WHITESAND GAMING

Report to the New Hampshire Gaming Regulatory Oversight Authority Regarding a Comprehensive Approach to Existing and Expanded Gaming

Area 2: 2013 Legislative Proposals

October 22, 2013

Table of Contents

2013 LEGISLATIVE PROPOSALS

In the 2013 Legislative Session a number of potentially viable proposals relating to the authorization of casino gaming were considered. Both Houses had gaming bills in play for much of the Session. For the purposes of this report, WhiteSand reviewed the four dominant proposals in terms of policy and direction, effectiveness of the regulatory structure and general feasibility. Where a Bill drew materially upon another state that fact is identified In specific, WhiteSand reviewed:

- House Bill 678 proposing video lottery machines only;
- House Bill 665 proposing two destination commercial casinos; and
- Senate Bill 152 proposing a single, high end commercial casino - both Senate and Omnibus Versions.

Although in the case of House Bill 678 and House Bill 665 the Bill's actual consideration was short lived, they warrant examination as they illustrate core policy considerations in developing an enabling statute. Each Bill, for example, reflected its own perspective and biases about the extent to which gaming should be expanded, who should own and operate a facility and equipment, which agency is best equipped to regulate, the persons to be licensed and the standards of suitability to be met, tax rate, minimum investment etc. While the study of each proposed structure and each Bill's individual strengths is important, it is the insights into the weaknesses, inconsistencies, unintended consequences, ambiguities and gaps in these Bills that is particularly illustrative as it is vital going forward for the Authority to understand and appreciate the potential for structural weaknesses to individually or collectively compromise a regulatory scheme.

The Authority is tasked with recommending to the Legislature statutory and regulatory provisions to enable and oversee casino gaming. In an effort to provide the Authority with recommendations and input for its consideration in a manageable format WhiteSand summarized House Bill 678 and House Bill 665 concentrating primarily on highlighting the core policy decisions each reflects. As among the proposals relating to the authorization of casino gaming considered in the 2013 Legislative Session, Senate Bill 152's Omnibus Version came closest to advancing a realistic, competitive, and meaningful regulatory scheme WhiteSand utilized it as the structure and context for its specific recommendations to the Authority. These recommendations in every case focus on assisting the Authority in designing and advancing a regulatory scheme that is cost effective, consistent with industry best practices and capable of ensuring both the integrity and competitiveness of any commercial casino approved in New Hampshire.

House Bill 678

House Bill 678 ("HB 678") was introduced January 3, 2013. By its terms it proposed RSA 287-H, *Gaming Oversight Authority and Video Lottery*. Its primary sponsor was Rep. Steven Vaillancourt (R-Hillsborough 15) and its co-sponsor was Rep. George A. Lambert (R-Hillsborough 44). After limited consideration on March 7, 2013, HB 678 was determined by Committee to be inexpedient to legislate meaning it would not be passed over to the other chamber. It was Laid on Table on March 21, 2013 meaning that it was set aside and may only be reconsidered if brought back from the table by a majority vote of the legislative body.

HB 678 embraced a state owned, state operated model consistent with that followed by Rhode Island but for the fact that it substituted a newly created gaming agency - the Gaming Oversight Authority ("Authority") for the supervision by the Director of the Lottery employed in Rhode Island. The Authority was to consist of the Commissioners of the Departments of Safety, Revenue Administration, and Resources and Economic Development or their designees. The Commissioner of the Department of Safety was to have served as the Authority's chair. Under HB 678 the Authority was authorized to own and operate up to 5000 video lottery machines. The Bill did not enable table games. Under its terms, the Authority was to utilize a delegation of authority to a newly formed Division of Gaming Enforcement ("DGE") and, largely through DGE's director, was to exercise its exclusive authority to " . . .staff, manage, and operate video lottery locations . . . ". DGE was to be organized as the Chair of the Authority (Commissioner of Safety) "deems necessary" and DGE personnel hired, trained, managed and supervised by DGE were to perform all functions associated with video lottery operations including, but not limited to, serving as cashiers, machine mechanics, security officers, supervisors and managers. Following the Rhode Island model, the locations themselves were to be supplied by facility licensees required to provide not only the gaming space but support resources in the form of dining, hotel, liquor and other unspecified amenities.

By its terms HB 678 reflects the following core policy decisions.

Type of Gaming: As noted above, the Bill enabled state owned and operated video lottery machines but did not enable table games. It closely mirrored many aspects of the Rhode Island model and tasked the state, through the Authority and DGE, with full ownership, control and management of the gaming enterprise. In electing to pursue a state owned and operated model, HB 678 adopted a minority approach. The vast majority of jurisdictions afford a gaming operator significant discretion over the management and operation of a commercial casino enterprise, even those limited to video lottery machines.

Limited Number of Licenses and Machines: HB 678 limited the number of facility licenses to no more that six and the number of video lottery machines to no more than 5000. Geographic limitations were not imposed other than to prohibit more than one facility per county. The Bill contemplated four facilities with 600 video lottery machines each and two facilities with 1300 video lottery machines. By proposing up to six facilities

with a state wide limit of 5000 video lottery machines, the drafters of this Bill likely intended facilities to be integrated into existing resorts and racetrack facilities. That choice, in turn, signaled expectations about capital investment and, as a corollary, the number of jobs and ancillary facilities to be generated as resorts and racetracks already have amenities like restaurants and hotel rooms.

Local Authorization: HB 678 required a video lottery location to be situated in a community that had affirmatively voted to adopt proposed RSA 287-H in accordance with rules that mirrored those applicable to bingo and Lucky 7 under RSA 287-E. It further allowed a host community to petition the Authority for revocation of a facility license.

Effective Tax Rate: Under HB 678 the state, as the owner and operator of the gaming enterprise, was to have distributed net machine income as follows: [1]

60%	General Fund
19%	Facility Licensee
12%	Authority (for the establishment, administration and operation of DGE)
6%	Each of three technology providers
2%	Central data provider
1%	Host community

Following recent trends in taxing structures, non-cashable promotional credits were excluded from the calculation of net machine income. This exclusion is significant to operators as it facilitates their ability to cost effectively incent their players through promotional credits that activate play on a video lottery machine but do not convert to cash at the conclusion of play.

The facility licensee's distribution, at 19% of net machine income, reflects the state owned and operated structure of HB 678 and marginalizes the relevance of this effective tax rate to competing proposals that do not adopt that model.

License Application Fee: HB 678 contemplated awarding each of the six licenses via a competitive bid process. The minimum bid for 600 video lottery machines was set at 5 Million dollars and the minimum bid for 1300 video lottery machines was set at 10 Million dollars. A predetermination of suitability was inferred but not expressly provided for in the Bill. The Facility License Application Fee was $150,000 plus 10% of the bid amount for regulatory agency start-up. The 10% was refundable if the applicant was not selected. If the applicant was selected, the 10% plus an additional 15% of the bid amount was to be retained for use as start up capital for the Authority and DGE and the remaining 75% was to be deposited into the General Fund. The fees associated with the bid process reflect the state owned and operated structure of HB 678 and marginalize their relevance to competing proposals that do not adopt that model.

[1] Under HB 678, net machine income was defined as ". . . all cash and other consideration utilized to play a video lottery machine, less all cash or other consideration paid to players of video lottery machines as winnings. Non cashable promotional credits shall be excluded from the calculation.

Minimum Investment: None specified. The state owned and operated structure of HB 678 marginalizes the relevance of this policy decision.

License Term: Under HB 678 facility and technology provider licensees were to be issued for a five year term. In recognition of the cost of license renewals, many jurisdictions are moving toward a longer license duration. Five years is within the norm.

Regulatory Structure: As discussed with specificity above, HB 678 created a new gaming agency in the form of the Authority and under its terms, the Authority was to utilize a delegation of authority to a newly formed DGE to exercise its exclusive authority to " . . .staff, manage, and operate video lottery locations . . . ". Ironically, while it declined to vest oversight authority in the New Hampshire Lottery, HB 678 is drafted in the vernacular of lottery. While some lottery centric jurisdictions like Maryland make an effort to maintain the vernacular of commercial gaming, it is very unusual for the vernacular of lottery to be utilized by a gaming agency. To be consistent, any legislation that proposes regulatory oversight by a gaming agency rather than a lottery agency should adopt the vernacular of commercial gaming including, but not limited to, use of the term slot machine rather than the term video lottery machine. Massachusetts, for example, authorized slot machines.

Qualification Threshold: Licensing best practices in the gaming industry generally provide that all persons or entities that have a legal, beneficial or equitable ownership interest in, or are otherwise able to manage or control, the person or entity applying for a license must "qualify" as part of the license application of the person or entity. Each jurisdiction is somewhat nuanced in its approach to "qualifiers" but typically the threshold is a 5% ownership position (for example PA, NJ). HB 678 followed standard practices and required the qualification, for both operators and technology providers, of key employees, officers and directors but elected to apply a stricter standard than the majority of jurisdictions to shareholders or other equity holders requiring qualification where a person or entity owned more than a 3% legal or beneficial interest in the entity. Given the costs and personal intrusions associated with a gaming license application, investors in gaming companies often structure holdings to avoid qualifier status. Most assume a 5% threshold as that is the norm. Deviating from that relatively standard threshold will have an impact on the cost of entry to the jurisdiction.

Background Investigations: HB 678 clearly envisioned the licensing of facility providers and technology providers. Its terms were somewhat contradictory as to the licensing of the centralized data provider - some of this confusion may have its root in the practices of many lottery agencies such as New Hampshire's where the centralized data provider is not licensed per se but is vetted to a presumably equivalent standard as an element of the request for proposal and contracting process for the online lottery system. The gaming enterprise itself was to be managed and operated by state employees so licensing of employees was not required.

For facility providers and technology providers HB 678 incorporated a key check and balance on agency discretion, namely the conduct of a background investigation independent of the deciding authority. Facility license applicants and their qualifiers were to be referred by the Authority to the Attorney General for a background investigation with the Attorney General obligated to report the results to the Authority within 90 days.

As it relates to the investigative process, HB 678 incorporated a number of deficiencies all of which go to regulatory expectations and processes. Specifically,

- HB 678 was silent as to whether the Attorney General made a formal recommendation as to suitability or whether the Authority must follow the Attorney General's recommendation.

- With regard to the licensing of technology providers, the language of HB 678 was more ambiguous than with regard to facility license applicants and it may have envisioned a more limited role for the Attorney General with technology providers. From a best practices perspective, there would be no basis for distinguishing the two classes of applicants.

- HB 678 required the Attorney General to report the results of his investigation to the Authority within 90 days. This timeline is patently unrealistic even where some element of abbreviated licensing assessment is employed. Many statutes do not include a specified number of days. Given the scope of these investigations, if the drafters desired to specify a maximum number of days the statute should have included an extension provision for good cause shown.

Rulemaking: Under HB 678 rulemaking authority was not exclusive to the Authority. In a nuanced departure from the majority approach, the Director of the DGE was also authorized to adopt rules with the approval of the Authority.

Regulatory Enforcement: In a significant departure from standard practices which reserve regulatory enforcement authority exclusively to a gaming agency or lottery, HB 678 designated the Authority as the "primary agency" for regulatory enforcement but allowed concurrent prosecution of regulatory enforcement matters by the Attorney General, county or city attorneys, sheriffs or their deputies or police officials in towns. The Authority was authorized to appoint gaming investigators to perform regulatory prosecutions and was authorized to suspend or revoke after hearing in accordance with RSA 541-A or impose fines or penalties. Appeal was to be in accordance with RSA 541-A.

Criminal Enforcement: HB 678 designated the Authority as the "primary agency" for criminal enforcement related to the enabling statute but allowed concurrent prosecution of criminal enforcement matters by the Attorney General, county or city attorneys, sheriffs or their deputies or police officials in towns. It accomplished this by delegating to DGE investigators all powers reserved for sheriffs in any county.

Limits on "technology providers": HB 678 limited the source of video lottery machines to three manufacturers. This is a minority approach closely associated with lottery operations. The vast majority of commercial gaming jurisdictions allow an open market for manufacturers and distributors willing to undergo the suitability assessment and pay the fees and costs associated with licensure. There are more than three dominant manufactures of slot machines and this limitation would have been materially adverse to the competitiveness of the gaming product offered in New Hampshire.

Casino Service Industries: HB 678 contained no provision for licensure of gaming related service providers like redemption kiosk, slot data system providers and junket representatives. These providers should be licensed to the same standard as a technology provider. A recommended approach to the licensing of this category of vendor is provided in the narrative addressing SB 152, Omnibus Version at page 24.

Payout Percentage: HB 678 proposed a payout percentage of 92 % on an annual basis. For the reasons discussed with specificity at page 36 with regard to SB 152, Omnibus Version an actual or theoretical payout percentage this high would have been materially adverse to the competitiveness of the gaming product offered in New Hampshire.

House Bill 665

LIke HB 678, House Bill 665 ("HB 665") was introduced on January 3, 2013. By its terms it proposed two new chapters: RSA 284-B, *Video Lottery Machines and Table Games* and RSA 287-H, *Table Games*. It also included substantive amendments to RSA 284:21 related to the Lottery Commission's oversight of video lottery machines and table games and RSA 172 related to the studies and programs administered by the Department of Health and Human Services related to problem gambling. The Bill's primary sponsor was Rep. Edmond D. Gionet (R- Grafton -5) and its co-sponsors were Representatives Robert W. Walsh (D-Hillsborough 1), Kenneth L. Weyler (R-Rockingham 13) and Herbert D. Richardson (R-Coos 4) and Senator Nancy F. Stiles (R-District 24). After limited consideration on March 7, 2013 HB 665 was determined by Committee to be inexpedient to legislate meaning it would not be passed over to the other chamber.

HB 665 sought to authorize two destination commercial casinos, one located in the White Mountains and one in a county that borders Massachusetts. Under HB 665 the primary regulatory authority over both video lottery machines and table games was to be the New Hampshire Lottery Commission ("Lottery"). A two-step approach was envisioned pursuant to which an applicant competed to be awarded a video lottery operator license by the Lottery to possess, conduct and operate video lottery machines and, on the basis of that license, was authorized to apply to the Lottery for a table game operation certificate to conduct table games. As drafted there was no explicit requirement that a operator licensee apply for a certificate.

By its terms HB 665 reflected the core policy decisions identified below. As will be discussed with greater specificity herein, the decisions in HB 665 related to separation of the video lottery machine and table game authorization processes, the potential reliance on an investigation conducted under the rules of the Racing and Charitable Gaming Commission for an operator licensee and an insufficiently robust assessment of third party providers of services related to table games all constitute weakness in HB 665 to be avoided in future proposals.

Type of Gaming: HB 665 followed the approach of the majority of jurisdictions and afforded an operator significant discretion over the management and operation of the gaming enterprise including ownership and operation of video lottery machines. Following a precedent set in many newer jurisdictions, under HB 665 the Lottery was slated to own and operate a central computer system utilized to communicate with, activate and disable video lottery machines. [2] As indicated above, under proposed RSA 287-H, table games were authorized for a destination casino pursuant to a table game operation certificate available only to a holder of a video lottery operator license. HB 665 was explicit that its table game requirements did not apply to charitable games of chance operated pursuant to RSA 287-D.

[2] The majority of slot machines in the United States, including those operated in Nevada and New Jersey, are not connected to a state operated central control computer system. Alternative internal controls and regulator access to the operator's slot management system can very effectively substitute for that functionality.

Limited Number of Licenses and Machines: HB 665 limited the number of operator licenses to two destination casinos subject to the geographic limitations cited. No explicit requirements or limits with regard to number of video lottery machines or table games were specified in the statute. Destination casinos were not defined to be resorts but the proposed statute clearly anticipated a scenario where a existing resort or location entered into an agreement with a person or entity to manage and operate video lottery machines at their location. Notwithstanding the minimum capital investment requirement specified below, as the statute allowed existing resorts and racetrack facilities to be destination casinos, capital investment would likely be modest.

As noted above, the Bill inferred that a table game operation certificate was discretionary although presumably a proposal would have to incorporate table games to compete successfully for one of the two licenses. Where a certificate was issued, the statute placed no limitations on the number of table games.

Local Authorization: Like HB 678, HB 665 required a destination casino to be situated in a community that had affirmatively voted to adopt proposed RSA 284-B in accordance with rules that mirror those applicable to bingo and Lucky 7 under RSA 287-E. HB 665, however, added a provision that where a gaming licensee requested an action to adopt proposed RSA 284-B, the gaming licensee applicant was obligated to pay all costs associated with a vote on the question. No additional local authorization was required to add table games and the statute did not incorporate the petition for revocation available to the host community under HB 678.

Effective Tax Rate: Under HB 665 the video lottery licensee would remit its tax payments to the State Treasurer.

Video Lottery Machines - remitted weekly

49% of net machine income distributed as follows: [3]

Cost of administration of the chapter - no limits specified;
$75,000 each fiscal year to the Department of Health and Human Services to support problem gambling programs under RSA 172;
3% of total net machine income to the host municipality; and
Remainder of the 49% to the Highway Fund.

51% of net machine income - Operator Licensee

Following recent trends in taxing structures, non-cashable promotional credits were excluded from the calculation of net machine income. This exclusion is significant

[3] Under HB 665, net machine income is defined as ". . . all cash and other consideration utilized to play a video lottery machine at a facility licensee, less all cash or other consideration paid to players of video lottery machines as winnings. Non cashable promotional credits shall be excluded from the calculation.

to operators as it facilitates their ability to cost effectively incent their players through promotional credits that activate play on a video lottery machine but do not convert to cash at the conclusion of play.

Table Games - remitted quarterly

8% of daily gross table game revenue for deposit in the Highway Fund; [4] and,

92% of daily gross table game revenue - Operator Licensee.

License Application Fee: HB 665 contemplated awarding two operator licenses in accordance with a competitive process "determined" by the Lottery Commission and an unlimited number of technology provider licenses. The fees were as follows:

Operators

$ 100,000 - to the Lottery to fund construction and regulatory oversight.
$ 100,000 - to the Lottery for an initial operator license application deposit, if the cost to process the application exceeded that amount the Lottery was authorized to further assess the applicant.
$ 50,000 - to the Attorney General for an initial operator license background investigation, if the cost of investigation exceeded that amount the Attorney General was authorized to further assess the applicant.

$10,000,000 - due to the Lottery upon initial approval of an operator license.

$ 1,000,000 plus the cost of investigation upon renewal of an operator license.

Technology Providers

$ 100,000 - to the Lottery for an initial technology provider license application deposit, if the cost to process the application exceeded that amount the Lottery was authorized to further assess the applicant.
$ 25,000 - to the Attorney General for an initial technology provider license background investigation, if the cost of investigation exceeded that amount the Attorney General was authorized to further assess the applicant.

[4] Under HB 665, gross table game revenue is defined as the total of cash or equivalent wagers received in the playing of a table game minus the total of (1) Cash or cash equivalents paid out to patrons as a result of playing a table game; (2) Cash paid to purchase annuities to fund prizes payable to patrons over a period of time as a result of playing a table game; and (3) Any personal property distributed to a patron as a result of playing a table game. "Gross table game revenue" does not include travel expenses, food, refreshments, lodging, or other complimentary services. This term does not include counterfeit money, tokens, or chips; coins or currency of other countries received in the playing of a table game, except to the extent that they are readily convertible to United States currency; cash taken in a fraudulent act perpetrated against a licensee for which the licensee is not reimbursed; or cash received as entry fees for contests or tournaments in which patrons compete for prizes.

$ 50,000 - due to the Lottery upon initial approval of a technology provider license.

$ 50,000 plus the cost of investigation upon renewal of a technology provider license.

Table Games

$10,000,000 - initial authorization fee for a video lottery operator to obtain a table game operation certificate - any amount not used to support implementation of table games was to be remitted to the Highway Fund.

No more than $1,000,000 renewal fee payable at five year intervals.

Minimum Investment: Ten million dollars for construction or renovation of a destination casino.

License Term: Under HB 665, all licenses had a five-year term. In recognition of the cost of license renewals many jurisdictions are moving toward a longer license duration. Five years is within the norm.

Regulatory Structure: HB 665 bifurcated video lottery machines and table games as follows.

HB 665 placed all authority to license and regulate the installation, operation and conduct of video lottery machines with the Lottery and the Bill was drafted in the vernacular of lottery. It contained no reference to any delegation of authority to the Executive Director of the Lottery although it does not preclude a delegation. Under the Bill the Lottery was responsible for licensing operators, technology providers and key employees. There was no provision for licensing or registration of gaming and non-gaming related employees. Under the Bill's provisions, operators fell into two categories - a destination casino that elected to install, operate and conduct video lottery machine gaming or a person or entity retained by a destination casino to manage or otherwise participate in the operation of video lottery machine gaming at a destination casino. Both categories were licensed to the same suitability standard. Under HB 665 the Lottery also selected, contracted for and managed the central computer system subject to technical standards put did not license the provider of that system.

As noted above, HB 665 treated table games in a materially different manner and authorized them via a table game operation certificate available only to a holder of a video lottery operator license. As was the case with video lottery machines, HB 665 anticipated that a video lottery operator licensee awarded a table game operation certificate might utilize a third party to manage, supervise or otherwise direct or provide equipment related to the operation of table games. By its terms it adopted the concept of a primary game operator and secondary game operator from RSA 287-D relating to charitable games of chance. In what can only be categorized as a material defect in the

proposed regulatory scheme, HB 665 did not appear to require primary game operators or secondary game operators of table games to be subjected to the same standard of review as a technology provider related to video lottery machines. Instead, HB 665 appeared to place significant discretion with the Lottery to determine the suitability of these parties based on "any" criminal history or background check the Lottery might initiate through the State Police or "any" background investigation that the Lottery might initiate with the Attorney General.

Qualification Threshold: Licensing best practices in the gaming industry generally provide that all persons or entities that have a legal, beneficial or equitable ownership interest in, or are otherwise able to manage or control, the person or entity applying for a license must "qualify" as part of the license application of the person or entity. Each jurisdiction is somewhat nuanced but typically the threshold is a 5% ownership position (for example PA, NJ). HB 665 followed standard practices and required the qualification, for both operators and technology providers, of key employees, officers, directors, partners and trustees but deviated from standard practice by applying a more relaxed standard to shareholders or other holders of an ownership interest requiring qualification only where a person or entity owned more than 10% of a legal or beneficial interest in the applicant.

Background Investigations: For operators, technology providers and their respective key employees HB 665 generally incorporated a key check and balance on agency discretion and required the Lottery to refer the conduct of the background investigation outside the Lottery to an independent party, in this case the Attorney General. Under HB 665 the Attorney General conducted the investigation and made a specific suitability recommendation to the Lottery as to the fitness of the person or entity to be associated with video lottery machines.

As it relates to the investigative process, in addition to its problematic approach to table game authorization HB 665 incorporated a number of additional weaknesses, two of which if applied carelessly could have impacted the fairness of a competitive selection process.

- By its terms, HB 665 allowed the Attorney General to rely, for purposes of an operator license, on the results of a license investigation it conducted for a pari-mutuel licensee, meaning a entity licensed by the Racing and Charitable Gaming Commission ("Commission") to offer simulcast horse and dog racing, provided that investigation was conducted within 12 months of the filing of a video lottery machine operator license application " . . . to the extent the applicant's circumstances have not materially changed." While the Commission's application process, its licensing criteria and the scope of the investigation conducted by the Attorney General's Office on the Commission's behalf are arguably consistent with that applied in horse racing they are not as robust as those commonly applied to commercial casino applicant's and the likely result, if the Lottery followed best practices in its rulemaking, would be that a

Commission licensee able to avail itself of this exception would be held to a lower standard of review than other applicants for an operator license.

- HB 665 also included the relatively new concept of abbreviated licensing. Employed in many reputable jurisdictions, abbreviated licensing allows a licensing authority to make a specific finding, after study and comparison, that the licensing standards of another jurisdiction are substantially similar to its criteria and, on that basis, permits it to afford licensure in the comparable jurisdiction weight in its own licensing assessment. Best practice applications of abbreviated licensing allow the entity conducting the background investigation, under HB 665 the Attorney General, to determine whether any information it has separately developed should supersede or otherwise outweigh a license in good standing in a comparable jurisdiction. Consideration of a comparable license is part of the suitability assessment not in lieu of it most notably because jurisdictions rarely, in the absence of a specific memorandum of agreement with another jurisdiction, release their full investigative file on an applicant. As drafted HB 665 could be read to allow the Lottery to make a licensing determination on the basis of a license in a comparable jurisdiction without any involvement or consideration of the applicant by the Attorney General. Such a course of action is not recommended. Abbreviated licensing is a positive development that reflects the continuing standardization of licensing practices in the gaming industry. It should be employed, however, as a means of expediting the background investigation, not in lieu of it.

- HB 665 required the Attorney General to issue his suitability recommendation to the Lottery within 60 days. This timeline is patently unrealistic even where some element of abbreviated licensing assessment is employed. Many statutes do not include a specified number of days. Given the scope of these investigations, if a number of days was specified the statute should have included an extension provision for good cause shown.

- HB 665 required the Lottery to act on a license application within 180 days of receipt of a completed application. Many statutes do not include a specified number of days. Given the scope of these investigations, if a number of days was specified the statute should have included an extension provision for good cause shown.

Rulemaking: Following standard practices, HB 665 provided that the Lottery had rulemaking authority over both video lottery machines and table games consistent with the implementation of the statute.

Regulatory Enforcement: Under HB 665 the Lottery exercised exclusive responsibility for regulatory enforcement. The proposed statute did not sufficiently develop how a regulatory violation would be prosecuted.

Criminal Enforcement: HB 665 did not sufficiently allocate responsibility for criminal enforcement. It is important that jurisdiction over criminal enforcement matters on the gaming floor and in restricted areas of a facility be formally established within an enabling statute. Typically, gaming related criminal enforcement is within the jurisdiction of state police or the Attorney General and non-gaming related criminal enforcement is the responsibility of the local jurisdiction.

Employees: HB 665 contained no provisions for licensing or registration of non-key employees or independent contractors. Licensing or registration, as appropriate, of employees and independent contractors involved in operating departments (security, surveillance, internal audit, accounting, operations, information technology) is a best practice. A recommended approach to employee licensing is provided in the narrative addressing SB 152, Omnibus Version at page 23.

Casino Service Industries: HB 665 contained no provision for licensure of gaming related service providers like redemption kiosk, slot data system providers and junket representatives. These providers should be licensed to a substantially similar standard as a technology provider. A recommended approach to the licensing of this category of vendor is provided in the narrative addressing SB 152, Omnibus Version at page 24.

Payout Percentage: HB 665 proposed an average payout percentage of 87 %. For the reasons discussed with specificity at page 36 with regard to SB 152, Omnibus Version an actual payout percentage at this level could be adverse to the competitiveness of the gaming product offered in New Hampshire.

Senate Bill 152, Omnibus Version

Senate Bill 152 was introduced on January 31, 2013. Although ultimately determined to be inexpedient to legislate on May 22, 2013, its Omnibus Version (5/16/13), which amended its Senate Version (3/14/13), developed and amplified concepts from both House Bills in the 2013 legislative Session, most notably HB 665, as well as incorporated many regulatory best practices. As the Omnibus Version largely improved upon the Senate Version, this report will focus on the Omnibus Version ("SB 152-O").

SB 152-O proposed a new chapter RSA 284-B, *Video Lottery Machines and Table Games* along with substantive amendments to RSA 284:21 related to the Lottery Commission's oversight of video lottery machines and table games, RSA 172 related to studies and programs by the Department of Health and Human Services related to problem gambling and RSA 287-D related to the Racing and Charitable Gaming Commission's oversight of games of chance. It was sponsored by Senator Lou D'Allesandro (D-District 20) and had 13 co-sponsors, Senators Jim B. Rausch (R-District 19), Chuck W. Morse (R-District 22), Donna M. Soucy (D-District 18), Bette R. Lasky (D-District 13), Peggy Gilmour (D-District 12), Jeff Woodburn (D- District 1), Sam A. Cataldo (R-District 6) and Nancy F. Stiles (R-District 24) and Representatives Gary S. Azarian (R-District Rockingham 8), Kenneth L Weyler (R-District Rockingham 13), Patrick T. Long (D-Hillsborough 42), Robert L. Theberge (D-District Coos 3) and Laura C Pantelakos (D-District Rockingham 25).

In an effort to provide the Authority with recommendations and input in a manageable format WhiteSand will analyze SB 152-O by identifying and discussing key elements of its regulatory approach and will then advise as to whether the proposed statute is consistent with regulatory best practices and, where appropriate, will enumerate options and alternatives to the approach reflected in the Bill.

SB 152-O chose a lottery centric model tasking the New Hampshire Lottery Commission ("Lottery") with authority to " . . .review, select and grant a license for one gaming location ". The license would have authorized no more than 5000 video lottery machines and 150 table games at a single location. As will be discussed with specificity herein, while many of SB 152-O's concepts and processes were significantly more developed than in its predecessor House Bills, especially as it related to problem gambling, political contributions and change in ownership, the Bill unfortunately extracted from HB 665 several weaknesses related to separation of the video lottery machine and table game authorization processes, substitution of a prior background investigation conducted for another purpose for the background investigation prerequisite to a gaming license and an insufficiently robust suitability assessment of third party providers of services related to table games. In addition, its attempt at integrating charitable games of chance into a commercial casino gaming environment is problematic at best and, at least in its present form, would likely have deleteriously impacted the desirably and value of a New Hampshire license opportunity.

Type of Gaming: SB 152-O enabled both video lottery machines and table games and in keeping with the majority approach afforded a licensee significant discretion over the management and operation of the gaming enterprise including ownership and operation of the video lottery machines. Following a precedent set in many newer jurisdictions, under SB 152-O state ownership and operation extended only to the Lottery contracting for and operating the central computer system utilized to communicate with, activate and disable video lottery machines. [5] In a serious departure from standard authorization practices, however, although the gaming licensee selected was eligible to conduct table game operations SB 152-O made issuance of a table game operation certificate to a selected licensee contingent upon its willingness to operate, or permit the on site operation of, games of chance by charitable organizations under RSA 287-D. In specific, SB 152-O required that at least 5000 SF of principal gaming area be set aside for charitable gaming and that there be a separate entrance to this space if architecturally feasible. Although the statute was somewhat ambiguous in this regard, it appeared that under its terms the Racing and Charitable Gaming Commission retained jurisdiction over any games of chance conducted at a gaming location. See Proposed 284-B:19.

> **Recommendation #1**. Given the deficiencies cited herein in New Hampshire's existing regulatory approach to charitable gaming, especially as it relates to the suitability assessment applied to game operators in games of chance, to physically and operationally integrate games of chance into a commercial gaming sector was and remains ill advised. The cornerstone of a successful commercial gaming sector is public confidence. By its terms SB 152-O would have forced a gaming licensee's well regulated table game operation to co-exist in a single gaming location with, and to in fact compete with, a table game operation that appears physically consistent but which was, in reality, radically different operationally and subjected to materially less robust licensing and operating regulations. As any distinctions would be largely lost on the gaming public, the licensee's reputation, and the public's overall confidence in its gaming product, would have been exposed to the vagaries of an operation within its boundaries largely outside its control. Given the realities of gaming regulation nationwide, a gaming licensee's relationships with the charitable organizations and game operators in New Hampshire would have been subjected to scrutiny by regulating authorities in other jurisdictions with all of the costs and complications related thereto. While there may be opportunities for a well regulated commercial gaming sector to support or supplement the efforts of the charitable gaming sector, in its report to the Legislature the Authority is strenuously advised to recommend against any physical linkage between table games and charitable gaming.
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> **Recommendation #2.** If the Authority elects to advance a proposal that unbundles table games and charitable gaming in the form of games of chance, thus effectively permitting charitable games of chance to continue to be offered

[5] The majority of slot machines in the United States, including those operated in Nevada and New Jersey, are not connected to a state operated central control computer system. Alternative internal controls and regulator access to the operator's slot management system can substitute very effectively for that functionality.

on a parallel track, it is urged to reconsider the efficacy of the adjusted charitable benefit concept at Proposed 284:6-b, *Duties of the Racing and Charitable Gaming Commission.* In lieu thereof the Authority might consider the creation of a fund, based on gross gaming revenue i.e. 1% and administered by the Racing and Charitable Gaming Commission, from which all charitable organizations meeting the criteria of RSA 287-D, whether or not they are currently offering games of chance, can compete for project specific annual grants.

Limited Number of Licenses and Machines: SB 152-O sought the development of a single high end commercial casino and accordingly limited the number of operator licenses to one, it did not include geographic requirements or limitations. Unlike HB 665 which allowed the market to determine the number of video lottery machines or table games at each of its two destination casinos, however, SB 152-O limited video lottery machines to no more than 5000 and table games to no more than 150. See Proposed 284-B:9.

Recommendation #3. Where multiple licenses are available and a jurisdiction has a target number of machines and gaming positions per location it is advisable to incorporate exception language in the statute that allows the regulating entity to reallocate the games mix among the existing licensees where the statutory formula falls short in order to maximize revenue to the state. See Md. Code §9-1A-36. With a single license this option is not available and should it recommend in its report to the Legislature a single license with a game density comparable to SB 152-O, the Authority should be prepared to acknowledge, at least in the short run, that the maximum number of machines and player positions may not be initially developed. The vast majority of successful casino operations in the Northeast, for example, Sands Casino Resort Bethlehem (discussed with greater specificity herein) have fewer than 5000 slot machines and 150 table games and it is common practice for operators to enter the market with a smaller footprint and to grow a facility as demand increases. If the desired result is a single high end commercial casino of a size and magnitude commensurate with the number of machines and gaming positions cited it will be critical that short term revenue projections do not anticipate the maximum level of build-out and that the cost of entry to the jurisdiction in the form of license fees, tax rate, sector subsidies and the cost of regulation permit an operator the margins necessary to drive the desired capital investment.

Local Authorization: Like HB 678 and HB 665, SB 152-O contained a prerequisite that a host community adopt proposed RSA 284-B in accordance with rules that generally mirror those applicable to bingo and Lucky 7 under RSA 287-E. Following HB 678, SB 152-O expressly provided that where a gaming licensee requested an action to adopt proposed RSA 284-B, the gaming licensee was obligated to pay all costs associated with a vote on the question.

Recommendation #4: SB 152-O astutely declined to incorporate the petition for revocation available to a host community under HB 678 . Any proposal advanced by the Authority should treat a licensee's compliance with any commitments made to a host community is a explicit condition on the license. Conditioning a license, as SB 152-O anticipated at Proposed 284-B:18, ensures that the licensee's obligations to the host community are well defined and that compliance is more objectively assessed. Properly structured, an enabling statute should position the regulating authority to enforce the commitment to the host community through sanctions, suspension or revocation.

Effective Tax Rate: Under SB 152-O the effective tax rates were as follows.

Video Lottery Machines - 30% effective tax rate remitted daily as follows. See Proposed 284-B:22.

- 25% of net machine income [6] allocated as follows:
  - Cost of administration of the chapter for the Lottery and Attorney General including the cost of the central computer system: no limitations specified;
  - Balance of the 25% not required for administration of the chapter was to be paid over to the state treasurer and distributed as:
    - 45% to department of Transportation pursuant to a specified allocation scheme;
    - 45% to a newly created university and community college fund;
    - 10% to a north country economic development fund.
- 3% of net machine income to the host community;
- 1% of net machine income to municipalities abutting the host community' and,
- 1% to the Department of Health and Human Services to support programs related to problem gambling under RSA 172.

[6] Under SB 152-O net machine income was defined as ". . . all cash and other consideration utilized to play a video lottery machine at a gaming location, less all cash or other consideration paid to players of video lottery machines as winnings. Noncashable promotional credits shall be excluded from the calculation.

- 70% of net machine income - Gaming Licensee less any adjusted charitable benefit amount or gaming location charitable benefit amount due to the Racing and Charitable Gaming Commission

Table Games - remitted daily. See Proposed 284-B:19

- 14% of daily gross table game revenue [7] to be deposited in an education trust fund; and
- 86% of daily gross table game revenue - Gaming Licensee

Recommendation #5. Following recent trends in taxing structure, under SB 152-O "noncashable promotional credits" were excluded from the calculation of net machine income. In addition, "promotional credits" were excluded from the calculation of gross table game revenue. These exclusions are significant to operators as they facilitate their ability to cost effectively incent their players through promotional credits that activate play on a video lottery machine or table game. Typically, if afforded at all, deductions are limited to noncashable promotional credits meaning credits that do not convert to cash at the conclusion of play. These deductions can have a significant impact on revenue to the state and the Authority is urged in its report to the Legislature to recommend treating table games consistent with video lottery machines and limit deductibility to noncashable promotional credits. This can be accomplished expressly or by authorizing rulemaking with regard to the deductibility of promotional credits. Some states like New Jersey place a cap on the amount of noncashable promotional credits that may be deducted in a year but as most competitor states, notably Massachusetts, have not invoked a statutory cap that course of action is not recommended.

License Application Fee: SB 152-O authorized one gaming license awarded in accordance with a competitive process administered by the Lottery. See Proposed 284-B:9,13. An unlimited number of technology provider licenses were authorized. See Proposed 284-B:16. Applicable fees were as follows:

Gaming License.

$ 500,000 - to the Lottery for an initial gaming license application deposit, this amount was nonrefundable, if the cost to process the application

[7] Under SB 152-O gross table game revenue was defined as the total of cash or equivalent wagers received in the playing of a table game minus the total of (1) Cash or cash equivalents paid out to patrons as a result of playing a table game; (2) Cash paid to purchase annuities to fund prizes payable to patrons over a period of time as a result of playing a table game; and (3) Any personal property distributed to a patron as a result of playing a table game and any promotional credits provided to patrons. "Gross table game revenue" does not include travel expenses, food, refreshments, lodging, or other complimentary services. This term shall not include counterfeit money, tokens, or chips; coins or currency of other countries received in the playing of a table game, except to the extent that they are readily convertible to United States currency; cash taken in a fraudulent act perpetrated against a licensee for which the licensee is not reimbursed; or cash received as entry fees for contests or tournaments in which patrons compete for prizes.

exceeded that amount the Lottery was authorized to further assess the applicant.

$ 100,000 - to the Attorney General for an initial background investigation, this amount was nonrefundable, if the cost of investigation exceeded that amount the Attorney General was authorized to further assess the applicant.

$80,000,000 - due to the Lottery upon initial approval of an gaming license; under the expressed terms of SB 152-O this amount was to be made available to the state in the fiscal year received.

$ 1,500,000 - plus the cost of investigation upon renewal of an operator license.

Technology Providers.

$ 100,000 - to the Lottery for an initial technology provider license application deposit, by inference this amount was refundable if not exhausted; if the cost to process the application exceeded that amount the Lottery was authorized to further assess the applicant.

$ 25,000 - to the Attorney General for an initial technology provider license background investigation, by inference this amount was refundable if not exhausted; if the cost of investigation exceeded that amount the Attorney General was authorized to further assess the applicant.

$ 50,000 - due to the Lottery upon initial approval of a technology provider license.

$ 50,000 plus the cost of investigation upon renewal of a technology provider license.

Table Game Certification Fee

$10,000,000 - to the Lottery as a initial authorization fee for a video lottery operator to obtain a table game operation certificate - any amount not used to support implementation of table games was to be remitted to the Highway Fund.

No more than $1,000,000 renewal fee payable at five year intervals.

Recommendation # 6. The $80,000,000 gaming license fee is comparable to the $85,000,000 sought by Massachusetts. The Table Game Certification Fee, however, raises New Hampshire to $90,000,000 for a full scale casino. For the multiplicity of reasons stated herein, the Authority is advised to consider recommending in its report to the Legislature that any license fee assessed cover both video lottery terminals and table games.

Recommendation # 7. The provision in SB 152-O that the gaming license fee be available to the state in the fiscal year received should be amplified in any future proposal advance by the Authority to expressly provide access to a portion of these funds to develop and fund the regulatory apparatus pre-opening.

Minimum Investment: SB 152-O required a minimum capital investment of $425,000,000 exclusive of land acquisition, off site improvements and license fees. This level of capital investment had to be achieved within 5 years of the grant of the gaming license. This minimum investment requirement is comparable to the $500,000,000 minimum investment required by Massachusetts.

Recommendation #8. The five year timeline in SB 152-O on meeting the full minimum investment requirement is realistic and the Authority should consider recommending a provision to this effect in its report to the Legislature. Any gaming license issued should be conditioned on the licensee's compliance with specific benchmarks associated with the minimum investment requirement.

License Term: Under SB 152-O a gaming license has a ten year term and a technology provider license has a 5 year term. The terms for the central system provider and key employee licenses and non-key gaming employee registration are unspecified. In recognition of the cost of license renewals many jurisdictions are moving toward a longer license duration and the 10 year duration proposed in SB 152-O is in keeping with industry norms.. Massachusetts has elected an generous 15 year license cycle at least in part to justify its high cost of entry. Other states like New Jersey, for example, have moved toward a non-expiring license subject to a full update akin to a license renewal every five years.

Recommendation #9. Under all the facts and circumstances a ten year term for a gaming license with a full renewal application and $1,500,000 renewal fee is firm middle ground on this issue. Likewise, five year term for all other licenses and registrations is within the norm. The Authority is advised to consider following SB 152-O.

Regulatory Structure:

SB 152-O placed general responsibility for licensing and regulating the installation, operation and conduct of video lottery machines and the operation of table games with the Lottery and the Bill was drafted in the vernacular of lottery. Under the terms of SB 152-O, an Administration and Enforcement Bureau ("Bureau") was created within the Lottery and it is this Bureau that was designated as the primary enforcement agent for regulatory matters. The Director of the Bureau was to serve as its executive and administrative head, was to be appointed by the Lottery and was to report to the Lottery's Executive Director. See Proposed 284-B:2, I, II.

SB 152-O contemplated the licensure of a single gaming licensee and unlimited technology providers [8] and their respective qualifiers and key employees. For both of these two categories it developed fairly standard licensing criteria. The Bill also referenced the licensure of the central computer system provider and the registration of non-key *gaming* employees. In the latter two areas it articulated no category specific licensing or registration criteria relegating the development of licensing and registration criteria and processes to the rulemaking function although the standards for a technology provider are obviously a good fit for the central computer system provider. Of particular note, SB 152-O did not contemplate even a registration process for non-gaming employees like cocktail servers or facilities personnel whose duties may be performed on the gaming floor or in restricted areas. Finally, the Bill left undefined the status of persons it referred to as " . . .technology vendors not licensed pursuant to this chapter . . ." and vendors of associated equipment [9] relegating these categories of vendor to rulemaking without benefit of a designation in the statute as to whether licensing or registration was to be expected. See Proposed 284-B:19.

SB 152-O treated table games in a materially different manner than video lottery machines. In specific, it provided that as a mandatory element of the gaming license application the applicant file a petition to conduct table games and that the granting of that petition take the form of a table game operation certificate triggering collection of a $10,000,000 Table Game Fee. As noted above, SB 152-O expressly made a table game operation certificate contingent upon an agreement to operate, or permit the on site operation of, games of chance by charitable organizations under RSA 287-D. Following HB 665, the Senate Bill anticipated that a gaming licensee might utilize a third party to manage, supervise or otherwise direct the operation of table games. By its terms it pursued an adaptation of the concept of a primary game operator and secondary game operator in RSA 287-D relating to charitable games of chance and, like HB 665, did not expressly require primary game operators and secondary game operators of table games to be subjected to the same standard of review as a technology provider related to video lottery machines. Instead SB 152-O placed significant discretion with the Lottery to determine the suitability of these parties based on "any" criminal history or background check the Lottery might initiate through the State Police or "any" background investigation that the Lottery might initiate with the Attorney General. See Proposed 284-B:12, 284-B:19.

[8] SB 152-O defined "technology provider license " to mean the license issued by the lottery commission to a technology provider licensee which allows the technology provider licensee to design, manufacturer, install, distribute or supply **video lottery machines and table game devices** for sale or lease to a gaming licensee.

SB 152-O defined “table game device” to include: tables, cards, dice, chips, shufflers, tiles, dominoes, wheels, drop boxes, or any mechanical or electrical contrivance, terminal, machine, or other device approved by the commission and used or consumed in operation of or in connection with a table game.

[9] SB 152-O defined “associated equipment” as any equipment or mechanical, electromechanical, or electronic contrivance, component, or machine used in connection with video lottery machines and/or table gaming, including linking devices, replacement parts, equipment which affects the proper reporting of gross revenue, computerized systems for controlling and monitoring table games, including, but not limited to, the central computer system, and devices for weighing or counting money.

SB 152-O clearly incorporated a key check and balance on agency discretion and required the referral of background investigations outside the Lottery to the Attorney General at least for a gaming license and technology providers and their respective qualifiers including key employees. See Proposed 284-B:2, III. It also created within the Department of Safety a Gaming Enforcement Unit ("Gaming Enforcement") under the supervision of the Commissioner of the Department of Safety. Gaming Enforcement, which would be staffed at least in part by state police, was charged with investigating regulatory violations and initiating proceedings before the Commission related thereto. It was also charged with investigating crimes that involve a violation of the enabling statute that occur at a gaming location. See Omnibus Version at page 32.

Under SB 152-O the Lottery's Bureau would have maintained an on site compliance presence concurrent with Gaming Enforcement. See Proposed 284-B:24.

Notwithstanding the general soundness of its approach there are any number of areas where the regulatory scheme envisioned by SB 152-O lacks sufficient clarity. Lines of responsibility and authority are blurred and the amount of concurrent authority envisioned arguably invites costly duplication of effort at best and regulatory paralysis at worst. In a number of areas the full scope of the licensing scheme is not outlined. While the rulemaking process is intended to amplify processes, an enabling statute should be explicit as to the standard of review for levels of employees and vendors.

Recommendation # 10. In its report to the Legislature, regardless of the regulatory structure recommended, the Authority should ensure that structural deficiencies of the nature cited herein with regard to SB-152-O are resolved.

- Additional clarity is required as to the relationship between the Executive Director of the Lottery and the Director of the Bureau. In specific, the statute should be explicit as to whether the Director of the Bureau reports to the Executive Director of the Lottery for administrative matters and daily supervision only or whether the Executive Director directs policy, purpose, responsibility or authority for the Bureau or plays any role with regard to the salary or termination of the Director. The statute's designation of the Bureau as the primary enforcement agent for regulatory matters infers a degree of autonomy in the Director and it will be essential for the efficient operation of the Bureau that lines of authority be clear.

- Additional clarity is required as to the duties and responsibilities of the Attorney General and Gaming Enforcement. While it was an important improvement for the Omnibus Version to have clarified the Attorney General's responsibility for background investigations and the suitability recommendation, the language of Proposed 284-B:2, III blurs lines of responsibility and invites unrestricted and unwarranted

redundancies in regulatory and criminal oversight. Further reconciliation is required as to the apportionment of responsibilities between the Bureau, Gaming Enforcement and the Attorney General for regulatory enforcement and between Gaming Enforcement and the Attorney General for criminal enforcement. Notably, Proposed 284-B:24 provided that the Lottery would maintain an onsite compliance presence in addition to Gaming Enforcement. In the section creating Gaming Enforcement the Bill expressly provided that Gaming Enforcement would initiate proceedings before the Lottery for regulatory violations. Can the Bureau also do that? Will it have its own legal staff?

- If cooperation and information sharing language is incorporated into an enabling statute it should be required of all parties authorized concurrent jurisdiction. The language of Proposed 284-B:2, III imposed obligations in this regard on the Lottery and State Police that were not imposed on the Attorney General.

- As noted above, SB 152-O treated table games in a materially different manner than video lottery machines. Its incorporation of the concept of a primary game operator and secondary game operator from RSA 287-D relating to charitable games of chance and its failure to hold such persons to the same standard of review as a technology provider is a material weakness in its overall approach. The focus of SB 152-O was a single high end casino. That infers a first rate gaming company and a first rate gaming company operates its own table games they do not, and many times are precluded by regulation from, contracting out a table game operation. Where a jurisdiction permits a casino licensee to utilize a management company that entity is typically licensed to the same standard as the casino licensee.

- SB 152-O made no provision for registering employees that do not fit the non-key *gaming* employee definition. Oftentimes persons deemed non-gaming like facilities personnel or cocktail servers in the normal course of their duties have access to restricted areas and the gaming floor. On that basis the preferred course of action is a basic disclosure and registration requirement. Many jurisdictions follow a two tier approach to employees with gaming employees, like dealers and cashiers, subjected to a realistic licensing scheme or a higher tier of registration than employees that do not handle assets or proceeds like cocktail servers and facilities personnel. In its report to the Legislature the Authority is urged to recommend a two tiered approach to non-key gaming employees and to

recommend that the Attorney General perform any background check related to a license. The primary regulating entity, upon review of a criminal history check run by the Division of State Police, may accept a registration without the involvement of the Attorney General.

- SB 152-O failed to develop a comprehensive licensing or registration scheme for vendors doing business with a gaming licensee. While to varying degrees SB 152-O addressed associated equipment, video lottery machines and table game devices it failed or elected not to address non-technical vendors like junket enterprises and representatives, money transmitters and vendors of non-gaming related services like consultants, contractors etc. It is a common practice to incorporate a reasonable level of scrutiny of persons doing business with a gaming licensee into a regulatory scheme. New Jersey, for example, utilizes a three level casino service industry license/registration approach. The top level of scrutiny is applied to a casino service industry enterprise license applicant- this license applies to a company that offers goods and services directly related to casino or gaming activity including gaming equipment manufacturers, suppliers and repair companies. This level of review also applies to any company, regardless of the nature of the goods or services, permitted a revenue share with a casino licensee such as an internet service provider. SB 152-O's technology provider licensing criteria mirrors this level of review. A mid-level of review is applied in New Jersey to an ancillary casino service enterprise applicant. An example would be money transmitter or other financial transaction company that performs routine services like check cashing and credit card advance services for a casino licensee. The lowest level of review would apply to a vendor registrant applicant such as a consulting company like WhiteSand or a service provider like a bakery or laundry service. Another variation on this type of scheme is to allow the dollar amount of business conducted by a vendor with the gaming licensee to drive licensing or registration for vendors of non-gaming goods and services. In its report to the Legislature the Authority is urged to recommend a broader approach to vendors and to recommend that the Attorney General perform any background check related to a license. The primary regulating entity, upon review of a criminal history check run by the Division of State Police, may accept a registration without the involvement of the Attorney General.

Alternative Regulatory Structures

As an element of this report WhiteSand has been tasked with advising on alternative approaches to regulatory structure. Distilled to its essence, SB 152-O advanced a form of lottery centric, dual agency regulatory scheme with the Lottery maintaining responsibility for license issuance, adjudication of regulatory violations and rulemaking, its Bureau responsible for compliance, audit and certification of revenue, the Attorney General responsible for background investigations and Gaming Enforcement responsible for regulatory investigations and gaming related criminal enforcement. Conceptually SB 152-O comports with best practices in that it ensures clear segregation of the investigatory and adjudicatory functions. With resolution of the above referenced issues, inconsistencies and concerns, it is a workable approach. There are, however, alternatives that are equally valid that might, under all the facts and circumstances, constitute a better fit for New Hampshire. As the Authority is charged with examining all viable options and alternatives, in the course of its due diligence it is urged to examine the following three options.

Structural Option #1

A variation on SB 152-O's approach that the Authority might consider is to overlay the general scheme of SB 152-O with a gaming location commission somewhat analogous to Maryland's Lottery Facility Location Commission. See Md. Code § 9-1A-36. With one or a very limited number of gaming locations, it may be more palatable to appoint a new body to conduct the competitive process from among a group of qualified applicants rather than allow an existing agency, that is also a competitor for gambling dollars, to conduct that process. Qualified applicants would be persons determined to be suitable by the Lottery after receipt of a suitability recommendation by the Attorney General.

A gaming location commission might consist of five members appointed subject to enumerated experiential and conflict criteria as follows:

Three by the Governor
One by the President of the Senate
One by the Speaker of the House

The Chair should be a gubernatorial appointment; balancing party representation on the Board should be considered.. Members could be part time, appointed for a defined term, for example, three years with little to no compensation other than expenses. They should be subject to a gaming industry specific ethics policy and at least a two year post employment restriction and an objective removal scheme might involve the Governor, in consultation with the President of the Senate and the Speaker of the House, for inefficiency, misconduct in office or neglect of duty.

Structural Option #2

Although SB 152-O, like HB 665, declined to follow the state owned and operated model adopted in Rhode Island and embraced in HB 678, that model remains an viable option albeit not a recommended one. In considering this model the Authority should be aware that *in practice* the state owned and operated model could run the full spectrum from New Hampshire declining the quality management and expertise available in this very sophisticated industry - and the revenue that expertise can generate - through to it paying lip service to the "state operated" mandate and actually taking managerial dictation from the licensee. Of particular relevance is the recent experience of Maryland. It initially elected to own both its video lottery terminals and central control computer system. A scant four years into it, driven by the model's upfront capital demands and operational considerations, it is actively extracting itself from terminal ownership with the expectation going forward of only retaining an interest in its central control computer system.

Structural Option #3

In many respects SB 152-O reflects an evolution of the lottery centric model initially proposed in HB 665. In its creation of an Administration and Enforcement Bureau within the Lottery, the appointment of a Director for that Bureau, and in its specific designation of the Bureau as the primary enforcement agent for regulatory matters there is tacit recognition of two facts: (1) that regulation of commercial casino gaming is materially different than regulation of a state owned and operated Lottery and (2) that the Lottery does not have an existing technical, audit or compliance staff readily cross trained and cross purposed to oversee a casino operation. These are not criticisms of the Lottery, they are simply realities. As with all state run lotteries, operation and promotion are its dominant fortes, regulation is largely in the form of contract administration. While there are likely economies of scale to be derived from the Bureau reporting through the Lottery these are almost all on the administrative side of that agency and are associated with office space, human resources, payroll, revenue collection and distribution.

Following the approach of many newer jurisdictions like Pennsylvania and Maryland, SB 152-O envisioned utilizing a central computer system to communicate with video lottery machines for purposes of information retrieval, retrieval of win and loss data and state activation and disabling. The primary purpose of this system would be to determine net machine income for tax assessment purposes. It is important for the Authority to understand that this hardware and software is physically and operationally independent of any hardware or software presently utilized by the Lottery.

Viewed in isolation the Bureau resembles a gaming agency and the terms of SB 152-O are readily converted to a gaming agency model. The roles of the Attorney General and Gaming Enforcement could remain largely intact and a Gaming Control Board could perform the functions assigned under SB 152-O to both the Lottery and its Bureau meaning that the newly created Board would undertake license issuance,

adjudication of regulatory violations, rulemaking, compliance, audit and revenue certification, collection and distribution. The newly created Gaming Control Board would appoint a director who would report to its Chair for administrative matters and daily supervision only and to the entire Board on matters of policy, purpose, responsibility or authority and the Board would control the salary and termination of the director as well as the appointment. Here again, the removal of an existing competitor agency like the Lottery from the gaming license award process might be attractive to lawmakers reluctant about an overconcentration of power in a single commission or executive director. Even with a limited number of gaming locations, there is no rational basis for assuming that a gaming agency is cost prohibitive. Regardless of whether a gaming agency model or a lottery centric model is elected, the start up costs will be comparable - the central computer system will need to be acquired and manned, office space secured, additional administrative infrastructure employed and personnel acquired with the expertise and skill sets required to oversee a commercial casino operation. In exploring this option the ability of the Department of Revenue Administration to assist a gaming agency with tax collection and/or distribution should be explored.

Similar to the gaming location commission option, a Gaming Control Board could consist of five members appointed subject to enumerated experiential and conflict criteria as follows:

Three by the Governor
One by the President of the Senate
One by the Speaker of the House

The Chair should be a gubernatorial appointment; balancing party representation on the Board should be considered. At least the Chair should be full time, all members should be compensated and appointed for a defined term, for example, four years that is staggered initially. Board members should be subject to a gaming industry specific ethics policy and at least a two year post employment restriction and an objective removal scheme might involve the Governor, in consultation with the President of the Senate and the Speaker of the House, for inefficiency, misconduct in office or neglect of duty.

If a gaming agency is elected all terminology should be revised to reflect the vernacular of the casino industry starting with references to slot machines and manufacturers, casino service industries or vendors. This is a relatively straight forward process and will not materially delay any progress toward a viable recommendation.

Qualification Threshold: Licensing best practices in the gaming industry generally require that all persons having a legal, beneficial or equitable ownership interest in, or who are otherwise able to manage or control, the person applying for a license must "qualify" as part of the license application of that person. Each jurisdiction is somewhat nuanced but typically the threshold is a 5% ownership position (for example PA, NJ). SB 152-O followed standard practices and required the qualification, for both gaming licensees and technology providers of officers, directors, partners and trustees and any shareholder, limited liability company member or other holder of more than 5%

of a legal or beneficial interest in the applicant. See Proposed 284-B:12 and 284-B:16. These base requirements were further amplified in Proposed 284-B:14 to include ". . .any other individual or entity determined by the lottery commission to exercise control of the applicant either individually or in the aggregate through one or more entities." Note: SB 152-O at Proposed 284-B:16 appears to have omitted a reference to limited liability company members in its qualification provisions related to technology providers.

> **Recommendation #11**. The qualification threshold articulated in Proposed 284-B:12, at 5%, is consistent with best practices and the Authority is advised to recommend this threshold be applied to all license categories.

Background Investigations: For a gaming licensee, technology providers and their respective key employees SB 152-O generally incorporated a key check and balance on agency discretion and required the Lottery, after determining an application to be complete, to refer the conduct of the background investigation outside the Lottery to an independent party, in this case the Attorney General. Under SB 152-O the Attorney General conducted the investigation and made a specific suitability recommendation to the Lottery as to the fitness of the person or entity. As is the case in the majority of jurisdictions, the Lottery was required to consider, but was not bound by, the Attorney General's recommendation. SB 152-O contained no expressed prohibition on the outsourcing by the Attorney General of a background investigation and presumably such services would be construed as consulting in nature and thus covered by Proposed 284-B:7.

> **Recommendation #12**. Abbreviated licensing is a positive development in regulatory practices that reflects the continuing standardization of licensing criteria in the gaming industry. In its report to the Legislature the Authority should recommend abbreviated licensing but should frame the recommendation to ensure it is utilized as a means of expediting the background investigation not in lieu of it. Utilized carelessly, abbreviated licensing can negatively impact the fairness of the licensing scheme especially a competitive selection process. SB 152-O, at Proposed 284-B:17, III, included the concept of abbreviated licensing for all license categories including the gaming license. Employed in many reputable jurisdictions, abbreviated licensing allows a licensing authority to make a specific finding, after study and comparison, that the licensing standards of another jurisdiction are substantially similar to its criteria and, on that basis, permits it to afford licensure in the comparable jurisdiction weight in its own licensing assessment. Best practice applications of abbreviated licensing allow the entity conducting the background investigation, under SB 152-O the Attorney General, to determine whether any information it has separately developed should supersede or otherwise outweigh a license in good standing in a comparable jurisdiction. Care should be taken that the comparable license the applicant holds is given weight in the suitability assessment not substituted for it. From a practical perspective this is necessary because while a jurisdiction will confirm that a person is licensed in good standing rarely, in the absence of a specific memorandum of agreement with another jurisdiction, do they release their full

investigative file on an applicant. As drafted SB 152-O could be read to allow the Lottery to make a licensing determination on the basis of a license in a comparable jurisdiction without any involvement or consideration of the applicant by the Attorney General. Such a course of action is not recommended.

Recommendation # 13. The Authority should consider recommending against abbreviated licensing for gaming license applicants. The competitive process associated with this category of license distinguishes it significantly from other categories of license applicant. In a competitive process, any determination by an issuing authority that a jurisdiction has a licensing scheme that is or is not similar to that imposed in New Hampshire will invite litigation among losing competitors and likely delay the project that is awarded the gaming license.

Recommendation #14. The Authority should consider recommending against the inclusion in any future proposal of any variation of the exceptions included in HB 665 and SB 152-O with regard to reliance on a prior investigation. These types of broad exceptions are ill advised especially where a competitive process is anticipated. SB 152-O, for example, provided in pertinent part:

> The attorney general, *in his or her sole discretion*, may rely on the results of a previous investigation of the applicant in this or another jurisdiction if (i) such previous investigation is deemed to be of similar scope and subject to similar safeguards, (ii) the previous investigation was conducted within the 12 months prior to the application filing, and (iii) the applicant's circumstances have not materially changed. The attorney general shall also take into consideration as evidence of fitness a letter of reference or sworn statement of good standing produced pursuant to RSA 284-B:12, I(b)(8). See Proposed 284-B:14, III.

SB 152-O provided this option to the Attorney General only for a gaming licensee. While an exhaustive comparison of New Hampshire licensing criteria for other professions and industries is outside the scope of this report, it is unlikely the any other licensing investigation conducted by the Attorney General, including that performed for a simulcast licensee on behalf of the Racing and Charitable Games Commission, involves an application process, licensing criteria or a scope of investigation "similar" to that commonly applied to a commercial casino applicant or commensurate with that envisioned by SB 152-O. Likewise, the likelihood of the Attorney General being able to meaningfully rely on a gaming related investigation in another jurisdiction is relatively low as jurisdictions do not typically release their full investigative files.

Recommendation # 15. SB 152-O required the Attorney General to issue his suitability recommendation to the Lottery within 120 days. It further provided for an extension on the timeline for good cause. The language was unclear as

to whether the Lottery was obligated to formally act on an extension. A comparable timeline, with a clarified extension provision, should be incorporated into the Authority's recommendations to the Legislature. See Proposed 284-B:16.

Recommendation #16. SB 152-O stated that the application of an applicant not selected for the gaming license would be denied. The Authority should ensure that any proposal it advances references "denied - competitive process" rather than "denied" so that it is clear that these applicants were determined to be suitable and simply did not get the award. This is important because a denial of a license has serious ramification in other jurisdictions where these applicants do business. See Proposed 284-B:15.

Rulemaking: Following standard practices, SB 152-O provided that the Lottery exercise rulemaking authority with regard to both video lottery machines and table games consistent with the implementation of the statute.

Recommendation #17. Generally SB 152-O provided a good template for the scope of rulemaking. The Authority is advised to consider recommending in its report to the Legislature that the following provisions be added to those already included into SB 152-O. See Proposed 284-B:3.

- The enabling statute should not reference rulemaking guided by the International Association of Gaming Regulators. Rulemaking should be specific to New Hampshire and there should be no inference that the Association's recommendations must be followed.

- Proposed 284-B:3, I (q) requires rulemaking with regard to a gaming licensee's duty to cooperate with the Department of Resources and Economic Development on advertising. The Authority should explore substituting a requirement that a gaming licensee advertise consistent with the Department's programs and that the gaming regulating entity retain jurisdiction over any determination as to whether advertising is consistent.

- In keeping with best practices, Proposed 284-B:3, I (r) requires a licensee to maintain a self exclusion program. The preferred course of action, especially where there is more than one gaming location, is for the state to maintain and administer the program meaning that a person would register to self exclude with the gaming regulating entity and that entity would communicate the self exclusion to its licensees. Given the nature of play associated with games of chance under RSA 287-D, the Authority might consider recommending that a self-

exclusion program cover games of chance locations in cooperation with the Racing and Charitable Gaming Commission.

- In keeping with standard practices, Proposed 284-B:3, I (z) prohibits the direct input of a credit card into a video lottery machine or table game device. It further expressly permits use of credit cards for non-gaming related purchases or services. Gaming operators in many well regulated jurisdictions utilize the services of money transmitters like Global Cash Access to facilitate *gaming related* check cashing, credit card advance and debit card withdrawal services. Typically these service providers have locations or kiosks just off the gaming floor. The Authority should provide for rulemaking related to these service providers.

- Any rulemaking provision should include a reference to rules relating to the security of a gaming location and the safeguarding of assets, employees and the gaming public. This will ensure that there is no question that the regulating entity may, via rulemaking, require robust security and surveillance functions.

- Any rulemaking requirement associated with a licensee's system of administrative and accounting controls over video lottery machines and table game operations should explicitly address whether the regulating authority will accept a filing of the system of internal controls and procedures or will require prior approval of same. In lieu of a prior approval requirement the Authority should consider requiring the following: (1) An attestation by the chief executive officer or other delegated individual with a direct reporting relationship to the chief executive officer attesting that the officer believes, in good faith, that the submitted internal controls conform to the requirements of the chapter and the regulations, (2) An attestation by the chief financial officer or other delegated individual with a direct reporting relationship to the chief financial officer attesting that the officer believes, in good faith, that the submitted internal controls are designed to provide reasonable assurance that the financial reporting conforms to generally accepted accounting principles in the United States and complies with applicable laws and regulations, including the chapter and the regulations, and (c) The initial submission must also be accompanied by a report from an independent registered public accounting firm licensed to practice in New Hampshire. The report should express an opinion as to the

effectiveness of the design of the submitted system of internal controls over financial reporting and should further express an opinion as to whether the submitted system of internal controls materially deviates from the requirements of applicable laws and regulations, including the chapter and regulations. Note: For a new jurisdiction the attestation/CPA opinion approach is preferable as staff do not typically have the expertise initially to conduct a meaningful review of internal controls.

- Any rulemaking provision should also include a catch all provision authorizing promulgation of such regulations as may be necessary to fulfill the policies of the chapter.

Proposed 284-B:3, II addressed the timing on rulemaking. Many emerging jurisdictions, like Maryland and Pennsylvania, did not commit to a timeline and Massachusetts has not as yet advanced a full suite of operating regulations. Licensing regulations involve the suitability of the person authorized to conduct gaming. Operating regulations involve the integrity, reliability and auditability of the gaming operation that person conducts. Operating regulations typically involve, but are not restricted to, minimum internal control standards, technical standards for video lottery machines and table game devices, standards and controls over gaming equipment, rules of the games, security, surveillance, facility requirements, junkets, complimentaries, liquor, issuance of credit, self-exclusion and exclusion of minor and intoxicated persons.

The content of a well crafted statute will signal to potential operators everything they need to know about the regulatory environment New Hampshire is offering. Every aspect of the subsequently developed regulatory scheme must be framed within the statute. If a statute is crafted carefully, with clear lines of responsibility and authority and is meticulous in its definitions, there will be few surprises in the subsequently developed rulemaking for an experienced operator. It is not unusual or problematic for a competitive selection process to run concurrent with the development of operating regulations as is currently the approach in Massachusetts and was the case in Pennsylvania.

It is of considerable value to have competing applicants and newly retained agency staff participate in the comment period attendant to the adoption of all regulations, especially operating regulations. It provides both sides an opportunity to understand the operation the applicant intends to conduct and the dialogue between regulator and the regulated community, if approached in good faith, generally yields well defined regulatory expectations that are meaningful without being burdensome. The exercise is an important learning tool for both sides and helps equip the regulating agency with the ability to actually implement its regulatory scheme.

Recommendation #18. If the Authority elects in its report to the Legislature to recommend incorporation of a timeline into any future proposal the following language should be considered.

> The{regulating entity] shall initiate the rulemaking process, for both licensing and operating regulations, immediately upon the effective date of this chapter. The [regulating entity] may, in its discretion, initiate rulemaking in 2 phases by relying on the interim rulemaking authority in RSA 541-A:19. Interim licensing regulations and associated application forms shall be adopted within 120 days of the effective date of this chapter or any date extended by the [regulating entity] for good cause. In no event may a request for applications occur prior to adoption of interim licensing regulations. Interim licensing and operating regulations shall be adopted within one year of the effective date of this chapter or any date extended by the [regulating entity] for good cause. In no event may a license, including a gaming license, be issued prior to the adoption of, at a minimum, interim licensing and operating regulations. In no event may a gaming licensee commence operation until the Commission has adopted final rules.

Note: The "good cause" language suggested is important to development and implementation of a comprehensive regulatory scheme. The inflexibility of the language in Proposed 284-B:4, IV, which required adherence to timelines unless there is "no alternative" will likely frustrate efforts to do quality rulemaking.

Regulatory Enforcement: Following standard practices, under SB 152-O the Lottery, through the Bureau, had sole and exclusive regulatory authority and, after hearing, was authorized to impose sanctions, issue a cease and desist order or suspend or revoke a license. As noted in Recommendation #10 some clarification is required as to the seemingly concurrent jurisdiction of the Bureau and Gaming Enforcement for investigation of regulatory violations

Criminal Enforcement: Under SB 152-O**,** Gaming Enforcement was to be on site concurrent with the Bureau and would be staffed at least in part by state police. As a result, Gaming Enforcement would be readily available to investigate crimes that may involve a violation of the enabling statute and the rules and gaming offenses promulgated thereunder that occur at a gaming location. Under SB 152-O gaming location is broadly defined to include nongaming structures related to the gaming area. Gaming area is broadly defined to include land, buildings, structures and any portion thereof approved by the Lottery.

> **Recommendation #19**. SB 152-O incorporated a very streamlined approach to criminal enforcement and the Authority is advised to consider incorporating this structure into its recommendations to the Legislature.

Leases Involving Gaming Locations: SB 152-O required all persons having a legal, beneficial or equitable ownership interest in, or otherwise able to manage or control the owner of a gaming location to qualify and further provided that where the owner of a

proposed gaming location was not an affiliate of the gaming license applicant, that the lease agreement be submitted as an element of the gaming license application.

> **Recommendation #20.** The Authority is advised to consider including in its report to the Legislature a recommendation that submission of any lease or functionally equivalent agreement related to a gaming location in every case be submitted as an element of the gaming license application not just where there is an absence of an affiliate relationship. It is further advised to frame this requirement in terms of establishing whether the lease arrangement is commensurate with fair market value or in fact creates an equity or other ownership interest which would otherwise trigger a qualification requirement under the statute. See Proposed 284-B:12

Open Records:

> **Recommendation #21.** The Authority is urged to obtain a written opinion from the Attorney General as to the impact of any open records requirements it recommends to the Legislature. While it is appropriate to have an inference in favor of access to public records by its very nature a gaming regulating entity will be privy to an inordinate amount of background and character information, statements of personal worth, other forms of financial statement and records relating to ownership, income, expenses, recapitalizations, financing and changes in control. It will also have full and unfettered access to proprietary accounting and internal control procedures, security and surveillance protocols, financial performance and marketing data that, if available for public inspection, could place its gaming licensee at significant risk and competitive disadvantage.

Transfer of License: SB 152-O included provisions addressing the transfer of a gaming license, the transfer of a controlling interest in a licensee and the transfer of an interest in a licensee. Prior Lottery approval was required only with regard to a license transfer and with regard to a controlling interest.

> **Recommendation #22**. Gaming licenses are not typically transferred and it is ill advised to offer such an option. Where a sale or other conveyance is contemplated, the acquiring entity steps forward for licensure in its own right. The Authority is advised to consider recommending that transfer of a controlling interest require prior approval by the regulating entity and that "controlling interest" be a defined term (see footnote below) [10]. Any transfer

[10] In Pennsylvania, 4 Pa. C.S. § 1103 defines "controlling interest" as: For a publicly traded domestic or foreign corporation, a controlling interest is an interest in a legal entity, applicant or licensee if a person's sole voting rights under State law or corporate articles or bylaws entitle the person to elect or appoint one or more of the members of the board of directors or other governing board or the ownership or beneficial holding of 5% or more of the securities of the publicly traded corporation, partnership, limited liability company or other form of publicly traded legal entity, unless this presumption of control or ability to elect is rebutted by clear and convincing evidence. For a privately held domestic or foreign corporation, partnership, limited liability company or other form of privately held legal entity, a

triggering qualifier status, meaning an ownership position of 5% or more, should be subject to prior approval.

License Application Requirements:

Recommendation #23. With regard to license application requirements, the Authority should consider the following.

- The Authority should consider recommending against any type of requirement similar in form to Proposed 284-B:12, (b)(12) that mandated that an applicant provide child care for patrons. Child care for employees is important, child care for patrons is not a standard requirement and is often cited as incenting problem gambling.

- The Authority should consider requiring an applicant, when citing projected employment numbers for a future gaming location, to break projected employees down by full time and part time. This will ensure that the accompanying benefit projections are meaningful.

- The Authority should consider recommending against any type of requirement similar in form to Proposed 284-B:12, I(f) that required an applicant to submit information about its internal security and accounting controls as an element of the license application. Development of a system of internal control is a costly and expensive process and its development in the context of a competitive selection process is unwarranted. This requirement was included in the Pennsylvania statute but in practice it was not implemented as it was premature and would have been unreasonably burdensome.

- The Authority should advised to reconsider incorporating the impacted live entertainment venue concept. The process and determinations associated with this concept will involve considerable rulemaking and administration. A limitation on the number of seats in an entertainment venue, for example SB 152-O's 1500 seat limit, could be sufficient to mitigate any impact especially where a single or limited number of venues is under consideration. Although Massachusetts is pursuing this concept it is pursuing a gaming footprint considerably larger than that contemplated by New Hampshire.

controlling interest is the holding of any securities in the legal entity, unless this presumption of control is rebutted by clear and convincing evidence.

License Determination Process: Proposed 284-B:15 provided that an applicant may not cross examine witnesses of a competing applicant.

> **Recommendation #24.** If not provided for is RSA 541-A, the Authority should consider incorporating into its recommendations to the legislature a rulemaking requirement aimed at permitting a competing applicant to raise and file an objection during the license determination hearing. The Pennsylvania rule addressing the filing of an objection is cited in the footnote below. [11]

Video Lottery Machines:

Proposed 284-B:21, V follows the regulatory best practice of requiring a video lottery machine to be tested and certified by an independent testing laboratory.

Proposed 284-B:21, VI requires a video lottery machine to ". . .provide a payoff of an average of at least 90%, except that progressive jackpots shall have a payoff of an average of at least 85%".

> **Recommendation # 25**. Regulatory best practices dictate that in addition to a video lottery machine all equipment, systems and software utilized to collect, monitor, interpret, analyze, authorize, issue, redeem, report and audit data with regard to activity at a video lottery machine also be tested and certified for compliance with applicable technical standards adopted by regulation. It is essential that any proposal advanced by the Authority include this requirement. Products almost universally subject to testing and certification are the central computer system, slot data systems and casino management systems, ticketing systems, promotional play systems, player tracking systems, ticket redemption units, automated jackpot machines, external bonusing systems and progressive controllers.
>
> **Recommendation # 26**. In its report to the Legislature, the Authority should consider recommending the utilization of multiple independent test

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[11] 58 Pa. Code § 441a-7(t) provides as follows: An applicant may raise an objection to the conduct of the hearing, procedure, process or rulings of the Board as it relates to its own hearing **or to the hearing of a competitive applicant as follows:**

(1) An objection may be raised orally by stating the objection during the hearing of an applicant and the objection shall be stenographically recorded upon the record. The Board may request written briefing of the basis of the objection prior to issuing a ruling.

(2) An objection relating to the hearing of an applicant or to a hearing of a competitive applicant may be raised by means of written objection filed with the Clerk no later than 2 business days after the action or event giving rise to the objection. A written objection must clearly and concisely set forth the factual basis for the objection and be accompanied by a legal brief addressing the legal basis supporting the objection.

(3) If an applicant objects to an action or event in the hearing of another applicant, the caption of the objection must include the docket numbers of both proceedings conspicuously displayed and shall be served upon counsel for the other applicant by electronic means.

(4) In the event an objection is filed to the hearing of another applicant, counsel for that applicant may file a responsive brief within 2 business days of electronic service.

(5) An objection not raised as provided in paragraphs (1)--(3) will be deemed waived.

laboratories subject to a certification process. Larger regulatory entities like those in New Jersey and Pennsylvania maintain their own testing laboratories, others like Mississippi and Nevada operate a hybrid model where the regulating entity maintains its own testing laboratory but outsources testing at its discretion to an independent testing laboratory. Still others like Maryland rely strictly on the services of an outside independent testing laboratory. Independent testing laboratories test and certify on behalf for the regulating entity in accordance with that jurisdiction's specific technical standards adopted by regulation. Long standing convention dictates that the laboratories invoice the manufacturers directly for testing services notwithstanding that the actual work is technically conducted for the regulating entity.

Jurisdictions take two approaches to independent testing laboratories. Many require them to be licensed. New Jersey, for example, requires an independent testing laboratory to have the highest form of vendor license - a casino service industry enterprise license. Other states, for example, Maryland, certify them to do testing and certification for the regulating entity on the basis that they have no direct contractual relationship with a gaming operator. Where a certification approach is elected, the certification usually requires that the testing laboratory demonstrate that it, at a minimum:

- Holds a certificate in good standing for compliance with:
  - International Organization for Standardization # 17025 – General Requirements for the Competence of Testing and Calibration Laboratories; and
  - International Organization for Standardization # 17020 – General Criteria for the Operation of Various Types of Bodies Performing Inspections; and
- Has performed testing and certification of gaming equipment, systems and software on behalf of a state within the United States for a period of five or more years.

Either option works but a certification process is more cost effective. Rhode Island and Maryland, for example, utilize a multiple laboratory certification approach and Massachusetts is expected to follow that format. A signal as to which path is to be pursued via rulemaking should be incorporated into any proposal advanced by the Authority. Care should be taken to ensure that the statute is drafted in the plural to allow multiple laboratories to certify for the regulating entity so that all qualifying laboratories have access to the jurisdiction (requiring them to compete for a manufacturer's business) and to ensure that forensic investigations required by the regulating entity or its

gaming licensee in the event of game malfunction or tampering can be performed by a "conflict" laboratory that did not perform the initial testing and certification of the product.

Following a minority approach, SB 152-O incorporated an average payout of at least 90% instead of a minimum theoretical payout percentage. Including this requirement in any proposal advanced by the Authority is not recommended. From a practical perspective an approach based on an average rather than a theoretical payout percentage frustrates an operator's selection of a complying video lottery machine since the manufacturer's "par sheet" [12] on the machine will only delineate theoretical results. The video lottery machine has not been played - there are no actual results at the moment of acquisition. It is likewise noteworthy that the average payout percentage proposed, at 90%, is materially higher than the payout percentage requirements imposed by many state and tribal jurisdictions. New Jersey, for example, requires a minimum *theoretical* payout percentage of 83%, Pennsylvania requires a minimum *theoretical* payout percentage of 85% and Nevada and many tribal jurisdictions require a minimum t*heoretical* payout percentage as low as 75%. Maryland does rely on a *range* of average actual payout percentages but even there it is set at 87%. Interestingly, Massachusetts did not specific a payout percentage in its enabling statute astutely maintaining the flexibility in this arena available through rulemaking. Adopting the payout percentage in SB 152-O would have ensured that manufacturers were not designing for and would not have had readily available a full catalogue of products that would have met the New Hampshire requirements.

An average payout percentage of at least 90% dictates that a video lottery machine offered in New Hampshire be designed within a much more narrow spread of payout percentages than is common in most jurisdictions, a circumstance that can affect the versatility and excitement level generated by the game. Generally, video lottery machines are designed around hit frequencies, i.e., the number of winning combinations that occur during game play that, in turn, translates into longer time on device for players. Game designers seek as great a spread on payout percentages as possible in order to create a more entertaining array of plays and pays. With New Hampshire's average payout percentage window required to hover between an actual 87% and 95%, the ability to make the games both compliant and entertaining would be limited and many popular games available in competing states will likely not be economically feasible for a New Hampshire operator.

Recommendation #27. For the reasons specified herein, the Authority is urged to consider recommending a more traditional approach, perhaps a minimum theoretical payout percentage of 85% [not to equal or exceed 100 %] comparable to Pennnsylvania. In the alternative it could follow Massachusetts and simply provide for future rulemaking with regard to payout percentage.

[12] A "par sheet" generally outlines the math including a video lottery machine's holds, payback, returns, and other game characteristics.

Conservatorship:

Recommendation # 28. In formulating its recommendations to the Legislature**, t**he Authority should revisit the concept, incorporated at Proposed 284-B: 25, III (h), of requiring a new gaming licensee to be located on the site of the pre-existing gaming location. In the event of a conservatorship it would be in the state's interest for a new gaming license to be awarded and for the new licensee to commence operation as soon as possible. In the majority of circumstances, SB 152-O's requirement would likely overcomplicate that process. See Proposed 284-B:23.

Gaming Study Commission:

Recommendation #29. In formulating its recommendation to the Legislature**, t**he Authority should consider whether a Gaming Study Commission should include representatives of departments and divisions actively engaged in regulating gaming sectors like the Lottery, Racing and Charitable Gaming Commission, Office of the Attorney General, State Police or any newly formed regulating entity. Broader participation in a study commission would allow an unbiased examination of sectors like charitable gaming in general and games of chance in particular. See Proposed 284-B:28.

Political Contributions:

Recommendation #30. In formulating its recommendations to the Legislature, the Authority is urged to recommend prohibitions on political contributions substantially similar to those articulated at Proposed 284-B:30 amplified to provide for an annual certification process analogous to that imposed in Pennsylvania. The Pennsylvania rule provides in pertinent part:

> The chief executive officer, or other appropriate individual, of each applicant for a slot machine license, manufacturer license or supplier license, licensed racing entity, licensed supplier, licensed manufacturer or licensed gaming entity shall annually certify under oath to the board and the Department of State that such applicant or licensed racing entity, licensed supplier, licensed manufacturer or licensed gaming entity has developed and implemented internal safeguards and policies intended to prevent a violation of this provision and that such applicant or licensed racing entity or licensed gaming entity has conducted a good faith investigation that has not revealed any violation of this provision during the past year. See 4 Pa. C. S.§ 1513.

Recommendation # 31. In formulating its recommendations to the Legislature regarding political contributions, the Authority is urged to recommend that any definition of "money", such as that incorporated at Proposed 284-B:30, be moved to the general definitions in any proposal advanced by the Authority as

it is relevant in other contexts. Likewise, the definition of "person" in Proposed 284-B:30 is stronger that that found in the general definitions of SB 152-O. "Close associates" should also be defined, the Massachusetts definition is as follows:

> A person who holds a relevant financial interest in, or is entitled to exercise power in, the business of an applicant or licensee and, by virtue of that interest or power, is able to exercise a significant influence over the management or operation of a gaming [establishment] location or business licensee under this chapter. Massachusetts Act @ Section 2, *Definitions.*

Internet Gaming:

> **Recommendation #32.** The Authority should consider recommending that the Legislature consider allowing a gaming licensee to be permitted to offer wagering via the Internet, subject to rulemaking and certification substantially similar to that adopted by Nevada or New Jersey, and that the regulating entity be authorized to compact with other states to offer this form of gaming.

[Concluding paragraphs to be drafted based in Authority input; additional discussion of use of uniform terms i.e. player/patron, gaming location/gaming establishment]