

The Rise of SKILL-BASED Gaming Regulation

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decade of social networks, smart phones, social gaming, traditional video games and motion-based video games has created a generation of consumers—Millennials—who do not favor slot machines as much as prior generations, and thus, has created a dilemma for land-based casino operators—how to attract Millennials to their casinos, and more importantly, onto the gaming floor.

The decline in popularity of slot machines, and the resulting effect on gaming revenue, is evident in Nevada. Statewide, Nevada gaming revenue reached its peak in 2007 at approximately \$12.8 billion, with 174,677 slot machine units in play within the State.¹ Las Vegas Strip gaming revenue also reached its peak in 2007 at approximately \$6.8 billion, with 49,891 slot machine units in play. In 2015, however, Nevada and Las Vegas gaming revenue was approximately \$11.1 billion and \$6.3 billion, respectively, representing a 13.5% and 7.03% decrease from the 2007 peak. Total slot machines in play also fell statewide 14.49% to 149,364, and 14.41% to 42,703 on the Las Vegas Strip.

Land-based casino operators have begun to address the trend and appeal to Millennials in a number of ways, with the most common being an increased focus on non-gaming amenities and entertainment. While Internet gaming and mobile wagering present the gambling experience to Millennials in a familiar package, neither form of gambling directly brings consumers into land-based casinos and onto the gaming floor, or directly addresses the lack of appeal traditional slot machines hold with Millennials.

On the other hand, skill-based gaming devices, designed to appeal to the younger generation of casino patrons, offer an additional tool to land-based casino operators to diversify their gaming floors and appeal to Millennials. The development of skill-based gaming devices has led to the rise of skill-based gaming regulation in the United States, particularly in Nevada and New Jersey. The approaches to skill-based gaming regulation in Nevada and New Jersey are considered below.

NEVADA

On May 19, 2015, Senate Bill No. 9 passed in Nevada. The Bill instructed the Nevada Gaming Commission (“Commission”) to, with the advice and assistance of the Nevada Gaming Control Board (“Board”), adopt regulations to encourage manufacturers to develop and deploy gaming devices, associated equipment and various gaming support systems that incorporate innovative, alternative and advanced technology. See N.R.S. 463.15997. The legislation permitted the Commission to adopt technical standards defining and differentiating between games of skill, games of chance and hybrid games; allowed for flexibility in payout percentages or game

outcomes based on “identifiers,” which are specific and verifiable facts based on objective criteria and are discussed in detail below; and required disclosures that game outcomes may be affected by skill or identifiers. The legislation defines “game of skill” as a game in which the skill (knowledge, dexterity or any other ability or expertise) of the player, rather than chance, is the dominant factor in affecting the outcome of the game over a period of continuous play, and also “hybrid games” as games in which a combination of skill and chance affects the outcome.

In September 2015, the Commission adopted amendments to Regulation 14 (“Amendments”) to address skill-based gaming. Under the Amendments, skill-based games may use an identifier to determine which games are presented to or available for selection by a player. The Amendments also envision inter-casino linked systems of games of skill or hybrid games, including progressive pay-off schedules that may include partial prize awards or prize awards for games with different themes or based on the use of identifiers.

The Amendments require that skill-based games clearly indicate that the outcome of the game is affected by skill, and that all possible game outcomes must be available upon the initiation of each game in which a player commits a wager. Further, they prohibit the modification of the rules of play for the game, including the probability and award of a game outcome, once a game is initiated.

The Amendments also require that all gaming devices meet a theoretical payout percentage of at least 75%, and continue to meet the Commission’s Technical Standards for Gaming Devices and Associated Equipment (“Technical Standards”).

In February 2016, the Commission amended its Technical Standards to address skill-based gaming, specifically Technical Standards 1, 2 and Definitions. The amendments to the Technical Standards include provisions for logging the use or assignment of identifiers and the basis for the assignment of an identifier. Importantly, the amendments provide additional detail regarding identifiers that may be used in skill-based games, such as:

- Predefined commercial activities, such as the patron’s frequency of visitation, wagering activity, activity on social media, and the accumulation of rank, points, or standing in either a gaming or non-gaming activity;
- Subscription to or enrollment in particular services, such as membership in a loyalty program;
- The use of a particular technology simultaneously with the play of a game;
- The patron’s level of skill, as identified or maintained by the gaming system or self-identified by the patron;

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- The patron's level of skill relative to the skill of other patrons participating in the same game; and
- The degree of skill required by the game.

The amended Technical Standards permit the use of "player interaction technology" for skill-based games, which refers to equipment that facilitates a player's physical interaction with a gaming device. For example, the technology may include touch screens, keypads, joy sticks, motion sensors, image sensors, image displays, infrared emitters and detectors and accelerometers. The amended Technical Standards also allow for the incorporation of an "in-session feature," which is an option that allows players to pay for and select an artistic attribute (i.e. graphics) or sound to increase the entertainment value of the game, but that otherwise has no influence on the operation of the game. Gaming devices using an in-session feature must include and display a separate meter that counts all credits deducted from the use of the feature.

The amended Technical Standards include provisions designed to ensure the integrity of the skill-based gaming device, such as the prevention of unintended physical, optical or radio disruptions to player interaction technology, and the avoidance of hardware variances between gaming devices that may impact the proper operation of the game or provide an advantage or disadvantage to a patron. The rules of play for a game of skill or hybrid game must describe or display information adequate for a reasonable person to understand the game prior to placing a wager. Further, the amended Technical Standards specify several factors, including the physical attributes of the game, that impact the determination of the required content of the rules for each game.

NEW JERSEY

On February 23, 2016, the New Jersey Division of Gaming Enforcement ("Division") adopted a temporary regulation concerning skill-based gaming devices. See N.J.A.C. 13:69E-1.28Y. The regulation was adopted on a temporary basis for a period of 270 days, during which time the Division will accept public comment on the regulation and the regulation may be revised before being proposed for permanent adoption. The regulation was drafted to mirror the skill-based gaming regulations adopted in Nevada in September 2015 (i.e. the Amendments), with the intention that gaming devices approved in New Jersey would also be eligible for approval in Nevada, and vice versa.

Prior to adopting the temporary regu-

lation, the Division took the stance that skill-based gaming machines could be approved under New Jersey's existing regulatory framework. The Division's stance was based on, in part, the definition of "slot machine" under the New Jersey Casino Control Act ("Act"), which envisions payouts dependent on "the skill of the operator or application of the element of chance, or both." N.J.S.A. 5:12-45. The Division's regulations also include provisions addressing theoretical RTP (return-to-player) for slot machines that require skilled strategy choices, addressing overall payout percentages on slot machines offering a play that relies on the knowledge of a patron or their physical dexterity, authorizing gaming tournaments for games where the outcome depends on the skill of the participant (as long as chance is also involved), and defining "skill feature" as a play on a slot machine requiring the patron to choose how to proceed in the game where the available choices affect the theoretical payout percentage of the play and the game. N.J.A.C. 13:69E-1.28A; N.J.A.C. 13:69F-8.6; N.J.A.C. 13:69-1.2. Despite the existing regulatory framework, the Division adopted the temporary regulation after industry stakeholders requested specific regulations to guide their development of new, innovative skill-based gaming devices.

Under the temporary regulation, "skill-based gaming" includes casino games in which the outcome of the game is dependent, in whole or in part, on the player's physical dexterity and/or mental ability. The temporary regulation permits skill-based games to contain features allowing patrons to gain an advantage over other patrons, such as patron-purchased enhancements, provided all patrons are advised of the feature, its benefits and the method for obtaining it, and are allowed to decline to compete against patrons using the feature. The regulation also provides that skill-based games may offer patrons the opportunity to compete against a computerized or skilled house-sponsored opponent, provided the patron is aware of the opponent, has the ability to elect whether to compete against the opponent and the opponent does not have access to information unavailable to the patron.

Under the regulation, skill-based games may use an identifier, such as the identifiers that may be used in Nevada, to determine which games are presented to or available for selection by a player. The regulation also includes several consumer protection related provisions, including clear disclosures that the game is affected by a player's skill and other information to ensure the player understands the game. The regulation also generally restricts alterations to the gaming device during game play, based on the skill of the patron, to make an event more or less likely. The regulation also mandates that casino licensees monitor peer-to-peer skill-based gaming for



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collusion and money laundering.

Notably, under the regulation slot machines with skill-based components are still required to meet a minimum payout percentage of 83%, similar to traditional slot machines under the Act. However, games that rely entirely on skill and games that do not use a random number generator are not required to meet that percentage. The regulation also provides that skill-based games may include an adaptive feature to increase the payback percentage and improve the return to the player.

Skill-based games may be submitted under the New Jersey First regulation, which provides that games submitted to the Division for testing and approval before or simultaneously with any other jurisdiction may debut on a casino floor in Atlantic City within two weeks if approved.

OTHER JURISDICTIONS

Aside from Nevada and New Jersey, a number of other jurisdictions have considered the adoption of skill-based gaming regulations. Similar to New Jersey, the definition of “slot machine” under the Massachusetts Expanded Gaming Act envisions payouts dependent on “the skill of the operator or application of the element of chance, or both.” M.G.L. c. 23K, § 2. On February 19, 2016, the Massachusetts Gaming Commission published draft regulations concerning skill-based gaming, which were subject to an informal public comment period that ended on March 7, 2016. On May 25, 2016, Gaming Laboratories International (“GLI”) released for public comment a revised Standard #11 for Gaming Devices (Public Comment Version 3.0) (“Revised Standard”), which addressed, in part, technical standards for “games with skill.” At the Massachusetts Gaming Commission’s July 21, 2016 public meeting, the Commission acknowledged the Revised Standard and opted to wait for the finalization of the Revised Standard before adopting any regulations relating to skill-based gaming, noting that the Revised Standard, in its entirety, may be adopted and incorporated into

the Massachusetts regulations, subject to public comment. In short, rather than adopting its own unique skill-based gaming regulations, Massachusetts may choose a more standardized approach (i.e. adoption and incorporation of the Revised Standard).

THE FUTURE OF SKILL-BASED GAMING

As Millennial consumers mature and the next generation of consumers increasingly favor new, innovative and interactive technologies, the transition away from traditional casino games and slot machines and concomitant demand for skill-based gaming devices will likely intensify. Accordingly, it is likely that additional states will consider authorizing and regulating skill-based gaming devices in the future. Provided such states follow the lead of New Jersey in adopting regulations that mirror those already enacted, manufacturers of skill-based gaming devices should be positioned to address demand for the devices. States formally adopting or incorporating the GLI Revised Standard concerning skill-based gaming would help create a standardized approach to regulation, which should be beneficial to manufacturers’ efforts at compliance. If on the other hand alternative approaches to skill-based gaming regulation develop, manufacturers may be delayed in developing devices that can be deployed across multiple jurisdictions and may be forced to weigh the cost effectiveness of doing so. ♣



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¹ David G. Schwartz. *Nevada Gaming Revenues 1984–2015: Calendar Year Results for Selected Reporting Areas*, Las Vegas: Center for Gaming Research, University Libraries, University of Nevada Las Vegas, 2016, available at http://gaming.unlv.edu/reports/NV_1984_present.pdf.