

PENN NATIONAL GAMING INC
Form S-8
June 17, 2005

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As filed with the Securities and Exchange Commission on June 17, 2005

Registration No. 333-

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

PENN NATIONAL GAMING, INC.

(Exact name of registrant as specified in its charter)

Pennsylvania

23-2234473

(State or other jurisdiction of
incorporation or organization)

(I.R.S. Employer
Identification No.)

825 Berkshire Boulevard, Suite 200
Wyomissing, Pennsylvania

19610

(Address of Principal Executive Offices)

(Zip Code)

Nonqualified Stock Option Agreement with Peter M. Carlino

(Full title of the plan)

Jordan B. Savitch
Senior Vice President and General Counsel
Penn National Gaming, Inc.
825 Berkshire Boulevard, Suite 200
Wyomissing, Pennsylvania 19610

(Name and address of agent for service)

(610) 373-2400

(Telephone number, including area code, of agent for service)

with a copy to:
Robert P. Krauss, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103-7599
(215) 665-8500

CALCULATION OF REGISTRATION FEE

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| Title of securities to be registered | Amount to be registered(1) | Proposed maximum offering price per share(2) | Proposed maximum aggregate offering price(2) | Amount of registration fee |
|---|----------------------------|--|--|----------------------------|
| Common Stock, par value \$.01 per share | 95,000 shares | \$7.95 | \$755,250 | \$89 |

- (1) This Registration Statement covers shares of Common Stock of the Registrant, which may be offered or sold pursuant to the Nonqualified Stock Option Agreement with Peter M. Carlino entered into on February 6, 2003. In addition, pursuant to Rule 416(a) under the Securities Act of 1933, as amended, this Registration Statement shall be deemed to cover an indeterminate number of additional shares of Common Stock of the Registrant issuable in the event the number of outstanding shares of the Registrant is increased by stock split, reclassification, stock dividend or similar transactions. The amount of shares being registered reflects the adjustment as a result of the Registrant's March 7, 2005 two-for-one stock split.
- (2) Estimated solely for the purpose of calculating the registration fee. In accordance with Rule 457(h)(1), the price shown is the actual exercise price per share of the options granted pursuant to the terms of the Nonqualified Stock Option Agreement with Peter M. Carlino entered into on February 6, 2003. The exercise price reflects the adjustment as a result of the Registrant's March 7, 2005 two-for-one stock split.

INTRODUCTION

This Registration Statement on Form S-8 registers shares of common stock issuable upon the exercise of options granted to Peter M. Carlino, Chairman and Chief Executive Officer of Penn National Gaming, Inc. ("Penn National" or the "Company"), pursuant to the terms of a Nonqualified Stock Option Agreement, dated February 6, 2003, between Mr. Carlino and the Company.

PART I INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The documents containing the information specified in Part I of Form S-8 will be given or sent to Peter M. Carlino as specified by Rule 428 under the Securities Act of 1933, as amended.

PART II INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Certain Documents by Reference.

The following documents filed with the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended, by Penn National (File No. 000-24206) are incorporated herein by reference:

- (a) Penn National's Annual Report on Form 10-K for the fiscal year ended December 31, 2004;
- (b) Penn National's Quarterly Report on Form 10-Q for the quarter ended March 31, 2005;
- (c) Penn National's Current Reports on Form 8-K filed January 27, 2005 (Items 2.01 and 9.01); February 8, 2005 (Item 8.01); February 9, 2005 (Items 8.01 and 9.01); February 23, 2005 (Item 1.01); February 25, 2005 (Items 8.01 and 9.01); March 9, 2005 (Item 8.01); March 15, 2005 (Items 1.01 and 9.01); March 16, 2005 (Items 8.01 and 9.01); March 30, 2005 (Item 8.01); April 8, 2005 (Items 1.01, 8.01 and 9.01); June 6, 2005 (Items 1.01 and 9.01); and June 16, 2005 (Items 1.01 and 9.01); and
- (d) The description of Penn National's common stock contained in Penn National's Registration Statement on Form 8-A filed May 26, 1994, including any amendments or reports filed for the purpose of updating such description.

All documents filed by Penn National pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended, after the date of this Registration Statement and prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference herein and to be part hereof from the date of filing such documents. Any statement contained herein or in a document incorporated by reference or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that such statement is modified or superseded by any other subsequently filed document which is incorporated or is deemed to be incorporated by reference herein. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

Not applicable.

Item 6. Indemnification of Officers and Directors.

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Sections 1741 to 1750 of the Pennsylvania Business Corporation Law of 1988, as amended, permit indemnification of directors, officers, employees and agents of a corporation under certain conditions and subject to certain limitations.

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Under the provisions of Penn National's Second Amended and Restated Bylaws, Penn National is required to indemnify any Indemnified Representative against any damage, judgment, amount paid in settlement, fine, penalty, punitive damages, excise tax assessed with respect to an employee benefit plan, or cost or expense of any nature ("Liability") incurred in connection with any threatened, pending or completed investigation, action, suit, appeal or proceeding of any nature, whether civil, criminal administrative or investigative, whether formal or informal, and whether brought by in the right of the Company, a class of security holders or otherwise, in which the Indemnified Representative may be involved as a party or otherwise by reason of the fact that such person is or was serving in an Indemnified Capacity, including, without limitation, Liabilities resulting from any actual or alleged breach or neglect of duty, error, misstatement or misleading statement, negligence, gross negligence or act giving rise to strict or products liability, except:

- (a) where such indemnification is expressly prohibited by applicable law;
- (b) where the conduct of the Indemnified Representative has been finally determined or otherwise:
 - (i) to constitute willful misconduct or recklessness within the meaning of 15 Pa.C.S. §§ 518(b) and 1746(b) or any superseding provision of law sufficient in the circumstances to bar indemnification against liabilities arising from the conduct; or
 - (ii) to be based upon or attributable to the receipt by the Indemnified Representative from the corporation of a personal benefit to which the Indemnified Representative is not legally entitled; or
- (c) to the extent such indemnification has been finally determined in a final adjudication to be otherwise unlawful.

An Indemnified Representative is any and all directors and officers of the Company, an employee of the Company requested, as part of the Company's disclosure controls and procedures and in connection with the performance of the employee's responsibilities in service to the Company, to provide to the Company a certification or certifications to be used by the Company in connection with the preparation of its periodic reports under the Securities Exchange Act of 1934, as amended; and any other person designated as an Indemnified Representative by the board of directors of the Company (which may, but need not, include any person serving at the request of the Company, as a director, officer, employee, agent, fiduciary or trustee of another corporation, partnership, joint venture, trust, employee benefit plan or other entity or enterprise).

Insofar as indemnification for liabilities arising under the Securities Act of 1933, as amended, may be permitted to directors, officers, or persons controlling the Company pursuant to the foregoing provisions, the Company has been informed that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in that Act and is therefore unenforceable.

We have in force and effect policies insuring our directors and officers against losses which they may become legally obligated to pay by reason of any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the directors and officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being directors or officers. Such coverage is limited by the specific terms and provisions of the insurance policies.

The foregoing summaries are necessarily subject to the complete text of the relevant document or statute.

Item 7. Exemption From Registration Claimed.

Not applicable.

Item 8. Exhibits.

- 4.1 Nonqualified Stock Option Agreement, dated February 6, 2003, between Penn National Gaming, Inc. and Peter M. Carlino.
- 4.2 Specimen copy of Common Stock Certificate (incorporated by reference to Exhibit 3.6 of Penn National Gaming Inc.'s Quarterly Report on Form 10-Q for the fiscal quarter ended June 30, 2003).
- 5 Opinion of Ballard Spahr Andrews & Ingersoll, LLP as to the legality of the securities to be offered.
- 23.1 Consent of BDO Seidman, LLP.
- 23.2 Consent of Ballard Spahr Andrews & Ingersoll, LLP (included as part of Exhibit 5 of this Registration Statement on Form S-8).
- 24 Power of Attorney (included in signature page of this Registration Statement on Form S-8).

Item 9. Undertakings.

The undersigned registrant hereby undertakes:

- (a) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:
 - (i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933, as amended;
 - (ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment hereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in this registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement;
 - (iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the registration statement is on Form S-3 or Form S-8, and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934, as amended, that are incorporated by reference in the registration statement.

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Provided, further, however, that paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is for an offering of asset-backed securities on Form S-1 or Form S-3, and the

information required to be included in a post-effective amendment is provided pursuant to Item 1100(c) of Regulation AB.

(b) That, for the purpose of determining any liability under the Securities Act of 1933, as amended, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

Penn National hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, as amended, each filing of Penn National's annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, as amended (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934, as amended), that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

Insofar as indemnification for liabilities arising under the Securities Act of 1933, as amended, may be permitted to directors, officers and controlling persons of Penn National pursuant to the foregoing provisions, or otherwise, Penn National has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by Penn National of expenses incurred or paid by a director, officer or controlling person of Penn National in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, Penn National will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Wyomissing, Commonwealth of Pennsylvania, on June 17, 2005.

PENN NATIONAL GAMING, INC.

By: /s/ PETER M. CARLINO

Peter M. Carlino, Chairman of the Board and
Chief Executive Officer

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Jordan B. Savitch and Robert S. Ippolito, and each or any one of them, his true and lawful Attorneys-in-Fact (the "Attorneys-in-Fact"), with full power of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement on Form S-8, and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said Attorneys-in-Fact, and each of them, full power and authority to perform each and every act and thing requisite and necessary to be done in connection therewith, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said Attorneys-in-Fact, or any of them, or his or their substitute or substitutes may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, as amended, this Registration Statement has been signed by the following persons in the capacities and on the date indicated.

| Signature | Title | Date |
|-------------------------|--|---------------|
| /s/ PETER M. CARLINO | Chairman of the Board; Chief Executive Officer and Director (Principal Executive Officer) | June 17, 2005 |
| Peter M. Carlino | | |
| /s/ KEVIN DESANCTIS | President and Chief Operating Officer | June 17, 2005 |
| Kevin DeSanctis | | |
| /s/ WILLIAM J. CLIFFORD | Senior Vice President Finance and Chief Financial Officer (Principal Financial Officer) | June 17, 2005 |
| William J. Clifford | | |
| /s/ ROBERT S. IPPOLITO | Vice President, Secretary and Treasurer (Principal Accounting Officer) | June 17, 2005 |
| Robert S. Ippolito | | |
| /s/ HAROLD CRAMER | Director | June 17, 2005 |
| Harold Cramer | | |

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/s/ DAVID A. HANDLER

Director

June 17, 2005

David A. Handler

/s/ ROBERT P. LEVY

Director

June 17, 2005

Robert P. Levy

/s/ JOHN M. JACQUEMIN

Director

June 17, 2005

John M. Jacquemin

/s/ BARBARA Z. SHATTUCK

Director

June 17, 2005

Barbara Z. Shattuck

EXHIBIT INDEX

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