TITLE 1: GENERAL PROVISIONS
CHAPTER II: JOINT COMMITTEE ON ADMINISTRATIVE RULES
PART 220 REVIEW OF PROPOSED RULEMAKING
SECTION 220.EXHIBIT A STATE MANDATES ACT QUESTIONNAIRE

Section 220.EXHIBIT A State Mandates Act Questionnaire

State Mandates Act Questionnaire

Agency: Illinois Gaming Board

Part/Title: Video Gaming (General) (11 Ill. Adm. Code 1800)

Illinois Register Citation: 47 Ill. Reg. 2540

1. Does this rulemaking affect any of the following: **No.**

Municipality	Other Unit of Local Govt.
County	School District
Township	Community College Dist.

2. Does this rule require any of the above entities to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues? **No.**

   Yes No Number of units affected _____

   If yes, please estimate the amount of additional expenditures necessitated by this rulemaking per unit of government: $ _____

   Note: If the dollar amount, or total number of units affected is unknown, please outline and attach to this form an explanation of the steps taken by the agency to determine the approximate expense of the rulemaking, and the number of units affected.

   If no, please explain why the rule does not necessitate such additional expenditures.

This rulemaking does not mandate additional expenditures on any of the units of governments listed above.

3. Were any alternatives that do not necessitate additional expenditures considered? **No.**

Yes No

If yes, please list these alternatives and explain why they were rejected.

4. What are the policy objectives of the rulemaking? (Please be specific)

This rulemaking seeks to provide clarity, transparency, and fair application of Section 30 of the Video Gaming Act to all video gaming licensees. From the date of its enactment in 2009, the Video Gaming Act (the "Act") has prohibited vertical integration among different tiers of video gaming licensees. Among its other provisions on this topic, Section 30 of the Act [230 ILCS 40/30] prohibits terminal operators from being licensed as establishments or from owning, managing, or controlling licensed establishments.

Illinois' First District Appellate Court upheld the Act's tiered license structure and restrictions on vertical integration in *Dotty's Café v. Illinois Gaming Board*, 2019 IL App (1st) 173207. More recently, Public Act 102-0689, effective December 17, 2021, clarified that the prohibition against vertical integration forbids licensed sales agents from owning or controlling licensed establishments. By enacting this new prohibition, the General Assembly reiterated that the intent of the Act is to prevent persons from simultaneously participating on both sides of the video gaming terminal operator-establishment divide.

Since 2009, certain practices have developed in the video gaming industry that have required the Illinois Gaming Board to expend countless hours and limited resources conducting fact-intensive investigations to determine whether these practices comport with the Act's vertical integration prohibition. This has resulted in uneven enforcement and created uncertainty, inconsistency and suspicion among the industry as to whether all licensees are abiding by the law.

To achieve compliance with the statutory mandate prohibiting vertical integration in an effective, consistent and transparent manner, the Board proposes adoption of clear rule provisions to prohibit certain problematic arrangements instead of addressing the issue through intensive investigations and disciplinary proceedings, or not at all.

Faithful adherence to the Act's vertical integration prohibitions raises complex issues that require attention and thoughtful action. Toward that end, the Board proposes the following:

New Section 1800.322 prohibits use agreements between terminal operators and establishments under certain circumstances, including where owners or PSICs of a terminal operator are immediate family members of a direct or indirect owner, or PSIC, of a location or any affiliated entity. The new Section also prohibits a terminal operator that is the landlord of an establishment from entering into a use agreement with that establishment. The Section prohibits sales agents from soliciting use agreements from locations owned or controlled by the sales agent's immediate family.

Section 1800.430 is amended to provide that the franchisors of an establishment are considered Persons of Significant Influence or Control ("PSICs") of the establishment when the establishment obtains more than 50 percent of its revenue from net terminal income. This change will ensure that terminal operators cannot use the franchise mechanism as a means to exercise indirect control over establishments.

New Section 1800.450 makes explicit that all licensees are limited to one tier of the video gaming industry. This limitation forces all individuals and business entities to decide whether they wish to participate in the industry on the terminal operator side − including as terminal handlers, technicians, or sales agents − or on the establishment side. By prohibiting the practices that have developed over the years involving employees of terminal operators acting as establishment owners, or establishment owners being paid as terminal handlers, this section will make it much more difficult for licensees to engage in behavior that may violate Section 30 of the Act.

5. Please explain why the policy objectives of this rule cannot be achieved in the absence of the rule or through a rule that does not create a State Mandate.

As stated in the agency's response to Question 1 above, the present rulemaking does not create a State Mandate. Explaining further: The rulemaking implements and adds needed clarification to the strict separation of licensing tiers established under Section 30 of the Act. In the absence of the rulemaking, the Illinois Gaming Board must separately evaluate--using criteria not defined by statute or rule--every situation in which Section 30 is potentially violated because a terminal operator is linked to an establishment with which it has entered into a use agreement through ownership, employment, status as a PSIC or immediate family relationship. The evaluations require case-by-case investigations often followed by hearings and subsequent litigation. Because of the lack of clear standards under current statutory and regulatory language regarding the vertical integration prohibition, agency orders may be subject to challenge and resulting lengthy delays. Further, the required enforcement effort diverts agency resources better used for other purposes, at an undetermined agency cost looking forward. In contrast, the bright-line tests established by the present rulemaking will ensure effective, efficient, clear, consistent, swift, and transparent enforcement of this essential statutory component of video gaming regulation.

(Source: Amended at 18 Ill. Reg. 4758, effective March 14, 1994)

AGENCY ANALYSIS OF ECONOMIC AND BUDGETARY EFFECTS OF PROPOSED RULEMAKING

Agency: Illinois Gaming Board

Part/Title: Video Gaming (General), 11 Ill. Adm. Code 1800

Illinois Register Citation: February 24, 2023 (47 Ill. Reg. 2540)

Please attempt to provide as dollar-specific responses as possible and feel free to add any relevant narrative explanation.

1. Anticipated effect on State expenditures and revenues.

   (a) Current cost to the agency for this program/activity:

   For FY 2024, the State Gaming Fund, out of which all agency expenditures for video gaming regulation are paid, has a total appropriation of $232,886,800. The FY 2024 appropriation out of this fund for costs associated with implementation and administration of the Video Gaming Act is $24,000,200. In addition, the Illinois State Police has an FY 2024 appropriation of $15,000,000 out of the State Gaming Fund covering its activities in connection with enforcement of the Video Gaming Act, Illinois Gambling Act and Sports Wagering Act.

   (b) If this rulemaking will result in an increase or decrease in costs, specify the fiscal year in which this change will first occur and the dollar amount of the effect.

   This rulemaking will not result in an increase or decrease in costs.

   (c) Indicate the funding source, including Fund and appropriation lines, for this program/activity.

   State Gaming Fund (fund # 129-56501-XXXX-0000). The State Gaming Fund is the funding source for both the Illinois Gaming Board and the Department of State Police in their implementation of the provisions of the Video Gaming Act.

   (d) If an increase or decrease in the costs of another State agency is anticipated, specify the fiscal year in which this change will first occur and the estimated dollar amount of the effect.

   There will be no increase or decrease in the costs of another State agency.

(e) Will this rulemaking have any effect on State revenues or expenditures not already indicated above? Specify effects and amounts.

No

2. Economic effect on persons affected by the rulemaking.

(a) Indicate the economic effect and specify the persons affected.

Several provisions in the rulemaking will have economic effects on specified categories of video gaming licensees, as well as persons connected with these licensees as direct or indirect owners, Persons of Significant Influence or Control ("PSICs"), affiliates, immediate family members, or employees and persons otherwise receiving fees for services from video gaming licensees. The proposed rulemaking would prohibit certain cross-license tier business and financial arrangements, including those between video gaming licensees who are immediate family members operating in different segments of the Illinois video gaming industry and among terminal operators who are landlords and video gaming location license holders who are tenants when the landlord operates their video gaming terminals in the tenant's establishment. These rules provide clarity on existing statutory prohibitions on holding multiple video gaming licenses and vertical integration in the Illinois video gaming industry.

The economic impact of the proposed rulemaking cannot be quantified. The IGB does not have an economic forecasting capacity to adequately estimate the potential economic impact of this rule. The proposed rulemaking would not bar anyone from licensure and there would remain an ample market for any potentially impacted licensees to compete without resort to the prohibited arrangements and business dealings should the rule become effective. For these reasons, any potential economic effects would not outweigh the statutory mandates and gaming integrity interests that make adoption of this rulemaking necessary.

(b) If an economic effect is predicted, please briefly describe how the effect will occur.

See item (a) above.

(c) Will the rulemaking have an indirect effect that may result in increased administrative costs? Will there be any change in requirements such as filing, documentation, reporting or completion of forms? Compare to current requirements.

The rulemaking will not have an indirect effect that may result in increased administrative costs.

ATTACHMENT A
FIRST NOTICE CHANGES

Agency: Illinois Gaming Board

Rulemaking: Video Gaming (11 Ill. Adm. Code 1800; 47 Ill. Reg. 2540)

Changes:

1. On line 307, change "six months" to "one year".

SECOND NOTICE

1) Agency: Illinois Gaming Board (the "Board" or "IGB")

2) Title and Administrative Code Citation: Video Gaming (General), 11 Ill. Admin. Code 1800

3) Date and Citation to Illinois Register: 47 Ill. Reg. 2540; February 24, 2023

4) Text and Location of any Changes from First Notice: See Attachment A First Notice Changes.

5) Response to Codification Recommendations: No changes were requested by the Secretary of State.

6) Incorporations by Reference: None

7) Final Regulatory Flexibility Analysis:

   A) Summary of Issues Raised by Small Business: The Illinois Gaming Board did not receive any comments from any self-described small businesses.

   B) Description of Actions and Alternatives Proposed by Small Business During First Notice: None

8) Compliance with Section 5-30 of the APA and 1 Ill. Adm. Code 220.285:

   The provisions of Section 5-30 of the APA and 1 Ill. Adm. Code 220.285 are not applicable to the proposed rulemaking because the proposed rulemaking does not contain provisions requiring the application of those sections.

9) A) List of Commenters:

   Commenters submitting written comments during the First Notice period:

   William Bogot on behalf of Lucky Street Gaming, LLC, Dragonfly Gaming, LLC and other unnamed entities licensed by the IGB, correspondence sent April 10, 2023. (the "Fox Letter").

   Christopher Curtis, Mayor of the City of Kankakee, correspondence sent April 25, 2023.

   Dale Eyman on behalf of DK Gaming, LLC, correspondence sent April 17, 2023. The DK Gaming, LLC correspondence incorporates the IGMOA Letter.

John D. Galle on behalf of Winner's Choice Gaming, LLC, correspondence sent April 18, 2023. The Winner's Choice Gaming, LLC correspondence incorporates the IGMOA Letter.

Rick Heidner on behalf of Gold Rush Amusements, Inc., correspondence sent April 24, 2023. (the "Gold Rush Letter"). The Gold Rush Letter incorporates the IGMOA Letter.

Matt Hortenstine on behalf of J&J Ventures Gaming, LLC, correspondence sent April 10, 2023. (the "JJVG Letter").

Paul Jenson on behalf of the Illinois Gaming Machine Operators Association, correspondence sent April 10, 2023. (the "IGMOA Letter").

Charity Johns on behalf of Laredo Hospitality Ventures, LLC and Illinois Café & Service Company, LLC ("Laredo"), correspondence sent March 27, 2023 and September 18, 2023.

Michael Meyer on behalf of 777 Gaming, LLC, correspondence sent April 18, 2023. 777 Gaming, LLC's correspondence incorporates the IGMOA Letter.

Top Notch Entertainment LLC, correspondence sent April 3, 2023.

Commenters presenting oral testimony at the IGB's April 27, 2023 special public meeting about this proposed rulemaking: (Please note that full audio and video of the IGB's April 27, 2023 public meeting is available on the IGB's website at www.igb.illinois.gov/filesVideoLaw/VerticalIntegration.mp4.)

Clinton Morris, Mayor of Belvidere, Illinois.

Terrance Carr, Mayor of McCook, presenting testimony in his capacity as a video gaming location owner.

Rick Heidner on behalf of Gold Rush Amusements, Inc.

Industry representatives participating in the September 20, 2023 commenters' discussion of the proposed rulemaking with IGB staff:

William Bogot of Fox Rothschild LLP
Erin Lynch Cordier of Taft Stettinius & Hollister LLP
Terence Dunleavy of O'Rourke LLP
Ivan Fernandez of IGMOA
Sherrie Kowalczyk of IGMOA
Derek Harmer of Accel Entertainment
Matt Hortenstine of JJVG
Paul Jenson of Taft Stettinius & Hollister LLP

Charity Johns of Laredo
Donna More of Fox Rothschild LLP
James Pellum of Accel Entertainment
Scott Renville of Renville Gaming, LLC

B) Issues Raised:

The following list consolidates and summarizes the major issues commenters raised in both written and oral public comments (note: all comments the IGB received are publicly available on the IGB website):

A delayed effective date or safe harbor in new Section 1800.322: The IGMOA and JJVG Letters, as well as various participants in the September 20, 2023 discussion with commenters and IGB staff, contend that the rulemaking that ultimately becomes effective should not apply to any existing video gaming relationships.

Constitutional concerns: The Fox, IGMOA, and JJVG Letters challenge the proposed rulemaking's constitutionality. Specifically, the commenters assert that the rulemaking will deprive licensees of property rights in use agreements and retroactively impair existing contracts. Commenters also contend that the proposed rulemaking is unnecessary and overbroad.

Exceeds the IGB's statutory authority: The Fox, IGMOA, JJVG, and Top Notch Letters contend that the proposed rules exceed the IGB's authority by trying to restrict familial business relationships between terminal operators, video gaming locations and others involved in Illinois video gaming. Commenters also contend that the proposed rulemaking governing familial relationships is unnecessary, overbroad and may harm terminal operators with limited geographic markets. The IGMOA and JJVG letters also contend that the IGB lacks the authority to prohibit licensed terminal handlers and technicians from ownership or control of a video gaming location.

Unnecessary and disruptive to economic development in its prohibition of terminal operators serving as landlords of locations in which they operate video gaming terminals: The Gold Rush, IGMOA and JJVG Letters, written comments from Christopher Curtis, and oral testimony from Clinton Morris and Terrance Carr contend that this aspect of the rulemaking is overbroad, unwarranted, and harmful to economic activity.

Create a new investigatory procedure to address apparent problematic relationships: Participants in the September 20, 2023 discussion with commenters and IGB staff proposed to address the IGB's concerns with certain relationships that appear problematic by creating an entirely new investigatory and enforcement process. Commenters propose to replace the proposed rulemaking's clear and straightforward prohibitions with individualized evaluations initiated by a letter sent by IGB staff notifying the licensee(s) of the concerning relationship.

The categories of public comment listed above are discussed below:

1. Request for a delayed effective date or safe harbor:

With respect to new Section 1800.322, commenters suggest applying these rulemaking's provisions to new video gaming relationships only. Commentors suggest leaving any current relationships unaffected. (*E.g.*, IGMOA Letter at 5.)

Were this suggestion adopted, the rulemaking would have no impact on the following arrangements:

(a) Currently existing familial relations between terminal operators and locations as prohibited by new Section 1800.322 (a) and (c),

(b) Currently existing terminal operator ownership of real estate that houses licensed locations where the terminal operator is operating VGTs as prohibited by new Section 1800.322 (b); and

(c) Current possession of location licenses by terminal handlers, technicians, and sales agents and brokers as prohibited by new Section 1800.450.

This suggestion would weaken the scope and efficacy of the rulemaking, undermine the statutory prohibition on vertical integration in Section 30 of the Video Gaming Act [230 ILCS 40/30], and create an unmanageable landscape of video gaming licensees operating under inconsistent and conflicting restrictions. Therefore, the IGB rejects this suggestion.

The IGB does, however, recognize that it may be necessary to afford licensees time to comply with the new rules. Accordingly, the IGB has modified the implementation date of Section 1800.322 in the following respect: Instead of requiring compliance within six months, Section 1800.322 (d)'s enforcement has been extended to one year from the effective date of the rule.

2. Constitutional concerns:

The Fox and JJVG Letters, along with other commenters, variously assert that the proposed rulemaking runs afoul of the U.S. and Illinois Constitutions. The following discussion addresses the commenters' contentions in turn.

Asserted deprivation of rights: The commenters correctly note that the proposed rulemaking will restrict certain economic arrangements involving video gaming licensees that implicate the Video Gaming Act's prohibition on vertical integration. Specifically, new Section 1800.322 ("Rule 322") prohibits use agreements between terminal operators and licensed establishments where the owners or Persons with Significant Influence or Control[1] ("PSICs") of the licensees are immediate family

[1] Defined in 11 Ill. Adm. Code 1800.430

members. Similarly, Rule 322 prohibits sales agents from soliciting use agreements from locations that are owned or controlled by the sales agent's immediate family. Rule 322 also prohibits a terminal operator from entering into a use agreement where the terminal operator or an affiliated entity is the landlord for the establishment. The IGB recognizes these proposed changes impact current licensees and existing arrangements, but the proposed amendments are nonetheless both constitutionally sound and necessary to strengthen IGB's efforts to achieve compliance with the statutory mandate and legislative intent regarding vertical integration.

Commenters initially note that the IGB unsuccessfully proposed a similar rulemaking in 2017 that JCAR concluded at the time would unconstitutionally divest licensees of property rights. Commenters incorrectly assert that nothing has changed since 2017 and there is no legal support for the IGB's proposed amendments today.

These objections and comparison to the 2017 rulemaking are misplaced. Commenters willfully ignore established Illinois Supreme Court case law and significant post-2017 legal precedent firmly establishing and reaffirming there are no constitutionally protected rights to engage in or profit from gambling. *J & J Ventures Gaming, LLC v. Wild*, 2016 IL 119870 (holding that the U.S. and Illinois Constitutions do not protect a terminal operator's right to freely contract with a location where the use agreement does not comply with the Video Gaming Act and IGB rules): *Dotty's Café v. Illinois Gaming Board*, 2019 IL App (1st) 173207 (holding that the statutory prohibition on vertical integration does not violate fundamental due process rights); *Dolly's Café, LLC v. Illinois Gaming Board,* 2019 U.S. Dist. Lexis 210368 (N.D. Ill. Dec. 6, 2019); *Dolly's Café, LLC v. Illinois Gaming Board*, 2019 U.S. Dist. Lexis 210368 (recognizing that the *Wild* decision "flatly foreclosed the notion that a protected liberty interest exists in the form of a gambling license").

Commenters also overlook the fact that in passing Public Act 102-0689 (effective December 17, 2021), the Illinois General Assembly added to the existing prohibitions on vertical integration by banning sales agents from owning or controlling licensed locations. In so doing, the General Assembly reiterated its intent to prevent persons from simultaneously participating on both sides of the video gaming terminal operator-location divide. The proposed rulemaking seeks to comply with that statutory directive.

Commenters further urge JCAR to reject the proposed amendment because they claim Rule 322 will violate the U.S. and Illinois Constitutions in two ways. First, they contend Rule 322 will offend constitutional prohibitions against laws that retrospectively impair existing vested rights in use agreements. Second, commenters claim Rule 322 will violate the Contracts Clause of the U.S. Constitution and the Impairments of Contracts Clause of the Illinois Constitution.

Here again, the commenters' constitutional objections miss the mark. It is well settled that retroactive application and impairment of contracts are constitutionally problematic only where constitutionally protected rights are impacted. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994) ("the potential unfairness of retroactive civil legislation is not, absent a violation of a specific constitutional provision, a sufficient reason for a court to fail to give a statute its intended scope."); *see also, Wild* at ¶ 42.

Without citation to any relevant applicable legal precedent, commenters conclude that the proposed rulemaking would retroactively impair protected rights in existing video gaming use agreements. Such assertions are premised on the assumption that terminal operators and establishments have vested rights in contracts that allow them to place gambling terminals for profit. However, controlling caselaw refutes this assumption. As noted above, the Illinois Supreme Court ruled in 2016 that the U.S. and Illinois Constitutions do not protect a terminal operator's right to freely contract where the video gaming use agreements do not comply with the Video Gaming Act and the IGB's adopted rules. *Wild*, 2016 IL 119870 ¶ 26. In *Wild,* plaintiff (and current commenter) JJVG argued, among other things that the rights of licensed terminal operators and locations to freely enter into video gaming contractual agreements were protected by the contracts clauses of the federal and Illinois Constitutions. *Id.*, at ¶ 7.

Recognizing there is no common law right in Illinois to engage in, or profit from gambling, the *Wild* court held that, by legalizing the use of video gaming terminals for commercial gambling purposes, the legislature enacted a "comprehensive statutory scheme which created *rights and duties that have no counterpart in common law or equity."* (Emphasis added.) *Wild*, at ¶ 32. Indeed, "nothing is more clearly and firmly established by the common law, than that all gambling contracts are void" and that all contracts that have their origin in gaming are void, not voidable. *Mallet v. Butcher*, 41 Ill. 382, 384 (1966); *Wild*, at ¶ 26.

The *Wild* court therefore held that since gambling on video gaming terminals is permitted in Illinois only under certain limited circumstances as defined by the Video Gaming Act, gaming contracts that do not conform to the applicable regulatory requirements of the IGB are void. *See also, Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 803, 809 (7th Cir. 2015)("A legislature, having created a statutory entitlement, is not precluded from altering or even eliminating the entitlement by later legislation."); *Sypolt v. Ill. Gaming Bd.*, 2021 U.S. Dist. LEXIS 62617 *; 2021 WL 1209132 (N.D. Ill., March 31, 2019) ('"[W]hen a state regulates an occupation it is otherwise empowered to extinguish (such as operating a tavern), then it has removed the liberty interest in that occupation.' As discussed above, the Illinois Supreme Court has held that 'gambling on video gaming terminals is permitted in Illinois only as authorized by' the Video Gaming Act. Accordingly, this Court concludes that running a video gaming establishment is not a 'common occupation' protected by the Fourteenth Amendment's due process clause.") (*Internal citations omitted*).

More recently, in *Dotty's Café v. Illinois Gaming Board*, 2019 IL App (1st) 173207, the First District Appellate Court rejected constitutional challenges to Section 25 and Section 30 of the Video Gaming Act, (the "VGA"), 230 ILCS 40/1 *et seq*. Critically, Section 30 contains the VGA's tiered licensing structure and prohibitions on vertical integration that the present rulemaking seeks to implement. To address the plaintiff's claim that the tiered licensing system violated substantive due process rights, the court analyzed the VGA to determine whether Section 30 was rationally related to a legitimate governmental interest. *Dotty*'s, at ¶ 30, 34 (applying the rational basis test since the VGA does not implicate fundamental rights). In applying the rational basis test to Section 30, the First District recognized that because gambling in any form is an activity that the General Assembly "may completely prohibit, the State has a legitimate interest in maintaining public confidence and integrity in the gambling activities it chooses to legalize." *Id.*, at ¶ 37 (citing, *Phillips v. Graham*, 86 Ill.2d 274, 286 (1981)). The *Dotty's* court then found the dual-license prohibition was rationally related to the state's interest of creating and maintaining public confidence and integrity in the video gaming industry and did not violate the Due Process Clause of the U.S. and Illinois Constitutions. *Id.*, at ¶¶ 40, 46, 57.

The First District explained that:

> Without the dual-license prohibition, one individual or business could build the video gaming machine, operate and maintain the machine, and own the establishment where the machine is located. In other words, that [one] individual or business could control every phase of the supply chain from manufacturing to retail, which could lead to vertical integration in the video gaming industry and suppress competition. *Dotty*'s, at ¶ 40.
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> Because of the perception that organized crime could be involved in video gaming, it is conceivable that the dual-license prohibition acts as a countermeasure, like in the alcohol industry, from organized crime dominating all aspects of the video gaming industry. Similarly, it is conceivable that the dual-license prohibition acts as a countermeasure, like in the alcohol industry, to vertically integrated organizations in which only a few entities control the entire video gaming industry, regardless of the possible perception of organized crime's involvement. Because of this, the dual-license prohibition is rationally related to the state's interest in maintaining public confidence and integrity in the video gaming industry and presents a reasonable method to achieve this goal. *Dotty's*, at ¶ 46.

Since video gambling is permitted only under certain limited circumstances in Illinois, as defined by the VGA, it is axiomatic that the right to participate in video gaming stems solely from the VGA, is subject to administrative regulation and may be amended or revoked by the legislature. *Wild*, at ¶¶ 26, 28. Thus, any interest that licensed terminal operators and locations hold in contracting to place video gaming terminals for gambling profit exists only within the regulatory framework that itself

allows the IGB to modify, limit or nullify that interest. *Id*. Such interests are akin to a privilege and do not confer upon the holder a constitutionally protected property right. *See Dennis Melancon v. City of New Orleans*, 703 F. 3d 262, 274 (5th Cir. 2012) (rejecting a constitutional challenge to amended regulations governing the City's taxicab industry because license holders do not have a property interest in their taxicab license).

As discussed above, and detailed more fully below, the IGB has already promulgated rules, which JCAR has approved, regulating use agreements between licensed terminal operators and locations. Rule 322 will add to this regulatory scheme and advance the State's interest in maintaining public confidence and integrity in video gaming. Based upon well-established gaming law, which is embraced in Illinois in *Wild* and its progeny, proposed Rule 322 does not deprive licensees with existing use agreements of a constitutionally protected right.

Given the importance of the State's interest in maintaining public confidence and integrity in the gaming industry, commentors' speculation that the amendment will be potentially unfair to terminal operators and related establishments (Fox Letter at 5), does not establish a violation of a constitutionally protected right. *Landgraf,* at 267-68; *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc*. 452 U.S. 264, 295 (1981) (in challenges limited to the facial constitutionality of legislation, the effects on particular participants in an industry are not dispositive; rather, the question is whether the mere enactment of a statute offends constitutional rights). The Fox Letter fails to meet its burden of showing that under no circumstances would Rule 322 be valid. *See Dotty's,* at ¶ 27, citing *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33. That proposed Rule 322, if enacted, may be unfair to some terminal operators and locations does not establish that the proposed rule is unconstitutional.

The Fox Letter also asserts that, if enacted, Rule 322(b) will "instantly terminate [existing] video gaming use agreements," that may have a term of up to 8 years thereby subjecting a terminal operator to discipline or forcing it to sell its real estate at a significant loss. (Fox Letter at 3.) Those claims misapprehend the proposed rulemaking. The prohibitions of proposed Rule 322, if enacted, will apply prospectively to all use agreements executed on or after the effective date of the rule. Existing use agreements that do not conform to Rule 322 will not instantly terminate or subject a terminal operator to discipline. The original proposed rule provided a six-month period for existing licensees to come into compliance; however, as explained above, Rule 322 now provides a one-year grace period to allow licensees reasonable time to undertake any necessary transactions or arrangements to come into compliance. Accordingly, commentors misconstrue proposed Rule 322's immediate impact on existing licensees.

<u>Asserted retroactive impairment of contracts:</u> Commenters also contend that proposed Rule 322 violates constitutional provisions that bar the IGB from retroactively changing the obligations and rights under a contract that was entered

into before the effective date of a new law or regulation. These objections are based on the prohibitions against contract impairment in the U.S. and Illinois Constitutions and case law applying these protections. The U.S. Constitution provides that "[n]o State shall . . . pass . . any Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Similarly, the Contracts Clause of the Illinois Constitution provides that "[n]o *ex post facto* law, or law impairing the obligation of contracts . . . shall be passed." Ill. Const. 1970, art. I, §16.

Contrary to the commenters' assertions, proposed Rule 322 does not retrospectively impair video gaming licensee contract rights in an unconstitutional manner. It is well settled that the prohibition contained in the Contracts Clause is not to be read or understood literally. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 472, 502 (1987). Instead, it must be accommodated to the inherent police power of the state to safeguard the vital interests of the people. *Energy* Reserves *Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983).

As the Supreme Court explained in *Manigault v. Springs*, 199 U.S. 473 (1905):

> [T]he interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. *Manigault*, 199 U.S. at 480-81.

Accordingly, not every impairment of a contractual right is unconstitutional under the Contract Clause. Rather, "states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). Among other types of agreements, "[c]ontracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery . . . are subject to impairment by a change of policy on the part of the state, . . in other words, that parties, by entering contracts, may not estop the legislature from enacting laws intended for the public good." *Manigault*, at 480. As shown below, that reasoning applies with equal force to uphold the constitutionality of proposed Rule 322.

Courts follow a three-part test in cases where a state law or administrative rule is challenged on alleged Contract Clause grounds for impairment of contracts between private contracting parties. *See Energy Reserves*, 459 U.S. at 411-413; *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 723, 736 (7th Cir. 1987). The first question is whether the law has, in fact, operated as a substantial

impairment of a contractual relationship. *Energy Reserves* 459 U.S., at 411. Second, if the law constitutes a substantial impairment, the state must have a significant and legitimate public purpose behind the law, such as remedying a broad and general social or economic problem. *Id.*, at 411-412. This requirement guarantees the state is exercising its police power, rather than providing a benefit to some special interest. *Id*. Finally, assuming a legitimate public purpose has been identified, the inquiry turns to whether the adjustments of the rights and responsibilities of the contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose behind the law's adoption. *Id*. Where, as with Rule 322, the state is not itself a contracting party, courts properly defer to legislative judgment as to the need and reasonableness of any specific law. *Id.*, at 412-413 and n. 14.

Even assuming for purposes of discussion that Rule 322, once enacted, will substantially impair the rights of licensed terminal operators and locations with existing use agreements, such impairment does not constitute a constitutional violation. Rule 322 represents a reasonable exercise of the IGB's authority to "promulgate rules for the prevention of practices detrimental to the public interest and for the best interests of video gaming." *Wild*, at ¶ 28, quoting, 230 ILCS 40/78(a)(3). This is a significant and legitimate public purpose meant to prevent vertical integration in the video gaming industry – a practice that the General Assembly deemed injurious to public confidence and integrity in video gaming. *Dotty's*, at ¶ 46. Finally, Rule 322 presents a reasonable method to achieve the legislative mandate to prevent vertical integration in video gaming. *See Dotty's*, at ¶¶ 46, 57.

As shown above, the objecting commenters cannot demonstrate that proposed Rule 322 exceeds the IGB rulemaking authority under the VGA. The commenters do not challenge the rulemaking's rational relationship to a legitimate state interest and have not shown that proposed Rule 322 presents an unreasonable method of addressing the legislative goal of preventing vertical integration. Consequently, deference must be given to the IGB's determination that the rule is necessary to effectuate the statutory mandate and provides a reasonable mechanism for doing so. *See*, *Energy Reserves*, 459 U.S. at 412-413. Thus, Rule 322, if enacted, would not unlawfully impair the obligation of contracts under the U.S. and Illinois constitutions.

In summary, and as discussed above, the commenter's various purported constitutional objections do establish that enactment of proposed Rule 322 will either offend constitutional prohibitions against laws that retrospectively impair vested rights in contracts or otherwise violate the Contracts Clauses of the U.S. and Illinois constitutions. These assertions do not warrant rejection of the proposed amendment.

3. Concerns about the proposed prohibition of cross-tier familial business relationships and arrangements:

Commenters object to portions of the proposed rulemaking based on the contention that the IGB exceeded its statutory authority by trying to restrict familial business relationships between different tiers of the statutory video gaming licensing scheme. To support this theory, commenters point to the absence of any language in the VGA that specifically mentions or prohibits cross-tier familial business arrangements. Commenters also assert that the proposed familial prohibition is unnecessary, overbroad and may harm terminal operators with limited geographic markets.

As a general matter, there is no dispute that the VGA broadly empowers the IGB to adopt regulations under which all video gaming is to be conducted in Illinois and those regulations "are to provide for the prevention of practices detrimental to the public interest and for the best interests of video gaming." *Wild*, at ¶ 28 (quoting 230 ILCS 40/78(a)(3)); *Dotty's,* at ¶ 23 (finding the regulatory scheme created by the legislature and the rules promulgated thereunder for video gaming, are designed to strictly regulate the facilities, persons, associations and practices related to gambling operations pursuant to the state's police powers). Nor is there any dispute that the IGB has adopted regulations with JCAR approval that, among other things, govern licensee conduct and establish minimum standards for use agreements. Proposed Rule 322 simply adds to the existing regulatory scheme that already defines minimum standards for use agreement validity and protects the integrity of Illinois video gaming.

The assertion that traditional rules of statutory construction require that 230 ILCS 40/30 be read as excluding familial relationships between licensed terminal operators and locations owned by immediate family from its prohibition is contrary to the regulatory scheme created by the General Assembly. The General Assembly vested the IGB with broad authority to administer the VGA's provisions—including the prohibition on vertical integration—and to promulgate regulations designed to protect public confidence and the integrity of Illinois gaming. *Wild,* at ¶¶ 27-30; *Dotty's*, at ¶ 46. Familial business relationships and arrangements across different tiers or vertical market segments within various industries are indisputably a means through which an individual or entity can achieve actual or *de facto* vertical integration and exert influence or control over other market participants, dominate every phase of the industry, and suppress competition. An additional negative of vertical integration is industry infiltration or domination by organized crime – a threat that cross-tier familial business relationships could no doubt exacerbate. Because the proposed restrictions in Rule 322 on familial cross-tier video gaming business relationships and arrangements rationally relate to the state's legitimate integrity interest in preventing vertical integration in the video gaming industry, the IGB has not exceeded its statutory authority and the proposed new rule should be adopted.

Finally, the Fox Letter hypothesizes a terminal operator with a small regional market whose only clients are locations owned by family members of the owner. The Fox Letter concludes that this terminal operator will go out of business if

proposed Rule 322 is adopted. The IGB will reserve comment about the facts and circumstances surrounding this terminal operator because a Second Notice submission is not the appropriate forum to discuss specific financial and compliance matters involving an individual video gaming licensee. Responding more broadly, the IGB notes that the VGA contemplates arms-length bargaining between different categories of licensees, including terminal operators and locations. The presence of immediate family relationships between terminal operators and locations jeopardizes this fundamental principle underlying the entire regulatory scheme of the statute. From a policy perspective, the VGA designed the Illinois video gaming market to be competitive. As a result, any entity that cannot compete effectively within the statutory and regulatory structure of the industry, including the prohibition on vertical integration, will face challenges remaining in business. Such outcomes are regrettable on an individual basis yet are nonetheless an unavoidable element of any highly regulated and competitive industry, including Illinois video gaming.

4. Concerns about the proposed prohibition of terminal operator-location landlord-tenant arrangements:

Commenters object to the proposed prohibition on terminal operators serving as landlords of locations where they operate video gaming terminals. Commenters contend that such restrictions on cross-tier landlord-tenant arrangements are overbroad, unnecessary, and disruptive to economic development.

A primary contention here is that the inclusion of video gaming income in the profits earned by real estate developers and landlords who are also terminal operators has been an important spur to economic activity and development efforts in video gaming host communities. These arguments were offered at the April 27, 2023 public hearing where Rick Heidner (Gold Rush), Mayor Morris (Belvidere), and Mayor Carr (McCook) provided oral comments and in written submissions from Mayor Curtis (Kankakee), Top Notch Gaming, IGMOA, JJVG, and Gold Rush.

The IGB does not at all minimize the considerable economic growth generated by video gaming in Illinois communities. However, the commenters' economic claims overlook the dual public purposes of gaming regulation in Illinois, under the Illinois Gambling Act and the VGA, to: (1) assist in economic development and generate state revenue; and (2) maintain public trust and confidence in the integrity and credibility of the state's gambling operations. Section 2 of the Illinois Gaming Act [230 ILCS 10/2(a)-(b)], incorporated by Section 80 of the VGA [230 ILCS 40/80], establishes the State's policy on gambling legalization and regulation as follows:

> (a) This Act is intended to benefit the people of the State of Illinois by assisting economic development, promoting Illinois tourism, and increasing the amount of revenues available to the State to assist and support education, and to defray State expenses.

(b) While authorization of riverboat and casino gambling will enhance investment, beautification, development and tourism in Illinois, it is recognized that it will do so successfully only if public confidence and trust in the credibility and integrity of the gambling operations and the regulatory process is maintained. Therefore, regulatory provisions of this Act are designed to strictly regulate the facilities, persons, associations and practices related to gambling operations pursuant to the police powers of the State, including comprehensive law enforcement supervision.

230 ILCS 10/2(a)-(b).

Thus, the law makes clear that economic development from gaming cannot be at the expense of gaming integrity. As demonstrated above, the state's legitimate interest in protecting gaming integrity includes the VGA's restrictions on vertical integration. *Dotty's*, at ¶¶ 46, 57. When the General Assembly enacted the VGA, it sought to ensure the integrity of gaming by assuring, through a guarantee of arms' length bargaining between different licensing tiers, that a single licensing tier could not achieve effective control of the video gaming market and thereby harm its competitive nature. In this essential way, the requirement of arms' length bargaining between the members of different licensing tiers promotes fair contracting and business practices.

Ownership of the real estate in which a business operates is an undeniable way for a landlord to exert control, influence, or dominance – whether for legitimate or illegitimate purposes – over the tenant business owner's operations. Also beyond dispute is that such opportunities and the corresponding negative impacts are heightened when the landlord and tenant operate in the same industry. The fact that a landlord or real estate developer might be incentivized by the prospect of video gaming profits to become a terminal operator, or vice versa, and that such incentives may lead to economic activity cannot trump the statutory mandates to maintain integrity and public confidence in Illinois gaming through enforcement of vertical integration restrictions and other regulatory safeguards. To conclude otherwise would ignore legislative intent and degrade public trust.

Terminal operator ownership or control of locations impairs fair bargaining and thereby defeats the statutory policy directive to preserve the credibility and integrity of gaming. As noted above, the court in *Dotty's* declared that the prohibition in Section 30 of the VGA against the holding of multiple licenses by a single entity serves to promote a perception of integrity in video gaming by averting any possibility that corrupt influences including organized crime, which historically has been endemic in unregulated gaming, retain the capacity to infiltrate and dominate this industry through the mechanism of integrated control of all its aspects. *Dotty's*, at ¶¶ 46, 57. New Rule 322 (b), along with new Rules 450 (b) and (c),are designed to remove and prevent the ownership and control of locations by terminal operators.

These sections will thereby effectively implement the provisions of Section 30. For this reason, these subsections should be retained in the rulemaking.

5. Concerns about the prohibition on terminal handler and technician ownership or control of video gaming locations:

Commenters contend that the proposed prohibition on licensed terminal handlers and licensed technicians being, owning or having PSIC status of a location exceeds the IGB's statutory rulemaking authority. These objections argue that since the VGA's prohibition on multiple licenses in Section 30 does not prohibit terminal handlers, technicians, and sales agents from holding other video gaming licenses, the IGB cannot do so through this rulemaking. While such objections correctly note this omission in the statutory language, they overstate its impact and overlook the IGB's broad statutory authorization under the VGA to promulgate regulations designed to protect public confidence and the integrity of the Illinois. *See Wild*, at ¶¶ 27-30; *Dotty's*, at ¶ 46.

Like the proposed amendments discussed above, the new prohibitions on terminal handlers, technicians and sales agents in the present rulemaking both comport with and strengthen the VGA's existing prohibitions against multiple licensure. From a functional perspective, technicians, terminal handlers and sales agents act as public-facing arms of the terminal operators that employ them and use their services. Sales agents solicit use agreements with locations on behalf of terminal operations, and terminal handlers and technicians install, repair, and maintain the terminal operator's VGTs in the locations. Typically, terminal operators employ them either on a salaried or contractual basis, with sales agents often earning commissions. It is therefore entirely consistent with Section 30—and serves to sharpen rather than distort current statutory requirements and integrity protections—to enact rule requirements preventing people in these roles from simultaneously owning, being employed by, or serving as PSICS of locations while employed by a terminal operator. The same compelling reasons that militate in favor of the proposed restrictions on familial business arrangements and landlord-tenant relationships across license tiers apply to sales agents, technicians, and terminal handlers with equal force.

Commenters also lodge a related objection to the "fee for service" provision in proposed Rule 450, particularly the portion that prohibits video gaming locations or their owners, PSICs, or employees from being employed by, or otherwise receiving fees from a terminal operator or sales agent and broker. Commenters contend that this prohibition is overly broad and spin out a hypothetical parade of horribles that would ensue if the Rule became effective, including the supposed prohibition of attorneys working for a law firm, and countless other professionals, providing services on behalf of terminal operators from having anything to do with video gaming locations. The IGB rejects this argument, contending for all the reasons discussed above that the prohibitions in proposed Rule 450 are an essential

aspect of keeping terminal operator and location licensees separate and maintaining the integrity of Illinois video gaming as the language of the VGA commands.

6. Suggestion that the IGB replace the present rulemaking in favor of a process for making individualized investigations and determinations of potentially problematic conduct in new "show cause" procedure:

Participants in the September 20, 2023 discussion among industry commenters and IGB staff proposed that the IGB replace the rulemaking's present "bright line" tests for violations with individualized IGB evaluations following investigations and evidentiary hearings. One suggestion involved a proposed amendment to the rule language providing for "show cause" orders. Under this suggested approach, IGB staff would issue such orders upon becoming aware of a potential problematic arrangement. A terminal operator receiving the IGB show cause order would be required to demonstrate that an ownership or familial relationship with a licensed video gaming location did not violate the prohibitions of new Rule 322.

Accordingly, there would be no absolute prohibitions against the specified ownership and familial relations between terminal operators and locations and the following proposed blanket prohibitions would <u>not</u> apply:

- The terminal operator, a direct or indirect owner of the terminal operator, an affiliate of the terminal operator, or a PSIC of the terminal operator could not also be the direct or indirect owner of either the location or the property on which the location is situated; and

- The terminal operator, a direct or indirect owner of the terminal operator, an affiliate of the terminal operator, or PSIC of the terminal operator could not be an immediate family member of the location owner.

As the IGB understands the proposal, if the terminal operator did not make the required showing in response to the IGB's show cause order, the IGB would then issue a disciplinary complaint against the terminal operator. The disciplinary complaint would apparently be based on the results of an IGB investigation showing that ownership or family relations between a terminal operator and location created a situation of undue influence or control of the location by the terminal operator. Upon issuance of the disciplinary complaint, the normal discipline and hearing process procedures contained in Subpart G of this Section (Rule 710 through 795) would apply.

The IGB appreciates the good faith in which the commenters made this proposal during the September 20, 2023 discussion and their willingness to engage with IGB staff to explore possible solutions to complex issues. Having considered this proposal in similar good faith, the IGB declines to adopt it for the following reasons.

At the threshold level, the proposal and the multiplying processes it would necessarily require are unworkable and would impose additional burdens and delays on the IGB's considerable existing regulatory and law enforcement functions. The IGB would be faced with the labyrinthine task of investigating, analyzing and adjudicating innumerable, fact specific circumstances involving relationships and arrangements among the thousands of Illinois video gaming licensees. The preliminary investigations under this proposal will inevitably consume extensive amounts of agency time and attention from a very limited number of available IGB personnel. The IGB operates on a lean, efficient basis. Given its limited staffing and resources, the IGB could not effectively implement and conduct the requirements of this proposal without sacrificing vital agency functions that video gaming, casino gambling and sports wagering applicants and licensees, as well as the State, depend upon.

For example, determinations whether a terminal operator or its affiliates or PSICs exercise sufficient undue influence or control over a location to trigger a show cause order would be a highly fact-based inquiry with almost innumerable potential permutations. Which specific investigative findings would lead to a conclusion that a violation of new Rule 322 had been committed and which would not? A comprehensive listing within the rules of all the possibilities would be unreasonably long, impossible to draft, and quickly incomplete and outdated.

Additionally, and equally critical, what underlying standards would the IGB follow when making determinations based on the investigative record and evidence presented to it in the show cause proceedings? Answering such questions would necessarily engender further rulemaking and complications.

In contrast to the inevitable web of complexity, opacity and delay this proposal would unavoidably generate, the proposed rulemaking in its present form applies bright-line, readily interpretable criteria that provide licensees with clarity, consistency and transparency and promote effective and prompt IGB enforcement.

Finally, the same concerns expressed in the preceding paragraphs also fully apply to the administrative adjudications that will follow the issuance of disciplinary complaints. Given the variety of specific situations that will need to be addressed and the necessarily non-comprehensive rule language, these adjudications will tend to be long, complex, and fraught with both factual and legal complexity. In many instances, administrative hearings will be followed by judicial appeals. The overall result will be a slow and uncertain regulatory process that is antithetical to the prompt and decisive agency oversight required for the effective video gaming regulation the VGA demands.

7. The IGB received a number of additional, less extensive comments that do not fit within the previous six responses. Those comments were identified by JCAR staff on November 28, 2023 and are answered below.

William Bogot on behalf of Lucky Street Gaming, LLC, Dragonfly Gaming, LLC and other unnamed entities licensed by the IGB, correspondence sent April 10, 2023 ("Fox Letter").

Comment: The IGB has specifically allowed the practice of terminal operator (TO) applicants entering into use agreements with establishments for which the TO applicant's affiliated real estate business was also the establishment's landlord. Lease agreements must be at arms-length.

IGB Response: As video gaming proliferated throughout the State, industry participants expanded certain practices intertwining business relationships between terminal operators and location applicants and licensees. As of the date of this submission, more than 8,500 licensed video gaming locations operate in Illinois, with hundreds more applying each month. The IGB is insufficiently resourced to investigate the specific and increasingly complex business and real estate relationships among applicants and licensees, including whether a lease is the result of an "arms-length" transaction, to ensure compliance with the statutory prohibition against vertical integration. Such fact-specific inquiries create undue and unworkable regulatory burdens. In contrast, this rulemaking provides a workable, bright-line standard that gives effect to the legislative prohibition against vertical integration in 230 ILCS 40/30.

Rick Heidner on behalf of Gold Rush Amusements, Inc., correspondence sent April 24, 2023 ("Gold Rush Letter"). The Gold Rush Letter incorporates the IGMOA Letter.

Comment: Prohibit a landlord (or any person having direct or indirect ownership interest in the landlord) from being a revenue sharing partner of: 1) any of the landlord's licensed establishment-tenants; or 2) a terminal operator with respect to any of the landlord's licensed establishment-tenants.

IGB Response: To the extent that a terminal operator or an affiliated entity is the landlord, this comment restates current law, which the IGB maintains is untenable for reasons already addressed in this submission without adoption of the proposed rulemaking. To the extent the landlord is not a terminal operator, the IGB rejects this comment as it is outside the scope of the rulemaking.

Comment: Franchisors should not be permitted to force their franchisees into a relationship with any specific terminal operator, or otherwise exert undue influence on the terminal operator selection process.

IGB Response: This comment was discussed in the memorialization of the September 20, 2023 meeting with commenters. That discussion can be found in the section titled, "The third topic discussed was PSICs and franchises." For the sake of clarity, the IGB is not interested at this time in making all franchisors

PSICs or prohibiting franchisors from exercising control over the franchise locations. Instead, the purpose of this rulemaking is to capture the franchisors whose business model is built around offering gaming to patrons. Accordingly, the IGB rejects this comment.

Matt Hortenstine on behalf of J&J Ventures Gaming, LLC, correspondence sent April 10, 2023. ("JJVG Letter").

Comment: There is already a rebuttable presumption of a prohibited incentive or inducement under Sec. 25(c) of the Act if a real estate lease or rental agreement that is below fair market value is offered by a Terminal Operator. The rulemaking should clarify that a lease: 1) must be for arms'-length terms and include rent that is fair market value for the area surrounding the location; 2) cannot require the specific use of any particular TO; and 3) cannot change the economic arrangement based on the identity of the TO.

IGB Response: The IGB takes the above comments under advisement. These comments raise questions about real estate leases that are not the subject of this rulemaking. The IGB, however, is insufficiently resourced to investigate the specific and increasingly complex business and real estate relationships among applicants and licensees that become part of their business model. Even reviewing each lease to determine whether it appears to be an "arms'-length" transaction burdens the IGB with making fact-specific determinations beyond its area of expertise in gaming regulation. This rulemaking provides a workable, bright-line standard that gives effect to the legislative prohibition against vertical integration in 230 ILCS 40/30.

Comment: The IGB should amend its video gaming location application to require applicants to upload any leases they have entered into in connection with the proposed premises.

IGB Response: The IGB takes this comment under advisement. The contents of a video gaming license application are not prescribed by administrative rule and are beyond the scope of this rulemaking.

Comment: What is the intent of Section 1800.322(c)? Does it only restrict a Sales Agent from soliciting a use agreement if a family member is the Owner/PSIC of the video gaming location being solicited?

IGB Response: This comment was discussed in the memorialization of the September 20, 2023 meeting with commentors. That discussion can be found in the section titled, "The first topic discussed was family relationships in video gaming." For the sake of clarity, the IGB is not seeking to prohibit the licensing of any sales agent who is a family member of a location owner. Rather, and to effectuate the statutory vertical integration prohibition, the IGB seeks to

prohibit sales agents from soliciting or being paid to solicit a use agreement for a location owned or operated by a PSIC who is a family member.

Comment: In Section 1800.430(d)(9), does the IGB intend to analyze and effectively audit a location's financial statements to determine whether Net Terminal Income ("NTI") accounts for the majority of a location's revenue?

IGB Response: The IGB intends to monitor compliance with Rule 1800.430(d)(9) using all of its regulatory tools. The IGB's audit, investigative, legal, and enforcement strategies and plans are not the subject of this rulemaking.

Comment: The IGB's FAQ states that an employee of a TO who is neither an owner nor shares in the revenue of the TO in any manner, may own a bar and that bar may participate in video gaming.

IGB Response: IGB's FAQ #8 states: "Can an individual who owns a bar also be licensed as a Terminal Operator? Yes, as long as the bar in question in NOT a Licensed Video Gaming Location. An employee of a Terminal Operator who is NOT an owner, nor shares in the revenue of the Terminal Operator in any manner, may own a bar and that bar may participate in video gaming."

FAQs are neither advisory opinions nor legal advice. To the extent that FAQ #8 is inconsistent with this rulemaking, the FAQ will be appropriately modified upon adoption of the rulemaking.

Top Notch Entertainment LLC, correspondence sent April 3, 2023.

Comment: Would the Board consider revising the rules to exclude relationships by marriage wherein there is no blood relation, or to at least create exemptions to the rules for these relationships where the is no vertical integration occurring?

IGB Response: The IGB rejects this comment. Carving out an exception for non-blood relatives is inconsistent with Section 30 of the Video Gaming Act, unworkable, unclear, and weakens the proposed rule.

Michael Meyer on behalf of 777 Gaming, LLC, correspondence sent April 18, 2023. 777 Gaming, LLC's correspondence incorporates the IGMOA Letter.

Comment: 777 believes the IGB may have proposed Section 1800.322(b) to prevent undue influence from being exerted by a Terminal Operator that also serves as the landlord to a Licensed Establishment. Consistent with the IGOMA's position, 777 does not believe that proposed Section 1800.322(b) is the answer. Instead, 777 suggests a potential solution is the required involvement of a third-party management company with any multi-unit

property (e.g., strip mall, shopping center, tec.) where a TO, or its affiliate, is both the owner of the multi-unit property and has an existing use agreement with the tenant of the multi-unit property.

IGB Response: The IGB rejects this comment. The proposal to require a third-party management company is untenable and would be impossible to implement and regulate.

Charity Johns on behalf of Laredo Hospitality Ventures, LLC and Illinois Café & Service Company, LLC ("Laredo"), correspondence sent March 27, 2023 and September 18, 2023.

Comment: We strongly support this Proposed Rule. The suggestion that the IGB require that Terminal Operator/Landlords hire a "third party management company" to oversee properties leasing to establishments is also unworkable. Would the IGB then have to enact rules prohibiting such "third party" companies from also being owned by PSICs or other closely related persons? The workarounds are obvious.

IGB Response: For the reasons stated, the IGB agrees with this comment.

Comment: In rare circumstances, the IGB could consider extending the grace period, but only upon an actual showing of undue hardship.

IGB Response: In the Second Notice Filing dated November 21, 2023, the IGB extended the grace period for enforcement of proposed Rule 1800.322(d)(2) to one year following the effective date of the rulemaking.

Entire Comment: Illinois Café & Service Company, LLC March 27, 2023 Letter

IGB Response: The IGB incorporated language suggested by this comment regarding proposed Rule 1800.322(a) in the Second Notice Filing of November 21, 2023. The IGB takes the remaining comments under advisement.

Paul Jenson on behalf of the Illinois Gaming Machine Operators Association, correspondence sent April 10, 2023. (the "IGMOA Letter").

Comment: We believe most of the topics and concepts contained in the proposed Vertical Integration Rules should be addressed legislatively, if at all, rather than through rulemaking.

IGB Response: The IGB disagrees. For the reasons stated in the section of the Second Notice Filing of November 21, 2023, titled "Constitutional Concerns," the proposed rulemaking does not exceed the IGB's rulemaking authority under the Video Gaming Act.

Since the 2009 legalization of Illinois video gaming, certain practices and relationships have developed in the industry that run contrary to the spirit and intent of the Video Gaming Act's vertical integration prohibition. These practices create uncertainty, inconsistency and undermine public confidence in the integrity of video gaming.

To achieve compliance with the statutory mandate of safeguarding the integrity of video gaming in Illinois, the IGB has proposed the adoption of clear rules to address problematic relationships between different tiers of licensees. The proposed rulemaking addresses those practices and relationships that offend the statutory prohibition against vertical integration in an efficient, consistent and transparent manner.

Comment: The IGMOA believes that the IGB already has the tools and power required to rid the industry of these bad actions without Section 1800.322(a).

IGB Response: The IGB disagrees. This rulemaking will provide the industry with clear direction while giving effect to the intent and plain language of the statutory prohibition against vertical integration.

Comment: The IGMOA is also aware of situations where Terminal Operator landlords hold Licensed Establishment tenants hostage at the time of use agreement renewal, threatening termination of the lease. The IGMOA encourages the IGB to implement a rule specifically prohibiting this conduct.

IGB Response: The IGB takes this comment under advisement. The IGB continues to encourage the IGMOA and its individual members to report misconduct or alleged violations to the IGB, which can be done anonymously through the IGB's online Prohibited Conduct Reporting Portal.

Comment: The IGMOA urges the IGB to consider proposing a rule that documents what many IGB agents already follow in the field. The rule could clarify that the lease: (1) must be an arm's-length transaction and include rent that is fair market value… (2) cannot require the specific use of any particular Terminal Operator; and (3) cannot change the economic arrangement based on the identity of the Terminal Operator.

IGB Response: The IGB takes this comment under advisement. The IGB's audit, investigative, legal, enforcement, and licensing strategies and plans are not the subject of this rulemaking. The IGB is insufficiently resourced to investigate the specific and increasingly complex business and real estate relationships among applicants and licensees. Even reviewing each lease to determine whether it appears to be an "arms'-length" transaction burdens the IGB with making fact-specific determinations beyond its area of expertise in gaming regulation. The present rulemaking provides a workable, bright-line

standard that gives effect to the legislative prohibition against vertical integration in Section 30 of the VGA..

Comment: What is the intent of Section 1800.322(c)? Does it restrict a Sales Agent only from soliciting a use agreement if a family member is the Owner/PSIC of the video gaming location being solicited?

IGB Response: This comment was discussed in the memorialization of the September 20, 2023 meeting with commenters. The discussion can be found in the section titled, "The first topic discussed was family relationships in video gaming." For the sake of clarity, the IGB is not seeking to prohibit any sales agent who is a family member of a location owner. Rather, the IGB seeks to prohibit sales agents from soliciting or being paid to solicit a use agreement for a location owned or operated by a PSIC who is a family member.

Comment: IGMOA encourages the IGB to implement the licensing of sales agents, as allowed by the Act.

IGB Response: The licensure of sales agents is not the subject of this rulemaking. The IGB is engaged in other rulemaking and implementation actions that address the licensure of sales agents.

Comment: IGMOA would appreciate clarity from the IGB regarding what issues Section 1800.430(d)(9) is intended to address and solve. Does the IGB intend to analyze and effectively audit a location's financial statements to determine whether NTI accounts for the majority of the location's revenue?

IGB Response: The IGB intends to monitor compliance with Rule 1800.430(d)(9) using all of its regulatory tools. The IGB's audit, investigative, legal, and enforcement strategies and plans are not the subject of this rulemaking.

C) Change in the Rule: See Attachment A First Notice Changes.

10) Justification and rationale

A) Changes in Statutory Language: None

B) Changes in Board Policy, Procedures or Structure: The Illinois Gaming Board will enforce the vertical integration provisions of this rulemaking.

C) Citations to Federal Laws, Rule or Regulations, or Finding Requirements: None

D) Court Decisions: None

E) Other Reasons: From the date of its enactment in 2009, the Video Gaming Act (the "Act") has prohibited vertical integration among different tiers of video gaming licensees. Among its other provisions on this topic, Section 30 of the Act [230 ILCS 40/30] prohibits terminal operators from being licensed as establishments or from owning, managing, or controlling licensed establishments. The First Illinois Appellate District Court upheld the Act's tiered license structure and restrictions on vertical integration in 2019 in Dotty's Café v. Illinois Gaming Board, 2019 IL App (1st) 173207. More recently, Public Act 102-0689, effective December 17, 2021, added to the prohibitions on vertical integration by banning licensed sales agents from owning or controlling licensed establishments. By enacting this new prohibition, the General Assembly reiterated the Act's intent to prevent persons from simultaneously participating on both sides of the video gaming terminal operator-establishment divide.

Certain practices may have developed over the years since 2009 that could be at odds with the spirit and intent of the Act's vertical integration prohibition, thereby creating uncertainty, inconsistency and suspicion. To achieve compliance with the statutory mandate and legislative intent regarding vertical integration in an effective, consistent and transparent manner, staff proposes adopting clear rules to prohibit certain problematic arrangements instead of addressing the issue through intensive investigations and disciplinary proceedings or not at all.

Faithful adherence to the Act's vertical integration prohibitions raises complex issues that require attention and thoughtful action. Toward that end, the Board proposes the following:

New Section 1800.322 prohibits use agreements between terminal operators and establishments under certain circumstances, including where owners or PSICs of a terminal operator are immediate family members of a direct or indirect owner, or PSIC, of a location or any affiliated entity. The new Section also prohibits a terminal operator that is the landlord of an establishment from entering into a use agreement with that establishment. The Section prohibits sales agents from soliciting use agreements from locations owned or controlled by the sales agent's immediate family.

Section 1800.430 is amended to provide that the franchisors of an establishment are considered PSICs of the establishment when the establishment obtains more than 50 percent of its revenue from net terminal income. This change will ensure that terminal operators cannot use the franchise mechanism as a means to exercise indirect control over establishments.

New Section 1800.450 makes explicit that all licensees are limited to one tier of the video gaming industry. This limitation forces all individuals and business entities to decide whether they wish to participate in the industry on the terminal operator side − including as terminal handlers, technicians, or sales agents − or on the establishment side. By prohibiting the practices that have developed over the years

involving employees of terminal operators acting as establishment owners, or establishment owners being paid as terminal handlers, this section will make it much more difficult for licensees to engage in behavior that may violate Section 30 of the Act.

11) Name of Agency Representative:

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