



The Future of Daily Fantasy Sports and eSports in Nevada

“Nevada has a vital interest in ensuring that it remains a leader in the best policies, practices, and regulations, while continuing to grow as new technologies emerge in the gaming industry and public demand develops”

By Scott Scherer

In January of 2016, Governor Brian Sandoval announced that he was reconvening the Nevada Gaming Policy Committee (“Committee”) to consider various topics relating to Nevada’s gaming industry, primarily daily fantasy sports (“DFS”) and wagering on eSports.¹ In Executive Order 2016-01, Governor Sandoval stated that “Nevada has a vital interest in ensuring that it remains a leader in the best policies, practices, and regulations, while continuing to grow as new technologies emerge in the gaming industry and public demand develops” and that “[t]he Committee shall gather information, engage in discussion, and provide recommendations on what is the best policy for Nevada’s gaming future”²

As of this writing, the Committee has held two meetings, on March 7, 2016 and on May 13, 2016. A third meeting is scheduled for August 23, 2016, and a fourth meeting is planned, likely in September or October of 2016.

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At the final meeting, the Committee will make recommendations regarding any policy changes that the members of the Committee believe will benefit the State of Nevada and its gaming industry. Those recommendations may include potential changes to the Nevada Gaming Control Act (the “Act”) or other state laws for consideration by the Nevada Legislature during its 2017 session, as well as possible changes to regulations, technical standards or policies that might be adopted by the Nevada Gaming Control Board (“Board”) and Nevada Gaming Commission (“Commission”). The recommendations of the Committee are likely to form a significant part of the gaming agenda during the 2017 Legislative Session.



DFS

With regard to DFS, the Board, with the advice of the Nevada Attorney General’s Office, determined that DFS as a business constituted a “gambling game” and a “sports pool” under the Act. Therefore, DFS is legal in Nevada, but sports pool licenses are required.³ Under the Act as currently written, they could not have reached any other conclusion.

The Act’s definition of “sports pool” is “the business of accepting wagers on sporting events or other events by any system or method of wagering.” There is no requirement that the outcome be determined primarily by chance, so the argument that DFS is a game of skill had no impact on the analysis. Additionally, since the definition encompasses wagers on both “sporting events” and “other events,” DFS is included even if the events involved are not “sporting events.”

Whether DFS is considered a sporting event is, however, critical to the economic model for DFS. With

limited exceptions, the Federal Wire Act⁴ prohibits a person in the business of betting or wagering from transmitting bets or wagers or information assisting the placement of bets or wagers “on any sporting event or contest” across state lines. Moreover, the Professional and Amateur Sports Protection Act (“PASPA”) prohibits most states (other than Delaware, Oregon, Montana and Nevada) from authorizing or sanctioning sports betting.⁵ The prohibition includes betting on “the performances of ... [amateur or professional] athletes in ... [one or more competitive] games.”⁶ If DFS is sports betting, and requires a sports pool license, existing federal laws would make it extremely difficult for DFS operators to achieve a national market of liquidity and volume of play necessary to make their operations profitable.

These are a few of the reasons that the major DFS operators have lobbied legislatures across the country seeking a form of regulation that recognizes DFS as a product that is distinct from sports betting. While bills have failed in many jurisdictions, the DFS operators have achieved some significant legislative victories in recent months, including bills legalizing and regulating DFS in Colorado⁷, Virginia⁸, Indiana⁹, Missouri¹⁰, Tennessee¹¹, and Mississippi¹².

A bill has passed both houses of the New York Legislature and is awaiting action by Governor Cuomo.¹³ The California Assembly overwhelmingly adopted a bill to legalize and regulate DFS, but as of this writing, the bill¹⁴ has not been approved by the California Senate.

Legal opinions in Kansas, Maryland, Rhode Island and Massachusetts have determined that DFS is legal under state law. In addition to determining that DFS is permissible under state law, the Massachusetts Attorney General promulgated regulations similar to many of the bills that have passed to provide certain consumer protections.

There are now at least nine states in which DFS is expressly legal (10 if you include the ability for a DFS operator to obtain a sports pool license in Nevada). If the New York and California bills are enacted (and with only the Governor’s approval needed in New York and only one “no” vote in the California Assembly, the odds appear to favor final approval), they will bring the number to 11, including two of the largest states in terms of population. Barring a significant scandal, it seems reasonable to assume that other states will

follow in 2017. A number of other states have taken no action either to approve and regulate DFS, or to prohibit DFS altogether.

Nevada lacks sufficient population to be a major player in the DFS debate. Nevada's influence is based upon its reputation as the "gold standard" of gaming regulation. The Committee will need to decide whether it is in the best interests of the State and its gaming industry to insist upon regulation of DFS as a "sports pool," or whether some form of alternative regulation will allow Nevada to play a more significant role in the DFS debate and best serve the people of the State. In either case, expect DFS to be a significant issue in the next session of the Nevada Legislature.



eSports

For those who are not familiar with the term, "eSports" involves professional video game players competing in video game tournaments for prizes, typically cash prizes. The numbers of people participating in and more importantly, watching these events is staggering. Tens of thousands of spectators are attending the major tournaments (including one held in Las Vegas) and millions are streaming them live online. There is now a dedicated eSports program on satellite radio. One Las Vegas casino has opened an eSports lounge, and others are considering how they can market to eSports aficionados.

At the May 13, 2016 Committee meeting, there were presentations regarding eSports and substantial discussion among the Committee members. According to the presentations, at least one sports book has requested approval to accept wagers on

eSports as an "other event," pursuant to Regulation 22.120. Based on testimony to the Committee by one eSports professional, describing the training regimen and diet necessary to maintain his stamina and focus throughout a tournament, the Committee discussed whether eSports might qualify as a "sporting event" rather than an "other event."

This is an important distinction. If eSports are "sporting events," then no approval is required for sports books to accept wagers on those events under Regulation 22.120. Sports books who are concerned about setting accurate lines can accept pari-mutuel wagers pursuant to Chapter 464 of the Nevada Revised Statutes.

One issue that spans both eSports and skill-based gaming devices is the extent to which gaming device manufacturers might offer special versions of popular video games on the casino floor, rather than in the sports book, whereby players would be allowed to wager against the house or against each other on the outcomes of those games.

The Committee is likely to engage in significant discussion about these and other issues related to eSports to determine whether any changes to the statutes or regulations are desirable to promote both the security and popularity of eSports and eSports wagering in Nevada. As with DFS, the Committee's recommendations with regard to eSports will likely become an important topic during the 2017 Session of the Nevada Legislature.



Skill-Based Games and Interactive Gaming

In addition to DFS and eSports, the Committee will also consider issues related to skill-based and interactive gaming. Since Nevada has already enacted statutes

relating to these topics, any recommended changes are likely to be incremental rather than revolutionary, but may nevertheless have significant impacts on Nevada's gaming industry. Existing statutes governing these topics already give the Board and Commission significant discretion, therefore changes to current regulations or technical standards will likely be sufficient and legislative action will not be absolutely necessary. To the extent that the Committee's recommendations involve a significant change in current state policy, however, it may be prudent to seek legislative ratification of those policy changes.

Scott Scherer is a partner in the law firm of Holland & Hart, practicing primarily in the area of administrative law with special emphasis on gaming regulatory matters and legislative affairs. Scott previously served in the Gaming Division of the Attorney General's Office, as Executive Director of Corporate Development for IGT, General Counsel and Chief of Staff to Governor Kenny C. Guinn, a member of both the Nevada Assembly and of the Nevada Gaming Control Board.

¹ While eSports was not specifically listed in the original Executive Order reconvening the Committee, it has emerged as a significant topic of discussion. Other topics include interactive gaming and skill-based games.

² State of Nevada, Executive Department, Executive Order 2016-01 (January 15, 2016).

³ On June 23, 2016, the Commission granted a license as an off-track pari-mutuel sports systems operator to a company that expressed its desire to offer a form of DFS in Nevada.

⁴ 18 U.S.C. § 1084.

⁵ Enforcement of PASPA has consisted primarily of court orders issued in response to litigation by the NCAA or major sports leagues. Many of the bills that have passed exclude collegiate sports, while some of the major sports leagues have invested in DFS operators, reducing incentives for the typical players to enforce PASPA.

⁶ 28 U.S.C. § 3702.

⁷ H 16-1404

⁸ S 646.

⁹ S 339.

¹⁰ H 1941.

¹¹ SB 2109, HB 2105.

¹² S 2541. Legalization in Mississippi is for one year while a task force studies the issue.

¹³ S 8153.

¹⁴ A 1437.

