



## NEVADA GAMING INVESTORS AND SHAREHOLDERS APPLICATION AND SUITABILITY REQUIREMENTS

Nevada Gaming Commission (“NGC”) will depend on the type of license held by the gaming company and the relative proportion of the investor's interests. First-time investors in gaming companies are less acquainted with the extent to which their involvement in the company will impact the applicable notice and filing requirements. The purpose of this article is to summarize these requirements for gaming company investors and shareholders.

### *Privately-held Businesses*

The Nevada gaming system is designed to give gaming regulators the power and discretion to require the filing of applications for findings of suitability of persons and business entities involved in the ownership or business activities of gaming licensees. In the case of privately-held business entities, before Governor Brian Sandoval signed Senate Bill 218 into law on May 16, 2011, all equity owners of the licensee and its holding and intermediary companies were required by applicable regulations to be licensed or found suitable. This was true regardless of whether the type of equity held entitles the investor to vote with other equity holders.

With the enactment of Senate Bill 218, however, individuals may own 5% or less of a limited partnership or limited-liability company that holds a state gaming license without being required to obtain a license or be found suitable (NRS 463.569(1) and 463.5735(1)). Those owning up to a 5% interest in a limited partnership or limited-liability company licensee must register with the State Gaming Control Board (“Board”) and submit to the Board's jurisdiction (NRS 463.569(2) and 463.5735(2)).

### By Jennifer L. Carleton

Business investors are generally familiar with the Securities and Exchange Commission reporting and disclosure requirements, including Sarbanes-Oxley Act provisions, applicable to their activities. They are often less familiar with the Nevada application, investigation and suitability requirements for investors in a gaming licensee or registered holding company. It is unsurprising that the type and extent of information that must be reported to the

The Nevada Gaming Control (“Act”) addresses privately-held business entities involved in the ownership or business activities of gaming licensees in four categories: corporations, limited partnerships, limited-liability companies, and holding and intermediary companies. (The terms “holding company” and “intermediary company” are defined in NRS 463.385 and NRS 463.386, respectively.) Pursuant to the Act and the regulations promulgated by the NGC, any or all of a privately-held business entities’ individual stockholders, lenders, members, partners, holders of evidence of indebtedness, underwriters, key executives, agents or employees may be required to be licensed (NGC Regulations 15.530-3, 15A.160, 15B.160; *see also* NRS 463.569(2) and NRS



463.5735(2)). Aside from owners of 5% or less of a limited partnership or limited-liability company that holds a gaming license, as described above, and institutional investors as described below, no person can acquire any equity security issued by a privately-held licensee or a holding company, nor become a controlling affiliate or holding company of such licensee without first obtaining the prior approval of the NGC (NGC Regulations 15.1594-6, 15A.060, and 15B.060; *see also* NGC Regulation 15.482-4 for the definition of “control”). An “equity security” is defined broadly under the Act, encompassing any voting stock of a corporation, any security convertible into such a security, carrying any warrant or right to subscribe to or purchase such a security, or any security having a direct or indirect participation in the profits of the issuer (NRS 463.484). A security can be any stock, membership in an incorporated association, bond, debenture or other evidence of indebtedness, investment contract, voting trust certificate, certificate of deposit for a security, or any interest or instrument for any

of the foregoing (NGC Regulation 15.482-8). The NGC may also take guidance from the SEC, which defines the term “equity security” to include any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so (Securities Act Rule 405 and Exchange Act Rule 3a11-1).

An investor in a privately-held gaming licensee is generally required to file an application for a finding of suitability with the NGC. If any such individual that is required by the NGC to be found suitable fails to apply, is not found suitable or is denied a license, or if his or her license or the finding of his or her suitability is revoked after appropriate findings by the NGC, that person must be immediately removed from any significant involvement with the activities of the licensee (NRS 463.560, 463.572, 463.5737, 463.595(2)).

#### *Publicly Traded Corporations*

Publicly traded corporations (“PTC’s”) are treated differently under Nevada gaming law than privately-held business entities. A PTC is defined in NRS 463.487(1), and the qualifications for, and applicable limitations on, a state gaming license for PTCs generally are addressed in NRS 463.625 to 463.643. The provisions of the Act and NGC Regulations that pertain to PTCs focus on voting control rather than solely on equity ownership. Voting control generally refers to the ability to vote for the election of members of the board of directors of a corporation or comparable persons in the case of a partnership, trust, or other form of business organization (NGC Regulation 16.010(20)). While the NGC has the discretion to require a finding of suitability for any person who acquires, directly or indirectly, beneficial ownership of any voting security, or beneficial or record ownership of any nonvoting security in a PTC, this discretion is seldom exercised. If an investor other than an

institutional investor holds more than 5% of the voting securities of a registered PTC, he or she must notify the NGC of any related filing made with the SEC in the manner



prescribed by the GCB Chairman, within 10 days after such filing is made with the SEC (NRS 463.643(3)). A holder of more than 10% of the voting securities of a registered PTC must file an application with the NGC for a finding of suitability within 30 days after the GCB Chairman mails the holder written notice requiring the filing of such an application (NRS 463.643(4)). There is no such similar mandatory notice or application requirements for holders of non-voting securities in a registered PTC.

In addition to a PTC's voting security holders, each officer, director and employee of a PTC that the NGC determines is actively and directly engaged in the administration or supervision of, or any other significant involvement with, the gaming activities of the corporation or any of its affiliated or intermediary companies must be found suitable and may be required to be licensed by the NGC (NRS 463.637(1); NGC Regulations 16.410, 16.415)). The following officers, directors or employees of the PTC are assumed to be actively engaged in the gaming activities of the licensee and, therefore, are normally required to be found suitable:

- (a) Each employee who is involved in gaming and who is also a director of the PTC;
- (b) The president, any persons performing the function of principal executive officer or principal operating officer, the principal financial officer, and any persons performing the function of chief technology officer or chief information officer;
- (c) Each director who serves as chairman of the board of directors or of its audit committee;
- (d) Each director who, individually or in association with others, is the beneficial owner of greater than 5% of any class of voting securities of the PTC for which he serves as a director; and
- (e) Each person, whether as director or otherwise, who serves on any committee of the board of directors to which is delegated the authority of the board of directors to act in any manner involving the activities of a corporate gaming licensee, and each director who serves in the capacity of lead

director (NGC Regulation 16.410, 16.415).

As with privately-held businesses, if any individual required to be found suitable fails to apply, is not found suitable or is denied a license, or if his or her license is revoked, that person must be immediately removed from any significant involvement with any gaming activities (NRS 463.637(2)).

#### *Institutional Investors*

In Nevada, qualified institutional investors may file for a waiver of the application and suitability requirements otherwise applicable to equity owners. An Institutional investor, which is defined in NGC Regulation 16.010(14) to include registered investment companies, employee benefit plans and pension plans subject to URISA, state or federal government pension plans, collective trust funds,

insurance companies, registered investment advisers, banks, savings and loan associations, and groups comprised entirely of such entities, may apply to the NGC for a waiver if the investor holds the equity securities for investment purposes only. To qualify as an institutional investor, a person other than a state or federal pension plan must also

meet the requirements of a "qualified institutional buyer" as defined in Rule 144A of the Federal Securities Act (NGC Regulation 16.010(14)).

#### *Institutional Investors in Privately-held Companies*

An institutional investor in a privately-held gaming licensee or holding company is not eligible for a waiver if he or she owns, directly or indirectly, more than 15% of the voting or equity securities of the corporate licensee on a fully diluted basis, unless the securities were acquired through a debt restructuring (NGC Regulations 15.430(1), 15A.070(1), 15B.070(1)). The securities can only be acquired and held in the ordinary course of business, and cannot allow the institutional investor to vote for the election of



members of the board of directors, cause any change in the corporate charter, bylaws, management, policies or operations of the licensee, or cause any other action which the NGC finds to be inconsistent with passive investment. The following activities are not deemed to be



inconsistent with holding voting or equity securities for investment purposes only: (1) serving as a member of any committee of creditors or security holders in connection with debt restructuring; (2) nominating any candidate for election or appointment to a board of directors or the equivalent in connection with a debt restructuring; and (3) making financial and other inquiries of management of the type normally made by securities analysts for informational purposes and not to cause a change in management, policies or operations (NGC Regulation 15.430(2)).

An institutional investor application for waiver must include the following information:

- (1) A description of the institutional investor's business and the reasons why the institutional investor is within the definition of "institutional investor."
- (2) The investor's purpose for holding the securities.
- (3) The name, address, telephone number and social security number of the officers and directors of the



institutional investor as well as those persons that have direct control over the institutional investor's holdings of the voting and equity securities.

- (4) The name, address, telephone number and social security or federal tax identification number of each person who has the power to direct or control the institutional investor's exercise of its voting rights as a holder of voting or equity securities.
- (5) The name of each person that beneficially owns more than 5% of the institutional investor's voting securities.
- (6) A list of the institutional investor's affiliates.
- (7) A list of all agencies with which the institutional investor files periodic reports.
- (8) A report that includes the all criminal or regulatory sanctions filed or imposed against the institutional investor, its affiliates, any current officer or director, or former officers or directors during the preceding 10 years, and all administrative or court proceedings filed by any regulatory agency during the preceding 5 years (NGC Regulation 15.430(3)).

The NGC may approve the application if it finds that the investor holds (1) not more than 15% of the securities of the licensee or holding company on a fully diluted basis; (2) for investment purposes only; and (3) the securities were acquired and are held in the ordinary course of business and not for the purpose of causing, directly or indirectly, the election of the members of the board of directors, or effectuating any change in the corporate charter, bylaws, management, policies or operations of the corporate licensee or any of its affiliates. If the application for waiver is granted by the NGC, the investor may hold up to 15% of the voting or equity securities of a corporate

licensee or a holding company without filing an application for a finding of suitability.

#### *Institutional Investors in PTCs*

An institutional investor in a PTC cannot hold, directly or indirectly, more than 25% of the voting securities of the registered PTC. The application requires the investor to provide the following information, in addition to the information listed above for privately-held investments:

- (1) The name of the PTC registered with the NGC in which the investor holds in excess of 10% of the voting securities, the percentage holding of such PTC's securities, and a dollar value representation for each such holding.
- (2) A list of all securities of any PTCs that are or were beneficially owned by the institutional investor or its affiliates within the preceding year, including a description of the securities, the amount, and the date of acquisition or sale.
- (3) Copies of the institutional investor's most recent Schedule 13D or 13G concerning any voting securities of the PTCs, and copies of any filing made under 15 U.S.C. 18a (the premerger notification and waiting period), with respect to the acquisition or proposed acquisition of voting securities of the PTCs.
- (4) A description of the internal controls established, implemented and maintained to ensure that the investor does not exceed the investment limitations authorized by the NGC (NGC Regulation 16.430).

The NGC may approve the application and grant a waiver if it finds that the investor holds (1) not more than 25% of the outstanding shares of the Nevada PTC; (2) for investment purposes only; and (3) if the voting securities were acquired and are held in the ordinary course of business and not for the purpose of causing, directly or indirectly, the election of a majority of the members of the board of directors, any change in the corporate charter, bylaws, management, policies or operations of the Nevada PTC. If the application for waiver is granted by the NGC, the investor may hold up to 25% of the

outstanding shares of a Nevada PTC without filing an application for a finding of suitability.

If the waiver is specific to one Nevada registered PTC, it will not expire once granted. If, however, the application for waiver covers all registered PTCs in which the applicant holds more than 10%, usually the application must be renewed every two years. In addition, the more general waiver requires the applicant to report, on a monthly basis, its holdings in all registered PTCs, and to file a quarterly update to its institutional investor certification, including the names of all persons controlling the applicant's investments, any regulatory or criminal violations, and any changes to the structure or operations of the applicant that could affect its classification as an institutional investor. In the event that the investor's application is denied, the investor must file an application for a finding of suitability as a holder of more than 10% of the outstanding shares of a PTC.

#### *Conclusion*

All privately-held business equity owners are required by applicable regulations to be licensed or found suitable, unless such owners can qualify as institutional investors. A holder of more than 5% of the voting securities of a licensed PTC must provide notice to the NGC of its holdings, and a holder of more than 10% must file an application with the NGC for a finding of suitability, unless such holders can qualify as institutional investors. Institutional investors generally cannot hold more than 15% of the voting or equity securities of a privately-held business or 25% of the outstanding shares of a Nevada PTC.

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