RECENT AMENDMENTS TO NGC REGULATION 16 PROVIDE LICENSEES AND REGULATORS WITH MORE FLEXIBILITY

By Vernon A. Nelson, Jr. and Kimberly Maxson Rushton

On May 19, 2011, the Nevada Gaming Commission adopted certain amendments and modifications to NGC Regulation 16. In summary, the amendments and modifications addressed six distinct subject areas:

1. Approvals for continuous or delayed public offerings;
2. Fraudulent and deceptive practices;
3. The listing of securities on a securities exchange;
4. Changes to certain reporting requirements;
5. The inclusion of a gaming legend on certain securities;
6. Certain modifications relating to licensing, suitability, or registration of certain officers, directors, employee, and other representatives of licensees, or affiliated companies.

This article will provide a brief overview of the amendments and modifications that affect each of the subject areas described above. The article will also provide some insight into the purpose behind the amendments. In this regard, the authors spoke with GCB Member A.G. Burnett.

The Board’s recommendation for the proposed amendments to NGC Regulation 16 derived in part from Gov. Sandoval’s call for state agencies to review and streamline regulations specific to an agency’s legislative directive. The Board recommended the amendments set forth herein after conducting a thorough review of NGC Regulation 16. In suggesting these amendments, including the abrogation of certain provisions, the Board conducted a risk/benefit analysis of the affected provisions. If the regulation imposed an undue burden to mitigate a relatively minor risk, the regulation would be subject to amendment or abrogation.
offerings of publicly traded corporations. Generally, “affiliated companies” must obtain the prior approval of the Commission before they can make a public offering of any of their securities. An “Affiliated Company” is a subsidiary company, holding company, intermediate company or any other form of business organization that, directly or indirectly, controls, is controlled by or under common control with one or more corporations or limited liability companies that hold gaming licenses, and is involved in gaming activities in Nevada or in the ownership of property in Nevada upon which gaming is conducted. NGC Regulation 16.115 allows an Affiliated Company that is a publicly traded corporation to apply for “approval of a continuous or delayed public offering of its securities…” (This type of offering is commonly referred to as a “shelf-offering”). This approval allows the Affiliated Company to make public offerings over a certain period of up to three years without having to seek approval for each public offering. An Affiliated Company may apply for such approval if: (1) the company has securities traded on one of the major security exchanges (i.e. NASDAQ) or has stockholder equity of $10 million or more; and (2) the company meets certain reporting requirements of the Federal Securities and Exchange Act.

The recent amendments reduced the required amount of stockholder equity from $15 million to $10 million. The amendments also extended the maximum length of an approval from two years to three years.

With the changes to NGC Regulation 16.115, publicly traded companies have more flexibility with respect to shelf-approvals. Additionally, the lower dollar threshold makes it possible for certain foreign licensees, with smaller global operations, to qualify for shelf-offerings. Consistent with the intent behind the current two (2) year approval period, extending the approval period to three years provides companies with the ability to issue securities in response to market changes and economic factors without the obligation of seeking a specific approval beforehand.

2. Fraudulent and Deceptive Practices.

NGC Regulation 16.300 prohibits certain fraudulent and deceptive practices in connection with the purchase and sale of securities issued by a corporation that holds a gaming license (“Corporate Licensees”), or an Affiliated Company. The recent amendments to NGC Regulation 16 expanded the list of prohibited practices.

Corporate Licensees and their Affiliated Companies are subject to disciplinary action if they cause "any document, correspondence, filing, or statement, containing materially untrue, incorrect or misleading information to be made or filed with board or commission, regardless of whether said information has been made or filed with another regulatory agency.”

The Board sought these amendments because the regulations lacked a mechanism for holding publicly traded companies accountable for disseminating false and misleading information to investors and the public. These amendments give the Board and Commission broad powers because the regulation is not limited to regulatory filings. In theory, a company could be subject to disciplinary action if it provided its counsel with incorrect information and thereafter directed counsel to submit such information to the Board. However, based on comments by the Board during the regulatory
workshops, the objective is to protect against the dissemination of false or misleading information, be it to the public, investors or regulators in foreign jurisdictions.

**3. The Listing of Securities on a Securities Exchange.**

This regulation also requires that publicly traded corporations report to the Board the "election or appointment of any director, any executive officer, and any other officer actively and directly engaged in the administration or supervision of the gaming activities at a licensed gaming establishment...." The recent amendment requires that this report must now be made within sixty (60) days after their election or appointment. The regulation previously provided that such report merely be made "promptly."

**5. The Inclusion of a Gaming Legend on Certain Securities.**

NGC Regulation 16.340 previously provided the Commission with the discretion to require that "each certificate representing a security issued by a publicly traded corporation" bear a legend providing notice of the GCB’s jurisdiction. Accordingly, NGC Regulation 16.340 now has been repealed in response to the Board’s determination that the burden of complying with the regulation no longer provided a material regulatory benefit.

**6. Certain Modifications Relating to Licensing, Suitability, or Registration of Certain Officers, Directors, Employees, and Other Representatives of Licensees, or Affiliated Companies.**

NGC Regulations 16.400 through 16.415 provide certain requirements for individuals connected with Corporate Licensees and Affiliated Companies. Each section will be addressed separately below.

**A. NGC Regulation 16.400**

This regulation provides the Commission with broad authority to regulate individuals. The Commission can require an individual to apply for a finding of suitability or licensing if the Commission determines that...
such individual “has a material relationship to, or material involvement with,” a publicly traded corporation.

In determining whether an individual has a material relationship or involvement, the Commission may consider whether the individual is a controlling person or key employee of the corporation. The Commission may also consider whether “as an agent, consultant, advisor, or otherwise,” the individual “exercises a significant influence upon the management or affairs of the corporation...” The regulation specifically provides that the Commission’s powers are not limited to individuals “having a formal and direct involvement or relationship with a publicly traded corporation.” Finally, the regulation also applies to “beneficial owners of any stated percentage of the outstanding equity securities.”

The recent amendments to NGC Regulation 16 clarified and expanded these powers and the Commission’s jurisdiction to individuals connected to an “affiliated company or a licensee,” and not just to a publicly traded corporation. The Commission has exercised these powers and its jurisdiction for some time. In fact, the notes relating to the “Purpose” of these amendments state that the amendments “specify the Commission may require a finding of suitability, registration, or licensing regarding certain affiliated companies.”

The Board and Commission proposed these amendments because of concerns that Regulation 16 did not provide sufficient authority to regulate individuals who wielded significant influence over a publicly traded corporation, but who were not directors, officers, or employees of the company.

consultants and agents.

B. NGC Regulation 16.405

This regulation addresses beneficial owners of voting securities. Beneficial owners are generally defined as any person or entity with sole or shared power to vote or dispose of the voting securities.

NRS 463.643 specifies certain requirements that apply to certain beneficial owners of voting securities. For example, NRS 463.643 (3) provides that any beneficial owner who: (1) controls more than 5% of any class of voting securities of any publicly traded corporation; and (2) who reports the acquisition of such securities to the SEC pursuant to certain provisions of the Securities Exchange Act of 1934, shall file a copy of such reports with the Commission. NRS 463.643(4) similarly provides that any person who controls more than 10% of any class of voting securities, shall apply for a finding of suitability.

NGC Regulation 16.405 refers to NRS 463.643 and provides that the Commission must consider NRS
463.643 when determining whether certain beneficial owners must apply for a finding of suitability. Previously, the regulation only referred to NRS 463.643 (1), (2), and (3). The recent amendments now require the Commission also consider NRS 463.643 (4) and (5), thereby providing a cross-reference between the regulation and the applicable sections of NRS 463.643.

C. NGC Regulation 16.410

This regulation identifies the officers and employees of a publicly traded company who are “normally required” to be licensed or found suitable. The regulation was amended to include the chief technology officer and the chief information officer, but delete the secretary, as persons who are normally required to be licensed or found suitable. Member Burnett indicated that the Board and Commission proposed these amendments due to the ever increasing emphasis on technology and information systems and the determination that it was important that the individuals holding these positions be subject to findings of suitability.

D. NGC Regulation 16.415

This regulation identifies the directors of a publicly traded corporation who are “normally required” to be licensed or found suitable. This regulation was recently amended to include: (1) each director who serves as the chairman of the Audit Committee of the board of directors; and (2) each director who serves in the capacity of lead director. Member Burnett indicated that the decision to require a finding of suitability of an Audit Committee chairman was based on the important role audit committee’s serve to publicly traded companies.

The Commission also included “lead directors” as persons who should be found suitable. According to Member Burnett, a lead director is an independent member of the board of directors who leads the other independent members of the board of directors and may perform duties typically performed by the chairman of the board, and, in some cases, may also actually be the chairman of the board of directors.

Finally, the amendments to NGC Regulation 16.415 increased the minimum beneficial ownership threshold requiring a finding of suitability for a member of the board of directors of a publicly traded corporation from over 1% to over 5%.

Vernon A. Nelson, Jr. concentrates on Casino Regulatory Compliance and Gaming / Hotel Operations. Vernon has served as corporate counsel for gaming companies in multiple jurisdiction and is versed in domestic and international business operations, contract negotiations, credit and collections, intellectual property, real property, employment law and corporate governance.

Kimberly Maxson Rushton has served in the Clark County District Attorney’s Office, in the Attorney General’s Office as Chief of the Las Vegas office and Counsel to the Nevada Gaming Commission, and as Chairman of Nevada’s Transportation Services Authority. Kimberly’s client list includes casinos, gaming suppliers and casino-related businesses.

Kimberly Maxson Rushton and Vernon Nelson, based in the Las Vegas office of Cooper Levenson, are members of the firm’s casino law practice group. The firm has additional offices in Atlantic City, NJ, Harrisburg, PA, and Bear, Delaware.