

# **A Practical Guide To Nevada Gaming Law For Institutional Investors**

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Over the past several decades, Nevada gaming law has permitted public companies, institutional investors and similar, other financial entities to invest in Nevada's gaming properties without having to obtain a license or finding of suitability for each individual or investor. This long standing practice has enabled such 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 continue to be found suitable.

### **1. Publicly traded companies**

Nevada has three separate regulatory thresholds as applied to ownership of public gaming companies.

Persons may acquire up to 5% of any class of voting securities in a public company without having to fulfill any mandatory gaming regulatory requirements. At all times, any beneficial owner of the voting securities of a Nevada publicly-traded gaming corporation, regardless of the number of shares owned, may be required in the discretion of the Nevada Gaming Commission (the "Commission"), to be required to file an application and be licensed or found suitable as such. NRS 463.643(1).

Acquiring between 5% and 10% generally triggers a mandatory reporting requirement. Specifically, each person who, individually or in association with others, acquires, directly or indirectly, beneficial ownership of more than 5% of any class of voting securities in a Nevada publicly-traded gaming corporation and who must report, or voluntarily reports, the acquisition to the Securities and Exchange Commission pursuant to section 13(d)(1), 13(g) or 16(a) of the Securities Exchange Act of 1934, must file a copy of that report, and any amendments thereto, with the Commission within 10 days after filing that report with the Securities and Exchange Commission.<sup>1</sup>

Anyone acquiring beneficial ownership of more than 10% of any class of voting securities generally initiates a requirement to file an application for a full finding of suitability by the Commission. Generally, Nevada law mandates that "each person who, individually or in association with others, acquires, directly or indirectly, the beneficial ownership of more than 10 % of any class of voting securities of a publicly traded corporation registered with the Commission, or who is required to report, or voluntarily reports, such acquisition pursuant to section 13(d)(1), 13(g) or 16(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78m(d)(1), 78m(g) and 78p(a), respectively, must apply to the Commission for a finding of suitability within 30 days after the Chairman of the [Gaming Control] Board mails the written notice."<sup>2</sup>

A major exception to this mandatory finding of suitability requirement exists, however, for institutional investors. Where an institutional investor holds stock for investment purposes only, the Nevada regulations generally allow for a maximum limit of 15% that may be held without being required to obtain a license or finding of

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<sup>1</sup> Nev. Rev. Stat. § 463.643(3)

<sup>2</sup> Nev. Rev. Stat. § 463.643(4)

suitability.<sup>3</sup> In these circumstances, the institutional investor who holds over 10% but less than 15% must apply for and obtain a *waiver* from mandatory licensing.

However, if the voting securities were acquired before a “debt restructuring” and retained after a “debt restructuring,” or as the result of an exchange, exercise or conversion after a “debt restructuring” of any securities issued to the institutional investor through a “debt restructuring,” then such an institutional investor may beneficially own more than 15% and yet still be eligible to receive a waiver. A “debt restructuring” for the purposes of these Nevada regulations is defined to mean (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.

An institutional investor that has been granted a waiver may nevertheless beneficially own more than 15% but not more than 19% of any class of the voting securities of a Nevada publicly-traded gaming corporation, but only if such additional ownership percentage resulted from a stock repurchase program and the institutional investor (a) does not purchase or otherwise acquire any additional shares of stock, and (b) reduces its ownership percentage to 15% or less within one year from the date it received constructive notice of exceeding the 15% threshold. This one-year time period can be extended for a reasonable period of time by the chairman of the Nevada State Gaming Control Board (the “Board”).

Finally, such a waiver granted to an institutional investor may not be construed to be a waiver of or an exemption from the prior approval requirements of NGC Regulation 16.200, which requires the prior approval of the Board and the Commission before any person can acquire control over a Nevada publicly-traded gaming corporation. Accordingly, an institutional investor that intends to apply for a waiver must also simultaneously apply for an exemption of the prior approval requirements of NGC Regulation 16.200 if its proposed acquisition will also give it control over the Nevada publicly-traded gaming corporation.

## **2. Corporations, limited partnerships and limited-liability companies.**

All officers and directors of a corporation, other than a publicly traded corporation, which holds or applies for a state gaming license, must be licensed individually. NRS 463.530. Likewise, every general partner and limited partner of a limited partnership that holds a state gaming license must be licensed [NRS 463.569], as well as every member, transferee of a member’s interest in a limited-liability company, director and manager of a limited-liability company that holds or applies for a state gaming license. NRS 463.5735.

As with publicly traded companies, however, each of the aforementioned applicants may waive the licensing procedure as long as they come within the definition of institutional investor; own 15% or less of the companies securities; and comply with the application procedures set forth within this guide. The procedural steps for obtaining a waiver are

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<sup>3</sup> Nev. Rev. Stat. § 463.643(4)

generally uniform, regardless of the form of the entity. However, an additional requirement is imposed upon the individuals of Corporations, LLPs and LLCs. In these instances, the Regulations require the 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. NGC Reg. 15.430(3)(b)(3); NGC Reg. 15A.070(3)(b)(3); and NGC Reg. 15B.070(3)(b)(3), respectively.

### **3. 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 publicly traded corporation 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 policies.

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 of America.

Besides these requirements, the 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.<sup>4</sup>

### **4. 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

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<sup>4</sup> 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 owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity.

business as an institutional investor. Moreover, generally such shares can not be held 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 publicly traded corporation registered with the commission or any of its gaming affiliates, or any other action which 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 of the type normally made by securities analysts for informational purposes and not to cause a change in its management, policies or operations; and
- Such other activities as the commission may determine to be consistent with such investment intent.<sup>5</sup>

An institutional investor that has been granted a waiver of a finding of suitability and that subsequently intends not to hold its voting securities of the publicly traded corporation for investment purposes only, or that intends to take any action inconsistent with its prior intent shall, within 2 business days after its decision, deliver notice to the Chairman in writing of the change in its investment intent. The Chairman may then take such action under the provisions of NRS 463.643 as is deemed appropriate.<sup>6</sup>

## **5. What needs to be filed?**

For an institutional investor to obtain the waiver, it must prepare and file an application by completing and submitting the following three forms to the Board: "GCB Form PTC-1, Application," "GCB Form 17, Release and Indemnity of all Claims," and "GCB Form PTC-430, Schedule Supporting Application." When furnishing their answers, institutional investors are required to comply strictly with the layout of the form templates provided by the Board. Moreover, answers should be typed because the Board will refuse any forms that are illegible. The forms must be prepared on good quality bond paper of standardized letter size (8 ½ x 11 inches) and unless otherwise required, all documentation should be filed in

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<sup>5</sup> NGC Regulation 16.430(3)

<sup>6</sup> NGC Regulation 16.430(4)(6)

duplicate original with the exception of bulky or substantially repetitious exhibits such as stockholders' lists. Finally, each form also must be manually signed by an authorized person.

### ***GCB Form PTC-1***

Every application that relates to a publicly traded company (made pursuant to the Nevada Gaming Control Act or NGC Regulation 16) must be submitted to the Board through use of the GCB Form PTC-1. The GCB Form PTC-1 is an application containing a sworn statement that is considered a public record. Consequently, all the information contained within it is subject to public inspection and disclosure.<sup>7</sup> The form itself is relatively basic and requires only key information including the institutional investor's name, address, and a brief statement of the action sought (in this case, a waiver of NGC Regulation 16.430 as an Institutional Investor), together with the applicable Regulation provisions for the action requested. The form must be accompanied by a "Release and Indemnity of all Claims" form that must be subscribed and sworn to by the institutional investor in the presence of a notary public.

### ***GCB 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. The GCB Form 17, Release and Indemnity of All Claims, must be signed and sworn before a notary public and submitted with the GCB Form PTC-1.

### ***GCB Form PTC-430***

GCB Form PTC-430, "Schedule Supporting Application for a Waiver of NGC Regulation 16.439 as an Institutional Investor," is the most substantial form that the institutional investor must complete to obtain a waiver of NGC Regulation 16.430. Unlike GCB Form PTC-1, GCB Form PTC-430 is not a public record and all the information contained within is confidential. GCB Form PTC-430 also is far more complex and invasive. The institutional investor must answer a number of questions and submit an abundance of material including:

- A description of the institutional investor's business and reasoning why the investor is within the definition of "institutional investor" as set forth in NGC Regulation 16.010(14);
- The name of the publicly traded corporation in which the institutional investor holds/intends to hold excess of 10% of the voting shares, the actual percentage of ownership, and a dollar value of the percentage of ownership;
- Any actions taken or expected to be taken by the institutional investor that are inconsistent with investment purposes;

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<sup>7</sup> Nev. Rev. Stat. § 463.120

- The name, address, telephone number and social security number of the officers and directors, or their equivalent, of the institutional investor as well as those persons that have direct control over the institutional investor's holdings of shares 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 shares in the company;
- The name of each person that beneficially owns more than 5 percent of the institutional investor's shares or other equivalent;
- A list of the institutional investor's affiliates;
- A list of all the shares of any Nevada publicly traded company that are or were beneficially owned by the institutional investor or its affiliates within the preceding year, setting forth a description of the securities, their amount, and the date of 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 5 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 need be 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 shares of the company. To be filed within 10 days after filing it with the SEC;
- A copy of any filing made under 15 U.S.C. 18a with respect to the acquisition or proposed acquisition of voting shares of the company; and
- A brief description of the internal controls established, implemented and maintained to ensure that the institutional investor does not exceed the investment limitations authorized by the Commission. This is to be accompanied with a copy of all internal controls and policies, including any regulatory compliance program which the institutional investor has adopted.

The institutional investor must sign the GCB 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. The signatory must also provide a statement explaining the basis of his 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 how they are presently held, directly or indirectly, by the institutional investor.

## **6. What type of investigation is conducted?**

Although the applications and supporting documents are initially filed with 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 the application, depending on the size of the applicant institutional investor and the Division's workload at that time. The investigation process is dissimilar to other regulatory investigations as it is both narrower in scope, shorter in duration and consequently not as costly. This is not to suggest however, 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," which 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.<sup>8</sup>

In most situations the investigation will examine the institutional investor's internal controls in place for compliance purposes, including that the 15% maximum threshold is not exceeded at any time; the history of the institutional investor with its regulators; the background of the company; its management structure; who and how decisions will be made by the institutional investor concerning the voting rights it holds in the Nevada gaming company; and a cursory background investigation of its owner(s). The most important review to be carried out by the Board agents, however, relates to the role the institutional investor intends to take with regard to the Nevada gaming company. The Division's investigator(s) must be confident that institutional investor will maintain only a passive role and will not attempt to assert influence or control over the management and affairs of the Nevada gaming company. 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.

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<sup>8</sup> Nev. Rev. Stat. §§ 463.643(1), .489(1), and .0129(1)(b)

## 7. What happens after the investigation?

After the conclusion of its investigation, the Division will hold a closing conference with the applicant institutional investor to share with it the results of its investigation and any areas of concern or areas of interest that were found during its investigation. The Division will also prepare a confidential report of the results of its investigation 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. Representative of the institutional investor applicant will likely be required to attend this public meeting and 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 institutional investor and obtain additional information that may be relevant to their consideration of the application. In any case, the representatives of the institutional investor should ensure that they are prepared to answer any questions that may be posed by the members of the Board. The institutional investor must be aware that failure of its representatives required to appear and testify, unless excused, constitutes grounds for denial of the application.

At the hearing, the Board will consider whether the waiver is consistent with the applicable policies of the state, which include to ensure that gaming is free from criminal and corruptive elements, 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, to assure the financial stability of corporate licensees and affiliated companies, to preserve the beneficial aspects conducting business in corporate form, and to promote a neutral environment for the orderly governance of corporate affairs, consistent with the other public policies of Nevada concerning gaming;<sup>9</sup> the factors set forth within NGC Regulation 16.060; and any views expressed to the Division by the publicly traded corporation or any licensed affiliate thereof. NGC Regulation 16.060 is a general regulation that lists factors applicable to a variety of financial transactions, only a few of which would have relevance to an investment by an institutional investor. These factors may include, to the extent applicable under the particular facts and circumstances:

- The business history of the institutional investor, including its record of financial stability, integrity, and success of its operations;
- 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;

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<sup>9</sup> Nev. Rev. Stat. §§ 463.0129(1)(b), .489(1), and .622

- The current financial structure of the institutional investor, as well as changes which 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 provision for such disclosure to all prospective security holders;
- Whether the proposed action tends not to work a fraud upon the public;
- Whether a proposed public offering contains speculative securities;
- Whether a proposed transaction will create a significant risk that the publicly traded corporation 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; and
- Any views concerning the institutional investor applicant expressed to the Board and the Commission by the publicly-traded gaming company or any licensed affiliate thereof.

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

After completion of its hearing, the Board will issue to the Commission an order recommending the approval or denial of the waiver application. Although the Commission has the final authority to deny or approve the waiver application, its public

hearings are generally shorter in duration than the Board's. 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, of course, can ask questions of their own and seek clarification of 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 remand the matter to the Board for such 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.

#### **8. How much does the process cost?**

The Division will require a deposit to be paid by the institutional investor in advance as a condition precedent to its beginning or continuing an investigation. Typically, the deposit is around \$15,000 to \$25,000.00. However, this fee may be higher if problems are encountered or envisaged by the Division, or if a great deal of expensive travel is anticipated. After all supplementary investigative fees and costs have been paid by the institutional investor, any balance remaining in the investigative account of the institutional investor, 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.

#### **9. 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 between approximately 4-6 months, but this time period can be impacted by many factors including whether the institutional investor has ever obtained a similar waiver before, 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, and the complexity of the institutional investor.

#### **10. What are the typical reasons why an application may be denied?**

To date, no institutional investor has been denied a waiver of NGC Regulation 16.430. Nevertheless, denial of a waiver could occur whenever doubt is cast on the institutional investor's ability or willingness to maintain a strictly passive role as a shareholder of a Nevada publicly-traded gaming corporation and refrain from asserting any influence or control. A waiver application could also be denied whenever 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 gaming application; and
- failure to timely respond to the agents' requests during the course of the investigation.