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NEVADA EXAMINES ITS REGULATORY APPROACH TO DAILY FANTASY SPORTS

by Jennifer Gaynor, Greg Gemignani, Kate Lowenhar-Fisher, and Jeff Silver

The nationwide controversy over daily fantasy sports (DFS) and how it is regulated has led Nevada Governor Brian Sandoval to convene the Nevada Gaming Policy Committee for the first time since 2012.

Sandoval wants the Policy Committee to devise recommendations that will “allow Nevada to continue to lead the nation and the world in developing and maintaining the best policies and practices involving the regulation of the gaming industry.” This discussion, which is meant to lead to innovation in how Nevada will deal with the quickly changing world of interactive and skill-based gaming in addition to DFS offerings, is vital to understanding how Nevada can remain the leader in the gaming industry and tap into the huge interest in DFS-style offerings by today’s market.

The state kicked off the nationwide discussion over whether DFS should be regulated as gaming last October, when the Nevada Attorney General’s office issued an opinion that DFS offerings were sports wagering, leading Nevada’s gaming regulators to announce that Nevada gaming licenses would be required for DFS websites to offer their product to Nevada customers. Several other states’ Attorneys General followed suit, forcing the issue to the top of almost every state’s list of hot legal topics.

Sandoval has asked the Policy Committee to “gather information and provide recommendations on what is the best policy for Nevada’s gaming future” as it regards DFS, among other issues. As the world’s gold-standard gaming regulator, Nevada often assumes a leadership role on gaming issues.

The Policy Committee was last convened in 2012 to discuss how Nevada should regulate interactive gaming. The 2012 Committee’s efforts resulted in legislation enabling Nevada to enter into interactive gaming agreements with other states. Prior to that, the full group had not met since the 1980s.

The Policy Committee is chaired by Sandoval and includes among its 12 members representatives from Nevada’s gaming regulators (Tony Alamo, Chairman of the Nevada Gaming Commission, and A.G. Burnett, Chairman of the Nevada Gaming Control Board), Nevada legislators, and members of the public and the gaming industry (including Jim Murren, CEO/Board Chairman of MGM, and Keith Smith, President of Boyd Gaming Corporation).

The Committee will consider input from various constituencies, including the public, on DFS and other timely gaming policy issues and will craft recommendations for the Control Board and Gaming Commission. The recommendations of the Committee are not binding on the gaming regulators but merely advisory.

The Committee’s initial meeting on March 7 served mainly as a forum for experts in the gaming industry and leaders of the DFS movement to share relevant research and

information. Presenters included Chairmen Alamo and Burnett, representatives of the American Gaming Association (AGA), the Nevada Resort Association (NRA), the Association of Gaming Equipment Manufacturers (AGEM), the CEOs of DraftKings and FanDuel, and academic and legal gaming experts, including Dickinson Wright attorney Greg Gemignani, who is a long-time professor in gaming law at the UNLV Boyd School of Law.

The discussion regarding skill gaming and interactive gaming included that Nevada needs to ensure that its regulations allow for speedy innovation to remain relevant for a younger generation that will want to see games that incorporate social media and video-gaming concepts. Marcus Prater of AGEM noted that he hopes that gaming manufacturers will have hybrid games of skill and chance on Nevada's casino floors by early summer.

The DFS discussion, however, dominated the day, and several themes became apparent throughout the meeting. First, almost all agreed that DFS can be "good" – in that it has sparked clear nationwide and even worldwide interest – and that it needs to be incorporated in Nevada in some fashion to allow our gaming industry to remain competitive. Everyone at the hearing also agreed that DFS offerings must be transparent and regulated to protect both consumers and the reputation of the gaming industry.

Where the consensus began to break down was in how such regulation should be structured. Several voiced concerns that Nevada's regulations need to be adjusted to keep pace with innovation and to allow for a greater number of content providers to contribute. Others noted that the black market for sports wagering far outpaces the legal market and put forth an argument that can be summed up as "citizens are going to find a way to wager on sports, illegally or legally, so we may as well craft regulations to protect them when they do so."

Nevada's gaming licensees' concerns centered on concepts of fairness. In particular, licensees want the opportunity to take part in the booming DFS industry but are concerned that even if DFS offerings were to be legalized in some form in Nevada, they could still put their gaming licenses in jeopardy by partnering with DFS companies if the DFS offerings violate federal law or the laws of other states where they are being offered.

The DFS operators, while agreeing that they are open to some form of regulation, argued that what they offer is not well suited to what they termed Nevada's "onerous" regulations for gaming licensees. They are requesting Nevada to create a "new box" for DFS offerings to be regulated.

Finally, the sword of Damocles hanging overhead is the fact that there are at least two U.S. Attorneys that are investigating DFS operators for violations of federal law. If a federal court determines that DFS offerings equal sports wagering, much like the Nevada Attorney General did several months ago, then federal laws, including the Wire Act, could make unlicensed DFS offerings illegal nationwide, despite any state regulations to the contrary.

In addition, a big issue hampering Nevada from taking fast action on this issue is the fact that its Legislature meets only every second year, with the next legislative session not until February 2017. This means that, short of calling a special session, any changes to Nevada's gaming laws to accommodate DFS-style gaming will be on hold until next year.

While the Committee ponders how to deal with the offerings from companies like FanDuel and DraftKings, however, DFS is showing some signs of life in Nevada. Vic Salerno, a long-time Nevada gaming business operator, has applied to become the first Nevada-licensed gaming operator to offer DFS-style wagering with his new venture, U.S. Fantasy

(USF). Through USF, he will offer a fantasy sports product that allows players to make fantasy-type sports wagers utilizing the existing pari-mutuel system. USF will be Nevada-licensed and will operate under existing Nevada gaming statutes and regulations.

The Committee determined that it will meet three more times during 2016: in May to discuss interactive and skill gaming issues, in August to focus on DFS, and then again in the fall to deliberate and craft its findings and recommendations. These recommendations will be delivered to the Governor, the Nevada Gaming Commission, and the Nevada Gaming Control Board just in time to craft legislation for the 2017 Nevada Legislature to consider.

Jennifer Gaynor, Greg Gemignani, and Kate Lowenhar-Fisher are Members in Dickinson Wright's Las Vegas office, and Jeff Silver is Of Counsel in the Las Vegas office. Jennifer Gaynor can be reached at 702.550.4462 or jgaynor@dickinsonwright.com. See the masthead for the contact information of the other authors.

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