

# Third-Party Software Providers— Will the DGE Take a Hard Look at Them?

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Unlock your iPhone and today you can swipe through the plethora of apps from the multitude of independent software providers available at your fingertips. As our phones have transformed into ‘smart phones,’ other forms of technology—including our slot machines and other gaming devices—have experienced a similar revolution. Gone are the days of a slot machine manufacturer designing, creating, programming and distributing slot machines from inception to the casino floor. The use of third-party independent contractors in connection with the design, theming, programming and development of gaming devices is now commonplace in the gaming device industry.

As the gaming equipment manufacturing process evolves, the laws and regulations governing the industry are adapting to this new normal, and New Jersey is at the forefront of this change. On Aug. 7, 2012, Governor Chris Christie signed into law, Senate Bill 1323, which, among other regulatory reforms, revised the New Jersey Casino Control Act<sup>1</sup> regarding the regulation of casino services industry enterprises (which includes slot machine and gaming equipment manufacturers).<sup>2</sup> With S-1323, New Jersey, for the first time, has statutorily recognized the use of independent software developers and contractors in the development of gaming devices used at the state’s casinos.

The Casino Control Act now defines the term, “independent software contractor,” and provides that they are not mandatory qualifiers subject to the licensing requirements of a casino service industry enterprise.<sup>3</sup>

An independent software contractor is defined as:

A person or entity not employed directly by a casino service industry enterprise who, pursuant to an agreement with the casino service industry enterprise, develops, designs, programs, produces, composes, or manufactures any software, source language, executable code, or content which a casino service industry enterprise acquires control over or ownership of and

assumes legal responsibility for the gaming device in which the software or code is used.<sup>4</sup>

## The Two-Prong Test for Independent Software Contractors

There is a two-part test to determine whether a software contractor meets the definition of an independent software contractor to limit exposure to New Jersey’s licensing requirements: 1) Has the casino service industry enterprise contracting with the software contractor acquired control over or ownership of the software, source language, executable code, or content? 2) Has that casino service industry enterprise assumed legal responsibility for the gaming device?<sup>5</sup>

The main issue arises with respect to the first prong—acquiring control over or ownership of the software, source language, executable code, or content. S-1323 does not provide guidance on what is required for a casino service industry enterprise to “acquire control over” the software, source language, executable code, or content. How is ‘control’ determined? Does S-1323 require complete control by the casino service industry enterprise, or can the independent software contractor maintain some lesser amount or level of control regarding the software, source language, executable code, or content? Similar questions arise with respect to ‘ownership.’ Is 100 percent ownership required by the casino service industry enterprise, or could this include some form of shared ownership structure?

Many licensed gaming equipment manufacturers frequently incorporate software- or platform-level operations that are ‘off-the-shelf’ products. Many licensed manufacturers use Linux, UNIX or Windows-based products, as well as device drivers, for graphics cards and other devices in their slot machines. Those licensed manufacturers almost always take some level of ownership of those off-the-shelf products and files, whether they are code, graphics or sound, and run them through their internal quality processes prior to creating a program that can functionally operate within a slot machine.

Presumably, the above questions of control and ownership

require New Jersey's regulators to determine the scope of licensure on a case-by-case basis, utilizing S-1323's catchall provision, which is discussed in more detail below.<sup>6</sup> However, without a bright line rule, manufacturers are left guessing how much control and/or ownership they will be required to assume with respect to an independent contractor's software, and whether the software contractors they deal with will ultimately be subject to New Jersey's licensing process.

### The Nevada Model

Similar to New Jersey, Nevada requires manufacturers of gaming equipment to be licensed. In June 2011, Nevada passed into law Assembly Bill 294, which, in part, amended licensing requirements for manufacturers of gaming devices. Under the new Nevada law, independent contractors are excluded from licensing requirements in instances where the manufacturer assumes responsibility for the gaming device.<sup>7</sup>

The law defines "manufacture," in part, as "[t]o direct, control or assume responsibility for the methods and processes used to design, develop, program, assemble, produce, fabricate, compose and combine the components and other tangible objects of any gaming device, cashless wagering system, mobile gaming system or interactive gaming system for use or play in Nevada."<sup>8</sup> The term "gaming device" includes a control program,<sup>9</sup> which is defined as "any software, source language or executable code which affects the result of a wager by determining win or loss as determined pursuant to regulations adopted by the Commission."<sup>10</sup>

Unlike New Jersey, the Nevada law contains a definition for the term "assume responsibility," providing that assume responsibility means to:

- (1) Acquire complete control over, or ownership of, the applicable gaming device, cashless wagering system,

mobile gaming system or interactive gaming system; and (2) Accept continuing legal responsibility for the gaming device, cashless wagering system, mobile gaming system or interactive gaming system, including, without limitation, any form of manufacture performed by an affiliate or independent contractor.<sup>11</sup>

Here, the term "complete" helps avoid any confusion regarding the amount of control or ownership necessary for licensing to kick in. Unless the manufacturer acquires complete control or ownership, the independent software contractor will still be required to be licensed separately as a manufacturer.

### The Evolution of S-1323 and the Effects on Licensing for Software Contractors

The term independent software contractor was not in the original version New Jersey's S-1323, but was added by Senate amendment on May 24, 2012.<sup>12</sup> The Senate also amended the definition of casino service industry enterprise to specifically exclude independent software contractors.<sup>13</sup> By amendment on June 21, 2012, the Assembly removed the exclusion for an independent software contractor from the definition of casino service industry enterprise.<sup>14</sup> Thus, following the canons of statutory interpretation, it appears as though an independent software contractor could fall within the Casino Control Act's definition of casino service industry enterprise because the Legislature originally identified a specific exclusion for an independent software contractor from the definition of casino service industry enterprise and subsequently removed the exclusion. This could be interpreted as the Legislature not intending to exclude an independent software contractor from the definition of casino service industry enterprise.

A casino service industry enterprise is

now defined under the Casino Control Act, as amended by S-1323, as:

Any vendor offering goods or services which directly relate to casino or gaming activity, including gaming equipment and simulcast wagering equipment manufacturers, suppliers, repairers and independent testing laboratories, or any vendor providing to casino licensees or applicants goods and services ancillary to gaming activity, including, without limitation, junket enterprises and junket representatives, holders of casino hotel alcoholic beverage control licenses, lessors of casino property not required to hold a casino license pursuant to section 82 of P.L.1977, c.110 (C.5:12-82), and licensors of authorized games. Notwithstanding the foregoing, any form of enterprise engaged in the manufacture, sale, distribution, testing or repair of slot machines within New Jersey, other than antique slot machines as defined in N.J.S.2C:37-7, shall be considered a casino service industry enterprise for the purposes of this act regardless of the nature of its business relationship, if any, with casino applicants and licensees in this State...<sup>15</sup>

Although an independent software contractor could fall within this definition, it would not be subject to the Casino Control Act's casino service industry enterprise licensing requirements because not all casino service industry enterprises are subject to licensure.

Section 92(a)(1) of the act, provides that:

Any business to be conducted with a casino applicant or licensee by a vendor offering goods or services which directly relate to casino or gaming activity, including gaming equipment and simulcast wagering equipment manufacturers, suppliers, repairers, and independent testing laboratories,

shall require licensure as a casino service industry enterprise in accordance with the provisions of this act prior to conducting any business whatsoever with a casino applicant or licensee, its employees or agents...<sup>16</sup>

Therefore, this licensing requirement only applies when a vendor intends to directly conduct business with a casino applicant or licensee—“[a]ny business to be conducted with a casino applicant or licensee by a vendor.” Since independent software contractors do business with gaming equipment manufacturers and not directly with casino applicants or licensees, independent software contractors may not be subject to the licensing requirement of Section 92(a).

### New Jersey Model Puts Decision-making in the Hands of Experienced Regulators

Independent software contractors, however, are not necessarily free and clear from New Jersey’s regulatory oversight. S-1323 contains a catchall provision to allow the director of the Division of Gaming Enforcement, at his discretion, to determine that an independent software contractor needs to register or be licensed as a casino service industry enterprise or as an ancillary casino service industry enterprise.<sup>17</sup>

Similar to the New Jersey law, Nevada’s law provides the Nevada Gaming Commission a certain level of discretion regarding the licensing requirements for manufacturers. Nevada’s discretion, however, allows its commission to opt a manufacturer out of the licensing requirement “if the Commission determines that the exemption is consistent with the purposes” of the law.<sup>18</sup> New Jersey’s discretionary language, on the other hand, allows the director of the Division of Gaming Enforcement to call someone forward—an opt-in method.

New Jersey’s approach allows an experienced regulatory agency, such as

the division, to make these licensing decisions on a case-by-case basis. Regulation, no matter how well thought out and intended, cannot keep pace with technological development. By providing for sound core principles regarding what triggers licensing, and coupling that with experienced, sound regulatory discretion, New Jersey regulators have fostered an environment of innovation, and set up a structure that allows the latest products to make it onto the casino floors sooner than any other jurisdiction, while at the same time assuring regulatory integrity of the gaming industry. ♣

### Endnotes

1. N.J.S.A. 5:12-1, *et seq.*
2. Charles Hack, Christie signs legislation allowing poolside gambling in Atlantic City, *The Jersey Journal*, Aug. 8, 2012, at [www.nj.com/hoboken-now/index.ssf/2012/08/hudson\\_county\\_assemblyman\\_co-s.html](http://www.nj.com/hoboken-now/index.ssf/2012/08/hudson_county_assemblyman_co-s.html).
3. N.J.S.A. 5:12-92.
4. N.J.S.A. 5:12-27(a).
5. N.J.S.A. 5:12-27(a).
6. N.J.S.A. 5:12-92(c)(2).
7. NRS 463.01715(2).
8. NRS 463.01715(1)(b).
9. NRS 463.0155(3).
10. NRS 463.0155.
11. NRS 463.01715(2).
12. S-1323, Second Reprint, May 24, 2012.
13. *Id.*
14. S-1323, Third Reprint, June 21, 2012.
15. N.J.S.A. 5:12-12.
16. N.J.S.A. 5:12-92(a)(1).
17. N.J.S.A. 5:12-92(c)(2). Ancillary casino service industry enterprises are “[v]endors providing goods and services to casino licensees or applicants ancillary to gaming, including, without limitation, junket enterprises and junket representatives, and any person employed by a junket enterprise or junket repre-

sentative in a managerial or supervisory position, non-casino applicants or licensees required to hold a casino hotel alcoholic beverage license pursuant to section 103 of P.L.1977, c.110 (C.5:12-103), lessors of casino property not required to hold a casino license pursuant to section 82 of P.L.1977, c.110 (C.5:12-82), and licensors of authorized games.” See N.J.S.A. 5:12-92(a)(3). The ‘registration’ option is an even less stringent licensing tier typically applying to vendors that do not fall within the casino service industry enterprise, or ancillary casino service industry enterprise licensing requirements such as casino site contractors and shopkeepers located within approved hotels. N.J.S.A. 5:12-92(c)(1).

18. NRS 463.650(8).

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