

The Corporate Securities Division of the State Gaming Control Board: An Overview and Guide to the Regulatory Process

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Introduction

With the expansion of the equity and debt markets' interest in Nevada gaming, the Corporate Securities Division (Division) has seen a marked increase in activity from late 1992 to present. From January 1, 1993, through March 31, 1994, the Division processed ten initial public offerings¹ that in total grossed over \$600 million. This amount is in addition to a corresponding increase in secondary public offerings and private placements of equity and debt by publicly traded corporations (PTCs) subject to the Nevada Gaming Control Act.

With such activity, there is an increased need to review the Division and its activities, and the obligations of PTCs under the Nevada Gaming Control Act and the regulations promulgated thereunder (Act and Regulations, respectively). This article will first provide an overview of the Division, then offer guidance regarding the Act and Regulations governing PTCs,² and lastly, will address certain areas of interest to a PTC's counsel.

The Corporate Securities Division

It is appropriate to initially review a preliminary matter related to the Division — namely, its duties and functions as enumerated under the Division's Mission Statement.

A. Mission Statement

The Division's Mission Statement charges the Division with the following responsibilities:

- (1) To investigate and analyze PTCs for suitability to be registered with the Nevada Gaming Commission (Commission) or to be a gaming licensee, or for their subsidiaries to be registered as an intermediary company or a gaming licensee;
- (2) To investigate and analyze applications for approval of public offerings by PTCs;³
- (3) To investigate and analyze applications by registered PTCs for approval to make future public offerings (known as "shelf offerings");⁴
- (4) To investigate and analyze applications for approval of an acquisition of control⁵ of a PTC, or an acquisition of control of a corporate licensee by a PTC;⁶
- (5) To investigate and analyze applications for exceptional repurchases of certain PTC securities;⁷
- (6) To investigate and analyze applications for a plan of recapitalization of a registered PTC;⁸
- (7) To call forward a stockholder of a registered PTC for a finding of suitability;⁹
- (8) To submit recommendations to the Chairman of State Gaming Control Board (Board) regarding administrative approval of proxy statements and information statements of registered PTCs¹⁰ and of applications to have securities of a registered PTC listed on a registered securities exchange;¹¹ and
- (9) To continually monitor all activities of registered PTCs and their subsidiaries and affiliates, both within and outside Nevada, for compliance with the Act and the

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Regulations, for continued financial viability and business probity, and for compliance with federal, state and local laws and regulations; and to continually monitor all gaming activity outside Nevada conducted by entities and individuals licensed to conduct gaming in the state of Nevada.

In short, the Division's mission is to investigate and analyze all applications involving PTCs, and to continue to monitor all of the activities of the PTC and its subsidiaries.

B. Divisional Statistics

The Division is currently comprised of the following personnel: a Chief, a supervisor, two senior agents, seven agents, and two support personnel. The Division suffered no staff reductions during the 1991 Legislature, nor during the later budgetary constraints of the 1991-1993 biennium. In fact, the Division's staff was increased with the addition of a new agent position.

The Chief heads the Division and is responsible for the overall investigation of applications and monitoring of PTCs. The supervisor reports to the Chief and is primarily responsible for the coordinating and processing of applications, and the investigative work of all the agents. The agents and senior agents investigate the applications and prepare investigative reports that result from the application and investigative field work. Last, but by no means least, the Division's two support personnel handle the administrative responsibilities that make the Division function smoothly.

For fiscal year 1993,¹² there were 224 applications filed and 289 investigations completed within the Division. The average time for investigation and processing of applications will vary depending on the type of application. For initial public offerings, the period from the date the application is filed to the date of Commission action will range between four and nine months, and averages 160 days. For an "A/B exchange," the range is four to nine months, and averages 100 days. For a public offering, the range is three to four months, and averages ninety-eight days. For continuous or delayed public offerings, the range is three to four months, and averages 115 days. For a corporate restructuring the range is four to six months, and averages 165 days. For opening a new property, the range is five to twelve months, and averages 230 days. For registration of a previously existing PTC, the range is seven to twelve months, and averages 255 days.

As noted, these are merely averages, and the length of time necessary to complete a particular application will vary with each application due to the complexity and completeness of the application, and the current work load and staffing levels of the Division.

C. Applications to the Division

1. Process

All applications are initially submitted to Applicant Services. After Applicant Services processes an application, if the application relates to a PTC, it is then routed to the Division. If a PTC application involves individuals (*i.e.*, an application for licensing as an officer or director), that element is routed to the Investigations Division for processing.¹³

Once the application is received by the Division, it is reviewed by the Chief and the supervisor. It is the supervisor's responsibility to assign the appropriate agents to the application, and with the Chief, to schedule a tentative agenda date. If individuals are involved in the application, it is necessary for the Division to coordinate with the Investigations Division regarding the agenda date. Depending on the respective workloads, one division or other may require more time before the entire application can be brought to an agenda.

It cannot be stressed enough that a *complete* application, which fully details the transaction and the individuals involved, is essential to the processing of an application.¹⁴ The Division has experienced several recent applications that were incomplete in terms of detailing the proposed transactions and the requisite approvals. While the Division's agents are knowledgeable as to the Act and the Regulations governing PTCs, they are not attorneys for the applicant nor paralegals for gaming counsel. It is incumbent upon the applicant and its gaming counsel to fully analyze the transaction, minute step by minute step, to determine all of the appropriate

applications that are necessary as a result of the transaction. Failure to do so creates additional burdens on the Division's agents and thereby lengthens the application process.

By way of example, if Stockholder A of a corporate licensee proposes to transfer his corporate licensee stock to Corporation A, which will then immediately transfer the corporate licensee stock to the PTC, the following applications must be submitted regarding the transfer: an application to transfer the corporate licensee stock to Corporation A, and an application to transfer the same stock to the PTC (pursuant to NRS 463.510). It is inappropriate to only submit an application for the transfer to the PTC, under the reasoning that Corporation A will hold the stock for only an instant, or that it is merely a conduit of the transfer. Gaming counsel must analyze each and every separate element of the transaction, and determine which applications must be submitted.

Once an application is assigned to an agent, the agent will review the application, direct an initial document/informational request to the applicant, and begin to schedule interviews with the applicant and its personnel. Again, it is imperative that the applicant and its gaming counsel provide prompt and complete responses to this initial request and all future requests. Failure to do so will only slow the investigative process and delay when an application can be brought to an agenda.

When the investigative field work is complete, the agent prepares a confidential investigative report, which is reviewed by both the supervisor and Chief, and any necessary revisions are made. The report is then distributed to the Board and Commission to prepare them for the public hearing on the application.

For each registered PTC there is an “Order of Registration.” This document details the corporate structure of the PTC as it relates to gaming.

2. Official Forms

The Division has developed a number of standardized forms for the submission of applications. The PTC forms may be obtained from Applicant Services or the Division.

The Division is in the process of increasing the number of PTC official forms.¹⁵ Currently, the following PTC forms exist and should be used as appropriate:

- (a) PTC-1, the Application itself, which briefly details the requests for approval;¹⁶
- (b) PTC-2, the Schedule supporting an application for registration as a PTC, or to amend an Order of Registration;¹⁷
- (c) PTC-110, the Schedule supporting an application for approval of a public offering;¹⁸
- (d) PTC-200, the Schedule supporting an application for approval of an acquisition of control;¹⁹
- (e) PTC-250, the Schedule supporting an application for approval of a plan of recapitalization;²⁰
- (f) PTC-260, the Schedule supporting an application for approval of an exceptional repurchase of securities;²¹
- (g) PTC-310, the Schedule supporting an application for administrative approval of a proxy statement or information statement;²² and
- (h) PTC-320, the Schedule supporting an application for administrative approval to list securities on a registered exchange.²³

3. Orders of Registration and Related Orders

For each registered PTC there is an “Order of Registration.” This document details the corporate structure of the PTC as it relates to gaming — in short, it provides a “snapshot” of the PTC after it has received the necessary Commission approvals. Specifically, the Order of Registration “must set forth a description of the publicly traded corporation’s affiliated companies and intermediary companies, and the various gaming licenses and approvals obtained by those entities.”²⁴ Additionally, any changes to the elements enumerated therein will require an application to amend the Order of Registration.²⁵ For example, if a PTC has two subsidiaries that operate separate gaming establishments, and if the PTC wishes to sell one subsidiary, in addition to any other approvals, the PTC must also apply to amend its Order of Registration to reflect that it no longer owns one of the subsidiaries.

In addition to the Orders of Registration, a separate order is generated when a PTC receives approval to do a specific public offering, or receives a shelf approval to do a public offering, or when an institutional investor receives a waiver under Regulation 16.430. These orders memorialize the approval granted and any conditions or limitations imposed on such approval.

PTC Reporting Requirements

Once a PTC becomes registered with the Commission, numerous reporting requirements become applicable. The following list is provided in an effort to summarize the various reporting requirements; however, it is clearly not meant to be a substitute for careful and independent review and study of the Act and the Regulations.

The following should thus be provided to the Division:

1. Five copies of all registration statements, including drafts, filed with the Securities and Exchange Commission ("SEC"), even if the offering is not subject to Commission approval. This includes, but is not limited to, Registration Statements on Forms S-1, S-2, S-3, S-4, S-8, SB-1, SB-2, 10 and 10-SB. (Reference: NRS 463.639(1)(d); NGC Reg. 16.330(1) and (6)).
2. Five copies of all proxy statements, including drafts, whether or not subject to Regulation 14A of the SEC, and all information statements, whether or not subject to Regulation 14C of the SEC. (Reference: NRS 463.639(1)(d); NGC Reg. 16.310(1) and 16.330(1)).
3. Five copies of all Annual and Quarterly Reports to Stockholders, Forms 10-K, 10-KSB, 10-Q, 10-QSB, and 8-K, and amendments thereto, and all other material documents or documents considered to be confidential or furnished to the holders of debt or equity securities of the PTC, which may be filed by a PTC with the SEC or any other national or regional securities exchange. (Reference: NRS 463.639(1)(b) and (d); NGC Reg. 16.330(1) and (6)).
4. One copy of all Forms 3, 4 and 5, and amendments thereto, and Schedules 13D and 13G, and amendments thereto, and all other documents received by a PTC that were filed with the SEC by any person and which relate to such PTC. (Reference: NRS 463.639(1)(c) and (d); NGC Reg. 16.330(2)).
5. Annually, a list of the holders of a PTC's voting securities, or more frequently as such lists are prepared. (Reference: NGC Regulation 16.330(3)).
6. One copy of all press releases issued by the PTC or a licensed subsidiary thereof, *faxed* to the Corporate Securities Division in Carson City, Nevada, at or before the time of release, to be followed by the filing of a hard copy of any such press release within five calendar days after its release. (Reference: NGC Reg. 16.330(6)).
7. A report filed promptly after the election or appointment of any director, executive officer, or any other officer actively and directly engaged in the administration or supervision of the gaming activities at a licensed gaming establishment associated with the PTC. (Reference: NRS 463.639(1)(a); NGC Reg. 16.330(4)).
8. A report filed promptly after being informed that a controlling person, as defined in NGC Regulation 16.010(4), has disposed of any of such PTC's voting securities. (Reference: NGC Reg. 16.330(5)).
9. Annually, a profit and loss statement and a balance sheet for the PTC, to be submitted within 120 calendar days after the close of its fiscal year. Documents filed with or furnished to the SEC containing the same information (*i.e.*, Form 10-K or Form 10-KSB) may be substituted instead so that duplicate filing of the same information will be avoided. (Reference: NRS 463.639(1)(b)).

Areas of Issue

There are several provisions of the Act and Regulations of which a new PTC and its gaming counsel should be aware. Specifically, attention is directed to the following provisions:

1. NRS 463.635 (1)(a), requiring maintenance of stock ledger;

2. NRS 463.635(1)(c), requiring an application to amend an Order of Registration if there are certain changes to a PTC's corporate structure or its various gaming licenses or approvals;²⁶
3. NRS 463.637, requiring the licensing/finding of suitability for certain officers and directors;
4. NRS 463.639, which details PTC reporting requirements;²⁷
5. NRS 463.641, which details penalties for noncompliance with laws and regulations;
6. NRS 463.643, which regulates beneficial owners of the PTC's voting securities;
7. NRS 463.645, which details proscribed activities with "unsuitable" or unlicensed persons;
8. Regulation 16.110, requiring the Commission's prior approval for certain public offerings;
9. Regulations 16.200 through 16.280, inclusive, which require the Commission's prior approval for a "change in control," "plan of recapitalization," and "exceptional repurchase of securities";
10. Regulation 16.310, requiring administrative Board approval before the distribution of certain proxy or information statements;²⁸
11. Regulation 16.320, which requires, in certain cases, administrative Board approval²⁹ before a PTC can list its securities on a registered securities exchange;³⁰
12. Regulation 16.330, which details PTC reporting requirements;
13. Regulations 16.410 through 16.420, inclusive, which detail requirements for employees, officers and directors; and
14. Regulation 16.440, which details proscribed activities with "unsuitable" persons.

Each new PTC that becomes registered with the Commission becomes subject to new requirements and obligations of the Act and the Regulations.

The foregoing is not complete, nor is it a substitute for independent review and study of the Act and the Regulations.

It is noted that there are several reoccurring instances of nonconformance which warrant the special attention of applicants and PTCs. For example, Regulations 16.310 and 16.320 have recently been a trap for the unwary. Accordingly, renewed attention to these Regulations is warranted.

Further, the Division is receiving too many applications that fail to fully and completely detail all elements of the transaction. Specifically, NRS 463.510 requires the Commission's prior approval for *each* sale, assignment, transfer, pledge or other disposition of corporate licensee stock. Gaming counsel must fully analyze a transaction involving corporate licensee stock, and for each transfer submit the appropriate information and detail. Moreover, as emphasized earlier, if an entity holds corporate licensee stock in a transaction, even for a split second, it must be registered as a holding or intermediary company,³¹ and each stockholder, director and officer may thus require licensing or a finding of suitability.³² When the new holding or intermediary company divests itself of corporate licensee stock, it must then "deregister" as a holding or intermediary company.

In sum, even though a transaction or application involves a PTC, gaming counsel must recognize that if a corporate licensee (or holding or intermediary company) is involved, careful study of NRS 463.489 to 463.560, inclusive, NRS 463.575 to 463.615, inclusive, and Regulation 15, is required. Generally speaking, the most consistent deficiencies seen by the Division result from gaming counsel's failure to analyze the requirements of the Act and Regulations applicable to corporate licensees and holding or intermediary companies.

In an effort to assist a new (or existing) PTC and its gaming counsel to work through the maze of Regulations 15 and 16, at Appendix A is a flow chart that tracks the various requirements of the Act and Regulations 15 and 16.

While the flow chart is written from the premise of a public offering, it is adaptable to various situations. For example, if a PTC is forming a intermediary company or is affecting changes to the corporate license, see pages 2-3 of the flowchart. If there are changes to a PTC's directors or officers, see page 5 of the flowchart. Note that the flow chart is not complete;³³ it is merely a guide, and, as always, is not a substitute for careful and independent

review and study of NRS 463.489 to 463.560, inclusive; NRS 463.575 to 464.615, inclusive; NRS 463.625 to 463.645, inclusive; and Regulations 15 and 16.

Conclusion

Each new PTC that becomes registered with the Commission becomes subject to new requirements and obligations of the Act and the Regulations. These provisions are detailed and demanding and require corresponding attention and analysis. The Division and its staff are well aware of market and timing demands placed on a PTC and seek, to the extent possible, to accommodate such demands. However, if a PTC and its gaming counsel do not submit complete and accurate applications, or fail to promptly respond to requests by the Division's agents, the Division's ability to accommodate the timing of any particular transaction is hindered. Of course, the Division is available to provide guidance; however, the responsibility for each application remains with the applicant and its gaming counsel.

The current market for gaming PTCs is dynamic and fluid. This benefits not only the particular companies but also Nevada. The Division will continue to foster a conducive environment for PTCs; however, this can only be fully accomplished with the cooperation of the PTCs and their gaming counsel, and their respect and understanding for the Act, the Regulations and the operations of the Division. Working together, the Division is confident these goals can be realized.

References

¹Station Casinos, Inc., on May 24, 1993, made an equity offering of 4.2 million shares and a debt offering of \$110 million; Primadonna Resorts, Inc., on June 22, 1993, made an equity offering of 5.8 million shares; Monarch Casino & Resort, Inc., on August 6, 1993, made an equity offering of 2.1 million shares; Boyd Gaming Corporation, on October 15, 1993, made an equity offering of 4.0 million shares; Ameristar Casinos, Inc., on November 9, 1993, made an equity offering of 2.4 million shares; Santa Fe Hotel Inc., on December 21, 1993, made a debt offering of 11,500 Units consisting of an aggregate of \$115.0 million 11% First Mortgage Notes due 2000 and 11,500 warrants to acquire \$11.5 million 11% First Mortgage Notes due 2000; Anchor Gaming, on January 28, 1994, made an equity offering of 2.75 million shares; Boardwalk Casinos, Inc., on February 11, 1994, made an equity offering of 1.8 million shares and 3.2 million warrants; Harveys Casino Resorts, on February 14, 1994, made an equity offering of 1.8 million shares; finally, Paul-Son Gaming Corporation, on March 25, 1994, made an equity offering of 1.8 million shares. See also Grover, *Will Too Many Players Spoil the Game?*, BUS. WK., October 18, 1993, at 80. The Division also processed three major reorganizations during 1993: Bally Grand, Inc.; Riviera, Inc.; and Sahara Resorts and Sahara Casino Partners, L.P.

²See NEV. REV. STAT. (NRS) § 463.625 through 463.645, inclusive, and Nevada Gaming Commission Regulation (NGC Reg.) 16.

³NGC Reg. 16.110.

⁴*Id.* at 16.115. See also Rule 415 promulgated under the Securities Act of 1933, 17 C.F.R. § 230.415.

⁵NGC Reg. 16.010(1) & (3).

⁶NGC Reg. 16.200.

⁷*Id.* at 16.260.

⁸*Id.* at 16.250.

⁹NRS 463.643(1).

¹⁰NGC Reg. 16.310.

¹¹*Id.* at 16.320.

¹²The fiscal year is from July 1, 1992, to June 30, 1993.

¹³In this issue, see Randall Sayre's article regarding the Investigations Division of the State Gaming Control Board.

¹⁴See *infra* notes 15 through 23 and accompanying text for a nonexclusive list of the various applications that PTCs are required to submit.

¹⁵The Division is considering creating an official form for applications for shelf approvals under Regulation 16.115, and for institutional investor waivers under Regulation 16.430.

¹⁶It should be noted that the PTC-1 is a document which is publicly available. However, the schedules which support the PTC-1 are not available for public dissemination.

¹⁷See NRS 463.627, .635(1)(b), (c).

¹⁸See NGC Reg. 16.110, .118, .130.

¹⁹See *id.* 16.200, .210.

²⁰See *id.* 16.250, .280.

²¹See *id.* 16.260, .280.

²²See *id.* 16.310.

²³See *id.* 16.320.

²⁴NRS 463.635(1)(c).

²⁵The application to amend an Order of Registration is applied for on official forms PTC-1 and PTC-2.

²⁶See *supra* note 25 and accompanying text.

²⁷See text at Section III.

²⁸This is one area in which PTCs have been recalcitrant. Such administrative approval is needed if the proxy or information statement "includes a discussion of the nature and scope of, and procedures under, the Act and regulations . . ." NGC Reg. 16.310. Even if no such discussion is included, it is still necessary (under NRS 463.639 and Regulation 16.330) to submit five copies of the proxy or information statement to the Division. Accordingly, renewed attention to these provisions is warranted.

²⁹This is another area in which PTCs have been recalcitrant — renewed attention to Regulation 16.320 is also warranted.

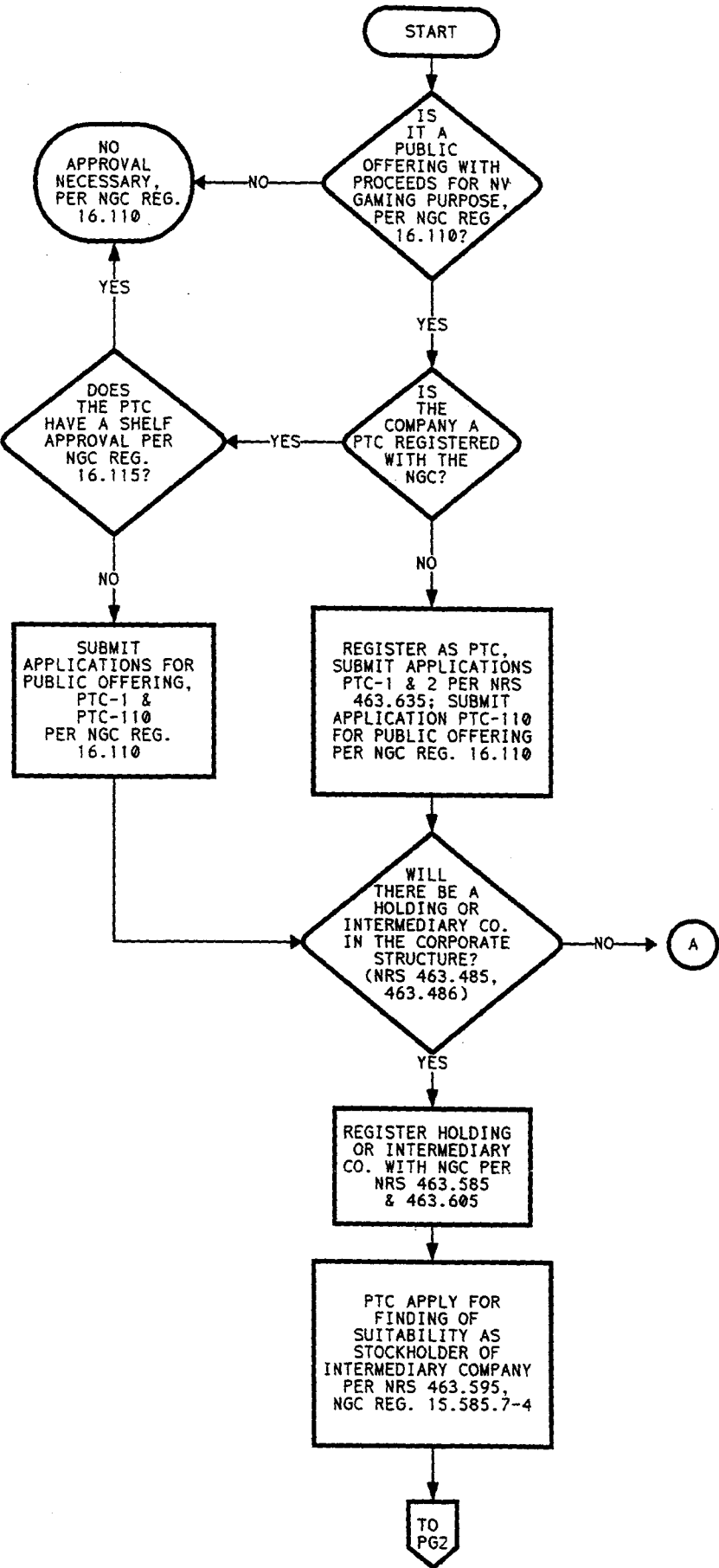
³⁰Under section 6 of the Securities Exchange Act of 1934 (1934 Act), there are two national registered securities exchanges, the New York Stock Exchange and the American Stock Exchange. Additionally, there are seven regional securities exchanges registered under section 6 of the 1934 Act: the Boston Stock Exchange, the Chicago Board Options Exchange, the Cincinnati Stock Exchange, the Inter-Mountain Exchange, the Midwest Stock Exchange, the Pacific Stock Exchange, and the Philadelphia Stock Exchange. It should be noted that National Association of Securities Dealers Automated Quotation/National Market System (NASDAQ/NMS) is not a securities exchange registered under section 6 of the 1934 Act, rather it is governed by section 15 of the 1934 Act. T. HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION 3-4 (2d ed. 1990 & Supp. 1993). Therefore, no prior approval is required under NGC Regulation 16.320 to have securities traded with the NASDAQ/NMS.

³¹NRS 463.585.

³²*Id.* 463.595.

³³For example, the flowchart does not address: changes in control, exceptional repurchases of securities, or plans of recapitalization. See NGC Reg. 16.200 through 16.280, inclusive.

Appendix A



A is on page 2

