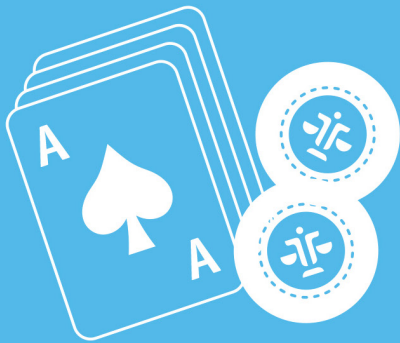


# THE DEFINITIVE GUIDE TO iGAMING IN THE UNITED STATES

Updated January 2017



Includes new eSports chapter

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# Introduction

**B**y 2010, the internet had become an indispensable part of virtually every aspect of our lives. We read newspapers, books, and magazines online instead of on paper, we shopped online instead of visiting the mall, and we streamed movies directly from the internet rather than renting them from a video store. Also by this time, a large part of our daily interactions with other human beings occurred over the internet, through email, and social media. Yet in 2010, there was no legal internet-based, real money gaming – or iGaming – in the United States. A number of companies, largely located offshore, offered online poker and other games, but did so in a legal gray area.

In 2011, the federal government announced that interstate online gaming was conducted illegally and shut down the largest internet poker websites in the U.S. Soon after, states recognized their potential to profit from the iGaming vacuum and passed laws legalizing online intrastate iGaming. In the following years, a growing number of states began permitting real-money online poker and other internet games. Some of these states have even entered into agreements allowing their players to play each other over state lines. The benefit to these states – as well as others that are considering making the jump – is clear. Legal iGaming offers the potential to increase in-state employment by requiring certain jobs and equipment to be kept within state boundaries, and states profit by collecting substantial state tax revenue and licensing fees. For states that already have brick and mortar casinos, iGaming offers opportunities to cross-market and thereby resuscitate struggling hotels and casinos with an influx of new patrons.

Although revenue figures have lagged behind the optimistic predictions forecasted by the first states to implement iGaming, it is still an important source of cash for state coffers. Venture capital firms and investment banks have begun to devote time, effort, and money to the industry – a sign that financial experts share the view that iGaming, ultimately, will be successful. Internet gaming will undoubtedly be a growing fixture in the gaming industry over the coming decades.

In this report, we seek to provide a comprehensive discussion of the current status of internet gaming in the United States. We begin with the topic of the business opportunities that iGaming offers. This is followed by a discussion on the legality of – and enforcement against – iGaming, including an analysis about the federal statutes that have been applied to iGaming and some of the significant milestones in federal law enforcement against the industry. We then provide detailed information regarding iGaming laws that states have passed or are considering. Next, we address how fantasy sports leagues, the “new kid on the block” of iGaming, will be viewed under state and federal law. In our newest chapter, we delve into the increasingly popular eSports arena and the myriad of legislative concerns that surround this progressive new facet of iGaming. Finally, we offer our predictions for iGaming trends in the coming year and beyond.

Our hope is to provide readers with an up-to-date resource on the current status of the iGaming industry in the United States, which will be updated regularly as developments occur.



# II.

## Business Opportunities in iGaming

● Gaming poses business opportunities for a number of participants, not only including entities involved directly with the games, but also an assortment of providers required in order to offer the product in a manner consistent with regulatory requirements. For the most part, iGaming is structured around the sharing of revenues and the costs and benefits of marketing.

a. THE CRITICAL ROLE OF LAND-BASED CASINOS

While iGaming offers many opportunities for profit, the industry is more restrictive than many others. Those restrictions limit profit to some extent and arise from the regulations imposed on providers in this field.

In the United States, iGaming has developed according to a model different from the way in which the industry operates in Europe and the rest of the world. A company wishing to offer iGaming cannot simply do so from the cloud; rather, iGaming is offered exclusively through contractual partnerships between the internet platform operators and existing land-based casinos already holding gaming licenses from state regulatory authorities. iGaming developed along this path as a result of a number of factors, including the political power and economic leverage wielded by land-based operators and fear on the part of land-based operators that the iGaming business would cannibalize brick and mortar revenues. These fears have been largely assuaged as the casinos have realized that the customers coming to iGaming platforms are demographically different from their land-based customers, but the model still remains.

Each of the state regulatory schemes that has been enacted in the United States thus far has followed this model, requiring partnering with licensed land-based casinos. But of course there is a limited number of land-based casinos, making opportunities to offer iGaming similarly limited. And the cost of entry into the industry is fairly high – including the costs of acquiring a land-based license, the costs of acquiring a license as an iGaming provider, and the hard costs of setting up the servers in the brick and mortar locations to provide the infrastructure for the online gaming products.

Generally, iGaming providers partner with the land-based casinos in contractual agreements that focus on revenue-sharing. In some cases, the iGaming provider shares its portion of the revenue with other downstream participants – for example, in those cases in which the iGaming provider does not own the actual software used in the online gaming product.

Thus far, for the most part, the land-based casinos have taken a largely hands-off approach to the management of the online products, leaving it to the iGaming providers to handle those matters. On the other hand, in many cases, the entry point for consumers to use the online gaming product is via the land-based casino's website. This offers certain advantages for land-based casinos that are already well-known and enjoy significant brand recognition. One exception to this general rule is Trump's online gaming, which is managed by Betfair and accessed through Betfair's website exclusively; however, that is an historical consequence of the buyout of Trump Hotel with a reservation by Trump of the exclusive right to offer iGaming under the "Trump" brand name.

#### b. OPPORTUNITIES FOR OVERSEAS OPERATORS

While iGaming in the United States has attracted many overseas providers (and certainly offers them opportunities in this market), those overseas providers face some unique issues. The expense of marketing – which is substantial – has generally been laid at the feet of the iGaming providers. The hotels, which already have customer lists and loyalty programs, usually provide the contact information of their customers to their iGaming provider partners to use in marketing campaigns, but otherwise largely leave marketing (and the cost therefore) to the iGaming providers. For those who come from overseas, the responsibility for carrying the sole burden of marketing may be unusual, and the sheer cost of entry may be daunting for smaller entities. Also, as the continuing PokerStars licensing determination in New Jersey shows, providers who accepted U.S. players as customers after 2006 may face hurdles or even barriers to their entry into the U.S. state-regulated market now.

#### c. OTHER INDUSTRY OPPORTUNITIES

iGaming offers numerous opportunities for others as well. Because of regulatory requirements for security and safety, provision of online gaming also requires the involvement of banks (for payment processing) and security affiliates (for verification of age and identity), among others. In some states, some of these ancillary providers are required to be licensed by the regulatory authority, though in some states that process is less intense and less intrusive than the licensing process applicable to those entities that will be in direct contact with customers during the offering of the online gaming product. Because data privacy, cybersecurity and underage gambling are very important concerns for regulators, these ancillary providers are viewed by regulators as extremely important participants in the industry.

#### d. CONVERGENCE

In these first years of state-regulated iGaming in the United States, much business analysis has focused on “convergence” – the extent to which the success of the brick and mortar hotel and casino and the internet-based gaming products are intertwined and mutually supportive. The use of existing hotel customer bases for marketing is one way in which the land-based partners have provided support for the marketing of their iGaming partners. The hope and goal of many hotel-iGaming partnerships is that iGaming, which is attracting a customer base from different demographic groups than the hotels themselves, will attract those new customer groups to spend money at the land-based hotels and casinos. The possible means for doing this are limited only by the imagination of creative marketing professionals, but they include sponsorship of tournaments, loyalty point programs, coupon offers, and the like. The ultimate mark of true success for iGaming will be whether and when it achieves true convergence in this respect.

e. OPPORTUNITIES FOR TRIBAL CONSTITUENCIES

While theoretically Native American tribes could partner with iGaming providers, the structure of tribal gaming in the United States and the geographic limitations of the reservations on which those tribes are permitted to offer gaming pose special challenges. In several states – particularly California, Florida and Michigan – the tribes wield enormous political power with respect to gaming and have historically held a monopoly on gaming in those states. The future of internet gaming in those states is dependent on the ability of the states to reach revenue sharing agreements with the tribes for the gaming that is permitted.

The primary obstacle to the offering of iGaming by Native American tribes is the very limited geographic area covered by their reservations. In many cases, those reservations simply do not include sufficient population to support the offering of iGaming – particularly in the case of online poker, which depends on player liquidity for its success. One possible solution, championed by the Tribal Internet Gaming Alliance (TIGA), would be to combine the player pools of the various reservations across the country (similar to the combination of players through interstate agreements like the one now in place between Delaware and Nevada). The difficulty with this approach is that it may simply result in too much competition for too few customers.

The Iowa Tribe of Oklahoma is attempting another solution. In April 2016, a federal court granted the Tribe the right to launch PokerTribe.com, an online gambling site catering to customers outside of the United States. The gaming servers will be located and controlled on the Tribe's lands. The site is scheduled to launch its real money gaming on August 1, 2016.<sup>1</sup>





# III.

## Recent History of the Legality and Enforcement of U.S. iGaming

The legality of online gaming in the U.S. has been the subject of debate since its inception. Inconsistent messages have been issued by federal and state lawmakers, regulators, enforcement bodies, and courts.

Government agencies have pursued enforcement actions against iGaming-related businesses and individuals pursuant to several federal laws. Many of the laws applied to online gaming predate the internet itself by several decades, including the Federal Wire Act of 1961, 18 U.S.C. § 1084 and the Illegal Gambling Business Act of 1970 (IGBA), 18 U.S. Code § 1955. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361–5367, was meant to provide clarity as to the legality of gaming transactions, but in some ways only served to muddy the waters. We discuss each of these laws in detail below, and analyze several significant events in which these federal laws were applied. Finally, we turn to the new and evolving area of state-regulated iGaming.

## **The Federal Wire Act of 1961, 18 U.S.C. § 1084**

One of the oldest statutes applied to the online gaming industry is the Federal Wire Act of 1961.<sup>2</sup> The Wire Act prohibits businesses from transmitting sports bets or wagers over the telephone (or other wired devices) in states that have made such activity illegal. President John F. Kennedy and Attorney General Robert Kennedy sought to use the law, along with several other contemporaneous pieces of legislation, to pursue perpetrators of organized crime. Legislative history reveals that Congress's overriding goal in implementing the Wire Act was to stop the use of wire communications for sports gambling. Over the years, however, it has been used to combat other forms of online gaming.<sup>3</sup>

The Wire Act outlaws the use of telephones or other wire devices to transmit bets or wagers on sporting events. It also outlaws other communications that help further these bets or wagers, such as transmission of payments.<sup>4</sup> The elements of a Wire Act violation are:

- (1) the defendant regularly devoted time, attention, and labor to betting or wagering for profit,
- (2) the defendant used a wire communication facility<sup>5</sup>: (a) to place bets or wagers on any sporting event or contest; (b) to provide information to assist with the placing of bets or wagers; or (c) to inform someone that he or she had won a bet or wager and was entitled to payment or credit, and
- (3) the transmission was made from one state to another state or foreign country.<sup>6</sup>

The Wire Act has not been used – nor was it intended to be used – against the casual or social bettor.<sup>7</sup>

But some courts have taken a somewhat broad approach to whom the statute applies: while some have interpreted “transmit” to apply to just the sender of a transmission,<sup>8</sup> others have interpreted “transmit” to apply to the sender or the recipient.<sup>9</sup> In other words, some courts have found a person guilty merely for receiving bets or payments on bets.

Prior to the passage of UIGEA in 2006, the Wire Act was one of the primary statutory weapons the DOJ used to pursue online gambling.<sup>10</sup> The Department of Justice (DOJ) applied the theory that the Wire Act criminalized all forms of internet gambling. The DOJ changed course, however, in 2011, when it analyzed the Wire Act and concluded that the Wire Act should not be applied to online gambling transactions.

## **The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361–5367**

The Unlawful Internet Gambling Enforcement Act of 2006 was pushed through Congress on the eve of a congressional recess. There was little review and virtually no discussion of the legislation, which was attached to an unrelated bill on port security.<sup>11</sup>

UIGEA seeks to combat online gambling by blocking the flow of funds from U.S. gamblers to online casinos. Lawmakers based the legislation on the questionable Congressional finding that internet gambling is a growing problem for banks and credit card companies.<sup>12</sup> It targets casinos, financial institutions, and intermediaries who facilitate the funding of online gaming. But because liability is only triggered when the gambling activity has violated an underlying state law,<sup>13</sup> if online gaming is permitted within a state, and an online casino restricts gaming to players within that state (and adheres to that state's laws and regulations), UIGEA does not apply.

UIGEA states that “[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful internet gambling” certain forms of payment including credit cards, electronic fund transfers, checks, or the proceeds of any other form of financial payment.<sup>14</sup> In brief, UIGEA makes it a felony for a person:

- (1) engaged in the business of betting or wagering
- (2) to knowingly accept money
- (3) in connection with unlawful gambling.<sup>15</sup>

UIGEA's criminal provision applies only to one who “knowingly accepts” a bet, i.e., the online casino.<sup>16</sup> It does not apply to a player who places a bet.<sup>17</sup> A bet or wager includes risking something of value on the outcome of a contest, sports event, “or a game subject to chance.”<sup>18</sup>

Another important aspect of UIGEA is the regulatory obligations it imposes on financial institutions. Regulations under the statute went into effect in June 2010 and require financial institutions and other payment processors to conduct “due diligence” when creating a relationship with a new commercial customer. The new due diligence standard is automatically met if the internet gambling operator is part of state government, if it has a state or tribal license, or if it has a “reasoned legal opinion” that it is not involved in restricted transactions.

## **Illegal Gambling Business Act, 18 U.S. Code § 1955**

The Illegal Gambling Business Act (IGBA) was enacted in 1970 to build on legislative initiatives to combat organized crime. The statute targets “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”<sup>19</sup> An “illegal gambling business” under the law is defined as a business that:

- (1) violates the law of a State or political subdivision in which it is conducted;
- (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (3) 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.<sup>20</sup>

Under the statute, “gambling” includes pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

The statute’s definition of gambling has been challenged and even questioned by federal courts. In an August 2012 ruling, a federal district court in New York held that IGBA was ambiguous as to what gambling it covered and that, as a game of skill, “Texas Hold ‘Em” poker was not covered by New York’s anti-gambling law. That judgment was later reversed by the United States Court of Appeals for the Second Circuit.<sup>21</sup> In February 2014, the Supreme Court refused a discretionary appeal from that ruling. For that reason, it is generally understood that people can still be prosecuted under IGBA for playing online poker in jurisdictions where it violates the law of the state where it is conducted.

### **Black Friday**

On April 15, 2011 – known in the gaming industry as “Black Friday” – the Justice Department dealt the industry a major blow when the U.S. Attorney’s office in Manhattan indicted 11 individuals and launched a \$3 billion civil lawsuit against online poker firms PokerStars, Full Tilt, and Absolute Poker. Through the action, the DOJ seized about 76 bank accounts in 14 countries and five domain names.

The indictment alleged that the defendants had violated UIGEA and IGBA and were guilty of bank fraud (it conspicuously did not allege any Wire Act violations). It further alleged that, from 2006 to 2011, the three leading internet poker companies doing business in the United States violated federal law by deceiving banks and financial institutions into processing billions of dollars in payments for illegal gambling activity on their sites. The defendants allegedly tried to circumvent federal rules with the help of individual payment processors, also named as defendants, who prosecutors claimed helped disguise gambling revenue as payments to phony merchants selling non-existent goods such as jewelry or golf balls.

Black Friday had a major chilling effect on iGaming. As of April 2011, many estimated the U.S. online poker industry to be worth up to \$6 billion.<sup>22</sup> Within a week, worldwide online poker traffic dropped 22 percent.<sup>23</sup> And since Black Friday, “online poker in the United States has become a market with very little to no supply, either in the form of regulated or unregulated operators.”<sup>24</sup>

## **September 2011 DOJ Opinion on the Wire Act**

While Black Friday seemed to shutter online gaming in the U.S., a window was opened by the Justice Department just months following the April 15, 2011 indictments. In a 13-page legal opinion (dated September 2011 but released to the public in December 2011),<sup>25</sup> the DOJ determined that the Wire Act applies only to sports betting: that is, that “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside the reach of the Wire Act.”<sup>26</sup> The DOJ’s opinion was a game-changing moment for iGaming. It eased fears among state lawmakers that money involved in online gaming would incur a violation of federal law as soon as it crossed state lines. As Poker Player’s Alliance Executive Director, John Pappas stated: “This is a much needed clarification of an antiquated and often confusing law. For years, legal scholars and even the courts have debated whether the Wire Act applies to non-sporting activity. [This] announcement validates the fact that internet poker does not violate this law.”<sup>27</sup> After the DOJ’s announcement, many states stepped up initiatives to begin regulating online gaming within their borders.



# IV.

## Legal iGaming: State-by-State

While there has been significant lobbying of the U.S. Congress by iGaming interests, it is widely believed that the prospects for a federal law legalizing online gaming are dim at best. In part for that reason, progress in the legalization and regulation of online gaming has rolled out on a state-by-state basis. By predicating its violation on the question of whether conduct violates a state's gambling statutes, UIGEA recognizes that a state may legalize internet gambling within its borders. States have the authority to determine (1) what type of gambling is legal within their borders, (2) where and how gambling can be carried out, and (3) who can gamble (i.e. age and location limits).

While several states are considering legislation to recognize online gaming, currently three states offer regulated iGaming: Nevada, Delaware, and New Jersey. These three states vary in population size and have taken different approaches to what type of online gaming they will allow. Whose approach is best may be difficult to determine as success depends largely on demographics. But as states pool their iGaming resources, the states' success will be less dependent on their respective populations. To date, payment processing and geolocation difficulties continue to hamper these states' markets. Nevada and Delaware are further challenged by low populations and consequent market liquidity. But as more states join the regulated iGaming market, and as more states enter reciprocal agreements to pool their players, liquidity issues should be reduced dramatically.

## NEVADA

Nevada was the first state to authorize online gaming (referred to as "interactive gaming" in the state). Even before the DOJ reversed its position on the Wire Act in late 2011, which was the impetus for many states to consider iGaming regulations, the Nevada State Legislature had passed a bill ordering its state's regulators to prepare for licensing internet poker. The state's Gaming Commission thus adopted regulations for online gaming in December 2011. Nevada's initiatives were stepped up in February 2013 with the passage of a new law to allow for interstate gaming. Nevada sought to be at the forefront of regulated iGaming in order to have a strategic advantage when negotiating compacts with other states. As Pete Ernaut, president of government affairs for R&R Partners, noted: "We have the most mature financial, auditing and collection capabilities, much greater than some of those states, and they have the players."<sup>28</sup>

## TIMELINE

The rollout of interactive gaming in Nevada has come in two stages: (1) legislation calling for regulated iGaming within Nevada in 2011 and (2) legislation allowing for interstate iGaming agreements in 2013.

In March 2011, the Nevada legislature introduced AB 258, which instructed the Nevada Gaming Commission to adopt regulations for the licensing and regulation of internet poker.<sup>29</sup> Progress on legislation was stymied by the Black Friday indictments of April 2011. But by December 2011, the Commission had adopted amendments to its regulations to make possible the licensing and operation of online gambling within the state if the federal government sanctioned the practice.<sup>30</sup> In June 2012, the Commission issued the first two licenses in the nation for internet gaming to two of the largest slot machine manufacturers: International Game Technology and Bally Technologies, Inc.<sup>31</sup>

Broadening the scope of Nevada's gaming laws, in 2013 the state enacted legislation that would allow for interstate iGaming.<sup>32</sup> On February 21, 2013, Nevada enacted AB 114<sup>33</sup>, which revised provisions governing interactive gaming.<sup>34</sup> The legislation allows players located outside of Nevada to register with one of the Nevada licensed operators (provided that play is limited to time within the state). The law also allows Nevada licensees to enter compacts with other states that have legalized online gaming.

## LAWS AND REGULATIONS

Internet gaming is overseen by the Nevada Gaming Commission.<sup>35</sup> Nevada regulations governing iGaming are largely focused on internal controls and the record keeping requirements licensed operators must maintain. These include player age and location restrictions and player registration and activity records. As with the other regulated states, to qualify to become an operator, license applicants in Nevada must be able to prove their ability to maintain controls on player registration, prevent underage play, and establish the location of players. Nevada regulations call for extensive oversight of player accounts and player activities. For instance, detailed records that must be maintained include account activity including date, time and location of each player while logged in, and deposits and withdrawals of player funds.<sup>36</sup> Records must be maintained for at least five years. One of the most notable distinctions between Nevada and the other regulated states, i.e. Delaware and New Jersey, is that the only online gaming Nevada recognizes is poker.<sup>37</sup>

Unlike New Jersey and Delaware, the only online gaming that Nevada offers is poker; it offers no other casino games.<sup>38</sup> Licensed operators in Nevada run their respective gaming sites independent of competitor sites within the state. As of June 2016, Nevada offers the selection of two iGaming sites through which to play.<sup>39</sup> The two currently offered are Real Gaming and the World Series of Poker, and 888 is coming on in the near future.<sup>40</sup>

## DELAWARE

In 2012, Delaware became the second state in the nation (after Nevada) to legalize online gaming. Another "second" for the state is that it is the second smallest in the nation. Its small size and population mitigate against player liquidity, making it less attractive to players who seek more game options. To overcome these limitations, the state entered an agreement with Nevada whereby the two states can merge poker player pools. The carefully drafted agreement, which Ifrah Law helped to draft as outside counsel to the Delaware State Lottery Office, provides a structure for states to share player pools but maintain their respective player revenues and enforce their respective gaming laws. The states' interstate agreement, which also created a Multi State Internet Gaming Association, may become the foundation for a broader base of players as more states roll out iGaming regulations and seek reciprocal arrangements. To date, however, Delaware's statistics demonstrate the need to build its base – perhaps through more robust marketing initiatives – and potentially open its operator space.



## TIMELINE

On June 28, 2012, Delaware Governor Jack Markell signed the Delaware Gaming Competitiveness Act of 2012, allowing the Delaware State Lottery to operate full-scale casinos online.<sup>41</sup> On September 10, 2013, the Delaware State Lottery issued their final Rules and Regulations for the Delaware Internet Lottery.<sup>42</sup> The website was launched on November 8, 2013. The comprehensive launch made Delaware the first state to launch a full-scale online gambling operation.<sup>43</sup>

## LAWS AND REGULATIONS

The Delaware State Lottery Office<sup>44</sup> is responsible for oversight of internet gaming. Gaming regulations are addressed in the Rules and Regulations for the Delaware Internet Lottery.<sup>45</sup> While the Delaware regulations are not as extensive as those in other regulated states, they authorize substantial oversight by the state Lottery Office. For instance, the Lottery Office Director is to review and approve each operator's system of internal procedures and administrative and accounting controls.<sup>46</sup> Documentation that is necessary or sufficient for licensing purposes is largely commended to the discretion of the Director.<sup>47</sup> Regulations further require the Director to examine and approve equipment used in internet gaming.<sup>48</sup> As in Nevada, Delaware regulations mandate the registration and monitoring of player accounts and call for stringent internal controls for gaming operators, with minimum control standards to be established by the state Lottery Office.<sup>49</sup> Like other states, the Delaware regulations also address player protections – from data security and data privacy to problem gambling resources. Because Delaware operates the gaming platform through which players access the licensed gaming sites, the state lottery director is responsible for selecting technology providers to develop and maintain the gaming platform and processed data (e.g., player accounts, tracking, and reporting).<sup>50</sup>

Unlike Nevada and New Jersey, online gaming in Delaware is funneled through a single online poker room into which all authorized brands feed. Delaware's three casinos – Delaware Park, Dover Downs, and Harrington Raceway – operate the branded portals.<sup>51</sup> The gaming platform is a joint venture of Scientific Games (the current live slots provider in Delaware) and 888 Holdings (including the 888 online poker platform).<sup>52</sup> Delaware offers several poker games, as well as roulette, blackjack, and slot titles. While state regulations allow the pooling of players under agreements with other states, some anticipate that Delaware's single-provider system will mean that only operators running on the 888 poker platform (such as WSOP.com) will have the opportunity to coordinate with the state.

## NEW JERSEY

In the race to be the first state to legalize online gaming, New Jersey almost won. But legal obstacles issued by Governor Chris Christie had to be addressed before any legislation could be enacted. After several volleys between legislators and the governor, New Jersey ultimately became the third state to legalize iGaming. The end-result is a very comprehensive legal framework within which gaming operators in New Jersey must operate; a framework that centralizes the New Jersey iGaming infrastructure in Atlantic City.

## TIMELINE

In November 2010, the New Jersey Senate passed the first online gaming bill.<sup>53</sup> The legislation then easily passed the state Assembly in January 2011.<sup>54</sup> But before the state could become the first to legalize online gaming, Gov. Christie vetoed the legislation, calling for revisions to the proposed legislation.<sup>55</sup> A new online gaming bill made its way through both state houses by the end of December 2012.<sup>56</sup> Though the governor provided a 31-page conditional veto to the new legislation,<sup>57</sup> the bill was revised swiftly to meet the governor's requested revisions. On February 26, 2013, Gov. Christie signed into law an amended version of the New Jersey Casino Control Act, which allowed the licensing and regulation for online poker in the state.<sup>58</sup> The regulations took effect as of October 21, 2013, and the first websites launched on November 26, 2013.

## LAWS AND REGULATIONS

New Jersey's Division of Gaming Enforcement oversees the drafting and enforcement of iGaming regulations in the state. The Casino Control Act, which was revised to incorporate internet gaming into legalized gaming within the state, contains certain provisions that Gov. Christie required in order to enact the legislation. These include: (1) an enhanced level of funding for compulsive gambling treatment programs and (2) a requirement that state employees and legislators disclose any representation past or present of entities seeking internet gaming licenses. Other major legal provisions of note include a requirement that all equipment necessary for iGaming be located in an Atlantic City casino facility.<sup>59</sup> While New Jersey has not yet entered into any reciprocal agreements with other regulated states, its law provides for that possibility, noting that persons not physically present in New Jersey may make wagers pursuant to a reciprocal agreement with the state.<sup>60</sup>

New Jersey regulations governing online gaming, the Internet Gaming Regulations,<sup>61</sup> are breathtakingly detailed and cover nearly all facets of online gaming operations, from organizational structure to required employees and related employee responsibilities to website content and operation. Unlike Delaware and Nevada, New Jersey specifies many website elements that casinos must incorporate in order to increase player awareness of time and financial investment in play. For instance, New Jersey requires sites to display information on 1-800-GAMBLING during player login or logoff and requires a continuous display of current time and time elapsed since beginning play. Another interesting detail that the other states do not include is a sunset provision for iGaming: the regulations state that authorization to conduct internet gaming shall expire on October 21, 2020.<sup>62</sup> The comprehensive nature of New Jersey's iGaming regulations may make them onerous for new market entrants, but with a field of several licensed operators and more than a dozen gaming sites, competition for the current player pool may already pose a challenge.

New Jersey offers several online gaming options through its brick and mortar Atlantic City casinos. They include Borgata, Caesars, Golden Nugget, Tropicana, Resorts and Trump Taj Mahal.<sup>63</sup> As in Nevada, each of the networks operates on its own platform, and several of the networks have multiple sites from which to choose. As in Delaware, New Jersey offers several games online, including poker, blackjack, roulette, craps, slot machines, and video poker. Offerings vary on a site-by-site basis.<sup>64</sup>



**V.**

**States Considering  
iGaming Laws**

The legalization of iGaming by Nevada, New Jersey, and Delaware has brought increased attention to other states that are actively considering bringing iGaming within their boundaries. States of particular interest include California, Michigan, New York, and Pennsylvania. While the status of bills that have been introduced in these states can change rapidly, we provide a brief history of iGaming legislation in each state, the high-level details of what the different bills propose, and the status of each bill as of publication of this white paper.

## CALIFORNIA

Over the last several years, California has attempted to legalize online poker several times. However, 2016 has been the best chance yet. State Assemblyman Adam Gray introduced AB 2863 on February 19, 2016, and this bill passed out of the Assembly Governmental Organization Committee with a unanimous vote on April 28, 2016.<sup>65</sup> The bill legalizes online poker and may have cleared the hurdles that have doomed previous legislation.

The two main issues in legalizing online poker in California have centered on opposition from the horse racing industry and concerns about the so-called “bad actors.”<sup>66</sup>

The horse racing industry has consistently opposed online poker legislation because of concerns about the potential damage to their own gambling-related revenues. The proposed legislation has tackled this opposition by granting an annual \$60 million payment to the industry (on top of the taxes and fees online poker outfits will pay to the state).<sup>67</sup> In exchange for the annual payment, the racing industry will be prohibited from pursuing online poker licenses.<sup>68</sup> At this time, the racing industry seems willing to support the legislation.<sup>69</sup>

The remaining “bad actor” issue will require further debate.<sup>70</sup> In the past, legislation has failed because it did not adequately address whether online poker companies who operated in California after the Unlawful Internet Gambling Enforcement Act was passed in 2006 – the “bad actors” – would be allowed to apply for licenses.<sup>71</sup> In the current draft, regulators are empowered to conduct various levels of investigation during the application process to determine if an applicant is a bad actor and if so, whether they may now be appropriate for licensing.<sup>72</sup> However, the bill still expressly requires the statute to define a “bad actor” and how to handle such applicants, before enactment, rather than leaving the issue solely to regulators.<sup>73</sup>

The bill passed the Appropriations Committee on June 22, 2016, and now will move to an Assembly Floor vote.

## MICHIGAN

On April 14, 2016, state senators introduced Senate Bill No. 889 to legalize online poker in Michigan.<sup>74</sup> The bill was referred to the Committee on Regulatory Reform and received a favorable report on June 9, 2016.<sup>75</sup>

The legislation calls for the creation of the Division of Internet Gaming under the auspices of the Michigan Gaming Control Board. The Division would have the authority to issue licenses to casinos or certain Michigan Indian tribes that operate land-based casinos. The bill also carries a hefty \$100,000 application fee and a \$5 million license fee, which would be an advance payment of the internet wagering taxes.<sup>76</sup>

The bill was referred to the Committee on the Whole on June 9, 2016 for further review, but the state legislature adjourned that same day without further action.

## NEW YORK

New York has attempted to legalize online poker several times, but has failed. In 2016, the state almost succeeded in passing a law, but it also failed at the last minute.

State Senator John Bonacic, who has spearheaded previous attempts to legalize online poker, introduced Senate Bill S5302D in May 2015, but the committee never voted on it during that legislative session. Yet, on January 6, 2016, the bill was again referred to the Racing, Gaming and Wagering Committee. For the first time ever, this bill cleared this first hurdle and was advanced to the Finance Committee on February 2, 2016.

The legislation would change the definition of poker to a game of skill – at least for Texas Hold ‘Em and Omaha style – and establishes a regulatory scheme for online poker. If passed, there will be ten licenses for online operators; each license will cost \$10 million and be good for 10 years. The Gaming Commission will manage consumer protection standards, such as age verification and geolocation.

While the New York Senate approved the bill by a wide margin, the bill never reached a committee vote on the Assembly side. Although the legislature has concluded business on this bill for this year, there is hope that the efforts will be renewed again in the 2017 legislative session.<sup>77</sup>

## PENNSYLVANIA

Early in the year, many expected the Pennsylvania legislation to be the best chance at legalizing online poker.<sup>78</sup> Pennsylvania Rep. John Payne introduced HB 649 to allow the state’s current casinos to seek full iGaming licensing, including online poker.<sup>79</sup>

Some confusion in May led to the bill stalling. One version of the bill authorized video gaming terminals and the other did not. The legislators were uncertain as to which bill they were voting on, and thus voted both bills down.<sup>80</sup>

Then, Representative George Dunbar introduced House Bill 2150 on June 9, 2016.<sup>81</sup> HB 2150 would legalize online casino gaming, including poker. The Pennsylvania Gaming Control Board would have the authority to determine what games besides poker could be offered. The bill left open the question of whether Pennsylvania would enter into shared liquidity markets, as Nevada and Delaware have.

On June 28, 2016, HB 2150 passed the House, with tentative optimism that the bill would clear the Senate shortly thereafter.<sup>82</sup> However, the Senate did not take up the bill prior to their summer break, and the legislation was ultimately deferred to the fall session to be considered as part of a larger revenue package for the state.<sup>83</sup>

## CONCLUSION

Delaware, Nevada, and New Jersey are still the only states with forms of legalized online poker. However, California, Michigan, New York, and Pennsylvania have continued the charge to legalize online gaming, and so far in 2016, the industry has seen significant progress. While some of the legislative sessions have adjourned, the online poker bills have made more progress than ever before, sparking hopes in the industry that the legalization is just the next legislative session away.



# **VI.**

## **iGaming Funding**

**R**egulated internet gaming in the U.S. faces many challenges, from technical glitches to player liquidity. One of the greatest challenges, however, is helping players fund their accounts. Since the DOJ focused on cutting down unregulated internet gaming by going after payment processing (four out of the eleven individuals indicted on Black Friday were payment processors, one was a bank chair, and three were directors of payments for gaming companies), credit card companies, and the banks that issue credit cards have been reluctant to take on the regulated iGaming market. The three states currently regulating iGaming (Nevada, Delaware, and New Jersey), along with several major payment processors, have been working hard to distance the regulated market from past legal challenges. Most notably, the New Jersey Attorney General issued an opinion in November 2013, affirming the legality of payment processing in the regulated internet gaming market.<sup>84</sup> Regulated jurisdictions are aware that if players cannot easily fund their accounts or access their funds, they will turn to unregulated gaming sites.

Nevada, Delaware, and New Jersey have taken slightly different approaches in their regulations on how player accounts may be funded – varying in levels of specificity and funding options. However, the states are consistent in certain account limitations. For instance, all three states:

- Limit players to one account per player for each licensed operator.<sup>85</sup>
- Prohibit the transfer of funds from one player account to another.<sup>86</sup>
- Prohibit players from having negative account balances.<sup>87</sup>

## Review of State Regulations

### NEVADA

Nevada regulations allow player accounts to be funded by (1) cash, (2) personal check, cashier's check, wire transfer, or money order, (3) funds held for the player at the casino, (4) debit or credit card, (5) bank or Automatic Clearing House (ACH) transfer or other e-commerce transfer, or (6) "other means approved by chairman."<sup>88</sup> Nevada prohibits the transfer of funds to a different financial institution than the one used to deposit those same funds.<sup>89</sup> They further prohibit the transfer of funds from one player to another.<sup>90</sup> Otherwise, Nevada regulations do not specify when or how withdrawals may be made, only that an operator shall comply with an undisputed withdrawal request within a reasonable amount of time.<sup>91</sup>

Nevada-based gaming sites currently offer the following options to fund player accounts: ACH, credit card, wire transfer, personal check, or cash deposit at the land-based casino. One of the three current Nevada sites, Ultimate Poker, notes that players can withdraw funds in person at the land-based casinos (though processing can take several days) or remotely by request for a paper check.

### DELAWARE

Delaware player accounts may be funded by credit card, bank transfer, or "other means approved by the Director."<sup>92</sup> Players may not transfer funds between accounts with different gaming operators, nor may they transfer funds to another player's account.<sup>93</sup> Withdrawals may be made by bank transfer, bank draft, or "other means approved by the Director."<sup>94</sup> Each of the three Delaware operators (Delaware Park, Dover Downs, and Harrington Gaming) provide for funding of accounts by ACH, Visa credit or



debit card, or MasterCard. Withdrawals are limited, however to bank transfers (to avoid misuse of gaming accounts, sites will not allow withdrawals to be made from credit card payments).

## NEW JERSEY

New Jersey regulations provide several options for funding player accounts:

- A deposit account including cash equivalent, casino check, casino affiliate check, annuity jackpot trust check, complimentary cash gift, chips, plaques, slot tokens, prize tokens, wire transfer, electronic fund transfer, gaming voucher, and electronic credits;
- Credit or debit card;
- Reloadable/non-transferable prepaid card;
- Cash complimentaries, promotional credits, or bonus credits;
- Winnings;
- Adjustments made by casino operator; or
- "Any other means approved by the Division."<sup>95</sup>

Like Nevada and Delaware, New Jersey does not allow the transfer of funds from one player's account to another player's account.<sup>96</sup> The regulations provide that funds originating from credit or debit cards be refunded to those cards before any additional withdrawal.<sup>97</sup> They further specify how funds may be withdrawn. For instance, players can cash-out at a casino cage immediately for amounts less than \$250 or within 72 hours for undisputed amounts greater than \$250.<sup>98</sup>

The numerous iGaming sites that operate through New Jersey (as of May 2014, New Jersey has seven licensees running sixteen sites) offer additional funding options to those available through Nevada and Delaware operators. Like Nevada, New Jersey sites allow players to fund accounts through credit or debit card, ACH, cash deposit at the land-based casino, wire transfer, and personal check. New Jersey sites also allow players to fund accounts through e-wallets, such as Neteller and Skrill, and proprietary prepaid cards. These additional funding options can provide flexibility to players and help to overcome challenges faced by funding through credit and debit cards.

## Review of Funding Options

### CREDIT AND DEBIT CARDS

It might seem like the easiest way to fund an iGaming account would be to use a credit or debit card. In theory, the option is available through regulated gaming sites. In reality, however, players regularly encounter problems using credit and debit cards. The problem is that many card issuers, like Bank of America and Wells Fargo, will not process online gaming transactions, even in states where iGaming is regulated. These banks, concerned with government enforcement actions or negative publicity, have opted to "hard block" any internet gaming transactions. The result is that as many as one third of credit card transactions have been declined.<sup>99</sup> MasterCard has been able to improve approval rates by using a new code for the transactions. Payment processors like Vantiv are encouraging Visa to do the same. In the interim, many casino sites provide a list of card issuers through which players may more easily fund accounts, including TD Bank and US Bank for Visa and Citibank, USAA Bank, and ING Bank for MasterCard.

An important limitation for players to keep in mind when funding accounts with credit cards is that they generally cannot withdraw or transfer those funds out of their player accounts. At best, they will be able to withdraw winnings in excess of amounts deposited through credit card transaction.

## BANK OR ACH TRANSFERS

Bank and Automatic Clearing House (ACH) transfers, whereby funds are transferred directly from a player's bank account to their iGaming account, have had a much higher success rate than credit and debit card transactions. These transfers, made directly from a player's bank account to their iGaming account, are instantaneous and generally do not carry any fees. Players may also withdraw funds from their player accounts back to their bank accounts within a few days.

## E-WALLET SOLUTIONS

E-wallets, or digital wallets, are supposed to be the electronic equivalent of an individual's physical wallet, containing funds and facilitating online transactions. E-wallets have fluctuated in popularity in the iGaming world over the past several years. Now that New Jersey online gaming recognizes this payment solution, their use may again be on the rise. A main benefit that players enjoy is the ability to transfer funds between different poker accounts through their e-wallet. There are drawbacks, however, as the e-wallet still faces some of the limitations of credit cards and several sites include transaction fees for their use.

Currently two e-wallet providers are available in New Jersey: Skrill and Neteller (and there is talk that PayPal may come on board). Skrill e-wallets can be funded through credit card, bank transfer, or prepaid card. Neteller e-wallets can be funded through Visa or MasterCard. Unfortunately, players who attempt to use MasterCard to fund their Skrill account may run into issues. According to one report, Party Poker rejects these deposits.<sup>100</sup> While players may deposit and withdraw funds through their Skrill accounts, players using Neteller can only deposit funds with their e-wallet and must use another method to obtain funds.

## PREPAID CARDS

Several of the New Jersey gaming sites offer players the option to use proprietary prepaid cards to fund their gaming accounts. These include the Borgata<sup>101</sup> and Golden Nugget. The prepaid cards can be funded by the same methods used to fund an e-wallet: by credit or debit card or bank transfer. One of the major drawbacks to using the proprietary prepaid cards, in addition to the need to jump through a few hoops in order to set up an account,<sup>102</sup> is the fee structure: the prepaid cards charge monthly maintenance fees and other service fees.

## ONLINE CURRENCIES

Online currencies, such as Bitcoin, are not yet options for funding regulated gaming accounts in the U.S. In the unregulated market, however, Bitcoin is growing as a viable alternative, touting instant funding and short delays for withdrawals. The site Seals With Clubs exclusively accepts Bitcoin and is growing in popularity. Other sites, including Americas Cardroom, are also now accepting Bitcoin. Calvin Ayre, industry expert and Bodog founder, predicted that, "2014 will see some major online gambling operator take the bold step by listing Bitcoin as a routine option for deposits and withdrawals."<sup>103</sup> Given the unregulated nature of Bitcoin to date, and the general anonymity of the currency, it is unlikely that regulated iGaming jurisdictions will start incorporating the currency as a funding option.



# VII.

**Online Sports Betting,  
Fantasy Sports and Lottery**

**W**hile much attention is given to the legislation surrounding casino-related iGaming, and its potential as a growth industry in the U.S., there are other online gaming avenues that are worth exploring. These opportunities include sports betting, fantasy sports and online lottery ticket sales.

## **Sports Betting**

In 2011, New Jersey voters endorsed sports betting in a nonbinding referendum. Soon after, the state enacted a law to allow betting at racetracks and casinos. In 2012, New Jersey attempted to implement a law meant to allow regulated sports betting at its racetracks and Atlantic City casinos. However, the professional sports leagues, the NCAA and the DOJ challenged the law and New Jersey's law was struck down twice by a federal court judge. Both dismissals were affirmed by the Third Circuit, which found the legislation violated the Professional and Amateur Sports Protection Act of 1992 (PASPA).

Last year, the Third Circuit surprised many observers when it agreed to hear an appeal of its decision by an en banc review. [En banc means all active judges on the circuit will hear the case]. An en banc review is not automatic and is extremely rare in the Third Circuit, which only grants a rehearing en banc in approximately 1 out of every 1000 decisions. For example, in 2014, the Third Circuit decided 2,402 cases on the merits and only issued one en banc decision, which reversed the lower court's decision to suppress evidence obtained by a GPS tracking device that was placed without a warrant. Thus, the decision to grant en banc review may signal the Third Circuit is willing to seriously consider the constitutionality of PASPA.

At this juncture, it is unlikely that the Third Circuit will provide direct court approval to completely overturn PASPA. There is a distinct possibility that the Third Circuit en banc will affirm the panel decision. Even if the full panel of judges disagrees with the panel decision, they are not likely to rule that PASPA is unconstitutional and give a full force green light to regulated sports betting. Rather, they are more likely to remand and order the lower court to engage in further fact-finding. Finally, there is a good chance the leagues will appeal to the Supreme Court if the full panel of judges disagrees.

## **Fantasy Sports**

UIGEA provides an explicit carve out for fantasy sports that are not considered gambling, as long as the game meets the following criteria:

- (1) No fantasy sports team is based on the current membership of an actual team that is a member of an amateur or professional sports league.
- (2) 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 those participants.

(3) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real world sporting events.

(4) No winning outcome is based on the score, point-spread, or any performance(s) of any single real world team or combination of such teams or solely on any single performance of an individual athlete in any single real-world sporting event.<sup>104</sup>

This explicit “safe harbor” for fantasy sports is unique to UIGEA and does not appear in any other federal statute. While there is no known caselaw that explicitly addresses the UIGEA fantasy sports carve out, it is generally accepted that season long fantasy sports contests are legal in states that do not have more restrictive gaming laws. Two federal cases have addressed fantasy sports games in the context of state qui tam loss recovery statutes. In one case, *Humphrey v. Viacom*, a plaintiff sought to recover under the qui tam gambling loss recovery statutes of several states against several fantasy sports operators that were offering season long fantasy sports games.<sup>105</sup> In an unpublished decision, the district court resolved the case without directly addressing the issue of skill in season long fantasy sports games, but noted that, “[t]he 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.”<sup>106</sup>

Fantasy sports games must comply with state gambling laws to be offered in those states for real money. In some states, fantasy sports would likely be considered a game of skill under its caselaw and therefore not subject to the states’ gambling laws. However, there are other states where the caselaw is less clear, the respective state attorney general has opined unfavorably on its legality, or fantasy sports are explicitly banned by a statute and real money fantasy sports games cannot legally be offered in those states.<sup>107</sup> Below is a summary of the states that have either passed laws explicitly permitting daily fantasy sports or have pending legislation to authorize daily fantasy sports.

Colorado passed legislation authorizing fantasy sports in the state.<sup>108</sup> The bill requires “large” operators – those with over 7,500 Colorado users – to be licensed; small operators must register, but do not need to be licensed or go through annual audits. The Division of Professions and Occupations will oversee the licensing, creation and enforcement of further regulations, and enforcement.

Indiana passed Senate Bill 339, which provides that a paid fantasy sports game does not constitute gaming for any purpose and subjects the industry to regulation (e.g. consumer protections, payment of \$50,000 licensing fee, etc.). The definition of daily fantasy sports mirrors the UIGEA definition and it is effective as of July 1, 2016.

Kansas enacted legislation that legalizes fantasy sports games, provided such games meet the statutory definition similar to UIGEA.<sup>109</sup> (Kansas’ position is particularly interesting because its Racing & Gaming Commission had previously opined that fantasy sports games constituted games where chance predominated over skill).

Maryland enacted legislation in 2012 to legalize fantasy sports, with language that mostly mirrors the UIGEA definition.<sup>110</sup> Further, in July 2016, the state comptroller released regulations aimed at managing fantasy and daily fantasy sports in Maryland. These regulations became final and were implemented on January 2, 2017.<sup>111</sup> Thus, it would seem 100% certain that daily fantasy sports are permitted in Maryland.

Notably, an Attorney General opinion<sup>112</sup> questioned whether the Maryland statute permits daily fantasy sports (as opposed to the traditional fantasy sports that were popular at the time the statute was enacted) and whether the legalizing statute needed to be approved by the electorate in a referendum. Further, the Attorney General even concluded that the legislature should probably re-visit the fantasy sports statute in its upcoming session. However, the Maryland legislature has not re-visited the issue and has largely ignored the Attorney General's recommendation. Therefore, it seems Maryland's legislature is comfortable that the current statute equally applies to daily fantasy sports and there is little risk in operating in Maryland.

Missouri has legalized daily fantasy sports. HB1941 passed through the legislature, and the Governor Jay Nixon signed the bill on June 10, 2016.<sup>113</sup> Under the law, the Missouri Gaming Commission will provide annual licenses to and general oversight of the online operators. The law also provides for the typical consumer protections.

New Jersey has enacted legislation legalizing fantasy sports tournaments for casino licensees. Fantasy sports are explicitly excluded from the definition of gaming or gambling.<sup>114</sup> The statute defines a fantasy sports tournament as "any fantasy or simulated game or contest involving athletic events in which a patron owns or manages an imaginary sports team and competes against other patrons or a target score for a predetermined prize."<sup>115</sup>

Under the statute, "[a] casino licensee may offer fantasy sports tournaments to its patrons subject to requirements of this chapter and 31 U.S.C. §§ 5361 et seq."<sup>116</sup> The statutory requirements mostly mirror the prongs of the UIGEA carve-out for fantasy sports, although the law does require a minimum age of 21 years old for participants.<sup>117</sup>

Importantly, nothing in the law explicitly states that non-licensed operators are prohibited from offering fantasy sports. Moreover, public comments and agency responses (Division of Gaming Enforcement) to the legislation support the argument that New Jersey does not believe that fantasy sports tournaments constitute illegal gaming and that offering such tournaments online does not violate state or federal law.<sup>118</sup>

New York's legislature overwhelmingly passed a bill, S5302C, legalizing daily fantasy near the deadline for the 2016 legislative session. The bill contains the standard consumer protections, taxes, and registering and licensing requirements.

Tennessee passed legislation this year legalizing fantasy sports; the bill is scheduled to go into effect on July 1, 2016. The Secretary of State will have oversight of the implementation of the law, licensing process, and other regulation.<sup>119</sup>

Early this year, Virginia was the first state in the nation to pass legislation authorizing and regulating daily fantasy sports.<sup>120</sup> The law places the authority to regulate operators with the state's Department of Agriculture and Consumer Services. Additionally, the law provides the general consumer safeguards.

California's legislature passed Assembly Bill 2863—better known as the Gray bill because of lead sponsor Adam Gray—which would legalize and regulate intrastate online poker in California and proposes to regulate daily fantasy sports. The law will ensure there are adequate consumer protections, underage participant restrictions, and other participant protections. However, the bill defers the question of overall legality of daily fantasy sports to the state attorney general.

The Connecticut legislature is considering S.B. No. 192, "To protect consumers who play daily fantasy sports contests from unfair or deceptive acts or practices." This reflects the legislature's tacit understanding that the daily fantasy sports are legal under current Connecticut law (so it is merely seeking to impose consumer protections on the industry), but that understanding has not been codified in a statute.

Massachusetts Attorney General Maura Healey has finalized a licensing structure that provides more robust protections for daily fantasy sports customers, which provides a significant level of comfort that she believes daily fantasy sports are legal under Massachusetts law- but again, there is no statute that codifies that understanding.

The Nebraska legislature considered legislation that would define fantasy sports as a game of skill, thus making them legal under Nebraska gambling law.<sup>121</sup> However, this bill has been postponed.

The Pennsylvania attorney general does not appear to have commented on DFS, but there appears to be a consensus in the state legislature that fantasy sports is not illegal. A State Senate hearing was held this past June and additional hearings have been scheduled to consider pending bills that would expressly legalize fantasy sports in Pennsylvania.

The Rhode Island Attorney General wrote "that daily fantasy sports may currently operate legally", but there is no codified statute. A bill to legalize daily fantasy sports has been introduced in the state legislature.

There are also a number of other states that have introduced bills that are still in the early stages of the legislative process: Alabama, Georgia, Hawaii, Illinois, and Vermont.

## **Online Lottery Ticket Sales**

Out of fear that selling lottery tickets online could violate federal law, in 2009, New York and Illinois asked the DOJ to clarify its stance on the application of the Wire Act to online lottery ticket sales.

When the DOJ released its September 20, 2011 memo (in December 2011), its position with regard to the sale of online lottery tickets was clarified. The memo stated that, “nothing in the materials supplied by the Criminal Division suggests that the New York or Illinois lottery plans involve sports wagering, rather than garden-variety lotteries. Accordingly, we conclude that the proposed lotteries are not within the prohibition of the Wire Act.”<sup>122</sup>

Three states currently offer online lottery ticket sales within their borders: Delaware, Georgia, and Illinois. In March 2012, Illinois became the first state in the country to offer online lottery ticket sales by initially offering sales of Mega Millions and Lotto online. Later in 2012, the Illinois Lottery expanded to offer Powerball ticket sales, and in the first two years of operation the Illinois Lottery has totaled online ticket sales of nearly \$37 million.<sup>123</sup> Minnesota briefly permitted online lottery ticket sales until a measure was passed on May 7, 2015 banning it. The ban came a year after an earlier attempt to do so failed.<sup>124</sup>

In these states, consumers who wish to purchase lottery tickets online must be residents of the state, of legal age to purchase lottery tickets, and physically located in the state at the time of the purchase. The states use geolocation<sup>125</sup> and age verification<sup>126</sup> technology, just as online gaming sites do, to ensure that players are located within their borders and of the legal age.

The Minnesota Lottery went live earlier this year with sales of scratch off tickets online. This was done without express authorization from the legislature, which has led to a flurry of activity in the state legislature. Several bills were introduced that would have prohibited the sale of lottery tickets online,<sup>127</sup> establish a moratorium on online lottery ticket sales,<sup>128</sup> or expressly authorize the sale of scratch tickets online, but none of the bills passed.<sup>129</sup>

Other states are considering legislation to allow for online lottery ticket sales within their borders. Massachusetts<sup>130</sup> and New Jersey<sup>131</sup> are currently considering legislation to allow for online lottery ticket sales. Florida introduced a bill to authorize online lottery ticket sales this year that failed. Michigan is moving forward with plans to offer online lottery ticket sales in the final quarter of 2014 and Kentucky went live with IGT in March 2016. West Virginia has introduced a bill that would authorize a study on online lottery and online gaming in an effort to provide the state’s residents with additional lottery game choices and to improve the competitiveness of the state lottery.<sup>132</sup> On the opposite end of the spectrum, Colorado<sup>133</sup> enacted a law prohibiting online lottery ticket sales and Maryland<sup>134</sup> enacted a law that placed a one year moratorium on online sales.





# VIII.

eSports

**e**Sports are a relatively new entrant to the world of iGaming. While videogames have been part of almost every family for decades, eSports brings team competition to gaming. eSports have turned traditional video gaming into a spectator sport, elevating those who are exceptional at their game of choice into athletes who perform both online and in stadiums for rapt audiences. The growing popularity of the eSports has led to international tournaments, team sponsorships, and, inevitably, to gambling.

## What are eSports?

eSports are first-person adventure games, where players embark on fantasy quests or military-style missions. These games that began as in-home entertainment have exploded into a professional sport, replete with teams, favorite players, and sponsors. Outstanding players are recruited to professional teams or granted individual sponsorships. As in any other sport, sponsors develop their own professional teams and enter those teams into tournaments all over the world. Individuals and companies investing in teams include individual millionaires and billionaires, NBA and NFL stars, Coca-Cola, Alibaba, and PokerStars.<sup>135</sup>

Fans can follow tournaments both in-person and online, although online viewing reigns supreme. Online tournaments are broadcast from platforms such as YouTube and Twitch, Amazon's rapidly growing online video platform. Today, Twitch is the leading eSports viewing platform, regularly featuring tournaments and allowing players to broadcast their gameplay while providing commentary.<sup>136</sup> Broadcasting allows players to build up a following among fans and for fans to become intimately involved with their favorite players.<sup>137</sup> Twitch has also teamed up with Turner Broadcast Systems (TBS), to simultaneously broadcast tournaments online and on cable television during select, high-profile tournaments.<sup>138</sup> A 24-hour eSports channel is scheduled to launch in late 2016 in the U.K. and Ireland and will reach an estimated 37 million homes.<sup>139</sup>

## Emerging eSportsbooks and Skin Betting

As with any competition, gambling has become part of the experience for fans. There are two types of gambling in eSports: real money gambling and skin betting. European sportsbooks have begun setting up eSports wagering tabs for real money bets, which are increasing in popularity.<sup>140</sup> Within those, fans can place bets on teams in tournaments or individual players.

While the real money gambling is growing, the focus worldwide is on skin betting. Skins are tokens such as guns, potions, swords, or other tools, that help players advance through the game more quickly and efficiently. Players typically gather skins during game play, but now they can purchase them on secondary markets. Typical skins sell for around \$10.00, but particularly rare ones can sell for several hundred dollars.<sup>141</sup>

Outside the game, players can wager their skins two ways. First, they may use the skin as the "money" placed on the bet on a team or player in an eSportsbook or other site dedicated to wagering on eSports competition. Second, they may use their skins to play casino-style games in which they win skins in return. Both styles are extremely popular and in some instances, players are even foregoing their own game play to focus on skin betting.<sup>142</sup> In fact, there are projections that the skin betting industry will be worth \$8 billion in 2016.<sup>143</sup>

## **Gambling-Related Legal Sports Issues for eSports**

Just as eSports are in the process of being defined in the United States, the gambling and betting aspects of eSports games are also in the process of being defined.

The past determinations of regulators and the courts make it fairly clear that real money betting on eSports tournaments is likely illegal in the United States. Either eSports are a sport, in which case gambling on them is prohibited under the Professional and Amateur Sports Protection Act,<sup>144</sup> or (although less likely) they are a game of chance, and betting is illegal under the Unlawful Internet Gaming Enforcement Act.<sup>145</sup> Although, as discussed below, some casinos classify eSports as games of skill (but not a sport) and thus exempt eSports from regulation under either federal law. This presents a possible avenue for audience wagering on eSports in the future.

In contrast, skin betting is the wild west of iGaming. Since skin betting does not put real money up for grabs, the entire industry exists in a legal gray area. Gamblers only win and lose skins and do not trade in real money until they exchange their skins on the secondary markets. Some gamblers may never exchange their skins for real money, preferring to use them in personal gameplay.

Skins could ultimately be considered a “thing of value.” If such a designation were made – either by a regulatory body, a legislature, or a court – then skin betting would fall under the auspices of gambling regulation. If so, major skin betting sites such as Counter Strike: Global Offensive Lounge (CS:GO Lounge) would no longer be able to operate in the United States.

### **Know Your Customer Concerns with Skin Betting**

Complicating matters, many skin betting sites do not follow the protocols that guide the online gambling industry, particularly know your customer protections. These sites do not use player identification verification systems, instead allowing gamblers to sign up with just an email address. So, while skin betting is not illegal currently, if the industry were to face legal scrutiny, sites that allow American players might face a serious threat to their customer base. In fact, the biggest skin betting site in the world, CS:GO Lounge, receives more visits from America than any other country, except Russia.<sup>146</sup> Similarly, on many sites there is no age verification in place, so underage gambling is common.<sup>147</sup>

## Skin Betting Lawsuits Begin

The first skin betting lawsuit was filed in the United States District Court for the District of Connecticut on June 23, 2016, *McLeod v. Valve Corporation*, Case No. 3:16-cv-01018. In this case, the plaintiff, as a putative class action representative, alleges that Valve (maker of Counter Strike: Global Offensive) is responsible for violations of state laws prohibiting gambling, racketeering, and unjust enrichment. The plaintiff bases these claims on Valve's apparent sanctioning of third-party skin betting sites and the secondary market in trading real money for skins. While this case is in its very earliest stages, it will set the tone for future litigation and possible industry regulation.

## Industry Begins to Respond

Valve has begun to take a stand on this matter. On July 13, 2016, Valve announced that it would no longer work with websites that violated its terms of service and will no longer allow open access to API.<sup>148</sup> This will effectively shutter all skin gambling sites that rely on access to Valve's API. Similarly, the online streaming site Twitch has backed out of supporting skin gambling. The day after Valve's announcement, Twitch announced it would no longer host streaming for skin gambling connected to CS:GO or Dota.<sup>149</sup>

## Real World Casinos Get into the eSports Business

While internet skin betting continues in its legal uncertainty, real world casinos are creating eSports lounges.

Fifth Street Gaming applied for a license from the Nevada Gaming Control Board to offer wagering on live eSports, possibly beginning at a tournament this year.<sup>150</sup> Fifth Street Gaming and their host casino, Downtown Grand, became interested in eSports in 2014 and invited professional eSports team the Renegades to practice at the casino.<sup>151</sup> From there, the relationship has grown with viewing parties and tournaments. The partners also hope to expand into the cardroom-style eSports lounges in the future.

Atlantic City is also poised to offer eSports lounges. The New Jersey Division of Gaming and Enforcement ("NJJDGE") has already begun reviewing the regulations pertinent to eSports lounges and concluded the games are games of skill.<sup>152</sup> If a casino wished to offer an eSports tournament in which players pay an entry fee and stand to win a prize, the casino merely needs to notify the NJJDGE of their intent to offer the tournament five days in advance, with details on the number of players, equipment in use, and security in place.<sup>153</sup> Additionally, head-to-head competition, where the players wager against one another and the casino only takes a rake is also permitted under NJJDGE regulation.<sup>154</sup> However, audience wagering on tournaments remains unauthorized under current NJJDGE guidance.

## Other eSports Legal Issues

The legal concerns for eSports do not stop at the issue of gambling. There are a variety of new issues confronting this business that, without proper legal guidance, could create problems for players, sponsors, and fans.

### Competitive Integrity

The integrity of the competitions is at risk, as concerns about match fixing appear to have been realized. Industry leader Valve banned several players from future events due to fixing traced back to skin betting sites in early 2016.<sup>155</sup> Similarly, several players were banned by the Korean eSports Association for match fixing in April 2016.<sup>156</sup>

The fixing even extends into the skin betting sites themselves. One player and gambler, Mohamad Assad had half a million followers on Twitch who watched him gamble on the site CS:GO Diamonds. Through an agreement with CS:GO Diamonds, Assad was informed in advance what the outcome of his rolls would be. He used this knowledge to increase his viewership. However, the relationship soured and Assad and CS:GO Diamonds engaged in a very public argument about the terms of their agreement.<sup>157</sup> Ultimately, Assad was paid nearly \$100,000 from the site to promote their product, but then exposed to his followers that the site was feeding him information about his spins. Assad has been banned from ELeague commentating and other commentating gigs as a result.

In another scandal, two highly popular YouTubers were caught promoting their own skin betting website. Trevor “TmarTn” Martin and Tom “Syndicate” Cassell had, between them, over 12 million subscribers on YouTube.<sup>158</sup> Subscribers not only watched them play CS:GO, but also watched them skin bet on games through their favorite site, CSGOLotto. However, what both TmarTn and Syndicate failed to disclose to viewers is that they are the founders and owners of the CSGOLotto website.<sup>159</sup> In fact, their videos show them suggesting that CSGOLotto approached them about sponsorship after discovering them on social media.<sup>160</sup> This deceptive advertising in particular has rocked the eSports world and put eSports viewers on notice that not all on YouTube and Twitch channels may be as it seems.

### Contracting Concerns for Players, Teams, and Sponsorships

Professional or aspiring professional players may be obligated to enter into contracts with sponsors, teams, leagues, or even broadcasting channels as they rise in prominence. Often, these contracts contain terms about non-compete clauses, division of revenue terms, or specifications about the player’s employment status.<sup>161</sup> Currently, there is not a standardized set of terms or contracts that guide these agreements; instead, the agreements are entered into privately and individually.<sup>162</sup> Further, the lack of legal sophistication or regulation surrounding this market means that parties to the contracts may not be appropriately or adequately protecting themselves. As this market grows, so too will the litigation surrounding these agreements.

## Player Organization and Regulation

Professional sports generally have a national governing body and related players' association to protect the interests of teams and players. However, in almost all jurisdictions, there is no such organization protecting eSports participants.

The Korea e-Sports Association ("KeSPA") emerged in 2012 as the managing body for 25 competitive eSports.<sup>163</sup> KeSPA has provided some regulation, including rankings systems, minimum salary for players, and promoting a shift to league rather than tournament format competitions. KeSPA is unique, but the desire for a regulatory body is not. There have been calls among players, team owners, and tournament organizers to consider whether eSports would benefit from centralized oversight.

The World eSports Association ("WESA") also launched in May 2016. WESA's goal is to bring together eSports professionals from all over the world and "further professionalize esports by introducing elements of player representation, standardized regulations, and revenue shares for teams."<sup>164</sup> The organization already has a board and league commissioner and is looking to establish a players' council as well.<sup>165</sup> At this point, WESA is a voluntary organization with aspirational motivations, but no ability to enforce them.

One of the reasons some have called for a governing body is to manage concerns about drug abuse among players. It is almost an open secret that many player take prescriptions to help with focus and attentiveness, such as Adderall, during competition.<sup>166</sup> In casual play this is simply an unfair advantage; but in professional play, this may violate terms of contracts and be considered doping. However, without a governing body to institute drug regulations and testing, the use of such performance enhancement may continue.

## Cybersecurity in Gaming

As with all things internet, cybersecurity is a major issue for eSports. Already, leagues have been attacked by hackers. A Defense of the Ancients 2 league had to suspend a round of semi-final competition when it was subjected to a Distributed Denial of Service ("DDoS") attack.<sup>167</sup> The DDoS attack caused gamers to have to continually disconnect from the game. The source of the attack was not identified. As the money and interest in eSports continues to grow, so too will the number of nefarious hackers that may try to raid eSports servers for their own gain.

## Cross-border Competition

One of the draws of eSports is the ability to connect with players from all over the world from the comfort of one's own living room. Yet, the rise of eSports tournaments and professional gaming has demanded that teams from all over the country come together in one arena in-person. This raises immigration issues for players and teams.

For example, in May 2016, authorities deported a leading player in Super Smash Bros Melee, William “Leffen” Hjelte, from the United States.<sup>168</sup> Hjelte had been in the U.S. on a tourist visa to play in professional tournaments. The United States Citizenship and Immigration Services had determined he should have entered on a work visa, and then denied him the needed visa because “Smash Bros Melee is not considered a legitimate sport.”<sup>169</sup> Players rallied behind Hjelte, and petitioned the White House through its WeThePeople.com portal to review the ruling.<sup>170</sup> Hjelte’s was eventually approved to attend a major tournament in the U.S. in July 2016.

This case highlights an unusual issue for international competitors. Players are traveling around the world for competition and need to be able to secure the necessary travel documents to do so. However, the government agencies that issue these documents may not know how to classify players appropriately. As tournaments and related travel grows, players, teams, and sponsors will need to become well-acquainted with their cross-border obligations.

## **Conclusion**

eSports is the rowdy teenager of the online gaming family. The industry is growing rapidly as new players and fans begin participating and tournaments and leagues grow in size and value. This expanding industry seems poised to bring in new participants and fans, but it also needs to be aware of the myriad legal concerns. As the sport matures, hopefully so will the legal sophistication among players, sponsors, teams, and fans.



# IX.

**Predictions & Trends:  
Looking Toward 2017**



**W**hen we first published our white paper in mid-2014, we noted that the future of iGaming is bright. As we look ahead to 2017, this still holds true. While it is hard to predict what will happen with any certainty, Michigan, New York and Pennsylvania are states where progress toward legalization could occur in the coming year.

## Legislation

Many believe that in 2017, conservative Republican and casino magnate Sheldon Adelson will move his agenda forward. Adelson aims to prohibit existing and future online gaming in the U.S. through the Restoration of America's Wire Act (RAWA). The bill prohibits online gaming at the state level, but some believe it would be modified to allow a state carve out (i.e. maybe for poker rather than a casino games). We predict that while Adelson's agenda and the bill he sponsors will get a lot of attention in 2017, it will not ultimately pass.

## Revenue

One of the big developments in 2014 was that Ultimate Gaming, the first operator to offer fully legal online gambling in Nevada, ceased operations in that state due to poor revenue and a limited player pool. Part of that failure may be due to the requirement that online operators partner with land-based casinos: this revenue relationship strains the economic feasibility of online gaming. In 2017, we will be watching to see if any other operators leave the U.S. market due to disappointing performance. We will also watch to see whether the land-based coupling of online gaming is eliminated, though we suspect this will not change in the short term.

In 2017, we anticipate fewer payment processing problems and more functional mobile apps being released in Nevada, New Jersey, and Delaware. As a result, we believe revenue will increase. The impact of a new market entrant- Amaya's receipt of its license in New Jersey is already helping with revenue generation. If online gaming develops momentum in California, we predict that Google will reverse its refusal to offer real money apps. But with only three states offering online gaming, there is no good business reason to allow real money apps; if California comes online, that may change.

## Sports Betting

New Jersey's brand new sports betting legislation was dealt a blow by the Oct. 20, 2014 suit filed by the NCAA, NFL, NBA, NHL and MLB, asking for a permanent injunction against sports betting in New Jersey. But the NBA commissioner's September 2014 comment that he believes sports betting in the U.S. is "inevitable" may be more significant in the long term.<sup>171</sup> While we expect no change in 2017, we believe groundwork will continue to be laid as additional leagues say there is a place for legalized sports betting in the U.S. The only way it is going to happen legally is for all of the leagues to come out in favor of it and use their influence in Washington. There already was a congressional committee hearing called by Rep. Frank Pallone, who is from New Jersey and seeks an alternative to the courts such as the amendment of PASPA. The question in 2017 is: Who is the next league? The word on the street is that it will be the NHL, the second largest league. As for the largest league, the NFL, it's questionable whether or not NFL leadership is willing to take a stand at this time.



**X.**

**About Ifrah Law**

I frah Law was founded in 2009 by Jeff Ifrah, one of the world's foremost attorneys on iGaming law. The only American listed on the 2012 Gaming Intelligence Magazine Hot 50 Winners in the Category of Law and Regulation, Jeff applies his complex litigation skills to defend clients who find themselves at the intersection of interactive gaming and government regulation.

Since its founding, Ifrah Law has become a leading provider of litigation and compliance services to companies active in internet advertising, iGaming, Fantasy Sports and eSports. Ifrah Law's attorneys include a former assistant U.S. Attorney and a number of highly trained veterans from some of the nation's largest and most respected law firms. These attorneys have all developed a deep understanding of how businesses operate in the online space, and they focus the majority of their time counseling and representing companies who rely on the internet for their livelihood. The firm's attorneys share their insights into iGaming regulation on their blog, [IfrahOniGaming.com](http://IfrahOniGaming.com).

Over the past four years, Ifrah Law has been at the center of most of the important prosecutions and lawsuits in the iGaming industry. The firm's clients include Full Tilt Poker, PokerStars, and the Inter-active Gaming Council (IGC). The firm also serves as Special iGaming Counsel to the State of Delaware and the Delaware State Lottery, advising on iGaming-related legal issues. The firm is known for its negotiation of the historic agreement between the Department of Justice, PokerStars and Full Tilt. Ifrah Law also assists with U.S. gaming licensure for internet gaming operators and defends trademarks and copyrights in the online space.

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