

Industry Comments

These are non-APA style articles highlighting gaming issues and insights, legal developments, economic aspects, and other topics of concern to gaming researchers, executives, managers and policy makers. An alternative form of peer-review more appropriate to these articles assures critical assessment of this section.

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Introduction

The UNLV Boyd School of Law has been a pioneer in the teaching of gaming law. We have arranged to reprint two commendable gaming papers from the law school's student writing competition.

Recognizing Nevada as the leader in gaming control, author Stafford reviews Nevada's significant role in gaming regulation and projects a future receptive to new policies and new models of operation. Author Baker faces the question of how far to go in permitting or promoting adult-themed entertainment within a casino, which raises the question: Are gentlemen's clubs with their overt sex appeal appropriate for a gaming establishment?

The Gaming Control Act Fifty Years Later: A Call for Proactive Gaming Policy

Matthew J. Stafford

I. Introduction

As the current financial crisis grips the nation, Nevada gaming revenue continues to decrease.¹ Besides seeking an economic turnaround, elected officials and the public are demanding tougher regulation and increased oversight of financial institutions.² This increase in federal regulation is sure to impact Nevada gaming licensees. This article sets out to argue that Nevada gaming regulators should move from a reactive to a proactive approach to regulation. A thorough review of the current regulations to reaffirm, amend, or repeal them before reacting to market whims or federal regulation will enable Nevada to regulate tomorrow's gaming industry.

Nevada's current approach to regulation sends a mixed message. On one hand, regulators, licensees, and gaming attorneys use the refrain that gaming is a legitimate business and work tirelessly to discredit stereotypes and misconceptions.³ Unfortunately, the regulatory structure sends the opposite message, without intrusive regulatory practices the industry will devolve into a haven for criminal elements, short change the state of tax revenue, or cheat its consumers. Are these assumptions undergirding the regulatory structure still true?

1 Howard Stutz, *Casino Revenue Falls*, Las Vegas Review Journal, April 08, 2009, at 1D; Howard Stutz, *Annual Gaming Revenue Suffers Sharpest Drop in State History*, February 12, 2009.

2 Jackie Calms, *Both Sides of the Aisle See More Regulation*, N.Y. Times, Oct. 14, 2008, at A15.

3 Robert Faiss, *Against the Odds: Reflections on a Career in Gaming Control and Gaming Law*, 12 Gaming L. Rev. 25, 29 (2008).

Because of Nevada's efforts, gaming is a legitimate business on Wall Street and other global financial centers. Licensees are rapidly coming under the purview of multiple external regulators who create cumulative and repetitive regulation. Similarly, the licensees of ten or fifteen years ago let alone fifty are not the same as today. Thus, many licensees are subject to market forces and investors, essentially creating private regulation that discourages actions covered by Nevada's regulatory scheme. This external and private oversight may provide avenues to decrease the State's role in certain areas or serve to validate current practice for alternative reasons. Nevertheless a rigorous examination by regulators, industry representatives, elected officials, interest groups, and the general public of the current regulatory scheme and current global gaming realities is appropriate before making policy and structural changes to the system.⁴ Allowing many interests a seat at the table, in a public forum, creates a dynamic process and allows buy-in and credibility to any recommendations submitted to the Nevada Gaming Commission.⁵

By exhaustively vetting the policy considerations behind Nevada's current regulatory framework and beginning to approach regulation proactively, Nevada will remain the hallmark of gaming jurisdictions by replacing out-dated or ill-suited considerations with new policies or elimination of regulations.

The first part of the article will look at the evolution of gaming regulation and its relationship to policy considerations. Secondly, it will examine external regulators and disincentives created by market forces that similarly regulate licensees or make certain standards duplicative or burdensome. Finally, it will submit a model for examination of the regulations and two areas for examination.

II. Gaming Regulation and Policy

The "Nevada model" of regulation seeks to maximize the economic benefits of gaming and allows the industry to meet market demands with little regulatory involvement. Although business decisions are vested with the industry, integrity and suitability issues are strictly regulated.⁶ This is accomplished through the twin pillars of Nevada regulation, licensing and oversight. Licensing and oversight of gaming has always been present, however its form and the policy reasons guiding it evolved in a reactionary fashion.

Licensure- tax collection, suitability, and exceptionalism.

From 1931 to 1945 a casino operator merely paid the minimal licensing fees for slot machines and table games.⁷ The fees were collected by the appropriate town, city or county and the fees were apportioned at twenty-five percent to the state and twenty-five percent to the city or town, if the activity took place there, the remainder was retained by the county.⁸ Poor enforcement of the fee schedule yielded low tax revenues but the Legislature's only action was a resolution reprimanding local law enforcement.⁹

Concerned about a budget deficit State legislators passed Senate Bill No. 142.¹⁰ The bill taxed a casino's gross revenue and placed regulatory responsibility with the Nevada Tax Commission.¹¹ Because the policy emphasized the generation and collection of tax revenue, the state left enforcement responsibilities with the local authorities.¹² This scheme generated revenue but left the Tax Commission powerless to exclude unfit

4 "I learned to listen and make sure I understood the problem before I offered a resolution to it." Faiss, *supra* note 3, at 30.

5 The notion that conflict is beneficial to good government has been espoused since Machiavelli. See Niccolo Machiavelli, *Discourses on Livy* (Harvey C. Mansfield & Nathan Tarcov trans., University of Chicago Press 1998) (ca. 1513-17).

6 See Nat'l Gambling Impact Study Comm'n, Final Report, at 3-1 (1999) available at <http://govinfo.library.unt.edu/ngisc/index.html>; Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 Chap. L. Rev. 181, 190 (2002).

7 Lionel, Sawyer, & Collins, *Nevada Gaming Law*, 10-11 (3rd ed. 2000) (\$25 per month for table games and \$10 per month for each slot machine.)

8 Mark A. Clayton, Esq., *Gaming Regulation in Nevada An Update...*, 2 (2006).

9 Lionel, Sawyer, & Collins, *supra* note 7, at 12.

10 S.B. 142, 1945 Leg., 42nd Reg. Sess. (Nev. 1945).

11 Maren Parry, *Nevada Gaming Lawyer*, September 2007, State Bar of Nevada Gaming Law Section.

12 *Id.*

operators from the licensing process or revoke issued licenses. More concerned that unfit operators would cheat on their taxes than engage in other criminal activity created or sully gaming's image, the Attorney General penned an opinion in 1947 that became the basis for the creation of the State Gaming Control Board in 1955.¹³ The language granted the Tax Commission the power to look into an applicant's character when assessing suitability for any license.¹⁴

As state oversight increased, the epicenter of Nevada gaming shifted south to Las Vegas. In 1946 the Flamingo Hotel opened and marked the turning point in Clark County's rise to Nevada's dominant gaming locale.¹⁵ The rise of gaming in southern Nevada brought Nevada's most infamous casino operators and their connections to organized crime. In response, the legislature created the Nevada Gaming Control Board in 1955 with the purpose of removing any undesirable element in gaming and providing regulations for the licensing and operation of gaming.¹⁶ This marked a turning point in gaming regulation, for the first time the focus of regulators became tax collection and suitability.

Campaigning against the rise in corruption and criminality in the gaming industry, Governor Grant Sawyer rode into office determined to clean up Nevada's most important industry. The first bill he signed was the Gaming Control Act in 1959.¹⁷ The Act created the new and independent Nevada Gaming Commission whose mandate provided the impetus for today's licensing policy and process.¹⁸

Obtaining a gaming license today is a daunting and expensive endeavor that ultimately comes down to character.¹⁹ The process takes months and costs tens of thousands of dollars.²⁰ A prospective licensee must authorize authorities to obtain any information they may request by waiving any constitutional, statutory, and common law privileges.²¹ No stone is left unturned; information attorneys, physicians, or any other person possesses is deemed relevant and examined by investigators.²² Responsibility of licensing decisions is vested exclusive with the Gaming Commission and final decisions are not subject to judicial review.²³ This plenary power is protected from rights afforded by the U.S. constitution because gaming is reserved to Nevada within the meaning of the Tenth Amendment.²⁴ Needless to say, today's gaming licensees are of the highest moral and ethical character because policy shifted from mere suitability to a standard of exceptionalism amongst licensees.

Oversight- Compliance Committees and Minimum Internal Controls

Regulations mandating corporate compliance committees have existed since the mid-1940's.²⁵ However, Nevada's current regulations requiring a compliance committee and minimum internal controls developed piecemeal from conditions on select licenses, to an institutional standard.

In 1984 Carma, a Canadian publicly traded corporation was licensed. Carma was one of the first companies to have a compliance system in place in Nevada.²⁶ Nevada regulatory compliance started to crystallize when Mr. Ginji Yasuda was granted a limited gaming license to acquire Aladdin Hotel and Casino. One of the conditions was a compliance committee.²⁷ The reasons behind the imposition of a compliance committee

13 *Id.*

14 Op. Att'y Gen. No. 47-528 (1947).

15 Clayton, *supra* note 8, at 4.

16 *Id.*

17 Parry, *supra* note 11, at n. 17 citing Lionel, Sawyer, & Collins, *Nevada Gaming Law*, 23 (3rd ed. 2000); Nev. Rev. Stat. 463.010 (2008) *et. seq.*

18 "Exhausted investigations [must] be made as to present licensees in order to be as certain as humanly possible that criminal elements, mobs, syndicates, have neither interests nor control of existing businesses." *Id.*

19 Dean Richard Morgan & Robert Faiss, *Do the Right Thing Ethics and the Gaming Industry*, Global Gaming Business, November 2003, at 16.

20 *Id.*

21 *Id.*

22 *Id.*

23 *State v. Rosenthal*, 93 Nev. 36, 559, P.2d 830 (1977).

24 *Id.*

25 John K. Maloney, *Global Gaming Compliance*, 8 Gaming L. Rev. 119, n. 1 (2004).

26 *Id.* at 121.

27 *Id.*

stem from the challenges related to international investigations, such as different cultural customs, conflicting legal, tax, and accounting systems, and language barriers.²⁸

In 1991 Nevada Gaming Commission adopted a regulation requiring a compliance review and reporting system. While compliance committees were becoming commonplace, this regulation formalized the requirement for licensees.²⁹ A compliance committee meets regularly to ensure that the licensee is avoiding undesirable associations, identify areas of focus that may concern the operator's license, and provide additional oversight of compliance with laws and regulations.³⁰ Typically a committee will discuss sales and leases, material transactions, and transactions with suppliers for goods and services to formulate an opinion on each action.³¹ When complete the findings of the committee are transmitted to gaming control agencies.³²

The second component of oversight is the implementation of a comprehensive system of operational controls known as Minimum Internal Controls or "MICS". MICS focus on gaming activity and provide rigid guidance for the conduct of games, the handling of cash and movement of cash, chips, or other financial instruments, and accounting or document trail for all transactions.³³ MICS help regulators monitor the daily operations of operators by creating a rough uniformity, any deviation from them raises the specter of collusion or cheating.³⁴ Nevada has roughly fifteen hundred MICS that, in some cases mechanically, govern nearly all aspects of a licensee's business.

The policy of today's compliance scheme is the product of a pragmatic approach to international investigation that eventually recognized the regulatory utility of day-to-day oversight by regulators.³⁵

Global Success

Whatever the policy motivations, Nevada gaming regulation has been wildly successful. Since the elimination of organized crime from the Strip in the early 1980's, gaming grew from a provincially tolerated industry into a global economic force.³⁶ Corporate America seems to exchange one scandal for another but gaming corporations, due to the licensing process and strict oversight, avoid misconduct.³⁷ In fact commentators suggest studying Nevada's successful balance of strict regulation and free market principals in the gaming industry.³⁸ Strictly regulated gaming is now seen as a cure-all for cash-strapped governments and, despite a recent downturn, a profitable investment. Given the success, are the assumptions behind current gaming policy still valid or has the industry matured to point where new realities must be incorporated to Nevada's regulatory approach?

III. External Regulators and Market Forces

Since the emergence of mega-resorts, corporate gaming has held center stage in Nevada. With corporate gaming came new types of business models. Licenses have been granted to a variety of foreign and domestic business entities from sole proprietorships to publicly traded corporations, and sovereign wealth funds.³⁹ These business models were necessary new types of investment vehicles to create the necessary capital or leverage to finance

28 *Id.* at 121.

29 See NGC Reg. 5.045(4) "The compliance review and reporting system shall be created for the purpose of monitoring activities relating to the licensee's or registrant's continuing qualifications under the provisions of the Nevada Gaming Control Act and regulations of the commission in accordance with a written plan to be approved by the board administratively or as otherwise ordered by the commission"; Maloney, *supra* note 25, at 121.

30 *Id.* at 122.

31 *Id.*

32 Morgan & Faiss, *supra* note 19, at 18.

33 Aronovitz, *supra* note 6, at 194.

34 *Id.*

35 Maloney, *supra* note 25, at 121.

36 Bo J. Bernhard Ph.D, *The Battered Gaming Industry: A Case Study for Our Times?*, 13 UNLV Gaming Res. & Rev. J. 55, 57 (2009).

37 Morgan & Faiss, *supra* note 19.

38 Bernhard, *supra* note 36, at 57.

39 For a complete list of current nonrestricted, restricted, manufacturer, distributor and slot route operator licenses visit <http://gaming.nv.gov/publications.htm>.

a non-restricted license. As corporate gaming expanded it brought regulation by other jurisdictions, federal oversight, shareholder actions, and stakeholder pressure to bear on Nevada licensees.

Whether strict regulation of suitability, profit margins, or a combination of each cleared the way for corporate gaming's rise is unresolved.⁴⁰ What is clear is that it takes enormous amounts of capital to obtain a non-restricted license. Beyond the reserves necessary, the Commission cannot grant a non-restricted license in a county with a population of 100,000 unless the establishment is a resort hotel.⁴¹ Very few corporate entities can muster the capital necessary for such an undertaking, one is the publicly traded corporation.⁴² Publicly traded corporations are, at least in theory, owned by their stockholders who retain private rights of action if harmful business practices, now forbidden by regulation, result in losses.

Manufacturers and others who operate in multiple jurisdictions, domestic and foreign, expend enormous amounts of money and manpower to comply with the myriad of laws and regulations in each jurisdiction.⁴³ Moreover, a knowing violation of another jurisdiction's laws, regulation or rule and failure to adhere to Nevada standards of integrity and honesty are all cause for discipline in Nevada.⁴⁴

Gaming corporations are subject to many federal regulators in addition to the NGC.⁴⁵ Federal regulators create rules that may or may not have the same intent as the Nevada Gaming Commission but nevertheless require similar reporting.⁴⁶

This overlap of regulation creates duplication and increases compliance costs. For example, prior to the repeal of Regulation 6A, casinos operated under an exemption of the Bank Secrecy Act.⁴⁷ To combat money laundering federal regulation governs cash transactions, along with suspicious activity report, in financial institutions including casinos. This exemption required Nevada to constantly amend its regulation to comply with Federal law.⁴⁸ The benefits began to erode and it was clear that Nevada was spending state funds to enforce federal law.⁴⁹

Standing alone, gaming is an unmatched source of economic vitality for Nevada. It created a micro-economy geared towards servicing gaming, directly and indirectly employing thousands. Because of this and its potential negative effects gaming has also spawned various interests groups.⁵⁰ These relatively powerful stakeholders mitigate the harmful effects of gaming by exerting pressure on gaming to be a good citizen.

Today's licensees are subject to oversight from a variety of sectors that perform functions similar, if not identical, as the NGC regulations. Nevada is expending precious resources to enforce these regulations. Whether continued state oversight is needed in all areas, or amendments to existing regulations could ease the burden on licensees needs to be determined. It may save Nevada scarce funds and manpower while increasing the profitability of gaming.

The assumptions behind a finding of suitability and the regulations it spawned were for a different set of operators. Today's licensees are held to strict standard by other jurisdictions, regulators, and stakeholders. Licensees have been de-incentivized

40 Bernhard, *supra* note 36, at 57.

41 Nev. Rev Stat. §463. 1605 (2008); see also Nev. Rev. Stat. 463.01865 (2008), a resort hotel is "any building or group of buildings that is maintained as and held out to the public to be a hotel where sleeping accommodations are furnished to the transient public and that has: More than 200 rooms available for sleeping accommodations; At least one bar with permanent seating capacity for more than 30 patrons that serves alcoholic beverages sold by the drink for consumption on the premises; At least one restaurant with permanent seating capacity for more than 60 patrons that is open to the public 24 hours each day and 7 days each week; and a gaming area within the building or group of buildings." Clark County's definition is narrower.

42 See *E.g.*, MGM, Las Vegas Sands Corp., and Wynn Resorts Limited.

43 Maloney, *supra* note 25, at 126. The cost may run into the millions of dollars.

44 Nev. Rev. Stat. § 463.720 (2008).

45 *E.g.*, SEC, Treasury Department- Financial Crimes Enforcement, Committee on Foreign Investment, and Internal Revenue Service.

46 Compare NGC Reg. 6A (repealed 2007) and Bank Secrecy Act, 12 U.S.C. § 1953 (2001).

47 NGCReg. 6A repealed 200X; Bank Secrecy Act, 12 U.S.C § 1953 (2001).

48 Edward Magaw, *Suspicious Activity Reporting and Casinos: The Life and Death of Nevada's Regulation of Casino Suspicious Activity Reporting*, 7 Gaming L. Rev. 427, 443 (2003)..

49 *Id.*

50 Labor unions, service industry organizations, and problem gambling activists are some of the many groups.

by the costs, both monetary and personally, of licensure and oversight. So too, the free market discourages bad-actors and encourages behavior required by the current scheme. Moreover, the scheme employed by Nevada has created principals the general public expects from gaming. The legitimacy gaming has earned is a product of the current system, now that gaming is legitimate is it time to revisit the regulatory scheme and its policies to update it for today's realities and the future?

IV. Proactive Regulation

Why Evaluate?

Public policy is the implementation of behavior-modifying techniques to affect individuals, groups, and organizations.⁵¹ Policy makers are charged with making thoughtful rational and well informed decisions.⁵² The Fiftieth anniversary of the Gaming Control Act is an opportunity to validate or eliminate regulation to keep Nevada the preeminent jurisdiction in global gaming. The current set of regulations and policies underlying them are the product of measures taken after the manifestation of a need. An ad hoc approach to regulation of a fast paced and increasingly global industry dulls Nevada's edge. A proactive approach is needed.

Tough-minded regulations are not meritorious merely because they are tough-minded, a thoughtful examination of the reasons behind every MIC or licensing procedure should be fleshed out by experts. A proactive approach to policy should regulate the industry as it will be, as opposed to employing a set of possibly stagnant ideas. This enables Nevada's regulators to foster the essential economic prosperity gaming creates and provide for the general welfare of the public.⁵³ Fully vetted regulations will remain as is, be amended, or discarded. Whether original policy considerations for a regulation are relevant or are replaced by new, just reasons, the exercise of examination creates buy-in from citizens, the industry, regulators and interest groups. Superfluous or inefficient regulation may be amended or discarded to meet Nevada's needs as determined by the Gaming Policy Committee and adopted by the Commission.

Who should evaluate?

A model for evaluating gaming policy already exists. Created by the legislature in 1961 the Gaming Policy Committee meets rarely, if ever.⁵⁴ The Policy Committee consists of: one member of the Commission, designated by the Chairman of the Commission; one member of the Board, designated by the Chairman of the Board; one member of the Senate appointed by the Legislative Commission; one member of the Assembly appointed by the Legislative Commission; one enrolled member of a Nevada Indian tribe appointed by the Inter-Tribal Council of Nevada, Inc.; and five members appointed by the Governor for terms of 2 years as follows: two representatives of the general public; two representatives of nonrestricted gaming licensees; and one representative of restricted gaming licensees.⁵⁵ Because the Policy Committee lays dormant, the potential rewards of this type of group are unrealized.

This model attempts to capture the wide range of interests invested in Nevada's gaming industry and serves to give a voice to many of those interests. Bringing together this group will go a long way towards getting experts in the representative areas discussing current trends in global gaming and Nevada's role as the preeminent jurisdiction. Unfortunately, it may not bring enough diversity for broad-based input. As noted earlier interest groups and other stakeholders are invested in gaming's future and would certainly advocate for a voice in any policy considerations.⁵⁶ Given that there

51 Bret Meich, *The Power to Destroy: The Psychology of Gaming Taxation*, 12 *Gaming L. Rev. & Econ.* 458, 464 (2008) citing Laurence E. Lynn, Jr., *Part 2: The Behavioral Foundations of Economic Theory*, 59 *J. Bus.* 379, 379-80 (Oct. 1986).

52 *Id.*

53 *Nev. Rev. Stat.* § 463.0129 (2008).

54 *Nev. Rev. Stat.* § 463.021 (2008).

55 *Id.*

56 Pablo T. Spiller & Sanny Liao, *Buy Lobby, or Sue: Interest Groups Participation in Policy Making-A Survey 3* (Nat'l Bureau of Econ. Research, Working Paper No. 12209, April 2006).

are only two places on the Policy board for members of the general public, and interests groups would have difficulty qualifying for this designation, a natural competition for these spots emerges.

The potential for groups left out of the process to scuttle or obstruct the process by pursuing separate unilateral agendas could undermine recommendations of the Policy committee. "Large distributional effects of legislation provide the affected groups strong incentives to attempt to control what policies are made and how they are enforced. Thus, much of interest group action in the modern administrative state is geared toward influencing the implementation of, often vague, policies."⁵⁷ To effectively influence policy, groups directly or indirectly, lobby, buy, or sue depending on a multitude of factors.⁵⁸ Soliciting the input of interest groups may avoid unintended consequences created by advocates lobbying outside the Policy committee structure.

Nevada Gaming Regulation 2.100 grants the NGC Chairman the power to appoint committees to study and report on any topic related to gaming.⁵⁹ Utilizing regulation 2.1000 could provide an avenue to expand participation in the formulation of gaming policy. Similarly, it allows independent and disinterested analysis for any number of topics concerning gaming. Independent studies could provide an important check on the Policy Committee and interest groups as well as a provide substantiation or rejection of assumptions.

Areas for inquiry

Potential areas to study are numerous. However, the rapid expansion of gaming and the recent economic downturn may be harbingers that previous regulations and the policies behind them need adjustment. Multi-jurisdiction licensure and compliance are costly and manpower intensive.⁶⁰ The pressing need for new sources of capital forced licensees to seek out new investment.⁶¹ However, regulations require mandatory licensure for certain levels of investment dissuade some investors or prolong the time frame. Addressing licensure does not mean lowering Nevada's standards. Rather using Nevada's cache as the preeminent investigatory jurisdiction to engage other jurisdictions, both foreign and domestic, to create processes that reduce licensee's global burdens, benefits Nevada. Licensure forms typically ask similar questions in various ways but the intent behind each is the same; harmonizing these procedures would go along way in reducing costs.

Revisiting the amount of investment that triggers automatic licensure requirement likewise should be examined. The policy behind this seems straight forward, by licensing beneficial owners gaming remains free of undesirable elements. However, institutional investors and investment vehicles not considered or known in the past, which fall in to this category, yet as a business model are passive investors, may refuse to undergo the licensing process and invest their dollars elsewhere. Policy considerations that determined the percentages listed in the regulation need to be justified in these times and for the future so gaming can keep pace with financial markets.

V. Conclusion

Nevada Gaming is at a turning point, gaming revenues are down and the industry is weathering a difficult economic storm. Gaming has been through worse and come out ahead no doubt gaming will emerge stronger for the experience.⁶² The policies, assumptions, and regulations that brought us to this point have been incredibly

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 5-6.

⁵⁹ NGC Reg. 2.100 (1990). The chairman may at his discretion appoint committees to study and report to the board or the commission any matter appropriate to the commission's administration of the Gaming Control Act or these regulations.

⁶⁰ Maloney, *supra* note 43.

⁶¹ MGM sought help to finance City Center from Infinity World, a subsidiary of Dubai World, creating a joint venture in the project. Las Vegas Sands Corp., offered eighteen million shares of common stock and five million of Series A stock in November.

⁶² Gabrielle Angle, *We're Not Dead Yet: The Darwinian Nature of Nevada's Gaming Industry*, (forthcoming May 2009).

successful. If they are to carry Nevada for the next fifty years an examination to validate, amend, or dispose of the regulations and the policies behind them is necessary to keep Nevada on the leading edge of global gaming. e to acquire funding.⁶³

⁶³ NGC Reg. 16.430(1) (2002) allows an investor to apply for a waiver of Nev. Rev. Stat. § 463.643 if the investment is less than fifteen percent and in some cases nineteen percent.