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The U.S. State of Nevada Consumes a Disproportionate Share of U.S. Securities and Exchange Commission Regulatory Resources

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Abstract

In the U.S., despite the attraction of a relatively and disproportionately high level of negative regulatory actions, the state of Nevada continues to gain market share in the U.S. “market for corporate law.” Nevada has increased its market share or proportion from 2.9 percent in 1987 to 8.5 percent in 2013. Historically, the state of Delaware has had and retains its market share leadership position.

We describe and extend analyses of what has been described as *the Nevada Effect* in this extension of Cataldo, Fuller and Miller (2014). We include data from our most recent examination of the entire population of 2013 U.S. Securities and Exchange Commission (SEC) trading suspensions, in addition to some early 2014 trading suspensions of marijuana stocks, disproportionately represented by firms incorporated in the state of Nevada.

Key Words: U.S. Securities and Exchange Commission (SEC) trading suspensions. The Nevada Effect

We examine the entire population of 2013 calendar year U.S. Securities and Exchange Commission (SEC) trading suspensions from U.S. stock exchanges. This represents an extension of our other forensic examinations into what has been characterized, in the U.S., as *the Nevada Effect*. We include the SEC monthly trading suspension data from Cataldo, Fuller and Miller (hereinafter; CFM 2014).

In all cases, without exception, 2013 (N=12) monthly U.S. SEC trading suspensions for Nevada corporations exceed the 8.3 percent Nevada incorporation market share (or proportion) contained in the Compustat data base for 2011. While CFM (2014) achieved comparable results in their examination of 2012 (N=12) monthly U.S. SEC trading suspensions, these results were achieved only after the extraction of an easily separable and separate U.S. SEC trading suspension of 379 dormant companies.¹ Therefore, in all cases, and without exception, non-targeted or ordinary operations-based U.S. SEC trading suspensions for Delaware corporations during 2012 and 2013 fall below the 54.3 percent Delaware incorporation market share (or proportion) contained in the Compustat data base for 2011.

Nevada continues, through calendar year 2013, to consume more than its anticipated proportionate share of U.S. SEC trading suspensions or regulatory resources. Delaware, through calendar year 2013, is consuming less than its anticipated proportionate share of these same suspensions and resources. We find it significant, in light of these facts, and using the same 2013 calendar year Compustat data base, that Nevada has achieved a new, all-time high with respect to its market share (or proportion) of U.S. corporations, at 8.5 percent.

The remainder of this paper is organized, as follows: First, a brief review of the historical literature stream on the market for corporate law and *the Nevada effect* is provided. Second, a brief review of the contemporary literature stream is provided. Third, we provide a primer and

¹ Extractions only infected 9 of the 12 months (e.g., March, April and May). See “SEC Microcap Fraud-Fighting Initiative Expels 379 Dormant Shell Companies to Protect Investors From Potential Scams: Massive Trading Suspension Is Largest in Agency History” (May 14, 2012; Press Release No. 2012-91). Available at <<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171489086#.U8vXrLFztWc>>.

summary on the topic of marijuana legalization in the United States. Fourth, we describe some very contemporary regulatory actions – in the form of trading suspensions - taken by the U.S. Securities and Exchange Commission against firms exploiting opportunities to take advantage of unsophisticated investors seeking abnormally high returns in the marijuana sector. Fifth, we briefly describe conditions likely to explain the over-representation of the U.S. state of Nevada in these regulatory actions in the context of Nevada corporate law. Sixth, we produce contemporary evidence of U.S. SEC trading suspensions for the 2012 and 2013 calendar years, where Nevada corporations represent a disproportionately high percentage of regulatory resources. **The detailed list of SEC trading suspensions for 2012 and 2013 are available on request**. Finally, we summarize our findings.

II. The Historical Literature Stream on the Nevada Effect

Nearly a decade ago, legal scholars and financial economists examined the foundation for shareholder protection, based on U.S. states and their laws of incorporation. Winter (1977) produced a seminal work product on U.S. corporate law and shareholder protection and related issues.

Legal scholars and financial economists quickly focused on and rigorously examined corporate law for the U.S. states of Delaware and Nevada. Daines (2001), Engledow (2002), Bebchuk and Cohen (2003) and Easmunt (2004) found and attempted to explain why Delaware corporation stocks traded at a statistically significant premium, when compared to stocks for firms incorporated in other U.S. states. While these abnormally high returns might be explained as a “small firm effect,”² it was noted that the U.S. state of Nevada was gaining market share or proportion in the “market for corporate law.”

Attention quickly focused on both Delaware and Nevada, the two market share leaders in the market for corporate law in the U.S., and a debate over which state was winning the “race to the top” or the “race to the bottom” began. The distinction is represented by a very different target marketing focus by these two U.S. states, where Nevada overtly favors the board of directors and executives or management over shareholders.

III. The Contemporary Literature Stream on the Nevada Effect

Barzuza and Cataldo have published the largest quantity of working papers and published works on *the Nevada Effect* over the past decade. Barzuza and co-authors have produced some academically rigorous evidence in some *high impact* journals, based on (1) legal theory (2004), (2) analytics (Oren Bar-Gill, Michal Barzuza, Lucian Bebchuk 2002)³, and (3) financial economics literature streams (2011 and 2012).⁴ Cataldo and co-authors⁵ have seen the impact of their research, as their working papers and published works have been used by the U.S.

² Recalling that America was first settled from the east coast, the premium associated with Delaware corporate stock was also conjectured as attributable to Delaware’s relatively mature business courts system and the predictability of Delaware case law.

³ See Bebchuk and Cohen (2003) for additional legal analyses.

⁴ See Barzuza’s working papers and publications on *the Nevada Effect*, available at <http://scholar.google.com/citations?user=SDq4nMoAAAAJ&hl=en>.

⁵ See Cataldo, Fuller and Oehlers (2009), Cataldo, Oehlers and Scanlon (2009), and Cataldo, DeMoss and K. Dunleavy (2010).

Securities Exchange Commission (SEC 2008).⁶ Cataldo and co-authors focused on (1) quasi-experimental statistical event studies consistent with SEC Litigation Release event dates (2006), (2) analyses of targeted SEC trading suspensions, and (3) including the migration of firms from other states of incorporation to Nevada.

Migrations of firms from other states of incorporation to Nevada have also been addressed by Barzuza, but Cataldo has provided several specific examples or case studies. Both have used agency or contract theory as a framework for analyses, where Cataldo and co-authors have merged market efficiency and agency theory frameworks under their common theoretical umbrella of information asymmetry.

IV. U.S. States legalizing marijuana for recreational use – Colorado & Washington states

As of July 2014, twenty-three U.S. states and the District of Columbia (DC) have legalized marijuana for prescribed or medical use.⁷ Two U.S. states have legalized marijuana for recreational use.

Colorado Amendment 64 was a popular initiative ballot measure, legalizing marijuana for recreational use. It passed on November 6, 2012.⁸ Similarly, Washington Initiative 502 (I-502) appeared on the November 2012 general ballot, and legalized marijuana for recreational use. It, also, passed by popular vote, on November 6, 2012.

Cannabis (or marijuana) remains a schedule I controlled substance under U.S. law, but the U.S. Department of Justice (DOJ) took no action to prevent these U.S. state laws from going into effect.⁹ Figure 1 provides a map of the U.S., where the states of Washington (WA) and Colorado (CO) are labelled, for easy reference. Delaware (DE) and Nevada (NV) can also be easily identified, using this map of the U.S., as the remainder of this paper focuses more narrowly on 2013 U.S. SEC trading suspensions, recent infant (marijuana) industry 2014 U.S. SEC trading suspensions, and *the Nevada effect*.

Refer Figure I

V. U.S. SEC Marijuana Stock Trading Suspensions

New or infant growth industries tend to attract investor attention and capital. In the U.S., the legalization of marijuana for medical and/or recreational use has created some investor excitement. Several publicly traded firms redirected their resources to this infant industry and promoted their firms' connection to now quasi-legal substance. These actions have attracted the attention of the U.S. SEC, the leading U.S. regulatory agency, charged with the responsibility of oversight for U.S. capital markets. Marijuana, cannabis or "pot" (a slang term used for this federally illegal substance) has resulted in some SEC investigations and trading suspensions, as follows:

...the SEC has been investigating several pot stocks - eight of which have now been temporarily suspended...(a)ccording to the SEC, (they) were in violation of

⁶ See *U.S. Securities and Exchange Commission, Plaintiff, v. Universal Express, Inc., et al., Defendant. United States District Court for the Southern District of New York, 1:04-cv-2322(GEL)* (June 24-25, 2008). Available at <<http://wiffenproof.angelfire.com/624receiver.pdf>>.

⁷ Available at <http://medicalmarijuana.procon.org/view_resource.php?resourceID=000881>.

⁸ See Article 18, section 16 of the Colorado state constitution.

⁹ See The Huffington Post. 2013. "Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect." (August 20). Available at <http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html>.

serious regulations, including instances of "manipulative transactions" and "unlawful distribution of securities."¹⁰

Those 8 firms, suspended from trading by the SEC, included four Nevada corporations (or 50 percent of the U.S. SEC trading suspensions) are presented in Table I.

Refer Table I

An examination of the 2011 Compustat data base of all U.S. corporations indicates that only 8.3 percent of U.S. corporations are incorporated under Nevada state law, while 54.3 percent of U.S. corporations are incorporated under Delaware state law.

Delaware has always held the market share or proportion leadership position. Delaware and Nevada are the current market share or proportion leaders in the U.S. "market for corporate law," where Nevada has increased its share of the market, dramatically, as reflected in the Compustat data presented in Table II and Figure II.

Refer Table II

Refer Figure II

VI. Nevada's Legal Incentives Promote *the Nevada Effect*

Nevada overtly seeks to attract corporations and the revenues associated with related corporate filing fees by citing a climate that favors directors and management over shareholders:¹¹ "[N]evada [has] embarked on a strategy to market its no-liability regime. Nevada's marketing pitch highlights the greater protections afforded to managers under Nevada law."¹² Nevada touts several provisions within its statutes that make it an attractive situs for corporations: including director flexibility in consenting to corporate activity;¹³ prohibitions preventing dissenting shareholders from voting their shares or receiving dividends when certain circumstances arise;¹⁴ provisions that allow filing of restatements of the corporation's articles of incorporation without an accompanying resolution;¹⁵ and provisions that allow amendments to be filed with delayed effective dates.¹⁶ "Some corporations have a stronger desire than others to free their officers and directors from liability for their acts. This variation in preferences among firms allows a state like Nevada to pursue a market segmentation strategy."¹⁷

What may be of most interest is the fact that in 2001 Nevada codified its prior case law regarding piercing the corporate veil doctrine as follows:

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the

¹⁰ See "Not All Pot Penny Stock Took a Hit from the SEC." Money Morning (June 10, 2014). Available at <<http://moneymorning.com/2014/06/10/not-all-pot-penny-stocks-took-a-hit-from-the-sec/>>.

¹¹ See, e.g., *Why Nevada? Legal Advantages: A Comparison with Delaware and California*, available at www.edawn.org/images/uploads/docs/CorporateLawComparison.pdf (last visited Jul. 14 2014).

¹² Michal Barzuza, *Market Segmentation: The Rise Of Nevada As A Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 958 (2012) (Barzuza has extensive discussions of the relative success of Nevada's marketing campaign within this article).

¹³ See *Supra* Note 11, See NRS 78.115-78.140.

¹⁴ *Id.*, See NRS 92A.380(3).

¹⁵ *Id.*, See NRS 78.403.

¹⁶ *Id.*, See NRS 78.380, 78.390 and 78.403.

¹⁷ Michal Barzuza, *Searching For The Right Mix Of Freedom And Regulation In Corporate Law*, VIRGINIA JOURNAL 2011, 12.

- corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.
2. A stockholder, director or officer acts as the alter ego of a corporation if:
 - (a) The corporation is influenced and governed by the stockholder, director or officer;
 - (b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and
 - (c) *Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.*
 3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.¹⁸

“In one day, all of Nevada's directors and officers were granted protection from most sources of liability.”¹⁹ Of interest here is the requirement of fraud or manifest injustice under section 2.(c) of the Nevada Statute. Commentators have noted that this language is some of the strongest protection available: “[b]ecause it relies on the standard of “fraud or manifest injustice”, which requires evidence of ill intent to proceed with veil piercing.”²⁰

Functionally, “[t]he party propounding the alter ego doctrine and attempting to pierce the corporate veil must establish the elements the statute articulates.”²¹ However, “[t]here is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case.”²² Thus, the proponent party must persuade the court, but “[i]t is not enough simply that some of the factors favoring alter ego liability exist. More importantly, based on the court’s prior holdings in this area, there must be a causal connection between those factors and the plaintiff’s injury.”²³ It is insufficient – in contrast to other jurisdictions – that the other factors (corporate influence and governance by the stockholder,²⁴ director or officer; and unity of interest and ownership that make the corporation and the stockholder, director or officer inseparable²⁵) are present. Instead courts consistently have held that while other factors might be present, without a causal connection between the first and second factors and the plaintiff’s putative injury the third factor cannot be met.²⁶

Thus, Nevada law buttresses Nevada’s Secretary of State’s marketing campaign – its brand. As Barzusa states, “Nevada's brand is important because it fosters a credible commitment that the state will continue to produce lax law.”²⁷

VII. Data from the Population of 2012 And 2013 SEC Trading Suspensions

Cataldo, Fuller and Miller (2014 and 2015) examined SEC trading suspensions through 2012. With respect to the examination of the 2012 calendar year SEC trading suspensions, a targeted

¹⁸ N.R.S. 78.747 (2001) (discussing the liability of stockholder, director or officer for debt or liability of a corporation) (italics ours); *See also* Basic Management Inc. v. U.S., 569 F.Supp.2d 1106 (2008).

¹⁹ 98 VA. L. REV. at 953.

²⁰ Nevada Corporate Headquarters, Incorporated, *Nevada or Wyoming incorporation? No Contest*, February 7, 2014, <http://nchinc.com/asset-protection/nevada-or-wyoming-incorporation-no-contest>.

²¹ *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp.2d 1234, 1241-42 (D. Nev. 2008), *reconsideration denied* 2008 WL 1944546 (internal citations omitted).

²² *Id.* (citing *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 747 P.2d 884, 887 (1987)).

²³ William H. Stoddard, *Making Sense Of Nevada’s Alter Ego Doctrine*, 20-DEC NEV. LAW. 6, 7 (2012).

²⁴ N.R.S. 78.747 2.(a).

²⁵ N.R.S. 78.747 2.(b).

²⁶ 20-DEC NEV. LAW. at 7 (discussing *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 377, 566 P.2d 819, 823 (1977)).

²⁷ 98 VA. L. REV. at 966.

SEC operation suspended 379 firms which had to be excluded from the population to examine and develop Nevada over-representation.²⁸ In our extension of this methodological approach to the 2013 calendar year population, no comparable adjustment was necessary.

In all cases, without exception, SEC trading suspensions for Nevada corporations for each and every month during 2012 and 2013 (N=24) exceed the 8.3 percent Nevada corporation proportion contained in the Compustat data base for 2011. In all cases, without exception, SEC trading suspensions for Delaware corporations for each and every month during 2012 and 2013 (N=24) fall below the 54.3 percent Delaware corporation proportion contained in the Compustat data base for 2011. These measures are presented in Table III and graphically depicted in Figure II, developed using the below equations for both Nevada and Delaware, respectively:

$$\text{Sectradingsuspensions\%}_{\text{NV}} - 8.3\% = \text{Difference}_{\text{nv}} \quad [1a]$$

$$\text{Sectradingsuspensions\%}_{\text{DE}} - 54.3\% = \text{Difference}_{\text{de}} \quad [1b]$$

$\text{Sectradingsuspensions\%}_{\text{NV}}$ is the percentage of 2013 calendar year SEC trading suspensions for Nevada corporations and $\text{Sectradingsuspensions\%}_{\text{DE}}$ is the percentage of 2013 calendar year SEC trading suspensions for Delaware corporations. In each and every single month for 2012 and 2013 (N=24), Nevada was over-represented and Delaware was under-represented. These results are both contemporary and compelling. Nevada corporations are consuming a disproportionate share of SEC resources with respect to trading suspension efforts.

Refer Table III

Refer Figure III

NV%US and DE%US, from Table II, are highly correlated and significant, with a Pearson product moment correlation at $r = 0.703$ ($p < 0.0001$). Both have gained market share or proportion (1987 through 2013 at N=26), from below 50 percent to well above 60 percent, when combined (see Table II). A nonparametric Mann-Whitney U test produces results, significance at the 0.0001 level, and a runs test produces comparable and significant results ($p < 0.0001$). The *market for corporate law* may be maturing, as Nevada continues to gain market share against Delaware, the long-time market share leader (see Figure II).

VIII. Limitations and Summary

There are no limitations to this study, with respect to the descriptive measures produced from our analysis of SEC trading suspensions through 2013. We have examined one-hundred percent of the data, while producing results that are descriptive, consistent and compelling.

While the causal nature of the high incidence of Nevada corporation trading suspensions might be difficult to decompose and quantify, the U.S. SEC is spending a disproportionate amount of time and resources suspending trading in securities for entities incorporated in a single U.S. state – Nevada. These efforts are presumed to represent efforts to protect the consuming public. Nevada has gained and continues to gain market share by successfully marketing what they believe represents a comparative advantage in the market for corporate law: protection from liability for corporate officers and directors.

²⁸ In May 2012 the SEC suspended the trading of securities for 379 dormant corporations before they could be hijacked by fraudsters and used to harm investors through reverse mergers or pump-and-dump schemes (SEC 2012).

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Table I: State of Nevada (NV) and State of Delaware (DE)
 U.S. Securities and Exchange Commission Stock Trading Suspensions of Marijuana Firms
 2014

<u>Firm Name</u>	<u>Ticker</u>	<u>NV</u>	<u>DE</u>	<u>Other</u>	<u>Total</u>	<u>2014 U.S. SEC Release No.</u>
1 Fortitude Group Inc.	FRTD			1	1	34-72232 dated May 23
2 FusionPharm Inc.	FSPM	1			1	34-72177 dated May 16
3 CannaBusiness Group Inc.	CBGI	1			1	34-72113 dated May 7
4 GrowLife Inc.	PHOT		1		1	34-71924 dated April 10
5 Advanced Cannabis Solutions Inc.	CANN			1	1	34-71814 dated March 27
6 Petrotech Oil and Gas Inc.	PTOG	1			1	34-71723 dated March 14
7 Aventura Equities Inc.	AVNE			1	1	34-71647 dated March 5
8 Citadel ETF Inc.	CDFT	<u>1</u>			<u>1</u>	34-71762 dated March 21
Total		<u>4</u>	<u>1</u>	<u>3</u>	<u>8</u>	
State Percent SEC Suspensions		50.0%	12.5%	37.5%	100%	
State Percent Compustat 2013		8.5%	55.5%	27.5%	100%	

Table II: Market Share or Proportion of U.S. Corporations for Nevada (NV%US), Delaware (DE%US), and Combined (NVDE%US)

<u>Year</u>	<u>NV%US</u>	<u>DE%US</u>	<u>NVDE%US</u>
1987	2.9%	46.9%	49.9%
1988	3.0%	47.7%	50.7%
1989	3.1%	48.7%	51.8%
1990	3.0%	49.8%	52.8%
1991	3.0%	50.7%	53.7%
1992	3.1%	51.8%	55.0%
1993	3.1%	50.4%	53.5%
1994	3.0%	51.2%	54.2%
1995	3.0%	52.8%	55.8%
1996	3.0%	53.6%	56.6%
1997	3.0%	54.2%	57.3%
1998	3.1%	55.8%	59.0%
1999	4.6%	54.5%	59.1%
2000	5.5%	54.2%	59.7%
2001	6.0%	53.9%	59.9%
2002	5.9%	54.4%	60.3%
2003	6.2%	54.5%	60.7%
2004	6.2%	54.8%	61.0%
2005	6.1%	55.5%	61.6%
2006	6.3%	55.6%	61.9%
2007	7.0%	55.8%	62.8%
2008	7.0%	56.0%	63.0%
2009	7.4%	55.6%	63.0%
2010	8.1%	55.0%	63.1%
2011	8.3%	54.3%	62.6%
2012	7.3%	54.9%	62.2%
2013	8.5%	55.5%	64.0%

Table III: Nevada (NV) versus Delaware (DE)

Securities and Exchange Commission Trading Suspensions – 2012 and 2013

Monthly & Annual Frequencies and Percentages

Developed from Data Contained in SEC Trading Suspensions – 2013 list. (List available on request).

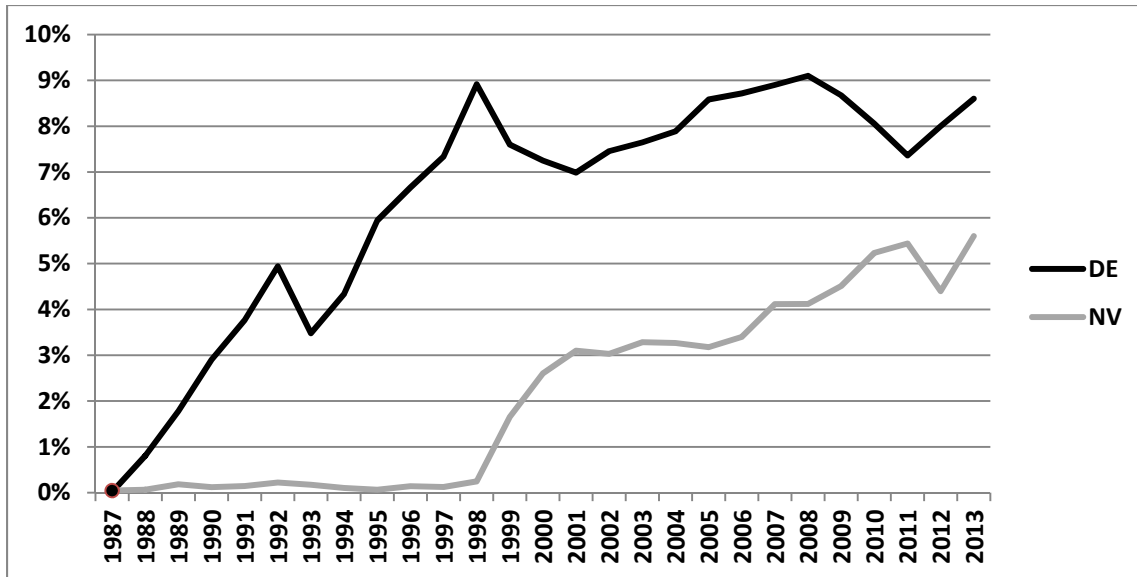
	<u>N</u>	<u>NV</u>	<u>DE</u>	<u>NV%</u>	<u>DE%</u>
2012 January	24	10	9	41.7	37.5
2012 February	37	13	9	35.1	24.3
2012 March	26	7	10	26.9	38.5
2012 April	11	3	5	27.3	45.5
2012 May	56	16	20	28.6	35.7
2012 June	21	6	5	28.6	23.8
2012 July	16	2	1	12.5	6.3
2012 August	4	3	0	75.0	0.0
2012 September	31	10	5	32.3	16.1
2012 October	16	5	1	31.3	6.3
2012 November	15	5	4	33.3	26.7
2012 December	36	16	4	44.4	11.1
2013 January	29	12	11	41.4	37.9
2013 February	22	8	7	36.4	31.8
2013 March	3	2	1	66.7	33.3
2013 April	15	7	3	46.7	20.0
2013 May	37	14	11	37.8	29.7
2013 June	65	18	24	27.7	36.9
2013 July	24	8	10	33.3	41.7
2013 August	24	7	8	29.2	33.3
2013 September	84	35	29	41.7	34.5
2013 October	21	9	11	42.9	52.4
2013 November	10	6	2	60.0	20.0
2013 December	<u>27</u>	<u>11</u>	<u>9</u>	40.7	33.3
2012 & 2013 Totals	<u>654</u>	<u>233</u>	<u>199</u>		
2012 Totals ²⁹	<u>293</u>	<u>96</u>	<u>73</u>	32.8	24.9
2013 Totals	<u>361</u>	<u>137</u>	<u>126</u>	38.0	34.9

**In All Cases
NV > 8.3% or
Over-Represented**

**In All Cases
DE < 54.3% or
Under-Represented**

²⁹ May 14, 2012 SEC trading suspensions excluded at N=379, NV=25, and DE=89.

Figure III: Delaware (DE) and Nevada (NV) Market Share Trend – Percentage Increase Compustat - 1987 through 2013 - 1987 base year
 Developed from Table III



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