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Gaming & Hospitality

GAMING & HOSPITALITY LEGAL NEWS

GAMING IN THE BIDEN ADMINISTRATION - WHAT TO EXPECT NEXT

by Jeffrey Silver, Kate C. Lowenhar-Fisher, Greg R. Gemignani, Taylor A. Anello, and Patrick Sullivan

Nobody has been able to predict anything about 2020, including the results of the 2020 U.S. elections (although many tried - more than \$1 billion in foreign wagers were placed on the outcome of the Presidential race). In the hopes of bringing some clarity back to our lives, Dickinson Wright gaming attorneys have tried to discern how a Biden administration will affect the gaming industry.

Whereas Donald Trump has owned casinos and currently has a real estate investment in Las Vegas (Trump Tower), President-elect Biden does not appear to have an active interest in the gaming industry. Biden's recent and frequent trips to Nevada were strictly campaign events, soliciting support from union members and arguing that stimulus funds had been held up by his predecessor. Biden's visits threw into sharp relief the desperation of Nevada's hospitality industry which has been decimated by resort closures, convention, and special event cancellations, leading to dramatic declines in visitor volume and hotel and gaming revenues.

LOCKDOWN IN LOCKSTEP?

Of greatest immediate importance to the gaming industry is whether there will be a mandate to impose a national lockdown on "non-essential" businesses. As the readers may recall, the casino industry was not deemed "essential" when it was purposefully omitted from the initial guidelines for the \$2 trillion Cares Act funding. Concerned about the national economy, it is unlikely that a Biden administration will impose a nationwide lockdown on casinos, especially since that will further damage an entire industry's chances for economic recovery. Instead, any occupancy restrictions or closures would continue to originate from directives from State governors as they perceive the need to address health concerns within their borders. And, even as some states have imposed lockdowns on gaming within their jurisdictions, tribal casinos have resisted and avoided such orders. For example, California's tribal casinos took the position that their sovereign status exempted them from state lockdown orders, and Governor Newsom's cardroom closure orders avoided a showdown between the State and Tribes by avoiding reference to tribal gaming.

December 17, 2020 | Volume 12, Number 15

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NEVADA (LAS VEGAS/RENO)

Kate Lowenhar-Fisher
702.550.4459 | klowenhar-fisher@dickinsonwright.com

Gregory R. Gemignani
702.550.4468 | ggemignani@dickinsonwright.com

Jeffrey A. Silver
702.550.4482 | jsilver@dickinsonwright.com

TORONTO

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Patrick Sullivan
202.659.6929 | psullivan@dickinsonwright.com

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FEDERAL FINANCIAL RELIEF

It took some forceful lobbying efforts by the American Gaming Association and individual gaming companies for Washington D.C. to allow small and mid-sized gaming properties (500-10,000 employees) to be eligible for the basic Paycheck Protection Program (“PPP”) distributions. However, any other funding for most operators had to take the form of repayable, albeit low-interest, loans.

The most recent aid package currently under consideration is a proposed post-election, bi-partisan bill for \$908 billion, far less than amounts bandied about in late summer. However, while there is some relief in the new bill in the form of unemployment compensation benefits for furloughed workers and a supplemental \$300 per week stipend for four months, it does not contain a forgivable PPP loan component except for small businesses with fewer than 300 employees that have suffered revenue declines of 30% or more.

TRAVEL RESTRICTIONS

On a worldwide basis, casino revenues have shown some slight improvement; however, the revenue numbers are dramatically lower than in 2019. Most significantly impacted is the VIP side of the business. While most travel restrictions have been lifted between Mainland China and Macau, considering the strident relationship between the Trump administration and the PRC, it may take some time for the governments in both nations to allow for the free-flow of visitors. While everyone expects President Biden to attempt to improve relations between the two countries, travel to the United States by PRC gaming VIPs, at least, will likely not resume for the near future. Other worldwide visitation will be similarly sluggish as international airline flights slowly resume.

MINIMUM WAGE - MAXIMUM IMPACT.

A Biden administration pledge to raise the minimum wage, if fulfilled, would have a significant impact on the gaming industry. Many casino jobs and those in the service sector are supplemented by customer gratuities. A \$15 minimum wage would mean an immediate jump from the current \$9 an hour minimum wage in Nevada (\$8 if health insurance is provided), making it nearly twice as costly to provide certain levels of service, especially in a resort setting. Added to the employer contributions for FICA, workman’s compensation, health insurance, meals, and many other benefits, some of which are predicated upon the total wages, the gaming industry would

be pressured to either lower profit expectations, reduce service levels, or automate.

IMPACT ON THE FEDERAL WIRE ACT AND ONLINE SPORTS WAGERING.

From 1961 to 2011, the U.S. Department of Justice (“DOJ”) took the position that the federal Wire Act applied to all forms of gaming, including wagering on “sporting events” and “contests” conducted in interstate and foreign commerce. Despite this, the DOJ applied the Wire Act nearly exclusively to bookmakers and sports betting. In 2001, the Fifth Circuit Court of Appeals agreed with a federal District Court in Louisiana, that the phrase “sporting event or contest” in the Federal Wire Act should be interpreted such that sporting modifies both events and contest, and thus the Federal Wire Act only applied to sports betting. In 2011, the DOJ issued an opinion consistent with the Fifth Circuit opinion stating that the DOJ believed the Federal Wire Act only applied to sports wagering in interstate and foreign commerce.

While Trump may have understood and had empathy for brick-and-mortar casino operators like himself, he did not support the expansion of online gaming or tribal gaming. In 2018, the DOJ reversed its 2011 opinion and stated that the Wire Act applies to all forms of wagering and transactions using electronic communications even where the bettor and betting service provider were in the same state. DOJ specifically stated that state lotteries could no longer rely on the 2011 opinion to conduct remote intrastate lottery product sales. The 2018 opinion was challenged by the state lottery of New Hampshire, and a District Court held that the 2018 opinion was flawed, and again reiterated that the Wire Act applies only to sports wagering, not the intrastate online lottery products offered in New Hampshire. The DOJ has since appealed.

We expect that the DOJ under new leadership with a Biden administration appointee will rescind the 2018 opinion and withdraw its appeal of the decision in the federal District Court of New Hampshire. This should provide a clear path for expanded use of internet communications for gaming products, such as intrastate online games, interstate online games (other than sports) where conducted by licensed gaming operators in each state and expanded uses of interstate wide-area progressives by commercial and tribal gaming operators.



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ENFORCEMENT ACTIONS AGAINST ILLEGAL OPERATORS.

During the Obama DOJ years, the DOJ spelled out its prosecutorial priorities. The rationale was that with limited resources, the DOJ should focus its efforts on crimes that have the greatest impact on the citizenry and economy. Thus, crimes related to terrorism, illicit drug trade, market manipulation, and human trafficking garnered significant, and very public, resources, while online gaming crimes were not a high priority.

During the Trump administration, the DOJ openly stated that priorities had changed and signaled that lower-level crimes would also receive significant attention. During the Trump years, those lower-level crimes did not apparently extend to gaming-related crimes. Thus, for gaming companies, regardless of the administration, there was little apparent effort given to enforcement and nothing like the infamous 2011 “Black Friday” actions against illegal online poker operators.

With expanded gaming nationally following New Jersey’s successful effort to invalidate the Professional and Amateur Sports Protection Act, there will be increased pressure on the DOJ to use its enforcement powers to limit the market presence of illegal bookmakers as the legal operators are becoming significant contributors to state economies, particularly in the recent economic downturn. With more states legalizing that form of gaming, regulated sports wagering handle in October 2020 alone was \$3 billion - the highest it has ever been. We expect increased effort by the DOJ in the next administration to enforce existing federal laws against foreign sports wagering operations that flout U.S. law at the expense of the legitimate regulated gaming markets in the U.S.

TRIBAL GAMING UNDER THE BIDEN ADMINISTRATION

The Biden Presidential campaign included a promise to appoint Native Americans to high-level government positions, but as of this writing, he has yet to name his pick for Secretary of the Interior (“Interior”), which is a pivotal role for Indian country, or Assistant Secretary-Indian Affairs (“AS-IA”), a job which also includes running the Bureau of Indian Affairs. A Native American has never served as Secretary, but Mr. Biden is under great pressure from Indian Country to name Native American or Alaska Native individuals for both roles.

The leading contender for Interior Secretary is Representative Debra Haaland (D-N.M.), a citizen of the Pueblo of Laguna, a New Mexico tribe. Other contenders include New Mexico Senators Tom Udall and Martin Heinrich, and Washington

Governor Jay Inslee. Fifty House members led by Rep. Raul Grijalva (D-Ariz.) have signed a letter supporting Halaand’s nomination. Despite her progressive positions, she has good bipartisan working relationships and earned praise from Rep. Don Young (R-AK), who serves with Haaland on the House Natural Resources Subcommittee on National Parks, Forests, and Public Lands.

Regardless of the specific leadership, Indian Country expects engagement from the Biden-Harris administration in a close and consultative relationship on a range of issues important to tribes, including Covid-19 relief, pipeline and drilling approvals, and resources to combat soaring levels of violence against Native American women. Biden’s declared top priority for Interior is to ban new fossil fuel drilling on all federal lands and waters throughout the nation as part of a strategy to fight climate change, but we can expect similar policy reversals with regard to Indian Country as well. Former AS-IA and Chickasaw Nation citizen Kevin Washburn, the Dean of the University of Iowa College of Law, is running Mr. Biden’s Interior transition team and is well-versed in Indian gaming as he previously served as the NIGC general counsel.

The Supreme Court’s 2009 *Carcieri v. Salazar* decision disallowed the United States from accepting new trust land for many tribes. The decision disqualified tribes that could not document that they were a “recognized Indian tribe now under federal jurisdiction” at the 1934 enactment of the Indian Reorganization Act. Mr. Biden has repeatedly expressed support for a “clean” legislative fix that would not impose additional conditions on tribes seeking gaming approvals.

The Obama administration accepted 542,000 acres of land into trust for tribes, but the Trump administration accepted only a small fraction of that. Obama’s Interior accepted land into trust status for gaming for the Cowlitz Tribe in 2013 and implemented a policy framework based on that decision to allow other such trust acquisitions. Trump’s Interior withdrew that policy in March 2020, but in the expected chain of similar reversal of reversals, Mr. Biden has promised to restore it!

The new trust-land policy will immediately impact at least one major tribal gaming project. The fate of the Mashpee Wampanoag Tribe’s proposed casino project in Taunton, Massachusetts, about halfway between Boston and Providence, Rhode Island, is currently in federal court. In 2015, the Obama administration placed the casino site into trust status and declared it eligible for gaming. In 2018, the Trump’s Interior reversed the decision. The Tribe sued the Department, but earlier this year Interior declared it was



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planning to record transfer of the land out of trust, revoke the reservation proclamation, and annul the gaming eligibility determinations. In June, a federal court ordered Interior to reconsider and enjoined its decision to take the land out of trust. Under Democrat control again, the agency will likely drop its litigating position and reissue the decision, allowing the project to go forward. However, administrative trust land acquisitions are always subject to litigation threats, and a more “originalist” Supreme Court may determine that Interior’s interpretation falls outside the boundaries of its Carcieri decision.

The National Indian Gaming Commission’s policies under the Trump administration have remained relatively stable, as the independent agency’s duties are set forth by regulation, and most controversial gaming land decisions are issued in coordination with the Interior. Trump elevated Sequoyah Simermyer to the 3-year Chairmanship in November 2019, with unanimous Senate approval. Mr. Biden will likely nominate two new commissioners to fill vacant and expiring seats, and these picks have not proven controversial in the past. There is consensus that the Commission will continue to be supportive and protective of tribal gaming as it was throughout the previous administration.

IMPACT ON DAILY FANTASY SPORTS.

If you ask the Daily Fantasy Sports Industry (“DFS”), they will tell you that they are not engaged in gaming. However, the IRS recently issued two memos stating that entry fees received from players on DFS activities are subject to taxation because they are gambling. A federal excise tax has long been imposed upon gaming with three original exemptions for table games, slots, and pari-mutuel racing and later in the 1980s for State Lotteries. For all other gaming activities, particularly sports wagering, there is a .25% federal excise tax on the betting handle (wagers made). However, if the activity has not been authorized by the State, the excise tax is 2%, which would eliminate all potential profits. This is the predicament in which DFS finds itself with the IRS and although there is still the possibility of settlement or a Tax Court reversal, it is highly unlikely that the Biden administration will intervene.

CONCLUSION.

The gaming industry has largely managed to avoid being caught in bipartisan feuding, and will find a way to work with any administration. The immediate challenges faced by the gaming sector have more to do with the health risks caused by COVID-19, its impact on the transportation industry,

and the ability of people to congregate in large groups at event settings. Equally important is the general state of the economy, including employment numbers, which translate to disposable income for entertainment purposes. There is no doubt that pent-up demand for gaming is out there, but in the near term, these health and economic factors are not policy decisions over which a Biden administration will have control.

ABOUT THE AUTHORS



Jeffrey A. Silver is Of Counsel in Dickinson Wright’s Las Vegas office. He can be reached at 702.550.4482 or jsilver@dickinsonwright.com.



Kate C. Lowenhar-Fisher is a Member and Gaming & Hospitality Practice Group Chair in Dickinson Wright’s Las Vegas office. She can be reached at 702.550.4459 or klowenhar-fisher@dickinsonwright.com.



Gregory R. Gemignani is a Member in Dickinson Wright’s Las Vegas office. He can be reached at 702.550.4468 or ggemignani@dickinsonwright.com.



Taylor A. Anello is an Associate in Dickinson Wright’s Las Vegas office. She can be reached at 702.550.4423 or tanello@dickinsonwright.com.



Patrick Sullivan is an Associate in Dickinson Wright’s Washington DC office. He can be reached at 202.659.6929 or psullivan@dickinsonwright.com.