect of its rules and decisions is not accepted.

39. On December 11, 2015, Petitioners individually filed petitions challenging the validity of the proposed rules. The cases were consolidated and ultimately placed into abeyance pending efforts to resolve the issues in dispute.

Agency Action Concurrent with Rulemaking

40. After the December 2015 public hearing, and prior to the adoption of any amendments to chapter 61D-11, Respondent filed a series of administrative complaints against cardrooms offering designated player games. Those administrative

complaints were very broadly worded, and reflected Respondent's newly-developed position that designated player games constituted "a banking game or a game not specifically authorized by Section 849.086, Florida Statutes." In that regard, Mr. Zachem testified that a cardroom could have been operating in full compliance with its Respondent-approved internal controls and still have been the subject of an administrative complaint.[5/]

41. The position of Respondent was made clear by Mr. Zachem's statement that if a cardroom has an approved designated player game "where a banker is using their table, their dealer, their facility they [the cardroom] are establishing a bank."[6/] Thus, there can be little doubt that Respondent now construes section 849.086 to mean that player banked games constitute prohibited "banking games" because, by allowing the player banked game in its facility, the cardroom "establishes" a bank against which participants play.

42. After the December public hearing, Ms. Helms was instructed that she was to no longer approve internal controls if they included provisions regarding designated players. That blanket instruction came with no conditions. Since that instruction, the internal controls for at least one facility have been disapproved, despite their being "about the same" as internal controls that had been previously approved for other facilities.

43. Ms. Helms testified that after the December 2015 rule hearing, "things kind of turned around" with regard to Respondent's position on designated player games. She then rethought her selection of words, stating instead that "things changed." Given the totality of the evidence in this case, Ms. Helms' statement that the position of Respondent towards designated player games "turned around" is the more accurate descriptor.

Notice of Change

44. On January 15, 2016, the Division published a Notice of Change/Withdrawal of proposed rules. Through the issuance of this notice, the Division withdrew proposed rule 61D-11.005(9). The proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) remained unchanged. Since that notice of change, the preponderance of the evidence demonstrates that Respondent has stopped approving internal controls that propose the offering of designated player games, and has continued to take action against facilities that offer designated player games. Respondent's statements and actions, including those made in the course of this proceeding, demonstrate that Respondent intends the repeal of rules 61D-11.001(17) and 61D-11.002(5), to effectuate the prohibition of designated player games despite the withdrawal of proposed rule 61D-11.005(9).

Lower Cost Regulatory Alternative

45. When it proposed the subject amendments to rule 61D-11 on October 29, 2014, Respondent had not prepared a statement of estimated regulatory costs. Rather, the notice of proposed rule provided that:

> The agency has determined that this rule will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the agency. The agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: the economic review conducted by the agency. Any person who wishes to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

46. On November 19, 2015, in conjunction with the rulemaking process described above, a number of licensed cardroom operators, including some of the Petitioners, timely submitted a good faith proposal for a lower cost regulatory alternative ("LCRA") to the proposed amendments to chapter 61D-11 that would have the effect of prohibiting designated player games, citing not only the creation of rule 61D-11.005(9), but the repeal of rule 61D-11.002(5). A preponderance of the evidence demonstrates that the LCRA indicated that the rule was likely to directly or

indirectly increase regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule.

47. The LCRA, as described in the letter of transmittal, also concluded that regulatory costs could be reduced by not adopting the proposed rule amendments, thus maintaining Respondent's previous long-standing interpretation of section 849.086, and thereby accomplishing the statutory objectives.

48. Respondent employed no statisticians or economists, and there was no evidence to suggest that any such persons were retained to review the LCRA. Though Mr. Zachem did not "claim to be an expert in statistics," he felt qualified to conclude that the LCRA was "a bit of a challenging representation." Thus, Respondent simply concluded, with no explanation or support, that "the numbers that we received were unreliable."

49. Respondent did not prepare a statement of estimated regulatory costs or otherwise respond to the LCRA.

50. Respondent argues that its abandonment of proposed rule 61D-11.005(9), which was the more explicit expression of its intent to prohibit designated player games, made the LCRA inapplicable to the rule as it was proposed for amendment after the January 15, 2016, notice of change. That argument is undercut by the fact that Respondent did not amend its statement of estimated regulatory costs as a result of the change in the proposed rule. Moreover, the evidence is overwhelming that

Respondent, by its decision to disapprove internal controls that included designated player games, and its enforcement actions taken against cardrooms offering designated player games, specifically intended the amendments repealing the designated player standards to have the effect of prohibiting designated player games. Thus, despite the elimination of the specific prohibition on designated player games, there was no substantive effect of the change. Therefore, the LCRA remained an accurate expression of Petitioners' estimated regulatory costs of the proposed rule.

Ultimate Findings

51. Respondent has taken the position that the repeal of rule 61D-11.005(9) was undertaken "[f]or clarity with the industry." That position is simply untenable. Rather, Respondent has taken an activity that it previously found to be legal and authorized and, by repealing the rule and simply being silent on its effect, determined that activity to be prohibited. By so doing, Respondent has left it to "the industry" to decipher the meaning and effect of a statute that is, quite obviously, ambiguous and in need of the interpretive guidance that has been and should be provided by rule.

52. The evidence is conclusive that, by its repeal of rule 61D-11.002(5), Respondent simply changed its mind as to whether playing with a designated player constituted the establishment of

a prohibited banking game.[7/] It previously determined that such games were lawful under the terms of section 849.086; it has now determined they are not.

53. Though there is substantial evidence to suggest that the reason for the change was related to the renegotiation of the Seminole Compact, the reason is not important. What is important is that Respondent has taken divergent views of the statute in a manner that has substantially affected the interests of Petitioners. For Respondent to suggest that its repeal of the rules is a clarification, a simplification, or a reflection of the unambiguous terms of the statute, and that Petitioners should just tailor their actions to the statute without any interpretive guidance from Respondent, works contrary to the role of government to provide meaningful and understandable standards for the regulation of business in Florida. Respondent cannot, with little more than a wave and well-wishes, expect regulated businesses to expose themselves to liability through their actions under a statute that is open to more than one interpretation, when the agency itself has found it problematic to decipher the statute under which it exercises its regulatory authority.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

55. Section 120.56(1)(a) provides that "any person substantially affected by . . . a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

Standing

56. Petitioners operate pari-mutuel facilities, and each has been licensed to operate a cardroom. Petitioners have been approved to offer designated player games at their cardrooms. If allowed to become effective, Petitioners would be affected by Respondent's stated purpose for the proposed rule, i.e. to prohibit player banked games. Therefore, each Petitioner is substantially affected in a manner and degree sufficient to confer administrative standing in this case. See, e.g., Abbott Labs. v. Mylan Pharms., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997) (recognizing that "a less demanding standard applies in a rule challenge proceeding

than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding."). If the rule directly regulates a party's behavior or limits its rights, it will cause injury in fact to the party. Prof'l Firefighters v. Dep't of HRS, 396 So. 2d 1194 (Fla. 1st DCA 1981).

57. Petitioners have demonstrated their standing in this proceeding.

Rule Repeal

58. Section 120.52(16) defines a rule, with exceptions that do not apply here, as:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

59. A repeal of a rule is subject to challenge, so long as the repeal satisfies the definition of a rule that it is "an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency." Fed'n of Mobile Home Owners of Fla., Inc. v. Fla. Manufactured Hous. Ass'n, Inc., 683 So. 2d 586, 590-91 (Fla. 1st DCA 1996); see also Osterback v. Agwunobi, 873 So. 2d 437, 439 (Fla. 1st DCA

2004) ("An agency's repeal of a rule is considered a rule subject to challenge when it has 'the effect of creating or implementing a new rule or policy.'"). The proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) has the effect of implementing Respondent's new policy with regard to designated player games.

60. The policy that Respondent intends to implement by the rule is clearly a change in the direction of the agency since it adopted the designated player rules. The ability of Respondent to change direction in reaction to what it perceives to be changed or better understood circumstances is not questioned. However, eliminating all interpretive rules, leaving regulated entities to decipher the agency's current policy regarding the construction of its enabling legislation, is not the appropriate way to change direction. As stated by the First District Court of Appeal:

> Aside from AHCA's decision to reinterpret the governing statutes, that is, to simply "change its mind," there is no good reason why the agency's abrupt change of established policy, practice and procedure should be sanctioned. Without question, an agency must follow its own rules, but if the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, "absent such amendment, expedience cannot be permitted to dictate its terms." That is, while an administrative agency "is not necessarily bound by its initial construction of a statute evidenced by the adoption of a rule," the agency may implement its changed

> interpretation only by "validly adopting subsequent rule changes." The statutory framework under which administrative agencies must operate in this state provides adequate mechanisms for the adoption or amendment of rules. See Section 120.535 and 120.54, Florida Statutes. To the extent that the results sought by an agency cannot be accomplished by changes in the administrative rules, interested parties must seek a remedy in the legislature. (emphasis added)(internal citations omitted).

Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin., 679 So. 2d 1237, 1242-1243 (Fla. 1st DCA 1996).

Burden of Proof

61. Section 120.56(2)(a) was amended by chapter 2016-116, Laws of Florida, and altered the Petitioners' burden from that of "going forward" to "prov[ing] by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule." The 2016 version of section 120.56(2)(a) applies to Petitioners in this case. See Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977) ("Burden of proof requirements are procedural in nature . . . [and] could be abrogated retroactively because 'no one has a vested right in any given mode of procedure.'") (Internal citations omitted); see also Shaps v. Provident Life & Accident Ins. Co., 826 So. 2d 250, 254 (Fla. 2002) ("[G]enerally in Florida the burden of proof is a procedural issue.").

62. Petitioners established that they are substantially affected by the proposed rule. Upon that showing by Petitioners, Respondent "has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(2)(a), Fla. Stat.

63. "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' . . . or evidence that 'more likely than not' tends to prove a certain proposition." (citations omitted) Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

64. When a substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

Rulemaking Standards

65. Section 120.52(8) defines an "invalid exercise of delegated legislative authority." As Petitioners have framed the issues in the Joint Prehearing Stipulation, only sections 120.52(8)(a), (8)(b), (8)(c), and (8)(f) are at issue in this proceeding. Those provisions establish that a rule is an invalid exercise of delegated legislative authority under the following circumstances:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> * * *
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

66. In addition to the subsections of 120.52(8) specifically pled, the "flush left" paragraph at the end of section 120.52(8) has been described as "a set of general standards to be used in determining the validity of a rule in all cases." S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-598 (Fla. 1st DCA 2000). The "flush left" section provides that:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may

> adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

Statement of Estimated Regulatory Costs

67. Section 120.541(1), which governs the preparation and consideration of statements of estimated regulatory costs, provides, in pertinent part, that:

> (a) Within 21 days after publication of the notice required under s. 120.54(3)(a), a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule if the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. If such a proposal is submitted, the 90-day period for filing the rule is extended 21 days. Upon the submission of the lower cost regulatory alternative, the agency shall prepare a statement of estimated regulatory costs as provided in subsection (2), or shall revise its prior statement of estimated regulatory costs, and either adopt the alternative or provide a statement of the reasons for

rejecting the alternative in favor of the proposed rule.

(b) If a proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within 1 year after the implementation of the rule, the agency shall prepare a statement of estimated regulatory costs as required by s. 120.54(3)(b).

(c) The agency shall revise a statement of estimated regulatory costs if any change to the rule made under s. 120.54(3)(d) increases the regulatory costs of the rule.

(d) At least 21 days before filing the rule for adoption, an agency that is required to revise a statement of estimated regulatory costs shall provide the statement to the person who submitted the lower cost regulatory alternative and to the committee and shall provide notice on the agency's website that it is available to the public.

(e) Notwithstanding s. 120.56(1)(c), the failure of the agency to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative as provided in this subsection is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter.

68. Section 120.541(2) provides, in pertinent part, that:

A statement of estimated regulatory costs shall include:

(a) An economic analysis showing whether the rule directly or indirectly:

1. Is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment

> in excess of $1 million in the aggregate within 5 years after the implementation of the rule;
>
> 2. Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within 5 years after the implementation of the rule; or
>
> 3. Is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule.

69. Section 120.541(3) provides that:

> If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

General Provisions Related to Gambling

70. Gambling in Florida is historically disfavored, to the extent of criminalizing casino-type gambling. The keeping of "gambling houses" is a third-degree felony. § 849.01, Fla. Stat. Playing or engaging in any game of chance, including cards, for money or "other thing of value" is a second-degree misdemeanor. § 849.08, Fla. Stat.

71. The Florida Legislature has established a narrow exception to these criminal statutes by allowing certain card games to be played in cardrooms at licensed pari-mutuel facilities "if such game and cardroom operation are conducted strictly in accordance with the provisions of this section." § 849.086(3), Fla. Stat. "The legislature finds that authorized games as herein defined are considered to be pari-mutuel style games and not casino gaming because the participants play against each other instead of against the house." § 894.086(1), Fla. Stat.

72. An "authorized game" is "a game or series of games of poker or dominoes which are played in a non-banking manner." § 849.086(2)(a), Fla. Stat.

73. A "banking game" is a "game in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." § 849.086(2)(b), Fla. Stat.

Rulemaking Authority

74. "[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers." Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985). Thus, the authority of the

legislature to empower the Division to adopt pari-mutuel rules to establish standards for cardroom operations and activities is recognized by the undersigned.

75. Despite the foregoing broad grant of authority, the authority to adopt rules is not without limits. See St. Petersburg Kennel Club v. Dep't of Bus. & Prof'l Reg., 719 So. 2d 1210, 1211 (Fla. 2d DCA 1998)(holding that neither section 550.0251(12) nor section 849.086(4)(a), Florida Statutes (Supp. 1996), authorized Respondent to adopt a definition of "poker," or to approve games based thereon).

76. Rules 61D-11.001 and 61D-11.002 list sections 550.0251(12) and 849.086(4) and (11) as the rulemaking authority.

77. Section 550.0251(12) provides that:

> The division shall have full authority and power to make, adopt, amend, or repeal rules relating to cardroom operations, to enforce and to carry out the provisions of s. 849.086, and to regulate the authorized cardroom activities in the state.

78. Section 849.086(4), entitled "Authority of Division," provides, in pertinent part, that:

> The Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation shall administer this section and regulate the operation of cardrooms under this section and the rules adopted pursuant thereto, and is hereby authorized to:

> (a) Adopt rules, including, but not limited to: the issuance of cardroom and employee licenses for cardroom operations; the operation of a cardroom; recordkeeping and reporting requirements; and the collection of all fees and taxes imposed by this section.
>
> (b) Conduct investigations and monitor the operation of cardrooms and the playing of authorized games therein.
>
> * * *
>
> (d) Suspend or revoke any license or permit, after hearing, for any violation of the provisions of this section or the administrative rules adopted pursuant thereto.

79. Section 849.086(11) establishes the requirement that cardroom operators keep and maintain records of cardroom operations, with "[t]he information required in such records shall be determined by division rule," and to report such records "on forms prescribed by the division." That statutory section is not applicable to the proposed rules at issue.

80. Petitioners have characterized the dispute in this case as centering on "the frequency in which the designated player button must be rotated around the poker table and offered to players." To the contrary, the preponderance of the evidence demonstrates that the fundamental disagreement is whether the manner in which the games are being played, in which the players

play against a banked designated player rather than against each other with a pooled pot, constitutes a "banking game" that is prohibited by section 849.086(12)(a).

The Designated Player Rules

81. The rules proposed for repeal, rules 61D-11.001(17) and 61D-11.002(5), relate to the play of designated player games.

82. Rule 61D-11.001(17) provides that "'[d]esignated player' means the player identified by the button as the player in the dealer position."

83. Rule 61D-11.002(5) provides that:

> Card games that utilize a designated player that covers other players' potential wagers shall be governed by the cardroom operator's house rules. The house rules shall:
>
> (a) Establish uniform requirements to be a designated player;
>
> (b) Ensure that the dealer button rotates around the table in a clockwise fashion on a hand to hand basis to provide each player desiring to be the designated player an equal opportunity to participate as the designated player; and
>
> (c) Not require the designated player to cover all potential wagers.

Internal Control Rules

84. Rule 61D-11.019, entitled "Internal Controls,"[8/] and last amended on July 21, 2014, provides, in pertinent part, that:

(1) Initial applications for a cardroom license shall include a complete set of written internal controls established in compliance with Section 849.086, F.S., and the rules promulgated thereunder. Subsequent changes to the internal controls must be submitted to the division for approval prior to implementation, as one complete set, in a format which will include underlining additions and striking through deletions, since the last date of approved revisions with a footnote of the current revision date.

(2) Failure of any cardroom operator to follow the internal controls once approved by the division shall be a violation of these rules.

* * *

(4) The cardroom manager or general manager shall sign and submit the internal controls to the division. The internal controls shall at a minimum contain the following:

* * *

(i) A list of all authorized games offered for play and a description of the rules of play and wagering requirements for each game[.]

Invalid Exercise of Delegated Legislative Authority

85. Petitioners have alleged that the proposed rules at issue constitute an invalid exercise of delegated legislative authority pursuant to subsection 120.52(8)(a), (b), (c), and (f).

A. 120.52(8)(a) - Respondent materially failed to follow applicable rulemaking procedures or requirements

86. When it proposed the subject amendments to chapter 61D-11, Respondent had not prepared a statement of estimated regulatory costs, relying on its determination that such was not required since the amendments would have little economic effect.

87. On November 19, 2015, Petitioners timely filed a written LCRA that, on its face, demonstrated that the proposed rule was likely to have adverse impact in excess of $1 million in the aggregate within five years after the implementation of the rule. When that LCRA was filed, a statutory obligation was triggered that required Respondent to prepare a statement of estimated regulatory costs and either adopt the LCRA or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule. § 120.541(1)(a), Fla. Stat.

88. Respondent did not prepare a statement of estimated regulatory costs or respond to a written lower cost regulatory alternative. Other than vague assertions that the numbers provided to it by Petitioners were "unreliable," assertions that were made without the assistance of qualified economists or statisticians, Respondent provided little in support of its decision.

89. Section 120.541(1)(e) provides that:

> Notwithstanding s. 120.56(1)(c), the failure of the agency to prepare a statement of

> estimated regulatory costs or to respond to a written lower cost regulatory alternative as provided in this subsection is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter.

90. As a result of its failure to comply with section 120.541, Respondent has materially failed to follow the applicable rulemaking procedures or requirements set forth in chapter 120.

B. 120.52(8)(b) - Respondent has exceeded its grant of rulemaking authority

91. As a legislative function, rulemaking is within the exclusive authority of the legislature. S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d at 598. It is not sufficient that the rule is "within the agency's powers and duties," there must be a specific grant of rulemaking authority. Id. at 598-99.

92. The opinions in Southwest Florida Water Management District, supra, and Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), recognize that the flush-left paragraph of section 120.52(8) is applicable to challenges involving allegations that an agency has exceeded its rulemaking authority, and is intended to restrict and narrow the scope of agency rulemaking. As established in Day Cruise:

> It is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class or powers or duties the Legislature has conferred on the agency.

794 So. 2d at 700. Nonetheless, "[i]t follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d at 599.

93. An "authorized game" is "a game or series of games of poker or dominoes which are played in a non-banking manner." § 849.086(2)(a), Fla. Stat. A "banking game" is a "game in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." § 849.086(2)(b), Fla. Stat.

94. Section 849.086(1) provides that "authorized games as herein defined" have been determined by the Legislature to be pari-mutuel style games because players play against each other, and do not play against the cardroom operator.

95. Respondent has cited sections 550.0251(12) and 849.086(4) and (11) as the rulemaking authority for rules 61D-11.001 and 61D-11.002. As set forth above, the authority in section 849.086(11) regarding recordkeeping and reporting is not applicable to the issues in this case.

96. In St. Petersburg Kennel Club v. Department of Business and Professional Regulation, 719 So. 2d 1210, 2011 (Fla. 2d DCA 1998), the Second District Court of Appeal determined that neither section 550.0251(12) nor section 849.086(4) "state, for example, that the Division shall have the authority to make rules which set forth the definition of poker."

97. Section 550.0251 has been amended twice since the 1996 version of Florida Statutes cited in St. Petersburg Kennel Club. Neither of the amendments made changes to the rulemaking authority in section 550.0251(12).

98. Section 849.086 has been amended eight times since the 1996 version of Florida Statutes cited in St. Petersburg Kennel Club. None of the amendments made changes to the rulemaking authority in section 849.086(4).

99. As with the effort in St. Petersburg Kennel Club, the effort to further define, prohibit, or limit activities authorized by statute, in this case by the repeal of a rule that authorized and set standards for designated player (i.e. player banked) games, exceeds Respondent's rulemaking authority.

See also Calder Race Course, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 04-2950RX (Fla. DOAH Dec. 21, 2004), aff'd per curiam Dep't of Bus. & Prof'l Reg. v. Calder Race Course, Inc., 913 So. 2d 601 (Fla. 1st DCA 2005).

100. As set forth herein, the result in this case is predicated on the fact that Respondent developed a rule that specifically recognized a particular manner of game play as being allowable and, by repealing that rule, has established a policy that the same manner of game play is not allowable. The effort to restrict gameplay by the repeal of the rules, and by so doing to establish what is an "authorized game," is beyond the authority conferred under sections 550.0251(12) and 849.086(4).

101. The undersigned fully recognizes the seemingly incongruous result created by this conclusion, as did Respondent. See Respondent's Proposed Final Order, ¶ 60. ("These exact statutory sections were also cited when the rules were first promulgated in July 2014 . . . . However, if the Petitioners' position is accepted, then the current version of the rules would be invalid because those sections were the exact ones cited when the rule was enacted."). That may well be the case. However, no party has argued that the existing rules are an invalid exercise of delegated legislative authority. Thus, the validity of the existing rules is not before the undersigned.[9/]

C. 120.52(8)(c) - The rule enlarges, modifies, or contravenes the specific provisions of law implemented

102. An agency is limited in its rulemaking authority to implementing and interpreting specific laws and may not promulgate a rule simply because the subject matter of the rule is within the general scope of its powers and duties. In that regard, "[u]nder Section 120.52(8)(c), the test is whether a (proposed) rule gives effect to a 'specific law to be implemented,' and whether the (proposed) rule implements or interprets 'specific powers and duties.'" Bd. of Trs. of the Int. Imp. Trust Fund v. Day Cruise Ass'n, 794 So. 2d at 701.

103. Respondent has cited section 849.086 as the law implemented by rules 61D-11.001 and 61D-11.002.

104. The issue is, therefore, whether Respondent's proposed repeal of rule 61D-11.001(17) and 61D-11.002(5), which has the effect of establishing a prohibition on designated player games, implements specific powers and duties established by section 849.086.

105. The powers and duties established by section 849.086 do not include the establishment of rules to define the manner of play or wagering for "authorized games."[10/]

106. A preponderance of the evidence demonstrates that, by its repeal of the rules at issue, Respondent intends to not only repeal the conditions for implementing authorized designated

player games, but to repeal the authority for such games altogether, a restriction on "authorized games" that is not apparent from section 849.086.

107. For the reasons set forth herein with regard to whether the repeal of rules 61D-11.001(17) and 61D-11.002(5) exceed Respondent's rulemaking authority, and recognizing the apparent incongruity created thereby, the undersigned similarly concludes that the repeal of the rules has been undertaken with the specific intent to define, prohibit, or limit activities authorized by statute, and thus enlarges, modifies, or contravenes the specific provisions of law implemented.

D. 120.52(8)(f) - The rule imposes regulatory costs on the regulated person which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives

108. Petitioners argue that the proposed repeal is invalid because Respondent is imposing regulatory costs on Petitioners that could be reduced through the adoption of less costly regulatory alternatives that substantially achieve the statutory objectives. The statutory objectives are, generally, "to provide additional entertainment choices for the residents of and visitors to the state, promote tourism in the state, and provide additional state revenues." § 849.086(1), Fla. Stat.

109. In support of its argument, Petitioners refer to the LCRA filed on their behalf. While the existence of the LCRA was

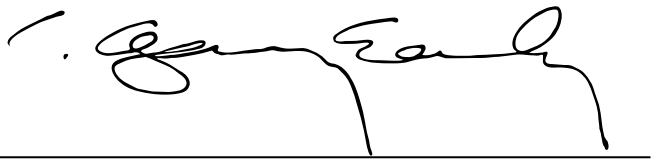
acknowledged by all parties, and evidence was sufficient to establish that it triggered the duties set forth in section 120.541, the LCRA itself was not entered in evidence.

110. It was the generally stated position of Respondent throughout the proceeding that the repeal of rules 61D-11.001(17) and 61D-11.002(5) had no real effect on the ability of Petitioners to allow designated player games at their cardrooms (though that position was not supported by the evidence). Thus, Petitioners' argument that the rule unnecessarily imposed regulatory costs has some facial merit. However, given that the LCRA was not entered in evidence, and given that the proposed repeal is invalid for the independent grounds set forth herein, it is unnecessary to calculate the effect of alternatives on the regulatory costs occasioned thereby.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) constitutes an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 26th day of August, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of August, 2016.

[1/] A petition was also jointly filed by St. Petersburg Kennel Club, Inc.; Sarasota Kennel Club, Inc.; Washington County Kennel Club, Inc.; and Fronton Holdings, LLC, and was assigned as Case No. 15-7055. That petition was voluntarily dismissed on February 12, 2016, and the case closed on February 15, 2016.

[2/] As set forth in the Order of Pre-hearing Instructions, the parties were, in their prehearing stipulation, to identify all issues of fact and law remaining for consideration in this proceeding. The failure to identify issues of fact or law remaining to be litigated has been held to constitute a waiver and elimination of those issues. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015).

Petitioners did not identify section 120.52(8)(d), which provides that a proposed rule is an invalid exercise of delegated legislative authority if "[t]he rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency, as being a basis for its challenge. Under the facts of this case, which includes Respondent's decision to deny internal controls with designated player games, had that section been raised, it may well have

proven to be an additional reason for the invalidation of the proposed rule.

[3/] Mr. Zachem explained, convincingly, that as a general rule, most poker games are designated player games. Using the example of Texas Hold 'Em, the "designated player" would be rotated around the table, with that person, though not physically dealing cards, being in the position of being dealt last. Advantages with regard to antes and being able to assess the bets of other players go with the table position of the "designated player. The button passes after each hand, with each player at the table having the sequential opportunity to be the "designated player," i.e., the player in the dealer position. Given the advantages attendant to that position, there would be little or no reason to decline the button. Thus, the stipulation that, for purposes of this rule challenge, "designated player game" are synonymous with "player banked games" more accurately describes the situation in which players individually play against a player with a designated amount of chips, a situation that Respondent has now determined to constitute a player maintained (but cardroom established) "bank."

[4/] It was not clear whether the Bestbet cardroom is affiliated with the Orange Park Kennel Club or the Jacksonville Kennel Club, both of which operate cardrooms.

[5/] The games as played, as depicted in the December 7, 2015 surveillance videos entered in evidence, differed in certain respects from those depicted in the April 2012 demonstration video, and approved in the internal controls. Nonetheless, the basic component of the games, i.e., that the designated players were individually playing their hands against the other players at the table, was consistent. The games, their manner of play, and the extent to which the games as played deviated from those approved in the internal controls, were ably described by Judge Van Wyk in her Recommended Order in Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Jacksonville Kennel Club, DOAH Case No. 16-1009. A review of that Order, which is not yet final, suggests that Judge Van Wyk's conclusion that "on December 7, 2015, Jacksonville operated cardroom games in a banking manner, or unauthorized games in violation of section 849.086" was based more on the case-specific proof that the games conducted on that date deviated from the internal controls, and was not a sweeping conclusion that designated player games as approved constituted prohibited banking games.

[6/] No explanation was provided as to how that interpretation squares with section 849.086(7)(c). ("The providing of . . . dealers by a licensee does not constitute the conducting of a banking game by the cardroom operator.").

[7/] Respondent has attempted to soften its position by arguing that it has no issue with designated player games, but that its concern is that the (previously approved) internal controls and house rules discourage the rotation of the button, and thus participation by more designated players regardless of whether they meet the uniform requirements. The preponderance of the evidence in this case demonstrates that Respondent's goal was a more fundamental desire to rid cardrooms of player-banked games established through the use of designated players.

[8/] The procedure for the approval of internal controls has existed in substantially similar form since September 7, 2008.

[9/] It is significant that Respondent did not propose the repeal of rules 61D-11.001(17) and 61D-11.002(5) on the basis that it had determined that it lacked rulemaking authority for those rules. Rather, the October 29, 2015, notice of proposed rule provided that "[t]he purposes and effects of the proposed rules are to update the guidelines that govern cardrooms in the state of Florida. Each of the above listed rules has been updated for clarity, efficiency, and congruency with statute," which suggests that Respondent believed it had the requisite authority to adopt the amendments, and intended the proposed amendments to have some substantive effect. The January 15, 2016, notice of change did not suggest otherwise.

[10/] Until section 849.086(8) was last amended in 2009, the Legislature established wagering limits and requirements, with the requirements having been amended several times since the initial enactment of section 849.086 in 1996. That authority is now to be exercised by the cardroom operator. Ch. 2009-170, § 24, Laws of Fla.

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Tallahassee, Florida 32399-1400
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.