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New York State Gaming Commission Proposes Rules on Gaming Facility Licensing

In anticipation of the award of three casino licenses in the Empire State this fall, on July 6, 2015, the New York State Gaming Commission proposed rules for the licensing of gaming facilities. Many of the proposals seek to codify the Commission's position during the question and answer phase of the RFA process in 2014 and address the following topics:

- > Gaming facility license application requirements
- > Application forms
- > Application fees
- > Form of license
- > Waiver of licensing requirements for certain passive and institutional investors
- > Suitability and license determinations
- > Award and duration of licenses
- > Post-licensure conditions
- > Required notifications
- > Monitoring of project construction

This *Client Alert* focuses on the proposed rules concerning qualifiers, waivers and required notifications which may be of relevance to potential investors and financial sources.

Qualifiers

Qualifiers of gaming facility applicants and licensees are required to file detailed disclosure forms and are subject to background investigations. Under the proposed rules, the following persons associated with a gaming facility are considered “qualifiers”:

- > Officers
- > Directors
- > Owners holding 5 percent or more direct, beneficial or proprietary interest in the gaming facility
- > Lenders
- > LLC members
- > Transferees of an LLC member’s interest
- > LLC managers
- > Partners
- > Limited partners
- > Gaming facility managers or operators

Waivers

Under the proposed rules, the Commission, in its discretion, may waive the licensing requirement for any of the following:

Qualified institutional investor - an institutional investor holding up to 15 percent of the publicly traded securities of a gaming facility applicant or licensee, or holding, intermediary or subsidiary company thereof, for investment purposes only and does not, nor intends, to exercise influence or control over the affairs of the issuer of such securities, nor over any licensed subsidiary of the issuer of such securities. To qualify as an institutional investor, an investor, other than a state or federal pension plan, must meet the requirements of a qualified institutional buyer as defined in regulations of the U.S. Securities and Exchange Commission. A qualified institutional investor includes, without limitation, any of the following:

- (1) a bank as defined under federal securities laws;
- (2) an insurance company as defined under federal investment company laws;
- (3) an investment company registered under federal investment company laws;
- (4) an investment advisor registered under federal investment company laws;
- (5) collective trust funds as defined under federal investment company laws;
- (6) employee benefit plan or pension fund subject to the Employee Retirement Income Security Act, subject to certain exclusions;
- (7) a state or federal government pension plan; and
- (8) such other persons as the Commission may determine for reasons consistent with policies of the Commission.

Passive investor - an investor owning, holding or controlling up to 25 percent of the publicly traded securities issued by a gaming facility licensee or applicant or holding, intermediate or parent company of a licensee in the ordinary course of business for investment purposes only and who does not, nor intends to, exercise influence or control over the affairs of the issuer of such securities, nor over any licensed subsidiary of the issuer of such securities.

Certain lenders, as long as:

- (1) the lender is in the business of providing debt or equity capital to individuals or entities;
- (2) the loan is in the ordinary course of the lender’s business; and
- (3) the lender does not have the ability to control or otherwise influence the affairs of the gaming facility applicant or licensee.

A party acquiring a debt instrument issued by a gaming facility applicant or licensee in a public or exempt private offering, as long as:

- (1) the party does not have the right or ability to control or influence the affairs of the gaming facility applicant or licensee; and
- (2) the party's acquisition of the debt instrument is in the ordinary course of business and is not part of a plan or scheme to avoid licensing requirements.

Required Notifications

Material changes to commitments and development plans – Gaming facility applicants and licensees must notify the Commission in writing and in a timely manner of any proposed material changes to commitments and development plans that were presented in such applicant's or licensee's gaming facility application, including, without limitation, in regard to finance and capital structure; land, construction and design of physical plant; workforce development; and sustainability and resource management. No material changes to such commitments and development plans are permitted without written approval of the Commission.

Material debt transactions - No material debt transactions may be consummated without prior written approval of the Commission, with the exception of the following which require 10 days advance notice:

- (1) agreements providing for borrowing for capital and maintenance expenditures;
- (2) agreements for refinancing of existing debt that includes borrowing for capital and maintenance expenditures of at least \$50 million;
- (3) agreements for any borrowing that does not result in an increase in annual debt service requirements; or
- (4) agreements that reflect a gaming facility applicant's or licensee's pro rata share of debt maintained at an affiliate, intermediary, or holding company.

Change of qualifier or financial source – Each gaming facility applicant or licensee must notify the Commission, in writing, as soon as it is aware:

- (1) of the appointment, nomination, election, resignation, incapacitation or death of any qualifier; or
- (2) that it intends to enter into a transaction bearing any relation to its gaming facility project that may result in persons involved in the financing of the gaming facility.

Monitoring of project construction – The award of a license is subject to the following requirements concerning the monitoring of the project:

- (1) project schedules and reporting;
- (2) inspection of construction related records;
- (3) certification of final stage of construction; and
- (4) determination that the gaming facility may open for business.

Comment Period Open

The public comment period on the proposed rules concludes Sept. 8, 2015. If the Commission approves final regulations, publication in the state register could be as soon as Sept. 30, 2015.

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