




BACK TO THE **FUTURE:**

Revisiting Interactive Gaming in Nevada

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Although the popular tourism catch phrase may be “What Happens in Vegas Stays in Vegas,” that sentiment is not always accurate in the age of smartphones. A more correct catch phrase might be “Vegas, Where the World Meets for Work and Play.” Today, Nevada is not only a gaming epicenter for the world, but our state has also become a world leader in hosting industry events, trade shows, and conventions for domestic, foreign, and global industries. Few places in the world can match Nevada’s experiences and amenities. Whether it is outdoor activities, such as hiking, skiing, boating, fishing, hunting, horseback riding, or off-roading, or more urban activities, such as casino gaming, shopping, dining, or attending shows, night clubs, day clubs, thrill rides, concerts and events, Nevada has it all.



Indeed, at its core, Nevada's economy is reliant upon people meeting and congregating. Unfortunately, meeting and congregating, while great for work and play, also can be instrumental in the transmission of infectious diseases. The steep downturn in business stemming from mandated closures and restrictions in response to rising COVID-19 infection rates has revealed a key vulnerability in our industry and economy.

As we look to the future, and the shade thrown over the future by the COVID-19 pandemic, it may be worth taking a step back to the past – all the way back to 2001.

The Interactive Gaming Act of 2001

In 2001, the Nevada gaming and tourism industries were booming. New properties were still coming on line at a steady rate, tourism was on the rise, and Nevada was the envy of the world.

Although the future looked bright, Nevada's lawmakers took notice of the rise in new forms of gaming and entertainment. In the U.K., companies were providing bingo games over cable TV, keno over satellite TV services, and blackjack on greyscale small-screen cellular flip phones. Additionally, unlicensed or lightly regulated operators in the Caribbean, Central America, and South Pacific were offering online casino, sports, and race wagering targeted at U.S. consumers.



Recognizing that online or remote gaming was growing fast – and that the market was growing with no participation by or competition from traditional companies with Nevada gaming licenses – the Nevada legislature enacted AB466, the Interactive Gaming Act of 2001.

At the time, the legislature sought to encompass all forms of remote casino and game wagering, whether it was online, mobile-phone based, cable-TV based, satellite-TV based, or local area network based. To encompass all of these different forms of remote wagering, the Nevada legislature coined the phrase “Interactive Gaming.”

Although some operators were enthused about the prospect of adding a digital dimension to gaming and marketing efforts, others were not. In the aftermath of the 2001 legislative session, the Nevada Gaming Commission worked diligently to learn more about interactive gaming, and whether interactive gaming could be conducted in a manner consistent with Nevada's policies. The Commission had concerns with many emerging technologies of the day and was investigating player safety, the effectiveness of geo-location tools, services to aid in digital player identification, and new electronic payment systems.

Nevada Pauses While the World Hurtles Forward

These activities continued in earnest until 2002, when the U.S. Department of Justice (“DOJ”) issued a letter to Nevada regulators that it was the opinion of the DOJ that all interactive gaming violates the Federal Wire Act. That DOJ letter put an end to the first concerted effort to regulate interactive gaming in Nevada.

Although Nevada's initial efforts to have legitimate and regulated interactive gaming were thwarted by federal intervention, interactive gaming continued to flourish globally.



Once a start-up industry containing many scofflaws and rogues, in the mid-2000s, several foreign interactive gaming companies became more corporate, more compliant, and often had public offerings that allowed their stock to be traded on prestigious international stock exchanges. The result was that many in the online industry, much like the Nevada land-based industry forty years prior, became legitimized in the public eye.

Online Poker Revitalizes Interactive Gaming in Nevada

By 2011, online poker had once again reached a critical mass in the U.S. market. Nevada casinos regularly hosted land-based tournaments sponsored by online sites that took U.S. play. One Nevada casino even bore a large wrap, bearing the name of an online poker company. Additionally, the lotteries of New York and Illinois were offering online lottery subscriptions.

In this climate, the 2011 Nevada legislature enacted AB258, which was aimed at revising and reinvigorating Nevada's languishing interactive gaming industry. Key revisions were to remove the 2001 act's requirement for the Nevada Gaming Commission to ensure that interactive gaming could be done in compliance with applicable laws (with a nod toward federal law). The bill compelled the Nevada Gaming Control Board to draft, and the Nevada Gaming Commission to adopt, interactive gaming regulations for online poker before January 31, 2012. The legislation did not limit interactive gaming to online poker, but it did require regulations to be created and adopted for online poker.

Compelled by the legislature, the Nevada Gaming Control Board did draft regulations for online poker licensing that were adopted by the Nevada Gaming Commission on December 22, 2011.

The DOJ Gives the Green Light for State Sanctioned Interactive Gaming in 2011 ...

On December 23, 2011, the DOJ published its first formal opinion and analysis regarding the Federal Wire Act, in which the DOJ opined that the Federal Wire Act was limited to sports betting, and had no application to other forms of wagering. The 2011 opinion was a reversal of the letter the DOJ sent to Nevada regulators

in 2002, and paved the way for interactive gaming in and between states where such wagering was authorized by the state.

In the wake of the 2011 DOJ opinion, Nevada, Delaware, and later New Jersey entered into an online poker agreement. Additionally, New Jersey and Pennsylvania enacted their own broad online gaming legislation similar to the 2001 legislation enacted in Nevada. Finally, Nevada and other states permitted interstate wide-area-progressive jackpots that allow commercial and tribal gaming operators to compete with interstate lottery products.

... But Nevada Remained Cautious

Although the federal impediment to interactive gaming was removed for licensed gaming companies, the political dynamic was not. Despite the legal opportunity to move forward with forms of interactive gaming beyond online poker, Nevada chose not to enact regulations for expanded interactive gaming, even though Nevada's statutes clearly permit licensing such activity.

Taking a Fresh Look at Interactive Gaming as an Imperative for Nevada

We now have more information on the relationship between interactive gaming and land-based gaming. For example, we can look at New Jersey, which has the most robust and competitive legal and licensed online gaming market in the U.S. Anecdotally, at least, online gaming in New Jersey has primarily been additive and not cannibalistic. In presentation after presentation, it appears that online gaming allows casino operators to reach patrons who were all but lost, to attract newer patrons, and to keep a casino's brand relevant in this age where eyes and cell phone screens are nearly inseparable for hours each day.

The challenges that the year 2020 have brought to Nevada's gaming industry present the best reason to date for the state to revisit the interactive-gaming tools the legislature provided the industry back in 2001.



As New Jersey has learned, interactive gaming will not replace land-based in-person gaming. The act of congregating, socializing, being in a social environment, and the excitement that it brings cannot be replicated in an online or mobile environment.

But interactive gaming brings other benefits. For example:

- Providing some revenue when a core in-person entertainment business like Nevada's is impacted by events beyond our control.
- Keeping casino operators, casino brands, and game brands top-of-mind for consumers.
- Keeping in touch with consumers to provide information that can allow them to make comfortable and confident decisions to return to their favorite escapes in Nevada.
- Re-connecting with patrons and providing an incentive for them to return and enjoy the amenities that Nevada has to offer.

Add to this the fact that some of the major hurdles to the success of interactive gaming have disappeared. Since 2001, great strides have been made in player safety, geo-location, digital player identification, digital financial transactions, and game technologies. All of this and the only-increasing popularity of the smart phone point to the time being ripe for Nevada to revisit interactive gaming.

While the DOJ once again changed its interpretation of the Federal Wire Act in 2018, a federal court in New Hampshire has ruled against the DOJ's enforcement of the 2018 Opinion against state sanctioned interactive gaming in New Hampshire. On June 18th, 2020, the DOJ argued before the First Circuit Court of Appeals asserting that the 2018 Opinion is merely internal advice, it is not final agency action, and it does not impact the rights of private parties out in the world. In the same hearing, the DOJ also asserted that it will issue warnings before engaging in enforcement based on any new interpretation of the Federal Wire Act. In light of these revelations and because the DOJ has not brought any action or sent any direct warning to any state agency based on the 2018 Opinion, no state with state sanctioned interactive gaming has ceased the activity or required its gaming licensees to cease offering interactive gaming.

How Nevada Can MoveForward – Quickly – with Interactive Gaming

When looking at how Nevada can take steps to reinvent interactive gaming in our state, it is important to point out that the legislation of 2001 did not limit licensed interactive gaming to the game of poker. The enabling legislation is broad, and reflects the intent of the

legislature in 2001 to capture as much remote gaming as possible (absent race and sports) under the interactive gaming umbrella.

This means that the only things standing in the way of broader licensed interactive gaming in Nevada are the need to draft regulations to implement the 2001 statute and the will to have licensed interactive gaming.

Surely, if other jurisdictions can effectively license and regulate interactive gaming, Nevada can do so at least as well. Likewise, if operators in other jurisdictions can find ways to use interactive gaming as a force multiplier tool to enhance land-based operations, Nevada operators will create ways to perfect use of this tool. It is time to go back to the future envisioned in 2001 and to provide Nevada operators with the opportunity to use interactive gaming as a tool to enhance their competitive standing in the global marketplace and to make up for lost time and opportunity in this space.



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Jeff Silver was appointed in 1975 as the resident Board Member supervising the Las Vegas office of the Nevada Gaming Control Board during the State's tumultuous period of cleansing the gaming industry of its organized crime influence. He is consistently honored as one of Nevada's pre-eminent gaming attorneys and practices gaming and administrative law as Of Counsel with Dickinson Wright, PLLC.