

WHAT LENDERS
TO GAMING
COMPANIES
**SHOULD KNOW
ABOUT NEVADA
GAMING LAW**



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This guide focuses on legal and practical issues facing lenders to gaming companies licensed by the state of Nevada. Nevertheless, while there are some jurisdictional differences, many of these issues are substantially similar to those encountered by lenders to gaming companies licensed by other commercial gaming jurisdictions throughout the United States.

Overview

Nevada, perhaps more than any other state, understands the importance of readily available credit to its licensed casinos and gaming manufacturers. The Nevada Gaming Control Act, which forms the basis for all gaming regulation, specifically provides that the state's public policy is "that the rights of the creditors of licensees are protected." Nevada's gaming regulatory scheme is quite friendly to creditors. Nevertheless, this accommodation must yield to the broader policies under which gaming is strictly controlled in order to assure that it is honestly conducted and free from criminal and corruptive elements. Some keys to strict regulation are licensing and related approvals of those involved in the gaming industry as well as the reporting, review, and approval of significant transactions. Accordingly, lenders to gaming companies must understand the unique requirements resulting from strict regulation.

This booklet is divided into two parts. The first part describes the regulatory requirements that apply before a loan can be made to a Nevada gaming company. These relatively minor regulations involve an understanding that a lender to a Nevada gaming company subjects itself to the jurisdiction of the Nevada gaming regulators, including the possibility of having to undergo a suitability review, having to report loans made to Nevada gaming companies and, in certain circumstances, having to obtain approval prior to the issuance or pledge of securities.

The second part of the booklet describes the regulatory aspects of loans that go bad. As with most commercial loans, lenders to gaming companies expect that the debtors will repay the borrowed monies according to terms of the credit facilities. In most every case, this is the course of events.

When borrowed funds are not repaid as agreed, lenders need to be aware of and comply with the gaming laws that apply to the debtor and its assets. Some lenders may have had prior experience with gaming regulation because other types of securities require prior gaming regulatory approval to be effective (e.g., pledges of stock of privately owned companies). These approvals are typically obtained before a transaction closes and the creditor-debtor relationship begins.

For other lenders, the first experience they may have with gaming regulation will involve regulatory compliance relevant to managing defaulting loans. Here, gaming regulation often creates a unique situation that affects a lender's ability to foreclose on the collateral. In most industries, a lender's rights include assumption of the business operations of the defaulting debtor. In the gaming industry, a lender generally cannot assume control of a gaming business without prior gaming regulatory approval. Moreover, certain gaming assets, like slot machines, often cannot be transferred without prior gaming regulatory approval.

Sophisticated debtors may attempt to use the gaming regulatory structure to their advantage against less sophisticated lenders. For example, a debtor can use a lender's inability to take over gaming operations without the appropriate licenses as leverage to renegotiate the terms of a loan transaction after a debtor default. Lenders may be disadvantaged because the only quick way to gain control of a gaming debtor's business would be to cease gaming operations, which would adversely affect the value of the collateral.

Lender's rights of foreclosure are rarely exercised outside of a bankruptcy action. Historical precedent in the gaming industry demonstrates that defaults on loan obligations by gaming companies end up in bankruptcy court. Of course, exceptions exist. Recently, the senior lender to Progressive Games, a publicly traded gaming device manufacturer, had a priority secured position in that company's assets. The senior lender noticed the assets for public sale but was able to consummate a private sale of most assets to a junior lender.

Foreclosures

In general, Nevada allows a secured party to foreclose on real property, gaming devices, proceeds from the operation of casino games, and personal property gaming collateral, including stocks, bonds, and other securities issued by a gaming or holding company. Except for stock of a gaming company and gaming devices, no foreclosure involves any regulatory approvals. For example, a secured party may foreclose on real property without prior approval, subject to general foreclosure law procedures.

A creditor must obtain prior approval of the Nevada Gaming Commission ("Commission") before enforcing a security interest in the stock of a Nevada gaming company. In many cases, the purchaser of that stock must also obtain a Nevada gaming license.

Bankruptcy Restructures

More often than not, the relationship between lenders and defaulting debtors in the gaming industry results in a bankruptcy restructure that allows the business to remain open, employees to remain employed, and the debtor and its creditors to explore ways to maximize the value of the bankrupt company and the return to creditors. In some instances, the parties may agree to reorganize the company outside of bankruptcy but must file a bankruptcy petition to achieve the agreement because of other creditors.

There are several different ways in which a gaming bankruptcy may occur. In some cases, the debtor may voluntarily file without having reached an agreement with any of its lenders. In others, a group of creditors may cause an involuntary filing. Either way, the bankruptcy becomes a venue for determining how the debtor will be restructured and what happens to its assets.

Within the confines of a bankruptcy action, rights of foreclosure may ultimately come into play and be exercised under the umbrella of the bankruptcy court. The gaming regulatory agencies and the bankruptcy courts work in tandem to administrate gaming bankruptcies. They aim to achieve the best interests of the bankruptcy estate in a manner consistent with gaming laws and regulations.

Restructuring Options

In seeking the most effective restructuring transaction to protect asset value, there are three types of bankruptcies used for gaming companies, who then are categorized as debtors:

Chapter 11 reorganization with a debtor that generates enough cash flow to continue operations and/or has significant debtor-in-possession financing to justify the bankruptcy court allowing the debtor to continue to operate during the bankruptcy and to offer a plan of reorganization to its creditors and the court. Examples of this type of bankruptcy are: Station Casinos, Stratosphere Casino and Hotel, Fitzgerald's Gaming Corporation, and the Aladdin Casino and Hotel. In each instance, the gaming companies were able to stay open and continue operations while a reorganization plan worked its way through the bankruptcy court. A recent variant of this type of reorganization was Herbst Gaming, where the company was allowed to operate while in Chapter 11, but the senior lenders to Herbst Gaming acquired 100 percent of the equity of the company and took control, subject to receipt of the necessary gaming licensing approvals.

Chapter 11 reorganization with a debtor that either does not generate enough cash flow to continue operations or does not have adequate debtor-in-possession financing to finance the bankruptcy long enough to go through a plan of reorganization. In this instance, the bankruptcy court may order a Section 363 sale of the debtor's assets (also called a "hammer sale"), which results in the property being marketed for sale. In this instance, a stalking horse bidder will be solicited and an auction will subsequently take place. The equity owners of the debtor are able to participate in the auction and bid for the assets. Examples of this type of bankruptcy are: The Resort at Summerlin, the Fortune Valley Hotel & Casino, and Stateline Casino. In each instance, the gaming companies were able to stay open with the agreement that a sale process would be immediately initiated. A recent variant of this type of bankruptcy was the Siena Hotel Spa Casino, which was forced to close while in Chapter 11 bankruptcy, but the judge quickly commenced a hammer sale and sold the assets to the highest bidder.

Chapter 7 liquidation with a debtor that does not generate positive cash flow and who does not have the ability to obtain sufficient debtor-in-possession financing to continue operations. In this type of situation, the bankruptcy court and the gaming regulators work together to appoint a trustee to take over operations and institute efforts to liquidate or sell the assets. Examples of this type of bankruptcy are: The Maxim Hotel and Casino and Fitzgerald's Reno (when it was the sole remaining asset of Fitzgerald's Gaming Corporation that couldn't be sold when the buyer declined to purchase that property along with the other three).

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Regardless of the type of gaming bankruptcy, once a bankruptcy is filed, the fiduciary duty over gaming operations shifts from the equity owners of the company to the bankruptcy estate itself (and more specifically to all of the creditors). The goal being that the gaming company's operations continue so as to maximize revenues and make it more likely that all creditor constituency groups can achieve the maximum recovery. Often, the prior owner's equity is wiped out as it is last in priority (i.e., all creditors would need to be paid in full to allow any payment to the equity holders). Specific to a Chapter 11 bankruptcy case, the debtor will propose a plan of reorganization based on its negotiations with creditors. Several restructuring alternatives are available to gaming companies seeking protection under Chapter 11 of the Bankruptcy Code. Among the alternatives are (I) refinancing outstanding debt, (II) converting debt to equity, or (III) selling assets pursuant to Section 363 of the Bankruptcy Code or a plan of reorganization. Most plans of reorganization will include a combination of these restructuring alternatives as detailed more fully below.

Refinancing in a Chapter 11 Bankruptcy Case

In many cases the easiest restructuring alternative available to a gaming debtor is to refinance its existing debt. As with the initial debt transaction itself, when a gaming debtor proposes to refinance existing debt, gaming regulators retain the discretion to require both new and existing lenders to undergo suitability investigations. This regulatory discretion, however, is rarely exercised so long as the lenders are bona fide banking institutions. In addition, the refinancing of debt may require prior regulatory approval. The debtor's ability to approve the plan of reorganization will likely be dependent on the lender and/or the transaction being approved by the gaming authorities.

Debt for Equity in a Chapter 11 Bankruptcy Case

An equity swap is another restructuring option available to a gaming debtor. To effectuate the equity swap, a significant amount of the debtor's creditors must accept the debtor's plan of reorganization (at least two-thirds in amount and a majority in number of those creditors voting in the class whose claims will be subject to conversion into equity of the reorganized). An equity swap will likely create gaming licensing issues for the lenders, the result of which will vary depending upon the nature of the entity in bankruptcy (public or private) and the jurisdictions in which that company does business. Likewise, a creditor may want to convert some of their debt into equity, either through a plan of reorganization or as part of a bid in a Section 363 sale, pursuant to the U.S. Bankruptcy Code.

These issues arise because equity holders that reach a certain percentage of the equity interest in a gaming company, holding company, or parent company may face mandatory licensing. In addition to the Herbst Gaming matter referenced above, this type of debt into equity swap occurred in the Elsinore bankruptcy in the 1990s, relating to the Four Queens property in downtown Las Vegas.

Asset Sales in a Chapter 11 Bankruptcy Case

A third restructuring option is for the debtor to sell its assets to a third party. Any sale of assets by the gaming debtor is subject to both bankruptcy court and gaming regulatory approval. An asset sale may be very beneficial to a creditor who is unwilling or unable to undergo the licensing or suitability scrutiny required in an equity swap. In the sale process, only the buyer and certain related entities and individuals will undergo such scrutiny. However, potential downsides exist for creditors in an asset sale, including that it is not guaranteed to yield the best recovery for creditors. Additionally, no assurances exist that the buyer will be able to obtain the required licenses in a timely manner.

Exemptions to Mandatory Licensing

Any reorganization or sale would need to go through the applicable gaming regulatory agencies for a regulatory review and possible licensing after the bankruptcy court rules. The gaming license investigations that may be necessary can range from a full-blown new gaming investigation of a company that has never been licensed before in a jurisdiction (which would take the most time) to an updated investigation of a company that is already licensed in a jurisdiction. Of course, the more jurisdictions in which a gaming company does business, the more gaming regulatory agencies that come into play.

In some circumstances, creditors may be able to afford themselves of certain licensing exemptions (i.e., public company status of the bankrupt entity, institutional investor status for members of the lending group, or non-voting stock). If the creditor wants to assume an operational role with members of its constituency group serving as officers, directors, or key employees, then at a minimum these individuals would need to be identified and go through the licensing process. Many large institutions and other creditors may not want their organizations or management to be subject to intense regulatory review. Until a creditor is found to be suitable by the gaming authorities, it cannot receive as distribution an equity interest in the reorganized debtor under the plan of reorganization.

Depending upon the circumstances of the bankrupt property, applying for and obtaining emergency approval to be involved in operations may be available to a buyer that has filed a gaming application. This happened in the Resort at Summerlin bankruptcy when, at the time of the auction disposition, the debtor did not have a high level executive with gaming experience. Since the buyer's gaming operator had previously obtained a Nevada gaming license and had significant gaming operational experience, the buyer received an approval for emergency participation.

For a comprehensive review of what a gaming licensing investigation entails and who must be licensed, please see our Gaming Practice Group's Guide on Obtaining a Non-Restricted Gaming License in Nevada.¹

Regulatory Overview

Before discussing the regulatory requirements applicable to creditors, the reader needs to understand who regulates the Nevada gaming industry. Nevada has a two-tiered regulatory system.

State Gaming Control Board

The State Gaming Control Board ("Board") administers the Gaming Control Act and its corresponding regulations adopted by the Nevada Gaming Commission.

- Key Points, State Gaming Control Board.
- Three members appointed by the Governor.
- Has seven divisions including Investigations and Corporate Securities.
- Investigations Division investigates all gaming license and key employee applicants.

Corporate Securities Division investigates and processes applications filed by publicly traded corporations.

The Board investigates the qualifications of each applicant before the Commission issues a license or grants any of the other required approvals. After completing an investigation, the Board recommends the Commission deny, limit, condition, restrict, or approve any license, registration, finding of suitability, or other approval.

¹ <http://www.lewisroca.com>

Nevada Gaming Commission

The second agency is the Nevada Gaming Commission. It is a part-time administrative body that has the final authority in deciding an applicant's suitability and issuing a gaming license. As the state's final authority, the Commission may accept, deny, or modify the recommendation of the Board on a license application. Other gaming regulatory agencies in the United States generally do not have a two-tiered system, and instead have a staff that makes a recommendation to the Commission during a single meeting. Another consideration is that otherstate gaming regulatory agencies may have different requirements than Nevada. This should be understood in multi-jurisdictional gaming bankruptcy.

Lender Considerations Before Making a Loan

Licensing of Lenders

Normally, creditors (including lenders) do not have to be licensed. Nevada law recognizes that a creditor may use its position to exert influence over the conduct of a gaming company. The loans, while being critical for a gaming company's survival, can result in the foreclosure of a gaming company. Although such circumstances are rare, it nevertheless puts substantial control over a gaming operation into the hands of unlicensed creditors. Therefore, the Commission can require licensure if it feels that a creditor has the power to exercise significant authority over a gaming company² or if it would serve the public interest.³ In such cases, the Commission will notify the gaming company. The creditor will then have 30 days to apply for a license.⁴ The gaming company must assure that the creditor files the proper application in a timely manner.⁵ The Board often requires a finding of suitability when the lender is not an established commercial lender. There are four major types of commercial lenders:

- Banks or savings and loans regulated by the U.S.
- Comptroller of the Currency or similar governmental agency.
- National insurance companies.
- Federally regulated pension or retirement funds.
- Foreign regulated banking institutions that permit gaming officials access to information. In this case, the lenders must prove funds come from general deposits and not specific depositors.

² Nev. Rev. Stat. § 463.165.

³ Nev. Rev. Stat. § 463.530.

⁴ Nev. Rev. Stat. § 463.165(2).

Reporting of Loans

A gaming company cannot borrow money for a gaming operation without complying with regulations.⁶ A gaming company must report certain loans, credit extensions, guarantees, and other security provisions made to or accepted on the gaming company's behalf within 30 days after the end of the quarter in which the transaction is consummated.⁷ The regulation governing this reporting divides the transactions into two categories, each with different dollar thresholds that trigger reporting depending on the gross revenue of the reporting gaming company.

These reporting requirements provide the Board with information on the involvement of

⁵ See e.g., NGC Reg. 15.530-533.

⁶ Nev. Rev. Stat. § 463.300.

⁷ NGC Reg. 8.130. Certain other transactions do not have to be reported. These include:

- Draws against a previously reported extension of credit.
- Goods or services that are exchanged for other goods or services of an affiliate of the licensee.
- Short-term cash loans.
- Loans and other financing activities that were reviewed during an investigation that resulted in Board or Commission action.
- Financing for gaming devices installed and used during a trial period.
- Funds received in satisfaction of accounts or notes receivable.
- Purchases or leases of gaming devices where the seller or lessor and the financier is a licensed manufacturer or distributor.
- Cash, property, credit, services, guaranty, benefit or any form of security loaned to the licensee by a licensed affiliate other than a stockholder, partner or proprietor of the licensed operation, licensed subsidiary or registered parent of the licensee.
- Assessments for property taxes or other taxes
- Payments of gaming winnings over time to patrons.
- Deposits or payments for conventions or similar events.
- Leases, including leaseback transactions and capital leases, where the lease term, including any extensions or renewals, does not exceed 90 days.
- Financing activity that has been approved by the Board Chairman.

creditors, lenders, guarantors, and holders of indebtedness in the gaming industry, such as names and addresses of all parties to the transaction, the amount and source of the funds, property or credit received or applied, the nature and amount of security provided by or on behalf of the licensee, and the purpose of the transaction. If a party to any transaction reportable pursuant to this regulation is a person other than the reporting licensee or a financial institution or related subsidiary, or a publicly traded company, a supplemental filing must accompany the report. This filing must include that party's federal tax identification number or social security number and date of birth, banking references, source of funds, and any additional information the Board might require.

Approval of Stock Transfers, Pledges, Options, and Other Restrictions

A privately-held corporate licensee and its licensed shareholders must obtain prior approval for a variety of other actions. The most common approvals sought are for:

- The issuance or transfer of stock in a licensed company or registered holding or intermediary company for any reason, including back to the corporation itself for cancellation or pursuant to a stock split or stock dividend.
- The pledge of stock to secure financing.
- The granting of an option to purchase such stock.⁸

A second type of stock pledge, called a negative pledge, also requires prior approval.⁹ A negative pledge is an agreement by the owner of stock not to sell, transfer, or pledge the stock, as well as an agreement not to encumber such stock. A person lending funds to the owner of stock may require a negative pledge to assure the debtor has assets from which to pay back the loan.

Issuance of Debt Securities

Before a gaming company that is approved as a corporate licensee can issue any debt security, it must secure prior approval from the Commission.¹⁰ A security includes bonds, debentures, and other interests or instruments.¹¹ A debenture is a bond issued by the debtor as evidence of the debt owed. Debentures entitle the holder to certain rights, including the payment of interest.

⁸ Nev. Rev. Stat. §§ 463.510(1) and 463.540(1).

⁹ NGC Regs. 15.510.1-4 and 15.585.7-3.

¹⁰ Nev. Rev. Stat. § 463.510; NGC Reg. 15.540.1-2; the licensee also must report the issuance of debentures as a loan under NGC Reg. 8.130.

¹¹ NGC Reg. 15.482-8.

A registered publicly traded corporation may make a public offering of debt securities with specific approval of the Commission or under the general approval of a shelf offering. Persons holding a debt security, like any other beneficial owners or holders of indebtedness, may be subject to a finding of suitability.

Some debentures or bonds are convertible into stock. In other words, a convertible debenture holder can change his status from a debt holder to an equity investor. Before conversion, the convertible debenture holders would be subject to discretionary licensing. Since the holders become equity investors upon conversion, they are subject to the same rules as other shareholders. This includes mandatory licensing if they acquire more than 10 percent of any class of voting stock or acquire control of the publicly traded corporation. It should be noted that for multi-jurisdictional gaming companies, the threshold for mandatory licensing is 5 percent in some jurisdictions outside of Nevada.

A privately held corporation, whether a licensee or a holding or intermediary company, may not issue or transfer any security, debt, or equity (including options to purchase such securities) without complying with gaming laws. A privately held holding or intermediary company must receive prior approval to issue or transfer any security.¹² However, any debt security that is also an evidence of indebtedness reported to the Board under NGC Reg. 8.130 is not a “security” and, accordingly, no prior approval is necessary.¹³

A corporate licensee must file a report of the proposed transfer or issuance with the Board and Commission. The Commission then has 90 days to approve or deny the request. If the Commission denies the request, the gaming company may not issue or transfer the security.¹⁴ The issuance or transfer may require separate approval under Commission Regulation 8 governing the transfer of interest among licensees¹⁵ and to an unrelated third party.¹⁶

These requirements have been interpreted by the Board and Commission as also applying to stock dividends, stock splits, and stock cancellations of corporate licensees and privately held holding and intermediary companies.

A corporate officer must sign the application for approval of the issuance or transfer of securities. An application must contain much of the same information that a company registering

¹² NGC Reg. 15.585.7-1.

¹³ NGC Reg. 15.482-8.

¹⁴ Nev. Rev. Stat. § 463.540.

¹⁵ NGC Regs. 8.010(4), 8.020, and 15.540.1-2.

¹⁶ NGC Regs. 8.010(4), 8.020, and 15.540.1-2.

with the Board must provide, together with all information about the current transaction.¹⁷

Regulatory Issues When Loans Go Bad

Foreclosures

As noted earlier, Nevada generally allows a secured party to foreclose on any of the assets of a gaming company, except for the stock of a gaming licensee and gaming devices, without any regulatory approvals.¹⁸

Stock - Public Companies

No approval is needed to enforce a security interest in the stock of a publicly traded corporation unless the secured party would acquire control of the company or more than 10 percent of any class of voting security.¹⁹

Stock - Private Gaming Companies (Including Those Owned by Public Companies)

Stock of a gaming company is considered personal property gaming collateral.²⁰ With regard to personal property gaming collateral, a secured party must obtain prior Commission approval before enforcing a security interest.²¹

A secured party shall apply for approval to enforce a security interest in such collateral using such form as the Chairman may prescribe.²² The application must include: a complete schedule and description of the gaming collateral, copies of the security agreement and documents evidencing the obligation secured, a statement by the applicant describing the act of default, and a copy of the notice of default.²³

The Board will then conduct an investigation by reviewing pertinent documents and analyzing the impact on the gaming company by approving the enforcement of the security interest, including whether the enforcement will disturb or curtail operations. The Board will also review whether the security interest, when granted, complies with the Nevada law and gaming

¹⁷ NGC Reg. 15.540.1-2.

¹⁸ NGC Reg. 8A.020(2).

¹⁹ NGC Reg. 8A.010(4)(c).

²⁰ NGC Reg. 8A.040(1). (“Personal property gaming collateral including stocks, bonds and other securities issued by a gaming license or holding company”).

²¹ NGC Reg. 8A.040(1).

²² NGC Reg. 8A.030(1).

²³ NGC Reg. 8A.030.

regulations, and investigate any other matter the Board considers relevant.²⁴

The Commission shall not approve the enforcement of such security interest in personal property if such enforcement will result in any person becoming subject to mandatory licensing, registration, or finding of suitability, unless all persons have been licensed, registered, or found suitable by the Commission, as applicable.²⁵

In cases where the pledged security is less than the majority control of a gaming company, the regulations allow for waiver of the licensing requirements but prevent the secured party from exercising any voting rights or control over the gaming company. The Commission may grant a temporary or permanent waiver of the requirement of prior licensing, registration, or finding of suitability, or may grant delayed licensing, registration, or finding of suitability, upon written request by the secured party and recommendation of the Board, if the Commission makes a written finding that such waiver or delay is consistent with state policy set forth in the Act.²⁶ The Chairman may permit the licensee or holding company to register or record the securities in its books or records in the name of the secured party, but only if the secured party has filed an application for approval to enforce a security interest.²⁷ The secured party, however, may not exercise any voting rights or other control over the licensee or holding company, and all dividends payable or other beneficial interest in the securities must be held in escrow pending final action on the application to enforce.²⁸

Notwithstanding these provisions, approval is not required under this regulation to enforce a security interest in a security issued by a holding company, or by a corporation, general partnership, or limited partnership licensee, if the gaming operation has ceased and the operating license has been surrendered to the Board prior to the enforcement of such security interest.²⁹

In the absence of obtaining approval, the secured party has several options:

- The secured party may obtain a license and assume direct control of the gaming company. This is typically not an option because of the time, cost, and complexity of licensing financial institutions.

²⁴ NGC Reg. 8A.030(2).

²⁵ NGC Reg. 8A.040(1).

²⁶ NGC Reg. 8A.040(1).

²⁷ NGC Reg. 8A.040(3).

²⁸ NGC Reg. 8A.040(3).

²⁹ NGC Reg. 8A.020(3).

- If the secured party is not licensed, registered, or found suitable by the Commission as applicable, the Commission may, upon its own initiative or that of the secured party, petition the district court for the appointment of a Supervisor to operate the gaming company after the license is surrendered to ensure the continuation of the gaming operation.³⁰
- The secured party may bring in a new licensed operator pursuant to an operating agreement or lease agreement.
- The secured party may leave the existing licensee in place until a new buyer or lessee is found.

Gaming Equipment

Security interests in gaming devices and proceeds from the operation of casino games may also be foreclosed without prior approval.³¹ There are, nonetheless, limitations with regard to the disposition of those gaming devices as “it is unlawful for any person, either as owner, lessee or employee, whether for hire or not, to operate, carry on, conduct or maintain any form of manufacture, selling or distribution of any gaming device without first procuring and maintaining all required federal, state, county, and municipal licenses.”³²

However, “[i]n cases of ... foreclosure of a lien by a bank or other person holding a security interest for which gaming devices are security in whole or in part for the lien, the Board may authorize the disposition of the gaming devices without requiring a distributor’s license.”³³ Therefore, a secured party must go through the administrative process by applying to the Board for administrative approval to dispose of the gaming devices and, upon approval, will then need to sell to someone who holds a manufacturer/distributor license.

Appointment of a Supervisor

Nevada law provides that if the closure of a gaming company occurs due to a surrender, lapse, revocation, or suspension of its license, “placing the management and control of a gaming company under a competent supervisory official may ensure the proper regulation of the gaming company while maintaining its value for its creditors and investors, protecting the interests of other persons, avoiding any disruption of the economy of the community in which it is located,

³⁰ See NGC Reg. 8A.040(2) and Nev. Rev. Stat. § 4638.080.

³¹ See act of June 18, 1991, ch. 390, 1991 Nev. Rev. Stat. § 1011.

³² Nev. Rev. Stat. § 463.650(1).

³³ Nev. Rev. Stat. § 463.650(3).

and promoting the general welfare of the state.”³⁴

The power to initiate the placement of a competent supervisory official (the “Supervisor”) is vested in the Commission. This statutory authority is rarely used.

In 1982, Boyd Gaming Corporation was appointed as a Supervisor at the Stardust after gaming regulators raided the casino amongst allegations of skimming by organized crime. Supervisors also were placed in casinos after disciplinary action against the owners at the Silver Spur in Henderson, Nevada in 1988.

Two appointments of Supervisors resulted from the financial distress of properties. They were the Station House Casino in Tonopah and Fitzgerald’s Reno. In each instance, the circumstances giving rise to the appointment of Supervisors were different. In the case of the Station House, the gaming licensee defaulted under a loan secured by the real estate. The lender foreclosed on the real estate and the property was set to close except for the appointment of a receiver. In the case involving Fitzgerald’s Reno, the bond holders of the corporation foreclosed on the stock of the corporation but could not operate the casino because they did not have a license. The bankruptcy court appointed the Supervisor to operate the casino for the benefit of the unlicensed corporation until such time as the property could be sold.

When the Harrah’s Entertainment–Caesars Entertainment merger was being considered, the Federal Trade Commission (“FTC”) determined that the combined company would have too many casinos in Northern Nevada, so it was agreed that Caesars Tahoe would be sold. Caesars Tahoe was to be sold to a gaming company that also had a significant Northern Nevada presence, so it also needed FTC approval.

When it looked like Caesars Tahoe might not receive clearance from the FTC in time to be sold, the Board and the Commission entertained the concept of appointing a Supervisor for that property in order to allow the Harrah’s–Caesars transaction to close. This even got to a point of being placed on an agenda, but the FTC ruled in time for this action to have not been necessary after all.

Circumstances That Allow Appointment

A Supervisor may be appointed if the license of any person who is essential to the operation of the gaming establishment:

³⁴ Nev. Rev. Stat. § 463B.050.

- Is revoked or suspended by the Commission.
- Lapses.
- Is surrendered because the gaming establishment or the ownership thereof has been transferred to a secured party who does not possess the licenses necessary to operate the gaming establishment.

Initiating the Appointment Process

The Commission, at their own discretion, may petition the district court for the county in which the gaming establishment is located (the “Court”) for the appointment of a Supervisor to manage the gaming establishment. This is an ex parte procedure. This is the only method for appointment of a Supervisor.

The Petition is actually the second step of the process and results from prior administrative proceedings. As a practical matter, the party seeking the appointment of the Supervisor is typically either the lender/bondholder (that wants to protect the value of the ongoing business) or the Board (that wants to prevent the displacement of gaming employees). The process is initiated because without the appointment of a Supervisor the property will be closed and will impact lenders, creditors, and gaming employees. After seeking an audience with both the Chairman of the Board and Commission to initiate the process, the lender/bondholder would set out the reasons why the appointment of the Supervisor would meet the criteria of the gaming laws and regulations as described below. If the request has merit, the Commission will set a hearing. The Board would be tasked to review the circumstances and provide input to the Commission.

Timing of the Administrative Hearing Where the Commission Decides Whether or Not to Seek a Supervisor

The Commission shall hold a hearing within 15 days after the suspension of a license and will provide public notice of the hearing.

Standstill During Appointment Process

During the pendency of any proceeding before the Commission that may result in the appointment of a Supervisor or during the period of supervision, neither the existing gaming licensee nor any other person may:

- Sell, lease, or otherwise convey for less than full market value or hypothecate any property of a gaming company.

Remove or secrete from the Commission or the Supervisor of a gaming establishment any property, money, books, or records of the gaming establishment, including evidences of debts owed to it.

A person who violates any provision of Subsection I is guilty of a Category D felony and shall be punished as provided in Nev. Rev. Stat. § 193.130.³⁵

Hearing Procedures

The hearing is public but does not follow any formal procedures or rules of evidence. The Commission will notify the existing gaming licensee of the meeting and “afford the licensee the opportunity to be heard concerning the appointment.”³⁶

Any person who suffers or is likely to suffer direct financial injury as the result of an act or omission of a Supervisor may file an objection with the Commission as to the suitability of the Supervisor.³⁷

The criteria used by the Commission in deciding whether or not to seek a Supervisor include:

- The nature of the violation that resulted in the revocation, suspension, surrender, or lapse.
- The ability and actions taken, if any, for a removal by licensees in good standing of persons who committed the violation.
- The involvement during a proposed supervisorship in any operation of the gaming establishment of persons whose
- licenses were revoked, suspended, surrendered, or lapsed.
- The economic impact of closure of the gaming operations upon the community in which the gaming establishment is located.
- The economic impact of closure of the gaming operations upon the State of Nevada.
- The prior efforts, if any, to sell the gaming establishment.
- The involvement, if any, of undisclosed interests in the gaming establishment.
- The presence, if any, of a publicly traded holding company and the public trading that would occur during a supervisorship.

³⁵ Nev. Rev. Stat. § 463B.280.

³⁶ Nev. Rev. Stat. § 463B.075.

³⁷ They may also petition the Court that made the appointment for an accounting or for a review of the Supervisor’s qualifications or performance.

- The current status of all fees and taxes applicable to the operation.
- The adequacy of existing financing for the operation, if continued, and the suitability of the source of such financing.
- The impact upon public confidence and trust that gaming operations in Nevada are conducted honestly, competitively, and free from criminal and corruptive elements.
- The ownership of the gaming establishment premises or an interest therein by persons other than the offending, surrendering, or lapsed licensee.
- Any other matter material to a full and complete consideration of the particular circumstances presented.
- The availability of two or more persons qualified and willing to assume the position of Supervisor for the gaming establishment in question, unless in the opinion of the Commission only one person is available who is qualified to serve, in which case the Commission may name only that person.³⁸

Qualifications for a Supervisor

A candidate for Supervisor must be a person:

- Of good character, honesty, and integrity.
- Whose prior activities, criminal record, reputation, habits, and associations do not pose a threat to the public interest of the State or to the effective regulation and control of gaming or charitable lotteries; or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or charitable lotteries; or in the carrying on of the business and financial arrangements incidental thereto.
- Who has adequate business probity, competence, and experience in gaming or generally.

Court Action on a Petition

If after the administrative proceedings the Commission decides to seek appointment of a Supervisor, the State Attorney General's Office will prepare and submit an ex parte petition to the court in the county where the property is located. The petition contains the names of two or more persons who the Commission believes are suitable and qualified to manage a gaming establishment and are available for appointment as a Supervisor unless, in the opinion of the Commission, only one person is available who is qualified to serve, in which case the

Commission may name only that person.³⁹ The Commission may also petition for the appointment of more than a single individual (such as a management team, association, or company) where such an appointment would better meet the circumstances and needs of the gaming establishment.⁴⁰ If in the opinion of the Commission only one qualified person is available to serve as the Supervisor, the Commission may name only that person. As a practical matter, the petition will probably name a single person. Upon receipt of the petition, the Court shall appoint the person(s) named in the petition as the Supervisor(s) of the gaming establishment.

Compensation of Supervisor

The Court, which appointed the Supervisor, shall allow for reasonable compensation (out of the revenue of the gaming establishment) for the services, costs and expenses of the Supervisor and for any other persons whom the Supervisor may engage to aid them in their duties.

Replacing a Supervisor

The Commission may, at any time after the appointment of a Supervisor, petition the Court for the removal of the Supervisor and the appointment of a new Supervisor or for the termination of the Supervision.

If at any time the court finds that a Supervisor is not qualified or available to serve as Supervisor, it shall request from the Commission the names of two or more persons who the Commission believes are suitable and qualified to manage a gaming establishment and are available to serve as Supervisor. If the Commission believes only one person is available who is qualified to serve, the Commission may name only that person.

Termination of the Supervisor

The appointment of a Supervisor terminates if any court of this state or of the United States overrules the Commission's decision to revoke or suspend the license for operation of the gaming establishment, or if the Commission's petition for termination is granted, except that the Supervisor shall transfer to the appropriate persons their respective interests in the gaming establishment.

The Commission also may seek termination if:

³⁹ Nev. Rev. Stat. § 4638.080(4); NGC Reg. 17.040(1).

- License fees and taxes are not paid when due.
- The gaming establishment enters into voluntary or involuntary bankruptcy proceedings.
- The gaming establishment's debts exceed the value of its assets or the gaming establishment cannot meet its debts as they become due.
- A violation of the gaming laws or the regulations relating to the gaming establishment has occurred subsequent to the supervisorship.
- A former owner, his agent, employee, or representative violated any statute or regulation relating directly or indirectly to gaming or the administration of the supervisorship, other than the violation, if any, that resulted in the revocation, suspension, surrender, or lapse.
- The death, disability, or removal of the Supervisor.
- Closure of gaming operations at the gaming establishment for any reason, regardless of fault.
- Any circumstances that render continued operations under the supervisorship impractical or detrimental to the interests of the State of Nevada, or licensed gaming, or both.

No Impact on Creditor Rights

The appointment of the Supervisor does not affect the right of a creditor to commence or continue foreclosure or other proceedings to collect a secured or unsecured debt, and the appointment must not be treated as an event precipitating a default or acceleration under any note, lease, deed of trust, or other extension of credit.

Duties and Powers of the Supervisor

The Supervisor is deemed to be a licensee of the gaming establishment under any license issued to operate the gaming establishment by a county, city, or town and may perform all acts that they are required or permitted to perform without approval or other action of the county, city, or town.

Upon the appointment of a Supervisor, the right, title, and interest of all persons in the gaming establishment are extinguished and automatically vest in the Supervisor subject to any liens, claims, and encumbrances thereon.

The Supervisor shall take "immediately into his possession all property of the gaming establishment, including its money, accounts, books, records and evidences of debts owed" and "continue the business of the gaming establishment."⁴¹

Unless authorized by the court, (I) all books and record relating to the operation of the gaming establishment and all evidences of debts owed to the gaming establishment must be kept and retained in the State of Nevada and (II) all the money of the gaming establishment that is to be deposited with financial institutions must be kept in accounts in financial institutions located in the State of Nevada.

The Supervisor may:

- Hire, discipline, and dismiss employees of the gaming establishment and fix the compensation of its employees.
- Engage independent legal counsel and accountants.
- Settle or compromise with any debtor or creditor of the gaming establishment.
- Prosecute actions on behalf of or defend actions against the gaming establishment.
- Enter into any contract or borrow money on behalf of the gaming establishment and pledge, mortgage, or otherwise encumber its property as security for the repayment of any loan, except that the power to borrow money or encumber property is limited by any provision of an existing document of credit.
- Grant or renew leases of the property of the gaming establishment.
- Perform any other lawful acts on behalf of the gaming establishment that an owner is entitled to perform (this does not authorize the sale of the gaming establishment by the Supervisor).

Continuing Role of the Court

The court that appointed the Supervisor has jurisdiction over all of the powers and duties of the Supervisor in any proceeding relating to the exercise of those powers and duties. To keep the court informed of the business at the gaming establishment, the Supervisor “shall file with the court which appointed him and the Commission reports on the administration of the gaming establishment in such form and at such intervals as the court may prescribe.”⁴²

These reports may be made available for inspection by any creditor of the gaming establishment or person having a substantial interest in the gaming establishment.

⁴¹ Nev. Rev. Stat. § 463B. 150.

⁴² Nev. Rev. Stat. § 463B 210(1).

Former Gaming Licensee's Entitlement to Earnings

A Supervisor may not distribute earnings of the gaming establishment to the former licensed owners thereof, until deduction is made for:

- The costs of the supervisorship, including compensation and expenses incurred by the Supervisor and those engaged by him to aid in his duties, then due and owing.
- Amounts deemed necessary by the Supervisor for continuing the operation of the gaming establishment, including, but not limited to, bankroll, salaries, and foreseeable operating expenses.
- Amounts deemed necessary by the Supervisor to preserve the assets of the gaming establishment.
- A reserve fund determined sufficient by the Supervisor to facilitate continued operation in light of pending civil litigation, disputed claims, contractual obligations, taxes, fees, and any other contingency known to the Supervisor which may require payment by the gaming establishment.⁴³

Supervisor's Role in the Sale of the Gaming Establishment

If any person who owned an interest in the gaming establishment at the date of appointment of a Supervisor secures a buyer for the gaming establishment before the time when the Supervisor must offer the property for sale, and the persons who owned a majority of the interest in the gaming establishment on the date of the Supervisor's appointment approve the terms and conditions of the proposed sale, then the Supervisor shall petition the court that appointed him for approval of the sale. If the court grants approval, the Supervisor shall carry out the sale on the terms and conditions agreed to between the parties. In addition, the buyer must be licensed to operate a gaming establishment. If the buyer is not licensed, the buyer must obtain a license to operate the gaming establishment within six months after the time when the Supervisor offers the property for sale.

The Supervisor of the gaming establishment shall offer it for sale if requested in writing by the owners of a majority of the equity interest in the gaming establishment to initiate sale proceedings: (I) six months after refusal by the Commission to renew the license for the gaming establishment for failure of a licensee to fulfill a condition of their license; (II) if no petition for judicial review is taken from the determination of the Commission to revoke or suspend the license six months after

⁴³ NGC Reg. 17.060.

the last date on which a petition for judicial review could have been filed, or (III) if a petition for judicial review is taken six months after exhaustion of any right of appeal in Nevada courts resulting in a final determination that upholds the revocation or suspension of the license, whichever date is later.

In addition, all known creditors and other persons designated by the court who are known to have had a legal ownership interest in the gaming establishment immediately prior to the appointment of the Supervisor must be notified of the proposed sale at least 30 days before the hearing on the petition for approval of the sale. Any person so notified may file a statement of objections to the proposed sale, including all grounds for the objections, no later than 10 days before the hearing. Upon completion of a sale of the gaming establishment, the appointment of the Supervisor terminates except that they shall convey all right, title, and interest in the property of the gaming establishment to the buyer and shall pay the net proceeds of the sale to those persons who owned the property at the time he acquired it, or their successors or assignees, according to their respective interests.

Takeovers of Nevada Public Gaming Companies

A person cannot acquire control of a registered publicly traded corporation without the prior approval of the Commission.⁴⁴

The regulations apply to obtaining control of a gaming company by ownership of equity securities, ownership of rights to acquire equity securities, statutory mergers, acquisition of assets, management and consulting agreements, or otherwise. “Control” means the direct or indirect possession of the power to direct or cause the direction of the management and policies of a person.⁴⁵

Applications for an acquisition of control should be filed using Board Form PTC-1 and PTC-200 and must contain full disclosure of all material facts relating to the transaction, including certain specified information.⁴⁶

The following considerations are relevant to all Commission Regulation 16 transactions, including public offerings and acquisitions of control:

⁴⁴ NGC Reg. 16.200. There is no specific statutory authority for the Commission to have adopted this regulation. Therefore, authority rested upon the general grant to promulgate regulations consistent with the policy, objectives, and purposes of the Gaming Control Act as the Commission may deem desirable in the public interest. Nev. Rev. Stat. §§ 463.150(1) and 463.635(3).

⁴⁵ NGC Reg. 16.010(3).

⁴⁶ NGC Reg. 16.210.

- Business history of the applicant, including its record of financial stability, integrity, and the success of its operations.
- Current business activities and interests of the applicant and those of its executive officers, promoters, financial backers, or any other associates.
- Current financial structure of the applicant and changes anticipated to occur to such financial structure because of the proposed action of the applicant.
- Gaming-related goals and objectives of the applicant, including a description of the plans and strategy for achieving such goals and objectives.
- Relationship between such goals and objectives and the requested approval.
- Adequacy of the proposed financing or other contemplated action to achieve the announced goals and objectives.
- Present and proposed compensation arrangement between the applicant and its directors, officers, principal employees, security holders, lenders, or other financial backers or sources.
- Equity investment, commitment, or contribution of present or prospective directors, officers, principal employees, investors, or other financial backers or sources.
- Dealings and arrangements, prospective or not, between the applicant and any investment bankers, promoters, finders, or financial sources.
- Effect of the proposed action on existing and prospective security holders of the applicant both before and after the intended action.
- Whether the applicant has made complete disclosure of all material facts about the proposed action to the Board and the Commission and made provision for such disclosure to all prospective security holders.
- Whether the proposed action is fair, just, and equitable to investors.
- Whether the proposed public offering contains speculative securities.⁴⁷

The scope of the required information suggests that the main criteria of approval under Commission Regulation 16 are the financial and managerial impacts of the proposed takeover.

Uncertainty arises from not knowing whether the requested approvals will be granted. Some delay can be expected. The Commission has stated it will use its best efforts to take final action upon an application for an acquisition of control by a person making a tender offer within 60 days of the date a complete application is submitted and the necessary fees are paid to the Board.

A person attempting to acquire control of a registered publicly traded corporation may also be required to file simultaneously for a finding of suitability as a shareholder because he or she will be acquiring more than 10 percent of a class of its voting stock. This brings into play standards of business probity, financing, and personal character.

Hostile Takeovers

The Nevada Legislature has declared that some corporate acquisitions opposed by management, repurchases of voting securities, and corporate defense tactics affecting Nevada gaming licensees and registered publicly traded corporations affiliated with such state gaming licensees may be injurious to stable and productive gaming in Nevada.⁴⁹ The Commission has established a regulatory scheme to reduce the potentially adverse effects of such business practices upon Nevada's gaming industry and to further the state's policy with respect to these business practices.⁵⁰

Licensing

For a comprehensive discussion on what a gaming license investigation entails, please see our Gaming Practice Group's Guide on Obtaining a Non-Restricted Gaming License in Nevada. (<http://www.lewisroca.com>).

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, which includes experience in casino gaming (commercial and tribal), Internet gaming, sports betting, pari-mutuel racing, sweepstakes, lottery, bingo and compliance.

⁴⁸ NGC Reg. 16.050(2).

⁴⁹ Nev. Rev. Stat. § 463.621.

⁵⁰ Nev. Rev. Stat. §§ 463.622 and 463.623.

Our gaming practice group is nationally recognized across the industry and has been at the forefront of all major gaming developments for the past quarter century. 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 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.