IN THE MATTER OF THE APPLICATION OF MARINA ASSOCIATES FOR A CASINO LICENSE

Decided: December 7, 1981
Approved For Publication By The Casino Control Commission: April 8, 1988

SYNOPSIS

Marina Associates applied to the Casino Control Commission for a casino license. Following a hearing by the Commission, a license was issued.

The Commission's decision focused on the qualifications of two corporate entities: Harrah's, an intermediary company of Marina and Holiday Inns, Inc. ("HII"), the parent company of Marina. Harrah's is a wholly-owned subsidiary of HII.

Regarding Harrah's, the Commission considered conduct involving the operation of casinos in Nevada and found that none of the incidents impact on qualification for licensure.

The major issue in the hearing involved alleged "sensitive payments" by HII to government officials or employees. Some of these were characterized as "grease" payments to low-level officials in foreign jurisdictions for the purpose of encouraging them to perform their duties more expeditiously. Expert witnesses testified that such payments would not technically violate any laws. Since 1976, HII has abided by a new corporate policy regulating sensitive payments, which the Commission found has been vigorously enforced to ensure compliance with both the letter and intent of applicable laws. Therefore, because of the new corporate policy and because none of the applicant's past actions violated any laws, the sensitive payments issue was held not to reflect adversely on the good character of HII.

Accordingly, the Commission concluded that the applicant had established by clear and convincing evidence its qualifications for a casino license.

Howard A Goldberg, Esq.; John Walker Daniels, Esq., and Nicholas Casiello, Jr., Esq., for Marina Associates
James F. Flanagan, Deputy Attorney General; L. Michael Lee, Deputy Attorney General, and Guy S. Michael, Assistant Attorney General, for the Division of Gaming Enforcement

Robert J. Genatt, General Counsel; David Arrajj, Special Counsel for Licensing; Thomas N. Auriemma, Deputy Director/Legal Division; Ted Rosenberg, Assistant Counsel, and Scott N. Silver, Assistant Counsel, for the Casino Control Commission

BY THE CASINO CONTROL COMMISSION:

I. INTRODUCTION

This matter has been brought before the Commission pursuant to the application of Marina Associates ("Marina") for a casino license. The history of Marina's application, its acquisition of a Temporary Casino Permit in November 1980, and the qualification criteria to this plenary casino license proceeding are set forth in the Chairman's Instruction to the Commission and need not be repeated at length here. That Instruction has been given to the Commissioners, made part of the record of the casino license hearing, and is incorporated by reference in this Opinion.

This Opinion concerns itself only with those areas which were the subject of significant attention at the hearing in this case. Detailed findings with regard to other licensing criteria are contained in a separate proposed Resolution.

The investigative report of the Division of Gaming Enforcement ("Division"), which, as modified, has been stipulated and admitted into evidence outlined several areas of concern. After exposition of the evidence at the hearing, the Division indicated in summation the following areas of concern: 1) certain accounts due to Harrah's, an intermediary company of Marina, were settled by payment to A.I.R. Corporation, a subsidiary of Harrah's; 2) the corporate practice of Harrah's whereby company funds were expended for prostitutes for the benefit of certain preferred casino patrons; 3) certain political contributions made by Mr. William F. Harrah, the founder of the company, with company funds; 4) litigation between Harrah's and the Nevada Gaming Control Board involving license fees, taxes, and interest due the State of Nevada from sports wagering at Harrah's casinos in that State; and 5) certain "sensitive" payments made to
various government officials and agents in foreign jurisdictions by Holiday Inns, Inc. ("HII"), the parent company of Marina, and the failure of HII to fully disclose the extent of such payments.

At the conclusion of the hearing, in which all of the foregoing areas were fully explored, the Division stated its view that the sensitive payments issue involving HII was the major issue in the case and that the Commission should not issue a casino license to Marina "unless and until [the] Commissioners are convinced by clear and convincing evidence that this type of conduct is not continuing in Mexico or anywhere else and that it will not continue in the future". No objection to the issuance of a casino license, however, was made. Obviously, as the Division has recognized, it is the Commission's responsibility to independently evaluate the entire record and determine the qualifications of the business entities and natural persons who must qualify. This has been done by each Commissioner. The relevant issues may now be addressed.

A review of the testimony and documentary exhibits clearly indicates that this case turns upon the qualifications of Harrah's, an intermediary company of Marina, and HII, a holding company of Marina. Accordingly, the qualifications of each of these corporate entities will be dealt with separately.

**II. THE QUALIFICATIONS OF HARRAH'S**

By way of historical background, Harrah's was founded by the late William F. Harrah in 1937. Initially, the main thrust of the business was the operation of a bingo game in Reno, Nevada. Thereafter, Mr. Harrah entered the hotel/casino business through the purchase of contiguous properties in downtown Reno. From humble beginnings, this business enterprise has emerged as a dominant force in the Nevada gaming industry. In addition to its interest in Marina Associates, Harrah's currently operates major gaming and resort facilities in Reno and Lake Tahoe, Nevada. Various Harrah's subsidiaries are engaged in auxiliary business projects.

The ownership structure of Harrah's has undergone a substantial transformation since the business started operations in 1937. From 1937 until 1971, Mr. Harrah was the sole owner of Harrah's and its subsidiary companies. On October 27, 1971, Harrah's became a publicly traded corporation. Until his death on June 30, 1978, Mr. Harrah maintained majority control of Harrah's. Thereafter, Mead Dixon was appointed executor of the estate of Mr. Harrah. Mr. Dixon was also
elected Chairman of the Board of Directors of Harrah’s in July 1978 and continues to serve in such capacity.

On February 28, 1980, HII, a Tennessee corporation, directly acquired two-thirds and HISUB-1 Corp., its wholly-owned subsidiary, acquired one-third of the outstanding stock of Harrah’s. HISUB-1 Corp. was an intermediary company incorporated in Nevada on January 21, 1980, exclusively to acquire and hold Harrah’s stock for tax purposes. Thus, Harrah’s is essentially a wholly-owned subsidiary of HII.

A. THE ISSUE OF GAMBLING DEBTS OWED TO HARRAH’S BEING PAID THROUGH A.I.R. CORPORATION

An area of concern identified in the Division’s investigative report is the infrequent Harrah’s practice of accepting payments on gaming receivables due Harrah’s by means of negotiable instruments made payable to A.I.R. Corporation. Incorporated on June 21, 1973, A.I.R. Corporation is a wholly-owned subsidiary of Harrah’s Club which, in turn, is wholly-owned by Harrah’s. Principally engaged in the business of providing advertising, insurance, and resale services to Harrah’s and its other subsidiaries, A.I.R. Corporation is a viable business entity with total taxable income in excess of $4 million since its incorporation.

Prompted by a Nevada Gaming Board investigation of a Harrah’s junket representative and by the Division’s licensing investigation, Harrah’s internal audit department prepared a report on the gaming receivables that were paid through A.I.R. Corporation. Although this practice apparently can be traced to 1973, Harrah’s internal audit department and the Division’s investigators could only uncover records of such payments since 1976. From October 14, 1976, to August 31, 1979, the company’s documentation reveals 13 of these indirect payments having been made by five individuals in amounts totalling $35,500.

Since the subsidiary’s inception, A.I.R. Corporation officials have handled these transactions by utilizing two different procedures. Initially, the negotiable instruments made payable to A.I.R. Corporation were deposited in A.I.R. Corporation’s bank accounts and thereafter checks were drawn on A.I.R. Corporation’s account and made payable to Harrah’s Club. The more recently adopted procedure has been to simply deposit the negotiable instruments made payable to A.I.R. Corporation directly into the Harrah’s Club account.
George Aker, Chairman of the Board and Chief Executive Officer of
the Nevada National Bank, testified that the latter type of procedure
would be acceptable from a banking viewpoint, so long as a proper
relationship existed between the two corporate entities involved.
During the hearing before the Commission, the issue first arose
as to whether Harrah's had violated Nevada gaming regulation
Number Six, dealing with the redemption of markers, by failing to
fully disclose the A.I.R. Corporation indirect payment procedure in
its Regulation Six Submission to the gaming authorities in that State.
John G. Hewitt, Director of Internal Audit for Harrah's and the
individual primarily responsible for these filings, convincingly testified
that there had been no violation of the aforementioned Nevada Regu-
lation by Harrah's. His incontrovertible testimony was that Regulation
Six does not specify to whom gaming debts should be made payable.
Rather, the focus of the regulation is on how funds received in pay-
ment of gaming debts should be properly recorded and handled for
accounting and tax purposes.
Based upon the investigative report of the Division and that of
the Internal Audit Department of Harrah's, we are satisfied that all
marker payments that were paid via A.I.R. Corporation were ul-
timately properly accounted for on the books of Harrah's and that
all appropriate taxes were paid. Nevertheless, the asserted justification
for the existence of this indirect payment mechanism requires brief
comment. It was suggested that the reason for such a payment
procedure was because certain patrons desired anonymity in paying
their gambling debts. However, allowing gaming patrons to pay their
debts anonymously, without disclosure to spouses or creditors, could
be achieved without any involvement on the part of Harrah's. The
utilization of cashier's checks or money orders to pay such obligations
could clearly preserve the debtor's anonymity. Significantly, no con-
crete evidence pertinent to this issue was presented during this hearing
to suggest any wrongful involvement or motivation on the part of any
Harrah's official.
Moreover, no charges have resulted from the Nevada Gaming
Board's investigation of the Harrah's junket representative and his
involvement with A.I.R. Corporation. Although Harrah's officials
have vouched for the legality of this aforementioned practice and have
expressed no intention to cease such activity in Nevada, it is clear
from the testimony of Harrah's General Counsel, Philip Satre, that
Harrah's officials are aware that this practice is not permitted in New
Jersey.
Finally, testimony revealed that Harrah's Nevada operations allow certain customers to pay gaming debts with checks made payable to individual employees of Harrah's, typically to a shift manager or a casino manager. The normal practice is for the Harrah's employee to then endorse the check and forward it to a cashier in the casino. Mr. Hewitt acknowledged that this practice also would not be permitted under New Jersey law. Without expressing an opinion on the foregoing Nevada practice, we are particularly cognizant of the inherent risks associated with this type of procedure.

Nevertheless, so long as Harrah's officials are aware that neither the A.I.R. Corporation type payment procedure nor the payment of gambling debts through checks made payable to individual casino employees will be tolerated in New Jersey, we are satisfied that the Harrah's practices discussed above do not adversely reflect on Harrah's honesty, integrity, business ability, or qualifications in New Jersey.

B. THE ISSUE OF PROSTITUTION FOR PREFERRED GAMING PATRONS

In its investigative report to the Commission, the Division identified Harrah's corporate involvement with certain prostitution activities as an area of concern. The testimony of various witnesses and the documentary evidence introduced have revealed that in the mid-1960's, the late William F. Harrah, the founder of the company, determined that it was competitively necessary for the company to provide certain preferred customers with the services of prostitutes. More particularly, during the period from 1972 to 1975, Harrah's Reno operation appears to have expended $65,600 for such activity, while the Lake Tahoe operation spent $50,500.

The foregoing corporate practice continued unchecked until 1975. On March 20, 1975, however, the Chairman of the Nevada Gaming Control Board, Philip Hannifin, sent a letter to Harrah's former President, M. F. Shepherd, wherein he voiced concern over certain cash withdrawals at Harrah's that were not a true reflection of their usage. Mr. Hannifin also sought assurances that the foregoing practices would be immediately terminated. In retrospect, it is clear that the subject matter of this letter concerned prostitution activities.

In response to Mr. Hannifin's letter and to information disclosed at a subsequent meeting attended by Mr. Hannifin, Mr. Sheperd, and Mead Dixon, whose law firm at that time was counsel to Harrah's, the senior management of Harrah's disseminated specific instructions
to discontinue payments to prostitutes. From the evidence presented to us, we find that Harrah's terminated the practice of providing prostitutes for preferred gaming patrons in April 1975. Since that date there has been only one instance of a payment by Harrah's to a prostitute. This occurred in 1977, and the Harrah's employee who had authorized such payment was severely admonished and was required to reimburse the company. This incident appears to be of an isolated nature, or as the Division notes "an aberration". The Commission is therefore, convinced that any authorized payments to prostitutes ceased, as noted earlier, in 1975. As such, this 1977 incident does not negatively impact upon Harrah's or Marina's qualifications.

During the hearing, testimonial and documentary evidence was introduced regarding the legality of these corporate payments to prostitutes. At the time these payments were made, it appears that the Nevada Revised Statutes did not contain any express proscription against prostitution or its related activities. Moreover, an opinion letter from the Chief Deputy District Attorney of Douglas County states that during the 1972-1975 period prostitution was not unlawful within Douglas County, Nevada (Lake Tahoe area). The relevant Reno ordinance at that time, however, did proscribe prostitution and solicitation for the purpose of prostitution. It appears that a violation of this ordinance was nonetheless a disorderly persons offense, as testified to by Mead Dixon. Moreover, no prosecutions against Harrah's or any of its employees were ever instituted by the State of Nevada or its political subdivisions.

Additionally, the Internal Revenue Service ("I.R.S.") in a 1975 audit of Harrah's prior tax returns questioned the deductibility of these payments for tax purposes. As a result of its investigation, the I.R.S. disallowed certain tax deductions taken by Harrah's for payments relating to prostitution. Harrah's ultimately agreed with this disallowance. Thereafter, in 1977, disclosure of these payments was also made to the Securities and Exchange Commission ("S.E.C.").

Presently, Harrah's has a clear policy of neither condoning nor tolerating activity involving prostitution. Richard J. Goeglin, who became Harrah's President and Chief Executive Officer within the last two years, has unequivocally stated that the company aggressively ferrets out prostitution and vigorously pursues a policy of ridding its casinos of it. Illustrative of this new attitude is the frank admission by Mead Dixon, the current Chairman of the Board of Directors of Harrah's, that the company had made a mistake by participating in the practice of providing prostitutes for preferred gaming patrons.
Furthermore, letters from the Douglas County Sheriff's Office and the City of Reno Police Department reflect Harrah's continuing vigilance in this area and confirm its commitment to an anti-prostitution policy.

In its summation, the Division noted that "there has been a good faith effort on the part of Harrah's and on their management to eliminate this problem". Accordingly, the Division has concluded that the prostitution question is "essentially a dead issue in this case."

We are in agreement with the Division that the foregoing does not negatively impact upon the qualifications of Marina since we are clearly convinced that the practice stopped years ago and does not in any way, reflect adversely upon the character or integrity of Harrah's present corporate management.

C. THE ISSUE OF HARRAH'S CAMPAIGN CONTRIBUTIONS

The political campaign contributions made by Harrah's between February and October 1972 were also identified as an area of concern in the Division's investigative report. As a result of the Federal Election Campaign Act of 1971, 18 U.S.C.A. §610, certain well-established corporate practices in the United States were made illegal. Specifically, after the effective date of that Act, publicly traded companies could no longer make direct political contributions to candidates campaigning for federal elective office.

Prior to Harrah's becoming a publicly held company on October 27, 1971, the late William F. Harrah owned a 100 percent equity interest in the company. Through its officers responsible for public affairs, Harrah's had regularly made campaign contributions to candidates for local, State, and Federal elective office on behalf of Mr. Harrah. These corporate contributions made for the personal purposes of Mr. Harrah were not subject to challenge since there were no minority shareholders of the company.

After the company became publicly traded in October 1971, Harrah's campaign contribution practices were not modified to conform to the legal compliance standards required of public companies. Thus, corporate monies were expended by Harrah's for contributions to the campaigns of various candidates for Federal elective office. From February to October 1972, the newly formed public corporation made political contributions to eight congressional candidates and to one presidential candidate in amounts totalling $17,600. Since these 1972 payments, Harrah's has ceased making campaign contributions
from corporate funds to candidates for Federal elective office.

In the wake of the Watergate revelations, the United States Department of Justice in 1973 requested all United States corporations to voluntarily disclose any past contributions to candidates for Federal office, and specifically any contributions to President Nixon's Committee to Re-Elect the President. During this time, Mead Dixon, then outside counsel to Harrah's, advised William F. Harrah that the company's campaign contribution practice was in violation of applicable Federal law and that all future contributions would have to be made by Mr. Harrah personally. Pursuant to this advice, on July 23, 1973, Mr. Harrah reimbursed the company in the amount of $17,600, the total amount of the prior campaign contributions. Two days thereafter, Harrah's officials met with representatives of the Special Prosecution Force of the United States Department of Justice in Washington, D.C. for the purpose of fully disclosing all of the 1972 corporate contributions made by Harrah's to candidates for Federal elective office.

Although it appears that Harrah's and certain of its corporate officials may have possibly violated the Federal Election Campaign Act of 1971, no prosecutions have ever occurred. Insight into the decision not to prosecute is provided by a memorandum from Thomas F. McBride, Associate Special Prosecutor, to Archibald Cox, Watergate Special Prosecutor, dated August 24, 1973. Militating factors in the decision not to prosecute included Harrah's early voluntary disclosure, the relatively insignificant amounts of money involved, and the absence of any evidence to indicate willful violations. This last conclusion was buttressed by the fact that all of the violations occurred within one year of Harrah's becoming a publicly traded company. We find plausible the explanation that the Harrah's officials involved in these practices were simply not aware of certain legal consequences pertaining to campaign financing that resulted from the company's newly acquired public status.

Moreover, without claiming any deduction for income tax purposes, Harrah's fully disclosed to the I.R.S. the special account that it maintained for purposes of political contributions. Similarly, all required disclosures and filings reflecting the existence of these political contributions were made with the S.E.C. Further, Harrah's fully disclosed these contributions in the Business Entity Disclosure Form that was filed with the Commission with regard to Marina's application for a casino license.

As indicated by Richard J. Goeglin, President and Chief Ex-
ecutive Officer of Harrah’s, in his testimony before this Commission, the company has instituted a comprehensive policy as reflected in the September 16, 1976, resolution adopted by Harrah’s Board of Directors concerning political expenditures and activities. Initially, two political action committees were created, one for each major political party. For administrative purposes, Harrah’s has maintained and administered a single political action committee since March 1979.

Based upon the present policy of Harrah’s, we are satisfied that an appropriate internal compliance mechanism has been established to prevent a recurrence of these practices. The individual principally responsible for the political campaign contributions made during 1972 is now deceased. The Division, in its summation, has referred to this area of concern as “a passing fancy in the Harrah’s history.” In view of all of the evidence presented to the Commission, we find that the political campaign contributions made by Harrah’s during 1972 do not adversely reflect on the character, integrity, honesty, or business ability of Harrah’s present corporate management.

D. THE ISSUE OF TAXES DUE TO THE STATE OF NEVADA ON RACE AND SPORTS BOOK WAGERS.

Although included in the Division’s investigative report as an area of concern, the dispute between Harrah’s and the Nevada gaming authorities over the proper amount of taxes due that State on certain race and sports book wagers does not raise issues pertinent to the instant licensing proceeding.

A controversy between Harrah’s and the Nevada gaming authorities arose as a result of the adoption of a new procedure for the collection of race and sports wagers at the Harrah’s Club facilities. Harrah’s Club, a wholly-owned subsidiary of Harrah’s, operates two state licensed race and sports book facilities in Nevada.

Pursuant to 26 U.S.C.A. §4401, a two percent Federal Wagering Tax is imposed on all race and sports wagers. Prior to the second quarter of 1977, Harrah’s Club collected the Federal Wagering Tax separately from the patron’s wager. Commencing with the second quarter of 1977, Harrah’s Club discontinued this collection procedure and began to include the two percent Federal Wagering Tax as part of the total amount paid by the patron, and, for accounting purposes, factored out the tax which was then remitted directly to the I.R.S.

As a result of a routine audit by the Audit Division of the Nevada Gaming Control Board for the period July 1, 1974, through June 30, 1978, Harrah’s Club on March 18, 1980, was presented with a deficien-
cy assessment in the amount of $17,693.48. The Audit Division's position was that the Nevada gross revenue license fee should be calculated based on the total amount of money bet, including that amount collected in payment of the Federal Wagering Tax. Harrah's asserted that the Nevada gross revenue license fee should be calculated on only the amount of the wager "at risk" and the State tax should not be imposed on any amount collected in payment of the Federal tax.

The Nevada Gaming Commission has rendered a final decision against Harrah's regarding this matter. Harrah's has paid the State of Nevada the full amount of the assessment allegedly due plus interest. Pending a final resolution of the underlying legal question by a court of law, Harrah's is paying under protest other sums allegedly due Nevada. Presently, this matter is awaiting a determination by the Second Judicial Court of the State of Nevada.

In an affidavit admitted into evidence, Patricia Becker, the Chief Deputy Attorney General of the Gaming Division for the State of Nevada, attested to the fact that there is currently no amount of the assessment underlying the litigation that is due and owing. Furthermore, she expressed the opinion that "this litigation represents a good faith effort on the part of a Nevada licensee to resolve a difference of opinion with the Nevada gaming authorities . . ." In its summation, moreover, the Division conceded that this ongoing litigation is "not really a matter of any great moment in this hearing."

Without expressing any opinion regarding the merits of the Nevada litigation, we find that the fact of its existence does not, in any way, negatively impact upon Marina's or Harrah's qualifications for licensure. We conclude, therefore, that such legal dispute can be appropriately resolved in a Nevada forum.

III. THE QUALIFICATIONS OF HII

Founded by Kemmons Wilson, HII has achieved truly remarkable growth since its first hotel was opened outside Memphis, Tennessee, in 1952. Mr. Wilson remained Chairman of the Board of Directors until his retirement in 1979. Initially incorporated in 1954 as a Tennessee corporation, the company underwent two name changes before the presently designated name was adopted on May 22, 1969.

Although principally engaged in the lodging and hospitality field, HII is currently a diversified multinational corporation with total 1980
revenues in excess of $1.5 billion. The HII system consists of approximately 240 company owned or managed hotels and 1,515 franchised properties, making the company the largest hotel business in the world. Perkins’ Cake and Steak, Inc., the company’s restaurant subsidiary, owns or franchises 375 family restaurants in 30 states. The company’s transportation interest, Delta Steamship Lines, Inc., is the leading U.S. flag line serving South America, the Caribbean, and West Africa.

The entry of HII into the casino/hotel business marked a dramatic change in corporate philosophy. Although presented with various opportunities both domestically and abroad throughout the early 1970’s, HII officials continued to reaffirm the longstanding corporate policy of avoiding association with gaming interests. However, on September 9, 1977, the HII Board of Directors chose to change the corporation’s policy concerning gaming. At that time, the Board of Directors of HII adopted a policy that permitted corporate officials to investigate business opportunities in the hotel/casino field in domestic jurisdictions where casino gaming had been legalized for a minimum of ten consecutive years as well as in areas outside the U.S. where gaming was legal. The ten-year limitation with respect to domestic jurisdictions was removed by a HII Board of Directors decision rendered on September 8, 1978.

Thereafter, on September 29, 1978, the Board gave its approval for HII’s participation in the Marina Associates casino/hotel project in Atlantic City. By virtue of its acquisition of Harrah’s and several other transactions, HII currently has approximately a 99 percent equity interest in the Marina limited partnership. Additionally, in April 1979, HII acquired a 40 percent interest in Riverboat, Inc., a casino operated in conjunction with the Holiday Inn Strip Hotel in Las Vegas, Nevada. As a result of its February 1980 acquisition of Harrah’s, HII now has an interest in all four major U.S. gaming centers: Las Vegas, Reno, Lake Tahoe, and Atlantic City.

A. THE ISSUE OF SENSITIVE PAYMENTS MADE BY HII

Although only one area of concern was identified in the Division’s investigative report pertaining to HII, this topic accounted for the most substantial portion of testimony presented during the Marina licensure hearing. Indeed, the Division in its summation characterized the “sensitive payments” issue as the major one in this case. The Division’s report alleged that during the period 1969 through 1980, HII had participated in the making of certain “sensitive
payments" which were questionable or illegal in both domestic and foreign jurisdictions. Partially adopting language of an internal HII memorandum, the Division indicated in its report that the term "sensitive payments" generally refers to (a) payments to government officials or employees, (b) commercial bribes or kickbacks, (c) rebates or refunds received from a third party, (d) political contributions, or (e) commissions or fees for goods or services, all or part of which are paid by the recipient to a government official or employee.

HII's involvement with sensitive payments began to surface in 1976 as a result of certain inquiries from the S.E.C. and the I.R.S. By letter dated August 25, 1975, the S.E.C., as part of its investigation of the Joseph Schlitz Brewing Company, served a subpoena ducet eum on HII to produce, among other things, records of any kickbacks, rebates, or payments of money or things of value to HII by the Schlitz Company or any of its affiliates. On March 18, 1976, the S.E.C. requested additional information regarding this matter from L. M. Clymer, then President of HII. During this same period of time, the I.R.S., as part of a routine audit for the tax years 1972 and 1973, questioned certain HII officials regarding the existence of corporate slush funds and political reimbursement funds.

As a result of the above governmental inquiries and the then prevailing public interest concerning such matters, HII on April 26, 1976, adopted a formal corporate policy regarding sensitive payments. In conjunction with the adoption of this policy, the company forwarded a questionnaire to approximately 122 of its corporate executives worldwide requesting written responses to three questions concerning sensitive transactions. From the responses obtained from this and subsequent inquiries, the Division compiled its sensitive transaction review, listing about $700,000 in "questionable payments."

The testimony of Craig Norville, Vice-President and Associate General Counsel of HII, reflected his analysis of the corporate books and records in the possession of the company relating to the various sensitive payments alleged by the Division. Since Mr. Norville was not in the employ of HII at the time that these payments were made, his conclusions, which were based on the data contained within these corporate books and records, were persistently challenged by the Division. Despite the Division's contention that Mr. Norville was but a corporate historian, his testimony was forthright and credible. Although vigorously cross-examined by the Division, Mr. Norville's testimony was essentially incontroverted. Dividing the sensitive pay-
ments into three general categories, Mr. Norville explained the various concerns noted by the Division. The Commission in rendering this Opinion had adopted this classification scheme.

Within his first category Mr. Norville placed payments, amounting to approximately one-half of the total noted by the Division, which he classified as entirely legitimate business expenditures. For example, a $200,000 item listed by the Division as a questionable payment was, according to Mr. Norville, an accrual of commissions due to a travel agent for room reservations. These commissions remain unpaid, however, because of a dispute between the local management of the company's facility in the United Arab Emirates and the travel agency over the amount of the commissions due. In light of the explanation given, this transaction appears innocent. Moreover, nothing in the record suggests that any of the remaining items in this category are anything other than innocent and we so find.

Mr. Norville's second category lumps together those payments listed by the Division that amount to mere rumors of potential impropriety by HII. As is true with all of the other entries listed by the Division on its sensitive transactions review, these rumors were elicited in response to the company's sensitive payments questionnaires. Further internal investigation by HII officials has proven certain of these rumors false. Other rumors remain unsubstantiated due to the passage of time and the changes made in corporate personnel. Of the approximately $700,000 listed in the Division's report as sensitive payments, this second category accounts for approximately $170,000. Certain fees paid by HII to Lebanese and Mexican attorneys for professional services rendered fall within this category and will be discussed below.

HII payments to various low-level foreign governmental officials and to foreign union employees constitute the final category under the Norville analysis. The testimony of Mr. Norville indicated that these expenditures were made for the purpose of assuring that the individuals involved would perform their official duties properly. The payments were not made to bribe foreign officials to commit illegal acts, but rather to encourage recalcitrant officials to perform their legally mandated duties in an expeditious fashion. Such payments are commonly referred to as "facilitating" or "grease" payments. The payments in this category amount to approximately $170,000 total listed in the Division's report. It is important to note that absolutely no evidence was presented during this hearing to indicate that any
similar payments were made by HII to any United States government officials or union officials.

Even though most of the category three payments were made before the passage of the Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§78m, 78 dd-1, 78 dd-2 and 78 ff (Supp. II. 1978), (the "F.C.P.A.") and were therefore not subject to its proscriptions, the F.C.P.A. must be considered in order to ascertain whether the more recent HII payments have violated U.S. law. Containing two components, the F.C.P.A. prohibits certain payments by American businesses to foreign government officials and also specifies various internal accounting and management control requirements designed to prevent concealment of such payments. Only the prohibitions relating to payments by American businesses to foreign government officials are relevant to the issues under consideration by the Commission.

The anti-bribery provisions of the F.C.P.A. contain specific limitations which curtail the scope of the Act. For instance, only payments made, directly or indirectly, to foreign government officials are prohibited. Consequently, the payments made by Delta Steamship Lines, Inc., a HII subsidiary, to foreign union officials in Argentina are not violative of the F.C.P.A. Another limitation is that the proscribed payments must be made for the purpose of obtaining or retaining business. Additionally, the Act encompasses only those payments made with a corrupt purpose.

The following excerpt from Senate Report No. 95-114, a report of the Senate Banking, Housing and Urban Affairs Committee dated May 2, 1977, describes the intended scope of the Act:

The statute covers payments made to foreign officials for the purposes of obtaining business or influencing legislation or regulation. The statute does not, therefore, cover so-called "grease payments" such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the
payor or to his client, or to obtain preferential legis-
lation or a favorable regulation. The word "corrupt-
ly" connotes an evil motive or purpose, an intent to
wrongfully influence the recipient.

The Senate Report quoted above accompanied a proposed version of
the bill which is not identical to the version ultimately adopted. 
However, the version proposed in the Report is essentially the same
as that ultimately adopted with respect to the provisions in question
here.

An example of a facilitating or grease payment made by HII to
a low-level foreign government official occurred in the Far East during
1978. From his review of the company's books and records, Mr.
Norville testified that the local HII hotel had paid all of the requisite
duties on certain imported goods. Nonetheless, the Customs inspector
refused to perform his official duties unless he was given money. Faced
with a most difficult decision, the company paid the inspector $1,850
during 1978 in order for the goods to be released to the hotel.

During the course of this hearing expert witnesses testified regarding
the F.C.P.A. and the exception relating to "grease" payments.
Rodney S. Dayan, a partner in the Wall Street law firm of
Cadwalader, Wickersham and Taft, which was outside counsel to HII
during the S.E.C. investigation of the company, testified that facilitat-
ing payments made by U.S. corporations to low-level foreign offi-
cials would not be a violation of the F.C.P.A. Another highly qualifi-
ced expert witness, Lloyd N. Cutler, a partner in the Washington,
D.C. law firm of Wilmer, Cutler, and Pickering, and a participant
in the drafting of the F.C.P.A., indicated that his firm had been
retained for the purpose of providing expert testimony at this hearing.
Based upon his review of the Division's report and various HII source
documents, he concluded that even if the F.C.P.A. had been in effect
at the time that all of the payments were made, there still would have
been no violations of the Act.

After having carefully considered all of the documentary evidence
and the testimony of Messrs. Norville, Dayan, and Cutler, we find
that the payments grouped in Mr. Norville's category three consisted of
facilitating or grease payments that are clearly within the confines
of United States law. This conclusion does not, however, reflect tacit
approval of such practices.

Although the Commission has thoroughly scrutinized all of the
payments made by HII, two particular areas merit closer examination.
These involve HII payments to Lebanese and Mexican attorneys for certain professional services rendered. An internal I.R.S. memorandum obtained by the Division reveals that during 1975 payments were filtered through G. Moarbes, a Lebanese attorney, to unknown parties for the purpose of reducing municipal taxes on certain HII properties in Lebanon. Due to a lack of substantiation as to where the money ultimately went, the I.R.S. disallowed the approximately $51,000 payment as a tax deduction. Similarly, the evidence suggests that an HII affiliate in Mexico may have utilized local attorneys as intermediaries to facilitate settlement of rate increases, union wage negotiations, and social security problems. The testimony of Jose Torres, the Division's only witness during these proceedings and the individual formerly in charge of HII's Mexican operations, indicated that the payments made in Mexico were both customary and necessary in order to protect HII's financial investment in that country.

Based upon the record before the Commission, we are satisfied that the above transactions were not in violation of the laws of the United States. We do not condone these practices. However, the policies that define standards of business conduct have been altered dramatically over the last decade. After reviewing all the evidence, we find that the HII payments to the Lebanese and Mexican attorneys do not impact so negatively upon the qualifications of HII as to impede licensing.

HII's current corporate policy on sensitive payments was adopted by its Executive Committee on April 26, 1976. Under the guidelines announced in this policy, sensitive transactions which violate either the letter or the intent of the law of the applicable jurisdiction are expressly prohibited. For those sensitive transactions that do not violate the letter or intent of the law, advance approval must be obtained from the General Counsel of HII prior to the participation by any employee or official. Noncompliance with this policy may warrant dismissal.

Michael D. Rose, who became President of HII in 1979, testified that with the exception of a few isolated instances, the corporate policy on sensitive payments has been effectively implemented. HII's audit department has been given the responsibility of assuring compliance with this corporate policy. Sensitive payments questionnaires are annually distributed to supervisory personnel employed by HII. The General Counsel's office monitors these responses and seeks additional information where appropriate. Finally, any violations of this
corporate policy are forwarded to the Audit Committee of the Board of Directors of HII.

We are satisfied from the evidence presented to us that HII is vigorously seeking to enforce its prophylactic corporate policy on sensitive payments. We expect that HII’s senior management will closely monitor all of its business operations to assure continuing compliance with its announced corporate policy.

In conclusion, none of the “sensitive payments” made by HII appear to have violated the laws of the United States. In view of, and in the context of all of the evidence presented, the sensitive payments area of concern does not reflect adversely on the good character, honesty, or integrity of HII or its present management.

B. THE ISSUE OF DISCLOSURE BY HII TO VARIOUS GOVERNMENTAL AGENCIES

As part of the sensitive payments area of concern, the Division in its investigative report questioned the adequacy of the disclosures made by HII to the I.R.S., S.E.C., and to this Commission. The sufficiency of the disclosures made to each of these governmental agencies will be separately addressed.

By early 1976, the I.R.S. had adopted a general policy that provided for the routine interrogation of senior corporate officials regarding the existence of any sensitive transaction matters. Pursuant to this policy, I.R.S. agents during a customary audit of HII’s tax returns, met with L. M. Clymer, the then President of HII in March 1976. Since this meeting preceded by a full month HII’s adoption of a sensitive payments policy and the mailing of its sensitive payments questionnaires, Mr. Clymer’s response, which indicated that the company had no knowledge of any improper transactions, does not appear to be misleading or evasive. Thereafter, the I.R.S. modified its policy and required its examining agents to obtain sworn, written responses to its inquiries on any sensitive transactions problem.

Accordingly, on April 18, 1976, HII received what is now commonly referred to as the I.R.S. “Eleven Questions”. By affidavit dated July 30, 1976, Mr. Clymer formally replied to this I.R.S. inquiry. Included therein was a disclosure of certain nominal payments made by HII to foreign governmental and union officials as an inducement for those persons to more promptly perform their normal, customary duties. Mr. Norville, in his testimony before this Commission, explained that the I.R.S. instructions that accompanied the “Eleven Questions” specifically directed the affiant to answer the questions
based upon personal knowledge. We are satisfied that as of July 30, 1976, Mr. Clymer's affidavit fully and truthfully disclosed all the information requested by the I.R.S. that was within his personal knowledge.

Since 1976, HII has continued to fully cooperate with the I.R.S. by providing appropriate information upon request. None of the various I.R.S. internal memoranda that have been admitted into evidence during this hearing suggest that HII has concealed pertinent information or has failed to cooperate fully in the comprehensive I.R.S. audits of these sensitive transactions. We conclude that HII's disclosures to the I.R.S. do not adversely reflect on its character, honesty, or integrity.

Approximately three months after the I.R.S. had received Mr. Clymer's responses to its "Eleven Questions", an attorney from the Division of Enforcement of the S.E.C. sent a letter dated November 8, 1976, to HII. In this communication, the S.E.C. requested that HII prepare a written report summarizing, among other things, any HII payments to foreign governmental officials and any illegal or questionably illegal transactions involving HII. As part of the ongoing internal corporate investigation of the sensitive payments problem, Charles Collins, then Senior Vice President and General Counsel of HII, submitted a report dated December 3, 1976, to the Audit Committee of the company. This report summarized the results of the company's internal investigation of the sensitive payments situation.

In compliance with the S.E.C.'s request, the report prepared by Mr. Collins for the HII Audit Committee was submitted to the S.E.C.'s Enforcement Division on December 16, 1976. Accompanying this report was a cover letter in which additional disclosures were made. On December 29, 1976, Mr. Collins and Mr. Dayan, the attorney from Cadwalader, Wickersham and Taft who had been retained by HII to assist the company's internal investigation, met with attorneys from the Division of Enforcement of the S.E.C. The S.E.C. staff was primarily interested in ascertaining whether HII had participated in certain rebate practices sponsored by the Schlitz Brewing Company. Although the subject of HII's sensitive payments was discussed, Mr. Dayan recalled that the S.E.C. staff did not show "any substantial interest in these transactions."

The Securities and Exchange Act of 1934, 15 U.S.C.A. §§78a, et seq., and the related S.E.C. rules and regulations require publicly traded companies to make public disclosures of "material" information. HII did not disclose any sensitive payments in its filings with
the S.E.C. During the course of this hearing, an issue arose as to whether HII was obligated under the applicable securities laws to publicly disclose any or all of the sensitive transactions that it had discovered through its internal investigations. We have heard testimony from three experts in the field of securities law. Messrs. Norville, Dayan, and Cutler all agreed that no public disclosure was required in this case.

Moreover, by letter dated April 28, 1980, the S.E.C. has indicated that there is "no concrete prospect of law enforcement activity by the Government based upon the materials it has obtained concerning Holiday Inns, Inc." The Division in its summation has conceded that the "issue of the S.E.C. in this case is basically a phantom issue and one which does not really have much relevancy to whether or not Holiday Inns should be licensed." Based upon all the evidence presented to this Commission, we find that HII's disclosures to the S.E.C. do not negatively impact upon its character, honesty, or integrity.

The final disclosure issue raised by the Division concerns Item 39 of the Business Entity Disclosure Form ("B.E.D.F.") filed by HII with this Commission on July 23, 1979, in connection with its application for licensure. Item 39 of the B.E.D.F. asks the applicant to furnish information relating to corporate bribes, kickbacks, and political contributions made within the prior ten year period. Although HII's responses to the questions contained within Item 39 reflect no corporate involvement in any of these practices, a reference was made to Schedule 22 which was enclosed along with HII's B.E.D.F.

Schedule 22 explains how HII interpreted the questions contained within Item 39. HII apparently assumed that the Item 39 questions should be answered in a similar manner to inquiries it had received from the I.R.S. and the S.E.C. The prior inquiries had been answered only with verified information and in light of S.E.C. materiality standards and the FCPA. Schedule 22 also explicitly refers to the Audit Committee report on sensitive transactions, the "Eleven Questions" affidavit submitted to the I.R.S., and the responses obtained from HII's sensitive payments questionnaires. Since these source documents contain a full disclosure of all sensitive payments transactions involving HII, we are convinced that there was no deliberate attempt on the part of HII to conceal or withhold information in this case. Additionally, the record reflects that HII has been most cooperative with the Division in providing relevant information for this hearing. Accordingly, we conclude that HII's answer to Item 39 of the B.E.D.F. does not negatively reflect upon its qualifications.
CONCLUSION

In light of all of the foregoing facts and conclusions, this Commission is satisfied that Marina, Harrah's, and HII have established by clear and convincing evidence their qualifications. Accordingly, a casino license will issue to Marina subject to the conditions contained in the Resolution regarding this matter which is numbered 81-823.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.