Regulation of Gaming Device Software Development: Nevada's Paradigm Shift On Independent Contractors

Dan R. Reaser*

I. Introduction

On April 22, 2010, the Nevada Gaming Commission (hereinafter the "Commission") adopted a number of amendments to Regulation 14 governing the manufacture of gaming devices.[1] A subset of these amendments were promulgated pursuant to changes to the Nevada Gaming Control Act (hereinafter the "Act") during the Seventy-Fifth Session of the Nevada Legislature.[2] The rules relate to "control programs" and the independent contractors who design, develop, program, produce, or compose software, source language or executable code compiled into the control program of a new gaming device or of a modification to a gaming device submitted for approval.[3] These particular rules became effective on July 1, 2010, and will become fully implemented on June 30, 2011.[4]

The rules themselves may seem relatively innocuous. These regulations and the enabling statutes upon which the rules rely, however, represent a para-

* California Western School of Law, J.D., 1980. California State University at Fullerton, B.A. in Business Administration and Political Science. Dan R. Reaser is a shareholder in Nevada's largest private law firm, Lionel Sawyer & Collins. He is the Vice-Chairman of the firm's Gaming and Regulatory Law Department. He counsels and represents clients on a variety of administrative law and regulatory matters including gaming, banking and other financial institutions, insurance, public utilities, public transportation, trade regulation and regulatory compliance issues. Mr. Reaser is admitted to practice in Nevada and California and before the Supreme Court of the United States, the United States Court of Appeals for the Ninth Circuit and the United States District Court in Nevada. Prior to joining the firm, Mr. Reaser served in the Office of the Attorney General of Nevada for eight years, including as Chief Deputy for the Gaming Division, where he was chief counsel to the Nevada Gaming Commission and Gaming Control Board from 1986 to 1990. Mr. Reaser represented the Association of Gaming Equipment Manufacturers as the principal industry advocate on Senate Bill 83 in the Nevada Legislature and before Nevada's regulatory agencies on the related amendments to Nevada Gaming Commission Regulation 14.

[1] Nev. Gaming Comm'n Reg. 14.010, 14.021, 14.0215, 14.023, 14.024, 14.110 (July 2010). Specifically, the adopted amendments affected the definitions in Subsections 1, 4, 11 and 24 of Regulation 14.010, Regulation 14.021, Regulation 14.0215, Regulation 14.023, Regulation 14.024, and Paragraph (b) of Subsection 3 of Regulation 14.110.

[2] *See* Nev. Rev. Stat. §§ 463.0155, 463.0172, 463.650(9) (2009).

[3] S.B. 83, 2009 Leg., 75th Sess., §§ 1-3, 5, 18.5, 2009 Nev. Stats. 272, 273-74, 276, 288-90 (Nev. 2009).

[4] Nev. Gaming Comm'n Reg. 14.021, 14.0215, 14.023, 14.024 (July 2010).

digm shift in the historical approach of the Act to regulating the manufacture of gaming devices. The rules signal a change in regulatory focus to independent contractors writing computer code from the central objective of the Act to mandate manufacturer control and responsibility for gaming devices. This shift has implications beyond the mere reporting and registration requirements of the new rules, impacting the broader issue of access to the technology and applications necessary for Nevada's gaming industry to remain competitive.

This article will summarize the requirements of the new rules. First, however, the article will provide some industry background on the role independent contractors typically play in the product development process and the competition among technology developers. Next, the article will examine the history of legislative policy development on licensing manufacturers of gaming devices, discussing the traditional oversight for the manufacture of computer programs used in gaming devices. The article will then review the legislation that led to the promulgation of the new regulations. Finally, after a synopsis of the rules, the article will present observations on an alternative approach to achieving necessary regulatory objectives.

II. Industry Background

A. *How the Independent Contractor Relationship Works In Practice*

Manufacturers use contractors in a variety of ways. A typical model involves independent contractors submitting a proposal to the manufacturer in accordance with written development agreements.[5] Once a project is approved, the independent contractor typically is granted access to a web-based interface platform (commonly referred to as a game development kit) designed and controlled by the licensed manufacturer.[6] The game development kit provides documentation and technical support through which the independent contractor designs source code files. These source code files may include paytables, reel maps, and evaluation functions. Game kits can also facilitate development by allowing prototype games to post simulated win and loss events to an operating system program of the manufacturer in a test environment.[7]

Other uses of contractors include hiring specialized engineering firms which employ dozens of programmers to perform massive rewrites and revisions of code for operating systems, games, and slot accounting systems.[8] These projects are periodically necessary to maintain efficient operation, and licensed manufacturers simply may not have the internal resources needed to perform such projects, or out-sourcing the project may be more cost effective. Another contractor example is when an individual presents a prototype running on an "off-the-shelf" or homegrown system on a personal computer.[9] If the

[5] Letter from Dan R. Reaser, Esq., Lionel Sawyer & Collins, to Peter C. Bernhard, Chairman, Nev. Gaming Comm'n, Regarding Proposed Amendments to Nevada Gaming Commission Regulation 14; Comments of Ass'n of Gaming Equip. Mfrs. 3 (Mar. 12, 2010) (on file with Nevada Gaming Commission) [hereinafter AGEM Comment Letter].
[6] *Id*. at 3-4.
[7] *Id*.
[8] *Id*.
[9] *Id*.

licensed manufacturer chooses to manufacture the game, the manufacturer will take the game and recode it for use on its own platform.

When an independent contractor completes a project, it submits the source code files to the manufacturer's engineering department. If accepted, the game source code files become the manufacturer's property subject to the manufacturer's exclusive control, in exchange for payment specified within the agreement.[10] These source code files will not and cannot independently run on a gaming device. This is similar to the case with sound and art source code files that have been provided to manufacturers by independent contractors for decades. Source code that maps a game, allows a particular sound to emanate from the device, or depicts a particular graphic on a computer screen must be part of the entire game computer program and integrated into the operating system to operate the device as a whole.[11] The manufacturer's engineering department will then review the game source code submitted by the independent contractor. Once vetted, the licensed manufacturer compiles and creates a single game computer program, combining game source code, as well as the sound and art files provided by employees or other independent contractors. The result of this compilation process is a game program that operates on a gaming device using the manufacturer's proprietary operating system and ready for regulatory approval.[12]

B. Competition Among Technology Companies For Independent Contractors

Gaming equipment manufacturers have used this independent contractor process for many years. Initially, source code for sounds and graphics in a slot machine started using this production method. However, in the last decade, the use of independent contractors to design and develop source code for game programs has accelerated, as all technology companies—including Apple, Microsoft, Sony, Motorola and Dell—have moved from employing all or most of their own engineering design talent to a business plan where the firms control a proprietary hardware platform and invite engineering talent to propose content applications for use on that platform.[13]

One example alone—Apple's iPhone—demonstrates this phenomenon. Apple designed and developed the iPhone platform and a number of the initial basic applications. However, as a cursory look at the official Apple iPhone website reveals, or as the barrage of television and other media advertising show, there are thousands of applications commonly known as "Apps" that one can purchase and download on his or her iPhone.[14] Many of these "Apps" are the brain-children of engineers and other creative-types who are not employees of the technology firms. In fact, the technology industries benefit from the independence of these innovators. There are obvious operating cost savings for manufacturers that own the technology platforms if they can contract project by

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[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 4-5.
[14] *See, e.g.*, www.apple.com/iphone.

project with design talent instead of incurring the expense of employing these individuals or acquiring entrepreneurial development firms.[15] Manufacturers of gaming devices are not immune from this global phenomenon that is driving fantastic innovation in the marketplace. In fact, they may be among the most at risk if they cannot participate in this marketplace of ideas because they cannot compete against companies such as Apple and Microsoft to employ this talent.

Nevada's casino gaming industry remains one of the most important economic engines in terms of the State's tourism and entertainment business. Routinely, sixty to seventy percent of the gaming revenue generated by casinos comes through slot machines.[16] Licensed manufacturers develop and bring to market the innovative, new, and exciting products that are so critical to maintaining a competitive and dynamic gaming experience. For this reason, the Nevada State Gaming Control Board (hereinafter the "Board") and Commission must have an appropriately measured oversight process carefully preserving an environment that fosters a pipeline to manufacturers of new games developed by independent contractors. This balance is nothing new, and to understand how it has been calibrated, this article next looks to the development of legislative policy on regulatory oversight of gaming device manufacturing.

III. The Development of Legislative Policy

A. *The Evolution of the Licensing Requirement for Manufacturers*

In 2009, the Nevada Legislature accepted the request of the Board and Commission to significantly change the licensing and regulatory system for gaming device manufacturers.[17] The implications of this change should be evaluated in the context of over forty years of legislative policy development.

1. *The Object Of Regulation: Defining "Gaming Device"*

The Act provides for the licensing of manufacturers of gaming devices as follows:

> [I]t is unlawful for any *person*, either as owner, lessee or employee, whether for hire or not, to operate, carry on, conduct or maintain any form of *manufacture* . . . of *any gaming device* . . . for use or play in Nevada or for distribution outside of Nevada without first procuring and maintaining all required federal, state, county and municipal licenses.[18]

First enacted in 1967, the aforementioned statute initially imposed the licensing requirement on the manufacture of "any device or machine used in gambling . . . in which the odds are operated, produced or determined electronically or electrically[.]"[19] Two years later, the Nevada Legislature eliminated from the statute the reference to "in which the odds are operated, produced or determined electronically or electrically" and otherwise expanded the statute's

[15] *Id*. at 5.
[16] *Id*. *See, e.g.,* Nev. State Gaming Control Bd., 2010 Nevada Gaming Abstract at 1-3 (June 30, 2010).
[17] *See infra* notes 67–84 and accompanying text.
[18] Nev. Rev. Stat. § 463.650(1) (2009) (emphasis added).
[19] *See* A.B. 392, 1967 Leg., 54th Sess., § 2, 1967 Nev. Stats. 1596, 1596 (Nev. 1967).

reach to include "any device, *equipment, material* or machine used in gambling[.]"[20]

Although the term "gaming device" was used and defined in the Act in 1967,[21] the expansive applicability of NRS 463.650 to "any device, equipment, material or machine" did not become part of the licensing scheme under NRS 463.650 until 1981.[22] That year, the Nevada Legislature replaced the existing reference in NRS 463.650 from "any device, equipment, material or machine" to the defined term "gaming device."[23] This change by lawmakers narrowed mandatory licensing to those persons manufacturing or distributing only "gaming devices," thus eliminating mandatory licensure requirements for any other type of "device, equipment, material or machine."[24]

The definition of "gaming device" was also refined in 1981.[25] That year, the Nevada Legislature amended this term to read as follows:

> "Gaming device" means any mechanical, *electromechanical or electronic* contrivance, *component* or machine used in connection with gaming or any game *which affects the result of a wager by determining win or loss. The term includes a system for processing information which can alter the normal criteria of random selection, which affects the operation of any game or which determines the outcome of a game. The term does not include a system or device which affects a game solely by stopping its operation so that the outcome remains undetermined*.[26]

Thus, the 1981 changes to the definition of "gaming device" were five-fold. First, reflecting technological developments, electromechanical or electronic machinery was brought within the meaning of the term. Second, the definition broadened to include the concept of "components." Third, the scope of the defined term narrowed to only those contrivances, components, or machines that determine a wager's win or loss. Fourth, also recognizing technological progress, the definition arguably extended to computer programs—"a system for processing information"—that determines game outcome exclusively by altering the operation of the random number generator (hereinafter the "RNG"). Fifth, excluded from the definition was a computer program or other device whose purpose was to suspend game operation, such as a tilt code process on game malfunction.

Similarly relevant to the jurisdictional requirements for licensing of manufacturers and distributors of "gaming devices," state lawmakers have made two statutory changes since 1981. In 1983, NRS 463.650 was amended to add the clause "for use or play in Nevada."[27] This change gave the statute extra-territorial applicability by changing the Nevada-base for regulatory oversight purposes from the physical location of the manufacturer to the physical location of where the device operated. Next, in 1989, the Nevada Legislature further

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[20] A.B. 746, 1969 Leg., 55th Sess., § 1, 1969 Nev. Stats. 651, 651 (Nev. 1969) (emphasis original).
[21] *See* S.B. 355, 1967 Leg., 54th Sess., §§ 1, 20, 1967 Nev. Stats. 1027, 1027, 1039 (Nev. 1967).
[22] S.B. 527, 1981 Leg., 61st Sess., § 56, 1981 Nev. Stats. 1067, 1101 (Nev. 1981).
[23] *Id*.
[24] *Id*.
[25] *Id.* § 22.
[26] *Id*. (emphasis added).
[27] S.B. 342, 1983 Leg., 62d Sess., § 5, 1983 Nev. Stats. 1205, 1206 (Nev. 1983).

refined this jurisdictional concept by adding the language "or for distribution outside of Nevada,"[28] thereby clarifying that licensing was mandatory for Nevada-based manufacturers and distributors that placed gaming devices in interstate or international commerce. This amendment was essentially a "home-state" rule intended to protect the reputation of Nevada should slot machines produced in Nevada end up in jurisdictions where the devices were illegal.

Although the Legislature amended NRS 463.650 eight times since 1989, none of the modifications to the specific licensing statute made substantive changes to the requirements applicable to manufacturers of gaming devices.[29] Instead, because of the dynamic influence of technology, the Nevada Legislature has fashioned a series of refinements to technical definitions of the products manufactured that influence the interpretation of the licensing requirement. Thus, in 1985 lawmakers again modified the definition of "gaming device" to provide:

> "Gaming device" means any *equipment or* mechanical, electromechanical or electronic contrivance, component or machine used *remotely or directly* in connection with gaming or any game which affects the result of a wager by determining win or loss. The term includes a system for processing information which can alter the normal criteria of random selection, which affects the operation of any game or which determines the outcome of a game. The term does not include a system or device which affects a game solely by stopping its operation so that the outcome remains undetermined.[30]

The Nevada Legislature once more adjusted the definition of "gaming device" in 1993. This time the statutory amendment dramatically changed the term. Specifically, the Legislature eliminated completely the language stating:

> a system for processing information which can alter the normal criteria of random selection, which affects the operation of any game or which determines the outcome of a game. The term does not include a system or device which affects a game solely by stopping its operation so that the outcome remains undetermined.[31]

In place of this concept, the lawmakers recast the term "gaming device" to include:

1. A slot machine.
2. *A collection of two or more of the following components*:
   (a) An assembled electronic circuit which cannot be reasonably demonstrated to have any use other than in a slot machine;

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[28] A.B. 733, 1989 Leg., 65th Sess., § 2, 1989 Nev. Stats. 969, 970 (Nev. 1989).

[29] *See* S.B. 242, 1993 Leg., 67th Sess., § 15, 1993 Nev. Stats. 306, 314-15 (Nev. 1993); A.B. 131, 1995 Leg., 68th Sess., § 15, 1995 Nev. Stats. 756, 762-63 (Nev. 1995); A.B. 419, 1997 Leg., 69th Sess., § 22, 1997 Nev. Stats. 3497, 3508-09 (Nev. 1997); A.B. 466, 2001 Leg., 71st Sess., § 26, 2001 Nev. Stats. 3075, 3091 (Nev. 2001); S.B. 3, 2003 Leg., 20th Spec. Sess., § 21, 2003 Nev. Stats. 2, 14-15 (Nev. 2003); A.B. 471, 2005 Leg., 73d Sess., § 16, 2005 Nev. Stats. 714, 719-20 (Nev. 2005); A.B. 295, 2007 Leg., 74th Sess., § 22.5, 2007 Nev. Stats. 1101, 1119-20 (Nev. 2007); S.B. 83, 2009 Leg., 75th Sess., § 18.5, 2009 Nev. Stats. 272, 288-90 (Nev. 2009).

[30] S.B. 239, 1985 Leg., 63d Sess., § 8, 1985 Nev. Stats. 2133, 2135 (Nev. 1985) (emphasis added).

[31] S.B. 242, 1993 Leg., 67th Sess., § 2, 1993 Nev. Stats. 306, 307 (Nev. 1993).

(b) A cabinet with electrical wiring and provisions for mounting a coin, token or currency acceptor and provisions for mounting a dispenser of coins, tokens or anything of value;

(c) A storage medium containing the source language or executable code of a computer program that cannot be reasonably demonstrated to have any use other than in a slot machine;

(d) An assembled video display unit;

(e) An assembled mechanical or electromechanical display unit intended for use in gambling; or

(f) An assembled mechanical or electromechanical unit which cannot be demonstrated to have any use other than in a slot machine.

3. Any mechanical, electrical or other device which may be connected to or used with a slot machine to alter the normal criteria of random selection or affect the outcome of a game.

4. A system for the accounting or management of any game in which the result of the wager is determined electronically by using any combination of hardware or software for computers.

5. Any combination of one of the components set forth in paragraphs (a) to (f), inclusive, of subsection 2 and any other component which the commission determines by regulation to be a machine used directly or remotely in connection with gaming or any game which affects the results of a wager by determining a win or loss.[32]

In hearings before the Nevada Legislature in 1993, the Board testified that the purpose of adding the language codified at paragraph (c) of subsection 2 of NRS 463.0155 was to clarify the statute. Specifically, the Board said more certainty was needed about the circumstances under which a "computer chip" used in a slot machine would be subject to regulatory oversight. The legislative record indicates that the agency believed the added language would facilitate Board prosecutions for the illegal manufacture of gaming devices.[33]

Therefore, the 1993 amendments to the Act provided the first explicit guidance on whether a computer program is a gaming device. The statute identified "[a] storage medium containing the source language or executable code of a *computer program* that cannot be reasonably demonstrated to have any use other than in a slot machine" as a "component" of a gaming device.[34] Thus identified, such a "storage medium"[35] and, logically, the embedded computer program therein was not itself a gaming device. If the storage medium or the embedded computer program were themselves a gaming device, the Legislature need not have identified them as a "component" in the list set forth in NRS 463.0155(2).[36] Importantly, the statutory scheme adopted by the Nevada Legislature, relating to "source language or executable code of a computer program," only extended regulatory oversight to the "*storage medium* containing"

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[32] *Id*. (emphasis added).

[33] *Hearing on S.B. 242 Before the S. Comm. on Judiciary*, 1993 Leg., 67th Sess. 3 (Nev. Mar. 17, 1993) (testimony of William A. Bible, Chairman, State of Nev. Gaming Control Bd.).

[34] S.B. 242, 1993 Leg., 67th Sess., § 2, 1993 Nev. Stats. 306, 307 (Nev. 1993) (emphasis added).

[35] *Id*.

[36] *Id*.

the source code.[37] Regulating a physical component was the touchstone of the definition of "gaming device" in NRS 463.0155, which identifies certain tangible articles, and not processes, as the objects that make up a device.[38]

The Supreme Court of Nevada has repeatedly explained that statutory amendments to clarify the law's interpretation or scope are persuasive evidence of the legislature's intent in adopting the original statute.[39] Thus, the 1993 amendment of NRS 463.0155 adding a specific reference to storage mediums for "source language or executable code of a computer program" persuasively demonstrates the legislature viewed the existing provision of NRS 463.0155(1) inadequate. The new statutory language recognized that source code is not a gaming device or even a component of a gaming device, absent the code's possible effect on determining win or loss of the game. This was consistent with the long-standing policy objective of the Act to assure that the integrity of win and loss is preserved.[40] The lawmakers were concerned with whether the computer program embedded in the storage medium was essentially useful only to operate a slot machine. The plain and unambiguous language of NRS 463.0155(2)(c) definitively resolved any then-existing dispute on the interpretation and application of the statute to computer programs.[41]

Given the record established by the Board before the Sixty-Seventh Session of the Nevada Legislature, the purpose of this statute was to provide the basis on which the Nevada state gaming regulators would have the authority to determine whether certain source code was termed a gaming device.[42] That determination looked to the "storage medium," or in the words of the then-Board Chairman, the "computer chip" that runs a slot machine.[43] At the time of passage, the Board asked the legislature to adopt this definition for penal purposes, namely to support criminal prosecution of illegal manufacturer of gaming devices.[44] A penal statute must be strictly construed and may not be expanded by inference or implication.[45] A more expansive interpretation thus would be impermissible under the rulings of the Supreme Court of Nevada.

Having adopted this narrow and particularized treatment of the subject matter, the specific purpose of the legislature prevailed over some other more general objective.[46] Only if this *storage medium* with an embedded computer program component was "collected" or "combined" with another enumerated component identified in NRS 463.0155(2) was a gaming device manufactured.[47] Moreover, NRS 463.0155(2)(c) did not sweep all source language or

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[37] *Id*. (emphasis added).
[38] *Id*.
[39] *See, e.g.,* Hughes Props., Inc. v. State, 680 P.2d 970, 972 (Nev. 1984).
[40] *See* S.B. 527, 1981 Leg., 61st Sess., § 22, 1981 Nev. Stats. 1067, 1074 (Nev. 1981) (emphasis added). *See also supra* notes 19 and 26 and accompanying text.
[41] *See, e.g.,* Hotel Emp. & Rest. Emp. Int'l Union v. State *ex rel.* Nev. Gaming Control Bd., 747 P.2d 878, 879 (Nev. 1987).
[42] *See Hearing on S.B. 242, supra* note 33, at 3-4.
[43] *See id*. at 3.
[44] *Id*.
[45] *See, e.g.,* State v. Elsbury, 175 P.2d 430, 434 (Nev. 1946) (citations omitted); Sheriff, Washoe Cnty. v. Smith, 542 P.2d 440, 443 (Nev. 1975) (citations omitted).
[46] *See, e.g.,* Sierra Life Ins. Co. v. Rottman, , 601 P.2d 56, 57 (Nev. 1979).
[47] S.B. 242, 1993 Leg., 67th Sess., § 2, 1993 Nev. Stats. 306, 307 (Nev. 1993).

executable code within the ambit of a gaming device "component."[48] The statute required that the language or code must be "of a computer program" and must be contained within a storage medium reasonably demonstrated for use in a slot machine.[49]

2. *Refining Regulatory Parameters: Defining "Manufacturer"*

In 1993, the Legislature added to the Act a definition of the term "manufacturer" in the same bill which revised the statutory term *gaming device*.[50] This statutory definition codified in Subsection 1 language of a regulation that had existed since 1989, namely that a manufacturer is a person who "[m]anufactures, assembles, programs or makes modifications to a gaming device[.]"[51]

The 1993 addition of a definition of "manufacturer" incorporated into the Act the answer to "who" was regulated that already had become recognized through the practical application of the law before the Board and Commission.[52] The statute reiterated the simple test that the person or entity which assembles or programs the gaming device is a manufacturer.[53] Unfortunately, the Board and the Commission also urged lawmakers that these changes were insufficient to resolve some more complex debates which had emerged with changes in technology. Accordingly, the statute expanded the term "manufacturer" to also include a person who:

> Designs, [assumes responsibility for the design of,] controls the design or assembly [of,] or maintains a copyright over the design of a mechanism, electronic circuit or *computer program* which cannot be reasonably demonstrated to have any application other than in a gaming device or in a cashless wagering system, [mobile gaming system or interactive gaming system] for use or play in this [S]tate or for distribution outside of this [S]tate.[54]

Subsection 2 of the definition was flatly in conflict with the definition of "gaming device" adopted in the same statute and failed to define the critical statutory term. The same legislative measure created two mutually inconsistent tests of manufacturing as it relates to computer programs.[55] As already discussed, the *gaming device* definition subjected a computer program to regulation if it was embedded in a *storage medium* and, then, only if the storage medium component was "collected" or "combined" with another enumerated component identified in NRS 463.0155(2).[56] The definition of *manufacturer*, on the other hand, included a person having "design control," "assembly control," or "copyright control" of the computer program alone.[57] This latter definition was confusing and had little legal import. The requirement to be

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[48] *See id.*
[49] *See id.*
[50] *See* Assemb. B. 626, 1993 Leg., 67th Sess., 1993 Nev. Stats. 829 (Nev. 1993).
[51] Nev. Gaming Comm'n Reg. 14.010(9) (May 2003).
[52] *See id*. *See also* Assemb. B. 626, § 3.
[53] *See* Assemb. B. 626, § 3.
[54] *Id*. § 2 (emphasis added).
[55] *Compare id*. *with* S.B. 242, 1993 Leg., 67th Sess., § 2, 1993 Nev. Stats. 306, 307 (Nev. 1993) (codified at NEV. REV. STAT. § 463.0155 (2009)).
[56] *See supra* notes 31–49 and accompanying text.
[57] *See* Assemb. B. 626.

licensed under NRS 463.650 remained unchanged and only extended to a person engaged in "any form of *manufacture* . . . of any *gaming device,*"[58] and nowhere used the term "manufacturer" to prescribe the scope of the licensing requirement under NRS 463.650(1).[59]

After 1993, an independent contractor source code developer with design control of a gaming computer program may have been considered a manufacturer as defined by the Act.[60] The independent contractor nevertheless would not be subject to licensing under NRS 463.650 because he or she did not assemble, produce, or modify—that is, manufacture—a gaming device. Rather he or she designed and produced source code and computer programs that were incorporated into a gaming device.[61] If he or she properly limited the scope of work, the independent contractor neither fit together the parts listed in NRS 463.0155(2) that made a gaming device nor did he or she otherwise create a gaming device.

For over fifteen years, the Board and Commission were able to comfortably oversee the manufacture of gaming devices despite the lack of symmetry in the legislative scheme.[62] The regulators largely accomplished this due to the acceptable standards and guidance in practice that had developed in the industry and at the Board.[63] In the unclear cases, the touchstone for resolving any interpretative difficulty was whether or not a licensed manufacturer "assumed responsibility" for the product.[64] If so, the product moved forward under a licensee's supervision and control.[65] If not, the person or entity that wanted to manufacture the device was required to first become licensed under NRS 463.650.[66]

IV. Senate Bill 83

Nevada law remained the same until 2009, when the Board and Commission sought the passage of Senate Bill 83. The purpose of Senate Bill 83 in relation to the manufacturing community was to correct the perceived deficien-

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[58] Nev. Rev. Stat. § 463.650(1) (2009) (emphasis added).
[59] *See id.*
[60] *See* Nev. Rev. Stat. § 463.0172 (2009).
[61] The Nevada Bills, Statutes, and Gaming Commission Regulations do not supply a meaning for the terms "assembles" or "produces." In the absence of a statutory definition or a statute-based regulatory definition, the term must be construed through the application of the rules of statutory construction used by the Supreme Court of Nevada. *See* Meridian Gold Co. v. State *ex rel*. Dep't of Taxation, 81 P.3d 516, 518 (Nev. 2003) (citations omitted) (rules of statutory construction apply to administrative regulations). The Court has frequently ruled that undefined words of a statute should be given their ordinary meaning and that dictionaries are an appropriate source for determining a term's "ordinary meaning." *See, e.g.,* Dumaine v. State, 734 P.2d 1230, 1233 (Nev. 1987) (citations omitted). The dictionary definition of *assembles* means to fit together parts or pieces to make a completed product. *See* American Heritage College Dictionary 85 (4th ed. 2002). To *produce* in this context is defined as "[t]o create by physical or mental effort." *Id.* at 1111.
[62] *See supra* notes 31-61 and accompanying text.
[63] *See supra* notes 50-51 and accompanying text.
[64] *See supra* notes 52-54 and accompanying text.
[65] *See id*.
[66] *See supra* notes 55-61 and accompanying text.

cies in the Act that might impact the power of the regulators to assert jurisdiction over persons with "design control," "assembly control," or "copyright control" of the computer program alone.[67] The regulators pursued this objective by proposing statutory language to direct the Act's regulatory sights on persons and entities involved with control programs.[68] The Board and Commission believed this was necessary because while a manufacturing firm or an independent contractor developing source code might be a person within the definition of *manufacturer* in NRS 463.0172, given the definition of gaming device in NRS 463.0155, neither was engaged in "any form of manufacture . . . of any gaming device" subject to the licensing requirements for manufacturers under NRS 463.650(1).[69]

On December 15, 2008, the Nevada Legislature introduced Senate Bill 83 as a pre-filed omnibus bill of the Board for the Seventy-Fifth Session.[70] As originally introduced, the bill contained three principal changes to existing provisions of the Act that govern the licensing and regulation of manufacturers of gaming devices. First, Senate Bill 83 provided in Section 1 of the bill a definition of what conduct constitutes an act of manufacture.[71] This change in the statute tidied-up the inartful drafting in 1993.[72]

Second, Section 3 of Senate Bill 83 revised the definition of "gaming device" by introducing the concept of a "control program."[73] The definition of control program added "software" to the existing concepts of source language or executable code and extended the language "which affects the result of a wager by determining win or loss" to such software and source code.[74] The concept of "control program" was considerably broader than the prior concepts of "source language or executable code," although these concepts remained tethered to the storage medium component. More problematic, the amendment made a "control program" itself a gaming device, thereby eliminating the concept that a computer program was only a component of a gaming device, and then only when embedded in a storage medium (e.g. EPROM, CD Rom or flashdrive) that contained a slot machine computer program.[75]

Third, the bill conferred on the Commission open-ended authority to define by regulation any item as a "gaming device" or to determine anything is a "control program."[76] The statute as proposed by the regulators provided no standards for what might be swept within the meaning of these terms by a Commission Regulation.[77]

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[67] *See Hearing on S.B. 83 Before the S. Comm. on Judiciary,* 2009 Leg., 75th Sess. 3, 6-7 and Exhibit C, C1-C2 (Nev. Feb. 10, 2009) (testimony of Dennis K. Neilander, Chair, State Gaming Control Bd.) [hereinafter *Judiciary First Hearing Minutes*].

[68] *See* S.B. 83, 2009 Leg., 75th Sess., §§ 1, 3 (Nev. Prefiled Dec. 15, 2008).

[69] NEV. REV. STAT. § 463.650 (2009).

[70] S.B. 83, 2009 Leg., 75th Sess. (Nev. Prefiled Dec. 15, 2008).

[71] *See id*. § 1.

[72] *Compare* S.B. 83, § 1 (Nev. Prefiled Dec. 15, 2008) *with supra* notes 54-58 and accompanying text.

[73] *See* S.B. 83, § 3(5) (Nev. Prefiled Dec. 15, 2008).

[74] *Id.* § 3(7).

[75] *Compare id.* § 3(5) *with supra* notes 34-49 and accompanying text.

[76] *See* S.B. 83, § 7 (Nev. Prefiled Dec. 15, 2008).

[77] *See id*.

The gaming device manufacturers sought changes to Senate Bill 83 before the Senate Judiciary Committee. Specifically, the industry asked that lawmakers impose a standard to guide the Commission in adopting rules defining what "software, source language or executable code" is considered a "control program."[78] The Legislature agreed and adopted the touchstone that particular software, source language, or executable code must be of the type that "affects the result of a wager by determining win or loss."[79] The industry also asked for legislative authority and parameters to guide the Commission in fashioning any regulatory scheme governing independent contractors.[80] Lawmakers amended Senate Bill 83 to include a statutory definition of "independent contractor" and specific authority on the types of oversight processes delegated to the Commission.[81]

The gaming industry supported the Board's efforts to amend the Act to clarify provisions enacted in 1993 that attempted unsuccessfully to recognize that a manufacturer was essentially the person who assumed responsibility for the gaming device.[82] The Legislature included a new definition of the term "manufacture" sought by the Board.[83] Consequently, under the amended statute a person becomes subject to licensing if he or she "direct[s], control[s], or assume[s] 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[.]"[84]

V. The Commission's Rules on Independent Contractors

A. *The Background of the Rulemaking Process*

Senate Bill 83 became law on May 18, 2009, and the Board moved quickly to have the Commission promulgate rules to regulate control programs and independent contractors.[85] Thereafter, the Board published proposed amendments and additions to Commission Regulation 14 on July 9, 2009 and conducted an industry workshop on July 22, 2009.[86] The workshop was followed by a Board hearing on September 3, 2009, a special hearing of the Board

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[78] *See Judiciary First Hearing Minutes, supra* note 67, at 12 and Exhibit C, C2 (testimony of Dan R. Reaser on behalf of the Ass'n of Gaming Equip. Mfrs.).

[79] *See Hearing on S. 83 Before the S. Comm. on Judiciary,* 2009 Leg., 75th Sess. 4-7 and Exhibit C, C60-C61 (Nev. Feb. 26, 2009) (testimony of Dennis K. Neilander, Chair, State Gaming Control Bd.) [hereinafter *Judiciary Second Hearing Minutes*].

[80] *See Judiciary First Hearing Minutes*, *supra* note 67, at 12-14 and Exhibit C, C7-C9 (testimony of Dan R. Reaser on behalf of the Ass'n of Gaming Equip. Mfrs.).

[81] *See Judiciary Second Hearing Minutes, supra* note 79, at 4-5, 7 and Exhibit C, C42, C48-C51(testimony of Dennis K. Neilander, Chair, State Gaming Control Bd.).

[82] *See Judiciary First Hearing Minutes*, *supra* note 67, at 12-14 and Exhibit C, C1-C2, C7-C9 (testimony of Dan R. Reaser on behalf of the Ass'n of Gaming Equip. Mfrs.).

[83] *See* S.B. 83, 2009 Leg., 75th Sess., § 1, 2009 Nev. Stats. 272, 273 (Nev. 2009); *Judiciary Second Hearing Minutes*, *supra* note 79, at 4, 6-7 and Exhibit C, C42-43.

[84] *See* S.B 83, § 1.

[85] *See infra* note 85 and accompanying text.

[86] *See generally Public Workshop on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Control Bd.* (Nev. July 22, 2009).

on November 13, 2009, and a Board hearing of February 4, 2010.[87] At a Commission hearing on March 18, 2010, the Board recommended a proposed regulation.[88] The Commission adopted amendments to Regulation 14 on April 22, 2010.[89] However, before canvassing these new administrative rules, a review of the issues before the Commission is useful.

The manufacturing community's approach to defining what constitutes a control program and for providing oversight of independent contractors consistently differed from that proposed by the Board.[90] The cornerstone of the Board's regulatory approach was an expansive definition of control program and implementation of a mandatory pre-registration—akin to that used for gaming employees and associated equipment manufacturers—of all independent contractors developing "control programs" used in slot machines.[91] The Board, therefore, wanted to directly regulate and certify persons employed as independent contractors of the manufacturers.[92] Also, the Board sought to layer reporting and oversight obligations on the manufacturer in dealing with independent contractors to this registration process.[93]

The centerpiece of the industry approach, as articulated by the Association of Gaming Equipment Manufacturers (hereinafter "AGEM"), was the requirement for the licensed manufacturer to assume responsibility for the accuracy of the code work of independent contractors and integrity of the process of integrating the code written by these contractors into the computer programs that run gaming devices.[94] In that context, the AGEM approach relied on reporting and other oversight duties of the licensees so that the Board and Commission could monitor, and, where appropriate, exercise direct oversight of the independent contractors through the long-standing call-forward process in the Act. Although the Board embraced the AGEM position, its scheme added to that requirement the burden of a registration system and eliminated typical procedural steps in suitability processes.[95]

These policy differences between the industry and the Board were narrowed through the rule-making process, and by the time the Commission was evaluating new rules, two critically important issues remained. The first was what constituted the scope of what is a control program, a defined term that necessarily impacted the mandatory registration requirement. The industry

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[87] *See generally Hearing on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Control Bd.* (Nev. Sept. 3, 2009); *Special Hearing on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Control Bd.* (Nev. Nov. 13, 2009) [hereinafter *Special Board Hearing Transcript*]; *Hearing on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Control Bd.* (Nev. Feb. 4, 2010) [hereinafter *GCB Feb. 2010 Hearing*].

[88] *See supra* note 85 and accompanying text. *See also Hearing on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Comm'n* 9-10 (Nev. Mar. 18, 2010).

[89] *See Hearing on Proposed Amendments to Nev. Gaming Comm'n Reg. 14 Before the Nev. Gaming Comm'n* 87-89 (Nev. Apr. 22, 2010) [hereinafter *NGC Apr. 2010 Hearing*].

[90] AGEM Comment Letter, *supra* note 5, at 1.

[91] *Id*. at 1-2.

[92] *Id*. at 2.

[93] *Id*.

[94] *Id*.

[95] *Id.*

argued that subsection 1 of Proposed Board Regulation 14.021 should apply to a limited category of independent contractors, namely those that write code that affect the random number generation, mapping, and evaluation processes.[96] The second was to modify Subsection 1 of Proposed Board Regulation 14.0215. AGEM wanted a clear and unequivocal statement that the regulations entirely preempted the application of the manufacturer licensing requirements of NRS 463.650 for independent contractors.[97]

The Board rejected these propositions because in its view, absent a new regulation providing for registration of independent contractors, these persons must have a manufacturer's license to write control program code.[98] However, the gaming industry correctly demonstrated that the Board's position had fundamental flaws. For instance, contrary to the Board's view, there is no provision in Senate Bill 83 mandating licensing under NRS 463.650 of an independent contractor who produces a control program for a licensed manufacturer.[99] Prior to the statutory changes made in Senate Bill 83, a person whose exclusive participation in the manufacturing process for a gaming device was to design or develop source code was not a "manufacturer" of a "gaming device."[100] NRS 463.0155(2)(c) explicitly dealt with the legal treatment of source code in a gaming device. That statute established that the legislature deemed this function as the development of a component of a gaming device and then only when embedded within the storage medium that contained a "computer program that cannot be reasonably demonstrated to have a use other than in a slot machine."[101]

Prior to passage of Senate Bill 83, the Nevada Legislature decided to only extend the reach of the manufacturer licensing statute to those who combined both the storage medium containing such a computer program and another enumerated component listed in NRS 463.0155(2).[102] The Legislature developed the preexisting statutory scheme using precision and particularity with the direct hand of the Board and Commission. An independent contractor developing source code of games for slot machines did not need a manufacturer's license pursuant to NRS 463.650 under that statutory scheme.[103]

Frequently over at least the last twenty years, the Board and the Commission have considered and approved gaming devices submitted by licensed manufacturers who engaged unlicensed independent contractors to help create the devices.[104] In fact, the Board and Commission have publicly encouraged and applauded manufacturers who leverage technology resources in this way, as long as the licensed manufacturers maintain control of the manufacturing process and assume responsibility for the finished products.[105]

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[96] *Id*.
[97] *Id.*
[98] *Special Board Hearing Transcript*, *supra* note 87, at 31-36.
[99] AGEM Comment Letter, *supra* note 5, at 6.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.

Senate Bill 83 did not change the status of the law on independent contractors. Instead, at the request of AGEM, the 2009 legislation delegated to the Commission the authority to provide for any regulatory oversight of independent contractors by adopting a regulation.[106] Absent the adoption of a regulation, independent contractors would remain unregulated. The Board's suggestion that, absent a Commission oversight regulation, independent contractors would be subject to mandatory licensing as a manufacturer is contrary to the plain language of Senate Bill 83 as codified in NRS 463.650(9). Moreover, the Board's position is in direct conflict with the rule of statutory construction that a general statute such as the licensing provision of NRS 463.650(1) is controlled by a specific statute on oversight of independent contractors as set forth in NRS 463.650(9).[107]

Even if one assumes that independent contractors must be licensed, the Board posited that Senate Bill 83 authorized the Commission to replace the licensing requirement with a registration requirement.[108] However, if that is so, then the Commission is equally empowered to replace the licensing requirement with a reporting requirement, a certification that the licensed manufacturer submitting the game has reviewed the code and "assumes responsibility" for the control program, or no requirement altogether. Senate Bill 83 does not dictate a particular means of regulating independent contractors, and the Board actually recognized this in the end as the ultimate issue for the Commission.[109]

AGEM also explained to the Commission that the definition of "control program" in the Board's proposed regulation cast too broadly the regulatory net contrary to the intent of the lawmakers.[110] The Nevada Legislature provided that the Nevada Gaming Commission must adopt regulations specifying what "software, source language or executable code" is a control program.[111] The Legislature, however, did not confer on the Commission open-ended rule-making authority.[112] To be designated a control program, the Legislature retained the long-established touchstone that particular software, source language or executable code must be of the type that "affects the result of a wager by determining win or loss."[113] The Supreme Court of Nevada has explained that administrative agencies like the Board and Commission may use their rule-making authority to craft rules to effectuate a legislative objective, but the

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[106] *Id*. at 7.

[107] *See, e.g.,* Hotel Emp. & Rest. Emp. Int'l Union, AFL-CIO v. State *ex rel.* Nev. Gaming Control Bd., 747 P.2d 878, 879 (Nev. 1987) (citations omitted) (plain meaning controls); State Indus. Ins. Sys. v. Surman, 741 P.2d 1357, 1359 (Nev. 1987) (citations omitted) ("a specific statute takes precedence over a general statute.").

[108] AGEM Comment Letter, *supra* note 5, at 7.

[109] *Special Board Hearing Transcript*, *supra* note 87, at 40, 43.

[110] AGEM Comment Letter, *supra* note 5, at 8.

[111] *Id*. at 7.

[112] *See, e.g.*, Oliver v. Spitz, 348 P.2d 158, 159 (Nev. 1960) (rules inconsistent with the statute are invalid and do not have the force and effect of law).

[113] AGEM Comment Letter, *supra* note 5, at 7-8. *See supra* notes 18-19 and 25 and accompanying text.

agency may not adopt regulations in conflict with or that ignore the language of the statute.[114]

The definition of *control program* sought in the proposed regulation impermissibly exceeded the parameters of the authority given to the Commission by the Nevada Legislature to define "control program" in two ways. First, the proposed rule begins by stating as to a control program, "[t]he term *includes but is not limited to*, any software, source language or executable code[.]"[115] This language makes the enumerated list illustrative and not exclusive. The enabling statute specifically states that the Commission must identify what is within the defined term, and absent such a designation, particular software code is not a control program.[116] The rule must, therefore, provide an exclusive list and not just illustrative examples.

A similar deficiency in this language is the statement that a control program is "any software, source language or executable code *associated with* the . . . [following operations.]"[117] Inclusion of the "associated with" concept exceeds the parameters of the rule-making authority conferred by the Legislature. In a computer program that operates a gaming device, all code is necessarily associated with all other code in the integrated computer program that runs the device.[118] For that reason, this language allows code that does determine win or loss to sweep that which does not into the ambit of a control program by mere association of the code in a single computer program. This approach is not consistent with the statutory authority conferred on the Commission. The legislative grant of rule-making authority under Senate Bill 83 was to prescribe with particularity the classes of computer code that determine win or loss that will then be subject to regulation.[119]

Second, the proposed rule enumerates as a control program the following ten types of operations performed by software, source language, or executable code:

(a) Random number generation process;

(b) Mapping of random numbers to game elements displayed as part of game outcome;

(c) Evaluation of the randomly selected game elements to determine win or loss;

(d) Payment of winning wagers;

(e) Game recall;

(f) Game accounting including the reporting of meter and log information to on-line slot metering system;

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[114] *See, e.g.,* State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 995 P.2d 482, 485 (Nev. 2000) (citations omitted) (agency regulation is invalid if it conflicts with existing statutory authority or exceeds scope of statutory delegation of authority to agency); Cashman Photo Concessions & Labs v. Nev. Gaming Comm'n, 538 P.2d 158, 160 (Nev. 1975) ("[A]dministrative body may within prescribed limits and when authorized by the law-making power" adopt regulations to effectuate expressed legislative intention.).

[115] *See* Nev. Gaming Comm'n Reg. 14.010(4) (Proposed; Draft date July 9, 2009) (emphasis added).

[116] AGEM Comment Letter, *supra* note 5, at 8.

[117] *Id.* (emphasis added).

[118] *See id*.

[119] *See id.* at 8.

(g) Monetary transactions conducted with associated equipment;

(h) Software verification and authentication functions which are specifically designed and intended for use in a gaming device;

(i) Monitoring and generation of game tilts or error conditions; and

(j) Game operating systems which are specifically designed and intended for use in a gaming device.[120]

The items listed in Paragraphs (a) through (c) are code operations which may determine the result of a wager by determining win or loss.[121] The remaining seven items, however, do not *determine* win or loss.

The Board's proposed rule confused, for example, that although a game recall routine may collect, store, and permit access to information used to confirm a win or loss, this function does not "determine" win or loss. Rather, the operations listed in paragraphs (d) through (i) perform some other function in the gaming device—preserving a record of certain past outcomes, performing accounting functions, providing oversight of malfunctions, detecting whether an approved program is in use—based on the fact of, or even without reference to, coding a win or loss.[122] The last of these items in paragraph (j), a game operating system, is so over-inclusive as to plausibly draw both operations that determine win or loss and those that have absolutely no connection to the statutory standard established for the rule by the legislators. The proposal as a whole comprehends just about every component and module in a slot machine, as well as slot accounting and other systems that historically have not been subject to this kind of regulation.

The Commission rejected the industry position on the over-breadth of the control program definition.[123] Further, the Board's request for a mandatory registration requirement for independent contractors was accepted,[124] as well as a rule imposing on licensed manufacturers specific duties based on the "assumes responsibility" test.[125] The Commission did, however, agree with AGEM that the rules include an exemption from licensing for independent contractors.[126]

B. Summary of Regulatory Program Adopted

1. Some Critical Definitions

As relates to determining the scope of regulation for independent contractors, the two most relevant rules adopted by the Commission are the definition of "independent contractor" in Regulation 14.010(11) and the definition of "control program" in Regulation 14.010(4). The definition of "independent contractor" is critical because it describes the class of "persons" subject to the new oversight rules. An independent contractor is (i) any natural person or business entity (a "person"); (ii) that is not an employee of the licensed manu-

[120] Nev. Gaming Comm'n Reg. 14.010(4) (Proposed; Draft date July 9, 2010).
[121] AGEM Comment Letter, *supra* note 5, at 9.
[122] *Id.*
[123] *See NGC Apr. 2010 Hearing, supra* note 89, at 12-14, 87-89.
[124] Nev. Gaming Comm'n Reg. 14.021(1) (July 2010).
[125] *See NGC Apr. 2010 Hearing, supra* note 89, at 12, 15-16, 87-89.
[126] *See Special Board Hearing Transcript*, *supra* note 87, at 33-35. *See also* Nev. Gaming Comm'n Reg. 14.0215(1), (7) (July 2010).

facturer or its affiliates; (iii) who pursuant to an agreement with a licensed manufacturer; (iv) designs, develops, produces or composes software, source language or executable code that the manufacturer "intends" to compile into a *control program*.[127]

Individuals or companies which are an independent contractor under this definition *and* which comply with the requirements of Regulation 14 governing independent contractors, are exempt from the manufacturer licensing requirements otherwise imposed on persons designing or producing control programs.[128] This safe-harbor eliminates prior disputes about whether both the "independent contractor" and the licensed manufacturer are "manufacturers" that must be licensed. Importantly, while prior to 2009 there were legal problems with the Board's assertion that independent contractors were required to hold manufacturer's licenses, Senate Bill 83 virtually eliminated this debate by making "control programs" alone a gaming device under NRS 463.0155. Moreover, the regulation makes clear that an individual independent contractor or natural person employed by an independent contractor company is not a gaming employee subject to any overlapping or duplicative registration requirements.[129]

Given this definition of independent contractor, the next most critical term is "control program." The concept of control program is expansive. The term includes the obvious, namely code that affects the random number generation, mapping, and evaluation processes.[130] The term also includes code that impacts:

> [T]he payment of winning wagers, game recall, game accounting including the reporting of meter and log information to on-line slot metering system, monetary transactions conducted with associated equipment, software verification and authentication functions which are specifically designed and intended for use in a gaming device, monitoring and generation of game tilts or error conditions, and game operating systems which are specifically designed and intended for use in a gaming device.[131]

Because the term *control program* is only codified within the statutory definition of *gaming device*,[132] a control program used in an inter-casino linked system, on-line slot metering system, or cashless wagering system is necessarily excluded from the rule.

2. *Registration of Independent Contractors*

The centerpiece of the Commission's oversight of independent contractors is the Regulation 14.021 registration requirement administered by the Board. There are two very important limitations on the registration requirement. First, no independent contractor is required to be registered unless and until the code written by the contractor is (i) actually incorporated into a control program, and, (ii) that control program is submitted by the manufacturer through an

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[127] *See* Nev. Gaming Comm'n Reg. 14.010(11) (July 2010).
[128] *See id.* at 14.0215(1) (July 2010).
[129] *Id.* at 14.0215(8) (July 2010).
[130] *Id.* at 14.010(4)(a)-(c) (July 2010).
[131] *Id.* at 14.010(4)(d)-(j) (July 2010).
[132] *See* NEV. REV. STAT. § 463.0155 (2009).

application to the Board's Technology Division for approval of a new gaming device or a modification to an existing device or game.[133] Second, the registration requirement does not apply to any agreement and scope of work existing before July 1, 2010, provided that scope of work is not modified *and* is completed before June 30, 2011.[134] This allows licensed manufacturers to essentially complete within a year what is in the "pipeline" under preexisting relationships and agreements.[135]

Consequently, independent contractors are not subject to the registration requirement while performing the research and development functions. The important corollary of that aspect of Regulation 14.021 is that new gaming device or modification applications will not receive final approval until registration is completed for all independent contractors who contributed to the control program code.[136]

The registration requirements are imposed on the independent contractor, not the manufacturer.[137] The process envisioned by the Board and Commission has been described by the regulators as a hybrid of the procedures used for associated equipment manufacturers and gaming employees.[138] The independent contractor must complete and submit a registration form.[139] The form is submitted in hard-copy paper format,[140] and the regulators may in the future allow for filing through an electronic interface on the Board's website akin to the procedure for gaming employees.[141] The application will be reviewed to determine if the form is complete.[142] If complete, the Board will issue a written document to the independent contractor that certifies that the contractor is in fact registered.[143] No fee is imposed for submitting or processing the application.[144] Of import is that registration is "informational," and establishes regulatory jurisdiction in the Board and Commission, but is not a determination of the contractor's suitability or probity.[145]

The information required by the application, however, is set forth with specificity in Regulation 14.021. Every independent contractor must provide information on the following:

- The name, address, and contact information of the licensed manufacturer with whom the independent contractor has entered into an agreement.

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[133] Nev. Gaming Comm'n Reg. 14.021(1) (July 2010).
[134] *Id.* at 14.021(6) (July 2010).
[135] *See id.*
[136] *See id.* at 14.021(1) (July 2010).
[137] *See id.*
[138] *See, e.g., Special Board Hearing Transcript*, *supra* note 87, at 44.
[139] Nev. Gaming Comm'n Reg. 14.021(2) (July 2010).
[140] *See Technology Division,* NEV. GAMING COMM'N & STATE GAMING CONTROL BD., http://gaming.nv.gov./agency_forms.htm#tech (last visited Feb. 12, 2011).
[141] *See Gaming Employee Registration,* NEV. GAMING COMM'N & STATE GAMING CONTROL BD., http://gaming.nv.gov./gaming_emp_reg.htm (last visited Feb. 12, 2011).
[142] *See* Nev. Gaming Comm'n Reg. 14.021(4) (July 2010).
[143] *See GCB Feb. 2010 Hearing*, *supra* note 87, at 70-74.
[144] *Id.* at 75-76.
[145] *See GCB Feb. 2010 Hearing*, *supra* note 87, at 74-75.

- A summary of the business and other arrangement between the licensed manufacturer and the independent contractor.
- Any arrests of the independent contractor by law enforcement involving a felony or crime of moral turpitude and the resulting disposition.
- Any incidences in which the independent contractor has, either individually or as part of a group, been refused a gaming license or otherwise found unsuitable by a regulatory body.
- Any privileged licenses held by the independent contractor and any current or past disciplinary against those licenses.[146]

All independent contractors must also agree as part of the registration process that the information they provided is accurate and complete, that they will cooperate with the Board and Commission, and that they are subject to a suitability call-forward procedure.[147]

Additionally, in those instances where the independent contractors are individuals, they must disclose their (i) "name, including aliases, past and present"; (ii) "residential address or addresses for the last five years"; (iii) "contact information (i.e. address, telephone number, e-mail address)"; (iv) "employment information, both current and for the prior ten years"; and (v) "date and place of birth."[148] Independent contractors that are business entities must include the following additional information:

1. The name(s), address(es), and contact information of the organization(s) or association(s) under which the independent contractor does business.

2. The date and jurisdiction under which the independents contractor is registered as a legal entity.

3. To the extent existent, and where applicable law permits disclosure, the independent contractor's tax identification number.

4. The names, and date and place of birth of the natural persons employed by the independent contractor who designed, developed, programmed, produced or composed the software, source language or executable code that has been compiled into the control program of a new gaming device or of a modification to a gaming device submitted for approval.[149]

Subsections 3, 4 and 7 of Regulation 14.021 set forth a procedure whereby the Board may ask an independent contractor for additional information to supplement the registration form.[150] The registration will not be completed until such supplemental information is provided. If the independent contractor wants to challenge this request he or she may appeal to the Commission.[151] However, in the interim, the independent contractor is not registered and the Board has the ability to hold the game approval hostage unless the manufacturer can obtain a "good cause" waiver from the Board Chairman.[152] The waiver procedure authorized by Subsection 7 of Regulation 14.021 is not lim-

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[146] Nev. Gaming Comm'n Reg. 14.021(2)(c) (July 2010) (numbering, lettering and introductory phrases omitted).
[147] *Id.* at 14.021(2)(e) (July 2010).
[148] *Id.* at 14.021(2)(a) (July 2010).
[149] *Id.* at 14.021(2)(b) (July 2010).
[150] *See id.* at 14.021 (3)-(4), (7) (July 2010).
[151] *Id.* at 14.021(3) (July 2010).
[152] *See id.* at 14.021(1), (3)-(4), (7) (July 2010).

ited to this context, thus providing a general safety-valve by which manufacturers can ask for a "good cause" exception to the registration requirement.[153]

Once registered, an independent contractor must update or affirm no changes have occurred in his or her record information with the Board by January 15 of each year.[154] There is a ninety-day grace period after which the registration lapses and must be resubmitted anew.[155]

3. Manufacturer's Obligations For Independent Contractors

Manufacturers have certain new regulatory obligations relative to independent contractors. These obligations are in four areas. First, the manufacturer's agreement with the independent contractor must include certain provisions. That contract must include provisions allowing the manufacturer to terminate the contract without continuing obligation if the contractor refuses to respond to information requests from the Board, fails to file a suitability application required by the Commission, or is found unsuitable.[156]

A second duty imposed on manufacturers is to perform a "complete review" of compliance with Commission Regulations and Technical Standards. This requires the manufacturer to independently examine for regulatory and technical compliance any software, source language, or executable code "designed, developed, produced or composed by an independent contractor" prior to submission to the Board.[157]

The third new task is related to game submission as well. The licensee must disclose in a new game or modification application a list of independent contractors and a description of the software code or language they "designed or developed" that has been compiled by the manufacturer into the control program.[158] Although this requirement is only explicitly imposed for modifications under Regulation 14.110(3)(e), the Board can obtain the same information for new games by modifying the forms used under Regulation 14.030.

Finally, manufacturers are obliged to maintain for a period of five years records by contractor name of software, source language, or executable code designed, developed, produced or composed by an independent contractor.[159] Regulation 14.024 provides that the Board chairman can modify this record-keeping requirement by written approval letter. The rule likewise states that the failure to maintain the records is an unsuitable method of operation.[160]

The record-keeping requirement is not limited to the work of "registered" independent contractors, but rather applies to all work completed by an independent contractor if that work is intended for compilation into a control program of the manufacturer.[161] This means that the manufacturers need to keep the records immediately upon engaging the contractors even if the work may be

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[153] *See id.* at 14.021(7) (July 2010).
[154] *See id.* at 14.021(5) (July 2010).
[155] *See id.*
[156] *Id.* at 14.023 (July 2010).
[157] *Id.* at 14.024(1) (July 2010).
[158] *See id.* at 14.110(3)(e) (July 2010).
[159] *Id.* at 14.024(2) (July 2010).
[160] *See id.*
[161] *See id. See also supra* notes 133-136 and accompanying text.

research and development because at some juncture the code may be compiled into a control program.[162] Of interest to licensees—as well as perhaps being indicative of an absence of need for independent contractor regulation altogether—during the rule-making process on these new regulations, the Board frequently noted that the obligations imposed by Regulation 14 on manufacturers relative to independent contractors were in addition to those related to business associate due diligence that exist for the licensees under gaming compliance review and reporting systems pursuant to Regulation 5.045.[163]

4. Independent Contractor Suitability Proceedings

The new regulation states that the Commission, on the recommendation of the Board, may require by written notice any independent contractor to file an application for a finding of suitability.[164] This regulation asserts that the Commission's jurisdiction continues over independent contractors even if they are not registered and have no continuing agreements or work with a manufacturer.[165]

Unless the Commission orders otherwise, the independent contractor has at least thirty days to comply with an application demand, and while the suitability determination is pending, the independent contractor may continue to work for the manufacturer.[166] The refusal or failure to file within the thirty-day period (or other specified period if longer) is a basis for a finding of unsuitability.[167]

If the independent contractor is ultimately found unsuitable after investigation and hearing, then any registration held by the contractor is cancelled.[168] Additionally, manufacturers must terminate any continuing relationships, associations or agreements with the unsuitable contractor, and failure to promptly do so is an unsuitable method of operation.[169] The finding of unsuitability impacts the products as well. Thus, any pending new gaming device application that includes a control program containing the work of the unsuitable contractor will not be approved.[170] Further, the approval previously granted to a gaming device that includes a control program containing work of the unsuitable contractor may be revoked if a nexus is shown between the basis of unsuitability and the work of the contractor.[171] The potential economic risks for manufacturers associated with this rule is alone sufficient to serious chill interest in using independent contractors.

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[162] *See* Nev. Gaming Comm'n Reg. 14.021(1), 14.024(2) (July 2010).
[163] *See id.* at 5.045(6) (Mar. 1991).
[164] *Id.* at 14.0215(2)-(3) (July 2010).
[165] *Id.* at 14.0215(6) (July 2010).
[166] *Id.* at 14.0215(3), (7) (July 2010).
[167] *Id.* at 14.0215(7) (July 2010).
[168] *Id.* at 14.0215(4)(a) (July 2010).
[169] *Id.* at 14.0215(4)(b), (5) (July 2010).
[170] *Id.* at 14.0215(4)(c) (July 2010).
[171] *Id.* at 14.0215(4)(d) (July 2010).

VI. A Better Approach

The integrity of gaming devices is not enhanced, Nevada's exposure to reputational injury is no less, and an important segment of the Silver State's economy is no healthier for the April 22, 2010, adoption of the Senate Bill 83 regulations. These administrative rules, therefore, fail by these important measures to justify expanding regulatory control by the Board and Commission.

An approach to achieving the same regulatory objectives without the same adverse regulatory costs and potential for detrimental economic impacts can be accomplished by returning to a system similar to that preexisting the adoption of Senate Bill 83. There are three aspects to such a system, and if adopted as bright-line tests, these provide the regulatory oversight needed over the manufacture of gaming devices.

First, the definition of what comprises a *control program* should be revised consistent with the statutory nexus required in NRS 463.0155, namely that the computer code must affect the result of a wager by determining win or loss. Adhering to this requirement will ensure that regulatory energy is properly focused on the random number generation, mapping, and evaluation processes that have been the long-standing cornerstone of Nevada's regulations. This also avoids confusion between regulating *what determines* win or loss on the one hand and on the other hand *how the information* of win or loss *is used* otherwise within the game computer program. As relates to the manufacture of a gaming device, the Commission should likewise revisit the regulation of the storage medium containing the control program because this is the component that is and must be practically regulated in commerce.

Refocusing on the storage medium containing the source code of the gambling game's computer program is also consistent with the practical experience of the gaming device manufacturing industry. Nevada manufacturers frequently incorporate platform level operations that are "off-the-shelf" products.[172] NRS 463.650 licensees use Linux, UNIX, or Windows-based products, as well as device drivers for graphics cards, USB, and other devices in the design of their gaming devices. The licensed manufacturer takes ownership of all source files, whether they are code, graphics, or sound and runs them through its quality processes prior to creating a program that can functionally operate within the gaming device. At no point does the unlicensed independent contractor or other component vendor have the ability to create a game program that will run on the gaming device, as the contractor does not have access to create a digital certificate for the game program that will work with the gaming machine's approved operating system program.

Second, the rules should be drafted with an emphasis on the traditional "assumes responsibility" test. This regulatory concept has served the regulators, industry, and marketplace ably for nearly two decades of unprecedented growth in technology and the scale of the business. Nevada's regulatory interests are served if a licensed manufacturer demonstrates "design control," "assembly control," and "copyright control" of the control program. The identity of the employees and independent contractors working for licensed manu-

[172] *See* AGEM Comment Letter, *supra* note 5, at 4.

facturers will always be a dynamic that the Board and Commission cannot control without expending significant public and private resources. As the independent contractor registration program just adopted proves, the Board and Commission do not even view the procedures as determining any form of suitability. This is a concession that the registration program under Commission Regulation 14.021 achieves less than what the manufacturers must already perform under the licensee's compliance plans and due diligence processes.

Third, the energies of the Board and Commission should be dedicated to the critical focal points of (i) the qualifications and resources of the firms issued and holding a manufacturer's license, (ii) the existence of an effective compliance review and reporting apparatus in each of these firms, and (iii) the strength of the protocols used by the Board to evaluate and by the Commission to approve new games and game modifications. Beyond these three focal points, the allocation of scarce and costly regulatory resources does not satisfy a rigorous cost and benefit analysis.

The Commission should revisit the Senate Bill 83 regulations, concentrating on these three topics. With the possible exception of establishing suitability proceedings jurisdiction,[173] all the tools the Commission needs to address any concern about the integrity of gaming device manufacture have been in the Act for decades. Indeed, the Senate Bill 83 regulations may have been largely an unnecessary diversion from a core mission of the Board and Commission.

[173] *See* NEV. REV. STAT. § 463.650(9)(c) (2009).