20th Annual National Institute on the Gaming Law Minefield

Defending Liberty
Pursuing Justice

Presented by the
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Criminal Justice Section,
Business Law Section Gaming Law Committee,
Solo, Small Firm and General Practice Division Gaming Law Committee
and Center for Professional Development
in cooperation with
International Masters of Gaming,
National Native American Bar Association
and National Indian Gaming Association

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Faculty and Author Biographies

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Thomas N. Auriemma is a gaming attorney and consultant for the casino industry. He is currently a member of the Penn National Gaming, Inc. Compliance Committee. From 2007 to 2011, Mr. Auriemma was the vice president/chief compliance officer of Penn National Gaming, Inc. and the president of a number of its subsidiaries. He is also a member of the Compliance Committee of Casino Rama in Ontario. Previously, he was a casino regulator in New Jersey for over 28 years. In 2002, he was appointed by the governor of New Jersey as the director of the Division of Gaming Enforcement. He held this position until 2007.

John W. Barron is the deputy executive director and general counsel for the Ohio Casino Control Commission in Columbus. He assists the executive director with overseeing the commission's general operations and all of its divisions, and advises and counsels the agency on all matters, including gaming, labor and employment, Ohio's Sunshine and Ethics Laws, and the Administrative Procedures Act. He is a member of the International Masters of Gaming Law. Mr. Barron previously served as chief legal counsel for the Ohio Senate.

William Bogot is a partner at Fox Rothschild LLP in Chicago. He represents clients in highly regulated industries and has worked for all three branches of the Illinois government. A former legal adviser to the Illinois Gaming Board (IGB), he authored much of Illinois' gaming regulations and advised the IGB and the Governor's Office on all aspects of gaming law and regulation. Mr. Bogot draws upon this and his other government experience to counsel clients in gaming and other industries that have heavy regulatory oversight.

Jennifer Carleton is a shareholder with Brownstein Hyatt Farber Schreck in Las Vegas. She counsels clients on corporate and regulatory matters, focusing on the licensing aspects of deal structures and transactions, mergers and acquisitions, reorganizations, and public finance. She has spent the last 19 years of her career in gaming, first as in-house counsel for an Indian casino and for the last decade as an adviser to the premier public and private gaming companies in the U.S.

Mark Clayton is a shareholder of Greenberg Traurig and co-chair of the firm's Global Gaming Practice in Las Vegas. He served for four years as a member of the Nevada Gaming Control Board, a position which he served until December 31, 2008. Before joining the board, he held corporate legal and general counsel positions three public gaming companies. Mr. Clayton started his legal career in private practice, with an emphasis on corporate, commercial and securities law.

Tiffany E. Conklin is the attorney member of the California Gambling Control Commission where she has served since 2010. Prior to her appointment, she served nine years in the California State Legislature, most recently as chief of staff to State Senator Tom Harman. In addition to her work for the legislature, she was an adjunct professor at Golden Gate University where she taught courses on administrative law and judicial governance. Commissioner Conklin earned a J.D. from the University of the Pacific, McGeorge School of Law and a B.A. in Government from California State University, Sacramento.

Paul Connelly is the director of licensing at the Massachusetts Gaming Commission in Boston. He is responsible for all functions related to license administration required by the Expanded Gaming Act, including licensing of all gaming establishment employees and vendors, qualification of directors and officers of gaming vendors, issuance of gaming beverage licenses, and licensing of gaming schools. He is a graduate of Bowdoin College and has a Master of Arts from the Fletcher School of Law and Diplomacy, where he concentrated in international security studies.

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Bill Curran is a partner at Ballard Spahr LLP in Las Vegas. He is also a former chairman of the Nevada Gaming Commission (1989-1999) and former chairman of the International Association of Gaming Regulators (1992-1994). His practice focuses on state and local government relations law, including all aspects of gaming law. He serves on the compliance committee of several major gaming companies. He was former president of the State Bar of Nevada (1989) and the National Association of County Civil Attorneys and currently serves as Chairman of the Board of Nevada Legal Services (NLS) and Vegas PBS.

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Marc C. Dunbar is partner in the law firm of Jones Walker, LLP in Tallahassee, Florida. For nearly two decades, he has served as counsel to a host of gaming clients. Mr. Dunbar is regularly asked to appear before legislative and administrative panels to comment on changes to Florida's various gaming laws as well as to provide assistance in drafting changes to Florida's gaming rules and statutes. He is an author of gaming related articles and media commentator on state and national gaming issues and has been qualified as an expert witness on gambling.

J. Kelly Duncan is a partner in Jones Walker's admiralty and maritime practice group in New Orleans. He is also a past member of the firm's Board of Directors (2006-2014) and he is head of the firm's Gaming practice. Mr. Duncan has more than 35 years of experience handling admiralty, maritime, and international and customs law matters. His maritime practice includes both domestic and international matters relating to marine acquisitions, financings, vessel construction, regulatory issues, maritime lien enforcement and foreclosures, contracts of affreightment, terminal tariffs, and charter parties.

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Constance Jones is director of responsible gaming for the Association of Gaming Equipment Manufacturers. Her role has helped to strengthen the bridge of communication and understanding between the gaming industry, specifically that of a gaming technology providers, and the problem gambling communities. Ms. Jones, a twenty-year veteran of the gaming industry, has presented at numerous conferences and events around the world on the gaming manufacturer's role in responsible gaming and the evolution of responsible gaming technologies. She was appointed by Nevada Governor Gibbons and then reappointed by Governor Sandoval to serve on the state's Advisory Committee on Problem Gambling.

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Kevin Rosenberg is an attorney with the Los Angeles law firm of Lowenstein & Weatherwax. His practice includes AML/BSA compliance for casinos and other financial institutions, internal/government investigations, and white collar criminal defense. He regularly presents at national financial crime, money laundering, Bank Secrecy Act, and Title 31 conferences. Before joining L & W, Mr. Rosenberg served as federal prosecutor in Los Angeles for more than 13 years. As a deputy chief in the Los Angeles U.S. Attorney's Office Organized Crime Drug Enforcement Task Force, he prosecuted domestic and international money laundering, bank fraud and related financial crimes, and violations of the Controlled Substances and RICO acts.

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Joseph Webster is a partner at Hobbs Straus in Washington, D.C. He focuses on Indian gaming, economic development, self-determination, and taxation.

Joseph Weinert is executive vice president of Spectrum Gaming Group in Linwood, New Jersey. He researches and directs economic, international and regulatory studies for private- and public-sector clients worldwide. He represents tribes on issues related to various state and federal internet gaming proposals. He has focused on helping to ensure that proposed internet gaming legislation protects existing tribal gaming operations and respects tribal sovereignty. Mr. Weinert graduated from The George Washington University Law School in 1995.

Dennis Whittlesey is a member of the law firm of Dickinson Wright PLLC in the firm's Washington, D.C., office, specializing in Indian law and Indian gaming law. He is a member of the District of Columbia and Oklahoma bars, and represents Indian tribes, gaming companies and local governments for Indian gaming issues throughout the country. His state and local government clients in this regard have included one state,

as well as various counties, cities and towns in a number of states, including Florida, Massachusetts, Michigan, Ohio, Illinois, New York, Oklahoma, Oregon and California. Mr. Whittlesey received his B.A. in journalism from the University of Oklahoma, and his J.D. and LL.M. in Taxation from Georgetown University Law Center.

Keith S. Whyte is the executive director of the National Council on Problem Gambling (NCPG) in Washington, D.C. He previously served as director of research for the American Gaming Association, where he was responsible for research and public policy issues, including problem gambling.

Glenn Wichinsky is recognized for his specialization in the fields of gaming law, gaming regulation and compliance and international business development. He is a licensed attorney in the states of Nevada and Florida, a long term member of the International Masters of Gaming Law. He earned his undergraduate degree in political science from the University of Miami.

Rob Ziems is the executive vice president, general counsel and compliance officer for Aruze Gaming America, Inc. in Las Vegas. Mr. Ziems represented gaming clients in private practice prior to joining AGA as senior vice president of business development in 2011. He has served as in-house counsel for gaming industry corporations for most of his professional career, including as general counsel and corporate secretary for PGIC. He graduated from Drake University School of Law and earned his Bachelor's degree from the University of South Florida.

SECTION A

The Role of Gaming Regulators in a Changing Environment

The Role of Gaming Regulators in a Changing Environment

Thursday, February 11, at 8:45 a.m.

Moderator
Marc Ellinger, Blitz Bardgett & Deutsch LC, Jefferson City, Missouri

Panelists
Paul Connelly, Massachusetts Gaming Commission, Boston, Massachusetts
William P. Curran, Ballard Spahr LLP, Las Vegas, Nevada
Susan Hensel, Director of Licensing, Pennsylvania Gaming Control Board, Harrisburg, Pennsylvania
Richard Kalm, Executive Director, Michigan Gaming Control Board, Detroit, Michigan
Emily Mattison, General Counsel, Illinois Gaming Board, Chicago, Illinois
Sara Gonso Tait, Executive Director, Indiana Gaming Commission, Indianapolis, Indiana

Summary

The entry of foreign casino operators into the Las Vegas market, the merger of gaming manufacturers, the rapid growth of the fantasy sports market, the impact of the Internet on the expansion of unregulated gaming activities, the entry of a new generation of gamers demanding creative products, technological advances and slow-to-understand-and-react politicians all combine to place a panoply of challenges on the desks of gaming regulators. The panel will discuss the challenges faced by regulators in this rapidly changing market environment.

Outline:

I. Introduction

II. Communications

11 CSR 45-1.015 Code of Ethics

(9) Ex Parte Contacts

NGC Reg. 7.040

III. Junket Enterprises

11 CSR 45-5.400 Junket, Junket Enterprises, Junket Representatives—Definitions

11 CSR 45-5.410 Junket Enterprise; Junket Representative; Agents; Employees—Policies and Prohibited Activities

11 CSR 45-5.420 Junket—Agreements, Schedules, and Final Reports

N.J.S.A. 5:12-29 *et seq.*

N.J.A.C. 13:69H-1.1. *et seq.*

IV. Fantasy Sports

Lottery

Missouri Constitution, Article III, § 39(9)

NRS 462.015, *et seq.*

Harris v. Mo. Gaming Comm'n., 869 S.W.2d 58 (Mo. banc 1994)

Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. banc 1970)

C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818 (8th Cir. 2007)

New York Constitution, Article I, § 9

Criminal Gambling

Section 572.010, RSMo, *et seq.*

N.Y. Penal Law §§ 225.00-225.40

Thole v. Westfall, 682 S.W.2d 33 (Mo. App. E.D. 1984).

Joseph M. Kelly, *Li-ing in a Fantasy*, 12 Gaming L. Rev. and Econ. 310, 317 (2008)

State v. Am. Holiday Ass'n, Inc., 727 P.2d 807 (Ariz. 1986) (*en banc*)

Humphrey v. Viacom, 2007 WL 1797648, (D.N.J. 2007)

Internet Gambling

UIGEA 31 U.S.C. 5361-5367

Recent Developments

Schneiderman v. Draft Kings, Index No. 453054/2015

V. Closing

Title 11—DEPARTMENT OF PUBLIC SAFETY
Division 45—Missouri Gaming Commission
Chapter 1—Organization and Administration

11 CSR 45-1.010 Organization and Administration

PURPOSE: This rule establishes the organization and administration of the Missouri Gaming Commission.

(1) The chairman of the commission shall be the chief public spokesperson for the commission in all dealings with the media.

(2) The executive director (director) shall be responsible for the daily operation of the commission's business as delegated by the commission; provided, however, that any party aggrieved by any action of the director, by petition to the chairman, may request that action be reviewed as an agenda item in a commission meeting.

(3) The director shall have the power to appoint, fire and discipline commission employees as delegated by the commission.

(4) All records of the commission shall be maintained by the custodian of records at the commission's office at 3417 Knipp Drive, Jefferson City, MO 65109.

(5) Unless otherwise required, all gaming tax and admission fee records and forms, application forms, fees, documents, papers, and materials to be filed with the commission shall be submitted to the commission's office in Jefferson City, Missouri.

AUTHORITY: section 313.004, RSMo 2000 and section 313.805, RSMo Supp. 2010. Emergency rule filed Sept. 1, 1993, effective Sept. 20, 1993, expired Jan. 17, 1994. Emergency rule filed Jan. 5, 1994, effective Jan. 18, 1994, expired Jan. 30, 1994. Original rule filed Sept. 1, 1993, effective Jan. 31, 1994. Amended: Filed Jan. 21, 1997, effective Aug. 30, 1997. Amended: Filed June 30, 2010, effective Jan. 30, 2011.*

**Original authority: 313.004, RSMo 1993, amended 1994 and 313.805, RSMo 1991, amended 1993, 1994, 2000, 2008, 2010.*

11 CSR 45-1.015 Code of Ethics

PURPOSE: The Missouri Gaming Commission is obligated to promote the public interest and maintain public confidence in the commission's integrity and impartiality. As a state regulatory agency, the commission and its staff are held to the highest ethical and professional standards and must conduct all business in a manner which maintains the public trust. Furthermore the commission is charged with insuring the integrity of the legalized gaming in Missouri. Therefore, the following Code of Ethics prescribes measures to prohibit practices that possess a potential of wrong-doing or the appearance of impropriety.

(1) Standard of Compliance for Commission and its Employees. Each member of the commission and all of its employees are directed to read and comply with this Code of Ethics and with Executive Order 92-04 dated January 31, 1992, a copy of which is attached hereto, and is incorporated by reference. For the purposes of this Code of Ethics, the term employee shall include all direct employees of the commission as well as all persons who are employed by entities which have contracted with the commission to perform investigations or have entered into a Memorandum of Understanding with the commission where specific mention is made of this Code of Ethics. The commission shall be responsible for the enforcement of applicable statutes, the provisions of the Executive Order and this rule by the suspension or discharge of the employee or other disciplinary action as the commission deems appropriate. The definitions at 11 CSR 45-5.056(1)(H) and (K) shall be applicable to this Code of Ethics.

(2) Prohibition of Gratuities From Persons Subject to Commission Regulation. All members of the commission and commission employees are prohibited from accepting a gift from any holder of or applicant for a license issued by the commission or any representative or agent of such license holder or applicant.

(3) Recommendations for Employment Prohibited. Every commissioner and every person employed by the commission or appointed to a commission committee, is forbidden and prohibited to solicit, suggest, request or recommend to any holder of or applicant for a license issued by the commission or any representative or agent of such license holder or applicant the appointment of any person to any office, place, position or employment.

(4) Stock Ownership and Non-Fair Market Value Contracts Prohibited. No commissioner or any employee of the commission, while in office or employed by the commission, or during the first two (2) years after termination of office or employment, may own any stock or other ownership interest in any holder of or applicant for a license issued by the commission or enter into any contractual relationship with any holder of or applicant for a license issued by the commission or any representative or agent of such license holder or applicant in which the commissioner or commission employee receives consideration that is above fair market value.

(5) Prohibited Relationships. No person who is related to a member or employee of the commission within the second degree of consanguinity or affinity shall possess any type of license issued by the commission.

(6) Compensation. No member or employee of the commission shall solicit any thing of value, nor shall any member or employee of the commission accept any thing of value, in addition to that compensation received from Missouri in their official capacity, intended to influence the member or employee's official duties or in exchange for having exercised the member's or employee's official powers or performed the member's or employee's official duties in a particular manner. For the purposes of this section, grant or payment of a thing of value to another person on behalf of the member or employee shall be considered grant or payment to the member or employee and an offer of an employment opportunity to any person shall constitute a thing of value. Nothing in this section shall preclude the acceptance of any award, presentation, honor or memorabilia presented to the member or employee of the commission in recognition of his/her performance in his/her official capacity and not designed to influence any particular action taken by the member or employee of the commission.

(7) Gambling Prohibited at Certain Properties. No member or employee of the commission shall participate in any gaming at any location which is owned or operated by a licensee of the commission, a license applicant, or under the jurisdiction of the commission.

(8) Confidentiality. No information furnished to the commission by a corporation, organization or person, except such matters as are specifically required to be open to public inspection by the provisions of Chapter 313 and Chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission.

(9) *Ex Parte* Contacts. No commissioner shall knowingly have *ex parte* conversations related to matters under the jurisdiction of the

commission with any applicant or licensee, their representatives, or any party to a matter pending before the commission. As *ex parte* communications, either oral or written, may occur inadvertently, any member of the commission who receives such a communication, shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the person(s) who participated in the *ex parte* communication; the circumstances which resulted in the communication; the substance of the communication; and the relationship of the communication to a particular matter at issue before the commission.

(10) Violations of Sunshine Law Prohibited. The Missouri Gaming Commission and its employees are directed to set the highest standards for open meetings and compliance with Chapter 610, RSMo. No commissioner or commission employee shall conduct any official business unless there is proper compliance with Chapter 610, RSMo.

(11) Confidential Information. No member or employee of the commission shall use or disclose confidential information gained in the course of or by reason of the member's or employee's official position or activities to further the member's or employee's own financial or political interests or the financial or political interests of anyone else.

(12) Confidential Information. A former member of the commission having information that s/he knows is confidential governmental information, or knew was confidential government information at the time the member or employee acquired the information, about a person or matter subject to the jurisdiction of the commission while the member or employee was associated with the commission, may not disclose such information without the consent of the commission granted prior to such disclosure and after complete disclosure to the commission of the information sought to be disclosed, all persons to whom the information is to be disclosed, and the reasons for such disclosure. Confidential information means information that has been obtained under governmental authority and which, at the time this rule is applied, the government or the Missouri Gaming Commission is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(13) No member or employee of the commission or person who has been a member or employee of the commission within the previous two (2) years may be a representative or agent of the holder of or applicant for a Class A or supplier's license.

EXECUTIVE ORDER
92-04

WHEREAS, public confidence in the integrity of the government of the State of Missouri is of utmost importance; and

WHEREAS, the executive branch of state government must discharge its duties in an independent and impartial manner; and

WHEREAS, executive branch employees must treat the public and fellow employees with respect, courtesy, and dignity, and provide equal access to services for all members of the public; and

WHEREAS, executive branch employees' conduct not only must be within the letter of the law but must seek to fulfill the spirit and intent of the law; and

WHEREAS, executive branch employees must provide a full day's work for a full day's pay, giving to the performance of their duties their earnest effort and best thought; and

WHEREAS, executive branch employees must demonstrate the highest standards of personal integrity and honesty and must not realize undue personal gain from the performance of any official duties; and

WHEREAS, executive branch employees are responsible for enhancing the mission of their agencies; and

WHEREAS, a clear statement of the code of conduct which guides the executive branch is both an assurance to the citizens of Missouri and an aid to our steadfast efforts;

NOW, THEREFORE, I, JOHN ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI, UNDER THE AUTHORITY VESTED IN ME UNDER THE CONSTITUTION AND THE LAWS OF THIS STATE, INCLUDING THE PROVISIONS OF SECTION 105.969 RSMO CUM. SUPP. 1992, DO HEREBY SET FORTH A CODE OF CONDUCT FOR EXECUTIVE BRANCH EMPLOYEES OF MISSOURI STATE GOVERNMENT (EXCEPTING THE EMPLOYEES OF THOSE ELECTED OFFICIALS WHO ARE TO ESTABLISH AN INTERNAL CODE OF CONDUCT FOR THEIR OFFICES):

CODE OF CONDUCT

1. Executive branch employees shall conduct the business of state government in a manner which inspires public confidence and trust.

A. Employees shall avoid any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of their official duties.

B. Employees shall act impartially and neither dispense nor accept special favors or privileges which might be construed to improperly influence the performance of their official duties.

C. Employees shall not allow political participation or affiliation to improperly influence the performance of their duties to the public.

D. Employees shall not engage in business with state government, hold financial interests, or engage in outside employment when such actions are inconsistent with the conscientious performance of their official duties.

E. Employees shall not use or improperly possess an illegal controlled substance or alcohol in the workplace or during working hours.

F. Employees of the State are expected to comply with the statutes of Missouri at all times.

2. Executive branch employees shall conduct themselves in scrupulous compliance with applicable federal, state and local law.

A. Employees shall observe all conflict of interest provisions in law applicable to their agencies and positions of employment.

B. Employees shall adhere to all laws providing equal opportunity to all citizens.

C. Employees shall perform their responsibilities as they are specified in law or other authority establishing those responsibilities.

3. Financial compensation of state employment consists of only authorized salaries and fringe benefits.

A. Employees shall not use their public positions in a manner designed to create personal gain.

B. Employees shall not disclose confidential information gained by reason of their public positions, nor shall employees use such information for personal gain or benefit.

C. Employees shall not directly or indirectly attempt to influence agency decisions in matters relating to prospective employers with whom employment has been accepted or is being negotiated.

4. Executive branch employees owe the public the diligent application of their knowledge, skills and abilities for which they are compensated.

A. Employees shall not perform outside employment or other activities not appropriate during hours compensated for state employment and will use leave and other benefits provided by the State only for the purposes intended.

B. Employees shall carry out all lawful instructions of designated supervisors, and will report instructions not consistent with law to the proper authorities.

5. Equipment, material and supplies purchased with public funds are intended for the performance of public purposes only.

A. Employees shall use and maintain state equipment, materials and supplies in an efficient manner which will conserve future usefulness.

B. Employees shall use state equipment, materials and supplies solely for purposes related to the performance of state business.

6. The work of state government will be conducted with respect, concern and courtesy toward clients, co-workers and the general public.

A. Employees shall approach their duties with a positive attitude and constructively support open communication, dedication and compassion.

B. Employees shall conduct their duties with courtesy toward clients, co-workers, patients, inmates and the general public, recognizing the diverse background, characteristics and beliefs of all those with whom they conduct state business.

C. Employees shall not engage in any form of illegal harassment or discrimination in the workplace, including on the basis of race, color, religion, national origin, ancestry, sex, age or disability.

D. Employees, in connection with the performance of their duties, shall not seek sexual favors from a client, co-worker, patient, inmate or member of the public.

7. This code shall provide guidance to the officials and employees of the executive branch of Missouri state government in matters of employment related conduct.

A. When questions arise in the application of this code, the public interest will receive primary consideration in any resolution.

B. This code is not intended to fully prescribe the proper conduct of employees and the failure to prohibit an employee action in this code does not constitute approval of the action.

C. This code is intended as a supplement to the provisions in law which govern employee conduct, and in no instance does it decrease the requirements in law.

D. Agency heads are responsible for promoting and enforcing this code of conduct among the employees of their agencies in accordance with their respective agency procedures, and shall supplement it with additional provisions to meet the needs of their agencies.

E. This code is intended to provide guidance for employment related conduct and is not intended to create any right or benefit enforceable by law.

F. No state agency or appointing authority shall discharge, threaten or otherwise retaliate against an employee for reporting in good faith any violation of this code.

G. In applying this code to specific situations, the standard to be used is that of a reasonable person having knowledge of the pertinent circumstances.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, this 31st day of January, 1992.

(Signature) _____
GOVERNOR

ATTEST

(Signature) _____
SECRETARY OF STATE

AUTHORITY: section 313.004.4, RSMo 2000. Original rule filed March 29, 1994, effective Sept. 30, 1994. Emergency rule filed June 14, 1994, effective June 24, 1994, expired Oct. 21, 1994. Amended: Filed Feb. 19, 1998, effective Aug. 30, 1998. Amended: Filed Nov. 10, 1998, effective June 30, 1999. Amended: Filed Sept. 29, 2011, effective May 30, 2012.*

**Original authority: 313.004.4, RSMo 1993, amended 1994.*

11 CSR 45-1.020 Commission Meetings

PURPOSE: This rule establishes the conditions for a commission meeting.

(1) The meetings shall be conducted in accordance with *Robert's Rules of Order.*

(2) The chairman shall preside over each meeting of the commission. The commission shall elect officers from its membership as it determines, including vice-chairman and secretary.

(3) Minutes of each meeting, open or closed, including special meetings, shall be prepared in written form and shall be subject to the approval of the commission.

(4) The commission may delegate to the chairman of the commission the limited authority to extend any existing license for up to sixty (60) days without a prior vote of the commission. Any action taken by the chairman pursuant to such delegation of authority shall have the full force and effect of a majority vote of the commission, but must be ratified by a subsequent majority vote of the commission at the next public meeting. If such action is not ratified by the commission as provided herein, such action shall be cancelled, withdrawn or rescinded as of the date of the public commission meeting at which the ratification failed. Such delegation of commission authority to the chairman shall expire twelve (12) months after its adoption by a majority of the commission, unless rescinded or renewed by the commission prior to its expiration.

AUTHORITY: sections 313.004 and 313.805, RSMo 2000. Emergency rule filed Sept. 1, 1993, effective Sept. 20, 1993, expired Jan. 17, 1994. Emergency rule filed Jan. 5, 1994, effective Jan. 18, 1994, expired Jan. 30, 1994. Original rule filed Sept. 1, 1993, effective Jan. 31, 1994. Amended: Filed Jan. 23, 2004, effective Aug. 30, 2004.*

**Original authority: 313.004, RSMo 1993, amended 1994 and 313.805, RSMo 1991, amended 1993, 1994, 2000.*

11 CSR 45-1.030 No Opinion or Approval by the Commission

PURPOSE: This rule establishes the meaning of a licensing decision.

(1) Any action of the commission relating to an applicant or a licensee shall not indicate or suggest that the commission has considered or passed in any way on the marketability of the applicant or licensee securities, or any other matter, other than the applicant or licensee's suitability for licensure under Missouri law.

AUTHORITY: sections 313.004 and 313.805, RSMo Supp. 1993. Emergency rule filed Sept. 1, 1993, effective Sept. 20, 1993, expired Jan. 17, 1994. Emergency rule filed Jan. 5, 1994, effective Jan. 18, 1994, expired Jan. 30, 1994. Original rule filed Sept. 1, 1993, effective Jan. 31, 1994.*

**Original authority: 313.004, RSMo 1993 and 313.805, RSMo 1991, amended 1993.*

11 CSR 45-1.040 Enrollment of Attorneys and Scope of Practice

PURPOSE: This rule establishes procedure for an attorney to file an appearance,

REGULATION 7

DISCIPLINARY PROCEEDINGS

7.010 Applicability.
7.020 Definitions.
7.030 Service of complaint.
7.040 Prohibition of ex parte communications.
7.050 Delegation to chairman.
7.060 Appearance through counsel.
7.070 Prehearing conferences; scheduling; management.
7.080 Discovery: mandatory exchanges.
7.090 Confidential and privileged materials.
7.100 Discovery: depositions.
7.110 Subpoenas.
7.120 Protective orders.
7.130 Discovery disputes.
7.140 Sanctions.
7.150 Conduct of hearings.
7.160 Evidence: admissibility.
7.170 Evidence: authentication and identification.
7.180 Failure or refusal to testify.
7.190 Amended or supplemental pleadings.
7.200 Motions.
7.210 Continuances.
7.220 Defaults.
7.230 Decision of the commission.
7.240 Guidelines for imposing penalties in disciplinary actions.

7.010 Applicability. Regulation 7 shall apply to disciplinary proceedings governed by NRS 463.312 to 463.3145, NRS 464.080, and NRS 466.100. Unless otherwise ordered by the chairman, this regulation shall apply to all such proceedings that are pending on the effective date of this regulation.
(Adopted: 8/90.)

7.020 Definitions. "Chairman" means chairman of the Nevada gaming commission or his designee.
(Adopted: 8/90.)

7.030 Service of complaint. The commission shall serve the complaint in the manner prescribed by NRS 463.312(2). The commission may serve the complaint by registered or certified mail, or may utilize the services of the board by referring the complaint to a board agent for personal service. Proof of service may be provided by a certificate or affidavit of service, which shall be signed by the person effecting service and which shall specify the date and manner of service.
(Adopted: 8/90.)

7.040 Prohibition of ex parte communications.
1. Unless required for the disposition of ex parte matters authorized by law:
(a) A party or his representative shall not communicate, directly or indirectly, in connection with any issue of fact or law related to a proceeding under this regulation, with any member of the commission, except upon notice and opportunity to all parties to participate; and
(b) A member of the commission shall not communicate, directly or indirectly, in connection with any issue of fact or law related to a proceeding under this regulation, with any party or his representative, except upon notice and opportunity to all parties to participate.
2. This section shall not preclude:
(a) Any member of the commission from consulting with commission counsel or supervisory counsel concerning any matter before the commission; or
(b) A party or his representative from conferring with the chairman or commission counsel concerning procedural matters that do not involve issues of fact or law related to the proceeding.
(Adopted: 8/90.)

7.050 Delegation to chairman.
1. Pursuant to Regulation 2.020, the chairman may issue rulings on discovery matters, scheduling matters, protective orders, the admissibility of evidence, and other procedural or prehearing matters that are not dispositive of the case or any portion thereof. The chairman's

New Jersey Statutes Annotated
Title 5. Amusements, Public Exhibitions and Meetings (Refs & Annos)
Chapter 12. Casino Control Act (Refs & Annos)
Article 1. Introduction and General Provisions

N.J.S.A. 5:12-29

5:12-29. "**Junket**"

Currentness

"**Junket**"--An arrangement the purpose of which is to induce any person, selected or approved for participation therein on the basis of his ability to satisfy a financial qualification obligation related to his ability or willingness to gamble or on any other basis related to his propensity to gamble, to come to a licensed casino hotel for the purpose of gambling and pursuant to which, and as consideration for which, any or all of the cost of transportation, food, lodging, and entertainment for said person is directly or indirectly paid by a casino licensee or employee or agent thereof.

Credits

L.1977, c. 110, § 29, eff. June 2, 1977. Amended by L.1979, c. 282, § 8, eff. Jan. 9, 1980; L.1983, c. 41, § 1, eff. Jan. 27, 1983; L.1987, c. 426, § 1, eff. Jan. 14, 1988.

Editors' Notes

SENATE INSTITUTIONS, HEALTH AND WELFARE COMMITTEE STATEMENT

Assembly, No. 3570--L.1987, c. 426

The Senate Institutions, Health and Welfare Committee favorably reports Assembly Bill No. 3570 OCR with committee amendments.

As amended, this bill modifies the current hold periods for checks accepted by casinos by requiring the number of days in a hold period to be calculated on the basis of calendar days rather than banking days and to require that hold periods vary from seven calendar days for amounts less than $1,000.00, to 14 calendar days for amounts from $1,000.00 to $5,000.00 and to 45 calendar days for amounts over $5,000.00.

Under current law, the hold periods vary from seven banking days for amounts under $1,000.00, to 14 banking days for amounts from $1,000.00 but less than $2,500.00, and to 90 banking days for amounts over $2,500.00.

The bill also permits a casino licensee to accept a patron check and to give cash or cash equivalents for a check if it is drawn by a casino licensee for winnings from slot machine payoffs. Under current law, such checks may not be exchanged for cash or cash equivalents by a casino licensee.

This bill further requires all **junket** agents to be licensed as casino key employees, and the bill provides that persons who currently hold a plenary license to conduct **junket** activities shall be considered licensed for the purposes of this act until the expiration of their current license. For persons who hold a temporary license, the bill provides for a transition period of 90 days during which time these persons may continue to engage in **junket** activities provided

an application for licensure is filed with the commission within the 90-day period. Under current law, **junket** agents must be licensed as casino employees.

The bill also limits the type of complimentaries which may be offered by prohibiting casino licensees from offering complimentary items or services unless the complimentary consists of:

(a) room, food, beverage or entertainment expenses that are provided directly to the patron and his guests by the licensee or indirectly on behalf of the licensee by a third party;

(b) documented transportation expenses provided directly to the patron and his guests or indirectly on behalf of the licensee by a third party;

(c) coins, tokens, cash or other items or services provided through a bus-coupon type program or other approved complimentary distribution program; or

(d) noncash gifts provided to the patron and his guests, except that gifts in excess of $2,000.00 must be supported by proper documentation.

As amended, this bill is identical to Senate Bill No. 2894 Sca (Codey), which the committee also reported favorably on this date. The committee amended the bill to clarify that the conditions under which complimentary services may be offered apply to a patron's guests, as well as the patron, and establish a transition procedure for persons who hold current plenary licenses to conduct **junket** activities, to obtain the new licenses required in the bill.

SENATE STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS COMMITTEE STATEMENT

Assembly, No. 1945--L.1983, c. 41

This bill changes the provisions of the "Casino Control Act" (P.L.1977, c. 110; C. 5:12-1 et seq.) concerning casino **junkets** in order to facilitate the organization and use of **junkets** without jeopardizing regulatory and law enforcement interests and standards.

At present, a "**junket**" is defined as an arrangement for transportation, food, lodging, and entertainment which costs over $200.00 and is paid for by a casino licensee and the purpose of which is to induce "any person" to gamble at a licensed casino.

This bill removes the $200.00 threshold and redefines **junket** to be an arrangement, of whatever cost, for persons "selected or approved for participation therein on the basis of ability to satisfy a financial qualification obligation related to his ability or willingness to gamble or on any other basis related to his propensity to gamble."

The bill also removes the present requirement that casino licensees must submit advance reports on **junkets**, including information on participants, terms or other relevant information, and instead requires that each casino licensee maintain on file a report on any **junket** engaged in on its premises. This report "may include the acknowledgments by the participants, signed on the date of arrival, that they understand the terms of the particular **junket**." Also to be reported are any arrangements that would qualify as **junkets** except for the fact that the basis for the selection of participants is different from that for **junkets**.

The bill differentiates between a "**junket** representative" and a "**junket** enterprise" and requires licensure for both. The former is any "natural person" who "negotiates the terms of, engages in the referral, procurement or selection

of persons who may participate in, or accompanies for purposes of monitoring or evaluating the participants on, any **junket** to a licensed casino, regardless of whether or not those activities occur within the State of New Jersey. ..." A "**junket** enterprise" is a business which, or a natural person who, "employs or otherwise engages the services of a **junket** representative in connection with a **junket** to a licensed casino, regardless of whether or not those activities occur within the State of New Jersey." The period of licensure in both instances is three years.

The bill specifically prohibits a **junket** representative or a **junket** enterprise from authorizing or issuing credit for gambling and from collecting on bad checks.

Other provisions of the bill include:

1. An applicant for **junket** representative or **junket** enterprise licensure must submit to the jurisdiction of New Jersey and demonstrate to the satisfaction of the Casino Control Commission that the applicant "is amenable to service of process within the State."

2. The holder of a casino key employee license or a gaming-related casino employee license may act as a **junket** representative for a casino licensee.

3. A casino licensee, **junket** representative, or **junket** enterprise must report the purchase of a list of **junket** patrons or potential patrons.

4. Temporary licenses may be issued to **junket** representatives and **junket** enterprises for a period of 12 months with one six-month extension.

5. The commission may exempt **junket** arrangements from compliance with the requirements concerning **junkets** but "may condition, limit, or restrict any exemption as the commission may deem appropriate."

The Casino Control Commission and the Division of Gaming Enforcement support this legislation.

N. J. S. A. 5:12-29, NJ ST 5:12-29
Current with laws effective through L.2015, c. 172 and J.R. No. 8.

End of Document

New Jersey Administrative Code
Title 13. Law and Public Safety
Chapter 69H. Junket Enterprises Not Employed by a Casino Licensee or Applicant (Refs & Annos)
Subchapter 1. Junket Enterprises Not Employed by a Casino Licensee or Applicant

N.J.A.C. 13:69H–1.1

13:69H–1.1 Definitions

Currentness

(a) The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Agent" means any person, including junket enterprises and junket representatives not employed by a casino licensee or applicant, acting directly or indirectly on behalf of a casino licensee or applicant.

"Complimentary guest room accommodations" means a guest room provided to a person at no cost, or at a reduced price not generally available to the public under similar circumstances; provided, however, that the term shall include any guest room provided to a person at a reduced price due to the anticipated or actual gaming activities of that person.

(b) The following words and terms, when used in this chapter, shall have the meanings set forth in the relevant portions of the Casino Control Act, N.J.S.A. 5:12–1 et seq.:

"Complimentary service or item" (as defined in N.J.S.A. 5:12–14a and N.J.A.C. 13:69D–1.9).

"Junket" (as defined in N.J.S.A. 5:12–29).

"Junket enterprise" (as defined in N.J.S.A. 5:12–29.1).

"Junket representative" (as defined in N.J.S.A. 5:12–29.2).

Credits
Adopted by R.2011 d.308, effective December 19, 2011.

CHAPTER EXPIRATION DATE

<Chapter 69H, Junket Enterprises Not Employed by a Casino Licensee or Applicant, expires on December 19, 2018.>

Current through amendments included in the New Jersey Register, Volume 47, Issue 24, dated December 21, 2015.

13:69H–1.1, NJ ADC 13:69H–1.1

End of Document

Missouri Constitution Section

←Article: 03038d1 Article: 03039a1→

Article III
LEGISLATIVE DEPARTMENT
Section 39
August 28, 2015

Limitation of power of general assembly.

Section 39. The general assembly shall not have power:

(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law;

(5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation;

(6) To make any appropriation of money for the payment, or on account of or in recognition of any claims audited or that may hereafter be audited by virtue of an act entitled "An Act to Audit and Adjust the War Debts of the State," approved March 19, 1874, or any act of a similar nature, until the claim so audited shall have been presented to and paid by the government of the United States to this state;

(7) To act, when convened in extra session by the governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session;

(8) To remove the seat of government from the City of Jefferson;

(9) Except as otherwise provided in section 39(b), section 39(c), section 39(e) or section 39(f) of this article, to authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; except that, nothing in this section shall be so construed as to prevent or prohibit citizens of this

state from participating in games or contests of skill or chance where no consideration is required to be given for the privilege or opportunity of participating or for receiving the award or prize and the term "lottery or gift enterprise" shall mean only those games or contests whereby money or something of value is exchanged directly for the ticket or chance to participate in the game or contest. The general assembly may, by law, provide standards and conditions to regulate or guarantee the awarding of prizes provided for in such games or contests under the provision of this subdivision;

(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision.

Source: Const. of 1875, Art. IV, §§ 45, 48, 51, 52, 55, 56, Art. XIV § 10.

(Amended November 7, 1978)

(Amended November 6, 1984)

(Amended August 5, 1986)

(Amended November 8, 1994)

(Amended November 3, 1998)

(1960) Tax imposed with respect to special motor vehicle fuel is a tax on the act of placing fuel in the fuel tank of a vehicle and not a use tax upon the use or acquisition of property paid for out of funds of political subdivision as prohibited by Article III Sec. 39(10) of the constitution. State ex rel. Arenson v. City of Springfield (Mo.), 332 S.W.2d 942.

(1970) Oil company's promotional game, even though participant need make no purchase to play, is a lottery. Mobil Oil Corp. v. Danforth (Mo.), 455 S.W.2d 505.

(1975) Held that state has the authority to require that names of residents of this state be taken off of mailing list of company allegedly mailing lottery material, this does not interfere with United States mail. State ex rel. Danforth v. Reader's Digest (Mo.), 527 S.W.2d 355.

(1994) Bingo, keno, numbers tickets, pull tabs, jar tickets, push cards and punch boards either fall within definition of lottery or have no element of skill as demonstrated by their similarity to lottery games and are lotteries within meaning of this section. Twenty-one and poker are not lotteries within meaning of this section. Case is remanded for determination whether slot machines, video slot machines, baccarat, craps, roulette wheel, klondike table, faro layout and video games of chance are games of pure chance or if there is an element of skill in game. Harris v. Missouri Gaming Commission, 869 S.W.2d 58 (Mo. en banc).

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Limited on Preemption Grounds by** Dalton v. Pataki, N.Y., May 03, 2005

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Constitution of the State of New York (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

McKinney's Const. Art. 1, § 9

§ 9. [Right to assemble and petition; judicial divorces; gambling, except pari-mutuel betting, prohibited]

Effective: January 1, 2014
Currentness

1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section.

Credits

(Amended Nov. 7, 1939; Nov. 5, 1957; Nov. 8, 1966; Nov. 4, 1975, eff. Jan. 1, 1976; Nov. 6, 1984, eff. Jan. 1, 1985. Amended Nov. 6, 2001, eff. Jan. 1, 2002; Nov. 5, 2013, eff. Jan. 1, 2014.)

Notes of Decisions (124)

McKinney's Const. Art. 1, § 9, NY CONST Art. 1, § 9
Current through L.2015, chapters 1 to 558.

Missouri Revised Statutes

Chapter 572
Gambling

←Chapter: 571 August 28, 2015 Chapter: 573→

Beginning January 1, 2017--Chapter definitions.

572.010. As used in this chapter the following terms mean:

(1) "Advance gambling activity", a person advances gambling activity if, acting other than as a player, he or she engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement or communication of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his or her knowledge for purposes of gambling activity, he or she permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation. The supplying, servicing and operation of a licensed excursion gambling boat under sections 313.800 to 313.840 does not constitute advancing gambling activity;

(2) "Bookmaking", advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events;

(3) "Contest of chance", any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein;

(4) "Gambling", a person engages in gambling when he or she stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his or her control or influence, upon an agreement or understanding that he or she will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; nor does gambling include playing an amusement device that confers only an immediate right of replay not exchangeable for something of value. Gambling does not include any licensed activity, or persons participating in such games which are covered by sections 313.800 to 313.840;

(5) "Gambling device", any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person with a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition;

(6) "Gambling record", any article, instrument, record, receipt, ticket, certificate, token, slip or notation used or intended to be used in connection with unlawful gambling activity;

(7) "Lottery" or "policy", an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance;

(8) "Player", a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking" as defined in subdivision (2) of this section is not a player;

(9) "Professional player", a player who engages in gambling for a livelihood or who has derived at least twenty percent of his or her income in any one year within the past five years from acting solely as a player;

(10) "Profit from gambling activity", a person profits from gambling activity if, other than as a player, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity;

(11) "Slot machine", a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance;

(12) "Something of value", any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge;

(13) "Unlawful", not specifically authorized by law.

(L. 1977 S.B. 60, A.L. 1991 H.B. 149 Adopted by Referendum, Proposition A, November 3, 1992, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Chapter definitions.

572.010. As used in this chapter:

(1) "Advance gambling activity", a person "advances gambling activity" if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement or communication of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation. The supplying, servicing and operation of a licensed excursion gambling boat under sections 313.800 to 313.840 does not constitute advancing gambling activity;

(2) "Bookmaking", means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events;

(3) "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein;

(4) "Gambling", a person engages in "gambling" when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; nor does gambling include playing an amusement device that confers only an immediate right of replay not exchangeable for something of value. Gambling does not include any licensed activity, or persons participating in such games which are covered by sections 313.800 to 313.840;

(5) "Gambling device" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person with a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition;

(6) "Gambling record" means any article, instrument, record, receipt, ticket, certificate, token, slip or notation used or intended to be used in connection with unlawful gambling activity;

(7) "Lottery" or "policy" means an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance;

(8) "Player" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking" as defined in subdivision (2) of this section is not a "player";

(9) "Professional player" means a player who engages in gambling for a livelihood or who has derived at least twenty percent of his income in any one year within the past five years from acting solely as a player;

(10) "Profit from gambling activity", a person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity;

(11) "Slot machine" means a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance;

(12) "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge;

(13) "Unlawful" means not specifically authorized by law.

(L. 1977 S.B. 60, A.L. 1991 H.B. 149 Adopted by Referendum, Proposition A, November 3, 1992)

Effective 11-03-92

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Constitutionally authorized activities notprohibited.

572.015. Nothing in this chapter prohibits constitutionally authorized activities under Article III, Sections 39(a) to 39(f) of the Missouri Constitution.

(L. 2014 S.B. 491)

Effective 1-01-17

Beginning January 1, 2017--Gambling--penalty.

572.020. 1. A person commits the offense of gambling if he or she knowingly engages in gambling.

2. The offense of gambling is a class C misdemeanor unless:

(1) It is committed by a professional player, in which case it is a class A misdemeanor; or

(2) The person knowingly engages in gambling with a child less than seventeen years of age, in which case it is a class B misdemeanor.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Gambling.

572.020. 1. A person commits the crime of gambling if he knowingly engages in gambling.

2. Gambling is a class C misdemeanor unless:

(1) It is committed by a professional player, in which case it is a class D felony; or

(2) The person knowingly engages in gambling with a minor, in which case it is a class B misdemeanor.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Promoting gambling in the firstdegree--penalty.

572.030. 1. A person commits the offense of promoting gambling in the first degree if he or she knowingly advances or profits from unlawful gambling or lottery activity by:

(1) Setting up and operating a gambling device to the extent that more than one hundred dollars of money is gambled upon or by means of the device in any one day, or setting up and operating any slot machine; or

(2) Engaging in bookmaking to the extent that he or she receives or accepts in any one day more than one bet and a total of more than one hundred dollars in bets; or

(3) Receiving in connection with a lottery or policy or enterprise:

(a) Money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(b) More than one hundred dollars in any one day of money played in the scheme or enterprise; or

(c) Something of value played in the scheme or enterprise with a fair market value exceeding one hundred dollars in any one day.

2. The offense of promoting gambling in the first degree is a class E felony.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Promoting gambling in the first degree.

572.030. 1. A person commits the crime of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling or lottery activity by:

(1) Setting up and operating a gambling device to the extent that more than one hundred dollars of money is gambled upon or by means of the device in any one day, or setting up and operating any slot machine; or

(2) Engaging in bookmaking to the extent that he receives or accepts in any one day more than one bet and a total of more than one hundred dollars in bets; or

(3) Receiving in connection with a lottery or policy or enterprise:

(a) Money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(b) More than one hundred dollars in any one day of money played in the scheme or enterprise; or

(c) Something of value played in the scheme or enterprise with a fair market value exceeding one hundred dollars in any one day.

2. Promoting gambling in the first degree is a class D felony.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Promoting gambling in the seconddegree--penalty.

572.040. 1. A person commits the offense of promoting gambling in the second degree if he or she knowingly advances or profits from unlawful gambling or lottery activity.

2. The offense of promoting gambling in the second degree is a class A misdemeanor.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Promoting gambling in the second degree.

572.040. 1. A person commits the crime of promoting gambling in the second degree if he knowingly advances or profits from unlawful gambling or lottery activity.

2. Promoting gambling in the second degree is a class A misdemeanor.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Possession of gambling records in the firstdegree--penalty.

572.050. 1. A person commits the offense of possession of gambling records in the first degree if, with knowledge of the contents thereof, he or she possesses any gambling record of a kind used:

(1) In the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five bets totaling more than five hundred dollars; or

(2) In the operation, promotion or playing of a lottery or policy scheme or enterprise, and constituting, reflecting or representing more than five hundred plays or chances therein.

2. No offense is committed under subdivision (1) of subsection 1 of this section if the gambling record possessed by the person constituted, reflected or represented his or her own bets in a number not exceeding ten.

3. The defendant shall have the burden of injecting the issue under subsection 2.

4. The offense of possession of gambling records in the first degree is a class E felony.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Possession of gambling records in the firstdegree.

572.050. 1. A person commits the crime of possession of gambling records in the first degree if, with knowledge of the contents thereof, he possesses any gambling record of a kind used:

(1) In the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five bets totaling more than five hundred dollars; or

(2) In the operation, promotion or playing of a lottery or policy scheme or enterprise, and constituting, reflecting or representing more than five hundred plays or chances therein.

2. A person does not commit a crime under subdivision (1) of subsection 1 of this section if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.

3. The defendant shall have the burden of injecting the issue under subsection 2.

4. Possession of gambling records in the first degree is a class D felony.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Possession of gambling records in thesecond degree--penalty.

572.060. 1. A person commits the offense of possession of gambling records in the second degree if, with knowledge of the contents thereof, he or she possesses any gambling record of a kind used:

(1) In the operation or promotion of a bookmaking scheme or enterprise; or

(2) In the operation, promotion or playing of a lottery or policy scheme or enterprise.

2. No offense is committed under subdivision (1) of subsection 1 of this section if the gambling record possessed by the person constituted, reflected or represented bets in a number not exceeding ten.

3. The defendant shall have the burden of injecting the issue under subsection 2.

4. The offense of possession of gambling records in the second degree is a class A misdemeanor.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Possession of gambling records in the seconddegree.

572.060. 1. A person commits the crime of possession of gambling records in the second degree if, with knowledge of the contents thereof, he possesses any gambling record of a kind used:

(1) In the operation or promotion of a bookmaking scheme or enterprise; or

(2) In the operation, promotion or playing of a lottery or policy scheme or enterprise.

2. A person does not commit a crime under subdivision (1) of subsection 1 of this section if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.

3. The defendant shall have the burden of injecting the issue under subsection 2.

4. Possession of gambling records in the second degree is a class A misdemeanor.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Beginning January 1, 2017--Possession of a gambling device--penalty.

572.070. 1. A person commits the offense of possession of a gambling device if, with knowledge of the character thereof, he or she manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

(1) A slot machine; or

(2) Any other gambling device, knowing or having reason to believe that it is to be used in the state of Missouri in the advancement of unlawful gambling activity.

2. The offense of possession of a gambling device is a class A misdemeanor.

(L. 1977 S.B. 60, A.L. 2014 S.B. 491)

Effective 1-01-17

Until December 31, 2016--Possession of a gambling device.

572.070. 1. A person commits the crime of possession of a gambling device if, with knowledge of the character thereof, he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

(1) A slot machine; or

(2) Any other gambling device, knowing or having reason to believe that it is to be used in the state of Missouri in the advancement of unlawful gambling activity.

2. Possession of a gambling device is a class A misdemeanor.

(L. 1977 S.B. 60)

Effective 1-01-79

*This section was amended by S.B. 491, 2014, effective 1-01-17. Due to the delayed effective date, both versions of this section are printed here.

Lottery offenses--no defense.

572.080. It is no defense under any section of this chapter relating to a lottery that the lottery itself is drawn or conducted outside Missouri and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.

(L. 1977 S.B. 60)

Effective 1-1-79

Gambling houses, public nuisances--abatement.

572.090. 1. Any room, building or other structure regularly used for any unlawful gambling activity prohibited by this chapter is a public nuisance.

2. The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for unlawful gambling activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

3. Appeals shall be allowed from the judgment of the court as in other civil actions.

(L. 1977 S.B. 60)

Effective 1-1-79

Preemption--exclusions.

572.100. The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, or the subject of a criminal or civil penalty or sanction of any kind. The term "gambling", as used in this chapter, does not include licensed activities under sections 313.800 to 313.840.

(L. 1977 S.B. 60, A.L. 1991 H.B. 149 Adopted by Referendum, Proposition A, November 3, 1992)

Effective 11-3-92

Until December 31, 2016--Duties of prosecuting attorneys.

572.110. It shall be the duty of the circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the provisions of this chapter, and the attorney general shall have a concurrent duty to enforce the provisions of this chapter.

(L. 1977 S.B. 60)

Effective 1-01-79

Transferred 2014; now 27.105; Effective 1-01-17

Until December 31, 2016--Forfeiture of gambling devices, records andmoney.

572.120. Any gambling device or gambling record, or any money used as bets or stakes in unlawful gambling activity, possessed or used in violation of this chapter may be seized by any peace officer and is forfeited to the state. Forfeiture procedures shall be conducted as provided by rule of court. Forfeited money and the proceeds from the sale of forfeited property shall be paid into the school fund of the county. Any forfeited gambling device or record not needed in connection with any proceedings under this chapter and which has no legitimate use shall be ordered publicly destroyed.

(L. 1977 S.B. 60)

Effective 1-01-79

Transferred 2014; now 513.660; Effective 1-01-17

Antique slot machines exempt from section 572.120, when.

572.125. 1. It shall be an affirmative defense to any prosecution under this chapter relating to slot machines, if the defendant shows that the slot machine is an antique slot machine and was not operated for gambling purposes while in the defendant's possession. For the purposes of this section, an antique slot machine is one which is over thirty years old.

2. Notwithstanding section 572.120, whenever the defense provided by subsection 1 of this section is offered, no slot machine seized from any defendant shall be destroyed or otherwise altered until after a final court determination that such defense is not applicable. If the defense is applicable, any such slot machine shall be returned pursuant to provisions of law providing for the return of property.

(L. 1977 S.B. 60)

Effective 1-1-79

Top

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title M. Offenses Against Public Health and Morals
Article 225. Gambling Offenses (Refs & Annos)

McKinney's Penal Law § 225.00

§ 225.00 Gambling offenses; definitions of terms

Effective: May 13, 2015
Currentness

The following definitions are applicable to this article:

1. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

2. "Gambling." A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

3. "Player" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking", as defined in this section is not a "player."

4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

6. "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

7. "Gambling device" means any device, machine, paraphernalia or equipment which is used or usable in the playing phases of any gambling activity, whether such activity consists of gambling between persons or gambling by a person involving the playing of a machine. Notwithstanding the foregoing, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices.

7-a. A "coin operated gambling device" means a gambling device which operates as a result of the insertion of something of value. A device designed, constructed or readily adaptable or convertible for such use is a coin operated gambling device notwithstanding the fact that it may require adjustment, manipulation or repair in order to operate as such. A machine which awards free or extended play is not a gambling device merely because such free or extended play may constitute something of value provided that the outcome depends upon the skill of the player and not in a material degree upon an element of chance.

8. "Slot machine" means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value. A device so constructed, or readily adaptable or convertible to such use, is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance. A machine which sells items of merchandise which are of equivalent value, is not a slot machine merely because such items differ from each other in composition, size, shape or color.

9. "Bookmaking" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

10. "Lottery" means an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value provided, however, that in no event shall the provisions of this subdivision be construed to include a raffle as such term is defined in subdivision three-b of section one hundred eighty-six of the general municipal law.

11. "Policy" or "the numbers game" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

12. "Unlawful" means not specifically authorized by law.

13. "Authorized gaming establishment" means any structure, structure and adjacent or attached structure, or grounds adjacent to a structure in which casino gaming, conducted pursuant to article thirteen of the racing, pari-mutuel wagering and breeding law, or Class III gaming, as authorized pursuant to a compact reached between the state of New York and a federally recognized Indian nation or tribe under the federal Indian Gaming Regulatory Act of 1988, is conducted and shall include all public and non-public areas of any such building, except for such areas of a building where either Class I or II gaming are conducted or any building or grounds known as a video gaming entertainment facility, including facilities where food and drink are served, as well as those areas not normally open to the public, such as where records related to video lottery gaming operations are kept, except shall not include the racetracks or such areas where such video lottery gaming operations or facilities do not take place or exist, such as racetrack areas or fairgrounds which are wholly unrelated to video lottery gaming operations, pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.

14. "Authorized gaming operator" means an enterprise or business entity authorized by state or federal law to operate casino or video lottery gaming.

15. "Casino gaming" means games authorized to be played pursuant to a license granted under article thirteen of the racing, pari-mutuel wagering and breeding law or by federally recognized Indian nations or tribes pursuant to a valid gaming compact reached in accordance with the federal Indian Gaming Regulatory Act of 1988, Pub. L. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68.

16. "Cash equivalent" means a treasury check, a travelers check, wire transfer of funds, transfer check, money order, certified check, cashiers check, payroll check, a check drawn on the account of the authorized gaming operator payable to the patron or to the authorized gaming establishment, a promotional coupon, promotional chip, promotional cheque, promotional token, or a voucher recording cash drawn against a credit card or charge card.

17. "Cheques" or "chips" or "tokens" means nonmetal, metal or partly metal representatives of value, redeemable for cash or cash equivalent, and issued and sold by an authorized casino operator for use at an authorized gaming establishment. The value of such cheques or chips or tokens shall be considered equivalent in value to the cash or cash equivalent exchanged for such cheques or chips or tokens upon purchase or redemption.

18. "Class I gaming" and "Class II gaming" means those forms of gaming that are not Class III gaming, as defined in subsection eight of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2703.

19. "Class III gaming" means those forms of gaming that are not Class I or Class II gaming, as defined in subsections six and seven of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2703 and those games enumerated in the Appendix of a gaming compact.

20. "Compact" or "gaming compact" means the agreement between a federally recognized Indian tribe and the state of New York regarding Class III gaming activities entered into pursuant to the federal Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68 (1988 & Supp. II).

21. "Gaming equipment or device" means any machine or device which is specially designed or manufactured for use in the operation of any Class III or video lottery game.

22. "Gaming regulatory authority" means, with respect to any authorized gaming establishment on Indian lands, territory or reservation, the Indian nation or tribal gaming commission, its authorized officers, agents and representatives acting in their official capacities or such other agency of a nation or tribe as the nation or tribe may designate as the agency responsible for the regulation of Class III gaming, jointly with the state gaming agency, conducted pursuant to a gaming compact between the nation or tribe and the state of New York, or with respect to any casino gaming authorized pursuant to article thirteen of the racing, pari-mutuel wagering and breeding law or video lottery gaming conducted pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.

23. "Premises" includes any structure, parking lot, building, vehicle, watercraft, and any real property.

24. "Sell" means to sell, exchange, give or dispose of to another.

25. "State gaming agency" shall mean the New York state gaming commission, its authorized officials, agents, and representatives acting in their official capacities as the regulatory agency of the state which has responsibility for regulation with respect to video lottery gaming or casino gaming.

26. "Unfair gaming equipment" means loaded dice, marked cards, substituted cards or dice, or fixed roulette wheels or other gaming equipment which has been altered in a way that tends to deceive or tends to alter the elements of chance or normal random selection which determine the result of the game or outcome, or the amount or frequency of the payment in a game.

27. "Unlawful gaming property" means:

(a) any device, not prescribed for use in casinio [1] gaming by its rules, which is capable of assisting a player:

(i) to calculate any probabilities material to the outcome of a contest of chance; or

(ii) to receive or transmit information material to the outcome of a contest of chance; or

(b) any object or article which, by virtue of its size, shape or any other quality, is capable of being used in casino gaming as an improper substitute for a genuine chip, cheque, token, betting coupon, debit instrument, voucher or other instrument or indicia of value; or

(c) any unfair gaming equipment.

28. "Video lottery gaming" has the meaning set forth in subdivision six of section sixteen hundred two of the tax law.

29. "Voucher" means an instrument of value generated by a video lottery terminal representing a monetary amount and/or play value owed to a customer at a specific video lottery terminal based on video lottery gaming winnings and/or amounts not wagered.

Credits

(L.1965, c. 1030. Amended L.1967, c. 791, § 31; L.1987, c. 632, §§ 1, 2; L.1994, c. 550, § 1; L.2011, c. 8, § 1, eff. March 25, 2011; L.2013, c. 174, § 3, eff. July 30, 2013; L.2013, c. 175, § 3, eff. July 30, 2013; L.2015, c. 59, pt. OO, § 2, eff. May 13, 2015.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARY

by William C. Donnino

The Gambling Crimes

Possession of a gambling device

(1) Slot Machine

In 2010, one of the affirmative defenses defined in Penal Law § 225.32(1)(d) (and referred to on page 363 of the main Practice Commentary) was repealed. The conduct included in that affirmative defense was, however, reenacted to make it lawful to transport and possess a slot machine which was transported into New York in a sealed container and possessed for the purpose of "product development, research, or additional manufacture or assembly," and the slot machine "will or has been" transported in a sealed container to another jurisdiction for a purpose which is lawful in that jurisdiction [Penal Law § 225.30(d)].

The effect of the amendment is to remove the burden on the possessor to prove that the slot machine was lawfully transported and possessed, and instead, to place the burden on the government to disprove that the slot machine was lawfully transported and possessed. The authors of the bill believed that placing the burden of proof on the possessor invited unnecessary prosecutions and that "every needless hindrance to business that we can eliminate will help our economy and our residents." Legislative Memorandum. Under that rationale and given this amendment, the parallel affirmative defense in Penal Law § 225.32(b) (the manufacture or assembly of slot machines for transportation in a sealed container to another jurisdiction for a lawful use in that jurisdiction) should have been similarly amended.

In 2011, the definition of a "slot machine" was further amended; that amendment is discussed below in the section on "coin operated gambling device."

(2) Coin Operated Gambling Device

In 1987, the term "coin operated gambling device" was added, and the definition of "slot machine" was amended to exclude from the definition of "slot machine," a machine which, based to a material degree on the skill of the player, awards the successful player a "free or extended play." L. 1987, c. 632.

As discussed in the Practice Commentary (p. 363-65), to the extent the legislation sought to draw a distinction between coin operated amusement or video games which reward the successful player with a free or extended play, and "coin operated gambling devices," it was questionable whether it succeeded because the exception for free or extended play was limited to a "slot machine." The commentary suggested that an amendment of the generic definition of "gambling device," which includes both a "coin operated gambling device" and "slot machine," to exclude a free or extended play would have been clearer.

In 2011, the Legislature accepted the commentary's suggestion [*see* Legislative Memorandum], repealed the 1987 amendment to the definition of "slot machine," and added a sentence to the definition of "coin operated gambling device." That sentence excludes from a "gambling device," a "machine which awards free or extended play"; provided "the outcome [of the game] depends upon the skill of the player and not in a material degree upon an element of chance." [Penal Law § 225.00(7-a)]. That amendment has the effect of excluding the awarding of a "free or extended play" from the definition of "something of value," which is a major factor in the definition of "gambling"; but, only if the other major factor in the definition of gambling obtains, namely, the outcome of the game depends on skill "and not in a material degree upon the element of chance."

(As noted, technically, the 2011 amendment as to what constitutes a "gambling device" was placed in the definition of "coin operated gambling device" rather than the definition of "gambling device," but the language of the exception is directed at what constitutes a "gambling device.")

(3) Any Gambling Device

In 2010, there was legislation to permit the transportation in New York of a "slot machine" for "product development, research, or additional manufacture or assembly." L. 2010, c. 321. In 2013, Racing, Pari-mutuel Wagering and Breeding Law § 104 was added to authorize any "gambling device" to be transported in New York in a sealed container, "solely for the purpose of exhibition, marketing, and product development" for a period not to exceed two weeks. L. 2013, c. 46. Penal Law § 225.30(e) was in turn added to make it clear that it was not unlawful to transport any "gambling device" when done in accord with the provisions of the Racing, Pari-mutuel Wagering and Breeding Law.

PRACTICE COMMENTARY

by William C. Donnino

Introduction

The New York State Constitution prohibits gambling, except, pursuant to certain conditions and requirements, lotteries operated by the state, pari-mutuel betting on horse races, and bingo and other games of chance conducted by religious, charitable or non-profit organizations. [N.Y. Const. art. I, § 9; Tax Law art. 34; Racing, Pari-mutuel Wagering and Breeding Law; General Municipal Law art. 9-A]. Federal law authorizing casinos on Indian territory within New York [Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 et seq.] preempts the state constitution's prohibition on gambling. *See Dalton v. Pataki*, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180 (2005)]. Thus, with the advent of federally authorized casinos, the exceptions to the constitutional prohibition on gambling have begun to swallow up the rule. In any event, the constitution directs the Legislature to "pass appropriate laws to prevent offenses against any of the provisions of [the constitution prohibiting gambling]" [N.Y. Const. art. I, § 9 (1)], and Penal Law article 225 is designed to meet that mandate.

The former Penal Law included some fifty-four sections relating to gambling, distributed between two articles, one entitled "Gambling" [former Penal Law article 88] and the other "Lotteries" [former Penal Law article 130]. The current Penal Law substantially revised the structure of the statutes defining the gambling offenses while keeping the changes of substance to a minimum.

As under the former law, "the mere player, contestant or bettor is not criminally liable, but ... anyone who, in some capacity other than as a player, operates, promotes or advances any gambling enterprise or activity is guilty of a

crime." Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 382. *See Watts v. Malatesta*, 262 N.Y. 80, 82, 186 N.E. 210 (1933) ("casual betting or gaming by individuals, as distinguished from betting or gambling as a business or profession, is not a crime").

Overall, the current Penal Law "proceeds upon the premise that, generally speaking, it is unnecessary to distinguish between the various forms of gambling or to enumerate the kinds of promotional conduct that render a person guilty of each particular form. The basic questions in each instance are (1) whether the game or scheme in issue constitutes gambling, and (2) if so, whether the defendant's conduct is of the indicated promotional character rather than that of a 'player.' If both questions are answered in the affirmative, a crime is committed regardless of the kind of scheme and regardless of the precise nature of the promotional activity; otherwise, no offense is committed." Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 382.

Definitions

Penal Law § 225.00 provides the definitional foundation for the "gambling offenses" set forth in this article. With the exception of the definitions of "coin operated gambling device," "slot machine," and "lottery," the definitions have not been amended since their original enactment; thus, the following commentary draws substantially from the original commentaries of Judges Denzer and McQuillan in McKinney's Practice Commentary to Penal Law § 225.00, pp. 22-24 (1967).

"***Gambling***" is the key definition. It incorporates in its definition two other defined terms: "something of value" and "contest of chance." Thus, a "person engages in gambling when he stakes or risks *something of value* upon the outcome of a *contest of chance* or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive *something of value* in the event of a certain outcome" (emphasis added) [Penal Law § 225.00(2)].

One illustration of the definition of "gambling," drawn from the commentaries of Judges Denzer and McQuillan, is the chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite chess being a game of skill, X and Y are "gambling" because the outcome depends upon a future contingent event that neither has any control or influence over. The same is not true of A and B, who are pitting their skills against each other and thereby, have a material influence over the outcome; they, therefore, are not "gambling." Thus the definition of "gambling" embraces "not only a person who wagers or stakes something upon a game of chance but also one who wagers on 'a future contingent event [whether involving chance or skill] not under his control or influence.' " Denzer and McQuillan, Practice Commentary, McKinney's Penal Law § 225.00, pp. 23 (1967).

"***Something of value***" is broadly defined to include more than money or tangible property [Penal Law § 225.00(6)] in order "to close loopholes which would exist and doubtless be exploited under a definition ... which restricted its scope to money or tangible property." Denzer and McQuillan, McKinney's Penal Law § 225.00, p. 24.

"***Contest of chance***" is a problematical term. "While some games or schemes are obviously 'contests of chance' (*e.g.*, roulette) ... and some are obviously contests of skill (*e.g.*, chess), there is a vast middle ground or gray area (*e.g.*, bridge and some other card games) that had caused the courts considerable difficulty." Denzer and McQuillan, McKinney's Penal Law § 225.00, p. 23. In *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71, 71 N.E. 753 (1904), the Court explained:

"Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by ... 'luck'. The test of the character of the game

is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?"

The current definition of "contest of chance," does not require that the element of chance be the "dominating element." Rather, it is a "contest of chance" when, notwithstanding that the skill of the contestants may be a factor in the outcome, the outcome depends in a "material degree" upon an element of chance [Penal Law § 225.00(1)]. The modernization of the definition of a "contest of chance" has not, however, made it easier for courts to discern whether a game is a contest of chance. For example, for more than a decade the trial courts have debated whether or not "three-card monte" or the similar "shell game" is a contest of chance and thus gambling. *Compare People v. Turner*, 165 Misc.2d 222, 629 N.Y.S.2d 661 (N.Y. City Criminal Court, 1995), *with People v. Hunt*, 162 Misc.2d 70, 616 N.Y.S.2d 168 (N.Y. City Criminal Court, 1994). A "fraudulent" game of three-card monte is, however, gambling. *People v. Olivieri*, 2002 WL 493557 (1st Dept., App.Term, 2002).

"Advance or profit from gambling activity": Once an activity is identified as "gambling," criminal liability for the promoting gambling crimes [Penal Law §§ 225.05 and 225.10] will require that the actor knowingly "advance" [Penal Law § 225.00(4)] or "profit from" [Penal Law § 225.(5)] gambling activity. Both definitions exclude the "player" [Penal Law § 225.00(3)] and instead focus on the entrepreneur who gains money or property from gambling activity [Penal Law § 225.(5)], or who engages in conduct which "materially aids" any form of gambling activity, irrespective of whether money or property is received for doing so [Penal Law § 225.00(4)].

"***Bookmaking***" under the former Penal Law was defined by case law. *People v. Farone*, 308 N.Y. 305, 311, 125 N.E.2d 582 (1955) (bookmaking relates to " '... betting and gambling organized and carried on as a systematic business.' " (citation omitted); *People v. Goldstein*, 295 N.Y. 61, 63, 65 N.E.2d 169 (1946) (a bookmaker is "the professional operator who makes a business of betting against the public's guesses"). The current definition tends to codify the views set forth by the Court of Appeals in those cases. While the definition requires proof that the defendant was accepting bets "as a business," that "does not necessarily require evidence of a series of bets." *People v. Pavia*, 8 N.Y.2d 333, 335, 207 N.Y.S.2d 659, 170 N.E.2d 667 (1960). The circumstances surrounding an individual transaction may well justify a finding that the defendant is a bookmaker. *Id.*

"Lottery": The Penal Law definition of "lottery" consists of "consideration, chance and prize" and "applies equally to all forms of gambling or games of chance," including for example casino games such as poker, blackjack or roulette. *Dalton v. Pataki*, 5 N.Y.3d 243, 264, 802 N.Y.S.2d 72, 835 N.E.2d 1180 (2005). By contrast, the definition of "lottery" in the New York State Constitution [N.Y. Const. art. I, § 9], as interpreted by the courts, is narrower. That definition requires "the use of tickets and multiple participation, as opposed to a single player competing against a single machine." *Dalton v. Pataki*, *supra*. The reason for the narrower definition is that the State Constitution permits a "lottery" when operated by the state in support of education, and "the limited constitutional exception for state-run lotteries cannot be read to allow any casino game (such as poker, blackjack or roulette) to constitute a valid lottery if operated by the State." *Id.* Under the constitutional provision, the state was authorized to operate a "video lottery." *Id.*

In 1994, the Penal Law definition of "lottery" was amended to exclude a "***raffle***" from that definition and thereby from the Penal Law offenses dealing with a lottery. L.1994, c. 550. The term "raffle" is defined by cross-reference to the definition of that term in General Municipal Law § 186(3-b), which reads as follows:

" 'Raffle' shall mean and include those games of chance in which a participant pays money in return for a ticket or other receipt and in which a prize is awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols designated on the ticket or receipt, determined by chance as a result of a drawing from among those tickets or receipts previously sold."

The 1994 amendment of the Penal Law was part of legislation which also amended the General Municipal Law article 9-A, known as the "Games of Chance Licensing Law" [General Municipal Law § 185], to add a "raffle" to the list of authorized games of chance permitted to be conducted by those licensed to conduct games of chance in order to raise funds for the promotion of bona fide charitable, educational, scientific, health, religious and patriotic causes.

That legislation was in part a response to *Harris v. Economic Opportunity Comm. of Nassau County*, 171 A.D.2d 223, 575 N.Y.S.2d 672 (1991), which held that a raffle sponsored by a charitable organization was unlawful and thus the agreement to award the "winner" a prize was void and unenforceable, but recommended that the law be amended to legalize charitable raffles. *Harris* noted that "it appears that the prohibition against illegal charitable raffles is one which is more honored in the breach than in the observance. ... Virtually every day charitable and nonprofit institutions conduct raffles to finance their essential services. ... Charitable and nonprofit organizations should no longer be forced to conduct their worthy fundraising activities outside of the law." *Id.* at 230-31.

By amending the Penal Law definition of "lottery" to exclude a "raffle," as that term is defined by General Municipal Law § 186 (3-b), rather than to exclude from the definition of lottery only a raffle authorized by the Games of Chance Licensing Law, the Legislature has excluded from that definition of lottery any "raffle," as that term is defined by the General Municipal Law, regardless of whether the "raffle" is "authorized" by the Games of Chance Licensing Law. Thus, a person who conducts such a raffle and is not authorized to do so may not be prosecuted for the felony of promoting gambling in the first degree as it relates to a lottery [Penal Law § 225.10(2)], nor for the crimes of possession of gambling records [Penal Law §§ 225.15, 225.20(2)]. However, that person may be subject to prosecution for a misdemeanor for "operating, holding or conducting" a game of chance not in accord with a valid license issued pursuant to General Municipal Law article 9-A [General Municipal Law § 195-k].

That a lottery is drawn or conducted in another jurisdiction, even one that permits such conduct, does not immunize a person from criminal liability in New York for the commission of acts in New York relating to such lottery which may constitute an offense. See Penal Law § 225.40.

"***Policy***" is defined as specialized form of lottery [Penal Law § 225.00(11). *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940), *overruled on other grounds by People v. Kohut*, 30 N.Y.2d 183, 190-91, 331 N.Y.S.2d 416, 282 N.E.2d 312 (1972).

"***Gambling device***" is limited to items "used or usable in the playing phases of any gambling activity" [Penal Law § 225.00(7)]. Such items would include cards and dice. The definition does not include "records" of gambling activity. And the statute deems lottery tickets and policy slips to be "records." Possession of "gambling devices" and possession of "gambling records" are dealt with in separate statutes [Penal Law §§ 225.15, 225.20 and 225.30].

The term "***coin operated gambling device***" was added in 1987 [Penal Law § 225.00(7-a)]. L.1987, c. 632. It is one specific kind of "gambling device." The term was added to the law to facilitate an amendment to the crime of "possession of a gambling device" to make it a crime to possess such coin operated gambling device "with intent to use such device in the advancement of unlawful gambling activity" [Penal Law § 225.30(3)].

Along with adding the definition of "coin operated gambling device," the 1987 legislation also amended the definition of "**slot machine**," in essence, to exclude from that definition a machine which, based to a "material degree" on the skill of the player, awards the successful player only a free or extended play [Penal Law § 225.00(8)]. However, the amendment may have been unnecessary since the pre-existing definition of a slot machine required that the machine "eject" something of value. Machines that award only free or extended play do not ordinarily "eject" anything, and thus would not have fallen within the definition of a slot machine in any event. However, if any such machine ejects, for example, a token to be used for free or extended play, or, if a court were to give an expansive interpretation of the term "eject," then this amendment may exclude that machine from the definition of a slot machine.

"***Unlawful***" means "not specifically authorized by law" [Penal Law § 225.00(12)]. The "promoting gambling" crimes [Penal Law §§ 225.05 and 225.10] require that the actor promote "unlawful" gambling activity. As discussed in the "Introduction," the New York Constitution prohibits gambling, with the noted exceptions. Since proof of the law of New York can be supplied by a court taking judicial notice of the law [see CPLR 4511; *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970); *People v. Vaughn*, 35 A.D.2d 889, 315 N.Y.S.2d 771 (3rd Dept., 1970)], a jury may be instructed, assuming the lawfulness of the gambling has not been placed in issue, that the term "unlawful" means "not specifically authorized by law" and that, with certain exceptions that do not apply to the case on trial, the law does not permit gambling or the type of gambling in issue. *See* CJI 2d (NY) Penal Law article 225 charges.

The Gambling Crimes

Promoting gambling

The key gambling offense is "promoting gambling in the second degree" [Penal Law § 225.05]. A person is guilty of that crime when that person "knowingly" [defined in Penal Law § 15.05(2)] "advances or profits from unlawful gambling activity."

The key element, "advances or profits from unlawful gambling activity," by definition excludes the "player" from criminal culpability [Penal Law § 225.00(4) and (5)]. *See Matter of Victor M.*, 9 N.Y.3d 84, 845 N.Y.S.2d 771, 876 N.E.2d 1187 (2007) (a player in a dice game was not liable for promoting gambling in the second degree); *People v. Paranzino*, 40 N.Y.2d 1005, 391 N.Y.S.2d 391, 359 N.E.2d 981 (1976), (the defendant's possession of a "collector's slip" -- *i.e.*, a writing made by an individual who receives and records bets from players -- constituted evidence that the defendant's conduct was "other than as a player"). Otherwise, the definition of the terms included in the term "advances or profits from unlawful gambling" [Penal Law § 225.00(4) and (5)] encompasses every form of gambling activity, including all forms of gambling house, bookmaking, lottery, policy and slot machine operations, without having to specify the particular form of gambling involved; at the same time, it encompasses any form of gambling which may be devised in the future.

The definition of "promoting gambling in the first degree" [Penal Law § 225.10] establishes a felony for certain self-explanatory aggravated forms of bookmaking [Penal Law § 225.10(1)], and lottery or policy [Penal Law § 225.10(2)]. In interpreting the bookmaking provision of the statute [Penal Law § 225.10(1)], the Court of Appeals has made it clear that the crime includes in essence two elements: knowingly advancing or profiting from unlawful gambling, and engaging in a bookmaking business to the extent specified in the statute. *People v. Giordano*, 87 N.Y.2d 441, 640 N.Y.S.2d 432, 663 N.E.2d 588 (1995).

Possession of gambling records

In the 1965 revision, it was made a crime to possess a record, with knowledge of its contents or nature, "of a kind commonly used" in the operation or promotion of bookmaking, lottery or policy [Penal Law § 225.15(1) & (2)]. While the record may objectively be one of a kind commonly used in the operation or promotion of bookmaking, lottery or policy, and the possessor may know that, the revisers allowed that such possession may be with "innocent intent or motives." Staff Comments of the Commission on Revision of the Penal Law. Revised Penal Law. McKinney's Spec. Pamph. (1965), p. 296. Accordingly, it was separately made a "defense" to such possession that, in fact, the records possessed were neither "used" nor "intended to be used" for the indicated criminal purposes [Penal Law § 225.25]. If a "defense" is placed in issue, the government must disprove it beyond a reasonable doubt [Penal Law § 25.00(1)].

With respect to lottery and policy records, there was an added desire to limit liability to an extent for such records which constitute a record of the defendant's own bets. Thus, it was also made a "defense" to the crime that such records

were of the defendant's own bets in a number not exceeding ten [Penal Law § 225.15(2)]. *See People v. Rubicco*, 34 N.Y.2d 841, 842, 359 N.Y.S.2d 62, 63, 316 N.E.2d 344 (1974) (all of the "plays" in a single combination bet qualify as separate "plays"). Presumably, no similar defense exists for bookmaking records, since the definition of "bookmaking" itself requires the acceptance of bets "as a business."

A key element of the crime is the requirement that the possessor have "knowledge" of the "contents" of the record. However, by a separate statute, the possession of any such gambling record is presumptive evidence of possession with the requisite knowledge [Penal Law § 225.35]. That rebuttable inference follows the normal evidentiary rule that generally "possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises." *People v. Reisman*, 29 N.Y.2d 278, 285, 327 N.Y.S.2d 342, 348, 277 N.E.2d 396 (1971); *People v. Kirkpatrick*, 32 N.Y.2d 17, 23, 343 N.Y.S.2d 70, 75, 295 N.E.2d 753 (1973), *appeal dismissed for want of a substantial federal question* 414 U.S. 948, 94 S.Ct. 283, 38 L.Ed.2d 204 (1973). *Cf. People v. Green*, 35 N.Y.2d 437, 442-43, 363 N.Y.S.2d 910, 914, 323 N.E.2d 160 (1974).

In *People v. Paranzino*, 40 N.Y.2d 1005, 391 N.Y.S.2d 391, 359 N.E.2d 981 (1976), the court rejected a claim that the defendant did not know the contents of the envelope which contained gambling records. In that case, as the police lawfully entered an apartment, they saw one person hand the defendant an envelope and then, on seeing the officers, abruptly snatch the envelope back and throw it to the floor. "In view of the fact that the defendant was seen in actual possession of the envelope there is a presumption that he had knowledge of its character and contents (Penal Law § 225.35). In addition there was testimony that for some time the apartment had been used to conduct a gambling business and that the defendant, who did not reside there, was frequently observed entering and leaving on a regular basis. Considering all the circumstances, including the presence in the apartment of racing forms and other items generally associated with gambling, the jury could well conclude that the defendant was fully aware of what the envelope contained." *Id.* at 1005-06.

In 1969, the crime of "possession of gambling records" was amended to make criminal the possession, with knowledge of its nature, of paper which has a low ignition point or which may be destroyed by immersion in water, *i.e.*, so-called "flash paper" [Penal Law § 225.15(3) & (4)]. Gamblers were using such paper to record their bets in order that they could readily destroy the record when they were about to be arrested. The statute is somewhat inartfully drawn, since there is no specification that such paper must be possessed in connection with the maintaining of gambling records. Such paper may be possessed for lawful purposes, and it was not the intent of the legislative sponsor to make possession of such paper a crime per se. *See* Sponsor's memorandum in Governor's Bill Jacket for Laws of 1969, chapter 974. The sponsor believed that the defense provided in Penal Law § 225.25 was sufficient to avoid that result. That defense is that such paper was neither used nor intended to be used in the operation or promotion of bookmaking, lottery, or policy. Presumably, therefore, the possession of such paper was intended to be criminal only when it is possessed in connection with the maintenance of records for such forms of gambling. If the statute were read more broadly than that, it could be an unreasonable classification of the possession of such paper as criminal per se. Perhaps the statute should have been written to prohibit the possession of such paper only when the circumstances surrounding such possession evince an intent that such paper be used in the promotion or operation of gambling.

"Possession of gambling records in the first degree" [Penal Law § 225.20] raises the crime to a felony when the records possessed are of a kind that depict the possessor as a substantial bookmaking, lottery or policy operator, *i.e.*, bookmaking records reflecting more than five bets totaling more than five thousand dollars, or lottery or policy records reflecting more than five hundred plays or chances.

Possession of a gambling device

(1) Slot Machine

Initially, the revised Penal Law treated a "slot machine" (defined in Penal Law § 225.00[8]) as a "device necessarily designed for an illegal purpose, or as inherently contraband, and hence, manufacture, possession, etc., thereof [was] made criminal per se," if the possessor knew the character of the machine [Penal Law § 225.30]. Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 383.

Over the years, however, with the expansion of the exceptions to illegal gambling, the Legislature amended the statute to remove liability for possession of a slot machine in several instances:

First, possession of a slot machine is permitted during the operation of gambling that is authorized by law, generally for charitable purposes [Penal Law § 225.30(a)(1); General Municipal Law, art. 9-A. *See also* General Municipal Law, art. 9-A, § 186(3), where the statute's definition of authorized "games of chance" does not preclude use of a "slot machine," as it had prior to these amendments]. L.2001, c. 383, Part B, sections 4 and 5.

Second, possession and use of a slot machine is permitted if such is pursuant to a "gaming compact" entered into between New York and an "Indian tribe or Nation" as authorized by federal law. [Penal Law § 225.30(b)]. L.2001, c. 383, Part B, sections 4 and 5. In 2003, the transportation and the possession of a slot machine were made lawful if done "to facilitate the training of persons in the repair and reconditioning" of slot machines used in authorized tribal casinos [Penal Law § 225.30(c)]. L.2003, c. 498.

Third, via an "affirmative defense," the possession of an "antique" slot machine is authorized provided it was neither used nor intended to be used in the operation or promotion of unlawful gambling. A slot machine manufactured prior to 1941 is "conclusive proof" that it is an antique. [Penal Law § 225.32(1)(a)]. L.1983, c. 676. A replica of an antique does not appear to qualify for the affirmative defense. However, if the slot machine is 30 years old and possessed in the defendant's home, it also qualifies for the affirmative defense [Penal Law § 225.32(1)(c)]. L.1997, c. 619. The author of the 1997 legislation which added the affirmative defense for 30-year-old slot machines believed that:

"The current law is unfair to antique owners and consumers, as many slot machines manufactured after 1941, are worth a great deal of money and are considered antiques. At the same time, many slot machines that are thirty years old are valuable to antique collectors. This legislation would provide a legal market in New York State for dealing and collecting such machines." Legislative Memorandum in support of the bill.

Since a more than 30-year-old slot machine which was manufactured after 1941 can only be possessed in a person's home, some provision should have been made for possession outside the home during the delivery of the machine to the home.

Also, given the "antique" market for a slot machine, it might be better to consider ending the per se restriction on possession, and, as with other gambling devices, make possession illegal only if possessed "believing that the same is to be used in the advancement of unlawful gambling activity" [Penal Law § 225.30(2)] or "with intent to use such device in the advancement of unlawful gambling activity" [Penal Law § 225.30(3)]. Indeed, the possession of "any other gambling device," with knowledge of its character, is a crime only when the device is possessed with the belief that it was to be used in the advancement of unlawful gambling activity [§ 225.30(2)].

Fourth, also via an affirmative defense, the manufacture or assembly of slot machines for lawful use in another jurisdiction, and their possession incident to such manufacturing, is authorized [Penal Law § 225.32(1)(b)], as is the transportation of slot machines in a sealed container into New York for manufacturing purposes, and out of New York to another jurisdiction for a purpose that is lawful in that jurisdiction, and their possession incident to such transportation. [Penal Law § 225.32(1)(d)].

(2) Coin Operated Gambling Device

In 1987, the term "coin operated gambling device" was added. L.1987, c. 632. The term was added to facilitate an amendment to the crime of "possession of a gambling device" to make it a crime to possess such coin operated gambling device, with knowledge of its character, "with intent to use such device in the advancement of unlawful gambling activity" [Penal Law § 225.30(3)]. The possession of three or more coin operated gambling devices, or the possession of one such device in a public place was made presumptive evidence of intent to use the device in the advancement of unlawful gambling activity [Penal Law § 225.35(3)].

The need for creating, in effect, the crime of possession of a "coin operated gambling device" was questionable. A "coin operated gambling device" is by its own definition a species of a "gambling device." *See, e.g., Matter of Plato's Cave Corp. v. State Liquor Authority*, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420 (1986) (a Joker Poker machine). While admittedly a coin operated gambling device may not qualify as a slot machine, such a device could qualify as a "gambling device"; and, as already indicated, the possession of a "gambling device" "believing that the same is to be used in the advancement of unlawful gambling activity" is, and was prior to the 1987 legislation, a crime [Penal Law § 225.30(2)]. There is a marginal difference in the mens rea of the possession of a gambling device crime and the possession of a coin operated gambling device crime; the former requires a "belief" that the device is to be used in the advancement of unlawful gambling activity, and the latter requires an "intent" to use such device in the advancement of unlawful gambling activity; one could believe the device is to be used in the advancement of unlawful gambling activity and not intend it.

The law's sponsor believed that a coin operated gambling device did not qualify as either a slot machine or a gambling device. In the words of the sponsor:

"Existing law does not specifically address coin operated gambling devices. Existing law defines slot machines, and gambling devices in general (such as dice, roulette wheels etc.).

"Coin operated gambling devices have flourished in recent years. ... These games, unlike traditional coin operated amusement or video games (such as 'Space Invaders,' 'Pinball' or 'Pacman') do not factor in a player's skill in determining the outcome. Instead, they rely primarily on random chance to award something of value. These devices range from video versions of slot machines, to various 'poker' style configurations. Unlike traditional slot machines, they do not 'eject' something of value, but merely record it on the machine. As a result, they do not fall into the existing Penal Law definition of slot machine. ... In most cases, the credits recorded on the machine are exchanged for cash by the proprietor or manager of the premise that plays host to the machine." Legislative Memorandum.

To the extent the legislation sought to draw a distinction between coin operated amusement or video games and the coin operated gambling devices, it was questionable whether it succeeded. *Bubba Restaurant, Inc. v. N.Y.S. Liquor Authority*, 160 A.D.2d 539, 554 N.Y.S.2d 189 (1st Dept., 1990) (a "Broadway" video game machine that rewards a winning player with additional games free of charge was a "gambling device."). The same legislation amended the definition of "slot machine" to exclude from that definition a machine which, based to a "material degree" on the skill of the player, awards the successful player only a free or extended play. Had that amendment been made to the generic definition of "gambling device," a clearer distinction between all "gambling devices" and coin operated amusement and video games would have been achieved.

(3) Dice

In *Matter of Victor M.*, 9 N.Y.3d 84, 87, 845 N.Y.S.2d 771, 876 N.E.2d 1187 (2007), a teenager and others were gambling with dice. An issue was whether the teenager had been legally arrested pursuant to that portion of the "possession of a gambling device" statute which made it a crime to possess a gambling device "believing it probable that the same is to be used in the advancement of unlawful gambling activity" [Penal Law § 225.30(a)(2)]. The Court

held that the arrest was illegal, that "[w]hatever its precise scope, this statute cannot fairly be read to apply to every player in a dice game who touches the dice."

Internet Gambling

In recent years, the internet has provided a mechanism for gambling which is unparalleled in history. An internet "house" is generally established in a jurisdiction which permits gambling. Anyone with access to the internet may then gamble on the internet site of that "house." Thus, a resident of New York who would not have access to various "games of chance" because of New York's prohibition on gambling may thereby gamble over the internet. The player is not guilty of a crime. But, in *People v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 714 N.Y.S.2d 844 (Supreme Court, N.Y. County, 1999), the court held that the "house" was in violation of New York's gambling law and, on application of the Attorney General, issued an injunction against the defendant-corporation which operated an internet gambling casino legally based in Antigua but doing business with New York residents. *See also U.S. v. Gotti*, 459 F.3d 296, 340-41 (2nd Cir. 2006).

A federal law designed to preclude internet gambling by interdicting the various methods by which the "house" obtained money from its customers became effective October 13, 2006. *See* 31 U.S.C.A. § 5361 et al.

Notes of Decisions (119)

Footnotes

1 So in original. ("casinio" should be "casino".)

McKinney's Penal Law § 225.00, NY PENAL § 225.00

Current through L.2015, chapters 1 to 558.

End of Document

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle IV. Money
Chapter 53. Monetary Transactions
Subchapter IV. Prohibition on Funding of Unlawful Internet Gambling

31 U.S.C.A. § 5361

§ 5361. Congressional findings and purpose

Effective: October 13, 2006
Currentness

(a) Findings.--Congress finds the following:

(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.

(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.

(3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.

(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.

(b) Rule of construction.--No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

CREDIT(S)

(Added Pub.L. 109-347, Title VIII, § 802(a), Oct. 13, 2006, 120 Stat. 1952.)

Notes of Decisions (1)

31 U.S.C.A. § 5361, 31 USCA § 5361
Current through P.L. 114-93 (excluding P.L. 114-74 and 114-92) approved 11-25-2015.

End of Document

SECTION B

The Ramifications of Gaming Equipment Manufacturer Mergers, Casino Growth, and the Search for Market Share

The Ramifications of Gaming Equipment Manufacturers Mergers, Casino Growth and the Search for Market Share

Roy Smolarz
Wilson & Elser
Las Vegas, Nevada

M&A Recap

- 18 month period (10-13 to 4-15) --5 major M&A transactions involving gaming manufacturers and lottery industry valued at over $15 Billion coming together
    - 10/13 Scientific Games – Acquires WMS ($1.5B)
    - 12/13 Bally Technology- Acquires SHFL ($1.3B)
    - 11/14 Scientific Games-Acquires Bally Technology ($5.1B)
    - 12/14 Global Cash Access- Acquires Multimedia ($1.2B)
    - 04/15 GTech- Acquires IGT (6.4B)
- Immediate Impact: Less Choices/ Less Pricing Pressure
- Compares well with recent surge of major airline industry mergers
    - US- America West
    - Delta-Northwest
    - United-Continental
    - American-US Air
- Future of Gaming Manufacturer M&A Activity
- Majority of activity is over.. but several smaller companies remain .. mainly international equipment companies

Welcome to the New Era of Slot Play- Rise and Impact of Skill Based Games

- Starting in 3rdQ of 2015..post merger mania…intense casino focus on the immediate need to develop Skill Based Games to keep the Millennial Generation casino interested…presumption that traditional casino slot play is NOT of interest to Millennials.
- Rapid rise of small private and microcap public companies to develop and market skill based games
    - Desire of casinos to roll out new skill based games FAST
    - Nevada Passage of SB 9 and issuance of final regulations.
- Will this lead to a near term acquisition frenzy of skill based providers by the big gaming guys??
- Will this phenomenon be to the detriment of the needs of the active current slot player in limiting new exciting slot games and machines being developed and introduced?

Foreign Casino Companies Emerging in the USA

- Genting- Resorts World Las Vegas
- Crown- Alon Las Vegas / Previous failed deal with Cannery Resorts
- Minority foreign equity investment in US casinos- Yes it exists

SECTION C

The World Regulatory View and Its Impact on Casinos and the Gaming Market in the United States

MICHIGAN DETROIT CASINO SUPPLIER AND OCCUPATIONAL LICENSING PROCESS

Robert W. Stocker II and Peter J. Kulick
Dickinson Wright PLLC
Lansing, Michigan

I. Introduction to Supplier Licensing

Subject to certain exceptions, contractors, subcontractors, and suppliers of goods and services to Detroit's three casinos are required to be licensed as "suppliers" or be exempted as "vendors" under the Michigan Gaming Control and Revenue Act ("Act") and the Michigan Gaming Control Board's Administrative Rules ("Rules"). It must be emphasized that the Act and the Rules apply only to Detroit's casinos. Michigan's Native American casinos are not subject to either the Act or the Rules. The regulatory process followed by Michigan's many Native American casinos is governed by individual tribal ordinances and policies and, to a limited extent, by the Indian Gaming Regulatory Act, 25 USC 2701 *et seq*. Except where otherwise noted, the discussion set forth in this article is limited to the regulatory framework for the Detroit Casinos as established by the Act and the Rules.

Suppliers that provide "gaming related" goods and services are required to obtain a supplier license from the Michigan Gaming Control Board (the "Board"). Suppliers of "nongaming related" goods or services must obtain a supplier license if they meet certain dollar thresholds of business relating to the casino enterprise unless they are eligible for and obtain an exemption. Suppliers of "nongaming related" goods and services in amounts under the threshold requiring licensure as a nongaming related supplier may be treated as a "vendor" if, but only if, they timely apply for and obtain a nongaming vendor exemption.

A "supplier" is defined as a person who provides a Detroit casino licensee or casino enterprise with goods or services regarding realty, construction, maintenance, or the business of the casino, casino enterprise, or related facility on a regular or continuing basis. Supplier groups include, but are not limited to, persons who engage in junket enterprises, security businesses, manufacturers, distributors, persons who service gaming devices or equipment, garbage haulers, maintenance companies, food purveyors, and construction companies.

In addition, key management employees overseeing services provided to Detroit casinos for suppliers required to obtain a supplier's license from the Board, as well as supplier employees providing onsite casino services or given remote access to onsite casino systems for repair or upgrade services, are generally required to obtain an occupational license in order for the supplier to supply the casino industry or to work on casino projects. Contractors/suppliers of products to tribal casinos that have received licenses from tribal casinos will still need to follow the Act's and Board's licensing procedures to do business with any Detroit casino licensed under the Act (hereafter referred to as a "Detroit Casino" or the "Detroit Casinos").

II. Contractual Requirement/Indication of Interest

The Board will **not** process an application for a supplier's license unless the applicant has a written indication of interest from a Detroit Casino stating that the Detroit Casino is interested in conducting business with the supplier.

III. Nongaming Vendor Exemption Application

All persons providing any goods or services for the operation of a casino or casino enterprise and all persons providing goods or services for construction of a casino or casino enterprise are required to obtain a supplier's license from the Board unless they are eligible for and have applied for and obtained an exemption.

A supplier is automatically granted an exemption from obtaining a supplier license if the supplier is providing under $50,000 worth of nongaming goods or services to Detroit Casino licensees in any rolling 12-month period. A supplier is eligible to apply for and obtain a vendor exemption if the supplier is providing $50,000 or more of nongaming goods or services but less than $400,000 to each of the three Detroit Casinos during any rolling 12-month period. Suppliers seeking the vendor exemption are required to timely file an application for a vendor exemption with the Board together with a $200 application fee.

Suppliers who provide goods and services to a Detroit Casino as part of the distribution of "complimentaries" to casino patrons may apply for a vendor exemption. Complimentaries are amenities provided to casino patrons to reward their patronage or to provide goodwill and are typically referred to as a casino's "Comp Program" or words to that effect. Suppliers of complimentaries are eligible for the vendor exemption provided that (1) the complimentaries are not used to pay for alcohol and are not converted to cash or its equivalent, (2) the supplier does not charge the Detroit Casino for any portion of the complimentary that is not used by the casino patron to whom it is issued, (3) the supplier permits the Board staff to inspect the supplier's accounting records and business premises, (4) the supplier properly accounts for all transactions and retains itemized records documenting the good or services provided to casino patrons pursuant to the complimentaries and (5) the $400,000 per Detroit Casino threshold in any rolling 12-month period (described *supra*) is not exceeded. Suppliers seeking this exemption must make their complimentaries services available to all three Detroit Casinos on a non-exclusive basis under similar or reasonably comparable terms and conditions. Suppliers who provide complimentaries to the Detroit Casinos and who do not meet the above criteria in any respect are required to timely apply for and obtain a nongaming supplier license from the Board.

A Nongaming Vendor Exemption Application must be completed by all persons supplying goods or services totaling $50,000 or more in any rolling 12-month period who are seeking a vendor exemption from the supplier licensing requirements.

All suppliers receiving a vendor exemption (other than suppliers automatically exempt) will be assigned a vendor exemption number. Vendor exemptions are effective for one year from the date of issuance or until a final decision is made on a renewal application that is filed at least 30 days before the date on which the existing exemption will expire. Vendor exemptions are in effect only so long as all requirements for the exemption continue to be met.

A vendor exemption is not a license and is merely a conditional waiver of the supplier licensing requirements of the Act and Rules. In the event that the necessary conditions for exemption from supplier licensing requirements are no longer being met, the Executive Director of the Board may summarily suspend the vendor exemption and inactivate that person's vendor number if it appears that the public health, safety or welfare requires emergency action. Actions or omissions that will require emergency action include, but are not limited to, the following:

- The termination of the contractual or business relationship with the Detroit Casino licensee(s) or its subcontractor relationship;
- Material misrepresentations to the Board;
- Failure to disclose information upon request of the Board or Executive Director of the Board;
- Any noncompliance with, or violation of, the Act, the Board's administrative rules, or Board resolutions; or
- Evidence that the person would not be eligible or suitable for licensure.

If the circumstances that caused the summary suspension are corrected or ameliorated to the satisfaction of the Executive Director of the Board, the vendor exemption may be reinstated.

The vendor exemption policies of the Board are periodically reviewed and updated by the Board to assure the integrity of the Detroit Casino gaming industry. Therefore, persons interested in providing goods and services to the Detroit Casinos should make appropriate inquiries regarding any current Board policy as of the time that business arrangements are being negotiated with the Detroit Casinos.

The Act provides that all businesses doing business with the Detroit Casinos are subject to background reviews. The Board has adopted Rules consistent with the Act's requirements, including reservation of the right to subject all suppliers seeking a vendor exemption to a background investigation to the same extent as those required for licensed suppliers. This reservation is a factor often overlooked by suppliers. The Act and the Rules give the Board and its staff broad discretion in determining the nature and scope of investigations so long as policies and procedures are uniformly and consistently applied within the framework of the Act and Rules.

IV. Supplier Licensing

A. Suppliers of Gaming-Related Goods and Services

Regardless of the total dollar amount of business transacted, businesses providing gaming-related goods or services must by licensed by the Board. Persons or entities that are ***always*** required to be licensed as a supplier under the Act include, without limitation, the following: manufacturers, suppliers, distributors, servicers, and repairers of slot machines, electronic gaming devices and machines, cards, dice, gaming chips, gaming plaques, slot tokens, prize tokens, dealing shoes, drop boxes, computerized gaming monitoring systems, bill exchangers, credit voucher machines and other devices, machines, equipment, items or articles utilized in gaming; providers of casino credit reporting services; and casino surveillance and

security systems and services. The Board has developed a contractor/supplier license application form for the gaming-related supplier, which differs from the nongaming supplier application form.

B. Suppliers of Nongaming Goods and Services

Subject to certain field of commerce exemptions (discussed *infra*) a supplier of nongaming goods or services is required to obtain a supplier license from the Board unless the supplier is eligible for and has timely applied for and obtained a nongaming vendor exemption (discussed *supra*).

The Board requires supplier licensing for nongaming suppliers providing goods or services for the construction or operation of any of the Detroit Casinos where the annual dollar amount of business is equal to or greater than $400,000 within any rolling 12-month period. In addition, the Board has the authority to require suppliers who do not meet these dollar thresholds in goods or services for the construction or operation of any of the Detroit Casinos to nonetheless obtain a supplier license whenever the Board, in the reasonable exercise of its discretion, determines that supplier licensing is necessary to protect the public interest.

Certain suppliers of nongaming goods and services that are not eligible for either a vendor exemption (discussed *supra*) or a field of commerce exemption (discussed *infra*) may nonetheless seek an exemption from the supplier license requirement. The following classes of suppliers are eligible to apply for an exemption:

- A business regulated by another regulatory agency in the state of Michigan.
- A publicly traded entity that derives less than five percent of its annual gross revenues from business with the Detroit Casinos and agrees to provide documentation of overall gross revenue and overall gross revenue from doing business with the Detroit Casinos.
- A media outlet that sells advertising that derives less than five percent of its annual overall gross revenues from advertising by the Detroit Casinos and agrees to provide documentation of overall gross revenue and overall gross revenue from doing business with the Detroit Casinos.
- A business that provides goods or services in **insubstantial or insignificant** amounts or quantities.
- A business that considers licensing unnecessary to protect the public interest or to accomplish the policies and purposes of the Act.

It should be emphasized that the Board is very circumspect in granting such exemptions.

The nongaming goods and services provided may include any of the following: alcoholic beverages; food and nonalcoholic beverages; gaming table layouts; non-value gaming chip sorters; garbage handling and pickup; vending machines; linen supplies; laundry services; landscape; janitorial and building maintenance services; management and operation of casino enterprises and junket enterprises; limousine services; real estate and building and construction services; and junket representatives.

C. Criteria for Issuing a Supplier's License

1. Eligibility for a License

Each person or entity required to be licensed as a supplier under the Act and/or Rules is required to provide in its application the information, documentation and assurances to establish the following by clear and convincing evidence:

- The applicant must be eligible, qualified and suitable for licensure under the licensing standards, criteria and requirements set forth in the Act and in the Rules;
- The applicant must be a financially stable and responsible person;
- The applicant, if an individual, must be at least 21 years of age;
- The applicant must be qualified and demonstrate a level of skill, experience, knowledge, and ability necessary to supply the equipment, goods or services that the applicant seeks permission to provide to a casino;
- The applicant must have not been convicted of any criminal offense involving gaming, theft, dishonesty or fraud in any jurisdiction;
- The applicant must not appear on the "exclusion list" of any jurisdiction;
- The applicant must be in substantial compliance with all local, state and federal tax laws; and
- The applicant must have adequate liability and casualty insurance.

A supplier licensee has a continuing duty to maintain its suitability for licensure.

2. Ineligibility of a Supplier

The Act provides that an applicant is **ineligible** to receive a supplier's license if **any** of the following circumstances exist:

- The applicant has been convicted of a felony under the laws of Michigan, any other state, or the United States;
- The applicant has been convicted of a misdemeanor involving gambling, theft, fraud or dishonesty in any state or a local ordinance in any state involving gambling, dishonesty, theft or fraud that substantially corresponds to a misdemeanor in that state;
- The applicant has submitted an application for a license under the Act which contains false information;
- The applicant is a member of the Board;
- The applicant holds an elective office of a governmental unit of Michigan, another state or the federal government, or is a member of or employed by a gaming regulatory body of a governmental unit in Michigan, another state or the federal government, or is employed by a governmental unit of Michigan. This subdivision does not apply to an elected officer of or employee of a federally recognized Indian tribe or an elected precinct delegate;

- The applicant owns more than a 10 percent ownership interest in any entity holding a casino license issued under the Act; or
- The Board concludes that the applicant lacks the requisite suitability as to integrity, moral character and reputation; personal and business probity; financial ability and experience; and responsibility.

The Act provides that no person applying for or holding a Detroit Casino license may own an interest greater than 10 percent in a contractor or supplier licensed under the Act. This restriction is applicable to any "affiliate" of the Detroit Casino, which includes individuals and entities meeting minimum ownership and/or managerial position standards. However, the Act does not prohibit a person who has applied for or holds a Detroit Casino license from entering into an agreement for the management of its gaming or casino operations with a key person of the applicant or licensee.

D. Field of Commerce Exemptions from Supplier License Requirement

The Act and the Board Rules permit the Board to issue exemptions from the licensing process in certain specific situations. The Board can exempt any person or field of commerce from the supplier licensing process if the Board determines that the person or field of commerce:

- Is an agency of state, local or federal government;
- Is regulated by another regulatory agency in Michigan;
- Provides goods or services of insubstantial or insignificant amounts or quantities; or
- Does not need to be licensed in order to protect the public interest or accomplish the policies and purposes of the Act.

Businesses that are eligible to apply for field of commerce exemptions include:

- A medical corporation, partnership, sole proprietorship, or other business entities authorized to transact business in Michigan, to the extent such entities provide medical related services to a licensee.
- Insurance companies licensed or authorized to transact business in Michigan by the Michigan Insurance Bureau to the extent such companies provide insurance related services to a licensee.
- Professional legal services.
- A Michigan or federally chartered depository financial institution to the extent that the entity provides financial related services to a licensee. This does not include financial institutions that provide financing to a licensee.
- Michigan public institutions of higher education to the extent such institutions provide education related services to a licensee.
- Public utilities regulated by the Michigan Public Service Commission to the extent such entities provide regulated utility related services to a licensee.
- Governmental agencies and the United States Postal Service to the extent that such agencies provide services related to their agency function to a licensee.

- Providers of facilities and services utilized by licensed casinos to provide or present advertising, special events or promotional events to casino patrons, including but not limited to, theatres, ballrooms, halls, arenas, parks, stadia, golf courses, and other entertainment, recreational and sports facilities located in the state of Michigan. This exemption includes all goods and services ordinarily furnished by the facility provider for similar or comparable events, including private boxes and admission tickets and seating, to the extent such services are provided to a licensed casino or its patrons and directly purchased or reimbursed by the casino. This exemption is only available to providers that make their facilities and services available to all licensed casinos on a non-exclusive basis under similar or reasonably comparable terms and conditions.
- Professional entertainers, sports figures and other celebrities engaged by a licensed casino to appear at casino-sponsored special entertainment or promotional events, and their respective individual agents who do not otherwise provide services to Michigan licensed casinos on a regular or continuing basis. This exemption is not available to promoters or agents that provide their services to a licensed casino on a regular or continuing basis.
- Hotels, motels or other lodging facilities, located within the state of Michigan, which regularly offer rooms to the general public to the extent that they provide lodging and other hospitality facilities and services to casino patrons that are directly purchased or reimbursed by a licensed casino. This exemption includes all goods and services ordinarily available to the provider's customers, including, but not limited to, food and beverage services, health club and spa services, convention and banquet services. This exemption is only available to providers that make their lodging and hospitality facilities and services available to all licensed casinos on a non-exclusive basis under similar or reasonably comparable terms and conditions.
- Third party retail tenants who have a strictly and purely landlord-tenant relationship with licensed casinos, who do not have direct access to the gaming areas, and who would be accessible to the general public without having to enter the gaming areas. This exemption does not apply to retailers providing complimentary goods or services for casino patrons.

E. The Application Process

The Board may issue a supplier's license to a person who applies for a license and pays the nonrefundable application fee set by the Board, if the Board determines that the applicant is eligible and suitable for a license. Pending issuance of a full license, which involves an extensive investigation that takes a significant amount of time to complete, the Board is empowered to and, in fact, does issue a "temporary license" to applicants that have submitted a complete supplier license application to the Board that, upon preliminary review, establishes that the supplier license applicant meets the standards for licensure. This "temporary license" is subject to revocation by the Board at any time should facts be discovered that (1) prohibit the supplier from receiving a supplier license under the Act or Rules or (2) otherwise raise qualification or public interest concerns.

1. Application Fee

The amount of the application fee varies depending upon the total dollar amount of business a supplier transacts with all casino licensees or enterprises in any 12-month period. The following scale is used to determine the application fee:

- An application fee of $2,500 for a supplier whose total transactions are equal to or greater than $500,000, whether the goods and services are gaming or nongaming related;
- An application fee of $1,000 for a supplier whose total transactions are equal to or greater than $100,000, but less than $500,000, whether the goods and services are gaming or nongaming related; or
- An application fee of $500 for a supplier whose total transactions are less than $100,000 (this applies to gaming related suppliers only).

In addition to the application fee, the applicant will be billed for any additional costs incurred by the Board during the course of the background investigation. While these costs vary based upon individual facts and circumstances, the expenses billed to suppliers by the Board to date have compared favorably with several other highly regulated jurisdictions.

2. Annual Supplier License Fee

Upon approval of the application by the Board, the supplier will be issued a supplier license upon payment to the Board of a $5,000 supplier license fee. The supplier license is renewable on an annual basis. The $5,000 supplier license fee is an annual fee.

3. Mandatory Disclosure

The supplier's license application and related required documentation requires extensive disclosure by any "key person" of the supplier. A key person is defined to include (1) officers, directors, trustees, partners and proprietors of the applicant; (2) managerial employees of the applicant performing the function of principal executive officer, principal operation officer, principal accounting officer or respective equivalents; (3) managerial employees of the applicant exercising management, supervisory or policy-making authority over the applicant's Michigan supplier operations; and (4) persons directly, indirectly or through attribution owning more than five percent of the applicant. Individuals classified, as a "key person" must complete the Personal Disclosure Form, Level 1 Application.

Applications and disclosure forms must be completed by the entity making application for a supplier license and the key persons or affiliates that control the applicant. The information subject to disclosure includes, but is not limited to, the following:

- Copies of all filings required by the Securities and Exchange Commission during the two preceding fiscal years;
- Properly executed Consents to Inspections and Seizures and Waivers of Liability for Disclosures of Information;

- Photographs and fingerprints of each individual person required to be qualified as part of the application;
- Names; aliases and nicknames; dates of birth; physical descriptions; citizenship; marital history and family data; and home and business addresses and phone numbers for each individual person required to be qualified as part of the application and their respective federal tax identification numbers, Michigan tax identification numbers and Social Security Numbers;
- Personal, business and financial information relevant to the moral character, reputation, and integrity;
- A listing of the jurisdictions in which the person making application for a supplier license and each person required to be qualified as part of that application, holds or has held a supplier's license or other gaming-related license;
- Information regarding any previous civil litigation involving the business practices of, or criminal arrests involving the person making application for a supplier license;
- Information regarding the incorporation, partnership or other business structure and organization;
- Information regarding the equipment, goods and services that the person making application for a supplier license will provide or supply to casino including, without limitation, information regarding inventory, prices and the knowledge, skill, education, training and experience of that applicant and the managerial employees;
- Information regarding any previous bankruptcy proceedings, filed by or against the person making application for a supplier license;
- Information regarding any previous formal legal proceedings to adjust, deter, suspend or otherwise work out payment of any debt owed by the person making application;
- Information regarding any present or previous tax delinquency or complaints, notices or liens filed against the person making application;
- Information regarding any previous violation or noncompliance of supplier licensing or regulatory requirements in Michigan or any other jurisdiction;
- Information regarding any previous violation or noncompliance of any other licensing and regulatory requirements involving other regulated gaming or nongaming related activity in Michigan or any other jurisdiction;
- Information regarding whether the person making application for a supplier license or any other person required to be qualified as part of that application has ever held a supplier's license or other gaming-related license, which was restricted, suspended or revoked in Michigan or any other jurisdiction;
- Information regarding any political contributions, loans, donations or payments made by that applicant or any other person required to be qualified including their respective spouses, parents, children or spouses of children to a candidate within one year prior to the application; and
- Any other information required by the Board which is deemed necessary by the Board to evaluate that applicant's eligibility, qualifications and suitability to be licensed as a supplier under the Act and the Rules.

An applicant for a supplier's license must assume and accept any and all risk of adverse publicity, notoriety, embarrassment, criticism, financial loss or other unfavorable or harmful consequences that may occur in connection with the application.

An applicant for a supplier's license must disclose to the Board, and its agents, all otherwise confidential records that the Board requests from the applicant or from third parties. Information that would otherwise be considered protected by a privilege (for example, attorney-client or doctor-patient) as a general rule must be disclosed if requested by the Board.

Any misrepresentation or omission in the application is cause for denial, suspension, restriction or revocation of a license by the Board.

An applicant must provide the name, address and telephone number of a representative who will act as a liaison to the Board and to the Michigan Department of State Police ("Michigan State Police"). Great care should be taken in selection of this designated representative. A designated representative who is knowledgeable about the Michigan Act's licensing process often proves to be invaluable in minimizing difficulties that might otherwise occur during the licensing process.

F. Supplier Reporting Obligations to the Board

A licensed supplier must furnish to the Board a list of all equipment, devices and supplies offered for sale or lease to the Detroit Casinos. A supplier must file a quarterly return with the Board listing all sales, leases and services. Furthermore, a supplier must permanently affix its name to all its equipment, devices and supplies for gaming operations.

Supplier applicants and licensees are under a continuing duty to provide information requested by the Board and to cooperate in any investigation, inquiry or hearing conducted by the Board. Failure to do so may result in denial, suspension or, upon reasonable notice, revocation of a license.

The reporting to the Board that occurs at both the supplier and Casino operator level is a critical element in the Board's oversight process. The Board staff has developed and continues to develop increasingly sophisticated software programs and reporting procedures as part of its oversight process. In this regard, the Board does not rely only upon the disclosure obligations placed upon the Casinos and their suppliers. The Board has also developed a sophisticated procedure for updating its database through other information resources totally independent of the Casinos and their suppliers. It is important that all businesses dealing with the Board understand and fully appreciate this fact and act accordingly in their dealings with the Board.

G. Failure to Obtain a Supplier License as Required by the Act and Rules

The Detroit Casinos will not do business with a non-licensed supplier that is required to apply for and obtain a supplier license from the Board since conducting business with a supplier that is not licensed as required by the Act and Board Rules will jeopardize licensure of the Detroit Casino. For this same reason, the Detroit Casinos require that vendors that are not required to obtain supplier licenses follow all required vendor regulations established by the Board pursuant to the Act and Board Rules.

H. Renewing a Supplier's License

All supplier licenses are renewable **annually** upon payment of the $5,000 annual license fee and upon transmitting to the Board an annual report that contains the information required under the Rules. The licensee must submit the annual license renewal fee at least 30 days prior to the expiration of the license.

I. Time Frame

The Board will take whatever time is necessary to conduct a thorough background investigation. Due to the volume of supplier license applications, final action on a supplier license is currently taking more than one year. The Board has addressed this by authorizing the Board staff to issue a "temporary license" to a supplier license applicant once the supplier license applicant's application is deemed complete and satisfactory by the Board staff. Therefore, it is imperative that the supplier license applicant submit a truly complete application to the Board. Failure to submit a complete application will result in substantial delays in processing and, where the deficiencies are significant, a return of the application to the applicant.

V. Overview of Occupational (Employee) Licensing

A. Introduction

The Act specifically authorizes the Board to issue occupational licenses. The Act provides that an "occupational license" means "a license issued by the Board to a person to perform an occupation in a casino or casino enterprise which the Board has identified as requiring a license to engage in casino gaming in Michigan."

Pursuant to this authority, the Board has promulgated Rules that specifically cover occupational licensing of employees of casino licensees, casino enterprises and **supplier licensees**. The following describes in general terms the individuals required to obtain an occupational license, and establishes three different classes of occupational licenses: "An individual who is employed by a casino licensee, casino enterprise, or a **supplier licensee** whose work duties are directly related to, or involved in, a gambling operation or performed in a restricted area of a casino or in the gaming area of the casino, or who is a gaming operations manager, general manager, department manager, or an equivalent, shall hold a valid occupational license that is the level required for his or her position before the individual may perform any of the duties of his or her position."

There are three different classes of occupational license: (i) Occupational license, level 1; (ii) Occupational license, level 2; and (iii) Occupational license, level 3.

The Board may exempt a person from the occupational licensing requirements if the Board determines that the person is regulated by another governmental agency or that licensing is not deemed necessary in order to protect the public interest or accomplish the policies and purposes of the Act.

Occupational licensees have a continuing duty to maintain their suitability for licensure.

B. Requirements for Level 1 or Level 2 Occupational Licensing

A Level 1 occupational license is the highest, or strictest, occupational license. A Level 1 occupational license is required for any individual who will be employed by a casino licensee or supplier licensee in a position that includes any responsibility or authority listed below:

1. The supervision of specific areas or departments related to, or involved in, the gambling operation. Such positions include the following:

- a casino shift manager;
- a pit boss;
- a poker shift supervisor;
- a slot shift manager;
- a person that supervises the repair and maintenance of slot machines and bill changers;
- a person that supervises surveillance investigations or the operation of the surveillance department during a shift;
- a person that supervises security investigations or the operation of the security department during a shift;
- a cage manager;
- a person that supervises the operation of the cashiers' cage, table games cage, or slot machine cage during a shift;
- a person that supervises the hard count or soft count room;
- a person that supervises the patron check collection unit; and
- a keno manager or keno supervisor.

2. The authority to develop or administer policy or long-range plans or to make discretionary decisions regulating gambling operations. Such positions include the following:

- **a director, officer, or comparable noncorporate employee of the casino licensee or supplier licensee**;
- a casino manager;
- a slot department manager;
- a director of surveillance;
- a director of security;
- a controller;
- a credit manager;
- an audit department executive;
- a management information department manager;
- a manager of a marketing department;
- an assistant manager of a casino department;
- an administrator of operations;

- a person with authority to authorize issuance of patron credit or cash complimentaries in the amount of $10,000 or more;
- an audit manager; and
- **a person that supervises other Level 1 employees**.

3. The authority to develop or administer policy or long-range plans or to make discretionary decisions regulating the management of a casino enterprise, and other casino operations. Such positions include the following:

- manager of the operation of a hotel;
- manager of nongaming entertainment activities of the casino licensee;
- manager of food and beverage operations of the casino licensee; and
- manager of personnel and human resource activities of the casino licensee.

The holder of a Level 1 license may perform the work of a Level 2 or Level 3 occupational licensee, but a Level 2 occupational licensee may not perform the work of a Level 1 licensee.

A Level 2 occupational license is required of any individual who will be employed by a casino licensee or supplier licensee and whose employment duties predominantly involve the maintenance, servicing, repair or operation of gambling games, gaming machines, devices or equipment or assets associated therewith, or who regularly requires work in a restricted casino area.

To perform an occupation covered by any of the various levels of occupational licensing, an individual is required to hold a current and valid occupational license prior to such employment.

C. Occupational Licensing Standards

The Act requires an applicant for an occupational license to be at least 21 years old, if the applicant will perform any function involved in gaming by patrons, and at least 18 years old, if the applicant will perform only nongaming functions. An eligible applicant cannot have any felony convictions under the laws of Michigan, any other state or the United States. An eligible applicant also cannot have any misdemeanor convictions which involve gambling, dishonesty, theft, or fraud in any state or any violation of a local ordinance in any state involving gambling, dishonesty, theft, or fraud that substantially corresponds to a misdemeanor in that state. There is no time or age limit on this exclusion for criminal convictions. For example, juvenile records are not excluded by the Act. Consequently, persons with criminal convictions face a particular daunting task in obtaining licensure in Michigan. Since this exclusion is established by the Act itself, the sole solution to obtaining relief from a disqualifying conviction is expungement of the conviction from the criminal records in the state where the conviction occurred. However, even in the case of an expunged conviction, full disclosure of the existence of the conviction and its subsequent expungement must be made to the Board in the occupational license application. The Board is then entitled to consider the conviction and its subsequent expungement in determining the suitability of the applicant for license in Michigan. That is, expungement of a conviction

does not prevent the Board from taking note of the past criminal history of the applicant and still denying the license application on public policy grounds in appropriate circumstances.

The Act permits the Board to issue an occupational license after the Board has determined that the applicant is eligible for an occupational license pursuant to rules. An applicant must demonstrate to the Board a level of skill, knowledge, or experience reasonably necessary to perform the job duties required for the occupation. However, an applicant may still be employed by a casino licensee or casino license applicant to perform the duties if the casino licensee or casino license applicant agrees to provide necessary training to the applicant.

In addition to the above mandatory requirements, the Act gives the Board the discretion to deny an occupational license if:

- **The applicant fails to disclose or states falsely any information requested in the application**;
- The applicant is a member of the Board;
- The applicant has a history of noncompliance with the casino licensing requirements of any jurisdiction;
- The applicant has been indicted, charged, arrested, convicted, pleaded guilty or *nolo contendere*, forfeited bail concerning, or had expunged any criminal offense under the laws of any jurisdiction, either felony or misdemeanor, not including traffic violations, regardless of whether the offense has been expunged, pardoned, or reversed on appeal or otherwise;
- The applicant has filed, or had filed against it, a proceeding for bankruptcy or has ever been involved in any formal process to adjust, defer, suspend, or otherwise work out the payment of any debt;
- The applicant has a history of noncompliance with any regulatory requirements in Michigan or any other jurisdiction;
- The applicant has been served with a complaint or other notice filed with any public body regarding a payment of any tax required under federal, state, or local law that has been delinquent for one or more years;
- The applicant is employed by a governmental unit;
- The applicant or affiliate owns more than a 10 percent ownership interest in any entity holding a casino license issued under the Act;
- The Board concludes that the applicant lacks the requisite suitability as to integrity, moral character, and reputation; personal probity; financial ability and experience; or responsibility;
- The applicant fails to meet any other criteria that the Board considers appropriate. The criteria considered appropriate by the Board shall not be arbitrary, capricious, or contradictory to the expressed provisions of the Act;
- The applicant is unqualified to perform the duties required of the license;
- The applicant has been found guilty of a violation of the Act; or
- The applicant has had a prior gambling-related license or license application suspended, restricted, revoked, or denied for just cause in any other jurisdiction.

Michigan's occupational license application forms are very comprehensive. Based upon Board staff actions and recommendations to date, Board staff is holding occupational license applicants to a high disclosure standard. Accordingly, an occupational license applicant should follow a very straightforward standard when completing the occupational license application – **If in doubt – DISCLOSE!** Applicants who fail to follow this principle face serious difficulties in obtaining licensure.

In order to ensure that an applicant meets the above standards for occupational licenses, the Board has broad powers to obtain information from and about applicants and to investigate the truthfulness of that information.

D. Application for Occupational Licensing

Application for a Level 1 occupational license is made by completing the Personal Disclosure Level 1 Form. ***A failure to disclose information requested in the application, or falsely stating any such information, is grounds for denial of an occupational license. Moreover, knowingly making a false statement on a license application is a 10-year felony subject to a $100,000 fine.***

The Board requires an applicant for a Level 1 or Level 2 occupational license to submit an application and personal disclosure form to the Board's principal office in Detroit, or another location specified by the Board. The application and personal disclosure forms may require the Level 1 or Level 2 applicant to provide the following information and documents:

- The applicant's name including any aliases or nicknames;
- Date of birth and copy of birth certificate;
- Physical description;
- Current address and residence history;
- Social Security Number;
- Citizenship and, if applicable, information regarding resident alien status;
- Marital history, dependents and other family data;
- The casino licensee, supplier licensee or applicant with whom the applicant is associated or employed, and the nature of the applicant's position with or interest in such licensee or applicant;
- Current home and business or work telephone numbers;
- Employment history of the applicant and applicant's immediate family;
- Education and training;
- Record of military service;
- Government positions and offices presently and previously held, and offices, trusteeships, directorships or fiduciary positions presently or previously held with any business entity;

- Other trusteeships or fiduciary positions presently or previously held by the applicant or applicant's spouse or immediate family, and any denial, suspension or removal from such positions;
- Current or recent memberships in any social, labor or fraternal union, club or organization;
- Licenses and other government permits or approvals presently and previously held by the applicant or the applicant's spouse or other members of the applicant's immediate family in Michigan or any other jurisdiction and related history of compliance and disciplinary action regarding such licenses;
- Any denial, suspension or revocation by a government agency of any license, permit or certification held by or applied for by the applicant or the applicant's spouse or immediate family, or by any entity in which the applicant or the applicant's spouse or other members of the applicant's immediate family was a director, officer, partner or owner of a five percent or greater interest;
- Any present or previous interest in, or employment with, an entity which has applied for a license, permit, certificate or finding of qualification or suitability in connection with any gambling or alcoholic beverage operation in Michigan or any other state, by the applicant, the applicant's spouse or any other member of the applicant's immediate family;
- Criminal history of the applicant and the applicant's immediate family;
- History of civil litigation and any other civil or administrative proceedings in which the applicant and applicant's immediate family were parties;
- Political contributions by the applicant and the applicant's immediate family to state and local candidates within one year of the application;
- Financial information, including statements of the assets and liabilities and net worth of the applicant and the applicant's spouse and dependents, and their respective bank accounts, loans, notes, real estate interests, mortgages and liens, life insurance, pension funds, real estate and income tax payables, vehicles and other assets;
- Copies of local, state and federal tax returns of the applicant;
- Judgments and petitions for bankruptcy or insolvency concerning the applicant or any business entity in which the applicant held a five percent or greater interest, other than a publicly traded company, or in which the applicant served as an officer or director;
- Any garnishment or attachment of wages, charging order or voluntary wage execution, or other formal proceedings to adjust, defer, suspend or otherwise work out the payment of any debt of the applicant;
- Information whether the applicant has failed to timely pay any present or previous local, state or federal taxes that are or were delinquent for any time period;
- Life insurance policies on the applicant's life naming someone other than the applicant's family as beneficiary;
- Whether the applicant has ever been bonded for any purpose or been denied any type of bond and the reasons for such denial;
- Other confidential financial and business information;

- The information specified and required by the Act, including a photograph and two sets of fingerprints of the applicant taken at a time and/or place specified by the Board;
- All required waivers and affidavits prescribed by the Board; and
- Any other information or documents that the Board deems necessary and relevant to determine the applicant's identity, eligibility, qualifications and suitability for licensure under the Act or the Rules.

The Act requires an applicant to provide his or her fingerprints and a photograph. All license applicants must consent in writing that fingerprints provided to the Board may be forwarded to the Michigan State Police and retained by the Michigan State Police for any identification purposes, including a background investigation of the applicant. The Board treats the criminal history disclosure requirement very broadly and requires the disclosure of arrests, detentions, indictments, expunged and sealed criminal records, pardons, executive clemency and convictions reversed on appeal.

The Act requires the Board to decide "in reasonable order" all license applications. The applicant has the burden to establish by clear and convincing evidence the applicant's eligibility and suitability as to integrity, moral character and reputation, personal probity, financial ability and experience, responsibility and other criteria as may be considered appropriate by the Board.

Much of the information submitted by an applicant to the Board may be disclosed by the Board to other persons. The Act generally states that information possessed by the Board is subject to the Michigan Freedom of Information Act. The Act excludes from disclosure "all information provided in an application for license required under this Act," but goes on to list exemptions from the exception. Notably, the Board is ***required*** to provide certain information upon written request from any person. Moreover, any other information possessed about an applicant or licensee is subject to disclosure if presented during a public hearing. The Board and its staff is, however, very sensitive to the issue of identity theft and, consequently, has established and implemented very effective security procedures that prevent disclosure of key information such as the social security number of the applicant that is typically a key element in identity theft.

Applicants and licensees are required to agree to accept any risk of adverse publicity, public notice, notoriety, embarrassment, criticism, financial loss, or other unfavorable or harmful consequences arising from an application and the licensing process, or from public disclosure of the information.

All applicants, along with licensees, are required to consent to the inspections, searches and seizures to which licensees are subject. Under most circumstances, it appears that such inspections, searches and seizures can occur only once the applicant is licensed, but the applicant can be required to give such consent at the time of the application. The Board effectively may require applicants to waive privileges for confidential communications and relationships, such as the attorney-client privilege and the physician-patient privilege.

E. Application Fees

The application fee must be paid to the Board when the application is submitted. The application fees are as follows:

- $500 for a Level 1 license;
- $100 for a Level 2 license; and
- $50 for a Level 3 license.

If the Board's cost in performing the background investigation on the applicant exceeds these amounts, the Board may require payment of an additional fee, which will be assessed to the applicant as a condition of issuing a license.

F. License Fees

In addition to the application fee, the following license fees are due upon initial issuance of a license and upon each subsequent renewal:

- $250 for a Level 1 occupational license;
- $100 for a Level 2 occupational license; and
- $50 for a Level 3 occupational license.

Occupational licenses must be renewed every two years.

G. Review of Application and Issuance of Occupational License

The Board staff will review the application and conduct a criminal history check. The Michigan State Police and Attorney General are required to assist in conducting any background checks of applicants. If the Board staff's review of an application reveals a deficiency that would require denial of the application, the applicant is notified of the deficiency and is provided a reasonable period of time to correct the deficiency.

Applicants are forbidden from engaging in *ex parte* communications with a member of the Board. An "*ex parte* communication" means "any communication, direct or indirect, regarding a licensing application, disciplinary action, or a contested case under this Act other than communication that takes place during a meeting or hearing conducted under this Act."

After completion of the background investigation, the Executive Director is required to report to the Board in writing regarding the background investigation of the occupational license applicant. The Board then grants or denies the application for an occupational license. If the application for an occupational license is granted, the applicant has 14 days after the date of mailing of the notice of the applicant's suitability for licensure to pay the license fee. If the applicant does not timely pay the fee, the Executive Director will issue a notice of denial. In the early days of the occupational licensing process, there were a significant number of occupational license denials. This was caused in large part as a result of occupational license applicants failing to reveal their criminal history, submitting false or materially incomplete information to the Board or failing to cooperate with the Board staff in the background investigation. As the

preliminary hiring and investigation processes have matured, the number of occupational license denials has dropped dramatically.

If a license application is denied, the notice of denial becomes final unless the applicant timely requests a contested case hearing. A person whose application for an occupational license has been denied may not reapply for an occupational license of the same or higher level for one year unless the Board receives a written request for leave to do so and approves the request.

An occupational licensee will receive an identification badge, which must be worn and clearly displayed during work hours and cannot be transferred to another person. The identification badge, like the license, remains the property of the Board at all times.

An occupational license is subject to renewal every two years. An occupational licensee must request renewal on a form prescribed by the Board no less than 30 days before expiration of the license.

H. Reporting Obligations

It is important to note that occupational licensees, like casino licensees and supplier licensees, are subject to very broad and comprehensive ongoing reporting obligations. The occurrence of any material modification of the information provided to the Board during the occupational licensing process must be immediately reported to the Board. As is the case with the original occupational license application process, **if in doubt – DISCLOSE!**

VI. Political Contribution Restrictions

The Act prohibits political contributions to **any** state, legislative and local candidates for elective office (including candidate, political party, independent and legislative caucus committees) by a broad range of persons associated with licensed suppliers (owners, officers, directors and managerial employees of the supplier) from the date the supplier license is applied for. This prohibition remains in effect for three years after the supplier's license has expired or otherwise terminated.

Similar restrictions also apply to Level 1 occupational licensees of the Detroit Casinos, although there is also a one year look back period applicable to the Level 1 occupational licensees. As a practical matter, no occupational licensee employed by any of the Detroit Casinos should make political contributions prohibited by the Act if the occupational licensee expects to eventually be promoted into the ranks of employees subject to the political contribution prohibitions established by the Act.

The political contribution restriction is draconian. No political contribution should be made to any candidate or committee that could possibly go to any candidate for elective office in the state of Michigan (except federal offices) without first determining whether or not the contribution is a prohibited contribution. This includes candidates for local elective positions (city council, local judges, school board, etc.) throughout the state of Michigan. Violation of this prohibition constitutes a felony punishable by not more than 10 years in prison or a fine of not more than $100,000 or both.

Applicants for a supplier license who have been issued a temporary license pending final action on the license application who violate the political contribution restriction while final action on the supplier license is pending may, under limited circumstances, seek Board relief from the Act's prohibition of licensure. The license applicant must demonstrate to the satisfaction of the Board that the political contribution was not made with the intent of influencing the supplier licensing process or any licensing, regulation or legislation relating to the Act. A detailed process must be followed by the license applicant, including good faith attempts to obtain the return of the contribution, withdrawal of the pending supplier license application, application to the Board for waiver of the one-year waiting period for resubmission of the supplier license application and timely resubmission of the supplier license application. If proper procedures are followed to the satisfaction of the Board, the technical violation can be cured, and the temporary licensure of the supplier will not be interrupted.

VII. Other Prohibited Conduct

A. Ex Parte Contact with the Board

The Act strictly prohibits licensees, applicants for licenses or their affiliates or representatives from having any "ex parte communication" with members of the Board. "Ex parte communication" includes any communication, direct or indirect, regarding a license application, disciplinary action, or a contested case other than a communication that takes place during a meeting or hearing conducted under the Act.

B. Prohibition on Gifts or Similar Transactions

The Act contains broad prohibitions on the offer of any gift, gratuity, compensation, travel, lodging or anything of value to any member, employee or agent of the Board.

The Board Rules go further, prohibiting licensees or applicants, their affiliates, key persons, representatives and labor organizations from directly or indirectly giving or offering to give any gift, gratuity, benefit, compensation, travel, lodging, food or beverage or any other thing of value to any member of the Board, the Executive Director of the Board, any employee of the Board, any employee of the State Police Gaming Section or any member of the Attorney General's Casino Control Division or any immediate family member of any such person.

C. Prohibited Employment

The Act and Rules specifically prohibit applicants and persons licensed by or registered (which includes vendors) with the Board, as well as the labor organizations associated with applicants and licensees, from employing or entering into contracts for goods or services with present and former Board members and employees or their families. The length of time of the prohibition varies depending upon whether the Board employee is a Board member or supervisory employee (four-year ban after service/employment with the Board is terminated) or a nonsupervisory employee (two-year ban after the service/employment with the Board is terminated).

The Rules apply the employment prohibition to employees of the Attorney General's Casino Control Division, command officers of the Michigan State Police Gaming Section and

any immediate family members of these persons. Immediate family members include the spouse (other than a spouse who is legally separated under a decree of divorce or separate maintenance), parent, child, dependent, sibling, spouse of sibling, father-in-law, mother-in-law and legally recognized domestic partner. The restrictions on employment of employees of the Department of Attorney General and the Michigan State Police have been waived by the Board in Board Resolution No. 2005-04 adopted by the Board on December 13, 2005.

The Act also prohibits licensees, applicants and their key persons, representatives and affiliates from knowingly employing or entering into contracts for goods or services with any state, local or federal law enforcement officer. This Rule effectively prohibits the hiring of off-duty law enforcement officers as employees by licensees and license applicants.

ENDNOTE

This overview is designed to give a brief introduction into the complexities of the supplier and occupational licensing process under the Michigan Gaming Control and Revenue Act and the related Rules adopted by the Michigan Gaming Control Board.

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SECTION D

The Perfect Regulatory Framework for Commercial Gaming in the United States

REGULATORY CHALLENGES FOR A GLOBAL INDUSTRY

By John Maloney and Samuel Weaver

In order for the gaming industry to continue to grow and attract those entities that can be found suitable in what we call a "privileged" industry, gaming jurisdictions must be efficiently and properly regulated. How do we know if a gaming jurisdiction is creating that proper balance between efficient and proper regulatory oversight on the one hand, and free-flowing commerce on the other hand?

While not perfect, the state of Nevada does understand gaming regulatory investigations and how to conduct such investigations. Nevada has been, and still is, the jurisdiction that most other gaming jurisdictions rely upon; it is the benchmark jurisdiction in gaming regulation. The reasons are many, but one very apparent reason is that the regulation of gaming is a number one priority in Nevada, not an afterthought. Nevada understands how to properly regulate gaming, from licensing investigations to ongoing oversight and review of existing licensees. It is one of the few gaming jurisdictions that requires self-reporting, from the creation of approved compliance plans to the formation of formal compliance committees.

When looking at other gaming jurisdictions, a good indicator and measure of how a gaming regulatory jurisdiction operates is to review how the regulatory investigation is conducted. It will not take long to figure out the capabilities of each respective jurisdiction if there is any complexity to the licensing/suitability investigation.

The following is a review of different licensing scenarios and what to expect based on certain criteria, such as domestic or international investigation, public company or closely held company, Nevada licensee or not. The different fact patterns are meant to be a guide for those gaming attorneys who are representing gaming clients and attempting to move through the investigative process in North America outside of Nevada.

U.S.-Based Client with Prior Approval in Nevada

Public Company or Closely Held Company

A suitability or licensing approval in Nevada as either a U.S.-based public company or closely held company are best-case scenarios. There is no better foundation if there is a business need to move into other gaming jurisdictions with your client. For example, certain vendors (such as gaming manufacturers) will want to sell their products in multiple gaming jurisdictions. Normally, if the vendor has approval in Nevada, the investigative process is much easier and much quicker in the vast majority (if not all) of the other gaming jurisdictions.

Many gaming jurisdictions allow gaming vendors to sell product in their gaming jurisdiction once an application is deemed complete and prior to conducting a complete regulatory investigation. The catch here is that a temporary certification is much more difficult to obtain if there is no prior approval in Nevada.

Based on experience, all too often the first question a gaming regulator will ask is whether the gaming applicant is approved in Nevada. If not, the second question is "Why not?" The luxury of an approval in Nevada means the investigative process in most gaming jurisdictions is form over substance, without the long, unnecessary delays.

However, the process of obtaining the Nevada approval is challenging and can be costly, time consuming and frustrating. There is a reason other gaming jurisdictions look to and rely on Nevada, and that reason is the extensive investigation that is conducted there. An approval in Nevada brings instant credibility in the gaming world.

U.S.-Based Client Without Prior Approval in Nevada

Public Company

This is the next-best-case scenario. The good news is that gaming regulators will have access to U.S. law enforcement sources, U.S. regulatory sources such as the Securities and Exchange Commission, and public financial information such as 10K reports and audited financial statements. Public financial documents are an excellent basis for further review of the gaming applicant or for the gaming regulator to rely on. Finally, there is some comfort level that another regulatory body has conducted a review of the applicant and

will continue to provide oversight of the applicant. This is important because of not being able to rely on a prior Nevada approval.

Closely Held Company
This scenario is more problematic because of the lack of public information and the inability to rely on another large regulatory body such as the SEC in the case of a public company. However, because there is access to U.S. law enforcement sources and the ability to review accounting records in English, some concerns will be alleviated. Information under this scenario will need to be researched, analyzed and developed, and thus cause delays. If the applicant is well-organized and has a transparent accounting review in place, things will be much easier.

Under both aforementioned scenarios, without the comfort level of a prior approval in Nevada, the investigative process will take much longer. The reasons might vary — lack of a gaming regulatory infrastructure, lack of resources to efficiently and effectively address an investigation of any complexity or, in many cases, reluctance on the part of the regulator to take any action out of fear of being embarrassed at a later date. This might sound harsh, but this is reality. All too often the fact that a company might need the regulatory approvals to conduct business is clearly overlooked. Most gaming regulators do not appreciate or understand the commercial implications of delays because very few have ever experienced the harsh realities of the private sector and having to meet such things as payroll.

Many of the emerging gaming jurisdictions or smaller gaming jurisdictions today do not have the infrastructure and experience that Nevada has in conducting investigations. Thus, the existence of a separate gaming regulatory body whose sole function is gaming regulatory oversight does not exist. In Nevada, the casino industry is vital to the state and a key source of revenues. It is in the best interest of the gaming industry in Nevada to be as efficient and diligent as possible in processing new applications and bringing resolution to those investigations. One only has to look at the Strip in Las Vegas to understand that Nevada is doing something right.

One only has to look at the Strip in Las Vegas to understand that Nevada is doing something right.

Again, the aforementioned comments are not meant to be critical, but are intended to point out what is reality. The small business operator who depends and survives on gaming regulatory approvals is at the arbitrary whim of the gaming regulator.

The foregoing statement does not include many of the Tribal Gaming agencies in California, Arizona, New Mexico and Michigan. Most of these agencies understand the commercial realities and are able to move much more quickly and efficiently than many of the large state bureaucracies.

International-Based Client with Prior Approval in Nevada

Public Company or Closely Held Company
The issue under this scenario is not whether the company will receive approvals in other gaming jurisdictions (because of the Nevada approval). Rather, it is a timely approval from each respective gaming jurisdiction once the Nevada thresholds are met. *[Note: If the international client has received an approval from Nevada, you can be assured that it was an exhaustive approval process. The Nevada review during an international investigation can take a year or more and hundreds of thousands of dollars. The point is that no other gaming body is willing or capable of conducting this strict level of review, especially if this review is conducted in a consolidated period of time.]*

The issue here, then, is the attraction to foreign travel and the delays this can cause in jurisdictions that do not grant temporary certification. Unfortunately, a common term among gaming regulators is "investivacation." This is a term that refers to a vacation that overlaps with an investigation. With the comfort level that a Nevada investigation provides, regulators are able to free more time up for non-investigative review, confident that all of the important issues have already been covered. This is a harsh reality and can be viewed as a cost of conducting business.

International-Based Client Without Prior Approval in Nevada

The international investigation is almost always a challenge to even the most sophisticated gaming regulatory bodies, such as those in Nevada. There are often language issues, different accounting and legal structures, cultural differences, time zones that leave you upside down, and even different cuisines that can leave the stomach very unhappy.

If there are language issues, most likely there will be issues of translating financial and legal documents. There is a further issue of what specifically to translate because it is not possible to have every document translated. It will then be necessary to identify specific documents that need translation, and this can only be accomplished if there is an understanding of the accounting and legal framework. Bottom line, the international investigation cannot be accomplished with a superficial overview of the applicant and cannot be accomplished unless a well-thought-out infrastructure is in place to deal with the many challenges.

Public Company
In order to conduct a review of a public company, it would be best to start with the regulatory structure in place that oversees public companies. How is this regulatory body viewed by advanced Western financial institutions? A "white" paper on the regulatory system in advance of any regulator's review is strongly recommended. Additionally, gaming regulators in Nevada from the Corporate Securities

Division could be a great help here because there is a very good chance Nevada would have had prior dealings with the respective regulatory bodies that oversee public companies.

The fact that there will be public financial documents available to review will also alleviate some of the concerns, even if some of the documents need to be translated. In all likelihood, the applicant has a credible accounting firm in place, which reports to the regulatory body overseeing public companies.

The best approach in this situation is to proactively educate the gaming regulators on the oversight of the public company and, to the extent possible, create similarities or equivalents between oversight of public companies in the foreign jurisdiction and the U.S. SEC. The operative term is "educate," because if it is easy to understand upfront, it will save time and cost in the long term and will greatly assist in the approval process.

If the applicant is an existing gaming company and a manufacturer of gaming devices, the public filings might state where the company is making gaming sales. It will be necessary to conduct a review on all gaming jurisdictions where sales have been or are currently being made to ensure they are recognized gaming jurisdictions. A good test here is to determine whether licensees in Nevada are making sales to the respective gaming jurisdictions. This is a very good, reliable indicator because sales to illegal gaming markets by a Nevada licensee will mean the loss of a gaming license.

Without prior Nevada approval, it is an uphill battle, but in the case of a public company, many of the prior suggestions can mean goodwill with the regulators, which can mean positive results.

Closely Held Company

This is the worst-case scenario, especially if there are language issues. There will be very little public information to access and very little regulatory oversight — if any — to rely upon. The gaming regulator will have to start from a zero level of understanding of the applicant, and this is where a lot of proactive work is necessary. An infrastructure will need to be in place to address both criminal issues (to include business associations) and financial issues (to include tax and reporting requirements). The gaming regulator will need to gain an understanding of the accounting and legal system, and with a well-thought-out infrastructure in place, this will be possible. For example, are generally accepted international accounting standards recognized and followed? Are local or federal law enforcement sources going to be helpful and cooperate with a "regulatory" investigation?

If the applicant is an existing gaming company, it will be necessary to review the credibility of gaming jurisdictions, and the prior and current sales to such gaming jurisdictions. The first area to address is whether a compliance review is in place and how effective and reliable it is. Without any public scrutiny, as in the case of a public company, attention to detail here is critical. An effective compliance infrastructure could mean the difference between being granted an approval or not. If it is determined sales are being made to problematic gaming jurisdictions, it is essential to proactively address this and to stop such sales.

In the case of a private company that has not previously been reviewed by Nevada, a very organized, clear, systematic approach is mandatory. As already stated, this means everything from reviewing possible criminal issues and determining if cooperation with local law and federal law enforcement officials is possible, to understanding the accounting framework, and any compliance efforts expended by the applicant. Depending on the results of the above, a game plan should be created on how to effectively and efficiently proceed. It will be a challenge.

***A common term** among gaming regulators is "investivacation." This is a term that refers to a vacation that overlaps with an investigation.*

Conclusion

The integrity and thoroughness of the gaming regulatory investigation must be respected. This is not at issue here. What is at issue is the efficiency of this process and the ability to more effectively address issues and get on with business. Gaming companies file applications and expect to be investigated. Gaming companies need gaming approvals in order to conduct business in the respective gaming jurisdictions. Without such approvals, sales are not made, leaving companies with staying power to wait it out while smaller companies without staying power either leave the jurisdiction, lay off employees, go out of business, or all of the above.

If the applicant is not suitable, then the applicant does not belong in this "privileged" industry. On the other hand, if it is just a matter of not wanting to or not being capable of making a decision, then what is the purpose of the gaming regulatory body other than to invite applicants to the jurisdiction and then turn them away due to the inability to perform the job properly? Crawl out from underneath the desk and make a decision. ⎔

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Photo: Doug Kerr (flickr.com/dougtone)

The road to regulation

Gaming law attorney **John K. Maloney** gives his take on the rights and wrongs of the latest attempt to legalise online poker in California

California is one of the largest economies in the entire world, which makes it fertile ground for regulated interactive poker. Because of California's potential, as well as the state's legitimate interest and concern in how online poker comes to be operated and regulated, thoughtful legislation will be needed for California to thrive within the interactive market.

While the issue of legalising intrastate online poker in California has been debated for well over six years, many are optimistic that it will be legalised during the 2015 legislative session. In the 2014 legislative session, AB 2291 and SB 1366 were introduced, and while unsuccessful, they laid the foundation for AB 9, introduced in December 2014. It is likely that companion bills to AB 9 will be introduced as well. For the most part, these proposals provide a good foundation for California's online poker market. However, the same issues contained in AB 2291 and SB 1366 are still present in AB 9.

LANGUAGE

Last session, two controversial provisions of the online poker legislation pertained to the inclusion of bad actor language and the exclusion of the racetracks. More than anything, both provisions appeared rooted in anti-competition, which is an improper approach to this legislation. The focus of internet poker legislation should not be on excluding certain groups to protect local operators, but at least in part focused on attracting entities with the know-how to operate a regulatory compliant platform.

"For the most part, these proposals provide a good foundation for California's online poker market. However, the same issues contained in AB 2291 and SB 1366 are still present in AB 9"

Unfortunately, following in the footsteps of the prior bills, AB 9 includes bad actor language and excludes the racetracks.

EXCLUSIONARY LANGUAGE

After the 2014 session, it was anticipated that the bad actor language seeking to exclude certain operators would be included in the next proposed version/versions of the internet poker legislation. As was expected, a new version, containing this same unnecessary language was introduced in December 2014.

AB 9 would prohibit certain operators from even applying for licensure if those operators continued to accept bets from players in the United States, or knowingly facilitated or provided services with respect to bets or gambling games using the internet, after the Unlawful Internet Gambling Enforcement Act (UIGEA) was passed in 2006. This language automatically makes such operators unsuitable to hold a licence.

Further, AB 9 also includes "covered assets" language, which would make a third-party applicant unsuitable if that applicant purchased or acquired the covered assets (broadly defined) of any entity described in the other exclusionary provisions. This type of language does not take into account the fact that people make bad decisions, assets do not. For example, brands are bought and sold every day. This language ignores any remedial or restructuring actions that may have been taken by a company to rehabilitate. While the legislation contains a waiver provision, that provision creates a seemingly impossible burden for an applicant to meet in order to waive the bad actor or covered assets provisions.

California should not have a system where suitability is determined by politicians and lobbyists. As long as any similar predetermined suitability language is included in online poker legislation, special interests will be dominating in an area they have no business influencing. The arguments in support of this language miss the purpose of the Gambling Control Act. California has implemented this two-tier bifurcated system so that the regulators are the ones determining suitability. Some supporters of the bad actor language argue that it is necessary to protect the consumer. But given the authority of the regulators, the current regulations and proposed internal controls in AB 9 (and AB 2291 and SB 1366), there is no merit to that argument. Within this privileged industry, there is a necessary investigatory and suitability process that must take place by the regulators, and no applicant is guaranteed a licence at the conclusion of that process.

For California's online industry to succeed and not be marginalised, the regulators must maintain the sole authority in determining suitability. The current regulations provide enormous discretion for regulators to capture and encompass any applicant in the interactive space that should not hold a licence. The new legislation essentially replicates the same provisions in AB 2291 and SB 1366 with regards to regulatory discretion in determining suitability in the interactive space. As a result, including bad actor and covered asset language is redundant and unnecessary, and only demonstrates a desire by competitors to eliminate future competition from the market. California needs to embrace applicants with proven technology and institutional knowledge, as it will benefit and grow the entire online industry. If California does not embrace these types of potential applicants by providing them a meaningful opportunity at licensure, they will likely come to compete with their technology in other jurisdictions and/or offshore. Legislators need to understand that any applicant willing to accept the risk of full disclosure to the regulators should be provided an objective analysis for a determination of suitability.

RACETRACK LANGUAGE

One issue that has the potential to delay this legislation before and after its passage into law is the inclusion of the racetracks. Including the racetracks in the online poker legislation has been a back and forth issue. The racetracks want to participate and operate an online poker site, but other groups see things differently. In AB 2291 and SB 1366, the racetracks were not included, but they were in prior legislation. In AB 9, they are not included. The primary reason for the recent exclusion appears to be the lobbying efforts by those who believe that expanding the legislation to include racetracks violates tribal casino exclusivity granted by the State Constitution. Based upon various public comments made by those involved, the tribes are split on that justification. Some tribes have no issue with the racetracks being included, while other tribes see their inclusion as a non-starter. Representatives for the racetracks have publicly stated that if excluded they may seek remedies through the courts, as they believe there is no legal basis for keeping them out of the online poker legislation.

"Including bad actor and covered asset language is redundant and unnecessary, and only demonstrates a desire by competitors to eliminate future competition from the market"

IMPLEMENTATION AND TECHNICAL COMPLIANCE

The interactive gaming space is relatively unknown in the United States, which has the potential to make it vulnerable if certain technical standards and internal controls are not in place. As a result, both the internal systems and those tasked with understanding the intricacies of them are crucial to California's online gambling industry. Because of how large California's market would be, the state will need to implement a system with a certain level of predictability and stability.

In terms of technical standards, the requirements from AB 9, AB 2291 and SB 1366 seem to provide a good starting point for the framework of California's interactive infrastructure and internal controls. The technical standards in each appear to be a combination of other jurisdictions' technical standards and policies. It is promising to see California incorporate many of the same domestic and international standards and policies, as this is what this industry will need in order to remain secure, competitive and attractive to businesses.


John K. Maloney

While the regulators are still guided by the same suitability and investigative standards in their approach, the current legislation (and any companion legislation) should include new and specific technical requirements and internal controls so that regulators can identify compliant and non-compliant platforms and software.

Regulators in California have backgrounds ranging from law enforcement to finance, and while they are more than capable of enforcing the new law, the additional task of enforcing internet gaming regulations is significant. As a result, their current regulatory approach will need to be modified with detailed procedures and training in order to keep the interactive platforms and operators compliant. This could be accomplished with new training programmes, supplemental regulations, additional employees or the creation of a designated interactive division within the Bureau.

BOTTOM LINE

California needs an online gaming framework that works for California and is adept at addressing the state-specific challenges. While AB 2291 and SB 1366 provided a good foundation last session, each contained flaws and issues that are still present in the latest online poker legislation. These issues, especially the anti-competitive sentiment underlying various provisions, will need to be addressed and resolved if the legislation is to create an infrastructure that works for California. For California to succeed on an intrastate basis, legislators need to be guided by principles of consumer and operator protection, and leave the issue of access and suitability to the regulators. Should that occur, California is likely to be the fourth US state to enter the online interactive space. ◄

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THE ARMCHAIR REGULATOR: GETTING IT RIGHT IN THE AGE OF TOO MUCH INFORMATION

By John Maloney and Britt R. Singletary

Whatever happened to "boots on the ground" investigations? We are referring to the type of investigations where the regulator actually takes the time and makes the effort to independently verify information regarding a gaming applicant. The Nevada-style investigations[1] are the most reliable, but we do not suggest that all gaming investigations be modeled after the very intense, comprehensive and expensive investigations that are carried out in Nevada. That approach is simply not realistic for a majority of gaming jurisdictions. When deciding whether to license applicants in their own jurisdictions, in many cases, gaming regulators have the luxury of relying on the results of a Nevada-style investigation, conducted by Nevada or other gaming bodies such as New Jersey, Missouri, Illinois, Colorado or Louisiana. Potential issues arise, however, when no Nevada-style investigation has been done and gaming applicants apply for approvals in gaming jurisdictions where the ability to analyze and verify information is limited. How should these smaller gaming jurisdictions, with limited resources, tackle potentially problematic issues without compromising the integrity of the regulatory review process?

The Regulatory Investigation

Step one for a smaller regulatory body when conducting a review of a gaming applicant (other than verifying the accuracy and completeness of the application) would be to verify which other gaming jurisdictions have actually started, completed and formally made a decision regarding the gaming applicant requesting licensure. For example, if the investigation was completed in Nevada, it would be easy to verify whether the applicant was licensed or found suitable. Furthermore, transcripts of the gaming hearings in Nevada are available for review. The transcripts can be very helpful in understanding what issues, if any, developed during the investigative process. The transcripts can also be very helpful in understanding if an application was referred to staff or if the applicant was allowed to withdraw an application and was therefore not subjected to a final determination.

The practice point is that independent verification can be made as to the status of an applicant's investigation and further what issues were raised at the public hearing. The Bureau of Gambling Control in California will provide a copy of the investigative report related to a determination of suitability. It must be emphasized that independent verification through review of transcripts or review of an investigative report is critical. If an application was tabled or withdrawn, it is vital to fundamental fairness that only a person with the status necessary to speak for the commission involved is questioned considering the withdrawal, since lower level employees are seldom privy to the negotiation between the agency and the applicant leading to the withdrawal.

Once an investigative report or hearing transcript is reviewed, the regulator can examine the basis of the findings. If, for example, Nevada conducted the investigation, there will be evidence that the regulators met with the applicant, traveled to the applicant's place of business, met with local law enforcement agencies, interviewed the applicant's accountants and tracked down and determined the reliability of sources of information found on the Internet, newspaper or magazine articles. If representatives from agencies like Nevada cannot support their findings through an investigative audit trail, the gaming regulator should ask what the source of the information is, and further, if the gaming regulatory body actually ever conducted a formal gaming investigation. Examples abound where employees of credible gaming regulatory bodies take it upon themselves to relay bad information and then treat it as if it is the opinion of the agency where they work. It is strongly recommended that direct journalism questions—who, what, when, where and how—be asked to verify the exact basis of any information before relying on it.

Are Internet search engines and websites diminishing the applicant's confidence in the fairness of the investigatory process?

Step two of the review process is to analyze other sources of information if there has been no high level investigative review of the applicant. This will include all Internet sources, even if it amounts to nothing more than yellow press. Step two should still be considered even if step one of the regulatory review was successful and there were credible sources of information to rely upon. However, step two of the review process *must* be implemented if a full investigatory review was not available.

What if none of the other experienced gaming regulatory bodies like Nevada, New Jersey, Illinois, Colorado, Missouri or Louisiana have formally investigated your applicant? Formal investigation involves meeting with the applicant, reviewing source documents such as tax returns and check registers, and meeting or conversing with local law enforcement contacts; it does not mean accepting as fact information from a tabloid publication that has no credibility, or better yet, relying on other gaming regulators who are relying on non-credible tabloid publications and passing the information on as proven fact. Ask the tough questions. What are the sources of the information that you are being asked to rely upon? Have you personally interviewed these sources? Have you checked with governmental bodies about whether there is a factual basis for the data? The danger of non-credible publications is the "known fact" syndrome, similar to gossip by people repeating mere allegations as fact, thereby rapidly creating a "known fact" that may not be true. This is one of the problems with regulators relying on Internet sources.

The most important part of step two is to have the applicant provide documents and references that will help alleviate concerns about the applicant. For example, in an international investigation, police clearance certificates from the applicants' place of residence should be reviewed. Also if the applicant has obtained a United States visa, the visa application will independently tell you whether the applicant has a criminal history.

Determine if the applicant uses a "big four"[2] accounting firm or other reputable accounting firm, such as Grant Thornton or Bradshaw Smith, and request a list of persons to contact in order to ask questions and verify information pertaining to their reports.

It can also be beneficial to ask the applicant for assistance in setting up a telephone interview with the accounting firm. Determine the scope of representation by the accounting firm and review, for example, the engagement letters and any management letters that have been submitted to the applicant by the accounting firm. The engagement letter will determine the scope of representation. It will be important to review any deficiencies noted in the management letters and whether those deficiencies were adequately addressed by your applicant. Also determine what type of initial due diligence was conducted by the accounting firm prior to its acceptance of the applicant as a client. Request a copy of any due diligence investigations that were conducted by the accounting firm. If a copy of the report is not available, confirm with a partner in the accounting firm the extent of the level of due diligence conducted. Also confirm whether there is any ongoing review of the applicant and/or periodic reviews to ensure the client continually meets the standards of the accounting firm. The civil and criminal penalties contained in the Sarbanes-Oxley Act[3] give investigations conducted by accounting firms considerable credibility. Many gaming jurisdictions have been engaging accounting firms to conduct formal investigations on their behalf.

Another important part of step two would be to retain a firm that conducts due diligence investigations. Hire a firm that specializes in gaming regulatory investigations and is used by other major gaming companies. There are many such firms in Nevada that have decades of experience in conducting due diligence investigations on behalf of licensees in Nevada. These firms understand the issues critical to the gaming industry. They are often staffed by former governmental agents, both state and federal. It is important to determine the scope of review with the investigative firm so as to obtain information most relevant to the gaming investigation.

Under step two, information can be gathered even without the luxury of being able to rely on a Nevada-style investigation. Step two of the process can be conducted without having to incur extensive out of pocket expenses, such as travel costs. In fact, this type of investigation can be conducted from an arm chair. If an issue arises, credibility should be first afforded to governmental agencies and licensed professional firms over any Internet sources. These agencies and firms are charged to get information collection and analysis correct and are subject to censure if they don't. Internet sources pass along all forms of uncensored and unverified information which is inherently suspect. Be skeptical of such sources and rely on qualified professionals.

Under step two, there will be challenges. There are many sources of information, and it is important to know what is credible and what is not. The gaming regulator will not have the luxury of being able to rely on prior transcripts and approvals from the Nevada-style jurisdictions if none are available. It will be a matter of weighing information from credible sources such as accounting firms, gaming regulatory due diligence agencies and state departments that issue visas versus, for example, tabloids that have no basis other than rumor and innuendo. The information provided on the Internet is a wonderful tool and a starting place for gathering information, but the regulator must be aware that the Internet is a tool and not the solution to the investigative review process. The key to the step two reviews is not to base decisions on information that cannot be verified or confirmed. Regulators cannot allow competitors, former spouses or partners, and other enemies to impact the decision-making process through innuendos and falsehoods.

Once all of the information has been gathered, it will be easy to create a matrix and separate out factual, credible information from questionable information. The fair regulator will always ask the applicant to explain the circumstances if there is information that is troubling and falls either in the non-credible or questionable category. How many times have we heard that a problem has been discovered, when in reality there were

plausible mitigating circumstances that turned the problem into a non-issue when the applicant was given an opportunity to explain?

If there is to be confidence in the decision-making process to either grant an approval or not, then it should be standard procedure to grant the applicant an opportunity for a hearing if the recommendation is not to approve the applicant. To do otherwise would clearly demonstrate that the gaming regulatory body has no confidence in its investigative abilities and thus would not want to be embarrassed at a hearing. In such a case, the step two reviews have either failed or were never implemented. Regulators have the opportunity to revoke a license at a later date, if warranted, but a denial based on questionable information is truly unfair and could cause economical disaster to the applicant.

Conclusion

All sources of information, where possible, must be verified as credible or questionable. It will not be difficult to verify credible information from good sources, such as an accounting firm. The review of management letters and engagement letters will confirm not only the scope of work, but also compliance with recommendations made by the accounting firm. Police clearance certificates from the applicant's country of residence address criminal charges and should be considered credible information. Any due diligence reviews by gaming regulatory investigative firms will have built-in qualifiers and should separate fact from fiction. Furthermore, if the information presented comes from credible sources or is an unconfirmed tabloid source or "questionable," it should be disregarded.

The gaming licenses/suitability approvals are the lifeline of a company's ability to transact business in gaming jurisdictions. The livelihoods of employees and tax revenues are at stake, and if the basis of decision making emanates from questionable sources, then the result is libelous and slanderous to the applicant. Shakespeare said, "He who steals my purse steals trash, but he who steals my good name, steals that which enriches him not, but leaves me poor indeed!"[4] It is clearly demonstrated that not all gaming regulatory investigations have to be step one, Nevada-style investigations. There are many sources of information available if gaming approvals from Nevada-style investigations cannot be relied upon. Under no circumstances should gaming regulatory bodies rely on non-credible sources of information as a basis for either approvals or denials. Such reliance demeans the integrity and professionalism of the entire gaming industry. Caution should be exercised by all regulators in disseminating potentially libelous information. Qualified immunity and sovereign immunity are not absolute defenses against lawsuits.

1 For the purposes of this article, a Nevada-style investigation means an investigation where the investigator conducts a field investigation that includes conducting thorough interviews, document reviews, and, if necessary, traveling to direct sources to verify both favorable and derogatory information. A Nevada-style investigation does not take information at face value; it questions the reliability of sources and determines the veracity of information through personal and detailed interaction.

2 The accounting firms Deloitte Touche, Ernst & Young, KPMG and Pricewaterhouse Coopers are generally referred to as the "Big Four."

3 The Sarbanes–Oxley Act of 2002 (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), also known as the 'Public Company Accounting Reform and Investor Protection Act' (in the Senate) and 'Corporate and Auditing Accountability and Responsibility Act' (in the House) and commonly called Sarbanes–Oxley, Sarbox or SOX, is a United States federal law enacted on July 30, 2002, that set new or enhanced standards for all U.S. public company boards, management and public accounting firms.

4 Shakespeare. (1564-1616) *Othello*. Act iii. Scene 3.

For nearly a decade and a half, John Maloney has focused exclusively on legal solutions of issues faced by applicants and participants in the gaming industry, concentrating exclusively on gaming law and regulation. He formerly served with the Nevada State Gaming Control Board and the Casino Control Division in Queensland, Australia. Maloney is also a founding member of the International Masters of Gaming Law and is listed in The Best Lawyers in America *(Woodward/White Inc.) in the Gaming Law Section and The Chambers Guide. He can be reached at JMaloney@johnkmaloneylaw.com.*

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What is Gambling?

SECTION E

THE COMMONWEALTH OF MASSACHUSETTS

White Paper on Daily Fantasy Sports

MASSACHUSETTS GAMING COMMISSION

Stephen P. Crosby, Chairman
Gayle Cameron, Commissioner
Lloyd Macdonald, Commissioner
Bruce Stebbins, Commissioner
Enrique Zuniga, Commissioner

JANUARY 11, 2016

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January 11, 2016

A Letter from the Chairman:

With the advent of the NFL Football season and its advertising in the Fall of 2015, coupled with the widely-distributed story of a DraftKings insider making big money on a competitor's site, the relatively new activity of Daily Fantasy Sports (DFS) exploded into the public's consciousness. Gaming regulators, Attorneys General, and Legislatures across the country suddenly confronted the complex questions about the legality of DFS, the definition of gambling, the significance of skill vs. chance, and the overall muddled state of societal views of gambling and the equally muddled state of much of its regulatory infrastructure.

Massachusetts was particularly caught up in this new controversy due to the existence of one of the leading DFS companies, DraftKings, being headquartered in Boston, the participation of the Kraft family in DFS, and the Attorney General's effort to sort through the legal thicket to focus on critical consumer protection issues. In the course of this public debate, the Governor, the Speaker of the House, and the Senate President all suggested, at least casually, that it might be helpful if the Gaming Commission were to offer its views on these issues. It is absolutely clear that the Gaming Commission, at this point, has no authority whatsoever either to regulate (that authority rests principally with the Attorney General) or to set policy (that authority rests with the Legislature) concerning DFS. The Gaming Commission *does* have considerable experience in launching a new gaming industry in Massachusetts and in considering many of the complicated and nuanced issues pertaining to gaming regulation. Further, the Commission has a responsibility under its enabling legislation to help protect the interests of the Lottery, and has a clear interest in rationalizing the gaming environment in which its casino licensees operate.

For all of these reasons, the Commission has decided to publish this White Paper, offering our thoughts on a range of issues the Legislature will likely confront as it comes to grips with the challenge of regulating DFS, and perhaps other online (also referred to as "Internet-based," or "remote") gaming. The Commission expects that these issues will likely include at least the following:

- Not so much the issue of *whether* DFS is legal under existing relevant law, but rather whether DFS *should* be legal.
- If the Legislature determines DFS should be legal, should it be regulated?
- If the Legislature determines that DFS should be regulated, what are the critical issues that need to be addressed by that regulation?
- As the Legislature determines what issues need to be addressed, it will likely consider what regulatory structure is appropriate, ranging from consumer protection laws, the regulatory style of the Department of Public Licensure (hairdressers, plumbers, etc.) or the full agency-led regulation like the Division of Banks, the Division of Insurance or the Gaming Commission.

Most of this Paper will be focused on the specific challenges of DFS. However, the Commission is very aware that while today DFS is the hot new Internet-based gaming, in past years it was online poker, and next year it may well be eSports. Online gaming technologies are proliferating at an ever faster pace, and new games can be deployed to a mass market in a matter of weeks. The last section of this Paper will suggest the possibility of the Legislature establishing a regulatory environment which is applicable to all online gaming technologies, assigning that regulatory structure to an agency for implementation, and leaving the daily work of drafting and adapting regulation of new gaming types to the regulatory agency that can be nimble and flexible in responding to technological gaming innovations.

An alternative approach is exemplified by the prodigious work the Legislature did to draft the Gaming Commission's enabling Legislation, Chapter 23K. This Legislation, years in development, established clear societal values, regulatory priorities, many highly directive regulatory parameters, and a host of regulatory innovations that have made much of Massachusetts casino regulation a model for other jurisdictions. It is probably impractical for the Legislature to do similar work for each new type of gaming; however, it may be that its comprehensive work in Chapter 23K has

already established the primary values and regulatory priorities that will need to be adapted to any new type of gaming.

In preparation for drafting this White Paper, the Commission (led by Commissioner Gayle Cameron, Staff Attorney Justin Stempeck and Director of Licensing Paul Connelly; Stempeck and Connelly served as lead authors of this Paper, along with Commissioner Lloyd Macdonald and former Commissioner Jim McHugh) held several information-gathering sessions with the DFS industry and experts, culminating in an extraordinary day-long forum on DFS and online gaming on December 10, 2015, that informed much of this Paper. The video and transcript of that Forum can be found at http://massgaming.com/news-events/article/daily-fantasy-sports-educational-forum-december-10-2015-2/.

I hope that the contents of this White Paper will be helpful.

Stephen P. Crosby
Chairman

EXECUTIVE SUMMARY

Daily Fantasy Sports (DFS) first started in 2007. This variant of fantasy sports offers a condensed version of the season-long fantasy experience, providing for the drafting of a team and participation in weekly or daily contests. The most popular DFS sport is football, followed by baseball, racing, basketball and hockey. Fantasy golf is also a popular product and is quickly gaining in popularity.

With the advent of the NFL Football Season and its advertising in the Fall of 2015, coupled with the widely-distributed story of a DraftKings insider making big money on a competitor's site, DFS exploded into the public's consciousness. Gaming regulators, Attorneys General, and Legislatures across the country suddenly confronted the complex questions about the legality of DFS, the definition of gambling, the significance of skill versus chance, and the overall muddled state of societal views of gambling and the equally muddled state of much of its regulatory infrastructure.
Pursuant to these events, and with encouragement of political leaders on Beacon Hill, the Massachusetts Gaming Commission (MGC) has decided to publish this White Paper, offering our thoughts on a range of issues the Legislature will likely confront as it comes to grips with the challenge of regulating DFS, and perhaps other online (also referred to as "internet-based," or "remote") gaming. The Commission expects that these issues will likely include at least the following:

- Not so much the issue of *whether* DFS is legal under existing relevant law, but rather whether DFS *should* be legal.
- If the Legislature determines DFS should be legal, should it be regulated?
- If the Legislature determines that DFS should be regulated, what are the critical issues that need to be addressed by that regulation?
- As the Legislature determines what issues need to be addressed, it will likely consider what regulatory structure is appropriate, ranging from consumer protection laws, the regulatory style of the Department of Public Licensure (hairdressers, plumbers, etc.) or the full agency-led regulation like the Division of Banks, the Division of Insurance or the Gaming Commission.

The last section of this paper will suggest the possibility of the Legislature establishing a regulatory environment which is applicable to all online gaming technologies, assigning that regulatory structure to an agency for implementation, and leaving the daily work of drafting and adapting regulation of new gaming types to the regulatory agency that can be nimble and flexible in responding to technological gaming innovations.

One approach to regulating DFS and other Internet-based gaming is exemplified by the prodigious work the Legislature did to draft the Gaming Commission's enabling Legislation, Chapter 23K. This Legislation, years in development, established clear societal values, regulatory priorities, many highly directive regulatory parameters, and a host of regulatory innovations that have made much of Massachusetts' casino regulation a model for other jurisdictions. It is probably impractical for the Legislature to do similar work for each new type of gaming; however, it may be that its comprehensive work in Chapter 23K has already established the primary values and regulatory priorities that will need to be adapted to any new type of gaming.

Massachusetts is in unsettled legal territory with respect to DFS as there are no statutes or legal decisions that directly address the topic. Without otherwise addressing DFS under the current laws of the Commonwealth, Attorney General Healey recently promulgated comprehensive draft consumer protection regulations to reduce or eliminate the risk of economic harm to vulnerable players and to promote the games' transparency. While these proposed regulations will mitigate many of the potential harms of DFS, the state Legislature possesses the singular power to clarify any remaining legal ambiguity with appropriate legislation.

From our own review of the gambling statutes currently in effect in the Commonwealth and from our review of the opinions of other interested parties, we believe that DFS does implicate certain provisions of existing civil and criminal statutes. However, while it could be construed that DFS is arguably illegal under existing Massachusetts law, the balance of Massachusetts law may make that reading illogical. See the discussion offered in detail in Section II, Legality of Daily Fantasy Sports.

In any case, a common concern repeated in the DFS industry by operators, players and vendors alike is a greater need for legal certainty. The real question for the Legislature is ultimately not "Is DFS legal?" but "Do we want DFS to be legal, and if so, under what conditions?" Nevertheless, we believe that before addressing that question, it is important that there be an understanding of the present legal framework of gaming in Massachusetts and at the federal level so that any legislative

solution here avoids conflict with existing laws, or intentionally amends those laws that otherwise would be in conflict with the Legislature's solution.

The Massachusetts statutes that present the greatest direct exposure to DFS operators, third party vendors and gaming participants are the statutes that make criminal the operation of betting pools, M.G.L. c. 271, §§ 16A and 17, and the holding of illegal lotteries, M.G.L. c. 271, § 7.

What makes the Massachusetts pooling statutes so potentially problematic for DFS is that the element of skill—so central to the DFS operator's defense to date—is irrelevant to the issue of culpability. That is because the statutes specifically reference a "trial or contest of skill" as the basis of an illegal pool. Accordingly, this language places DFS participants (operators, third party vendors and players) at risk.

The lottery statute poses challenges to DFS, as well, although not as directly as the betting pool statutes. The term "lottery" has been interpreted broadly by the courts to include any activities consisting of the following three elements: "(1) the payment of a price for (2) the possibility of winning a prize, depending upon (3) hazard or chance." See *Com. v. Stewart-Johnson*, 78 Mass. App. Ct. 592, 594 (2011), quoting, *Com. v. Lake*, 317 Mass. 264, 267 (1944). The running of lotteries outside of a "gaming establishment" is illegal under Massachusetts law and such lotteries are broadly defined in the statute:

> Whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with ***chance*** by lot, dice, numbers, game, hazard or other gambling device … shall be punished by a fine … or by imprisonment …. (*Emphasis added.*)
>
> M.G.L. c. 271, § 7

This debate about skill versus chance is at the heart of the DraftKings – State of New York legal actions, and similar debates and lawsuits across the nation. In the Commission's judgment, it would be worthwhile for the Legislature to consider whether it is in the public interest for DFS to be exposed to the uncertain reach of the lottery statute, or to the "skill" vs. "chance" distinction at all.

The federal statute that potentially presents the greatest constraints on state action to address DFS is the Professional and Amateur Sports Protection Act or "PASPA." 28 U.S.C. § 3701 (1992). In simple layman's terms, PASPA makes illegal (except in a few grandfathered states) essentially any state action that makes sports or sports-related betting legal. Thus, at first glance, PASPA may constrain the Legislature from any legislation that directly or indirectly permits or regulates DFS. While there appears to be little appetite for further PASPA challenges by those provided with a right of action under the statute, the lack of significant court interpretation of the statute, the inherent vagueness of the statutory terms and the pending *en banc* review in the Third Circuit of New Jersey's most recent attempt to legalize sports betting, suggests a cautious approach to state action addressing DFS directly.

There is, however, an alternative approach for the Legislature to consider. Rather than trying to anticipate unfavorable outcomes, or trying to design Massachusetts public policy that accommodates a peculiar and vague federal statute, the Legislature might simply write legislation and regulations it believes appropriate for the people of Massachusetts, and let the others react as they see fit. Ultimately, clarification of federal law on this (and many other) aspects of gaming law will be required; clear and decisive state action may further that objective.

The Gaming Commission believes that the issue of "whether to regulate DFS" is largely settled.

After several years of a largely laissez-faire environment, there is a growing consensus amongst regulators, industry analysts and the DFS industry itself that some form of regulation is necessary not only to protect the interest of DFS players, but also to provide some clear guidelines and predictability to DFS operators. While cautious of the potential breadth of regulations, and fearful of a patchwork implementation across the country, the major DFS operators have all publicly recognized the need for government regulation to provide security to customers and operators alike. The majority of the debate in this area continues to focus on the form and extent of a future potential regulatory environment.

In the past, legislators and regulators typically approached the issue of gaming legality by asking the questions, "is it gambling?" and often "is it a game of skill or a game of chance?" As discussed in this paper, much of this analysis has been a residue of moral judgments initially asserted hundreds of years ago, and carried forward in many religious and ethical constructs, and the definitions of "gambling," "skill" and "chance" have often been unclear at best. Even with these religious and ethical disapprovals, however, gambling of one sort or another—especially lotteries—has been approved and utilized by government jurisdictions and other institutions as a means of raising revenues and providing entertainment since at least the beginning of this Republic. And much more recently, the Legislature and the people of Massachusetts have emphatically endorsed many forms of gambling by way of the legalization of the Lottery and casinos.

We are left now with a public policy position that seems to assert that gambling is bad/illegal, except when it is not. And what makes it not bad/illegal is when the Legislature authorizes a regulatory framework and a public purpose for a particular kind of gambling. Generally speaking, we have largely come to accept gambling as a legitimate form of economic activity, entertainment and public or philanthropic revenue generation (even within the religious community) – under certain regulatory conditions.

Perhaps, as a consequence of profound changes in public values and public policy, the challenge for the Legislature about DFS and other internet-based gaming is to define gambling clearly and carefully, and then regulate accordingly. For example, the Legislature might use this definition: "Is this economic activity characterized by a payment by a player for an opportunity to win an award based on the outcome of a future event, which is not otherwise regulated?"

The Commonwealth routinely regulates most economic activity, at some level of intensity, looking into the nature of that activity to determine whether and how to regulate. In this case, it may be helpful to define in law the specific features that might be considered gambling, to serve as the tripwire for a greater than normal degree of regulation. If the proposed economic activity has these defining features, it will be considered gambling, and then the checkered history of gambling, the continuing public ambivalence about gambling activities, and long established public policy, suggest a number of key topic areas that may require regulatory consideration.

The following issues and potential remedies, presented across five, broad policy areas, represent a starting point for consideration of a regulatory schema. (These issues are also presented in a table format in Section III Issues Requiring Regulation.)

Know your Customer: Ensuring that players are of legal age and are playing in a jurisdiction where DFS play is allowed. Ensuring that DFS operators can uniquely and accurately identify each and every DFS player.

DFS Player Protection: Ensuring that players' funds are properly protected, and that players understand the nature of the games, the risks involved and have access to tools and resources if they feel they have a problem.

Technical Security: Ensuring that the wealth of personal information regarding customers is protected, the system cannot be manipulated to any player's advantage, and all user activity data is retained for auditing and research purposes.

Suitability and Licensure: Ensuring that regulators know the principals involved in DFS operations, and that there is a level of investment that increases the costs of non-compliance.

Impact on Real-World Sports: Ensuring that the relationship between DFS and the sports for which it provides contests does not adversely affect the perception (or reality) of fair play.

There are multiple regulatory models that could be employed to address the issues outlined above. The Attorney General's proposed regulations consider the most important issues of concern and provide consumers with a powerful tool to address their concerns and grievances. This tool, however, necessitates that an aggrieved consumer or law enforcement agency seek remedy which for many may be too costly or time consuming to pursue, and which in any case provides only a very random method of enforcement An appropriately robust regulatory structure would consider how to work in concert with the Attorney General's proposed consumer protection regulations to address these same concerns *prospectively*, so that issues are detected and addressed, or avoided altogether without the need for consumer action.

In considering the appropriate kind of regulatory scheme for DFS and other on-line gaming, certain principles are worth bearing in mind:

- The scheme must be commercially viable
- The scheme must be technologically feasible
- The scheme should attempt to balance the “problem solved” with the “cost increased”
- The scheme should be “risk-based,” balancing the risk and seriousness of the problem with the cost and imposition of the solution

Whatever the outcome, careful thought should be afforded to the design of the regulatory approach, as many other jurisdictions may look to the first successful model for guidance. Furthermore, the DFS industry’s present urgent desire for a consistent regulatory approach will probably mitigate resistance that might otherwise exist to implementation of a prompt, comprehensive, “smart” model.

The discussion thus far has focused primarily on DFS. However, DFS is only one form of Internet gaming activity that the Commonwealth is likely to encounter in both the near and the long term. Internet gaming (also referred to as “online” or “remote” gaming) offers a dizzying and constantly expanding variety of games including on-line casino games, sports betting, eSports, social gaming, skill-based games, and prediction markets (all discussed more fully in Section V, The Proliferation of Internet Gaming.) Any new regulatory effort for just one of these types of games will surely beg the question of how to handle the others. A regulatory strategy that is broad enough and flexible enough to adapt to any and all of these proliferating games may be worth serious consideration.

As recent history and litigation demonstrate, it is not enough – indeed, it is frequently not fruitful – simply to ask whether a new form of Internet activity involving payment of money for future rewards constitutes "gambling". The real question is how to determine whether a new Internet activity involving payment of money in return for future rewards ought to be regulated and, if so, how and by whom. Not all such activity necessarily requires regulation. Even when regulation is required, regulations and the regulatory framework must be of the right size, i.e., neither so onerous that it stifles positive economic activity nor so lax that it fails to protect the public interest.

One approach for the Legislature to consider is to recognize that because Internet gaming activity is unique, quickly deployed and highly malleable, regulation ought to be vested in a single, nimble Internet gaming regulatory body. This approach would require new legislation, but the regulatory body could be one that currently exists or one that the Legislature creates. Such omnibus on-line gaming regulatory legislation would establish the Commonwealth's overriding public policy objectives and regulatory principles, presumably including the principles embodied in existing horse racing, gaming and lottery legislation enumerated in Section III of this Paper. Minimally, such legislation would direct that organized crime and individuals with criminal backgrounds have no operational control over the gaming activity, that players are protected from unfair or deceptive practices when they engage in the gaming activity, that operators of the activity take appropriate steps to mitigate any adverse consequences the activity may produce, and that the activity produces economic benefits for Massachusetts. The economic benefits may come through taxation of the activity at a rate the Legislature determines but also through encouragement of Massachusetts job creation and economic development.

If such an omnibus online gaming regulatory body were created, it would be important to give it jurisdiction also over all Internet-based (or "online" or "remote") economic activity in which a person stakes or risks something of value on the outcome of a future event, whether that outcome is dependent on chance, the individual's skill or a combination of both. So formulated, the regulatory body's jurisdiction would be broad enough to invest it with the power to look at all Internet gaming activity, determine whether any form of regulation of that activity is necessary and, if it is, create "right-sized" regulations to deal with it, pursuant to the public policy objectives and regulatory principles in the Legislature-promulgated enabling legislation.

To be sure, an agency with a broad mandate of that kind and description would have considerable power to affect what could become a broad swath of economic activity on the Internet. Accordingly, legislative oversight, even if in arrears, would be highly desirable. But with that broad mandate and developed expertise, such an agency would be prepared to provide the Legislature and the citizens of Massachusetts with informed regulatory measures, promptly, economically, and thoughtfully, to avoid clear pitfalls while promoting economic growth in a dynamic arena.

I. THE EVOLUTION OF DAILY FANTASY SPORTS

This section will briefly address the history of fantasy sports as well as the recent development of daily fantasy sports or "DFS" in order to provide some perspective on the rapidly evolving market for these businesses.

A. History

Fantasy sports are largely understood to have started with a 1980 "Rotisserie" Baseball League (named for the New York Restaurant where the draft was held; *La Rotisserie Francaise*). Under the rules of this first league, each participant used an imaginary budget to bid on various baseball players at a simulated auction in order to draft a team. Over the course of the baseball season, the league participants kept track of various statistics of their players, scoring points based on the performance of their players, with the participant who scored the most points at the end of the season winning a cash prize.

Early fantasy sports aficionados started playing Rotisserie-style fantasy baseball and the game accumulated a small but devoted following. As the game evolved, players suggested new rules (including weekly head-to-head format, keeper leagues[1], and others) but largely adhered to the core premise.[2] Over time, the game format migrated outside of baseball to other professional sports. Popularity of the game spiked in conjunction with the mid 1990's Internet boom likely due to the automation of scoring contests, the ready availability of eager contest participants and easy access to sports news and information. In conjunction with the creation of numerous new fantasy sports sites came fantasy sports *support* sites, offering player insights and recommendations on drafting the strongest team.

[1] In a "keeper" league, depending upon the rules, anywhere from one player to an entire team is retained from one sports season to the next.

[2] One of the primary distinctions in fantasy sports leagues comes in the initial allocation of players. Although the original format featured an auction draft, another popular variant is the "snake draft," where participants are randomly assigned a number designating their pick position in the draft. During the draft the participant that picked first in round one goes last in round two and the participant that picked last in round one goes first in round two.

B. Advent of Daily Fantasy Sports

Daily Fantasy Sports or "DFS" first started in 2007. This variant of fantasy sports offers a condensed version of the season-long fantasy experience, providing for the drafting of a team and participation in weekly or daily contests. The most popular of DFS sport is football, followed by baseball, racing, basketball and hockey. Fantasy golf is also a popular product and is quickly gaining in popularity.

The current DFS landscape is dominated by two companies: DraftKings and FanDuel, which together account for 85-95% of the market.[3] Both companies offer a similar experience, allowing participants to draft players using a salary cap auction. In that format all participants start with the same amount of imaginary funds to use to draft players to fill their team roster. Real-world players are assigned fictitious "salaries" by the DFS site operators, based on a number of known factors (player past performance, weather, team match ups, etc.) and certain factors unknown to participants. Under this format participants are allowed to draft the same players, as long as they do not exceed their assigned salary cap. Each imaginary roster accumulates various points over the course of the contest based on the real world performance of the professional sports players and at the end of the contest period (either a week or a day), the points are tallied and the results are reported.[4]

DFS sites offer a variety of contest types including private league, head-to-head, 50/50 and guaranteed prize pools. Private leagues allow participants to create an entire league where participation is limited by invitation of the league creator. Head-to-head match ups are one-on-one contests between two players. 50/50 leagues involve a large pool of people where the participants in the top half of the standings win and those in the bottom half lose. These contests often allow for the potential to multiply winnings based on how high in the percentile rankings a participant reaches. Guaranteed prize pools involve a contest for an operator guaranteed sum (for example $1 million), which will be paid out to the winner whether contest entry fees meet that sum or not. In the event that entry fees fail to fully fund the guaranteed contest, the DFS operator will make up the difference in order to fund the contest. The operator typically retains 8-10% of the total entry fees from each DFS contest, similar to the "vig" in pari-mutuel betting, or the "rake" in casino poker.

[3] The remaining market share is split between approximately 18 other smaller companies.
[4] All of these functions, from drafting a team to checking the real time score of a contest, can also be completed using a paired smartphone application.

The current DFS market is estimated to be 3-4 million players. Many news stories have conflated this number with the significantly greater figure representing all players of fantasy sports generally (which would include season long fantasy sports players). The majority of DFS players are white males in their mid-twenties to mid-thirties. Eilers Research CEO Todd Eilers estimates "that daily games will generate around $2.6 billion in entry fees this year and grow 41% annually, reaching $14.4 billion in 2020." Notably, this projection was made before the DFS legal backlash that occurred this past fall and it is unknown what effect this slew of lawsuits and law enforcement investigations will have on these projections.

II. LEGALITY OF DAILY FANTASY SPORTS

Massachusetts is in unsettled legal territory with respect to DFS as there are no statutes or legal decisions that directly address the topic. Without otherwise addressing DFS under the current laws of the Commonwealth, Attorney General Healey recently promulgated comprehensive draft consumer protection regulations to reduce or eliminate the risk of economic harm to vulnerable players and to promote the games' transparency. While these proposed regulations will mitigate many of the potential harms of DFS, the state Legislature possesses the singular power to clarify any remaining legal ambiguity with appropriate legislation.

From our own review of the gambling statutes currently in effect in the Commonwealth and from our review of the opinions of interested others[5], we believe that DFS does implicate certain provisions of existing civil and criminal statutes. However, while it could be argued that DFS is illegal under existing Massachusetts law, the balance of Massachusetts law may make that reading illogical.

In any case, a common concern repeated in the DFS industry by operators, players and vendors alike is a greater need for legal certainty. The real question for the Legislature is ultimately not "Is DFS legal?" but "Do we want DFS to be legal, and if so, under what conditions?" Nevertheless, we believe that before addressing that question, it is important that there be an understanding of the legal framework of gaming in Massachusetts and at the federal level so that any legislative solution here avoids conflict with existing laws, or intentionally amends those laws that otherwise would be in conflict with the Legislature's solution.

[5] At the December 10, 2015 DFS Forum the issue of DFS' relationship to illegal sports betting was addressed by several national experts in attendance. Also, the Commission's legal staff solicited and received comprehensive legal memoranda on the subject from DraftKing's counsel. (Senior personnel from DraftKings and FanDuel and their counsel were also on several of the panels at the Forum.) The Forum was live-streamed, and a complete video record and transcript of the Forum is available on the Commission's website.

A. Massachusetts Statutes Posing Issues for DFS

Massachusetts addresses illegal gaming through a number of criminal and related civil statutes including, but not limited to, statutes on the operation of an illegal gaming establishment,[6] the recovery of gaming losses,[7] the loaning of money for purposes of gaming,[8] gaming establishments as a public nuisance[9], rights of entry to seize implements and materials of a "common gaming house" [10], forfeiture of gambling devices[11], keeping a "common gaming house" or being knowingly present therein[12] and the operation of a bet-placing operation;[13] amongst others.

In Massachusetts "the word 'game' is very comprehensive and embraces any contrivance or institution which has for its object the furnishing of sport, recreation or amusement. 'Gaming for money or other property' is illegal." Com. v. Theatre Adver. Co., 286 Mass. 405, 411 (1934). In the statute that provides a glossary of definitions for subsequent reference in the General Laws, "illegal gaming" is defined in as any "banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding [the state sanctioned lottery, casinos authorized by the Gaming Commission enabling act, horse and dog racing, bingo and charitable gaming]." M.G.L. c. 4, § 7. Although the statute is definitional only and does not have any affirmative provisions for criminal or civil consequences, the state's Supreme Judicial Court cited the statute in holding that "[i]t is settled that the buying or selling of pools or the registering of bets is illegal gaming in this commonwealth,". *Sullivan v. Vorenberg*, 241 Mass. 319, 321 (1922).[14]

The statutes that present the greatest direct exposure to DFS operators, third party vendors and gaming participants are the statutes that make criminal the operation of betting pools, M.G.L. c. 271, §§ 16A and 17, and the holding of illegal lotteries, M.G.L. c. 271, § 7.

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[6] M.G.L. c. 137, § 2.
[7] M.G.L. c. 137, § 1.
[8] M.G.L. c. 137, § 3.
[9] M.G.L. c. 139, § 14
[10] M.G.L. c. 271, § 23
[11] M.G.L. c. 271, § 5A
[12] M.G.L. c. 271, § 5
[13] M.G.L. c. 271, § 17.
[14] There is no specific statute criminalizing running a "banking or percentage game" even if such an operation is labeled "illegal gaming" under § 17.

1. Betting Pools

M.G.L. c. 271 § 17 provides that it is a felony for one who possesses an "apparatus, books or any device…for buying or selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game…." Section 16A makes it similarly illegal for one who "organizes, supervises, manages or finances … the illegal buying or selling of [such] pools."

The Supreme Judicial Court in *Commonwealth v. Sullivan*, addressed the meaning of a betting pool and how a betting pool works:

> A pool has been defined as 'a combination of stakes the money derived from which was to go to the winner.' . . . This does not mean, however, that all the money derived from the combination of stakes must go to the winner. Commonly the man who runs the pool makes something out of the transaction. It is enough to constitute the criminal offense if there is a combination of stakes a part of which is to go to the winner. . . . [It] is enough if the proceeds [advanced by the players] constituted a fund out of which the so-called prizes--in fact the proceeds of the pool--were paid to the winners in the game of chance.[15]
>
> 218 Mass. 281, 283 (1914) (citing the definition articulated by Oliver Wendell Holmes in *Commonwealth v. Ferry,* 146 Mass. 203, 208 (1888).

[15] In this regard, it is worth noting that the CEO of DraftKings, Jason Robbins, was quoted in a Reddit post July 26, 2012, as saying "For example, when anyone on my fantasy team hits a home run in real life, I get points on my team. The person with the most points at the end of all the games, wins. In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people, and each put in $10, you'd win $100 *(minus 10% which goes to us)"*. (Emphasis added).

The Court described the activity at issue in *Sullivan* in the following terms:

> There was evidence tending to show that the defendants kept the rooms and there kept and sold, for twenty-five cents each, books entitled, 'American and National League Baseball Schedule and Record Book.' The book was exhibited in evidence and is described in the record as 'containing many advertisements and a schedule of dates when and places where baseball games were to be played by the various clubs belonging to the American and National Leagues together with some other information.' One page contained two coupons to be filled out in duplicate 'by writing in the names of the baseball clubs which the contestant believed would score the greatest number of runs on each day of the following week.' One coupon was to be given to one of the defendants and the other kept by the contestant. The names of six different baseball teams could be used, but the name of one could not be used twice during the same week. Prizes of considerable amounts were offered. . . . Whether the aggregate of the prizes constituted the entire pool does not appear in the evidence and is of no consequence.

Sullivan further defines a "bet" as "the hazard of money or property upon an incident by which one or both parties stand to lose or win by chance.[16]" Id. "For one to have placed a "bet," he must have taken a risk on the uncertain outcome of a particular event and, depending on the outcome, he must be entitled to receive payment from another." *Com. v. Sousa*, 33 Mass. App. Ct. 433, 437 (1992)

The typical DFS contest involves numerous participants paying their entry fees to a company, the company taking a percentage of the total entry fees and the winner being paid from the company's coffers. Such contests bear more than passing resemblance to the betting pools found to be illegal in *Sullivan*. In this respect, the Commission finds significant that the Nevada Gaming Control Board recently found DFS to constitute betting pools under Nevada's law and thus subject to mandatory regulation as other forms of gambling are there.

[16] This definition is similar to the definition of "wager" applied by the Nevada attorney general. In Nevada, a wager is "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain." See Nev. Rev. Stat. Ann. 463.01962.

What makes the Massachusetts pooling statutes so potentially problematic for DFS is that the element of skill—so central to the DFS operator's defense to date—is irrelevant to the issue of culpability. That is because the statutes reference a "trial or contest of skill" as the basis of an illegal pool. Accordingly, this language places DFS participants (operators, third party vendors and players) at risk.[17]

The pooling statutes, in particular, should be addressed to determine whether they should be amended.

2. Lotteries

The lottery statute poses challenges to DFS, as well, although not as directly as the betting pool statutes. The term "lottery" has been interpreted broadly by the courts to include any activities consisting of the following three elements: "(1) the payment of a price for (2) the possibility of winning a prize, depending upon (3) hazard or chance." See *Com. v. Stewart-Johnson*, 78 Mass. App. Ct. 592, 594 (2011), quoting, *Com. v. Lake*, 317 Mass. 264, 267 (1944). The running of lotteries outside of a "gaming establishment" is illegal under Massachusetts law and such lotteries are broadly defined in the statute:

> Whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device … shall be punished by a fine … or by imprisonment ….
>
> M.G.L. c. 271, § 7.[18]

[17] If DFS were to be found to comprise an illegal betting pool, then by operation of the other gaming-related statutes referenced above, the parties could be prosecuted for operating an "illegal gaming establishment" and being "present" therein; the operation could be declared a "public nuisance" and shut down, and the equipment at the premises and the proceeds generated by the contests could be subject to civil forfeiture. Any person or organization providing goods and services knowing the nature of the DFS games could also be exposed to liability as an accessory.

[18] This statute has been widely used as a catch-all for other types of illegal gambling:

In order to set chance-based endeavors apart from other contests that rest on the skill of participants, the Supreme Judicial Court adopted the "dominant factor test." The SJC has stated:

> Where the game contains elements both of chance and of skill, in order to render the laws against lotteries effectual to combat the evils at which they are aimed, it has been found necessary to draw a compromise line between the two elements, with the result that by the weight of authority a game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates.
>
> *Com. v. Lake*, 317 Mass. 264, 267 (1944); see also *Com. v. Plisner*, 295 Mass 457, 464 (1936).

Massachusetts cases evaluating the chance versus skill balance have looked at a number of different factors as set forth below:

In *Plisner*, the Court found that a machine where a player operated a toy crane to attempt to pick prizes was more chance than skill (and thus a lottery) where the players' only ability to manipulate the crane was to set the area where it would descend and where the player had no ability to influence the manner or strength by which the crane closed its claw on a potential prize. 295 Mass. at 244.

In *Com. v. Theatre Advertising Co., Inc.,* 286 Mass. 405, 410 (1934), the court found that a game called "Beano," consisting of a combination of darts and bingo, involved more chance than skill and thus constituted illegal gaming.

Over time, "lottery" has become used as shorthand for a wide variety of gambling practices deemed to be prohibited by the statute. Such practices extend significantly beyond the narrowest sense of the term (the sale of chances that a number selected by a player will match one chosen in a random drawing). Thus, for example, a pinball game with a cash prize has been viewed as a "lottery" within the meaning of the statute.

Com. v. Stewart-Johnson, 78 Mass. App. Ct. 592, 595, (2011), citing *Com. v. Macomber*, 333 Mass. 298 (1955).

Similarly, in *Lake* the court examined a machine that players would pay to use to attempt to win prizes. After paying, the player could press a button to cause a mechanical arm to swing out in an attempt to push various prizes into a hole in the center of a rotating circle. The defendant argued that the machine did not constitute a lottery where success was based on the skill of the player. The court reasoned that even if it was possible to become skilled enough in the machine to outweigh the chance involved that "in determining which element predominates, where the game is not one of pure skill or of pure chance, some courts have held, we think rightly, that it is permissible in appropriate instances to look beyond the bare mechanics of the game itself and to consider whether as actually played by the people who actually play it chance or skill is the prevailing factor." Id. at 925. Ultimately, the court explained that the determination of whether the game was more one of skill or chance was to be left to the jury.

In *U.S. v. Marder*, 48 F.3d 564 (1st Cir. 1995), the First Circuit examined the chance versus skill argument in the context of video poker machines while applying Massachusetts law. The court found that chance predominated and that the jury could lawfully find that the defendant was operating an illegal lottery despite recognizing that there was some skill involved in a player choosing which cards to discard from any given hand. The court identified a number of considerations as material to the dominant factor calculus, including: the short amount of time that players were permitted to play a hand, the relative lack of normal poker skills in play, the profit that the operator made and the fact that "there were a great many more losers than winners."

To date, no Massachusetts case has addressed whether season-long fantasy sports or DFS would constitute a "lottery" as in the examples set forth above. The cited cases all involved analyzing chance versus skill where the individual playing the game had a direct effect on the outcome of the game (i.e., personally operating a crane, choosing cards or throwing darts). These examples stand in contrast to DFS where the player's skill is exercised only in choosing the roster, as the player has no ability to control the final outcome of the sporting events. DFS operators have consistently argued that theirs is a skill-based game and that they possess studies to prove unequivocally that skill trumps chance in their contests. This position has been extensively argued in the recent filings in New York by both DraftKings and FanDuel, and it was a recurrent theme in the materials submitted to the Commission staff by counsel for DraftKings.

The dominant factor test reduces the exposure that DFS operators have under the lottery statute, but ultimately, if a criminal charge were brought, the decision as to liability would be a jury issue. While a DFS players' skill can significantly affect the outcome of the contests, the reality is that no one knows who wins or loses until the last game (the athletes in which are the subject of the DFS contest) is concluded. And no one participating in the contest has control over the athletes whose performance ultimately drive the outcome of the DFS matches.

3. Evolution of Perspectives on "Skill vs. Chance"

This discussion of lotteries emphasizes the legal distinction between games of skill and games of chance—a tortured distinction presently being debated and litigated across the country. The underlying premise of this distinction is the notion that for some reason "games" of "chance" are bad, while "games" of "skill" are not – or at least are less so.

The Commission suggests that it may be time to assess the significance of this distinction, and to consider eliminating it from the legal discussion of gaming or gambling legality.
While there have been many different rationales for opposing gambling, and while philosophers and religions have historically differed on the degree of disapproval, the dominant disapproval in the United States seems to have grown out of a largely Protestant,[19] than Puritan-imposed disapproval of earning something for nothing—of earning fortune by mere *chance*:

- "During the nineteenth century, morality arguments against gambling took center stage in the debate. Reformers pointed to gambling as an immoral activity engaged in by flouters of the Puritan work ethic, people who wanted to obtain something of value without contributing any work." "Regulatory Public Morals and Private Markets", Christine Hurst, Boston University Law Review, Vol 86.
- "Gambling, as a means of acquiring material gain *by chance* and at the neighbor's expense is a menace to personal character and social morality." United Methodist Church Book of Resolutions.

[19]"Some religious groups oppose all forms of gambling, continuing a tradition of moral criticism that has stemmed primarily from organized Protestantism (Weber; 1958. Downs et al, 1976; Ellison and Nyboten, 1999)." "Gambling Against the State," Cosgrove and Keassen, *Current Sociology*, September 2001, Vol. 49

- "Gambling is essentially the redistribution of a people's wealth according to *chance* rather than according to the receiver's contribution to society" American Baptist Convention, 1959.
- "Whatever encourages men to take from one another without giving value in return serves the cause of Satan. Gambling is a game *of chance* that takes without giving value in return. Gambling puts money or other things of value into a pool and then redistributes it on the basis of a roll of the dice, a spin of the wheel, or a drawing of a number. Nothing of value is produced in the process." "Gambling-Morally Wrong and Politically Unwise," Elder Dallin H. Oaks of the Quorum of Twelve, Church of Jesus Christ of the Latter-day Saints, January 1987.
  (Emphasis added.)

This profound disapproval of games of chance was woven into many state's laws and regulations, including Massachusetts, as seen in the discussion of lotteries above. A consequence of legislating this moral judgement has been the legal contortions of many forms of betting to demonstrate their reliance on skill, as opposed to chance. As Seth Stevenson wrote in *Slate*, on September 29, 2015, "The broader critique of daily fantasy betting is an older and more traditional one: that fantasy sports play is gambling, and gambling is bad. But the fact that some players consistently win demonstrates that if anything can be considered a game of skill – the technical loophole under which these forms of betting are considered legal—it's fantasy sports." Seth Stevenson, Think of the Children! The Moral Panic Over Fantasy Sports Betting is Misguided (Sept. 29, 2015), http://www.slate.com/articles/sports/sports_nut/2015/09/draftkings_and_fanduel_the_moral_panic_over_fantasy_sports_betting_is_misguided.html

This debate about skill versus chance is at the heart of the DraftKings – State of New York legal actions, and similar debates and lawsuits across the nation. In the Commission's judgment, it would be worthwhile for the Legislature to consider whether it is in the public interest for DFS to be exposed to the uncertain reach of the lottery statute, or to the "skill" versus "chance" distinction at all.[20]

[20] At the Commission's December 10th DFS forum, three national gambling law experts on a panel were asked to comment as to the difference, if any, between "sports betting" and DFS. Their responses varied, but there was consensus that while DFS is significantly more complex than conventional sports betting and that DFS is a "head-to-head" contest as opposed to a competition against "the house", the "connective tissue" binding the two were: (a) the payment of something of value; (b) with the payment made in the hope of winning a prize, and (c) the dependence of the award on the outcome of a sporting event or of the performance of athletes at such a sporting event over which the player had no control. The

B. Professional and Amateur Sports Protection Act (PASPA)

The federal statute that potentially presents the greatest constraint to state action to address DFS is the Professional and Amateur Sports Protection Act (PASPA) 28 U.S.C. § 3701 (1992). In simple layman's terms, PASPA makes illegal (except in a few grandfathered states) essentially any state action that makes sports or sports-related betting legal. Thus, at first glance, PASPA may constrain the Legislature from any legislation that directly or indirectly permits or regulates DFS, including the pending bill regarding the Lottery's entry into fantasy sports.

The following is a discussion of legal issues involved in the application of PASPA to state action. (PASPA is currently the subject of a challenge by the state of New Jersey pending in the Third Circuit Court of Appeals for an *en banc* review. Because of its pending status we do not discuss it here.[21] But its outcome, whenever that is, will likely further inform the Legislature's action on these issues.)

The most relevant section of PASPA with potential application to DFS states:

> It shall be unlawful for-
>
> (1) A governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact or
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), **on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games**.
>
> 28 U.S.C. § 3702 (emphasis added).

Commission agrees that substantial "connective tissue" exists between what indisputably is viewed as "gambling" and DFS. This is an additional reason for the Legislature's attention to the DFS issue.

[21] A limited discussion of the New Jersey – PASPA matter is included in Appendix A

Before PASPA can be applied to DFS it must be determined that DFS constitutes a "lottery, sweepstakes or other betting, gambling or wagering scheme based, directly or indirectly on … one or more performances of such athletes in such games." Thus, the first question to answer is whether DFS qualifies as a lottery, sweepstakes, betting, gambling or wagering scheme. Without getting into the details of the federal cases that have addressed what comprises such "schemes," the Commission believes that for reasons detailed in Appendix B, that DFS would be subject, as a threshold matter, to PASPA.

1. Is DFS "Based on" Athletic Contests or the Performances of Athletes in Such Contests?

After determining that DFS contests qualify as a "betting scheme," a reviewing court would next need to examine if they are "directly or indirectly" based on "one or more competitive games in which amateur or professional athletes compete, or are intended to participate, or on one or more performances of such athletes in such games." While DFS contests are not based on the actual results of any specific games, they are based on the performances of athletes. Specifically, the success of the individual athletes that make up a participant's team, when filtered through the scoring rubric set up by the DFS operator, will result in the win or loss of the participant. While a participant is not betting that a specific player achieve a particular milestone, such as scoring three touchdowns, that participant is betting that the aggregate performances of the individual athletes on his team will exceed the aggregate performance of the individual athletes on his opponents' teams. Simply stated, if there were no underlying athletic performances, there would be no DFS, thus the Commission believes a DFS contest would likely be found to be "based on" those performances.

2. Potential Limits on State Action Involving DFS

In the event that DFS is found to constitute a PASPA defined "scheme," "based on" athletic performances the analysis would next turn to the limits on state action concerning DFS. In relation to such a "scheme" under PASPA, a state cannot:

- sponsor
- operate
- advertise
- promote
- license, or
- authorize by law or compact

Critically, PASPA does not define these six verbs, which necessarily results in ambiguity in any statutory analysis, particularly with respect to the terms "promote" and "authorize." Actions which would constitute the other four verbs are more straightforward. The fact that PASPA prohibits a governmental entity "to sponsor, operate, advertise, promote, license or authorize **by law or compact**" may suggest that conflict would only arise when a state passes legislation or joins a compact that involves one of the six PASPA verbs.

Regulation (as distinct from legislative passage of a law) that does not involve affirmative authorization by law is a significantly more conservative approach that appears far less likely to directly conflict with PASPA and has already been initiated by our Attorney General. Further, "regulate" is not one of the PASPA verbs and thus is arguably permitted on the face of the statute, particularly where the regulations themselves do not establish a licensing or other heavy state oversight scheme.

Another method of avoiding the PASPA limitations may be to promulgate legislation that addresses the larger subject of Internet-based electronic gambling. While DFS would likely fall under the umbrella of such legislation, if the legislation does not specifically mention DFS, it runs less chance of any outright PASPA challenge.[22]

[22] The framework for such potential legislation is addressed in detail in the final section of this White Paper.

Under PASPA there are a limited number of entities that have an enforcement right, namely, a United States Attorney General, a professional sports organization or an amateur sports organization. Given the business relationships between many of the professional sports leagues and the DFS operators, it is extremely unlikely that any PASPA challenge would be asserted from that group. Similarly, given the relationships between the professional and amateur sports organizations[23], this position may trickle down and eliminate challenges from amateur groups. With respect to the United States Attorney General, both Kansas and Maryland have existing state laws legalizing fantasy sports, yet neither has been the subject of a PASPA challenge, thus begging the question if state action addressing DFS (directly or indirectly) will actually lead to any further legal challenges.

While there appears to be little appetite for further PASPA challenges by those provided with a right of action under the statute, the lack of significant court interpretation of the statute, the inherent vagueness of the statutory terms and the pending *en banc* review in the Third Circuit of New Jersey's most recent attempt to legalize sports betting, suggests a cautious approach to state action addressing DFS directly.

There is, however, an alternative approach for the Legislature to consider. Rather than trying to anticipate unfavorable outcomes, or trying to design Massachusetts public policy that accommodates a peculiar and vague federal statute, the Legislature might simply write legislation and regulations it believes appropriate for the people of Massachusetts, and let the other actors react as they see fit. Ultimately, clarification of federal law on this (and many other) aspects of gaming law will be required; clear and decisive state action may further that objective.

[23] An "amateur sports organization" under PASPA is defined in relevant part as "(A) a person or governmental entity that sponsors, organizes, schedules or conducts a competitive game in which one or more amateur athletes participate or (B) a league or association of persons or governmental entities described in subparagraph (A)." Notably, the interests of the amateur sports organizations and the professional leagues are not always aligned as demonstrated by the NCAA's request that DFS operators stop offering contests based on their college sports, thus leaving the NCAA as a potential wild card PASPA plaintiff.

C. Unlawful Internet Gaming Enforcement Act (UIGEA)

UIGEA is another federal statute that has been widely cited in conversations addressing the legality of DFS. It contains a carve out in the definition of "bet or wager" that exempts fantasy sports. UIGEA prohibits "gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law." The focus of the statute was the exploding online poker industry and its passage effectively eliminated online poker in the U.S. It is essentially an enforcement act dealing specifically with payment processing.

However, UIGEA also contains a critical "Rule of Construction" that explains: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." (emphasis added). This fact is conveniently ignored by DFS operators who frequently rely on the UIGEA carve-out as the basis for the purported legality of the games. Thus, UIGEA defers to any other federal or state law that prohibits or regulates gambling, including DFS. Despite the fact that UIGEA did not expressly legalize DFS and deferred to applicable state and federal law concerning gambling matters, some states have looked at its carve out language as a road map for state legislation. The Commission believes that such an approach is flawed and would likely result in significant problems with statutory interpretation. Since the Commission believes state law will supersede UIEGA, we do not discuss it further here. However, a more detailed analysis of UIEGA is found in Appendix C.

III. ISSUES REQUIRING REGULATION

Notwithstanding Massachusetts' unsettled legal territory with respect to DFS and the potential limitations on state regulatory actions presented by PASPA, any suggestion to regulate DFS in Massachusetts benefits from an analysis of both the rationale for regulation, and the specific issues to regulate. This section will address some of the fundamental questions pertaining to the need for regulation, identify the critical public policy issues posed by DFS, and suggest the relative merits of possible approaches. Specific suggestions regarding the framework of a regulatory approach will appear later in this Paper.

A. Rationale for Regulation

The Gaming Commission believes that the issue of "whether to regulate DFS" is largely settled.

After several years of a largely laissez-faire environment, there is a growing consensus amongst regulators, industry analysts and the DFS industry itself that some form of regulation is necessary not only to protect the interest of DFS players, but also to provide some clear guidelines and predictability to DFS operators. The confluence of the media "blitzkrieg" waged by the two DFS industry leaders this summer and the insider information concerns widely reported in October 2015 cast the industry in a new light in the public's eye, and provided a precipitating event for a broad discourse on issues that had been heretofore under-examined. Concerns regarding the potential for fraud and collusion, questions surrounding the fairness of the competitions, and a lack of clear consumer protections all pointed to the need for some effort – whether regulatory or otherwise – to provide the general public with the assurance that they could trust the industry and the integrity of the competitions. While there is an ongoing effort by the Fantasy Sports Trade Association (FSTA) to implement a regime of self-regulation, the momentum on the issue has shifted significantly to a perspective recognizing the necessity for government regulation, exemplified by FanDuel CEO Nigel Eccles' stated position that "now is the time to memorialize them [regulations] in law". While cautious of the potential breadth of regulations, and fearful of a patchwork implementation across the country, the other major DFS operators have all publicly recognized the need for government regulation to provide security to customers and operators alike. The majority of the debate in this area continues to focus on the form and extent of a future potential regulatory environment.

In the past, legislators and regulators typically approached the issue of gaming legality by asking the question, "is it gambling?" and often "is it a game of skill or a game of chance?" As discussed above, much of this analysis has been a residue of moral judgements initially asserted hundreds of years ago, and carried forward in many religious and ethical constructs, and the definitions of "gambling," "skill" and "chance" have often been unclear at best. Even with these religious and ethical disapprovals, however, gambling of one sort or another—especially lotteries—has been approved and utilized by government jurisdictions and other institutions as a means of raising revenues and providing entertainment since at least the beginning of this Republic.[24] And much more recently, the Legislature and the people of Massachusetts have emphatically endorsed many forms of gambling by way of the legalization of the Lottery and casinos.

We are left now with a public policy position that seems to assert that gambling is bad/illegal, except when it is not. And what makes gambling not bad/illegal is when the Legislature authorizes a regulatory framework and a public purpose for a particular kind of gambling. Generally speaking, we have largely come to accept gambling as a legitimate form of economic activity, entertainment and public or philanthropic revenue generation (even within the religious community) – under certain regulatory conditions.

Perhaps, as a consequence of profound changes in public values and public policy, the challenge for the Legislature about DFS and other Internet-based gaming, is to define gambling clearly and carefully. For example, the Legislature might use this definition: "Is this economic activity characterized by a payment by a player for an opportunity to win an award based on the outcome of a future event, which is not otherwise regulated?"

The Commonwealth routinely regulates most economic activity, at some level of intensity, looking into the nature of that activity to determine whether and how to regulate. In this case, it may be helpful to define in law the specific features that might be considered gambling, to serve as the tripwire for a greater than normal degree of regulation. If the proposed economic activity has these defining features, it will be considered gambling, and then the checkered history of gambling, the

[24] The Gaming Commission has a copy of a "Massachusetts Lottery" ticket from May 1758, the owner of which "shall be entitled to any prize drawn against said Number, in a LOTTERY granted by an Act of the General Court of the Province before said, in April 1758, towards supplying the Treasury with a Sum of Money for the intended Expedition against Canada, Subject to no Deduction."

continuing public ambivalence about gambling activities, and long established public policy, suggest a number of key topic areas that may require regulatory consideration.

B. Identifying Issues that Require Regulatory Consideration

Acting on the invitation of the Legislature and the Governor, the Massachusetts Gaming Commission (MGC) has attempted to help advance the Commonwealth's understanding of the public policy issues surrounding DFS. The MGC's efforts were conducted in conjunction with the Massachusetts Attorney General's Office, as Attorney General Healey promulgated first-of-their-kind consumer protection regulations regarding DFS. The MGC has leveraged its growing regulatory experience and expertise to provide an independent perspective on the issues. In addition, the MGC convened industry representatives and experts to discuss the state of the industry, identify public policy issues, and consider possible remedies to these issues. The MGC's fact-finding culminated in a public Educational Forum on DFS, which included representatives from DraftKings and FanDuel – the two largest DFS operators – along with industry thought leaders, regulators (including representatives of the Attorney General's Office), and experts on technical standards in online gaming. The discussion below presents a distilled understanding of the public policy issues presented by DFS as identified throughout this process. It is worth noting that this list closely mirrors the issues addressed in the Attorney General's proposed regulations as well as a number of other emerging frameworks, including the National Council on Problem Gambling Fantasy Sports Consumer Protection Guidelines (issued in conjunction with a DFS operator, DraftDay). This indicates that just as regulators, industry experts and DFS operators have moved toward a consensus regarding the *need* for regulation, so too has a consensus begun to coalesce around the issues that need to be addressed.

The following issues and potential remedies are presented as a starting point for consideration when evaluating the appropriate regulatory schema. To simplify analysis, these issues are presented in the table below across five, broad policy areas:

Know your Customer: Ensuring that players are of legal age and are playing in a jurisdiction where DFS play is allowed. Ensuring that DFS operators can uniquely and accurately identify each and every DFS player.

DFS Player Protection: Ensuring that players' funds are properly protected, and that players understand the nature of the games, the risks involved and have access to tools and resources if they feel they have a problem.

Technical Security: Ensuring that the wealth of personal information regarding players is protected, the system cannot be manipulated to any player's advantage, and all user activity data is retained for auditing and research purposes.

Suitability and Licensure: Ensuring that regulators know the principals involved in DFS operations, and that there is a level of investment that increases the costs of non-compliance.

Impact on Real-World Sports: Ensuring that the relationship between DFS and the sports for which it provides contests does not adversely affect the perception (or reality) of fair play.

Please note that as stated in the table, the "Potential Risks" are not a statement of fact, but rather statement of risk that could exist. In discussion with the industry, the MGC has learned that many of these issues are being addressed, or have already been addressed. However, until such time as this is challenged or verified by a regulator or other governmental authority, these remain – for the sake of discussion – open issues.

DFS Issues of Concern

Policy Area	Issue	Potential Risk	Potential Remedy
"Know Your Customer"	Age Verification	• Underage players participate	• Ensure use of verified technology solutions (including 3rd party verifiers)
	Identity Verification	• Operators cannot accurately and uniquely identify players • Operators cannot limit users' ability to create multiple accounts • Operators cannot track unique users' gaming activity on site	• Ensure use of verified technology solutions (including 3rd party verifiers)
	Location Verification	• Players from restricted or excluded jurisdictions participate	• Ensure use of verified technology solutions (including 3rd party verifiers)
DFS Player Protection	Funds Protection	• Player deposits not protected • Player "bonus" funds are not protected • Unauthorized funds withdrawals • Commingling of operational and player-deposited funds • Players unable to access deposited funds upon demand	• Require monitoring to ensure segregation of deposited/operational funds • Require outside financial guarantees in case of failure
	Transparency	• Playing field not level due to unfair information disparities (insider information) • Playing field not level due to selective use of software tools "scripts" to automate tasks • Winners not transparent • Odds are not clear	• Prohibit play by individuals with access to insider information • Ensure that tools are equally available to all players • Require clear identification of winners • Require 3rd party validation of information

Policy Area	Issue	Potential Risk	Potential Remedy
		• Player pools not constructed fairly (i.e. "Sharks" vs. "Minnows")	presented to players • Require clear/comprehensible disclosure of odds (where possible) • Limit number of entries • Require release of raw, anonymous player data (no Personally Identifying Information) for 3rd party aggregation and analysis • Limit ability to enter certain contests based on past performance (i.e. tiered contests based on past success)
	Responsible Gaming	• Players cannot control their play • Players lose money and chase losses • Players do not perceive DFS as "gambling"	• Require clear/ comprehensible disclosure of odds (where possible) • Require information on game rules and expected payouts for contests • Require ability to self-exclude • Require informed choice options • Require ability to set limits on play • Require staff training on spotting and addressing problem gaming • Require reference to problem gaming resources
Technical Security	Network Security	• User data not protected • Contests artificially manipulated	• Enforce existing data security laws • Require regular information security audits

Policy Area	Issue	Potential Risk	Potential Remedy
			• Require 3rd party penetration testing
	Forensic Accounting/Anti-Money Laundering	• Operators cannot account for individual users' activity to check for suspicious/illegal behavior including money laundering	• Require retention of user activity audit data • Leverage existing work of payment processors
Suitability and Licensure	Operator Suitability	• Principals involved in DFS operations are largely unknown to regulators • Lack of investment in license fee and absence of suitability investigation increases risk of non-compliance by operator	• Create licensing schema to include DFS Operators • Create definition of "suitability"
Impact on Real-World Sports	Insider Information – Team	• Playing field not level due to unfair information disparities (insider information)	• Require DFS operators to exclude play by employees and athletes of participating sports teams.
	Insider Information – DFS Companies	• Playing field not level due to unfair information disparities (insider information)	• Require DFS operators to exclude play by employees.
	Game and Athlete Integrity	• Game and athlete integrity is questioned if athletes allowed to participate in DFS contests	• Prohibit athletes and league personnel from playing

Another way for the Legislature to consider issues that might require regulatory attention is to draw on its past experience in establishing regulatory parameters for other gaming initiatives in the Commonwealth – casinos, Lottery, and horse racing. Although they are all organized somewhat differently, the following list of regulatory principles embedded in current statutes and the Attorney General's proposed regulations are quite similar in scope to those enumerated in the chart above.

REGULATORY PRINCIPLES EMBEDDED
IN CURRENT STATUTES (Chapters/Section) & REGULATIONS

1. **Oversight by regulatory body**
    a. Lottery: Ch. 10/§23, §24
    b. Racing: Ch. 128A/§9
    c. Casino: Ch. 23K/§3, §69, §70
2. **Consumer protection**
    a. Broad gov't authority over games, payouts and accounting
        i. Lottery: Ch. 10/§24
        ii. Racing: Ch. 128A/§5, §5C, §9; §128C
        iii. Casino: Ch. 23K/§4, §5, §35, §36
    b. Disclosure of odds
        i. Lottery: Ch. 10/§24A
    c. Minimum age
        i. Lottery: Ch. 10/§29
        ii. Racing: Ch. 128A/§10
        iii. DFS: 940 CMR 34.04, 06 (Proposed)
        iv. Casino: Ch. 23K/§25, §54
    d. Security of deposits
        i. DFS: 940 CMR 34.05 (Proposed)
    e. Content of Advertising
        i. DFS: 940 CMR 34.07, 09 (Proposed)
    f. Use of non-public information
        i. DFS: 940 CMR 34.12 (Proposed)
    g. Grouping by skill level
        i. DFS: 940 CMR 34.06, 12 (Proposed)
    h. Assuring integrity of gaming devices
        i. Casino: Ch. 23K/§66
3. **Prevention of criminal or other undesirable conduct**
    a. Licensing & registration
        i. Lottery: Ch. 10/§27
        ii. Racing: Ch. 128A/§2, §3, §11, §11C
        iii. Casino: Ch. 23K/§9, §12-16, §30-33
    b. Focus on Organized crime
        i. Lottery: Ch. 10/§24
    c. Power to exclude patrons and others
        i. Racing: Ch. 128A/§10A
    d. Law enforcement powers
        i. Casino: Ch. 23K/§6, §35, §37-44
    e. Prohibited campaign contributions
        i. Casino: Ch. 23K/§46, §47
    f. Research consequences
        i. Casino: Ch. 23K/§58, §71

4. **Revenue generation for dedicated purposes**
    a. Cities and towns
        i. Lottery: Ch. 10/§25, §35
        ii. Racing: Ch. 128A/§5
    b. Other specified beneficiaries
        i. Lottery: Ch. 10/§57
        ii. Racing: Ch. 128A/§5
        iii. Casino: Ch. 23K/§53-64
    c. Ensuring integrity of revenue stream
        i. Casino: Ch. 23K/§25, §65
5. **Mitigation**
    a. Adverse Community impacts
        i. Casino: Ch. 23K/§17, §18
    b. Problem gambling prevention
        i. Lottery: Ch. 10/§24A
        ii. DFS: 940 CMR 34.10, 11 (Proposed)
        iii. Casino: Ch. 23K/§26, §27, §28, §45
    c. Horse health support (Tufts): Ch. 128A/§5
    d. Child support
        i. Lottery: Ch. 10/§28A
        ii. Casino: Ch. 23K/§51, §52
    e. Prevention of cannibalization
        i. Lottery: Ch. 10/§27
        ii. Casino: Ch. 23K/§18
6. **Job creation/economic development**
    a. Lottery: Ch. 10/§27
    b. Racing: Ch. 128A/§5
    c. Casino: Ch. 23K/§10, §11, §18
7. **Self sustaining regulatory body**
    a. Lottery: Ch. 10/§25
    b. Racing: Ch. 128A/§5B
    c. Casino: Ch. 23K/§56

IV. CONSIDERING A REGULATORY MODEL

Once the Legislature has determined whether and how the issues identified above need regulatory attention, it will need to turn to the question of what form of regulation is appropriate.

Regardless of the exact regulatory approach adopted, the intent of any form of regulation should be to remedy either the potential dangers to consumers or the negative externalities of the industry, not to artificially or needlessly constrain the industry. An effective regulatory schema (like the draft regulations proposed by the Massachusetts Attorney General) should provide measured "tools" for regulators to use to either (1) promote a public good, or (2) mitigate a potential risk. As such, any analysis of a proposed regulatory approach must begin with an understanding of the issues and risks at hand; next consider potential tools to address these issues; and finally weigh options for how to effectuate those regulatory tools in such a manner that clearly connects the public interest being served with the burden being imposed.[25] Finally, in this particular case, given the nascent nature of the DFS industry and its likely, but unpredictable evolution, the issues examined should be fundamental in nature (broadly defined) so as not to confine the analysis to the games as they currently exist, but rather to identify and anticipate the universal public policy issues of concern both now and in the future.

There are multiple regulatory models that could be employed to address the issues outlined above. The Attorney General's proposed regulations consider most of the important issues of concern and provide consumers with a powerful tool to address their concerns and grievances. This tool, however, necessitates that an aggrieved consumer or law enforcement agency seek remedy which for many may be too costly or time consuming to pursue, and which in any case provides only a very random and reactive method of enforcement. An appropriately robust regulatory structure should consider how to work in concert with the Attorney General's proposed consumer protection regulations to address these same concerns prospectively, so that issues are detected and addressed, or avoided altogether without the need for consumer action.

[25] This is a sentiment that was echoed several times throughout the December 10, 2015 DFS Educational Forum, best summarized by Kevin Mullally, Vice President of Government Relations and General Counsel for Gaming Laboratories International, LLC who said, "I firmly believe that when you start looking at an activity that you deem worthy of regulation that for every requirement you should have a specific public policy objective. You should be able to very distinctly and specifically …identify what risk you're trying to mitigate or what public benefit you are trying to advance and make it proportional to the risk."

Such a model would require a body or an agency to promulgate regulations, monitor compliance, enforce corrective action and continuously work with the DFS operators to ensure the proper functioning – from a regulatory perspective – of the industry. Still, given this goal, there remains a spectrum of possible approaches, ranging from the "heavy" regulatory environment imposed upon the brick-and-mortar casino industry, to a "light" regulatory schema that accepts increased levels of risk and limits both the requirements placed on industry and the resultant compliance monitoring.

A "heavy" casino-style approach should be examined, but any examination should be mindful of the potential financial burden on an industry that has yet to prove profitable over time. Additionally, consideration should be given to the fact that brick-and-mortar casino regulations originated in an environment replete with criminal involvement and subsequently developed over time to address risks that were repeatedly disclosed. This template for traditional casino regulation is now well established and provides less flexibility to regulatory bodies, as the risks are well documented and the approaches largely harmonized across jurisdictions.

DFS is a virtual business in nature and has a small-to-nonexistent physical footprint in a given jurisdiction. This consideration, along with the fact that DFS outsources much of its risk dealing with money and customers to third party payment processors, eliminates some of the concerns surrounding traditional casinos. A "light" regulatory schema with more discretion afforded to the regulatory body to make judgement calls might make sense in that it may provide the necessary flexibility to address both evolving technology and evolving issues given the contemplative pace of legislative change. Additionally, given the data-driven nature of DFS, there are opportunities to employ hands-off, big-data style approaches to regulation analogous to Central Monitoring Systems used to monitor slot machine activity in traditional casinos. Such systems offer comprehensive oversight with little to no hands-on or physical regulation.

In considering the appropriate kind of regulatory scheme for DFS and other on-line gaming, certain principles are worth bearing in mind:

- The scheme must be commercially viable
- The scheme must be technologically feasible
- The scheme should attempt to balance the "problem solved" with the "cost increased"
- The scheme should be "risk-based," balancing the risk and seriousness of the problem with the cost and imposition of the solution

Whatever the outcome, careful thought should be afforded to the design of the regulatory approach, as many other jurisdictions may look to the first successful model for guidance, and the DFS industry's desire for a consistent regulatory approach will remove barriers to implementing a "smart" model. Further discussion of this proposal is found in Section VI: An Omnibus Regulatory Approach to Internet Gaming.

V. THE PROFILERATION OF INTERNET GAMING

The discussion thus far has focused primarily on DFS and the considerations surrounding the availability of that form of Internet activity in the Commonwealth. This focus is appropriate because the rapid expansion of DFS and the uncertain legal environment in which it operates demand immediate and careful consideration. At the same time, however, DFS is only one form of Internet gaming activity that the Commonwealth is likely to encounter in both the near and long term.

Internet gaming opportunities are abundant today and will almost certainly grow quickly. Those opportunities were discussed at length in an October 26, 2015, memorandum entitled "Internet Gambling" that is posted on the Commission's website at http://massgaming.com/wp-content/uploads/Internet-Gaming-Memorandum-10-26-15.pdf. In summary, although only Delaware, New Jersey and Nevada currently permit Internet gambling, Internet gambling here and abroad, legal and illegal, is a huge enterprise. As reported in a recently completed study commissioned by the American Gaming Association, an enormous amount of illegal Internet gambling opportunities are available in the United States. Indeed, their widespread availability, the risk to bettors they pose and the loss of tax revenue they create have been used as arguments for permitting state created and controlled Internet gambling opportunities in the United States and elsewhere. Outside of the United States, including Europe, there is an enormous amount of legal and highly regulated Internet gambling activity.

Internet gaming or gaming-like economic activity falls into one or more of six broad categories.

A. Casino Games

At present, three states currently allow casino-type Internet gaming. New Jersey and Delaware, two of the three states where Internet gambling is permitted, allow participants to play virtual slot machines as well as virtual table games including craps, poker and blackjack. Participants must be physically located within the New Jersey or Delaware boarders and their presence within those boundaries is assured by sophisticated software. Age limits also apply. Both states use age verification protocols in which they have a high degree of confidence, though it is always possible for a participant of the proper age to allow an underage person to play Internet games using the participant's name and bank account. Gaming activity in both states is principally governed by state

law and regulations, though some federal law is applicable and is described in the memorandum mentioned above.

Nevada, the third state where Internet gambling is allowed, only permits Internet poker. Nevada has entered a compact with Delaware so that Nevada players can play poker at Delaware sites and vice versa. Again, Nevada players must be physically located in Nevada in order to play and Nevada uses age verification protocols for all participants

In addition to those three states, ten others – Pennsylvania, Alabama, Iowa, California, Connecticut, Illinois, New York, Pennsylvania, Rhode Island, Texas and Washington – have considered authorizing Internet play. Thus far, none has done so. In the spring of this year, it appeared that Pennsylvania would very likely have Internet gaming before the end of the year but the legislative session expired before any of the pending measures were enacted and a renewed discussion late in the year likewise failed to produce authorizing legislation. Illinois is in the middle of a very serious budget crunch and that may cause legislators to push forward with thus far unsuccessful efforts.

Here in Massachusetts, two Internet gaming bills were filed last session but neither made it out of committee. This year, three bills are pending, two of which deal with the Lottery. The first, S151, was introduced by Sen. Flanagan and referred to the Joint Committee on Consumer Protection and Licensure. That bill would authorize the Lottery to offer online "lottery" games and would allow the Lottery to decide what those games look like. Last term a similar bill died in committee. A hearing on S151 was scheduled for September 15 but the Bill has not yet been reported out of Committee. The second of the two is S191, which was introduced by Sen. Rush and also referred to the Joint Committee on Consumer Protection and Professional Licensure. That bill would authorize and direct the Lottery "to implement online games of skill, including, but not limited to, fantasy sports, so-called, poker, so-called, and other games of skill, subject to the provisions of, and preempted and superseded by, any applicable federal law." That bill has not been reported out of Committee.

The final bill is S241. Introduced by Sen. Tarr, that bill would authorize any Massachusetts Category One or Two gaming licensee to conduct gaming operations on the Internet under rules and regulations the Gaming Commission promulgates provided that "such operations do not include or reflect gaming mechanisms operated by the state lottery program o[r] those simulating or resembling slot machines." The bill was referred to the Joint Committee on Economic Development

and Emerging Technologies. The Committee held a hearing on the bill on November 10, 2015 but the bill has not been reported out.

B. Sports Betting

A second well-established form of Internet gambling involves betting on sports. Primarily four sports -- horse racing, professional sports, fantasy sports and, now, eSports – are involved. While a wide variety of sports betting is available outside the United States, most sports betting is illegal here. Nevertheless, illegal sports betting in the United States involves hundreds of millions of dollars, a fact that underlies at least some of the pressure to legalize and regulate all of the betting activity.

Of the four, horse racing is probably the most well-entrenched. Federal law permits state regulated horse racing and interstate off-track betting. As a result, betting is available on a number of Internet sites. Bettors can wager on races at hundreds of tracks throughout the world on desktop and mobile devices as well as at off-track betting sites. On the Internet, the bettor makes a deposit at the site, virtually goes to the track of his or her choice and places a bet out of the amount he or she has on deposit. If the bettor picks a winner, the winnings are deposited into the bettor's account. All sites contain some handicapping information but stand-alone programs also provide handicapping information, some for free and, in much more detail, some by paid subscription.

Betting on professional and collegiate sports is prohibited by federal law except in Nevada, Delaware, Montana and Oregon, which were exempted from the federal ban because they permitted sports betting when PASPA was enacted. Nevada permits sports betting through licensed bookmakers at physical locations and online, Delaware permits a "parlay" form of sports betting and the other two states do not permit any betting on any sport. Several years ago, New Jersey enacted legislation designed to allow sports betting in a manner that legislators believed was consistent with what they saw as the terms of the federal ban. Major league baseball, football and hockey along with the NCAA challenged the New Jersey legislation in federal court and the suit is now before the United States Court of Appeals for the Third Circuit sitting *en banc*. A New Jersey victory in the suit would likely provide a foundation for other states to undertake a similar approach, one that might well include intrastate betting via the Internet.

Fantasy sports is the newest, hottest and now most controversial offering in the sports betting area and has been explored thoroughly in earlier portions of this Paper.

C. eSports

The Wikipedia description of eSports accurately and succinctly describes eSports as "organized multiplayer video game competitions, particularly between professional players. The most common video game genres associated with electronic sports are real-time strategy, fighting, first-person shooter, and multiplayer online battle arena. Tournaments . . . provide both live broadcasts of the competition, and cash prizes to competitors."

At present, eSports competitions are viewed over the Internet and at live performances in large capacity auditoriums. One of the largest Internet eSports sites announced last June that it was broadcasting an average of 1.5 million games per month to an average worldwide audience of 100 million monthly viewers. Indeed, Sports Illustrated recently reported that in 2014, 27 million worldwide fans watched an eSports world championship match between teams from South Korea and China. That audience was more than the 23.5 million who watched the clinching games of last year's World Series or the 17.9 million who watched the final game of the NBA playoffs. Recognizing the size of the audience and the popularity of the games, Turner Broadcasting Company recently announced that it plans to run two 10 week tournaments in 2016 with a live broadcast of a contest on TBS stations throughout the country each Friday night during those 10 week periods.

D. Social Gaming

Running parallel to real money gambling is a form of entertainment known as social gaming. That label stems from the fact that Facebook has historically been the gateway to many of the most popular games. Today, however, the label now applies to all forms of Internet gaming in which prizes remain in the game and cannot be redeemed either for real money or for other tangible rewards.

Some of the games bear no resemblance to casino games. Nevertheless, games that resemble casino games today proliferate. Virtually all of the games, casino and other, use the "freemium" model in which new players receive an initial amount of play money for free and can purchase more when

that supply is exhausted. The vast majority of the games do not offer any tangible rewards for successful play or any ability to convert the play money into real money or other things of value. Some, however, link success on the social gaming site to some form of recognition, tangible or otherwise, when the player visits a brick-and-mortar casino facility with which the social site is affiliated. Currently, social gaming is a big business. Some estimates suggest that worldwide social gaming revenues will approach $30 billion in 2015, though that includes all forms of social games, not just those that resemble games available in casinos.

E. Skill Based Games

In addition to the games just described, some sites offer what appear to be true games of skill in which one can play against an opponent for real money. Games of skill are those in which dexterity, problem-solving ability or other player attributes have a far greater role than chance in determining the outcome of the game. One company, for example, offers very realistic bowling and darts games that a participant can play on a mobile device either alone for free or in competition for real money with another player. Nevertheless, each contains some elements that may not be visible to the player. In the bowling game, for example, elements of chance such as pin placement, the algorithm that determines which pins fall when the ball strikes, the skill of the opponent, the role played by the "oil" on the lane or other game elements likely affect at least some part of the play.

Currently, casino operators and slot machine manufacturers are exploring the extent to which skill based games should replace at least some of the more familiar slot machines on casino floors. Nevada will likely set the standard for the new games and machines, at least for the immediate future and has already drafted regulations on the subject. (And in Massachusetts, the Gaming Commission is considering regulations that would make skill based slot machines acceptable in Massachusetts casinos.) It will be important to watch Nevada developments because some, and perhaps most, of those games can migrate easily to the Internet or already exist on the Internet as social games and can migrate to the gaming floor.

F. Prediction markets

Prediction markets are another area of Internet activity that involves investment and return based on the outcome of a future event. Essentially, prediction markets contain a series of questions, typically though not exclusively questions that can be answered "yes" or "no," that have been prepared by the market sponsor or host. The market allows individuals to buy "shares" of a "yes" or "no" answer to those questions. All shares have an ultimate value of $1.00. Individuals buy "yes" or "no" shares based on their assessment of the likelihood that the event will or will not occur. The market matches purchasers of "yes" shares with purchasers of "no" shares and vice versa. The market determines the price of the shares based on its collective judgment about the likelihood of the event's occurrence. For example if the question were "will Candidate X win the upcoming gubernatorial election" and the market concluded that it was just as likely that Candidate X would win as it was the he or she would lose, the price for both "yes" and "no" shares would be $.50. If the market determined that Candidate X only had a 30% chance of winning the election, then "yes" shares would cost $.30, "no" shares would cost $.70. After the event, be it the election or some other event occurs, the shareholder who holds shares matching the actual outcome collects $1.00 (typically minus a 10% transaction cost taken by the operator) and the person who holds the non-matching shares collects nothing. The market also permits shareholders to sell their shares as the market price for them changes, thus allowing a shareholder to cut losses or preserve gains before the event occurs.

At present, two companies host prediction markets of the type just described. The first is called Predictit, and is run by the University of Wellington in New Zealand assisted by a company called Aristotle International, Inc., a well-known Washington DC provider of technological and other assistance to political and public affairs campaigns. At the Predictit site, $850 is the maximum amount an individual is permitted to invest in the shares of any single question. The other site is called IEM, which is an acronym Iowa Electronic Market, and is hosted by the University of Iowa. There, $500 is the maximum amount an individual is permitted to have in his or her investment account at any one time. Both Predictit and IEM have received "no action" letters from the Commodities Futures Trading Commission and are otherwise unregulated. A third site, called Predictwise, does not allow monetary investments but instead aggregates answers to questions in real time and displays the aggregate answer in constantly updated graphics.

VI. AN OMNIBUS REGULATORY APPROACH TO INTERNET GAMING

Internet gaming (also referred to as “online” or “remote” gaming) offers a dizzying and constantly expanding variety of games. Any new regulatory effort for just one of these games will surely beg the question of how to handle the others. A regulatory strategy that is broad enough and flexible enough to adapt to any and all of these proliferating games may be worth serious consideration.

All of the Internet activity just described as well as activity that is sure to come shares common characteristics. The activities are innovative and rapidly deployed. When combined, innovation and speedy deployment make it difficult to determine quickly whether and to what extent the activities pose risks to the public and to decide who is responsible for making that determination. If policymakers decide that an activity does pose risks, it can be difficult to determine whether the risks are of sufficient magnitude to require a new legislative framework or whether new regulations or other oversight by an existing regulatory body suffices. Because the activities can be and frequently are modified quickly, whatever decisions are made at the outset about the need for regulation may require frequent revisiting. Given the dynamic nature of the Internet, the public appetite for Internet games and gaming, the creative energies and talents of game creators, and the low barriers to entry of new games and approaches to gaming, those difficulties are likely to accelerate in the years ahead.

As recent history and litigation demonstrate, it is not enough – indeed, it is frequently not fruitful – simply to ask whether a new form of Internet activity involving payment of money for future rewards constitutes "gambling". Given the complexity of the Commonwealth’s gambling statutes, the answer to that question in any given case may not be clear, as we have discussed at length in an earlier portion of this Paper. While an activity that combines price, prize and chance often looks like gambling, Massachusetts law is not always clear on which gambling-like activities are legal and which are not. As previously discussed, "chance" and the role chance plays in determining a given outcome can vary widely from activity to activity. Moreover, the answer to the “is it gambling” question does not necessarily determine whether it is good public policy to prohibit the activity nor does it determine the nature and kind of regulation appropriate for the activity if it is permitted.

The real question, then, is how to determine whether a new Internet activity involving payment of money in return for future rewards ought to be regulated and, if so, how and by whom. Not all such

activity necessarily requires regulation. Even when regulation is required, regulations and the regulatory framework must be of the right size, i.e., neither so onerous that it stifles positive economic activity nor so lax that it fails to protect the public interest.

Basically there are three legislative approaches to determining the nature and type of appropriate regulation and the identity of the appropriate regulators:

A. The "Chapter 23K" Approach

First, the Legislature could examine each new activity or category of activity, decide whether and to what extent it should be regulated and, if new regulations are required, create a legislative framework within which that regulation will occur as it did with casino gambling in Chapter 23K. The difficulty with this approach stems from the inherent nature of the legislative process, a process that is deliberative, careful, consensus-based and thoroughly debated - such as the process that produced the expanded gaming legislation. Those characteristics give the process an enormous strength. But those characteristics may pose obstacles to a rapid response to new Internet developments that may be required to mitigate quickly the public dangers innovative Internet activity can present. Moreover, those characteristic may make it difficult to respond with appropriate speed to fundamental changes in that activity after a regulatory framework is initially deployed.

B. The "Leave It Alone" Approach

A second approach is for the Legislature simply to allow existing branches of government, including the administrative agencies they contain, to determine whether a new Internet activity involves some element or elements falling within their existing regulatory authority. This approach has the benefit of drawing on the expertise many agencies currently possess. Nevertheless, it has the drawback of requiring the agencies, perhaps at the state, regional and local levels, to decide what portions of the new activity fall within their regulatory authority and then how that authority should be exercised. Although the Attorney General's proposed DFS regulations demonstrate that existing law can be utilized to adapt to new gaming innovations, earlier comments have suggested that consumer protection regulations alone may be inadequate to the regulatory need. And in a balkanized environment of that sort, decision-making may lag far behind the activity itself. In

addition, more than one agency—or perhaps no agency— may legitimately feel that it has at least some responsibility for regulating the activity, leading to the possibility of regulatory efforts that either work at cross purposes, even as regulators of competence and good faith seek to avoid that result, or fail altogether.

C. The Omnibus Regulatory Approach

A third approach is for the Legislature to recognize that because Internet gaming activity is unique, quickly deployed and highly malleable, regulation ought to be reposed in a single, nimble Internet gaming regulatory body. This approach would require new legislation, but the regulatory body could be one that currently exists or one that the Legislature creates. Such omnibus on-line gaming regulatory legislation would establish the Commonwealth's overriding public policy objectives and regulatory principles, presumably including the principles embodied in existing horse racing, gaming and lottery legislation, and enumerated previously in Section III. Minimally, such legislation would direct that organized crime and individuals with criminal backgrounds have no operational control over the gaming activity, that players are protected from unfair or deceptive practices when they engage in the gaming activity, that operators of the activity take appropriate steps to mitigate the adverse consequences the activity may produce, and that the activity produces economic benefits for Massachusetts. The economic benefits may come through taxation of the activity at a rate the Legislature determines but also through encouragement of Massachusetts job creation and economic development.

If such an omnibus online gaming regulatory body were created, it would be important to give it jurisdiction also over all Internet-based (or "online" or "remote") economic activity in which a person stakes or risks something of value on the outcome of a future event, whether that outcome is dependent on chance, the individual's skill or a combination of both. So formulated, the regulatory body's jurisdiction would be broad enough to invest it with the power to look at all Internet gaming activity, determine whether any form of regulation of that activity is necessary and, if it is, create "right-sized" regulations to deal with it, pursuant to the public policy objectives and regulatory principles in the Legislature-promulgated enabling legislation. With that broad mandate, the agency would inevitably keep itself abreast of developments in the Internet gaming industry and develop a body of expertise allowing it to decide quickly the kinds of dangers the new activity posed or presented and impose the measures tightly tailored to preventing those dangers.

To be sure, an agency with a broad mandate of that kind and description would have considerable power to affect what could become a broad swath of economic activity on the Internet. Accordingly, legislative oversight, even if in arrears, would be highly desirable. To that end the agency could be required to file quarterly reports, engage in periodic briefings of legislative committees or even, as in the case of horse racing regulations, be required to deliver proposed regulations to the Legislature and delay implementation for a period of time while legislators pondered their potential impact. In any event, an Internet regulatory body with that kind of a broad mandate and developed expertise would be prepared to provide the Legislature and the citizens of Massachusetts with informed regulatory measures, promptly, economically, and thoughtfully, to avoid palpable dangers while promoting economic growth in a dynamic arena.

VII. CONCLUDING THOUGHTS

There remain a couple of important issues the Legislature will likely consider as it addresses the issue of DFS and online gaming, which we refer to in the body of this Paper only tangentially. The first is taxation—the issue of whether and how to impose extraordinary taxes on one or more of these new gaming approaches. This is an issue solely for deliberation by the Legislature. The Commission notes only that legal gambling is typically subjected to extraordinary tax rates, both when there are very high profit margins (casinos) or when the gaming is barely profitable (pari-mutuel betting on horse racing); that these taxes are typically assessed on gross revenues, rather than profits; and that such gross revenue taxes can be an impediment to viability for new and innovative gaming companies.

The second issue is one-time licensing fees dedicated to a public purpose. Again, this is effectively a tax issue, in the sole discretion of the Legislature. The Commission notes only that significant license fees can serve as a way to limit participation to serious (or at least well-heeled) operators and developers; that such license fees can serve to enhance operator compliance with laws and regulations, since it gives the operator meaningful "skin-in-the-game;" and that such fees can be an impediment to viability for new and innovative gaming companies.

The Commission hopes to have made clear in this Paper that there is some urgency for the Legislature to address the issue of DFS. Unsettled Massachusetts law and piecemeal regulation make playing DFS a risky activity, both legally and practically for Massachusetts citizens, and makes operations and fund-raising highly problematic for DFS operators, including DraftKings, an innovative new economic engine in our midst. Prompt clarification of the law is highly desirable for citizens, players, and operators alike.

The Massachusetts Legislature has led the nation on a host of challenging public policy issues over the years. It has the opportunity to do so again with the challenge of DFS and the future of Internet-based gaming.

The Massachusetts Gaming Commission

APPENDIX A

NEW JERSEY LITIGATION AND PASPA

In November 2011, the voters of New Jersey approved a referendum which granted the state legislature the authority to amend the constitution to allow sports wagering. Subsequently, the legislature passed a bill allowing the state to issue licenses to the state's casinos and racetracks to permit gambling on sporting events. The bill was then signed into law. Prior to any regulations being promulgated, the NCAA, NBA, NFL, NHL and MLB filed an action in the United States District Court for the District of New Jersey to prevent the state from implementing the law asserting that it violated PASPA. The District Court found in favor of the leagues in February 2013. The state then appealed to the United State Court of Appeals for the Third Circuit to challenge the District Court's decision. In a two-to-one decision, the Third Circuit affirmed the District Court's decision. In discussing the limits of PASPA the majority explained:

> Under PASPA, "[i]t shall be unlawful for ... a governmental entity to sponsor, operate, advertise, promote, *license, or authorize by law or compact*" a sports wagering scheme. 28 U.S.C. § 3702(1) (emphasis added). Nothing in these words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] *by law* " of gambling schemes. Appellants contend that to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as "authorizing" that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it. This argument is problematic in numerous respects. Most basically, it ignores that PASPA speaks only of "authorizing *by law*" a sports gambling scheme. We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law. Second, the argument ignores that, in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people. Indeed, that the Legislature needed to enact the Sports Wagering Law itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to "authorize [it] by law."
>
> *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013).

Seizing upon this rationale, New Jersey passed a law in 2014 that repealed a portion of the prior law that had criminalized sports betting at state casinos and racetracks asserting that such repeal was not an "authorization by law."

The leagues then challenged New Jersey's selective repeal in District Court arguing that it constituted PASPA prohibited "authorization" in disguise. The District Court judge found for the leagues and the state appealed to the Third Circuit. The reviewing panel of three judges ruled two-to-one in favor of the leagues' argument agreeing that New Jersey's selective repeal violated PASPA and contradicting their prior decision. The dissenting judge, Justice Fuentes, argued that it was illogical to determine that the repeal of a portion of a law was an "authorization" to do anything, either implicit or explicitly. New Jersey requested an *en banc* appeal, which was granted, the underlying opinion was vacated and the matter was scheduled for a new hearing in February 2016.

The New Jersey case exemplifies the breadth of PASPA's application even in situations where a state arguably took no affirmative action to "sponsor, operate, advertise, promote, license or authorize" a sports betting scheme. Given the manner in which the Third Circuit interpreted the PASPA prohibition on state "authorization" of sports betting, a similar interpretation of state "promotion" of sports betting even without traditional "promotional" behavior[26] is equally possible. While the willingness of the Third Circuit to reconsider the New Jersey matter *en banc*, suggests an opportunity to revisit the discussion, it is impossible to predict the outcome.

The fact that PASPA prohibits a governmental entity "to sponsor, operate, advertise, promote, license or authorize **by law or compact**" suggests that conflict would only arise when a state passes legislation or joins a compact that involves one of the six PASPA verbs. This same interpretation, that PASPA requires some *affirmative* state action, was discussed in the earlier of the two New Jersey cases. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 232 ("All that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law* ' of gambling schemes."). There is presently a dearth of case law discussing the limits of what would constitute affirmative state action sufficient to trigger a PASPA violation; however the New Jersey case demonstrates that the selective *repeal* of legislation authorizing sports betting was enough to constitute "authorization;" thus setting the bar for a PASPA violation quite low. While this decision was vacated, it demonstrates the

[26] It remains unclear what is considered "promotional" state action according to PASPA.

inherent vagueness of the PASPA terms and the potential for their broad interpretation even within the same court.

Any approach to state action outside of the six PASPA verbs should be a cautious one in light of the New Jersey decision discussed at length above. While some states have promulgated legislation to specifically exempt DFS from their definitions of gambling/bet/wager, such action could be challenged as "authorizing" or "promoting" a sports betting scheme particularly where a state would be required to take affirmative action to achieve the goal. Arguably, a state could defend its actions as merely clarifying the absence or ambiguity of existing law rather than an outright "authorization" that would run afoul of PASPA.

Regulation that does not involve authorization by law is a significantly more conservative approach that appears far less likely to directly conflict with PASPA and has already been initiated by our attorney general. Further "regulate" is not one of the PASPA verbs and thus is arguably permitted on the face of the statute, particularly where the regulations themselves do not establish a licensing or other heavy state oversight scheme.

Another method of avoiding the PASPA limitations may be to promulgate legislation that addresses the larger subject of internet-based electronic gambling. While DFS would likely fall under the umbrella of such legislation, if the legislation does not specifically target DFS, it runs less chance of any outright PASPA challenge.[27] Notably, the plaintiffs in the New Jersey cases were sensitive to creative draftsmanship of legislation in an effort to avoid PASPA; however, it is unclear whether those same plaintiffs would pursue a legal challenge at this time for the reasons set forth below.

Under PASPA there are a limited number of entities that have an enforcement right, namely, a United States Attorney General, a professional sports organization or an amateur sports organization. Given the business relationships between many of the professional sports leagues and the DFS operators, it is extremely unlikely that any PASPA challenge would be asserted from that group. Similarly, given the relationships between the professional and amateur sports organizations[28], this position may trickle down and eliminate challenges from amateur groups.

[27] The framework for such potential legislation is addressed in detail in the final section of this white paper.

[28] An "amateur sports organization" under PASPA is defined in relevant part as "(A) a person or governmental entity that sponsors, organizes, schedules or conducts a competitive game in which one or more amateur athletes participate or (B) a league or association of persons or governmental entities described in subparagraph (A)." Notably, the interests of the amateur sports organizations and the

With respect to the United States Attorney General, both Kansas and Maryland have existing state laws legalizing fantasy sports, yet neither has been the subject of a PASPA challenge, thus begging the question if state action addressing DFS (directly or indirectly) will actually lead to any further legal challenges.

While there appears to be little appetite for further PASPA challenges by those provided with a right of action under the statute, the lack of significant court interpretation of the statute, the inherent vagueness of the statutory terms and the pending *en banc* decision in the Third Circuit suggest a cautious approach to state action addressing DFS directly.

professional leagues are not always aligned as demonstrated by the NCAA's request that DFS operators stop offering contests based on their college sports, thus leaving the NCAA as a potential wild card PASPA plaintiff.

APPENDIX B

AN ANALYSIS OF DFS AS A GAMBLING SCHEME

Before PASPA can be applied to DFS it must be determined that DFS constitutes a "lottery, sweepstakes or other betting, gambling or wagering scheme based, directly or indirectly on . . . one or more performances of such athletes in such games." Thus, the first question to answer is whether DFS qualifies as a lottery, sweepstakes, betting, gambling or wagering scheme.

A. Lotteries

The widely recognized elements of a lottery consist of the distribution of prizes according to chance in exchange for consideration. FCC v. ABC, 347 U.S. 284, 290 (1954). It is unclear what level of chance is necessary for a contest to qualify as a "lottery" under PASPA, although any such determination would be fact intensive. DFS providers would argue that their contests do not qualify as a lottery where the distribution of prizes is not by chance but dependent upon the skill of the participants and they would point to their data driven studies. Opponents would likely argue that chance is still involved in determining the winners of any DFS contests and thus they could qualify as a lottery under federal law in the absence of an established federal skill versus chance test.[29] Ultimately, it is likely that DFS operators would have the edge in arguing that their contests do not qualify as traditional lotteries.

B. Sweepstakes

Similarly undefined under PASPA is the term "sweepstakes." Massachusetts law defines a sweepstakes as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." M.G.L. c. 271, § 5B. At least one federal statute defines a sweep stakes as "a game of chance for which no consideration is required to enter." 39 U.S.C. § 3001(k)(1)(D). Common dictionary definitions often conflate sweepstakes and lotteries, drawing no distinction between the two.

[29] For example, in Massachusetts an activity that is "predominantly" chance-based would qualify as a lottery but if it was "predominantly" skill-based it would not. There is no such corollary at the federal level.

Simply because most DFS contests require the payment of consideration to play does not eliminate DFS from potential consideration as a "sweepstakes." As indicated in M.G.L. c. 271, § 5B, a sweepstakes can be "with or without payment of any consideration." Similarly, many DFS contests can be played with promotional credit and result in the winning of real money prizes, thus the lack of paid consideration would not be dispositive to such an analysis. It is far more likely that any determination of whether DFS constitutes a "sweepstakes" would again turn on whether the winner was decided by chance or skill. Such an analysis would mirror that described above for lotteries.

C. Betting, Gambling or Wagering Scheme

This phrase serves as a broad catch-all within PASPA to address those "schemes" that do not qualify as lotteries or sweepstakes. Given the lack of definitions within the statute a reviewing authority would constitute common definitions of the terms. One source of such a definition is found in Massachusetts case law concerning the definition of bet as set forth in detail above. Other common dictionary definitions of "bet" find a multitude of overlapping definitions[30] including:

- Something that is laid, staked, or pledged typically between two parties on the outcome of a contest or a contingent issue. See http://www.merriam-webster.com/dictionary/bet.
- To risk a sum of money on the unknown result of an event in the hope of winning more money than you have risked. See http://dictionary.cambridge.org/us/dictionary/english/bet
- An agreement to risk money on the unknown result of an event. See http://dictionary.cambridge.org/us/dictionary/english/bet
- A pledge of a forfeit risked on some uncertain outcome; wager: See http://dictionary.reference.com/browse/bet?s=t.
- An act of risking a sum of money on the outcome of a future event. See http://www.oxforddictionaries.com/us/definition/american_english/bet
- A sum of money staked on the outcome of a future event: http://www.oxforddictionaries.com/us/definition/american_english/bet

[30] The terms "bet" and "wager" have near identical definitions even in the context of dictionary entries.

- An agreement between two parties that a sum of money or other stake will be paid by the loser to the party who correctly predicts the outcome of an event. See http://www.collinsdictionary.com/dictionary/english/bet.

The common law definitions of a "bet" as well as the Massachusetts definition strongly suggest that DFS would qualify as a "betting, gambling or wagering scheme" under PASPA where a sum of money is pledged on the outcome of a future unknown event. In DFS, such a sum is pledged on the future performance of the group of athletes that a participant drafts for his/her fantasy team in the hopes that those performances will score more points than the participant's competitors.

Even accepting an argument that the terms are somewhat vague or subject to multiple interpretations, clarification is found in the legislative history of PASPA, by way of the Senate Committee report on the statute which states:

> The prohibition of section 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual performance or performances therein, including schemes utilizing geographical references rather than formal team names (e.g., Washington vs. Philadelphia), or nicknames rather than formal names of players.
> S. REP. NO. 102-248 at 8 (1992).

This language clearly demonstrates that the statute was designed to have a broad scope applying to a wide swath of "schemes" regardless of the balance between chance and skill.

APPENDIX C

The specific UIGEA carve out language states:

> the term bet or wager … does not include … participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation team is based on the current membership of an actual team that is a member of an amateur or professional sports organization and meets the following conditions:
>
> 1. All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by participants.
>
> 2. All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
>
> 3. No winning outcome is based:
>
> > a. On the score, point spread, or any performance or performances of any single real world team or any combination of such teams; or
> >
> > b. Solely on any single performance of an individual athlete in any single real-world sporting or other event."

Adopting this language wholesale runs the risk of creating a host of additional undefined terms that will undoubtedly sow legal confusion in the same vein as PASPA. For example, UIGEA fails to define "a real-world sporting event" thus raising the question of whether such an event is an entire game, a quarter, an at-bat, a ball possession or some other fragment of time defined by the specific sport involved. Determining what qualifies as a "real-world sporting event" would necessarily affect

which sports could be offered as existing contests involving golf and NASCAR often focus on one tournament or race and under the UIGEA language no winning outcome can be based on a single performance in a single event.

Similarly, winning outcomes "determined predominantly by accumulated statistical results" is a problematic phrase. It is unclear what UIGEA is considering beyond statistical results to determine the winner even if statistical results are the "predominant" factor in such a conclusion. Additionally, the statutory language does not explain how many "statistical results" are sufficient for such a game or who determines which statistical results are appropriate on which to base a game.[31]

UIGEA was not originally drafted in an effort to legalize DFS and it has never been stress-tested through a rigorous legal analysis on the subject. UIGEA's main thrust was as an enforcement act to address internet payment processors. While it may be helpful as an object lesson it does not have a "one size fits all" application as state legislation without significant clarification.

[31] Given the number of data points generated during most sports and the development of advanced statistical analysis through such modes as sabermetrics, the term "statistical results" has nearly infinite potential.

BRIAN SANDOVAL
Governor

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SHAWN R. REID, *Member*
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NOTICE TO LICENSEES

Notice # 2015-99 Issuing Division: Board Chairman

DATE: **OCTOBER 15, 2015**
TO: **ALL LICENSEES AND INTERESTED PARTIES**
FROM: **A.G. BURNETT, CHAIRMAN**
SUBJECT: **LEGALITY OF OFFERING DAILY FANTASY SPORTS IN NEVADA**

Over the last several months, Nevada Gaming Control Board (Board) staff has analyzed the legality of pay-to-play daily fantasy sports (DFS) pursuant to the Nevada Gaming Control Act and the regulations adopted thereunder. I further asked the Gaming Division of the Office of the Nevada Attorney General to perform a legal analysis as to whether DFS activities conflict in any way with Nevada law. Based on these analyses, I, along with Board staff, have concluded that DFS constitutes gambling under Nevada law. More specifically, DFS meets the definition of a game or gambling game pursuant to Chapter 463 of the Nevada Revised Statutes. Moreover, because DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission. Further, a licensed operator who offers DFS must comply with all laws and regulations that apply to licensed sports pools.

Therefore, since offering DFS in Nevada is illegal without the appropriate license, all unlicensed activities must cease and desist from the date of this Notice until such time as either the Nevada Revised Statutes are changed or until such entities file for and obtain the requisite licenses to engage in said activity. Although Nevada gaming licensees who have received approval to operate a sports pool may expose DFS for play themselves in Nevada (in compliance with all applicable statutes and regulations), such licensees should exercise discretion in participating in business associations with DFS operators that have not obtained Nevada gaming approvals. While this Industry Notice is intended to provide clear guidance as to Nevada law, Nevada licensees wishing to conduct business with DFS companies should also conduct thorough and objective reviews of DFS activities under the laws of other states and any applicable federal laws.

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MEMORANDUM

Date: October 16, 2015

To: A.G. Burnett, Chairman, Nevada Gaming Control Board; Terry Johnson, Member, Nevada Gaming Control Board; Shawn Reid, Member, Nevada Gaming Control Board

From: J. Brin Gibson, Bureau Chief of Gaming and Government Affairs
Ketan D. Bhirud, Head of Complex Litigation

Subject: Legality of Daily Fantasy Sports Under Nevada Law

You have requested that our Office research the legality of daily fantasy sports under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations.

Pursuant to NRS 463.0199, the Office of the Nevada Attorney General serves as legal counsel to the Nevada Gaming Control Board and the Nevada Gaming Commission. In particular, the Gaming Division within the Office of the Nevada Attorney General provides legal advice to both regulatory agencies upon request. This memorandum was drafted in response to such a request made by the Nevada Gaming Control Board and is strictly a legal analysis. In developing this analysis, our division has expressly rejected any consideration regarding claims of a double standard for daily fantasy sports as measured against the regulation of traditional sports wagering, the popularity of daily fantasy sports, the general demand for daily fantasy sports products, or the existence or potential for partnerships between daily fantasy sports operators and important industries. Furthermore, while this Office recognizes that there are strong voices on both sides of the policy debate surrounding daily fantasy sports, our goal, above all, is to provide legal advice that shows complete fidelity to the law. We believe this opinion accomplishes that purpose.

QUESTION

Do daily fantasy sports constitute gambling games, sports pools, and/or lotteries under the Nevada Gaming Control Act and Gaming Commission Regulations?

SHORT ANSWER

In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.[1]

ANALYSIS

I. Background

A. General Description of Fantasy Sports

Fantasy sports are games where the participants, as "owners," assemble "simulated teams" with rosters and/or lineups of actual players of a professional sport. These games are generally played over the Internet using computer or mobile software applications. Fantasy sports cover a number of actual professional sports leagues, including the NFL, the MLB, the NBA, the NHL, the MLS, NASCAR, as well as college sports such as NCAA football and basketball.

Fantasy sports can be divided into two types: (1) traditional fantasy sports, which track player performance over the majority of a season, and (2) daily fantasy sports, which track player performance over a single game. The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. The actual players' performance in specific sporting events is converted into "fantasy points" such that each actual player is assigned a specific score. An owner will then receive a total score that is determined by compiling the individual scores of each player in the owner's lineup. Thus, although the owners select lineups, once the lineup has been selected—at least in the context of daily fantasy sports—the owners have basically no ability to control the outcome of the

---

[1] This conclusion—that daily fantasy sports are gambling—is consistent with how operators of certain daily fantasy sports describe themselves. For example, Jason Robins (the owner, co-founder, and CEO of DraftKings) stated that the concept for DraftKings.com was "almost identical to a casino." Mr. Robins made these comments on Reddit.com, which is an entertainment, social networking, and news website where registered community members can submit content, such as text posts or direct links, making it essentially an online bulletin board system. The website contains a section titled "/r/IAma," which generally translates to "ask me anything." On the thread that he started, Mr. Robins engages in an online discussion about how he and two friends started DraftKings, Inc. *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/. Similarly, DraftKings' has applied for and received licenses to operate in the United Kingdom. http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html . Although there is no question that the gambling laws of the United Kingdom and Nevada are fundamentally different, it is still noteworthy that the licenses in question are for "pool betting" and "gambling software," and that DraftKings does not include either of those terms in its press release. Instead, DraftKings simply states that "the company has been granted a license to operate in the United Kingdom," without identifying the licenses at issue. It appears that DraftKings recognizes the appearance of inconsistency between its position that it should be unregulated in the United States and its decision to submit to gaming regulation in the United Kingdom.

simulated games.[2] Specifically, the owners of the simulated teams have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner has no ability to influence the outcome of a simulated game. At that point, the owner waits to see what happens based upon the performance of the actual players selected.

B. Player Selection

The three most common methods of player selection in fantasy sports are (1) a snake draft; (2) an auction draft; and (3) a salary-cap draft.[3] In a snake draft, owners take turns drafting actual players for their simulated teams. In an auction draft, each owner has a maximum budget to use to bid for players. Competing owners, however, cannot select the same actual players for their simulated teams as other owners. Daily fantasy sports do not generally utilize a snake draft or an auction draft.

In a salary-cap draft, just like in an auction draft, each owner has a maximum budget. Unlike in an auction draft, however, the owners do not bid against each other. Instead, each actual player has a set fantasy salary. Although (with a few exceptions)[4] the owners can select any actual player for their teams, the owners cannot exceed their maximum budget. In this format, generally speaking, competing owners can select the same actual players for their simulated teams as other owners.

C. Types of Simulated Games

Although there are many different types of simulated games offered across the different daily fantasy websites, the simulated games can generally be divided into (1) head-to-head; and (2) tournaments.

In head-to-head simulated games, one owner competes against another owner. The owner with the highest total score will win the entire payout pool.

Tournaments are simulated games that involve more than two owners. Although there are theoretically many different kinds of tournaments, the most common are (1) 50/50; (2) double-up; (3) triple-up/quadruple-up/quintuple-up/etc.; and (4) top-X.

Although 50/50 and double-up simulated games are very similar (and some sites use the terms interchangeably), they are not necessarily identical. In a traditional 50/50 simulated game, an owner's goal is to end up in the top half of total scores. Owners who finish in the top half will equally split the payout pool. As a result, half the owners will lose their entry fee and half the owners will win. The winning owners, however, will not actually "double" their entry fee because the site operator will take a "rake"[5] from every owner who participates. For example,

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[2] Given that lineups on some sites do not "lock" until the start of each individual game, the owners have until the tipoff of each individual game to set each particular lineup spot.

[3] Because it is not relevant to daily fantasy sports, dynasty and keeper league options are not discussed.

[4] For example, most sites require owners to select actual players from at least three different actual teams.

[5] A rake is a fee taken by an operator of a game.

in a 100 person, 50/50 simulated game with a $10 entry fee, the 50 highest scoring owners would receive $18, the 50 lowest scoring owners would receive $0, and the site operator would receive $100 as a rake. By contrast, in a double-up simulated game, the site operator might allow 110 owners into the simulated game, while only paying the owners with the top 50 scores. In that scenario, an owner finishing in the top 50 scores would receive $20, an owner finishing in the bottom 60 scores would receive $0, and the operator would take a $100 rake.

Triple-up, quadruple-up, and quintuple-up simulated games are similar to double-up simulated games, except that instead of the opportunity to double their money, the owners have the opportunity to triple, quadruple, or quintuple their money. For example, in a triple-up league, the top third splits the payout pool; in a quadruple-up league, the top fourth splits the payout pool; and in a quintuple-up league, the top fifth of the league splits the payout pool. Similar to a double-up simulated game, site operators generally will pay less than one-third, one-fourth, or one-fifth of the total wagers placed, respectively.

In a top-X simulated game, which can consist of up to thousands of owners, the owners finishing with a total score in the top-X (top 1, top 2, top 3, etc.) will split the payout pool (either evenly or with progressively more based on how high they finish). For example, in a 100 person, top 3 simulated game with a $10 entry fee, the first place finisher might receive $500, the second place finisher might receive $300, the third place finisher might receive $100, and the operator would take a $100 rake.

D. Guaranteed and Non-Guaranteed Simulated Games

Daily fantasy sports operators often offer both simulated games that are guaranteed and simulated games that are non-guaranteed. If a simulated game is guaranteed, the winners will be paid out regardless of how many owners enter the simulated game. If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. If a non-guaranteed simulated game is cancelled, the entry fees will be fully refunded.

II. Preliminary Discussion

A. Determinations of Skill Versus Chance Under Nevada Law

In the context of addressing the legality of fantasy sports, the question of whether skill or chance is involved is often deemed important. However, under Title 41 of the Nevada Revised Statutes, the determination of whether an activity involves skill, chance, or some combination of the two, is relevant only when analyzing lotteries. By contrast, the determination of whether an activity constitutes a gambling game or a sports pool under Nevada law does not require analysis of the level of skill involved. This distinction was made crystal clear by the passage of Senate Bill (SB) 9 during the 2015 Nevada Legislative Session, which distinguishes between games of skill, games of chance, and hybrid games of both skill and chance, while recognizing that all three are gambling games.

1. Lottery

Nevada Revised Statute 462.105(1) defines "lottery" as follows:

> 1. Except as otherwise provided in subsection 2, "lottery" means any scheme for the disposal or distribution of property, **by chance**, among persons who have paid or promised to pay any valuable

> consideration for the chance of obtaining that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of **by lot or chance**, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.[6]

Accordingly, there are three essential elements for a lottery: (1) prize; (2) chance; and (3) consideration. If any one of these elements is missing, the activity does not qualify as a lottery.

The case of *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961) provides some guidance as to when the element of chance would be satisfied. *Gibson* involved an "offer to pay $5,000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course."[7] In that case, where the central question was whether the transaction involved gambling, the Nevada Supreme Court concluded—using a definition of "wager" that is different than what is in our statutes today—that a gaming transaction was not present. After doing so, the Court, in *dicta*, provided a test for determining whether a game is one of chance or skill: "The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element."[8] This test is commonly known as the "dominant factor test."

Assuming the Nevada Supreme Court were to apply the same test that it outlined in *dicta* in *Gibson*, a game where skill is the dominant factor would not constitute a lottery. That being said, *Gibson* involved a situation where the alleged gamblers ***directly controlled*** the outcome of the event. They were the participants in the underlying sporting event. By contrast, in daily fantasy sports, the outcome of any simulated game is determined by third parties—the actual players on actual teams and not by the owners, regardless of their skill in choosing lineups and assessing various other factors that may contribute to the outcome of the simulated game. As a result, it is unclear whether a determination of skill versus chance is necessary in determining whether daily fantasy sports are lotteries.

2. Senate Bill 9

Senate Bill 9, which was passed during the 2015 Nevada Legislative Session, explicitly authorizes the Nevada Gaming Commission to adopt regulations, applicable to gaming devices, that "define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance and a hybrid game." Senate Bill 9 further provides definitions for a "game of skill"[9] and a "hybrid game."

Importantly, Senate Bill 9 does not comment on or address whether games of skill fall within the Gaming Control Act. Rather, it starts from the premise that they do. To the extent

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[6] (Emphasis added).
[7] *Gibson*, 77 Nev. at 27, 359 P.2d at 86.
[8] *Id.* at 30, 359 P.2d at 87.
[9] "Game of skill" for the purposes of Senate Bill 9 is defined as "a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play." With this definition, the Nevada Legislature has arguably codified the "dominant factor test" as articulated in *Gibson*, although, as noted, such a test will have limited applicability in the context of the Gaming Control Act.

there was any doubt whether Nevada regulators had jurisdiction over gambling games that incorporate skill in determining their outcome, Senate Bill 9 extinguishes that doubt.

3. Gambling Games and Sports Pools

Despite the foregoing, arguments have been made that games of skill, where skill is the dominant factor, are outside of the jurisdiction of the Nevada Gaming Control Board and Commission. These arguments, however, ignore Nevada's statutory requirements.

Nevada Revised Statute 463.160 makes it unlawful for any person to deal, operate, carry on, conduct, maintain or expose for play in Nevada any gambling game without first obtaining a gaming license. "Gambling game" is defined in NRS 463.0152 as:

> [A]ny game played with cards, dice, equipment ***or any*** mechanical, electromechanical or ***electronic device*** or machine for money, property, checks, credit or any representative of value, including, ***without limiting the generality of the foregoing***, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, ***any banking or percentage game*** or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.[10]

In essence, under NRS 463.160, a gambling game is (1) any game played with cards, dice, equipment or any device or machine for any representative of value;[11] (2) any banking game; (3) any percentage game; or (4) any other game or device approved by the Nevada Gaming Commission. This broad definition makes no distinction between games of skill and games of chance. Therefore, while a determination that an activity is a game of skill is relevant to determining whether that activity is a lottery, it is not relevant to determining whether that activity constitutes a gambling game. Similarly, NRS 463.0193, which defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering," makes no distinction between games of skill and games of chance. Indeed, it has long been noted that there is a strong element of skill involved in sports wagering.

It is important to note that while Nevada gaming regulators clearly have authority to regulate games of skill, the present analysis does not concede the argument that daily fantasy sports are predominately skill-based. As Dr. Timothy Fong, Associate Clinical Professor of Psychiatry and Biobehavioral Sciences at the David Geffen School of Medicine at UCLA and Executive Director of the UCLA Gambling Studies Program, states in regards to fantasy football:

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[10] (Emphasis added.)

[11] The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

> Very simply, it's gambling, [it's putting] money on an event with a certain outcome in the hopes of winning more money. To call it anything else is really just not accurate. That link hasn't really been made by the players and the public—that what I'm doing is no different than playing blackjack or craps or betting on sports in Vegas casinos.[12]

The debate about whether daily fantasy sports are predominately driven by skill or chance is not settled. Nonetheless, the distinction between skill and chance is of limited significance under Title 41 of the Nevada Gaming Control Act, other than when analyzing lotteries.

B. UIGEA Did Not Legalize Fantasy Sports

As this Memorandum is written solely to analyze daily fantasy sports under Nevada law, it takes no position on the legality of daily fantasy sports under federal laws, such as the Professional and Amateur Sports Protection Act of 1992.[13] That being said, a point of clarification is in order because there are some operators and commentators who have taken the position that the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA")[14] legalized fantasy sports within the United States. Given the explicit language of UIGEA, that position is simply untenable, and often at odds with what those same operators and commentators have said in the past.

Specifically, in its first section under the subheading "Rule of construction," UIGEA states: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[15] Thus, it is clear that UIGEA neither made legal nor illegal any form of gambling within the United States. UIGEA simply provides "[n]ew mechanisms ***for enforcing*** gambling laws on the Internet," which Congress deemed necessary as it believed "traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders."[16] This conclusion is consistent with those of prominent commentators, including one of the leading attorneys representing daily fantasy sports operators, who stated, "The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA."[17]

Former Representative Jim Leach, the congressman who drafted UIGEA, when asked whether the 2006 legislation makes daily fantasy sports operations legal, responded, "[t]he only unique basis provided fantasy sports by UIGEA is its exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial

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[12] Ramon Ramirez, *The Dark Secret About Fantasy Football No One Is Talking About*, THE KERNAL (August 30, 2015), *at* http://kernelmag.dailydot.com/issue-sections/features-issue-sections/14172/is-fantasy-football-addictive/ (internal commentary omitted).

[13] PL 102–559, October 28, 1992, 106 Stat 4227.

[14] 31 U.S.C.A. §§ 5361-5367.

[15] 31 U.S.C.A. § 5361(b).

[16] 31 U.S.C.A. § 5361 (a)(4) (emphasis added).

[17] Anthony N. Cabot & Louis V. Csoka, Fantasy Sports: One Form of Mainstream Wagering in the United States, 40 J. Marshall L. Rev. 1195, 1201 (2007).

firms."[18] He continued, "[b]ut it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing. Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law." He concluded, "There is no credible way fantasy sports betting can be described as not gambling . . . [o]nly a sophist can make such a claim."[19]

In short, UIEGA is irrelevant to determining the legality of daily fantasy sports under Nevada law.

III. Analysis of the Legality of Daily Fantasy Sports Under Nevada Law

A. Daily Fantasy Sports Are "Sports Pools" Under NRS 463.0193

Nevada Revised Statute 463.0193 defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering." In order to determine if daily fantasy sports operators are operating a sports pool, one must determine (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in "the business" of accepting wagers.

Daily fantasy sports meet all of these requirements and, thus, constitute "sports pools" under Nevada law. This conclusion is consistent with the views of one of the leading attorneys representing daily fantasy sports operators, who stated that "fantasy sports" was "a significant evolution in the realm of sports betting."[20]

1. Wagers on Sporting Events or Other Events by Any System or Method of Wagering

a. Wagers

i. Wagers Are Present in Daily Fantasy Sports

Nevada Revised Statute 463.01962 defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[21]

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[18] Tim Dahlberg, *"Former congressman says DFS is "cauldron of daily betting," at* http://cdcgamingreports.com/former-congressman-says-dfs-is-cauldron-of-daily-betting/.

[19] *Id.*

[20] Anthony N. Cabot & Louis V. Csoka, The Games People Play: Is It Time for A New Legal Approach to Prize Games?, 4 Nev. L.J. 197, 215 (2004).

[21] *See* Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RESEARCH & REVIEW JOURNAL 29 (2004) (In his exploratory review of fantasy baseball, Dr. Bo Bernhard, Executive Director of the International Gaming Institute and Professor at the William F. Harrah College of Hotel Administration, concluded that, "[i]f we broadly define gambling as an activity that risks something of value . . . on an event whose outcome is uncertain [essentially Nevada's definition of "wager"] (such as the whims of a professional baseball season), fantasy baseball clearly qualifies.").

Although its holding came prior to the enactment of NRS 463.10962—and, thus, may no longer be applicable—the Nevada Supreme Court stated in *State v. GNLV Corporation*,[22] that:

> a "wager" exists when two or more contracting parties have mutual rights in respect to the money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event. A prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act. In a wager, each party has a chance of gain and takes a risk of loss.[23]

With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[24] If an owner wins, the owner gets money back. If an owner loses, the owner loses the bet made. When owners play against each other, some will win and some will lose. Thus, because owners risk money on an occurrence for which the outcome is uncertain, wagers are present.[25]

This determination is consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO states "You are ***playing against other players***, we simply act as the 'points tally' and 'money distributor.'"[26] The DraftKings CEO also states that DraftKings' "concept is a mashup between poker and fantasy sports. Basically, you pick a team, ***deposit your wager***, and if your team wins,

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[22] *State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992). *GNLV* was a case where GNLV Corp. dba The Golden Nugget Hotel and Casino (the "Golden Nugget") ran a program known as the "24 Karat Club." The "24 Karat Club" was a program in which enrolled patrons automatically received a fifty-cent ticket each time the last dollar of a total of $75.00 was placed in certain designated slot machines. After the patron wagered the 75th dollar, the slot machine dispensed a ticket worth fifty cents toward the purchase of a "gold certificate. Gold certificates could be redeemed for gaming tokens, cash, room rental, food, beverages or merchandise. The slot machines dispensed the fifty-cent tickets ***irrespective of gains or losses resulting from the play involved*** in each $75.00 increment. On that record, the Nevada Supreme Court held that because the Golden Nugget's distribution of the tickets was required by the contract between the Golden Nugget and its "24 Karat Club" members, it was not dependent upon the result of a legitimate wager. As a preliminary matter, *GNLV* was decided before the enactment of NRS 463.01962 (the statute defining the term "wager"). More importantly, in *GNLV*, the patrons were neither competing against one another for the tickets nor receiving tickets based upon the outcome of an uncertain event. By contrast, in daily fantasy sports, the owners are competing against one another. As a result, each owner has a risk of loss depending on the outcome of their simulated team's performance. Thus, although the Nevada Supreme Court found that wagers were not present in *GNLV*, wagers are present in daily fantasy sports regardless of whether one uses the new statutory definition of wager or applies the holding in *GNLV*.

[23] *Id.* at 458, 834 P.2d at 413 (1992) (internal citations omitted).

[24] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

[25] 463.0152.

[26] *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

you get the pot."[27] Additionally, the DraftKings CEO repeatedly refers to the payments on his sites as "wagers" and "bets," and the activity as "betting."[28]

Similarly, the DraftKings website uses the following image on its website for its pages for fantasy football, weekly fantasy football, fantasy college football, weekly fantasy college football, weekly fantasy golf, daily fantasy basketball, fantasy college basketball, weekly fantasy basketball, weekly fantasy college basketball, and weekly fantasy hockey:[29]

That image is identified on each of those webpages, through alternative text ("alt text")[30] with a phrase that includes the word "betting" (i.e., "fantasy golf betting," "weekly fantasy basketball betting," "weekly fantasy hockey betting," "weekly fantasy football betting," "weekly fantasy college football betting," "weekly fantasy college basketball betting," "Fantasy College Football Betting," "daily fantasy basketball betting," and "Fantasy College Basketball Betting"). Although it is unclear why this image is identified using the alt text "betting,"—whether it is because these sites are trying to draw Internet search traffic from gamblers, because "betting" is how the sites internally discuss their product, or for some other reason—it appears that although the sites' representatives publicly state that they do not believe daily fantasy sports involve "wagers" or "bets," they do use the terms "betting" and "wagering" when they are not dealing with law enforcement agencies.

ii. *Las Vegas Hacienda, Inc. v. Gibson* Is Inapposite

There have been some who suggest that wagers are not present in daily fantasy sports because of the Nevada Supreme Court's 1961 decision in *Las Vegas Hacienda, Inc. v. Gibson*.[31] Those people are mistaken. To begin with, *Gibson* was decided several years before the gaming statutes at issue in this Memorandum were enacted. Because of that, the Court did not have the

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[27] *Id.* (emphasis added).
[28] *Id.*
[29] *See e.g.*, https://www.draftkings.com/fantasy-football , https://www.draftkings.com/weekly-fantasy-golf , and https://www.draftkings.com/daily-fantasy-basketball .
[30] Alt text (alternative text) is a word or phrase that can be inserted as an attribute in an HTML (Hypertext Markup Language) document to tell website viewers the nature or contents of an image. The alt text appears in a blank box that would normally contain the image.
[31] 77 Nev. 25, 26, 359 P.2d 85, 86 (1961).

benefit of those statutes in making its determination. As a result, *Gibson* applies a common law understanding of "wager" and "gambling" that differs from our current statutory framework.

Gibson involved a golf course that offered to pay $5,000 to any person who shot a hole-in-one after paying 50 cents for the opportunity to attempt to do so. From the record, it is unclear whether (1) the patron paid 50 cents for the opportunity to play a round of golf and, incidentally, would be awarded a prize if he or she sank a hole-in-one; or (2) the patron paid the 50 cents solely for the opportunity to try and shoot a hole-in-one. Regardless, a patron eventually shot a hole-in-one and the golf course refused to pay, arguing that a person cannot sue for recovery of money won in gambling. The Court held for the patron by determining the debt was a contractual debt rather than a gambling debt. As part of its analysis, the Court distinguished between "prizes" and "wagers." In doing so, the Court stated:

> A prize or premium differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss. . . . In a wager or a bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid or accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded.[32]

Even applying these outdated elements from *Gibson*, wagers are present in daily fantasy sports. Assuming that in a wager, "each party interested therein has a chance of gain and takes a risk of loss" and "there must be [at least] two parties . . . who must either lose or win," daily fantasy sports involve wagers because owners in daily fantasy sports all have a chance of gain and take a risk of loss based upon who wins and who loses. Additionally, even accepting that a prize "is a reward or recompense for some act done" and a wager "is a stake upon an uncertain event," does not change the conclusion. In the case of daily fantasy sports, the primary "act" at issue is that of choosing a lineup. The completion of this "act" will not, in itself, result in any prize. The payouts in daily fantasy sports are not awarded to owners who simply set a lineup, they are awarded to the owners whose lineups receive the highest total score (which is dependent upon the *uncertain* outcomes associated with sporting events). Accordingly, even applying *Gibson*, wagers are present in daily fantasy sports.

Moreover, the Court stated that its holding was based upon the absence of a statute providing otherwise.[33] Every statute addressed in this Memorandum was enacted after *Gibson* was decided. That distinction is important to remember, because a strict application of *Gibson* in the modern day could lead to the absurd result of removing large categories of gambling from the

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[32] *Id.* at 28-29, 359 P.2d at 86-87.

[33] *Id.* at 27, 359 P.2d at 86 ("It is generally held, in the absence of a prohibitory statute, that the offer of a prize to a contestant therefor who performs a specified act is not invalid as being a gambling transaction."). Additionally, NRS 463.01962, which defines a "wager" was added to the Nevada Revised Statutes in 1997. As a result, any cases, including *Gibson*, that defined the term "wager" prior to 1997 are no longer mandatory or persuasive.

control of the Nevada Gaming Control Board and Commission and, moreover, could render null a number of Nevada gaming statutes and regulations that take precedence over common law.

b. <u>On Sporting Events or Other Events by Any System or Method of Wagering</u>

Although it seems obvious that the wagers in question are being placed on sporting events, some discussion of this element is necessary as certain commentators have suggested that because the wagers at issue are not being placed upon the *outcome* of a particular sporting event, the wagers do not fall within the requirement that they be placed on sporting events or other events. That interpretation not only belies common sense, but is also contradicted by an analysis of the Gaming Control Act and Regulations.

To begin with, that interpretation is inconsistent with Nevada's historic understanding of sports pools. For example, Nevada has been regulating "proposition bets" or "prop bets" for decades.[34] A prop bet is a wager on the occurrence or non-occurrence of some event during the course of a sporting event. Examples of prop bets include whether a particular quarterback will pass for more or less than 300 yards, whether a particular basketball player will score more or less than 25 points, and whether a particular pitcher will pitch more or less than 10 strikeouts. Through the use of "parlay cards," the State has also regulated combinations of prop bets. Specifically, Regulation 22.090(1) states: "As used in this section, 'parlay card wager' means a wager on ***the outcome of*** a series of 3 or more games, matches, or similar sports events ***or on a series of 3 or more contingencies incident*** to particular games, matches or similar sports events."[35] As a result, it is clear that Nevada intended to regulate wagers on both (1) the outcomes of particular sporting events; and (2) contingencies incident to particular sporting events.

Notably, NRS 463.0193, which defines "sports pool," not only fails to use the word "outcome," but instead specifically broadens its definition by adding the words "by any system or method of wagering." This is in contrast to the definition of "pari-mutuel system of wagering," which only includes wagers on "the ***outcome*** of a race or sporting event."[36] As a result, the Nevada Legislature has, in some places, distinguished between betting on the outcome of particular sporting event and simply betting generally on the sporting event "by any system of method of wagering."[37] The logical, and likely only, conclusion is that Nevada's regulation of sports pools includes (1) wagering on the outcome of particular sporting events; (2) wagering on any activity that takes place during particular sporting events; and (3) wagering on combinations of the outcomes of and/or activities that take place during particular sporting events.

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[34] *See, e.g.*, Nev. Gaming Comm'n Reg. 22.060(4).
[35] Nev. Gaming Comm'n Reg. 22.090(1) (emphasis added).
[36] NRS 464.005(5) (emphasis added).
[37] It should be noted, however, that although the absence of the term "outcome" within the definition of "sports pool" precludes a conclusion that the definition only prohibits wagering on the final score of sporting events, the inverse is not necessarily true. Even if the definition of "sports pool" had included the word outcome, one could find that "outcome" includes contingencies incident to particular sporting events.

2. Business of Accepting Wagers

If it is accepted that the daily fantasy sports operators are "accepting wagers on sporting events or other events by any system or method of wagering," there seems to be no dispute that they are in the business of doing so.[38] With perhaps some limited exceptions, the daily fantasy sports operators are not operating their sites solely for recreation or amusement; they are operating the sites as businesses to make money.

B. Daily Fantasy Sports Are "Gambling Games"

There are, generally speaking, four types of gambling games outlined in NRS 463.0152: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) other games or devices approved by the Nevada Gaming Commission.[39] These four categories are not necessarily mutually exclusive.

1. Daily Fantasy Sports Are Games Played with Cards, Dice, Equipment, Devices or Machines for Any Representative of Value

The first type of gambling game included in NRS 463.0152's definition has two elements. First, it must be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine." Second it must be played "for money, property, checks, credit or any representative of value." Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Game Played with Cards, Dice, Equipment, Device, or Machine

Although the term "electronic device" is not defined by the Gaming Control Act, other Nevada statutes have defined a computer to be an electronic device.[40] That definition is consistent with the general understanding of what an electronic device is. As a result, daily fantasy sports, which cannot possibly be played except online using computers and/or mobile phones, meet the first element requiring that the activity be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine."

b. Played for Money or Any Representative of Value

The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash."[41] With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[42] If an owner wins, the owner gets money back. Thus, daily fantasy sports meet the second requirement that the activity in question must be played "for money, property, checks, credit or any representative of value."

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[38] NRS 463.0193.
[39] NRS 463.0152.
[40] *See* NRS 205.4735 and 360B.410.
[41] NRS 463.01862.
[42] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

2. Daily Fantasy Sports Are Probably Not Banking Games

Nevada Revised Statute 463.01365 defines a "banking game" as "any ***gambling game*** in which players compete against the licensed gaming establishment,[43] rather than against one another."[44] Nevada Revised Statute 463.0152 defines a "gambling game" to include "any ***banking game***."[45] As a result, these definitions are circular and there is ambiguity as to what the statutes mean. It is worth noting that Black's Law Dictionary defines a "banking game" as a "gambling arrangement in which the house (i.e., the bank) accepts bets from all players and then pays out winning bets and takes other bettors' losses."[46]

A logical reconciliation of these statutes (and the traditional definition of "banking game") is to define a banking game as a game in which (1) participants compete against the operator of the game (rather than the other participants) using representatives of value; and (2) calculation of the payout to any given participant is, generally speaking, not based upon the representatives of value used by any other participants.[47] That interpretation is consistent with the Nevada Supreme Court's statement that craps, roulette, and black jack are examples of banking games.[48]

Generally speaking, daily fantasy sports operators do not directly wager against the owners. Instead, the owners wager against each other by placing a bet and competing for the highest scores, with the operator paying out to the highest scorers. If that is true, in those circumstances, daily fantasy sports do not constitute banking games as the payouts to each owner are directly related to the payouts to other owners based upon other owners' simulated teams' performances. That being said, if a particular operator were to allow owners to wager directly against the operator, then that particular simulated game would be a banking game.

3. Daily Fantasy Sports Are Percentage Games

The third type of gambling game included in NRS 463.0152's definition is a percentage game, which has two elements. First, it must be a game "where patrons wager against each

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[43] Although this statute could arguably be read to exclude from its definition any games offered by a non-licensee, that interpretation would lead to an absurd result. The Nevada Legislature could not possibly have intended to only restrict the type of games offered by licensees, leaving the rest of the public free to offer banking games. Additionally, given that the term "banking game" appears twice in the definitions of NRS 463, and only once has this limiting language, there is additional reason to reject that interpretation.

[44] (Emphasis added.)

[45] (Emphasis added.)

[46] BANKING GAME, Black's Law Dictionary (10th ed. 2014).

[47] We can imagine situations in which various banking games might have some sort of cumulative payout. For example, an establishment might offer blackjack but (directly or indirectly) take some percentage of each hand played and place it into a cumulative payout pool that is awarded to one or more participants based upon the occurrence of some event. That tying of some wagers with the operator to wagers with other players would not remove the game from what is contemplated by the definition of "banking game."

[48] *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984).

other."[49] Second, "the house takes a percentage of each wager as a 'rake-off.'"[50] Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Patrons Wager Against Each Other

The Gaming Control Act defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[51] As was explained in Section III.A.1.a above, because the daily fantasy sports owners pay money to play the simulated games and receive money based upon which of them has the highest total scores, the owners risk money on an occurrence for which the outcome is uncertain. As a result, wagers are present and daily fantasy sports meet the requirement that "wagers" be present.

b. The House Takes a Percentage of Each Wager as a "Rake-off"

Although the specifics of how each rake is calculated differs and the rake may be a flat fee (and, as a result, the actual percentage taken in any given simulated game would vary depending upon the number of owners) the daily fantasy sports operators all make their profit by directly or indirectly taking some percentage of the wagers in each simulated game.

This conclusion is also consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO explains that "In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in $10 dollars, you'd win $100 (***minus 10% which goes to us***)."[52]

4. Daily Fantasy Sports Have Not Been Approved by the Commission

As the Nevada Gaming Commission has not approved daily fantasy sports, analysis of these types of gambling games is unnecessary. Daily fantasy sports are not games or devices approved by the Nevada Gaming Commission.

C. Some Daily Fantasy Sports Could Be Considered Lotteries Depending on How a Court Resolves the Question of Whose Skill Is at Issue and the Amount of Skill Involved in the Particular Simulated Game at Issue

If, for some reason, daily fantasy sports are not otherwise determined to be gambling games or sports pools, they could constitute lotteries, which—with limited charitable exceptions—are prohibited by Article IV, Section 24 of the Nevada Constitution. A lottery is a scheme for the disposal of property ***by chance***, among persons who have paid consideration, for the chance of obtaining all or a portion of said property.[53] Essentially, a lottery involves the common law elements of gambling: (1) prize; (2) chance; and (3) consideration. Because all of

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[49] *Id.* ("Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a 'rake-off.'").

[50] *Id.*

[51] NRS 463.01962.

[52] *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

[53] NRS 462.105.

the daily fantasy sports at issue involve consideration to play and a prize, the sole issue is whether a particular simulated game is determined predominantly by skill or by chance.[54]

As a preliminary matter, there may not need to be a determination of skill. As skill is generally understood when analyzing a lottery, the skill at issue is the skill of the individuals determining the actual outcome of the event. With daily fantasy sports, although the owners select a lineup for their simulated team, the owners have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner simply waits to see what happens based upon the performance of the actual players involved. Given that the owners' skills do not determine the outcome of the simulated games, there may be no skill involved as that term is traditionally understood in the context of lotteries. If that is the case, then daily fantasy sports constitute lotteries and are prohibited in Nevada.

If a court rejects that interpretation and decides to analyze the skill of the owners in picking their lineups, then an analysis of whether a particular simulated game is determined predominantly by skill or chance is required. There are some daily fantasy sports in which the element of chance clearly predominates. These include simulated games in which the owners are assigned a random slate of players for their virtual teams. As there is no skill involved in these games, they would be considered unlawful lotteries. By contrast, the vast majority of daily fantasy sports require some level of skill on the part of the owners. Because the level of skill involved is a question of fact, each individual simulated game must be examined by a finder of fact, who will determine this issue on a case-by-case basis.

CONCLUSION

Upon extensive review of pay-to-play daily fantasy sports, we conclude that they constitute sports pools under NRS 463.0193 and gambling games under NRS 463.0152. Daily fantasy sports may also constitute illegal lotteries under NRS 462.105(1) depending on the legal question of whose skill is being assessed and the factual question of whether skill or chance is dominant. If the skill being assessed is that of the actual players rather than that of the fantasy sports team owners, then daily fantasy sports constitute illegal lotteries. If the skill being assessed is that of the owners, then there is a factual question as to whether the skill in selecting lineups predominates over chance.

Throughout the foregoing analysis, the holdings and dicta of the *Gibson* and *GNLV* cases are distinguished from the facts, law, and context of the current matter. It is particularly noteworthy that both of these gaming cases were decided before the definition of "wager" was codified in NRS 463.01962. *Gibson*, in particular, was decided in 1961, at the most nascent stage of the Nevada Gaming Control Act and before the passage of the statutes at issue. As a result, the *Gibson* court had to rely upon traditional common law principles of gambling rather than our current statutory and regulatory framework. Consequently, the *Gibson* decision must be considered not against the backdrop of 2015, but within the historical milieu of 1961.

In summary, pay-to-play daily fantasy sports constitute sports pools and gambling games under Nevada law. They may also constitute lotteries, depending on the test applied by the

[54] *Gibson*, 77 Nev. at 30, 359 P.2d at 87.

Nevada Supreme Court. As a result, daily fantasy sports cannot be offered in Nevada without licensure.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

NOTICE TO CEASE AND DESIST AND
NOTICE OF PROPOSED LITIGATION PURSUANT TO
NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349

BY CERTIFIED AND EXPRESS MAIL
Mr. Nigel Eccles
Chief Executive Officer
FanDuel Inc.
19 Union Square West, 9th Floor
New York, NY 10003

Dear Mr. Eccles:

This letter constitutes a demand that FanDuel, Inc. ("FanDuel") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of FanDuel. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, FanDuel's operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that FanDuel's operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." FanDuel's customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each FanDuel wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

FanDuel DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, FanDuel's advertisements seriously mislead New York citizens about their prospects of winning.

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. For those reasons among others, the legality of traditional fantasy sports has never been seriously questioned in New York.

Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: FanDuel and similar sites set the prizes, control relevant variables (such as athlete "salaries"), and profit directly from the wagering. FanDuel has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, unlike traditional fantasy sports, DFS is designed for instant gratification, stressing easy game play and no long-term strategy. For these and other reasons, DFS functions in significantly different ways from sites that host traditional fantasy sports.

Further, FanDuel has promoted, and continues to promote DFS like a lottery, representing the game to New Yorkers as a path to easy riches that anyone can win. The FanDuel ads promise: "anybody can play, anybody can succeed"; "Play for real money with immediate cash payouts ... the money is real!" and similar enticements. Like most gambling operations, FanDuel's own numbers reveal a far different reality. In practice, DFS is far closer to poker in this respect: a small number of professional gamblers profit at the expense of casual players. To date, our investigation has shown that the top one percent of FanDuel's winners receive the vast majority of the winnings.

Finally, during the course of our investigation, the New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

The illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution. The Constitution prohibits gambling in all forms not specifically authorized:

> [E]xcept as hereinafter provided, **no** lottery or the sale of lottery tickets, **pool-selling, book-making, or any other kind of gambling,** except lotteries operated by the state . . ., except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . . **shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to**

prevent offenses against any of the provisions of this section.

N.Y. Const. Art. I, § 9 (emphasis added).

To enforce this clause, the Legislature established a series of criminal offenses applying to businesses that promote gambling. *See, generally,* N.Y. Penal Law §§ 225.00-225.40. These provisions all apply the same statutory definition of gambling:

> A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

N.Y. Penal Law § 225.00(2). The penal law imposes no criminal liability on individual bettors, focusing instead on bookmakers and other operations that advance or profit from illegal gambling activity. *See, e.g.,* N.Y. Penal Law § 225.10 (Promoting Gambling in the first degree).

FanDuel wagers easily meet the definition of gambling. FanDuel bettors make bets (styled as "fees") that necessarily depend on the real-world performance of athletes and on numerous elements of chance. The winning bettors receive large cash prizes – and the company takes a "rake" or a cut of from each wager.[1]

Accordingly, we demand that FanDuel cease and desist from illegally accepting wagers in New York State as part of its DFS contests.

This letter also serves as formal pre-litigation notice pursuant to New York State General Business Law ("GBL") §§ 349 and 350 and Executive Law § 63(12). These statutes direct the State to give notice prior to commencing a summary proceeding to enjoin repeated illegal and deceptive acts and practices, and to obtain additional injunctive relief, restitution, penalties, damages, and other relief that a court may deem just and proper.

The unlawful and illegal conduct under consideration by our Office includes, but is not limited to, the following:

(a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;

(b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;

(c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

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[1] Washington State, which has substantially the same statutory definition of gambling, has reached the same legal conclusions with respect to DFS.

(d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;

(e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;

(f) Misrepresenting that FanDuel complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that FanDuel's games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and

(g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

Pursuant to GBL §§ 349 and 350, FanDuel is afforded the opportunity to show orally or in writing to this Office, within five business days of receipt of this notice, why the Attorney General should not initiate any proceedings.

Sincerely,

Kathleen McGee
Chief, Internet Bureau

cc: Marc Zwillinger, Esq.

STATE OF NEW YORK
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NOTICE TO CEASE AND DESIST AND
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NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349

BY CERTIFIED AND EXPRESS MAIL
Mr. Jason Robins
Chief Executive Officer
DraftKings, Inc.
376 Boylston Street, Ste 501
Boston, MA 02116-3825

Dear Mr. Robins:

This letter constitutes a demand that DraftKings, Inc. ("DraftKings") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of DraftKings. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, DraftKings' operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that DraftKings' operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

DraftKings DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, DraftKings' advertisements seriously mislead New York citizens about their prospects of winning.

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. For those reasons among others, the legality of traditional fantasy sports has never been seriously questioned in New York.

Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: DraftKings and similar sites set the prizes, control relevant variables (such as athlete "salaries"), and profit directly from the wagering. DraftKings has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, unlike traditional fantasy sports, DFS is designed for instant gratification, stressing easy game play and no long-term strategy. For these and other reasons, DFS functions in significantly different ways from sites that host traditional fantasy sports.

Further, DraftKings has promoted, and continues to promote DFS like a lottery, representing the game to New Yorkers as a path to easy riches that anyone can win. The DraftKings ads promise: "It's the simplest way of winning life-changing piles of cash"; "The giant check is no myth. . . BECOME A MILLIONAIRE!" and similar enticements. Like most gambling operations, DraftKings' own numbers reveal a far different reality. In practice, DFS is far closer to poker in this respect: a small number of professional gamblers profit at the expense of casual players. To date, our investigation has shown that the top one percent of DraftKings' winners receive the vast majority of the winnings.

Finally, during the course of our investigation, the New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

The illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution. The Constitution prohibits gambling in all forms not specifically authorized:

> [E]xcept as hereinafter provided, **no** lottery or the sale of lottery tickets, **pool-selling, book-making, or any other kind of gambling,** except lotteries operated by the state . . ., except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . . **shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.**

N.Y. Const. Art. I, § 9 (emphasis added).

To enforce this clause, the Legislature established a series of criminal offenses applying to businesses that promote gambling. *See, generally,* N.Y. Penal Law §§ 225.00-225.40. These provisions all apply the same statutory definition of gambling:

> A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

N.Y. Penal Law § 225.00(2). The penal law imposes no criminal liability on individual bettors, focusing instead on bookmakers and other operations that advance or profit from illegal gambling activity. *See, e.g.,* N.Y. Penal Law § 225.10 (Promoting Gambling in the first degree).

DraftKings wagers easily meet the definition of gambling. DraftKings bettors make bets (styled as "fees") that necessarily depend on the real-world performance of athletes and on numerous elements of chance. The winning bettors receive large cash prizes – and the company takes a "rake" or a cut of from each wager.[1]

Accordingly, we demand that DraftKings cease and desist from illegally accepting wagers in New York State as part of its DFS contests.

This letter also serves as formal pre-litigation notice pursuant to New York State General Business Law ("GBL") §§ 349 and 350 and Executive Law § 63(12). These statutes direct the State to give notice prior to commencing a summary proceeding to enjoin repeated illegal and deceptive acts and practices, and to obtain additional injunctive relief, restitution, penalties, damages, and other relief that a court may deem just and proper.

The unlawful and illegal conduct under consideration by our Office includes, but is not limited to, the following:

(a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;

(b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;

(c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

---

[1] Washington State, which has substantially the same statutory definition of gambling, has reached the same legal conclusions with respect to DFS.

(d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;

(e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;

(f) Misrepresenting that DraftKings complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that DraftKings' games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and

(g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

Pursuant to GBL §§ 349 and 350, DraftKings is afforded the opportunity to show orally or in writing to this Office, within five business days of receipt of this notice, why the Attorney General should not initiate any proceedings.

Sincerely,

Kathleen McGee
Chief, Internet Bureau

cc: Stuart Shorenstein, Esq.
Alex Southwell, Esq.

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
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940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts

34.01: Purpose
34.02: Scope
34.03: Definitions
34.04: Gameplay by Minors; Restrictions on Games Based on Student Sporting Events
34.05: Protection of Consumer Funds on Deposit and Compliance with Data Security Requirements
34.06: Limitation to One Account Per DFS Player
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34.08: Restrictions on Advertising to Minors or at Schools or School Sporting Events
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34.01 Purpose

940 CMR 34.00 is designed to protect Massachusetts consumers who play Daily Fantasy Sports contests for prizes from unfair and deceptive acts and practices that may arise in the gaming process. The regulation is also intended to protect the families of persons who play Daily Fantasy Sports to the extent that they may be affected by unfair and deceptive practices that lead to unaffordable losses.

34.02 Scope

940 CMR 34.00 defines unfair or deceptive acts or practices that violate G.L. c. 93A, § 2(a), but is not intended to define all Daily Fantasy Sports activities that violate the statute. Daily Fantasy

Sports acts or practices not specifically proscribed in this regulation are not to be treated, by implication, as permitted under G.L. c. 93A or other applicable law. Nor shall this regulation be interpreted to limit claims available under G.L. c. 93A and other law prior to the effective date of this regulation.

940 CMR 34.00 applies to acts or practices of Daily Fantasy Sports Operators doing business in Massachusetts.

Nothing in this regulation may be interpreted as authorizing a wager, bet, or gambling activity that is prohibited by law.

34.03 Definitions

Daily Fantasy Sports or "DFS": Any contest in which the offer or award of a Prize is connected to the statistical performance or finishing position of one or more individual participants in an underlying amateur or professional competition, but does not include offering or awarding a Prize to the winner of or participants in the underlying competition itself.

Daily Fantasy Sports Operator or "DFSO": Any Enterprise that engages in the business of offering, by means of the Internet or smart phone application (or via other similar electronic or digital media or communication technologies), multiple Daily Fantasy Sports contests to persons who include residents of Massachusetts. For the purpose of this regulation, Daily Fantasy Sports Operators includes any Enterprise that offers more than 10 DFS contests by means of the Internet or smart phone application each month. However, an Enterprise is not a Daily Fantasy Sports Operator if it offers only DFS contests that meet one of the following criteria:

1. No Prize is awarded;

2. No entry fee is collected;

3. The Enterprise offering the contest receives no compensation in connection with the contest regardless of the outcome of the contest;

4. The Prize or Prizes offered are of no greater value than the lowest individual entry fee charged to a single participant for entering the contest; or

5. The contest encompasses an entire season of the activity in which the underlying competition is being conducted, consists of at least 200 underlying competitions, and the Prize or Prizes awarded are determined by agreement of the participants in order to distribute the participants' contributions to a fund established to award a Prize or Prizes for the contest.

DFS Consumer: Any individual or corporate resident of the Commonwealth of Massachusetts with an account to enter contests on a DFS Contest Platform.

DFS Contest Platform: Any website, smart phone application or other portal providing access to a DFS contest.

Enterprise: Any business organization including, without limitation, its subsidiaries and parent entities, its owners, officers, partners and employees as individuals, as well as other related entities that share common ownership, control or management.

Prize: Anything of value, including money, contest credits, merchandise, or admission to another contest.

Minors: Persons under the age of 21.

Script: A list of commands that a DFS-related computer program can execute that are created by DFS players (or by third parties for the use of DFS players) to automate processes on a DFS Contest Platform.

Beginner: Any DFS player who has entered fewer than 51 contests offered by a single DFSO.

Highly-experienced Player: Any DFS player who has 1) entered more than 1,000 contests offered by a single DFSO; or 2) entered more than 250 contests offered by a single DFSO and has prevailed in more than 65% of the total number of such contests; or 3) has won more than three DFS contest Prizes valued at $1,000 or more. Once a DFS player is classified as a Highly-experienced Player, a player will remain classified as such.

Prominently Publish: Material will be considered prominently published within the meaning of this regulation if it is placed, directly or via link, on a dashboard or similar visualization tool that is properly labeled and clearly accessible from the home page of each of a DFSO's Contest Platforms.

DFSO Contractor: Any person or corporate entity who works pursuant to an independent contract with a DFSO and who has access to non-public portions of the DFSO's office, the DFSO's computer network, or to DFSO proprietary information that may affect gameplay.

AGO: The Commonwealth of Massachusetts Office of the Attorney General.

34.04 Gameplay by Minors; Restriction on Games Based on Student Sporting Events

(1) No Gameplay by Minors: No DFSO will allow a Minor to participate in any contest, whether or not a Prize is offered in that contest.

(2) Refunds of Deposits by Minors: A DFSO will promptly refund any deposit received on a Minor's account, whether or not the Minor has engaged in or attempted to engage in gameplay, provided, however, that any refund may be offset by Prizes already awarded.

(3) No DFS Games Based on Student Sporting Events: DFSOs shall not offer DFS contests that include college, high school or student sporting events.

(4) Parental Controls: DFSOs will Prominently Publish and facilitate parental control procedures to allow parents or guardians to exclude minors from access to any DFS Contest Platform.

34.05 Protection of Consumer Funds on Deposit and Compliance With Data Security Requirements

(1) Data Security: DFSOs will comply with all applicable state and federal requirements for data security.

(2) Protections for DFS Accounts: Funds in DFS Consumer accounts will be held in trust by the DFSO for the DFS Consumer that establishes the account. DFSOs will implement and Prominently Publish procedures that:

a. prevent unauthorized withdrawals from DFS Consumer accounts by DFSOs or others;

b. prevent commingling of funds in a DFS Consumer account with other funds including, without limitation, funds of the DFSO; and

c. establish procedures for responding to and reporting on complaints by DFS Consumers that their accounts have been misallocated, compromised or otherwise mishandled.

(3) Procedures for Closing Accounts at the Request of a Customer: DFSOs will implement and Prominently Publish procedures that allow any DFS Consumer to permanently close an account at any time and for any reason. The procedures will allow for cancellation by any means including, without limitation, by a DFS Consumer on any DFS Platform used by that DFS Consumer to make deposits into a DFS account.

(4) Prompt Refunds on Closed Accounts: When a DFS Consumer account is closed, the DFSO will refund all funds in the account no later than the close of business on the next full business day.

(5) Payment of Prizes on Closed Accounts: If a Prize is awarded to a DFS Consumer with a closed account, that Prize, to the extent it consists of funds, will be distributed by the DFSO within five business days.

(6) Account Closures Due to Inactivity; Unclaimed Funds in DFS Consumer Accounts:

a. A DFSO will close any DFS Consumer account that is inactive for two years and notify the account holder that the account has been closed by email and by mail to the account holder's last known address.

b. When a DFS Consumer account is closed due to inactivity, the DFSO will refund all funds in the DFS Consumer account within thirty days.

c. In the event that funds in a closed DFS Consumer account cannot be refunded and remain unclaimed, the DFSO will provide annual notice of the existence of funds to the DFS Consumer no less often then semi-annually for three years. Such notice will be provided by email and by mail to the account holder's last known address and will provide a process for claiming the funds.

d. In the event that funds in a closed DFS Consumer Account cannot be refunded and remain unclaimed by the DFS Consumer after three years, such funds will be paid by the DFSO to the Commonwealth of Massachusetts Unclaimed Property Fund in the Office of the State Treasurer unless the DFS Consumer has established a last-known address in another state.

(7) Publication of Terms, Conditions and Rules: A DFSO will Prominently Publish all contractual terms and conditions and rules of general applicability that affect a DFS Consumer's Account. Presentation of such terms, conditions and rules at the time of on-boarding a new DFS Consumer will not suffice.

34.06 Limitation to One Account Per DFS Player

(1) One Account Per Player: DFSOs will not allow a DFS player to establish more than one username or more than one account.

(2) Identification of Players by DFSOs: DFSOs will take commercially and technologically reasonable measures to verify DFS players' true identities and addresses to the greatest extent possible and will use such information, at a minimum, to enforce subsection 34.06(1).

(3) No Proxy Servers: DFSOs will not allow any DFS player to use a proxy server to enter any DFS Contest Platform.

(4) Termination of Players that Establish More than One Account: DFSOs will implement procedures designed to terminate all accounts of any DFS player that establishes or seeks to establish more than one username or more than one account, whether directly or by use of another person as proxy.

(5) Simultaneous Log-ins: DFSOs will not allow simultaneous log-ins on a single account.

34.07 Truthful Advertising; Limitations on Advertising Content

(1) Compliance with Existing Advertising Regulations: DFSOs will comply with the following regulations promulgated by the Attorney General to the extent they concern advertising and apply to the DFS business model: 940 CMR §§ 3.00 (General) and 6.00 (Retail Advertising).

(2) No Depiction of Minors: DFSO advertisements will not depict Minors, students or school or college settings.

(3) No Endorsement by Minors, College Athletes, Colleges, or College Athletic Associations: DFSO advertisements will not state or imply endorsement by Minors, collegiate athletes, colleges or college athletic associations.

(4) Advertisements to Include Information to Assist Problem Gamers: DFSO advertisements in published media (*e.g.*, print, television, Internet and smartphone applications) will include information concerning assistance available to problem gamblers or will direct consumers to a reputable source for such information.

(5) Limitation on Representations About Winnings: Any representation concerning winnings shall be accurate, not misleading, and capable of substantiation at the time the representation is made. DFSO advertisements may make no representations about average winnings that do not equally prominently represent the average net winnings of all players.

34.08 Restrictions on Advertising to Minors or at Schools or School Sporting Events

(1) No Advertisements Targeted to Minors: DFSOs will not advertise in publications or other media that are aimed exclusively or primarily at Minors.

(2) No Promotional Activities at Schools or Colleges: DFSOs will not advertise or run promotional activities at schools or on college campuses.

(3) No Advertising at Amateur or Student Sporting Venues: DFSOs will not advertise or run promotional activities at amateur, school or college sporting events unless such sporting event is conducted in a venue that is not primarily used for amateur, school or college events.

(4) Limitations on Advertising at Amateur or Student Sporting Events Held in Other Venues: At an amateur, school or college sporting event conducted in a venue that is not primarily used for such events, DFSOs will neither conduct promotional activities nor run electronic advertisements by means, for example, of the game scoreboard or advertising tickers. Nor will it place an advertisement in any format other than those that are typically present at that venue for all events.

34.09 Promotional Offers

(1) Compliance with Existing Law On Promotional Offers: A DFSO's promotional offers will comply with 940 CMR § 3.13(3) and § 6.08 with the exception of 6.08(3)(b)-(c), (5)(b)-(c) & (6).

(2) Predisclosure of Terms of Promotional Offers: DFSOs will fully and accurately disclose the terms of all promotional offers at the time such offers are advertised and provide full disclosures of limitations on the offer before the DFS Consumer provides anything of value in exchange for the offer. If a promotional offer cannot be fully and accurately disclosed within the constraints of a particular advertising medium (*e.g*., on a billboard), the promotional offer may not be advertised in that medium.

(3) Limitation of Delay of Implementation of Promotional Offers Available to New Customers: No promotional offer available to new DFS Consumers may contain terms that delay its full implementation by the DFSO for a period of longer than 90 days, regardless of the amount of gameplay in that period by the DFS Consumer.

34.10 Protections for Problem Gamers

(1) Self-Exclusion: DFSOs will honor requests from DFS Consumers to self-exclude from all contests on any DFS Contest Platform or to set self-imposed deposit limits or to set self-imposed loss limits. DFSOs will implement and Prominently Publish procedures for DFS Consumers do so. Such procedures must include, at a minimum, opportunities to self-exclude or to set deposit limits on any DFS Platform used by that DFS Consumer to make deposits into a DFS account.

(2) Self-Limitation: DFSOs will provide options to DFS Consumers that allow them to limit the number of contests they enter per week, and/or that they only be allowed to play in contests with contest fees below a limit that they establish. DFSOs will implement and Prominently Publish procedures for DFS Consumers to do so. Such procedures must include, at a minimum, opportunities to set contest limits on any DFS Platform used by that DFS Consumer to make deposits into a DFS account.

(3) Restriction On Direct Marketing to Excluded DFS Consumers: DFSOs will not market a contest to DFS Consumers by phone, email or in any form of individually targeted advertisement or marketing material if the player is self-excluded or otherwise barred from playing in that contest.

(4) Publication of Sources of Assistance to Problem Gamers: DFSOs will Prominently Publish a description of opportunities for problem gamers to receive assistance or which direct DFS Consumers to a reputable source, accessible in Massachusetts, for such information.

(5) Requests for Exclusion Made by Third Parties: DFSOs will develop and Prominently Publish procedures for honoring requests of third parties to exclude DFS Consumers (or to set deposit or loss limits).

a. These procedures will include provisions for honoring requests to exclude DFS Consumers for whom the requestor can provide documentary evidence of sole or joint financial responsibility for the source of any funds deposited with a DFSO for gameplay, including

i. proof that the requestor is jointly obligated on the credit or debit card associated with the DFS Consumer's account;

ii. proof of legal dependency of the DFS Consumer on the requestor under state or federal law; and

iii. other situations in which the requestor may be legally obligated for the debts of the person for whom exclusion is requested.

b. The procedures established under this subsection will also provide for exclusion in situations in which the requestor can establish the existence of a court order requiring the DFS Consumer to pay unmet child support obligations.

(6) Limitations on Consumer Deposits: DFS Consumer deposits will be limited to no more than $1,000 in any calendar month; provided however that a DFSO may establish and Prominently Publish procedures for temporarily or permanently increasing a DFS Consumer's deposit limit, at the request of the DFS Consumer, above $1,000 per calendar month.

a. If established by a DFSO, such procedures will include evaluation of information, including income or asset information, sufficient to establish that the DFS Consumer can afford losses that might result from gameplay at the deposit limit level requested.

b. When a temporary or permanent deposit level limit increase is approved, the DFSO's procedures will provide for annual evaluation of a player's financial ability to afford losses.

34.11 Prohibition on Extensions of Credit

DFSOs shall not issue credit to DFS Consumers.

34.12 Fairness of DFS Contests

(1) No Game Play by Employees and Others Affiliated with a DFSO: No DFSO employee, DFSO principal, DFSO officer, DFSO director, or DFSO Contractor may play on any DFS Contest Platform of any DFSO. Nor may such person play through another person as a proxy. However, such individuals may play in a private contest on a DFS Contest Platform in which the individual's relevant affiliation with a DFSO is fully disclosed to each player. DFSOs will make these restrictions known to all affected individuals and corporate entities.

(2) No Disclosure of Proprietary Information: No DFSO employee, DFSO principal, DFSO officer, DFSO director, or DFSO Contractor may disclose proprietary or non-public information that may affect DFS gameplay to any person permitted to engage in DFS gameplay. DFSOs will make these restrictions known to all affected individuals and corporate entities.

(3) No Gameplay by Athletes and Others Connected with DFS Contest Outcomes: No DFSO will allow a professional or amateur athlete whose individual statistics or performance may be used to determine any part of the outcome of any DFS contest, or a sports agent, team employee, referee or a league official associated with any competition which is the subject of DFS contests, to enter DFS contests in the sport in which they participate. Nor may such athlete, sports agent, team official, team representative, referee or league official play through another person as a proxy.

a. DFSOs will make commercially reasonable efforts to obtain lists of such persons for the purpose of implementing this provision.

b. DFSOs, upon learning of a violation of this rule, will bar the individual committing the violation from playing in any DFS contest by suspending such individual's account and banning such individual from further play, will terminate any existing promotional agreements with such individual and will refuse to make any new promotional agreements that compensate such individual.

c. DFSOs will make these restrictions known to all affected individuals and corporate entities.

(4) Restriction on Sharing Non-Public Information that May Affect DFS Gameplay: No DFSO will knowingly permit an athlete, sports agent, team employee, referee or league official to provide proprietary or non-public information to any DFS player, or to provide such information to a DFS player before such information is made public.

a. DFSOs, upon learning of a violation of this rule, will bar the individual(s) committing the violation as well as the person(s) receiving such information from playing in any DFS contest by suspending the affected account(s) and banning such individual(s) from further play. The DFSO will also terminate any existing individual promotional agreements with any athlete, sports agent, team employee,

referee or league official that violates this rule and will refuse to make any new individual promotional agreements that compensate such individual.

b. DFSOs will make these restrictions known to all affected individuals and corporate entities.

(5) Beginner Games: All DFSOs will develop games that are limited to Beginners and will keep non-Beginner players from participating in those games either directly or through another person as a proxy. A DFSO will suspend the account of any non-Beginner DFS player that attempts to enter a Beginner game directly or through another person as a proxy and will ban such individual from further play.

(6) Games that Exclude Highly-Experienced Players: All DFSOs will develop games in which Highly-experienced Players cannot participate either directly or through another person as a proxy. A DFSO will suspend the account of any Highly-Experienced Player who attempts to enter a game that excludes Highly-Experienced Players directly or through another person as a proxy and will ban such individual from further play.

(7) On-boarding Procedures for New Players: On-boarding procedures for new players will explain opportunities to learn about contest play, to identify Highly-experienced Players, and will recommend beginner contests and low-cost private contests with friends for their value as a learning experience.

(8) Prohibition of Scripts: No Scripts will be allowed. Existing scripts will be removed. A DFSO will bar any individual or corporation found to be using an unauthorized Script from playing in any DFS contest by terminating such individual or corporate account and by banning that individual or corporation from DFS Contest Platforms.

(9) Rules on When DFS Contests Lock:

a. As of the time a DFS contest locks, no further entries or substitution of participants will be accepted in connection with that contest. Nor will participants be allowed to make further alterations or substitutions in connection with their entry or entries.

b. DFSOs will have Prominently Published rules that govern when each DFS contest will lock. Each DFSO contest will also prominently disclose contest-specific information about the time that contest locks in connection with each contest offered.

c. A DFSO will strictly enforce all disclosed lock times.

(10) Identification of Highly Experienced Players: DFSOs will identify Highly-experienced Players by a symbol attached to their username, or by other easily visible means, on all DFSO Contest Platforms.

(11) Restrictions on Number of Entries by Contest:

a. DFSOs will not allow DFS players to submit more than one entry in any DFS contest involving 12 entries or less.

b. DFSOs will not allow DFS players to submit more than two entries in any DFS contest involving 13-36 entries.

c. DFSOs will not allow DFS players to submit more than three entries in any DFS contest involving 37-100 entries.

d. DFSOs will not allow DFS players to submit more than 3% of all entries in any contest involving more than 100 entries.

e. For all advertised DFS contests, the DFSO will prominently include information about the maximum number of entries that may be submitted for that contest.

34.13 Tax Laws and Disclosures

(1) Obligation to Comply with Applicable Tax Laws Including Disclosures: DFSOs will comply with all applicable tax laws and regulations including, without limitation, laws and regulations applicable to tax withholding and laws and regulations applicable to providing information about winnings and withholdings to taxing authorities and to DFS Consumers.

(2) Disclosure of Potential Tax Liabilities: DFSOs will disclose potential tax liabilities to DFS Consumers in the on-boarding process and again at the time of award of any prize in excess of $600. Such disclosures will include a warning that the obligation to pay applicable taxes on winnings is the responsibility of the DFS Consumer and that failure to pay applicable tax liabilities may result in civil penalties or criminal liability.

34.14 Data Retention

(1) Consumer Account Information: DFSOs will retain information sufficient to trace the deposits into and out of a DFS Consumer's account for at least ten years from the date of deposit or withdrawal.

(2) Prize Information: DFSOs will retain data about the winner(s) of each DFS contest and the amount of any Prizes awarded to the winner(s) for at least ten years from the date of the DFS contest.

(3) Advertising: DFSOs will retain copies of all advertisements for at least four years from the date of the last use of that advertisement and will retain records sufficient to identify

where such advertisements were placed. To the extent that an advertisement cannot be maintained in its original form (*e.g.*, billboards), the advertising copy will be retained.

34.15 Investigating and Resolving Complaints by DFS Consumers; Self-Reporting of Violations

(1) Consumer Complaint Procedures:

a. DFSOs will develop and Prominently Publish procedures by which a DFS Consumer may file a complaint, by internet chat, in writing or by other means, with the DFSO about any aspect of DFS operation.

b. DFSOs will respond to such complaints in writing within seven days. If the relief requested in the complaint will not be granted, the response to the complaint will state the reasons with specificity.

c. If the response to a complaint is that more information is needed, the form and nature of the necessary information will be specifically stated. When additional information is received, further response will be required within seven days.

d. All complaints received by a DFSO from a DFS Consumer and the DFSO's responses to complaints will be retained for at least four years and made available to the AGO within seven days of any request by the AGO.

34.16 Severability

If any provision of 940 CMR 34.00 or the application of such provision to any person, entity or circumstances is held to be invalid, the validity of the remainder of 940 CMR 34.00 and the applicability of such provision to other persons, entities or circumstances shall not be affected.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 19, 2016

The Honorable Myra Crownover
Chair, Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78711-2910

Opinion No. KP-0057

Re: The legality of fantasy sports leagues under Texas law (RQ-0071-KP)

Dear Representative Crownover:

You ask for an opinion on two questions involving fantasy sports leagues.[1] Specifically, you ask whether

1. [d]aily fantasy sports leagues such as DraftKings.com and FanDuel.com are permissible under Texas law, and

2. [whether i]t is legal to participate in fantasy sports leagues where the house does not take a "rake" and the participants only wager amongst themselves.

Request Letter at 1.

I. Factual Background

To begin, a brief description of what we understand you to mean by "fantasy sports leagues" is necessary.[2] Fantasy sports leagues allow individuals to simulate being a sports team owner or manager. Generally, an individual assembles a team, or lineup, often under a salary limit or budget, comprising actual players from the various teams in the particular sports league, i.e., National Football League, National Basketball League, or National Hockey League. Points are

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[1]*See* Letter from Honorable Myra Crownover, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (received Nov. 12, 2015), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2]The forthcoming description of fantasy sports play is compiled generally from the October 16, 2015, Memorandum from the Nevada Attorney General's Office, to which you refer, concerning the legality of daily fantasy sports. *See generally* Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs & Ketan D. Bhirud, Head of Complex Litig., Nev. Att'y Gen., to A.G. Burnett, Chairman Nev. Gaming Control Bd. & Nev. Gaming Control Bd. Members Terry Johnson & Shawn Reid (Oct. 16, 2015), http://gaming.nv.gov/modules/showdocument.aspx?documentid=10487 ("Nev. Att'y Gen. Memo").

garnered for the individual's "team" based on the actual game performance of the selected players, and scoring is based on the selected player's performance in the game where actual performance statistics or measures are converted into fantasy points. Each participant "owner" competes against other owners in the fantasy league. In a traditional fantasy sports league, play takes place over the course of an entire sports season, tracking the performance of selected players for the duration of the season. In contrast, in daily fantasy sports leagues, play tracks players' performances in single games on a weekly basis. With respect to both types of fantasy games, once a participant selects his or her players as the team or "lineup," they have no control over the players' performance in the actual game or the outcome of the actual game. The participant waits for the outcome, and his or her point levels are determined by the performance of the players on game day. Individuals pay a fee to participate in a league, which fees fund the pot of money used to pay out to the participants as their earned points direct. In play on the Internet sites for DraftKings and FanDuel, a portion (ranging from 6% to 14%) of the fees collected are not paid out to the participants but are retained by the gaming site. The "commissioner" running a traditional fantasy sports league may or may not retain a portion of participants' entry fees.

Turning to the law, article III, section 47(a) of the Texas Constitution provides, "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State," subject to certain exceptions.[3] In accordance with article III, section 47(a), the Legislature has prohibited a variety of gambling activities through chapter 47 of the Penal Code.[4] In Texas, a person commits a criminal offense if the person "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest."[5] The answer to your first question turns on whether participants make a bet. Under chapter 47, a "bet" means "an agreement to win or lose something of value solely or partially by chance."[6] And a bet specifically excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]"[7] Lastly, it is a defense to prosecution if, among other things, "no person received any economic benefit other than personal winnings,"[8] which cannot be true if the house takes a "rake."

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[3]TEX. CONST. art. III, § 47(a); *see City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (articulating as elements necessary to constitute a lottery (1) the offering of a prize, (2) by chance, and (3) the giving of consideration for an opportunity to win the prize).

[4]*See* TEX. PENAL CODE §§ 47.01–.10; *see also Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.) (recognizing the Legislature's adoption of chapter 47 pursuant to article III, section 47).

[5]TEX. PENAL CODE § 47.02(a)(1).

[6]*Id.* § 47.01(1).

[7]*Id.* § 47.01(1)(B).

[8]*Id.* § 47.02(b)(2).

II. Standard of Review

These questions require us to examine competing statutory provisions. The courts have developed time-honored canons for reconciling tension within a statute. According to the United States Supreme Court,

> canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[9]

This cardinal canon is best implemented by examining the plain contextual meaning of a statute—not by improperly removing a snippet from the statutory context.[10] A court "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."[11]

In the attorney general opinion process, we cannot resolve factual issues.[12] But we can assume facts if requested, as you have here.[13]

III. Analysis

A. Paid Daily Fantasy Sports

Your first question is whether paid daily fantasy sports leagues constitute illegal gambling. Answering your question requires determining whether paid daily fantasy leagues constitute betting on the performance of a participant in a game (thus constituting illegal gambling) or instead are, in and of themselves, bona fide contests for the determination of skill (thus constituting no bet and no illegal gambling). Paid daily fantasy league participants are wagering on "the performance of a participant in a game or contest."[14] If that act constitutes a bet under the statute, then the

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[9]*Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

[10]*See Cascos v. Tarrant Cty. Democratic Party*, No. 14-0470, 2015 WL 6558390, at *5 (Tex. Oct. 30, 2015) (reversing a court of appeals when its opinion "improperly takes a snippet of language out of its statutory context"); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) ("Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.").

[11]*See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

[12]Tex. Att'y Gen. Op. No. KP-0046 (2015) at 4 (noting that attorney general opinions do not resolve disputed fact questions).

[13]*See* Request Letter 1 ("Please assume the following facts, as more fully explained in an October 16, 2015 memo from the Nevada attorney general's office to the Nevada Gaming Control Board.").

[14]TEX. PENAL CODE § 47.02(a)(1).

activity is illegal gambling. Participants in a daily fantasy sports league pay a fee to participate,[15] only a portion of which is included in the pot of funds that are paid out to the winning "owners." By proffering this fee, players agree to win or lose something of value—a portion of the pot.[16] The dispositive question then is whether the win or loss is determined solely or partially by chance. Proponents of daily fantasy sports games argue that skill is required to predict which players will have the best performance for their position in any particular game.[17] This may well be true. However, Texas law does not require that skill predominate. Instead, chapter 47 requires only a partial chance for there to be a bet.[18] Texas courts have confirmed this plain language in the statute.[19] And this office has previously concluded that "the plain language of section 47.01(1) . . . renders irrelevant the matter of whether poker is predominantly a game of chance or skill. . . . If an element of chance is involved in a particular game, it is embraced within the definition of 'bet.'"[20]

It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. The participant's skill in selecting a particular player for his team has no impact on the performance of the player or the outcome of the game. In any given week:

- a selected player may become injured or be ejected and not play in all or a portion of the game—such as an injury to a third-string quarterback causing a team to rotate

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[15]We understand that some daily fantasy sports contests charge no fee to participate and pay nothing to the winners. Brief from James Ho, Gibson Dunn, to Honorable Ken Paxton at 2, 8, 9 (Dec. 21, 2015) ("GibsonDunn Brief") (on file with the Op. Comm.). Participation in such contests involves no consideration and no bet, and as a result cannot constitute illegal gambling in Texas. *See City of Wink*, 100 S.W.2d at 701.

[16]TEX. PENAL CODE § 47.01(9) (defining a "thing of value" to generally mean "any benefit").

[17]*See* GibsonDunn Brief at 18–25; Brief from Reid Wittliff, ZwillGen, to Honorable Ken Paxton at 6–7 (Dec. 18, 2015) ("ZwillGen Brief") (on file with the Op. Comm.).

[18]*See* TEX. PENAL CODE § 47.01(1) (a "bet" means "an agreement to win or lose something of value solely or partially by chance").

[19]*See Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940) ("The legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined." (quoting *Melton v. State*, 124 S.W. 910, 911 (Tex. Crim. App. 1910), *Mayo v. State*, 82 S.W. 515, 516 (Tex. Crim. App. 1904), and Words and Phrases, Second Series, Vol. 1, p. 433); *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.").

[20]Tex. Att'y Gen. Op. No. GA-0335 (2005) at 3–4.

three different players at quarterback in one half[21] or a batter charging the mound after getting hit by a pitch and getting corrected and then ejected;[22]

- a selected player may perform well or perform poorly against the opponent that week, perhaps due to weather conditions—such as a defensive tackle diving on a football after a blocked field goal attempt, only to allow the other team to recover the ball and score the game-winning touchdown;[23]

- a selected player's performance may be impacted by the state of the game equipment (say, the underinflation of a football or the presence of cork inside a baseball bat)[24] or facilities (such as the air conditioning system in a basketball arena failing, causing the star player for a team aptly named "Heat" to suffer temperature induced legs cramps and be carried off the court);[25] and

- a selected player's performance may be impacted by a call of refereeing officials—such as a catch that all individuals not wearing stripes believe to constitute a touchdown being ruled an incompletion with instant replay.[26]

The list goes on. All of these random circumstances, especially if they occur after the participants' selections are locked in, amount to chance and do not involve any skill on the part of the participant. Chance happens, especially on game day. "That's why they play the game."[27] Based

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[21]John Werner, *Everybody hurts: Another QB injured, Bears stumble in home finale, 23-17*, WACO TRIB., (Dec. 6, 2015), http://www.wacotrib.com/sports/baylor/football/everybody-hurts-another-qb-injured-bears-stumble-in-home-finale/article_4e581922-a55e-5289-a7c7-dfa43ca15a5a.html.

[22]*See* Thomas Neumann, *Nolan Ryan-Robin Ventura fight anniversary—13 things you should know*, ESPN.com, (Aug. 4, 2015), http://espn.go.com/mlb/story/_/id/13375928/nolan-ryan-robin-ventura-fight-anniversary-13-things-know.

[23]Daniel Hajek, *Cowboys' Leon Lett On 'One Of The Worst Days Of My NFL Career,'* NAT'L PUB. RADIO, (Nov. 27, 2015), http://www.npr.org/2015/11/27/457565031/cowboys-leon-lett-on-one-of-the-worst-days-of-my-nfl-career.

[24]Ian Rapoport, *More details on the investigation of Patriots' deflated footballs*, NFL.com, (Feb. 1, 2015), http://www.nfl.com/news/story/0ap3000000466783/article/more-details-on-the-investigation-of-patriots-deflated-footballs; Rick Weinberg, *Sammy Sosa gets caught with corked bat*, ESPN.com, (Aug. 4, 2004), http://www.espn.go.com/espn/espn25/story?page=moments/33.

[25]Royce Young, *Spurs: AC back up and running*, ESPN.com, (June 6, 2014), http://www.espn.go.com/nba/playoffs/2014/story/_/id/11042810/san-antonio-spurs-say-air-conditioning-their-arena-repaired.

[26]Brandon George, *Was it a catch? Controversial Dez Bryant play reversed*, DALLAS MORNING NEWS, (Jan. 11, 2015), http://www.sportsday.dallasnews.com/dallas-cowboys/cowboysheadlines/2015/01/11/was-it-a-catch-controversial-dez-bryant-play-reversed.

[27]Bud Montet, *Random Shots*, MORNING ADVOC., Dec. 30, 1965, at 2C (attributing quote to University of Kentucky basketball coach Adolph Rupp), *see* THE BIG APPLE, *That's why they play the games* (sports adage), http://www.barrypopik.com/index.php/new_york_city/entry/thats_why_they_play_the_games.

on the facts you ask us to assume, the argument that skill so predominates that chance is minimal is nonetheless an admission that chance is an element and partial chance is involved.[28] Accordingly, odds are favorable that a court would conclude that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.[29]

Two providers of daily fantasy sports leagues nonetheless contend that participation in such leagues is not gambling because the statutory exception to the definition of "bet" excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]"[30] Specifically, they contend the element of skill so predominates in daily fantasy sports as to render chance immaterial and that the fantasy league participants are the actual contestants. While Texas courts have yet to address the actual-contestant exclusion from the definition of "bet," this office addressed that matter in 1994. The question presented involved participants paying an entry fee for a chance to win prizes in a contest to forecast the outcome of approximately 150 sporting events, which required "using the skills necessary to analyze relevant data, including, but not limited to, point differentials as published in newspapers of general circulation, weather conditions, injuries or other factors."[31] We noted that the Practice Commentary to the statute indicated the actual-contestant exclusion "is intended to exclude only awards and compensation earned by direct participation in the contest—the pole-vaulter's cup, the pro football player's salary—not the receipt of a wager made on its outcome."[32] We concluded that, although the "exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace those who pay entry fees for a chance to win a prize from forecasting the outcome of the events."[33] Moreover, the other types of contests in the actual-contestant exclusion (speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or

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[28]The attorneys general in Nevada and New York have reached the conclusion that there is sufficient chance to violate the "material chance" standard in their state laws. *See* Nev. Att'y Gen. Memo at 9, 15–16; Letter from Kathleen McGee, Chief, New York Attorney General's Internet Bureau, to Jason Robins, CEO, DraftKings, Inc., (Nov. 10, 2015) at 1, http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf ("DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a 'contest of chance' where winning or losing depends on numerous elements of chance to a 'material degree.'"). *See also New York v. DraftKings, Inc.*, No. 453054-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015) (orders determining that the payment of an entry fee to participate in daily fantasy sports is risking a thing of value and, under New York statutes, constitutes illegal gambling and granting preliminary injunction and temporary restraining order against defendant in each action).

[29]Likewise, entities that promote daily fantasy sports league gambling could possibly violate section 47.03 of the Penal Code by operating a gambling place or becoming a custodian of a bet. *See* TEX. PENAL CODE § 47.03(a).

[30]TEX. PENAL CODE § 47.01(1)(B). *See* GibsonDunn Brief at 17; ZwillGen Brief at 4.

[31]Tex. Att'y Gen. Op. No. LO-94-051, at 1.

[32]*Id.* at 2.

[33]*Id.*

aircraft) inform the nature of what the Legislature means with the term "skill."[34] Following this office's 1994 opinion, the Illinois Attorney General recently concluded that Illinois's similar statutory actual-contestant exclusion does not apply to participants of daily fantasy sports leagues.[35]

Subsection 47.01(1)(B), and our interpretation of it, remains unchanged. For example, if a person plays in a golf tournament for an opportunity to win a prize, he or she is within the actual-contestant exclusion to the definition of betting. If instead the person does not play in that tournament but wagers on the performance of an actual contestant, he or she is gambling under Texas law. To read the actual-contestant exception as some suggest would have that exception swallow the rule.[36]

B. Season-Long Fantasy Sports

The same framework applies to traditional fantasy sports leagues, but the outcome may differ depending on whether the house takes a rake. Payment of a fee to participate in the league constitutes an agreement to win or lose something of value, and the outcome depends at least partially on chance, thus involving a bet. However, traditional fantasy sports leagues often differ from daily fantasy sports leagues in that any participation fee is not retained by the "commissioner" of the traditional fantasy sports league and is instead paid out wholly to the participants. And section 47.02 contains a defense to prosecution when "(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants."[37] Thus, to the extent play in a traditional fantasy sports league satisfies the above three elements, the participants in such league may avail themselves of the defense to prosecution.

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[34]*See Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015) (applying doctrine of *ejusdem generis* to hold that the a broad term in a list was constrained by the meaning of the remaining, narrower terms).

[35]*See* Ill. Att'y Gen. Op. No. 15-006 (Dec. 23, 2015) at 10–13 (Letter from Honorable Lisa Madigan, Ill. Att'y Gen. to Honorable Elgie R. Sims, Jr. Ill. State Rep., Dist. 34, and Honorable Scott R. Drury, Ill. State Rep., Dist. 58).

[36]*See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 81 (Tex. 2014) ("[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless." (quotation marks omitted) (alteration in original)). One paid daily fantasy sports operator also contends that the payment of entry fees to participate in fantasy leagues are not bets. *See* ZwillGen Brief at 4. The New York court rejected this argument, holding that the entry fees were "something of value" under New York law and thus constituted a bet. *New York v. DraftKings, Inc.*, No. 453054-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015). We agree with the New York court that the labelling of the consideration as an entry fee does not transform its character as consideration for the opportunity to win a prize.

[37]TEX. PENAL CODE § 47.02(b); *see* Tex. Att'y Gen. Op. No. GA-0611 (2008) at 5 (acknowledging that the term "and" is usually used in a conjunctive sense).

In present form, which has remained unchanged for purposes of this analysis since its codification in 1973,[38] the Legislature has seen fit to prohibit betting on the performance of individuals in games or contests but to not prohibit actual contestants in contests of skill from receiving compensation or prizes.[39] Under this statutory framework, odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sport leagues that occurs in a private place where no person receives any economic benefit other than personal winnings and the risks of winning or losing are the same for all participants does not involve illegal gambling. It is within the province of the Legislature, and not this office or the courts, to weigh the competing policy concerns necessary to alter this framework to legalize paid daily sports fantasy leagues.

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[38]*See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, Sec. 1, § 47.01–.02, 1973 Tex. Gen. Laws 883, 965–66.

[39]TEX. PENAL CODE §§ 47.01(1)(B), .02(a)(1).

SUMMARY

Under section 47.02 of the Penal Code, a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest. Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.

Though participating in a traditional fantasy sports league is also illegal gambling under section 47.02, participants in such leagues may avail themselves of a statutory defense to prosecution under section 47.02(b) of the Penal Code when play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants.

Very truly yours,

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Chair, Opinion Committee

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,		
Plaintiff-Respondent,	:	New York County Clerk's Index No. 453056/2015
- against -		
FANDUEL INC.,		
Defendant-Appellant.		

REPLY MEMORANDUM OF DEFENDANT-APPELLANT FANDUEL INC. IN FURTHER SUPPORT OF ITS MOTION FOR A STAY PENDING APPEAL AND AN EXPEDITED APPEAL

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FanDuel, Inc. ("FanDuel") submits this reply memorandum in further support of its motion for a stay pending resolution of its appeal, continuing the interim stay of the lower court's preliminary injunction order entered by a single Justice of this Court (Hon. Paul G. Feinman) on December 11, 2015.

PRELIMINARY STATEMENT

This case is precisely the type for which stays pending appeal are intended. Denying a stay of the preliminary injunction for the duration of the appeal would cause virtually the same harm to FanDuel and give the State essentially the same relief as a final determination on the merits, before any court has rendered a final judgment on whether FanDuel's business is legal and before this Court has had a full opportunity to consider that issue. New York law does not countenance such a result under the circumstances here. Barring a true emergency, an injunction altering the status quo by forcing a defendant out of business is generally available only *after* a final judgment finding that the business is illegal. No emergency exists here, and there has been no such finding of illegality.

The State's submission largely ignores the central, limited question at issue in this motion—whether this Court should continue the current stay of Supreme Court's extraordinary preliminary order—as well as the proper considerations that inform a stay decision under established New York law. Instead, the State largely devotes its submission to the ultimate, first-impression question on the merits in this case, namely whether the fantasy sports contests FanDuel has operated openly for years without a hint of concern from the State are illegal. FanDuel will demonstrate in its appellate brief, which it will file on an expedited basis to perfect its appeal for the next available term (April Term), how Supreme Court erred in finding the State likely to succeed in ultimately establishing that FanDuel's fantasy sports contests constitute illegal gambling. But that is not the question now before this Court. On the issue before this

Court, the harm to FanDuel from a business shutdown, the absence of any public emergency warranting the infliction of that harm and the credibility of FanDuel's position on the merits issue of first impression in New York overwhelmingly support continuing the existing stay of Supreme Court's preliminary injunction order until this Court has decided FanDuel's appeal.

Under New York case law, a stay of a preliminary injunction pending appeal is appropriate on a showing that the balance of hardships favors preserving the status quo until the appeal is decided, where it is not "clearly shown that there is no merit to the appeal." The State's contrary contention that a stay requires an extraordinary showing of probability of ultimate appellate success and irreparable harm misstates the holdings of the cases that the State cites. Worse, the State misrepresents Supreme Court's findings in this case. On the present record, a stay is plainly appropriate under the correct legal standard.

A lifting of the stay would unquestionably cause FanDuel substantial hardship by closing down its business for New York customers during the pendency of this appeal. The State disputes this obvious proposition only by citing cases featuring orders that shut down lines of business *after* final judgments of illegality had been rendered or where illegality was uncontested. When a business's legality has remained in dispute, courts have stayed injunctions shutting down the business until the legality issue was resolved. Similarly, the State's contention that FanDuel cannot establish irreparable harm when the adverse consequences from a shutdown are "merely economic" disregards that the authorities recognizing this principle rely on the enjoined party's ability to obtain damages if it prevails. But FanDuel cannot recover such damages, because the State will not obtain a bond or otherwise provide any compensation to FanDuel for its economic losses from a shutdown upon an eventual finding that FanDuel's contests are legal.

In attempting to sidestep the principle that an order shutting down a business is generally available only *after* a judgment finding the business illegal, the State mischaracterizes Supreme Court's decision by repeatedly suggesting that it entered such a judgment. It is not true that Supreme Court "found" FanDuel's contests "to be plainly unconstitutional, unlawful and harmful to the public" and "gambling barred by the State constitution and the Penal Law." State's Memorandum of Law in Opposition to Defendants' Motion for an Interim Stay, Dec. 23, 2015 ("Mem.") at 12, 14. Instead, the court took pains to stress that it was making only an interim finding that the State "has a greater likelihood of success on the merits," that its preliminary conclusion "is not a final determination on the merits," and that its tentative impression remains subject to possible alteration after discovery—a far cry from the conclusive judgment the State asserts. Affirmation of John S. Kiernan in Support of Motion for a Stay Pending Appeal, Dec. 11, 2015 ("Kiernan Aff.") Ex. A (Order) at 9. In reaching that interim conclusion, the court did not hold an evidentiary hearing, did not analyze any of the documentary and testimonial evidence presented to it, did not address in any detail the legally required balancing of hardships associated with the requested injunction, and did not analyze FanDuel's arguments about why its contests are legal.

The State's contention that FanDuel's fantasy sports contests are illegal presents an issue that has never previously been considered in New York. The issue has been resolved in the defendant's favor elsewhere by the only court to have squarely addressed it, as well as by the U.S. Congress. The question of legality remains fiercely contested. The State's theory is unsupported by any credible evidence. Those facts strongly support continuing the stay.

Moreover, FanDuel's challenged conduct does not remotely involve the kind of extraordinary emergency conditions that compel lifting the stay to protect the public from

FanDuel's business pending appeal, as the State asserts. The State's sudden new illegality claim reflects an extraordinary change of mind by New York's Attorney General regarding a widely advertised and openly pursued line of business activity that hundreds of thousands of New Yorkers have enjoyed for six years, and that highly credible investors and sports leagues have sponsored and supported, without any expression of concern about legality from any State law enforcement officials. The Attorney General's transformation in November 2015 did not instantly convert activities long viewed as benign into an urgent source of harm. The State's own conduct confirms its recognition of the absence of emergency. Numerous other fantasy sports providers offer New York residents the same types of contests featuring entry fees and prizes (both daily and season-long) at issue in this case, but despite the State's claims that these contests pose alarming threats to New Yorkers, the State has not sought to force the discontinuance of those alternative offerings. As a result, daily and season-long fantasy sports contests run by others will continue in New York regardless of whether this Court extends the stay pending FanDuel's appeal. The State's tolerance of that reality undermines any claims that the public welfare demands an immediate halt to FanDuel's business.

There also is ample merit to FanDuel's appeal. As will be more fully set forth in FanDuel's appellate brief, Supreme Court erred in its assessment of the State's likelihood of success. FanDuel's contests fall within the category long recognized by New York law of legally valid contests in which the participants pay an entry fee and pit their skills against each other, with the contest's sponsor paying a pre-announced prize to the winners. Here, the contest involves participants' relative skill at picking a fantasy "roster" to be tested against other participants' fantasy rosters, simulating the role of a general manager or coach. These kinds of contests, which are a widely recognized and approved component of the American social fabric,

do not involve "risk[ing] or stak[ing] something of value" within the first prong of New York's statutory definition of illegal gambling. Nor do they satisfy the second prong of New York's definition of illegal gambling: they are not "games of chance" but games of skill, and they do not involve wagers over "future contingent events" as to which the participants have no "control or influence." Rather, the outcome of a fantasy sports contest is determined primarily by the relative skill of the fantasy competitors, a fact fatal to the State's claims.

The Court should continue the stay of Supreme Court's preliminary injunction until it decides FanDuel's appeal.

ARGUMENT

I. THE BALANCE OF THE PARTIES' RELATIVE HARDSHIPS FAVORS CONTINUING THE STAY

A. The State Mischaracterizes the Applicable Law and Standards

Cases in which New York courts have considered stays pending appeal under CPLR 5519(c) establish recognized factors to be considered in determining whether such relief is appropriate. The decision whether to grant such a stay lies in the court's discretion, but an appellate court is "duty-bound to consider the relative hardships that would result from granting (or denying) a stay." *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990). There is no requirement that FanDuel show irreparable harm to obtain a stay, *see, e.g.*, *id.*, but the irreparability of the harm to FanDuel may be considered as part of the balance of hardships. Courts also may consider the merits of the appeal in deciding a stay application. *Id.*; *Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep't 1987). FanDuel need not, however, show that Supreme Court erred in granting the preliminary injunction; rather, this Court may readily grant a stay unless the State has "clearly shown that there is no merit to the appeal." *Matter of*

Terrence K. (Lydia K.), 135 A.D.2d 857, 857 (2d Dep't 1987); *see also Herbert*, 126 A.D.2d at 407.

The State urges this Court to deny the stay based on a different and incorrect standard, premised on a mischaracterization of the cases the State cites. *See* Mem. at 15. For example, contrary to the State's assertion, this Court did not suggest in *DeLury v. City of New York*, 48 A.D.2d 405 (1st Dep't 1975), that a stay pending appeal is a "drastic remedy" requiring a "clear right," "reasonable probability of ultimate success" and "the prospect of irreparable harm." Mem. at 14-15. To the contrary, the Court used those words to describe the extraordinarily stringent nature of the test for approving the trial court's *preliminary injunction*, citing them as factors *favoring* continuation of a stay of that injunction pending appeal. *DeLury*, 48 A.D.2d at 405-406 (denying motion to dissolve automatic stay under CPLR 5519(a)). That reasoning supports granting, not denying, a stay pending appeal here.

Similarly, in *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799 (2d Dep't 1970), the court reversed (with one minor exception) a preliminary injunction that, much like the injunction here, was entered on affidavits without an evidentiary hearing and changed the status quo. *Id.* at 801. Contrary to the misleading impression the State seeks to create, Mem. at 15, the court in *Russian Church* does not even mention a stay of the preliminary injunction pending appeal, because such a stay was not at issue—once again, the court was only describing the standard applicable to the underlying preliminary injunction on appeal. Striking virtually all of the trial court's injunction, the Appellate Division held that such preliminary injunctions should be granted only "with great caution and only when required by urgent situations or grave necessity." *Russian Church*, 34 A.D.2d at 801. Again, that decision presents reasons for granting, not denying, a stay to FanDuel.

Applying the correct standard, this Court should stay the extraordinary change in the status quo caused by the preliminary injunction until this Court has had an opportunity to hear and decide FanDuel's appeal.

B. Supreme Court Made No Finding that FanDuel's Business Was Illegal

The State's contentions concerning the balance of equities rest entirely on the false claim, repeated many times in its submission, that "Supreme Court found [FanDuel's operations] to be plainly unconstitutional, unlawful, and harmful to the public." Mem. at 14; *see also id.* at 12, 37. Supreme Court did no such thing. Although the court stated that the State had shown a "likelihood of success," it expressly emphasized that its order "does not constitute a determination of the ultimate issues" and that "discovery is needed after joinder of issue." Kiernan Aff. Ex. A (Order) at 9. The State's submission completely ignores the court's explicit statement that it was not making any determination as to any of the ultimate issues in the case—including whether FanDuel's business was legal.

The two cases on which the State primarily relies illustrate why the State is incorrect in arguing that Supreme Court's provisional findings conclusively establish irreparable harm to public interests from letting FanDuel stay in operation pending this appeal. *See* Mem. at 37. In *United States v. Diapulse Corp. of America*, 457 F.2d 25 (2d Cir. 1972), the Second Circuit affirmed a preliminary injunction enjoining a party from making advertising claims only after a jury had found, after a full trial on the merits in a prior action between the same parties, that the claims were misleading. And in *United States v. Rx Depot, Inc.*, 290 F. Supp. 2d 1238 (N.D. Okla. 2003), a federal court preliminarily enjoined the defendant from selling imported prescription drugs, but only based on a finding, after an evidentiary hearing, that the defendants' business was founded on illegal imports of prescription drugs. Neither of those situations is anything like the one here, where a preliminary injunction was entered without a judgment

finding illegality, without a trial or evidentiary hearing, and on sharply disputed facts. The State does not cite even a single case, in New York or elsewhere, in which a court (without later being reversed on appeal) enjoined the conduct of an ongoing business when the legality of the business remained an unresolved dispute.[1]

On the contrary, New York courts have recognized that it is inappropriate to shut down a longstanding business prior to a final adjudication on the merits without proof that immediate harm to the public is likely. For example, in *City of Rochester v. Sciberras*, 55 A.D.2d 849 (4th Dep't 1976), Supreme Court had granted a city's motion to preliminarily enjoin operation of a Roto-Rooter franchise on the ground that the operator lacked a plumbing license after finding that the city was likely to succeed on the merits. A Justice of the Appellate Division stayed the injunction pending appeal, however, on the ground that the "defendant has been operating his business in the City of Rochester for several years [and] there is no evidence that any harm has been caused thereby to any private sewer system or the public sewer system of the City." *Id.* at 849. And on reaching the merits of the appeal, the Appellate Division concluded that the preliminary injunction should be reversed for a similar reason: despite "the importance to the City of having its Ordinances obeyed," there was "no justification for the issuance of a preliminary injunction" in the face of a challenge to the administration and validity of the plumbing license requirement, in the absence of "evidence of immediate injury to the City or its

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[1] *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 171 (2d Cir. 2007) (cited in Mem. at 37) (vacating stay of further proceedings in U.S. District Court; no injunction against operation of business was involved); *Marcone APW LLC v. Servall Co.*, 85 A.D.3d 1693, 1697 (4th Dep't 2011) (cited in Mem. at 42) (affirming injunction against use of customer list that defendant admitted was stolen from plaintiff; imposing no restriction on soliciting or doing business with other customers); *City of New York v. Smart Apartments LLC*, 39 Misc. 3d 221, 224 (Sup. Ct. N.Y. County 2013) (cited in Mem. at 45) (preliminarily enjoining clear violations of law based on evidence that was "exceedingly well-documented and not significantly denied by defendants").

citizens." *Id.* at 850; *see also People v. New York Carbonic Acid Gas Co.*, 128 A.D. 42, 43 (3d Dep't 1908) ("defendants should not be enjoined in the prosecution of their ordinary business" while challenge to constitutionality of law was pending). Here, too, there was neither an actual determination that FanDuel's business operations were illegal nor (as discussed below, *see* Part II.C, *infra*), any actual evidence, as opposed to mere assertion, that FanDuel's operations are causing harm to the public. Thus, as in *City of Rochester v. Sciberras*, a stay pending appeal is warranted.

The legality of FanDuel's conduct and the correctness of Supreme Court's preliminary injunction are intensely disputed on this appeal. No New York court has ever previously addressed the legality of fantasy sports contests, an issue of first impression in this State. As discussed more fully below, other authorities have agreed with FanDuel's position that its contests do not constitute illegal gambling, and Supreme Court's interim conclusion that the State is "more likely" to succeed ultimately on the merits is legally incorrect. In circumstances of this kind, it is appropriate to stay the radical step, based only on preliminary conclusions, of shutting down FanDuel's New York customer business until this Court has evaluated the merits of FanDuel's appeal.

C. Forcing FanDuel to Stop Serving Customers in New York Will Cause Serious and Irreparable Harm to Its Business

1. Prohibiting FanDuel from Serving Hundreds of Thousands of Customers Without Any Right to Recover Damages from the State Is Irreparable Harm

The irreparable harm to FanDuel from the preliminary injunction is obvious and profound. If that injunction is allowed to take effect, FanDuel will be unable to continue to provide services to its New York customers until this Court reverses the preliminary injunction or the IAS court dissolves that injunction itself. The loss of business as a result of this shutdown

would be immediate and substantial, and the shutdown of services to New York customers would likely threaten harm to FanDuel's business in other states, too.

While the State cites several cases for the proposition that "monetary harm is insufficient to establish an irreparable injury," Mem. at 41, it neglects to mention the reason given in each of those cases: the harm was fully reparable through money damages.[2] While a party obtaining a preliminary injunction is ordinarily required to post a bond to indemnify the opponent against damages caused by the injunction, *see* CPLR 6312(b), that requirement does not apply here: The State is exempt from the requirement to post security as a condition for its preliminary injunction, and the IAS court did not fix any liability for the State in lieu of a bond when imposing the preliminary injunction. *See* CPLR 2512(1). As a result—as the State admitted at oral argument before Justice Feinman on FanDuel's emergency interim stay application—FanDuel cannot recover any damages from the State for its lost business upon a future reversal or dissolution of the preliminary injunction. *See, e.g., Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852, 856 (3d Dep't 2007); *Town of Babylon v. Conte*, 61 Misc. 2d 1055, 1057 (Sup. Ct. Suffolk County 1970). If the preliminary injunction is not stayed pending appeal, the harm to FanDuel will be wholly irreparable. *See New York Carbonic*, 128 A.D. at 43 (vacating preliminary injunction obtained by State because it was "a hardship to enjoin the greater part of defendants' business, with no indemnity in case they are finally successful").

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[2] *Di Fabio v. Omnipoint Comms. Inc.*, 66 A.D.3d 635, 636-37 (2d Dep't 2009) ("Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient.") (internal quotation marks omitted); *New York City Off-Track Betting Corp. v. New York Racing Ass'n, Inc.*, 250 A.D.2d 437, 442 (1st Dep't 1998) (no irreparable harm "since the injury alleged is pecuniary in nature, and may be adequately compensated by money damages"); *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 186 A.D.2d 417, 418 (1st Dep't 1992) ("Damages compensable in money and capable of calculation ... are not irreparable.").

In addition, this Court has repeatedly recognized that a "loss of business [that is] impossible, or very difficult, to quantify" constitutes irreparable harm, even if it does not involve the shutdown of the entire business. *Invesco Inst. (N.A.), Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 A.D.3d 696, 697 (1st Dep't 2010) (quoting *Willis of New York, Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002)). Courts also have found irreparable harm where a business would be prevented from operating within a particular jurisdiction. *See, e.g., Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570 (2d Dep't 2005) (enjoining zoning ordinance that would stop existing business from operating in current location); *Barclay's Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp. Union*, 51 A.D.2d 516, 517 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 269 (1977) (enjoining illegal picketing aimed at stopping deliveries to New York City).

Apart from the loss of revenue associated with a protracted shutdown, FanDuel would also suffer a loss of goodwill as customers migrate to other fantasy sports sites that remain in operation for New Yorkers, potentially to remain customers there even following a reversal of the preliminary injunction order. That is particularly clear given that the State is only seeking to shut down FanDuel and one of its competitors, DraftKings, while leaving the rest of the industry in operation. *See* Reply Affirmation of John S. Kiernan, Jan. 4, 2016 ("Kiernan Reply Aff.") ¶ 5 (submitted herewith). Such losses would be impossible to quantify but would likely be very substantial. As one of the cases cited by the State makes clear, "[t]he loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by monetary damages" and therefore constitutes "irreparable harm." *Marcone APW, LLC v. Servall Co.*, 85 A.D.3d 1693, 1696-97 (4th Dep't 2011) (cited in Mem. at 42) (affirming injunction against misconduct that would result in plaintiff's loss of customers); *see also, e.g., Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 859 (3d Dep't 2003) (same).

Thus, although irreparability of harm is not a requirement for a stay pending appeal, the fact that FanDuel would plainly suffer such harm from the preliminary injunction provides a strong reason to grant the stay.

The State's contention that the injunction will cause no substantial harm to FanDuel because FanDuel will continue to have customers in other states does nothing to negate the harm associated with the loss of hundreds of thousands of customers in New York. The scale of this lost business should make the substantial harm from the shutdown indisputable, even in the unlikely event that the injunction has no adverse collateral consequences to FanDuel regarding customers in other states. Unlike the injunction in *Marcone*, cited by the State, which only forbade the solicitation of approximately 600 specific potential customers, 85 A.D.2d at 1697, the injunction entered below would prevent FanDuel from doing business with any customers located anywhere in New York State.

There is equally no merit to the State's argument that FanDuel's decision to stop accepting business temporarily from New York customers from November 17 to December 12, 2015 demonstrates that the injunction will cause no serious or irreparable harm. That argument is a remarkable attempt to prejudice FanDuel for adhering in good faith to the Attorney General's cease-and-desist letter for a short period, while FanDuel sought to enjoin the State from taking enforcement action and to negotiate an agreed resolution with the Attorney General—and ignores the fact that it was motivated in large part by actions taken by FanDuel's payment processors as a result of communications from the Attorney General's Office. *See* Kiernan Reply Aff. ¶ 3. Even this temporary period of voluntary cessation unquestionably caused FanDuel substantial and irreparable harm, as FanDuel explicitly told the State at the time, and a shutdown of New York customers for the longer duration of this appeal would indisputably

cause FanDuel even more harm. *See id.* FanDuel is offering its contests to New York customers now based on the interim stay entered by a Justice of this Court, and it will continue its operations for New York customers if this Court continues the stay pending appeal as requested. *See id.*

2. The Preliminary Injunction Is Particularly Harmful Because It Would Alter the Longstanding Status Quo

The change in the status quo that would be caused by the preliminary injunction is also an important factor in determining the appropriateness of a stay of that injunction until this Court has had an opportunity to hear and decide FanDuel's appeal. The State's assertion that the preliminary injunction somehow will not upset the status quo because FanDuel's business was increasing in recent years, Mem. at 43-45, is nonsense. Before the Attorney General sent FanDuel a cease-and-desist letter and commenced this action in November 2015, FanDuel was serving hundreds of thousands of customers in this state. If the preliminary injunction were to take effect, FanDuel could serve none of them.

This Court has recognized the sharp distinction between preliminary injunctions that merely "maintain the status quo pending a hearing on the merits," *360 W. 11th LLC v. ACG Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep't 2007), and injunctions that change the status quo by effectively "granting the ultimate relief" a party seeks during the pendency of the litigation, before a final judgment on the merits, *St. Paul Fire & Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347, 349 (1st Dep't 2003). Preliminary injunctions to change the status quo are proper, if at all, only in "extraordinary circumstances." *United for Peace and Justice v. Bloomberg*, 5 Misc. 3d 845, 849 (Sup. Ct. N.Y. County 2004) (quoting *St. Paul Fire & Marine Ins. Co.*, 308 A.D.2d at 349). In particular, a party seeking such drastic preliminary injunctive relief bears at a minimum the "heavy burden" of proving a "clear right" to the relief—a burden

that cannot be satisfied where, as here, "there is [any] unresolved factual issue." *Thomson v. Daisy's Luncheonette Corp.*, 7 Misc. 3d 1019(A), 2005 N.Y. Slip Op. 50674(U), at *3 (Sup. Ct. Kings County 2005); *accord Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't 1970) (cited in Mem. at 15). The State has not even come close to meeting that heavy burden.

D. A Stay Pending Appeal Will Not Harm the State's Interests

1. The State's Assertion of Urgent Harm Is Incompatible with Its Having Allowed FanDuel to Operate Openly for Over Six Years

FanDuel operated in New York for six years before November 2015 without any criticism or challenge from any New York law enforcement agency. Kiernan Aff. ¶¶ 3, 12; *id.* Ex. F (Griffiths Aff.) ¶¶ 6, 9-10. Hundreds of thousands of New York sports fans have played in FanDuel's contests. *Id.* ¶ 10. Respected major investors—including KKR, Comcast Ventures, NBC Sports, Scottish Investment Bank and others—have made substantial investments in FanDuel based on their confidence in its legality and business model. Kiernan Reply Aff. ¶ 4. FanDuel also has partnership and sponsorship deals with sixteen NFL teams, sixteen NBA teams, and the NBA itself. *See* Kiernan Aff. Ex. F (Griffiths Aff.) ¶ 11. FanDuel has earned a position as an established presence in the world of fantasy sports, which has become a core part of this country's sports culture. *Id.* ¶ 9; *see also* Kiernan Aff. Ex. G (Dodds Aff.) ¶¶ 2-4, 13-23.

Although maintaining a preliminary injunction pending appeal would be warranted to shut down an unquestionably illegal and harmful business (involving illegal drug sales, human trafficking or theft, for example), nothing has happened to cause FanDuel's well accepted business suddenly to become so toxic as to warrant this drastic step. The Attorney General is of course entitled to change his mind about fantasy sports, but the absence of any expression of legal concern about those contests over such a long period before the Attorney General's shift in

position strongly reinforces the absence of sudden urgent public need to shut down FanDuel *immediately*—before a judgment on the merits of whether its business is legal in this state, and before an opportunity for appeal of the preliminary injunction order. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (lengthy delay in seeking injunction evidences lack of irreparable harm).[3]

2. The Record Does Not Establish a Special Public Need to Shut Down FanDuel's Business Before Its Appeal Can Even Be Heard

The State attempts to justify shutting down FanDuel's business with New York customers based on assertions that daily fantasy sports exacerbates problem gambling. That argument is unsupported by the record. It is also highly incongruous given the State's role as sponsor of the lottery, horse racing and casinos that are widely recognized to be the actual centerpieces of problem gambling.

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[3] In a letter to the Clerk dated December 30, 2015, the State has cited and attached a letter from the Illinois Attorney General to two members of that state's legislature, in which she opines that daily fantasy sports contests offered by FanDuel and DraftKings constitute "gambling" as that term is defined in Illinois law. As the State concedes in its letter, the Illinois anti-gambling law is substantially different from New York's: for example, the Illinois statute, unlike the New York statute, prohibits "play[ing] games of chance *or skill* for money," 720 Ill. Comp. Stat. 5/28-1 (emphasis added), and it does not include the "stakes or risks something of value" element of the New York statute, N.Y. Penal Law § 225.00(2). Moreover, FanDuel strongly disagrees with the Illinois Attorney General's views and has filed a declaratory judgment action challenging those views in Illinois state court. *See* Kiernan Reply Aff. ¶ 7. What is most relevant to this stay motion, however, is that FanDuel and the Illinois Attorney General are in the process of agreeing to a schedule for the orderly resolution of the litigation on the merits, and the Illinois Attorney General has made no effort to enjoin FanDuel's business with Illinois customers before the litigation is resolved. *See id.* If the New York Attorney General had similarly allowed FanDuel to continue operating while the courts resolve this litigation, instead of precipitously seeking to shut down FanDuel's business with New York customers before his views are even tested in court, this stay motion would have been completely unnecessary. An orderly process for resolving the legal issues in this case, like the one taking place in Illinois, is all that FanDuel is seeking on its motion, and that relief is appropriate regardless of the merits.

Supreme Court issued its preliminary injunction without any evidentiary hearing and without presenting analysis of the parties' evidentiary submissions in connection with the State's motion. While the court made a single comment suggesting provisional acceptance of the State's "problem gambling" assertions, *see* Kiernan Aff. Ex. A (Order) at 9, the opinion shows no actual evaluation of the State's supposed evidentiary support for that position (which provides no legally sustainable basis for such a conclusion), much less any effort to address the credible contrary evidence submitted by FanDuel.

The State's purported "evidence" consisted of two affidavits—both less than three pages long—from asserted experts who did not even purport to present a scientific or non-anecdotal, non-speculative empirical foundation for their conclusions that daily fantasy sports contests attract problem gamblers. One, an affirmation from a psychiatry professor, acknowledges that "it is not clear that DFS wagering [sic] causes gambling problems," but nonetheless makes general assertions that his own "research"—which he makes no effort to describe—"shows" that "it *appears* that people with gambling problems, especially young people, view DFS as an easy opportunity to gamble." Affirmation of Valerie Figueredo, Dec. 23, 2015 ("Figueredo Aff.") Ex. R (Derevensky Aff.) ¶ 6 (emphasis added). The State's proposed expert does not identify any basis for his unelaborated speculation that such a correlation exists or what might explain it, *see id.*; and even if such a correlation existed, it could have multiple explanations and would not in any sense establish causation. The other, from an employee of a nonprofit organization who was formerly associated with the gambling industry, similarly asserts, without even purporting to offer supporting evidence, that young men interested in sports gambling are more likely than other people to be interested in daily fantasy sports—an assertion that falls far short of supporting a finding that fantasy sports contests cause or exacerbate problem gambling.

Figueredo Aff. Ex. Q (Whyte Aff.) ¶ 7. The affidavit also attempts to draw certain conclusions based on the purported "structural characteristics" of daily fantasy sports contests, including that they are competitive and that success requires substantial work. *Id.* ¶¶ 8-9, 12. But that discussion, too, is nothing more than speculation unsupported by a shred of scientific evidence or study. Before making a finding based on expert evidence, a court is required to determine both that the methods used have achieved general scientific acceptance and that the specific procedures used in the particular case are reliable. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446-47 (2006) (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). The State's asserted expert affidavits, which do not even purport to disclose any methods and procedures that the witnesses used, do not come close to meeting this requirement.[4]

In provisionally stating that an injunction was warranted to "protect[] the public, particularly those with gambling addictions," Kiernan Aff. Ex. A (Order) at 9, the court cited no basis for this comment and took no account of FanDuel's evidence showing the unfounded nature of the fears the State is trying to whip up. Stephen L. Martino—a former Kansas and Maryland gambling regulator who has extensively studied and worked on issues of problem gambling—submitted an affidavit confirming that, in his extensive study of and work on problem gambling, he has never become aware of any research or other evidence indicating that

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[4] The State also repeatedly relies on anecdotal reports in newspaper articles and other publications—for example, a newspaper article citing an anonymous source who claims he was a compulsive fantasy sports player. Figuereido Aff. Ex. H. Contrary to the State's approach (as also reflected in its submission on this motion), a journalist's decision to publish a second-hand assertion does not make it credible or admissible evidence. Isolated hearsay anecdotes about anonymous individuals provide no basis worthy of weight for conclusions about the existence or scale of an asserted problem. The State equally does not present an evidentiary basis for its claims by misleadingly citing as support only its own unverified complaints in this case and the *DraftKings* case (Exhibits A and B to the Figueredo Affirmation). *See* Mem. at 5-10.

participation in daily fantasy sports contests contributes to problematic or addictive behavior. Kiernan Aff. Ex. H (Martino Aff.) ¶ 8. He also explained in detail that, contrary to the unsupported assertions in the State's affidavits, daily fantasy sports contests have a number of features that make them unattractive to problem gamblers. Most notably, the results of the most popular weekly fantasy football contests do not offer instant gratification but unfold from Thursday through Monday, and success in fantasy sports requires the kind of hard competitive work on roster selection over a long period that tends to attract sports enthusiasts and dissuade problem gamblers. *Id.* ¶¶ 9-12. The contests that FanDuel offers simply do not involve the kind of instant gratification that comes from gambling activities, like throwing a pair of dice or turning a card at the blackjack table. FanDuel's own records regarding self-reported problem players and large amounts spent by individual players confirm that problem play in daily fantasy sports is rare. Kiernan Aff. Ex. E (Bonaddio Aff.) ¶¶ 3-4 & Exs. 1-2; *see generally* Kiernan Aff. Ex. C (FanDuel Memorandum of Law in Opposition to Motion for Preliminary Injunction) at 14-16. The State's bare speculation about fantasy sports' possible effects is simply too thin a reed to serve as predicate for a continued shutdown of an ongoing business at this preliminary stage, before FanDuel's appeal has been considered. *See, e.g.*, *City of Rochester v. Sciberras*, 55 A.D.2d at 849-850 (staying and then overturning preliminary injunction shutting down allegedly illegal business because of absence of proof of actual harm to the public interest).

3. The State's Inaction Against Other Sites Offering the Same Types of Contests Belies Its Claim of Urgency

Since the Attorney General issued his cease-and-desist notice and after Supreme Court's preliminary injunction order, competing websites continue to offer fantasy sports contests to New Yorkers that are indistinguishable from those offered by FanDuel and DraftKings. The State is well aware of these other major enterprises, which widely advertise and sponsor fantasy

sports contests (including "daily" contests) featuring the payment of entry fees, competitions over who has selected the most effective roster and prizes in the thousands of dollars for winners. For example, Yahoo! continues to advertise and offer daily fantasy sports contests with entry fees and large cash prizes (as high as $250,000) to New York residents on its fantasy sports site. Kiernan Reply Aff. ¶ 5. At least 20 other daily fantasy sports sites appear (based on their terms of use) to be operating in New York State. Kiernan Reply Aff. ¶ 5 and Ex. 2. The State has chosen not to seek relief against any of those active competitors of FanDuel, while claiming it is somehow urgent to shut down FanDuel (and just one of its competitors, DraftKings) immediately.

Leaving aside *daily* fantasy sports, the established *season-long* fantasy sports operators—such as CBS, ESPN, and Yahoo!'s season-long leagues—also offer exactly the same kinds of contests as FanDuel, with similar entry fees and prize structures, and no other significant difference except the duration of the contests. *See* Kiernan Aff. Ex. G (Dodds Aff.) ¶¶ 15-23. For example, the CBS Fantasy Football Prize League charges entry fees ranging from $29.99 to $999.99 and awards prizes up to $5,000. *Id.* ¶ 23; Kiernan Reply Aff. ¶ 5 & Ex. 3. Many other large and small-scale enterprises also operate season-long fantasy sports sites with entry fees and large prizes. Yet the State has apparently disclaimed any intention to take action against such season-long fantasy websites based on the assertion that "most" of their revenue does not come "principally" from what the State now claims is gambling. Kiernan Aff. Ex. E (Bonaddio Aff.) Ex. 4 (AG Letter) at 2.

The State is entitled to bring enforcement actions selectively, but its inaction against these and other fantasy providers seriously undermines the claims of urgent public harm on which the State predicates its opposition to the continued stay. A refusal to stay the preliminary

injunction would not stop fantasy sports contests in New York; it would merely relocate FanDuel's players to Yahoo! or another daily fantasy sports site—causing great harm to FanDuel's business but no significant other change in behaviors. The State's lack of concern for that basic reality belies its claims that fantasy sports suddenly pose a grave harm to New Yorkers, requiring an immediate shutdown of FanDuel before there has even been a judgment regarding its contests' legality.

4. Hearing the Appeal Without Delay Will Fully Address the State's Purported Concerns

Any legitimate concern about the desirability of a rapid determination should be satisfied by hearing and deciding FanDuel's appeal from the preliminary injunction order promptly. The State has asked this Court to direct that the appeal be perfected by April 2016 Term; FanDuel will file its appellate brief on this schedule regardless of whether the Court orders it to do so. If this Court were to determine that even more speed is warranted, FanDuel would not object to an order accelerating briefing even further and advancing the argument to the March Term. FanDuel's willingness to pursue an expedited appellate process should tip the balance even more strongly in favor of maintaining the stay of the court's injunction order during the limited additional time needed for FanDuel's appeal to be heard and decided.

In sum, multiple factors tip the balance of hardships in FanDuel's favor: (1) the absence of any final determination on the hotly contested question of whether FanDuel's business violates New York law, (2) FanDuel's loss of business and customer goodwill without any ability to recover damages if the injunction is reversed, (3) the injunction's radical alteration of the longstanding status quo, (4) the incongruity in the State' having allowed FanDuel's business to operate extremely openly for six years without any expression of concern before suddenly asserting an "emergency" need to shut it down, (5) the absence of actual evidence that FanDuel's

business harms the public, (6) the State's lack of effort to stop the many other businesses, other than FanDuel and DraftKings, offering similar contests, and (7) the opportunity for the appeal to be heard and decided promptly. A stay is therefore warranted until this Court is able to hear and determine FanDuel's appeal of the preliminary injunction.

II. FANDUEL HAS RAISED SERIOUS ISSUES ON APPEAL

FanDuel more than satisfies the requirement that its appeal is not clearly without merit, which—given the balance of the hardships in FanDuel's favor—is all that is required at this stage to stay the shutdown of its business with New York customers. *See* Part I.A., *supra*. The underlying merits question in this action is one of first impression in New York: whether paying an entry fee to compete in a fantasy sports contest for a pre-announced prize constitutes unlawful gambling. After the six years FanDuel has been in business in New York, the State has now come forward with a simplistic answer: fantasy sports contests, according to the State, are merely "rebranded" sports betting, equivalent to binary parlay and proposition bets, and therefore illegal. Mem. at 1, 5. But as FanDuel will demonstrate in greater depth in its brief on appeal, fantasy sports contestants are not mere observers betting on sporting events. They are contestants themselves in a separate bona fide contest, competing against each other in simulating the role of a general manager, using their knowledge and sports acumen to make skilled roster selections. The primary determinant of the outcome of that separate fantasy contest is the relative skill of the fantasy contestants. The State's misguided and contrary theory strays far from the applicable statutory text and longstanding principles established by the case law, ignores key facts (and invents others) and is far too broad to be given practical application.

Perhaps most significant at this stage, the State fails to acknowledge the true novelty of its theory, which is directly contrary to the existing legal authorities that have addressed fantasy sports. Implementing the State's theory would not only wreck an entire fantasy sports industry

for New York customers, undercutting the reliance of sophisticated major investors on existing legal authority, but also call into question a wide range of other legitimate activities based on skilled predictive judgments, from investing to insurance. Of course, the State is free to argue, if it wishes, that this Court should disagree with the reasoned decisions of other courts, the judgment of the U.S. Congress when it considered the issue, and the consensus view of well-counseled investors in the fantasy sports industry. But there is no basis for the State to claim that its late and contrary view is so *obviously* correct that it should not even be subject to appellate scrutiny before it is forced upon FanDuel and the fantasy sports industry. This Court should maintain the stay, and the status quo prior to the Attorney General's cease-and-desist letter, pending its review of the merits of the preliminary injunction entered in this consequential and closely watched case.

A. The State's Novel Theory Sharply Departs from Existing Legal Authority Holding That Fantasy Sports Contests Are Not Gambling

1. The Only Court to Have Confronted the Question Has Held that Fantasy Sports Contests Are Not Gambling

No New York court prior to this case has directly considered whether fantasy sports contests constitute illegal gambling. The one court outside of New York that has considered the issue has found that fantasy sports contests involving entry fees and prizes do not have the fundamental characteristics of gambling and accordingly are not illegal under a similarly worded New Jersey statute. In *Humphrey v. Viacom, Inc.*, No. 06-cv-2768, 2007 WL 1797648 (D.N.J. June 20, 2007), the court was applying a New Jersey *qui tam* statute that allows plaintiffs to recover their losses from "wagers, bets or stakes" upon a game of chance or contingent event. *Id.* at *7 (quoting N.J. Stat. Ann. 2A:40-1). The court dismissed the complaint for failure to state a claim, holding "as a matter of law" that entry fees for fantasy sports contests are not wagers, bets or stakes. *Id.* at *9. In doing so, the court identified the key characteristics of fantasy

contests, in terms that accurately describe the contests offered by FanDuel: (1) "participants pay a set fee for each team they enter in a fantasy sports league"; (2) "prizes are guaranteed to be awarded at the end of the [contest], and the amount of the prize does not depend on the number of entrants"; and (3) the contest operators are "neutral parties in the fantasy sports games—they do not compete for the prizes and are indifferent as to who wins the prizes." *Id.* at *7. Importantly, the Court also recognized the fantasy contest as separate from the underlying sporting events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Id.* at *2.

Based on those key factors, the *Humphrey* court concluded that "it would be patently absurd to hold that the combination of an entry fee and a prize equals gambling." *Id.* at *8 (internal quotation marks omitted). In doing so, the court grounded its ruling on a longstanding rule that courts in New York and elsewhere have followed in applying state gambling prohibitions, "distinguish[ing] between *bona fide* entry fees and bets or wagers" and "holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." *Id.* at *8. Because there was no bet, wager or stake, the *Humphrey* court concluded, it was not necessary even to address the second prong of the New Jersey "gambling" definition and decide "whether the outcome of the game is determined by skill or chance." *Id.*[5] As the United States Court of Appeals for the

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[5] Supreme Court attempted (and the State now attempts) to distinguish *Humphrey* on the basis that "the New York State Penal Law does not refer to 'wagering' or 'betting,' rather it states that a person, 'risks something of value.'" Kiernan Aff. Ex. A (Order) at 7. That distinction, however, is not sustainable because both the New York statute and the New Jersey statute, in effectively identical language, prohibit "*stak[ing]*" money upon games of "chance" or upon a "contingent event." *Compare* N.Y. Penal Law § 225.00(2) *with* N.J. Stat. Ann. (continued)

Third Circuit recently confirmed, there is a "legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir. 2013) (citing *Humphrey*, 2007 WL 1797648, at *9, and *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86-87 (1961) (discussed below)).

The State's contrary contention that *Humphrey*'s analysis is "erroneous," Mem. at 31, because fantasy sports participants are not active contestants but mere passive bettors in contests being undertaken by others, misapprehends the nature of fantasy sports. In the separate fantasy context where these contests operate, the participants *are* the contestants. The competition is a competition of skill at selecting a roster of players as a general manager or coach would and pitting each competitor's selections against the selection efforts of others. Fantasy sports participants typically expend substantial time and effort in this competition, believing (with strong empirical basis) that they are actually engaged in competitions of skill, and that effort and aptitude in roster selection make a pivotal difference in prospects for success. Their fantasy roster teams will never actually step on a field together or actually compete against any other team, but the participants who have selected these rosters actively compete in their own self-contained contests of skill.

2A:40-1 (emphasis added). The addition of the words "or risks" in the New York statute does not alter the statutory reach. Nor does the shorter term of FanDuel's contests provide any basis to distinguish the analysis in *Humphrey*. If a fantasy sports entry fee constituted a gambling transaction, an entry fee would be "something of value" whether the game lasted a day, a week or a season.

2. Longstanding New York Case Law Compels the Conclusion That Fantasy Sports Contests Are Not Gambling

Although the State remarkably seeks to write off *Humphrey* as irrelevant here, the *Humphrey* court's reasoning finds longstanding support under New York law, which likewise holds that an entry fee paid by a participant in a contest for a prize does not constitute a "bet or wager," and that participants in such contests for a prize are consequently not engaged in illegal gambling. As the Court of Appeals explained in *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), which involved contestants who staked money on a race involving horses they owned, with the sponsoring organization paying large prizes to the winners:

> If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them.

Id. at 19.

The State has not disputed that the Court of Appeals' decision in *Fallon* remains good law in New York, such that participants in contests for a prize will not be considered to "stake[] or risk[] something of value upon [an] outcome" within the statutory definition of "gambling" in Penal Law § 225.00(2). Indeed, the State acknowledged in its motion papers below that entrants in the Belmont "Stakes" competition, who pay entry fees to pit horses they own against other owners' horses, and receive a pre-determined prize from the race's sponsor if they win, are not

engaged in "gambling" under New York law. Kiernan Reply Aff. Ex. 4 (State's Memorandum of Law in Support of Motion for Preliminary Injunction) at 20.

Courts of other states also apply the same rule. *See, e.g., State of Ariz. v. American Holiday Association, Inc.*, 151 Ariz. 312, 314-15, 727 P.2d 807, 809-10 (1986) (en banc) (word puzzle contest with entry fees of $1 to $15 and prizes of new cars and $20,000 cash was not gambling); *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 29, 359 P.2d 85, 87 (1961) (golfing hole-in-one contest with 50¢ entry fee and $5,000 prize was not gambling); *Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609 (Fla. 4th Dist. Ct. App. 1967) (various games involving skill played at fair were not gambling); *Toomey v. Penwell*, 76 Mont. 166, 173, 245 P. 943, 945 (1926) (horse racing stakes event with $2 entry fee and $375 purse was not gambling). As the Arizona Supreme Court explained in *American Holiday Association*, relying on the New York rule articulated in *Fallon*:

> [A]n entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests and even literary or essay competitions, are all illegal gambling....

151 Ariz. at 314, 727 P.2d at 809; *see also id.* at 314-15, 727 P.2d at 809-10 (quoting *Fallon*, 152 N.Y. at 19). As the *Humphrey* court found, fantasy sports contests are directly analogous to these traditional, bona fide contests, because the contestants compete against each other in a test of acumen and sports knowledge for pre-announced prizes.

3. Applying the Same Principle Embodied in New York Law, the U.S. Congress Expressly Recognized that Fantasy Sports Contests Are Not Gambling

It was against this common law backdrop that Congress specifically addressed fantasy sports contests in the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), a federal statute addressing financial transactions involving unlawful gambling proceeds. *See* 31 U.S.C.

§ 5362(1)(E)(ix). In that statute, Congress began by defining "bet or wager"—the basis for the substantive prohibitions and penalties under the statute—in terms strikingly similar to the New York law at issue here: "staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." *Id.* § 5362(1)(A).

Recognizing the inherent ambiguity and unclear boundaries of that provision, Congress went on to address the specific case of fantasy sports, and made clear that fantasy sports contests that meet certain criteria do not constitute unlawful gambling. Specifically, in Congress's judgment, a fantasy sports contest that involves an entry fee and a prize does not involve a bet or wager if (1) prizes are established and announced in advance, (2) outcomes reflect the "relative knowledge and skill of the participants," and (3) the result is not determined by the outcome for a real-world team or teams or an athlete's performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). FanDuel's contests meet all of those requirements.

In adopting this provision, Congress considered precisely the same issue now before the Court and articulated in the statutory language reasoned bases for concluding that, against the same background legal rule, fantasy sports contests should be distinguished from sports betting and other forms of gambling: (1) Fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contestants who test their skill against each other in ways that do not depend on (much less compromise the integrity of) the outcome of underlying sporting events.

It is thus remarkable that the State does not even acknowledge UIGEA's existence in its submission, particularly given the relative scarcity of legal authorities that have specifically addressed whether fantasy sports should be considered gambling. To be clear, UIGEA is not binding here; the statute expressly does not preempt state gambling laws. 31 U.S.C. § 5361(b). But for the State to ignore a congressional definitional judgment on precisely the same issue presented here—particularly when it was enacted against the uninterrupted backdrop of case law stretching back to the Court of Appeals' decision in *Fallon* and beyond—appears to reflect either an attempt at obfuscation or a recognition that UIGEA poses a serious difficulty for the State's theory.

The consistency of these authorities, and particularly the judgment of Congress, combined with silence and inaction from enforcement officials and legislators in New York and elsewhere, has fostered a significant online fantasy sports industry, including both season-long and daily contests for prizes. The direct conflict between the State's theory and these existing sources of law (and the resulting undercutting of numerous investors' reliance on those sources) further counsels in favor of preserving the status quo until the merits of FanDuel's appeal can be heard.

B. The State's Dramatically Expanded Definition of Gambling Lacks Support in the Statutory Text and Would Lead to Untenable Results

Even assuming the State could somehow avoid the force of the longstanding precedents recognizing that legitimate contests for prizes are legally distinct from staking or risking something within the meaning of the anti-gambling statutes, the State's theory also fails the remaining requirements of New York's statute. Under the definition in Penal Law § 225.00(2), an activity constitutes "gambling" only if the player "stakes or risks something of value upon the outcome of" either (a) "a contest of chance" or (b) "a future contingent event not under [the

player's] control or influence." In addition to failing to meet the "staking or risking" element as discussed above, the State has failed to provide any evidence for the separately required element of a "contest of chance" or "a future contingent event not under [the player's] control or influence."

1. Fantasy Sports Contests Do Not Involve Improper Staking of Funds on Future Contingent Events Not Under Contestants' Control or Influence

The State's theory that fantasy sports contests are gambling because the participant cannot influence the future actions of athletes on the field elides the critical terms of the statutory text. By its terms, the statutory definition does not depend on the contestant's ability to influence individual athletes. Rather, it turns on the contestant's influence on the "event" on which the "outcome" of the contest depends, in this case the result of the fantasy competition with other fantasy players. The participant who selects the best combination of players for his roster will win over participants who have made other selections. Because the outcome of a fantasy sports contest is determined primarily by the comparative skill of the fantasy competitors in assembling their fantasy rosters, FanDuel's contests do not meet the statutory definition of gambling.

While the State has argued that fantasy sports contests constitute wagering or betting because participants have no control over the future performance of the athletes on their fantasy roster, the same is true for many other kinds of contests not considered gambling. The horse owners in *Fallon* (or in the Belmont Stakes events that the State has conceded do not constitute gambling for those who pay the entry fees) had no control over the performance of the horse or jockey once the race began—their only influence was in their selection of the horse and jockey they would sponsor. The owner of a sports team similarly is relying on the performances of others for a successful outcome. A participant in a fishing contest may exercise great skill in knowing how and where to cast, but even the most skilled fisherman will always depend for

success on the actions of the fish. A player in a hole-in-one golf tournament, or even a conventional golf tournament, may see a shot affected by an unpredictable gust of wind while the ball is in the air. The presence of some contingency beyond the contestants' control is at the heart of virtually all competitions. That does not mean that the outcome is beyond the influence or control of the competitors.

A fantasy sports contest is fundamentally a contest in which participants simulate the role of a general manager of a sports team, choosing rosters within resource constraints to assemble the best team. Being a good general manager requires skill—not at swinging a bat or at throwing a pass, but at choosing players the manager believes will perform well in the future. The general manager merely watches the games, but few would doubt that the manager's choices have an influence on the team's performance. The same is true in fantasy sports. Like a general manager, the fantasy player can never step onto the field or affect the performance of the individual players on his roster. But it does not follow that his roster choices have no influence on the outcome of the fantasy contest. To the contrary, the single biggest determinant of a fantasy contest between two players will be the relative skill of the fantasy contestants. *See generally* Kiernan Aff. Ex. D (Hosoi Aff.).

The State cannot make even a plausible factual showing that the fantasy contest participant has no "control or influence" over the outcome of the fantasy contest, and Supreme Court did not even preliminarily find that the State was likely to succeed in making such a showing. It is beyond serious question that participants directly influence the outcome by the selection of their roster, based upon their skill and knowledge in evaluating the expected performance of players in the underlying sporting events. Kiernan Aff. Ex. F (Griffiths Aff.) ¶ 22; *id.* Ex. G (Dodds Aff.) ¶¶ 27-28; *see, e.g., People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012

N.Y. Slip Op. 50004(U), *6 n.1 (Crim. Ct. Kings County 2012) (under "future contingent event" prong of statutory definition, mahjong players "would not be engaged in gambling, since they have *some control* over the outcome of the game using their skill") (emphasis added).

The State's contention that fantasy sports contests are akin to complex sports betting schemes such as parlay or proposition betting—a contention for which the State has presented no evidence—should fail on the merits, for the reasons the *Humphrey* court articulated and Congress identified in UIGEA. Unlike proposition bets about whether a particular individual performance will or will not meet a specific performance benchmark, or parlay bets about whether a team or teams will win multiple games, fantasy sports contestants compete against each other, not against the house or against any odds determined by the number of entries. Kiernan Aff. Ex. F (Griffiths Aff.) ¶ 22; *id.* Ex. G (Dodds Aff.) ¶ 29. Moreover, unlike proposition or parlay bets, a fantasy sports contest is not dependent on the binary outcome of any particular game or games or whether a particular player or combination of players meets pre-identified benchmarks. A fantasy sports contest depends on how one player's entire lineup fares, measured by a range of statistical criteria, relative to the other fantasy players in the contest. FanDuel has no interest in who wins the contest, and the prizes are not based on the outcome of any sporting event or statistical achievement.

2. Fantasy Sports Competitions Are Not Contests of Chance

Similarly, the State has not demonstrated that fantasy sports involve a "contest of chance." FanDuel presented extensive empirical evidence demonstrating the dominant role of skill in increasing participants' prospects for success in daily fantasy sports contests. That evidence included a detailed affidavit by MIT Professor Anette Hosoi. Kiernan Aff. Ex. D (Hosoi Aff.). Professor Hosoi's affidavit reports at length on long-term research results showing that skilled players' choices consistently outperform random chance, that stronger players tend to

remain consistently strong while weak players tend to remain consistently weak, and that continued intensive play tends to lead to improved performance over time—all characteristics of a contest of skill that do not correspond with characteristics of a game of chance. As Professor Hosoi states, "skill plays a decisive role in a player's cumulative performance over time." *Id.* ¶ 31.

The State has offered no contrary evidence on the relative roles of skill and chance in daily fantasy sports. Although the State has pointed out that the statute defines "contest of chance" to include a contest that depends "in a material degree upon an element of chance" even though skill may also be a factor, Penal Law § 225.00(1), and argues that this means chance need not be the dominant element, the weight of the authority in New York is that the "material degree" test requires the State to prove that skill is not the dominating element. *See generally* Kiernan Aff. Ex. C (FanDuel Memorandum of Law in Opposition to Motion for Preliminary Injunction) at 27-30 (citing and discussing cases and other authorities). Even if the State were right that a "material degree" of chance can exist even when skill predominates, it presented no evidence at all to the court below on what role chance plays in fantasy sports. There was a complete failure of proof of this element under any standard.[6]

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[6] Supreme Court seems to have misunderstood the record in stating that "Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG" that "the outcome depends substantially on chance and factors not within the DFS player's control." Kiernan Aff. Ex. A (Order) at 6. It is not clear what evidence the court was referring to, since the State presented no evidence (as opposed to argument or bare assertion) on this point. In any event, Professor Hosoi's affidavit and the other affidavits submitted by FanDuel witnesses regarding its competitions—which the decision below does not discuss—amply refute the State's assertions. Kiernan Aff. Ex. D (Hosoi Aff.), Ex. F (Griffiths Aff.), Ex. G (Dodds Aff.).

3. Adoption of the State's Theory Would Call into Question All Predictive Judgments on Which a Financial Consequence Depends

The breadth of the State's theory likewise confirms its flaws. The State's theory that any payment of money that can result in a recovery of more money based on future events in which the payor is not personally involved constitutes gambling would prohibit not only all fantasy sports contests that involve an entry fee and a prize, including the season-long fantasy contests that the State went out of its way in its Complaint to justify, Figueredo Aff. Ex. A ¶¶ 37-38, but also a wide range of other legitimate activities including virtually all forms of passive investment such as purchases of stock.

An investment manager, for example, may exercise great skill in selecting a portfolio of stocks but has no control or influence over the performance of any individual company whose stock was chosen. Yet the portfolio's performance is unmistakably influenced by the manager's acumen. In exactly the same way, the performance of a fantasy sports roster is unmistakably influenced by the contestant's skill in choosing a fantasy lineup of athletes. Daily fantasy sports contestants may look more like day traders than like portfolio managers, but neither fantasy sports contestants nor day traders are engaged in gambling merely because a financial consequence turns on their skill at predictive judgments about expected future performance by others.

The same could be said for insurance. Contracts of insurance are explicitly based on future events beyond the insurer's control. Yet insurance does not constitute gambling under the definition in Penal Law § 225.00 for the same reason that fantasy sports contests do not: the underwriter is not betting or wagering on the outcome of a future contingent event but is exercising skill in selecting and pricing a book of insurance so as to maximize the insurer's chances of profiting in the aggregate.

The State argues that even gamblers exercise skill in choosing their bets, but it cannot be the case that the mere presence of a contingency transforms an otherwise legitimate activity into illegal gambling. *See, e.g.*, *Fallon*, 152 N.Y. at 19; *Las Vegas Hacienda*, 77 Nev. at 29, 359 P.2d at 87. Stretching the "future contingent event" prong of the statute to extend to any activity involving a contingency—rather than limiting it to core gambling activities such as lotteries and numbers games—would sweep an enormous range of legitimate activities into the bucket of illegal "gambling" and leave countless legitimate businesses at the mercy of the prosecutor's whims.

In enacting UIGEA, the U.S. Congress recognized precisely the danger of the overly broad construction of gambling the State presses here. For that reason, alongside the provisions making clear that fantasy sports contests do not constitute wagering or betting under federal law, Congress also provided express provisions excluding from the statute's scope "any contract of insurance," commodities futures and similar derivative transactions, and the "purchase or sale of securities," among other forms of passive investment in predicted performance of others not under the investor's control. 31 U.S.C. § 5362(1)(E). Congress adopted these provisions to steer courts away from the same interpretive pitfall that the State urges on the Court here: the erroneous view that all forms of predictive judgment about the performance of others on which a financial consequence turns are gambling. That has never been the law of New York. Unlike UIGEA, Penal Law § 225.00 itself contains no express exceptions, not even for investing or insurance; rather, the Legislature has relied on the courts to apply the law in a sensible way. Given the potentially serious consequences posed by adoption of the State's overly broad theory here, not only for the established fantasy sports industry but also for other legitimate businesses, the Court should decline the State's invitation to leap before it looks.

C. The Absence of Record Support for the Factual Assertions on Which the State Relies Provides an Additional Reason That FanDuel Is Likely to Succeed on the Merits of Its Appeal

Supreme Court appeared to recognize that the State's preliminary injunction motion depended on a number of contested factual propositions, which it could not properly resolve without considering the credibility of witnesses. *See* Kiernan Aff. Ex. A (Order) at 9. These included, among others:

(1) the structure of FanDuel's various types of fantasy sports contests, which is crucial to understanding the nature of the challenged contests and evaluating the proper scope (if any) of any proposed injunction;

(2) the basis for and significance of the State's misleading allegation that only 1% of FanDuel winners receive the "vast majority of winnings," *see* Kiernan Aff. Ex. E (Bonaddio Aff.) ¶¶ 5-6 & Exs. 3-4, which the State has asserted in support of its position;

(3) whether there is any evidentiary support for the State's allegation, asserted without competent supporting evidence, that FanDuel's fantasy sports contests exacerbate problem gambling;

(4) the roles of skill and chance in fantasy sports contests; and

(5) the similarities and differences between "daily" fantasy sports contests like those offered by FanDuel and what the State calls "traditional" fantasy sports contests, which the State at least initially said are legal.

Because these facts were "in sharp dispute," the State has not met its burden of "establish[ing] a clear right to preliminary injunctive relief." *Advanced Digital Sec. Sols., Inc. v. Samsung Techwin Co.*, 53 A.D.3d 612, 613 (2d Dep't 2008). A preliminary injunction is a

"drastic remedy," and "[i]f key facts are in dispute, the relief will be denied." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996); *Faberge Int'l v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985). In particular, before a court may grant preliminary injunctive relief, New York law "requires that the court hold a hearing when ... the defendant raises issues of fact with respect to [the] elements" required for such relief. *1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 23-24 (1st Dep't 2011). Supreme Court's failure to consider and hear evidence on these unresolved factual issues provides an additional reason why this Court should reverse the preliminary injunction order when it considers the merits of FanDuel's appeal.

CONCLUSION

Supreme Court's unelaborated findings that the State is likely to succeed on the merits of the action and has shown a balance of hardships in its favor are incorrect. But this Court need not and should not finally resolve now, before briefing and argument of the appeal, whether the preliminary injunction should have been granted or denied. Given the significant merit of FanDuel's arguments on appeal and the extraordinary harm that would result from an order shutting down FanDuel's business for New York customers based on expressly preliminary findings, the Court should continue the currently operative stay pending the resolution of FanDuel's appeal.

Dated: New York, New York
January 4, 2016

Respectfully submitted,

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Index No. 453056/2015

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

FANDUEL INC.,

Defendant-Appellant.

REPLY MEMORANDUM OF DEFENDANT-APPELLANT FANDUEL INC. IN FURTHER SUPPORT OF ITS MOTION FOR A STAY PENDING APPEAL AND AN EXPEDITED APPEAL

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ATTORNEY CERTIFICATION

The undersigned attorney certifies that, to the best of his/her knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this document is not frivolous as defined in 22 NYCRR 130-1.1 (c).

Signature: _____
Printed Name: John S. Kiernan

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,	:	
Plaintiff-Respondent,	:	Supreme Court, New York County
- against -	:	Index No. 453054/15
DRAFTKINGS, INC.,	:	
Defendant-Appellant.	:	

REPLY BRIEF IN SUPPORT OF DEFENDANT-APPELLANT DRAFTKINGS, INC.'S MOTION FOR A STAY OF PROCEEDINGS PENDING APPEAL

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PRELIMINARY STATEMENT

The limited question now before this Court is whether it should continue the emergency stay now in place for the duration of this appeal because, otherwise, DraftKings will be forced out of business in New York before its appeal is heard on the merits. For nearly a decade, New York residents have enjoyed playing daily fantasy sports ("DFS") contests—without any state official ever before suggesting that they might be illegal. Now, New York's Attorney General ("NYAG"), after years of that office's silent indifference, has decided to take the position that DFS contests amount to "gambling" under New York law. But there is no reason to rush to judgment and shut down DraftKings *immediately*, before this Court has the opportunity to consider this important appeal on the merits.

DraftKings merely seeks to maintain the status quo through a short extension of the interim stay that is already in place. New York courts have granted stays pending appeal in similar circumstances, where the preliminary injunction being appealed from would shut down the company's statewide operations. *See, e.g.*, *City of Rochester v. Sciberras*, 55 A.D.2d 849, 849 (4th Dep't 1976).

In this case, Justice Mendez entered a preliminary injunction without holding an evidentiary hearing, without taking witness testimony, and without making credibility findings—an approach that did not afford DraftKings due process. Allowing his preliminary injunction to take effect would immediately

force DraftKings to shutter its business in New York, depriving its 375,000 New York customers of the contests they love and have been enjoying for years. It would cause DraftKings to lose millions of dollars in revenue while irreparably harming its relationships with investors and business partners that have invested hundreds of millions of dollars over the past four years, such as Fox Sports, Major League Baseball, the National Hockey League, the New York Yankees, the New York Mets, the New York Knicks, the New York Giants and the New York Rangers—organizations that have always taken a strong stance against gambling. *See* Affidavit of Timothy Dent ("Dent Aff.") ¶ 15 (attached to the Figueredo Affirmation ("Figueredo Affirm.") at Ex. J).

The NYAG has little to say in response. Rather than identify the concrete and immediate harms necessary to support a preliminary injunction, the NYAG instead resorts to smear tactics and speculation, stretching to tie DFS contests to everything from child abuse to over-eating, among other things. NYAG Br. 37-38. The Attorney General's armchair sociology would not pass muster on a daytime talk show. DFS contests have been offered openly, honestly, and permissibly in New York for nearly a decade; and if the NYAG had actual *evidence* that they caused public harm, he would have identified it in his brief. There is none. The absence of any evidence of public harm—let alone the type of imminent and severe public harm necessary to support the extraordinary

remedy of a preliminary injunction—is by itself sufficient reason to maintain the stay that is already in place for a short additional period now that the parties are in agreement that DraftKings will perfect this appeal for expedited hearing in this Court's April term.

The NYAG is unlikely to succeed on the merits of this appeal because his position rests on a blatant misreading of the gambling statute that is at odds with the way New York courts have interpreted it for more than a century. Contrary to the NYAG's view, contests like DFS, in which participants pay an entry fee to compete for "purses, prizes, or premiums," do not amount to unlawful "gambling." *People ex rel. Lawrence v. Fallon*, 4 A.D. 82, 88 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897). This is settled New York law—which explains why, until this Attorney General for whatever reason decided to assert a contrary view, not a single state law enforcement official or regulator had ever suggested that daily fantasy sports were illegal.

The NYAG's attempted rewrite of century-old New York law is also evident in his refusal to accept that the relevant test is whether chance or skill is the contest's "dominating and controlling factor." *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904). Under the NYAG's approach, which simply asks whether the outcome could be affected by some element of chance outside the contestant's control, all sporting events, and virtually any contest or pastime,

would be criminalized if it involved an entry fee. New York law does not enshrine a standard so at odds with common sense. Indeed, as all of the skill studies and experts uniformly confirmed below, DFS is predominantly a game of complex strategy where contestants act as general managers of their fantasy teams putting together their rosters under set rules and salary caps, with the winner determined by whose fantasy team outperforms other contestants' fantasy teams. That defines a game of skill. The record is barren of evidence controverting DraftKings' experts and skill studies.

The NYAG's rationalizations for attempting to avoid the consequences of his repeated concessions that *season-long* fantasy sports are legal have become increasingly tenuous and incoherent with each successive filing. The obvious truth is that there is no difference between the two under New York law. It is the same game, differentiated only by the period of time over which each is played. The NYAG contends that season-long contest operators charge less in fees, and contestants collect less in prizes. NYAG Br. 36-37. But the NYAG nowhere explains how these marginal differences could even conceivably have any legal significance—a failure that further underscores the NYAG's arbitrariness in ordering daily fantasy sports operators to shut down while permitting season-long fantasy sports operators to stay in business.

Last week the NYAG filed with this Court a letter from the Illinois Attorney General opining on the legality of DFS under that state's unique gambling laws. The NYAG seems to think the evolving situation in Illinois supports its position in this case—as opposed to the more than 40 other states where DraftKings remains in business without any serious question from those states' regulators, including the eight other states that have laws virtually identical to New York's. But the NYAG has missed the significance of the Illinois proceedings. Although the Illinois Attorney General, like the NYAG, views DFS contests as unlawful gambling, the Illinois Attorney General has recognized that, given the uncertainty in the law, DraftKings may remain in business until the court rules on the merits in an expedited proceeding. This approach reflects the common-sense principle that where a court is presented with a question of first impression concerning the legality of a business—and there is no actual showing of severe and immediate harm to the public—it would be unfair and unjustified to force the business to close its doors before both sides have been able to present evidence in a merits hearing. Extending the stay here pending appeal would accomplish much the same purpose.

DraftKings is likely to prevail on the merits of this appeal and will suffer irreparable financial and reputational harm if the preliminary injunction goes into effect. Moreover, the balance of equities tip decidedly in DraftKings' favor, as the

NYAG cannot claim any emergency here, but DraftKings will be put out of business in New York without a stay pending appeal. Daily fantasy sports contests have been offered in New York for nearly a decade without objection and without any evidence of harm to the public. This Court should therefore maintain the status quo by extending the stay that is currently in place for the short period necessary to resolve this appeal on the merits.

STATEMENT OF FACTS

A. Fantasy Sports Are Contests of Skill.

Fantasy sports are a national pastime played by more than 50 million Americans. Fantasy sports have been played since at least the 1960s and provide fans with an opportunity to assemble a fantasy team of athletes to compete against other fantasy teams. Affidavit of Gregory Karamitis ("Karamitis Aff."), attached as Exhibit 6 to the Dec. 11, 2015 Affirmation of Joshua I. Schiller ("Schiller Aff."), ¶¶ 6, 17. Some fantasy contests, known as season-long fantasy sports, span the entire season of a particular sport—usually four to six months. The NYAG admits that season-long fantasy sports have been "enjoyed and legally played by millions of people nationwide, including in New York" (NYAG Compl. ¶ 1) and "the legality of traditional fantasy sports has never been seriously questioned in New York." NYAG Letter, Schiller Aff., Ex. 3 at 2.

Daily fantasy sports contests, which span a day or week, are a natural outgrowth of season-long fantasy sports contests. Karamitis Aff. ¶ 6. DFS contests have been offered to New Yorkers at least since June 2007. Affidavit of Jason Robins ("Robins Aff."), attached to the Figueredo Affirm. as Ex. L, ¶ 4. Since that time, many companies have entered the DFS marketplace, including FanDuel (founded in 2009) and DraftKings (founded in 2012). *Id.* DraftKings currently serves more than two million customers across 44 states, including hundreds of thousands in New York. DraftKings has financial support from partnerships with major sports entities that have strongly opposed sports gambling but endorse fantasy sports competitions, such as Major League Baseball, the National Hockey League, Major League Soccer, and the owners of numerous New York-based sports teams. *See* Affidavit of Timothy Dent ("Dent Aff.") ¶ 15. DraftKings has operated openly, honestly, and legally in New York for nearly four years.

As with season-long games, DFS contestants act as "General Managers" of a fantasy team and compete against other contestants to see who can execute the General Manager skill-set most effectively. Robins Aff. ¶ 5; Karamitis Aff. ¶ 6. In the first phase of a fantasy sports contest, contestants select real-world athletes to fill virtual positions on a fantasy sports team, regardless of what team the athletes play for in real life. Robins Aff. ¶¶ 5, 8.

Selecting a fantasy team requires contestants to exercise skill, including the assessment of a wide array of factors, such as the historical performance of athletes, the on-field strategic tendencies of real-life coaches and athletes, team and athlete matchups, weather patterns, and injury risks. Affidavit of Peter Jennings ("Jennings Aff."), attached to the Figueredo Affirm. as Ex. M, ¶¶ 7-11. DFS contestants rely on sports knowledge and evidence-based analytics to assemble fantasy rosters. Robins Aff. ¶¶ 5, 8. The only evidence in the record below demonstrates that the most successful fantasy contestants expend significant time and effort honing their analytical skills. Jennings Aff. ¶ 6.

The record below establishes that DFS contests are dominated by skill, not chance. Karamitis Aff. ¶¶ 8-23; Jennings Aff. ¶¶ 6-12. Every piece of record evidence concerning the actual outcomes of DFS contests demonstrates that a small group of skilled contestants consistently win. One study of daily fantasy baseball outcomes found that just 1.3% of contestants won 91% of the prizes. Karamitis Aff. ¶ 21. Another study conducted by a University of Chicago professor of statistics and econometrics concluded that "it is overwhelmingly unlikely that the performance of any exceptionally performing" contestant "could be due to chance." Gilula Aff., attached as Ex. 5 to the Schiller Aff., ¶ 17. And yet another study comparing the performance of top-earning contestants against randomly generated lineups found that the top contestants outperformed the

random lineups between 82% and 96% of the time, depending on the sport. Karamitis Aff. ¶¶ 14-17.

The NYAG did not offer any evidence below, and the trial court relied on no evidence in the record, to rebut the skill-based nature of DFS contests. In fact, the NYAG acknowledges that DFS contestants "may exercise some skill" (NYAG Br. 3), and his own investigation confirmed that "the top one percent of DraftKings' winners receive the vast majority of the winnings." Schiller Aff., Ex. 3 at 2. Importantly, at oral argument below, the NYAG admitted there is no "distinction about whether daily fantasy sports is more or less dependent on skillful decisions than traditional fantasy sports leagues." November 25, 2015 Hearing Tr. 63:9-12, attached as Ex. 2 to the Schiller Aff.

B. The Scoring in All Fantasy Sports (Season-Long *and* Daily) Depends Upon Two Things: The Athletes Selected by the Fantasy Contestant and the Fantasy Points Generated by Those Athletes.

Once each contestant in a fantasy contest has finished selecting a fantasy team, the second phase of the fantasy contest occurs. In that phase, the points scored by the contestants' fantasy teams are calculated. Robins Aff. ¶ 8. A contestant's score equals the sum of the fantasy points generated by the athletes the contestants selects in her line-up. Those fantasy points, in turn, are calculated based on the performance of the real-life athletes. *Id.* Thus, the results of DraftKings' fantasy contests are not tethered to the outcomes of real-world

sporting events.

Similarly, because fantasy sports contests depend on a contestant's fantasy team as a whole outscoring the other fantasy teams, the outcome of a DFS contest—as with all fantasy sports contests—does not depend on any particular athletes' hitting any particular benchmarks of individual performance (*e.g.*, throwing at least three touchdowns or gaining at least 100 yards). Robins Aff. ¶ 11. Indeed, the NYAG acknowledges that a "DFS contestant wins if his roster as a whole receives more points than other rosters." NYAG Br. 2; *see also* NYAG Br. 7 ("The winning DFS team at the end of the day or week is the one with the most points").

C. Both DraftKings and Season-Long Fantasy Sports Providers Charge Entry Fees and Award Cash Prizes.

For some of its DFS contests, DraftKings awards cash prizes to the winner(s). The amount of these prizes is fixed and announced in advance of the contest; it does not vary depending upon participation or revenue generated from the contest. Robins Aff. ¶ 12. Contestants participating in contests with cash prizes pay an entry fee. *Id.* These entry fees compensate DraftKings for its work and expenses administering DFS contests. DraftKings retains the entry fees regardless of whether a contestant wins or loses the contest. Robins Aff. ¶ 13. This is precisely the same model employed by many season-long fantasy sports

providers, as the evidence below established.[1] *See, e.g.*, Jennings Aff. Ex. 1 ¶ 17 (season-long fantasy providers such as ESPN offer a ten thousand dollar prize).

PROCEDURAL HISTORY

For almost four years, DraftKings has operated in New York openly and transparently. Before the NYAG's sudden lawsuit, no state prosecutor or regulator had ever questioned the legality of fantasy sports under New York law.

On October 6, 2015, the NYAG began investigating DraftKings for an unrelated matter. Robins Aff. ¶ 17. At no point during the NYAG's month-long investigation, with which DraftKings fully cooperated, did the NYAG ever indicate he was investigating DraftKings' legality. *Id.* ¶ 18. But on November 10, 2015, the NYAG issued a cease-and-desist letter demanding that DraftKings effectively shut down its New York operations. NYAG Letter at 1, 3-4.

On November 17, 2015, the NYAG filed a motion for a preliminary injunction, seeking to enjoin DraftKings' operations in the State of New York.

On December 11, 2015, the Supreme Court issued a preliminary injunction requiring DraftKings to shut down all operations in New York. The court issued

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[1] The fact that ESPN offers a $10,000 cash prize in its season-long fantasy sports contests disproves the NYAG's assertion, based on no record evidence, that daily and season-long fantasy sports are distinguishable based "on the different ways that these activities handled money" and that season-long fantasy sports do not "involve massive monetary payouts." NYAG Br. 36. Similarly, the NYAG's contention that season-long fantasy sports providers accept "only small 'administrative fees' to cover the costs of operating a website or service" (NYAG Br. 37) is not based on any real evidence: the NYAG offers as support only self-serving assertions from his own complaint and cease-and-desist letter.

this injunction without an evidentiary hearing or live testimony on the material issues. That same day, DraftKings appealed, and a Justice of the Appellate Division issued an interim stay of the Supreme Court's order granting the preliminary injunction.

ARGUMENT

The Court Should Grant A Stay Pending Appeal.

This Court has discretion to stay "all proceedings to enforce the judgment or order appealed from pending an appeal." CPLR § 5519(c); *see Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986). The Court also has discretion to "modify or limit a preliminary injunction . . . pending appeal" under CPLR Section 5518. In exercising its discretion, the Court is "duty-bound to consider the relative hardships that would result from granting (or denying) a stay." *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990). The Court also "may consider the merits of the appeal," *id.*, whether a stay is in the public interest, and whether granting a stay will prejudice the non-moving party, *see Russell v. N.Y.C. Hous. Auth.*, 160 Misc. 2d 237, 239 (Sup. Ct. Bronx County 1992).[2]

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[2] The NYAG's reliance on *DeLury v. City of New York*, 48 A.D.2d 405 (1st Dep't 1975), and *Nken v. Holder*, 556 U.S. 418 (2009), is misplaced, since neither case involved a motion for a stay of a preliminary injunction pending appeal. *DeLury* involved a motion to vacate the automatic stay pending appeal that arises under CPLR 5519(a) when there is a judgment against a government entity, not a motion to stay under CPLR 5519(c). And *Nken* concerned a foreign citizen's application for a stay of a *final order* (of removal from the United States), not a preliminary injunction.

These factors all weigh in favor of staying the enforcement of the preliminary injunction in this case. DraftKings is likely to succeed on the merits; a preliminary injunction would cause immediate and irreparable harm by forcing DraftKings to shut down statewide; and maintaining the stay that is currently in place will not harm the public in any way. To the contrary, it will preserve the status quo for a short period until this Court can resolve this appeal on the merits.

I. DraftKings Is Likely to Succeed on the Merits.

A preliminary injunction is a "drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001). It should not be granted where the facts "are in sharp dispute." *Thomson v. Daisy's Luncheonette Corp.*, 7 Misc. 3d 1019(A), 2005 N.Y. Slip Op. 50674(U), *3 (Sup. Ct. Kings County 2005).

A preliminary injunction "should be used sparingly," *Fischer v. Deitsch*, 168 A.D.2d 599, 601 (2d Dep't 1990), and where used to change the status quo, such as by shutting down a business, it should only issue in "extraordinary circumstances," *United for Peace & Justice v. Bloomberg*, 5 Misc. 3d 845, 849 (Sup. Ct. N.Y. County 2004). "In order to obtain a preliminary injunction, the moving party must demonstrate (1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor." *Matter of 35 N.Y.C.*

Police Officers v. City of New York, 34 A.D.3d 392, 394 (1st Dep't 2006). Conclusory allegations will not satisfy a movant's burden: "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996). Where the issue being resolved is one of first impression, a preliminary injunction upending the *status quo* is inappropriate. *See Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976) (issuing preliminary injunction to *preserve the status quo* on an issue of first impression "while the legal issues are determined in a deliberate and judicious manner"). An order granting a preliminary injunction must be reversed if the trial court abused its discretion. *See Heldman v. Douglas*, 33 A.D.2d 695, 695 (2d Dep't 1969).

The NYAG failed to make a "prima facie showing of a reasonable probability of success." *Weissman v. Kubasek*, 112 A.D.2d 1086, 1086 (2d Dep't 1985). DraftKings' daily fantasy sports contests are not "gambling" as New York law defines that term. A person "engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." N.Y. Penal Law § 225.00(2). DraftKings' daily fantasy competitions do not constitute "gambling" for two independent reasons: (1) DFS contests do not depend on the

outcome of "a contest of chance" or a "future contingent event not under [the contestant's] control or influence" and (2) the bona fide entry fees charged by DraftKings do not require contestants to stake or risk "something of value upon the outcome" of the competitions.

A. Daily Fantasy Sports Contests Are Not Contests of Chance.

The trial court erred in concluding that the NYAG likely would prove that daily fantasy sports are a "'contest of chance' as currently stated in Penal Law §225.00 [1],[2]." Op. 9. This conclusion had no support in the record, and the trial court offered no explanation of what evidence persuaded him to reach this conclusion.

A "contest of chance" is "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1). The mere potential influence of chance on the outcome of a game never suffices to prove that the game is a "contest of chance." Instead, chance must affect the game to a "material degree." *Id.* The materiality requirement is only satisfied if chance is "the ***dominating element*** that determines the result of the game." *People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (Crim. Ct. Queens County 2009) (emphasis added).

Because nothing in the record even remotely suggested that chance is the dominating element in daily fantasy sports, the trial court erred by holding that the NYAG was likely to carry his burden of proof at trial. Daily fantasy sports, like season-long fantasy sports, require the contestant to exercise skillful judgment in selecting athletes for a fantasy lineup. Before the trial court's order issuing the preliminary injunction, no court had ever suggested that the role of chance predominates over the role of the contestant's skill in fantasy sports. In fact, the only court to have addressed this issue reached the opposite conclusion:

> The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.

Humphrey v. Viacom, Inc., No. 06-2768 (DMC), 2007 WL 1797648, at *2 (D.N.J. June 20, 2007), attached as Exhibit 1 to the January 4, 2016 Supplemental Affirmation of Joshua Schiller ("Suppl. Schiller Aff"). *Humphrey* involved season-long fantasy sports. While the trial court stated that the legality of season-long fantasy sports was not at issue (Op. 7), season-long fantasy sports, as a closely analogous and admittedly legal game of skill, provided an obvious point of reference for deciding whether daily fantasy sports are games of skill. Indeed, the NYAG acknowledged at oral argument below that there is "no distinction about whether daily fantasy sports is more or less dependent on skillful decisions than

traditional fantasy sports leagues." November 25, 2015 Hearing Tr. 63:9-12. Yet, the trial court offered no explanation for why the reasoning of *Humphrey* should not apply with equal force to daily fantasy sports.

The record below demonstrates that the rules of daily fantasy sports are designed to reduce the already immaterial role that chance plays in season-long fantasy sports. The trial court ignored the special features that make daily fantasy sports less dependent upon chance, and even more dependent on a contestant's skill, than season-long fantasy sports. These features in DFS contests include, for example:

- **Salary Cap.** DFS contests, unlike season-long fantasy sports, have a fantasy salary cap limiting the total amount of fantasy dollars any contestant can spend on the roster. Each athlete is assigned a salary, and a contestant must "pay" that salary to place the athlete on the roster. This economic constraint requires contestants to strategize by choosing only those athletes likely to provide the most value for their assigned salaries. Robins Aff. ¶ 10.

- **Athlete Choice.** In season-long fantasy sports, contestants assemble teams by participating in a draft, in which each contestant takes turns claiming exclusive "ownership" of an athlete for fantasy team composition purposes. The randomly assigned positions in the drafting order introduce an element of chance that can affect the season-long competition outcome and limit a player's control over the

composition of his lineup. DFS contests eliminate this chance element by allowing each contestant to select any athlete.[3] Robins Aff. ¶ 9.

▪ **Selection-to-Outcome Lag.** In season-long fantasy sports, lineups are selected only *once*, at the start of the season, exposing season-long fantasy teams to the effect of a full season's barrage of weather and injury events, with limited ability to change the lineup. By contrast, in DFS, the lag between athlete selection and competition completion is much shorter (*e.g.*, days or weeks), allowing the contestant to better understand the risks of inclement weather and injuries and compensate for these elements accordingly. Karamitis Aff. ¶ 13.

The trial court erred in declining to address the inconsistency of the NYAG's interpretation of the law, which somehow makes season-long fantasy sports lawful while prohibiting daily fantasy sports.

Every piece of record evidence on the actual outcome of daily fantasy sports contests confirms that a small group of skilled contestants consistently dominates the contests. *See* Karamitis Aff. ¶¶ 14-17, 21; Gilula Aff. ¶¶ 16-17. The NYAG did not offer, and the trial court did not identify, anything to rebut the overwhelming evidence establishing that DFS contests are games of skill. In fact, the NYAG's own investigation confirmed that "the top one percent of DraftKings

[3] Although contestants cannot trade athletes in daily fantasy sports, the relatively short window between the selection of athletes and daily fantasy competitions eliminates the need for trades.

winners receive the vast majority of the winnings"—a finding completely at odds with the NYAG's claim that daily fantasy sports amount to gambling because they are games of chance. Nov. 10, 2015 NYAG Letter at 2. There is simply nothing in the record supporting the trial court's conclusion. The trial court's obviously erroneous holding that "Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG" supposedly proving that daily fantasy sports competitions are games of chance, Op. 6, demonstrates that the court did not meaningfully engage with the record before issuing its decision.[4]

Although the trial court never stated the basis for its holding, it recited the NYAG's mistaken assertion that the outcomes of daily fantasy sports contests depend "substantially on chance and factors not within the DFS player's control, including whether the athletes chosen are injured, or the game is 'rained out.'" (Op. 6). But neither the NYAG nor the trial court offered any analysis supporting the conclusion that the effect of factors such as injury and weather were in fact "substantial," and nothing in the record purports to quantify the degree to which

[4] Even as the court acknowledged that "[a] preliminary injunction should not be granted unless its necessity and justification is clear based on *undisputed facts*" (Op. at 6) (emphasis added), it relied on entirely *disputed facts* to issue its preliminary injunction order, including how entrance fees are calculated, whether daily fantasy sports are contests of skill or chance, whether the outcome of DFS contests are outside the contestants' control and influence, and whether a preliminary injunction is needed to protect the general public. Each of these issues was hotly disputed before Supreme Court.

injuries and weather actually affect DFS contests. Moreover, the trial court and the NYAG made no effort to address the indisputable fact that weather, injuries, and similar factors affect numerous games of skill—including season-long fantasy sports—without converting them into contests of chance. In fact, even real life athletes have no control over these aspects of their sports. A wide receiver, for example, cannot control a sudden gust of wind affecting the quarterback's throw, and a slalom skier has no control over the icy conditions on the ski slopes. Yet the potential influence of a gust of wind or icy mountain cannot transform football or skiing into games of chance.

In its opposition, the NYAG never claims to have carried its burden of proving that chance is the dominating element in daily fantasy sports contests. Instead, it shirks that burden, asserting that the test for materiality does not consider "what *amount* of chance is involved." NYAG Br. 22. The NYAG cites nothing in support of its remarkable position that the amount of chance involved is irrelevant to the determination of whether a game is a "contest of chance." The NYAG's position is contrary to New York law, which demands proof that chance is "the ***dominating element*** that determines the result of the game." *People v. Li Ai Hua*, 24 Misc. 3d at 1145 (emphasis added).

Nor does the NYAG offer any proof of the ***actual*** role of chance in daily fantasy sports. Instead, the NYAG asserts—without citing any evidence—that

"***whatever*** element of chance affects DFS outcomes is the same type of chance that makes sporting events and horse races unpredictable." NYAG Br. 23 (emphasis added). But this assertion is pure *ipse dixit*: even though it could be tested empirically, the NYAG has not done so, and a preliminary injunction shutting down a business cannot be based on unproven speculation and specious analogies. The NYAG offered no evidence that skill in sports betting actually has a comparable influence to the influence it indisputably has in daily fantasy sports. Nothing in the record suggests, for example, that 1% of skilled sports gamblers receive upwards of 90% of winnings on baseball bets, or that top sports gamblers outperformed randomly placed bets as much as 82% and 96% of the time, as was proven with DFS. *See* Karamitis Aff. ¶¶ 14-17, 21. Without conducting a comparative analysis of the degree to which chance affects the outcomes of sports betting, the NYAG has no basis for asserting that the role of skill in daily fantasy sports is comparable to the role of skill in sports betting.

The NYAG's flawed analogies do not withstand scrutiny in any event. The claim that "whatever skill DFS involves is the same type of skill exercised by sports bettors or horse-racing gamblers" (NYAG Br. 23) is simply wrong. Daily fantasy sports require many skills that sports gambling does not. For example, one critical skill unique to daily fantasy sports is managing the salary cap, which requires not only forecasting the likely performance of athletes, but also assessing

the relative value of athletes given the scarcity of money a fantasy team can spend and slots on a fantasy team. Robins Aff. ¶¶ 9-10. There is no evidence that sports gamblers exercise this type of skill. Nor is there evidence that sports gamblers take into account what strategies their opponents are likely to use (game theory). By contrast, the record demonstrates that the skill of predicting and countering the strategies of one's opponent is a key ingredient to success in daily fantasy sports. *See* Karamitis Aff. ¶¶ 12, 22.

The NYAG's assertion that "DFS represents nothing more than an extension of the proposition bets and parlay bets that have long been a staple of sports bettors" (NYAG Br. 19) obscures still more critical differences between sports betting and daily fantasy sports. In sports betting, the gambler competes against the house, whereas in daily fantasy sports, contestants compete against each other. As the NYAG admits, "[a] DFS player wins if his roster as a whole receives ***more points than other rosters***." NYAG Br. 2 (emphasis added). Moreover, in all the forms of sports betting referenced by the NYAG, the gambler wins or loses depending upon the gambler accurately predicting a simple binary outcome. In daily fantasy sports, by contrast, insofar as athletic performances contribute to the final score, the possible contributions from each performance are not binary. In fantasy football, for example, a wide array of statistics from each athlete's performance—including but not limited to yards gained, touchdowns, fumbles, and

interceptions—contribute to the points the fantasy athlete scores in the fantasy game. And even if one athlete on a fantasy team performs more poorly than expected, the team can still win if other athletes exceed expectations or the opposing fantasy team underperforms. For this reason, daily fantasy sports are also fundamentally different from a parlay bet, which depends upon each binary prediction in the series being correct. *See, e.g.*, 1984 N.Y. Op. Att'y Gen. 11 (1984) (parlay bets involve prediction of the "outcome of 4 or 5 games" and all outcomes "must conform with the bettor's prediction in order for the bet to win") (attached as Ex. 2 to the Suppl. Schiller Aff.).

Next, the NYAG asserts that a "contest of chance" includes any competitive event where the contestants do not have "some direct influence over the outcome of the game." NYAG Br. 26. The NYAG cites no New York cases or statutes in support of this position. The statutory definition of "contest of chance" does not even mention "influence," much less "direct" influence. Even where § 225.00 speaks of "influence" in the future contingent event prong of the definition of "gambling" (addressed in Section B below), it does not require that the "influence" be direct. Because New York Penal Law § 225.00(2) makes no distinction based on a contestant's "direct influence" over the game, the NYAG is wrong in asserting that the supposed absence of "direct influence" by fantasy sports contestants is "critical" to the inquiry. NYAG Br. 26. In any event, as explained

below, daily fantasy sports contestants exercise significant influence over the outcome of the contests.

The NYAG's assertion that DraftKings' "business strategy and marketing" is "perhaps the most telling indication that FanDuel and DraftKings run gambling operations" (NYAG Br. 32) does nothing to prove daily fantasy sports are illegal gambling. None of the elements of section 225.00 require an assessment of DraftKings' business and marketing strategies. The law looks to the nature of the contest itself, not to how it is marketed.

DraftKings' activities in different jurisdictions, subject to different gambling laws, say nothing about DraftKings' compliance with New York law. For example, the NYAG admits that the Illinois Attorney General opinion that he filed with this Court on December 30, 2015 considers the status of DFS under a law that prohibits "any game of chance *or skill* for money." Dec. 30, 2015 NYAG Letter at 1 (emphasis added). The Illinois opinion cannot support the NYAG's position when it did not consider whether DFS contests are contests of skill.[5] *See* Ill. Att'y Gen. Op. at 9. Moreover, it bears noting that her opinion notwithstanding, the Illinois Attorney General has agreed to allow DraftKings to continue operating in

[5] Even if it had, such opinions are advisory, "not binding on the courts," and are entitled to be considered only to the extent that they are well reasoned. *Burris v. White*, 901 N.E.2d 895, 899 (Ill. 2009). Not only does DraftKings dispute the Illinois Attorney General's reasoning, but it has sought a court opinion on the matter along with FanDuel and Head2Head (a company that provides *season-long* fantasy contests).

the state while a court decides the merits of her opinion. *See* Suppl. Schiller Aff., Ex. 3. This stands in stark contrast to the NYAG's extraordinary efforts to shut down DraftKings' business before proving its case in an evidentiary hearing.

B. Daily Fantasy Sports Contests Do Not Depend upon a Future Contingent Event Outside the Contestants' Influence or Control.

Implicitly recognizing the vulnerability of the trial court's holding that daily fantasy sports are contests of chance, the NYAG tellingly opens its brief with an argument the court did not even address: that daily fantasy sports amount to gambling because the fantasy contestant "stakes or risks something of value upon the outcome of . . . a future contingent event not under his control or influence," under New York Penal Law § 225.00(2). *See* NYAG Br. 2, 18-22. The trial court had good reason for declining to accept this theory.

The suggestion that "DFS games hinge on athletic performances that the fantasy player neither controls nor influences" (NYAG Br. 20) is wrong because Section 225.00 speaks only of a singular "future contingent event," not multiple athletic performances. Moreover, the NYAG misidentifies the future contingent event upon which daily fantasy contests depend. The outcomes of daily fantasy sports contests do not depend on any one real-world team's winning or any real-life athletes' surpassing particular benchmarks of performance (such as throwing a touchdown or hitting a homerun) or even upon any one real-life athlete's

performance. Robins Aff. ¶¶ 8, 11. Instead, daily fantasy sports competitions are decided based on the relative strength of the composite statistics generated by the lineups selected by the fantasy contestants—which bear no relation to any real-world sports team. *See supra* pp. 9-10. In short, the "future contingent event" upon which the outcome of daily fantasy sports competitions depend is the competition between two or more fantasy teams.

Fantasy contestants indisputably exercise significant "control or influence" over the outcome of their competitions within the meaning of Section 225.00(2) by selecting a particular fantasy lineup among the billions of possible lineups that could be generated. Robins Aff. ¶ 11. That is the only explanation for why a small group of fantasy contestants can consistently outperform both randomly generated lineups and other, less skilled fantasy contestants: the judgment and skill of the contestants have a material influence on the outcome. *See supra* pp. 8-9.

The NYAG offered no evidence supporting its claim that "DFS games hinge on athletic performance that the fantasy player neither controls nor influences" NYAG Br. 20. In contrast, the record (including the NYAG's own submission here) is replete with evidence conclusively establishing that fantasy contestants exert material influence on the outcome of daily fantasy sports contests. *See* Figueredo Affirm., Ex. K ¶ 11 ("The 'challenge' of DFS—and the skill set required to play DFS successfully—has absolutely nothing to do with correctly

predicting the ultimate win-loss outcome or margin of victory of a basketball game or soccer match. Instead, the relevant skill set involves accurately projecting the performance of individual athletes *and* strategically assembling individual athletes into optimal lineups given the constraints of the salary cap and the payout structure of the contest."); Figueredo Affirm., Ex. L ¶ 10 ("daily fantasy sports rewards players who use creative and strategic thinking in assembling the best team while staying under budget"); Figueredo Affirm., Ex. I at 1 (explaining how strategies employing covariance influence the outcome of fantasy competitions).

The "influence" exerted by fantasy contestants negates the argument that daily fantasy sports amounts to "gambling" under Section 225.00(2). The NYAG's claim that the influence must be "direct" (NYAG Br. 26) or "physical[ ]" (Op. 6) manufactures requirements found nowhere in the statutory text. Where an "Attorney-General's suggested interpretation is wholly at odds with the wording of the statute and would require" the Court "to rewrite the statute," the Court "cannot" adopt such an interpretation. *People v. Smith*, 63 N.Y.2d 41, 79 (1984).

The NYAG's argument that contestants do not influence the outcome because their lineups are "locked" (NYAG Br. 10) fails for the same reason. That the contestant's influence occurs at the beginning rather than the end of the contest does not mean that there is no influence at all. In fact, many games of skill work this way. Season-long fantasy sports contestants "lock in" their selections before

each weekly competition. The owners of show dogs are "locked" once the competition begins; while the hours of training and grooming before the show influence the likelihood of success, the owner cannot control what the dog does during the show. In all these cases, the fact that intervening actors or phenomena can exert an independent influence between the moment a contest is "locked in" and the moment the winner(s) are announced does not eliminate the influence the contestant exerts on the contest as a whole. Nothing in the statute requires that influence be exerted throughout all phases of the contest.

Rewriting a statute is forbidden under any circumstance—but the rewriting of criminal statutes (like Section 225.00) poses special dangers. Under the rule of lenity, "[i]f two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted." *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (citation omitted); *see also Skilling v. United States*, 561 U.S. 358, 410-11 (2010). Here, DraftKings' position—that a contestant need only exercise a material degree of influence over the outcome of the competition to avoid violating the gambling law—is a plausible interpretation of the statute, and it has been embraced by many courts. By contrast, the NYAG's interpretation would effectively rewrite Section 225.00 to require contestants to exert "direct" or "physical" influence "throughout all phases of the game." The rule of lenity requires the Court to reject this abrupt expansion of the statute to "apparently

innocent conduct," subjecting to criminal jeopardy those who offer an immensely popular and beloved game that has long been widely understood to be lawful. *Liparota v. United States*, 471 U.S. 419, 426-27 (1985).

C. DraftKings Contestants Do Not Stake or Risk Something of Value on the Outcome of Daily Fantasy Sports Contests.

The trial court also erred by concluding that DFS contestants "stake[ ] or risk[ ] something of value upon the outcome" of the contest under New York Penal Law Section 225.00(2) by paying entry fees to compete in daily fantasy sports contests. Op. 4-7.

New York courts have held for more than a century that "there is a distinction between the words bet or wager and that which is conveyed by the term purses, prizes, and premiums"—a distinction which "has been adopted so far as we can discover in every case in which the question has been raised in this country." *People ex rel. Lawrence v. Fallon*, 4 A.D. 82, 88 (1st Dep't 1896) .

In his brief to this Court the NYAG concedes that *Fallon* "held that a horse owner did not engage in illegal gambling by entering his horse into a race with an entry fee and a prize." NYAG Br. 27 n.10. In the NYAG's brief to the trial court it tried to distinguish *Fallon* by saying:

> The New York Court of Appeals held that the "competing parties" were not gambling. Thus, paying to enter your own horse in the Belmont Stakes is not gambling, but betting by spectators and other third parties on the race is gambling, albeit gambling that is currently exempted under the law.

NYAG Br. 20 (Nov. 23, 2015). However, that argument fails because the "competing parties" in a DFS contest are the DFS contestants who pay an entry fee and compete for a prize. In its brief to this Court, NYAG now tries to distinguish *Fallon* by asserting:

> The horse owner retained some degree of control and influence over the performance of his horse on the track—through his choice of a trainer, a jockey, etc.—even though chance undoubtedly played some role in the outcome of the race itself.

NYAG Br. 27 n. 10 (Dec. 22, 2015). That argument also fails because just as a horse owner exercises "control and influence" over whether the owner wins a prize by the owner's "choice of a trainer, a jockey, etc.", DFS contestants exercise even more "control and influence" over whether they win a prize by their choice of a roster. While no horse owner wins anything close to a majority of his or her races, skilled DFS contestants repeatedly win contest after contest.

The rule in *Fallon* remains good law. For example, in *Humphrey v. Viacom, Inc.*, No. 06-cv-2768, 2007 WL 1797648 (D.N.J. June 20, 2007), the court rejected a claim that a season-long fantasy sports provider that charged entry fees and awarded prizes was an illegal gambling operation.

> Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).

Id. at *8. Although the trial court below correctly noted that *Humphrey* involved New Jersey's gambling statute, the New Jersey statute is substantially identical to New York's. Moreover, the court dodged the central issue: both *Humphrey* and *Fallon* recognize that contests involving bona fide entry fees are not "gambling." The trial court did not even cite *Fallon*, let alone distinguish it. And with good reason: the decision below directly conflicts with *Fallon*. The entry fees DraftKings charges are indistinguishable from the bona fide fees charged by the defendants in *Humphrey* and *Fallon*. DraftKings' fees are paid unconditionally, regardless of the outcome of any contest, and DraftKings retains a portion of these payments as compensation for providing daily fantasy contests to its customers. As for the prizes, DraftKings announces in advance the exact amount the winners will receive. In short, these are bona fide entry fees just as in *Humphrey* and *Fallon*, and the NYAG has no evidence otherwise.[6]

The trial court misapplied New York law in stating that DraftKings' fees are not bona fide entry fees because "the participants pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage

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[6] The prejudice resulting from the Court's refusal to hold an evidentiary hearing is apparent from the Court's fundamental misunderstanding of how DraftKings operates and how entry fees are calculated. For example, contrary to all the evidence, the court stated that the "amounts of the entrance fee [to enter a DFS contest] is calculated in part on salary capped [sic] at up to $50,000.00 and on the athletes perceived value." (Op. at 5) In reality, contest entrance fees have nothing to do with the salary caps imposed on the game and the "salary" each contestant must "pay" to place the athlete on his roster. Robins Aff. ¶¶ 10, 12-14.

of every entry fee being paid to . . . Draftkings, Inc." Op. 7. DraftKings' entry fees are just as "one time" as the fees charged by the season-long fantasy sports providers in *Humphrey*. *Id.* In both season-long and daily fantasy sports, one fee is charged per contest. The only difference is that daily fantasy sports contests are shorter. But New York law does not look to the duration or frequency of gameplay in determining whether an entry fee is bona fide. These facts have no legal significance.[7]

II. DraftKings Will Suffer Substantial And Irreparable Harm Absent A Stay.

DraftKings will be severely and irreparably harmed absent a stay. The trial court's order enjoins DraftKings from operating in New York—one of its largest markets, with 375,000 customers. These customers have paid more than $99 million in entry fees in 2015, generating more than $10 million in revenue. Should DraftKings cease operations in New York, it will suffer severe economic harm with no ability to recover damages from the NYAG.

DraftKings would also risk losing the support of its investors and its fundraising efforts would be severely hampered. DraftKings has partnered with

[7] The trial court noted that DraftKings charges entry fees "as high as $10,600.00 on one or more contests." Op. 7. This fact also lacks legal significance, as the size of an entry fee has no bearing on whether an activity constitutes gambling. In any event, the vast majority of DraftKings' New York users have never played a contest with an entry fee exceeding $20. Karmitis Aff. ¶ 24(a).

major sports entities such as Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, and the owners of the New York Yankees, New York Giants, New York Knicks, New York Mets, New York Rangers, and New York City F.C. *See* Robins Aff. ¶ 7. A court-ordered shutdown would chill and curtail DraftKings' ability to attract new investors and partners, and would jeopardize DraftKings' relationships with its existing investors and partners. All of this harm would not be confined to New York, but would cause a cascading effect throughout the country—including in the dozens of states where DraftKings also continues to operate lawfully—threatening its customer base and its business relations with vendors, customers, and regulators.

The devastation wrought by a forced shutdown would be particularly unreasonable given that New York legislators have introduced legislation to ensure that DFS contests remain legal in this state. *See* Michael Virtanen, Key NY lawmaker sees state legalizing daily fantasy sports, Associated Press (Dec. 8, 2015), attached as Ex. 4 to the Suppl. Schiller Aff.

New York courts have found irreparable injury where a party will "likely sustain a loss of business impossible, or very difficult, to quantify." *Willis of New York, Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002). Irreparable injury will also be found where a company's revenues and customer goodwill are threatened. *See Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d

255, 272-73 (1st Dep't 2009) (finding irreparable injury where a company's inability to operate jeopardized business licenses, damaged revenues, harmed customer goodwill, and meant the loss of a real estate investment); *see also Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 6 (1st Dep't 2003) (finding irreparable harm where customer goodwill and business creditworthiness threatened). Indeed, New York courts have stayed a preliminary injunction pending appeal where the injunction would shut down a company's entire business within the state, where the company had already been operating for several years. *See, e.g., City of Rochester v. Sciberras*, 55 A.D.2d 849, 849 (4th Dep't 1976) (staying and ultimately reversing grant of preliminary injunction against sewer cleaning company operating without a license because the company had operated lawfully in the city for several years and there was "no evidence of immediate injury to the city or its citizens" from running the business). If forced to shut down its New York operations, DraftKings will suffer immense and unquantifiable economic harm; it will lose goodwill among its customers and investors nationwide; and it will endure massive reputational harm.

The cases cited by the NYAG—which hold that "economic loss, which is compensable by money damages, does not constitute irreparable harm," *DiFabio v. Omnipoint Comc'ns, Inc.*, 66 A.D.3d 635, 636 (2d Dep't 2009) (quotation marks and citations omitted)—are easily distinguishable. NYAG Br. 41. None of these

cases involved litigation between a private party and the government. *See id.*; *N.Y. City Off-Track Betting Corp. v. N.Y. Racing Ass'n, Inc.*, 250 A.D.2d 437, 442 (1st Dep't 1998); *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 186 A.D.2d 417, 418 (1st Dep't 1992). The NYAG offers no reason to believe that DraftKings will be able to recover damages against the government in the event it is forced to shut down and the preliminary injunction is later reversed. While a private party that obtains a preliminary injunction ordinarily must post a bond to indemnify its opponent from damages caused by the injunction, *see* CPLR 6312(b), that requirement does not apply here. The economic harm is therefore irreparable.

III. A Stay Will Not Prejudice or Harm the Public.

No one will suffer prejudice from a short stay of the preliminary injunction order. Daily fantasy sports contests have been offered in New York for nearly a decade. If the NYAG had evidence that these contests cause harm to the public, it would have offered this evidence below.

Instead, the "evidence" the NYAG relies upon was nothing more than speculation and inadmissible double- or triple-hearsay. For example, as its sole support for the proposition that "DFS is addictive" (NYAG Br. 39), the NYAG relies upon the affidavit of an expert witness who offers

second- and third-hand accounts from "several" unidentified individuals who claim to have spoken to other unidentified people with supposed "DFS-related gambling

addictions." Figueredo Affirm., Ex. Q ¶ 11 (stating that declarant spoke to "several recovering gamblers" and "gambling counselors who have encountered people with DFS-related gambling addictions"). Such vague assertions are not only inadmissible, but also nowhere near sufficient to support an assertion that DFS is addictive to justify shutting DraftKings down. The NYAG's purported expert does not even claim to have met someone who believes he is addicted to daily fantasy sports.

Before making factual findings based on expert evidence, a trial court must determine that the methods used by the expert have achieved general acceptance within the scientific community—*and* that the expert followed reliable procedures in the particular case. *See Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446-47 (2006). The NYAG's purported expert did not come close to satisfying these standards.

Apparently recognizing the insufficiency of its trial court submission, the NYAG now seeks to supplement the record by citing to a newspaper article that was published after briefing below was completed. *See* NYAG Br. 40 (citing Figueredo Affirm., Ex. H). This article is not properly before the Court and should be ignored, and it is rank hearsay.[8] *See Broida v. Bancroft*, 103 A.D.2d 88, 93 (2d

[8] The article attached as Exhibit H to the Figueredo Affidavit also recognizes that "[m]ost people can play daily fantasy or casino games without a problem."

Dept. 1984). There is no admissible evidence supporting the NYAG's assertion that gambling addicts find "the readily accessible nature of DFS games irresistible." NYAG Br. 3.

Furthermore, the NYAG's inaction against providers of season-long fantasy sports contests—not to mention providers of daily contests other than DraftKings and FanDuel—undercuts his allegations of urgent public harm. If these contests truly posed a grave threat to public safety as the NYAG claims, he would not have selectively targeted only two companies within a far broader industry.

The NYAG's assertion that granting DraftKings' motion would result in a "nullification of [the] Supreme Court's preliminary injunction" (NYAG Br. 15) misunderstands the relief that is at issue. This motion does not seek to nullify anything. A stay pending appeal would only prevent the enforcement of the trial court's erroneously issued preliminary injunction during the pendency of this appeal. If the NYAG were to succeed on the merits of this appeal, the stay would be lifted and a preliminary injunction would continue pending the outcome of the litigation below.

Finally, the NYAG's claim that the DFS industry is "expanding" and thus a stay would not preserve the status quo (*see* NYAG Br. 43-45) is absurd. First, the NYAG does not offer any evidence of DraftKings' future expansion; he only speculates that the user base will grow due to advertising and continued

enthusiasm for sports. Moreover, if the potential growth of a business during the pendency of an appeal could somehow undermine the status quo, no active company could ever secure a stay pending appeal. Such a result would defy logic. Whether DraftKings' customer base remains static into the future should not alter the analysis, particularly where DraftKings is committed to perfecting its appeal for the April Term, ensuring that any stay pending appeal would be brief.[9]

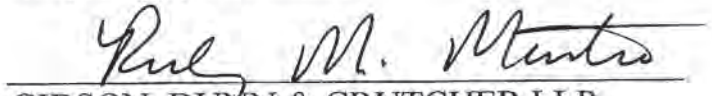
CONCLUSION

DraftKings' motion to stay proceedings pending the resolution of its appeal should be granted.

Dated: New York, New York
January 4, 2015

[9] The NYAG asks the Court to order DraftKings to perfect its appeal for the April Term. (NYAG Br. at 4, n.1). There is no need for such an order. Given DraftKings' desire to resolve the legality of DFS contests on an expedited basis, it already intends to perfect its appeal for the April Term.

Respectfully submitted,



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Attorneys for Defendant DraftKings, Inc.

**pro hac vice* to be sought

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

THE PEOPLE OF THE STATE OF NEW YORK, By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

DRAFTKINGS, INC.,

Defendant.

INDEX NO. 453054/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 16 were read on this motion to/for Injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits ____ cross motion ____	6 - 16
Replying Affidavits ____	

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, filed under Motion Sequence 001, is granted and decided in accordance with the attached Decision and Order filed under Index #453056/2015, Motion Sequence 001.

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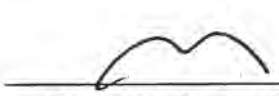

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C..

Dated: December 11, 2015

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

THE PEOPLE OF THE STATE OF NEW YORK, By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,
Plaintiff,
-against -
FANDUEL, INC.,
Defendant.

INDEX NO. 453056/15
MOTION DATE 11-25-15
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 14 were read on this motion to/for Injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 7
Answering Affidavits — Exhibits ____ cross motion ____	8 - 13
Replying Affidavits ____	14

Cross-Motion : Yes X No

Upon a reading of the foregoing cited papers it is Ordered that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order seeking injunctive relief, enjoining and restraining Fanduel, Inc. from doing business in the State of New York, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted. The motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, is granted.

Fanduel Inc.'s motion filed under Index # 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services is denied. Draftkings Inc.'s motion filed under Index Number 102014/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313 granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York from taking any enforcement action or other action, against Draftkings, Inc., and its employees, agents and suppliers of goods and services, and for expedited discovery, hearing and trial, is denied.

Fanduel, Inc. and Draftkings, Inc. are online Daily Fantasy Sports (DFS) companies that operate websites. On October 6, 2015, the Office of the New York Attorney General (hereinafter referred to as "NYAG") commenced an investigation into both

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Fanduel, Inc. and Draftkings, Inc., related to allegations that employees of the competing company websites utilized inside information to improve chances of winning competitions on the competing sites. As a result of the investigation the NYAG determined that the DFS competitions on Fanduel, Inc. and Draftkings, Inc. websites, are in actuality illegal gambling operations, subjecting the public to the fraudulent perceptions that the games are winnable.

On November 10, 2015 the NYAG served a "cease and desist" letter on both companies, demanding that they, "cease and desist from illegally accepting wagers in New York State in connection with 'Daily Fantasy Sports (DFS)." The NYAG's investigation determined that DFS on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets on events they cannot control or influence, "on the real-game performance of professional athletes" and that in reality the entrance fees are wagers on a "contest of chance," with the results depending on numerous elements of chance to a "material degree." The NYAG also determined that the websites involve the companies having full and active control with direct profit from the wagering, they set prizes, control relevant variables such as athletes wages, and promote themselves like a lottery. DFS on the companies websites was deemed to create public health and economic concerns including the equivalent of gambling addiction, with advertisements misleading the public with the lure of easy money while only the top one percent, typically professional gamblers profit. The NYAG pursuant to General Business Law §§349 and 350, provided five days for Fanduel, Inc. and Draftkings, Inc. to show why the NYAG should not initiate any proceedings.

On November 13, 2015, Fanduel Inc. commenced an action against Eric T. Schneiderman, in his official capacity as NYAG and the State of New York, under Index #161691/2015. The complaint asserts two causes of action seeking declaratory and injunctive relief and alleges that Fanduel Inc. operates in compliance with New York Law and functions as a game of skill. Fanduel, Inc., under Index #161691/2015, brought an Order to Show Cause seeking a preliminary injunction and temporary restraining order pursuant to CPLR §6301 and §6313, enjoining Eric T. Schneiderman, in his capacity as NYAG, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of DFS contests are a violation of the law, as against Fanduel, Inc., and its employees, agents and suppliers of goods and services. On November 16, 2015, this Court denied Fanduel Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses the defendant's motion filed under Index #161691/2015, Motion Sequence 001.

On November 13, 2015, Draftkings, Inc. commenced an Article 78 proceeding under index #102014/2015, against the NYAG and the State of New York. The verified petition alleges that the actions of the NYAG are arbitrary and capricious, in excess of his jurisdiction, and seeks declaratory and injunctive relief. The petition asserts claims of violation of the due process and separation of powers provisions in the New York State Constitution and violation of equal protection provision and uncompensated takings in violation of the New York State Constitution, the U.S. Constitution, and 42 U.S.C. §1983. Draftkings, Inc. also asserted claims of tortious interference with a contract and tortious interference with prospective business relations. Draftkings, Inc. brought an Order to Show Cause seeking injunctive relief and a temporary restraining order, enjoining the NYAG and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily sports contests are a violation of the law, together with seeking expedited discovery, hearing and trial. On

November 16, 2015 this Court denied Draftkings, Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses Draftkings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001.

The NYAG commenced an action against Fanduel Inc., under index #453056/2015, on November 17, 2015. The complaint asserts nine causes of action and alleges that plaintiff under the authority of Executive Law§63[12], is entitled to enjoin the defendants from illegal and fraudulent conduct and seeks injunctive relief pursuant to Business Corporation Law (BCL) §1303, General Business Law (GBL) §§ 349 and 350. The NYAG's motion filed under index # 453056/2015, Motion Sequence 001, seeks an Order pursuant to Executive Law §63[12] BCL§1303, GBL §§349 and 350, and CPLR §§6301 and 6313 enjoining and restraining Fanduel, Inc., from doing business in the State of New York as a result of its fraudulent and illegal practices. The NYAG also seeks to enjoin the defendant from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on its website.

The NYAG commenced a separate action against Draftkings, Inc., under index #453054/2015, on November 17, 2015 asserting nine causes of action making the same allegations as were asserted against Fanduel, Inc. The NYAG's motion filed under index #453054/2015, Motion Sequence 001, seeks an Order granting the same injunctive relief against Draftkings, Inc., as is sought against Fanduel, Inc..

The NYAG on its motions filed under index #453054/2015 and 453056/2015 argues that pursuant to Executive Law §63[12], the Attorney General has authority to seek injunctive relief because of Fanduel, Inc. and Draftkings, Inc.'s repeated, ongoing, illegal and fraudulent activities. The NYAG also seeks injunctive relief under the consumer protection provisions of GBL §§ 349 and 350. Pursuant to BCL §1303, the NYAG claims empowerment to sue to enjoin and restrain Fanduel, Inc. and Draftkings, Inc. as foreign corporations registered in Delaware, and doing business in New York from doing business in New York as a result of the fraudulent and illegal acts or practices.

Executive Law §63[12], permits the NYAG to bring an action for injunctive relief or damages to remedy repeated fraud or illegality (State of New York v. Princess Prestige Co., 42 N.Y. 2d 104, 366 N.E. 2d 61, 397 N.Y.S. 2d 360 [1977]). The NYAG is entitled to injunctive relief pursuant to Executive Law § 63 [12], upon a showing that there was a repeated statutory violation (Schneiderman v. One Source Networking, Inc., 125 A.D. 3d 1345, 3 N.Y.S. 3d 505 [4th Dept., 2015]). A prima facie claim of fraud pursuant to Executive Law § 63 (12), is established by showing that, "...the act complained of has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (People ex rel. Spitzer v. Applied Card Sys., Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 [1st Dept., 2005] and People ex rel. Spitzer v. General Electric Company, Inc., 302 A.D. 314, 756 N.Y.S. 2d 520 [1st Dept., 2003]).

Pursuant to GBL §349, a prima facie case is established by a showing of injury resulting from "consumer-oriented conduct," and that the defendant is engaging in an act or practice that is materially misleading or deceptive, likely to, "...mislead a reasonable consumer acting reasonably under the circumstances" (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, 647 N.E. 2d 741 , 623 N.Y.S. 2d 529 [1995]). Pursuant to GBL §349, an omission is deceptive, if a business possesses material or information relevant to the consumer and fails to provide it to the consumer (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20,

supra). GBL §350, specifically applies to false advertising, otherwise the standard to establish a prima facie case is the same as that for a claim, pursuant to GBL §349. (Goshen v. Mutual Life Ins. Company of New York, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y.S. 2d 858 [2002]). GBL §350, also requires an allegation of reliance on, or knowledge of the defendant's advertisement (Non-Linear Trading Co. v. Braddis Associates, Inc., 243 A.D. 2d 107, 675 N.Y.S. 2d 5 [1st Dept.,1998]).

BCL §1303, permits the NYAG to, "...bring an action to enjoin or annul the authority of a foreign corporation which operates within this state contrary to law, has done or omitted any act which if done by a domestic corporation would be a cause for its dissolution under section 1101(Attorney-general's action for judicial dissolution)..." (McKinney's Con. Laws Annotated, Business Corporation Law §1303). BCL §1303, has been applied to enjoin a foreign corporation from doing business in a fraudulent or illegal manner and the court can grant a decree of forfeiture and annulment of the right to do business in the state of New York (People v. American Ice. Co., 135 A.D. 180, 120 N.Y.S. 41 [1st Dept., 1909]).

The NYAG argues that the DFS games played on the Fanduel, Inc. and Draftkings, Inc. websites constitutes illegal sports gambling as defined in the New York State Constitution Article I, § 9[1] and under Penal Law §225.00-225.40, specifically Penal Law §225.05, §225.10, §225.15 and §225.20 which are alleged to have been violated. It is the NYAG's contention that Penal Law sections §§225.00-225.40, apply to the DFS games played on Fanduel, Inc. and Draftkings, Inc.'s websites, which is "gambling" as defined in Penal Law §225.00 [2], with each player participating in a "contest of chance" as defined in Penal Law §225.00 [1], not a game of skill.

New York State Constitution Article I, §9[1], states in relevant part,

> "...no lottery or the sale of lottery tickets, pool-selling, book making or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." (Emphasis added) (McKinney's Con. Laws Annotated, Const. Art. I, §9[1]).

The provisions of New York State Constitution Article I, §9[1], reflects the public policy of the State of New York against commercialized gambling. The New York State Constitution Article I, §9[1] permits the legislature through the relevant sections of the Penal Law to regulate gambling, the statutory provisions are subject to strict construction and prohibit unauthorized activity. Laws authorizing gambling should not be extended by implication beyond what is specified by the Legislature (New York Racing Ass'n, Inc. v. Hoblock, 270 A.D. 2d 31, 704 N.Y.S .2d 52 [1st Dept., 2000]).

The definition of "gambling" is found in the Penal Law §225.00 [2], which defines gambling as when a person, "... stakes or risks something of value upon the outcome of

a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." (McKinney's Con. Laws Annotated, Penal Law §225.00[2]). Penal Law §225.00 [6] defines "something of value" as, "...any form of money or property... or credit...involving...a privilege of playing at a game or scheme without charge," the award of a free game has been held a violation of the Penal Law. The term "something of value," is established by the payment of cash to play, and the receipt of a cash award. (Plato's Cave Corp. v. State Liquor Authority,68 NY 2d 791,498 N.E. 2d 420, 506 N.Y.S. 2d 856 [1986]).

It is the NYAG's contention that DFS played on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets labeled "entrance fees" on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling as defined in Penal Law §225.00 [2]. The NYAG claims that the "entrance fee" is not returned in the event of a loss and because the statute only requires "something of value," not requiring that it be classified as a "bet or wager" the "entrance fee" is sufficient to establish gambling.

In support of the NYAG's contention, internet screen shots are submitted showing the manner in which a potential DFS player may sign-up for each of the websites. The published rules or terms of use for each website include statements of legality and the finality of the roster. Terms of use and rules for each website establish that a player selects a set number of professional athletes for their DFS team and once the DFS team is selected, the players are "locked in," and the selections may no longer be changed. Scoring for the DFS team is tallied by Fanduel, Inc. and Draftkings, Inc., who rely on individual real game performances of the athletes selected for the DFS team by the online player. The NYAG provided a copy of the DFS scoring system for professional football but the scoring system varies with different types of sports. The terms of use and rules for each website state that points allotted to the DFS team are affected if there is a rain out, postponement, suspension, or shortened game for any of the DFS athletes selected by the player as part of the DFS team. The final tally of a daily or weekly DFS competition occurs when the final box scores of the sporting events of the respective DFS team players have concluded.

The NYAG claims the "entrance fees" a DFS player can pay ranges from $.25 to $10,600.00 on Draftkings, Inc.'s website and from $1.00 to $10,600.00 on Fanduel, Inc.'s website. The amounts of the entrance fee is calculated in part on salary capped at up to $50,000.00 and on the athletes perceived value. There are multiple types of contests a DFS player may enter including, "head to head" match-ups involving a DFS player betting that the line-up they choose will perform better than those picked by another DFS player, and "Guaranteed Prize Pools" involving a pool with up to hundreds of thousand other players. It is also the NYAG's contention that the types of games played are more like "parlay" bets contingent on combinations of games and "prop" bets relying on statistics, than "contests of skill." The NYAG submits advertisements for Fanduel, Inc. and Draftkings, Inc. as proof that they advertise themselves as legal, operate in a manner similar to that of a lottery, and that they claim competitions are "winnable" regardless of the level of skill, with instant gratification to DFS players.

It is the NYAG's contention that both Fanduel, Inc. and Draftkings, Inc. take between 6% and more than 14% of the "entry fee" as "commission" on every competition, and equates this to the equivalent of a "rake" or "vig" charge taken on wagers by a sports bookie. Their terms of use on entry fees are exactly alike, there is no

specific set fee or percentage paid as an entry fee, DFS players participate in a contest with the amount debited from their account determined by Fanduel, Inc. and Draftkings, Inc.. There is no breakdown of fees per type of game, which across different sports can potentially result in multiple entry fees paid daily by the same DFS player, allowing Fanduel, Inc. and Draftkings, Inc. to profit from every entry fee being paid.

Penal Law §225.00 [1] defines "'Contest of Chance' to mean, "...any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, *notwithstanding* that skill of the contestants may also be a factor therein" (emphasis added), (McKinney's Con. Laws Annotated, Penal Law §225.00[1]).

The NYAG contends that DFS played on the websites are "contests of chance" because although the skill of the contestants is a factor, the outcome depends substantially on chance and factors not within the DFS player's control, including whether the athletes chosen are injured, or the game is "rained out." Furthermore, once a team is chosen for a contest there is no means of physically altering the outcome.

Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG, instead each seeks a preliminary injunction pursuant to CPLR § 6301 and a temporary restraining order pursuant to CPLR § 6313. They argue that DFS games as played on their websites are not illegal gambling. They claim that DFS is a "game of skill" and not a "contest of chance," with DFS players acting like general managers and relying on a team that does not exist in reality. They refer to Humphrey v. Viacom, Inc., 2007 WL 1797648, and the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31U.S.C. §§5362, 5363, as support for their contention that they have the likelihood of success because, they argue, DFS is not illegal gambling as defined in the New York Penal Law §225.00.

CPLR § 6301 grants this court the power to issue an order directing that a party be enjoined from performing an act, or to refrain from performing an act which would be injurious. The issuance of a preliminary injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (Doe v. Axelrod, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]).

A preliminary injunction should not be granted unless its necessity and justification is clear based on undisputed facts (Residential Board of Managers of the Columbia Condominium v. Alden, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991]). The likelihood of ultimate success on the merits requires a prima facie showing of the right to relief (DiMartini v. Chatham Green, Inc., 169 A.D. 2d 689, 575 N.Y.S. 2d 712 [1st Dept., 1991]). Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (Zodkevitch v. Feibush, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [1st Dept., 2008]). The balancing of the equities requires the Court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief (Ma v. Lien, 198 A.D. 2d 186, 604 N.Y.S. 2d 84 [1st Dept., 1993]). CPLR §6313 permits the imposition of a temporary Restraining Order pending the determination of a motion for preliminary

injunction (People v. Asiatic Petroleum Corp., 45 A.D. 2d 835, 357 N.Y.S. 2d 542 [1st Dept., 1974]).

Fanduel, Inc. and Draftkings Inc., each refer to Humphrey v. Viacom, Inc., 2007 WL 1797648 [D.C.N.J., 2007], an unreported decision from the New Jersey U.S. District Court addressing the New Jersey Qui Tam statute (N.J.S.A. 2A:40-1) permitting illegal gambling losers to recover losses. This case has no application in this jurisdiction and is distinguishable. The Court in Humphrey v. Viacom, Inc., granted a motion to dismiss the complaint, and determined that the payment of an entry fee in order to participate in seasonal fantasy sports is not an illegal "wager" or "bet" pursuant to the New Jersey Qui Tam statue. The Court in Humphrey v. Viacom, Inc., stated that, "entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." Humphrey v. Viacom, Inc., involved seasonal fantasy sports in which the players paid a nonrefundable one time entry fee. Contrary to Humphrey v. Viacom, Inc., the facts in this action involve DFS, the participants pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage of every entry fee being paid to Fanduel, Inc. and Draftkings, Inc.. Furthermore the New York State Penal Law does not refer to "wagering" or "betting," rather it states that a person, "risks something of value." The payment of an "entry fee" as high as $10,600.00 on one or more contests daily could certainly be deemed risking "something of value." The language of Penal Law §225.00 is broadly worded and as currently written sufficient for finding that DFS involves illegal gambling.

Fanduel, Inc. and Draftkings, Inc. refer to the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31U.S.C. §§5362, 5363, arguing it carves out an exception for Fantasy Sports. UIGEA [1][e][ix], permits participation in, "any fantasy or simulation sports game or educational game or contest in which...no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization..."(31U.S.C. §5362 [1][e][ix]) The UIGEA language exempting fantasy sports has no corresponding authority under New York State law as currently written. UIGEA creates an exception for state statutes, specifically stating, "The term 'unlawful internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by means which involves the use, at least in part, of the Internet *where such bet or wager is unlawful under any applicable* Federal or *State Law in the State* or Tribal lands in which the bet or wager is initiated, received or otherwise made (emphasis added) (31U.S.C. §5362 [2].[10][A]). The exception found in UIGEA does not apply under the current New York State statutory language. UIGEA by its own language does not apply to "...placing, receiving, or otherwise transmitting a bet or wager where..(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;..."(31U.S.C. §5362 [2] [10][B][I], [ii]). UIGEA is not a basis to find the NYAG exceeded its authority or to grant Fanduel, Inc. and Draftkings, Inc., the injunctive relief sought.

Fanduel, Inc. and Draftking, Inc.'s claims of laches or estoppel cannot be invoked against a government agency to prevent the discharge of statutory duties where the acts the agency seeks to prevent could easily result in extensive public fraud (Parkview Associates v. City of New York, 71 N.Y. 2d 274 77, 519 N.E. 2d 1372, 525 N.Y.S. 2d 176 [1988] and New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, 566 N.E. 2d 134, 564 N.Y.S. 2d 1007 [1990]). The possibility of estoppel against a governmental agency is to be denied, in all but the, "rarest of cases" such as where,

(1) there is no awareness of the law sought to be enforced and it could not be discovered by reasonable diligence, (2) there is no potential for public fraud and (3) "manifest injustice" will result (New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, supra). The DFS corporations, have not stated a basis to find the "rarest of cases" exception applies to the NYAG's claims, and the potential for public fraud has not been eliminated. Defendant's contention that plaintiff failed to seek restraint as to Seasonal Fantasy Sports, is not relevant to the pending motion because that relief is not before this Court.

Draftkings, Inc., has asserted constitutional arguments of violations of due process and equal protection in its Order to Show Cause seeking injunctive relief. Due process requires notice and the opportunity to be heard (People v. Apple Health & Sports Clubs, 80 N.Y. 2d 803, 599 N.E. 2d 279, 587 N.Y.S. 2d 279 [1992]). The NYAG conducted an investigation over the course of a month and provided both notice and an opportunity for Draftkings, Inc. to be heard in the November 10, 2015, "cease and desist letter." Draftkings, Inc. commenced a special proceeding and brought an Order to Show Cause seeking injunctive relief during the period provided by the NYAG. The due process argument fails because Draftkings, Inc. has been provided with the opportunity to be heard by both the NYAG and this Court. The equal protection argument also fails to avoid injunctive relief. Draftkings, Inc. claims that the NYAG is selectively enforcing the illegal gambling provisions of Penal Law §§225.00-225.40, solely against DFS as played on the corporation's website. Draftkings, Inc. is required to provide evidence that other DFS websites or corporations that are "similarly situated" have been exempted by the NYAG from its investigation and enforcement to establish a violation of the equal protection provisions of the Constitution (Dezer Entertainment Concepts, Inc. v. City of New York, 8 A.D. 3d 37, 778 N.Y.S. 2d 18 [1st Dept., 2004]). Draftkings, Inc. failed to provide evidence that "similarly situated" DFS websites were exempted from the NYAG's investigation, such that injunctive relief should be denied.

Draftkings, Inc. asserted the constitutional argument of separation of powers in its Order to Show Cause filed under index # 102014/2015. It fails to establish that the injunctive relief sought by the NYAG should be avoided under the separation of powers doctrine. It is Draftkings, Inc.'s contention that the NYAG by its interpretation of the New York State Constitution, Article I, §9 and the Penal Law, is engaging in "Judicial powers" and "legislative powers" instead of applying executive authority. Draftkings, Inc. claims that the NYAG is applying judiciary power by determining whether a particular individual or company has violated the law and seeking to shut the company down. The November 10, 2015, "cease and desist letter," was not a final determination, and the NYAG in providing the opportunity for Draftkings, Inc. to be heard did not infringe on "judicial powers." The injunctive relief sought by the NYAG is not seeking to determine the ultimate issues raised by the parties.

Draftkings, Inc. claims that the NYAG is engaging in policy decisions that should be restricted to the legislature. The separation of powers is implied in each of the three coordinated branches of government: executive, legislative and judicial. The Legislature's powers involve, "making critical policy decisions, while the executive branch's responsibility is to implement those policies." Although there is a "functional separation" between the legislative and the executive branches they, "...cannot neatly be divided into isolated pockets" (Bourquin v. Cuomo, 85 N.Y. 2d 781, 652 N.E. 2d 171, 628 N.Y.S. 2d 618 [1995]). The four part test for infringement of legislative powers involves determining if an agency, (1) is not authorized to, "structure its decision making in a cost-benefit analysis," (2) create a comprehensive set of rules without guidance from the

legislature, (3) is acting to "fill the vacuum" in an area the legislature had been unable to, "reach an agreement on the goals and methods that should govern" and (4) the technical competence necessary to provide details for broadly stated legislative policies (Boreali v. Axelrod, 71 N.Y. 2d 1, 517 N.E. 2d 1350, 523 N.Y.S. 2d 464 [1987]). The four part test requires proof that the statutory provisions, "have numerous exemptions," there is repeated attempts at legislative enactments with failure to reach an agreement in the legislature after "substantial public debate and vigorous lobbying," and a showing that there is no special expertise or competence of the agency involved (Festa v. Leshen, 145 A.D. 2d 49, 537 N.Y.S. 2d 147 [1st Dept., 1989]). Draftkings, Inc. has not provided any proof in support of the contentions that the NYAG has failed to meet the four part test. The mere assertions that the NYAG fails to meet the requirements is not enough to avoid the injunctive relief sought by the NYAG.

The NYAG in opposition to the separation of powers argument, argues that the injunctive relief sought by Draftkings, Inc. amounts to the extraordinary relief of a writ of prohibition. "The extraordinary remedy of a writ of prohibition lies only where 'there is a clear legal right' to such relief, and only when the body or officer involved acts or threatens to act in a manner over which he or she has no jurisdiction or where he or she exceeds his or her authorized powers..." (Kimyagarova v. Spitzer, 791 N.Y.S. 2d 610 [2nd Dept., 2005]). Draftkings, Inc.'s argument that the NYAG has exceeded its authority and misinterpreted the meaning and application of the New York State Constitution Article I, §9 and the Penal Law, does not require that this Court utilize the extraordinary remedy of restraining the NYAG (Morgenthau v. Erlbaum, 59 N.Y. 2d 143, 451 N.E. 2d 150, 464 N.Y.S. 2d 392 [1983] and Matter of Johnson v. Price, 28 A.D. 3d 79, 810 N.Y.S. 2d 133 [1st Dept., 2006]). Draftkings, Inc. has not established a clear legal right to the injunctive relief sought, prohibiting the NYAG from taking enforcement action.

The NYAG has established the likelihood of success warranting injunctive relief under the authority provided in Executive Law§63[12], to avoid fraudulent or illegal acts and violations of GBL §§349 and 350. The NYAG has a greater likelihood of success on the merits under the New York State Constitution Article I, §9, and the definitions of gambling and "contest of chance" as currently stated in Penal Law §225.00 [1],[2]. The NYAG has also established that both Fanduel, Inc. and Draftkings, Inc., as out of state corporations, can be enjoined-pursuant to BCL §1303-from their activities in the State of New York. The NYAG is not required to show irreparable harm under Executive Law §63[12], it is implied in the need to prevent the effects of fraudulent and illegal conduct on the general public (People v. Apple Health & Sports Clubs, 599 N.Y. 2d 803, supra). The balancing of the equities are in favor of the NYAG and the State of New York due to their interest in protecting the public, particularly those with gambling addictions. Fanduel, Inc. and Draftkings, Inc., are only enjoined and restrained in the State of New York, DFS is permitted in other states, and the protection of the general public outweighs any potential loss of business.

Fanduel, Inc. and Draftkings, Inc. have not established entitlement to a preliminary injunction, however, a granting or denial of a preliminary injunction does not constitute a determination of the ultimate issues (Walker Memorial Baptist Church v. Saunders, 285 N.Y. 462, 35 N.E. 2d 42 [1941] and Jou-Jou Designs, Inc. v. International Ladies Garment Workers' Union, Local 23-25, 94 A.D. 2d 395, 465 N.Y.S. 2d 163 [1st Dept., 1983]). Fanduel, Inc. and Draftkings, Inc.'s failure to establish entitlement to a preliminary injunction, is not a final determination of the merits and rights of the parties, therefore discovery is needed after joinder of issue. The relief sought by Draftkings, Inc.

in its motion papers filed under Index Number 102014/2015, Motion Sequence 001, seeking expedited discovery, hearing and trial, is premature since the NYAG and State of New York have not had an opportunity to answer.

Accordingly, it is ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law§§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Fanduel, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, §[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Fanduel, Inc., is temporarily enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Fanduel, Inc.'s website pending a final determination, and it is further,

ORDERED, that Fanduel, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453056/2015, and it is further,

ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law§§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Draftkings, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, Section§[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Draftkings, Inc., is enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers, or bets from New York State consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website until a final determination, and it is further,

ORDERED, that Draftkings, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453054/2015, and it is further,

ORDERED, that Fanduel, Inc.'s motion filed under Index Number 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his offical capacity as Attorney General of the State of New York, and the State of New York shall serve an answer or otherwise move in the action filed by Fanduel, Inc. under Index #161691/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Draftkings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001, seeking an Order, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, from taking any enforcement action or other action, against Draftkings, Inc., and its employees, agents and suppliers of goods and services, seeking expedited discovery, hearing and trial, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his offical capacity as Attorney General of the State of New York, shall serve an answer or otherwise move in the proceeding filed by DraftKings,Inc. under Index # 102014/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: December 11, 2015

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

The Intersect of Sports Betting and Fantasy Sports

SECTION F

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ASSOCIATION, INC., OREGON RACING, INC.,
MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC.,
and LAUREL RACING ASSOCIATION, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES TURF CLUB, INCORPORATED, a California Corporation, LOS ANGELES TURF CLUB II, INC., a California Corporation, PACIFIC RACING ASSOCIATION, a California Corporation, PACIFIC RACING ASSOCIATION II, a California Corporation, GULFSTREAM PARK RACING ASSOCIATION, INC., a Florida Corporation, OREGON RACING, INC., a Delaware Corporation, MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC., a Maryland Corporation, and LAUREL RACING ASSOCIATION, INC., a Maryland Corporation, Plaintiffs, vs. HORSE RACING LABS, LLC, a Delaware Limited Liability Company,	Case No.: 2:15-cv-9332 **COMPLAINT FOR** **1. Violation of the *Interstate Horseracing Act*;** **2. Violation of the *Racketeering Influence and Corruption Act*;** **3. Violation of California *Business & Professions Code* Sections 17200, *et seq.*; and** **4. Intentional Interference With Prospective Economic Advantage** **DEMAND FOR JURY TRIAL**

(also known as IMMERSE, LLC), doing business as DERBYWARS, and DOES 1 through 10, inclusive,

Defendants.

Plaintiffs Los Angeles Turf Club, Incorporated, Los Angeles Turf Club II, Inc., Pacific Racing Association, Pacific Racing Association II, Gulfstream Park Racing Association, Inc., Oregon Racing, Inc., Maryland Jockey Club Of Baltimore City, Inc., and Laurel Racing Association, Inc., (collectively, "PLAINTIFFS"), allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court over the subject matter of this action is predicated on 28 U.S.C. § 1331, because the claims herein arise under federal law, including the *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. §1965, and the *Interstate Horseracing Act*, 15 U.S.C. § 3007, and the Court's supplemental jurisdiction, 28 U.S.C. § 1367.

2. Venue is proper in this Central District because a substantial part of the events or omissions giving rise to the claims alleged in this Complaint occurred in this District.

THE PARTIES

3. Plaintiff Los Angeles Turf Club, Incorporated ("LATC") is, and at all times mentioned herein was, a corporation, organized and existing under the laws of the State of California, and maintaining its principal place of business in Los Angeles County, California. LATC operates a horse racing meet at Santa Anita Park race track in said county.

4. Plaintiff Los Angeles Turf Club II, Inc. ("LATC II") is, and at all times mentioned herein was, a California corporation, organized and existing under the laws of the State of California, and maintaining its principal place of business in Los

Angeles County, California. LATC II also operates a horse racing meet at the Santa Anita Park race track in said county.

5. Plaintiff Pacific Racing Association ("PRA") is, and at all times herein mentioned was, a California corporation, with its principal place of business in Alameda County, California. PRA operates a horse racing meet at the Golden Gate Fields race track in said county.

6. Plaintiff Pacific Racing Association II ("PRA") is, and at all times herein mentioned was, a California corporation, with its principal place of business in Alameda County, California. PRA operates a horse racing meet at the Golden Gate Fields race track in said county.

7. Plaintiff Gulfstream Park Racing Association, Inc. ("GPRA") is, and at all times herein mentioned was, a Florida corporation, with its principal place of business in Broward County, Florida. GPRA operates a horse racing meet at the Gulfstream Park race track in said county, and also operates a horse racing meet at Calder Race Course in that same county for a portion of each year, under the name "Gulfstream Park West."

8. Plaintiff Oregon Racing, Inc. ("ORI") is, and at all times herein mentioned was, a Delaware corporation, with its principal place of business in Multnomah County, Oregon. ORI operates a horse racing meet at the Portland Meadows race track in said county.

9. Plaintiff Maryland Jockey Club of Baltimore City, Inc. ("MJC") is, and at all times herein mentioned was, a Maryland corporation with its principal place of business in Baltimore County, Maryland. MJC operates a horse racing meet at the Pimlico Race Course in said county.

10. Plaintiff Laurel Racing Association, Inc. ("LRA") is, and at all times herein mentioned was, a Maryland corporation with its principal place of business in Prince George's County, Maryland. LRA operates a horse racing meet at the Laurel Park race track in said county.

11. Defendant Horse Racing Labs, LLC, (also known as Immerse, LLC), doing business as DerbyWars, is, and at all times mentioned herein was, a Delaware limited liability company with its principal place of business in Louisville, Kentucky. Said Defendant is operated by five or more persons, and has been or remains in substantially continuous operation for a period in excess of thirty days, and has had gross revenue of $2,000 in any single day.

12. PLAINTIFFS do not presently know the true names and capacities of the Defendants sued herein as Does 1 – 10, inclusive. PLAINTIFFS will seek leave of court to amend this Complaint to allege said Defendants' true names and capacities as soon as PLAINTIFFS ascertain them. Defendant Horse Racing Labs, LLC, (also known as Immerse, LLC), doing business as DerbyWars, and Does 1 – 10, are collectively referred to herein as "DerbyWars."

FACTS COMMON TO ALL CLAIMS FOR RELIEF

REGULATION OF HORSE RACING

13. Horse racing is a heavily regulated industry in the United States, on both the federal and state level.

14. The Federal Wire Act, 18 U.S.C. § 1084, prohibits the transmission of wagering information across state lines:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both."

15. The *Interstate Horseracing Act of 1978* (15 U.S.C. § 3001 *et seq.*) (the "IHA"), creates an exception to the prohibition of the Wire Act for wagering on horse

racing, but limits that exception to wagering that is in strict compliance with the IHA:

> "No person may accept an interstate off-track wager except as provided in this Act." 15 U.S.C. § 3003.

16. The IHA defines an "interstate off-track wager" as:

> "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools;" 15 U.S.C. § 3002(3).

17. In order to accept an interstate off-track wager on horse racing, Section 3004 of the IHA requires the consent of: 1) the host racing association (and its respective horsemen's group), 2) the host racing commission, and 3) the off-track racing commission. 15 U.S.C. § 3004.

18. Parimutuel wagering on horse racing was legalized in California in 1933, and has been specifically exempted from California *Penal Code* § 337a, which criminalizes bookmaking. As set forth in California *Business & Professions Code* § 19411: "'Parimutuel wagering' is a form of wagering in which bettors either purchase tickets of various denominations, or issue wagering instructions leading to the placement of wagers, on the outcome of one or more horse races. The association distributes the total wagers comprising each pool, less the amounts retained for purposes specified in this chapter, to winning bettors based on the official race results."

19. California *Business & Professions Code* § 19590 provides that, "Parimutuel wagering shall be conducted only by a person or persons licensed under

this chapter to conduct a horse racing meeting or authorized by the board to conduct advance deposit wagering."

20. California *Business & Professions Code* § 19595 provides that: "[a]ny form of wagering or betting on the result of a horse race other than that permitted by this chapter is illegal." Thus, under California law, only licensed racing associations and licensed advance deposit wagering companies are authorized to accept wagers from the State of California on horse racing.

21. The States of Florida, Maryland and Oregon all similarly restrict wagering on horse racing to licensed entities. *See Fla. Stat. Chapter* 550 *Pari-Mutuel Wagering*; *Md. BUSINESS REGULATION Code Ann*. § 11-801, 804; and *ORS* § 462.140.

22. DerbyWars does not hold, nor has it ever held, a license to conduct wagering on horse racing in California, Florida, Maryland, or Oregon.

PLAINTIFF RACING ASSOCIATIONS

23. Plaintiff racing associations operate horse racing meets in California, Oregon, Florida and Maryland, at various times of year.

24. All wagering by PLAINTIFFS and by wagering entities that have a contractual or statutory relationship with PLAINTIFFS on the horse races run at PLAINTIFFS' tracks is conducted in compliance with all applicable laws, including the receipt of consents under the IHA when required. When consents are granted under the IHA to other entities to accept wagers on horse races at PLAINTIFFS' tracks, PLAINTIFFS and their horsemen condition such consents upon the receipt of compensation from those entities.

25. The compensation paid to PLAINTIFFS and their horsemen by other entities is typically a "host fee", which is a percentage of the "handle" or amount of wagers placed on a race or races.

26. When unauthorized, i.e. illegal, betting on horse races occurs, the racing association where the race was run is deprived of the host fees it otherwise would receive.

"FANTASY" SPORTS BETTING AND THE UIGEA

27. Fantasy sports have been popular for some time, particularly fantasy football. Generally, in fantasy football, a player "drafts" football players from different teams throughout the National Football League, and competes against other players and their "teams." Each week, a player accumulates points based upon the output of the players in the starting line-up that he has selected for the week. The contest can be conducted on a daily basis, or can continue over the course of the NFL season.

28. In 2006, Congress enacted the *Unlawful Internet Gambling Enforcement Act of 2006* (the "UIGEA") to restrict internet gambling. By its language, the UIGEA made only two changes in the law of internet gambling: (1) it created a new federal crime of receiving money by an operator of an illegal gambling website; and (2) it ordered federal regulators to enact regulations to identify and block money transfers by bettors in the United States to those outlaw gambling sites. 31 U.S.C. §5361.

29. While the UIGEA does not prohibit fantasy sports betting, it also does not legalize it, if it is otherwise illegal under another anti-gambling law. By its express language, the UIGEA was not intended to change any other anti-gambling law:

> "(b) Rule of construction. No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b).

30. The "carve-out" for fantasy sports betting is found in Section 5362 (ix), of the UIGEA, wherein excluded from the definition of "Bet" or "Wager" is participation in a fantasy game or contest, so long as the player's "team" is not based on an actual team, and (1) the prizes and awards are known in advance and the value is not based on the number of participants or the amount of the fees; (2) winning outcomes reflect the skill of the participants and are determined by statistical results of the performance of individuals in multiple games; and (3***) the winning outcome is not based on the "score, point-spread, or any performance or performances of any single real-world team or any combination of such teams, or solely on any single performance of an individual athlete in any single real-world sporting or other event***." (Emphasis added). Thus, it does not permit a wager on the outcome of a sporting event, or a combination of outcomes of multiple sporting events, such as a "parlay" bet.

31. Section 5362 (D) of the UIGEA also specifically addresses horse racing, and expressly states that it is not the intent of the UIGEA to legalize betting on horse racing that would otherwise be illegal under the IHA. The plain language also preserves any state prohibition against gambling on horse races that existed at the time of the UIGEA's enactment (31 U.S.C. § 5362 (D)).

DERBYWARS

32. DerbyWars is an internet website for fantasy sports betting on horse races, including races run at race meets operated by PLAINTIFFS. DerbyWars has been in business since 2011, and offers online wagering opportunities throughout the United States, including on races run at race meets operated by PLAINTIFFS. According to DerbyWars:

> "DerbyWars is a skill based fantasy league competition based on professional horse racing, where winners are awarded based on their abilities to skillfully pick horses and compete against other players over a series of races.

> In each contest, you pick horses which serve as fantasy bets and you move up and down a leaderboard depending on how skillfully you pick those races. It also takes skill to understand the dynamics of the contest and the leaderboard. We currently offer contests several days each week and players can win real money."[1]
>
> "Each contest (collectively the "Contests") is a skill-based competition in which players ("Players") can demonstrate their knowledge of pari-mutuel horse racing information and rules in several Contest formats. ***Prizes will be awarded to Players who are most successful in selecting winning horses in actual horse races at actual licensed tracks***, under the Tournament Structures described more fully below. Players will choose to participate in one or more Contests from a menu of Contests available. Each Contest will have a fixed entry fee, a fixed prize pool and a maximum number of entries. Some contests may also have a minimum of number of entries which will be published in advance on the Website."[2] (Emphasis added).

33. The format used by DerbyWars is simple: players select a horse to win in each race of the tournament, and each winning selection adds to their point total. Players can go head-to-head, or play against larger numbers of bettors. At the end of the tournament, the player with the most points wins a cash prize. DerbyWars keeps a percentage of the tournament "pool" for itself, and none of the money goes to the race meets where the races used in the contest were run.

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[1] http://blog.derbywars.com/about-us/
[2] http://blog.derbywars.com/official-rules-1/

34. This is indisputably a form of wagering on the results of horse races, which is not in compliance with federal or state laws because the consents required under the IHA have not been given and DerbyWars does not hold a license permitting it to accept wagers from California, Florida, Maryland, or Oregon.

35. It also does not come within the fantasy sport carve out set forth in the UIGEA, because the winning contestant is determined by being the player who is "***most successful in selecting winning horses in actual horse races at actual licensed tracks"*** which takes the player out of the fantasy sports carve out found in the UIGEA which does not apply if the winning outcome is based on "***any performance or performances of any single real-world team or any combination of such teams, or solely on any single performance of an individual athlete in any single real-world sporting or other event***."

36. The only reasonable interpretation of the term "team" as used in the UIGEA as applied to horseracing is that a "team" is defined as a horse or a horse and its jockey. Thus, DerbyWars' handicapping tournaments (which are essentially parlays) fall outside of the exceptions set forth in Section 5362 (ix), in that the winning outcome is based on the performances of a combination of teams (horses). In the same manner that the fantasy carve-out does not include selecting six winning teams from six football games, it cannot include selecting six winning horses from six races.

37. As currently conducted, DerbyWars is in violation of the IHA, California *Business & Professions Code* § 19595, and the *Illegal Gambling Business Act of 1970*, 18 U.S.C. § 1955 which criminalizes an "illegal gambling business," which is a gambling business in violation of State law.

FIRST CLAIM FOR RELIEF – AGAINST ALL DEFENDANTS

(Violation of the *Interstate Horse Racing Act,* 15 U.S.C. §3001, *et seq.*)

38. PLAINTIFFS incorporate paragraphs 1 – 37 above, as if set forth in full herein.

39. The IHA permits only interstate wagering on horse racing that has

received the authorizations required under the IHA. Section 3003 of the IHA provides that: "No person may accept an interstate off-track wager except as provided in this Act."

40. Section 3004 of the IHA requires interstate wagering to receive authorization from: 1) the host racing association (and its respective horsemen's group), 2) the host racing commission, and 3) the off-track racing commission. 15 U.S.C. § 3004.

41. The states of California, Florida, Maryland and Oregon allow only wagering on horse racing by licensed entities.

42. DerbyWars accepts interstate off-track wagers that do not comply with the IHA or applicable state law on race meets at the horse tracks operated by PLAINTIFFS in California, Florida, Maryland and Oregon.

43. PLAINTIFFS do not receive any compensation from the amounts bet at DerbyWars, even though the bettors are wagering on the races run at PLAINTIFFS' race meets. Therefore, the actions and omissions of DerbyWars have (and continue to) directly cause damages to PLAINTIFFS by depriving them of the compensation to which they are entitled under state and Federal law.

44. 15 U.S.C. §3005 sets forth the damages recoverable by PLAINTIFFS for these violations of the IHA by DerbyWars. Section 3005 provides that:

> "Any person accepting any interstate off-track wager in violation of this Act shall be civilly liable for damages to the host State, the host racing association and the horsemen's group. Damages for each violation shall be based on the total of off-track wagers as follows:
>
> . . . .
>
> (2) If such interstate off-track wager was of a type not accepted at the host racing association, the amount of damages shall be determined at the rate of takeout prevailing at the off-track betting system for that type of wager and shall be distributed according to the same formulas as in

paragraph (1) above."

45. 15 U.S.C. §3006 further provides that host racing associations, like PLAINTIFFS, may commence a civil action against any person in violation of the IHA, for both injunctive relief and damages.

46. As a direct and proximate result of the acts and omissions of DerbyWars PLAINTIFFS are entitled to injunctive relief and an award of damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF – AGAINST ALL DEFENDANTS

(Violation of the *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. §§ 1961, *et seq.*)

47. PLAINTIFFS incorporate paragraphs 1 – 37 above, as if set forth in full herein.

48. The *Racketeer Influenced and Corrupt Organizations Act*, provides that:

"As used in this chapter

(1) **'racketeering activity' means (A) any act or threat involving . . . gambling**, which is chargeable under State law and punishable by imprisonment for more than one year; (B) **any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1955 (relating to the prohibition of illegal gambling businesses**), . .

. . .

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this

chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961 (emphasis added).

49. PLAINTIFFS are "persons" as defined in 18 U.S.C. § 1961, because each is an entity capable of holding a legal or beneficial interest in property.

50. DerbyWars is a "person" as defined in 18 U.S.C. § 1961, because it is an entity capable of holding a legal or beneficial interest in property, and it is an "enterprise" as defined in 18 U.S.C. § 1961, because it is a legal entity.

51. DerbyWars' has engaged in a pattern of racketeering activity that takes place across state lines, affecting interstate commerce, in that DerbyWars has accepted multiple bets from individuals in multiple states that qualify as "racketeering activity" as defined in 18 U.S.C. § 1961, because the actions are indictable under 18 U.S.C. Section 1955. These acts are related and continuous.

52. 18 U.S.C. § 1961(a) states that: "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

53. DerbyWars used and invested income that was derived from a pattern of racketeering activity in an interstate enterprise.

54. 18 U.S.C. § 1961(b) states that: "(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

55. DerbyWars acquired and has maintained interests in and control of the enterprise through a pattern of racketeering activity.

56. DerbyWars' numerous and ongoing predicate acts are a pattern of activity

that involves gambling; specifically, gambling that is in violation of the *Illegal Gambling Business Act of 1970*, 18 U.S.C. § 1955 which provides that: "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." An "illegal gambling business" means a gambling business which: (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

57. DerbyWars violates California *Business & Professions Code* § 19595, and therefore, also violates 18 U.S.C. § 1955, inasmuch as it is not licensed by the State of California to accept wagers on horse racing, and it has been operating for more than 30 days, and it has conducted business that made more than $2,000.

58. 18 U.S.C. § 1964 provides that: " (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

59. As a direct and proximate result of the racketeering activities of DerbyWars, and its violations of 18 U.S.C. § 1962 (a) and (b), PLAINTIFFS have been injured in their business and property in that DerbyWars has deprived PLAINTIFFS of the compensation to which they are entitled for bets placed on races run at the race meets that they operate, in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF – AGAINST ALL DEFENDANTS

(Violation of California *Business & Professions Code* §§ 17200*, et. seq.)*

60. PLAINTIFFS incorporate paragraphs 1 – 37 above, as if set forth in full herein.

61. California *Business & Professions Code* § 17200 provides that:

> "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

62. DerbyWars' wrongful acts as alleged in this Complaint, constitute unfair business practices both under the common law of the State of California, within which these acts have occurred, and California *Business & Professions Code* §§ 17200, *et seq*.

63. DerbyWars' acts of unfair business practices have caused and continue to cause damage and injury to PLAINTIFFS, while earning profits for DerbyWars.

64. As a direct and proximate result of the acts and omissions of DerbyWars as alleged in this Complaint, PLAINTIFFS have suffered damages and incurred additional expenses, the precise amount of which has not been ascertained.

65. PLAINTIFFS have suffered, and continue to suffer, irreparable harm by DerbyWars' unfair business practices, have no adequate remedy at law and cannot be adequately compensated for the damages and injuries they have has sustained and will sustain if DerbyWars is permitted to continue to operate its gambling operation. PLAINTIFFS seek a permanent injunction, as expressly permitted by California *Business & Professions Code* § 17200, enjoining and restraining DerbyWars.

66. As a direct and proximate result of the acts and omissions of DerbyWars in violation of common law and California *Business & Professions Code* § 17200, *et seq.*, PLAINTIFFS are entitled to restitution of profits wrongfully earned by DerbyWars, and attorney's fees and costs, in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF – AGAINST ALL DEFENDANTS

(Intentional Interference With Prospective Economic Advantage)

67. PLAINTIFFS incorporate paragraphs 1 – 37 above, as if set forth in full herein.

68. There exists a non-contractual, economic relationship between PLAINTIFFS and prospective bettors on the horse races run at the race meets operated by PLAINTIFFS containing a probability of future economic benefits accruing to PLAINTIFFS in the form of compensation PLAINTIFFS receive from legal bets placed on those races.

69. DerbyWars knew of this economic relationship because the individuals associated with DerbyWars have experience in the horse racing industry.

70. DerbyWars intentionally disrupted these beneficial relationships when it offered bettors a means to place bets on horse races that violated the IHA, and California *Business & Professions Code* §§ 17200 *et seq*, California *Business & Professions Code* § 19595, *RICO* and 18 U.S.C. § 1955.

71. The above actions of DerbyWars has caused a disruption of the above described economic relationship in that many prospective bettors have placed bets through DerbyWars website, rather than placing bets through proper channels, thereby depriving PLAINTIFFS of their compensation.

72. As a direct result, PLAINTIFFS have suffered damages as a proximate result of the actions of DerbyWars in a sum to be determined at trial.

73. The aforementioned acts of DerbyWars were willful, fraudulent and malicious, and PLAINTIFFS are therefore entitled to an award of punitive and exemplary damages in an amount to punish and set an example of DerbyWars.

WHEREFORE, PLAINTIFFS pray for Judgment against DerbyWars, as follows:

First Claim for Relief – Violation of the IHA:

1. For monetary damages as set forth in 31 U.S.C. § 3005, in an amount to be proven at trial;

2. For injunctive relief as provided in 15 U.S.C. §3006;

Second Claim for Relief – RICO Violations:

1. For treble damages as provided in 18 U.S.C. § 1964;

2. For their attorneys' fees as provided 18 U.S.C. § 1964, and costs to the extent allowed by law;

Third Claim for Relief – Violation of *Business & Professions Code* §17200, *et seq*.:

1. For monetary damages in an amount to be determined at trial;

2. For restitution of profits;

3. For injunctive relief;

4. For their attorney's fees and costs;

Fourth Claim for Relief – Interference with Prospective Economic Advantage:

1. For monetary damages in an amount to be determined at trial;

2. For punitive and exemplary damages;

All Claims for Relief:

1. For such other, further and different relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

PLAINTIFFS hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: December 2, 2015

CORBETT, STEELMAN & SPECTER
A Professional Law Corporation

By: /s/ Richard B. Specter
Richard B. Specter
Attorneys for PLAINTIFFS

State Actions to Prevent/Cease Unregulated and Illegal Gambling

SECTION G

Cease and Desist Letters
Do They Work?

STATE OF MICHIGAN
E PLURIBUS UNUM
TUEBOR
SI QUAERIS PENINSULAM AMOENAM
CIRCUMSPICE
ATTORNEY GENERAL

Presenter

Donald McGehee
Department of Attorney General
Division Chief
Alcohol & Gambling Enforcement Division (AGED)
(517)241-0210

mcgheed1@michigan.gov

What Are Cease and Desist Letters

Cease and desist letters have two main purposes.

The first is obvious: it tells you to stop doing that thing you are doing which is illegal. The demand to cease is based on a claim the author has a legal right to do (i.e. enforce the law) and that you are violating the law.

The second purpose of these letters might help explain why they often sound as if they were written by an angry pedantic badger. C & Ds, as the kids who have mountains of law school debt like to call them, are the first written threat in a potential lawsuit or prosecution. Ultimately, the author hopes that you will be so frightened by the strength of his legal claims and the damning nature of the evidence he's collected, you'll stop whatever it is you're doing to avoid ending up litigation or worse with a criminal conviction.

Reasons for C & D letters

- Stop illegal Gambling that is without regulation and taxation.
- Stop Alcohol sales that are without regulation and taxation.
- Health, safety welfare reasons.
- Many other reasons.

What C & D Letters Are Not

- *A C & D is not legally binding*. A C & D is the opinion of one attorney who is representing the person who feels harmed or from the prosecutor trying to enforce the law.
- Attorneys are sworn to tell the truth and not make false claims, but we're not prohibited against having bad or even wrong opinions.
- *A C & D is not a guarantee of a law suit or prosecution*. While it's likely the person writing the C & D will say they may sue you or charge you with a crime, getting a C & D does not mean that will definitely happen.
- None of this means you shouldn't take the letter seriously, because you should.
- Suing someone is ridiculously expensive these days and most sane people try to avoid it.
- More seriously, is the risk of being charged with a crime and most times it's a felony.

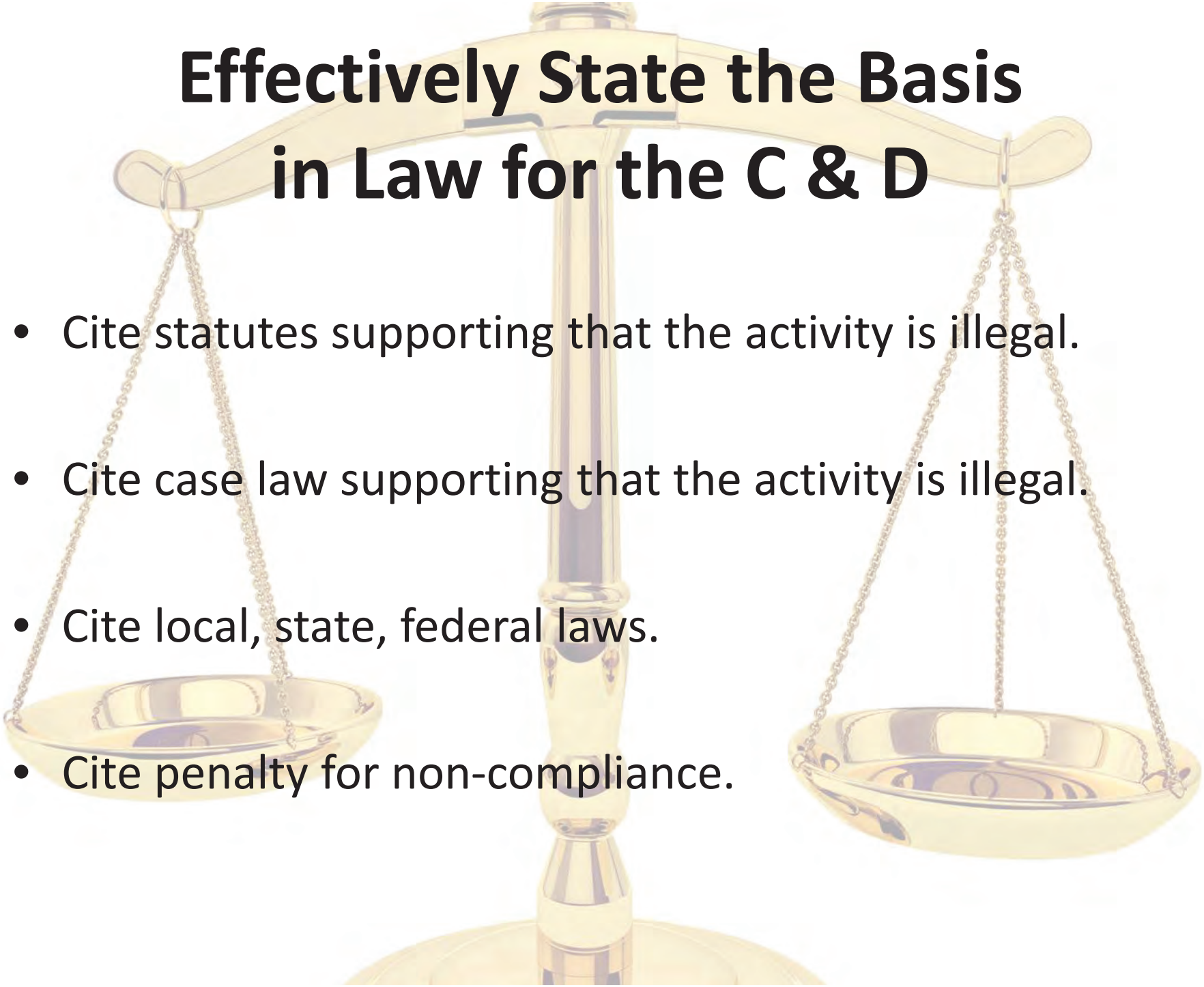
Backing Up the C & D

- Before sending multiple C & D letters make sure you are ready to proceed with the lawsuits or prosecutions first.
- Otherwise, it won't be long before the cat is out of the bag.
- Have complaints pre-drafted.
- Have legal briefs pre-drafted.
- Anticipate the defenses.
- Have evidence ready to go.

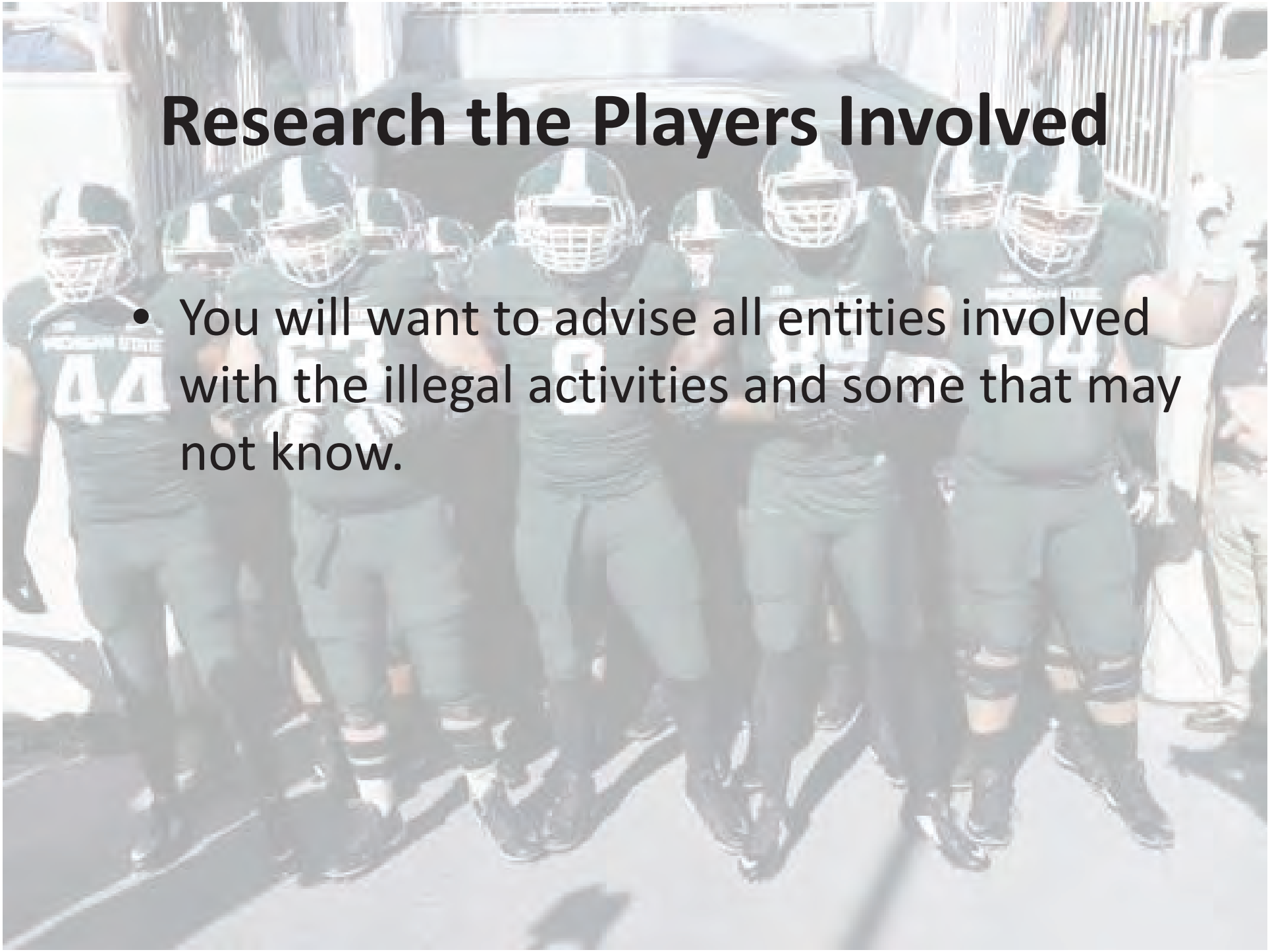
Effectively State the Facts in the C & D letter

- Summarize the facts supporting the illegality.
- Make sure the facts adequately confirm each element of the illegality or crime.
- Evidence is essential (e.g., video surveillance).

Effectively State the Basis in Law for the C & D



- Cite statutes supporting that the activity is illegal.
- Cite case law supporting that the activity is illegal.
- Cite local, state, federal laws.
- Cite penalty for non-compliance.



Research the Players Involved

- You will want to advise all entities involved with the illegal activities and some that may not know.

Where to Send C & D Letters

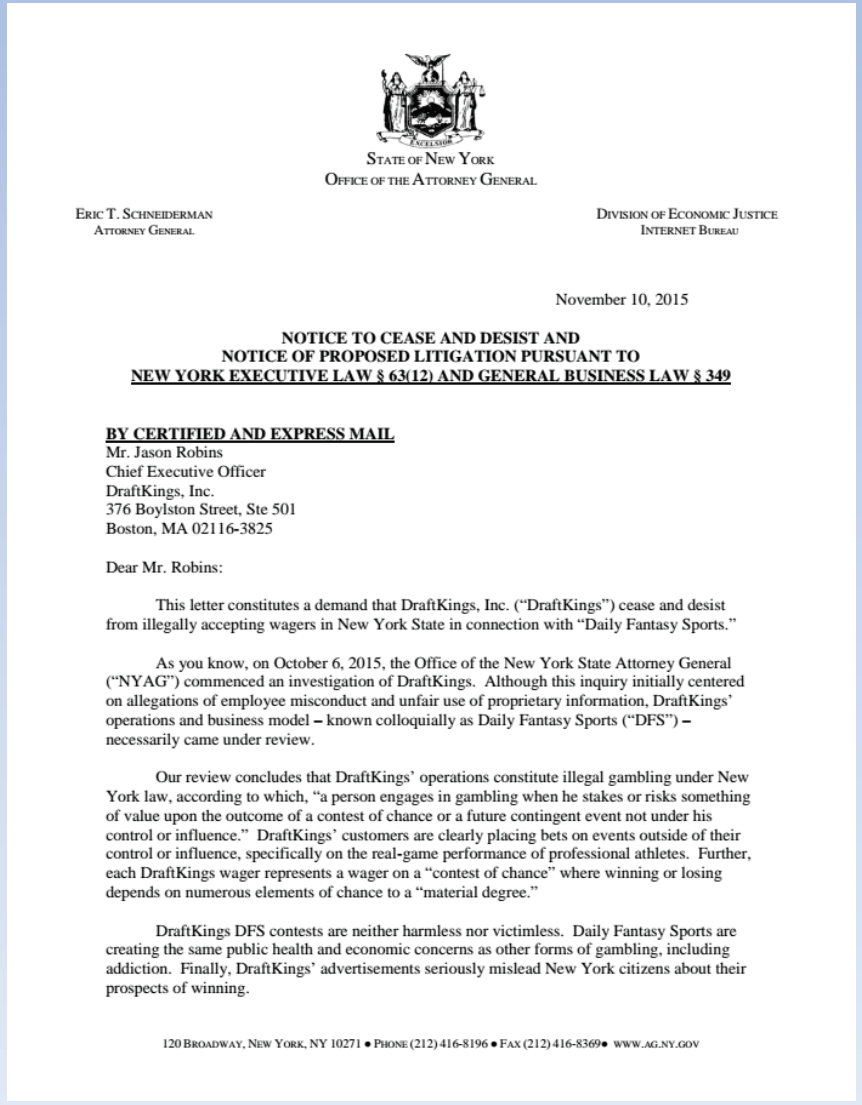
- Send to as many entities as possible connected to the illegal activity
  - Agents
  - Landlords
  - Software licensing companies
  - Multiple owners

Give a Deadline to Comply & Personal Service

- 14 days is typically reasonable.
- Generally do not give extensions.
- Certified mail is okay and sometimes the only way but personal service is always better.

C & D Letter Samples

(Gaming and Alcohol)



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

NOTICE TO CEASE AND DESIST AND
NOTICE OF PROPOSED LITIGATION PURSUANT TO
NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349

BY CERTIFIED AND EXPRESS MAIL
Mr. Jason Robins
Chief Executive Officer
DraftKings, Inc.
376 Boylston Street, Ste 501
Boston, MA 02116-3825

Dear Mr. Robins:

This letter constitutes a demand that DraftKings, Inc. ("DraftKings") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of DraftKings. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, DraftKings' operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that DraftKings' operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

DraftKings DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, DraftKings' advertisements seriously mislead New York citizens about their prospects of winning.

120 BROADWAY, NEW YORK, NY 10271 • PHONE (212) 416-8196 • FAX (212) 416-8369 • WWW.AG.NY.GOV

Examples of C & D Successes

- In Michigan, our actions have resulted in shutting down over 60 Internet Café locations through sending over 160 cease and desist letters and conducting several raids. We estimate that Michigan at one time had over 60 locations operating. According to the Michigan State Police some of the larger locations were estimated to be generating as much as $1 million in gross revenue from the illegal gambling.

- Other states are doing the same with varying degrees of success.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30736
Lansing, Michigan 48909

BILL SCHUETTE
ATTORNEY GENERAL

October 18, 2012

CERTIFIED MAIL, RETURN RECEIPT

Person in Charge
[redacted]
Burton, MI 48507

RE: Cease and Desist Illegal Gambling

Dear Madam/Sir:

This office has confirmed that [redacted], constitutes an illegal gambling house and, thus, a public nuisance. This conclusion arises from the business's ongoing practice of receiving money from customers in exchange for phone cards and chances to win prizes by playing computer-based casino-style games. Accordingly, the business and anyone affiliated with its operation, as well as the building's owner and lessee, are ordered to cease this illegal activity or face possible criminal charges or civil action to abate the nuisance.

Specifically, the parties mentioned above must cease and desist their ongoing practice of providing customers who purchase phone cards with opportunities to play casino-style games and awarding prizes to successful players. This activity violates the Michigan Gaming Control and Revenue Act (the Gaming Act), MCL 432.201 *et seq.*, and multiple provisions of the Michigan Penal Code, MCL 750.1 *et seq.*, such as MCL 750.372. Michigan's gambling prohibitions do not contain an exception for what are sometimes described as Internet Sweepstakes businesses.

More specifically, the Gaming Act prohibits a party from conducting a gambling operation without a license issued by the Michigan Gaming Control Board. A party who operates an unlicensed gambling operation is guilty of a felony punishable by imprisonment for up to 10 years or a fine of up to $100,000.00, or both. MCL 432.218(1)(a).

Additionally, unless an exception applies, the Michigan Penal Code broadly prohibits any kind of gambling, which generally involves the elements of consideration, prize, and chance. The continued operation of Shamrocks Sweepstakes violates several provisions of the Penal Code that prohibit certain gambling-related activity. For example, MCL 750.301 prohibits

accepting money with the understanding that money will be paid to any person contingent upon the happening of an uncertain event:

> Any person or his or her agent or employee who, directly or indirectly, takes, receives, or accepts from any person any money or valuable thing with the agreement, understanding or allegation that any money or valuable thing will be paid or delivered to any person where the payment or delivery is alleged to be or will be contingent upon the result of any race, contest, or game or upon the happening of any event not known by the parties to be certain, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

The Penal Code further prohibits keeping or occupying a building used for gambling, MCL 750.302; keeping or maintaining a gaming room, gaming table, or game of skill for hire, gain, or reward, MCL 750.303; using a computer program, computer, computer system, or computer network to commit a crime, MCL 752.796; promoting a lottery for money, MCL 750.372(1); and setting up or aiding in the setting up, managing, or drawing of a lottery or gift enterprise, *id.*

Michigan's Courts broadly interpret the anti-gambling laws in this state "'with the view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief.'" *Attorney General v Powerpick Players Club of Michigan*, 287 Mich App 13, 37 (2010) (quoting *People v McPhee,* 139 Mich 687, 690 (1905)). Internet Sweepstakes businesses, such as Shamrocks Sweepstakes, subject the public to the "mischief intended to be prevented" by Michigan's gambling prohibitions. Without the type of regulations that govern legalized gambling in Michigan, the public lacks assurance that these businesses accurately pay winning players or appropriately follow tax and other laws. Additionally, lack of oversight could lead to increased crime and compulsive gambling.

Notably, Michigan law allows for the seizure of any evidence of gaming, including but not limited to money, records, gambling devices, and material used in connection with promoting gambling or the gambling place. MCL 750.308. Further, items seized as evidence of gambling are subject to forfeiture and disposition by the seizing agency. MCL 750.308a.

The Public Nuisance statute, through an order of abatement, also allows for "remov[ing] from the building or place all furniture, fixtures and contents therein and [directing] the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year." MCL 600.3825.

Shamrocks Sweepstakes is also violating the Consumer Protection Act (CPA) by promoting and falsely representing to the public that its business is legal. Section 3 of the CPA,

MCL 445.903(1)(a), prohibits representations that cause a probability of confusion or misunderstanding as to their approval. A persistent and knowing violation of this law may result in a court assessing a civil penalty of $25,000, along with costs and attorney fees, in favor of the Attorney General. See MCL 445.905.

The statutes and possible legal actions stated in this letter are by no means exhaustive; this letter is intended only to place Shamrocks Sweepstakes and persons affiliated with its operation, including the owner and lessee of the premises where it is located, on notice that the business is violating the laws prohibiting this form of gambling. If this activity fails to cease within 14 days of your receipt of this letter, our office will take legal action to stop it. This may include filing criminal charges or a civil action to abate the nuisance, as well as seizure and forfeiture of evidence of gambling.

Sincerely yours,

Donald S. McGehee

Donald S. McGehee
Division Chief
Alcohol and Gambling Enforcement Division
(517) 241-0210
Fax: (517) 241-1074

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30736
Lansing, Michigan 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 14, 2015

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[redacted]

RE: Cease and Desist Unauthorized Use of the Michigan Liquor Control Commission Logo

Dear Mr. [redacted]:

This office has confirmed that your website, Michigan-liquorlicense.com, is using the Michigan Liquor Control Commission logo—which includes the State of Michigan Coat-of-Arms—to advertise your liquor license broker business. State law forbids the use of the Coat-of-Arms in advertising activity and the misuse of the Coat-of-Arms is a misdemeanor. Accordingly, you are ordered to cease the illegal use of the State Coat-of-Arms, as well as the use of any language that suggests that your business is authorized or approved by the Michigan Liquor Control Commission, or face possible criminal charges or civil action.

Specifically, Michigan-liquorlicense.com must cease and desist its ongoing use of the State Coat-of-Arms to advertise [redacted] Inc.'s services as a "Michigan liquor license broker." This activity violates the provisions of the Michigan Penal Code, MCL 750.1 *et seq*. More specifically, the Penal Code prohibits the use of the State Coat-of-Arms in connection with any advertisement. MCL 750.247. A party who improperly exhibits or displays the Coat-of-arms is guilty of a misdemeanor. MCL 750.245

[redacted], Inc. is also violating the Consumer Protection Act (CPA) by suggesting that its services are approved or certified by the Michigan Liquor Control Commission. Specifically, your use of the Michigan Liquor Control Commission logo, and your self-proclaimed title as a "State of Michigan liquor license broker," creates a probability of confusion or misunderstanding as to the approval or certification of [redacted] Inc.'s services as a license broker by the

Michigan Liquor Control Commission. Section 3 of the CPA, MCL 445.903(1)(a), prohibits representations that cause a probability of confusion or misunderstanding as to their approval. A persistent and knowing violation of this law may result in a court assessing a civil penalty of $25,000, along with costs and attorney fees, in favor of the Attorney General. See MCL 445.905.

The statutes and possible legal actions stated in this letter are by no means exhaustive; this letter is intended only to place [redacted], Inc. and persons affiliated with its operation, including the owner, that its website Michigan-liquorlicense.com is violating the laws governing the use of the State Coat-of-Arms and the CPA. If this activity fails to cease within 14 days of your receipt of this letter, our office will take legal action to stop it. This may include filing criminal charges or a civil action.

Sincerely yours,

Donald S. McGehee
Division Chief
Alcohol and Gambling Enforcement Division
(517) 241-0210
Fax: (517) 241-1074

c: Andrew Deloney, Chairman
Michigan Liquor Control Commission

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30005
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

August 24, 2015

[redacted]
Leesburg, VA 20176

RE: Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor

Dear Sir or Madam:

This office has confirmed that [redacted] Leesburg, VA 20176, has been directly shipping wine into the State of Michigan despite not possessing a direct shipping license. This conclusion arises from the business's ongoing practice of receiving money from customers in exchange for direct shipments of alcoholic liquor, contrary to the Michigan Liquor Control Code of 1998 (Liquor Code) and administrative rules. See MCL 436.1101, et seq. Accordingly, the business and anyone affiliated with its operation, as well as the building's owner and lessee, are ordered to cease this illegal activity or face possible criminal charges.

Specifically, the parties mentioned above must cease and desist their ongoing practice of selling, furnishing, or shipping alcoholic liquor to paying customers. This activity violates the Liquor Code and constitutes criminal activity. According to MCL 436.1909(3), any person who "performs any act for which a license is required under this act without first obtaining that license or who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor . . . is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than $1,000.00 or both." Activities that constitute selling, delivering or importing in excess of 80,000 ml of alcoholic liquor constitute a felony punishable by imprisonment of not more than 4 years or a fine of not more than $5,000.00 or both." MCL 436.1909(4)(a).

The U.S. Constitution, in the 21st amendment, reserves the right to control alcoholic beverages to the individual states and each state has their own system of licensing, taxation, and regulation to prevent unauthorized sales. See, U.S. Const Amend XXI, see also 1963 Const Art. IV, §40. The Michigan Legislature has established a system of licensing, taxation and enforcement standards, which the Michigan Liquor Control Commission (MLCC) is responsible for implementing. The

essence of such a control system is the fact that alcoholic beverages, while legal, are controlled substances which are susceptible to misuse or abuse. Liquor licensees, who are authorized to sell alcoholic beverages, are directly accountable to the MLCC. If you wish to become licensed by the MLCC as a direct shipper so that you can legally sell or furnish alcoholic liquor within the State of Michigan, please contact the MLCC to obtain information on how to become a licensed entity. But unless and until the above business becomes licensed, it is engaging in illegal activity.

[redacted] is also violating the Consumer Protection Act (CPA) by promoting and falsely representing to the public that its business is legal. Section 3 of the CPA, MCL 445.903(1)(a), prohibits representations that cause a probability of confusion or misunderstanding as to their approval. A persistent and knowing violation of this law may result in a court assessing a civil penalty of $25,000, along with costs and attorney fees, in favor of the Attorney General. See MCL 445.905.

The statutes and possible legal actions stated in this letter are by no means exhaustive; this letter is intended only to place [redacted] and persons affiliated with its operation, including the owner and lessee of the premises where it is located, on notice that the business is violating the laws prohibiting unlicensed individuals from the direct shipment of alcoholic liquor. If this activity fails to cease within 14 days of your receipt of this letter, our office will take legal action to stop it. This may include filing criminal charges.

Sincerely yours,

Donald S. McGehee
Division Chief
Alcohol and Gambling Enforcement Division
(517) 241-0210
Fax: (517) 241-1074

Gambling, Credit Cards, Privacy: A Regulatory Environment Trifecta

SECTION H

Snell & Wilmer

Gambling, Credit Cards, Privacy: A Regulatory Environment Trifecta

ABA Gaming Law Minefield National Institute

February 11, 2016

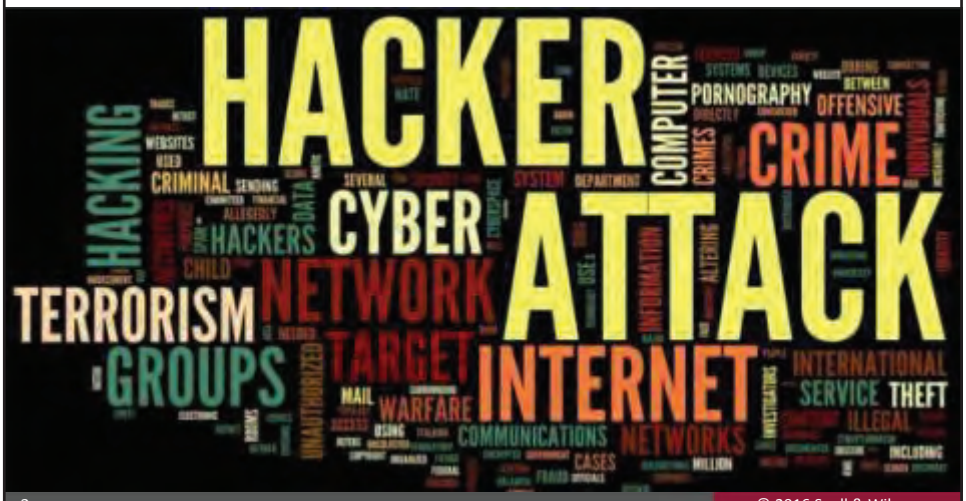
Patrick X. Fowler ● Snell & Wilmer L.L.P.
One Arizona Center ● Phoenix, AZ 85023
602.382.6213 ● pfowler@swlaw.com

Recognize the New Normal

- The data you collect and store contains protected personal, health and/or financial information;
- You are subject to multiple data privacy and cyber security laws and/or regulations;
- You will likely experience a data loss incident or breach at some point in time (if you haven't already);
- A data breach can cause significant financial and brand reputation damage; and
- Ignoring the risk won't make it go away.

Source: *2015 Data Protection and Breach Readiness Guide,* Online Trust Alliance (February 13, 2015)

The Threat Environment



Cyber Threat Environment

- Annual global corporate **losses** to cyber crime and data breaches:
  - 2014: $375 - $575 billion
  - 2019: **$2.1 trillion**
- Annual global corporate **spending** on cybersecurity solutions:
  - 2015: $ 75 billion
  - 2020: **$170 billion**

Source: *The Economist*: http://ww2.cfo.com/cyber-security-technology/2015/11/cybersecurity-cost-immaturity/

Cyber Threat Environment

- 70% of cyber-attacks go undetected
- Average time to detect a cyber-attack: **205 days**
- New malware signatures released *each day*: **> 70,000!**
- **One gaming-related data center reports 500,000 cyber attacks per week!**
- As of January 4, 2016*:
  - 781 separate data breach events reported in 2015
  - 169 million records exposed

*Source: Identity Theft Resource Center
http://www.idtheftcenter.org/images/breach/ITRCBreachReport2015.pdf

whitehouse.gov

Cyber Security – a "High Priority" in 2014

THE FINANCIAL EXPRESS
Read to Lead
Print Close Window

Cyber security on Obama admn's top priority: White House

PTI Posted online: Tuesday, May 20, 2014 at 0000 hrs
Washington : The issue of cyber security is a high priority for the Obama Administration, the White House today said, asserting attacks that badly hit the American national security and economic interests.
"(US) President (Barack) Obama has ... cybersecurity a high priority for his administration. It is specifically the case that the ... counterpart our concern over gove... ...sored cyber-enabled theft of trade secrets and other sensitive business informat... Carney told reporters.

"The issue of **cyber security is a high priority for the Obama Administration**, the White House said today, asserting that it would not tolerate any cyber espionage and other attacks that badly hit the American national security and economic interests."

whitehouse.gov

Cybersecurity – a "National Emergency" in 2015

The White House
Office of the Press Secretary

For Immediate Release April 01, 2015

Executive Order -- "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities"

EXECUTIVE ORDER

BLOCKING THE PROPERTY OF CERTAIN PERSONS ENGAGING IN SIGNIFICANT MALICIOUS CYBER-ENABLED ACTIVITIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, find that the increasing prevalence and severity of malicious cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency to deal with this threat.

whitehouse.gov

Cyber Security – a "National Emergency" in 2015

- the increasing prevalence and severity of malicious cyber-enabled activities
- originating from, or directed by persons located, in whole or in substantial part, outside the United States
- constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.
- **I hereby declare a national emergency to deal with this threat.**

.gov

- When the government assigns a **high priority** to something, it commits **massive resources** to it.
  - Department of Commerce
  - Securities & Exchange Commission
  - Federal Financial Institutions Examination Council
  - Federal Trade Commission
  - Federal Communications Commission
  - Food & Drug Administration
  - Department of Homeland Security
  - Department of Justice
  - Department of Defense
  - National Security Agency
  - Congressional legislation

.gov

Federal Cyber Guidance/Regs – Accelerating

- **February:** FINRA releases Report on Cybersecurity Practices
- **February:** SEC OCIE's Cybersecurity Examination Sweep Summary
- **February:** EO issued encouraging "Information Sharing & Analysis Organizations" (ISAO") for private industry and with DHS
- **April:** EO announces offensive steps against external malicious cyber threats ("national emergency")
- **April:** SEC issues new "Cybersecurity Guidance" to investment funds and advisers
- **April:** DOJ issues "Best Practices" for Victim Response and Reporting of Cyber Incidents

.gov

Federal Cyber Guidance/Regs – Accelerating

- **May:** DOJ and FTC urge companies to cooperate with post-breach investigations by law enforcement
- **June:** FTC issues "Start With Security: A Guide for Business"
- **August:** DOD releases draft "rapid reporting" requirements for defense contractors that experience a possible data breach.
- **August:** OMB issues draft guidance for improving cyber security in the federal acquisitions process
- **September:** DHS awards grant to University of Texas San Antonio for ISAO Standards Organization
- **December:** Congress passes cyber security legislation (CISA)
  - To encourage sharing of cyber threat information by business
  - Includes liability protections for information sharing

Trending in Privacy and Cybersecurity

- New government enforcement actions:
  - Federal agencies now investigate some big breaches:
    - FTC, SEC, FCC, HHS, DOJ, FDA
    - Monetary penalties can be significant
    - "Settlements" may include decades of enhanced self-reporting
  - The FTC's power to regulate cybersecurity practices was affirmed in August by a federal appeals court.
    - *FTC v. Wyndham Worldwide Corp.*
  - FCC and FTC now in a simmering turf war over consumer data protection enforcement. Who's the boss?

Trending in Privacy and Cybersecurity

- Several states have recently added new laws on privacy protection and data breach notification: CA, FL, MT, NV, OR, MT
  - 48 states have data breach notification laws. Neither uniform nor consistent.
  - Still no uniform federal data breach notification law
- State Attorneys General are investigating higher-profile data breach events upon breach disclosure
  - Threats of government investigations complicate the data breach victim's ability to focus on breach response
    - See: Anthem, JP Morgan

Trending in Privacy and Cybersecurity: Europe

- The "Safe Harbor" treaty between the U.S. and EU was voided by the European Court of Justice last October
  - Facilitated transfer of personal information from the EU to the U.S.
  - "Version 2.0" is in negotiations, but not yet in place
- The new General Data Protection Regulation becomes effective in early 2018, replacing Directive 95/46/ec.
  - Will carry significant penalties and fines for non-compliant data controllers and processors (i.e., **up to 4% of global revenues**)
  - Very short breach notification (i.e., 72 hours) to inform gov't regulators
  - Clarifies the so-called "right to be forgotten"

Thank you!

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http://www.swlaw.com/blog/data-security/

The Challenge in Identifying and Treating Compulsive Gamblers in a Changing Environment

SECTION I

The challenge in identifying and treating compulsive gamblers in a changing environment & CSR and RG or is the problem not as big as we think?

Las Vegas, February 2015

Pieter Remmers

Responsible Gaming in Context

For every complex problem there is an easy answer, and it is wrong. ***H.L. Mencken***

What are we talking about? (1)

- Games of skill vs games of chance
- The risks of the game
- Integrated mix of factors
- Biological / genetic predisposition
- Psychological constitution
- Social environment

What are we talking about? (2)

- Nature of the activity itself
- Problem Gambling
- Terminology
- Responsible Gaming Strategies
- Company Policy

What is Responsible Gaming?

Policies and practices to prevent and reduce harm of gambling

Responsible gaming is about informed choice to play well designed games in a secure and supportive environment

Aim of the Global Gambling Guidance Group/ G4

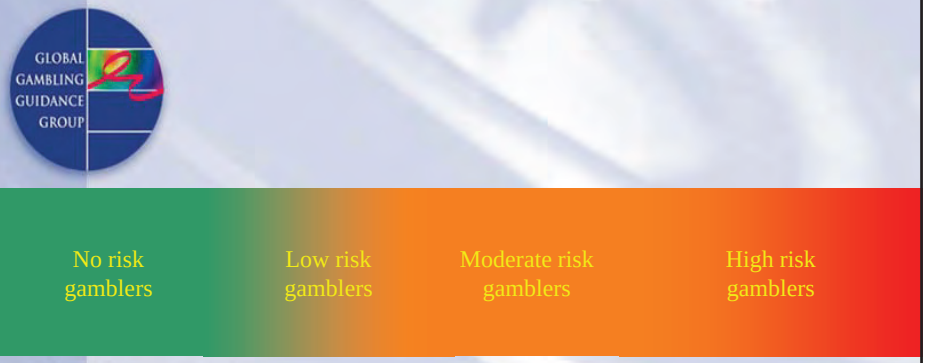
To minimise the impact of problem gambling by promoting a worldwide accreditation programme on responsible gaming

Games of skill *versus* Games of chance

The characteristics should always be looked at in the way they are *mixed and interact.*

In this process, it may happen that some characteristics of one and the same game rather indicate towards a game of chance, and others towards a game of skill.

Who should be targeted?



Four strategies to promote RG

- Environment of the product
- Awareness through public education
- Staff/Customer education
- Awareness using software tools

Four strategies to promote RG

<u>Environment of the product</u>:

- Employee profile
- Customers profile
- Advertising and promotion campaigns

Four strategies to promote RG

Awareness through public education:

- What information and communication is used by the company to keep gambling entertainment or to keep gambling save and healthy for the customer
- Advertising and promotion
- Industry compliance to codes of conduct
- Informed choice
- Appropriate staff intervention

Four strategies to promote RG

Staff customer education:

1. Awareness sessions for all staff
2. Specific sessions for Management, support staff, marketing, development and others.

Four strategies to promote RG

Awareness through software tools:

All responsible gaming/betting software settings that are implemented on the site:

1. Account limits
2. Self assessment test
3. Clearly visible clock
4. Cooling off period
5. Self exclusion
6. Currency (no points or credits)

Contact info

www.gx4.com

E-mail: info@gx4.com;
pieter@assissa.nl

The Latest Challenges in Indian Country Gaming

SECTION J

The Latest Challenges in Indian Country Gaming: Hot Topics in Law

Kathryn R.L. Rand
Dean, UND School of Law
Co-Director, Institute for the
Study of Tribal Gaming Law & Policy

UNIVERSITY OF NORTH DAKOTA

Hot Topics in Law 2016

- Online gaming
- Labor relations
- Indian lands
- Compacting issues

UNIVERSITY OF NORTH DAKOTA

Online Gaming

- Plug for next session!
- NIGA & NCAI positions re tribal sovereignty

UND UNIVERSITY OF NORTH DAKOTA

Labor Relations

- Tribal Labor Sovereignty Act bill, S. 248/H.R. 511
- Post-San Manuel cases:
  - Chickasaw Nation
  - Saginaw Chippewa

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Indian Lands

- Carcieri—no fix yet
  - S. 1879, Barrasso (R-WY)
- Recent BIA decisions
  - Mashpee Wampanoag
- Pending cases
  - Cowlitz reservation appeal

UND UNIVERSITY OF NORTH DAKOTA

Compacting Issues

- North Fork Rancheria v. California
  - State obligation to negotiation in good faith
- Pauma Band of Luiseno Indians v. California
  - Misrepresentation
- New Mexico compacts
  - Revenue sharing provisions

UND UNIVERSITY OF NORTH DAKOTA

CROWELL LAW OFFICES
Tribal Advocacy Group

20th ANNUAL AMERICAN BAR ASSOCIATION GAMING LAW MINEFIELD - NATIONAL INSTITUTE
February 11 & 12, 2016
HENDERSON, NEVADA

LITIGATION UPDATE: LIST AND BRIEF SUMMARY OF NOTABLE COURT DECISIONS AND OTHER LEGAL DEVELOPMENTS REGARDING INDIAN GAMING ISSUED IN 2015

Although the intent is to provide an exhaustive list of reported cases, and some still in early stages, we are certain the enclosed list is not complete. You may also retrieve copies of this update and any supplement at the firm's web page: crowelllawoffice.com. Many of the cases cited are merely the latest developments in litigation that have produced many reported (and non- reported) decisions over the years. Outlines for prior years are also posted on crowelllawoffice.com. Although a crude attempt is made to divide the decisions by topic, this has become increasingly difficult as many decisions weigh in on several different topics. We also apologize in advance for attempts to simplify in a few sentences what are typically complex matters.

I. SOVEREIGN IMMUNITY CASES

A. DISTURBING SOVEREIGN IMMUNITY CASES

Pistor v. Garcia,
791 F.3d 1104 (9th Cir. June 30, 2015)

Civil rights claims brought against Tribal police and security officers in their individual capacities regarding detention of individuals suspected of cheating at Tribe's casino.

Applies and expands the 2013 *Maxwell* case out of the Ninth Circuit. Distinguishing between "individual capacity" lawsuits and "official capacity" lawsuits, tribal officials sued in their individual capacity cannot claim a sovereign immunity defense even if clearly acting within scope of authority.

Other issue on appeal, Ninth Circuit found error in District Court's refusal to rule on sovereign immunity defense at preliminary stages of litigation reasoning that District Courts must rule on sovereign immunity defenses as soon as they are raised to avoid subjecting tribe to the litigation of process (which is ironic

because by extending *Maxwell*, plaintiffs will subject tribes to the process by seeking recourse against individuals rather than tribe, when the reality is that insurance paid by the tribe, or tribal indemnification policies will translate in relief ultimately being provided by the tribe itself)

Consentino v. Fuller
S227157 – NOT published (Cal. May 28, 2015, modified June 22, 2015, depublished, September 23, 2015). Previously published at 237 Cal.App.4th 790.

Card dealer sues members of Pechanga Gaming Commission alleging that his license was revoked because he was an informant in criminal investigations.

HELD: Sovereign immunity is not a valid defense brought against tribal officials sued in their individual capacities.

HELD: Tribe officials acting outside the scope of official capacities are not protected by Tribe's sovereign immunity.

NOTE: A concerted coordinated effort by several California Tribes to "depublish" the decision was successful, Eighteen tribes in several briefs heavily criticized the decision and the ability to narrow the decision to its facts.

Guidiville Rancheria of California v. United States
2015 WL 4934408 (N.D. Cal. August 18, 2015)

Tribe entered into agreement with developer and City of Richmond to have part of former Point Molate Navy Fuel Depot taken into trust with the intent of restoring the Tribe's land base including a casino resort. City reneged on agreement and DOI ruled that Tribe did not meet historical nexus requirement for land to qualify under IGRA's restored lands exception. The Tribe's request for a two-part determination remains pending.

City filed against developer in state court for declaration that agreement was void or no longer in effect. Tribe and developer filed federal action against DOI and City. City filed motion for judgment on the pleadings and Court ruled in favor of City and certified the ruling for an interlocutory appeal which is pending.

City moves for an award of attorneys fees:

Held: Award of attorneys' fees of approximately $ 2 million awarded against both developer and Tribe. Tribe's Complaint seeking an award of attorneys' fees against the City constitutes a waiver of the Tribe's immunity for an award of fees against the Tribe.
Appeal pending.

Star Tickets v. Chumash Casino Resort

No. 322371 (Mich. App. October 22, 2015)

Ticket company filed suit against Tribe in Michigan State Court alleging breach of contract. Tribe moves to dismiss on sovereign immunity grounds.

HELD: Tribe's performance of the contract constitutes a ratification of the express waiver of immunity in the contract that otherwise would be invalid as no such waiver was approved under established tribal law. Motion denied.

Petition for Michigan State Supreme Court review pending.

B. BANKRUPTCY CASES

In re Womelsdorf
2015 WL 3643477 (Bnkr. D. Ore. June 11, 2015*)*

HELD: Applying *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir. 2003), which held that tribal sovereign immunity was abrogated by Congress in the passage of the Bankruptcy Code, the Cow Creek Tribe's Seven Feathers Casino is required to produce to trustee records of debtors' gaming activities.

In re Greektown Holdings
532 B.R. 680 (E.D. Mich. June 9, 2015)

HELD: Congress, in passage of Bankruptcy Code, did expressly abrogate sovereign immunity of the United States and States, but the definition of "governmental unit" did not include tribal governments, therefore, there is no express statement of Congress' intent to abrogate tribal immunity. Therefore USDC is reversed with instructions to dismiss claims against the Sault Ste. Marie Tribe.

NOTE: Case goes into great detail in consideration of the Ninth Circuit in *Krystal Energy* and concludes that *Krystal Energy* was wrongly decided.

C. SOVEREIGN IMMUNITY AND "INDIAN LANDS" CASES IN THE WAKE OF *BAY MILLS*:

Michigan v. Sault Ste. Marie Tribe of Chippewa Indians
1:12 CV 962 (W.D. Mich. September 16, 2015)
Not yet reported on Westlaw

Tribe seeks to have land purchased with land claim settlement funds taken into trust. Speculation is that Tribe seeks to conduct gaming on the lands. Michigan filed suit to enjoin Tribe from submitting the fee-to-trust application. USDC granted injunction. Case was stayed pending SCOTUS review of *Bay Mills.* After

stay was lifted, State filed *Ex Parte Young* claims on remand. On December 3, 2014, the Court entered an Order dismissing case with leave to re-file *Ex parte Young.* Tribe moved to dismiss:

HELD: *Ex parte Young* claims are directed at preventing a governmental officer from acting in contravention of the law, but at issue in this litigation are the ability of the government, rather than governmental officers, to enter into bilateral contracts, therefore *Ex parte Young* is not applicable – case dismissed.

Oklahoma v. Hobia,
775 F.3d 1204 (10th Cir. 2014)
Cert. denied, Dk # 14-1177 (Oct. 5, 2015)

Land in question is 'restricted fee land' owned by individual Indians. Tribal Town entered into lease agreement with individuals. Question as to Muscogee vs. Kialegee vs. no jurisdiction. NIGC issues NOV because Tribal Town had not established it exercises jurisdiction over the subject lands.

HELD: Kialegee Tribal Town's efforts are for gaming not on Indian lands, therefore, no federal cause of action. Applied *Bay Mills.*

HELD: NIGC NOV did not advance to be a final agency action.

NOTE: Decision does not resolve dispute.

Related case:
MCZ Development Corp. v. Dickinson Wright PLLC
2015 WL 700813 (N.D. Ill. 2015)

Malpractice lawsuit alleging that law firm committed malpractice by opining that Tribal Town of Kialegee had authority under IGRA to conduct gaming activities over certain Indian lands.

Held: Case dismissed because NIGC ruling that Kialegee lacked authority to game was not a final determination for malpractice purposes and NIGC decision has since been overturned.

D. OTHER SOVEREIGN IMMUNITY CASES

Boricchio v. Chicken Ranch Casino
2015 WL 3648698 (E.D. Cal. June 10, 2015)

Several wrongful termination cases alleging discrimination brought against tribal casino.

HELD: Statement in Employee Handbook that Tribe will not consider race in hiring falls far short of express waiver of tribal sovereign immunity.

HELD: Laws of General Applicability, such as the Age Discrimination Employment Act, that apply to Tribe under Ninth Circuit's *Donovan* analysis do not abrogate tribal sovereign immunity in private causes of action.

Longo v. Seminole Tribe of Florida
2015 WL 2449642 (M.D. Fla. May 21, 2015)

Former security guard alleges Title VII violations based on wrongful termination.

HELD: Title VII did not abrogate tribal sovereign immunity; Congress expressly exempted tribes from definition of 'employer'.

HELD: Plaintiff failed to demonstrate that Seminole is not a federally-recognized Indian Tribe.

Harris v. Lake of Torches,
363 Wis.2d 656, 2015 WL 1014778 (Wisc. App. March 10, 2015)

Formal Tribal employee sought workman's comp beyond what tribal self-insurance was willing to provide. Employee sued in state court, which stayed litigation pending claims in tribal court. After 11 months of no post-trial decision by tribal court, employee re-opened state court action. Lower court allowed for claim to proceed. Appeals Court reversed:

Held: Compact provision requiring tribe to provide workman's' comp. did not constitute a waiver for employee to sue tribe.

Held: Tribe's tactic of not asserting immunity defense in tribal court does not equate to a waiver of the immunity in the state court action.

Harris v. San Manuel Band
5:14-cv-02365-SJO-DTB (C.D. Cal. April 29, 2015)

Wrongful termination claim alleging that Tribe's Compact provides an effective waiver of tribal immunity.

HELD: Compact does not provide a waiver for third party claims

HELD: Plaintiff's argument that he steps in shoes of state in a *qui tam* action fails because wrongful termination claim is not a breach of compact claim

Muller v. Morongo
2015 WL 3824160 (C.D. Cal. June 17, 2015)

Slot attendant went on medical leave pursuant to tribal policy based on Family Medical Leave Act. Discharged for drug use, employee claimed drug use was related to medical condition and sued for wrongful discharge.

HELD: FMLA as a law of general applicability does not abrogate tribal immunity in private causes of action.

HELD: Gaming Compact's waiver of immunity does not extend to third party plaintiffs.

Sun et. al. v. Mashentucket Pequot
DK# 15-2148 (2nd Cir.)

Appeal from District Court Order denying motion to reopen case. Gamblers had their winnings confiscated by the casino and filed suit. In a complicated matter procedurally, the District Court found that tribal sovereign has not been waived and denied the motion. Gamblers appealed, which is pending.

Related – no diversity jurisdiction
Payne v. Mississippi Band of Choctaw,
3:15-cv-00105-TSL-RHW (S.D. Miss. April 17, 2015)

Plaintiffs sought wrongful death claim against casino business entity of Mississippi Choctaw for alleged slip and fall at Tribe's casino. Tribe sought to dismiss for lack of jurisdiction.

HELD: Neither tribes or unincorporated tribal business entities are "citizens" of any state for purposes of federal diversity jurisdiction.

II. COMPACT LITIGATION:

Tulalip Tribes of Washington v. Washington
783 F.3d 1151 (9th Cir. April 17, 2015)

Tulalip Tribes sought to exercise "most-favored-nation" provision in its tribal-state compact based on compact agreement reached between State and the Spokane Tribe. Specifically, the Spokane Compact includes a provision that allows the

Tribe to secure additional machines by making payments into an inter-tribal fund rather than secure transfer agreements with other Washington Tribes if transfer agreements are not available at a reasonable price. The State refused Tulalip's request and on April 20, 2012, the Tribe filed its lawsuit against the State seeking an order that its compact is modified pursuant to the most-favored-nations clause. District Court found against the Tribe. Tribe appealed:

HELD: Most-Favored Nations Clause in compacts does not allow a Tribe to "cherry pick" those provisions it prefers, while rejecting those provisions it does not prefer. Tulalips proposed amendments did not include conditions and consequences of provisions in the Spokane Compact.

Tohono O'odahm v. Ducey
2015 WL 5475290 (D. Ariz. September 17, 2015)

Latest in long-running dispute over Tribe's ability to offer gaming on lands acquired in greater Phoenix area under Act to compensate tribe for dam flooding reservation lands.

Lawsuit filed by Tohono O'odahm after Arizona Department of Gaming announces it will not issue licenses regarding new facility and threatens licenses of entities doing business with Tribe. On motions to dismiss by Defendants and motion for Preliminary injunction:

HELD: Preliminary injunction denied because Tribe's own evidence regarding Class II gaming disproves allegations of irreparable harm.

HELD: Claims against ADOG will not be dismissed – Tribe alleges viable cause of action that requires State official to comply with federal law.

HELD: claims against Governor and AG to be dismissed – evidence does not show they participated in allegedly illegal acts – only ADOG Director.

See also, related litigation under Indian lands section.

California v. Picayune Rancheria of Chukchansi Indians of California
2015 545987 (E.D. Cal. February 10, 2015)
2015 WL 7353888 (E.D. Cal. November 19, 2015)
2015 WL 9304835 (E.D. Cal. December 22, 2015)

Latest in longstanding internal leadership dispute. Casino remains shuttered.

In February Order, One faction files for Order to Show Cause as to why another faction is not in contempt for distributing casino cash to those individuals the faction considers to be enrolled members.

HELD: Motion denied on jurisdictional grounds. Even though casino cash may have been improperly distributed, court's jurisdiction is narrow to protecting the public and will not deviate into dispute amongst factions as to which is the proper government of the Tribe.

In November Order, One faction files for order to show cause alleging preliminary injunction violated by another faction attempting to prepare casino for reopening.

HELD: Motion denied. Preliminary injunction only forbids activity that places public in imminent danger.

NOTE: Faction has announced intent to appeal order.

In December Order, State and one faction jointly move for entry of permanent injunction, which keeps opposing faction from reopening casino without USDC's consent.

NOTE: NIGC and newly-elected trial faction have reached an agreement that will likely result in reopening of casino.

Pauma Band v. California
804 F.3d 1031 (9th Cir. October 26, 2015)

The Ninth Circuit affirms the District Court ordered that the Pauma/Schwarzenegger Compact Amendment should be rescinded because of a mutual mistake of fact regarding the number of machines available in the state-wide license pool for gaming devices. The Tribe's gaming activities are, therefore, governed by the original1999 Proposition 1A Compact, the Tribe is excused from payment of the large revenue sharing payments in the Schwarzenegger Amendment, and the State is ordered to refund back to Pauma all payments previously made.

San Pasqual Band v. California
241 Cal. App.4th 746 (Ca. App. 2d Dist. 2015)

Tribe seeks money damages for lost revenue due to State's unlawful position that pool of gaming device licenses required by Compact had run dry.

HELD: Compact's dispute resolution provisions do not allow for award of money

damages.

State of Florida v. Seminole Tribe (M.D. Fla.)

Complaint filed October 30, 2015 (No cause number available at time this outline is prepared)..

Compact provided for large revenue sharing payments based on exclusivity for house-banked card games. Provision expired amidst political debate over expansion of gaming. Tribe continues offering card games despite termination and State sues to have card games shut down. Meanwhile compact amendment negotiations continue. The Compact's authorization of slot machine games is not directly impacted by the dispute.

Related case:

Gretna Racing LLC v. Florida Dept. of Business and Professional Regulation

2015 WL 5773536 (Florida App. October 2,2015)(unpublished)

State statute limiting slots to two counties valid – court found statute's provisions protecting exclusivity of gaming compact were valid.

NOTE: Poarch Band, which owns racetrack in Tallahassee has announced intention to appeal

***Citizen Potawatomi Nation v. Oklahoma*,**

AAA Case No. 01-15-0003-3452 (Application filed May 29, 2015)

Tribe seeking binding arbitration after State attempted to take enforcement action against alcohol sales. Potawatomi alleges Compact provides for exclusive means of dispute resolution and because compact has provisions re sale of alcohol, State cannot circumvent compact by pursuing other means of enforcement.

Note: Oklahoma Tribes and State also in dispute over machine classification – State argues that post-compact changes by NIGC allows Tribe to improperly offer Class III machines as Class II. Expect additional compact litigation in the near future.

Flandreau Santee Sioux v. Gerlach
2015 WL 9273931 (S.D. December 18, 2015)

State is threatening to refuse renewal of liquor licenses unless Tribe pays user taxes and sales taxes. Tribe alleges that such taxes are pre-empted by IGRA. Compact provisions are only manner in which state may impose/collect tax and the Tribe's compact has no such provisions.

December 18, 2015 Order denies State's motions for Judgment on the pleadings, res judicata and jurisdictional challenges. Court finds plausible argument that state alcohol taxes cannot apply because they were not addressed and agreed to in context of an IGRA gaming compact (compare Oklahoma compact dispute).

III. CASES ALLEGING THAT TRIBE IS NOT COVERED BY IGRA

Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)
2015 WL 7185436 (D. Mass. November 13, 2015).

After DOI issues opinion that Tribe's gaming is governed by IGRA and NIGC approved site-specific gaming ordinance, Massachusetts files action in state court alleging that state law governs the Tribe's gaming activities. The Tribe removed the action to federal court. Town of Aquinnah and Homeowners intervene. Parties file cross-motions for summary judgment.

HELD: State law governs activities on Aquinnah Indian lands. Tribe lacks requisite governmental power over its lands to qualify under, and IGRA does not impliedly repeal gaming restrictions in earlier Settlement Act.

HELD: No deference to opinions issued by DOI Solicitor and NIGC General Counsel.

NOTE: Tribe has announced intent to appeal to First Circuit.

98 F.Supp.3d 55 (D. Mass. Feb. 27, 2015)

On various procedural motions:

HELD: Tribe may proceed with counterclaims against State Officials under *Ex parte Young*, but Eleventh Amendment immunity bars counterclaims against State itself.

HELD: Tribe is collaterally estopped from claiming no waiver of Tribe's sovereign immunity because same parties and issue were present in earlier state court lawsuit over application of Town zoning laws to tribal lands. Result in place

despite earlier federal court action that concluded no state waiver is in place.

HELD: NIGC and DOI are not required parties under Rule 19. Tribe's and United States' interests are aligned and decision will not place Tribe in position of conflicting obligations.

State of Texas v Ysleta Del Sur Pueblo (Tigua)
DK # 99-00320 (W. D. Texas)

Longstanding injunction for Tigua Tribe's gaming activities based on Fifth Circuit decision that Tribe's Restoration Act removes it from IGRA. Tribe has continued to operate marginal facility with a whack-a-mole approach to a variety of gaming machines over the years under Texas state law.

In a potential sea change, the National Indian Gaming Commission recently approved Class II Gaming Ordinances for both the Pueblo of Tigua and the Alabama Coushatta Tribe, which were both restored under the same Congressional restoration statute. The NIGC action relies on a formal opinion from the Solicitor's Office that concludes the Fifth Circuit opinions that IGRA does not apply to the tribes were wrongly decided, are not binding on the United States, and do not deprive the NIGC of its jurisdiction over Class II games on Indian lands, to the exclusion of the State.

The District Court has asked for pleadings from the parties regarding the impact of this development on the litigation. Briefing is ongoing at the time of preparing this outline.

Frank's Landing Indian Community v. NIGC
3:15-cv-05828 (W.D. Wash), Complaint filed November 13, 2015

Tribe's submission of a Class II Gaming Ordinance rejected on grounds that Tribe does not qualify because it is not on the Federal Register's list of federally recognized Tribes. Action makes no attempt to explain how decision is justified in light of Congressional legislation (which prohibits Class III, but not Class II gaming) and a Ninth Circuit decision that makes clear that the Community possesses sovereign governmental power over its lands and its members. Tribe files suit alleging that it qualifies under IGRA's definition, which makes no reference to the Federal Register's list.

IV. IGRA BAD FAITH LITIGATION

New Mexico v. Dept. of the Interior
DK # 1:14-cv-00695 JAP SCY (D. N.M. 2014)
Appeal pending, DK ## 14-2219 and 14-2222 (10th Cir.)(oral argument Sept. 28, 2015)

State files lawsuit after being notified by DOI that DOI had determined that the Pojoaque Pueblo qualified for Class III Secretarial Procedures pursuant to 25 C.F.R. Part 291.

HELD: Action is cognizable and ripe under APA.

HELD: Congress limited Secretary's authority to issue procedures only when an Article III judge has made a determination the State has negotiated in bad faith. Accordingly, the Secretary is enjoined from proceeding with the Pueblo's application.

NOTE: Court concedes that Congress did not intend this result. Court directly suggests that United States file lawsuit against New Mexico on behalf of Pueblo. Court notes that NIGC has much broader rule-making authority under IGRA, indirectly suggesting that NIGC has authority to promulgate procedures similar to 25 C.F.R. Part 291.

RELATED CASE: *Pueblo of Pojoaque v. New Mexico*
1:15-cv-0625 RB/GBW (D, N.M.) Complaint filed August 17, 2015

After Compact expired on June 30, 2015, New Mexico Gaming Control Board takes a series of actions that place licenses in jeopardy for major slot machine suppliers and vendors based on their continuing business relationships with the Pueblo's gaming facilities. Tribe files lawsuit alleging *inter alia* State officials' actions are the unlawful application of state jurisdiction over tribal gaming and seeks preliminary injunction.

HELD: Injunction granted. State may not threaten or take adverse action on a gaming license based on licensee or applicant's business with the Pueblo's gaming operations. State jurisdiction over the Pueblo's gaming ended when the compact terminated. State officials expressly admonished by the Court for thinly veiled effort to do indirectly what it cannot do directly.

NOTE: New Mexico Gaming Control Board in wake of injunction, deferred action on all impacted licenses and applications. Contempt proceedings are pending.

Big Lagoon Rancheria v. California
789 F3d 947 *en banc* (June 4, 2015, 9TH Cir. 2015)
Technical amendments to decision in context of denying rehearing (July 8, 2015)

En Banc panel vacated three-judge panel decision that allowed for collateral attack re *Carcieri.*

HELD: Using IGRA litigation for collateral attack on status of Tribe and Indian Lands is impermissible.

HELD: USDC finding of bad faith affirmed. That decision focused on State's taxation demands, applying *Rincon.* Tribe's cross appeal seeking bad faith finding based on State's insistence that strict environmental provisions be imposed on Tribe dismissed as moot.

NOTE: Mediator's decision on Last Best Offer is worth reading: rejected State's attempts to impose strict environmental provisions on Big Lagoon

North Fork Rancheria v. California
1:15-cv-00419-AWI-SAB (E.D. Cal. November 13, 2015)

In wake of successful statewide voter initiative unraveling State Legislature's ratification of negotiated compact, Tribe files suit for State's failure to conclude negotiations in good faith.

HELD: State's obligation under IGRA to conclude negotiations in good faith extends to all state actors, not just the Governor. Effect of successful statewide initiative is to place state in violation of IGRA. Accordingly, Court implements IGRA's remedial provision of a sixty day negotiation period followed by last-best-offer arbitration

NOTE: On August 26, 2015, District Court denied motion to intervene filed by an unrecognized Indian Tribe.

NOTE: related challenge to DOI's action of taking land into trust and issuing favorable two-part determination is still pending.

V. LITIGATION OVER COMPACT DISAPPROVAL

Forest County Potawatomi Community v. United States
Case 1:15-cv-00105 (D. D.C.) Complaint filed January 21, 2015

2005 Compact provides for parties to negotiate amendment to compensate Tribe for impact if Governor concurs with a two-part determination within 50 miles of Milwaukee facility (Menominee/Kenosha). Binding, last-best-offer arbitration if no agreement is reached.

On November 21, 2014, the Three-judge arbitration panel selects Tribe's last-best-offer, which obligates State to fully compensate Tribe for lost revenue year-to-year. On January 9, 2015, Interior disapproves compact amendment alleging,

inter alia, that amendment binds the Menominee Nation and that amendment addresses issues beyond limited scope of issues allowed by IGRA.

On January 21, 2015, Tribe files suit alleging that disapproval violates IGRA's narrow grounds on which a compact may be disapproved and for arbitrarily and capriciously applying a different standard to reviewing the compact inconsistent with DOI's actions regarding approvals and deemed approvals of other compacts.

United States' Motion for Change of Venue pending
Menominee Motion to Intervene pending.

NOTE: Governor Walker did not concur in favorable two-part determination for Menominee Nation despite disapproval of Forest County Potawatomi compact amendment.

VI. INDIAN LANDS LITIGATION

REDDING RANCHERIA

Redding Rancheria v. Jewell

776 F.3d 706 (9th Cir. January 20, 2015)

Tribe restored in *Tillie Hardwick* litigation seeks to take land into trust on 1-5, less than two miles from existing facility under restored lands exception. DOI issues a negative ILD based on 25 CFR part 292.12(c) which disallows application if tribe operating and existing facility.

Lower Court upholds DOI regulation that disallows 'restored tribe' exception to 25 U.S.C. § 2719 if applicant Tribe is operating an existing gaming facility. Tribe appeals:

HELD: Regulation does not prohibit a restored Tribe from relocating an existing facility to newly-acquired lands, but regulations are otherwise under *Chevron* deference. Case remanded to be reconsidered in light of opinion.

COWLITZ

Confederated Tribes of Grand Ronde v. Jewell
DK# 1:13-cv-00849-BJR
(consolidated with *Clark County, et al. v. Jewell*, DK# 1:13-cv-00850-BJR)

December 12, 2014 Order deciding the merits on cross-motions for summary judgment.

Cowlitz Tribe, formally acknowledged through Interior administrative process in 2002, files application to have land in Clark County, WA taken in trust for gaming under the IRA and initial reservation exception in IGRA Section 20. Grand Ronde, joined by Clark County, La Center card rooms, City of Vancouver, and individuals, challenge the Department's April 2013 decision, which sets out Interior's interpretation of the *Carcieri* decision.

HELD: Cowlitz "now under federal jurisdiction" as of 1934 within the meaning of the *Carcieri* decision. IRA Section 19 is ambiguous, therefore DOI analysis is entitled to *Chevron* deference. Tribe need not be federally recognized in 1934; DOI two-part test to determine whether a tribe is under federal jurisdiction in 1934 is within its discretion, properly considers many factors (guardian-like actions/ continuous course of dealings/ actions by the Office of Indian Affairs/ no formal termination action prior to 1934).

HELD: A Tribe may be 'restored' for purposes of IGRA Section 20, and may still have been "under federal jurisdiction" in 1934 for purposes of the IRA.

HELD: DOI's part 292 'initial reservation' regulations and its interpretation of "significant historical connections" in connection to Cowlitz lands are reasonable. Opposition's claims that ethno-historic evidence must demonstrate a tribe had permanent presence on or ownership of the exact parcel in question are inconsistent with Congress' intent and Secretary's authority to take lands in trust for gaming that are in "the vicinity" of lands where the Tribe had a historic presence.

HELD: Grand Ronde's interest too attenuated to establish standing for NEPA challenge (Note: although the decision is strong and well-reasoned in most aspects, the standing analysis is the weakest part). Because Judge Rothstein reached the merits on NEPA claims in connection with Clark County's challenges, however, the issue is moot.

HELD: Routine NEPA challenges (to reliance on Tribal ordinance, reasonable alternatives, water issues) were properly addressed in the EIS/ROD.

Appeal pending

ONEIDA NATION

Town of Verona v. Jewell
2015 WL 1400291 (N.D. New York, March 26, 2015)

Upstate Citizens for Equality v. Jewell
2015 WL 1399366 (N.D. New York, March 26, 2015)

Central New York Fair Business Association v. Jewell
2015 WL 1400384 (N.D. New York, March 26, 2015)

These three cases included Broad challenges to DOI decision to take lands into trust, ending dispute over Indian lands status of Oneida Nation's Turning Stone Casino.

HELD: No violation of NEPA. Issues that Town complains of, including impacts on jurisdiction, were adequately addressed in EIS. Comprehensive settlement agreement between Tribe and State at issue in separate litigation and not at issue here.

HELD: No violation of *Carcieri.* Favorable two part test established by DOI and applied to Oneida is given *Chevron* deference and upheld.

TOHONO O'ODHAM

Tohono O'odham Nation v. City of Glendale
2015 WL 6774044 (9th Cir. 2015)

City and State appeal from District Court decision striking down a new state law that allows City to annex 'unincorporated islands" into the City. Statute designed to change status of T.O. lands by disqualifying them under the criteria of the Gila Bend Indian Reservation Lands Replacement Act ("GBIRLRA").

HELD: New state law obstructs intent of the GBIRLRA. Accordingly, it is pre-empted by federal law. District Court affirmed.

See also, related litigation under compact litigation section

ENTERPRISE RANCHERIA

Latest in series of lawsuits surrounding Gov. Brown's concurrence with favorable two-part determination.

Citizens for a Better Way v. Interior
2015 WL 5648925 (E.D. Cal. September 24, 2015)

Blitzkrieg attack on DOI's two-part determination, challenging inadequacy in NEPA review, failure to adequately consider impact information in making two-part determination, and *Carcieri*-based challenge under IRA.

HELD: on cross-motions for summary judgment, in favor of Enterprise Rancheria on all counts.

2015 WL 37949257 (E.D. Cal. June 17, 2015)

In an APA action, Plaintiffs submit evidence, namely an expert impact analysis by Alan Meister and related affidavits, that were not part of the certified Administrative Record. DOI and the Enterprise Rancheria move to strike.

HELD: APA action limited to review of Administrative Record. Although there are narrow exceptions that allow Plaintiffs to expand or supplement the record, they do not apply to post-decisional evidence – motion granted.

Enterprise Rancheria v. California
Case No. 2:14-CV-01939-TLN-CKD (E.D. Cal.)

On August 20, 2014, the Enterprise Rancheria filed a complaint against the State of California alleging that the State failed to conclude negotiations in good faith because the Legislature failed to ratify the compact negotiated in August, 2012 with Governor Brown. Ratification of the compact was held up over controversy of gaming on lands taken into trust pursuant to two-part determination.

Cross-motions for summary judgment pending.

IONE BAND

Latest of several lawsuits challenging Ione Band's gaming.

County of Amador v. Interior
2015 WL 5813980 (E.D. Cal. September 30, 2015)

Applying Chevron deference, court held (1) grandfather provision in part 292 regulations reasonable; (2) finding of tribe exercising jurisdiction reasonable; and (3) determination that lands qualify under restored lands exception, reasonable.

No Casino in Plymouth v. Jewell
2015 WL 5813694 (E.D. Cal. September 30, 2015)

HELD: Carcieri-based challenges rejected under Chevron deference
HELD: NEPA challenges rejected – DOI provided adequate consideration**.**

2014 WL 3939585 (E.D. Cal. 2014)
2013 WL 5159011 (E.D. Cal. 2013).

JAMUL INDIAN VILLAGE

One of dozens of lawsuits (litigious and well-funded local opposition, which have ***never*** prevailed, but they keep filing lawsuits despite sanctions and reprimands. $ 300M-plus facility managed by Penn National Gaming set to open in summer of 2016.

Jamul Action Committee v. Chaudhuri
2015 WL 2388950

JAC seeks to enjoin construction of Jamul Casino:

HELD: Court lacks standing against DOI for lack a redressability – they lack the power to stop tribe from construction.

HELD: JAC unlikely to prevail on merits because the casino construction is not contingent on any major federal action requiring NEPA compliance. JAC's efforts to conflate construction activity, which does not require a major federal action with approval of a management contract with Penn National, which does require a major federal action, are unavailing.

2015 WL 1802813:

Disgruntled tribal members seek leave to submit an amicus brief.

HELD: Proposed amici attempt to challenge legal issues already decided in the case, therefore allowing leave will not assists court in further deliberations – motion denied.

GUN LAKE

Patchak v. Jewell
2015 WL 3776490 (D. D.C. June 17, 2015)

On remand from SCOTUS, case rendered moot by Gun Lake Act, by Congress mandating land be taken into trust and eligible for gaming.

QUAPAW

Kansas v.NIGC,
2015 WL 92728847 (D. Kansas December 18, 2015)

Kansas opposes effort of Tribe, with existing Indian lands in Oklahoma near the Kansas/Oklahoma border to have lands in Kansas taken into trust. Tribe and State file jurisdictional motions to dismiss.

HELD: Case Dismissed. Claims against NIGC are not actionable under IGRA and APA claims are time bared. Claims against Tribe dismissed on grounds of tribal sovereign immunity.

Good analysis on a narrow reading of *Bay Mills* discussion re *Ex parte Young.*

VII. CLASS II GAMING

Alabama v. PCI Gaming Authority
801 F.3d 1278 (11th Cir. September 3, 2015)

Affirms 15 F.Supp.3d 1161 (M.D. Ala. 2014), ruling against latest of several challenges by Alabama Attorney General Strange to stop Poarch Band's gaming operations. Tribe operates Class II games and does not have a Compact with the State.

HELD: State has no jurisdictional basis to challenge Tribe's Class II gaming. Remedy is to complain to NIGC and United States Attorney.

HELD: State nuisance laws pre-empted by IGRA. IGRA meets complete pre-emption requirement.

HELD: Tribe immunity does not bar *Ex Parte Young* claims against tribal officials.

HELD: State's challenges based on *Carcieri* and *Big Lagoon* are untimely and Ninth Circuit's three judge panel decision was wrongly decided (see discussion of *Big Lagoon*, above).

Somewhat related case:
Alabama v. 50 Serialized JLM Games
Case 1:14-cv-00066-CG-B (S.D. Ala. March 30, 2015)
Unrecognized Tribe (MOWA) removes to federal court an action brought by the State in State Court to enjoin Tribe from operating games. State moves to remand.

HELD: No federal issues because Tribe is not federally recognized. Remand grants.

Idaho v. Coeur d'Alene
794 F.3d 1039 (9th Cir. July 22, 2015)

Tribe opened Texas Hold'em poker tournaments over State's objection. NIGC did not act (has not acted) on State's objection. State filed suit alleging Compact violation even though Tribe does not look to compact as source of authority.

Initial holding that matter should be resolved by arbitration per compact, but after neither party initiated arbitration, District Court ruled it had jurisdiction to rule on merits of State's motion for preliminary injunction and ruled that Texas Hold'em not Class II because State Constitution prohibits game, even though widely and openly played in several non-Indian venues in State. Tribe appealed:

HELD: Congress abrogated tribal immunity in breach of compact litigation.

HELD: Texas Hold'em not Class II because State Constitution prohibits game, even though widely and openly played in several non-Indian venues in State.

NOTE: On remand, the parties stipulated to dismiss the lawsuit based on Tribe's representations that it will no longer offer Texas Hold'em at its gaming facilities.

Wisconsin v. Ho-Chunk Nation
784 F.1086 (7th Cir. April 29, 2015)

Tribe operating virtual poker at its Class II-only facility in Madison, Wisconsin.

State alleges game is Class III, asserts violation of compact and initiates lawsuit.

HELD: USDC erred in finding that Poker is a prohibited Class III game. Applying tradition criminal/prohibitory and civil/regulatory analysis from *Cabazon,* State fails to establish that Wisconsin has a criminal/prohibitory scheme. Court emphasized that State scheme did not extend to Class III compacts that allow for poker and that State had decriminalized possession of a small number of machines that includes video poker.

California v. Iipay Nation of Santa Ysabel
DK # 14CV2724 AJB NLS (S.D. Cal)(Complaint filed November 18, 2014)

State alleges that Tribe's launch of Class II bingo games over the internet violates Tribal/State Gaming Compact.

Tribe does not claim authority to offer the gaming pursuant to the Compact. Tribe looks solely to IGRA's Class II authority.

TRO issued on December 12, 2014.

HELD: Court has jurisdiction because State *alleges* that game is Class III and on Indian lands. NOTE: This analysis is contradictory to Complaint: State alleges that gaming is off Indian lands, while noting Tribe's position that gaming is on Indian lands.

HELD: Game is an "electronic facsimile" and not a "technological aid."

NOTE: This analysis is not driven by the use of the internet, but appears to challenge current, widely-played Class II gaming machines.

HELD: UIEGA applies.

2015 WL 2449527 (S.D. Cal. May 22, 2015)
Tribe sought dismissal on jurisdictional grounds.

HELD: Tribe in a catch-22. Compact restricts Tribe to only authorized Class III games, therefore State can use immunity waiver in compact because it alleges games are Class III (even though Tribe does not allege they are Class III, nor does it rely on compact as authority to offer game). State alleges UIGEA violation, which gives court jurisdiction as to aspects of gaming that are on non-Indian lands.

NOTE: Per stipulation, the action by the United States and the action by the State have been consolidated.

NOTE: The NIGC has recently issued an advisory opinion concluding that the Tribe's games are Class III games.

NOTE: the case has been consolidated with *United States v. Iipay Nation of Santa Ysabel* DK# 14CV2855 DMS BLM (S.D. Cal.) Compliant filed December 4, 2014, which alleges liability based on Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367.

NOTE: As with the *Coeur d'Alene* and *Ho Chunk* decisions, the Tribe is not looking to the compact as the authority to offer the game. There is a disturbing trend of states using compacts as the basis to challenge Class II gaming.

VIII. NIGC

Fond du Lac/Duluth Agreement:

Latest lawsuits in longstanding dispute over pre-IGRA revenue sharing agreement in exchange for support to have land in downtown Duluth taken into trust with intent to operate gaming facility.

City of Duluth v. National Indian Gaming Commission
89 F.Supp.3d 56 (D. D.C. March 31, 2015)

After losing indirect challenge to NIGC action of issuing NOV based on revenue sharing agreement violating "sole proprietary interest" provisions of IGRA in lawsuit against the Tribe, City sues NIGC directly under the APA.

HELD: NIGC decision entitled to *Chevron* deference.
HELD: NIGC's interpretation of IGRA's "sole-proprietary interest provision" is reasonable, not arbitrary or capricious. NIGC's prior approval of agreement did not preclude it from taking later contrary action. That decision results in retroactive relief is not relevant.

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa
785 F.3d 1207 (8th Cir. May 8, 2015)
2015 WL 4545302 (D. Minn. July 28, 2015)

After Tribe stopped payments to City based on NIGC Order, and City lost in action against NIGC. District Court ruled that Tribe could not recover payments made to City prior to NIGC Order.

HELD: District Court, in ruling that Duluth must return those payments made by the Tribe after the NIGC's Notice of Violation, but need not return those payments made by the Tribe prior to the NIGC's Notice of Violation, failed to consider that Congress intended that Tribes be the primary beneficiary of tribal gaming activities

Eighth Circuit vacated and remanded. On remand:

HELD: Tribe entitled to retroactive relief. City must refund payments made by Tribe.

NOTE: The *Fond du Lac* series of cases stand for the proposition that IGRA's prohibition against taxation extends beyond compacts and to City MSAs and MOU's. This line of cases should be part of any dialogue where a city or county is attempting to overreach in contract negotiations, especially in situations where the Compact mandates such agreements (e.g. all compacts out of the Schwarzenegger and Brown Administrations in California).

Fort Sill Apache v. National Indian Gaming Commission
2015 WL 2203497 (D. D.C. May 12, 2015)

HELD: APA's waiver of United States' sovereign immunity does not require final agency action otherwise reviewable under APA. Accordingly, Tribe's claim for injunctive relief is not dismissed

NOTE: Despite repeatedly losing this argument in several forums, DOJ continues to raise it as a matter of course.

HELD: APA Claims challenging NIGC Closure Order dismissed because Tribe closed gaming facility on its own volition to avoid fines, rather than defy NIGC Order. Although Tribe alleges failure of NIGC to rule on Tribe's appeal of closure order is a final agency action, the Tribe's own decision to close is not causally related to the NIGC decision.

IX. CONTRACT DISPUTES

Stifel, Nicolaus & Co., Inc. v. Godfrey & Kahn
2015 WL 7454484 (7th Cir. Nov. 24, 2015)

Latest in long line of cases re LDF Lake of Torches bond dispute. Appeals. While several lawsuits were pending in other jurisdictions (see outline from last year's seminar), Tribe filed action is tribal court. District Court enjoined all tribal court actions except one. On cross appeals:

HELD: District Court should have enjoined tribal court action in its entirety.
HELD: Lack of Tribal Court jurisdiction clear, such that exhaustion not required
HELD: Waiver of immunity in collateral contracts to unapproved management contract enforceable

X. CRIMINAL CASES:

State v. Yang

2014 WL 734765 (Minn. App. December 29, 2014***)***

Maid in hotel of tribal casino resort discovered drugs and paraphernalia while cleaning room. She reported it to her supervisor who contacted hotel security, who handled evidence and contacted local law enforcement. In appeal of conviction, accused argues that evidence should have been suppressed as an illegal search in violation of Indian Civil Rights Act.

HELD: No showing that security acted in capacity of tribal law enforcement or under direction/authority of Tribe in handling evidence, therefore no basis to contend that evidence was part of governmental search. Conviction upheld.

United States v. Olney
2015 WL 5226273 (E.D. Wash. September 8, 2015)

Defendant allegedly engaged in illegal cockfighting on Yakama Indian Reservation alleged amongst other defenses that IGRA precludes prosecution.

HELD: Defendant fails to establish that cockfighting is authorized under compact, therefore, state law is validly assimilated for federal criminal charges.

XI. FEDERAL LAWS OF GENERAL APPLICABILITY

OBAMACARE

Northern Arapaho v. Burwell
90 F.Supp.3d 1238 (D. Wyo. Feb. 26, 2015)
2015 WL 4639324 (D. Wyo. July 2, 2015)

HELD: Congress' intent to include Tribes as large employers was clear.

NLRA.

Little River Band v. NLRB
788 F.3d 537 (6th Cir. June 9, 2015) en banc denied September 18, 2015.

HELD: NLRA applies. Scathing dissent. Majority opinion chock-full of statements doubting the correctness of its own decision.

Saginaw Chippewa v. NLRB,
791 F.3d 648 (6th Cir. July 1, 2015), *en banc* denied September 29, 2015.

HELD: NLRA applies. Interesting dissent. Heavy criticism of *Donovon.* Dissent found treaty rights distinguishes case from *Little River Band.*

NOTE: Given the two scathing dissents and the two majority opinions' concessions regarding the possibility of a wrong result, it was a surprise to most observers that the cases were not accepted for *en banc* review.

In re Chickasaw Nation.

NLRB Administrative decision, 362 NLRB 109 (June 4, 2015)

HELD: Because assertion of NLRA jurisdiction over Chickasaw Nation would interfere with Tribe's treaty rights, NLRA does not apply.

Unite H.E.R.E Local 19 v. Picayune Rancheria of Chukchansi Indians
2015 WL 1498847 (E.D. Cal. March 31, 2015)

Tribe has collective bargaining agreement with union. Per the agreement, the Union sought arbitration for wrongful termination of two employees and prevailed. Arbitrator awarded make whole compensation. Tribe refused to honor the arbitration award and union filed suit.

HELD: Judgment on the pleadings for labor union. Tribe's jurisdictional defenses do not stand in light of express waiver of sovereign immunity in collective bargaining agreement.

XII. INSTANT RACING MACHINES

In re Verified Petition for Writ of Mandamus (Coeur d'Alene)
2015 WL 7421342 (Idaho, November 15, 2015)
supersedes 2015 WL 5286169

Racino industry convinced Idaho Legislature that "historical racing machines" would expand the appeal of the "sport of kings." Coeur d'Alene Tribe exposed the effort and educated members of the Legislature about how instant racing machines really worked. Legislature repealed the statute and Governor Otter attempted to veto the measure, but he did so three days late under the Idaho Constitution. The Secretary State recognized the veto anyway and the Coeur d'Alene Tribe petitioned for a writ of mandamus. Governor Otter's veto was untimely and Secretary of State may not ignore his obligation to reject untimely veto for political expediency. Accordingly the State Legislature's repeal of instant racing machine statute is valid.

American Legion v, Texas Racing Commission,
DK # D-1-GN-14-003700 (Travis County, TX. 2014)
Appeal pending NO. 03-15-00118-CV

Traditional Kickapoo Tribe of Texas intervened as Plaintiff. Preliminary injunction invalidates Texas Racing Commission approval of instant racing machines as such games violate State Constitution and Racing Commission's authority. Appeal pending.

XIII. TRIBAL LEADERSHIP DISPUTES IMPACTING GAMING

Paskenta Band of Nomlaki Indians v. Crosby et. al.

Case No. 15-cv-00538-GEB-CMK (E.D. Cal.)

Tribe files suit against former Councilmembers for fraud and embezzlement. Former Councilmembers counter with claim that Tribe's current leadership organized an armed coup that lead to the temporary closure of the gaming facility.

Cayuga Nation v. Tanner
2015 WL 2381301 (N.D. N.Y. May 19, 2015)
2015 WL 3563501 (N.D. N.Y. June 11, 2015)

Key issue in dispute is whether Town's anti-gaming laws can be enforced to shutter Cayuga Nation's gaming facility. Case challenging Town's authority was dismissed because Plaintiffs could not establish that they were the governing body authorized to bring lawsuits against Town.

Plaintiffs seek stay pending appeal.

HELD: Some chance of success in appeal that Plaintiffs have authority to bring lawsuit on behalf of Nation, and other factors of balance of harms weigh heavily in favor of keeping casino open pending appeal – Stay granted.

California Valley Miwok Tribe v. California Gambling Control Commission
3:15-cv-00622-AJB-JLB (S. D. Cal. Sept. 11, 2015)

HELD: CGCC allowed to withhold annual ($1.1 million) distribution from Revenue Sharing Trust Fund until internal leadership dispute is resolved (if ever?). This case is at least the third effort of one tribal faction seeking to force CGCC to pay the tribal RSTF distribution.

See also, litigation involving Picayune Rancheria of Chukchansi Indians of California in compact litigation section, above.

XIV. TRIBAL COURT CASES

Mashentucket Pequot v Gallinaro
6 Mash. Rep. 249, 2015 WL 884233 (Tribal Court February 26, 2015).

Tribe seeks to collect on unpaid lie of credit. Defendant argued that debt was not enforceable under Massachusetts State Law.

HELD: State law defense not applicable on Tribal lands.

Camarena v. Somday
12 Am. Tribal Law 174, 2015 WL 7785525 (Colville Tribal Court, December 29, 2014).

Tribal Gaming Agent has license revoked, causing him to be terminated. Filed appeal:

HELD: Loss of license is not within handbook's definition of disciplinary action, therefore no right to challenge decision and due process rights are not violated.

Online Gaming in Indian Country

SECTION K

UNIVERSITY OF NORTH DAKOTA

Online Gaming in Indian Country: Maybe it is a Minefield

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Associate Vice President for Academic Affairs
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Prepared for presentation at ABA Gaming Law Minefield National Institute, Las Vegas, NV, Feb. 12, 2015

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CREATIVE INNOVATIVE ENTREPRENEURIAL SPIRITED

THE UNIVERSITY OF NORTH DAKOTA

Newsweek, Aug. 22, 2014

Today's Conversation

- **A lot at stake in online & mobile market**
  - American Indian tribes face highest stakes, barriers to entry
- But…**revenue disappoints** in DE, NJ, NV
- **Three key questions:**
  - 1. What does Indian Gaming Regulatory Act say about online gaming?
  - 2. Where are things now?
  - 3. Which factors will influence legalization?

Part I

WHAT DOES IGRA SAY ABOUT ONLINE GAMING?

Tribal Gaming's Framework:
Indian Gaming Regulatory Act of 1988 (IGRA)

- Policy goals: promote **tribal economic development**, **self-sufficiency**, and **strong tribal governments**
- Regulates gaming conducted by **"Indian tribe"** on **"Indian lands"**
- Tribe can game if **not barred** by state law
- **Regulatory scheme** according to type of game
  - Class I, II, III

Key Knowns & Unknowns

- **Two knowns**
  - IGRA has established framework for all tribal gaming operations
  - IGRA's policy goals were intended to reinforce tribal sovereignty & economic self-sufficiency
- **Two unknowns**
  - Federal and state public policy & regulatory authority determine whether Indian gaming is legal – but what about online gaming?
  - IGRA presumes bricks-and-mortar operations but leaves room for technology innovation – but what about online gaming?

Part II

WHERE ARE THINGS NOW?

The Erratic Push for Legalization

- **Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)**
  - Prohibited banks, credit card companies, or other financial institutions from collecting on debts incurred on an Internet gaming web site
  - Effectively banned online gaming by making it illegal to process financial transactions
- **Financial meltdown** (2008-10)
- **Congress & states like CA, NJ, FL, NV start looking to legalize online poker** (2011)

Zigs & Zags

- **"Black Friday"** (Apr. 15, 2011)
  - DOJ criminal indictments under UIGEA against 11 executives at PokerStars, Full Tilt, Absolute
  - Civil suit for $3 billion in forfeiture, money laundering penalties
- DOJ (Sept. 2011): **Wire Act** only applies to **sports betting**
- **Congress** considers **legalizing** (at least) **online poker**
  - Best shot in 2012 with Harry Reid's support – comes up short
  - Tribal Online Gaming Act of 2012 (fails)
- **State innovators** – DE, NV, NJ. . . .

Restoration of America's Wire Act (RAWA) (2015)

- **Would have reversed 2011 DOJ Opinion, "rewritten" Federal Wire Act of 1961**
  - Clarified that Internet transmissions related to gaming activities are covered, prohibited by Wire Act;
  - Deleted phrase "on any sporting event or contest" to expand reach of Wire Act to include all forms of Internet gaming;
  - Included rule of construction seeking to protect status quo with regard to horseracing, in-person electronic sales of state lottery tickets, and state charitable gaming
- **Banned most forms of online gaming, even if legal and regulated by NJ, DE, NV**
- **Exempted fantasy sports**
- **Negatively impacted Indian Gaming?**
  - National Indian Gaming Association: "unintended consequences that could adversely impact existing brick and mortar based 'linked' Indian gaming that has been authorized for more than twenty-five years now under IGRA".
- **RAWA update**

(See Heidi McNeil Staudenmaier, Tribal Online Gambling Conference, May 4-5, 2015, Scottsdale, AZ)

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Continuing to Play Out at All Levels

- **States considering legalization**
  - CA, IL, MA, MS, NY, PA, WA
- **Congress considering prohibition & legalization**
  - RAWA & Coalition to Stop Internet Gaming; Internet Poker Freedom Act
- **Tribes considering . . . .**
  - Inclusion of tribes in proposed CA legislation
  - Great Luck platform & Bingo Nation TV
  - Santa Ysabel & DesertRoseBingo.com litigation

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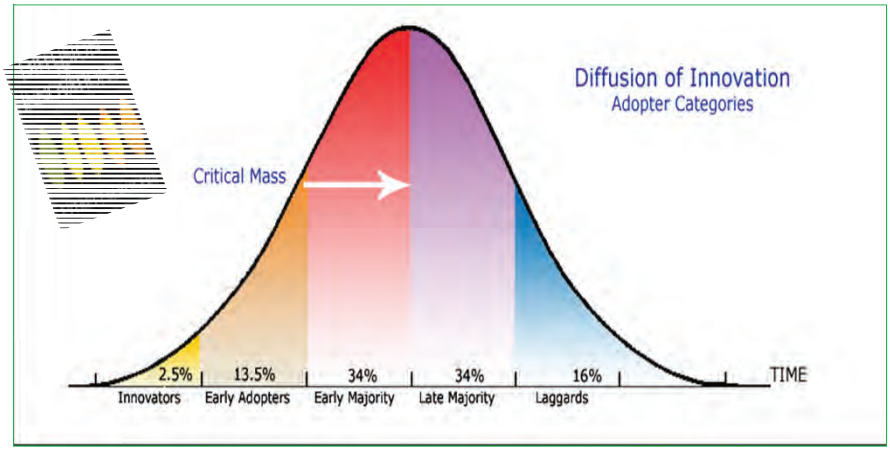
Part III

WHICH FACTORS WILL INFLUENCE LEGALIZATION?

Diffusion of Innovation in Online Gaming

(an extension of the Everett Rogers model)



Everett Rogers, *Diffusion of Innovations* (5th ed. 2003)
http://cjni.net/journal/?p=1444

Determinants of Diffusion for Online Gaming

1. Relative advantage
- Legalization over prohibition
- Online over bricks-and-mortar

2. Compatibility
- "Fit" with political culture
- Existing capacity—regulation, technology, marketing

3. Complexity
- Player verification, geolocation, fair & honest play, etc.

4. Trialability
- Free play, online poker only
- States as policy labs

5. Observability
- Regulation & monitoring
- Media & industry scrutiny

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Determinants of Diffusion for Tribes

1. Relative advantage
- Gaming operator more than government
- Lost exclusivity, brand strength?

2. Compatibility
- Best in states with profitable casinos
- Scalable from existing expertise?

3. Complexity
- Experience under IGRA
- Scalable from existing expertise?

4. Trialability
- Tribal sovereignty affords experimentation
- Constrained by federal law, role as governments & gaming operators?

5. Observability
- States-as-labs
- Different policy environment, high risks?

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Online Gaming in Indian Country: Maybe it is a Minefield

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Prepared for presentation at ABA Gaming Law Minefield National Institute, Las Vegas, NV, Feb. 12, 2015

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Lewis Roca
ROTHGERBER CHRISTIE

Internet Gaming: Opportunities and Threats for Indian Tribes

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California I-Poker: Background and History

- Internet Gaming legislation suffered a rocky start in California.
- Senator Roderick Wright introduced the Internet Gambling Consumer Protection Public-Private Act in 2010.
- He reintroduced it in 2011, even though he was facing indictment for false declaration of candidacy, voter fraud and perjury.
- Despite these allegations he tried again to move his bill in 2012 and 2013; However in 2014, he was ultimately convicted and forced to resign.

Background and History

- The effort to pass Internet Gaming legislation has continued because of several important policy issues:
  - Consumer Protection concerns.
  - California illegal online gambling players assumed all the risks and revenues are being realized by off-shore operators.
  - Unregulated Internet gambling websites endanger Californians.
  - Casino style games played on the Internet may violate the exclusivity granted to Indian tribes in the California compacts (Poker as a class II game which was played before the compacts were entered into does not threaten a violation of exclusivity).
  - There has been insufficient revenue available to law enforcement agencies to combat illegal internet gambling activity which is expanding quickly.

Development of Legislation

- At the end of the 2014 California legislative session, 13 tribes and 24 card rooms developed unified language to authorize intrastate Internet poker in the State of California.
- Specifically, that legislation would:
  - Authorize only Internet poker;
  - Authorize the issuance of operator licenses to existing operators of land base gaming facilities in California (Indian Tribes and Card Clubs);
  - Grant power to certain state agencies to oversee the operations of each licensee operator;
  - Require a determination of suitability of owners, officers, directors and key employees and service providers;

Development of Legislation (cont.)

- Establish the Internet Poker Fund to cover the cost of licensure oversight, consumer protection, state regulation and problem gambling programs;
- Establish the Unlawful Enforcement Gambling Fund to allow enforcement against illegal internet gambling and other illegal gambling activities;
- Ensure consumer protection through extensive provisions regarding the registration of players, prohibition of co-mingling of player accounts with other assets of the licensed operators and protection of personally identifiable information.

- Though the Legislation had strong support from most stakeholders, there was insufficient time left in the legislative session to enact the bill.

2015 Legislative Session

- Then for the 2015 session, Representatives Jones-Sawyer and Gatto each introduced a bill, AB 167 and AB 9 respectively, that were largely based on language from the 2014 Legislation.
- The bills, however, had certain key differences which developed between stakeholders during the off-session. Even with the Assembly Chair of the powerful Government Operations committee Adam Gray, submitting a bill, those issues stalled iPoker legislation in the 2015 session.
- For the 2016 session Representatives Jones-Sawyer and Chairman Adam Gray are anticipated to push legislation.
- To be successful they will have to find middle ground on several issues.

Amendments Needed to Achieve Middle Ground to Pass an Internet Poker Bill in the 2016 Session

Horse Racing Association Eligibility

- Eligible entities:
  - Horse Racing Associations have fought to be eligible for Internet poker operator licenses on essentially the same terms as eligible tribes or cardrooms.
  - If legislation is to be passed, horse racing associations may need to be eligible for an Internet poker operators license; and additional provisions will likely be necessary to address the concerns of others involved in the horse racing industry; those provisions should be developed by agreement within the industry.
  - Any revenue split among the racing industry stakeholders should be funded by the racing association licensees, without subsidy or contribution from other eligible licensees.

Horse Racing Association Eligibility (cont.)

- However, there is cogent, credible opposition to allowing horse racing associations to be eligible for an operator's license. Several influential tribal leaders believe that allowing racetracks to operate Internet gaming will ultimately lead to further expansion, threatening exclusivity and the long term sustainability of tribal gaming.

Participation by Persons or Entities who Engaged in Unauthorized Internet Gaming

- "Bad actor" provisions will be critical to pass legislation.
- A balance must be struck between the State's need to ensure that persons who willfully defy gaming laws not be permitted to jeopardize the integrity of Internet poker in California, while recognizing that control of an entity may change over time in a way that resolves regulatory concerns.
- A successful approach should look specifically at personal participation in unauthorized gaming.

Participation by Persons or Entities who Engaged in Unauthorized Internet Gaming (cont.)

- That is, those persons with control today over a licensed operator, service provider, or marketing affiliate, cannot be persons who personally participated in operating illegal, unauthorized Internet gaming. Looked at from a different angle, if a company that engaged in unauthorized gaming changes ownership, regulators should be able to review the affect of that change in ownership under the bill's standards.

Use of Assets Developed Through Unauthorized Internet Gaming

- Entities that engaged in illegal, unauthorized Internet gaming earned significant profit, which was invested in brand names, customer databases, and software platforms needed for operation of Internet poker; as those assets are bought and sold difficult questions are raised as to whether the assets should be used in California's Internet poker industry.
- This is one of the most difficult issues; some jurisdictions have used things like penalty boxes which, for example, could stop a brand from being used for a number of years, and other jurisdictions have left these thorny issues to the regulators.
- A consensus position must be formed based on considerations of fairness, regulatory integrity, and the legal requirements at issue.

Why Internet Poker Legislation Now?

- Tribes are being left behind.
  - Commercial Entities have moved forward with iGaming in three jurisdictions, New Jersey, Nevada and Delaware. And with an ongoing billion dollar budget deficit, Pennsylvania is considering whether new internet gaming revenue would help shore up its financial position.

Lotteries

- Meanwhile, state lotteries have quickly and aggressively moved into the iGaming space.
- Illinois, Minnesota, Michigan and Georgia have been selling lottery tickets on the Internet.
- Kentucky, Maryland, Florida, New York and New Mexico appear not far behind.
- While legislation in Minnesota banning the lottery from offering electronic instant games will apparently have the unintended consequence of ending all internet lottery sales, there remain strong reasons why Internet lottery poses a threat to Indian tribes.

Lotteries (cont.)

- Because lottery statutes are often broad, movement of a state lottery into the iGaming space can occur with little to no legislative action.
- The games can quickly morph from traditional lottery tickets to instant tickets and casino style games.
- For example, Michigan has moved to “modernize” their lottery products by selling lottery tickets and tickets for scratch-off games and instant keno.

Lotteries (cont.)

- For Indian tribes these actions by Lotteries can have two important impacts:

1. Significant competition in the iGaming space can occur quickly.
2. Significant questions will be raised about the value of exclusivity in gaming compacts and how to interpret gaming compacts written before the ambitions of the lottery industry emerged.

Daily Fantasy Sports

- If the DFS Industry didn't have enough to worry about, tribal gaming and tribal ambition to operate on the Internet have now raised their heads.
- Over half the states in the country have some form of tribal gaming.
- Most tribal gaming operations benefit from contractual provisions in their tribal/state compacts, negotiated under the federal Indian Gaming Regulatory Act, that provide them with exclusive rights to offer gambling.
- Accordingly, in 2014 a bill designed to legalize DFS in Arizona was defeated when Tribes raised concerns.

Daily Fantasy Sports (cont.)

- Likewise, there is concern in Florida where the Seminole's are seeking a new compact, that the Tribe's exclusivity payments may cease if the state changes the law to allow for "Internet gaming involving wagering."
- Approaching the issue from a different vantage point, in New York the Seneca's are interested in offering DFS and have signed a partnership with Draft Day (though the business is on hold while legal clarity is sought).

Conclusion

- Tribes are making efforts to expand into online gaming, while at the same time protecting their brick and mortar facilities from competition. Though they are subject to state legislative and regulatory provisions when they operate Internet gaming, Tribes command a significant part of the U.S. Gaming market and to maintain their position, many are willing to operate beyond the boundaries of the Indian Gaming Regulatory Act.

Online Gaming in Indian Country
Program Overview[1]

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1. Legalization of Online Gaming

Many predicted that legalized online and mobile gaming would spread rapidly throughout the United States. Online gaming made the cover of *Newsweek* in 2014, with a child holding a tablet computer displaying a poker hand, and the headline "Poker Face." Predictions that online gambling would be the next wave of legalized gaming were based on the confluence of technology and generational shift, key factors shaping online gaming, a rapidly growing $33 billion global market including a variety of virtual games—casino games, sports wagering, bingo, lotteries, and poker—with an estimated $3 billion contributed by illegal bets in the U.S.

Yet in 2016, Congress has yet to legalize online gaming—and in fact recently considered federal legislation to prohibit it through the proposed Restoration of America's Wire Act (RAWA), H.R. 707, S. 1668, 114th Congress (2015). If passed, the RAWA would have overturned the 2011 U.S. Department of Justice opinion that the Interstate Wire Act did not prohibit states from authorizing non-sports-related online gaming.

Three states—Delaware, Nevada, and New Jersey—legalized online gaming on the basis of the DOJ opinion. While some argued that the DOJ opinion was insufficient to support state legalization, several other states considered following suit. Leading traditional industry operators, including Caesars Entertainment, Boyd Gaming, and MGM Resorts, partnered with online experts in social and mobile gaming and specialized providers of geolocation and other security software to grow the legal online gambling market.

And yet, to date legal online gaming has performed below expectations. In Delaware, the Gaming Competitiveness Act of 2012, Del. Code Ann. tit. 29, §§ 4801-4837 (as amended), legalized online casino gaming at the state's three commercial "racinos," which offered both casino games and race track betting at their facilities. At the time, Governor Jack Markell predicted "a couple thousand jobs" and $7.75 million in state revenue thanks to online gaming. Online gaming operations went "live" in late summer 2013, but attracted few players. Some major banks and credit cards refused to process the transactions. Far from the predicted $7.75 million in revenue during its first year, actual revenue was only $1.2 million.

Nevada legalized online poker in 2013 (Nev. Rev. Stat. ch. 463 (as amended)). The legislation also authorized Nevada to enter into compacts with other states to offer Nevada's online poker games to residents within their borders. (The state's first and, to date, only compact is with Delaware.) Ultimate Poker launched the state's first online gaming web site in April 2013. In their first year, Nevada's three online poker sites earned some $10 million (or, about what the state's casino-based poker rooms earned in a single month in 2015). But in November 2014, Ultimate Poker's parent corporation, Ultimate Gaming, closed its Nevada operations, citing a lack of profits. With online gaming legal in only three states, and potential player liquidity therefore limited to patrons physically present in those states, "[t]hese factors have combined to make the path to profitability very difficult and uncertain," explained Ultimate Gaming Chair Tom Breitling. In the meantime, the combined monthly revenues for the state's remaining two online poker sites hovered around $600,000.

New Jersey was first out of the gate with authorizing legislation in 2011, N.J. Stat. Ann. §§ 5:12-1 to 5:12-233 (as amended), and online casino games were up and running in late 2013. Governor Chris Christie audaciously had predicted that online gaming would generate $1 billion in revenue and $200 million in state taxes in the first year. By mid-2014, with under $10 million in tax revenue collected, the state treasurer succinctly—and understatedly—reported, "Clearly, the results so far have not met our expectations."

2. Tribes and Online Gaming

Tribes are constrained by the conventions of "Indian gaming" as defined and developed over the last three decades. This starts with federal law. While tribal casinos have much in common with commercial casinos, Indian gaming is subject to a unique regulatory framework under the Indian Gaming Regulatory Act (IGRA) of 1988, 25 U.S.C. §§ 2701-2721.

In IGRA, Congress set forth two primary public policy goals: promoting tribal economic development, tribal self-sufficiency, and strong tribal governments through Indian gaming; and providing effective regulation of Indian gaming, including ensuring that tribes are the primary beneficiaries of gaming operations. These policy objectives remain paramount as exercises of tribal sovereignty, and frame how and why Indian gaming is conducted.

In terms of prospects for tribal online and mobile gaming, it is important to remember three important points: first, that that IGRA's terms have established the framework for all existing tribal gaming operations, with both legal and real-world implications; second, that federal and state public policy and regulatory authority are key determinants of whether Indian gaming is legal, and the question of what are the implications for online gaming is open; and third, that IGRA's public policy goals were intended to underscore and reinforce tribal sovereignty and economic self-sufficiency, and in that context, tribes have legitimate arguments that online gaming should do the same; and that federal and state public policy and regulatory authority are key determinants of whether Indian gaming is legal. Also important: through its regulatory scheme, IGRA presumes land-based, "bricks-and-mortar" operations, but leaves room for technological innovation in virtual space. But does it leave room for online gaming? And if so, are the public policy goals and potential outcomes in line with Indian gaming as defined by IGRA—and should they be? With current online markets in mind, how aggressive should tribes be in pursuing online gaming in Indian country?

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Endnote

[1] This overview borrows from Kathryn R.L. Rand & Steven Andrew Light, "The Diffusion of Online Gaming among States, Congress, and Tribes: Innovators and Early Adopters," 19 *Gaming Law Review & Economics* 571 (2015).

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The Diffusion of Online Gaming Among States, Congress, and Tribes: Innovators and Early Adopters

Kathryn R.L. Rand and Steven Andrew Light

I. INTRODUCTION

Not long ago, online and mobile gaming was sure to be the next wave of legalized gambling in the U.S. In 2014, *Newsweek* depicted a tablet computer displaying a poker hand, held by a child, with the headline "Poker Face."[1] This provocative image reflected the confluence of technology and generational shift, key factors shaping online gaming, a rapidly growing $33 billion global market including a variety of virtual games—casino games, sports wagering, bingo, lotteries, and poker—with an estimated $3 billion contributed by illegal bets in the U.S.[2]

The spread, or diffusion, of online gaming reflects political, legal, and technological innovation. Delaware, Nevada, and New Jersey were the first states to go all in, dissatisfied with Congress's fits and starts.[3] Leading traditional industry operators, including Caesars Entertainment, Boyd Gaming, and MGM Resorts, partnered with online experts in social and mobile gaming, such as 888 Holdings, and specialized providers of geolocation and other security software, such as Locaid, to accelerate the developing virtual gambling market.[4]

At the same time, after consistent opposition, many American Indian tribes began reversing course to explore or advocate for online gaming, seeing it as a means to expand—rather than compete with—the saturated land-based Indian gaming market.[5] Generating $28 billion in revenue in 2013, tribally owned and operated casinos account for more than a quarter of the legalized gambling industry's total gross revenue across 48 states and the District of Columbia.[6] Though still an overwhelming success, the tribal gaming industry's growth has slowed, reflecting its status as a mature industry with market borders defined geographically, legally, and politically by the limits of reservation lands, and the actions—or inaction—of non-tribal institutions.

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[1] Newsweek, Aug. 22, 2014.
[2] *See* Kate Zernike, *New Jersey Now Allows Gambling via Internet*, N.Y. Times, Nov. 26, 2013, <http://www.nytimes.com/2013/11/27/nyregion/new-jersey-opens-up-for-online-gambling.html?_r=0>.
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[4] *See* Christopher Versace, *The Time is Here for Online Gaming*, Forbes, Feb. 26, 2014, <http://www.forbes.com/sites/chrisversace/2014/02/26/the-time-is-here-for-online-gaming/>.
[5] *See, e.g.*, Dave Palermo, *Second Thoughts*, Global Gaming Bus., Sept. 2012, <http://ggbmagazine.com/issue/vol-11-no-9-september-2012/article/second-thoughts1>.
[6] *See* Press Release, National Indian Gaming Commission (NIGC), 2013 Indian Gaming Revenues Increased 0.5% (Jul. 21, 2014), <http://www.nigc.gov/Media/Press_Releases/2014_Press_Releases/PR-226_07-2014.aspx>.

With three states in the virtual market, and continual debate in Congress, both the existing and the potential online and mobile gaming markets are too large, too dynamic and fluid, and too under-regulated for the federal, state, or tribal governments in the U.S. to ignore. And, indeed, they haven't.[7] Yet the legalization and diffusion of online gaming has been in significant flux, mediated by a plethora of legal, political, commercial, and cultural push and pull factors. In these uncertain times, who will push the diffusion curve forward, from innovators to early adopters, and beyond?

In this article, we explore the spread of online and mobile gaming, and the prospects for its successful diffusion among states, the federal government, and American Indian tribes. Part II briefly lays out the basic conventions of Indian gaming, establishing the stakes for tribes. In Part III, we describe the erratic push for online legalization in recent years, fueled by federal agency actions and Congress in particular, before states got into the act. Part IV explains the influential diffusion of innovations theory for how some new ideas, technologies, products, and policies spread through society, starting with innovators and early adopters who push the curve. We then apply the model in the online gaming context, as Delaware, Nevada, and New Jersey were the first to innovate through legalization. Given those states' mixed results, the question we explore in Part VI is whether other states or Congress will become early adopters. Part VII demonstrates how tribes have explored their own innovative approaches to online gaming through "free play" websites, multijurisdictional compacts, state-authorized licenses, and other online platforms that may, or may not, represent a new model of tribal gaming. In Part VIII, we circle back to the question of which jurisdictions will take the risks necessary to push the diffusion curve forward and forestall diffusion failure.

II. THE BASIC CONVENTIONS OF INDIAN GAMING

Tribes are constrained by the conventions of "Indian gaming" as defined and developed over the last three decades. This starts with federal law. While tribal casinos have much in common with commercial casinos, Indian gaming is subject to a unique regulatory framework under the Indian Gaming Regulatory Act (IGRA) of 1988.[8]

In IGRA, Congress set forth two primary public policy goals: promoting tribal economic development, tribal self-sufficiency, and strong tribal governments through Indian gaming; and providing effective regulation of Indian gaming, including ensuring that tribes are the primary beneficiaries of gaming operations.[9] These policy objectives remain paramount as exercises of tribal sovereignty, and frame how and why Indian gaming is conducted.

Stated simply, IGRA permits gaming on tribal lands by federally acknowledged tribal governments in states that have legalized at least some forms of gambling. Through IGRA, Congress established a federal independent regulatory agency with specific authority over tribal gaming (the National Indian Gaming Commission, or NIGC),[10] delegated some regulatory power to the states over casino-style gaming, and set the terms for tribal regulation of gaming.

IGRA also created three classes of Indian gaming: Class I, or traditional tribal games, falls within exclusive tribal regulatory authority; Class II, or bingo and similar games, is regulated by tribes with NIGC oversight; and Class III, or casino-style gaming, requires that the tribe enter into a compact with the state in which the casino is located.[11]

In terms of prospects for tribal online and mobile gaming, it is important to remember three important points: first, that IGRA's terms have established the framework for all existing tribal gaming operations, with both legal and real-world implications; second, that federal and state public policy and regulatory authority are key determinants of whether Indian gaming is legal, while

[7] When Congress appeared poised to act in 2011, we analyzed tribal considerations for Internet gaming. *See* Kathryn R.L. Rand and Steven Andrew Light, *Indian Gaming on the Internet: How the Indian Gaming Ethic Should Guide Tribes' Assessment of the Online Gaming Market*, 15 GAMING L. REV. & ECON. 681 (2011).
[8] 25 U.S.C. §§ 2701–2721.
[9] *Id.* § 2702.
[10] *Id.* § 2704; *see also id.* §§ 2705–2707, 2711–2716.
[11] *Id.* § 2710.

the question of what are the implications for online gaming is an open one; and third, that IGRA's public policy goals were intended to underscore and reinforce tribal sovereignty and economic self-sufficiency, and in that context, tribes have legitimate arguments that online gaming should do the same. Also important: through its regulatory scheme, IGRA presumes land-based, "bricks-and-mortar" operations, but leaves room for technological innovation in virtual space.[12] But does it leave room for online gaming? And if so, are the public policy goals and potential outcomes in line with Indian gaming as defined by IGRA—and should they be?

Before one can try to answer these questions in the tribal realm, the inconsistent, uneven, and erratic evolving politics of online gaming intervene. When it came to land-based casinos, IGRA made clear the respective roles of tribes, states, and the federal government. Not so for online or mobile gaming.

III. THE ERRATIC PUSH FOR ONLINE LEGALIZATION

Accompanying the global proliferation of offshore and allegedly wager-free poker sites, which cross all virtual U.S. "boundaries," Congress sought to curb online money-laundering activities by passing the federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).[13] The UIGEA prohibited banks, credit card companies, or other financial institutions from collecting on debts incurred on an Internet gaming website.[14] The UIGEA effectively banned American online gaming by making it illegal to process financial transactions related to online gambling, though playing online poker or similar games itself was not necessarily illegal. Nevertheless, online games became increasingly popular, even as revenue generated by the bricks-and-mortar industry cratered, then slowly rebounded, following the nation's fiscal crisis.[15]

By spring 2011, several members of Congress had joined the District of Columbia and states including California, New Jersey, Florida, and Nevada in considering the prospects for legalizing online poker or casino-style gaming.[16] Nevertheless, in April 2011, the U.S. Department of Justice enforced the UIGEA on a grand scale, raiding the most three popular online poker websites: PokerStars, Full Tilt Poker, and Absolute Poker.[17] Some commentators suggested that the Justice Department's actions were intended to short-circuit state and federal efforts to legalize online gambling.[18] Yet Congress continued to explore the legalization of online poker, state-level initiatives picked up steam, and such prominent commercial operators as Caesars Entertainment made inroads with state and international partners.[19] At the same time, American Indian tribes and their key gaming lobby and advocacy organization, the National Indian Gaming Association (NIGA), expanded their own conversa-

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[12]IGRA permits Class II games to utilize "electronic, computer or other technologic aids." *See* 25 U.S.C. §§ 2703(7), 2710(b)(1). Class III casino-style gambling includes slot machines, most casino-style table games, and "electronic facsimiles" of Class II games, all which must be regulated pursuant to a negotiated tribal-state compact. *See id.* § 2710(d)(3), (6).

[13]31 U.S.C. §§ 5361–5367.

[14]*Id.* The law "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law." It excludes most fantasy sports and legal intrastate and intertribal gaming.

[15]*See Gaming Revenue: 10-Year Trends*, American Gaming Association, <http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=8> (showing total commercial casino revenue peaked in 2007 at $34.1 billion and fell to $30.7 billion in 2009). According to one account, only about half of the online poker sites stopped accepting U.S. players after the UIGEA took effect. *What Is the Unlawful Internet Gambling Enforcement Act?*, Legal U.S. Poker Sites, n.d., <http://www.legaluspokersites.com/uigea/>.

[16]*See* Rand and Light, *Indian Gaming on the Internet*, *supra* note 7, at 684; Alexandra Berzon, *States Make Play for Web Gambling*, Wall Street J., Mar. 2, 2011, <http://online.wsj.com/article/SB10001424052748703409904576174730883294102.html>.

[17]Federal authorities seized some 75 bank accounts in 14 countries and issued criminal indictments against 11 defendants, including each of the sites' founders, charging them with bank fraud and money laundering. A civil forfeiture action reportedly was settled for $730 million. *See* Andrew Harris, *PokerStars' Scheinberg to Pay $50 Million to End U.S. Probe*, Bloomberg Businessweek, Jun. 12, 2013, <http://www.bloomberg.com/news/articles/2013-06-12/pokerstars-scheinberg-to-pay-50-million-to-end-probe>.

[18]I. Nelson Rose, *Poker's Black Friday*, 15 Gaming L. Rev. & Econ. 327 (2011).

[19]Richard N. Velotta, *Regulators OK Ties Between Caesars, Internet Gaming Company*, Las Vegas Sun, Mar. 24, 2011, <http://www.lasvegassun.com/news/2011/mar/24/regulators-oks-ties-between-caesars-internet-gaming/>.

tion about the potential implications for tribal casinos under IGRA and existing tribal-state compacts.[20]

In December 2011, the Justice Department issued a surprising legal opinion that the federal Interstate Wire Act of 1961 did not ban states from conducting online lottery sales within their borders.[21] The opinion signaled that online sales of state lottery tickets also do not conflict with the UIGEA.[22] In effect, the opinion opened the door to state legalization and regulation of online gaming.

Many states were seeking new sources of revenue to overcome the effects of the recent economic recession, so it was no surprise that California, Delaware, Florida, Nevada, New Jersey, and a dozen more states considered legislation to legalize online poker or casino-style gaming within their borders.[23] Some assumed that Congress would preempt the field with federal legislation, especially as bills to legalize online poker had been under consideration for several years. Yet these efforts did not generate serious traction until 2012, when Senator Harry Reid (D-NV) led attempts to legalize Internet poker and also to recognize a tribal role through the separate Tribal Online Gaming Act (TOGA).[24]

The TOGA purported to establish a logical and effective regulatory framework for tribal online gaming—specifically, online poker conducted by a federally recognized Indian tribe—that advanced the mutual policy goals of tribes, the federal government, and states.[25] While echoing IGRA's primary policy goals for tribes,[26] the TOGA would have created a separate federal regulatory framework apart from IGRA and absent NIGC authority, a complicating and even troubling development to some.[27]

In the meantime, several states were more aggressive and more successful in drafting and enacting laws allowing online gaming. Delaware was first out of the gate in 2012, with Nevada and New Jersey close behind. More nimble than Congress, and unconstrained by IGRA (as tribes were), these three states became the innovators of legalized online gaming.

[20]*See* Rand and Light, *Indian Gaming on the Internet*, *supra* note 7, at 689. The latter two questions were echoed in a fall 2010 NIGA Resolution:

> At a minimum, any federal internet gaming legislation must incorporate the following fundamental principles:
>
> - Indian tribes are sovereign governments with a right to operate, regulate, tax, and license Internet gaming, and those rights must not be subordinated to any non-federal authority;
> - Internet gaming authorized by Indian tribes must be available to customers in any locale where Internet gaming is not criminally prohibited;
> - Consistent with long-held federal law and policy, tribal revenues must not be subject to tax;
> - Existing tribal government rights under Tribal-State Compacts and IGRA must be respected;
> - The legislation must not open up the Indian Gaming Regulatory Act for amendments; and
> - Federal legalization of Internet gaming must provide positive economic benefits for Indian country.

Resolution MY-001 on Legislation to Legalize Internet Gaming, National Indian Gaming Association (Oct. 20, 2010), <http://indiangaming.org>.

[21]*Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, Memorandum Opinion for the Assistant Attorney General, Criminal Division, U.S. Department of Justice, Sept. 20, 2011, <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>. The opinion found that the Wire Act, which prohibited "transmission of wire communication" related to betting and wagering, does not reach online lotteries that do not involve wagering on "sporting events or contests." *Id*. at 1.

[22]While the Justice Department had issued criminal charges under the Wire Act for online gaming as recently as 2008, the April 2011 indictments tellingly did not include Wire Act charges. *See* Nathan Vardi, *Department of Justice Flip-Flops on Internet Gaming*, Forbes, Dec. 23, 2011, <http://www.forbes.com/sites/nathanvardi/2011/12/23/department-of-justice-flip-flops-on-internet-gambling/>.

[23]Michael Cooper, *As States Weigh Online Gambling, Profit May Be Small*, N.Y. Times, Jan. 17, 2012, <http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html>.

[24]Tribal Online Gaming Act of 2012, S. __, Discussion Draft, 112th Cong. 2d. Sess. (2012), <http://www.indian.senate.gov/sites/default/files/upload/files/TOGA-Sec-by-Sec-final.pdf>. For a discussion of public policy issues related to tribal online gaming, *see* Rand and Light, *Indian Gaming on the Internet*, *supra* note 7.

[25]For our take on the TOGA, *see* Kathryn R.L. Rand and Steven Andrew Light, Statement for the Record Before the U.S. Senate Committee on Indian Affairs on the Tribal Online Gaming Act (Jul. 26, 2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg78446/html/CHRG-112shrg78446.htm>. For a discussion of other policy issues related to tribal online gaming, *see* Rand and Light, *Indian Gaming on the Internet*, *supra* note 7.

[26]The bill's policy goals paralleled those of IGRA: to promote tribal economic development, self-sufficiency, and strong tribal governments; to provide effective regulation of tribal online gaming; and to encourage online gaming as a means of generating tribal revenue and providing essential government services to tribal communities. *See* Tribal Online Gaming Act of 2012, *supra* note 24.

[27]The bill assigned primary oversight and regulatory authority of tribal online gaming to the U.S. Secretary of Commerce, via a new Office of Tribal Online Gaming. *See, e.g.,* Rand and Light, Statement for the Record Before the U.S. Senate Committee on Indian Affairs, *supra* note 25.

At the leading edge of public policy innovation, the question became which states or tribes would follow suit, and when.

IV. THE DIFFUSION OF INNOVATION IN LEGALIZED ONLINE GAMING

New ideas, products, technologies, and other innovations spread through society, starting with the innovator and early adopters of the innovation and then, if the innovation is successful, moving to widespread adoption. An easy recent illustration of this phenomenon is the mobile or cellular phone. From Martin Cooper's first public call on a prototype cell phone in 1973, to Gordon Gekko's now laughably gigantic mobile phone in the 1987 film *Wall Street*, to voting on your cell phone for your favorite next *American Idol*, to the role of mobile phones in shaping political debates in the 2011 Arab Spring, cell phones—and most transformatively, the smart phones which place unlimited information in your purse or pocket—are ubiquitous. In 2015, with a global population of 7.2 billion, there were 7.08 billion cell phone subscriptions, or 96.8 for every 100 people—an unusually successful diffusion of a technological innovation that also transforms society.[28]

The diffusion of an innovation, like the mobile phone, across society was explained in 1962 by the sociologist and communications scholar Everett M. Rogers.[29] His model demonstrates the process and rate through which new ideas or technologies spread throughout a social system, shaped by the nature of the particular innovation, communication, and time. Rogers identified five categories of adopters, whose likelihood and rate of adoption are influenced by such factors as risk tolerance, opinion leadership, and skepticism:

- *innovators*;
- *early adopters*;
- *early majority*;
- *late majority*; and
- *laggards.*

Tracked on a Bell curve, and assuming successful progression through the entire model to 100% adoption within a social system, the first 2.5% of adopters are the innovators, followed by the next 13.5% as early adopters, with 68% comprising the early and late majority adopters, and the last 16% representing the laggards.[30]

Rogers' theory centered on the communication of an idea, and the role of novelty and uncertainty in determining the rate of adoption:

> Diffusion is a special type of communication in which the messages are about a new idea.…The newness [of the idea] means that some degree of uncertainty is involved in diffusion.…Uncertainty implies a lack of predictability, of structure, of information, [which influence whether the new idea will be adopted].…When new ideas are invented, diffused, and adopted or rejected, leading to certain consequences, social change occurs.[31]

Given the variables at play, not every innovation is successful: some fail to reach a tipping point or critical mass on the diffusion curve. And successfully diffused innovations may proceed at different rates of speed. Rogers further identified five characteristics of innovations that determine the rate of successful diffusion:

- *relative advantage*, or the degree to which the innovation is seen as better than what existed before;
- *compatibility*, or an innovation's alignment with existing values or needs;
- *complexity*, or how difficult it is to understand or use the innovation;
- *trialability*, or the ability to "try out" the innovation in small ways; and
- *observability*, or how visible the results of the innovation are.[32]

Rogers' diffusion model has been applied to describe the adoption of a wide range of social, technological, and policy innovations, including planting hybrid corn by farmers, prescription of pharmaceuticals by doctors, and political messaging to voters. Given the interconnectedness of novelty, technology, and uncertainty in the online and mobile gaming arena, as well as ability to identify discrete social systems in the form of political jurisdictions, the

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[28]ITU (United Nations telecommunications agency), *2005–2015 ICT Data*, ITU.INT, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.
[29]EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (5th ed. 2003).
[30]*Id.*
[31]*Id.* at 6.
[32]*Id.* at 15–16.

model is well-suited to explain the diffusion of legalized online gaming in the U.S. It allows us to explore the prospects for successful and pervasive adoption of online gaming by states, Congress (that is, the federal government), and tribes. The online gaming innovators—Delaware, Nevada, and New Jersey—represent the leading edge of the diffusion curve. The results are mixed.

V. THE INNOVATORS

A. Delaware

The Delaware Gaming Competitiveness Act of 2012[33] legalized online casino gaming with the intent of buttressing the state's three commercial "racinos," which offered both casino games and racetrack betting at their facilities. The racinos' gaming revenue was declining due to competition from gaming facilities in neighboring states.[34] At the time, Governor Jack Markell predicted "a couple thousand jobs" and $7.75 million in state revenue thanks to online gaming.[35]

In late summer 2013, Delaware's three racinos launched online operations, starting with free games, including slots, poker, blackjack, and roulette, and then fully implemented pay-to-play games a few months later. Despite the hype, early returns were lackluster, as the online games failed to attract customers, and some major banks and credit cards refused to process the transactions, citing uncertainty concerning the UIGEA's applicability.[36] Far from the predicted $7.75 million in revenue during its first year, actual revenue was only $1.2 million.[37]

In 2014, Delaware entered into an interstate compact with Nevada, allowing residents of both states to play online poker against each other. In a rare example of technology having to catch up with law, the compact was implemented thirteen months later, in March 2015. Delaware's racinos saw an immediate uptick in players, reporting significant growth—but combined monthly revenues at the three facilities remained modest, so far failing to top the record $107,000 reported in December 2013.[38] At the same time, the state legislature was considering a proposed $46 million bailout package for the state's bricks-and-mortar racinos.[39]

B. Nevada

As he signed the 2013 legislation legalizing Internet poker,[40] Nevada Governor Brian Sandoval declared, "Today I sign into law the framework that will usher in the next frontier of gaming in Nevada.…This bill is critical to our state's economy and ensures that we will continue to be the gold standard for gaming regulation."[41]

Nevada pushed the online gaming envelope by authorizing interstate online gaming through compacts with other states to offer Nevada's online poker games to residents within their borders. (As noted above, the state's first and, to date, only compact is with Delaware.) State lawmakers understood the necessity of player liquidity for online poker to succeed, as state-by-state legalization limited online gaming markets to only those players physically present in the state. By authorizing interstate compacts, Nevada innovated by paving the way for increasing the total number of potential players.

Fast-tracking implementation, Ultimate Poker launched the state's first online gaming website in April 2013. In their first year, Nevada's three online poker sites earned some $10 million, including a record $1 million in monthly revenues in July 2014.[42]

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[33]DEL. CODE ANN. tit. 29, §§ 4801-4837 (as amended).
[34]Wade Malcolm, *Casino Competition Hits Delaware in the Wallet*, USA TODAY, Jun. 20, 2013.
[35]Doug Denison, *Delaware to Allow Online Gambling*, USA TODAY, Jun. 28, 2012, <http://usatoday30.usatoday.com/news/nation/story/2012-06-28/delaware-online-gambling/55897914/1>.
[36]*See, e.g.*, Wade Malcolm, *Online Gaming Far From an Instant Hit for Delaware's Casinos*, NEWS J. (Wilmington, DE), Jan. 25, 2014, <http://www.delawareonline.com/story/tech/2014/01/24/online-gaming-far-from-an-instant-hit-for-delawares-casinos/4841937/>.
[37]*See* Jon Offredo, *Online Gambling a Bad Bet for State?*, NEWS J. (Wilmington, DE), Jul. 11, 2014, <http://www.delawareonline.com/story/news/local/2014/07/11/online-gambling-bad-bet-state/12542795/>.
[38]*See Delaware iGaming Net Proceeds*, DELAWARE LOTTERY (Jun. 2015), <http://www.delottery.com/games/igaming/finalstats.asp>.
[39]Jon Offredo, *No Dice on Delaware Casino Bailout Legislation*, NEWS J. (Wilmington, DE), Jun. 12, 2015, <http://www.delawareonline.com/story/news/local/2015/06/12/dice-delaware-casino-legislation/71129686/>.
[40]NEV. REV. STAT. ch. 463 (as amended).
[41]Press Release, Office of the Governor (NV), Sandoval Statement on Signing Internet Gaming Legislation (Feb. 21, 2013), <http://gov.nv.gov/News-and-Media/Press/2013/Sandoval-Statement-on-Signing-Internet-Gaming-Legislation/>.
[42]*See Nevada Legalizes Online Gambling*, CBS NEWS, Feb. 22, 2013, <http://www.cbsnews.com/news/nevada-legalizes-online-gambling/>; Adrienne Lu, *Online Gambling Revenues Fall Short*, USA TODAY, Jun. 24, 2014, <http://www.usatoday.com/story/news/nation/2014/06/24/stateline-online-gambling-revenues-fall-short/11306661/>.

But in November 2014, Ultimate Poker's parent corporation, Ultimate Gaming, closed its Nevada operations, citing a lack of profits. With online gaming legal in only three states, and potential player liquidity therefore limited to patrons physically present in those states, "[t]hese factors have combined to make the path to profitability very difficult and uncertain," explained Ultimate Gaming Chair Tom Breitling.[43] In the meantime, the combined monthly revenues for the state's remaining two online poker sites hovered around $600,000,[44] while the state's casino-based poker rooms brought in over $10 million in May 2015.[45] Instead of pursuing further expansion of online gaming, Nevada's legislature chose a different direction in 2015, expanding sports betting and authorizing development of "skills slots," slot machines akin to arcade games.[46]

C. New Jersey

After authorizing Internet gaming in 2011,[47] New Jersey online casino games were up and running in late 2013. As did Delaware, New Jersey limited licenses to existing Atlantic City casinos and permitted online versions of the games offered at the bricks-and-mortar casinos, including slots, blackjack, roulette, and table games.

"This was a critical decision, and one that I did not make lightly," said Governor Chris Christie.[48] He and New Jersey lawmakers, as well as numerous business interests with ties to the state's casinos, hoped online gaming would save Atlantic City's casino industry and balance the state's budget. By 2014, however, four of the twelve casinos in Atlantic City—the Atlantic Club, Showboat, Revel, and Trump Plaza—had closed, with 8,000 jobs lost and gaming revenues half of what they were just eight years ago.[49] Governor Christie audaciously had predicted that online gaming would generate $1 billion in revenue and $200 million in state taxes in the first year. By mid-2014, with under $10 million in tax revenue collected, the state treasurer succinctly—and understatedly—reported, "Clearly, the results so far have not met our expectations."[50]

VI. WHO WILL PUSH THE DIFFUSION CURVE AS EARLY ADOPTERS: STATES OR CONGRESS?

If successful, the diffusion of legalized online gaming would continue, with additional states as early adopters. As noted above, Rogers identifies five characteristics of innovations that determine the rate of successful diffusion: relative advantage, compatibility, complexity, trialability, and observability.[51] Here, each of these factors helps to assess the likelihood that more states, and which ones, will legalize online gaming, and whether Congress instead might preempt the field.

A. Relative advantage

The relative advantage of legalization of online gaming is the degree to which it is perceived as better than prohibiting online gaming. This might take into account the costs and feasibility of enforcing a ban on Internet gaming, "lost" tax revenues and economic impacts in an illegal online market, the allure of attracting new customers through a novel platform or by carving out a competitive edge in a saturated marketplace, or an overall cost-benefit analysis of the socioeconomic impacts of creating an online market as compared to existing bricks-and-mortar

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[43]Howard Stutz, *Online Poker's Ultimate Gaming Folds After 19 Months*, Las Vegas Rev.-J., Nov. 14, 2014, <http://www.reviewjournal.com/business/casinos-gaming/online-poker-s-ultimate-gaming-folds-after-19-months>.

[44]Robert DellaFave, *Nevada Online Poker Revenues: Stable for Now, but Serious Structural Concerns Remain*, Online Poker Report, Mar. 18, 2015, <http://www.onlinepokerreport.com/16004/nv-online-poker-revenue-february-2015/>.

[45]Brian Pempus, *Nevada Poker Rooms Collect $10.32 Million in May*, Cardplayer.com, Jun. 26, 2015, <http://www.cardplayer.com/poker-news/18983-nevada-poker-rooms-collect-10-32-million-in-may>.

[46]Howard Stutz, *Sandoval Signs Bills Seen Boosting Sports-Betting Handle in Nevada*, Las Vegas Rev.-J., Jun. 3, 2015, <http://www.reviewjournal.com/business/casinos-gaming/sandoval-signs-bills-seen-boosting-sports-betting-handle-nevada>; Howard Stutz, *Gov. Sandoval Signs Bill Allowing Slot Machines with Skill Factor*, Las Vegas Rev.-J., May 21, 2015, <http://www.reviewjournal.com/business/casinos-gaming/gov-sandoval-signs-bill-allowing-slot-machines-skill-factor>.

[47]N.J. Stat. Ann. §§ 5:12-1 to 5:12-233 (as amended).

[48]Chris Palmeri, *New Jersey Governor Signs Bill Allowing Online Gambling*, Bloomberg Bus., Feb. 27, 2013, <http://www.bloomberg.com/news/articles/2013-02-26/new-jersey-governor-christie-signs-law-allowing-online-bets-1->.

[49]*See* Wayne Parry, *As 4 of its 12 Casinos Closed, Atlantic City Casino Industry Grew Operating Profit 44 Percent*, Associated Press, Apr. 7, 2015.

[50]Lu, *Online Gambling Revenues Fall Short*, *supra* note 42; Ryan Hutchins, *Christie Overplayed Hand on NJ Internet Gambling*, Star-Ledger (Newark, NJ), Feb. 26, 2014, <http://www.nj.com/politics/index.ssf/2014/02/christie_made_bad_bet_on_online_gambling_revenue.html>.

[51]*See supra* text accompanying notes 29–32.

November 18, 2015

Via registered mail & email

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Re: Desert Rose Bingo – Game Classification Advisory Legal Opinion

Dear Chairman Perez, Chairman Vialpando, Mr. Chelette, and Mr. Valandra:

This letter constitutes an advisory legal opinion regarding the game classification of Desert Rose Bingo. Although neither the Nation nor the game's manufacturer formally requested this advisory legal opinion, there has been correspondence between the Santa Ysabel Tribal Gaming Commission and the NIGC Office of General Counsel regarding the classification of the game.[1] In that correspondence, the Tribal Gaming Commission informed the NIGC that it had determined the game is Class II.[2] The NIGC Office of General Counsel responded, clarifying that the NIGC retains the right to determine how a

[1] Letter to David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission, from Eric Shepard, NIGC Acting General Counsel (Feb. 13, 2015) at 2. Letter to Jonodev Chaudhuri, NIGC Chairman, from David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission (February 15, 2015).

[2] Letter to Jonodev O. Chaudhuri, NIGC Acting Chair, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (Feb. 8, 2015) at 2 (requesting that the NIGC "state affirmatively in writing that the NIGC has no objection to" the Nation's game classification); *see also* Letter to Jonodev O. Chaudhuri, NIGC Chair, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (April 30, 2015) ("I urge the NIGC not to remain silent on this issue.").

particular game should be classified under the Indian Gaming Regulatory Act.[3] Given that correspondence and the Nation's opinion on the classification of the game, I felt this legal opinion necessary.

After careful review and consideration of the materials provided by the Iipay Nation of Santa Ysabel, including a game description, tribal regulations, test lab report;[4] materials provided by the NIGC Compliance Division regarding two demonstrations of the game;[5] and explanations of game play provided by a testing laboratory,[6] I conclude that Desert Rose Bingo is a Class III game under the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(8), and NIGC regulations, 25 C.F.R. § 502.4. Desert Rose Bingo does not satisfy the statutory and regulatory definitions of bingo and does not constitute a game similar to bingo since it lacks a majority of the bingo criteria to qualify as a variant of the game.

I. Factual Background & Game Description

During late October or early November 2014 through mid-December 2014, the Nation offered Desert Rose Bingo for play,[7] which it contends is a "server-based bingo game[]" "played using a Class II gaming system known as the 'Virtual Private Network Assisted Play System' ('VPNAPS')," "a proxy system."[8] The maker of the VPNAPS system describes it as follows:

> Just as the first generation of Class II electronic bingo machines represented the "electrification" of bingo by making the technological leap in putting the classic paper &

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[3] Letter to David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission, from Eric Shepard, NIGC Acting General Counsel (Feb. 13, 2015) at 2. Early in NIGC's existence, Senator Inouye, the Chairman of the Select Committee of Indian Affairs, advised: "under the statutory framework of the Indian Gaming Regulatory Act, the determination of which machines come within the definition of Class II or Class III gaming activities has been vested in the National Indian Gaming Commission." Letter to Honorable Eddie Brown, Assistant Secretary – Indian Affairs, Interior, from Senator Daniel K. Inouye, Select Committee of Indian Affairs (Jan. 17, 1991). The D.C. Circuit Court of Appeals agrees, and has explained that the agency was created "to resolve such issues." *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000); *see also Cohen's Handbook on Federal Indian* Law, 5th ed. § 12.03 (the NIGC is tasked with determining "whether games are classified as Class II or Class III."); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1085 (7th Cir. 2015) *cert. denied,* (U.S. Oct. 5, 2015). Further, the 10th Circuit Court of Appeals has found that "[w]ith regard to classifying devices under IGRA, the NIGC's specialization warrants [] deference." *Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003). And, specifically in regard to NIGC advisory opinions on classification issues, the 10th Circuit noted that they are entitled to *Skidmore* weight. *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000).

[4] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System ("VPNAPS") at 1 (June 24, 2014); Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System (June 24, 2014); Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, "Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation"; BMM Certification Test Report (Jan. 8, 2015).

[5] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo at 3 (Jan. 23, 2015); NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor at 2 (Nov. 10, 2014).

[6] NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015).

[7] Letter to Jonodev O. Chaudhuri, NIGC Acting Chairman, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman at 1 (Feb. 8, 2015); Letter to Douglas Hatfield, NIGC Compliance Director, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman at 1 (Nov. 3, 2014); Email to Lance Vallo, NIGC Region Director, from Dave Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (Dec. 13, 2014).

[8] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System ("VPNAPS") at 1 (June 24, 2014).

> dauber bingo game into a wholly ***electronic*** format, the [VPNAPS] gaming system takes the next technological leap, deploying new software and hardware enhancements that … represent the 'digitalization' of bingo by transforming the client-server architecture of e-bingo gaming systems and putting it in an wholly ***digital*** format ….[9]

The Nation represented that the game can be played from any internet connection within the State of California and is set up to reject any attempt to access the site for play outside the boundaries of the state.[10] There is no designated game play area for this game within the Santa Ysabel gaming facility.[11] The equipment for the game is located at the Santa Ysabel Gaming Commission office and the play of the game is monitored by the Commission from the office.[12] The main game server and a backup server are located at the Santa Ysabel gaming facility.[13]

An individual uses a "web-browser enabled device[14] to access the Santa Ysabel Interactive gaming facility and its servers" via the VPNAPS.[15] Essentially, this means that an individual accesses the gaming facility in part,[16] via a virtual private network (VPN) that utilizes[17] the internet.[18] Initially, an individual must establish an account and receive approval to qualify as an Account Holder, which requires that the individual use the "virtual registration booth."[19] An individual connects to the "virtual registration booth" via the internet, without use of a VPN.[20] From there, the virtual registration booth uses

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[9] Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck, LLC (Apr. 16, 2014) with attachment "Nature of VPNAPS Gaming System" at 1; *see also* Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 5.

[10] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo at 3 (Jan. 23, 2015). As an aside, the Nation has made no representations about access to the site for play on other Tribes' Indian lands in California. For the play of this game on other Tribe's Indian lands in California to be legal, it would need to conform to the requirements of 25 U.S.C. § 2710(d)(1), including being authorized by such Tribes' NIGC approved gaming ordinances and permitted by California for any purpose by any person, organization or entity (and not otherwise specifically prohibited on Indian lands by Federal law).

[11] *Id.*

[12] *Id.*

[13] *Id.* (NIGC Compliance officers were informed that Santa Ysabel Interactive servers are linked to Kahnawakee Gaming Commission servers, located in Quebec, Canada, for the purposes of providing back-up for the Interactive game servers, but that the Kahnawakee Gaming Commission does not have any involvement with the game.).

[14] Such as a computer, a phone, or a tablet with worldwide web access.

[15] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Timeline diagram 3, *supra* ("The Nation describes the VPNAPS as a "[c]losed loop intranet system with [a] private IP address; includ[ing] hardware (servers) and software components."); Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1.

[16] The Nation's diagrams indicate that an individual connects to the "virtual registration booth" via the internet, without use of a VPN. Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Timeline diagrams 4 (registration booth), 5 (account holder department), 6 (proxy station).

[17] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Appendix B, Features of a Closed Proprietary Communications Network, *supra* at 8 ("a virtual private network shares some connectivity infrastructure with the Internet").

[18] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2 (The Nation contends that: "The VPN gateway link used by Account Holders . . . will be assigned a 'special use' Internet protocol address by the Internet Assigned Numbers Authority and uses a form of communication that utilizes secured and restricted access connections (i.e. via software and a server that authenticates users, encrypts data, and manages sessions with users) over connectivity infrastructure to create point-to-point connections segregated and isolated from the publicly accessible Internet network (also known as the World Wide Web), such as to constitute a closed proprietary communication network.").

[19] *Id.*

[20] *Id.*, Timeline diagram 4 re: registration booth.

the VPN to convey information to the Account Holder Department.[21] "The initial registration process for accessing the tribal gaming enterprise . . . gathers basic identification information."[22] Subsequently, additional information is required from the individual, including: further identification information, age and location verifications, affirmations of policies regarding privacy and other requirements, and payment and settlement information and authorizations.[23] Once established, the account contains the following information: deposits; withdrawals; amounts risked; amounts paid for prize winnings; and adjustments to the account.[24]

Upon becoming a registered Account Holder, an individual must fund his or her account.[25] "An Account Holder can fund their account by several different means, including direct cash deposits, mailed checks or money orders, wire transfers, ACH transfers, or debits from Visa or MasterCard debits or credit cards made using features of the VPNAPS."[26]

Once the player registers as an Account Holder and funds his or her account, game play is only possible via a proxy.[27] As set forth in the Nation's game description, "no live bingo game action is ever performed" by the Account Holder.[28] Instead, the "VPNAPS allow[s] the Account Holder to access a 'VPN gateway' connecting them to a virtual 'proxy engagement station' – to hire a proxy to conduct the bingo game play on their behalf."[29] "The Account Holder engages their proxy via a request form," instructing the proxy "to purchase (in U.S. currency) bingo cards to be played on their behalf."[30] On the request form, the Account Holder selects the denomination for the cards, the number of games in which to engage, the number of cards to play in each game, and the theme of the cards.[31] The Account Holder may choose the game-ending pattern or can allow the pattern to be randomly selected.[32] Thus, Account Holders "may purchase multiple cards for each game with the option to purchase cards for succeeding bingo games."[33] This allows Account Holders who purchase succeeding bingo game cards to automatically continue play in such games.[34]

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[21] *Id.*, Timeline diagram 5 re: account holder depart.
[22] *Id.* at 3.
[23] *Id.*; *see also* Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, "Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation", § 14 (Sept. 4, 2014).
[24] Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, "Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation", *supra* at § 2(a).
[25] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.
[26] *Id.*
[27] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1-2.
[28] *Id.* at 1; *see also* Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2 ("Game play, however, is achieved via 'proxy play'" and "real live bingo game action is played only by the 'proxy'").
[29] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1-2.
[30] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2-3.
[31] *Id.*, Attachment No. 4 "Desert Rose Bingo" at 1-3.
[32] *Id.*, Attachment No. 4 "Desert Rose Bingo" at 2. ("Choose A Pattern" "A pattern is randomly selected by default. If you want to choose a pattern, click on 'My Pick.'"); BMM Certification Test Report, "Desert Rose Bingo v1.5 rev 6171" (Jan. 8, 2015) at 3 ("A random game ending pattern is selected by the system for all games except the Half Hour bonus games.").
[33] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.
[34] *Id.*

Further, the system "does not require a player to stay on-line while bingo games are being played,"[35] and, in fact, an Account Holder cannot do so.[36] However, Account Holders can "witness the status of" a game, including whether the game is waiting for other players to join, the number of seconds until the game begins, and when a game is closed and is not accepting players.[37]

Next, the proxy[38] attempts to initiate play of the game on the VPNAPS "by requesting from the game action server component of the VPNAPS the purchase of one or more digital bingo cards…" "with a set domination" of a penny, 5 cents, 10 cents, 25 cents, 50 cents, or a dollar game.[39] There is "no limit to the number of cards available for purchase for each bingo game."[40] The digital bingo cards consist of a traditional 5x5 bingo matrix with numbers for each card.[41] "All digital bingo cards used by prox[ies] for a common game of bingo are unique"[42] and are "randomly distributed to each proxy."[43]

Once five or more proxies purchase digital bingo cards of comparable dollar denominations within a set period of time,[44] the game commences.[45] At that time, the game presents a screen to the tribal

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[35] *Id.* at 2-3.

[36] NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor at 2 (Nov. 10, 2014) (The Account Holder's "access and authorization permissions [are] limited to initial account set-up requests, account payment and receipt preferences, rate/speed of game replay view, game selection and selection of game graphical themes."); Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System at 4 ("the 'proxy function' element of the VPNAPS … will allow the Account Holder's proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf."); Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 ("Game play results are revealed on a time-delayed basis to the Account Holder").

[37] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Attachment No. 4 "Desert Rose Bingo" at 4.

[38] The Nation contends that "[a] Gaming Enterprise employee monitoring the proxy functions of the VPNAPS shall act as the legally designated agent of the Account Holder and, assisted by the technologic aid of proxy software elements contained in the VPNAPS, shall conduct proxy play of Class II bingo games on the Account Holder's behalf." Santa Ysabel Tribal Gaming Commission, Commission regulation SYGC 14-I011, "Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation" at 18 (Sept. 4, 2014). However, the NIGC found that "[o]n-site, 'round the clock' Tribal proxy monitors manage player relations, view real-time game play and provide 'live' chat room management. Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access." *See* NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2.

[39] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

[40] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.

[41] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2. ("The five columns of the digital bingo card face are labeled 'B''I''N''G''O' from left to right. The center space on the card is marked 'Free Space' and is considered automatically filled when contained in a pattern. The range of numbers is restricted by column, with the 'B' column containing numbers between one and fifteen inclusive, the 'I' column containing sixteen through thirty, the 'N' column containing thirty-one through forty-five, the 'G' column containing forty-six through sixty, and the 'O' column containing sixty-one through seventy-five."); *see also* BMM Certification Test Report, "Desert Rose Bingo v1.5 rev 6171" (Jan. 8, 2015) at 3 ("Bingo cards are provided by the game with spaces arranged in five (5) columns and five (5) rows, with numbers assigned to each space. There is a free spot in the center of the card.").

[42] *See* BMM Certification Test Report, *supra* at 3 ("The system is designed to preclude duplicate bingo cards from being used in the same game.").

[43] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 ("each card contains a uniquely identifying serial number").

[44] "In the event that there are not five or more prox[ies] initiating game play for a common game within the maximum allotted period, that bingo game will not be permitted to commence. Failure to attain five or more

proxy monitors[46] and Account Holders[47] showing a 15 second count down until play begins.[48] And, each proxy receives a digital bingo card(s).[49]

There is a single bingo ball draw for all prox[ies] in each bingo game.[50] "Ball numbers are randomly drawn using an electronic random number generator"[51] and "displayed respectively one (1) by one (1)."[52] A Nation document describes the sequence of game play as follows:

> Digital bingo cards are first randomly distributed to each proxy [] as requested *and then ball numbers are randomly drawn* using an electronic random number generator. *As they are drawn*, the ball numbers are released one at a time in rapid succession in the same sequence and delivered to all prox[ies] at the same time.... *The ball draw release continues* until a 'bingo' has been made (i.e. game-ending pattern is achieved) and the game ends.[53]

However, nothing in the test lab report explicitly confirms this sequence of game play events. Therefore, the test lab was consulted to clarify when the ball draw occurs. To that end, the test lab affirmed that the ball draw is done and stored before the bingo cards are created.[54] Further, the test lab explained that *after*

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prox[ies] within the allotted period will result in the common game being cancelled and the value of the purchased cards being refunded to the Account Holder's account." Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; *see also* BMM Certification Test Report, *supra* at 3 ("This game requires a minimum of five (5) players to initiate play ... The game does not initiate until the required number of players are participating.").

[45] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

[46] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 4 ("the electronic hardware and software components will permit a video or digital representation of the Class II game play and results to be displayed in real time to proxy participants").

[47] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Attachment No. 4 "Desert Rose Bingo" at 4 ("[U]sers will be able to witness the status of the game. The Time category indicates the following status: ... # of Seconds: When the timer displays numerical values in a descending order, this indicates the game starting ...").

[48] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

[49] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

[50] *Id.*

[51] *Id.* at 2 ("Each bingo game uses a pool of 75 bingo balls numbered from 1 to 75 inclusive which are randomly selected without replacement."); *see also* BMM Certification Test Report, *supra* at 3 ("The bingo numbers are randomly drawn by an electronic random number generator ...").

[52] BMM Certification Test Report, *supra* at 3.

[53] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2-3 (emphasis added). In addition, it appears that at the demonstration of the game, NIGC Compliance officers were advised that "[o]nce a bingo game is initiated, a ball draw occurs." However, it also appears that they were advised that "[t]he ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG)." NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

[54] NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015) ("The ball draw is performed all at once such that the ball draw process is complete and no further ball draws will be necessary. The ball draw happens before the cards are created.") ("In the *init_new_game* is where the ball drop is performed. ...Then ..., the game-ending pattern is assigned to the BingoGameRoom. On... the card generation takes place. Finally ... the BingoGame is played."); In addition, it also appears that NIGC Compliance officers were advised at the demonstration of the game that "[t]he ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG)."NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

the bingo cards are created and distributed to the proxies, the ball draw numbers – which were drawn before the bingo cards were created– are compared one at a time to the numbers on the bingo cards.[55] This process was described by the test lab as "virtual daubing."[56]

In fact, for game play no physical daubing occurs.[57] The VPNAPS system "is equipped with an auto-daub feature to assist the [] proxies in their play of the bingo games."[58] In this regard, "[c]omponents of the VPNAPS" system "daub[] or cover[] the corresponding numbers on the digital bingo card when matched with ball numbers."[59]

Once a match between a game-ending pattern on a bingo card and the numbers from the ball draw occurs, the game ends.[60] Each bingo game is "played to cover a single prize pattern randomly selected prior to commencement of the game from a set of seven (7) designated patterns that each require a minimum of eight (8) numbers to achieve 'bingo' (i.e. an 'X' pattern, '7' pattern, 'T' pattern, etc.)."[61] "When a winning match occurs, the numbers on the card are highlighted by flashing the matching numbers."[62] The game does not necessarily need to use all the ball draw numbers to complete a match.[63]

And even though the bingo game described above ends upon a winning match, other bingo games will continue based on the number of cards and number of consecutive succeeding games purchased by an Account Holder.[64] Once all purchased bingo cards and purchased consecutive succeeding games are exhausted, an Account Holder must once again hire a proxy to play additional games.[65]

All bingo games pay out prizes in a pari-mutual format, meaning the prize amount is a certain percentage of the pay-in amount of the game cards purchased for that common game.[66] And, if a card held by a proxy meets the standards for a bonus prize – meaning, it achieves the game-ending pattern within a pre-determined limited set of ball numbers – the proxy's card will win both the iBonus prize[67] and the

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[55] NIGC meeting with BMM Testlabs (May 28, 2015).
[56] *Id.*
[57] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2; BMM Certification Test Report, *supra* at 3 ("No daubing is required by the player to claim a winning bingo pattern.").
[58] Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck LLC (Apr. 16, 2014) with attachment "Nature of VPNAPS Gaming System" at 1.
[59] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2.
[60] NIGC meeting with BMM Testlabs (May 28, 2015); *see also* Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3 (game ends when a bingo has been made); *see also* BMM Certification Test Report, *supra* at 3 ("For a win to occur, the bingo card patterns have to completely match the predetermined bingo winning pattern.").
[61] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.
[62] BMM Certification Test Report, *supra* at 3.
[63] NIGC meeting with BMM Testlabs (May 28, 2015); BMM Certification Test Report, *supra* at 3 ("The ball draws end once a game ending pattern is achieved and for this reason the game will often draw and display a different number of balls."); *see also* Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 ("Each bingo game uses a pool of 75 bingo balls numbered 1 to 75 inclusive which are randomly selected without replacement.").
[64] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 3.
[65] *Id.*
[66] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.
[67] *Id.* at 3 (An iBonus is equal to "ten thousand times the card cost." Unless, "[i]f the iBonus is not won before one million cards are sold cumulatively for that game denomination, then the iBonus activates a 'floodgate' feature that

game-ending prize.[68] Further, upon the initial opening of the Santa Ysabel Interactive, additional bonus games were to be offered.[69] It is unclear whether they were. Moreover, additional bonus games may be offered in the future, but at this time, Santa Ysabel Interactive is shut down.[70]

Once a game is complete, "[g]ame play results are revealed on a time-delayed basis to the Account Holder."[71] "[A]n Account Holder can select the theme for watching the replay display of the game played by their proxy on their behalf."[72] And, the Account Holder's account is automatically credited or debited for game wins and losses.[73]

II. Applicable Law

IGRA defines Class II gaming in relevant part as:

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.[74]

In contrast, Class III gaming is defined under IGRA as "all forms of gaming that are not class I gaming or class II gaming."[75]

NIGC regulations further elucidate the statute, defining Class II gaming as:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

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permits the iBonus to be won without regard to the limited set of numbers drawn requirement"); *see also* BMM Certification Test Report, *supra* at 3 ("If a card matches the predetermined bingo winning pattern within a prescribed number of ball draws then the player will be awarded the iBonus in addition to the base prize. All bingo games are eligible to win the iBonus. The iBonus prize will award 10,000x the bingo game denomination.").

[68] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.

[69] *Id.* at 3-4 ("[U]pon the initial opening of Santa Ysabel Interactive, four percent (4%) of the pay-in amount for every common bingo game will be retained for prize pay-out for a 'Half Hour Bonus Game,' one percent (1%) will be retained for prize pay-out for an in game bonus ('iBonus'), and a certain percentage will be retained by Santa Ysabel Interactive.").

[70] *Id.* at 4-5.

[71] *Id.*

[72] *Id.*

[73] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 3.

[74] 25 U.S.C. § 2703(7)(A).

[75] 25 U.S.C. § 2703(8).

(1) Play for prizes with cards bearing numbers or other designations;

(2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and

(3) Win the game by being the first person to cover a designated pattern on such cards;

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.[76]

Although IGRA does not define "other games similar to bingo," NIGC regulations interpret the term to mean: "any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes."[77]

Class III gaming is defined by NIGC regulations, in relevant part, to "mean[] all forms of gaming that are not class I gaming or class II gaming, including but not limited to: … Casino games ..."[78]

Both IGRA and NIGC regulations provide that Class II games may use "electronic, computer, or other technologic aids."[79] NIGC regulations define electronic, computer or technologic aid as: "any machine or device that: (1) Assists a player or the playing of a game; (2) Is not an electronic or electromechanical facsimile; and (3) Is operated in accordance with applicable Federal communications law."[80] "Electronic, computer or other technologic aids include, but are not limited to, machines or devices that: (1) Broaden the participation levels in a common game; (2) Facilitate communication between and among gaming sites; or (3) Allow a player to play a game with or against other players rather than with or against a machine."[81] "Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games."[82]

On the other hand, an electronic or electromechanical facsimile is defined by NIGC regulations to mean "a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine."[83]

Thus, if a game contains the fundamental characteristics of a Class II game, meaning it satisfies IGRA's and NIGC regulations' definitions of Class II gaming, and is played using an electronic, computer or other technologic device, the determining factor in the game's classification is whether the device is an aid to the play of the game, in which case the game is Class II, or whether the device is a facsimile of a game, in which case the game is Class III.

III. Analysis

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[76] 25 C.F.R. § 502.3.
[77] 25 C.F.R. § 502.9.
[78] 25 C.F.R. § 502.4(a)(2).
[79] 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3(a).
[80] 25 C.F.R. § 502.7.
[81] *Id.* (b).
[82] *Id.* (c).
[83] 25 C.F.R. § 502.8.

As set forth above, the Nation asserts that Desert Rose Bingo (DRB) is a Class II server-based bingo game played using the VPNAPS gaming system, which the Nation describes as a "proxy system."[84] The Nation further maintains that the VPNAPS is a "technologic aid."[85] In particular, the Nation believes that the "proxy function" of VPNAPS, among others, serves as a technological aid,[86] because "[a] Gaming Enterprise employee monitoring the proxy functions of the VPNAPS shall act as the legally designated agent of the Account Holder and, assisted by the technologic aid of proxy software elements contained in the VPNAPS, shall conduct proxy play of Class II bingo games on the Account Holder's behalf."[87]

At bottom, however, this function involves a tribal gaming employee monitoring electronic auto-daubing[88] by watching it occur on a computer screen, which the Nation equates to "proxy play" by an Account Holder's agent.[89] As previously described, to play DRB, no physical daubing occurs,[90] because the VPNAPS "is equipped with an auto-daub feature"[91] that "daub[s] or cover[s] the corresponding numbers on the digital bingo card when matched with ball numbers."[92] Also of note is that the ball draw occurs, is completed, and is stored before the bingo cards are created.[93] After the bingo cards are created and distributed to the proxies, the previously drawn and stored ball draw numbers are compared one at a time to the numbers on the bingo cards.[94]

Given these particular facts, the task before me is to opine on the game classification of DRB. Because the Nation claims that DRB is bingo, its classification depends on whether it meets IGRA's and

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[84] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 1.
[85] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.
[86] *Id.* at 3-4.
[87] Santa Ysabel Tribal Gaming Commission, Commission regulation SYGC 14-I011, "Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation", *supra* at 18.
[88] NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2 ("[o]n-site, 'round the clock' Tribal proxy monitors manage player relations, view real-time game play and provide 'live' chat room management. Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access.").
[89] Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 4 ("the 'proxy function' element of the VPNAPS, monitored by the tribal gaming employee designated for the Account Holder, will allow the Account Holder's proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf.").
[90] NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2; BMM Certification Test Report, *supra* at 3 ("No daubing is required by the player to claim a winning bingo pattern.").
[91] Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck LLC (Apr. 16, 2014) with attachment "Nature of VPNAPS Gaming System" at 1.
[92] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2.
[93] NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015) ("The ball draw is performed all at once such that the ball draw process is complete and no further ball draws will be necessary. The ball draw happens before the cards are created.") ("In the *init_new_game* is where the ball drop is performed. …Then …, the game-ending pattern is assigned to the BingoGameRoom. On… the card generation takes place. Finally … the BingoGame is played."); In addition, it also appears that NIGC Compliance officers were advised at the demonstration of the game that "The ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG)."NIGC Compliance Division's Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.
[94] NIGC meeting with BMM Testlabs (May 28, 2015).

NIGC regulations' definition of Class II gaming, specifically, the three elements necessary to qualify as bingo. Therefore, the question that must be answered is whether DRB contains the fundamental characteristics of bingo.

A. Does DRB contain the fundamental characteristics of bingo?

In IGRA, neither Congress, in devising the statutory definition of bingo, nor the NIGC in its interpretation of the definition[95] found in its regulations implementing IGRA, intended to limit bingo to its classic form.[96] That being said, IGRA's and NIGC regulations' three explicit criteria for bingo are the legal requirements for a game to qualify as Class II bingo.[97] These criteria, as set forth above, require that: the game must be played for prizes with cards bearing numbers or other designations; cardholders must cover numbers as they are drawn; and the game must be won by the first person to cover the designated pattern.[98]

i. Is DRB played for prizes with cards bearing numbers or other designations?

The first criteria for bingo mandates that the game be "played for prizes …, with cards bearing numbers or other designations."[99] DRB uses digital bingo cards that have a traditional 5x5 bingo matrix, numbers assigned to each space and a free space in the center of the card.[100] As is apparent from the first bingo criteria, there is no requirement that bingo be played with paper cards.[101] Further, IGRA and NIGC regulations explicitly allow the use of technologic aids in the game of bingo.[102] NIGC regulations specifically cite "electronic cards for participants in bingo games" as an example of a technologic aid.[103] Moreover, both the 9th and 10th Circuit Courts of Appeal have found Megamania, a bingo game played with electronic cards, to meet this criteria.[104]

As for the requirement that the game be played for prizes, DRB awards monetary prizes in a pari-mutual format, meaning the prize amount is a certain percentage of the pay-in amount of the bingo cards purchased for the game.[105] Consequently, DRB satisfies the first criteria for bingo.

ii. Do cardholders cover numbers or other designations as they are drawn?

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[95] *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000) (NIGC's interpretation of IGRA's bingo definition is entitled to substantial deference.); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000) (affording *Chevron* deference to NIGC regulations); *Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003) (noting that NIGC regulations are given *Chevron* deference, including the regulations that classify devices under IGRA).

[96] *103 Elec. Gambling Devices*, 223 F.3d at 1096-97 (citing 57 Fed.Reg. 12382, 12382 – "The Commission does not believe Congress intended to limit bingo to its classic form.") ("[T]he NIGC's interpretation of both IGRA and the NIGC's primary IGRA implementing regulation, 25 C.F.R. § 502, rests on the proposition that neither Congress nor the Commission intended to 'limit bingo to its classic form.'").

[97] *Id.* at 1096; *162 MegaMania Gambling Devices*, 231 F.3d at 719.

[98] 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3.

[99] 25 U.S.C. § 2703(7)(A)(i)(I); 25 C.F.R. § 502.3(a)(1).

[100] BMM Certification Test Report, "Desert Rose Bingo v1.5 rev 6171" (Jan. 8, 2015) at 2-3; Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 ("digital bingo cards").

[101] *Id.*

[102] 25 U.S.C. § 2703(7)(A) & 25 C.F.R. § 502.3(a).

[103] 25 C.F.R. § 502.7(c).

[104] *103 Elec. Gambling Devices*, 223 F.3d at 1095; *162 MegaMania Gambling Devices*, 231 F.3d at 719.

[105] Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.

a. Do cardholders cover?

The second criteria of bingo mandates that the cardholders cover the numbers when they are drawn or electronically determined.[106] Specifically, IGRA provides that bingo is a game "in which *the holder of the card covers* such numbers or designations when objects [] are drawn or electronically determined."[107] NIGC regulations interpreting this provision require that for bingo, *"players cover numbers* or designations when object, similarly numbered or designated, are drawn or electronically determined."[108] As recognized by the 9th and 10th Circuit Courts of Appeal, this regulation is accorded *Chevron* deference.[109]

In addition, although IGRA states that the "holder of the card cover" and NIGC regulations further define such holder as a "player," there is no statutory or regulatory prohibition against agents "covering" on behalf of a player.[110] The NIGC Office of General Counsel has previously articulated that:

> It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. When the agent plays the [] card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA's provision regarding the holder nor NIGC's regulations that discuss the player. [111]

But here, in the play of DRB, neither the player nor the "proxy agent" takes any action or actively participates in any way to cover numbers on the electronic bingo card. As noted above, in DRB "no live bingo game action is ever performed" by the player.[112] Similarly, in its review of the DRB, the NIGC Compliance Division found that the sole functions of the "proxy agents" are to manage player relations, view real-time game play, and provide live chat room management.[113] In essence, the proxy agents' interaction with DRB game play is limited to viewing it on a computer screen. [114] Consequently, the second bingo criteria is not satisfied, because DRB does not conform with the statutory and regulatory mandate that the "holder of the card," the "player" or their agent "cover."[115] At bottom, the player or proxy agent must undertake some act to actually and actively participate in the play of the game. In this instance, the player does not participate in live game play and the proxy agent takes no action whatsoever to cover nor actively participates in the covering in any way.

This conclusion is in line with a proposed rule of the Commission, an NIGC Chair decision, and numerous prior NIGC Office of General Counsel legal opinions, all of which underscore that the player or

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[106] 25 U.S.C. § 2703(7)(A)(i)(II); 25 C.F.R. § 502.3(a)(2).
[107] 25 U.S.C. § 2703(7)(A)(i)(II) (emphasis added).
[108] 25 C.F.R. § 502.3(a)(2) (emphasis added).
[109] *See* note 93, *supra.*
[110] 25 U.S.C. § 2703(7)(A)(i)(II); 25 C.F.R. § 502.3(a)(2).
[111] Letter to Bertram E. Hirsch, Esq. from Kevin K. Washburn, NIGC General Counsel, re: National Indian Bingo Game Classification Opinion at 3 (Nov. 14, 2000) (citing 3 Am. Jur. 2D Agency § 2 (1986); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F2d 250, 272 (5th Cir. 1980); *U.S. v. Sylvanus*, 192 F.2d 96, 108 (7th Cir. 1951); and *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965)); *See also* Letter to Mr. Larry Montgomery, President and COO, Multimedia Games, Inc., from Anthony J. Hope, NIGC Chairman re: MegaBingo Game Classification Opinion at 1-2 (July 26, 1995).
[112] *See supra* notes 25 & 26.
[113] NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2 ("Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access.").
[114] *See supra* notes 55, 86, & 88.
[115] The cover of the bingo card is performed by the VPNAPS auto-daub feature, which is not initiated by the "player" or the proxy.

the agent must perform some act to be involved in the play of the game of bingo.[116] This proposed rule, Chair decision, and all of these opinions with the exception of one occurred after the issuance of the NIGC regulation that clarified the definition of electronic, computer and technologic aids.[117] So, any argument that certain explanatory language in the preamble to the final rule defining electronic, computer and technologic aids, allows a wholly electronic bingo game that *omits any* player participation to qualify as Class II bingo is specious.[118]

In the same vein, this conclusion – that the player or agent must actively participate in the play of the game - is also consistent with an opinion from the United States District Court for the Northern District of California, which addressed the question of whether MegaMania, an electronic gaming device, qualified as bingo or a game similar to bingo.[119] In so doing, the court examined whether the "covering" done by the player met the criteria for bingo. In MegaMania, the device automatically identified the numbers on each electronic bingo card that were electronically determined, and the player "covered" them on the card by pushing a daub button.[120] In holding that this method of covering was sufficient to

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[116] *See* 78 Fed. Reg. 37998, 37999 (June 25, 2013) (In the proposed rule, the player takes the initial action of touching a button. To this end, the proposal stated: "In one touch bingo, the player covers the numbers or designations when drawn. That step is achieved by the assistance of a machine via the first, and only touch of the button."); Letter to Mayor Karl S. Cook, Jr. from Philip N. Hogen, NIGC Chair, re: Metlakatla Indian Community Gaming Ordinance Amendment Disapproval (June 4, 2008) at 5 ("IGRA's definition of bingo, particularly the repeated use of the word 'cover' in the second and third statutory elements of the game … identifies another necessary element of the game - a requirement that the players actually and actively participate in the play of the game."); Letter to Bertram E. Hirsch, Esq. from Kevin K. Washburn, NIGC General Counsel, re: National Indian Bingo Game Classification Opinion at 6-7 (Nov. 14, 2000) (agent uses reader/minder to cover and using such a device requires the agent to take an independent action to enter into the machine data identifying each letter and number combination drawn); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 12-13 (Sept. 26, 2003); Letter to Joseph H. Webster, Esq., Hobbs, Straus, Dean & Walker from Penny J. Coleman, NIGC Acting General Counsel re: Rocket FastPlay Bingo 1.0 Advisory Opinion at 12 (Oct. 18, 2004) ("FastPlay meets the requirement that a player cover when objects are drawn in that numbers are not stored on the game's computer. Instead, numbers are released sequentially and displayed in the order released and players all have the same opportunity to cover (or daub) immediately upon release of drawn balls."); Letter to Jack Saltiel, Cadillac Jack, Inc., Chief Technical Officer from Penny J. Coleman, NIGC Acting General Counsel re: Cadillac Jack Triple Threat Bingo Advisory Game Classification Opinion at 12 (Dec. 23, 2004)("the player is actually performing some act to be involved in the play of the game of bingo."); Letter to Nancy McAlister, Commissioner, Eastern Shawnee Tribe of Oklahoma from Penny J. Coleman, NIGC Acting General Counsel at 1 (April 22, 2005) ("As I understand Lucky Lotto, it automatically daubs matching numbers for the player without the player taking any overt action, and it lacks a designated game-winning pattern. These features make the game Class III."); Letter to David Matheson, President, Bingo Nation Network Authority, from Eric Shepard, NIGC Acting General Counsel re: Bingo Nation Game Advisory Opinion at 5 (June 27, 2014) ("Following the draw of a number, the proxy player must press a 'Daub/Claim' button on their minding device, which covers the corresponding number on each matching game card.").

[117] *Id.*, 67 Fed. Reg. 41166-02 "Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo" (June 17, 2002).

[118] *See* 67 Fed. Reg. 41166-02, 41171, Summary of Comments section ("IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities. A manual component to the game is not necessary. What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo, is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone or against a machine rather than with or against other players.").

[119] *United States v. 103 Elec. Gambling Devices*, No. C 98-1984 CRB, 1998 WL 827586, at *1 (N.D. Cal. Nov. 23, 1998) *aff'd,* 223 F.3d 1091 (9th Cir. 2000).

[120] *Id.* at *1 and *6.

qualify as bingo, the court explained: "[t]here is nothing in IGRA or its implementing regulations [] that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered."[121] Thus, in finding that IGRA and NIGC regulations "merely require a player to cover," the court recognized the requirement for bingo that the player carry out some action to "cover."

Since in DRB neither the player nor the proxy agent takes any action to cover, nor actually and actively participates in any way in such covering, the game fails to meet the second criteria for bingo.

b. Pre-drawn numbers

Furthermore, there is yet another reason that DRB does not comply with the second criteria for bingo - that "players … [c]over numbers or designations *when* … drawn or electronically determined."[122] In a guidance bulletin, the NIGC stated: "[w]e conclude that the statutory requirement for bingo is met only when numbers or designations are drawn *after* a player begins play of the game."[123] This is due to the statutory and regulatory mandate that a player cover *when* numbers are drawn.[124] Specifically, the bulletin explained:

> Some have argued that, for the purposes of IGRA, "when" means "after" and that it should not matter how long after balls are drawn that the card is daubed, thus allowing for pre-drawn numbers. This is in opposition to the common meaning of the word "when." Webster's Collegiate Dictionary (10th ed.) defines the conjunction "when" as: 1a: at or during the time that: WHILE…b: just at the moment that…c: at any or every time that…2: in the event that: IF…3a: considering that…b: in spite of the fact that: ALTHOUGH…4: the time or occasion at or in which…. This definition is counter to the proposition that "when" means "at any point after." The draw by either a bingo blower or some other method where numbers are "electronically determined," must occur in real time or very near in real-time to the actual play of the particular bingo game.[125]

In sum, the bulletin concluded that "the requirement that a player cover *when* objects are drawn means that games that use pre-drawn numbers cannot constitute bingo."[126]

NIGC Office of General Counsel legal opinions have reiterated and expounded on this guidance, by analyzing particular gaming systems to ascertain whether they fulfill the requirement that "a player cover when numbers are drawn." Such opinions have found that this criteria is complied with when numbers are not stored in the game system's computer; players purchase their cards *before* the numbers

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[121] *Id.* at *6; *see also United States v. 162 MegaMania Gambling Devices*, No. 97-C-1140-K (N.D. Okla. October 26, 1998), *aff'd*, 231 F.3d 713 (10th Cir. 2000) (court found pressing a daub button was sufficient to "cover" for purposes of bingo).
[122] 25 C.F.R. § 502.3(a)(2) (emphasis added).
[123] NIGC Bulletin No. 03-3 "Guidance on Classifying Games with Pre-Drawn Numbers" (Sept. 23, 2003) at 1 (emphasis added).
[124] *Id.* at 2.
[125] *Id.*
[126] *Id.*

are generated; and, once the numbers are generated, the players may take action to cover.[127] As to the Triple Threat Bingo system, which met this criteria, OGC explained:

> The electronic cards … are provided to the player before actual game play begins. … Thus a player is actually playing the card and hoping to achieve a winning bingo pattern on the card when the numbers are drawn rather than buying a card with winning numbers pre-selected and hoping his purchase yielded a card containing a winning pattern. … A player "daubs" or covers the numbers on the player's card when the numbers are electronically determined. The numbers are determined in real time by a random number generator.[128]

In contrast, in Quick Shot Bingo, where a bingo blower chose certain numbers, the numbers were then posted on boards, and then customers purchased bingo cards to compare the numbers on the card to the numbers that had been drawn, the NIGC Office of General Counsel opined that the game did not meet the regulatory definition of bingo for several reasons, including the fact that the players did not cover the numbers when they were drawn but instead all the winning numbers were drawn and posted before the players bought their cards.[129] Similarly, as to Meganaza, the Office of General Counsel found that the covering did not occur when the numbers were drawn, because pre-determined numbers - the numbers were chosen by a random number generator at some time prior to the cards being sold - were revealed on the game's screen at the same time as such numbers on electronic bingo card were automatically covered.[130]

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[127] Letter to Clifton Lind, President & COO, Multimedia Games, Inc., from Penny J. Coleman, NIGC Acting General Counsel, re: Reel Time Bingo at 6 (Sept. 23, 2003); Letter to Michael Fletcher, CEO, NOV Gaming Inc., from Penny J. Coleman, NIGC Acting General Counsel, re: NOVA Bingo System Advisory Classification Opinion at 10 (Apr. 4, 2005); *See also* Letter to Alan Frank, The HomeBingo Network, from Penny J. Coleman, NIGC Acting General Counsel re: 8 Draw Kingo at 6 (May 11, 2004) ("It does not appear that numbers are drawn before the play of the game, which would negate a conclusion that the game is either bingo or a game similar to bingo."); *Compare* Letter to Frank Banyai and Mike Macke, Cadillac Jack, Inc., from Kevin K. Washburn, NIGC General Counsel at 2, 3 & 8 (Mar. 22, 2001) (finding that game satisfied criteria even though the numbers were drawn via a bingo blower and then put on a computer chip in the system, but emphasizing that "an important consideration … is the real-time or near real-time selection of the winning numbers in the bingo blower draw compared to the display of those numbers. It is significant also that players are playing against each other in real time *as the numbers are drawn and called"*); Letter to David Matheson, President, Bingo Nation Network Authority, from Eric Shepard, NIGC Acting General Counsel re: Bingo Nation Game Advisory Opinion at 2, 3, (June 27, 2014) (Drawings are conducted using a bingo ball blower and "once the game begins, the drawn numbers are entered into server software." Thus, the pre-drawn numbers were not inserted into the game system until the game began.).

[128] Letter to Jack Saltiel, Cadillac Jack, Inc., Chief Technical Officer from Penny J. Coleman, NIGC Acting General Counsel re: Cadillac Jack Triple Threat Bingo Advisory Game Classification Opinion at 11 (Dec. 23, 2004); *see also* Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 12 (Sept. 26, 2003) ("It is important to note that the electronic cards in 'Mystery Bingo' are provided to the player before actual game play begins. … Thus a player is actually playing a card and hoping to achieve a winning pattern on the card when the numbers are drawn rather than buying a card with winning numbers pre-selected and hoping this purchase yielded a card containing a winning pattern.").

[129] Memorandum to Region Chief, Region IV from NIGC Acting General Counsel re: Quick Shot Bingo (Sept. 19, 2002) at 1-2; *see also* Memorandum to Tadd Johnson, NIGC Chair, from Penny Coleman, Acting General Counsel re: King Dobber bingo card dispenser (Mar. 11, 1998) (opining that the game is not bingo because it does not meet the regulatory criteria of covering numbers when they are drawn since all the winning numbers are drawn and posted on boards before the players buy cards and then the players compare and cover the numbers on their cards).

[130] Letter to Mr. Clifton Lind, President & COO, Multimedia Games, Inc., from Penny J. Coleman, NIGC Acting General Counsel at 6-7 (Apr. 15, 2002).

In the matter at hand, the ball draw occurs, is completed, and is stored in DRB before the bingo cards are created.[131] Then, after the cards are created and "distributed" to the proxy agents, the ball draw numbers are compared one at a time to the numbers on the bingo cards.[132] Hence, DRB uses pre-drawn numbers - the winning numbers are produced by a random number generator before the bingo cards are made and issued. As a consequence, in the play of DRB, the bingo card numbers are not covered *when* the ball draw numbers are drawn, and therefore, DRB does not satisfy the second criteria for bingo.

iii. Is DRB won by the first person to cover the designated pattern?

The third criteria of bingo requires the game be won by the first person to cover a previously designated pattern.[133] Because, as explained in section A(ii)(a) herein, in DRB, neither the player nor the proxy agent takes any action to cover or actually and actively participates in such covering, DRB does not fulfill the third criteria for bingo either.

B. Is DRB a game similar to bingo?

IGRA permits games similar to bingo to qualify as Class II if they are played in the same location as bingo.[134] Although IGRA does not define "games similar to bingo," NIGC regulations do, interpreting the term to mean "any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes."[135]

In devising this definition, the Commission explained that "games similar to bingo" have to satisfy some, but not all, of the three criteria for bingo:

> It is particularly noteworthy that the statutory listing of specific games followed by the phrase, "and other games similar to bingo," can be read in two ways. First, it can be interpreted to mean merely that the specified games are similar to bingo. The Commission finds this interpretation unlikely. Alternatively, this language can be interpreted to leave class II open to other games that are bingo-like, but that do not fit the precise statutory definition of bingo. This second reading, that the class was left open to a group of non-specific, bingo-like games, or "variants" on the game of bingo, is consistent with legislative history and the holdings of the Courts of Appeal for the Ninth and Tenth Circuits in their analysis of the game Megamania []. … It defies logic to conclude that the Congress intended to require that these other "similar" games satisfy the same statutory requirements of bingo. If this were Congress' intent, there would have been no need for the phrase "and other games similar to bingo." These games would not in effect be "similar" to bingo; they would be bingo. The definition announced today corrects this flaw by accurately stating that "other games similar to bingo" constitute a "variant" on the game and do not necessarily meet each of the elements specified in the statutory definition of bingo.[136]

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[131] *See supra* notes 52 & 91.
[132] *See supra* notes 53 & 92. As explained previously, the proxy agents have no physical interaction with the game, which is why the quotation marks are used around the term distributed.
[133] 25 U.S.C. § 2703(7)(A)(i)(III); 25 C.F.R. § 502.3(a)(3).
[134] 25 U.S.C. § 2703(7)(A(i)(III).
[135] 25 C.F.R. § 502.9.
[136] 67 FR 41166-02 "Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo" (June 17, 2002).

As to this matter, DRB does not qualify as a game similar to bingo. To qualify as such, a game must be "bingo-like," meaning close enough to bingo to be considered a variant. In that vein, a game must include nearly all the characteristics that are inherent in bingo's statutory and regulatory criteria. Because DRB only possesses one of the three criteria, it fails to come within the zone of games that may be considered a variant.[137] In this regard, in DRB, the ball draw numbers are electronically drawn before the bingo cards are created and distributed, which eliminates the possibility that DRB qualifies as a game similar to bingo.[138] Additionally, DRB utilizes an auto-daub and, as a consequence, neither the player nor the proxy agent cover. Taking an act to cover or actually and actively participating in such covering is an essential element to the play of bingo or a variant of the game.[139] Thus, for this reason as well, DRB is not a game similar to bingo. And, even if DRB met the requirements of a game similar to bingo, it is not played in the same location as bingo, so cannot be considered as Class II under IGRA, 25 U.S.C. § 2703(7)(A(i)(III), or NIGC regulations, 25 C.F.R. § 502.9.

IV. Conclusion

For the reasons set forth in detail above, DRB does not qualify as a Class II game. It is not bingo because it does not satisfy two of the three statutory and regulatory criteria for the game. Nor is it a game similar to bingo, as it is not a variant on the game and lacks a majority of the elements that make-up bingo under IGRA and NIGC regulations. Besides, even if DRB did qualify as a game similar to bingo, it is not played in the same location as bingo and, therefore, cannot constitute a Class II game. Thus, in the legal opinion of the NIGC Office of General Counsel, DRB constitutes a Class III game.[140]

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised or reconsidered by a subsequent General Counsel or Acting General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chairman or the NIGC Commission, who are free to disagree with it in any action that comes before them or via the Chairman's prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court. Further, by issuing this advisory legal

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[137] *See* Letter to Alan Frank, The HomeBingo Network, from Penny J. Coleman, NIGC Acting General Counsel re: 8 Draw Kingo at 8 (May 11, 2004).

[138] *Id.* at 6 ("It does not appear that numbers are drawn before the play of the game, which would negate a conclusion that the game is either bingo or a game similar to bingo."); NIGC Bulletin No. 03-3 "Guidance on Classifying Games with Pre-Drawn Numbers" (Sept. 23, 2003) at 1 ("We conclude that the statutory requirement for bingo is met only when numbers or designations are drawn after a player begins play of the game. We conclude further that, in order to constitute a game similar to bingo, numbers must be likewise be drawn after the play of the game begins.").

[139] *See* Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 13 (Sept. 26, 2003) ("We find that covering numbers as they are called is an essential ingredient to the play of the game of bingo or a variant of that game. We conclude that a game offered as class II bingo or a 'game similar to bingo' must provide a 'daub' or 'cover' requirement for all players after the bingo numbers are announced and not just for winning players."); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 3 fn. 5 (May 26, 2004) (same).

[140] Although the NIGC Office of General Counsel is aware of and has considered the opinion of the United States District Court for the Southern District of California in *California v. Iipay Nation of Santa Ysabel et al.* that provides a differing analysis as to why Desert Rose Bingo constitutes a Class III game, that opinion and analysis is not binding on this office or the agency, as neither the United States nor the NIGC is a party to the suit. *See California v. Iipay Nation of Santa Ysabel et al.*, No. 14cv2724 AJB (NLS) (S.D. CA. Dec. 12, 2014). Nor is the opinion circuit law that the NIGC is bound to follow. *See N.L.R.B. v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Cardoza-Fonseca v. U.S.I.N.S.*, 767 F.2d 1448, 1453-54 (9th Cir. 1985) *aff'd sub nom. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987); *Spraic v. U.S. R.R. Ret. Bd.*, 735 F.2d 1208, 1211 (9th Cir. 1984); *Ithaca Coll. v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980).

opinion, the NIGC Office of General Counsel does not speak on behalf of the U.S. Department of Justice or the United States Attorneys in regard to their enforcement responsibilities.[141]

If you have any questions regarding this legal opinion, please contact Jo-Ann M. Shyloski, Of Counsel, at (202) 632-7003.

Sincerely,

Michael Hoenig
General Counsel

[141] *See, e.g.,* 18 U.S.C. §§ 1166-1168; 15 U.S.C. §§ 1171-1178; 31 U.S.C. §§ 5361-5367.

THE COMPETITIVE IMPACT OF TAX RATE POLICY; TAXES; WITHHOLDING; FINCEN REPORTING

SECTION L

20th Annual National Institute on the Gaming Law Minefield

FinCEN Reporting

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Background

FIs Must Comply with Obligatory Laws & Regulations at the Federal & State Level

Casinos, MSBs and other FIs face many challenges today, including: financial performance, shareholder value, fierce competition, and **Regulatory Pressure**

In USA, these FIs are supervised/regulated by:

- The IRS
- FinCEN
- State Banking or Gaming Regulators

Origin of Reporting Requirements

- Currency & Foreign Transactions Reporting Act of 1970 (aka, the BSA) requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering

- FIs include: banks; credit unions; foreign bank branches/agencies; casinos; card clubs; insurance companies; travel agencies; car, boat, or airplane dealers; securities brokers/dealers; MSBs; jewelers; pawnbrokers; and futures/commodities brokers

Money Laundering Reporting Crimes

- Money Laundering Control Act (1986), 18 U.S.C. §§ 1956 and 1957, gave law enforcement new weapons to combat drug trafficking

- Two basic categories of crimes:
  - Not complying with reporting requirements
  - Certain acts that help launder funds

Money Laundering/Financial Crimes

- Money laundering alive and well globally.
- A 2014 State Department report:
  - 66 countries (including U.S., Afghanistan, Iran, Iraq, Mexico, China, Japan, Israel, Canada, and the U.K.): "primary concern" for money laundering
  - 69 countries as a "concern" for money laundering

Money Laundering/Financial Crimes

- In 2010, estimated proceeds from all financial crimes in US (except tax evasion): $300 billion
  - Illegal drug sales: $64 billion
  - All other forms (mostly fraud): $236 billion

- Fraud proceeds rarely start off as cash, but criminals use MSBs, check cashers, ATMs, and normal bank or brokerage transfers to cash out fraud proceeds

2015 National Money Laundering Risk Assessment

Money Laundering/Financial Crimes

- Cases show: illicit proceeds from drug trafficking, illegal gambling, and fraud are placed in casinos directly as cash or transferred via wire or check
- Most significant ML vulnerability: accessing foreign funds of questionable origin through US casinos, patron using some money at property, then withdrawing remainder in US or elsewhere
- Minimal gaming often indicator of ML
- Challenge: licit and illicit cash often indistinguishable

2015 National Money Laundering Risk Assessment

Casino AML Program Requirements

***31 CFR §1021.210(b)(2)(i) – (v)*

1. System of internal controls to assure ongoing compliance
2. Internal and/or external independent testing for compliance
3. Training of casino personnel
4. Individual or individuals to assure day-to-day compliance
5. Procedures for using all available information
6. The use of automated programs to aid in assuring compliance

Money Laundering Crimes (Reporting)

- CTR: each deposit, withdrawal, exchange of currency or other payment of currency > $10,000 by, through, or to FI
- Form 8300: any transaction > $10,000 in "coin or currency," of the U.S. or another country
- CMIR: transporting, mailing, or shipping > $10,000 in currency/monetary inst. at once into or out of U.S.
- Structuring: crime to breaking up transactions to avoid reporting requirements
- Suspicious Activity Report

History of SARs

- Annunzio-Wylie AML Act of 1992: Required financial institutions to file SARs
- Depository Institutions started filing in 1996
- MSBs started filing in 2002
- Casinos/Card Clubs and others starting filing in 2003
- Form itself has undergone several facelifts, most recently in 2012

Dec. 2003 FinCEN Guidance: Casino Suspicious Activity Reporting Guidance

- Must at "*minimum*… have . . . a system of internal controls reasonably designed to prevent money laundering"
- Casino required to use *ALL AVAILABLE* information to engage in due diligence designed to prevent money laundering

Why to File a SAR

Casino MUST file SAR if know, suspect, or have reason to suspect transaction:

(1) involved funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity;

31 CFR § 103.21 (Issued Dec 2003)

Why to File SAR (con't)

What are "Funds Derived from Illegal Activity?"

- The phrase "funds derived from illegal activity" means the monetary proceeds of a criminal act.
- Example. A drug trafficker sells drugs to a user for $500. The money received from the drug purchaser, the $500, is proceeds of the drug sale and is "funds derived from illegal activity."

Why to File a SAR

Casino MUST file SAR if know, suspect, or have reason to suspect transaction:

(2) were designed to evade the reporting/recordkeeping requirements of the BSA;

31 CFR § 103.21 (Issued Dec 2003)

Why to File SAR (con't)

What is a transaction that "Is Designed to Evade BSA Requirements?"

- Example. Patron conducting an $11,000 cash transaction attempts to bribe a casino employee not to file a CTR.
- Example. Patron asks cage employee how much money he can cash out before employee must complete paperwork.

Why to File a SAR

Casino MUST file SAR if know, suspect, or have reason to suspect transaction:

(3) had no business or apparent lawful purpose or was not the sort in which the particular customer would normally be expected to engage, AND institution knew of no reasonable explanation for the transaction after examining the available facts; or

31 CFR § 103.21 (Issued Dec 2003)

Why to File SAR (con't)

What is a Transaction that "Serves No Business or Apparent Lawful Purpose?"

- Some transactions may be conducted in such a way that they appear unusual or suspicious, i.e., broken up transfers, unknown beneficiaries, inconvenient routing of funds.
- However, additional facts, if known by the reporting business, might disclose a reasonable basis for what, at first, appears unusual or suspicious.

Why to File a SAR

Casino MUST file SAR if know, suspect, or have reason to suspect transaction:

(4) Involves use of the FI to facilitate criminal activity.

31 CFR § 103.21 (Issued Dec 2003)

Why to File SAR (con't)

What is a transaction that "Involves Use of the FI to Facilitate Criminal Activity?"

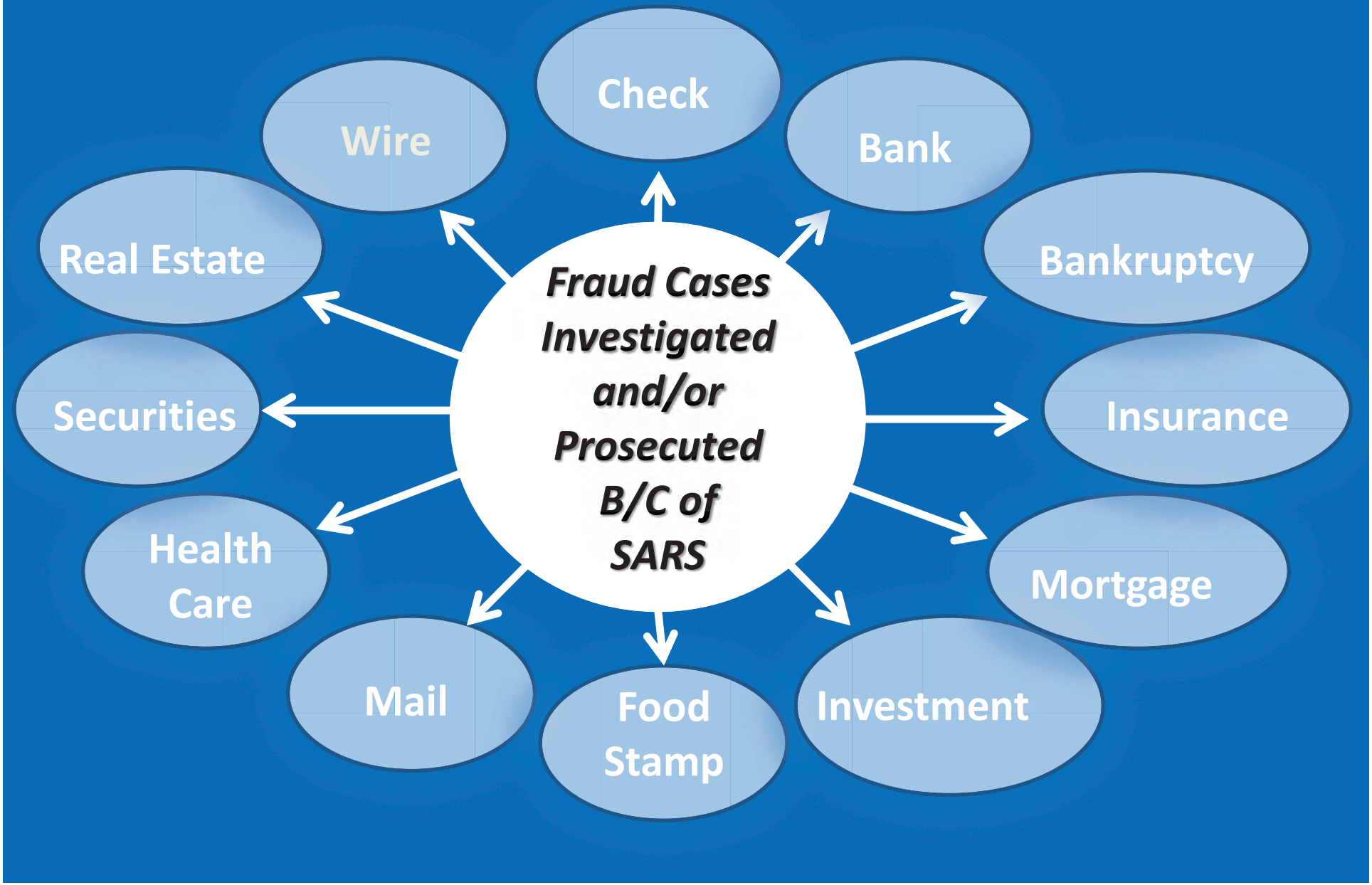
- **Example.** An MSB suspects that a customer is sending a money transfer in order to fund a terrorist organization.
- It is important to note that size alone, such as a large cash transaction or money transfer, should not be a determining factor in the decision to file a SAR.
- Factors that should contribute to that decision, however, include the following: the size, frequency and nature of the transactions; the MSB's experience with the customer and other individuals or entities associated with the transaction (if any); and the norm for such transactions within the MSB's line of business and geographic area.

When to File SAR

- **Where a subject has been identified, timeline:**
  - Identification of suspicious activity and subject: Day 0
  - Deadline for initial SAR filing: Day 30
  - End of 90 day review: Day 120
  - Deadline for continuing activity SAR with subject information: Day 150 (120 days from the date of the initial filing on Day 30)
- **Where a subject has NOT been identified, timeline:**
  - Identification of suspicious activity: Day 0
  - Deadline for initial filing if subject not identified: Day 60

FinCEN Guidance -http://www.fincen.gov/whatsnew/html/sar_faqs.html

SARs Matter


Check
Wire
Bank
Real Estate
Bankruptcy
Fraud Cases Investigated and/or Prosecuted B/C of SARS
Securities
Insurance
Health Care
Mortgage
Mail
Food Stamp
Investment

SARs Matter

Casinos/Card Clubs Filings (March 2012-Aug 2015)

Month	2012	2013	2014	2015
January	0	503	3,480	4,404
February	0	569	3,025	3,912
March	0	1,287	3,326	3,890
April	54	2,400	3,321	4,190
May	54	2,515	3,617	4,222
June	90	2,413	3,488	4,282
July	194	2,883	4,560	4,494
August	263	2,803	4,770	4,093
September	279	3,034	4,114	--
October	376	3,117	4,431	--
November	386	2,982	4,021	--
December	423	2,999	4,422	--
Subtotal	2,119	27,505	46,575	33,487

Recent Cases

- Casino patron wires large amounts of funds to pay for services or put on account, but the money comes from originators casino could not link to the customer/patron.
- That same customer's wires come from businesses, cities, or countries to which he has no visible link.
- That customer also breaks up his wire transfers into numerous smaller transfers.

http://www.nytimes.com/2013/08/28/us/lasvegas-casino-settles-in-money-laundering-inquiry.html

Recent Cases

1. 1998: FinCEN fines $477,000
2. Repeated BSA violations back to 2003
3. Violations discovered in prior IRS exams
4. Failed to:

    -report suspicious transactions;

    -properly file CTRs;

    -keep appropriate required records;

FinCEN Fines Trump Taj Mahal Casino Resort $10 Million for Significant and Long Standing Anti-Money Laundering Violations

http://www.fincen.gov/news_room/nr/html/20150306.html (March 2015)

Recent Cases

1. Failed to develop and implement AML program
2. No compliance officer/responsible person
3. No independent testing
4. No training
5. Failed to file thousands of CTRs
6. Mgt willfully facilitated suspicious transactions and provided hints about avoiding U.S. & foreign laws
7. Mgt helped UC agents posing as money launderers

FinCEN Fines Tinian Dynasty Hotel & Casino $75 Million for Egregious Anti-Money Laundering Violations

http://www.fincen.gov/whatsnew/html/20150603.html (June 2015)

Recent Cases

- Casino had private gaming salons for top patrons
- They can gamble millions, often anonymously
- No AML scrutiny, leading to biggest and riskiest transactions going unreported
- Failed to monitor large suspicious wires from overseas branch offices

FinCEN Reaches $8 Million Settlement with Caesars Palace for Lax Anti-Money Laundering Controls on High Rollers

http://www.fincen.gov/news_room/nr/html/20150908.html (Sept. 2015)

Recent Cases

1. Highly deficient internal controls
2. Inadequate independent testing
3. Deficient training

FinCEN Reaches $8 Million Settlement with Caesars Palace for Lax Anti-Money Laundering Controls on High Rollers

http://www.fincen.gov/news_room/nr/html/20150908.html (Sept. 2015)

Recent Cases

4. Didn't use all available information across depts.
5. Failed to file over 100 SARs during exam period re:

   -unidentified guests team play at VIP gaming salons;

   -suspicious transactions at branches;

   -3rd party payments by businesses and individuals;

   -structuring; minimal play and bill stuffing;

   -chip walking; and

   -observed suspicious behavior by individual patrons

FinCEN Reaches $8 Million Settlement with Caesars Palace for Lax Anti-Money Laundering Controls on High Rollers
http://www.fincen.gov/news_room/nr/html/20150908.html (Sept. 2015)

Recent Cases

1. 2011: California GCB consent fine: $550,000 re: loansharking at club (1/2 stayed)
2. BSA program and reporting violations from March 2009 through April 2012
3. Failed to:

    -establish/implement effective AML program;

    -report nine identified suspicious transactions

FinCEN's First Card Club Enforcement Action Leads to $650k Settlement with California's Oaks Card Club

https://www.fincen.gov/whatsnew/html/20151217.html (December 2015)

Questions?

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A Primer on Casino Bankruptcy Proceedings

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Introduction

A bankruptcy proceeding involving a gaming business involves the interaction of federal law and the state regulation of an industry. For many states, the gaming industry has become a staple, and highly dependent, source of revenue.[1] Atlantic City, Detroit, and New Orleans placed casinos at the center point of economic revival plans.[2] Other communities have followed suit, with the most recent examples include Pennsylvania, where casinos have been operating already for a few years, and Ohio, which authorized commercial gambling in Cleveland, Columbus, and Toledo that began operations in 2012. The potential for significant tax revenue from commercial gambling is often the reason to authorize commercial gambling, which has, in part, contributed to the gaming industry's rapid expansion across the United States.

The economic meltdown and corresponding frozen credit markets from 2008 to 2011 dispelled the long-standing presumption that the casino industry is immune from economic downturns. Several commercial casino-operating companies entered bankruptcy beginning in 2008. These recent bankruptcy proceedings have involved casinos located throughout the United States, including Detroit-based Greektown Casino, Nevada-based and national casino operator Station Casino, national casino operator Tropicana Entertainment, Atlantic City-based Trump Entertainment, Las Vegas-based Riviera Casino, and the Indiana-based racino, Indiana Live!.

As the casino industry rapidly expanded in the late 1990s and early 2000s, many casino operators incurred unsustainable debt levels. As banks failed and credit became commercially unavailable, highly leveraged casinos, along with casinos plagued by poor management, became susceptible to financial collapse. The prospect for bankruptcy was simply a matter of time. As evidenced by the numerous Chapter 11 proceedings involving casinos, the use of bankruptcy to restructure debt and financial operations of casino business enterprises has started and will likely continue as the commercial casino industry continues to expand.[3]

Casino bankruptcy proceedings have received the attention of the financial sector, the gaming industry, and the legal industry. A Chapter 11 bankruptcy proceeding involving a commercial casino is not a new legal development.[4] Rather, the first instance of a casino bankruptcy dates back to 1985, when two Atlantic City-based casinos, the Atlantis Casino and the Dunes Casino, entered bankruptcy protection.[5] It was not, however, until 2008 that casino bankruptcy proceedings occurred with greater frequency.

The gaming industry is heavily regulated by the states pursuant to the states' police powers.[6] Bankruptcy is a unique creature of federal law. A bankruptcy proceeding will invoke the jurisdiction of a specialized department of the federal judiciary, the federal bankruptcy courts, operating under a federal body of law. The bankruptcy court possesses some level of control over the operation of the debtor's business activities during the institution of the bankruptcy proceedings. Adding a heavily state-regulated industry to the mix of a bankruptcy proceeding makes an already complex body of law and procedure even more complicated.[7]

The interaction of state gaming regulation and federal bankruptcy law may introduce competing interests and goals. The fundamental goal of state gaming regulators is to protect the public integrity of commercial casinos. Bankruptcy law is designed to ensure creditors are paid and an ongoing business can successfully emerge from bankruptcy proceedings. Balancing these two goals can present immense challenges to the attorneys and other professionals involved in a Chapter 11 bankruptcy proceeding involving a casino operator.

Federal Bankruptcy Law

Federal bankruptcy law is rooted in the United States Constitution. The Constitution provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[8] Acting under the authority granted by the Constitution, Congress has vested federal district courts with jurisdiction over bankruptcy proceedings and enacted a comprehensive Federal Bankruptcy Code.[9]

Jurisdictional Matters

"[O]riginal and exclusive jurisdiction of all cases under Title 11 [Federal Bankruptcy Code]" is statutorily granted to the federal district courts.[10] Congress has established specialized bankruptcy courts to hear bankruptcy cases.[11] Federal district courts possess plenary powers over a debtor's property. Federal courts "in which a case under Title 11 [the Federal Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction – (1) *of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate*…."[12]

Bankruptcy Court Abstention

The likelihood that a bankruptcy court would abstain from hearing a bankruptcy proceeding involving a casino operator, either under the permissive or mandatory abstention doctrines, appears to be remote. Although the federal district courts have original jurisdiction over bankruptcy proceedings, federal courts may nonetheless abstain from entertaining certain matters raised in the context of a bankruptcy proceeding.[13] There are two circumstances when a federal court may abstain in bankruptcy proceedings: permissive abstention and mandatory abstention.

Permissive abstention arises under the Federal Bankruptcy Code which provides that "nothing in [the grant of original jurisdiction] prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding under title 11 or arising in or related to a cause under title 11."[14] Permissive abstention is appropriate when unique, unsettled, or difficult issues of state law are presented.[15] Thus far, however, there are no known cases of a bankruptcy court abstaining from overseeing a casino bankruptcy in total deference to state gaming regulators.

The basis for mandatory abstention is similarly set forth in the statute granting federal district courts original jurisdiction of bankruptcy matters.

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of caution, related to a cause under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.[16]

Accordingly, mandatory abstention is limited in scope to those circumstances where a debtor attempts to have a federal court adjudicate a state law claim by virtue of the federal court's bankruptcy jurisdiction.

Casino Licenses as Property of the Bankruptcy Estate

There is an inherent tension between the original jurisdiction of a bankruptcy court over a Chapter 11 bankruptcy debtor, including jurisdiction over the property of the debtor, and state regulatory oversight of casinos. The tension can serve as a means of deflecting attention from a troubled casino to a jurisdictional battle of control over the oversight of a casino. Ultimately the competing claims to jurisdictional supremacy may result in an insolvent casino, effectively undermining regulatory oversight. Moreover, the decision of the Seventh Circuit Court of Appeals in *Village of Rosemont v. Jaffe*[17] reveals that efforts to undermine state regulatory oversight can lead to a lose-lose situation for the casino in order to successfully implement the bankruptcy reorganization plan.

The automatic stay of Federal Bankruptcy Code § 362 limits the use of judicial or administrative tribunals once a bankruptcy petition has been filed. The automatic stay further prohibits any entity from taking any act to gain possession of property of the debtor's estate.[18] There is an important exception to the automatic stay for the exercise of police powers by a governmental unit.[19] Broadly construed, the automatic stay could effectively deny state gaming

regulators from taking disciplinary action against a casino under the supervision of a bankruptcy court.[20] In contrast, if the automatic stay does not apply – either because the casino license is not "property of" the bankruptcy estate or the police power exception to the automatic stay applies – the bankruptcy court would effectively be denied jurisdiction to oversee the operation and reorganization of a bankrupt casino.[21]

The threshold question turns on whether a casino license can be construed to be "property" of the estate. State gaming laws usually expressly provide that a casino license amounts to a mere privilege and does not rise to the status of a property right. The Michigan Gaming Control and Revenue Act has a typical formulation of this concept by expressly providing that a casino license is simply "*a revocable privilege granted by the state and is not a property right*."[22]

The Federal Bankruptcy Code grants bankruptcy courts broad jurisdiction over the property of the estate of a debtor. An argument has been advanced in academic circles that a gaming license should be construed to be property of a casino-debtor's bankruptcy estate.[23] This argument simply concludes that, "despite its attributes under state law, a gaming license properly is considered property of the bankruptcy estate. As such, the state authorities cannot exercise control of the license itself without violating the automatic stay."[24]

The Seventh Circuit decision in *Jaffe* raises questions of the viability of the proposition that a casino license is property of a bankruptcy estate. In *Jaffe* the Seventh Circuit stated, "[n]or do we accept the argument that we should treat [the casino's] license as a res with respect to which the bankruptcy court had the authority to displace the state's police power."[25] A court could narrowly construe *Jaffe* to mean that the police power exception to the automatic stay applied under the facts of the case. *Jaffe* can, however, be read to support the proposition that a casino license is not "property" of a bankruptcy estate for all purposes and, moreover, recognizes that gaming regulatory bodies maintain regulatory oversight functions.[26]

Whether or not a casino license is property of the estate of a casino-debtor,[27] federal law recognizes that debtors must continue to comply with state gaming laws.[28] The policy of 28 U.S.C. § 959(b) is to ensure "that debtors continuing to operate in bankruptcy comply with state laws."[29] The bankruptcy court in *In re New York City Off-Track Betting Corp.* rejected an argument proffered by the New York Off-Track Betting Corporation, in the context of a Chapter 9 case, that it did not need to comply with the New York State Racing Law.[30] Otherwise, a bankruptcy proceeding could effectively be used to completely abrogate the regulatory authority of state gaming regulators. The Seventh Circuit in *Jaffe* recognized that although a "[gaming] license is for some purposes 'property of the estate,' ... the [federal bankruptcy] Code forbids the bankruptcy court from interfering with the government's police and regulatory powers." Thus, *Jaffe* recognizes the limitation on the jurisdiction of the bankruptcy courts with respect to state oversight of casino licensees.

Even if it is assumed that a casino license is property of the estate of a bankrupt casino, in most instances states' regulatory authority over casinos more likely than not falls within the police power exception to the automatic stay. *Jaffe* acknowledges as much.[31] "But whatever property right the [casino] license conferred has always been subject to, or conditioned on, the regulatory powers of the state."[32] Moreover, "[n]othing in the bankruptcy laws permits the court to enjoin the [gaming commission], a state regulatory agency, from exercising police powers of the state to regulate the gambling industry."[33]

In re Elsinore Shore Assoc. held that the police power exception to the automatic stay was not applicable to allow state regulators to condition renewal of a casino license upon payment of pre-petition taxes and fees.[34] *In re Elsinore Shore Assoc*. could be construed to limit the authority of state gaming regulators to take disciplinary action against a casino licensee. The decision in *In re Elsinore Shore Assoc*. does not necessarily stand for such a broad, blanket proposition of the law. Rather, *In re Elsinore Shore Assoc.* can be construed to stand for the proposition that threats of state regulatory action cannot be used to alter the priority order of payment of claims against a Chapter 11 debtor.[35] *In re Elsinore Shore Assoc*., thus, can be interpreted in a manner that is consistent with Section 362(b)(4) and limited to a situation where a state is attempting to collect a money judgment.[36]

While arguments can be asserted to challenge the regulatory authority of state gaming regulators, the case law can be narrowly construed to limit the applicability of the automatic stay provisions of the

Federal Bankruptcy Code. *Jaffe* supports the legal proposition that gaming regulatory bodies retain regulatory oversight of gaming-related licenses.[37]

The Federal Bankruptcy Code – 11 U.S.C. § 101, *et seq*.

In the context of a casino bankruptcy, it is important to identify provisions of the Federal Bankruptcy Code which may alter common approaches because of the state law regulations of commercial casinos. After a Chapter 11 bankruptcy petition is filed, several important rights arise under the Federal Bankruptcy Code that control the actions that creditors and state gaming regulators may take with respect to a commercial casino.

11 U.S.C. § 362 Automatic Stay

An important consequence of filing a bankruptcy petition is the application of the automatic stay provisions. Particularly relevant to a casino bankruptcy proceeding, the automatic stay provisions of the Federal Bankruptcy Code provide that a bankruptcy petition –

> operates as a stay, *applicable to all entities*, of –
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> …
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate….[38]

The intent of the automatic stay is "to give the debtor a 'breathing spell' from creditor actions that would gravely impair the debtor's ability to reorganize and to ensure that similarly situated creditors be treated the same, rather than permitting the spoils (i.e., the debtor's assets) to go to the fleetest or nimblest creditor."[39] Accordingly, the automatic stay performs an important function by ensuring the orderly administration of bankruptcy reorganizations.

Congress has imposed limits on the reach of the automatic stay of 11 U.S.C. § 362. One limitation on the reach of the automatic stay is an exception for the enforcement of the police and regulatory powers of governmental units.[40] "In the automatic stay context, we generally have construed the phrase 'police or regulatory power' to 'refer to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court.'"[41] The police or regulatory power exception to the automatic stay is broadly construed.[42]

11 U.S.C. § 525 Anti-Discrimination Limitation on Regulatory Actions

The automatic stay provision works in conjunction with the Federal Bankruptcy Code's prohibition of discrimination against a debtor in possession.[43] 11 U.S.C. § 525(a) provides that "a governmental unit *may not* deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant … against, a person that is or has been a debtor under this title … solely because such bankrupt or debtor is or has been a debtor under this title…."[44] The anti-discrimination provisions of the Federal Bankruptcy Code could conflict with state gaming laws and regulations by operating to forestall regulatory action.

Role of a Chapter 11 Trustee or Debtor in Possession Under the Federal Bankruptcy Code

A Chapter 11 proceeding may either involve the appointment of a trustee to continue the operation of the business activities of the debtor or allow for a debtor in possession to continue its business activities. In a Chapter 11 proceeding, "the trustee may operate the debtor's business."[45] A debtor in possession similarly has the right under a Chapter 11 proceeding to continue to operate its business.[46] The legislative history of 11 U.S.C. § 1108 recognizes that a trustee is not presumed to be the party approved to operate the debtor's business.[47] Rather, the trustee's power is merely one of the powers a debtor in possession acquires under 11 U.S.C. § 1107.[48]

A trustee operating the business of a casino during the administration of the bankruptcy proceeding raises licensing considerations. State gaming laws ordinarily require the licensing of key persons. If a

trustee is appointed to operate the casino during the Chapter 11 proceedings, the trustee will either need to secure a gaming license(s) from the applicable gaming regulatory body or receive a determination from regulators that a license is not required. This issue with respect to whether a trustee must be licensed can ordinarily be avoided. In most Chapter 11 proceedings involving casino operators, the debtor in possession will continue to operate the gaming business during administration of the proceedings.

State Gaming Regulations

Historically, the regulation of the gaming industry was aimed at eliminating the participation of organized crime within the industry.[49] As a result, a foundation of the gaming regulatory model is to prevent unlicensed persons from sharing in the profits of licensed gaming activities and to ensure that the government receives its proper share of tax revenue.[50] More broadly, the underlying public policy for regulating gaming is to protect the public integrity of the legalized gambling industry. Specific public policy goals of commercial gaming regulatory models have been identified to include:

> (1) the prevention of unsavory or unsuitable persons from having a direct or indirect involvement with gaming at any time or in any capacity; (2) the establishment and maintenance of responsible accounting practices and procedures; (3) the maintenance of effective controls over the financial practices of a licensee, including the establishment of minimum procedures for internal fiscal affairs and the safeguarding of assets and revenues, providing reliable record keeping and requiring the filing of periodic reports with Gaming Authorities; (4) the prevention of cheating and fraudulent practices; and (5) the creation of a source of state and local revenues through taxation and licensing fees. These statements of public policy are embodied in statutes, regulations and supervisory procedures implemented at the state and local level by a variety of overlapping regulatory bodies (the "Gaming Authorities").[51]

Gaming licensing regulations are directed at three different levels of the operation of gaming businesses: first, at the operating business level, by providing for a licensing system and the adoption of minimum internal control standards and operating standards for casinos;[52] second, at the management level, by identifying which individuals affiliated with the operation of a casino – whether the individual is an employee or other personnel, such as corporate directors – must be licensed in connection with the operation of the casino;[53] and third, at the ownership level, by identifying circumstances when equity owners of casinos must be licensed.[54] Thus, to reemphasize the scope of licensing within the regulated gaming industry, it is important to keep in mind that licensing may be required at each of the three different levels. Moreover, licensing at one of the three levels does not necessarily mean that a license will be issued to persons at the other two levels.

State Regulation of Casinos

The state regulation of casinos generally encompasses three distinct subject matters: "(1) licensing and registration, (2) financial reporting, and (3) gaming license fees and taxes."[55] Understanding each of these regulatory subjects is beneficial for both structuring a Chapter 11 reorganization of a casino business and for effectuating the reorganization plan.

Initially, state gaming laws universally require a person to hold a casino license as a prerequisite to operate a commercial casino.[56] State gaming laws and regulations typically set forth comprehensive criteria which must be met for a person to be eligible to hold a commercial casino license. For example, the Michigan Gaming Control and Revenue Act[57] (the "*Michigan Act*") requires the Michigan Gaming Control Board to consider, when determining whether to grant a casino license, such factors as (1) the integrity, moral character and reputation of the applicant, (2) personal and business probity, (3) financial ability and experience, and (4) the past and present compliance of the applicant and its affiliates with the gaming laws of other jurisdictions.[58] Nevada law, which serves as the model gaming law for many other jurisdictions, provides that a casino license:

> must not be granted unless the applicant has satisfied the Commission that:
>
> (a) The applicant has adequate business probity, competence and experience, in gaming or generally; and

> (b) The proposed financing of the entire operation is:
>
> (1) Adequate for the nature of the proposed operation; and
>
> (2) From a suitable source.[59]

Applicants bear the burden of establishing that they meet the statutory criteria to hold a casino license.[60]

Casino licensing standards may require licensees to undertake comprehensive development obligations, meet certain financial ability standards, and make binding legal commitments to state and local governments. The Michigan Act is illustrative of this concept. Specifically, the Michigan Act obligates casino licensees to enter into development agreements with the City of Detroit that, among other matters, address financial commitments to the city and set forth minimum contracting, hiring, and facility requirements for the casino properties. Thus, parties to a Chapter 11 proceeding involving a casino should ascertain whether the casino operator has entered into a development agreement and, if so, identify all obligations that may be owed to the applicable governmental unit. The presence of a development agreement may also mean that a governmental unit is an interested party that has standing to participate in the Chapter 11 proceedings.[61]

State gaming laws and regulations provide for detailed reporting and recordkeeping requirements. For example, casinos are typically required to submit annual reports to state gaming regulators.[62] Casino licensees also have continuing duties to disclose any information requested by state gaming regulators or as a result of proscribed changes in the operation of the casino business.[63] Licensed casinos must also ordinarily report and, in some cases, receive approval from state gaming regulators prior to closing any loan or financing arrangements.[64] The state regulatory authority concerning the approval of financing would be affected in the event that a casino enters the supervision of a bankruptcy court.

State regulation of casinos also addresses the payment of licensing fees and taxation of gaming revenue. For example, under the Michigan Gaming Control and Revenue Act, the state wagering tax is transmitted daily to the State.[65] The ability to continue daily transmittal of wagering taxes is a further source of tension between the jurisdiction of a bankruptcy court and state regulation of casinos. The failure to transmit post-petition wagering taxes could result in suspension or even revocation of a casino license.

A casino's continuing ability to legally transmit wagering taxes post-petition raises interesting legal issues and practical planning considerations.[66] As a practical matter, trustees and debtors in possession will likely desire to obtain a court order authorizing continuing payment of wagering taxes. However, in some instances, a trustee or debtor in possession operating a casino during the administration of a Chapter 11 case may have a legal basis to continue to pay wagering taxes without a hearing and court approval. Section 363(c)(1) allows for the use of property of the estate in the ordinary course of the debtor's business.[67] Specifically, under Section 363(c)(1):

> [i]f the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.[68]

Reliance on Section 363(c)(1) is dependent upon (1) the payment of wagering taxes qualifying as an activity that is conducted in the ordinary course of the casino's business and (2) none of the exceptions to Section 363(c)(1) being implicated.[69] Section 363(c)(1), accordingly, first begs the question: what activities are considered to be conducted in the ordinary course of the business of a casino? Resolution of this question turns on an analysis under the bankruptcy law tests for determining what an ordinary course transaction is. Courts have applied two tests to assess whether a transaction is carried out in the ordinary course of a business.[70] These two tests are: (1) the horizontal dimension test and (2) the vertical dimension test.[71]

The horizontal dimension test analyzes whether the transaction at issue is of a character which is commonly undertaken within the debtor's industry.[72] In other words, the horizontal dimension test examines whether the transaction is normal for the particular industry sector. While no bankruptcy case has directly considered whether payment of post-petition wagering taxes meets the horizontal dimension test, payment of these taxes would arguably seem to be a common activity which

satisfies the horizontal dimension test. The payment of wagering taxes – either on a daily or less frequent periodic basis – is a normal transaction within the gaming industry. State gaming laws typically mandate payment of wagering taxes on a periodic basis.[73] Therefore, the payment of wagering taxes, in itself, would seem to be a transaction which satisfies the horizontal dimension test in order to qualify as a transaction within the ordinary course of the business of a casino.

The second test for determining whether an activity is conducted in the ordinary course of the debtor's industry is the vertical dimension test. "The vertical dimension test reviews the transaction from the perspective of creditors, asking whether the transaction is one that creditors would reasonably expect the debtor to enter into."[74] The payment of gaming taxes likely also satisfies the vertical dimension test. Failure to pay gaming-related taxes could imperil the casino's gaming license or expose the casino licensee to other regulatory sanctions. Creditors expect casinos to pay all gaming-related taxes and, in fact, many loan documents contain covenants expressly obligating casinos to pay gaming-related taxes.

There are several exceptions to Section 363(c)(1) which may prevent a trustee or debtor in possession from acting without a hearing and court approval to use property of the estate to pay wagering taxes.[75] Particularly relevant within the gaming industry, the Bankruptcy Code imposes strict limitations on the use of cash collateral during the administration of a Chapter 11 case.[76] Section 363(c)(2), for example, limits a trustee or debtor in possession from using cash collateral unless (1) each entity with an interest in the cash collateral consents, or (2) the bankruptcy court authorizes the use, sale, or lease of cash collateral after notice and hearing.[77] Casinos by the very nature of the operations generate the bulk of their receipts in cash.[78] As a result, secured creditors may receive an all assets security interest in the assets and proceeds of a casino. Additionally, gaming equipment suppliers often enter into agreements with casinos which grant suppliers a specified percentage of gaming revenue derived from gaming equipment used on the casino floor.[79] Thus, creditors may have a security interest in cash collateral of the casino. In turn, Section 363(c)(1) may be unavailable to a trustee or debtor in possession operating a casino as a means to continue to pay wagering taxes without a hearing and court approval.

Licensing and Regulation of Key Personnel and Employees of Casinos

Licensing key casino personnel is a hallmark of the commercial gaming regulatory regime. Licensing implicates investigations of entities and key individuals seeking a gaming license. Gaming regulatory bodies are renown for conducting thorough and comprehensive investigations of casino licensees and so-called "qualifiers" (e.g., individuals the gaming regulatory authorities determine should be fully investigated and approved before become active in the operations of the casino) in order to determine whether the entity and/or qualifier meets the applicable licensing standards.

In connection with obtaining a casino license, key personnel and so-called "qualifiers" of the casino license applicant must satisfy suitability standards.[80] Typical formulations of the definition of key personnel and qualifiers include, for instance, (a) officers and directors of the casino license applicant, (b) a person who holds, directly or indirectly, either more than a 1% or 5% equity interest in a casino license applicant or other person holding a controlling interest in a casino license applicant, and (c) certain managerial employees.[81] Accordingly, state gaming bodies actively investigate and regulate a wide range of individuals involved with the operation of or benefit from a licensed casino.

In addition to requiring key personnel to meet suitability standards, state gaming regulations ordinarily require most casino employees to hold an occupational license. For instance, under the Michigan Gaming Control and Revenue Act, occupational licenses are issued to "a person to perform an occupation in a casino or casino enterprise which the [Michigan Gaming Control Board] has identified as requiring a license to engage in casino gaming in Michigan."[82] "Casino" is defined under the Michigan Gaming Control and Revenue Act to mean "a building where gaming is conducted."[83] A "casino enterprise" is defined to mean buildings and facilities functionally or physically connected with a casino.[84] Thus, occupational licenses extend to those individuals who are employed by licensed casinos who perform services within the casino, including onsite management personnel. Nevada, New Jersey, and

other commercial gaming jurisdictions have adopted similar approaches to occupational licensing.[85]

Licensing and Regulation of Owners of Casinos

The ownership of an equity interest in a casino is further subject to licensing and regulation by state gaming regulators.[86] Regulations promulgated under the Michigan Gaming Control and Revenue Act require a finding of suitability by the Michigan Gaming Control Board of equity owners which hold direct or indirect interests in the licensee at or above prescribed levels.[87] Furthermore, transfers of an equity interest in a licensed casino often are subject to the approval of gaming regulators.[88] Under the Nevada Gaming Control Act, "[i]t is unlawful for any person to sell, purchase, lease, hypothecate, borrow or loan money, or create a voting trust agreement or any other agreement of any sort to or with any licensee in connection with any gaming operation licensed under this chapter or with respect to any portion of such gaming operation, except in accordance with the regulations of the [Nevada Gaming] Commission."[89] Accordingly, gaming regulators must not only approve most transfer of ownership interests in licensed casinos, but key personnel of a person acquiring an ownership interest in a licensed casino may also be subject to suitability determinations.[90]

Tribal Corporations as Debtors Under the Federal Bankruptcy Code

Typically, federally recognized Indian tribes will conduct tribal gaming operations through the auspices of a tribally chartered entity, often a corporation. As a result, while the Indian tribe will be the sole shareholder of the tribally chartered corporation, the Indian tribe may not, itself, directly own and operate the tribal casino. Accordingly, while a federally recognized Indian tribe itself is likely ineligible to be a debtor in a bankruptcy proceeding, the analysis may differ with respect to a tribally chartered corporation.

The issue whether a tribally chartered corporation may constitute a "person" for purposes of the Federal Bankruptcy Code has recently been squarely raised in a bankruptcy proceeding commenced in Federal Bankruptcy Court in Arizona. The case, *In re* 'SA' NYU WA, Inc., BK 2:13-bk-02972-BMW (Bankr. D. Ariz. March 4, 2013), involves an effort to seek chapter 11 protection by a tribally chartered corporation ('SA' NYU WA, Inc.) wholly owned by the Hualapai Indian Tribe. The issue turns on whether a tribally charted corporation will be deemed to be a "corporation," and thus a "person," for purposes of the Federal Bankruptcy Code. The bankruptcy court has permitted the bankruptcy to proceed forward. In addition, in an unpublished Memorandum Decision and related Order dated September 25, 2013, the bankruptcy court ruled that the assertion of sovereign immunity by HBBE, another chartered corporation of the tribe, is abrogated pursuant to 11 U.S.C. § 106(a). The tribe had terminated 'SA' NYU WA, Inc.'s contract to operate a tribal-owned tourist attraction and assigned operating rights to HBBE prior to the filing of the bankruptcy petition. The largest creditor of 'SA' NYU WA, Inc. sought discovery of documents from HBBE. The bankruptcy court's decision rejecting the HBBE sovereign immunity claim and permitting the discovery to proceed has been appealed.

In the non-bankruptcy context, federal courts have held that a tribally chartered corporation constitutes a corporation for purposes of other federal laws.[91]

With the widespread number of Indian gaming operations, a determination that an Indian tribally chartered corporation is an eligible debtor under federal bankruptcy law could open the door to the use of chapter 11 to restructure the debt of Indian casinos.[92] Other federal laws, namely the federal Indian Gaming Regulatory Act, will however likely restrict the potential scope of a plan of reorganization involving tribally chartered corporations that operate Indian casinos. Specifically, the federal Indian Gaming Regulatory Act provides that only federally recognized Indian tribes may operate tribal casinos on Indian lands. Moreover, third-party management contracts are subject to strict limits and must be reviewed and approved by the National Indian Gaming Commission, which can be a time-consuming process.

Conclusion

The interaction of the Federal Bankruptcy Code and state gaming regulation in the context of a casino bankruptcy raises several questions concerning who has jurisdiction and over what matters. The lessons learned from prior proceedings reveal that state

gaming regulators will have an active say in the operation of the casino during the bankruptcy proceeding and any plan of reorganization to exit bankruptcy. It is imperative for professionals involved in a casino bankruptcy to become knowledgeable of the complex interaction of state gaming laws upon a Chapter 11 proceeding. Such actions will assist both the bankruptcy courts and the professionals in navigating a casino through Chapter 11 proceedings.

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Endnotes

*Robert W. Stocker II and Peter J. Kulick are authors of Chapter 25, "*Chapter 11 Proceedings Involving Casino Businesses*," in the seminal bankruptcy law guide COLLIER GUIDE TO CHAPTER 11 PRACTICE: KEY TOPICS AND SELECTED INDUSTRIES. The outline is partially based on the materials in COLLIER GUIDE TO CHAPTER 11 PRACTICE: KEY TOPICS AND SELECTED INDUSTRIES. For in-depth treatment of this subject matter, readers are urged to consult COLLIER GUIDE TO CHAPTER 11 PRACTICE: KEY TOPICS AND SELECTED INDUSTRIES.

[1] During 2012, the commercial casinos in the 23 states – which includes states both with land-based casinos, as well as racinos – had aggregate gross revenue equal to $37.34 billion. Commercial casinos paid $8.60 billion in gaming-related taxes to the states with legalized casino gambling in 2012. Commercial casinos employed 332,075 people during 2012 and contributed $13.2 billion in wages. *See* American Gaming Association, *2013 State of the States: the AGA Survey of Casino Entertainment* (2013).

[2] *See*, *e.g.*, Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" – A Proposal to Redefine "Public Use,"* 2000 L. Rev. M.S.U.-D.C.L. 639, 640–41 (2000).

[3] *See*, *e.g.*, *In re Greektown Holdings, L.L.C., et al*, BK-N-08-53104 (Bankr. E.D. Mich. 2008); *In re Stations Casino, Inc.*, BK-N-09-52477-GWZ (Bankr. D. Nev. 2009); *In re TCI 2 Holdings, LLC, et al*, BK-N-09-13645 (Bankr. D. N.J. 2009); *In re Indianapolis Downs*, BK-N-11-11046 (Bankr. D. Del. 2011); and *In re Revel AC Inc.,* BK-N-13-16253-JHW (Bankr. D. N.J. 2013).

[4] *See* Gregg W. Zive, *The House Doesn't Always Win*, 8 GAM. L. REV. 278, 279 (2004).

[5] *See* Zive *supra* note 4.

[6] *See* John M. Czarnetzky, *When the Dealer Goes Bust: Issues in Casino Bankruptcies*, 18 MISS. C. L. REV. 459, 461 (1998). Commercial casinos are primarily regulated under state gaming laws which legalize commercial gambling. Nevada was the first jurisdiction with legalized gaming in the United States. Nevada held that distinction for nearly 50 years. Seventeen states have legalized commercial casinos as of 2013. Nearly every other state has some form of legalized gambling, either in the form of race track casinos (aptly known as "racinos") or Tribal casinos. *See* American Gaming Association, *2013 State of the States: the AGA Survey of Casino Entertainment* (2013).

[7] *See* Zive *supra* note 4 at 279.

[8] U.S. CONST. art I, § 8, cl. 4.

[9] *See* 28 U.S.C. § 1334 (granting jurisdiction to federal district courts over bankruptcy proceedings) and 11 U.S.C. § 101, *et seq*. (Federal Bankruptcy Code).

[10] *See* 28 U.S.C. § 1334.

[11] *See* 28 U.S.C. § 151.

[12] 28 U.S.C. § 1334 (emphasis added).

[13] *See* 28 U.S.C. § 1334(c)(1).

[14] 28 U.S.C. § 1333(c)(1).

[15] *See*, *e.g.*, *In re Dow Corning Corp.*, 113 F.3d 565 (6th Cir. 1997), *cert den* 522 U.S. 977 (1997).

[16] 28 U.S.C. § 1334(c)(2).

[17] 482 F.3d 926 (7th Cir. 2007).

[18] 11 U.S.C. § 362.

[19] 11 U.S.C. § 362(b)(4).

[20] *In re Elsinore Shore Assoc.*, 66 B.R. 723 (Bankr. D. N.J. 1986) is one such example where a bankruptcy court invoked the automatic stay to enjoin the New Jersey Casino Control Commission from taking action to revoke a casino license for failure to pay pre-petition gaming taxes. Although the bankruptcy

court in *In re Elsinore Shore Assoc.* implicated the automatic stay, the Seventh Circuit's holding in *Rosemont* calls into question the continuing vitality of *In re Elsinore Shore Assoc.* or, at a minimum, greatly curtails the potential reach of the decision.

[21] *See* Zive *supra* note 4 at 284. Judge Zive argued that "[p]ermitting" gaming regulators to exercise "the police power exception to the automatic stay to take away or deprive a casino of its license to operate during the reorganization process … would in essence negate the ability of the casino to operate or reorganize." *Id*.

[22] Mich. Comp. Law § 432.208c(1) (emphasis added); *see also* La. Rev. Stat. § 27:2.

[23] *See* Czarnetzky *supra* note 6 at 465. Although recognizing that most state laws clearly provide that such licenses are not "property" of the casino, Professor Czarnetzky argues that a casino license should properly be construed to be "property" of the bankruptcy estate. *See id*.

[24] Czarnetzky *supra* note 6 at 469.

[25] 482 F.3d at 936.

[26] *Id*. at 937.

[27] State gaming laws explicitly provide that casinos do not have a property right in a casino license. *See*, *e.g.*, La. Rev. Stat. § 27:2; Mich. Comp. Law § 432.208c(1). Long-standing principles of federalism and states' right to regulate under the police power offer support for the legal argument that a casino license is not property of the bankruptcy estate. *Jaffe* provides additional legal support for this proposition.

[28] *See* 28 U.S.C. § 959(b); *see also In re New York City Off-Track Betting Corp.*, 2010 Bankr. LEXIS 2316 (S.D.N.Y. Aug. 5, 2010).

[29] *In re New York City Off-Track Betting Corp.*, 2010 Bankr. LEXIS 2316 at *30.

[30] *See id*. While *In re New York City Off-Track Betting Corp.* was a Chapter 9 case and involved horse racing, the principle advanced by the bankruptcy court should be equally applicable to a Chapter 11 case involving a casino business. First, 28 U.S.C. § 958 operates as a belt and suspenders to require casino-debtors to continue to comply with state gaming laws. Second, state interest in regulating horse racing is similar to the interest in regulating other forms of gambling.

[31] 482 F.3d at 936.

[32] *Id*.

[33] *Id*.

[34] 66 B.R. 723 (Bankr. D. N.J. 1986).

[35] *See* Czarnetzky *supra* note 6 at 469. Moreover, in light of the holding of *Jaffe* where the Seventh Circuit permitted Illinois gaming regulators to take disciplinary action for pre-petition conduct, the continuing applicability of *In re Elsinore Shore Assoc.* may be questionable. Specifically, to the extent that *In re Elsinore Shore Assoc*. is viewed as forestalling the ability of state gaming regulators from taking regulatory action (including, as was the case in *In re Elsinore Shore Assoc.*, preventing the New Jersey Casino Commission from denying the renewal of a casino license), *Jaffe* provides authority to argue that a bankruptcy court cannot interfere with the exercise of regulatory power by state gaming regulators.

[36] 11 U.S.C. § 362(b)(4) provides that the filing of a bankruptcy petition does not operate to prevent a state from exercising its police and regulatory power, except, among other matters, for the enforcement of a money judgment.

[37] It would be reasonable for a bankruptcy court to authorize the legal transfer of a casino license under the Federal Bankruptcy Code in connection with effectuating a reorganization plan. However, state gaming regulatory bodies still maintain the authority to approve such transfers and all other oversight with regard to the regulation of casinos. Thus, resolution of issues presented under the automatic stay provisions, and other jurisdictional issues surrounding casino bankruptcies, do not necessarily lend themselves to black-or-white answers. Rather, due to the highly regulated nature of gaming businesses, the approach to these types of questions really involves a hybrid analysis.

[38] 11 U.S.C. § 362(a) (emphasis added).

[39] Czarnetzky *supra* note 6 at 461–62.

[40] *See* 11 U.S.C. § 362(b)(4). The police power exception to the automatic state provides that the automatic stay "does not operate as a stay … of the commencement or continuation of an action or

proceeding by a governmental unit … to enforce such unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the government unit to enforce such governmental unit's or organization's police or regulatory power."

[41] *City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123 (9th Cir. 2006) (quoting *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n,* 997 F.2d 581, 591 (9th Cir.1993)).

[42] *See In re Baillie*, 368 B.R. 458, 466 (Bkrtcy. W.D. Pa. 2007).

[43] *See* 11 U.S.C. § 525(a).

[44] *Id*. (emphasis added).

[45]11 U.S.C. § 1108.

[46]*See* 11 U.S.C. § 1107.

[47]*See* House Report No. 95-595, 95th Cong., 1st Sess. 404 (1977).

[48] *See id*.

[49]*See* Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, *in* REGULATING INTERNET GAMING 79, 102–104 (Anthony N. Cabot and Ngai Pindell, eds) (2013).

[50]*See* Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, *in* REGULATING INTERNET GAMING 79, 102–104 (Anthony N. Cabot and Ngai Pindell, eds) (2013).

[51] Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. BANKR. L. & PRAC. 293, 295 (2001); *see also* Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, *in* REGULATING INTERNET GAMING 79, 102–104 (Anthony N. Cabot and Ngai Pindell, eds) (2013).

[52] Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, *in* REGULATING INTERNET GAMING 79, 102–104 (Anthony N. Cabot and Ngai Pindell, eds) (2013); *see also* Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. BANKR. L. & PRAC. 293, 296 (2001)

[53] *See* Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. BANKR. L. & PRAC. 293, 297–98 (2001).

[54] *See* Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. BANKR. L. & PRAC. 293, 298–99 (2001).

[55] *See* Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. BANKR. L. & PRAC. 293, 296 (2001).

[56] *See*, *e.g.*, Colo. Rev. Stat. § 12-47.1-501; In. Code Ann. § 4-33-6; La. Rev. Stat. § 27:47; Mich. Comp. Laws § 432.206(1); Miss. Code Ann. § 75-76-55; Nev. Rev. Stat. § 463.160(1); and NJ Stat. Ann. § 5:12-82(a). For purposes of state gaming laws, a "person" is defined in ordinary legal sense. In other words, "person" includes not only natural persons, but also business entities, such as corporations, limited liability companies, and partnerships. *See*, *e.g.* Mich. Comp. Laws § 432.202(ff).

[57] Mich. Comp. Laws § 432.201, *et seq*.

[58] *See* Mich. Comp. Laws § 432.206(5); Miss. Code Ann. § 75-76-67; and N.J. Stat. Ann § 5:12-84. Michigan's casino licensing provisions are unique in many respects compared to other jurisdictions. The Michigan Gaming Control and Revenue Act was enacted as part of an initiated law that amended the Michigan Constitution to legalize commercial casino gambling in limited circumstances. Under the Michigan Gaming Control and Revenue Act, only three casino licenses may be awarded, with operations limited to the City of Detroit. As a result, the casino licensing qualifications set forth many unique characteristics that effectively limit license applicants to constructing casinos within the Detroit city limits.

[59] Nev. Rev. Stat. § 463.170(3).

[60] *See* Mich. Comp. Laws § 432.206(1) (applicant bears the burden by "clear and convincing evidence" to establish it meets the casino licensing standards); Nev. Rev. Stat. § 463.170(1); and NJ Stat. Ann. § 5:12-80(a) (applicant must establish eligibility by "clear and convincing evidence").

[61] Involvement of applicable governmental units in Chapter 11 proceedings may politicize the reorganization process. Thus, an understanding of state and local political dynamics can be important in developing a plan of reorganization and securing confirmation of the plan.

[62] *See* La. Rev. Stat. § 27:61; Mich. Comp. Laws § 432.206(8); and Miss. Code Ann. § 75-76-95.

[63] *See* Mich. Comp. Laws § 432.206(10); N.J. Stat. Ann. § 5:12-80(d).

[64] *See* Nev. Rev. Stat. § 463.300; N.J. Stat. Ann. § 5:12-85; *see also* Mich. Admin. Code R. 432.1509. For example, the Michigan Gaming Control Board administrative regulations require a casino licensee to obtain the approval of the Gaming Control Board prior to entering into any debt transaction affecting the capitalization or financial viability of its Michigan properties. *See id*. A debt transaction is defined to mean circumstances when a casino licensee "acquires debt, including, but not limited to, bank financing, private debt offerings, or any other transaction that results in a change of encumbrance of more than 1% in capitalization or debt-to-equity ratio of the licensee, applicant, holding company, or affiliate of the applicant or holder of the casino license." Mich. Admin. Code R. 432.1102(b).

[65] *See* Mich. Comp. Laws § 432.212.

[66] Some jurisdictions require daily payment of wagering taxes. For instance, Michigan gaming law requires commercial casinos to daily transmit wagering taxes. *See* Mich. Comp. Laws § 432.212. Other jurisdictions may require wagering taxes to be transmitted less frequently. As an example, Nevada law provides for wagering taxes to be transmitted to the state on a monthly basis. *See* Nev. Rev. Stat. § 463.370.

[67] *See* 11 U.S.C. § 363(c)(1).

[68] 11 U.S.C. § 363(c)(1).

[69] *See* 3-363 Collier on Bankruptcy ¶ 363.03 (citations omitted)

[70] *See id*.

[71] *See id*.

[72] *See*, *e.g.*, *In re Lavigne*, 183 B.R. 65, 70 (S.D.N.Y. 1995); *see also* 3-363 Collier on Bankruptcy ¶ 363.03.

[73] *See*, *e.g.*, Mich. Comp. Law § 432.212; Nev. Rev. Stat. § 463.370.

[74] 3-363 Collier on Bankruptcy ¶ 363.03[1][b].

[75] *See* 3-363 Collier on Bankruptcy ¶ 363.03[2].

[76] *See*, *e.g.*, 11 U.S.C. § 363(c)(2)(A).

[77] 11 U.S.C. § 363(c)(2).

[78] Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, *in* REGULATING INTERNET GAMING 79, 91–92 (Anthony N. Cabot and Ngai Pindell, eds) (2013).

[79] The interest of a gaming equipment supplier in gaming revenue derived from particular gaming equipment will depend upon the terms of the underlying agreement with the casino.

[80] *See*, *e.g.*, N.J. Stat. Ann. §§ 5:12-89, 5:12-90, and 5:12-91; *see also* Mich. Admin. Code R. 432.1304(2).

[81] *See*, *e.g.*, Mich. Admin. Code R. 432.1104(c).

[82] *See* Mich. Comp. Laws § 432.202(ee).

[83] Mich. Comp. Laws § 432.202(g).

[84] *See* Mich. Comp. Laws § 432.202(h).

[85] *See*, *e.g.*, N.J. Stat. Ann. §§ 5:12-89, 5:12-90, and 5:12-91.

[86] *See* Gordon, *et al*., *supra* note 49 at 298–99. State gaming acts and regulations make distinctions between the treatment of privately owned casinos and casinos owned and/or operated by companies whose shares are traded on a stock exchange. As a general rule, shareholders of a publicly traded company may freely purchase and sell shares in the public market without being vetted and without obtaining approval until such time as the person's stock ownership exceeds a certain percentage of the outstanding shares of the publicly traded company, typically a 5% interest. The Nevada Legislature recently amended Nevada gaming law to provide similar rules for minority owners of privately held casino licensees. *See* NEV. REV. STAT. § 463.569 and § 463.5735; *see also* NEV. REG. 15.530-1.3.

[87] *See* Mich. Admin. Code R. 1432.304(2).

[88] *See* Nev. Rev. Stat. § 463.300.

[89] *Id*.

[90] *See* Nev. Rev. Stat. § 463.300; Mich. Admin. Code R. 432.1304(2).

[91] *See Wells Fargo v Lake of the Torches*, 658 F3d 684 (7th Cir. 2011).

[92] A tribally chartered corporation, Santa Ysabel Resort and Casino, that operated an Indian tribal casino, filed a chapter 11 bankruptcy petition on July 2, 2012. *See In re* Santa Ysabel Resort and Casino, BK-12-09415-CL11 (S.D. Calif. July 2, 2012). The

Santa Ysabel Resort and Casino bankruptcy petition was dismissed by the debtor, without explanation, on September 11, 2012. As a result, the bankruptcy court did not address the question whether a tribally charter corporation that operates an Indian casino is an eligible debtor under the federal Bankruptcy Code.

Developing Accounting, Auditing, and Recordkeeping Requirements for the Regulation of the I-Gaming Industry

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Introduction

Developing an effective i-gaming regulatory regime should begin with an understanding of the underlying purposes for regulations and the i-gaming business model. There are several underlying reasons for the various regulations which govern the operation of the gaming industry. The regulation of the gaming industry in the United States historically targeted curtailing participation of organized crime in the gaming industry. Regulations were initially developed to assure that unlicensed individuals did not share in the profits of a licensed gaming operation and that the government received the proper tax revenue.[1] Moreover, rules were implemented to protect players by ensuring that games were fair and not rigged to allow the owners to always win.[2] As the gaming industry has evolved into a major economic force,[3] gaming regulations have similarly evolved to include safeguards intended to encourage an economically healthy and viable industry.

Regulations relating to accounting, auditing, and recordkeeping play an important role in maintaining the integrity of operations and ensuring a healthy, viable gaming industry. Accounting, auditing, and recordkeeping rules are largely now contained in minimum internal control standards ("MICS").[4] Internal controls derive from accounting and auditing concepts.[5] The particular internal control standards ("ICS"), which embody any required MICS of a regulating jurisdiction, define the procedures for operating a casino game. They include the procedures and methods for determining income/loss generated from gambling activity. In the brick-and-mortar casino industry,[6] I[1]CS have a significant impact concerning how casino staff responsibilities are assigned, the recording of revenue, and how the games are conducted. ICS likewise provide procedures for assigning responsibilities, recording revenue, and how games are offered within the i-gaming industry.[7]

The lessons learned from the regulation of the brick-and-mortar casino industry can serve as a logical resource to develop best practices in the regulation of i-gaming.[8] The rationale for examining the regulatory approach used in the brick-and-mortar industry is simple: both brick-and-mortar casinos and i-gaming operators have a common attribute. That is, the ultimate activity which is subject to regulatory oversight is gambling. The prospective universe of gambling games offered online and on a casino floor are identical.[9]

While i-gaming and land-based gaming share a common underlying activity, the practical means of conducting gaming and the business model differ. The economic model, cost structure, means of operating games and the roles of suppliers differ in the i-gaming industry from that of the land-based gaming industry. Accordingly, effective i-gaming laws and regulations must be sensitive to these differences and embrace regulatory approaches that adhere to the realities of the i-gaming industry.

Developing best regulatory practices for accounting, auditing, and recordkeeping requirements of regulated i-gaming are influenced by several factors. At the macro-level, policy goals and the regulatory philosophies/attitudes can, and will, affect the scope of accounting, auditing, and recordkeeping rules. To that end, this article first explores the policy goals sought to be achieved by implementing accounting, auditing, and recordkeeping rules for regulated i-gaming.

Regulatory tools which have been used are introduced in summary fashion. Next, the article embarks on a discussion of the theory and history of casino accounting, auditing, and recordkeeping requirements. The discussion is presented in the context of subscribing to the notion that an appreciation of the history and theories of casino accounting, auditing and recordkeeping can assist in developing efficient and effective i-gaming regulatory practices. This article then presents a more detailed discussion of mechanisms used in the field of gaming accounting, auditing, and recordkeeping regulations. Finally, we end our journey by enumerating aspirational best practices for the regulation of accounting, auditing, and recordkeeping functions within the field of regulated i-gaming.

The I-Gaming Business Model; Identifying Policy Goals and Regulatory Tools Used to Implement Policy Goals

The regulation and operation of a regulated business conceptually is similar to a three-tiered pyramid. At the apex of the pyramid is the public policy developed by policymakers. Typically the policymakers are legislative bodies and the policies are adopted in the form of laws. In the middle tier lies implementing rules adopted by regulatory agencies. The regulations add flesh to the policies through interpretative guidance with respect to actions which should, or should not, be undertaken by the regulated business in the conduct of its affairs.[10] Administrative agencies are charged with the task of interpreting and enforcing the policies embraced in the laws and enforcing regulations promulgated under the governing law. At the base of the pyramid are actual operating systems adopted by the regulated business that are intended to comply with the legal requirements.

Understanding the business model, in addition to the policy goals embraced in authorizing laws, is essential in order to develop efficient and effective regulations. A failure to appreciate the business model can inadvertently lead to the implementation of nonsensical or impractical rules. An extreme example is illustrative. One can envision the well-intentioned regulator advocating for a rule that requires an agency staff person to be physically present any time cash from poker rakes is physically counted by an i-gaming operator. With an understanding of the business model, our well-intentioned regulator would quickly recognize that the i-gaming operator collects its "cash" through electronic fund transfers.[11]

The discussion below first provides an overview of the typical i-gaming business model. Second, policy goals applicable to accounting, auditing, and recordkeeping requirements for the regulated i-gaming industry are identified. Finally, a summary overview of regulatory mechanisms implemented to achieve the policy goals is set forth.

Overview of the I-Gaming Business Model

A simple rule of thumb to understand any business operation is to "follow the money." In order to develop robust regulations, policymakers and regulators should first gain an understanding of the flow of money in the conduct of i-gaming and the i-gaming business model. While the business of i-gaming shares a common activity with its brick-and-mortar brethren, it has a different business operational model. Capital needs, operating costs, the role of suppliers, and staff needs can all substantially differ from the brick-and-mortar gaming industry.

The flow of money in the operation of an i-gaming operation differs from brick-and-mortar casinos. Typically, a player will use a credit or debit card to transfer money to an account held in the name of the i-gaming operator.[12] The credit or debit card transfer will be effectuated by a money processor, which may or may not be directly affiliated with the i-gaming operator. The funds will be held on account for the player with the i-gaming operators. The funds held on deposit in a financial institution may be deposited in a segregated account or commingled with funds of other players or even other funds of the i-gaming operators. Figure 1 graphically illustrates the flow of funds.

Like any other business, including land-based gaming operators, there is no one-size-fits-all organizational structure. There are three categories of providers operating within the i-gaming sphere: (1) business-to-business ("B2B"); (2) business-to-consumer ("B2C"); or (3) business-to-government ("B2G"). I-gaming operations normally encompass eight distinct spheres of activities. These activities consist of: (1) the game software; (2) the gaming license granted by a licensing jurisdiction; (3) payment processing; (4) liquidity management; (5) site hosting; (6) customer service; (7) marketing; and (8) back-end support. Figure 2 depicts the eight spheres of i-gaming business activities.

What can differ among i-gaming businesses are which activities the operator will directly undertake and which functions will be provided by third parties.

A business which obtains an i-gaming license operates as a B2C business. The B2C interfaces directly with consumers/players. The licensee may enter into agreements with B2B providers to perform certain functions in the operation of an i-gaming website. Two basic business models have developed in the i-gaming industry for the operation of i-gaming websites. The activities which the

licensee assumes will depend upon the business model adopted. The business model which an i-gaming licensee adopts will depend on a variety of business factors, such as in-house IT capabilities and payment processing expertise.

The first model used in the i-gaming industry is known as the "white label" or "skin" model. In the skin model, the licensee is purely a B2C business. The i-gaming licensee will obtain a gaming license from a jurisdiction and then enter into licensing arrangements with one or more B2B providers to supply game software, payment processing, website hosting, liquidity management, and other services. The game software provider will necessarily be required to obtain a gaming license as a software provider.

The second business model is a B2C model or a software license model. In a B2C model, the i-gaming licensee will hold a gaming license, as well as own underlying game software. The gaming licensee may also enter into agreements with B2B providers to perform certain other spheres of services. For example, in the software license model, the gaming licensee may engage third-party affiliates to provide marketing services.

In summary, armed with an understanding of the i-gaming business model, policymakers and regulators can develop a robust regulatory model that can support the development of the i-gaming industry without threatening economic viability.

Identifying Policy Goals for I-Gaming Accounting, Auditing, and Recordkeeping Requirements

Accounting, auditing, and recordkeeping rules at their root have the policy prerogative of protecting the flow of funds. However, for government revenue purposes, they also ensure only licensed persons share in profits.[13] Well-designed regulations focus on the purpose for imposing financial-related regulatory burdens. Poorly designed regulatory practices ultimately end up requiring processes to be undertaken, or materials to be provided, which are at best tangentially related to the underlying policy and at worst trumpeting bureaucratic form over substance.

With a starting point that accounting, auditing, and recordkeeping rules are intended to assure the legitimate flow of funds from gaming operations, other policy goals may also come to light.[14] To expound upon the ultimate goal of protecting the flow of funds, rules governing gaming accounting, auditing, and recordkeeping can be classified into four categories: (1) ensuring the government receives the proper tax revenue; (2) preventing unlicensed persons from sharing in the profits of the gaming operations; (3) protecting against fraud; and (4) protecting the integrity of the games. Further examination of these four policy goals is appropriate to gain a better understanding of the underlying concerns.

Ensuring the Government Receives the Proper Tax Revenue

Regulations governing accounting, auditing, and recordkeeping, both for the i-gaming and land-based gaming industry, at the core are directed at ensuring the government actually receives the appropriate tax revenue.[15] In the United States, tax laws are based on self-assessment – or voluntary compliance – whereby taxpayers determine their own tax liability and are responsible for timely paying the tax liability.[16] A hallmark of self-assessment systems is a requirement that taxpayers not only are required to file reports (the reporting obligation), but also maintain adequate records to substantiate the positions taken on such reports (the records obligation).[17] Thus, requiring gaming licensees to maintain records is not unique to gaming laws. Accordingly, promulgating gaming regulations that embrace a policy goal to ensure that the proper amount of tax is reported and paid has a long-standing tradition.

The unique aspect of the gaming industry compared to other business sectors is the nature of how revenue is generated. Gaming conducted in brick-and-mortar casinos occurs at a fast pace with several transactions occurring either simultaneously or in rapid-fire succession. As a result, it is impractical to record most individual gaming transactions.[18] To address the realities of gaming transactions in brick-and-mortar casinos, aggregate accounting methods and special rules have developed to ensure procedures are in place to properly record the results of each transaction, along with the corresponding revenue and tax liability.[19]

Like the regulation of brick-and-mortar gaming operations, i-gaming laws share the common goal of ensuring the proper tax is paid by licensees. The means by which revenue is received from the

conduct of i-gaming differs from traditional brick-and-mortar operations. By virtue of having electronic transactions, i-gaming affords the opportunity to depart from aggregate accounting. From a practical standpoint, this distinction will lead to very different regulatory content with respect to developing best practices to ensure that revenue is properly recorded in an effort to determine the proper tax liability.

Protecting Against Unlicensed Individuals Sharing in Profits

The protection of the public integrity of the gaming industry has long been an underlying public policy of the regulation of the industry.[20] Measures to prevent unsavory or unsuitable persons from having a direct or indirect involvement in the gaming business further the public integrity of the gaming industry.[21] Accounting, auditing, and recordkeeping rules help fulfill this policy goal by offering the opportunity to trace revenue and the distribution of revenue to ensure that money is not being skimmed from gaming operations.

Protecting Against Fraud

The emergence of Internet commerce presents new threats for fraudulent activity.[22] Internet-based fraudulent activities range from money-laundering and terrorist financing activities to payment fraud and identity theft.[23] Online fraud often centers on electronic identity theft and payment fraud.[24] The very nature of i-gaming as an activity conducted through the Internet, which can involve significant and frequent monetary transactions, exposes the i-gaming industry to threats of criminal activity through electronic means.[25] Accordingly, advancing the integrity of i-gaming includes having protocols that assure the public that i-gaming sites have safeguards to reasonably protect against unwittingly becoming mechanisms for online fraudulent activities.

Protecting the Integrity of the Games

The ICS developed to satisfy accounting, auditing, and recordkeeping requirements can further be used to detect irregularities in the conduct of games. For example, surveillance controls can detect uncommon or unusual moves in the play of a game, which, in turn, may indicate that the integrity of the game has been compromised.[26] Therefore, accounting, auditing, and recordkeeping requirements can also be utilized to further the policy goal of protecting the integrity of the online games. As an example, software may be used to detect unusual betting patterns or wagers.

Summary

Four basic policy goals have been identified above. Jurisdictions may have additional policy goals which can be advanced through accounting, auditing, and recordkeeping requirements.[27] Public policy can be influenced by a variety of factors, such as cultural or political proclivities.

The policy goals of a particular i-gaming jurisdiction will impact the content of accounting, auditing, and recordkeeping requirements. In the purest sense, the accounting, auditing, and recordkeeping functions should be designed with the initial goal of protecting the legitimate flow of funds. Ultimately, the i-gaming regulations must be reflective of the policy goals embraced in the enabling laws. A careful balance must be maintained with respect to the scope of the regulatory requirements. If i-gaming regulations unduly burden operators with unnecessary requirements, or requirements that are impractical, the viability of the i-gaming industry can be undermined.

Overview of Regulatory Tools to Achieve Accounting, Auditing, and Recordkeeping Requirements

Regulations can serve as one of the means to effectuate general policy goals embodied in an enabling law. Regulations can interpret the laws and offer guidance with respect to fulfilling the statutory, or code-based, requirements. The land-based gaming regulatory field has utilized several different regulatory tools in order to carry out these financial policy goals. The regulatory tools that have historically been used to further accounting, auditing, recordkeeping policy goals can be adapted for use in the regulation of i-gaming.

Regulatory mechanisms which can be implemented to effectuate the oversight of i-gaming accounting and auditing controls include:

(1)*Active governmental participation in the accounting process;*[28]

(2)*Government conducted audits*;[29]

(3)*Independent audits;*[30]

(4)*Development of minimum internal control standards (or MICS)*;[31]

(5)*Imposition of financial and operational recordkeeping requirements;*[32] and

(6)*Reporting requirements.*[33]

Ultimately, several factors will influence the particular tools implemented to further accounting, auditing, and recordkeeping goals.

History and Theories of Casino Accounting, Auditing, and Recordkeeping

Distinctive approaches to accounting, auditing, and recordkeeping requirements have developed in the land-based casino gaming industry. Procedures utilized in the land-based gaming industry can be beneficial for developing best practices in the regulation of i-gaming. Understanding the theory for imposing regulatory requirements is beneficial in two respects. First, it reveals why certain requirements have been incorporated into rules. That is, what harm the rule seeks to protect against or what information is sought in order to achieve the policy goals. Second, understanding the theory allows for the development of rules that can be adopted for the unique business differences within the i-gaming industry.

The notion of accounting invokes the method by which a business records its receipts and expenditures. Accounting methods answer questions such as what items are considered expenses and income, as well as the timing when expenses and income are recognized.

At the most fundamental level, an audit is a compliance check to assess the fairness of financial statements to ensure that financial results are accurately reflected in all material respects.[34] The meaning of an "audit" has expanded in the regulatory field to include so-called "certification" audits. A certification audit involves an auditor certifying that a business has complied with other requirements, including nonfinancial regulatory requirements.[35]

Recordkeeping involves the exercise of identifying the type and scope of information businesses maintain, the medium for maintaining the information, and the length of time that the information must be maintained (usually a minimum of 5-7 years).

Casino Accounting

Accounting is an exercise of recording transactions to determine financial results. The accounting process relies upon *control* mechanisms to ensure that transactions are properly recorded.

A Background Primer on Casino Accounting

Standard accounting practice entails identifying revenue and expenses to arrive at the business's profit/loss.[36] Supporting data must be examined to determine the results of each transaction. For most businesses, accounting consists of a review of receipts and other records to trace the inflow of money (i.e., income) and the outflow of money (i.e., expenditures). The process of accounting requires use of internal controls to provide assurances that transactions are accurately and properly recorded.[37]

The method of accounting is an often overlooked, but critical, aspect of accounting. In the United States, the non-accountant, and even perhaps the accountant, will defer to the use of "generally accepted accounting principles" ("GAAP") without a full appreciation of what GAAP really means.[38] GAAP may be an easily identifiable standard; however, it is also a complex system which allows for multiple approaches to account for transactions.[39] Accordingly, simply dictating the use of GAAP does not necessarily provide an assurance that the accounting records will provide the information regulators are seeking.

Standard accounting practices have not historically been used in the brick-and-mortar gaming industry.[40] "Casinos are unique because millions of dollars continually change hands among thousands of people on the casino floor without a complete transactional record being made of how much money is exchanged, how many people are involved, or who those individuals are."[41] To record every transaction would mean that the gambling activity necessarily would come to a standstill.[42] As a result, standard accounting practices have proved to be impractical in the brick-and-mortar gaming industry.[43] Consequently, a unique system of accounting and internal control procedures is necessary for the land-based casino industry. This unique accounting method is known as aggregate accounting.

At a very basic level, the aggregate accounting method used in land-based casinos is simple to explain. Revenue results are measured over a specified period of time. Win or loss is measured by comparing the beginning chip inventory, the amount

of cash or credit received and the remaining chip inventory at the end of the specified period.[44] The real difficulty lies with having proper, effective internal controls.[45] In a brick-and-mortar casino, chips must be delivered to tables ("fills"), money is constantly being deposited at tables and in electronic gaming devices ("drops"), and "drops" collected.[46] Lack of control procedures at each step of this process can cause inaccuracies.[47]

Use of Internal Controls

To ensure accurate accounting, businesses rely upon internal control policies.[48] Internal control policies are a fundamental aspect of financial accounting.[49] The policies and procedures within the purview of internal controls include policies which: (1) address the maintenance of records in reasonable detail in order to accurately reflect transactions and dispositions of company assets; (2) provide reasonable assurances that the transactions are recorded in a manner that allows financial statements to be prepared in accordance with the accounting system;
(3) ensure that receipts and expenditures are made only in accordance with the authorization of management and directors; and (4) provide reasonable assurances to either prevent or allow for timely detection of unauthorized transactions involving company assets that could have a material effect on financial statements.[50]

Based on the nature of operations in a brick-and-mortar casino, "special procedures to ensure that [the casino's] financial records properly reflect the actual results of gaming transaction" must be used.[51] Similar to any other business, the purpose of internal controls in the gaming industry is "to act as checks on the handling of financial operations."[52] The benefits derived from the use of ICS in land-based gaming have been described as "assist[ing] both the state and federal governments in their efforts to control gambling operations, protect the betting public, and collect taxes and fees from the casinos."[53]

The types of internal control procedures adopted in the gaming industry focus on documentation controls, physical/access controls, and personnel controls.[54] Casino internal control policies include provisions to provide for the "separation of functions, and extradepartmental [sic] reviews of transactions."[55]

Summary

There are common considerations between i-gaming and land-based gaming related to accounting procedures and the types of internal controls which may be used. Operators in both the context of Internet-based and in-person gambling share the common desire to ensure that the win/loss from the operation of a game is properly recorded. While the goal is similar, the nature of how games are conducted differs substantially. As a result, while traditional casino accounting and internal controls have some application in i-gaming operations, the accounting and internal controls must be adapted to reflect the reality of how i-gaming is conducted. The means by which i-gaming is conducted affords an opportunity to receive more detailed records because each gaming transaction can be readily recorded during the course of play without bringing play to a standstill.

Casino Audits

Audits serve several important functions. Audits are beneficial for internal business purposes to serve as a check on the activities of the business.[56] Financial markets also depend on audits to assess the worth and creditworthiness of companies. Audits further serve as a method of assuring regulatory compliance through certifications.

The United States Supreme Court has characterized the role of the auditor as that of the "public watchdog."[57] While the auditing vocation may not necessarily embrace the role of being the "public watchdog," the public relies on auditors to provide an independent assessment of the fairness of financial statements.[58] "Audits" have expanded beyond simply serving as a tool to assess the fairness of financial statements.[59] The concept of an audit is "now used in a variety of contexts to refer to new or more intense account-giving and verification requests."[60] This is especially the case for publicly traded companies, where audits are required to comply with SARBOX.

Without an appreciation of the reason for requiring audits and the role of the auditor, the potential value of an audit can quickly disappear. Regulations and the regulators enforcing the regulations should gain an appreciation of: (1) the role of the auditor; (2) the purpose of the audit; and (3) content which should be included in an audit.

The Role of an Auditor

The traditional role of the auditor is to serve as a detective for the owner of a company.[61] "The standard task of what is now called internal auditing is to inform owners of the activities of their agents and employees."[62] Over the past century, auditors have taken on a secondary role of certifying information for third-party disclosure.[63] In the certifying function, an auditor is considered to be a gatekeeper for the third-party user.[64] In connection with publicly traded companies, the role of the auditor has been effectively expanded by SARBOX.

Purpose of the Audit

The objective of an audit will depend on whether the auditor is acting in the role of a detective or certifier. In the "detective" function, the purpose of an audit of the financial statements of a business is to express an opinion with respect to the fairness of the presentation of financial statement in disclosing, in a material respect, the financial position and results of the business.[65] In the certification function, an audit is examining whether financial records satisfy an accounting or other standard.[66] Thus, "the audit is seen as a particularly important tool of regulation, accountability, and governance."[67]

Audit Content

The content of the audit will turn on the purpose of the audit and the accounting system used by the business subject to the audit. At the base level, an audit will include notes explaining significant financial transactions and the accounting of those transactions. A certification audit, such as would be expected in the regulated gaming industry, may also include a summary of the licensee's ICS and a certification with respect to whether the ICS satisfy regulatory requirements.[68]

Audits Within the Gaming Industry

For the gaming industry, the function of the auditor is typically two-fold. First, the auditor – as with any other audit engagement – is responsible for expressing an opinion with regard to whether the income or loss of the gaming business is properly reported.[69] Second, state gaming laws typically impose additional certifications.[70] For instance, the gaming laws and regulations in several jurisdictions ordinarily require an auditor to provide an assessment of the internal control procedures of the casino licensee.[71] This requirement is also found in laws specifically applicable to i-gaming.[72]

The function of the audit, therefore, plays an important role of not only ensuring that gaming revenue is properly recorded, but also for determining compliance with the underlying gaming laws and regulations. The internal controls operate as the backbone of gaming businesses by establishing procedures for, among other matters, recording gaming transactions, document control, and access control. Casino accounting procedures and the audit requirements are intertwined within the regulatory body governing the financial aspects of casino operations.

Recordkeeping Requirements

Recordkeeping is simply the obligation of operators to document certain transactions, retain the documents, and disclose information. Records are the evidence used to support the results of the transactions of the operator and demonstrate compliance with regulatory requirements. The prospective scope of records can be expansive, ranging from records relating to financial results to records which demonstrate compliance with gaming laws and rules. In the regulation of i-gaming, as discussed below, recordkeeping will cover the substance of matters such as recording of wagering transactions, player and location verification, and the conduct of games.

Regulatory Tools

Government regulation of the gaming industry represents government intervention into an economic market. Government intervention can affect economic efficiency and lead to market failures.[73] The economic costs of compliance must carefully be considered when designing regulatory models. In particular, efforts should be undertaken to ensure that regulations do not adversely affect market efficiency. In addition, the cost benefits of the regulations should be carefully measured.[74]

Various mechanisms can be implemented to effectuate accounting and auditing policy goals within the i-gaming regulatory field. Accepted policy analysis principles allow for the assessment of the economic costs of regulatory requirements.[75] Cost-benefit analysis is particularly useful to ascertain the market costs of regulations and the impact on market efficiency.[76] Cost-benefit analysis involves identifying both the costs and benefits of a prospective regulation.[77] Quantifying the costs and benefits can often be a difficult and complicated

task. In addition to examining cost benefits, feasibility of technological requirements of a regulation must also be contemplated to avoid imposing standards which are not technologically capable of being achieved.[78]

Accounting and auditing regulations are ordinarily intricately intertwined with internal control procedures. Internal control procedures, whether cast in the form of required minimum internal control systems or merely the procedures adopted by i-gaming operators, can serve as a practical regulatory model. In the land-based gaming industry, the use of required MICS has been adopted in many jurisdictions as an effective approach to identify accounting, auditing, and recordkeeping procedures.[79] Similarly, MICS have also found use in the regulation of i-gaming to identify required accounting, auditing, and recordkeeping procedures.[80] The use of MICS, therefore, can serve as the main tenet of accounting, auditing, and recordkeeping regulations.

Ultimately in designing an effective regulatory model, regulatory bodies should strive to keep policy goals front and center. It is far too easy to lose sight of the forest for the trees. Therefore, by constantly asking whether a regulatory requirement furthers an underlying policy goal is a good practice when developing best regulatory practices.

Examining Accounting and Auditing Regulatory Tools: the Practicality of Direct Government Involvement, Government Audits, Independent Audits, and Other Tools

As previously identified, gaming regulations have generally resorted to the use of six basic categories of requirements to effectuate accounting, auditing, and recordkeeping requirements. These six tools – government participation, government audits, independent audits, mandatory minimum internal control procedures, recordkeeping, and reporting – in isolation can have individual merit. These regulatory tools also can have considerable overlap among one another. Thus, often a mix of the six regulatory categories often proves to be an efficient and effective regulatory approach.

Government Participation

Government involvement in accounting and auditing functions can take the form of direct governmental participation in gaming operations.[81] A method of government participation in the i-gaming regulatory field could entail the use of central monitoring of the conduct of games and monetary transactions.

Louisiana experimented with direct participation by means of a central monitoring system for electronic gaming devices ("EGD").[82] The lessons of the Louisiana experiment have application to the regulation of i-gaming. Specifically, the purpose of the Louisiana central monitoring system was to provide state gaming regulators with the ability to remotely monitor EGDs and related monetary transactions. Eugene Martin Christiansen conducted a study to assess the feasibility of the Louisiana experiment.[83]

Louisiana has authorized both commercial gaming and video lottery terminals ("VLT"). Commercial gaming is conducted at land-based and riverboat casinos. VLT machines were authorized to be located at establishments selling alcohol, truck stops, racetracks, and off-track betting facilities. The Louisiana central monitoring system was intended to be a "State-operated central *monitoring and control* system providing regulators with control over individual slot-machines, including the ability to shut down malfunctioning machines down, in addition to audit and financial monitoring for individual machines and for slot gaming as a whole in real time."[84]

The Christiansen Study concluded that the Louisiana's direct participation through use of a central monitoring system of EGD ultimately "is a weak *monitoring* system … and essentially duplicates the financial audit controls provided to licensed operators by casino computer monitoring systems designed for this purpose."[85] Christiansen's study emphasis several salient points: (1) operators and state regulators share a common interest in accurate machine reporting and the integrity of each gaming device; (2) technological challenges add costs and compromise the strength of a regulatory system; and (3) redundancy may produce no additional benefits.[86]

What does the Louisiana experiment mean for the development of i-gaming regulatory practices? At the threshold, the Louisiana approach introduces a potential method for monitoring compliance with i-gaming accounting, auditing, and recordkeeping requirements. Specifically, the Louisiana system

highlights a method for government regulators to directly monitor electronic games which could similarly be used in the regulation of i-gaming. The Christiansen Study, however, calls into question whether any added benefits can be derived from direct government participation. The Christiansen Study found that any benefits were minimal and merely duplicative of existing accounting and audit reports produced by the EGDs for the licensees.[87] Moreover, the Louisiana central monitoring system was expensive to develop and maintain.[88] As a result, the Christensen Study reveals that the costs of government participation through monitoring games and monetary transactions are significant and outweigh the benefits. Essentially, the Louisiana system created an unnecessary redundancy when there was no evidence that current accounting and audit regulations were ineffective. Therefore, the Christiansen Study suggests that direct government participation through central monitoring is not only inefficient, but of little regulatory benefit.

Government Audits

The term "government audit" typically evokes the tax audit by government revenue officials designed to ensure the proper payment of taxes. Audits, however, can address a variety of subjects with respect to regulatory oversight, accountability, and corporate governance.[89] Accordingly, a threshold matter for a government audit requirement necessitates answering the question of what regulators are seeking to accomplish as a result of a government audit.[90]

As a compliance check and deterrent tool, government audits can be effective.[91] The *ability* – as opposed to a *mandate* – to conduct government audits may serve a useful regulatory purpose.[92] To the extent that regulations require independent audits, requiring periodic government audits will likely be an unnecessary duplication of the independent audit.[93] Therefore, the flexibility to conduct discretionary and random audits can be a practical regulatory tool. Requiring the government to periodically audit all i-gaming operators, however, may not add sufficient benefits compared to the resulting costs imposed on licensees.

Independent Audits

Independent audits are an efficient method to ensure compliance with accounting, audit, and recordkeeping requirements for i-gaming businesses.[94]

ICS and MICS: Internal Controls Procedures and the Role of Mandatory Minimum Internal Controls

As discussed above, internal control procedures are not simply a creation of gaming regulations.[95] Internal control procedures are paramount for ensuring accurate accounting of the operations of any business. The internal controls identify the procedures to carry out transactions and record the results of the transactions.[96] Not only do "[internal control procedures] prevent improprieties and promote the integrity of the transactions and the records of results," they also provide detailed procedures for the conduct of i-gaming operations.[97]

Jurisdictions have promulgated regulations that set forth required MICS.[98] MICS generally serve the purpose within gaming regulations to "safeguard casino assets, ensure the reliability of financial records, and guarantee that all transactions are authorized by casino management."[99] Internal control procedures within the gaming industry cover three categories, consisting of documentation controls, access/physical controls, and personnel controls.[100]

Documentation controls center on the types of records an i-gaming operator must maintain in connection with preparing financial statements and demonstrating compliance with gaming laws and rules. Documentation controls within i-gaming regulatory models often bridge not only technology-related recordkeeping obligations, but also records that relate to player accounts. I-gaming regulatory standards further typically include comprehensive documentation and recordkeeping requirements relating to the underlying gaming software.[101] The documentation requirements often consist of maintaining records that detail all technology-related changes and software and hardware updates.[102] Examples of player account document controls include requirements to maintain records relating to deposits to and withdrawals from player accounts, summary reports of player account balances, gaming play reports, and revenue reports of i-gaming operators.[103]

Access/physical controls are procedures that identify the personnel who may have access to company records and assets.[104] As an example,

access controls may provide that only certain IT personnel can be allowed access to gaming software.[105] Similarly, many i-gaming jurisdictions impose access controls that restrict access to player accounts and related player information.[106] Access controls can also be in the form of maintaining records which identify each instance of access by operator personnel and establish security procedures for operator personnel to access software.[107]

Personnel controls are procedures which establish an organizational structure for the approval of transactions.[108] Typically, personnel controls rely on the division of duties and responsibilities.[109] Personnel control can also include the use of checks and balances to ensure that no single department or person within the i-gaming operator organization has unfettered control.[110]

The scope of required MICS for i-gaming operators have ordinarily included a requirement for independent audits, preparation of detailed reports concerning player account deposits/withdrawals, and detailed reports concerning the conduct of games.[111] The content of accounting control systems typically includes both general accounting procedures, as well as establishing auditing and recordkeeping procedures. The detail with respect to the types of controls and records which must be maintained that are set forth in i-gaming regulatory models differs by jurisdiction. The following presents an overview of the content of accounting, auditing, and recordkeeping rules adopted by different i-gaming jurisdictions.

An Overview of Documentation, Access, and Personnel Controls Used in I-Gaming MICS: Alderney ICS

The Alderney ICS present an overview of the general content of i-gaming MICS. The Alderney ICS are illustrative of the fact that the same categories of controls – documentation, access/physical, and personnel – are adaptable for application in the regulation of i-gaming. The Alderney ICS accounting control procedures require licensees to identify:

- Internal accounting controls – which consists of identifying procedures for documenting transactions, maintaining accounting records, providing controls over the safeguarding of physical and financial assets, controlling the expenditures of funds, and reconciling customer accounts and profits and losses;
- List of all accounts used in the operation of the licensee's operations;
- Internal reporting procedures;
- External reporting procedures – includes the submission of various reports to gaming regulators, such as monthly reports concerning operations and quarterly financial reports;
- Reports evidencing that licensees meet prescribed capital ratios;
- Procedures for the preparation and approval of annual budgets and forecasts;
- Identification of the licensee's external auditor and timing for preparation of external audit;
- Description of accounting software used by the licensee, including such information as procedures for backing up accounting software data and the secure storage of accounting data;
- Access controls for the computerized accounting systems;
- Record retention policy;
- Bank accounting information; and
- Information pertaining to how customer funds are held, such as identifying whether customer funds are held in segregated or comingled accounts.

Similarly, the Nevada Interactive Gaming MICS require operators to have independent audits,[112] reconcile certain payment reports,[113] and periodically prepare and review various gaming-related data.[114]

Audit Requirements: Use of Certification Audits

Similar to land-based gaming, i-gaming regulatory models have embraced mandating the use of independent audits. The Ontario, Canada Draft iGaming Registrar's Standards require the engagement of a reputable independent auditor.[115] Under the standards, the auditor is required to perform a compliance audit to verify operators have

appropriate system and manual controls which are in compliance with the underlying regulations.[116]

The Nevada Interactive Gaming regulations adopt a comparable approach. Nevada requires an independent auditor be engaged to prepare a written report of the licensee's compliance with the MICS.[117]

Regulatory models also have adopted standards which afford wide discretion to regulators with respect to audit subjects. As an example, the British Columbia, Canada standards authorize regulators to request audits of specific areas of operation to ensure compliance with i-gaming regulations.[118] The discretionary standard can be useful to assess the health of a licensee when other red flags may arise. Nonetheless, policymakers and regulators must proceed with caution when embedding discretionary standards within a regulatory model. The reason being is that discretionary standards can cause uncertainty with respect to what actions licensees must undertake to satisfy regulatory requirements and unnecessarily increase compliance costs.

When audits discover deficiencies with regard to compliance with ICS, most regulatory regimes obligate licensees address the deficiencies.[119] The Nevada Interactive Gaming regulations, for instance, require the licensee to submit a statement with the independent auditor's report addressing each instance of noncompliance.[120] Imposing a timeframe for disclosing an independent report, as well as the response to compliance deficiencies, is beneficial in order to afford early detection of operators potentially experiencing greater difficulties. Thus, Nevada requires that a licensee's statement addressing items noncompliance must be submitted within 150 days following the end of the licensee's fiscal year.[121]

Self-Assessment of ICS

Consistent with the approach of requiring audit certifications of compliance with MICS, gaming regulatory models often impose an obligation on licensees to assess the effectiveness of MICS.[122] Self-assessment can be a useful tool for operators to measure operations and identify weaknesses in operational aspects, such as online security protocols, as well as business practices.

The Ontario, Canada Draft iGaming Registrar's Standards address the timing of when self-assessment should occur. The standards provide that testing the effectiveness of MICS is not simply a snapshot on a periodic annual date.[123] Rather, ensuring effectiveness of internal controls is an ongoing regulatory requirement.[124] Hence, the Ontario, Canada standards provide that the frequency of measuring effectiveness is based on the risk exposure of the operator.

Recordkeeping: Player Account Records

I-gaming regulatory systems typically require operators maintain accurate records of all financial transactions.[125] A general obligation to maintain accurate records of financial transactions would likely equate to the maintenance of records relating to player accounts, including account deposits, credits, and withdrawals.

The Nevada Interactive Gaming regulations specifically enumerate detailed content which operators must maintain with respect to player accounts. This information includes records of account deposits and withdrawals, the amount of money wagered during each table session, money won during each table session, promotional or bonus credits wagered during each table session, manual adjustments to the player account, and any other information required by regulators.[126]

Recordkeeping: System Reports

The very nature of the data driven aspects of an Internet business activity allows for flexibility in the development of the content to be included in operational reports of licensees. The Nevada Interactive Gaming regulations identify a comprehensive list of system reports which licensees are obligated to disclose to regulators.[127] The scope of reports includes logs of user access, identifying closed or inactive player accounts, daily players' funds transactions, monthly revenue reports, system configuration settings, and game session reports.[128] British Columbia, Canada and Ontario, Canada i-gaming standards have embraced a more flexible approach by requiring operating systems have the capability to provide custom and on-demand reports to regulators.[129] Finally, regulatory models also typically include comprehensive guidance with respect to the methods which must be used to maintain records.[130]

Summary

In summary, the tenet of internal control principles developed for the brick-and-mortar gaming industry

can be adapted to the regulation of i-gaming. Documentation controls have application in the field of i-gaming regulation similar to the brick-and-mortar industry. Documentation controls can be specifically customized with regard to the maintenance of records concerning software and gaming activity.[131] Access/physical controls will also have application in the regulation of i-gaming operators by, for example, establishing procedures with respect to the access to player account information and access to software by the IT personnel of the software licensee or operator.[132] Finally, personnel controls can also play an important role with regard to identifying organizational structures and describing decision-making processes.

Developing Best Practices for I-Gaming Accounting, Auditing, and Recordkeeping Regulations

Several guiding principles from mature i-gaming jurisdictions and from brick-and-mortar gaming regulations can be elicited with respect to developing best practices for i-gaming accounting, auditing, and recordkeeping regulations. Lessons learned from i-gaming jurisdictions across the globe, such as Alderney, Canada, Malta, Nevada, and the United Kingdom, can serve as a good resource for the development of best practices. I-gaming accounting, auditing, and recordkeeping regulatory requirements are not necessarily an opportunity to recreate the regulatory wheel, but rather offer an opportunity to improve upon existing regulatory practices to develop a robust i-gaming regulatory model.

To develop effective and efficient regulations, regulators must first understand the business model of i-gaming. This means that i-gaming regulators should understand both the business organizational models, such as the skin or B2C model, and the flow of money in the operation of an i-gaming site. As the background section illustrates, the business model for i-gaming differs from traditional land-based gaming and introduces the potential for new types of suppliers. Understanding the i-gaming business model and the flow of funds can permit the development of robust i-gaming regulations which are carefully balanced to not pervasively impinge upon the efficient operation of economic markets.

An initial guiding principle for the development of robust i-gaming regulatory practices centers on a full comprehension of the policy goals of a particular jurisdiction. Comprehending the policy goals allows for the implementation of regulations that seek to further the governing policy goals.

The basic rationale for imposing accounting, auditing, and recordkeeping regulations is to protect the legitimate flow of funds. Specifically, ensuring that (1) the government receives the lawfully correct tax revenue, (2) non-licensed persons do not impermissibly share in profits of i-gaming operations, and (3) player funds deposited with i-gaming operators are adequately protected.

In the process of promulgating rules, administrative agencies must consider the costs of compliance. Imposing regulatory burdens that are too costly to meet will effectively cause market failures. To that end, cost-benefit analysis should be employed to assess the costs and benefits of regulations.

The following are suggested guiding principles for developing best practices for i-gaming accounting, auditing, and recordkeeping regulations:

> (1) Understand the business model of an i-gaming operator and the flow of funds.
>
> (2) Requesting information on the corporate structure can be a good regulatory practice.[133] Disclosure of the corporate structure not only reveals which individuals are potential qualifiers that are subject to a finding of suitability, but can also reveal relationships with vendors, what functions the i-gaming licensee will undertake, how decisions are made, and the individuals responsible for making decisions. A review of corporate structure can also disclose that proper control procedures are in place to ensure that all transactions are properly approved and recorded. In other words, regulators can quickly gain confidence in the ICS adopted by the i-gaming operators.
>
> (3) Understand the accounting system used by the i-gaming operator. The accounting system will reveal how items are recorded as revenue, when expenses are recognized, and other important financial information. For example, if regulations require GAAP, regulators should know precisely what the

implications of GAAP accounting means for the presentation of financial statements and the certifications which may be provided by independent auditors.

(4) Use independent audits. Independent audits are a cost-effective and efficient means for not only obtaining an independent, unbiased opinion of the financial results of the i-gaming operator, but also certifications with respect to regulatory compliance. The independent audit is more efficient and less costly to the markets, as compared to requiring annual government audits. Allowing for discretionary and random audits can, however, serve as a useful incentive to encourage i-gaming licensees to use best efforts to materially comply with the i-gaming laws and regulations.

(5) Identify the purpose(s) for independent audits. The purpose of the independent audit will guide the scope of the audit and what auditors should certify.

(6) I-gaming licensees are in a unique position to electronically record transactions and present detailed reports with respect to player accounts, the results of games, and the ability to reconcile accounts. Such records should be required to be maintained. Regulatory models have adopted different levels of detail with respect to the type of reports which must be maintained. Nevada has comprehensively enumerated numerous reports which operators are obligated to maintain. In contrast, British Columbia, Canada has embraced an approach giving regulators greater flexibility to seek custom reports. The flexible approach must be used with caution because too much flexibility can result in uncertainty with respect to what is required of licensees, with the requirements susceptible to frequent changes. Nevertheless, some flexibility can be beneficial to the extent that the flexibility allows regulators to adapt regulatory requirements to the realities of actual operations. Furthermore, best practices would also dictate that licensees should strive to maintain all records in an organized and systematic fashion.

(7) Developing MICS is a good idea – within reason. The Alderney MICS and Nevada Interactive Gaming MICS are examples of minimum required internal control procedures. A balance must be maintained to allow flexibility to i-gaming operators with regard the internal control processes and procedures which are implemented.

An inherent criticism of the gaming regulatory MICS leveled by auditors has been a failure to identify the overall objective of the MICS.[134] "Routine adherence to mechanical procedures without considering the overall objectives of a casino audit may prevent an auditor from detecting a well-designed fraud."[135] Hence, in designing MICS, a fundamental question must be raised with respect to the objectives and goals the MICS are intended to achieve. Are the MICS intended to ensure the integrity of the i-gaming games, insure appropriate player and site identification, help identify and prevent problem gambling behaviors, incorporate anti-money laundering protections, or to ensure revenue is properly recorded or all of the above?

The Alderney ICS, British Columbia, Canada IGS Standards, Nevada Interactive Gaming MICS, and Ontario, Canada Standards all provide models for the development of best practices for i-gaming accounting, auditing, and recordkeeping regulations. The Alderney ICS offer a coherent statement of objectives.[136] The Alderney ICS identify four objectives for internal controls: administrative control with respect to the organizational structure and decision-making process of the licensee; accounting controls to ensure transactions are executed in accordance with management authorization and transactions are properly recorded to prepare financial statements; controls are in place over the operation of customer accounts and the calculation of gaming activities; and safeguards are in place in relation to physical and electronic security of the licensee's systems.

Finally, it is worth noting a few regulatory approaches that are not best practices. Most notably, as the Christiansen Study illustrates, direct government participation in monitoring activities will likely cost far in excess of any benefits received. Moreover, the accounting and audit information which can be obtained through a central monitoring system is duplicative of the information which the i-gaming operators can already obtain.

Endnotes

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[1] *See* Anthony N. Cabot, CASINO GAMBLING: POLICY, ECONOMICS, AND REGULATION 395 (1996).

[2] *See id*.

[3] See American Gaming Association, State of the State 2011 for comprehensive information concerning the economic impact of the commercial gaming industry in the United States.

[4] *See*, *e.g.*, Nev. Rev. Stat. Ann. § 463.157; Nev. Reg. 6.090; Alcohol and Gaming Commission of Ontario, Canada, Draft iGaming Registrar's Standards 8.1 (*hereinafter* "AGCO Standards"); British Columbia, Canada TGS5, Technical Gaming Standards for Internet Gaming Systems (IGS) (2009) (*hereinafter* "BC IGS Standards"); Malta Remote Gaming Regulations, 2004, Compliance Audit Questionnaire.

[5] *See*, *e.g.*, Lipton, *infra,* note 39.

[6] The terms "brick-and-mortar" and "land-based" are used interchangeably throughout this article to refer to physical casinos that offer in-person gaming.

[7] *See*, *e.g.*, Alderney Gambling Control Commission, Technical Standards and Guidelines for Internal Control Systems and Internet Gambling Systems (2010) (*hereinafter* "Alderney ICS"). AGCO Standards 3.38 (providing that software development roles must be segregated).

[8] *See* Ian Abovitz, "Why the United States Should Rethink its Legal Approach to Internet Gaming: A Comparative Analysis of Regulatory Models that have Been Successfully Implemented in Foreign Jurisdictions," 22 Temp. Int'l & Comp. L.J. 437, 451 (2008). Abovitz suggests that "[a]n effective scheme for internet gambling should be similar to that of traditional gambling and should be based on a balance between government's right to tax and supervise and its duty to protect the industry's actors." *Id*. As explored in depth below, many of the principles of brick-and-mortar gaming regulation are adaptable to the regulation of i-gaming. In some respect, developing i-gaming regulations in major emerging jurisdictions – notable the United States – offers an opportunity to improve upon regulatory approaches advanced in other i-gaming jurisdictions and regulatory practices which have traditionally been employed in the brick-and-mortar industry.

[9] For example, whether on a casino floor or through the virtues of the Internet, the universe of games which can be offered run the gambit of table games – baccarat, blackjack, craps, poker, roulette and the numerous permeations of these table games – and "slot-machines." In the modern gaming industry, the use of the "slot-machine" nomenclature is an archaism of the early gambling devices where gamblers deposited coins into devices which were operated by electro-magnetic spinning reels with randomly produced characters. A modern slot-machine has evolved into a highly sophisticated computerized device, capable of offering extensive games and functions.

[10] An entire body of law has developed in the United States dedicated to administrative law. *See*, *e.g.*, Ronald M. Levin, "The Administrative Law Legacy of Kenneth Culp Davis," 42 San Diego L. Rev. 315 (2005) (discussing the development of United States administrative law practice). Issues commonly encountered in the field of administrative law include the binding nature of a rule to the level of deference afforded the rules promulgated by the administrative agency. *See*, *e.g.*, Matthew C. Stephenson, "Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies," 56 Admin. L. Rev. 657, 658-660. Not infrequently, persons subject to regulations will challenge the validity of a rule, often asserting that the rule exceeds the authority granted to the administrative body under an enabling law. *See*, *e.g.* Stephenson at 658-660. A comprehensive discussion of the basic tenets of administrative law is well-beyond the scope of this article. Suffice to say, regulators must be cognizant of the legal limitations on the scope of rules adopted in the course of developing i-gaming regulations. *See id*.

[11] At best, a regulation has been adopted that will never be used because an i-gaming operator will not have a physical count. At worse, a regulation has been introduced that is difficult to interpret, potentially confusing and impractical. That is, would an agency interpret the rule to mean that an agency staff person must be physically present when an operator reviews computer data and reconciles

bank statements. The example is extreme and likely not to occur in the real world. The example is intended to be shocking in order to illustrate the importance of understanding business models and how tasks are capable of being carried out in the real world.

[12] Players may use other methods to fund a player account, such as sending in a live-check, use of electronic funds transfers, wire transfers, automated clearinghouse transfers, debit cards, or other means of electronic payments.

[13] *See* Cabot *supra* note 1 at 395.

[14] *See* Cabot *supra* note 1 at 395. Accounting and audit regulations have traditionally been directed at ensuring the government receives its proper share of tax revenue and prohibiting unlicensed individuals from sharing in profits.

[15] *See id*.; *see also* Michael A. Santaniello, "Casino Gambling: the Elements of Effective Control," 6 Seton Hall Legis. J. 23, 25 (1982) (noting that "[t]he reported gross profit or loss of the casino, with its accompanying tax consequences, is dependent upon the continued integrity" of the control mechanisms to ensure that cash and casino chips reach the counting process).

[16] *See*, *e.g.*, IRC §§ 6001 and 6011. While the characterization of the United States tax system as voluntary may suggest that of taxes are paid is only out of altruistic motivation, the legal requirement imposed by United States tax laws is not at all altruistic. Rather, the qualitative "voluntary" aspect of the United States tax system means that taxpayers determine tax liability as opposed to the government computing tax liability.

[17] *See*, *e.g.*, IRC § 6001; Treas. Reg. § 1.6001-1. United States Treasury Regulations generally obligate "any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deduction, credits, or other matters required to be shown by such person in return of such tax or information." Treas. Reg. § 1.6001-1(a).

[18] *See* Santaniello, *supra* note 15 at 25 (noting that "[t]he reported gross profit or loss of the casino, with its accompanying tax consequences, is dependent upon the continued integrity" of the control mechanisms to ensure that cash and casino chips reach the counting process.). In the context of the brick-and-mortar casino, numerous opportunities for inaccuracies – both intentional and unintentional – exist which can occur in the process of collecting and recording profits. *See id*. As an example, inadequate controls that allow a dealer to pocket chips can result in underreporting of revenue and the corresponding tax.

[19] *See id*. at 24. "Due to the impracticality of recording each gaming transaction, a [brick-and-mortar] casino must rely on aggregate amounts of cash, checks, and gaming chips to determine its gross profits or loss." *Id*. For further discussion of the control procedures used in brick-and-mortar casinos to ensure income and loss is properly reported, see generally Santaniello, *supra* note 15.

[20] *See* Robert W. Stocker II and Peter J. Kulick, "Gambling with Bankruptcy: Navigating a Casino Through Chapter 11 Bankruptcy Proceedings, 57 Drake L. Rev. 361, 369 (2009).

[21] *See* Stocker & Kulick *supra* note 20 at 369.

[22] *See generally* Edward M. Roche, "Internet and Computer Related Crime: Economic and Other Harms to Organizational Entities," 76 Miss. L.J. 639 (2006) (discussing the costs of Internet crime).

[23] *See* Sonya Crites, "Best Practices in Addressing Online Cash Management Security," 23 Com. Lending Rev. 21, 23-24 (2008). Crites notes that many organizations lack "appropriate controls needed to adequately protect a company's financial assets" from electronic fraud involving identity theft and payment fraud. *Id*.

[24] *See* Crites *supra* note 23 at 23.

[25] Beyond offering gambling games through the Internet, i-gaming is intertwined with online banking and cash management systems. Wager amounts are transferred by payment processors to the operators and from the operators to players. Consequently, i-gaming regulations will necessarily touch on practices designed to ensure the integrity of the payment processing systems.

[26] *See* Santaniello *supra* note 15 at 34.

[27] As an example, a particular jurisdiction may decide to implement a stringent problem-gambling policy that allows for self-exclusion for a specified period of time. Consequently, in order to further the

self-exclusion policy, a jurisdiction may require i-gaming operators to maintain records that identify players who have opted to self-exclude. The scope of recordkeeping may further identify such information as the date of self-exclusion and the length of the self-exclusion period.

Legal requirements can operate to assist in achieving secondary policy goals. Theoretically, it could be argued that accounting, auditing, and recordkeeping should be limited simply to protecting the flow of money. While a theoretically pure regulatory approach has many positives, adopting public policy is not always as simple as what common sense would dictate. The point being, regulations governing accounting, auditing, and recordkeeping can be adapted to assist with achieving secondary policy goals beyond protecting the legitimate flow of funds.

[28] *See* Cabot *supra* note 1 at 396-97. Governmental involvement in the accounting process raises both an efficiency and practical question with respect to the appropriate level of governmental intrusiveness during the accounting process. For example, regulations could mandate the presence of onsite regulatory personnel to supervise accounting functions. The reliance on active governmental participation in the accounting process, consequently, can raise efficiency and economic feasibility concerns. *See id*.

[29] *See* Cabot *supra* note 1 at 396.

[30] *See id*.

[31] *See id*.

[32] *See id*. As discussed further below, recordkeeping requirements present the question concerning the appropriate scope of records an operator must maintain. Scope consists of the type, content, and period records must be maintained.

[33] *See id*. From a financial perspective, the primary reporting obligation is ordinarily a requirement to periodically file tax returns. Reporting requirements can also have significant overlap with other regulatory requirements. For instance, i-gaming regulations could impose reporting requirements to further anti-money laundering protections, suitability and licensing requirements, integrity/fairness of the games, player protections/problem gambling, and age and location verification.

[34] *See* Comment, "The Toothless Watchdog: Corporate Fraud and the Independent Audit - How Can the Public's Confidence Be Restored?," 58 U. Miami L. Rev. 891, 896 (2003).

[35] *See* Amy Shapiro, "Who Pays the Auditor Calls the Tune?: Auditing Regulation and Clients' Incentives," 35 Seton Hall L. Rev. 1029, 1036 (2004).

[36] *See*, *e.g.*, Cabot *supra* note 1 at 396.

[37] *See* Martin Lipton, *et al.*, "Audit Committee Guide & Best Practices," ALI-ABA Course of Study Materials, Eleventh Annual Corporate Governance Institute, 19 (2004). The use of internal control standards in the casino industry – often simply referred to using the acronym of ICS or MICS – has evolved into special meaning vis-à-vis regulatory-mandated operations within the gaming industry. The minimum internal control standards, or MICS, are regulatory standards that establish exactly what the name means – the minimum procedures which a licensee must employ for the ultimate purpose of recording each gaming transaction. The internal control standards, or ICS, are those control procedures actually adopted by a licensee to record gaming transactions. As discussed further below, MICS and ICS will provide more detail and cover significantly more subject matters than simply recording an individual gaming transaction.

MICS and ICS are analogous to a staircase. That is, the MICS and ICS require the licensee to undertake several steps in the process which will arrive at an accurate record of the gaming transaction. While ICS have derived special meaning within the gaming industry, the notion of internal control policies (alternatively referred to as internal control procedures) is a much broader accounting concept. Internal control policies sets forth procedures businesses implement in order to ensure transactions are accurately reported. Businesses universally rely on internal control policies. In the public company context, internal control policies are an important element in the accounting and audit process, as well as assuring compliance with the Sarbanes Oxley Act of 2002, 15 USC 7201 *et seq.*, ("SARBOX"). *See* Lipton at 19.

[38] *See* Shapiro *supra* note 35 at 1051-52.

[39] *See id*.

[40] *See* Cabot *supra* note 1 at 396.

[41] *See* Santaniello *supra* note 15 at 23.

[42] *See id*.

[43] *See id*. at 24.

[44] *See id*.

[45] *See* Richard A. Meyer, "Accounting for the Winnings - Auditing Gambling Casinos," 12 Conn. L. Rev. 809, 811 (1979).

[46] *See* Meyer *supra* note 45 at 811-812.

[47] *See* Santaniello *supra* note 15 at 23. The significance of using internal controls when aggregate accounting is used can be illustrated by a simple example. At the outset, aggregate accounting measures beginning and ending values over a period of time. If a dealer pockets chips during the measurement period, absent controls, aggregate accounting will not necessarily detect the theft. Therefore, the use of internal controls becomes important to prevent irregularities and ensure an accurate measure of income/loss.

[48] *See generally* Lipton *supra* note 37 at 19. Internal control procedures are alternatively often referred to as internal control policies. *See id*.

[49] *See id.*

[50] *See id.*

[51] Meyer *supra* note 45 at 812.

[52] *Id*.

[53] *Id*. at 813.

[54] *See* Cabot *supra* note 1 at 399-401.

[55] *Id*. at 812. In-person gaming occurring on the casino floor is a fast-paced environment which can literally include dozens of separate gaming transactions in the course of each incidence of play. For example, depending on the number of seats at a blackjack table (typically 5 to 7 seats), a single game of blackjack could consist of over a dozen isolated wagers, not to mention players exchanging cash for chips or "coloring-up" chips to greater dollar denominations, all taking place within the course of a matter of minutes. As a result, the internal control procedures which developed in the land-based gaming environment have been designed to "guarantee that cash, checks, and gaming chips will be properly handled during the gaming day and that they will reach the counting process." Santaniello *supra* note 15 at 25.

[56] *See* Comment *supra* note 34 at 894-95.

[57] *See United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

[58] *See* Comment *supra* note 34 at 894-95.

[59] *See* Sasha Courville, *et al.*, "Auditing in Regulatory Perspective," 25 Law & Pol'y 179 (2003).

[60] *Id*.

[61] *See* Amy Shapiro, "Who Pays the Auditor Calls the Tune?: Auditing Regulation and Clients' Incentives," 35 Seton Hall L. Rev. 1029, 1034 (2004). Shapiro provides a detailed overview of the traditional role of the auditor.

[62] *See* Shapiro *supra* note 61 at 1034.

[63] *See id*. at 1036.

[64] *See id*.

[65] *See id*. at 896 (quoting AICPA Professional Standards, Statements on Auditing Standards No. 1, AU § 110.01 (American Inst. of Certified Pub. Accountants 2001)).

[66] *See* Shapiro *supra* note 61 at 1037. "Accounting standards are vital to certification auditing because the third party information user needs some way to evaluate the information received." *See id* at 1050. Too often, policymakers, attorneys, and regulators will simply express the relevant accounting standard as ensuring that financial records are prepared in accordance with GAAP – that is, "generally accepted accounting standards" – published by the professional society of accountants. *See*, *e.g.*, Shapiro *supra* note 61 at 1051 n.90 (citations omitted). The problem with GAAP is that it "is not only complex, but provides numerous ways to account for even common items such as inventory and depreciation as well as exotic ones such as derivatives." *Id*. at 1052. Accordingly, without understanding the accounting system, a certification audit may prove to be of little value.

[67] *See* Courville *supra* note 59 at 179.

[68] *See*, *e.g.*, Mich. Comp. Laws Ann. § 432.214 (requiring quarterly audits of the financial conditions of casino licensees); 2000 AACS, R 432.11201 to 432.11209; Nev. Rev. Stat. Ann. § 463.157; see also Meyer *supra* note 45 at 817.

[69] *See* Meyer *supra* note 45 at 810 ("[audits] are essential parts of the proper reporting of income or loss by gambling casinos."). Beyond ensuring that income or loss is reported, the tasks of the auditor also include studying and evaluating the casino's ICS. The evaluation of ICS can be tied to the process of ensuring that the audit is performed in adherence with professional standards. In the United States, auditors typically conduct audits in accordance with Generally Accepted Auditing Standards ("GAAS").

[70] *See id*. at 817.

[71] *See*, *e.g.*, BC IGS Standards 1.3.1, 2.26, 4.2.8, and 4.4.2; Mich. Comp. Laws Ann. § 432.214 (requiring quarterly audits of the financial conditions of casino licensees); 2000 Mich. Admin. Code R 432.11201 to 432.11209; Nev. Rev. Stat. Ann. § 463.157; and AGCO Standards 8.1; *see also* Meyer *supra* note 45 at 817.

[72] *See* BC IGS Standards 4.1.1; Malta Remote Gaming Regulations, 2004, Compliance Audit Questionnaire; AGCO Standards 8.2; and Nev. Reg. § 6.090(9).

[73] *See* Tevfik F. Nas, Cost-Benefit Analysis: Theory and Applications 11 (1996). Economic efficiency is the goal for allocating goods in a market. *See*, *e.g.*, Steven E. Rhoads, The Economist's View of the World: Government, Markets, & Public Policy 63 (1994). *Pareto* optimality dictates that markets reach a state of efficiency "where no one person can be made better off without simultaneously making at least one person worse off." Nas at 11. Government intervention can threaten the ability of a market to achieve *Pareto* optimality and impose welfare costs (or dead-weight losses) on markets. *See* Rhoads at 64.

[74] *See* Australia Productivity Commission 2010, Gambling, Report no. 50, at 17.24, Canberra, Australia (2010) (*hereinafter* "Australian Gambling Study").

[75] *See* Australia Productivity Commission 2010, Gambling, Report no. 50, at 17.24, Canberra, Australia (2010).

[76] *See* Nas *supra* note 73 at 11.

[77] *See* Nas *supra* note 71 at 11. The actual application of cost/benefit analysis is simple in theory. Consider the following illustration. Suppose that a regulation is implemented requiring the jurisdiction to implement online monitoring of all interactive games, with the costs of the system being directly passed to the regulated i-gaming operators. If the costs to operators is $200 per year, while operations can only be expected to generate $100 per year, there is little incentive to actually engage in commercial activity. In the example, the costs of the regulation destroyed any potential economic benefit.

[78] *See* Eugene Martin Christiansen, Central Systems for Machine Gaming: A Good Policy? (2003) (*hereinafter* the "Christiansen Study"). The Christiansen Study outlines a classic example of regulatory requirements creating inefficient redundancies.

[79] *See*, *e.g.*, Nev. Rev. Stat. Ann. § 463.157; Mich. Admin. Code R. 432.1901 to 432.1907 (Michigan gaming rules regarding ICS); *see also* Meyer *supra* note 47 at 815.

[80] *See*, *e.g.*, BC IGS Standards; Malta Remote Gaming Regulations, 2004.

[81] *See* Cabot *supra* note 1 at 396. Cabot explains government participation can involve direct supervision of the count process and transactions involving money, credit, or cash equivalents. *See id*.

[82] *See* Christiansen *supra* note 80 at 5-7.

[83] *See* Christiansen *supra* note 80.

[84] *See* Christiansen *supra* note 80 at 7.

[85] *Id*. at 7 (emphasis present).

[86] *See id*. at 5-8.

[87] *See id*.

[88] *See id*.

[89] *See* Courville *supra* note 61 at 179.

[90] In the brick-and-mortar gaming industry, government audits have been justified as an enforcement mechanism to ensure compliance with required minimum internal control procedures, tracking the flow of money to ensure unlicensed individuals do not economically share in revenues, properly reporting revenue, and paying all fees and taxes. *See* Cabot *supra* note 1 at 397-98.

[91] *See* Cabot *supra* note 1 at 398.

[92] *See id*. Certainly on the tax-side, the ability of the government to conduct audits is an important mechanism to ensure that revenue is being properly

reported and the proper amount of tax is paid on the revenue. This is particularly the case for North American jurisdictions which depend upon voluntary compliance. The tax systems are voluntary in the sense that taxpayer compliance is voluntary.

[93] The independent audit is designed to be an independent, unbiased check of the fairness of financial statements and certification of compliance with regulatory requirements. *See* Note, "Securities Regulation: Private Auditor Independence for Non-Audit Services - An Evolving Standard," 55 Okla. L. Rev. 513 (2002). In other words, an independent audit is not the situation where a gaming licensee presents its most optimistic and favorable explanation of the results of its operations. *See id*. That is, the independence of the audit is intended for third parties to be able to rely upon the fairness, in all material respects, of the matters subject to the audit. *See* Comment *supra* note 36 at 896. Accordingly, requiring annual government audits would likely not add any greater value than an independent audit. In contrast, the ability to conduct discretionary and random audits to verify information or, to conduct further investigations if red flags are raised, can be a useful regulatory tool. *See* Cabot *supra* note 1 at 397-98. Discretionary and random audits can serve as an incentive to ensure compliance. *See id*. That is, the threat of the government audit can serve to strike a sufficient amount of fear in the licensee to ensure the licensee will use best efforts to remain in material compliance with regulatory requirements. Similarly, the discretionary audit can be helpful for regulators to conduct further investigation when suspected problems, be it with respect to the integrity of games or financial viability, arise.

[94] For i-gaming operators which are part of a publicly held company, independent audits will likely be required under SARBOX. *See* Lipton *supra* note 37 at 19.

[95] Albeit, the ICS receive considerable attention within the gaming industry with respect to daily operational procedures.

[96] *See* Alderney Gambling Control Commission, Technical Standards and Guidelines for Internal Control Systems and Internet Gambling Systems (2010) (*hereinafter* "Alderney ICS").

[97] Meyer *supra* note 45 at 812; *see also* Alderney ICS.

[98] *See* Nev. Rev. Stat. Ann. § 463.157; *see also* Meyer *supra* note 45 at 815-16.

[99] Meyer *supra* note 45 at 815.

[100] *See* Cabot *supra* note 1 at 399-401; Meyer *supra* note 45 at 815.

[101] *See*, *e.g.*, AGCO 3.55 to 3.59.

[102] *See, e.g.*, BC IGS Standards 2.3.1.

[103] *See* Nevada Interactive Gaming MICS 130 to 143; AGCO 2.10.

[104] *See*, *e.g.*, Nevada Interactive Gaming MICS 11 ("[r]emote access to the interactive gaming system components (production services, operating system, network infrastructure, application, database and other components) should be limited to authorized IT department personnel employed by the operator of the interactive gaming system."). Other i-gaming regulatory models require the implementation of access controls. *See* Malta Remote Gaming Regulations, 2004, Audit Questionnaire 9.1 to 9.2. For example, the Ontario, Canada Draft iGaming Registrar's Standards impose access controls which limit access to player account and player information to operator personnel when such information is appropriate to carry out the personnel's job responsibilities. *See* AGCO 7.4. Furthermore, access must be appropriately authorized by the operator. *See id*.

In the context of land-based gaming, access/physical controls have included the use of physical safeguards such as surveillance cameras and restricting the personnel that have access to slot-machine drops or other gaming equipment. *See* Cabot *supra* note 1 at 399. For further discussion of access/physical controls used in the land-based gaming industry, see generally Cabot *supra* note 1 at 399-400.

[105] *See* Nevada Interactive Gaming MICS 11.

[106] *See* BC IGS Standards 3.1.7(a); AGCO 7.4.

[107] *See* Nevada Interactive Gaming MICS 12.

[108] *See*, *e.g.*, Alderney ICS at 4 (providing that a licensee's ICS should include administrative controls detailing organizational structure and decision-making processes).

[109] *See* Santaniello *supra* note 16 at 32 (discussing division of responsibilities in the context of land-based gaming operations).

[110] *See id*.

[111] *See*, *e.g.*, Alderney ICS at 24-30; AGCO 2.1 (all financial transactions must be completely and accurately logged); Malta Remote Gaming Regulations, 2004, Audit Questionnaire 2.4 (operators must adequately record financial transactions); and Nevada Interactive Gaming MICS 144.

[112] Nevada Interactive Gaming MICS 144.

[113] Nevada Interactive Gaming MICS 145, 147, 148, 151, and 154.

[114] Nevada Interactive Gaming MICS 146.

[115] *See* AGCO Standards 8.1.

[116] *See id.; see also* Nev. Reg. 6.090.

[117] Nev. Reg. 6.090.

[118] *See* BC IGS Standards 1.3.1, 2.2.6, 4.2.8, and 4.4.2; AGCO Standards 8.1.

[119] *See* AGCO Standards 8.2; Nev. Reg. 6.090(9).

[120] *See* Nev. Reg. 6.090(9).

[121] *See id*.

[122] *See* BC IGS Standards 4.1.1; Malta Remote Gaming Regulations, 2004, Rule 20; Nev. Reg. 6.090(9); and AGCO Standards 8.2.

[123] *See* AGCO Standards 8.2.

[124] *See id*.

[125] *See* BC IGS Standards 3.1.10; AGCO Standards 2.10; and Malta Remote Gaming Regulations, 2004, Audit Questionnaire 2.4.

[126] Nev. Reg. 14.

[127] *See id.*

[128] *See id*.

[129] *See* BC IGS Standards 4.3; AGCO Standards 7.11.

[130] *See* BG IGS Standards 4.3; Malta Remote Gambling Regulations, 2004, Rule 20 and Audit Questionnaire 1.1; and AGCO Standards 8.5. The regulations typically obligate licensees to maintain records in an organized and systematic fashion.

[131] *See* AGCO Standards 7.4 (i-gaming operating systems must be capable of providing unfettered custom and on-demand reports).

[132] Access controls can also be imposed which obligate licensees to develop personnel user access protocols. *See* Nevada Interactive Gaming MICS 12.

[133] The collapse of Full Tilt Poker is illustrative of the benefits of timely information. The independent report prepared by Peter Dean (the "Dean Report"), the former chairman of the British Gambling Commission, at the behest of the Alderney Gaming Control Commission offers some insight with respect to the impact of regulatory reporting. The Dean Report is available online at http://www.gamblingcontrol.org/userfiles/file/FTP%20Report%2026%20March%202012.pdf.

[134] *See* Meyer *supra* note 45 at 816.

[135] *Id*.

[136] *See* Alderney ICS at 4-5.

C(s)hips Ahoy

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Two pervasive features of life on Earth have been the presence of water and the presence of gambling phenomena. Water covers 71% of the world's surface while also constituting the essence of most life forms. Indeed 70% of the human body is either liquid or water. From the inception of human existence, homo sapiens have enjoyed engaging in games involving gambling—that is, games where players are risking things of value in hopes of securing rewards. Adam and Eve may have been the earliest gamblers. The Bible's Book of Genesis tells how the two were commanded by God not to touch the fruit on the sacred tree of life. But the tree promised a reward—a prize, the apple. If they took the risk of grabbing the apple they could enjoy countless riches. Alas, they lost their bet, and as a result of their gamble, they had to leave the Garden of Eden and roam a world fronted by sin, and pain, and even death. Regardless of the consequences human kind has continued playing games.

Religions seeking a reunion of mankind and God have failed to stop gambling. The religions of man have turned to the waters to find a renewed purity by engaging in various forms of baptisms. Simultaneously, people have created vessels that would carry them across the waters of the Earth. Large boats were found in Egypt by 4000 B.C. to sail upon the Nile River. Even larger boats came to venture on the open seas and oceans. Boats moved people who were seeking new homelands, and they carried goods people exchanged with each other, and also sailors and soldiers who engaged in battles between societies. By 2000 B.C. the movements of ships were propelled by sails.

The earliest boats or ships did not feature gambling activities as they were too small for people to maneuver about playing areas. However, games were not too distant from waters. The earliest casinos—rooms devoted exclusively to playing games—were found in Roman villages with natural spa waters. As expanded ships were developed they gained space for recreational gambling. The first gamblers on ships may have been members of the crew. The sailors on the three ships under command of Christopher Columbus in 1492 engaged in card games with one another. It is believed by some that the crew became worried that their play offended God. Many were religious and felt they were being punished—by not seeing lands of the New World—because of their play. Accordingly, they threw all of their gambling cards overboard. The next day land was sighted. Rejoicing, they found trees on land, and from the leaves on the trees they made new playing cards.

A few centuries later a new kind of gambling came to the seas. Ship owners had expanded greatly in numbers and ships now directed much of the commerce of the globe. But the owners feared that storms and other calamities would destroy their cargos. Accordingly the insurance business began at Lloyd's Coffee Shop in London. There ship owners and others met together and listed their voyages on a big board. Other owners and bankers signed (that is, "underwrote") their names below the ships. They pledged funds for vessels that failed to deliver goods. On the other hand, they received payments if the voyages were successful.

Another century passed and another invention—the steam engine—came along enabling ships to be much larger and to carry large numbers of passengers on long travels across the oceans. A motivation for gambling on ships came with the fact that many nations—often with religious leaders made laws rendering gambling illegal. However, the laws applied only to activities on lands of the nation. Here was the loophole. If a ship went to sea, typically three miles off a coast, the jurisdiction of the nation stopped. (Sometimes the measure was 12 miles. Three miles was a chosen distance because the canon on ships could fire only that distance and no further). A nation retained a measure of jurisdiction for commerce—i.e. mining activity—for up to 200 miles off the coast. Control over gambling was limited to three miles. Parenthetically, aircraft were bound by the rules of the land (or waters) under their flight paths.

In the 19th Century steam powered riverboats dominated commerce in middle America, especially

on the Mississippi River and its tributaries. The boats carried farm products south toward New Orleans where they were sold. The farmers then headed north with pockets full of money. However the decks of the boats were also full of gamblers who enticed then with games of poker and three card monte. The games were player-banked games conducted one-on-one between the gambler and the (usually) unsuspecting farmer. Cheating was rampant as it provided the only guarantee that the gambler would win. The Time-Life Series on the Old West claims that "99% of the gamblers were dishonest. Their activity is well described in George Devol's book, "Forty Years a Gambler on the Mississippi." (1887).

Riverboat commerce and the attendant gambling activity waned and gradually ceased as the Civil War years unfolded, and America turned to railroads for transportation activity.

Riverboat gambling returned in 1990, but the now state government regulated games involved organized casinos with house-banked games in which the player opposed the casino itself. The notion of player-banked games was developed in the studies of Garolamo Cardano (1501-1576) and Blaise Pascal (1623-1662), both considered the fathers of the study of statistics. In house-banked games odds of winning are less than odds of losing, hence there is very little motivation for a casino to cheat. From 1990 to the present day, six states have authorized licensed riverboat gambling for waters inside their jurisdictions.

During several decades at the start of the 20th Century there was a niche market for gambling on sea waters. The Era of Prohibition (1919-1933) of Alcoholic Beverages provided an incentive for owners of ships to move out into ocean waters three miles off the Pacific Coast and anchor their barges. There they served drinks, in addition they conducted casino games which were also illegal on shore. The gambling barges were opposed by legal authorities and by the 1940s crackdowns of various kind led to their demise. In addition "cruises to nowhere" also began and ended, although several states in modern times have used a new federal law of 1992 to allow ships to dock on their shores and take short voyages to at least three miles out at sea.

Luxury ships carried passengers across oceans for transportation in the early decades of the 20th Century, however this commerce came without gambling operations. Most of the activity died out in mid-century. By 1960, only the Cunard Lines with the Queen Mary and the Queen Elizabeth II offered one way travel between the United States and England. The idea of using ships for transportation had been displaced by trans-oceanic air travel. However, the ships were not done, not at all. A new return of ocean cruising with major gambling started in 1972 aboard the Empress of Canada—the first ocean liner with a full casino. Since that date, almost all ocean ships include casinos on board. One major exception is found with the Disney Corporation's ships which cater strictly to families and especially small children.

The purpose of the modern cruise ship is the actual cruise, not just transportation. Typically the cruises last several days or even weeks with the ships visiting many port locations. The ships are among the largest ships in the world. The Oasis of the Royal Caribbean Lines is over 1000 feet long and has a crew of nearly 2400, carrying 6000 passengers. The casino on board has 500 slot machines and 27 tables on a gaming floor of 18000 square feet. Carnival Lines leads all companies with 40 of its ships offering games. Other major cruise lines with casinos include Holland American Lines, Norwegian Cruise Line, Princess Cruises, and Royal Caribbean International.

Most of the casinos at sea are operated by outside gaming companies. The leading operator is Casinos Austria with 13 casinos. The gaming on the ships is supervised by the ships' crews. With one historical exception for a ship casino operated by Caesars Palace, a Nevada License holder, governments are not involved in the casino regulation. Because Caesars held a Nevada license, they agreed to allow Nevada to regulate their casino on a contractual basis. The agreement is no longer in force.

The ships generally follow Gambling Guidelines established by the Cruise Lines International Association. Guidelines include publishing rules for play, the use of audits, and requirements for surveillance, as well as procedures for resolving disputes.

Ship board casinos differ from land-based casinos in several ways. The casinos pay no gambling taxes. The casinos are not open on a 24 hour basis. Usually hours are from noon to after mid-night. Whenever the ship comes into a port—basically within the

three mile limit from the shore—the casino must close. The amounts gambled are usually restricted—typically $300 per session. Machine payoffs are not high, often about 80%. Occasionally there is a tournament for big players, some of whom are invited and have their cruise paid for. Otherwise complementaries are rare, but regular players may join clubs that give incentives for play activity. With few exceptions, there is no credit play.

Security is light but not a major concern. If there is any cheating or stealing from the casino, the culprits would find it difficult to escape with large sums of money. Rules against activity such as "card counting" are more easily enforced than in land-based casinos.

The collective winnings of all ships' casinos do help bottomline profits, but in comparison with land-based casinos they are not excessive. In 2011, the ships carried 22 million passengers, but only 10% gambled in the casinos, most wagering small sums, less than $20 per visit to the casino.

The ship lines indicated above are not American companies. In 1949, the U.S. Congress passed very strict prohibitions banning gambling on American flag vessels no matter where they were operating. The ban also affected vessels owned or registered by Americans. The Johnson Act of 1951 made possession of gaming machines illegal with some exceptions. Foreign vessels could have machines, but they had to stop operating when they came into an American port.

By 1990 the cruise ship industry was flourishing. Over 80 cruise ships utilized American ports. All but two flew foreign flags. American ship building was in a downfall. Interest in ships however was renewed with an Attorney General ruling that American ships were not labeled "gambling ships" if they provided overnight accommodations or landed in a foreign port. Then in March 1992 Congress passed the "Cruise Ship Competitiveness Act." Now American flag ships can have gambling on cruises into international waters.

Summing Up Things

The above overview of gambling on the seas leads us to offer comments on the bottomline—it has not been that good. Why? Consider the following:

1. The concept of a cruise and the concept of "going to Vegas" are quite different. The cruise cries out for relaxation—Vegas quite the opposite.
2. Casino success is tied to competition. That is found with land-based operations—not on the high seas.
3. There is a stability of rules with land-based casinos, not so with cruise ships—a new port may bring new rules.
4. Time limits for play disrupt the activity of the best gamblers.
5. Similarly, money limits interfere with active play.
6. Cruise ship casinos are small—build it and they will come—but build it big.
7. There is competition—maybe even another casino—in every port.
8. Odds in games aboard the ships are not favorable to player.
9. The best players are rich—they can choose their casinos. Ships can't compete with offerings of land casinos.
10. Ships encounter problems with play when weather affects operations.

CULTURES OF CASINO GAMING

ANSWERING UNIVERSAL DESIRES

Essays By William N. Thompson, Ph.D.

A Cooperative Project of
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20. Not in My Backyard: Las Vegas Residents Protest Casinos (1993)

"This gambling monster will lead to increased crime rates, drunken bums in jail." "We will be forced to increase our police force so that casino owners can fill their pockets at our expense with gambling money." We have enough trouble trying to keep our drug problem down so we don't need the kind of element the gambling would bring in." "We are going to fight against it so we can keep our reputation clean and free from mobs and the gangsters which it will surely bring."–Quotations in opposition to casino gambling from citizens desiring good neighborhoods for their children.

Nothing is unusual about opposition to casinos. However, these words come from Las Vegas residents. Las Vegas residents know the economic advantages of living in the fastest growing area of the United States with one of the most favorable tax climates. They have no state income tax, minimal inheritance taxes, and low property taxes compared to their neighbors across the land. And these residents know that the key to the prosperity of their community is the gaming industry, which provides the bulk of government revenue as well as 30% of the employment in Las Vegas.

This article examines the issue of casinos located in residential areas of the Las Vegas Valley. It presents data from a survey of 967 area residents who purchased a home within the last two years. Respondents were asked about factors that contributed to the selection of their home. Situations (including gaming) which they sought to avoid in the process were also investigated. The results provide understandings about citizen concern over casino locations.

Home purchasers were surveyed because their behavior offers strong evidence of commitment to the community, and it may be suggested that their attitudes toward neighborhood factors are more deeply held than the attitudes of many others.

Nevada legalized casino gaming in 1931. However, effective state regulation

of gaming was achieved only after the creation and appointment of a Nevada Gaming Commission in 1958. The first Commission regulations specified that casino locations had to conform to local zoning requirements. Additionally, the state stipulated that casino locations would be unsuitable if they were near churches, hospitals, schools, public playgrounds, or military facilities. Local Nevada governments also have location requirements. Reno demands that new licenses be granted for locations where old licenses had been in operation. Clark County (Las Vegas Metropolitan Area) will not approve licenses for gaming within 1500 feet of a school, church, hospital, or military camp. The City of Henderson stipulates that there can be no gaming in open areas, doorways, or vestibules–only on the street level within the four walls of a room. North Las Vegas limits the number of games to one per 10,000 population.

None of Nevada's seventeen counties has banned casino gambling, and only one city, Boulder City, has an official policy against gaming.

The early casinos of Las Vegas and Reno were located in downtown areas. During the 1940's entrepreneurs developed properties south of Las Vegas on what is now The Strip. These casino hotels became destination resorts–places sought out by players and other tourists from throughout the world. As tourists increasingly visited Nevada casinos, local gamblers increasingly frequented less developed properties which were generally known as "sawdust joints." These were found in downtown locations and in smaller towns scattered throughout the state. This locational pattern changed in the 1980s, as a new phenomenon appeared on the scene: the local-based casino entertainment center. A far cry from earlier locals' joints, these casinos featured bowling, dancehalls, lounge shows, movie theaters, and gambling. Their gambling offerings increased to include race and sports books and video slot machines. The new gaming entertainment centers were not located in downtown areas or on the Strip. Rather, their operators sought to place them in locations that could reach as many local residents in the most convenient manner. They were placed on major arteries where there was already heavy traffic. The casinos also met existing requirements for minimum

number of hotel rooms (200 if they were in the city of Las Vegas, 300 in areas controlled by the Clark County government).

It was not too long before residents of Las Vegas recognized that gaming was becoming part of their neighborhood existence. Many did not like it. In southern Nevada, the targets of protestors included proposed properties along North Rancho Drive in Las Vegas, in the new Green Valley residential areas of suburban Henderson, and in Boulder City. They protested with the slogan, "Not in my backyard."

In October 1990 a newly created Better Boulder City Committee thought limited gaming–slot machines and bingo–could help the community's economic climate (especially hotel and restaurant business). The Committee recommended that the city council put the matter to a public vote. Over 150 residents jammed council chambers to speak against the notion. Only three persons (officers of the Committee) showed up to advocate a gaming election. One opponent summarized the feelings of many with these words: "My primary reason for moving to Boulder City was to be as far removed from the bright lights, noise, glitter, and gambling that attract certain individuals to Las Vegas." (*Boulder City News*, November 15, 1990)

The rapid growth of Green Valley, a new and expanding residential area within the boundaries of the industrial working class suburb of Henderson, threatened to change the political formula in the community. The new residents were upwardly mobile, family-oriented professionals with a "Yuppie" flavor thrown in. The vocal Green Valley Community Association was credited with keeping several casino properties off nearby portions of Sunset Road–the main thoroughfare leading into Green Valley. One protest thwarted efforts by a developer to put table games into a restaurant. However, the voices of 100 angry homeowners failed to convince the Henderson City Council (still dominated by residents of the city's older neighborhoods) that a new gourmet supper club and bar should not be allowed to have 75 slot machines. (*Las Vegas Sun*, May 22, 1989)

In the meantime, further north on Rancho Drive in North Las Vegas, pro-

testors successfully defeated the establishment of the "Bighorn Casino" project. On the other hand, protesters were unsuccessful in defeating another project, the Santa Fe Casino, but they did force the casino to be constructed without exterior signs. In the latter case, the city responded to residents whose views were captured in the comments of one protester: "I have a four-,two-, and one-year old, and they're going to have to go to school around here, and I don't want them to go past a casino." The Nevada state assemblyman representing the North Rancho Road areas told the local press that the residents of the area were not against gaming. It was just that they "took exception to a casino being built so close to their backyards" (*Las Vegas Sun*, July 26, 1989).

State assemblyman Matthew Callister introduced A.B. 845 into the 1989 legislative session. The bill mandated the creation of special zones for casinos in each of the general governmental jurisdictions of Clark County. He called the zones "Gaming Enterprise Districts."

Callister Claimed that he wasn't against casinos. " I love the gaming industry," he said. "It's the reason we exist. We're sure as hell are not growing potatoes down here." However, he added that it was necessary for residents to be "assured that their quality of life will not be hampered by unchecked growth in the gaming field." (*Las Vegas Review Journal*, June 15, 1989).

The fate of the bill was uncertain until it was endorsed by the influential Nevada Resort Association, voice of the largest Las Vegas Strip casinos. Soon the governor added his support, and the legislation sailed though both the state Assembly and Senate. The governor signed A.B.845 into law on June 30, 1989 (*Las Vegas Sun*, July, 1, 1989).

In this study the researchers used a mail survey of recent home buyers. The sampling frame-that is the list of names of recent home buyers (1989 and 1990)-came from the files of the Clark County assessor's Office.

The researchers received 967 completed questionnaires from 4000 that were mailed out.

The demographic characteristics of respondents were not dissimilar from those of respondents to a much large annual community survey of community attitudes.

Of the total number of respondents, 921 answered a question about the importance of casino proximity in their housing purchase decision. We found 202 (21.9 percent) felt that casino proximity was very important, and 138 (15.0 percent) felt it was important, 232 (25.2 percent) found the factor to be neither important nor unimportant, while 106 (11.5 percent) found the factors to be unimportant and 243 (26.4 percent) very unimportant. A total of 166 (18 percent) of the home buyers sought information regarding the proximity of casinos at the time they were making their purchase decision.

The respondents were asked how close they would be willing to live to casinos. Only 10 percent indicated a willingness to live adjacent to a casino; 6.7 percent said they would be willing to live within one-half mile of a casino, while 10.9 percent said they would like between one half mile and one mile of a casino. Another 16.6 percent expressed a willingness to live from one to three miles from a casino, while 64.7 percent indicated they wished to live more than three miles from the closest casino.

When subgroups of the respondents are compared, those house-holds with children are more likely to view the proximity of casinos with concern. Also those purchasing more expensive homes (over $100,000) were more negative toward casinos locations than those purchasing less expensive homes (under $100, 000). No appreciable difference were found between male and female respondents, between those who lived in southern Nevada over or under two years, those who had expectations of staying at their present home for over three years or for less than three years and between those households with residents with college degrees and those households without such residents.

Of those with children, 39.4 percent reported that locations of casinos were either an important or a very important housing choice factor, and 19.5 percent sought information on casino locations at the time of their purchases

decision. In contrast, 35.0 percent of those without children felt the matter was important or very important, and 15.6 percent sought information on the factor. Consequently, we found a slight difference in the significance households with and without children attach to the location of a casino.

On further analysis, we find households with and without children have a more pronounced difference on how close they were willing to live to a casino. Only 14.5 percent of those with children under 18 indicated a willingness to purchase a home within one mile of a casino, compared with 22.3 percent for those without children under 18. Just over 12 percent of those with children under 18 were willing to live between 1 and 3 miles of a casino, while 73.9 percent wanted to live more thatn 3 miles of a casino, while 73.9 percent wanted to live more than 3 miles away. In addition 20.1 percent of the non-children home buyers were willing to live in the 1-3 miles range, while 575 percent wished to live over three miles distant from any casino.

Purchasers of homes costing more than $1000,000 were also more likely to desire living far away from casinos. We Found 68.4 percent of the households paying more than $100,000 wished to be over 3 miles away compared with 60.9 recent of those purchasing homes for less than $100,000. But these buyers of homes priced more than $100,000 were less likely to consider a casino to be important or very important in their housing decision (32.4 percent compared to 41.4 percent). However they were more likely to seek information regarding the factor (20.7 percent compared to 13.8 percent).

From these results, we find evidence that the importance of casinos within the neighborhood, the acceptable distance between one's home and a casino, and whether the homebuyer sought information on casinos in the neighborhood differs significantly between those persons who spent more or less than $ 100,000 on their home.

When compared with other negative attributes, casinos did not fare that badly. Responses showed that while citizens are certainly concerned about casinos in their neighborhoods, they place other matters higher on their agendas. At the top is concern over crime, particularly gangs: 92.7 percent

felt the matter was important or very important and, for drugs, 91.4 percent felt that way. Also of a greater importance are flooding (89.3 percent and air pollution (80.9 percent). Over half considered industry proximity (53.0 percent and freeway proximity (59.9 percent) to be important or very important. We found that 47.8 percent believed major streets were matters of importance, 47.7 percent believed the location of a nuclear waste transportation route was of importance, contrasting with the 36.9 percent for casino location, while airport location (25.8 percent) and railroad track locations (11.2 percent) trailed in importance.

When queried about the distance that the residents would wish to have between their homes and certain factors, it was found that casinos were in a middle position. The most undesirable factor for a residential area would be a sewer plant- only nine percent indicated a willingness to live with three miles of a plant. This was followed by a nuclear waste routed (10.1 percent), a military base (17.7 percent), an airport (17.8 percent), and an industrial area (19.4 percent). Also of greater perceived negative value than casinos were railroads and major gas and electrical lines. Just over 35 percent did not want to live within three miles of a casino.

Factors more desirable than the above included heavily travelled streets, schools and fast food restaurants. The most desirable factors (considered to be the least risky) were parks and shopping centers. Over 85 percent would be willing to live within three miles of parks, and 91.4 percent expressed a desire to live this close to shopping centers.

The respondents were also asked to rank eight community concerns against each other in terms of undesirability. Crime clearly led the list. Trailing crime by a considerable margin were the industrial plants, a nuclear repository, freeways, air flight patterns and patterns, and neighborhood casinos. Enclosed malls and fast food restaurants were of less concern than casino locations.

As other jurisdictions consider legalizing casinos, they might consider buffers that will minimize the force of the "Not in my backyard" phenomenon. Las

Vegas and Nevada have been historically lax in providing such buffers. As these are now demanded by the local residents, the community leaders are finding that they must expend considerable public policy energy in acrimonious debates that are quite divisive.

The information reported from our survey demonstrates that there is a marked concern about casinos in neighborhoods, their potential negative effects on child development and on property values. The concerns are strong enough that the cry of "not in my backyard" is increasingly being heard in debates over expansions of designated Gaming Enterprise District boundaries to permit casinos to be located nearer to residential areas.

Casinos can provide jobs and generate public revenues, but they are not always seen as the best neighbors in a community. Nevada casino properties stay open 24 hours a day, all serve liquor, and most give it away to players. They generate extra street traffic- especially the locally-patronized casinos. Their lights are bright and gaudy and their marquees may carry sexually suggestive attractions. Their interiors and exteriors can be noisy. When all is evaluated, most people generally do not want these kinds of neighbors in their backyards. But there are worse things. People are much more concerned about the crime, flooding, air pollution, and industrial locations. Yet, increasing concerns result in casinos being just another problem where, more and more, we hear the militant cry, "Not in My Backyard."

Source: William N. Thompson, R. Keith Schwer, Richard Hoyt, and Dolores Brosnan(Spring 1993). "Not in My Backyard: Las Vegas Residents Protest Casinos," *Journal of Gambling Studies*, v. 9, no. 1, pp. 47-62.

21. The Economics of Casino Play: Slots of Trouble (2004)

Economics constitute a major issue in formulating laws for casinos. An article I wrote for the *Washington Post Sunday Outlook* presents an overview of economic costs and benefits of casinos.

Lawmakers in Pennsylvania recently approved the legalization of slot machines for racetracks and other locations. A bill for machines is on hold in Maryland, but has a chance at passage. District of Columbia policy makers are on the same trail. Politicians in these three venues and many others as well are seeing slot machine gambling as an easy way to pick up dollars for public programs. The machines can be taxed and they do make a lot of money. Owners of the machines, whether they are at racetracks or other facilities, know that they can realize enormous profits from machine operations. Slot machine makers–the I.G.T. company in Reno and Bally's in Las Vegas see great cash flows as they make most of the machines sold in America. A lot of people see a lot of easy dollars and cents–politicians, machine owners, machine makers. This cannot be challenged. But do the dollars and cents add up to economic sense for the venues? Will the machines make economic sense for Pennsylvania, Maryland, and the District of Columbia? This is another question, a question that the politicians, machine owners and machine makers are very reluctant to answer–publicly anyway.

As a professor and a gambling researcher at the University of Nevada, Las Vegas, I am often asked if gambling operations will help or hurt a local or regional economy. I have made many studies of the question posed above. Over the past year a citizens' group in Pennsylvania asked me to analyze the economic impacts of slot machines. Also the Governor's office ask me to furnish them with a report on the volume of revenues that could be generated by the machines. I wrote two reports.

I was able to conclude that a plan for over 30,000 machines in Pennsylvania would produce three billion dollars in profits, and that with a tax rate of 33%,

the state could easily realize an extra one billion dollars for its annual budgets. Each machine would win approximately $100,000 from players every year–get this, each machine will take that much from players even AFTER the machines give the players all those winnings and jackpots that the players will never stop telling their friends about. This is about as much money the machines make in Atlantic City, while machines in Illinois and Connecticut actually make net revenues over $150,000 each per year. The report must have been happy news for the Governor, for when the final legislation was passed it authorized over 60,000 machines. Maybe the machines will take five or six million dollars from the players. A lot of money.

But the most important question is how will this impact the economies of Pennsylvania–the Pittsburgh economy, the Philadelphia economy, the other local economies.

This was the question I posed in my second report. The answer to this direct question is provided by studying the flows of money into and out of the machines. Very simple matters to assess: where does the money come from? Where does the money go? Follow the money.

I love my visits to the East. I've been in Pennsylvania and my home state of Michigan recently. I love the East because everything is so green. You have trees, things I remember from my childhood. Now I live in Las Vegas where everything is brown, worse yet, we are now in the midst of a drought. There are no natural trees in Las Vegas. Oh, sure you can see trees here, but they are brought here on trucks and planted. Then other trucks bring in water so that they can stay alive. We are in a desert, no trees. But Las Vegas has experienced great economic growth, The state of Nevada is America's fastest growing state, and the Las Vegas metropolitan area is the fastest growing urban area. Las Vegas has lots of money. I am always saddened when I learn that places like Michigan and Pennsylvania experience economic declines, that they do not have lots and lots of money. But I still love their trees. Conclusion - Dah! Money does not grow on trees!

Unfortunately, those pushing slot machines onto new jurisdictions are acting

like the money generated by the machines somehow just falls from the sky, as if from leaves of trees.

Unfortunately, the $100,000 generated each year by a single slot machine is money that comes out of people's POCKETS. We MUST ask who's pockets are being picked, and then we must follow the money after it comes out of the back side of the machines. It does go into other pockets.

Las Vegas has experienced a continued economic growth (advancing every year since the 1950s to today with the exceptions of 2001 and 2002–for obvious reasons) because Las Vegas gets its gambling money–90% of it–from tourists and visitors who live in other places. We get 36 million visitors each year. And they stay here for an average of four days, spending more money on non-gambling activities than at the tables and machines. They spend half their vacation budgets on hotel rooms, restaurant meals, shows and events, and shopping. We have to get visitors. Our population of 1.7 million would support about four or five casinos, and maybe seven or eight thousand slot machines. Trouble is we have almost 200 casinos and over 150,000 machines. We go out and get visitors to come here.

Unfortunately, Pennsylvania, Maryland, and the District of Columbia have sufficient residents to support all the slot machines which have been proposed for the venues. The average American adult spends (that is, LOSES) $350 each year gambling. Those in casino jurisdictions lose twice that much–Nevadans probably lose over a thousand dollars a year gambling. The mid Atlantic gambling market (there are thirteen million adults in Pennsylvania, Maryland, and the District) can certainly produce another seven or eight billion in gambling revenues–without taking a penny away from what is now being spent in Atlantic City. And the local populations of the three venues will produce ALL the revenues for the machines–100% of the revenue!

So now we must ask–where will the money go? If ALL of the money taken from the local gamblers stays in the local areas, then it's a "wash," and we can leave the debate up to the moralists and the politicians. But, dream on,

it just doesn't work that way. Consider one slot machine placed in Philadelphia. It will win $100,000 each year. The $100,000 does not stay in Philadelphia–not close.

First, the machine owner has to buy the machine. Cost $15,000. Market life, three years. Hence, Philadelphia loses $5000 a year. (Nevada gains $5000–we make the machines). Machines don't require much labor (one worker for each 20 machines), but much of the labor cost will remain in the area. Most administrative costs (ergo, marketing, accounting, etc.) will stay, and most other supplies, as well as building costs and utilities stay. Consider that these costs represent $25,000 with 80% staying, and $5000 leaving. Consider state taxes–33%. $33,000 goes to Harrisburg for statewide programs. The Philadelphia area has less than half the state population, so maybe fifteen thousand dollars returns, but $18,000 is lost for the Philadelphia economy. Perhaps local taxes of $3000 will be levied on the facility, and this money will remain in the Philadelphia economy.

This leaves profits for the owners of the machines. Machines make a ton of money, and they cost so little to operate, profits are enormous. The figures above suggest that the owners will realize profits of $34,000. Does this money stay in Philadelphia? Sorry, most of the facilities are owned by out of state concerns. One Pennsylvania race track has non-American owners. Let's suppose that one half the ownership is local. Swoosh, there goes another $17,000 out of the economy.

This ignores federal taxes, and the windfall level of profits (34%) will cause a bigger portion of the locally held profits to leave the area than if the gamblers' spending went to normal local businesses. We can assume that another $5000 leaves Philadelphia.

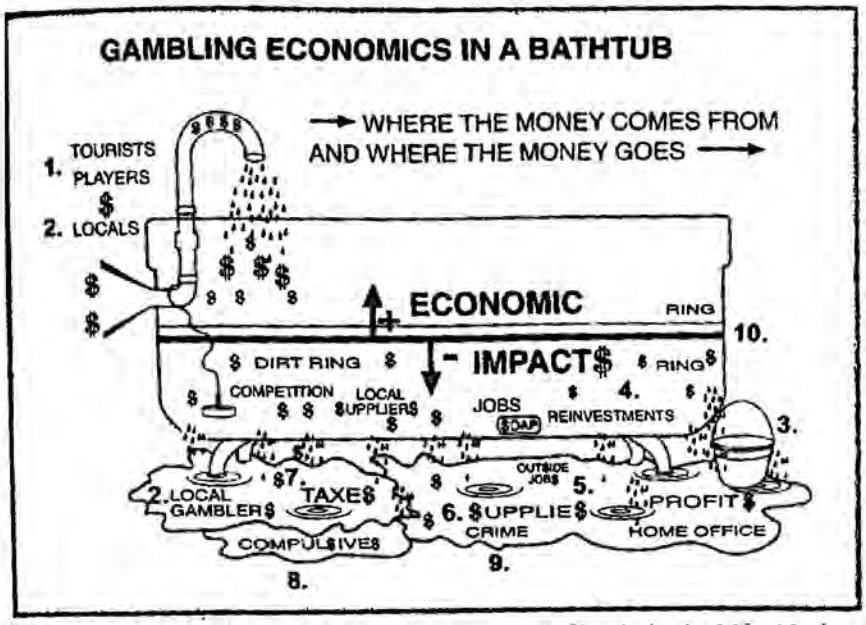
Add it up–a single machine takes $100,000 from the local residents of the Philadelphia area. And one half of that money leaves the Philadelphia economy. Each machine results in $50,000 leaving the Philadelphia economy each year. 60,000 machines. We should hate to think about it. But consider this, a basic worker's job–$18 an hour–costs an economy

$50,000 a year. Each machine represents a LOSS of one job for the local economy each year.

So that's Pennsylvania's choice. Should there be a slot machine casino or three in the District of Columbia? You add up the numbers. It might make sense if more than 50% of the gamblers will be tourists, but get real. The District does get tourists. But those school buses on the mall do not carry gamblers, nor are those young men and women pushing baby carriers and tugging little tykes along by the hand your typical "Vegas" visitor. Our gamblers average 50 years of age, and only 8% of our visitors bring underage (under 21) children with them on their trips to Las Vegas. Your tourists ARE NOT prospects for machine gambling. Don't think about it. They want to see our Nation's museums and monuments to democracy. The slot machine is not part of the history of democracy. But then maybe the Smithsonian could have a special exhibition for the District's most infamous casino, "The Palace of Fortune." This "palace" of games and politics was located at 14th and Pennsylvania, NE. It was owned by Edward Pendleton, and was in operation from the mid-1830s to 1858. Pendleton used his business position to become the leading lobbyist in the Capital city. Hundreds of bills–most of them private bills–were passed on his recommendations. He was especially persuasive with congressmen who had rather large debts as a result of their gambling. Also other congressmen could expect a run of good luck at the tables if Pendleton needed their vote on a special bill. One side benefit of a new District casino would accrue to my new hometown, Las Vegas. If the casino was right there where the politicians made their decisions, the Democrat and Republican parties could quit sending their "bagmen" to Las Vegas (wasting air fuel and other precious resources) to raise money in the back rooms of our casinos. We are doing quite well without them and our legitimate visitors do need the hotel rooms, thank you.

Source:William N. Thompson, "Outlook: Slots of Trouble," *Washington Post Sunday Outlook,* July 18, 2004

22. Gambling Economics in a Bathtub (2001)



1-2. Source of Gambling Funds; 3. Profits to outside owners; 4. Profits reinvested in casino location; 5. Jobs; 6. Purchase of supplies; 7. Taxes; 8. The social cost of pathological gambling; 9. The costs of gambling-related crime; 10. The dirt ring—we don't see it if the water level is rising.

So what is the impact of gambling activity upon an economy? This is not really a difficult question to answer, although the answer must contain many facets, and the answer will vary according to the kind of gambling in question as well as the location of the gambling activity. Although the question for specific gambling activity is complex, the model necessary for finding the answers to the question is actually quite simple. It is an input-output model. Two basic questions are asked: (1) Where does the money come from? and (2) where does the money go? The model can be represented by a graphic display of a bathtub.

Water comes into a bathtub, and water runs out of a bathtub. If the water comes in at a higher rate than it leaves the tub, the water level rises; if the

water comes in at a slower rate than it leaves, the water level is lowered. An economy attracts money from gambling activities. An economy discards money because of gambling activity. Money comes and money goes. If, as a result of the presence of a legalized gambling activity, more money comes into an economy than leaves the economy, there is a positive monetary effect because of the gambling activity. The level of wealth in the economy rises. If more money leaves than comes in, however, then there is a negative impact from the presence of casino gambling. Several factors must be considered in what I will call the Bathtub Gambling Economics Model. We must recognize the source of the money that is gambled by players and lost to gambling enterprises, and we must consider how the gambling enterprise spends the money it wins from players.

Factors in the Bathtub Gambling Economics Model

Tourist players: Are players persons from outside the local economic region (defined geographically)–and are they persons who would not otherwise be spending money in the region if gambling activities were absent? A tourist's spending brings dollars into the bathtub unless they otherwise would have spent the money in the region.

Local players: Are the players from the local regional economic area? If so, does the presence of gambling activities in the region preclude their travel outside the region in order to participate in gambling activities elsewhere? If they are locals who would not otherwise be spending money outside the region, their gambling money cannot be considered money added to the bathtub.

Additional player questions: Are the players affluent or people of little means? Are the players persons who are enjoying gambling recreation in a controlled manner, or are they playing out of control and subject to pathologies and compulsions?

Profits: Are the profits from the operations staying within the economic region, are they going to owners (whether commercial, tribal, or governments) who reside outside the economic region, or are they reinvested by the owners in projects that are outside of the region?

Reinvestments: Are profits reinvested within the economic region? Are gambling facilities expanded with the use of profit moneys? Are facilities allowed to be expanded?

Jobs: Are the employees of the gambling operations persons who live within the economic region? Are the casino executives of the companies who operate (or own) the facilities local residents?

Supplies: Does the gambling facility purchase its non-labor supplies–gambling equipment (machines, dice, lottery and bingo paper), furniture, food, hotel supplies–from within the economic region?

Taxes: Does the facility pay taxes? Are profits leading to excessive federal income taxes? Are gambling taxes moderate or severe? Do the gambling taxes leave the economic region? Does the government return a portion of the gambling taxes to the region? How expensive are infrastructure and regulatory efforts that are required because of the presence of gambling that would not otherwise be required? Do the gambling taxes represent a transfer of funds between different economic strata of society?

Pathological gambling compulsive or problem gambling): How much pathological gambling is generated because of the presence of the gambling facility in the economic region? What percentage of local residents have become pathological gamblers? What does this cost the society–in lost work, in social services, in criminal justice costs?

Crime: In addition to costs caused by pathological gamblers, how much other crime is generated by gamblers because of the presence of a gambling facility? How much of this crime occurs within the economic region, and what is the cost of this crime for the people who live in the economic region?

The construction factor: If a gambling facility is a large capital investment, the infusion of construction money will represent a positive contribution to the economic region at an initial point. The investors must be reimbursed for the construction financing with repayments and interest over time, however. The long-range extractions of money from a region will more than balance the temporary infusions of money into a region. An application of the model must recognize that the incomes eventually produce outgoes.

Source: William N. Thompson(2001). *Gambling in America, An Encyclopedia of History, Issues, and Society(2001).* Santa Barbara: ABC-Clio, 2001, p. 100

Court Cases That Could Make a Difference

SECTION M

Gambling and the Law®: The Future of Legal Gaming[1]

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Casinos, lotteries, racetracks and even bingo halls are built around forms of gambling that were invented in the 1800s, if not earlier. The growing trouble facing almost every gaming operator is Millennials. This segment of the population, aged 21-35 years old, is now the largest cohort in the population, surpassing Baby Boomers in 2015. The problem is: Millennials hate traditional games. Far fewer of them than their parents and grandparents are attracted to the idea of sitting in front of a metal box with spinning reels in a building the size of a warehouse. And they can't imagine having to wait a few hours, let alone a few days, to find out if their lottery numbers are winners.

And it is not just reduced attention spans. Millennials really are different. For example, 25% never carry any cash. For an industry built on cash play, this is obviously a problem.

And when Millennials do play traditional casino games, to older gamblers, their behavior seems to make no sense. They love in-play sports betting and other bets where they get instant results, even when they have not done the research necessary to make an informed wager. That can be explained by the over-confidence many have in their own decision-making abilities.

But how to explain that Millennials spend more time playing slot machines in casinos than any other age group; yet, they lose less money on the exact same machines? That is, of course, statistically impossible.

Researchers watched these younger gamblers through casinos' security cameras, to find out what they were doing while sitting in front of their slot machines. Millennials are comfortable with modern electronics and have little concern for their own privacy. So they naturally always log in with their frequent players cards at the beginning of each session. But even though the slot machine registers them as playing, they are actually taking long breaks from gambling, to play games on their cell phones.

The gaming industry is trying to respond to this new type of gambler. In 2015, slot machines were introduced with built-in USB ports for cell phones. Nevada changed its law to allow slot machines to have elements of skill. And state lotteries are about to take games like Candy Crush® and offer them online for cash prizes.

19th Century Games, 21st Century Players

Can an industry built around 19th Century games evolve to attract 21st Century players?

Almost all of the most important forms of gambling were invented in the 1800s, or even earlier.

Lotteries were very big in England in the late 1700s. In fact, they were used to raise money to help the loyalists who had sided with the King during the unpleasantness we call the American Revolution.

The oldest game is probably Keno. It is derived from Pok Kop Piu, the White Pigeon Ticket, which is at least 2,000 years old. It is possible that it may be far older, since a version originated in China during the Han Dynasty 3,000 years old.

Casinos, outside of Asia, make most of their gaming revenue from slot machines. It is generally agreed that the first slots were invented in the 1890s. Charles August Fey, a San Francisco mechanic, unveiled his three-reel Liberty Bell in 1896. Whether or not Fey deserves the credit for the modern slot machine, there is no doubt that San Francisco quickly became the center for

manufacturing the new gaming devices. Slot machines became so connected with the City by the Bay that they were popularly called "Californians," at least until the factories were devastated by the great 1906 earthquake and fire.

So, the mechanical heart of 21st century land-based casinos is a device developed when society and technology were radically different from today. Fey used the now well-known symbols of cherries and bells because so few people in the 19th Century could read or write.

Blackjack, until recently, generated the most revenue for casino table games in U.S. casinos.[2] The game, then known as Vingt-et-Un, French for "21," was popular in European casinos in the 1700s. But the game may be even older. According to Wikipedia, "The first written reference is found in a book by the Spanish author Miguel de Cervantes, most famous for writing Don Quixote." Cervantes, himself a gambler, wrote about a couple who were experts at cheating at Ventiuna, Spanish for "21." "The short story was written between 1601 and 1602, implying that Ventiuna was played in Castilla since the beginning of the 17th century or earlier."[3]

In Macau and Singapore, the most profitable game is Baccarat. James Bond may have played it in Ian Fleming's 1953 book, CASINO ROYALE. But the game and its revolving deal counterpart, Chemin de Fer, is at least 100 years older. Often spelled Baccara, the banking game was popular in the legal and illegal casinos of France, England and the U.S. that catered to upperclass gamblers in the 1800s.

The number nine has special significance in China, having been associated with the Emperor. So games built around the number, like Baccarat and its predecessor Pai Gow ("make nine"), still played in card clubs in California, are popular with Chinese gamblers. After all, you cannot have more luck or success than being the Emperor.

Blackjack and Baccarat came together in the 19th Century in a game with the intriguing name "Macao." Players are dealt only one card. As with Baccarat, tens and face cards count zero, aces are always one and the object is to get closer to nine than your opponents. But as with Blackjack, naturals are paid bonuses, players can draw as many cards as they want, but they lose if they go over – in this case – nine.

The other casino games are equally as old. As shown by its name, Roulette came from France. The "little wheel" became popular in the 1790s. The only significant difference from today's game is that the zero and double-zero were red and black; they were made green in the early 1800s.

The history of Craps is not as well-settled. This is in part because it was a game played more in back alleys and below decks by blacks than by whites in fancy salons. Craps has also been associated with soldiers: One version has it invented during the Crusades in the 12th Century; its modern popularity arose from dice sent to enlisted men in World War II. Whatever the connection with the ancient game of Hazard, there is no dispute that John H. Winn, a dice-maker, created the modern game and layout. Winn is known as the father of casino craps because he developed the idea of making the dice game into a banking and percentage game, including giving players the option of betting against the shooter. This was in 1907.

Versions of Poker were played as early as the 1820s. Players were dealt five cards face down and made their bets. Gambling games developed during wars, when young men sat around together for long periods of time. So, it appears that the idea of being able to replace cards, Draw Poker, and having some cards face up, Stud Poker, became popular during the Civil War. Seven-Card Stud spread during World War I. So did community card games, primarily Spit In The Ocean, which evolved a couple of decades later into Texas Hold 'Em.

Baccarat, Fan Tan, Wheel of Fortune, Chuck-A-Luck and other casino games have equally long histories. I have a rule book from 1897 that lists Baccara; Chemin de Fer; Chuck-Luck; Craps; Draw Poker; Chinese Fan Tan, to distinguish it from the card game Fan Tan; Keno, also known as Lotto; Macao; Rouge et Noir, also known as Trente et Quarante, still played in casinos in South America; Roulette; Stud Poker; Vingt-et-Un; and, of course the most popular banking game of the era, now gone, Faro.[4]

But you don't have to haunt used and antique book stores to confirm what the Internet tells you were the most popular gambling games of the 19th Century. Just look at old criminal statutes.

Changes in the law follow changes in society. The law is reactive, not proactive. Legislators do not sit around debating what to do if, say, the Internet is

invented. Instead they react to situations brought to their attention, often by stories in the media.

Horse-racing, for example, has been around forever. But the invention of the telegraph and parimutuel machine, in the mid and late 19th century, allowed poorer people to bet on contests. They did not even have to be present at the track: "pool rooms" – today we would call them off-track betting parlors – sprang up in cities. So state legislatures started passing anti-bookmaking laws.

The same is true of dog racing, which also started in the 19th century. There was not much concern, because the straight tracks and use of live rabbits as lures turned off most bettors. Owen Patrick Smith, known as O.P. Smith, developed the circular track and mechanical bunnies in 1912. He opened the first professional dog-racing track with stands like in horseracing in 1919. Society's views toward animals, including greyhounds, became more compassionate, resulting in the sport being greatly restricted or, usually, outlawed.

Ancient Romans bet on their favorite gladiators. Tour guides at the Colosseum in Rome point out that gladiators were athletes, whose training cost their owners a lot of time and money. So they usually did not fight to the death, despite what you see in movies.

Sports Betting was popular in the U.S. in the 19th Century, once the games of baseball, basketball and American-style football got uniform rules and professional players. The rising popularity of betting on games like baseball, called "the national past-time," can be seen in the infamous "Black Sox" scandal. Gamblers, in particular Arnold Rothstein, bribed members of Chicago's White Sox team to throw the 1919 World Series.

One form of parimutuel betting popular in the 1800s was Auction Pool, also call Calcutta Auctions, Calcutta Pools or simply Calcuttas. Although today most commonly found associated with the game of golf, legal Calcuttas on other sports events can still be found in Alaska, North Dakota and Wyoming.[5]

You know your business needs to be updated when the most modern product you have may be Bingo. Bingo developed out of the 200 year old parlor board game of lotto. The artist Charles Joshua Chaplin captured this early version of bingo in his mid-19th century painting "le jeu de lotto". The painting shows cards divided into rows and columns, with three down and nine across and blacked out free spaces; the same as in England today. An entrepreneur, Edwin Lowe, is credited with inventing the modern American version of bingo – a five-by-five card with one center free space – in 1929. The game was originally played on hard cards, and players used beans to cover the numbers as they were called. In Massachusetts, Bingo is still referred to as Beano in state statutes.[6]

It is easy to see what games were being played in casinos in the 19th Century, by looking at the statutes passed to outlaw them. California Penal Code § 330 is typical of the criminal codes of the era:

> Every person who deals, plays, or carries on . . . any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value . . . is guilty of a misdemeanor . . .

It was virtually the universally accepted practice to list the games that were prohibited. In fact, the anti-gambling statutes of states such as Oregon, Oklahoma, Texas, and Arkansas contained lists of prohibited games that were almost word for word identical to the California statute. The city of Portland, Oregon, for example, made it a crime to play "faro, monte, roulette, rouge-et-noir, rondo, twenty-one, poker, draw poker, bluff, brag, tantan or fan-tan, for or with anything of value."[7]

Lawmakers felt it was necessary to specifically enumerate the games that were to be outlawed. This tradition derives from the common law restriction laid down in the *Case of Monopolies* in 1603, which prevented courts from defining illegal games independent of statute.[8] As can be seen by the inclusion of "any banking or percentage game" along with the list of specific games, the change to prohibiting games broadly by type took many decades to be generally accepted.

So, what does it mean for the gaming industry of the 21st Century, that it is selling products that are two hundred years old? Maybe nothing, or everything. Something like telephones survive, and a website ad may say, "Dial this number," even though phones no longer have dials. But, although automobiles still sell

their "horsepower," the manufacturers of buggy whips are few and far between.

The bad news for the casino industry is that Millennials hate slot machines. Americans in their 20s or 30s do not even carry enough cash to pay for their, admittedly overpriced, Starbucks® coffee.[9] When you ask them where they would get the money to play a slot machine, the answer you get is, "Why would I want to play a slot machine? They're stupid."

And to people who have always carried the best games ever invented in their pockets, they may be right.

Of course, things could always be worse. As one state lottery executive recently told me, the only thing Millennials hate worse than slot machines is traditional lottery games.

The good news for casinos is that older patrons, who do like traditional casino games, are living longer.

There are also regional differences. Gamblers from Mainland China still like Baccarat, which might qualify as the world's dumbest casino game. The mystical number nine is involved. Plus, many Chinese gamblers actually think there is something akin to skill involved. Why "squeeze" the cards, that is, bend the corner and turn it over slowly? It is not just to prolong the excitement of gambling. Many actually believe they can change the number of a card that has already been dealt.

Gamblers from China are also being introduced, for the first time, to slot machines. So, they like them. For now.

The two major changes facing the gaming industry in the 21st Century are social and technological. It is hard to imagine that, in 1961, when the federal Wire Act[10] was passed to help the states enforce their public policies toward gambling, there were no state lotteries and the only state with casinos was Nevada. It is rare to see the majority of a society change their attitudes toward something as universal as gambling, and the law struggling to keep up.

Technology is also forcing change. But it is here where the gaming industry faces its greatest challenges.

The most important developments for legal gambling have been the computer and video screen, tied in with improvements in communication. Every game, in fact, every form of gambling, can now be played on a machine. But that does not mean that gamblers will play them.

The slot machine evolved from the purely mechanical, to electro-mechanical, to server-based and other pure computerized versions. But the games remained overwhelmingly the same. Instead of three mechanical spinning reels, the vast majority of slot machines have five simulated spinning reels, usually with large "Q"s and "K"s, in homage to video poker. More interesting variations have been tried, but they have not been widely successful. Perhaps that is because slot machines are primarily played by people, more women than men, over 40, who don't want to have to learn new, complicated games.

Internet casinos naturally started with simulations of the games being offered in their brick and mortar counterparts. But Internet poker in Nevada has been a failure, as have the wider range of casino games available online in New Jersey and Delaware.

The major question for online gaming, and eventually for landbased casinos, is whether the problems with introducing remote wagering are procedural or substantive. Nevada's regulatory system, which worked for brick and mortar casinos, is too slow and expensive for the Internet.

England had already proved this. The idea was that operators would leave their current jurisdictions for the prestige of having a license from the United Kingdom. But operators realized that players did not care; the cost, and U.K. taxes, were higher than in other licensing nations; and, the English system was too strict. The last is the most scary. Legitimate operators were afraid that they would be refused a license by the U.K. This would put all their other licenses in jeopardy.

We know that legal gambling requires strict licensing. But, for the first time, an operator can choose which state or nation to call its official home. It can then take, often legally, players from many other jurisdictions. This poses a risk of a race to the bottom, with the regulator who is cheapest and easiest giving out the most licenses.

Even more fundamental is the question of whether these 19th Century games will succeed in direct competition with their 21st Century competitors. So far, the answer appears to be no. Games like Angry Birds® and Candy Crush® not only have hundreds of millions more players. Even though technically

not gambling, they make hundreds of millions more dollars.

Ironically, it is the oldest legal gambling operations that are going to be the first to break out of the trap of offering the same games in cyberspace that worked for decades in the real world. State lotteries know that their younger potential patrons do not want to merely pick numbers and wait hours or days to find out whether they have won. The Christmas Present of the Obama Administration's Department of Justice declared that the Wire Act is limited to sports events, opening the door to all other forms of in-state Internet gambling.[11] Six states were already selling lottery ticket subscriptions online. They, and at least an equal number more, had statutory authorization allowing them to sell individual tickets over the Internet. Some, like the Minnesota Lottery's eScratch Games, have made instant winner games available anywhere at any time. The next step is taking games like Candy Crush® and turning it into true gambling.

The challenge for the rest of the gaming industry, and its suppliers, but especially its regulators, is how to do the same thing with parimutuel betting, bingo and casinos.

The quant games of Macao and Faro have disappeared. To find out what they are, we have to search for them online. Our great-grandchildren will be looking up Blackjack, Craps and Roulette, on whatever comes after the Internet, because those, too, will no longer exist.

Will they also have to look up "Las Vegas casino"?

Gambling Games of the Future

Of course there have been technological developments. But these have been evolutionary, not revolutionary.

Slot machines, for example, have evolved from the purely mechanical, to electro-mechanical, to server-based and other pure computerized versions. With three mechanical reels and only ten stops per reel, the maximum jackpot could be only $1,000, and that would be with a 100% payout to the player.[12] Virtual stops and linked machines allowed gigantic jackpots.[13] This was especially important with the proliferation of state lotteries, for casinos could offer life-changing prizes without players having to wait for days for the numbers to be drawn.

But the slot machine games remained overwhelmingly the same. Instead of three mechanical spinning reels, the vast majority of slot machines have five simulated spinning reels, usually with large "Q"s and "K"s, in homage to video poker. More interesting variations have been tried, but they have not been widely successful. Perhaps that is because slot machines are primarily played by people, more women than men, over 40, who don't want to have to learn new, complicated games.

Meanwhile, Millennials hate slot machines. The comment I hear most often from people under 35 when I ask them about casinos is, "Slot machines are stupid."

Since all Millennials carry the greatest, most addictive games every invented on their smart phones, I guess they are right.

Changes in technology in one part of society lead to unexpected changes in other parts. Did anyone think that the invention of the cell phone and Internet would lead to the demise of much of the photography industry? Commercial photographers used to get commissions from magazines. Now the mags, if they even still exist, search the web and buy from brokers selling great shots from amateurs. Facebook alone has 250 million images uploaded every day.[14] And most of those shots are from phones. The small camera stores near tourist sites have almost all disappeared.

The law of unintended consequences kicks in whenever there are major technological developments. Newspapers are being killed by the Internet, but not because people can now get their news instantly online. Someone still has to write that content. And reporters and editors have been trained and have the resources. The Internet has no editor, which means that straight fiction is often reported as fact. But newspapers need advertising to survive. Most of them depended upon classified ads for their revenue. The birth of online rating services and eBay meant the death of daily papers.

Legal gaming has a special problem. As the most heavily regulated consumer industry, it is one of the slowest to change. Technology is playing havoc with the law of gambling. It is not even clear who should do the regulating.

Different forms of gambling have traditionally been viewed as creating different problems. Lotteries have been considered dangerous because tickets can

become too easily available. In 1849 and again in 1903, the U.S. Supreme Court declared: "The wide-spread pestilence of lotteries... infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple."[15]

Throughout most of its history, casino gaming was considered dangerous because it took working men away from factories and farms, and because wealthy, but foolish, individuals would sometimes, overnight, lose everything they owned.

Betting at a track on horse races has often been legal, while betting on college and professional sports events is almost always prohibited. The anti-bookmaking laws were designed to limit where and when wagers were made and to fight organized crime.

Charity bingo has been considered a low-stakes, social game. Laws were enacted that basically left the game alone, while ensuring that profits went to the sponsoring worthy cause.

But gambling is being transformed by technology in ways that make these distinctions meaningless. Even worse, for law-makers, the changes are unpredictable.

Daniel J. Boorstin, Director Emeritus of the Library of Congress, wrote a book in 1994 entitled CLEOPATRA'S NOSE: ESSAYS ON THE UNEXPECTED, about how the accidental and unexpected can alter the course of history. The title is from a statement by French mathematician Blaise Pascal (1623-1662), who wrote, "Cleopatra's nose, had it been shorter, the whole face of the world would have been changed."[16]

Today we might call this chaos theory: small changes can lead to enormous, unpredictable results. If Cleopatra had had a smaller nose, Julius Caesar and Mark Antony might not have fallen for her, and transforming the history of the Roman Empire.

Boorstin believes we have a new "Machine Kingdom" with different laws and rules from the traditional designations of "Animal, Vegetable and Mineral Kingdoms." In the Animal Kingdom, for example, species evolve through natural selection and survival of the fittest, by adapting to their environment. Machines, on the other hand, create their own environment, particularly by creating demand.[17]

Boorstin's observations about the ways in which new inventions affect human experience help explain how technology is changing the way people make bets:

Technology creates its own demand. Printed books created widespread literacy and the need for more printed books. Does the same work for legal gaming? One of the most popular forms of gambling today is the video poker machine. Did anyone want to play video poker, before video poker was invented?

The most potent machines invade all environments. Take, for example, the clock. “One of the surprising facts of technology is that for most of human history people had only the crudest ways of measuring time.”[18] For gambling, the most potent inventions have been the video screen and computer chip. Every form of gambling, from lotteries, through bingo, poker, horse racing and casinos, can now be played on a screen, for money. And the video screen need not be restricted to a licensed location.

Inventions expand experience. Video games and home computers created the ability to play faster games more conveniently, almost wiping out slower forms of gambling. New inventions do not mean that old forms disappear – but the games do change.

Inventions blur traditional boundaries. The Internet made national borders seem like little more than lines on a map. Technology defies existing legal categories. The New Jersey State Lottery and casinos in Atlantic City battled over which would have the right to run Keno games.

Is blackjack on the Internet casino gaming? There’s usually no live dealer. In fact, there are no cards tables or chips, only their images. Perhaps online blackjack is legally a lottery. Players are actually picking numbers and win if the computer on the other end says those numbers are winners. Or maybe it is bookmaking. Bettors are using wires to place bets on future uncertain events. And where does the bet take place?

Laws in the United States, and particularly definitions and fine distinctions, are often made by courts. Because there has to be a live case before a judge can rule on a question, many of the issues of where to draw the lines with online gaming have

simply never been addressed by even trial courts, let alone final courts of appeal. One of the few Internet gambling cases that did result in a final judgment held that Internet casinos were gambling devices like slot machines.[19] But the case involved a guilty plea and an unusual set of facts.

The Attorney General of Missouri had obtained a permanent injunction against the online casino, located in Blue Bell, PA. Although the casino had agreed not to accept any applications from Missouri residents for casino gambling services, it did, including from undercover agents. Although the defendant was enjoined from marketing in Missouri, and from representing that its services were legal in that state, it continued to take wagers from Missouri. The defendant's president was ordered extradited to Missouri to stand trial. Rather than face a possible prison sentence, he pleaded guilty to a criminal indictment that he had "traveled to" Missouri, through the magic of the Internet, and "set up" a "gambling device." The gambling device was the undercover agent's personal computer.

The lesson is not that Internet gambling is a slot machine. See, for example, the problems the governor of Kentucky has had trying to seize domain names under the Commonwealth's gambling devices statute.[20] The real lesson is that if you have agreed and even been enjoined from not taking bets from a jurisdiction, don't take bets from that jurisdiction.

Inventions are increasingly intrusive. Boorstin uses recorded music, which seems to be unescapable. Cars and television are dramatic examples, but so are computerized games. Many of the so-called social games offer additional goodies for players who are willing to spend small amounts. Some of these look a lot like traditional casino games; only they are a lot more interesting and fun to play.

Technology becomes ever more unintelligible to its users. Patrons really do not care whether their slot machine is a true slot machine – now often called a Class III gaming device based on the Indian Gaming Regulatory Act – or a Class II bingo game. In Mexico, operators often have what they call Class 2.5 machines; especially ironic because Mexico does not have a statute like IGRA, so there are no actual classes.

What is a Video Lottery Terminal? My definition of a VLT is a slot machine that is legal under the state's lottery laws, and therefore technically not a slot machine, even if it plays exactly like a slot. Rhode Island VLTs, for example, take coins, pay coins, and have handles or buttons that operate spinning reels.

There is no task that cannot be done by a more complicated machine. The mechanical three-reel slot machine has been replaced. But even bingo today is not played only with hand-drawn numbered balls and paper cards covered with beans.

Inventions cannot be uninvented.[21] The law can react, after the fact, to unexpected developments. But if the demand has been created, technology will eventually find ways of getting around the legal barriers.

Will the law be able to cope? Law constantly has to adjust to technological developments in gambling, designing new means of control. As Boorstin put it, "For us invention has become the mother of necessity."[22]

So what will the future forms of gambling be like? The immediate future is more computerized games played on monitors. The Internet and mobile phones will not be replaced any time soon. Players have shorter and shorter attention spans and want convenience, so remote wagering will thrive, once suppliers and operators develop games that are as appealing as Angry Birds® and Candy Crush®. Regulators will have such a hard time keeping up, that independent labs will grow even more important.

In the intermediate and long term, we cannot know what inventions will revolutionize our lives, let alone the unexpected consequences they will have on legal gaming. But there are clues. Look at what becomes popular for non-gambling games and other forms of entertainment. If the technology catches on and becomes less expensive, virtual casinos may become truly virtual. Movies and non-gambling games are going beyond 3D into extra dimensions of experience. Not only motion simulators but also headsets which allow audiences to have 360 degree views of the artificial world they have entered.

What will the games themselves look like? We know what succeeds with casino gamblers. The game must be easy to learn with a small house advantage or fee. Frequent, small prizes act as positive reinforcement, but there should be the possibility of a very large jackpot. Play must be fast, but not too fast to follow.

And, the most successful games have at least the illusion of skill.

The 19th Century games offered by 21st Century casinos will continue to exist for older players, and for younger ones, if modern versions can be developed. But the casino of the future will not have paper playing cards or wooden roulette wheels. Those ancient inventions will become as scarce as mechanical three-reel slot machines.

The Future of Internet Gambling

The legal gaming industry is as predictable as any other part of modern life. If we can uncover the trends that brought us to where we are today, we can at least make educated guesses about what shape gambling will take tomorrow.

For example, will Sheldon Adelson succeed in getting Congress to outlaw Internet gaming? It is true that Adelson, the chairman and chief executive officer of Las Vegas Sands, has become a major power in the Republican Party. Adelson gave approximately $140 million to Republican candidates in 2012, making him the largest single contributor in the history of American politics. Although this is an enormous amount of money in terms of elections, for Adelson it is spare change. A few weeks after Barack Obama won the election, Adelson had LVS declare a special dividend, giving him about $1.2 billion. He is now throwing tens of millions of dollars into an extensive lobbying campaign in Washington, seeking a ban on Internet gambling.

But while the GOP does control Congress, the President will be a Democrat until at least January 2017.

More importantly, Congress has enacted almost no new substantive laws of any kind since the Republicans gained control of the House in January 2011. This is not hyperbole. Although bills to name post offices and court houses have gone to the President's desk for signature, with the exception of amendments to the patent laws and small changes to other statutes, this Congress has done almost nothing.[23] The chances of it enacting controversial legislation to legalize, or, for that matter, to outlaw, Internet gambling is slim. This is particularly true of an issue that so few in Washington care about.

Politics always involves counting votes. A Republican Congressman voting in favor of Adelson's proposed ban would be publicly showing that he did not favor one of the GOP's sacred doctrines, State's Rights. The State Legislatures of Nevada, New Jersey and Delaware, and the territory of the U.S. Virgin Islands, have passed bills legalizing Internet gaming; bills that were signed into law by Republican and Democratic governors. Regulators in the three states have issued licenses and the online gambling is up and operating. More than half the states have changed their state statutes to expressly allow people to bet from home on horseracing. Half a dozen state lotteries have been selling tickets online for years. State political leaders have repeatedly and openly stated that they are opposed to Washington telling them what they can and cannot do within their own state borders about gaming in general and Internet gambling in particular.

A Republican Congressman voting in the opposite direction, in favor of the federal government legalizing Internet gambling, would also have to be careful about not stepping on State's Rights: There is no way Congress will impose the same gambling policy on Utah as on Nevada. In addition, he would face a primary opponent from the extreme right wing Tea Party, which would depict the vote as one in favor of bringing gambling into people's homes.

By the time the Republicans again win the White House, there will be more states with at least legal online poker, and lots of state lotteries with online games. Even if Internet gambling continues to disappoint operators, it still contributes millions of dollars every year to hard-pressed state budgets. Even if the Democrats lose everything in 2016, a very doubtful prediction, there will be sufficient numbers of Republican state officials who will make sure that the federal government does not close down this much-needed source of revenue.

We cannot predict exactly what the future holds for Internet gambling. But it is safe to predict that trends and forces that exist today will continue to exist. The legality of Internet gaming in the U.S. is going to be decided by politicians, not courts or polls or political scientists. And those politician will be office-holders on the state level, not members of Congress.

One of the most important trends is the continuing growth of what I call "the Third Wave."[24] States go through a fairly regular pattern of gambling proliferation. In the 1930's, during the Great

Depression, there was growing political pressure to end Prohibition. This included not only repealing the Constitutional Amendment that made America dry, but also overturning the outlawing of all legal gaming. In 1931, Nevada re-legalized casinos. States began reopening their racetracks. Every year has seen an expansion of for-profit, charity, and tribal legal gambling in the U.S.

We have finally reached the point where there is not much room left to grow.

For example, only a half-dozen states do not have state lotteries. For a mature industry, revenue growth usually requires attracting new customers. This almost always means coming up with a new product. If that new product also leads to greater spending by current patrons, so much the better. But state lotteries, as well as every other form of legal gambling, are greatly restricted by law on what new products they can sell.

In addition, state lotteries are run by government bureaucrats, who are naturally conservative, inclined to do things the way they have always been done. In any state agency, but particularly one connected to gaming, it is dangerous to be too inventive, or successful. Rebecca Paul was fired as Lottery Director by an anti-gambling governor of Florida for being too flamboyant.[25]

To grow, state lotteries need to come up with new games. The main area of growth has been Video Lottery Terminals. VLTs are so profitable, only political pressure has delayed them from being introduced in every state. The opposition usually comes from privately-owned and tribal casinos, racetracks, and other competitors. The expected opposition from religious groups has never materialized, or at least, has not been significant. But religious politicians, usually right-wing and often holding city and other local offices as well as state legislators, have slowed the proliferation of VLTs.

If the state legislature refuses to authorize new games, state lotteries have only been able to tinker with their offerings. In some cases, the changes have been disastrous. The California Lottery went through a time when every time they introduced a new games, sales dropped. New players were not attracted, and current players were lost.

Selling scratchers for $10 a ticket does bring in more revenue. But it would be nothing like lottery games available on players' home and office computers and smart phones.

Lotteries are often in a better position, legally, to take bets online than state-licensed casinos. Internet gambling, even intra-state, requires at least three steps: The state legislature has to pass an enabling statute, regulators have to issue regulations, and regulators have to issue licenses to operators and possibly suppliers. State lotteries sometimes have favorable statutes already in place. Some expressly allow the state lottery to sell tickets online.[26] Other state statutes are silent on the issue, which can be read as permitting the lottery to conduct its business however it wishes. When a statute allows such Internet sells, the state lottery can quickly write its own regulations, and issue licenses, or run the games themselves.

Two days before Christmas in 2011 the federal Department of Justice released a formal revision of its position on the Wire Act,[27] the main federal statute then being used against Internet gambling operators.[28] Since the invention of the Internet, the Criminal Division of the DOJ had held the Wire Act covered all forms of gambling. The DOJ officially reversed that position, declaring that prosecutions would be limited to sports betting. This Christmas present led to Internet poker being licensed in Nevada, and online casinos opening in Delaware and New Jersey.

The DOJ declaration came in response to a much more limited question being asked by state lotteries. Illinois, New York and four other states were selling lottery subscriptions intra-state online. They merely wanted to know if they could use out-of-state processors to handle the payments.

What they got instead was an enormous gift: a declaration from the highest level of federal law enforcement that there were very few acts of Congress that could be read as limiting state governments, including state lotteries, from doing just about anything they wanted online. A quick reading of federal anti-gambling statutes reveals that almost every one requires that the gambling be illegal under state law before the operation can be found to violate federal law.

So, the state lotteries are moving, more slowly perhaps than private operators would, to introducing games online. The Illinois Lottery was the first to sell individual tickets over the Internet.

Sales were so great that its computers crashed.[29] State lottery directors are reviewing their operative statutes to see whether they, too, can bring their games into every home in their states.

Being inherently conservative, state lotteries will start with traditional lottery games. A few more progressive directors are already looking at what other games they can offer. Younger lottery staff members in particular know that when you have grown up with the greatest games ever invented accessible whenever you wanted by turning on your smart phone, you don't want to merely choose numbers and then have to wait days to find out if you have won. A life-changing prize is not as attractive, or, as the online non-gambling social game industry says, not as "addictive" as constant small reenforcements.

Like a slot machine.

Also like a slot machine, Internet gambling is not a cornucopia. Online casino operators, even more than their landbased counterparts, are going to have to figure out how to attract Millennials to bet. But landbased casinos are doing a pretty good job attracting players more than 35 years old, which is still the great bulk of the possible customer base.

Because 2016 is an election year, not much can happen that requires state legislation. Professional politicians have unusual lives. Imagine having to campaign for your very job every two years; if you lose the election, including the primary, you are literally out of work. Lawmakers are faulted for being overly concerned with reelections. But it is an inherent flaw in the system: Imagine if you had to literally campaign and get enough votes, beating a competitor, every two, four or six years, to keep your job.

The cynical think politicians won't pass the seemingly inevitable legalization of Internet poker, so that they can continue to solicit political donations. In close races, a few hundred votes can make the difference between having a title, like Senator, and being unemployed. Why take the chance on voting for, or against, something never before seen? Few voters will be overwhelmed with joy or sorrow if Internet poker is made legal. But maybe a few will feel strongly enough to swing a local election. Better to put off the debate on Internet poker to 2017.

After the election, every state with legal gambling and a projected budget deficit, which means most of them, will be looking at legalizing online gaming, particularly Internet poker. The only barriers to legalization are political. Local operators, mainly privately-owned and tribal casinos, but also racetracks and cardclubs, have to be cut in and not feel that big-money outside casino companies will be the ones getting the licenses. Bills will be reintroduced in Pennsylvania, Florida, New York and the biggest prize, California.

In fact, there will be so many bills in so many states than even the seemingly endless wealth of Sheldon Adelson will not be able to stop the coming wave of state-licensed Internet poker.

The Rise of Near-Gambling

The current hot controversy over daily fantasy sports (DFS) has taken the focus away from what had been the most startling development for gaming – the explosive growth of social casino games. State legislation and court cases will determine whether DFS is a contest of skill or a form of sports betting. More important, even if DFS might be gambling, state legislatures can make it legal, as they have with so many other games during this third wave of legal gambling.

But social casino games are continuing to grow with little discussion among lawmakers as to whether they are actually forms of gambling, or even whether the games should be regulated.

Licensed land-based and Internet casino companies are spending hundred of millions of dollars to get into the social gaming business. Caesars Entertainment Corp. has bought a half dozen social gaming companies in the past few years.

One of Caesars' first purchases was Playtika. Playtika was founded in Israel in 2010 for about $1 million. It immediately started to lose money. In fact, it never made any money during the 11 months that it was independent. Yet Caesars paid $80 to $90 million dollars for 51% of the company. Why? Because Playtika had invented Slotomania, the number one social casino game on Facebook.

It is still one of the most popular social games. Slotomania has 13 million "likes" on Facebook, twice the adult population of the entire state of New Jersey.

Casino companies like social games because they help spread their brand name and build customer lists. More importantly, they make money, potentially lots of money.

At the 2014 meeting of the International Masters of Gaming Law in Oslo, Norway, Internet gaming expert Melissa Blau created a stir when she reported that the "whales," players who spend the most on social casino games, pay an average of $550 each, per month.

The news that people are ponying up nearly $7,000 a year to play free Internet games was startling. But Blau topped that when she reported that the average spent on real-money online gambling sites was also $550.

This is not really that surprising. Compulsive gamblers say that the best thing in the world is winning. But the next best thing is losing.

Very few people understand the difference between gambling and social games. Or, that different forms of gaming create different risks.

In the U.S., gambling requires the presence of three elements: consideration, chance and prize. Players bet on the outcome of an uncertain event to win a larger amount. Social games are not gambling, if they eliminate one of the three elements.

If anyone can play a game for free, it does not matter if the outcome is determined more by luck than skill, and valuable prizes may be won.
No-purchase-necessary sweepstakes have been common since at least 1954, when the U.S. Supreme Court ruled that the T.V. gameshow "Name That Tune" was not a lottery, even though contestants at home could enter by sending in a postcard.[30]

Contests of skill can charge contestants money – the smarter operators call the payments "entry fees" than "wagers," to compete for valuable prizes.

Atari introduced millions of people to the idea of electronic video games. Players pay money to play. Even if the game is predominantly chance, not skill, the game is not gambling, if players cannot win anything of value.

So, how do social games make money, if they are not gambling?

Making a game free for anyone to enter does not mean that contestants are prohibited from spending money. Sweepstakes work because people do buy the product being promoted, perhaps thinking that subscribing to a magazine increases their chances of winning. Charities run "donation requested" raffles, knowing social pressure and guilt feelings make most individuals send in money, even though not required.

Subscription games, like "free" poker for money prizes, are profitable because most players prefer their credit cards being billed about $20 every month, rather than having to fill out and mail postcards for free entries.

Most social games with a free alternative means of entry ("FAME") give players opportunities to play (I'll call these "chips" for convenience) when they sign up, and more every hour or every day. Operators sell additional chips for real money, but nobody is required to buy them. Sites make their profits from players who have lost everything and do not have the patience to wait for additional free chips.

Because there is no consideration, a casino game with a FAME is not gambling. However, some old cases involving pinball games from the 1930s and ‘40s indicate that these social games actually would be considered gambling in about a half-dozen states.

Social games where players compete against each other are not gambling, if the outcome is determined primarily by skill. States sometimes have special rules, for example, that the prize cannot be composed of the entry fees.

There are about ten states that put restrictions on contests of skill, such as requiring 100% of the players' money to go to the winner, or limiting the maximum amount that can be won. Interestingly, if you look at the skill contests for real money sites, you'll find that there is no general agreement as to exactly which states should be avoided.

The most common way for social games to get around the prohibitions on gambling is by not offering valuable prizes. Then why would anyone play? Jurisdictions can differ widely on exactly what constitutes a "prize." The easiest case is where the winner can win real cash, or an item that can be quickly sold for cash. The F.B.I. raided Second Life because there were casinos which used the site's "linden dollars." Because the linden dollars could be transferred to other players, a secondary market developed where this play currency could be converted into real money.

Social games have discovered that some players will spend a lot of real money to get avatars and virtual gifts that cannot be sold. Opponents have argued that these games do have all three elements, since the prizes are of value to the players. But only a few jurisdictions would agree that a non-material item is a "prize of value" if it cannot be sold.

Social gaming is obviously very big. And very volatile. Zynga, the leading company, was valued at one point at $9 billion. In 2013, it announced it was laying off 18% of its workforce and closing its New York, Dallas and even Los Angeles offices.

A controversy has exploded mainly because it is casino and other real-money gambling companies that are getting into the social gaming field.

During the 15th International Conference on Gambling and Risk Taking in Las Vegas, I agreed to act as one of the trial lawyers for a moot court on whether social gaming should be regulated. The mock trial was extremely lively and entertaining. But it did have a serious side, and raised these issues:

Social casino games are not always social. There is a big difference between contests in which players interact and play against each other, and games in which the patron is one against the house. Lawmakers have long recognized that banking games are more dangerous than non-banking games. We regulate blackjack, craps and roulette more strictly than poker and bingo. A FAME slot game on an iPad is closer to a real slot machine than it is to Angry Birds®.

Social casino games may be inherently misleading. Because the games are not regulated, they are free to set the odds at any level they want. In fact, they are almost never truly random. Game manufacturers don't want players to get bored, so they make the game easier if a player is stuck at one level, or harder if the player is winning too handily. This Dynamic Game Balancing ("DGB") is done automatically, because game designers want players to be hooked. Obviously, with real gambling, operators can't change the odds mid-game. And casinos do not brag about a game being "addictive."

Because they are not regulated, social casino games are available to children and potential compulsive gamblers. No one should care, if the games are harmless. But, are they? Should an online or land-based real-money casino be allowed to offer games indistinguishable from slot machines, with no restrictions? If a child is playing a social casino game that is set for 120%, will he realize the difference when he plays a real slot machine set at 95%? If an adult is playing a social casino game with DGM and spending money on additional chips, will she realize the reason she is losing is that the game automatically set longer odds when she had a winning streak?

Social casino games have millions of players, many spending as much as they do on real-money online gambling. And the games are not regulated.

Studies are beginning to show exactly how much people do pay to play supposedly free games online.

The most common model is “Freemium.” Players can participate for free. They only have to pay to get additional goodies, like avatars. But the most common commodity sold is time. Once players have lost the free chips given at the beginning of each hour, they can wait for more free chips. Or they can pay and get them right away.

So, a social poker player who has lost all his chips can sit out a few dozen hands, or buy additional chips, for real money.

The lure of the freemium is so great that people will pay for more time, even when they cannot win money or a prize that can be sold.

And the games are good. Better than the best slot machine available on a casino floor.MIT cultural anthropologist Natasha Dow Schüll has written about the terrestrial gaming devices in her book, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS (Princeton University Press 2012). She describes how some players enter “the zone,” a pleasurable other-world experience. It is gambling for gambling’s sake, like getting drunk or high. Players in the zone really do not care whether they win or lose, as long as the game is fun to play.

Brain scans have shown that near misses, which are programed to be part of every real-money and social gaming site, stimulate the same parts of the brain as wins. The pleasure centers of the brain don’t really care whether you are winning, or losing, real money or just virtual chips.

But, doesn’t it make a difference that on many social gaming sites you can’t win anything, at least nothing that can be sold for real money? The people who ask that question have obviously never played games

where getting to the next level is a bigger kick than winning ten dollars. And players can win avatars and other non-physical items that are of value to them.

All gambling requires chance, consideration and a prize of value. In most jurisdictions, even if a person values what he wins so much that he would be willing to pay for it, it is not a prize of value, unless the item can be sold. However, there are some states that have laws dating from the 1930's, when pinball began to be big, declaring that even a free replay is a prize of value. If winning more time is enough, awards of electronic items that bring prestige or can be sent to friends are surely prizes.

The landbased casinos understand that they may know how to operate banking table games and slot machines. But they are smart enough to know they don't have the time to learn how to attract real money players to the Internet, protect themselves from hackers, and make sure their sites never crash.

Borgata partnered with bwin.party, the online giant created by the merger of bwin, which started with sports betting and then expanded to poker and casino games, and Party Gaming, the world's largest real-money operator, when it was Party Poker.

What does bwin.party get out of the deal? New Jersey has limited its permits to the dozen brick and mortar casinos in Atlantic City. And, as the suppliers to state lotteries have shown, the first companies to be successful in one state have a step up in getting contracts and licenses when other states join the games.

Caesars Entertainment, the nation's largest landbased gambling operator, realized that it lacked the expertise to get into the social casino gaming field. So it bought Playtika.Caesars and the other brick and mortar casinos watched with envy as individuals became billionaires offering poker online. Caesars, then named Harrah's, couldn't get into the game, because it would have lost its licenses everywhere it had casinos.

The land-based operators are not about to let that happen again. They saw, before anyone else, that social casino games are the next Internet poker.

The games make fantastic amounts of money, and they are basically unregulated.

The potential for growth is fantastic. About one-quarter of all Internet users play social games regularly. No one laughs when experts predict that there will be one billion users within three years.

But at some point the games will begin to get the attention of regulators. The reasons are obvious, once you realize we are not talking about Farmville®.

True casino games always have some form of random number generator: reels or dice or internal computers. Slot machines, for example, are completely random. And the law often sets the minimum and maximum payouts. In Nevada, a slot machine has to pay out at least 85% and no more than 100% over time.

A social casino games may look like a slot machine, but the mechanics are completely different. Chance is a factor. But the games are never completely random.

Payouts can be varied, even during the middle of a game. There is no law preventing a social casino game from paying out 75% or 125%.

In fact, that is exactly what they do with Dynamic Game Balancing. If a player seems to be losing too much, and they might leave, the game automatically makes winning easier. And if the game seems too easy, so, again, players might get bored and leave, it is programed to make winning harder.

Games like Candy Crush, the most popular non-casino social game, brag about being addictive. Because they are. But, almost everyone plays for free, so what's the harm?

One concern is "grooming." If non-gamblers play a game that looks like a slot machine but pays out 125%, will they become more likely to gamble for real money? And how long will it take before they realize what the odds are on a true slot machine?

Another concern is the lack of transparency. The European Union looks like it is going to require operators to tell players that the games are not what they seem. Right now, not a single social casino game informs players that the games are not really random.ge verification can be a problem. Facebook puts its minimum age at 13. But it checks by merely asking people how old they are when they sign up. Reputable social casino games put the minimum age at 18, though most real-money casinos require players to be at least 21. But the checking again is minimal. After all, the games are technically not gambling and can be played for free.

The addictive nature of the games can tempt unscrupulous operators to take advantage of players. The operators have nearly perfect knowledge of their patrons. Once a player has paid money to continue after losing all her chips, it is easy to make the game so attractive that the player will always be close to winning, but will have to pay more and more to continue.

The player's world will be filled with near-misses. And the only way out is to run out of money or time.

END

I. Nelson Rose

Professor I. Nelson Rose is a Distinguished Senior Professor at Whittier Law School and a Visiting Professor at the University of Macau, an internationally known scholar, author and public speaker, and is recognized as one of the world's leading experts on gaming law.

Prof. Rose is best known for his internationally syndicated column and 1986 landmark book, "GAMBLING AND THE LAW®." He is the co-author of INTERNET GAMING LAW (1st and 2nd editions), BLACKJACK AND THE LAW, the first casebook on the subject, GAMING LAW: CASES AND MATERIALS (LexisNexis), and GAMING LAW IN A NUTSHELL. Prof. Rose is co-editor-in-chief of the *Gaming Law Review & Economics*.

Harvard Law School educated, Prof. Rose is a consultant to governments and industry. He has testified as an expert witness in administrative, civil and criminal cases throughout the United States, in Australia and New Zealand, including the first NAFTA tribunal on gaming issues. Prof. Rose has acted as a consultant to major law firms, international corporations, licensed casinos, tribes and local, state and national governments, including the provinces of Ontario and Québec; the District of Columbia; the states of Arizona, California, Delaware, Florida, Illinois, Michigan, New Jersey, Texas; and the federal governments of Canada, Mexico and the United States.

With the rising interest in gambling throughout the world, Prof. Rose has addressed such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe and the National Academy of Sciences. He has taught classes on gaming law to the F.B.I.; at universities in Spain, France, Slovenia and China; and as a Visiting Scholar for the University of Nevada-Reno's Institute for the Study of Gambling and Commercial Gaming. Prof. Rose has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, Canada, England, Australia, Antigua, Portugal, Italy, Argentina and the Czech Republic.

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Endnotes

[1] © Copyright 2016, all rights reserved worldwide. GAMBLING AND THE LAW® is a registered trademark of Professor I Nelson Rose, www.GamblingAndTheLaw.com.

[2] Due to the influx of high-rollers from China, Baccarat now generates more income for casinos in Las Vegas than does Blackjack.

[3] http://en.wikipedia.org/wiki/Blackjack.

[4] Foster, R. F., FOSTER'S COMPLETE HOYLE: AN ENCYCLOPEDIA OF ALL THE INDOOR GAMES PLAYED AT THE PRESENT DAY (Frederick A. Stokes Company 1897).

[5] Alaska Stat. § 05.15.180, NDCC, 53-06.1-03(1), WY ST § 6-7-101(a).

[6] See, e.g., M.G.L.A. 10 § 38.

[7] Ordinance number 3,911, passed 1883, quoted in *In re Lee Tong*, 18 F. 253, 254 (D.Ore. 1883).

[8] Law Enforcement Assistance Administration, United States Department of Justice, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 8.

[9] One quarter of millennials never carry even $5 cash. http://www.icba.org/millennialstudy/.

[10] 18 U.S.C. § 1084.

[11] See, Rose, I. Nelson, "Gambling and the Law®: The Future of Internet Gambling," Gaming Law Review and Economics, Vol. 18, No. 8 at p. 788 (October 2014).

[12] If there are ten symbols on a reel with only one signifying a jackpot and there is an equal chance of the reel stopping on each symbol, then there is a one

in ten chance of the reel stopping on the jackpot stop. With three identical reels the odds of a jackpot are then one in ten, times one in ten, times one in ten, or one in a thousand: 10 X 10 X 10 = 1,000.

[13] With virtual stops, the random number generating computer that determines the winner is programmed so that each reel has many more stops than the number of symbols, and each symbol no longer has an equal chance of appearing. If each reel has 100 virtual stops, the odds of it stopping on a jackpot symbol can be one in 100, so with three identical reels the odds would be 100 X 100 X 100 = 1,000,000, one in one million.

[14] Pete Brook, "Photographs Are No Longer Things, They're Experiences," *Wired* (Nov. 15, 2012), http://www.wired.com/2012/11/stephen-mayes-vii-photography/all/.

[15] *Phalen v. Virginia*, 49 U.S. 163, 168 (1850); *Lottery Case*, 188 U.S. 321 (1903).

[16] Daniel J. Boorstin, CLEOPATRA'S NOSE: ESSAYS ON THE UNEXPECTED at p.ix (1994).

[17] Id., ch.14.

[18] Id., p.162.

[19] *State v. Interactive Gaming & Communications Corp.*, CV97-7808 (Cir.Ct. Jackson County, Mo. May 22, 1997).

[20] I. Nelson Rose, "Using Archaic Laws to Fight Modern Gambling," 18 *Gaming L.R. & Econ.* 4 (2014).

[21] The sole exception may be the gun in Japan. Firearms were disrupting the traditional hierarchy, for a farmer could kill a samurai at a distance. So laws were passed to tax and then outlaw ammunition and the manufacturing of guns, until the island nation was gun free. This turned out to be not such a great idea centuries later, when Commodore Matthew Perry sailed his gunships into Tokyo bay in 1853.

[22] Daniel J. Boorstin, CLEOPATRA'S NOSE: ESSAYS ON THE UNEXPECTED at p.167 (1994).

[23] For a list of every law that Congress has passed, see http://www.congress-summary.com/.

[24] For a detailed history of the proliferation of legal gambling, see "How Gambling Law Developed," in I. Nelson Rose and Martin D. Owens, Jr., INTERNET GAMING LAW ch.5 (Mary Ann Liebert, Inc. Publishers, 2nd edition 2009.

[25] Ron Stodghill, "Behind the Jackpot: The Lottery Industry's Own Powerball," *New York Times*, (November 18, 2007) http://www.nytimes.com/2007/11/18/business/18queen.html?pagewanted=all&_r=0

[26] E.g., the Illinois State Lottery Internet Pilot Program, 20 ILCS 1605/7.12.

[27] 18 U.S.C. § 1084.

[28] Virginia Seitz, Whether Proposals By Illinois and New York To Use The Internet And Out-Of-State Transaction Processors To Sell Lottery Tickets To In-State Adults Violate The Wire Act, Memorandum Opinion for the Assistant Attorney General, Criminal Division, Sept. 20, 2011, release December 23, 2011.

[29] Paul Merrion, "Illinois Lottery website fails amid record jackpot," *Crain's Chicago Business* (March 30, 2012) http://www.chicagobusiness.com/article/20120330/NEWS07/120339977/illinois-lottery-website-fails-amid-record-jackpot.

[30] *Federal Communications Comm'n. v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954)

Legal Ethics; Professionalism; Substance Abuse: A Primer for Lawyers

SECTION N

The Attorney Disciplinary Process in Nevada

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Hopefully, the reader will never need the information provided here, but it is offered because for most conscientious lawyers the disciplinary process is scary, both because the process is unfamiliar and the potential outcome can be career threatening. Like most other states, the Nevada Supreme Court[2] has substantially adopted the Model Rules of Professional Conduct, proposed by the American Bar Association[3], but not the Comments and not in full. However, most law schools' ethics classes concentrating in the Model Rules will give the admitted attorney a firm grasp on their obligations in Nevada.

In 1997 as modified in 2007, the Nevada Supreme Court established the procedure for adjudicating ethics violations.[4] The Court established two Disciplinary Districts, one to serve the southern tier of the state, Clark, Esmeralda, Lincoln, Nye and White Pine counties, and the second to serve the remainder of the state, principally the north.[5] Available discipline ranges from disbarment to a letter of caution, which is actually a dismissal of the grievance, but provides cautionary advice to the attorney in question.[6] Two intermediate forms of discipline are in a process of change. Designated a public reprimand and a private reprimand, [7] these forms of discipline can be more educational than punitive. Public reprimands are made public and published in state-wide outlets, specifically the Nevada Lawyer, stating the attorney's name and the details of the matter. Private reprimands are still made public by publication in the Nevada Lawyer, but the specific identity of the attorney is withheld, the description of the matter referring to "Attorney A". Thus, a private reprimand is not truly private, but the specific attorney is not exposed to the public. Both explain the ethical violation as advice for others.

The Nevada disciplinary process is reactive, rather than proactive.[8] Commencement relies on the lodging of a grievance. Although the Court has created the Office of Bar Counsel to represent the State Bar Association in the prosecution of ethics complaints,[9] its initial function is to "[i]nvestigate all matters involving possible attorney misconduct or incapacity called to bar counsel's attention, whether by grievance or otherwise."[10] Thus, attorney misconduct or incapacity is first revealed by a grievance or court referral or some other method of notification to Bar Counsel, not the investigative tactics of Bar Counsel. While most referrals or grievances are voluntarily presented, but see RPC 8.3 which mandates attorney reporting of known violations of the Rules of Professional Conduct, the IOLTA program requires participating financial institutions to report any overdraft of an IOLTA account.[11] Notification from a participating financial institution will cause an investigation by Bar Counsel and the presentation of the matter to a screening panel, defined below.

While *sui generis*, the procedure for the prosecution of ethics violations is similar to the criminal process. The process is set forth in Nevada State Bar Association's Disciplinary Rules of Procedure.[12] Matters presented to Bar Counsel are reviewed by that office and an initial determination of validity is made with the noted exception of IOLTA account overdrafts which are always presented for further review. Each Disciplinary Board is comprised of 47 members appointed by the Board of Governors of the State Bar Association, 35 of who are members of the bar.[13] The Board of Governors also appoints one attorney to act as Chair of each Disciplinary Board and one to act as Vice Chair of each Disciplinary Board.[14]

Once a grievance is filed, Bar Counsel will notify the subject attorney of the basis of the grievance. The attorney is given an opportunity to respond and provide her version of the events or contacts. Of course, it is in the attorney's best interests to respond and provide relevant information which may very well negate the factual presentation of the grievance. Should the attorney not reply and Bar Counsel is left with only the grievance, the matter will be presented to a screening panel and most likely result in a Complaint for a formal hearing.

Once Bar Counsel has assembled sufficient facts from the grievant, the respondent attorney and from its investigation, the matter is presented to a screening panel, comprised of two attorney and one lay members of the Disciplinary Board having jurisdiction for the county in which the attorney practices.[15] The screening panel sits very much like a grand jury, receiving evidence from Bar Counsel only. Usually the screening panel sits for a day or less and reviews a number of matters. A Northern Nevada Disciplinary Board Screening Panel may review 6 to 10 matters at a time and a panel is convened perhaps once a month or less frequently. The Southern Nevada Disciplinary Board Screening Panel reviews many more matters and meets more frequently due to the number of attorneys, especially practicing in Clark County, and the number of grievances presented there.

Bar Counsel provides a written packet of information about each matter and its recommendation to the screening panel members at least three days in advance of the panel session.[16] Bar Counsel makes a presentation to the screening panel which can ask any questions or request additional information. The session is not recorded. A majority vote of the panel members is required. The options available to a screening panel are:

> (a) Hold the matter over for further investigation.
>
> (b) Dismissal with or without prejudice.
>
> (c) Diversion or mentoring pursuant to SCR 105.5.
>
> (d) Letter of caution issued by bar counsel, which is a dismissal but cautions the attorney regarding specific conduct and/or disciplinary rules. A letter of caution may not be used as an aggravating factor in any subsequent disciplinary proceeding.
>
> (e) Letter of reprimand, with or without conditions, including but not limited to restitution, a fine of up to $1,000, or both a reprimand and a fine, imposed by a screening panel of the disciplinary board pursuant to SCR105(1). The screening panel chair shall sign the proposed reprimand.
>
> (f) Filing a written complaint for formal hearing. 17

It is noted that a screening panel does not recommend either disbarment or suspension, but only the referral of the matter to a formal hearing.

One matter of note interesting to this author, who began his legal career in New Jersey, is the treatment of trust account violations in Nevada. As early as 1979[18], the New Jersey Supreme Court took a very strict approach to trust account violations. The docket there is legend with attorneys being disbarred for not just intentional misappropriation of client funds, but the reckless or negligent mishandling of client funds. The Court's unwavering position created new procedures for attorneys. For example, real estate closings, which previously could be conducted with non-certified funds, have required only certified funds to allow trust account disbursements, or at the very least, proof that the funds have cleared and are available to be able to disburse. The author has participated in several screening panel reviews of trust account overdrafts where the attorney has excused the overdraft with poor record-keeping or bad timing. While these excuses carry little to no weight in New Jersey, Nevada Bar Counsel's position, not contradicted by the Supreme Court, has been to simply caution most such violations. It is to be remembered that a Letter of Caution is a dismissal of the grievance, even though a record is maintained for three years in the event of subsequent discipline. I am not making this comparison to encourage bad trust account accounting or management, it just points out the differences in approach from one jurisdiction to another.

The respondent attorney is notified of the screening panel action and has fourteen (14) days to object to the imposition of a Letter of Reprimand.[19] In the event of an objection, at the attorney's election, a formal hearing is scheduled to be held before five (5) members of the local Disciplinary Board, or an informal hearing is scheduled to be held before three (3) members of the local Disciplinary Board, two attorney members and one lay member.[20]

An informal hearing is just that. It is not recorded. The pre-hearing process is truncated and the hearing itself is usually short. The selection of panel members is subject to challenge. The procedure for both formal and informal hearing panels is to provide Respondent attorney and Bar Counsel a list of the local Disciplinary Board members. Each is allowed five (5) preemptory challenges and

challenges for cause. Preemptory challenges must be filed with Bar Counsel no later than the date that an answer to a formal complaint is due.[21] Members of the screening panel are prohibited from being on the hearing panel.[22]

Recently an interesting advantage to the Respondent was noted. Should the Respondent object to a Letter of Reprimand and chose an informal hearing, the hearing panel cannot impose any greater or different discipline than originally imposed. The impact has been to increase the number of informal hearing appeals from the issuance of Letters of Reprimand as there has been no added risk to the Respondent and the hearing panel could reduce the discipline or even dismiss the grievance. In response, Bar Counsel has proposed, in addition to several other rule changes, the deletion of the informal hearing to appeal the issuance of Letters of Reprimand. An additional proposal is to reduce the number of members of a formal hearing panel from five to three, creating only one format for hearings, the formal hearing conducted by three Disciplinary Board members.

The formal hearing is utilized for more serious matters. In addition to those appeals of the issuance of a Letter of Reprimand and where a Respondent has failed to cooperate with an investigation or respond to Bar Counsel requests for information or where a Respondent may not be located, [23] the formal hearing process is used for the imposition of disbarment, suspension or material conditions to a Letter of Reprimand.

The formal hearing process is similar to other judicial process. The matter is instituted by the lodging of a Complaint, normally in the same format as used before the District Court. Bar Counsel sets forth the factual allegations in paragraph form, identifies the particular Disciplinary Rule claimed to be violated and seeks the imposition of discipline. The Complaint is served on the Respondent attorney at her address of record with the State Bar.[24] A response, usually in the form of an Answer, is due within 20 days, which can be extended once by the Disciplinary Board Chair.[25] It is important to note that the response must be verified by the Respondent.[26] An unverified answer is an insufficient response.[27] A failure to respond will constitute a default and the allegations of the Complaint are deemed admitted.[28] Once the issues are joined, a Chair of the Hearing Panel, who is subject to challenge, is appointed by the Disciplinary Board Chair. The Hearing Panel Chair then presides over the pre-hearing process. Within thirty (30) days after the Hearing Panel Chair is appointed, she will conduct an Initial Conference, similar to such conferences in civil litigation.[29] Discovery issues, scheduling and settlement can be discussed.

Limited discovery is allowed, but Bar Counsel is to provide its documents and witness list at the Initial Conference.[30] No later than thirty (30) days prior to the hearing date, both parties are to exchange witness and document lists.[31] Good cause is required for additional discovery to be requested. The Disciplinary Rules of Procedure do allow for depositions in lieu of appearance at the hearing[32] and for the issuance of subpoenas to compel witness appearance.[33]

The remaining members of the formal hearing panel are appointed and the hearing is to be held within 45 days of their appointment[34], but that requirement is frequently waived, as is the requirement that venue for the hearing is fixed in the county where Respondent maintains her residence or principal office. This is mainly due to the availability of facilities at the two Bar Association offices, one in Las Vegas and the second in Reno.

No later than ten (10) days prior to the hearing date, a pre-hearing conference is held by the Hearing Panel Chair with Bar Counsel and Respondent, who is entitled to counsel during the proceedings. Any remaining issues are discussed and any evidentiary matters are brought up.[35] Trial briefs may be required.[36] Settlement can be arranged. The Settlement of ethical matters is presented by a conditional guilty plea, where the Respondent admits one or more ethics violations in exchange for a limitation on the discipline to be imposed. While there can be disbarment by consent, most conditional guilty pleas are in exchange for a stipulated discipline, such as limited suspension time, conditions on a Letter of Reprimand or the like.[37] The plea is conditional as it must be approved by the hearing panel by its majority vote and where suspension or disbarment is imposed by the Supreme Court.[38]

The hearing is presided over by the Hearing Panel Chair. The proceeding is recorded and rules of

evidence apply. The Chair will make all evidentiary and procedural rulings during the hearing. Documentary evidence is to be in the format generally utilized in District Court and introduced either by stipulation or by testimony. The Hearing Panel is provided a hearing packet containing all the pleadings, correspondence and stipulated exhibits in advance and available at the hearing.[39]

A decision is to be rendered within thirty (30) days of the conclusion of the hearing unless post-hearing briefs or submissions are made in which case the decision is due within sixty (60) days.[40] An attorney subject to discipline can be liable for the costs of the proceeding, including reporter's fees, cost of investigation, bar counsel and staff expenses, witness costs, services fees and the like.[41] Especially in conditional guilty pleas, Bar Counsel will agree to waive salary expenses, but actual costs, such the reporter's fee, will be imposed in order to ease the financial burden on the State Bar Association and its members.

Discipline of disbarment or suspension is subject to review by the Supreme Court. Other lesser public or private discipline is not.[42] However, either party may appeal to the Supreme Court from any decision of a screening panel or formal hearing panel. The decision of an informal hearing panel to impose a Letter of Reprimand is final.[43] The appeal process is the same for any appeal to the Supreme Court.

Should an attorney be disbarred or suspended, there are two key time frames. First, an attorney who is suspended for more than six (6) months must apply for reinstatement. It is not automatically allowed, but must be reviewed by the Supreme Court. Second, an attorney who has not practiced for a consecutive total of five (5) years due to suspension or disbarment, no matter what the initially imposed term was, must pass the current bar exam as a mandatory condition of reinstatement.[44] The procedure for reinstatement is to file a petition with Bar Counsel stating the justification for reinstatement together with an advance for costs of $1,000[45]. The attorney has the burden to demonstrate by clear and convincing evidence that "he or she has the moral qualifications, competency, and learning in law required for admission to practice law in this state, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest."[46] A hearing before a Disciplinary Board hearing panel must be conducted within sixty (60) days and a report from the panel must be filed with the Supreme Court within another sixty (60) days. Either Bar Counsel or the Petitioner dissatisfied with the recommendation and report from the Disciplinary Board may file a brief with the Supreme Court. The Court then renders its decision.[47] A subsequent petition for reinstatement shall not be filed within one (1) year following an adverse decision, unless otherwise ordered.[48]

A different but related reason for an attorney to not be fit to practice law is due to disability. It can be caused by mental incompetency, mental illness, infirmity or addiction. Should an attorney be adjudicated incompetent, the Supreme Court shall enter an order transferring the attorney to disability inactive list.[49] The Court may impose such conditions as are appropriate. Otherwise, when it appears to the Disciplinary Board or a hearing panel that an attorney suffers from mental infirmity, illness or addiction, it may petition the Supreme Court for a consideration of the attorney's mental state. Such petition is confidential and is processed separately from any other disciplinary matter. The Supreme Court shall order such action as is appropriate and upon a finding of incapacity to practice law shall transfer the attorney to disability inactive status. Any pending disciplinary matter shall be held in abeyance.[50]

An attorney on disability inactive status may apply for reinstatement no more than once per year unless otherwise ordered, has the burden to prove by clear and convincing evidence her suitability to practice law and otherwise comply with the standard for reinstatement otherwise set forth.[51] There is an automatic waiver of the doctor-patient privilege for reinstatement proceedings related to disability inactive status.[52]

While the author trusts that no attorney reading this article will be faced with an ethics grievance, the reader should have a better understanding of the disciplinary process in Nevada and, if called upon, be able to assist other more needy counsel with their ethical issues.

Endnotes

[1] Mr. Aaron is a member of the Northern Nevada Disciplinary Board, where he serves as a screening and hearing panel member and has presided over contested disciplinary hearings. He is admitted to practice in Nevada, New Jersey and New York. He has served as a public prosecutor, Deputy Attorney General, as a litigator in private practice and as Chief Legal Officer and Compliance Officer for both publicly traded and privately held companies in the gaming industry. He currently is offering his over 35 years of experience as a litigator and problem-solving in-house attorney as a mediator and business consultant. For further information, go to www.nevadamediation.net.

[2] ADKT 370, 2006

[3] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

[4] SCR 99 through 123.

[5] SCR 100.

[6] SCR 102.

[7] SCR 102 (5), (6) and (7).

[8] SCR 105.

[9] SCR 104.

[10] *Id*.

[11] SCR 78.5 (2).

[12] https://www.nvbar.org/sites/default/files/DISCIPLINARY%20RULES%20OF%20PROCEDURE%20%20FINAL%207-14-14.pdf, hereinafter "DRP".

[13] SCR 103(1).

[14] SCR 103 (3).

[15] SCR 105 (1).

[16] DRP Rule 7.

[17] DRP Rule 8.

[18] In re Wilson, 81 N.J. 451 (1979).

[19] SCR 105 (1) (b).

[20] *Id.*

[21] SCR 105 (2) (b).

[22] SCR 105(1) (c).

[23] Although it is noted that Nevada attorneys are obligated to provide a current mailing address and email address to the State Bar. SCR 79.

[24] SCR 105(2).

[25] *Id.*

[26] DRP Rule 18 (b) (2).

[27] DRP Rule 21 (b)

[28] *Id.*

[29] DRP Rule 23,

[30] DRP Rule 23(b).

[31] *Id.*

[32] DRP Rule 24 (b).

[33] DRP Rule 25.

[34] DRP Rule 26.

[35] DRP Rule 28.

[36] DRP Rule 29.

[37] SCR 112 and 113.

[38] *Id.*

[39] DRP Rules 35-37.

[40] DRP Rule 39.

[41] DRP Rule 40.

[42] SCR 113.

[43] SCR 105 (c).

[44] SCR 116.

[45] SCR 116(4).

[46] SCR 116 (2).

[47] SCR 116.

[48] SCR 116(6).

[49] SCR 117(1).

[50] SCR 117.

[51] SCR 117(4).

[52] SCR 117 (6).