May 28, 2019

VIA EFILING ONLY
Peggy Mancuso
Rules Coordinator
Minnesota Gambling Control Board
1711 W County Rd B Ste 300 S
Roseville, MN 55113
peggy.mancuso@state.mn.us

Re: In the Matter of the Proposed Amendment to Rules Governing Lawful Gambling, Primarily Lawful Gambling Electronic Games, Sports-Themed Tipboards, and Other Changes; Minnesota Rules part 7861.0210, subp. 33a
OAH 60-9017-35616; Revisor RD-4555

Dear Ms. Mancuso:

Enclosed herewith and served upon you is the REPORT OF THE ADMINISTRATIVE LAW JUDGE in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Gambling Control Board can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. Please ensure that the agency’s signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor’s office following receipt of that order. Our office will then file the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the agency for its rulemaking record. The Board will then receive from the Revisor’s office three copies of the Notice of Adoption of the rules.

The Board’s next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor’s office should be submitted to the State Register for publication. A permanent rule with a hearing does not become effective until five working days after a Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.27.
If you have any questions regarding this matter, please contact Ian Lewenstein at (651) 361-7857, ian.lewenstein@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,

CARAH FAGGÉTT
Legal Assistant

Enclosure
cc: Legislative Coordinating Commission
Revisor of Statutes
STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
THE GAMBLING CONTROL BOARD

In the Matter of the Proposed Amendment to Rules Governing Lawful Gambling, Primarily Lawful Gambling Electronic Games, Sports-Themed Tipboards, and Other Changes; Minnesota Rules part 7861.0210, subp. 33a

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge James E. LaFave for a rulemaking hearing on March 8, 2019. The public hearing was held in Suite 300 of the Minnesota Gambling Control Board’s offices in Roseville, Minnesota.

The Minnesota Gambling Control Board (Board or Agency) proposes to amend its rules to strengthen the authorized regulatory oversight as it pertains to electronic games and sports tipboards by:

- Standardizing electronic game terminology and point-of-sale (POS)/portal reports.
- Automating licensed organizations’ (charities’) daily reconciliation of cash with electronic game receipts.
- Eliminating common causes of profit carryover variances related to electronic games.
- Increasing efficiency and effectiveness of paddlewheel with a table regulation.
- Providing, as allowed in statue, standards and conduct guidelines for sports tipboards.¹

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.² The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the legal requirements for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comments regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process

---
¹ Exhibit (Ex.) D at 1 (Statement of Need and Reasonableness [SONAR]).
provides the general public an opportunity to review, discuss, and critique the proposed rules.

The Agency must establish that the proposed rules are within the Agency's statutory authority, are necessary and reasonable, and comply with the required procedures. In addition, the Agency must establish that any modifications that the Agency made after the proposed rules were initially published in the State Register are within the scope of the matter that was originally announced.\(^3\)

The Agency panel at the public hearing included Tom Barrett, Executive Director, Peggy Mancuso, Executive Assistant, Gary Danger, Compliance Officer, Steve Pedersen, Licensing Supervisor, Brett McEeever, Compliance Specialist, Ken Koch, Gambling Control Board Member, and Stephen D. Melchionne, Assistant Attorney General.\(^4\)

Approximately 44 people attended the hearing and 20 signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Three members of the public made statements or asked questions during the hearing.\(^5\)

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until March 28, 2019 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.\(^6\)

On April 24, 2019, the Agency filed a Certificate of Mailing Notice to Rulemaking List, and an October 4, 2018, letter from Jim King, Executive Budget Officer, Minnesota Management and Budget to Peggy Mancuso, Minnesota Gambling Control Board. On April 25, 2019, the Agency filed a Certificate of Accuracy of Mailing List. The Administrative Law Judge accepted the late filed submissions. The hearing record closed on April 25, 2019

**SUMMARY OF CONCLUSIONS**

The Agency has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

---

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The Board is responsible for regulating the charitable gaming industry. It is governed by the Minnesota Lawful Gambling and Gambling Devices Act which states the purpose of the act “is to regulate lawful gambling, to insure integrity of operations, and to provide for the use of net profits only for lawful purposes.

2. In 2012, the Minnesota Legislature amended the Minnesota Lawful Gambling and Gambling Devices Act to provide for electronic pull-tab games, electronic linked bingo games, and sports-themed tipboard games.

3. Electronic pull-tabs have shown tremendous growth since first offered in 2012. With the evolution of electronic games, together with the advances in technology, the Board sees a need for clarification and to make sure the rules are current and relevant.

4. Sports-themed tipboards have been authorized by Minnesota law since 2012. But, because the federal Professional and Amateur Sports Protection Act (PASPA) prohibited the wagering on the outcome of sporting events, the Board has not approved any sports-themed tipboard games.

5. In 2018, the United States Supreme Court declared the PASPA unconstitutional. For lawful gambling in Minnesota, that means the Board may approve sports-themed tipboard games as authorized by Minnesota law.

II. Rulemaking Authority

6. The Agency cites Minn. Stat. § 349.151, subd. 4(a)(5) and (20), 4c, 4d, 4e, and 13, as its source of statutory authority for these proposed rules.

7. Minn. Stat. § 349.151, subd. 4(a)(5) empowers the Board to make rules authorized by chapter 349 and Minn. Stat. § 349.151, subd. 4(a)(20) directs the Board to take all necessary steps to ensure the integrity of, and public confidence in, lawful gambling.

---

9 Minn. Stat. § 349.11.
10 Ex. D at 1 (SONAR).
11 Id.
12 Id.
13 Id.
15 Id.
17 Ex. D at 1 (SONAR); Ex. K at 1.
8. Minn. Stat. § 349.151, subd. 4c states that “the Board may by rule authorize but not require the use of electronic bingo devices.” Subdivision 4d authorizes the Board to adopt rules it deems necessary to ensure the integrity of electronic pull-tab devices, electronic pull-tab games played on the devices, and the electronic pull-tab game systems necessary to operate them.

9. Minn. Stat. § 349.151, subd. 4e authorizes the Agency to adopt rule for sports-themed tipboards. Minn. Stat. § 349.151, subd. 14 grants the Agency the authority to adopt rules authorized by chapter 349 and when necessary or proper in discharging the Board’s powers and duties.

10. The Administrative Law Judge concludes that the Agency has the statutory authority to adopt rules governing lawful gambling, electronic games, sports-themed tipboards, as well as make other changes related to these enterprises.

III. Procedural Requirements of Chapter 14

A. Publications

11. On October 3, 2016, the Agency published in the State Register, a Request for Comments seeking comments “on possible rule amendments governing lawful gambling primarily concerning electronic gaming, and other changes that may come up that the board decides to address as time allows.”

12. The Board published a Notice of Intent to Adopt Rules Without a Public Hearing in the State Register on October 22, 2018. The Notice set November 21, 2018, as the deadline for comments or to request a hearing.

13. The Board received 31 requests for hearing by November 21, 2018.

14. By way of an Order issued on January 9, 2019, Chief Administrative Law Judge Tammy L. Pust approved the Agency’s request to omit the text of the proposed rule changes in the State Register.

15. The Notice of Hearing was published in the State Register on February 4, 2019.

16. Minn. Stat. § 14.14, subd. 1a requires that an agency maintain a list of all persons who have registered with the agency for the purposes of receiving notice of rule

---

19 43 State Register 461 (Oct. 22, 2018).
20 Ex. K at 2.
21 Ex. K at 3.
22 Order on Request to Omit from the Notice the Text of Proposed Rules, Pursuant to Minn. Stat. § 14.14, subd. 1(B) (Jan. 9, 2019).
23 43 State Register 931 (Feb. 4, 2019).
proceedings. As of January 24, 2019, there were no persons on the agency’s official rule-making list.\textsuperscript{24}

17. On January 24, 2019, the Agency emailed a copy of the Notice of Hearing to all persons and associations identified in the additional notice plan.\textsuperscript{25}

18. On October 19, 2018, the Agency emailed a copy of the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules.\textsuperscript{26}

19. On October 19, 2018, the Agency mailed a copy of the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.\textsuperscript{27}

20. The Notice of Hearing identified the date and location of the hearing in this matter.\textsuperscript{28}

21. At the hearing on March 8, 2019, the Agency filed copies of the following documents, as required by Minn. R. 1400.2220 (2017):

   (a) the Agency’s Request for Comments as published in the \textit{State Register} on October 3, 2016;\textsuperscript{29}

   (b) the proposed rules dated October 17, 2018, including the Revisor’s approval;\textsuperscript{30}

   (c) the Agency’s SONAR;\textsuperscript{31}

   (d) the Certificate of Mailing the SONAR to the Legislative Reference Library, dated October 19, 2018.\textsuperscript{32}

   (e) the Notice of Hearing as mailed and as published in the \textit{State Register} on February 4, 2019.\textsuperscript{33}

\textsuperscript{24} Certificate of Mailing Notice to Rulemaking List (on file with the Minn. Office Admin. Hearings).
\textsuperscript{25} Ex. G, Ex. H.
\textsuperscript{26} Ex. K-3.
\textsuperscript{27} Ex. E.
\textsuperscript{28} Ex. F.
\textsuperscript{29} Ex. A.
\textsuperscript{30} Ex. C.
\textsuperscript{31} Ex. D.
\textsuperscript{32} Ex. E.
\textsuperscript{33} Ex. F.
(f) the Agency did not file a Certificate of Mailing the Notice to the Rulemaking Mailing List or the Certificate of Accuracy of the Mailing List;\textsuperscript{34}

(g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan dated January 24, 2019;\textsuperscript{35}

(h) the written comments on the proposed rules that the Agency received during the comment period that followed the Notice to Adopt Rules Without a Public Hearing;\textsuperscript{36}

(i) the Certificate of Sending the Statement of Need and Reasonableness to Legislators on October 19, 2018;\textsuperscript{37} and,

(j) the Agency did not file a memorandum from Minnesota Management and Budget.\textsuperscript{38}

\textbf{B. Additional Notice Requirements}

22. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

23. On December 31, 2018, the Agency filed a request for review and approval of its Additional Notice Plan.\textsuperscript{39} On January 7, 2019, the Administrative Law Judge denied the request as moot.\textsuperscript{40}

24. On January 24, 2019, the Agency provided the Notice of Hearing in the following manner, according to the Additional Notice Plan:

(a) Posted the Notice of Hearing on the Board’s website.\textsuperscript{41}

(b) Posted the Notice of Hearing in the Board’s lobby.\textsuperscript{42}

\textsuperscript{34} As noted above, the Agency subsequently filed the Certificate of Mailing Notice to the Rulemaking List on April 24, 2019 and the Certificate of Accuracy of Mailing list on April 25, 2019.
\textsuperscript{35} Ex. G; Ex. H.
\textsuperscript{36} Ex. I.
\textsuperscript{37} Ex. K-3.
\textsuperscript{38} The Agency filed an October 4, 2018, letter from Jim King, Executive Budget Officer, Minnesota Management and Budget to Peggy Mancuso, Minnesota Gambling Control Board on April 24, 2019.
\textsuperscript{39} Letter from Peggy Mancuso, Executive Assistant to The Honorable Tammy L. Pust (Dec. 26, 2018) (on file with the Minn. Office Admin. Hearings).
\textsuperscript{40} Order on Review of Additional Notice Plan (Jan. 7, 2019).
\textsuperscript{41} Ex. G; Ex. H.
\textsuperscript{42} Id.
(c) Emailed the Notice of Hearing to members who served on the Public Advisory Committee (PAC) for this rule process.43

(d) Emailed the Notice of Hearing to the representative of Allied Charities of Minnesota – an industry trade association.44

(e) Emailed the Notice of Hearing to the representative of the Electronic Gaming Group – an industry trade association.45

(f) Emailed the Notice of Hearing to the representative of the National Association of Fundraising Ticket Manufactures (NAFTM) – a trade association of companies that manufacture pull-tabs, bingo paper, and related supplies for the charitable gaming industry.46

C. Notice Practice

i. Notice to Stakeholders

25. Because there were no persons on the Agency’s official rulemaking list (maintained under Minn. Stat. § 14.14) as of January 24, 2019, there was no one to notify as required by Minn. Stat. § 14.14, subd. 1a.47 On January 24, 2019, the Agency provided a copy of the Notice of Hearing to the stakeholders identified in its Additional Notice Plan.48

26. The hearing was held on March 8, 2019.49

27. There are 43 days between January 24, 2019 and March 8, 2019.

28. At the hearing, the Agency failed to file a Certificate of Accuracy of the Mailing List or a Certificate of Accuracy of Mailing Notice to the Rule Making List at. The Agency subsequently filed those documents on April 25, 2019, and April 24, 2019, respectively. The Administrative Law Judge finds the failure to timely file the Certificate of Accuracy of the Mailing List and the Certificate of Accuracy of Mailing Notice to the Rule Making List to be harmless error because no one was deprived of the opportunity to participate in the hearing and the Agency took corrective action to cure the error.50

29. The Administrative Law Judge concludes that the Agency fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2017), to mail the Notice of Hearing at least 33 days before the end of the comment period.

43 Id.
44 Id.
45 Id.
46 Id.
48 Ex. G; Ex. H.
49 Ex. F.
50 See Minn. Stat. § 14.15, subd. 5.
ii. Notice to Legislators

30. Minn. Stat. § 14.116 (2018) requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.51

31. On October 19, 2018, the Agency sent a copy of the Notice of Intent to Adopt Rules and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.52

32. The Administrative Law Judge concludes that the Agency fulfilled its responsibilities, to timely send a copy of the Notice of Intent to Adopt Rules and a copy of the SONAR to legislators.53

iii. Notice to the Legislative Reference Library

33. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

34. On October 19, 2018, the Agency mailed a copy of the SONAR to the Legislative Reference Library.54

35. The Administrative Law Judge concludes that the Agency fulfilled its responsibility to send the Legislative reference Library a copy of the SONAR when the Notice of Intent to Adopt Rules was mailed.

D. Impact on Farming Operations

36. Minn. Stat. § 14.111 (2018) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the State Register.

37. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Agency was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

38. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.55 Those factors are:

52 Ex. K-3.
53 Id.
54 Ex. E.
a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

i. The Agency’s Regulatory Analysis
   a. A Description of the Classes of Persons Who Probably Will Be Affected by the Proposed Rule, Including Classes that Will Bear the Costs of the Proposed Rule and Classes that Will Benefit from the Proposed Rule.

39. The Agency claims that licensed lawful gambling (charitable) organizations, licensed manufacturers of gambling systems and equipment, linked bingo game providers of electronic linked bingo game systems, licensed distributors of
gambling systems, and players of the games are the classes of person most likely to be affected by the proposed rule.\textsuperscript{56}

40. The Agency goes on to assert that there will be costs to manufacturers of electronic games and to linked bingo game providers to bring previously approved games into compliance.\textsuperscript{57} There will be a cost to the seven licensed organizations that conduct paddlewheel with table games to bring their DVR recording systems into compliance with the real-time access requirement. The seven organizations were polled and they believe it will cost between $500 and $1,000 to comply with the real-time access requirement.\textsuperscript{58}

41. While the Agency believes the entire gambling industry will benefit from the proposed rules,\textsuperscript{59} the following groups in particular will benefit in the following ways:

- Licensed gambling organization will have further confidence in electronic game formats offered to the public;
- Charities will benefit by raising additional funds from sports-themed tipboard games;
- Manufacturers will benefit by being able to offer additional electronic game features, and by being able to offer sports tipboards for sale in Minnesota, linked bingo game providers will benefit from greater control over winner verification;
- Distributors will gain by having additional electronic game features to offer customers and by having additional game format in the form of sports-themed tipboards to offer for sale;
- The public will benefit by having continued confidence that electronic games and new sports-themed tipboards are trustworthy games of chance.\textsuperscript{60}

b. The Probable Costs to the Agency and to Any Other Agency of the Implementation and Enforcement of the Proposed Rule and Any Anticipated Effect on State Revenues.

42. The Agency does not project that implementation and enforcement of the proposed rules will result in additional costs to the Agency or any other state agency. This is because there are minimal costs to the Agency to edit the Lawful Gambling Manual, application forms, continuing education class materials, the Agency’s website or gambling managers’ seminar materials.\textsuperscript{61}

\textsuperscript{56} Ex. D at 2 (SONAR).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 3.
\textsuperscript{60} Id.
\textsuperscript{61} Ex. D at 3 (SONAR).
43. The Agency asserts there are no identifiable costs to any other agency for the implementation or enforcement of the proposed rules.\(^\text{62}\)

44. The Agency believes the proposed rules will not affect state revenues because there is currently a tax imposed on lawful gambling gross receipts and a tax on lawful gambling equipment.\(^\text{63}\) In addition, sports tipboards are tax exempt.\(^\text{64}\)

\begin{itemize}
  \item[c.] The Determination of Whether There Are Less Costly Methods or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule.
\end{itemize}

45. The Agency asserts that, aside from these proposed rules, there is no other method to achieve the purpose of these rules.\(^\text{65}\) The Agency notes that it distributed the “Summary of Rulemaking Process and Public Advisory Committee (PAC) Role” to the PAC members, made up of the Minnesota licensed gaming organizations, manufactures, linked bingo game providers, distributors, and representative of NAFTM. The Summary asked for advice and expertise in the forming the rules, as well as any probable costs of complying with the proposed rules. As of the date of the SONAR, all comments from PAC members, lawful gambling representatives, or from any individual, entity or other state agency have been resolved.\(^\text{66}\)

\begin{itemize}
  \item[d.] A Description of Any Alternative Methods for Achieving the Purpose of the Proposed Rule that Were Seriously Considered by the Agency and the Reasons Why They Were Rejected in Favor of the Proposed Rule.
\end{itemize}

46. Because it is necessary to amend the current rules to further secure the electronic game format, and because there are no rules regulating sports tipboards, the Agency could not identify methods other than rulemaking to provide the recommended regulatory relief.\(^\text{67}\)

\begin{itemize}
  \item[\text{62}] ld.
  \item[\text{63}] ld.
  \item[\text{64}] ld.
  \item[\text{65}] ld.
  \item[\text{66}] ld.
  \item[\text{67}] ld.
\end{itemize}
e. The Probable Costs of Complying with the Proposed Rule, Including the Portion of the Total Costs that Will Be Borne by Identifiable Categories of Affected Parties, Such as Separate Classes of Governmental Units, Businesses, or Individuals.

47. As stated above, the cost to the Agency of complying with the proposed new rules will be minimal and it is unlikely that any other state agency will incur any costs as a result of the new rules.\textsuperscript{68}

48. The Agency estimates that some of the electronic game changes may require additional independent lab testing for which there is a cost of up to $10,000.\textsuperscript{69} One linked bingo game provider estimated it would cost between $70,000 and $80,000 to comply with the proposed rules.\textsuperscript{70} Manufactures and linked bingo game providers have known of the proposed rules for two years and will have 180 days to come into compliance.\textsuperscript{71}

49. The Agency sought information from 15 organizations licensed to conduct paddlewheels regarding upgrading recording systems to accommodate real-time access. Each expressed a willingness to comply and none objected.\textsuperscript{72}

50. As mentioned in Finding 48 above and as more fully discussed below, the Agency believes that one business may incur cost of between $70,000 and $80,000.\textsuperscript{73}

f. The Probable Costs or Consequences of Not Adopting the Proposed Rule, Including Those Costs Borne by Individual Categories of Affected Parties, Such as Separate Classes of Governmental Units, Businesses, or Individuals.

51. The Agency asserts that the costs or consequences of not adopting the proposed rules is that needed adjustment to, and fine-tuning of, electronic game systems will not occur. Also, by not adopting the proposed rules there will be no manufacturing standards or operating guidelines for sports-themed tipboards.\textsuperscript{74}

\hspace{1cm} \textsuperscript{68} Ex. D at 3 (SONAR).
\textsuperscript{69} Id. at 4.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
g. **An Assessment of Any Differences Between the Proposed Rules and Existing Federal Regulation and a Specific Analysis of the Need for and Reasonableness of Each Difference.**

52. The Agency asserts that there are no federal regulations touching upon the proposed rules. As a result, the proposed rules are not different or potentially inconsistent regulations under federal law. The Agency also notes that, as it relates to sports-themed tipboards, the United States Supreme Court’s recent ruling in favor of legalized sports betting allows states to regulate of sports betting.

h. **An Assessment of the Cumulative Effect of the Rule with Other Federal and State Regulations Related to the Specific Purpose of the Rule.**

53. As noted above, the subject matter of the proposed rules is not a matter that is regulated by federal law. The Agency therefore maintains that the proposed rules do not add to the regulatory burdens of meeting the requirements of federal law.

54. The Administrative Law Judge finds that the Board has met its obligation to complete the eight assessments set forth in Minn. Stat. § 14.131, in the text of its SONAR.

ii. **Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

55. As required by Minn. Stat. § 14.131, by letter dated October 4, 2018, the Commissioner of Minnesota Management and Budget (MMB) responded to a request by the Agency to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency’s proposed rules and concluded that: “the proposed rule changes will have no fiscal impact on local units of government.”

iii. **Performance-Based Regulation**

56. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.

---

75 Ex. D at 4 (SONAR).
77 Ex. D at 4-5 (SONAR).
78 Letter from Jim King, Executive Budget Officer to Peggy Mancuso, Minnesota Gambling Control Board (Oct. 4, 2018) (on file with the Minn. Office Admin. Hearings).
57. The Agency believes the superior achievement in the proposed rules comes from:

- establishing high standards for the manufacture, distribution, and conduct of games that optimize electronic reporting and minimize the potential for manipulation, theft, or tampering;
- requiring appropriate manufacture of games, thereby enabling strong oversight with specific parameters and reduction of theft and manipulation potential;
- allowing sports tipboard games as an additional fundraising tool for licensed charities; and
- enabling charities being able to run successful lawful gambling operations to help accomplish their missions with appropriate and meaningful regulation.\(^{80}\)

58. The Agency asserts the proposed rules are performance-based rules because they:

- enable lawful gambling regulators to approve and monitor the conduct of all forms of lawful gambling, thus ensuring the integrity of the games regulated by statute;
- upgrade manufacturing standards for electronic games;
- allow for innovation and features that likely make it easier for charities to conduct these games;
- provide for the conduct of, restrictions on, and manufacturing standards for sports tipboard games; and
- provide for improved security procedures and requirements for electronic and sports tipboard games, thus enabling these games to be played in a lawful fair manner.\(^{81}\)

iv. Summary

59. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

60. Minn. Stat. § 14.127 requires the Agency to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any

\(^{80}\) Ex. D at 5 (SONAR).
\(^{81}\) Id.
one statutory or home rule charter city that has less than ten full-time employees.” The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.\textsuperscript{82}

61. The Agency determined that the cost of complying with the proposed rule changes will exceed $25,000 for one of the licensed linked bingo providers. This cost will be required to bring that provider’s linked bingo games into compliance.\textsuperscript{83}

62. The Administrative Law Judge finds that the Agency has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

\section*{F. Adoption or Amendment of Local Ordinances}

63. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.\textsuperscript{84}

64. The Agency concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency’s proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.\textsuperscript{85}

65. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.128. and approves that determination.

\section*{IV. Rulemaking Legal Standards}

66. The Administrative Law Judge must make the following inquiries: (1) whether the agency has statutory authority to adopt the rule; (2) whether the rule is unconstitutional or otherwise illegal; (3) whether the agency has complied with the rule adoption procedures; (4) whether the proposed rule grants undue discretion to government officials; (5) whether the rule constitutes an undue delegation of authority to another entity; and (6) whether the proposed language meets the definition of a rule.\textsuperscript{86}

67. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials

\begin{flushleft}
\textsuperscript{83} Ex. D at 7 (SONAR).
\textsuperscript{84} Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3 (2018).
\textsuperscript{85} Ex. D at 7 (SONAR).
\textsuperscript{86} See Minn. R. 1400.2100 (2017).
\end{flushleft}
developed for the hearing record, “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy), and the agency’s interpretation of related statutes.

68. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.” By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”

69. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.

70. Because the Agency suggested changes to the proposed rule language after the date it was originally published in the State Register, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

71. On April 4, 2019, the Agency detailed the revisions it would make to the proposed rules in response to the stakeholder feedback at the rulemaking hearing and during the later comment period.

72. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2018). The statute specifies that a modification does not make a proposed rule substantially different if:

   (1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;
(2) the differences “are a logical outgrowth of the contents of the
... notice of hearing, and the comments submitted in
response to the notice”; and

(3) the notice of hearing “provided fair warning that the outcome
of that rulemaking proceeding could be the rule in question.”

73. In reaching a determination regarding whether modifications result in a
rule that is substantially different, the Administrative Law Judge is to consider whether:

(1) persons who will be affected by the rule should have
understood that the rulemaking proceeding ... could affect
their interests”;

(2) the “subject matter of the rule or issues determined by the
rule are different from the subject matter or issues contained
in the ... notice of hearing; and

(3) the effects of the rule differ from the effects of the proposed
rule contained in the ... notice of hearing.”

V. Rule by Rule Analysis

74. Several sections of the proposed rules were not opposed by any member
of the public and were adequately supported by the SONAR. Accordingly, this Report
will not necessarily address each comment or rule part. Rather, the discussion that
follows below focuses on those portions of the proposed rules as to which
commentators prompted a genuine dispute as to the reasonableness of the Agency’s
regulatory choice or otherwise requires closer examination.

75. The Administrative Law Judge finds that the Agency has demonstrated by
an affirmative presentation of facts the need for and reasonableness of all rule
provisions that are not specifically addressed in this Report.

76. Further, the Administrative Law Judge finds that all provisions that are not
specifically addressed in this Report are authorized by statute and that there are no
other defects that would bar the adoption of those rules.

95 Minn. Stat. § 14.05, subd. 2.
96 See Id.
A. Minn. R. 7864.0230 (2017), subp. 1 D.

77. In response to comments received on behalf of the National Association of Fundraising Ticket Manufacturers (NAFTM) of St. Paul, the Agency agreed to modify Minn. R. 7864.0230, subp. 1D, consistent with NAFTM’s suggestion, as follows:

D. Not later than December 31 of each calendar year in a format approved by the board, a manufacturer must submit to the board, on a form prescribed by the board, a list of all board-approved games that it intends to sell in Minnesota. Any board-approved game not included on the manufacturer’s list, or any board-approved game which the manufacturer has not shipped into Minnesota for the previous two calendar years, will be considered abandoned by the manufacturer and will be removed from the board’s approved games database. Nothing in this subpart prohibits a manufacturer from voluntarily informing the board at any time of an abandoned game. No voluntary abandoned game may be shipped by a manufacturer into Minnesota unless the game is reapproved by the director. Abandoned games shipped into Minnesota by the manufacturer on or before December 31 may continue to be sold in the state Minnesota by licensed distributors and organizations. 97

78. The Administrative Law Judge concludes that the proposed rule, as modified, is not substantially different from the rule as originally proposed because it was made in response to public comments and is in character with the rule as proposed.


79. The Agency, to be consistent with the changes made to Minn. R. 7864.0230, subp. 1D, recognized that proposed rules Minn. R. 7863.0270, subp. 36 H and Minn. R. 7864.0235, subp. 38 I would require similar modifications. 98

80. As a result, Minn. R. 7863.0270, subp. H was modified as follows:

Not later than December 31 of each calendar year, a linked bingo game provider must submit to the board, on a form prescribed by the board, a list of all board-approved games that it intends to sell in Minnesota. Any board-approved game not included on the linked bingo game provider’s list, or any board-approved game which has not been played by a licensed organization in Minnesota the previous two calendar years, will be

97 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 2 (April 4, 2019) (Re: Comments from NAFTM) (on file with the Minn. Office Admin. Hearings).
98 Id.
considered abandoned by the linked bingo game provider and will be removed from the board’s approved games database. Nothing in this subpart prohibits a linked bingo game provider from voluntarily informing the board at any time of an abandoned game. No voluntarily abandoned game may be provided by a linked bingo game provider for play in Minnesota unless the game is reapproved by the director.99

81. Similarly, Minn. R. 7864.0235, subp. 38 I was modified as follows:

Not later than December 31 of each calendar year, a manufacturer must submit to the board, on a form prescribed by the board, a list of all board-approved games that it intends to sell in Minnesota. Any board-approved game not included on the manufacturer’s list, or any board-approved game which has not been played by a licensed organization in Minnesota the previous two calendar years, will be considered abandoned by the manufacturer and will be removed from the board’s approved games database. Nothing in this subpart prohibits a manufacturer from voluntarily informing the board at any time of an abandoned game. No voluntarily abandoned game may be provided by a linked bingo game provider for play in Minnesota unless the game is reapproved by the director. Abandoned games already uploaded for play by a licensed organization before December 31 may continue to be played until the game is closed.100

82. The Administrative Law Judge concludes this revision of the texts is needed and reasonable and would not be a substantial change from the rules as originally proposed because they were made in response to a public comment and are in character with the rules as proposed.

VI. Criticisms of the Board by Stakeholders

83. Several stakeholders sharply criticized the Agency for already having approved games that, they believe, violate the law. For example, the Mdewakanton Sioux Community asserts the game Wild Walleye “is illegal as a matter of law because it does not require the player to activate or open each individual line, row, or column.”101

99 Id. at 2-3.
100 Id. at 3.
84. The Lower Sioux Indian Community and the Prairie Island Indian Community claim the Agency “has already approved games that incorporate animated win determinations that look and function like video slot machines in direct contravention of statutory law.” 102

85. One stakeholder asserted “many of the Electronic Linked Bingo games currently being offered in Minnesota blatantly violate both Statute and Rules.” 103

86. Whether the Board has approved games that violate the law is a very different question from whether the proposed rules should be approved. The scope of the Administrative Law Judge’s review is limited to whether the Agency has: (1) the legal authority to adopt the proposed rules, (2) fulfilled all of the relevant legal and procedural requirements in order to promulgate the rules, and (3) demonstrated, among the possible alternatives for rulemaking that were available to the Agency, the rules that the Agency has proposed are needed and reasonable. 104 Whether the games already approved by the Agency violate the statute and rules is beyond the scope of this rulemaking proceeding and cannot be addressed by the Administrative Law Judge.

VII. Additional Actions Urged by Stakeholders

87. During the rulemaking hearing, and thereafter during the public comment periods, there were seven principal critiques. One related to the Agency’s rulemaking process and the other six critiques were of the proposed rules. Each of these critiques is addressed below.

A. Critique 1: The Rule Drafting Process

88. Three commentators raised concerns regarding the Agency’s rule drafting process. The Lower Sioux Indian Community, the Prairie Island Indian Community and the Shakopee Mdewakanton Sioux Community all note that, while the Agency utilized a PAC to help draft the proposed rules, neither they nor any other federally-recognized Indian tribes were provided with the opportunity to participate in the PAC’s efforts to revise the rules related to lawful gambling. 105 They note that when Minn. Stat. ch. 349

102 Letter from Robert L. Larsen, Community Council President, Lower Sioux Indian Community, to The Honorable James E. LaFave at 2; Letter from Jessie Seim, General Counsel, Prairie Island Indian Community to James E. LaFave, Administrative Law Judge at 2 (Mar. 8, 2019) (on file with the Minn. Office Admin. Hearings).
103 Letter from Fredrick Reis, CEO, Compliant Gaming, LLC to the Office of Administrative Hearings at 3 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
104 See Minn. R. 1400.2100 (Standards of Review).
105 Letter from Robert L. Larsen, Community Council President, Lower Sioux Indian Community, to The Honorable James E. LaFave at 1; see also Letter from Jessie Seim, General Counsel, Prairie Island Indian Community to James E. LaFave, Administrative Law Judge (Mar. 8, 2019), Letter from Skip Durocher to James E. LaFave, Administrative Law Judge (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
was amended in 2012 to authorize many of the games that are the focus of the prosed rules, Indian tribes provided meaningful input.\textsuperscript{106}

89. The Agency countered that it followed all legal requirements to provide the public with notice and the opportunity to participate in the rulemaking process.\textsuperscript{107} It asserts that “no specific party was solicited or requested to be on the PAC” and that “invitations [were] not extended to participate in a rules promulgation process.”\textsuperscript{108} The Agency also stated, “[n]o other party establishes or picks out an agenda with regard to its rulemaking responsibilities.”\textsuperscript{109}

90. The Agency asserts in the SONAR that it “employed the use of a [PAC]” and that the “PAC met on four occasions to work through language that resulted in the final version.”\textsuperscript{110} It begs the question about how was the PAC formed? The Agency maintains interested parties volunteered based on notice received from the Agency.\textsuperscript{111} If so, did the Indian tribes receive notice? The Administrative Law Judge observes that notice to the Indian tribes was not specifically provided for in the Agency’s Additional Notice Plan.\textsuperscript{112}

91. One of the purposes of the Administrative Procedures Act is “to increase public participation in the formulation of administrative rules.”\textsuperscript{113} While the legislature stated that the articulated purposes of the Act do not confer substantive rights on regulated parties, it was the lawmakers’ “expectation that better substantive results will be achieved in the everyday conduct of government by improving the process by which those results are attained.”\textsuperscript{114}

92. The Agency was not required to use a PAC.\textsuperscript{115} Moreover, other than one condition not relevant here,\textsuperscript{116} neither the statues nor the rules provide requirements or give guidance on the creation or use of a PAC.\textsuperscript{117}

\textsuperscript{106} Letter from Robert L. Larsen, Community Council President, Lower Sioux Indian Community, to The Honorable James E. LaFave at 1; see also Letter from Jessie Seim, General Counsel, Prairie Island Indian Community to James E. LaFave, Administrative Law Judge (Mar. 8, 2019), Letter from Skip Durocher to James E. LaFave, Administrative Law Judge (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).

\textsuperscript{107} Affidavit (Aff.) of Tom Barrett ¶ 2 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Ex. D at 1 (SONAR).

\textsuperscript{111} See Letter from Tom Barrett to The Honorable James LaFave, Administrative Law Judge at 1 (April 4, 2019) (“The PAC was composed of interested parties who responded to any of the various public notices put out by the Board.”) (on file with the Minn. Office Admin. Hearings).

\textsuperscript{112} Ex. D at 6-7 (SONAR).

\textsuperscript{113} Minn. Stat. § 14.001 (2018).

\textsuperscript{114} Id.


\textsuperscript{116} Id.

\textsuperscript{117} See Minn. Stat. § 14.101; Minn. R. 1400.2050 (2017).
93. Best practice would have been for the Indian tribes to have participated in the PAC process. Also, going forward, the Indian tribes, as actively participating stakeholders, should be included in any future Additional Notice Plans.

94. As it pertains to this proceeding, however, the Indian tribes’ absence from the PAC process and the Additional Notice Plan did not prevent them from meaningfully participating in the rule making proceeding. The Indian tribes had the opportunity to - and did - participate in the rulemaking hearing. Indeed, they provided thoughtful, well-reasons comments.

95. The Administrative Law Judge finds that the Indian tribes’ failure to participate in the PAC process and absence from the Additional Notice Plan was harmless error\footnote{See Minn. Stat. § 14.05, subd. 2 (2018).} and does not invalidate the proposed rules.

B. Critique 2\footnote{As the critiques of the Lower Sioux Indian Community, the Prairie Island Indian Community and the Shakopee Mdewakkanton Sioux Community are virtually identical, this report will cite only to the comments of the Shakopee Mdewakkanton Sioux Community.} of Minn. R. 7864.0255, subp. 18 (C) (2017)

96. Several commentators complain about the proposed language of Minn. R. 7864.0235, subp. 18 (C) which they contend improperly authorizes the use of animated win determinations.\footnote{Letter from Skip Durocher to James E. LaFave, Administrative Law Judge at 4 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).} These commentators note that:

Minn. Stat. § 349.12, subp 12b states that electronic pull-tab devices may not include spinning reels or other representations that mimic a video slot machine. Minn. Stat. § 349.12, subp. 12c states that electronic pull-tab games must display facsimiles of pull-tab tickets. Minn. Stat. § 349.13 states that electronic gambling devices, including electronic pull-tabs, may not display or simulate any other form of gambling or entertainment.\footnote{Id.}

97. The commentators again argue that the Agency “has already approved [section] 349.13 games that incorporate animated win determinations that look and function like video slot machines.”\footnote{Id. at 4-5.} The commentators maintain these statutory provisions do not support the use of animated win determinations and urge that proposed Minn. R. 7864.0235, subp. 18 (C) be deleted from the proposed rules.\footnote{Id.}

98. The Agency maintains the proposed rule is consistent with the statute. It argues that Minn. Stat. § 349.12, subd. 12b (7) and (8) specifically provide that pull-tab games may contain other amusement features and visual enhancements. The Agency also argues that the commentators are misconstruing Minn. Stat. § 349.13. The Agency asserts the prohibition that electronic gaming devices “may not display or simulate any
other form of gambling or entertainment” means “displaying or simulating any form of gambling or entertainment other than an electronic pull-tab game or electronic bingo game is prohibited.”

99. Minn. Stat. § 439.12, subd. 12b (7) and (8) allow pull-tab devices to have amusement features and visual enhancements. An “animated win determination” on a pull-tab device is a visual enhancement or amusement feature allowed by law. As explained earlier, the issue of whether the Board is approving electronic devices that violate the prohibition against displays that mimic a video slot machine or have win displays that directly violate the law is outside the scope of this proceeding.

100. The proposed rule complies with the statutes and the Board has demonstrated the need for, and reasonableness of, the rule.

C. Critique 3: Minn. R. 7864.0235, subp. 4

101. Several commentators objected to the language in Minn. R. 7864.0235, subp. 4 as it relates to bonus features on electronic pull-tabs. They argue “the statutory language found in Minn. Stat. § 349.12, subps. 12b, 12c, and 13 do not support the inclusion of bonus features in electronic pull-tab systems.”

102. The Agency counters that bonus features are authorized by Minn. Stat § 349.1721 (2018). That statute allows pull-tab games to be multiple seal games, cumulative games, event games or multiple chance games. A “multiple seal game play is parallel to extended/bonus play in electronic games.”

103. In rebuttal, the commentators tacitly concede that bonus features in electronic pull-tab games are multiple seal or multiple chance games but argue the permission granted by Minn. Stat § 349.1721 “does not trump the more specific requirements” contained in Minn. Stat. § 349.12.

124 Id.
125 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 7 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings) (emphasis in original).
126 Minn. Stat. 349.12, subd. 12b (7) (An electronic pull-tab “may incorporate an amusement game feature as part of the pull-tab game . . .” )
127 Minn. Stat. 349.12, subd. 12b (8) (An electronic pull-tab “may have auditory or visual enhancements to promote or provide information about the game being played, provided the component does affect the outcome of a game or display the results of a game.”).
129 Id.
130 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 7 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
131 See Minn. Stat.§ 349.1721, subds. 1, 2 and 5.
132 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 7 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
104. The commentators’ arguments are unpersuasive. Minn. Stat. 349.1721 authorizes multiple seal games and multiple chance games. Importantly, the legislature also specifically stated that “the rules shall also apply to electronic pull-tab games.”133

105. The inclusion of bonus features on electronic pull-tabs is permitted under Minn. Stat. 349.1721.

106. Accordingly, the proposed rule complies with the statutes and the Board has demonstrated the need for, and reasonableness of, the rule.

D. Critique 4: Minn. R. 7863.0270, subp. 18a and Minn. R. 7864.0230, subp. 6

107. Minn. R. 7863.0270, subp. 18a134 and Minn. R. 7864.0230, subp. 6,135 relate to the standards and requirements for electronic-linked bingo game systems and manufacturer standards for electronic bingo devices, respectively.136 The two proposed rules authorize the use of animated win determinations.137

108. The commentators adamantly argue that animated win determinations are not allowed by law and that “any reference to animated win determinations in Minn. R. 7863.0270, subp. 18a and Minn. R. 7864.0230, subp. 6 should be deleted.”138 The commentators fear that the use of animated win determinations will lead the Board to approve games that look and function like video slot machines.139 To support this contention they point to a YouTube video that portrays a game approved in Minnesota that commentators believe functions like a video slot machine.140

109. The Agency counters, as it did above, that animated win determinates are allowed under the provisions of Minn. Stat. § 349.12, subd. 12b (7) and (8).141 Those subdivisions permit electronic pull-tab games to contain amusement features and visual enhancement.142

110. The Agency also argues that the commentators’ position is too expansive and is unreasonable.143 “Animation itself does not make an electronic device or game “mimic a slot machine.” If animation alone is considered to “mimic a slot machine” then

133 Minn. Stat. § 349.1721, subd. 1.
134 Ex. C at 47 (Proposed Rules) (Minn. R. 7863.0270, subp. 18a).
135 Ex. C at 67 (Proposed Rules) (Minn. R. 7864.0230, subp. 6(G)).
136 Ex. C at 47, 67 (Proposed Rules).
137 Id.; see Ex. C at 47 (Proposed Rules) (Minn. R. 7863.0270, subp. 18a);.
139 Id.
140 Id.
141 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 5 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings); Minn. Stat. § 349.12, subd. 12b(7) and (8).
142 Minn. Stat. § 349.12, subd. 12b(7) and (8).
143 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 5 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
every electronic screen with moving objects could be interpreted to be mimicking a slot
machine."\textsuperscript{144}

111. The Administrative Law Judge, as previously determined above, finds Minn. Stat. § 439.12, subd. 12b (7)\textsuperscript{145} and (8)\textsuperscript{146} . . . allow pull-tab devices to have amusement features and visual enhancements. An “animated win determination” on a pull-tab device is a visual enhancement or amusement feature allowed by law. The Administrative Law Judge also notes that the issue of whether the Board is approving electronic devices that violate the prohibition against displays that mimic a video slot machine or have win displays that directly violate the law, is outside the scope of this proceeding.

112. The proposed rules comply with the statutes and the Board has demonstrated the need for, and reasonableness of, the rules.

E. Critique 5: Minn. R. 7861.0274, subp. 3a (2017)

113. Several commentators objected to the proposed language in Minn. R. 7861.0274, subp. 3a.\textsuperscript{147} They note “the proposed language states that electronic bingo devices ‘must not have any other games or interactive programs stored in or on the device . . . ’."\textsuperscript{148} The commentators go on to observe that “Minn. Stat. § 349.12, subp. 12a and Minn. Stat. § 349.13 provide more robust requirements.”\textsuperscript{149}

114. The Agency argues the commentators are mistakenly attempting to extend the prohibition against an amusement function on the electronic bingo device to the electronic bingo game itself.\textsuperscript{150} Then note that Minn. Stat. § 349.13 “prohibits the display or simulation of any other form of gambling or entertainment, except as otherwise allowed by Chapter 349.”\textsuperscript{151} The Agency maintains “the statute only prohibits entertainment functions unrelated to electronic linked bingo games or electronic pull-tabs.”\textsuperscript{152}

115. The Administrative Law Judge agrees. Minn. Stat. 349.13 states in relevant part:

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id., subd. 12b (8) (An electronic pull-tab “may have auditory or visual enhancements to promote or provide information about the game being played, provided the component does affect the outcome of a game or display the results of a game.”).
\textsuperscript{147} Letter from Skip Durocher to James E. LaFave, Administrative Law Judge at 9-10 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
\textsuperscript{148} Id. at 9.
\textsuperscript{149} Id.
\textsuperscript{150} Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 4 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
\textsuperscript{151} Id. (Emphasis in original).
\textsuperscript{152} Id.
Electronic game devices, including but not limited to electronic bingo devices . . . [and] electronic pull-tab devices . . . may only be used in the conduct of lawful gambling permitted under this chapter and board rule and may not display or simulate any other form of gambling or entertainment, except as otherwise allowed under this chapter.

116. Chapter 349, the Minnesota Lawful Gambling and Gambling Devices Act\(^{153}\) governs lawful gambling in this state and authorized electronic pull-tabs and electronic bingo. The plain language of Minn. Stat. §349.13 prohibits electronic gaming devices from containing “other forms of gambling or entertainment” – that means gambling or entertainment that are not electronic pull-tabs or electronic bingo.

117. The proposed rule comlies with the statutes and the Board has demonstrated the need for, and reasonableness of, the rule.

E. **Critique 6: Minn. R. 7861.0210, subp. 15c**

118. Proposed Minn. R. 7861.0210, subp. 15c defines “electronic bingo device.”\(^{154}\) An electronic bingo device has one of two functions: one as a bingo card minder, the other as a device on which the electronic bingo game is played.\(^{155}\) The proposed definition delineates between those two functions.\(^{156}\)

119. Several commentators objected to the proposed rule arguing that Minn. Stat. § 349.12, subd. 12a already defines “electronic bingo device” and does not distinguish between an electronic bingo device used as a card minder and an electronic device that is used to play bingo.\(^{157}\)

120. The Agency maintains the proposed rule language clarifies the distinction between these two functions and that the proposed rule does not minimize or change the statutory definition of “electronic bingo device.”\(^{158}\)


\(^{154}\) Ex. C at 2-3 (Proposed Rules).

\(^{155}\) Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 2-3 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).

\(^{156}\) *Id.*; see Ex. C at 2-3 (Proposed Rules).


\(^{158}\) Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 2-3 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
121. The role of the Administrative Law Judge during a legal review of rules is not to fashion requirements that the judge regards as best suited for the regulatory purpose; but rather, to determine whether the Agency has made a reasonable selection among the regulatory options available to it. The Minnesota Legislature delegated the rulemaking authority to the Agency and not to the Judge. In this instance, proposed rules comply with the statutes and the Board has demonstrated the need for, and reasonableness of, the rules.

F. Critique 7: Minn. R. 7861.0210, subp. 15h

122. This proposed rule defines “electronic linked bingo game” as “an electronic bingo game that is played on a handheld, portable device that permits play against other bingo players at multiple permitted premises.”

123. Commentators note that while “electronic linked bingo game” is not defined in statutory law, “linked bingo game” is defined in Minn. Stat. § 349.12, subp. 25a. They argue the proposed definition should reference the definition of “linked bingo game.”

124. The Agency responded that absent a statutory definition of “electronic linked bingo game”, Minn. Stat. § 349.17 controls the conduct of bingo in Minnesota. The Agency points out that Minn. Stat. § 349.17, subd 8, governs the play of “linked bingo games and that Minn. Stat. § 349.17, subd 9, provides that linked bingo games are played “exclusively on electronic bingo deceives that, independent of the linked bingo game requirements specified in subdivision 8.” The Agency asserts the proposed rule is reasonable because it “clarifies where the distinction between subdivisions 8 and 9 occurs.”

125. The proposed rules comply with the statutes and the Board has demonstrated the need for, and reasonableness of, the rules.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

159 See generally, Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm’rs, 713 N.W.2d 817, 832 (Minn. 2006) (“Our role when reviewing agency action is to determine whether the agency has taken a ‘hard look’ at the problems involved, and whether it has ‘genuinely engaged in reasoned decision-making’”) (quoting Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn. 1977)); Manufactured Hous. Inst., 347 N.W.2d at 244 (“Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like”) (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976)).
162 Id.
163 Letter from Tom Barrett, Executive Director to The Honorable James LaFave at 3 (Mar. 28, 2019) (on file with the Minn. Office Admin. Hearings).
164 Id.
CONCLUSIONS OF LAW

1. The Agency gave notice to interested persons in this matter.

2. Except as noted in Finding 28, the Agency has fulfilled the procedural requirement of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. As noted above in Finding 28, the Administrative Law Judge concludes the Agency’s failure to timely file the Certificate of Accuracy of the Mailing List and the Certificate of Accuracy of Mailing Notice to the Rulemaking List are harmless error under Minn. Stat. § 14.15, subd. 5.

4. The Administrative Law Judge concludes that the Agency has fulfilled its additional notice requirements.

5. The Agency has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii) (2018).

6. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).

7. The Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, .50.

8. The modification to the proposed rules suggested by the Agency after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the Agency to adopt other revisions to the proposed rules. In each instance, the Agency’s rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:
RECOMMENDATION

IT IS RECOMMENDED that the proposed amended rules be adopted.

Dated: May 28, 2019

JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule’s adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.