

LEWIS  ROCA

A PRACTICAL
GUIDE TO NEVADA
GAMING LAW FOR
INSTITUTIONAL
INVESTORS



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Introduction

Over the past several decades Nevada gaming law has permitted public companies, institutional investors and other financial entities to invest in Nevada gaming properties without obtaining a license or a finding of suitability for each individual or investor. This long-standing practice enables unlicensed individuals to provide funds to Nevada licensees for the sole purpose of investment, while maintaining the requirement that those in control of a licensed location remain suitable.

Publicly Traded Companies

Nevada has three separate regulatory thresholds as applied to ownership of public gaming companies. Any person who acquires, directly or indirectly, beneficial ownership of (I) any voting security of a gaming company registered with the Nevada Gaming Commission (Commission) as a publicly traded corporation (PTC) may be required to be found suitable as such at the discretion of the Nevada State Gaming Control Board (Board); (II) more than five percent of any class of voting securities of a PTC is required to notify the Board in writing within 10 days of knowledge of such acquisition; and (III) more than 10 percent of any class of voting securities of a PTC shall apply to the Commission for a finding of suitability within 30 days after the Chairman of the Board mails such beneficial owner a written notice requiring such finding of suitability application.¹

A major exception to this rule exists for institutional investors. If a bona fide institutional investor is required to file an application for a finding of suitability under either of the scenarios set forth in (I) or, more particularly, (III) above, under certain circumstances, such institutional investor may apply for and receive a waiver of such finding of suitability requirement.

An institutional investor is allowed to beneficially own up to and including 25 percent of any class of a PTC's voting securities and still qualify for a waiver.² An institutional investor that owns more than 20 percent but not more than 25 percent of a PTC must still be careful to comply with the Board and the Commission's "acquisition of control" approval requirements discussed below.

¹ Nev. Rev. Stat. § 463.643.

² Under NGC Reg. 16.430(1), it is possible to qualify for a waiver while owning more than 25 percent, provided that the additional ownership was acquired through debt restructuring. For purposes of the Nevada gaming regulations, a "debt restructuring" means (a) any proceeding under the United States Bankruptcy Code; or (b) any out of court reorganization of a person that is insolvent or generally unable to pay its debts as they become due. NGC Reg. 16.010(8).

Once granted a waiver, an institutional investor may beneficially own more than 25 percent, but not more than 29 percent, of any class of a PTC's voting securities, if such additional ownership resulted from a stock repurchase program conducted by the PTC and the institutional investor does not purchase or otherwise acquire any additional voting securities of the PTC that would result in an increase in the institutional investor's ownership percentage.

Finally, a person or corporation must receive permission from the Commission before acquiring control of a PTC licensed by the Commission.³ A suitability waiver granted to an institutional investor does not include a waiver or exemption from this requirement. Accordingly, an institutional investor must also apply to the Board and to the Commission for an exemption from the prior approval requirements if (I) the proposed acquisition would give the institutional investor power to direct management and control of the PTC, or (II) the institutional investor intends to increase its beneficial ownership to more than 20 percent, but not more than 25 percent, of any class of voting securities of a PTC. If at the time an institutional investor applies to the Board and to the Commission for a waiver it does not intend to increase its beneficial ownership to more than 20 percent of any class of the voting securities of a PTC, but subsequently forms the intention to increase its beneficial ownership thereof to more than 20 percent, but not more than 25 percent, it must apply to the Commission for an exemption from the prior approval requirements.⁴

Corporations, Limited Partnerships and Limited Liability Companies

All officers and directors of a corporation, other than a PTC, who hold or apply for a state gaming license, must be licensed individually.⁵ Likewise, every general partner and every limited partner with more than a five percent ownership interest in a limited partnership who holds a state gaming license must be licensed individually.⁶ Moreover, every member with more than a five percent ownership interest in a limited-liability company and every director and manager of a limited-liability company who holds or applies for a state gaming license must be licensed individually.⁷

³ NGC Reg. 16.200.

⁴ NGC Reg. 16.430(7).

⁵ Nev. Rev. Stat. § 463.530.

⁶ Nev. Rev. Stat. § 463.569

⁷ Nev. Rev. Stat. § 463.5735.

As with PTCs, however, each of the aforementioned applicants may waive the licensing procedure as long as they come within the definition of an institutional investor, own a 15 percent or less interest in the company and comply with the application procedures set forth in this guide. The procedural steps for obtaining a waiver are generally uniform, regardless of the form of the entity. However, an additional requirement is imposed upon individuals of corporations, limited liability partnerships and limited liability companies. In these instances, the regulations require an applicant to agree not to grant an option to purchase or sell, assign, transfer, pledge or make any other disposition of any interest in or equity security issued by the entity or the holding company without the prior approval of the Commission.⁸

Who Qualifies as an Institutional Investor?

An institutional investor can include any of the following:

- A bank as defined in Section 3(a)(6) of the Federal Securities Exchange Act
- An insurance company as defined in Section 2(a)(17) of the Investment Company Act of 1940
- An investment company registered under Section 8 of the Investment Company Act of 1940
- An investment advisor registered under Section 203 of the Investment Advisors Act of 1940
- Collective trust funds as defined in Section 3(c)(11) of the Investment Company Act of 1940
- An employee benefit plan or pension fund subject to the Employee Retirement Income Security Act of 1974, excluding an employee benefit plan or pension fund sponsored by a PTC registered with the Commission
- A state or federal government pension plan
- A group comprised entirely of persons specified above
- Such other persons as the Commission may determine for reasons consistent with state policies⁹

The latter is a catch-all provision that allows consideration of entities that act like institutional investors but do not strictly qualify in any of the defined categories, such as similar institutional investors from outside the United States.

⁸ NGC Reg. 15.430(3)(b)(3); 15A.070(3)(b)(3); 15B.070(3)(b)(3).

⁹ NGC Reg. 16.010(14).

Besides these requirements, a shareholder (other than a state or federal pension plan) must meet the requirements of a “qualified institutional buyer” as defined in Rule 144A of the Federal Securities Act to qualify as an institutional investor. Similar to the definition of an “Institutional Investor,” a “Qualified Institutional Buyer” includes insurance companies, investment companies, employee benefit plans, trust funds, business development companies, savings and loan associations, banks, investment advisers and dealers, all of whom act for their own account or the accounts of other qualified institutional buyers that in the aggregate own and invest on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity.

What Are Investment Purposes?

An institutional investor will not be deemed to hold shares only for investment purposes unless the voting securities were acquired and are held in the ordinary course of business as an institutional investor. Generally, such shares cannot be held for the purpose of directly or indirectly causing 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 PTC registered with the Commission or any of its gaming affiliates or any other action that the Commission finds to be inconsistent with investment purposes only.

The Board and the Commission have deemed the following activities, among others, to be consistent with holding shares for investment purposes only:

- Voting, directly or indirectly, through the delivery of a proxy furnished by the board of directors on all matters voted on by the holders of such voting securities
- Serving as a member of any committee of creditors or security holders formed in connection with a debt restructuring
- Nominating any candidate for election or appointment to the board of directors in connection with a debt restructuring
- Accepting appointment or election as a member of the board of directors in connection with a debt restructuring and serving in that capacity until the conclusion of the member’s term
- Making financial and other inquiries of management normally made by securities analysts for informational purposes and not to cause a change in its management, policies or operations
- Other activities the Commission determines to be consistent with investment intent¹⁰

An institutional investor that has been granted a waiver of a finding of suitability and that subsequently intends not to hold its voting securities for investment purposes only or that intends to take any action inconsistent with its prior intent shall, within two business days after its decision, deliver notice to the Chair in writing of the change in its investment intent. The Chair may then take such action under the provisions of NRS 463.643 as they deem appropriate.¹¹

What Needs to Be Filed?

For an institutional investor to obtain a waiver, it must prepare and file an application by completing and submitting the following three forms to the Board: (1) Form PTC-1, Application; (2) Form 17, Release and Indemnity of all Claims; and (3) Form PTC-430, Schedule Supporting Application for a Waiver. When furnishing their answers, institutional investors are required to comply strictly with the layout of the form templates provided by the Board. The forms must be typed on high quality, letter size (8.5 x 11 in.) bond paper. Answers should be typed because the Board will refuse illegible forms. Each form must also be physically signed by an authorized person.

Form PTC-1, Application

Every application that relates to a PTC (made pursuant to the Nevada Gaming Control Act or NGC Regulation 16) must be submitted to the Board by using a Form PTC-1. The Form PTC-1 is an application containing a sworn statement and is considered a public record. Consequently, all the information contained within it is subject to public inspection and disclosure.¹² The form itself is relatively basic and requires only key information, including the institutional investor's name and address, a brief statement of the action sought (in this case, a waiver of NGC Regulation 16.430 as an Institutional Investor) and all applicable regulatory provisions for the action requested.

¹⁰ NGC Reg. 16.430(3).

¹¹ NGC Reg. 16.430(6).

¹² Nev. Rev. Stat. § 463.120.

Form 17, Release and Indemnity of All Claims

Each institutional investor filing an application for a waiver must agree to release and indemnify the State of Nevada, the Commission, the Board and the Nevada Attorney General's office with regard to any actions arising from its application. A Form 17, Release and Indemnity of All Claims must be signed and sworn before a notary and submitted with a Form PTC-1.

Form PTC-430, Schedule Supporting Application for a Waiver

The Form PTC-430, Schedule Supporting Application for a Waiver of NGC Regulation 16.430 as an Institutional Investor, is the most substantial of the three forms. Unlike Form PTC-1, Form PTC-430 is not a public record and all the information contained within is confidential. Form PTC-430 is also far more complex and invasive. The institutional investor must answer several questions and submit an abundance of material including:

- A description of the institutional investor's business and reasoning as to why the investor falls within the definition of "institutional investor" as set forth in NGC Regulation 16.010(14)
- The name of the PTC in which the institutional investor holds or intends to hold in excess of 10 percent of the voting securities, the actual percentage of ownership and a dollar value for such ownership
- Any actions taken or expected to be taken by the institutional investor that are inconsistent with investment purposes
- The names, addresses, telephone numbers and social security numbers of the officers and directors or their equivalent of the institutional investor as well as those persons who have direct control over the institutional investor's holdings of voting securities in the company
- 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 securities in the company
- The name of each person who beneficially owns more than five percent of the institutional investor's voting securities or other equivalent
- A list of the institutional investor's affiliates
- A list of all the securities of any Nevada PTC that are or were beneficially owned by the institutional investor or its affiliates within the preceding year, setting forth a description of the securities, the amount and the date of the acquisition or sale

- A list of all regulatory agencies with which the institutional investor or any affiliate that beneficially owns voting securities files periodic reports and the name, address, and telephone number of the person, if known, to contact at each agency regarding the institutional investor
- A disclosure of all criminal or regulatory sanctions imposed during the preceding 10 years and any administrative or court proceedings filed by any regulatory agency during the preceding five years against the institutional investor, its affiliates, any current officer or director or any former officer or director whose tenure ended within the preceding 12 months. As to a former officer or director, such information is provided only to the extent that it relates to actions arising out of or during such person's tenure with the institutional investor or its affiliates
- A copy of the institutional investor's most recent Schedule 13D or 13G (and any amendments thereto) filed with the United States Securities and Exchange Commission concerning any voting securities of the company
- A copy of any filing made under 15 U.S.C. 18a with respect to the acquisition or proposed acquisition of voting securities of the company
- A brief description of the internal controls established, implemented and maintained to ensure the institutional investor does not exceed the investment limitations authorized by the Commission. This is accompanied by a copy of all internal controls and policies, including any regulatory compliance program adopted by the institutional investor

An institutional investor must sign the Form PTC-430 and swear a certification under oath and the penalty of perjury that it acquired the voting securities and intends to hold them for investment purposes only. A signatory must also provide a statement explaining the basis of their authority to sign the certification and to bind the institutional investor to its terms. In addition, this certification provides that the institutional investor agrees to be bound by and comply with the Nevada Gaming Control Act and the regulations adopted there under, to be subject to the jurisdiction of the courts of Nevada and to consent to Nevada as the choice of forum in the event any dispute, question or controversy arises regarding the application or any waiver granted under this section.

Lastly, if the institutional investor acquired the voting shares as a result of a debt restructuring, it must provide a detailed explanation of how the voting securities were acquired during the debt restructuring and if they are presently held directly or indirectly by the institutional investor.

What Type of Investigation is Conducted?

Although the applications and supporting documents are initially filed with the Board's Investigations Division Applicant Services, the Corporate Securities Division (the Division) is responsible for the investigation process. The Division will assign either one or two agents to investigate an application depending on the size of an applicant institutional investor and the Division's workload. The investigation process is narrower in scope and shorter in duration than other non-restricted licensing investigations and consequently, not as costly. This is not to suggest that the investigation is less invasive or thorough. Indeed, the Division will recommend that the institutional investor be required to apply for a full finding of suitability or licensure if there is any reason to believe its ownership "would be inconsistent with the declared policy of the state."¹³ This, in applicable part, is to broaden the opportunity for investment in gaming through the pooling of capital in corporate form, to maintain effective control over corporate licensees, to restrain any speculative promotion of the stock or other securities of gaming enterprises, to protect the rights of creditors of licensees and to ensure that gaming is free from criminal and corruptive elements.¹⁴

In most situations, the investigation will examine the following:

- The internal controls that the institutional investor has in place for compliance purposes, including ensuring that the applicable maximum threshold is not exceeded at any time
- The history of the institutional investor with its regulators
- The background of the company and its management structure—who and how decisions can and will be made by the institutional investor concerning the voting rights it holds in the Nevada gaming company
- A cursory background investigation of its owner(s)

The most important review to be carried out by the Division agents relates to the role an institutional investor intends to take with regard to the Nevada gaming company. The Division's investigator(s) must be confident that an institutional investor will maintain only a passive role and will not attempt to assert influence or control over the management and affairs of a Nevada gaming company.

¹³ Nev. Rev. Stat. § 463.643(1).

¹⁴ Nev. Rev. Stat. §§ 463.489(1), 0129(1)(b).

If there is any doubt in this regard, the waiver will not be granted and the institutional investor will be required to apply for a full finding of suitability or licensure as a shareholder.

What Happens After the Investigation?

After the conclusion of its investigation, the Division will hold a closing conference with the applicant to share the results of its investigation and will address any areas of concern or areas of interest that were found during the investigation. The Division will also prepare a confidential report of the investigation results for review and consideration by the Board. The institutional investor will not have access to or the ability to review this investigative report. The Board will then give notice by letter to the institutional investor of the time and place when its application for a waiver will come before the Board for consideration at a public hearing. A representative of the institutional investor applicant will likely be required to attend this public meeting and to testify as to matters of interest to the Board. Simply because an institutional investor is required to appear, does not necessarily mean that the application has problems. In many cases, the regulators simply want to meet the principals of the applicant and to obtain additional information that may be relevant to their consideration of the application. In any case, the representatives of the institutional investor should be prepared to answer any questions that may be posed by the members of the Board. The institutional investor must be aware that failure by the required representatives to appear and to testify, unless excused, constitutes grounds for denial of the application.

At the hearing, the Board will consider whether the waiver is consistent with Nevada's public policy goals for the gaming industry. This includes, along with other factors identified in NGC Regulation 16.060, (i) ensuring that gaming is free from criminal and corruptive elements, (ii) increasing the availability of investment capital by allowing for the pooling of funds in corporate form, (iii) maintaining effective control over corporate licensees, (iv) protecting against the speculative promotion of stock or other securities involving gaming enterprises, (v) protecting creditors' rights, (vi) assuring the financial stability of corporate licensees and affiliated companies, and (vii) preserving the benefit of conducting business in corporate form. These factors may include, to the extent applicable under the particular facts and circumstances:

- The business history of the institutional investor, including record of financial stability, integrity and operations success
- The current business activities and interests of the institutional investor as well as those of its executive officers, promoters, lenders, and other sources of financing, or any other individuals associated therewith
- The current financial structure of the institutional investor and changes that could reasonably be anticipated to occur to such financial structure as a consequence of the proposed purchase or acquisition by the institutional investor

- The gaming-related goals and objectives of the institutional investor, including a description of its plans and strategy for achieving such goals and objectives
- The relationship between such goals and objectives and the requested approval
- The adequacy of the proposed financing or other action to achieve the announced goals and objectives
- The present and proposed compensation arrangements between the institutional investor and its directors, executive officers, principal employees, security holders, lenders or other sources of financing
- The equity investment, commitment or contribution of present or prospective directors, officers, principal employees, investors, lenders or other sources of financing
- The dealings and arrangements, prospective or otherwise, between the institutional investor and any investment bankers, promoters, finders or lenders and other sources of financing
- The effect of the proposed action on existing and prospective security holders of the institutional investor, both before and after the intended action
- Whether the institutional investor has made full and complete disclosure of all material facts relative to the proposed action to the Board and the Commission and made provisions for such disclosure to all prospective security holders
- Whether the proposed action lends itself to perpetrating fraud upon the public
- Whether a proposed public offering contains speculative securities
- Whether a proposed transaction will create a significant risk that the PTC and its affiliated companies will not (a) satisfy their financial obligations as they become due or (b) satisfy all financial and regulatory requirements imposed by chapter 463 of NRS and the regulations adopted by the Commission
- Any views concerning the institutional investor applicant expressed to the Board and the Commission by the gaming company or any licensed affiliate thereof

The Board may inquire as to any other matter it feels is pertinent to the institutional investor's eligibility to hold a waiver.

After the completion of its hearing, the Board will issue the Commission an order recommending the approval or denial of the waiver application. The Commission has the final authority to deny or approve the waiver application and its public hearings are generally shorter in duration than the Board hearings. The Commission members will receive a full transcript of the Board hearing accompanied by written reasons upon which the order was based. The Commission members may ask questions to seek clarification on any point. The Commission hearing, which typically occurs two weeks after the Board hearing, is similar to the Board hearing. The Commission, for any cause deemed reasonable may, by a majority vote, sustain, modify or reverse the decision of the Board or may remand the matter to the Board for further investigation and reconsideration as the Commission may order. All such orders and reasons are public.

If the Commission denies the waiver, the Commission will prepare and file a written decision setting forth the reasons for its action. On the other hand, no written decision is necessary if a waiver application is approved.

How Much Does the Process Cost?

The Division requires a deposit to be paid in advance by the institutional investor as a condition precedent to its beginning or continuing an investigation. Typically, the deposit is \$15,000 to \$25,000, but will ultimately depend on the complexity of the investigation and travel involved. After all supplementary investigative fees and costs have been paid by the institutional investor, any balance remaining in the investigative account, together with an itemized accounting of the investigative fees and costs incurred by the Division on the institutional investor/applicant's behalf, shall be refunded by the Division.

How Long Does the Process Take?

Because each waiver application is unique, no specific time frame for the application approval process is provided within the Nevada Gaming Control Act or NGC Regulations. Upon receipt of a complete application, the Board shall stamp the date and place of its filing.

Typically, the whole process of investigation of the application will take approximately four to six months, but this time period can be influenced by many factors, including:

- Whether the institutional investor has ever obtained a similar waiver
- The completeness of the application
- The diligence of the institutional investor in providing additional information requested
- The present workload of the Division
- The number and nature of issues revealed during the application investigation
- The complexity of the institutional investor

What Are the Typical Reasons an Application Might Be Denied?

To date, no institutional investor has been denied a waiver. Nevertheless, denial of a waiver could occur any time doubt is cast on an institutional investor's ability or willingness to maintain a strictly passive role as a shareholder of a Nevada gaming corporation and refrain from asserting any influence or control. A waiver application could also be denied any time evidence exists of any egregious regulatory or compliance violation(s), including:

- Poor, absent or incorrect record keeping
- A pattern of regulatory violations, whether intentional or not
- Lack of diligence and accuracy in completing the application
- Failure to respond in a timely manner to an agent's request during the course of the investigation

Lewis Roca has one of the largest dedicated gaming law practices in the world. The attorneys in our practice group have extensive experience in gaming law that spans several decades and includes experience in casino gaming (commercial and tribal), Internet gaming, sports betting, pari-mutuel racing, sweepstakes, lottery, bingo and compliance.

Our gaming practice group is nationally recognized across the industry and has been at the forefront of all major gaming developments for the past 25 years. We represent casino operators, gaming manufacturers and distributors, management companies, tribes, entrepreneurs, investors and governments in a variety of matters, including licensing, compliance, transactions, restructuring and regulatory adoption.

As legalized gaming continues to proliferate across the United States and throughout the world, the laws governing the gaming industry continue to evolve. Lewis Roca's gaming practice group closely monitors activity in this unique industry to provide our clients with sound and timely advice.