

# The Definitive Guide to Online Gaming and Betting in the U.S.



**IfrahLaw**

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# I. 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, much of our daily interactions with other human beings occurred over the internet, through email and social media.

Entertainment of all forms had migrated online. Consumers across age groups were increasingly turning to computers and mobile devices for music, television shows, and the news. Yet in 2010, there was no legal internet-based, real money gaming 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 online domestic sites offering gaming were functioning illegally under applicable legislation and ordered the shut-down of the largest internet poker websites in the U.S. This created a vacuum that several states sought to fill by passing laws to legalize online intrastate iGaming.

In the years that followed, a growing number of states began permitting real money online poker and other internet games. Some of these states even entered into agreements allowing their players to play each other across state lines. The benefit to these states – as well as to others considering making the jump – was clear: research in states like Nevada and New Jersey where online gaming is permitted demonstrated that the practice offered the potential to increase in-state employment (so long as jobs and equipment were required to stay within intrastate border) and profit from collection of substantial state tax revenue and licensing fees. For states which already had brick and mortar casinos, online gaming offered opportunities to cross-market and thereby resuscitate struggling hotels and casinos with an influx of new patrons.

In 2018, the United States Supreme Court's decision in *Murphy v. National Collegiate Athletic Association, et al.*, found that the Professional and Amateur Sports Protection Act (PASPA) of 1992 was unconstitutional and that states could decide for themselves whether to legalize or prohibit sports betting. That decision opened the floodgates of state legislation legalizing sports betting, opening up an entire new industry to operators and consumers alike. More states began introducing legislation to legalize sports betting and other forms of internet wagering and online gaming. At the same time, the federal government and other forces persisted in attempts to curb the growing industry and the spread of legalization; for example, the U.S. Department of Justice (DOJ) issued an opinion instructing that the Wire Act applied to all forms of gambling (i.e., not just sports betting), and that any internet wagering that used a wire communication (like a modem) and crossed state lines was illegal under federal law.

As of this update, the legal status of online gaming and betting across the United States is rapidly evolving. In this White Paper, we seek to provide a comprehensive discussion of the current status of online gaming in the United States. We begin with a discussion on the legality of – and enforcement against – online gaming and betting, including an analysis about the federal statutes that have been applied and some of the significant milestones in federal law enforcement against the industry. We then discuss sports betting, a burgeoning field since the 2018 *Murphy* decision. Next, we provide detailed information regarding online gaming laws that states have passed or are considering, as well as information regarding online gaming funding. We then address how fantasy sports leagues and esports, the “new kids on the block” of online gaming and betting, will be viewed under state and federal law. Finally, we offer insight into new industries of affiliate marketing and skill-based games that have popped up with the onset of internet-based gaming and betting.

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

## **II. HISTORY OF ONLINE GAMING AND BETTING**

**T**he legality of online gaming and betting in the United States 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 online gaming-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. §§ 5361–67, 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.

## **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>1</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>2</sup> and its interpretation remains in dispute as of 2019.

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>3</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>4</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>5</sup>

The Wire Act has not been used – nor was it intended to be used – against the casual or social bettor.<sup>6</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>7</sup> others have interpreted “transmit” to apply to the sender or the recipient.<sup>8</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 Department of Justice (“DOJ”) used to pursue online gambling,<sup>9</sup> as the DOJ applied the theory that the Act criminalized all forms of internet gambling. The DOJ changed course, however, in 2011, when it reanalyzed the Wire Act and concluded that it should *not* be applied to online gambling transactions.

Adding to the uncertainty, the DOJ again changed course in its 2018 OLC memorandum, which instructs that the Wire Act is applicable to any form of gambling (*i.e.*, not just sports betting) that uses a wire communication and crosses state lines.

These contradictory opinions led to a case in New Hampshire in 2019 where the United States District Court for the District of New Hampshire set aside the DOJ 2018 opinion regarding the Wire Act, as discussed in more detail later in this section.

## **THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006, 31 U.S.C. §§ 5361–67**

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>10</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>11</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>12</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>13</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>14</sup>

UIGEA's criminal provision applies only to one who "knowingly accepts' a bet, *i.e.*, the online casino.<sup>15</sup> It does not apply to a player who places a bet.<sup>16</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>17</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 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>18</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>19</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>20</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 eleven 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 seventy-six bank accounts in fourteen 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 online gaming. As of April 2011, many estimated the U.S. online poker industry to be worth up to \$6 billion.<sup>21</sup> Within a week, worldwide online poker traffic dropped twenty-two percent.<sup>22</sup>

## SEPTEMBER 2011 DOJ OPINION ON THE WIRE ACT

While Black Friday seemed to shutter online gaming in the United States, a window was opened by the Justice Department just months following the April 15, 2011 indictments. In a thirteen-page legal opinion (dated September 2011 but released to the public in December 2011),<sup>23</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>24</sup> The DOJ’s opinion was a game-changing moment for online gaming. 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. After the DOJ’s announcement, many states stepped up initiatives to begin regulating online gaming within their borders.

Relying on the 2011 opinion, as well as Court of Appeals opinions in two circuits that reached the same conclusion,<sup>25</sup> state lotteries and online gaming groups invested in infrastructure and pursued operations in regulated states, enjoying the support of that DOJ opinion. Online gaming began to expand rapidly, bringing with it economic growth, jobs, and greater tax revenues for states.

## NOVEMBER 2018 DOJ OPINION ON THE WIRE ACT

The DOJ's pronouncement, released in January of 2019, reverses its 2011 opinion, declaring that the Wire Act prohibits *all* interstate wagering activity, not just sports betting. This interpretation contradicts federal appellate court decisions limiting the Wire Act's scope to sports betting, in addition to the Wire Act's legislative history. Even the Supreme Court's decision in *Murphy v. NCAA* referred to the Wire Act as "outlaw[ing] the interstate transmission of information that assists in the placing of a bet *on a sporting event*" (emphasis added). The DOJ opinion literally invited litigation, which started with a case in New Hampshire.

In *NH Lottery Commission v. Barr*,<sup>26</sup> the New Hampshire Attorney General's office filed a complaint on behalf of the New Hampshire Lottery Commission with the United States District Court for the District of New Hampshire challenging the DOJ opinion that the 1961 Wire Act applies to lottery sales over the internet. In 2018, the New Hampshire Lottery generated \$87.5 million in net profits, all of which went to support public education in New Hampshire. Governor Chris Sununu claimed that the DOJ opinion put millions of dollars of educational funding at stake and "we have a responsibility to stand up for our students."

In June 2019, the United States District Court for the District of New Hampshire issued a ruling setting aside the United States Department of Justice's 2018 opinion regarding the Wire Act and restoring the interpretation that the Wire Act's application is limited to sports betting.<sup>27</sup> Although it remains to be seen whether the Department of Justice will pursue an appeal, it has filed a notice of appeal, so as to preserve its ability to do so.

New Hampshire's win has led to speculation that states seeking to allow for legalized online gambling within their borders might attempt to avoid potential Wire Act problems by bringing online gambling operators under the umbrella of state lotteries, or some other state agency. Rhode Island and Washington, D.C. passed sports gambling legislation allowing gambling to be operated only through their lotteries, and Montana enacted legislation allowing for lottery-only sports gambling operation.

However, a lottery "workaround" for legal online gambling should not be necessary, especially if the DOJ's 2018 Wire Act interpretation remains set aside. Regardless, the better approach would be to read the Wire Act to not encompass activity legalized by states, as this would be consistent with the federal government's historical respect for states' choices regarding gambling within their borders.

Since the Supreme Court eliminated the federal restriction on sports betting, states have scrambled to enact legislation that opens the door to regulated online gaming that benefits consumers, the industry, and the states (see legislative bill tracker [here](#)). The trend is clearly moving in the direction of state acceptance and regulation of sports betting, with the technological convenience of mobile gaming at nearly everyone's fingertips. Whether New Hampshire marks the first or last battle over the Wire Act's reach remains to be seen.

# III. SPORTS BETTING

In its May 2018 decision in *Murphy v. NCAA*,<sup>28</sup> the Supreme Court struck down the Professional and Amateur Sports Protection Act of 1992 (“PASPA”),<sup>29</sup> ending the federal ban on sports betting and opening the door for states to begin legalizing sports gambling. The ruling immediately legalized sports betting in New Jersey,

opening up a logjam that states, casinos, and foreign sportsbooks had been hoping to break for years, and facilitating a rush to legalize sports betting in many states that already allow casino gambling. Although this book discusses the current status of legal sports betting in various states (and the District of Columbia) as of its date of publication, the most up-to-date tracking of sports gambling legislation is available at <https://ideagrowth.org/legislative-tracking/>.

The *Murphy* Court’s ruling relied on a fairly straightforward application of the anti-commandeering doctrine. Under this doctrine, first described by the Court in 1992, federal laws cannot require states to take actions implementing federal policy.<sup>30</sup> As the Court explained, “[w]here a federal interest is sufficiently strong to cause Congress

to legislate, it must do so directly; it may not conscript state governments as its agents.”<sup>31</sup> Because PASPA acted by prohibiting states from authorizing sports betting, many scholars had come to believe it was a clear violation of this doctrine.<sup>32</sup> But, because of America’s conflicted views on the morality of sports betting<sup>33</sup> – and because the Court had previously declined to consider the issue – there was a surprising amount of uncertainty over how the Court would rule on this seemingly straightforward question.<sup>34</sup>

## **SPORTS BETTING IN THE UNITED STATES**

The United States has long had a complicated relationship with gambling – particularly with regard to sports betting. On one hand, the overwhelming majority of states have stringent restrictions or prohibitions on gambling – often in their state

constitutions.<sup>35</sup> On the other hand, gambling has been increasing in popularity in recent years, with many states embracing it as a way to collect substantial tax revenue while providing entertainment opportunities to their citizens.<sup>36</sup>

Against this backdrop, PASPA had long been an outlier. PASPA was enacted to “stop the spread” of sports gambling based upon fears that it could “change the nature of sporting events from wholesome entertainment...to devices for gambling,” undermine confidence in sports, and promote underage gambling.<sup>37</sup> But whereas other federal gambling laws only covered gambling already illegal under state law,<sup>38</sup> PASPA prohibited states from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing] by law or compact” any form of sports betting<sup>39</sup> (except for existing sports betting, such as in Nevada, which was grandfathered in).<sup>40</sup> PASPA also made it unlawful for any person to engage in the same conduct pursuant to state law.<sup>41</sup>

Over the decades following PASPA’s passage, outlooks began to change on gambling. Several states that had outlawed it completely began to experiment with legalizing casino gambling.<sup>42</sup> And even as sports betting remained illegal in forty-nine states,

Super Bowl pools, March Madness brackets, and various fantasy games became increasingly integrated into basic sports fandom. Prior to *Murphy*, the prohibition on sports betting was increasingly being honored in the breach.<sup>43</sup>

## NEW JERSEY'S QUEST FOR LEGAL SPORTS BETTING

With attitudes changing about sports betting – and seeking to capitalize on doubts about PASPA's constitutionality – in 2012, New Jersey enacted a comprehensive law legalizing sports betting and providing a robust regulatory structure.<sup>44</sup> The MLB, NFL, NBA, NHL, and NCAA were initially successful in suing to enjoin this law from taking effect, with the Third Circuit Court of Appeals ruling that by prohibiting the affirmative authorization of sports betting, PASPA did not commandeer state governments by requiring them to *do* anything specific.<sup>45</sup> The Supreme Court refused to take up New Jersey's appeal, seemingly ending the matter for the foreseeable future.<sup>46</sup>

Taking the Third Circuit at its word, in 2014 New Jersey simply repealed its prohibitions on sports wagering in certain casinos and racetracks without expressly authorizing

or licensing it.<sup>47</sup> The sports leagues challenged this second law and, this time, the Third Circuit ruled, en banc, that even the repeal of prohibitions in more than a *de minimis* way was an “authorization” of sports gambling.<sup>48</sup>

This time, the Supreme Court took the case. Although the constitutional issues seemed relatively clear, the fact that the Third Circuit had twice upheld PASPA, combined with a long history of hand-wringing over the morality of gambling, made the outcome hard to predict.

## THE *MURPHY* RULING AND INVALIDATION OF PASPA

The Court struck down PASPA 6–3, in an opinion authored by Justice Samuel Alito. The majority opinion acknowledged that “Americans have never been of one mind about gambling,”<sup>49</sup> and that “[s]ports gambling...has long had strong opposition.”<sup>50</sup> Yet

Justice Alito set aside the history of gambling and antigambling sentiment in the United States in an unusually doctrinaire opinion, concluding that “[t]he legalization of sports gambling requires an important policy choice, but the choice is not ours to make.

Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own...PASPA is not [constitutional].”<sup>51</sup>

To reach its conclusion, the Court agreed with the Third Circuit – and the sports leagues – in finding that New Jersey had “authorized” sports betting in violation of PASPA.<sup>52</sup> But it was precisely that finding that necessitated the conclusion that PASPA “unequivocally dictates what a state legislature may and may not do...it is as if federal officers were installed in state legislative chambers and were armed with the authority

to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”<sup>53</sup> Because nearly every state had a sports betting prohibition on the books when PASPA was enacted, simply declining to legislate at all was not an option,<sup>54</sup> and under PASPA, no state was free to repeal its prohibitions.

There was no real disagreement with this conclusion by any of the nine Justices. Indeed, even in dissent, Justice Ginsburg simply assumed it was correct without expressly agreeing.<sup>55</sup> Rather, the dissenters, including Justice Breyer in his partial dissent,<sup>56</sup> only disagreed with the Court on whether the rest of PASPA – prohibiting individuals from engaging in sports betting pursuant to state law and prohibiting advertising of sports betting – could be severed and stand on its own. The majority found the provisions to be inseparable, noting, for one, that it would be incongruous to prohibit private sports betting activity *only* if authorized by state law – particularly in light of other federal laws that rely on state law to define illegal gambling.<sup>57</sup> The dissenters disagreed and would have left intact the provisions prohibiting individuals from engaging in sports betting, essentially preserving PASPA’s ban.<sup>58</sup>

## AFTERMATH OF MURPHY

In the 15 months since the *Murphy* decision, approximately a **third of the states** had already joined Nevada with legalized sports gambling authorized by legislation or constitutional amendment, and legislation has been proposed in countless other states. As states move to legalize sports betting (and as states that have already done so fine-tune their existing regulatory and legislative structures), state legislatures are faced with new and novel issues. Though it would be relatively simple for states with casino gambling to authorize sports books, most sports gambling is more likely to occur online where most sports fans already turn for fantasy sports, March Madness brackets, and football pools.<sup>59</sup> This will require more innovative approaches, and some states – such as New Jersey, Nevada, and Pennsylvania<sup>60</sup> (which are already active); along with Tennessee, New Hampshire, Oregon, Rhode Island, and Washington, D.C. (expected to be operational soon) – have already enacted legislation allowing for online gambling.

At the same time, sports leagues will likely try to find new ways to exercise control over sports betting. Though past efforts to use intellectual property law to tamp down on gambling have failed,<sup>61</sup> as state legislatures take up new sports betting legislation there will be opportunities to lobby to control which games can be bet on and seek out benefits such as “integrity fees” (kickbacks to sports leagues paid by sports books ostensibly to prevent match fixing by flush leagues that already work to keep their games fair).

One thing is certain: the horse is now out of the barn. Given the popularity of sports betting in the United States and the number of states that have implemented it legally (and other states that are attempting to do so), there is little question that it is now here to stay.

## ENACTED LEGISLATION

### ARIZONA

In April 2021, the Arizona Governor, Doug Ducey, signed legislation that authorized mobile and retail sports betting in the state. The legislation allows for 20 available sports betting licenses. The state's gaming tribes will receive 10 of the licenses and sports organizations will receive the other 10. Each licensee is permitted to operate an online and retail sportsbook. Arizona's Department of Gaming will set out the details of the state's sports betting regulations. State legislators expect that operators will be able to launch by September 1, 2021.

### ARKANSAS

In November 2018, Arkansas voters approved a constitutional amendment to bring expanded gambling (including sports betting) to four counties in the state. The ballot measure specified that "accepting wagers on sporting events" was included under the definition of permissible casino gaming. Licensing at the four locations is overseen by the Arkansas Racing Commission, and betting commenced at the first licensed location – the Oaklawn Racing Casino Resort in Hot Springs – on July 1, 2019. The Arkansas legislation does not authorize mobile sports betting.

### COLORADO

Sports betting was legal in Colorado as of May 1, 2020. Bets must be placed with a licensed and authorized sports betting operator within the state. Those wishing to place bets in casinos or online in the state must be at least 21 years old.

### CONNECTICUT

On May 27, 2021, Governor Ned Lamont signed into law a bill allowing the Mashantucket Pequot and Mohegan Indian tribes to control online gaming in the state through the operation of two of the three mobile platforms available. Under this expanded agreement, sports betting will be legal. The legislation only allows for three online skins. DraftKings is partnered with the Mashantucket Pequot and Kambi is partnered with the Mohegan. The State Lottery shall control the third skin and is currently deciding on their partner. The bill was sent to the Department of Interior (Bureau of Indians) for federal approval.

### DELAWARE

In June 2018, less than a month after the Supreme Court struck down PASPA, Delaware began to offer single-game sports betting at three of the state's casinos: Delaware Park, Dover Downs, and Harrington Raceway. Online sports betting is not available in Delaware at this time.



## FLORIDA

A bill permitting a gambling compact with the Seminole Tribe of Florida was signed by Governor Ron DeSantis in May 2021. Under the compact, the Seminole Tribe is able to operate mobile sports betting including fantasy sports. After signature, the bill was sent to the US Department of the Interior (Bureau of Indian Affairs) where relators have 45 days, or until July 2021, to decide whether to approve. Should Secretary Deb Haaland not act at the end of that time, the compact shall be considered approved as long as it does not violate federal law. The agreement allows the tribe to begin sports betting on October 15, 2021.

## ILLINOIS

In late June 2019, Illinois's governor signed into a law a broad gaming bill that allows for both online and in-person sports betting. The law also allows for on-location betting at venues such as Wrigley Field. Certain data providers and operators must obtain a license under the law. Betting is not allowed on any game involving "an Illinois collegiate team" or on a "minor league sports event."

## INDIANA

In May 2019, Indiana's governor signed into law a bill that allows both mobile and in-person sports betting in the state as early as August. The Indiana Gaming Commission will oversee all sports betting regulations and started accepting sports betting applications on July 1, 2019. The law bans betting on esports and high school sports but permits wagering on college and pro sports. As many as 14 brick-and-mortar sportsbook locations are expected to start operating as soon as September 2019.

## IOWA

In May 2019, Iowa's governor signed into a law a comprehensive bill to legalize sports betting, including mobile sports betting, in the state. The law specifies that there is a 6.75 percent tax on revenue and that operators must pay a \$45,000 licensing fee. The law allows betting on college sports but bans certain kinds of in-game prop bets involving college games. The Iowa Racing and Gaming Commission is charged with developing sports betting regulations under the law, and it has already approved sports betting licenses for 18 of the state's 19 licensed casinos, and bets started to be accepted in August 2019.

## LOUISIANA

The Louisiana constitution restricts forms of gambling but allows parish level voter referendums on specific gaming expansions if approved by a majority of both houses of the legislature and the governor. On November 3, 2020, Louisiana voters in all 64 parishes voted on the following referendum: "Shall sports wagering activities and operations be permitted in the parish of (individual parish name)?" Voters in 55 of the 64 parishes passed the referendum to legalize sports betting in the state.

## MARYLAND

On November 3, 2020, Maryland voters passed a referendum to allow sports wagering in the state, with more than half of voters approving the measure. On April 12, 2021, the State Senate and House both voted to pass a bill legalizing and setting forth the rules for sports betting. The bill provides for 60 online sportsbooks to be licensed and 30 retail licenses. Sports teams, six major commercial casinos, as well as secondary small businesses such as bars, restaurants, fairgrounds and small sporting arenas are all eligible to receive a license. The number of licenses to be permitted in the state far surpasses every other state thus far. The Maryland Gaming Commission will oversee all regulatory and licensing requirements for sports betting within the State. State representatives are hoping to officially launch mobile sports betting operations in the fall of 2021.

## MICHIGAN

Legislation was passed in 2020 that legalized sports betting in Michigan. The initial Michigan sportsbook began accepting in-person bets in March 2020, and online sports betting followed on January 22, 2021. Any of the state's 26 commercial and tribal casinos may apply for a license, then they can partner with an existing online operator or leverage their own sports betting brand. Sports betting is regulated by the Michigan Gaming Control Board. Michigan is expected to be one of the most lucrative sports betting markets in the country.

## MISSISSIPPI

In 2017, Mississippi passed a law that, if the Supreme Court ruled in favor of sports gambling, would legalize sports betting in the state. In July 2018, brick-and-mortar sports wagering became available in Mississippi, and 23 sportsbooks were opened by the end of 2019. In March 2020 sports betting officially launched in Montana. The Intralot platform is only legal option for sports betting in the state.

## MONTANA

In May 2019, Montana legalized sports betting through the state lottery. The law allows for both mobile and in-person gambling. The state and its lottery commission are still in the process of selecting a contractor to oversee the sports wagering operation, and it is uncertain whether sports wagering will be available before 2020.

## NEVADA

Nevada's sports betting industry has been around for years, and states that have recently legalized may look towards Nevada for a good example of legal sports betting. In addition to a robust sports wagering market through the state's physical casinos, several Nevada sportsbooks offer online wagering, as well. Other states are catching up to Nevada.

## NEW HAMPSHIRE

In June 2019, New Hampshire's legislature legalized sports betting and the first official bet was placed on December 30, 2019. The legislation allows the New Hampshire Lottery Commission to regulate sports betting within the state. The bill allows both mobile and retail sports betting, with an exception for in-state college games, and all bettors must be at least 18 years old. State officials gave DraftKings exclusive access to legal online sports betting in the state, although the law allowed up to five separate sites to enter the market. DraftKings holds exclusive rights in the state after it offered to pay 51% of gross gaming revenue from mobile and 50% from future retail in a six-year deal.

## NEW JERSEY

In June 2018, following its Supreme Court victory in *Murphy*, New Jersey passed a sports betting bill that was then signed by the governor. The first bets taken in the state were at a William Hill sportsbook on June 14, 2018, and approximately a dozen physical sportsbooks and over a dozen online sportsbooks are currently operational in the state. In June 2019, the *New York Times* reported that more money was wagered at sportsbooks in New Jersey than in Nevada, marking a significant milestone in the rapid progression of legal sports wagering in the United States.

## NEW MEXICO

In October 2018, the first sports bet in New Mexico was placed. There has not been any new legislation since the Supreme Court decision, but some sports betting is legal through a gambling compact with the state. The third brick-and-mortar sportsbook in New Mexico—at the Inn of the Mountain Gods Casino—opened in July 2019. Although New Mexico casinos initially did not allow betting in games involving the University of New Mexico or New Mexico State University, the Isleta Resort & Casino recently announced that it would begin allowing such wagers.

## NEW YORK

New York passed a law in 2013 that allowed sports betting at four brick-and-mortar casino locations in the state, and sportsbooks started opening at those locations in July 2019, following a lengthy regulatory process overseen by the New York Gaming Commission. On April 22, 2021, Governor Cuomo signed New York's sports betting bill into law, legalizing mobile sports wagering. The regulatory and licensing procedures processes are underway, and it is expected that New York residents will be able to place a mobile sports bet come 2022.

## NORTH CAROLINA

In July 2019, North Carolina Governor Roy Cooper signed a bill into law permitting sports wagering to take place at the two tribal casinos operated by the Eastern Band of Cherokee Indians. The North Carolina law permits both professional and college sports betting, but any further sports betting legislation will have to align with a tribal-state gaming compact that is in place in the state.

## OREGON

Oregon was originally exempted under PASPA, and in 2019 a larger sports betting bill passed in Oregon. Most sports wagering in Oregon takes place on the state-operated Scoreboard app and website. Retail locations like tribal casinos can also offer sports betting.

## PENNSYLVANIA

Sports betting commenced relatively quickly in Pennsylvania following the *Murphy* decision, with the first bets being booked in November 2018. The bill that was enacted also had provisions legalizing online poker and daily fantasy sports. This bill was originally passed in 2017 but came into effect after the PAPA ruling in May 2018. Eight brick-and-mortar sportsbooks had launched in Pennsylvania by March 2019, and four online sportsbooks launched operations in the summer of 2019.

## RHODE ISLAND

The Rhode Island state budget allowed for legal sports betting in the state in June 2018. The first bets were placed in November of that year, and legal sports wagering – operated by IGT-William Hill – is currently available at Twin River’s two properties in Lincoln and Tiverton, Rhode Island. Since then, the Rhode Island law has been changed to add provisions allowing for legal mobile betting offered by the casino sportsbook operators in conjunction with the state lottery. Online sports betting in Rhode Island is limited by only offering a lone, lottery-run betting site and requires in-person registration prior to placing a bet.

## SOUTH DAKOTA

On November 3, 2020, South Dakota voters approved a constitutional amendment – Amendment B – that legalized sports betting in the city of Deadwood, as well as the state’s Native American gaming facilities.

## TENNESSEE

The “Tennessee Sports Gaming Act” became law without the governor’s signature on May 25, 2019. The law permits statewide mobile sports betting without the requirement of being tied to a brick-and-mortar sportsbook, making it the country’s first online-only sports wagering regime. Operators must pay a \$750,000 licensing fee and there is a 20 percent tax rate. In addition, the law requires all operators to “exclusively use official league data for purposes of live betting,” subject to a narrow exception.

## WASHINGTON, D.C.

In 2018, Washington, D.C. legalized sports betting . Intralot, the D.C.'s lottery vendor, will oversee the launch of a mobile sports betting product that will be available throughout the District. The D.C. Office of Lottery and Gaming issues and enforces sports betting licenses and is in charge of developing and implementing regulations. Beyond the District-wide Intralot/lottery application, the legislation allows for two classes of private geographically-restricted operators: Class A and Class B. Class A operators are sports wagering facilities that can be located at Capital One Arena, Audi Field, Nationals Park, and St. Elizabeth's East Entertainment and Sports Arena. Class B operators can be single individuals, a group of individuals, or entities operating private sports wagering facilities, such as at bars or restaurants. Class B sports wagering facilities cannot be located within a two-block radius of any Class A facility. Operators may offer a mobile product, but only within the confines of their brick-and-mortar facilities.

## WASHINGTON

On March 25, 2020, Washington Governor, Jay Inslee signed the state's sports betting bill into law. The law permits sports betting at Class III tribal casinos. Mobile sports betting is only permitted when on-site at a licensed tribal casino. The law bans wagering on games involving Washington colleges or minor league professional events. Regulatory oversight of sports betting will be done by the Washington State Gambling Commission.

## WEST VIRGINIA

In 2018, West Virginia began to offer legal sports betting. This came half a year after the legislature passed a bill that would allow the West Virginia Lottery Commission to write the regulations for the state. By the end of 2018, brick-and-mortar sports wagering was available at five West Virginia casinos. Online betting is permitted along with retail betting under the law. In August 2019, FanDuel launched its online sports betting experience, in partnership with The Greenbrier, to sports fans within West Virginia. DraftKings partnered with Hollywood Casino at Charles Town Races, launching online sports betting in addition to a standalone casino app.

## WYOMING

In April 2021, Wyoming legalized sports betting. The law will take effect on September 1, 2021 wherein residents will be able to download sports betting applications and place bets inside the state. The state will impose a 10% tax on gaming revenues. The law provides that there will be no retail shops and all wagers will be made online; similar to the setup that Tennessee has in place. Sports betting will be regulated by the Wyoming Gaming Commission which estimates that even though the state has the smallest population out of all 50 states, it will eventually see up to \$449 million in bets each year. The state anticipates there to be at least five online sportsbook operators, but only sportsbooks operating in at least three other states will qualify for the state's application. Online sportsbook operators will also be required to obtain a license before operating. There will be a \$2,500 fee for both the initial application and renewal; a

\$100,000 fee for an initial sports betting operator permit; a \$50,000 fee for renewal of the sports betting operator permit; a \$10,000 fee for the initial sports betting vendor permit; and a \$5,000 fee for sports betting vendor permit renewal.

## PENDING LEGISLATIVE EFFORTS

### ALABAMA

In April 2019, a bill was introduced to the Alabama Legislature that would allow for sports betting on some types of events. If the bill were to pass, it would create the Alabama Sports Wagering Commission to regulate sports betting. The bill would also include a 10 percent tax on all operators of sports betting.

### FLORIDA

A bill permitting a gambling compact with the Seminole Tribe of Florida was signed by Gov. Ron DeSantis in May 2021. Under the compact, the Seminole Tribe is able to operate mobile sports betting including fantasy sports. After signature, the bill was sent to the US Department of the Interior (Bureau of Indian Affairs) where relators have 45 days, or until July 2021, to decide whether to approve. Should Secretary Deb Haaland not act at the end of that time, the compact shall be considered approved as long as it does not violate federal law. The agreement allows the tribe to begin sports betting on October 15, 2021.

### HAWAII

A bill was brought to the Hawaii legislature in early 2019 that would regulate sports betting. The bill would create a “Hawaii sports wagering corporation” in order to oversee regulation of sports betting within the state.

### KANSAS

A law was introduced in early 2018 that would allow the Kansas Lottery to include some level of sports betting. Another bill was introduced in early 2019, after the *Murphy* decision.

### KENTUCKY

A bill was introduced in 2017 that would allow the Kentucky Horse Racing Commission (KHRC) to bring forward a system of sports betting. This would include college and professional sports. It also brings along a tax rate of 3 percent of handle, and a licensing charge of \$250,000. Beyond this bill, two separate bills were introduced in early 2019.

### LOUISIANA

In 2018, a bill was introduced to the Louisiana State House that would authorize more games and sports betting at live horse racing facilities. It would only have allowed the betting at a handful of racinos already licensed in the state. The bill did not advance through the legislature.

## MAINE

In June 2019, Maine's state legislature passed a bill authorizing sports wagering. However, Maine's governor "pocket vetoed" the bill by allowing 10 days to elapse without signing it into law. However, on February 6, 2020, the legislature overrode the governor's veto.

## MASSACHUSETTS

In early 2018, the Massachusetts Gaming Commission wrote a paper to explore options for legalizing sports betting in state. There was a bill that went to the state senate to study sports betting, and a different one to legalize sports betting was introduced late 2018. In 2019, more than a dozen sports betting bills were introduced in Massachusetts, but no bill has advanced out of committee as of yet.

## MINNESOTA

In April 2018, a bill went through Minnesota legislature that would have created a commission to regulate legalized sports betting, both mobile and in-person, in the state. There were no actions taken on the bill before the session ended that year. Additional bills were introduced in the Minnesota legislature in early 2019, but none have advanced to a vote.

## MISSOURI

In early 2018, a bill was introduced in Missouri that would allow sports betting at some locations that already had casino licenses or daily fantasy sports offerings. The bill did not get anywhere, and no votes were taken on it. In 2019, many sports betting legalization bills were brought to the legislature. At the end of 2020, Missouri lawmakers proposed three different sports betting bills; all three of the bills offer online sports wagering.

## NORTH DAKOTA

Two bills were introduced in early 2019 in the North Dakota legislature which would have legalized sports betting (one on college and professional sports; the other solely on professional sports) under the jurisdiction of the North Dakota Attorney General. Neither bill passed. In March 2021, the state House put forth a resolution letting voters decide on legalizing sports betting, but the measure was rejected by the Senate.

## OKLAHOMA

Oklahoma had a bill introduced that would have allowed sports betting at tribal casinos already operating in state. The legislative session ended that year without action being taken on the bill.

## OHIO

In 2019, Ohio legislators introduced legislation that would legalize and regulate sports betting business and that would tax sports betting wagering. The legislature adjourned without taking action on these bills.

## SOUTH CAROLINA

In 2017, there was an amendment to South Carolina's Constitution that would have allowed sports betting in some small, restricted areas. The amendment did not get enacted before the session ended, and a new bill was announced at the start of 2019 to address a similar issue. The Palmetto Forum for Gaming Studies is currently convening forums throughout the state to discuss sports betting, along with other forms of potential in-state gambling.

## TEXAS

In February 2019, a bill was introduced to the Texas Legislature that would have allowed for sports betting regulations to begin to take shape in state. The Texas Commission of Licensing and Regulation would be in charge of regulating the new industry. This bill did not pass. In March 2021, two lawmakers filed bipartisan legislation to legalize sports betting and casinos. The bills must be approved by two-thirds of lawmakers (State House and Senate) before being put to a referendum.

## VERMONT

In February 2021, four Vermont State Senators put forth a bill that would authorize sports betting for individuals over the age of 18, run by the State lottery and allow for up to six mobile sportsbook operators. The proposed bill would ban betting on Vermont colleges or any college event taking place in Vermont. The ban does not include betting on a college tournament that includes Vermont colleges or part of the events taking place in the state. The bill is currently awaiting a hearing in the Senate Committee on Economic Development, Housing and General Affairs.

## WASHINGTON

In January 2021, lawmakers introduced a bill legalizing mobile sports betting and retail wagering at State card rooms and horse racetracks. The proposed legislation would expand the current law which only permits sports betting at tribal brick-and-mortar facilities.



**IV. LEGAL STATUS  
OF ONLINE GAMING IN  
THE UNITED STATES:  
CURRENT AND PENDING**

**W**hile there has been significant lobbying of the U.S. Congress by online gaming interests, 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.

Moreover, by predicating its violation on the question of whether conduct violates a state's gambling statutes, the federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) statute itself 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 (*e.g.* age and location limits).

## **ENACTED LEGISLATION**

While several states are considering legislation to recognize online gaming, there are currently six states that already offer regulated gaming online: Delaware, Michigan, Nevada, New Jersey, Pennsylvania, and West Virginia. These five states vary in population size and have taken different approaches to what type of online gaming they will allow. The ideal or best approach is difficult to determine as success largely depends on demographics and other state-specific factors. Nevada and Delaware are further challenged by low populations and consequent market liquidity. To date, payment processing and geolocation difficulties continue to hamper these states' markets. However, as states pool their online gaming resources, the states' success will be less dependent on their respective populations and unique features because, as more states join the regulated online gaming market and enter reciprocal agreements to pool their players, the liquidity issues should be reduced dramatically.

## **CONNECTICUT**

Connecticut signed into law a bill allowing the Mashantucket Pequot and Mohegan Indian tribes to control online gaming in the state through the operation of two of the three mobile platforms available. iGaming, iLottery, and iKeno will be legal.

### **Timeline**

In April of 2021 Gov. Ned Lamont and the two Indian tribes of Connecticut, Mashantucket Pequot and Mohegan, agreed to a new gaming compact. On May 27, 2021, Gov. Lamont signed a bill allowing the Indian tribes to operate two of the three mobile platforms. However, before the law is official it must be approved by the Bureau of Indian Affairs at the United States Department of the Interior. It is anticipated that the Department of Interior will approval the bill. The bill is not final until it receives this stamp of approval, and the State's compact requires federal agency approval before online gaming can begin. The State's goal is to have a framework for placing bets in place by the start of 2021 NFL season.

## **Laws and Regulations**

On or after July 1, 2021, the Commissioner of Consumer Protection is permitted to issue licenses to the Indian tribes. The Department of Consumer Protection will also develop the regulatory structure of online gaming.

The legislation only allows for three online skins. DraftKings is partnered with the Mashantucket Pequot and Kambi is partnered with the Mohegan. The State Lottery shall control the third skin and is currently deciding on their partner. After reviewing preliminary presentations, the Lottery has asked four specific operators to bid for the license. A license will permit the holder to operate one skin for online sports wagering, one skin for online casino games, and fantasy contests; the bill does not specifically authorize a license for online poker.

There will be an 18% tax initially on online casino gambling which will increase to 20% after five years. Individuals 21 years of age and older will be able to bet online if they are located in the State. The State Lottery will pay \$1 million per year and each tribe will pay \$500,000 per year to problem gambling programs, according to the law.

## **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, thereby making it less attractive to players who seek many 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 online gaming regulations and seek reciprocal arrangements that would help their player liquidity.

### **Timeline**

On June 28, 2012, Delaware’s then-Governor Jack Markell signed the Delaware Gaming Competitiveness Act of 2012, allowing the Delaware State Lottery to operate full-scale casinos online.<sup>62</sup> On September 10, 2013, the Delaware State Lottery issued their final Rules and Regulations for the Delaware Internet Lottery.<sup>63</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>64</sup>

## **Laws and Regulations**

The Delaware State Lottery Office<sup>65</sup> is responsible for the oversight of internet gaming. Gaming regulations are addressed in the Rules and Regulations for the Delaware Internet Lottery.<sup>66</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>67</sup> Documentation that is necessary or sufficient for licensing purposes is largely left within the discretion of the Director.<sup>68</sup> Regulations further require the Director to examine and approve equipment used in internet gaming.<sup>69</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>70</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>71</sup> Delaware only reported \$1.4 million and \$1.8 million in its first two years of offering online gambling. However, revenues shot up to \$3 million in 2016, so it appears the trend is on the upswing.<sup>72</sup>

Importantly, online gaming in Delaware is funneled through a single online poker room into which all the authorized brands feed. Delaware's three casinos – Delaware Park, Dover Downs, and Harrington Raceway – operate the branded portals.<sup>73</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>74</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.

## MICHIGAN

The state of Michigan authorized online gambling after Governor Gretchen Whitmer signed a bill in December 2019 legalizing online casinos and real money poker sites. Michigan modeled its online gambling market/structure similarly to New Jersey's. Michigan is the 5th state to legalize online gambling and is expected to be one of the most lucrative online gambling markets.

### **Timeline**

The Michigan legislature began to discuss possible legalization of online gambling in 2017. The state has a long history with other forms of legal gambling including pari-mutuel wagering (horse racing), licensed charity gaming, Michigan Lottery, tribal casinos and Detroit commercial casinos. There are 26 casinos in Michigan consisting of three commercial casinos in Detroit and 23 tribal casinos across the state.

In December 2018, the Michigan Legislature passed a bill legalizing online gambling; however, outgoing Governor Rick Snyder vetoed it as one of his final acts. New life was breathed into the legalization of online gambling when Gretchen Whitmer was elected governor later that year.

In March 2019, House Bill 4311 was introduced by Rep. Brandt Iden. The bill reached two House committees that same month. The bill declared, in part, that “it is in the best interest of this state and its citizens to regulate this activity by establishing a secure, responsible, fair, and legal system of internet gaming.” The bill would legalize not only online gambling but sports betting and daily fantasy sports.

Legal tribal gaming throughout the state was a hurdle in the online gambling legalization process. Michigan’s federally recognized Native American tribes have compacts with the state that dictate their gambling provisions including that sovereign nations can operate within their own laws while on reservation lands. Although, because the tribes would become statewide casino operators for internet gambling, they made a compromise to allow some of the tax revenue from online casinos to go back to the tribes’ own local governments. The bill eventually was passed by both the state house and senate. The state legislature and Gov. Whitmer officially legalized online gambling on December 20, 2019 when Gov. Whitmer signed the bill, which is now known as the Lawful Internet Gambling Act.

Regulators then spent all of the following year formulating rules and ways to monitor and license the new platforms. Some lawmakers initially thought that online gambling could go live in March 2020, but that did not happen as the State’s priorities shifted in light of the COVID-19 pandemic. Sites waited until January 2021, when they received the official go-ahead to operate.

### **Laws and Regulations**

The Michigan Gaming Control Board (MGCB or board) is the overseeing body that seeks to enforce all aspects of the industry. Under the law an internet wager received by the operator or platform provider is considered gambling that is conducted in the internet gaming operator’s Michigan casino, regardless of the participant’s location at the time. The law allows for casino operators in the state to offer internet gaming under two separate brands, one each for interactive poker and for casino-style games; although, it is also permissible to have one brand for both. Each of the federally recognized tribes in the state may also offer one of each, online casino and poker.

Valid internet gaming operators must obtain a license, and evidence of the license must be clearly displayed on the platform. To obtain a license an applicant must either be: (a) a person that holds a casino license under the Michigan Gaming Control and Revenue Act, or (b) an Indian tribe that lawfully conducts gaming in a casino located in the state under a facility license issued by the chair of the National Indian Gaming Commission. It is the burden of the applicant to also show, by clear and convincing evidence, its suitability as to character, reputation, integrity, business probity, and financial ability.

An initial license application must be accompanied by a \$50,000 application fee, along with an \$100,000 initial license fee. There is also an annual license fee of \$50,000 paid in each of the following years.

The operating licenses are valid for 5 years and may be renewed thereafter for an additional 5-year period if it is determined that the applicant continues to meet eligibility and suitability standards.

The board sets the conditions for license maintenance and renewal but according to the Act licensees will only be issued, maintained, and renewed if the operator complies with the following conditions: (a) the person complies with the act, rules promulgated by the board, and minimum internal controls pertaining to types of and rules for playing internet games, technical standards, procedures, and requirements for the acceptance of internet wagers; (b) the person adopts and maintains technical standards for internet gaming platforms, systems, and software consistent with the act; (c) the person maintains 1 or more mechanisms on the internet gaming platform that are designed to reasonably verify that a participant is 21 years of age or older and that internet wagering is limited to transactions initiated and received by an authorized participant located within the state; (d) the person adopts and maintains responsible gaming measures; (e) the person continues to maintain and operate a casino in the state and the casino contains no less than 50% of the gaming positions that were in place on the effective date of the act; (f) the person makes payments based on a graduated percentage schedule on the adjusted gross receipts (AGR) received each year by the person from all internet gaming it conducts as described below; (g) the person agrees to provide timely books and records related to its internet gaming operations upon request; and (h) the person provides a waiver of sovereign immunity.

Licensed internet gaming operators must also submit monthly reports to the MGCB breaking down the operation's amount of revenue and play of internet slots, poker, and table games. Additionally, the report must delineate the total amount of wagers, payouts, free play redeemed, deductions, and AGR.

The tax and payment rates paid by operators will range from about 20% to 28%, based on the operator's AGR. If an operator's AGR is less than \$4 million then their tax rate is 20%, if it is between \$4 and \$8 million then the rate is 22%, if it is between \$8 and \$10 million then the rate is 24%, if it is between \$10 and \$12 million then the rate is 26%, and if it is over \$12 million then the operator will pay a tax rate at 28%. To calculate AGR poker operators cannot deduct more than 10% of gross receipts as "free play" in years 1 through 3. In year 4, it is a 6% maximum, and in year 5, it is a 4% maximum. The state will not permit free play deductions in year 6. An operator's "year 1" begins on January 1 of the year following launch. Taxes are to be paid monthly by the 10th of the following month.

Revenues from online gaming will support the state's school aid fund and First Responder Presumed Coverage Fund; however, taxes linked to Detroit casinos will go to the internet gaming fund, Detroit public services, and Michigan's agriculture equine industry development fund. The taxes from the tribal casinos will go to the tribal government for services, the internet gaming fund, and the Michigan strategic fund.

You must be 21 and over to play, but you do not have to be a resident of Michigan. The law is clear that operators must have a mechanism in which they can detect age verification, geolocation, and that individuals are not on the MGCB's responsible gaming database.

## NEVADA

Nevada was the first state to authorize online gaming (referred to as “interactive gaming” in Nevada). Even before the DOJ reversed its position on the Wire Act in late 2011, which was the impetus for many states to consider online gaming 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 online gaming 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>75</sup>

### Timeline

The rollout of interactive gaming in Nevada came in two stages: (1) legislation calling for regulated online gaming within Nevada in 2011, and (2) legislation allowing for interstate online gaming 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>76</sup> Progress on legislation was stymied by the Black Friday indictments of April 2011. Nevertheless, by December 2011, the Commission had adopted amendments to its regulations to govern the licensing and operation of online gambling within the state if the federal government sanctioned the practice.<sup>77</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>78</sup>

Broadening the scope of Nevada's gaming laws, in 2013, the state enacted legislation that allowed for interstate online gaming.<sup>79</sup> On February 21, 2013, Nevada enacted Assembly Bill 114, which revised provisions governing interactive gaming.<sup>80</sup> The legislation allows players located outside of Nevada to register with one of the Nevada licensed operators (provided that play is limited to their 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>81</sup> Nevada regulations governing online gaming largely focus 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>82</sup> Records must be maintained for at least five years.

One of the most notable distinctions in Nevada is that it only permits online poker and no other form of online gaming (e.g. casino games).<sup>83</sup> In contrast, the online gaming permitted in other regulated states, e.g., Delaware and New Jersey, is not limited to online poker.

Licensed operators in Nevada run their respective gaming sites independent of competitor sites within the state. As of July 2019, the World Series of Poker site was the only active website available to Nevada Players.<sup>84</sup>

## NEW JERSEY

In the race to be the first state to legalize online gaming, New Jersey almost won. But, legal obstacles issued by then-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 online gaming. 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 online gaming infrastructure in Atlantic City.

### Timeline

In November 2010, the New Jersey Senate passed the first online gaming bill.<sup>85</sup> The legislation then easily passed the state Assembly in January 2011.<sup>86</sup> But before the state could become the first to legalize online gaming, then-Governor Christie vetoed the legislation, calling for revisions to the proposed legislation.<sup>87</sup> A new online gaming bill made its way through both State Houses by the end of December 2012.<sup>88</sup> Though the governor provided a thirty-one-page conditional veto to the new legislation,<sup>89</sup> the bill was revised swiftly to meet the governor's requested revisions. On February 26, 2013, then-Governor 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>90</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 online gaming 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 then-Governor 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



of past or present entities seeking internet gaming licenses. Other major legal provisions of note include a requirement that all equipment necessary for online gaming be located in an Atlantic City casino facility.<sup>91</sup> New Jersey's 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>92</sup> The state recently took advantage of the law by joining the multi-state online poker compact with Delaware and Nevada.<sup>93</sup>

New Jersey regulations governing online gaming, the Internet Gaming Regulations,<sup>94</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/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 online gaming: the regulations state that authorization to conduct internet gaming shall expire on October 21, 2020.<sup>95</sup> The comprehensive nature of New Jersey's online gaming regulations may make them onerous for new market entrants, and, with a field of several licensed operators and more than a dozen gaming sites, the competition for the current player pool may 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, and Resorts.<sup>96</sup> Similar to Nevada, each of the networks operates on its own platform, and several of the networks have multiple sites from which to choose. Similar to Delaware and Pennsylvania, New Jersey offers several forms of online games, including poker, blackjack, roulette, craps, slot machines, and video poker. Offerings vary on a site-by-site basis.

## PENNSYLVANIA

The state of Pennsylvania is the largest state with legal, regulated online gambling in the U.S. In 2017, Governor Tom Wolf was responsible for signing legislation that authorized interactive gaming. These verticals included lottery, casino, fantasy sports, sports betting, and poker.

### **Timeline**

Leading up to the 2017 legislation's passage, Pennsylvania carefully observed online gambling and interactive gaming for several years prior. A bill finally became law in the fall of 2017.<sup>97</sup> The law successfully legalized and stood to regulate a number of other gaming formats, including the online lottery, video gaming terminals, satellite casinos, daily fantasy sports, and sports betting. The new legislation expanded gambling almost immediately. Retail sports betting went live in late 2018, followed by online sports betting in May 2019.

The first regulated Pennsylvania online casinos sites rolled out into the market on July 15, led by Hollywood online casino and Parx online casino. Both Golden

Nugget and MGM will offer online casino games in Pennsylvania after obtaining permits as Qualified Gaming Entities.

### **Laws and Regulations**

The Pennsylvania Gaming Control Board is the overseeing body that seeks to enforce all aspects of the industry. Licensees can choose to offer online slots, online table games, or both. All of the operators who obtained licenses chose the ability to do both.

The key licenses are initially limited to land-based casino licensees. Many of the casinos in Pennsylvania are authorized to offer online poker, should they so choose. Many acquired the license to do so alongside online casinos; they are all supposed to go live with such a room within a year after the launch of online gaming in the state. Here are the casinos which are licensed for online poker: SugarHouse, Harrah's, Hollywood Casino, Mount Airy, Parx, Valley Forge, and Wind Creek. Casinos have partnered up with current and prospective online casino and poker operators, much as we've seen in New Jersey. Pennsylvania skins need to be partnered with a Pennsylvania casino licensee and display their brand prominently.

Interactive gaming permits are limited based on the number of casino licenses issued by the state. As things currently stand, that means there are: 13 licenses to operate online table games, 13 licenses to operate online slots, and 13 licenses to operate online poker. That makes room for as many as 39 brands, but the number of licenses doesn't necessarily equate to the number of sites.

During the first 90 days after licensing opened, casinos could only buy all three categories (poker, table, and slots) in one bundle for \$10 million. During days 91-120, casinos could buy individual categories for \$4 million apiece. After day 120, "qualified gaming entities" could submit an application for the remaining licenses at a cost of \$4 million per category.

Pennsylvania interactive gaming permits are valid for five years.

There are three distinct tax rates for online games. Slots are taxed at 54%, table games are taxed at 34%, and poker is taxed at 16%. Tax is based on gross gaming revenue, defined as "the total of all cash or cash equivalent wagers... minus the total of cash or cash equivalents paid out to registered players as winnings."<sup>98</sup>

You must be 21 and over to play, but you do not have to be a resident of Pennsylvania. Employees of land-based licensees and key employees of platform providers are excluded, as are individuals who are barred from land-based casinos and individuals who have elected to self-exclude.

The Pennsylvania law paves the way for interstate play and it appears there will be few hurdles on the path to interstate online poker for players in Pennsylvania. The states of Delaware, Nevada, and New Jersey currently share player pools under a multi-state online poker agreement.<sup>99</sup>

## WEST VIRGINIA

In 2019, lawmakers finally passed the West Virginia Lottery Interactive Wagering Act, legalizing online gambling in the state.<sup>100</sup>

### Timeline

The West Virginia Lottery Interactive Wagering Act sailed through the House in February, and the Senate then approved and made amendments to the bill. The House accepted those changes and sent the bill to the desk of Governor Jim Justice. Governor Justice let the veto deadline pass without further action, thereby allowing the bill to become law.

### Laws and Regulations

West Virginia will include online poker and casino games for customers aged 21 and older within state borders. Land-based casinos can apply for one of the five available permits.

The Hollywood Casino at Charles Town Races, Mountaineer Casino, Racetrack & Resort, The Casino Club at The Greenbrier, Mardi Gras Casino & Resort, and Wheeling Island Hotel would pay a \$250,000 fee for an interactive license, which can be renewed for a fee of \$100,000 every five years. This comes on top of the \$100,000 fee for platform and service management licenses and \$10,000 fee for supplier licenses.

Online sports betting was legalized about the same time last year, and the first app launched in December. It's not clear if the experience with online sports betting will help as the state tries to get online casino gaming and online poker going. But, even in an aggressive timeline, it would seem like 2020 would be the earliest date that a launch would take place.

Much of West Virginia's online gambling legislation is similar to the state's sports betting law. While the state has not detailed how many skins will become available for casinos, it might fall in line with the three mobile skins per property allowed for West Virginia sports betting.

All five casinos currently boast sports betting partnerships: The Greenbrier (FanDuel Sportsbook), Hollywood (William Hill US, DraftKings Sportsbook), Mountaineer (William Hill US), Mardi Gras (Miomni), and Wheeling Island (Miomni). Likely, these deals could expand to including West Virginia online gambling. And if the state allows for multiple skins, outside operators could come in to take advantage of West Virginia's expansion.

## PENDING LEGISLATION

The legalization of online gaming by Nevada, New Jersey, Delaware, Pennsylvania, and West Virginia has brought increased attention to other states that are actively considering bringing online gaming within their boundaries. States of particular interest include Connecticut, Massachusetts, and New York. While the status of bills that have been introduced in these states can change rapidly, we provide a brief history of online gaming 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.

## MASSACHUSETTS

An over-arching gaming bill that appears to allow for online gambling in Massachusetts surfaced this year. The bill's focus, however, is daily fantasy sports. A hearing was held on the bill in February 2019, but nothing has happened since. The gaming commission in Massachusetts remains one of the most up-to-speed organizations when it comes to new forms of gaming. The latest example: it's now preparing for the possibility of sports betting.

## NEW YORK

The New York legislature adjourned for 2018 without legalizing online gambling. Bills which had made progress in both chambers failed to come to a vote in either. As the 2019 session hits its stride, lawmakers are set to consider online poker legislation for the sixth consecutive year. Serving as the new chair of the Senate Racing, Gaming and Wagering Committee, Sen. Joseph Addabbo is off and running with the baton passed by now-retired Sen. John Bonacic. In January, Addabbo introduced a bill that would reclassify online poker as a legal game of skill. The bill is still being reviewed by the state Senate Racing, Gaming, and Wagering Committee. Prospects for passage remain somewhat cloudy, but at least there is a proposal on file for the new legislative session.

## SUMMARY

As of April 2021, Delaware, Michigan, Nevada, New Jersey, Pennsylvania, and West Virginia are still the only states with forms of legalized online poker. However, those states listed above have continued the charge to legalize online gaming, and the industry continues to see 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.

# **V. ONLINE GAMING FUNDING AND VIRTUAL CURRENCY**

**D**espite recent growth, regulated internet gaming in the U.S. continues to face 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 online gaming market.

Three of the states currently regulating online gaming (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>101</sup> Regulated jurisdictions are aware that if players cannot easily fund their accounts or access their funds, they will turn to unregulated gaming sites.

Federal regulatory uncertainty continues to be a drag on bank and payment processor acceptance of legal online gaming transactions. As discussed above, the DOJ's 2018 OLC memorandum, which instructed that the Wire Act is applicable to any form of gambling that uses a wire communication and crosses state lines, chilled bank and processor willingness to jump into the expanding legal gambling market. Although New Hampshire and other gaming interests prevailed in the New Hampshire case challenging the OLC opinion, DOJ appears poised to appeal that ruling and to continue to place legal hurdles to any interstate transmissions – including payments – that might cross state lines.

On a state basis, 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>102</sup> and prohibit the transfer of funds from one player account to another.<sup>103</sup> As other states legalize sports betting and/or online gambling, they generally opt for an approach similar to at least one of these jurisdictions.

## **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, 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>104</sup> Nevada prohibits the transfer of funds from one player to another.<sup>105</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>106</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.

## DELAWARE

Delaware player accounts may be funded by credit card, bank transfer, or “other means approved by the Director.”<sup>107</sup> Players may not transfer funds between accounts with different gaming operators, nor may they transfer funds to another player’s account.<sup>108</sup> Withdrawals may be made by bank transfer, bank draft, or “other means approved by the Director.”<sup>109</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>110</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>111</sup> The regulations provide that funds originating from credit or debit cards be refunded to those cards before any additional withdrawal.<sup>112</sup> They further specify how funds may be withdrawn.

The numerous online gaming sites that operate through New Jersey (as of July 2019, 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 eWallets, 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 online gaming 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.

Many card issuers, like Bank of America and Wells Fargo, will not process online gaming transactions, even in states where online gaming 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>113</sup>

As referenced above, credit card companies have been able to improve approval rates by using a new code for the transactions. Nonetheless, because of the low acceptance rate, 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 online gaming 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 online gaming 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.

### eWallet Solutions

EWallets, or digital wallets, are supposed to be the electronic equivalent of an individual’s physical wallet, containing funds and facilitating online transactions. EWallets have fluctuated in popularity in the online gaming world over the past several years. A main benefit that players enjoy is the ability to transfer funds between different poker accounts through their eWallet. There are drawbacks, however, as the eWallet still faces some of the limitations of credit cards and several sites include transaction fees for their use.

Currently two eWallet providers are available in New Jersey: Skrill and Neteller (and there is talk that PayPal may come on board). Skrill eWallets can be funded through credit card, bank transfer, or prepaid card. Neteller eWallets can be funded through Visa or MasterCard. While players may deposit and withdraw funds through their Skrill accounts, players using Neteller can only deposit funds with their eWallet 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>114</sup> and Golden Nugget.<sup>115</sup> The prepaid cards can be funded by the same methods used to fund an eWallet: by credit or debit card or bank transfer.

## Cryptocurrencies

Multiple companies have developed and are seeking to implement cryptographic token-based gaming. CryptoSlate lists at least 45 tokens intended for use in the gambling space. While these approaches have gained some transaction in non-U.S. and non-regulated spaces, they remain off the table in the United States. Many crypto-based gaming platforms expressly exclude U.S. players. Even major cryptocurrencies, such as Bitcoin, are not yet options for funding regulated gaming accounts in the United States.

Use of crypto tokens in the United States is complicated due to the uncertainty of U.S. regulation and the difficulty of obtaining approval of regulators for token issuance.

The U.S. Securities and Exchange Commission (SEC) appears likely to treat any new, tradable token as a security, which significantly increases the cost and regulatory risk of introducing such a token in U.S. markets. The SEC's unclear treatment of crypto tokens also creates civil litigation risk for U.S. market participants. For example, Unikrn introduced Unikoin Gold (UKG) for use in esports gambling transactions, among other things. Despite its clear statements that UKG was not for investment purposes, a purchaser later brought a civil suit claiming that UKG was an unregistered security. Consequently, the use of crypto tokens as a method of gambling funding in the U.S. lags behind many other jurisdictions.

In many non-U.S. markets, and particularly the unregulated market, cryptocurrencies increasingly are a viable funding alternative, touting instant funding and short delays for withdrawals. Given the unregulated nature of Bitcoin to date, and the general anonymity of the currency, it is unlikely that regulated online gaming jurisdictions will start incorporating the currency as a funding option.

# **VI. FANTASY SPORTS AND LOTTERY**

The background features a solid blue color with several large, overlapping geometric shapes in a lighter shade of blue. These shapes include a large inverted triangle on the left, a trapezoid in the center, and a vertical rectangle on the right, creating a modern, abstract design.

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

## 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>116</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>117</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 star and which players will be placed on the bench.”<sup>118</sup>

Fantasy sports games must comply with state gambling laws to be offered in those states for real money. Under case law in some states, fantasy sports would likely be considered a game of skill and therefore not subject to the relevant state's 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>119</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.

## ENACTED LEGISLATION

### ALABAMA

In June 2019, Alabama governor Kay Ivey signed into law a bill legalizing daily fantasy sports in Alabama for the first time since 2016, when the state's attorney general opined that such games were illegal. Companies wishing to offer daily fantasy sports in Alabama must register with the Office of the Attorney General, but an exception to the registration requirement was made for companies that operated in Alabama prior to the 2016 attorney general opinion. These companies include DraftKings and FanDuel.

### ARIZONA

In April 2021, Arizona Governor, Doug Ducey signed legislation permitting mobile and retail sports betting, including daily fantasy sports. The state's law permits both fantasy sports for prizes and sports betting. Fantasy sports sites are expected to go live once official regulations are drafted by the State's Gaming Department, in or around September 2021.

### ARKANSAS

In 2017, Arkansas became the first to enact a new law permitting cash-based daily fantasy sports. The law taxes daily fantasy sports revenue for companies operating in the state at a rate of 8 percent of in-state revenue.

### COLORADO

Colorado passed legislation authorizing fantasy sports in the state.<sup>120</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 of further regulations, and enforcement.

### DELAWARE

Delaware passed a law that took effect in August 2017 allowing for daily fantasy sports to take place in the state. Operators are required to pay a \$50,000 fee, along with a tax rate of 15.5 percent of net in-state revenue.

## ILLINOIS

While Illinois does not have a daily fantasy sports law on the books, a 2015 opinion by the Illinois Attorney General concluded that daily fantasy sports violated state gambling law. A 2020 decision by the Illinois Supreme Court, however, determined that at least some daily fantasy contests are games of skill and are, therefore, permissible.

## INDIANA

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.

## IOWA

Iowa Governor Kim Reynolds signed legislation in May 2019 allowing Iowans 21 years and older to play fantasy sports legally. The Iowa Racing and Gaming Commission regulates fantasy and sports betting in the state. Starting in October 2019, DraftKings was the first to operate in the state.

## KANSAS

Kansas enacted legislation that legalizes fantasy sports games, provided such games meet the statutory definition similar to UIGEA.<sup>121</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).

## LOUISIANA

A Louisiana bill passed in May 2018<sup>122</sup> that put the issue of fantasy sports to the voters, and the voter referendum passed in November of that year. In June 2020, the governor signed a bill into law that made fantasy sports legal in 47 of the 64 parishes in the state.<sup>123</sup> Fantasy sports could go live in the state in spring 2021.

## MAINE

Maine passed a bill in August 2017 that regulates and legalizes paid-entry fantasy sports.<sup>124</sup>

## MARYLAND

Maryland enacted legislation in 2012 to legalize fantasy sports, with language that mostly mirrors the UIGEA definition.<sup>125</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>126</sup> Thus, it would seem 100% certain that daily fantasy sports are permitted in Maryland.

Notably, an Attorney General opinion from January, 2016<sup>127</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 revisit the fantasy sports statute in its upcoming session. However, the Maryland legislature has not revisited 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.

## MASSACHUSETTS

In March 2016, Massachusetts' Attorney General implemented daily fantasy sports regulations.<sup>128</sup> Among other things, the regulations ban players under the age of 21, mandate player funds be segregated from operating funds, and require sites to

offer beginner-only games. In addition, no fantasy contests can be based on athlete performances in college or high school sports. Later in 2016, Massachusetts' governor signed legislation to formally permit fantasy sports in accordance with the Attorney General's regulations.<sup>129</sup>

## MISSISSIPPI

Mississippi passed a bill in 2016 that legalizes and regulates fantasy sports in the state.<sup>130</sup>

## MISSOURI

Missouri has legalized daily fantasy sports. House Bill 1941 passed through the legislature, and Governor Jay Nixon signed the bill on June 10, 2016.<sup>131</sup> Under the law, the Missouri Gaming Commission will provide annual licenses to, and general oversight of, online operators. The law also provides for the typical consumer protections.

## NEW HAMPSHIRE

On July 18, 2017, New Hampshire's governor signed a fantasy sports bill into law.<sup>132</sup> The new law includes a number of consumer protection features, including a minimum age of 18, accounting audits, and restrictions on unauthorized scripts. Fantasy contests based on "collegiate, high school, or youth athletic events" are banned.

## NEW JERSEY

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>133</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>134</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>135</sup> The statutory requirements mostly mirror the prongs of the UGIEA carve-out for fantasy sports, although the law does require a minimum age of 21 years old for participants.<sup>136</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>137</sup>

## NEW YORK

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. On February 6, 2020, the New York Appellate Division, Third Department, affirmed the New York Supreme Court's declaration that daily fantasy sports violate the New York constitutional ban on gambling.<sup>138</sup> The court also struck the part of the trial court order that upheld decriminalization of daily fantasy sports.

## OHIO

In December 2017, Ohio passed a law that legalized paid-entry fantasy sports.<sup>139</sup> The law became effective on March 23, 2018. The Ohio Casino Control Commission oversees all licensing, approvals, and authorizations.

## PENNSYLVANIA

On October 26, 2017, the Pennsylvania House passed a bill to formally legalize daily fantasy sports in the state, along with online poker and other forms of online gambling, including online table games and slots.<sup>140</sup> The Senate passed the same bill a day prior. A few days later, Pennsylvania officially became the seventeenth state to regulate daily fantasy sports (and the fourth to regulate online gambling) when Governor Tom Wolf signed the bill into law. In May of 2018, regulated fantasy sports in Pennsylvania officially launched.

## RHODE ISLAND

In Rhode Island, daily fantasy sports was approved in early 2016. "It is the opinion of this office that daily fantasy sports may currently operate legally," Rhode Island Attorney General Peter F. Kilmartin wrote in a Feb. 4 letter to Gov. Gina Raimondo.<sup>141</sup> Kilmartin further wrote that, "[a]pplying the 'dominant factor' standard, I do not believe that daily fantasy sports constitute a 'game of chance.'" A legislative bill pertaining to DFS was also introduced in the state.<sup>142</sup>

## TENNESSEE

Tennessee passed legislation in 2016 legalizing fantasy sports; the bill went into effect on July 1, 2016. The Secretary of State oversaw the implementation of the law, licensing process, and other regulation.<sup>143</sup>

## VERMONT

On June 8, 2017, Vermont's governor signed a bill that permits cash-based daily fantasy sports in the state.<sup>144</sup> The new legislation includes a variety of consumer protection provisions, including a prohibition on certain computer scripts and a requirement that all player funds are segregated from operating accounts. The statute invalidated the opinion of a former Vermont attorney general who had concluded that daily fantasy sports constituted illegal gambling under state law.<sup>145</sup>

## VIRGINIA

In 2016, Virginia was the first state in the nation to pass legislation authorizing and regulating daily fantasy sports.<sup>146</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.

## WYOMING

In April 2021, Wyoming enacted legislation that regulates and legalizes sports wagering. However, the legislation states that fantasy sports are "outside" the scope of this legislation. The state does not outlaw fantasy sports but there is also no specific state legislation regulating fantasy sports. Currently, daily fantasy sports are operational in the state, allowing for paid contests.

## 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 memorandum (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>147</sup>

In 2018, however, the DOJ reversed its position and stated that the federal Wire Act applies to all forms of interstate gaming, not just sports betting.<sup>148</sup> The New Hampshire Lottery, joined by the lotteries of various states, filed suit in federal court against the DOJ to attempt to stop it from enforcing its new opinion about the Wire Act against lotteries.<sup>149</sup> On April 8, 2019, before the court issued a ruling on the suit, the Deputy Attorney General issued a memo stating that the DOJ does not believe that lotteries are impacted by its 2018 opinion.<sup>150</sup> On June 3, 2019, the district court issued a ruling striking down the 2018 opinion.<sup>151</sup> The DOJ filed a notice of appeal of the district court's decision on August 16, 2019, but it remains unclear whether or not the DOJ will pursue the appeal or accept the district court's decision.



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. Today, more than a dozen states have approved measures that allow some form of online lottery ticket sales: Georgia, Illinois, Kentucky, Maine, Maryland, Michigan, New York, North Carolina, North Dakota, New Hampshire, Pennsylvania, and Virginia. 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>152</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 and age verification<sup>153</sup> technology, just as online gaming sites do, to ensure that players are located within their borders and of the legal age.

# VII. ESPORTS AND OTHER GAMES



**E**sports are a relatively new entrant to the world of online gaming and betting. While videogames have been part of almost every family for decades, esports brings team competition to videogaming. 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 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>154</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>155</sup> Broadcasting allows players to build up a following among fans and for fans to become intimately involved with their favorite players.<sup>156</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>157</sup> A 24-hour esports channel was launched in late 2016 in the U.K. and Ireland and now reaches 50 countries in over 55 million homes.<sup>158</sup>

## EMERGING ESPORTSBOOKS AND SKIN BETTING

As with many forms of 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>159</sup> Within those sportsbooks, 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 virtual tokens such as guns, potions, swords, or other tools, that help players advance through the game more quickly and/or 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>160</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 may 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>161</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 may be illegal in the United States if they are considered a game of chance and unlawful betting under the Unlawful Internet Gaming Enforcement Act.<sup>162</sup> Although, as discussed below, some casinos classify esports as games of skill and thus exempt esports from regulation under federal law.

This circumstance presents a possible avenue for audience wagering on esports in the future.

In contrast, skin betting is the wild west of online gaming. 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 (KYC) 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 (KYC) protections. These sites do not use player identification verification systems, instead allowing gamblers to sign up with just an email address. Thus, 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>163</sup> Similarly, on many sites there is no age verification in place, so underage gambling is common.<sup>164</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*.<sup>165</sup> In this case, the plaintiff, as a putative class action representative, alleged that Valve (maker of Counter Strike: Global Offensive) is responsible for violations of state laws prohibiting gambling, racketeering, and unjust enrichment. The plaintiff based these claims on Valve's apparent sanctioning of third-party skin betting sites and the secondary market in trading real money for skins. The district court dismissed the complaint, holding that the plaintiffs failed to meet the RICO standing requirement.<sup>166</sup>

## 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 would no longer allow open access to API.<sup>167</sup> This effectively shuttered 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>168</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.<sup>169</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>170</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, NJ is also poised to offer esports lounges. The New Jersey Division of Gaming and Enforcement ("NJDGE") has already begun reviewing the regulations pertinent to esports lounges and concluded the games are games of skill.<sup>171</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 NJDGE 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>172</sup> Additionally, head-to-head competition, where the players wager against one another and the casino only takes a rake is also permitted under NJDGE regulation.<sup>173</sup> However, audience wagering on tournaments remains unauthorized under current NJDGE 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>174</sup> Similarly, several players were banned by the Korean e-Sports Association (KeSPA) for match fixing in April 2016.<sup>175</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>176</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>177</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>178</sup> In fact, their videos show them suggesting that CSGOLotto approached them about sponsorship after discovering them on social media.<sup>179</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 esports 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 a player’s employment status.<sup>180</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>181</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 concerning 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 twenty-five competitive esports.<sup>182</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>183</sup> The organization already has a board and league commissioner and is looking to establish a players’ council as well.<sup>184</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 players take prescriptions to help with focus and attentiveness, such as Adderall, during competition.<sup>185</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-related, 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>186</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>187</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>188</sup> Players rallied behind Hjelte, and petitioned the White House through its WeThePeople.com portal to review the ruling.<sup>189</sup> Hjelte was eventually approved to attend a major tournament in the United States 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.

## Loot Boxes

The Federal Trade Commission (“FTC”) held three panels on Wednesday, August 7, 2019, that centered on one topic: loot boxes earned or purchased during online game play. It is clear from the selection of panelists and the questions posed by FTC staff that the FTC is on high alert about potential consumer protection issues surrounding these in-game purchases.

Loot boxes are containers of randomized digital content holding items with varying degrees of in-game value that can either be earned through in-game play or purchased using in-game or real-world currency. Today’s gaming industry is rife with “freemium” games and games for purchase that are about the same price as those video game cartridges of yesteryear (adjusting for inflation). Gaming development budgets, however, have skyrocketed to generate the photorealistic graphics and endless gameplay that consumers have come to expect. To bridge the gap, developers are increasingly relying on in-game purchases, of which loot boxes are a subset. Consumers do not always know how the value of these boxes are calculated or the odds that they will receive a particular item, and they are not always aware of the subliminal tactics that developers use to encourage gamers to purchase these boxes. That lack of transparency has long bothered the FTC.

Michael Warnecke, Chief Counsel of Tech Policy of the Entertainment Software Association (“ESA”), announced during one of the FTC panels that Microsoft, Nintendo, and Sony have a new commitment to being more transparent. These companies will provide the “drop rate,” or the level of rarity, of certain items in loot boxes available for purchases. Warnecke said that regardless of the method used to calculate the odds of acquiring a desired item (i.e., static versus dynamic), the odds would be disclosed. In that way, game developers will provide more information to consumers about their in-game purchases.

The announcement was met with mixed reactions by the other panelists, with some applauding the effort to increase transparency surrounding loot boxes and others cautioning that, for the lay person, knowing the odds is not necessarily enough information. Every panelist agreed that children are a subgroup that deserved particular consideration by the FTC because children cannot always appreciate the charges being racked up when making in-game purchases. Both the ESRB and the NCPG have already taken steps to provide parents with disclosures and educational outreach on the subject, and pledged to do more.



Game developers need to be sensitive to consumer protection issues for all gamers, however; not just children. Regulations often lag far behind advances in gaming, so while the FTC's role is important in protecting consumers against questionable loot box practices, the onus falls on the developers to ensure that the industry self-regulates in real time. ESA's announcement is a step in the right direction and shows that game developers take consumer concerns seriously. In addition, gaming companies offering clear, fulsome disclosures will have a basis to defend against any regulatory investigations and to collect their charges.

## **SUMMARY**

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.

# VIII. AFFILIATE MARKETING



**A**s the U.S. regulatory landscape shifts in favor of allowing online gaming and sports betting, operators are seeking to acquire and increase their customer base. Affiliate marketing is one strategy that operators are using successfully to increase traffic to their online gaming services. States have not missed the trend and are moving to regulate these cooperative marketing relationships. Operators must successfully navigate relevant regulations and use affiliates effectively to gain the greatest benefit from affiliate marketing.

## **WHAT IS AFFILIATE MARKETING?**

Affiliate marketing is estimated to be a \$12 billion industry as of 2019.<sup>189</sup> The premise is simple: by offering incentives to affiliates that promote their services, companies can in turn reach more customers.<sup>190</sup> Many popular online gaming websites offer affiliate programs to drive customer growth, and the competitive landscape is intense. These cooperative marketing programs sometimes can be more lucrative for the affiliates than the operator.<sup>191</sup>

Affiliate marketing is effective because it crowdsources marketing. Instead of paying out of pocket to run ads with the hope of attracting customers, a company can reward affiliates only when they successfully bring users to its site. The company can focus less on marketing and the affiliate has a way to generate revenue – it is a win-win strategy.

Affiliates are paid in a variety of ways for their work. The two most common payment schemes are Revenue Sharing and Cost Per Acquisition (or CPA), both of which can be effective to attract customers to an operator. Under the Revenue Sharing model, affiliates get a share of the revenue from each customer they produce for the operator. This benefits affiliates who bring in loyal and high-paying customers. As discussed below, however, this model also may place greater regulatory burdens on the affiliate.

Cost Per Acquisition is a simpler model. Instead of receiving a cut of revenues that the referred user earns the operator, the affiliate is paid a fixed fee for every person it drives to the service. CPA is easier to administer, but the affiliate may find it less lucrative than Revenue Sharing on a long-term basis.

## **WHAT DO AFFILIATE SITES OFFER?**

Affiliates need an audience to generate referrals, which requires web content sufficient to attract attention. Many employ a blog or other informational format. For example, a site may highlight online gaming websites that offer the best deals and rates, and suggest that their audiences visit those sites. By providing a link to a website, the affiliate can let the provider know that it sent the customer and then collect either CPA or Revenue Sharing based on their marketing contract. Affiliate sites can offer other types of information as well. An affiliate site might be dedicated to daily fantasy sports and, along with providing affiliate codes for certain providers, could also offer suggestions and information regarding lineups for that night's games. Affiliate sites are not merely plain pages with links to outside sites: they are interesting sites with solid content designed to cultivate an audience that can be referred to operators.

Affiliate sites are not always independent. Oftentimes they will join affiliate networks to grow their audiences. By uniting all sorts of websites (fantasy sports, online gaming, odds comparing) these networks can cast a wider net and attract more people than affiliates could individually. The networks also produce quality content in the hopes of delivering more customers to the operators with which they have agreements.<sup>192</sup>

## LICENSING

States that are legalizing online sports betting or gambling are quick to regulate affiliate marketing for these industries. Such regulations slow the market growth of online gaming but protect customers against potential bad practices. Pennsylvania and New Jersey have similar regulatory schemes, which may serve as models for other states as they move to regulate internet-based gaming.

### NEW JERSEY

In New Jersey there are two different licenses depending on the type of marketing affiliate. If the affiliate is being paid on a flat rate, or CPA, it must register for a vendor license.<sup>193</sup> This basic license is acquired through a straightforward application. If an affiliate is being paid on a Revenue Sharing basis, however, it may need an “ancillary” license, which involves a much lengthier and more complex license application process.<sup>194</sup>

New Jersey has rigorously pursued affiliate marketers that violate its regulations. Perhaps most critically, if an affiliate promotes a grey – or black-market-product, New Jersey will deny it a license and will not allow the affiliate to market in New Jersey.<sup>195</sup> Because many offshore platforms offer lucrative affiliate programs, many affiliates with experience in the gambling space will face increased scrutiny when trying to enter New Jersey’s burgeoning market.

### PENNSYLVANIA

Pennsylvania’s licensure policy is similar to New Jersey’s, but with a few key differences. For example, rather than apply for a vendor license, affiliate marketers operating under a CPA model in Pennsylvania must apply to be a “registered” gaming services provider. This differs from New Jersey’s vendor application in that it includes a background investigation. If the affiliate operates on a Revenue Sharing model, it must become a “certified” gaming service provider. This is similar to New Jersey’s ancillary license in that the application requires many details concerning the applicant’s personal history.

This certification application is much more arduous to complete than the registered gaming service provider application. Along with these applications come fees and a background check.<sup>196</sup>

Because Pennsylvania based large portions of its policy on New Jersey’s successful approach, we expect to see, eventually, a similar approach to regulating marketers.

## FEDERAL OVERSIGHT

Affiliate marketers also are subject to federal oversight from the Federal Trade Commission (FTC), which is charged with (among other things) tackling deceptive advertising. The FTC does not directly regulate affiliate marketers, but it will take action with respect to ads or promotions that it deems to be deceptive due to exaggerated claims or misleading information. In September 2017, the FTC released endorsement guidance to clarify how its regulations apply to social media, bloggers, and celebrity endorsements.

The FTC guide states that you must “disclose your relationship to the retailer clearly and conspicuously on your site...”<sup>197</sup> This basic disclosure requirement provides more transparency between the affiliate marketer and the consumer.

## SUMMARY

Affiliate marketing sites are more than just a blog with a link at the bottom. They can be powerful and lucrative operations, especially when they take advantage of “affiliate networks.” As more states legalize online gambling, affiliate marketing in online gaming will become more competitive and lucrative. Along with this, the regulations for online gaming affiliates will also become more comprehensive. Understanding the state regulatory requirements will be critical for successful affiliates and operators using their services.

# XI. CONCLUSION



This is the third edition of Ifrah Law’s white paper on online gaming and betting in the United States. At the conclusion of the second edition, we predicted much of the legislation that eventually came to pass, albeit at a pace slower than anticipated. In the six years since the original white paper was published, but particularly since the Supreme Court’s decision in *Murphy*, legal online gaming has undergone an explosion in the United States; a long-awaited wave of legalization and regulation is in full swing in domestic markets. We are pleased with the recent breakthroughs that have the potential to bring online interactive gaming into the U.S. mainstream, where it can create jobs and offer a secure, exciting experience for adults nationwide.

While much of the current legislation focuses on sports betting, many states have expressly approved legalized online gaming. In the next 10 years, we predict that more states will allow companies to offer online sports betting, and that subsequently these companies will seek to seize cross-selling opportunities by adding poker and casino offerings.

Challenges remain. The U.S. Department of Justice continues to support its about-face on the interpretation of the Wire Act. Payment processing and banking are still an issue, as there are insufficient options for operators and customers. The implementation of cryptocurrency as a payment channel continues to face regulatory hurdles, despite the clear benefits in transparency and security. But the winds are all blowing favorably for the online gaming industry. In the long term, the recent wave of legalization and regulation will create an entirely new market, with enormous scalable business opportunities for operators, inventors, innovators, and supporting industries including marketing, suppliers, and payment processing. The future of online gaming in the United States has never looked brighter.

# **X. ABOUT IFRAH LAW**



**A**fter over a decade in business, Ifrah Law is pleased with the recent legal breakthroughs that have the potential to bring online interactive gaming into the U.S. mainstream, where it can create jobs and offer a secure, exciting experience for adults nationwide.

For our firm's founder, **Jeff Ifrah**, a passion for advancing online gaming was kindled in 1999, when as a member of a BigLaw firm he began representing clients who sought to build online gaming businesses in the United States. Throughout the next decade, Jeff was among a handful of litigators who fought to establish precedent in this nascent area of law. His belief in the internet's capacity to provide a satisfying, virtual gaming experience grew ever-stronger, even though prospects for favorable federal legislation dimmed in 2006 (with UIGEA's passage) and suffered severe blows in 2010 (when efforts to pass a federal regulatory scheme failed).

In 2009, Jeff formed Ifrah Law PLLC in Washington, D.C., and intensified his efforts to build the case for legalization of online gaming and sports betting in the United States, with a focus on state-level legislation. By 2013, it appeared that legalization of online gambling in Delaware, Nevada and New Jersey might create a ripple effect nationwide. But, over the next two years, no significant state-level online gaming laws were advanced.

Jeff determined that moving online gaming forward required a two-pronged strategy: first, harness the combined influence of key industry stakeholders and, second, select one state – New Jersey – to serve as the proof-of-concept that would move the nation. In 2016, Jeff Ifrah formed **iDEA Growth**, which helped to align 25 online entertainment companies behind a positive, pro-jobs agenda. On behalf of iDEA Growth, Jeff submitted an **amicus brief to the Supreme Court in *Murphy v. NCAA***, which in May 2018 was decided in favor of iDEA's argument – and represented a victorious “shot heard round the world” for online gaming advocates nationally.

In the next 10 years, Jeff predicts that more states will allow companies to offer online sports betting, and that subsequently these companies will seek to seize cross-selling opportunities by adding poker and casino offerings.

All of these trends, in the long term, will create an entirely new market, with enormous scalable business opportunities for operators, inventors, innovators, and the fulfillment of Jeff's vision of the creation of an exciting, virtual gaming and entertainment world that is within everyone's reach.

**Ifrah Law is a leading provider of litigation and compliance services to companies active in internet advertising, online gaming, sports betting, fantasy sports, and esports.** Ifraha Law's 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 online gaming regulation on their blog, [IfrahOniGaming.com](http://IfrahOniGaming.com).

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