



Legal Division

TO: Commissioners
FROM: Justin Stempeck, Staff Attorney
CC: Catherine Blue, General Counsel
DATE: October 23, 2015
RE: Daily Fantasy Sports

This memorandum will address the legal history of gaming in Massachusetts and its potential intersection with daily fantasy sports (“DFS”), with additional reference to potentially relevant federal statutes.

I. Legal History of Gaming in Massachusetts

A. Illegal Gaming

Illegal gaming in Massachusetts is defined as any:

banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) a game conducted under chapter 23K; (iii) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (iv) a game of bingo conducted under chapter 271; and (v) charitable gaming conducted under said chapter 271.

M.G.L. c. 4, § 7.

In addition to this definition, cited in only one case,¹ Massachusetts case law has noted that “the word ‘game’ is very comprehensive and embraces any contrivance or institution which has for its object the furnishing of sport, recreation or amusement. ‘Gaming for money or other property’ is illegal.” Com. v. Theatre Adver. Co., 286 Mass. 405, 411 (1934) (internal citations omitted). Nevertheless, no Massachusetts statute directly criminalizes participation in “illegal gaming” or a “banking or percentage game” in those terms. Instead, Massachusetts addresses illegal gaming through a multitude of different criminal statutes dealing with where, when and how “illegal gaming” is conducted or financed including,

¹ Sullivan v. Vorenberg, 241 Mass. 319 (1922) (the receiving of a bet on a horse race and making a memo of same on a slip of paper is “registering a bet” and thus, illegal gaming)

but not limited to, statutes on running an illegal gaming establishment,² trying to recover gaming losses,³ loaning money for purposes of gaming,⁴ and running a bet-placing operation;⁵ amongst others.

B. Lotteries

While there is very little case law addressing the statutory definition of “illegal gaming,” there are a number of cases addressing “lotteries.” The term “lottery” has been interpreted broadly to include any activities consisting of the following three elements: “(1) the payment of a price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.” See Com. v. Stewart-Johnson, 78 Mass. App. Ct. 592, 594 (2011), quoting, Com. v. Lake, 317 Mass. 264, 267 (1944). The running of lotteries outside of a “gaming establishment” is illegal under Massachusetts law and such lotteries are broadly defined to include certain types of illegal gaming:

Whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device that is not taking place in a gaming establishment licensed pursuant to chapter 23K, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids either by printing or writing, or is in any way concerned, in the setting up, managing or drawing of such lottery, or in such disposal or offer or attempt to dispose of property by such chance or device, shall be punished by a fine of not more than three thousand dollars or by imprisonment in the state prison for not more than three years, or in jail or the house of correction for not more than two and one half years.

M.G.L. c. 271, § 7.⁶

In order to set chance-based endeavors apart from other contests that evaluated the skill of participants, the Commonwealth adopted an approach now known as the “dominant factor test.” The Supreme Judicial Court stated that:

² M.G.L. c. 137, § 2.

³ M.G.L. c. 137, § 1.

⁴ M.G.L. c. 137, § 3.

⁵ M.G.L. c. 271, § 17.

⁶ This statute has been widely used as a catch-all for other types of illegal gambling:

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

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

Where the game contains elements both of chance and of skill, in order to render the laws against lotteries effectual to combat the evils at which they are aimed, it has been found necessary to draw a compromise line between the two elements, with the result that by the weight of authority a game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates.

Com. v. Lake, 317 Mass. 264, 267 (1944); see also Com. v. Plisner, 295 Mass 457, 464 (1936).

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

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

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

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

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

To date, no Massachusetts case has addressed whether fantasy sports or daily fantasy sports would constitute a "lottery" as in the examples set forth above. The cited cases all involved analyzing chance versus skill where the individual playing the game had a direct effect on the outcome of the game (i.e., personally operating a crane, choosing cards or throwing darts). These examples stand in contrast to daily fantasy sports where the player's skill is exercised only in choosing the roster, as the player has no ability to control the final outcome of the sporting events. It is not clear whose skill a Massachusetts court would examine in determining the skill versus chance contest in the fantasy sports arena.

C. Betting Pools

Another related area of Massachusetts gaming law that factors into many of the criminal statutes addresses the “pooling” of bets or wagers. Such statutes are of particular relevance in light of the recent opinion by the Nevada attorney general finding that DFS constitute gaming requiring licensure where DFS qualify as both “sports pools” and “percentage games” under Nevada law.

The two primary statutes in Massachusetts addressing betting “pools” are G.L. c. 271, §§ 16A and 17. § 16A states:

Whoever knowingly organizes, supervises, manages or finances at least four persons so that such persons may provide facilities or services or assist in the provision of facilities or services for the conduct of illegal lotteries, or for the illegal registration of bets or the illegal buying or selling of pools upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the happening of any event, or upon the result of a game, competition, political nomination, appointment or election, or whoever knowingly receives from at least four such persons compensation or payment in any form as a return from such lotteries, such registration or such buying or selling shall be punished As used in this section the word "persons" shall not include bettors or wagerers or persons who organize, supervise, manage or finance persons for the purpose of gaming conducted under chapter 23K who merely avail themselves of such facilities or services for the purpose of making a bet or wager and do not otherwise provide or assist in the provision of such facilities or services. This section shall not apply to such bettors or wagerers.

Similarly, § 17 states

Whoever keeps a building or room, or any part thereof, or occupies, or is found in, any place, way, public or private, park or parkway, or any open space, public or private, or any portion thereof, with apparatus, books or any device, for registering bets, or buying or selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election, or whoever is present in such place, way, park or parkway, or any such open space, or any portion thereof, engaged in such business or employment; or, being such keeper, occupant, person found or person present, as aforesaid, registers such bets, or buys or sells such pools, or is concerned in buying or selling the same; or, being the owner, lessee or occupant of a building or room, or part thereof, or private grounds, knowingly permits the same to be used or occupied for any such purpose, or therein keeps, exhibits, uses or employs, or knowingly permits to be therein kept, exhibited, used or employed, any device or apparatus for registering such bets, or for buying or selling such pools, or whoever becomes the custodian or depository for hire, reward, commission or compensation in any manner, of any pools, money, property or thing of value, in any manner staked or bet upon such result, shall be punished by a fine of not more than three thousand dollars or by imprisonment in the state prison for not more than three years, or in jail or the house of correction for not more than two and one half years. This section shall not apply to a person who organizes, supervises,

manages or finances another person for the purpose of gaming conducted in accordance with chapter 23K.

Limited case law has addressed “betting pools;” however, Commonwealth v. Sullivan, provides a definition of the term and some explanation of how a betting pool works:

A pool has been defined as 'a combination of stakes the money derived from which was to go to the winner.' . . . This does not mean, however, that all the money derived from the combination of stakes must go to the winner. Commonly the man who runs the pool makes something out of the transaction. It is enough to constitute the criminal offense if there is a combination of stakes a part of which is to go to the winner. . . . [It] is enough if the proceeds of the so-called purchases of the coupon books constituted a fund out of which the so-called prizes--in fact the proceeds of the pool--were paid to the winners in the game of chance.

218 Mass. 281, 283 (1914).

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

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

Sullivan further defines a “bet” as “the hazard of money or property upon an incident by which one or both parties stand to lose or win by chance.”⁷ Id. “For one to have placed a “bet,” he must have taken a risk on the uncertain outcome of a particular event and, depending on the outcome, he must be entitled to receive payment from another.” Com. v. Sousa, 33 Mass. App. Ct. 433, 437 (1992)

Many of the contests offered by DFS operators involve numerous participants paying their entry fees into a common pool, from which the winner receives his/her award (with the operator also

⁷ This definition is extremely similar to the definition of “wager” applied by the Nevada attorney general. In Nevada, a wager is “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” See Nev. Rev. Stat. Ann. 463.01962. Massachusetts’ definition of bet was cited with approval as recently as 1992.

receiving a percentage of the total pool value). No Massachusetts court has addressed whether fantasy sports or DFS would qualify as betting pools and thus run afoul of either G.L. c. 271, §§ 16A or 17.

II. Does the MGC Have Any Obligation or Authority to Regulate DFS?

The Massachusetts Gaming Act sets forth the scope of the Commission's powers in the realm of gaming oversight. Critically, under the Act, the "paramount policy objective" is "ensuring public confidence in the integrity of the gaming licensing process and in the strict oversight of all gaming establishments." M.G.L. c. 23K, § 1(1) (emphasis added). The term "gaming establishments" is specifically defined as "the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities." Id. at §2.

Numerous other sections of the Gaming Act explain the Commission's involvement with "licensees" and "gaming establishments," but there is no suggestion within the Act that the Commission is responsible for oversight of questionably illegal gaming occurring outside the four walls of a licensed "gaming establishment." The only potential argument for greater oversight authority can be found in the list of enumerated powers of the commission at § 4(36) of the Act which states that the powers include the ability to: "monitor any federal activity regarding internet gaming and coordinate with the office of the treasurer and receiver general on implementing any measures necessary to protect the commonwealth's lottery and gaming interests." There are no regulations associated with this section that further explain how such powers would be exercised nor is "internet gaming" a defined term in the statute itself.

G.L. c. 23K defines "Game" as: "a banking or percentage game played with cards, dice, tiles, dominoes or an electronic, electrical or mechanical device or machine played for money, property, checks, credit or any other representative of value which has been approved by the commission." Critically this definition is nearly identical to the definition of illegal gaming cited in the preceding section. Neither statute nor any regulations further define a "banking or percentage game;" however, a banking game is traditionally one in which players play against the house (blackjack, roulette, craps) versus a percentage game where players directly compete against each other and the house takes a rake (poker).

These definitions of "game" and "illegal gaming" are similar to Nevada's definition of "gambling games." Nevada's attorney general recently concluded that DFS constitute "sports pools" and "gambling games" under Nevada law and thus require a license to run. In analyzing the comparison between DFS and "gambling games" the attorney general noted that DFS was not likely to qualify as a banking game as players do not play against the house but that DFS did qualify as a percentage game where players played against each other and the operator took a percentage of the overall betting pool.

Recently, Massachusetts' attorney general stated that DFS is not expressly made illegal under Massachusetts and Federal gaming law but that she planned to meet with DFS representatives to discuss implementing consumer protection mechanisms. Although M.G.L. c. 4, § 7 identifies percentage games as "illegal gaming," there is no statute that actually criminalizes percentage games absent violation of one of the associated criminal statutes mentioned above. In contrast, Nevada's Revised Statute 463.160 makes it unlawful for any person to "deal, operate, carry on, conduct, maintain or expose for play in Nevada any gambling game without first obtaining a gaming license." (emphasis

added). There is no corollary to this statute in Massachusetts and our Gaming Act does not criminalize offering a percentage game.

As the Gaming Act is currently drafted, the MGC has no ability to regulate DFS without formal legislative action broadening its oversight powers. Even if DFS were determined to qualify as a percentage game, the Act does not provide the MGC with generalized authority over gaming outside of a “gaming establishment.”

III. The Role of UIGEA

While both Fanduel and DraftKings rely on UIGEA to support their conclusions that DFS are legal, this conclusion is not entirely clear, particularly where DFS did not exist at the time that UIGEA was passed in 2006.⁸ Dozens of articles have broadly stated that UIGEA is a federal law that made DFS legal. Such a conclusion is an over-simplification of the statute, which has a far narrower scope.

UIGEA prohibits “gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.” The focus of the statute was the exploding online poker industry and its passage effectively eliminated online poker in the U.S. It is essentially an enforcement act dealing specifically with payment processing. UIGEA on its own does not legalize DFS or fantasy sports of any kind.

In the “Congressional Findings and Purpose” section of the statute, the “Rule of Construction” notes that: “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.” (emphasis added). Thus, UIGEA defers to any other federal or state law that prohibits or regulates gambling, including DFS. Ostensibly, a company could be in compliance with UIGEA but still violate state law and mere compliance with UIGEA would not protect the company.

The oft-cited UIGEA provision relied upon by DFS operators is merely an exception to the statute’s definition of “bet” or “wager.” There is no express language legalizing fantasy sports, nor any indication that the drafters contemplated the way DFS operate today.

Further, under the text of UIGEA, fantasy sports are only entitled to a carve out when “all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.” Based on this definition, it is unclear how certain DFS providers can offer contests, such as golf and NASCAR, with results based on solely one tournament/race.

IV. Other States’ Approaches to DFS Regulation

A. Kansas

⁸ The first DFS website appeared in 2007.

In 2015, the Kansas legislature excluded fantasy sports leagues from the definition of a "bet" if the league meets certain conditions set forth in the definition of Fantasy Sports League found in K.S.A. 21-6403(d):⁹

"Fantasy sports league" means any fantasy or simulation sports game or contest in which no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization and that meets the following conditions:

(1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants;

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

(3) no winning outcome is based:

(A) on the score, point spread or any performance or performances of any single real-world team or any combination of such teams; or

(B) solely on any single performance of an individual athlete in any single real-world sporting event.

This change in the law contradicted the previous position taken by the Kansas Racing and Gaming Commission that fantasy sports were an illegal lottery where they had a prize, consideration and chance. On its website FAQ section in 2014, the Commission stated that fantasy leagues were predominantly games of chance¹⁰ and cited to a similar opinion by the Florida attorney general's office. The Commission's website still links to an article where they take the position that gambling on fantasy sports is illegal although the language expressing the opinion that such leagues were games of chance has been removed from the FAQ section. Additionally, it appears clear from the 2015 legislation that this position by the Commission has now been officially superseded.

B. Florida

Although lacking any statutory or regulatory authority on the subject of DFS, in 1991 the Florida attorney general was asked for an opinion concerning the legality of a fantasy football league wherein a group of football fans each paid an entry fee of \$100.00 to draft and manage a team for the football

⁹ This definition mirrors that of the UIGEA fantasy sports carve out.

¹⁰ The commission specifically cited to such factors left to chance as (1) how a drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player's actual team in a given week executes a game plan that fits the player's talents; whether the coach calls plays that favor the player; and (4) how opponents of the actual player (who may be drafted by another manager) actually play.

season. At the end of the season the winner with the highest aggregate statistics would win the total amount of entry fees paid.

In evaluating the scenario, the attorney general discussed the fact that state gaming laws typically governed contests of skill and that the drafting of a fantasy football team could involve some skill; however, under Florida law: "Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast . . . or whoever knowingly becomes the custodian or depository of any money or other thing of value so staked, bet, or wagered upon any such result . . . shall be guilty of a misdemeanor." Fla. Stat. 849.14. Citing this statute, the attorney general noted that the statute prohibited the fantasy football league where the \$100.00 entry fee constituted a "bet, stake or wager" on a contest of skill.

C. Washington State

A senator in Washington State introduced a bill in early 2015 that would have defined fantasy sports specifically as skill-based and not gambling. Washington is one of five states where DFS are not offered due to the manner in which state law defines gambling¹¹. At the State Senate Labor and Commerce Hearing to discuss the bill, the presenting senator clearly stated that her bill was for season-long fantasy sports which were "games of skill" and not DFS which were undoubtedly "gambling." A representative from the Fantasy Sports Trade Association also spoke in favor of the bill but attempted to characterize DFS as games of skill. The commission was unpersuaded by his presentation and repeatedly observed that such daily competitions suggested the actions were gambling. This bill has not yet been acted upon and has been reintroduced in several separate legislative sessions.

D. Nevada

On October 16, 2015, Nevada's Office of the Attorney General provided a 17-page memorandum to Nevada's Gaming Control Board concerning the "Legality of Daily Fantasy Sports Under Nevada Law." This memorandum came a day after the Board released a "Notice to Licensees" declaring that DFS constitute gambling under Nevada law and thus any provider of DFS must have a gaming license in order to offer DFS within the state. The Board explained that "DFS meets the definition of a game or gambling game pursuant to Chapter 463 of the Nevada Revised Statutes" and that "because DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission." These conclusions were further supported and explained in the attorney general's detailed memorandum.

Nevada defines a "game" or "gambling game" as:

any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte,

¹¹ Washington defines "gambling" in relevant part as "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." RCW 9.46.0237.

roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.

Nev. Rev. Stat. Ann. § 463.0152.

In applying this definition to DFS, the attorney general determined that DFS are a “game played with cards, dice, equipment or any mechanical electromechanical or electronic device or machine” and that they are played for “money, property, checks, credit or any representative of value.” The attorney general concluded that DFS are not a “banking game” (where participants play against the house as in craps, roulette or blackjack), but that DFS qualify as “percentage games” because the players wager against each other and the house takes a percentage of each wager.

Additionally, the attorney general examined the statutory definitions applicable to sports pools to conclude that DFS operators must possess a license (issued by the board) to operate.

Nevada defines a sports pool as “the business of accepting wagers on sporting events or other events by any system or method of wagering.” See Nev. Rev. Stat. Ann. § 463.0193. A “wager” is defined as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” See Nev. Rev. Stat. Ann. § 463.01962. Analyzing these definitions in the context of DFS, the attorney general concluded that “wagers” are present in DFS and that DFS operators are in “the business of accepting wagers on sporting events,” thus they require a license to operate within the state.

E. Michigan

The Michigan Gaming Control Board’s executive director recently opined that under current Michigan law, daily fantasy sports are illegal. The board has yet to publish anything official establishing this position nor has the Michigan attorney general commented on the statement. Ironically, approximately a week before the Board took this position a state senator introduced a bill to legalize fantasy sports as a game of skill. The proposed bill seeks to carve out fantasy sports, as defined by UIGEA, from the state penal code as it applies to gambling

F. California

Early in 2015, state lawmakers in California introduced a bill to regulate DFS. That bill has been extensively amended and is still pending in committee. Under the bill, DFS operators in the state would be required to obtain a license prior to offering any games to residents of California. The bill additionally contains numerous consumer protection safeguards.

G. Massachusetts

There is no current or pending legislation concerning the legality of DFS in Massachusetts.

State senator Michael Rush introduced a bill which would authorize the Lottery commission to create online games of skill which would allow customers to play fantasy sports or poker accessible only via a prepaid card that would need to be purchased, in-person, from lottery agents. This bill is currently pending in the Joint Committee on Consumer Protection and Professional Licensure.

V. Federal Law and Potential Intersection with DFS

A number of federal statutes have potential application to DFS; however, none have been yet been used to challenge the industry.

A. The Interstate Wire Act of 1964 (“IWA”)

The IWA begins by stating:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084.

The IWA has been held to apply to wagers on sporting events made over the internet, despite the fact that the internet did not exist at the time the statute was drafted. See U.S. v. Lyons, 740 F.3d 702, 717 (1st. Cir. 2014). The “bets or wagers” contemplated by the IWA have been interpreted as risking money on a game that includes an element of chance. United States v. Bergland, 209 F. Supp. 547, 548 (E.D. Wis. 1962) rev'd, 318 F.2d 159 (7th Cir. 1963).

IWA has never specifically been used to challenge DFS. Applying the IWA to DFS would require evidence that DFS operators are “engaged in the business of betting or wagering” on “any sporting event or contest” and that the bets or wagers include an element of chance.

B. Illegal Gambling Business Act of 1970 (“IGBA”)

In order to determine if a defendant violated IGBA the government must show that

(1) a gambling business described in the indictment was conducted which violated the laws of the state in which it was conducted; (2) five or more persons including the defendant, knowingly and deliberately conducted, financed, managed, supervised, directed or owned all or part of that gambling business; and (3) the gambling business was either in substantially continuous operation for more than thirty days, or, alternatively, the gambling business, on at least one day, had gross revenues of two thousand dollars or more.

United States v. Conley, 37 F.3d 970, 977 (3rd Cir. 1994); 18 U.S.C. § 1955.

Based on the overwhelming success and rapid growth of DFS, the second two of the three criteria cited above are likely met by DFS providers. The critical element that could result in federal prosecution would be a determination that DFS is illegal under state law. To date no DFS providers have been pursued via IGBA.

C. Professional and Amateur Sports Protection Act (“PASPA”)

PASPA was passed in 1992 to effectively outlaw sports betting in all but a few specific states. The most relevant section of PASPA with respect to DFS states:

It shall be unlawful for

...

a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), **on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.**

28 U.S.C. § 3702 (emphasis added).

Based on its broad application, PASPA could equally apply to challenge DFS in the event that DFS was defined by any state law as “a lottery, sweepstakes...betting, gambling or wagering scheme.” Again, the applicability of this federal statute is dependent upon state law categorizing DFS. While professional sports leagues have aggressively challenged any attempts to legalize sports betting in contravention of PASPA, the statute has never been used to challenge DFS providers.

VI. Conclusion

As is clear from the discussion and examples set forth in this memorandum, the legal status of DFS is in flux. The common denominator to any analysis of DFS will hinge on specific state interpretation of whether DFS constitutes illegal gaming under state law, which could potentially also trigger liability under federal statutes as mentioned above.

MEMORANDUM

October 26, 2015

TO: Chairman Crosby and Commissioners Cameron, Stebbins & Zuniga

FROM: Commissioner McHugh

Re: Internet Gaming

This memorandum summarizes current issues and trends Internet gaming. It is intended to be a true summary, not a comprehensive discussion of all facets of the Internet world, for there simply is too much in that world to fit in any memo of reasonable length. Accordingly, the memorandum touches on important aspects of current Internet current activity and where that activity is likely to lead, at least in the near term. In addition to information I obtained over the past three years from various industry publications and through participation in a variety of national Internet gaming conferences, many of the specific sources on which I relied in preparing this memo are available via the hyperlinks readers of the electronic version of the memo will see throughout the text. Finally, although the memorandum discusses fantasy sports and although I am delivering it to all of you at a time when fantasy sports are on center stage, I promised the Chairman some time ago that I would pull my iGaming thoughts together before I left, so the timing is driven by my departure date, not by current issues.

I. Introduction & Background

At the outset, several general observations are worthwhile. Although only Delaware, New Jersey and Nevada currently permit Internet gambling, Internet gambling, legal and illegal, is huge enterprise. As reported in a recently completed [study commissioned by the American Gaming Association](#), a huge amount of illegal Internet gambling opportunities are available in the United States. Indeed, their widespread availability, the risk to bettors they pose and the loss of tax revenue they create have been used as reasons for permitting state created and controlled gambling opportunities in the United States and elsewhere.

Outside of the United States, there is an enormous amount of legal and highly regulated Internet gambling activity. In Europe, for example, Internet gambling is widely available and provides a broad array of betting opportunities. [Bet365](#), just one of many UK sites, quickly shows the breadth of that array. Many European nations permit Internet gambling and have created national regulatory bodies to oversee it. Indeed, some of the smaller European jurisdictions including Alderney, one of the British Channel Islands, the Isle of Man in the Irish Sea and Gibraltar are the headquarters for many European Internet

gaming operators. The [Alderney Gambling Control Commission](#), the [Isle of Man Gambling Supervision Commission](#) and the [Gibraltar Gambling Division](#) are widely viewed as effective regulators.

For a long time, United States regulators and law-enforcement officials believed that Internet gambling was prohibited by the [Wire Act](#), 18 U.S.C. § 1084, a 1961 statute that makes it illegal to use “a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.” In December, 2011, however, the Justice Department released an [opinion](#) stating that the Act applies only to sports betting and has no application to casino games or other forms of gambling. Among other things, that opinion opened the door for states to permit and regulate gambling over the Internet. Thus far, Delaware, Nevada and New Jersey have done so. Their approaches are discussed below.

Some members of Congress and some in the gaming industry favor new legislation designed to counter the DOJ interpretation by creating a firm statutory ban on all Internet gambling in the United States. Sheldon Adelson, one of the world’s largest brick and mortar casino operators, is a leading proponent of that approach. In public discussions of the subject, he maintains that his view is based on a belief that the Internet provides far too easy a path to addictive gambling. He often mentions addictive gambling within his own family and the experiences of his wife, [Miriam](#), a physician who specializes in addictive diseases. Last term, Sen. Lindsey Graham and others introduced [legislation](#) entitled “Restoration of America’s Wire Act” that was designed to achieve the result Adelson desires but the legislation attracted little support and failed to pass.

Some industry supporters of Internet gaming also support federal as opposed to state regulation of online activity. Those supporters point to the desirability of a single set of standards that would flow from federal regulation and the liquidity, i.e., the availability of open table spaces particularly for poker, a single, nationwide regulatory framework federal legislation would provide. In 2013, Senate Majority Leader Harry Reid and Arizona Senator Jon Kyl discussed legislation that would have created federal control over all online gambling activity and actually drafted a [bill](#) to achieve that result. Their [effort failed](#) and there has been no real focus on reviving the effort since then. As a result, the center of recent Internet regulatory activity has been in the states.

In the past, one of the strong arguments against state-by-state regulation of Internet gambling had to do with the perceived difficulties in determining the age or location of bettors. Those difficulties now have been largely solved. With the assistance of a firm

called [GeoComply USA](#), New Jersey has implemented a highly sophisticated, highly accurate geolocation protocol to ensure that online bettors are actually betting from within New Jersey state lines. [The New Jersey Division of Gaming Enforcement](#) is constantly testing that protocol and is confident that it works with a high degree of precision. The same is true of protocols the State has instituted to ensure that there are no underage bettors, though regulators agree that no protocol can ensure that a registered adult will not allow someone below the statutory betting age to use his or her identity and credit card to place wagers on an Internet site.

In the three states that do allow Internet gaming, a persistent problem facing operators has been the reluctance of credit card companies to process wagers charged to a credit card on an Internet gambling site. That reluctance stems primarily from a fear of running afoul of The [Unlawful Internet Gaming Enforcement Act of 2006](#), 31 U.S.C. §§ 5361 et seq., (UIGEA), which prohibits the acceptance or processing of a financial instrument for the purpose of “unlawful Internet gambling.” The statute does not define unlawful internet gambling but, inferentially at least, relies on other federal and state laws to do so. It is clear, however, that the prohibition applies to everyone in the acceptance and processing chain. Consequently, as state authorized Internet gambling began, the major credit card companies, which act as clearing houses for credit card debt but do not themselves pay that debt, were not convinced that they could separate legal from illegal gambling payments. Accordingly, they refused to pass the charges on to the card-issuing banks. Ultimately, the industry convinced the companies that there was a way to separate legal from illegal gambling sites and debts, so the companies agreed to process the charges and send them to the card issuing banks for payment. Convincing the banks to pay the debts, however, has proven to be a more difficult problem because of the large numbers of banks that have to be convinced and because, even if one could reach all of those banks, many still do not want to be involved in what they view as a risky effort to differentiate legal from illegal gambling obligations. Recently, however, [PayPal](#), which has a very large role in processing European Internet gambling wagers, has [begun to test payment protocols](#) for four New Jersey Internet gambling sites. If the tests are successful and if PayPal then broadens its reach to all legal US Internet gaming sites, the difficulties posed by the reluctance of banks to pay legal Internet gambling debts may be removed.

Finally, when one thinks about Internet gaming, one should also be thinking about mobile gaming. To some extent, they offer the same content but on different platforms. For example, essentially the same Internet games offered by [Borgata Casino](#), one of Atlantic City's most successful Internet gaming hosts, can be played a desktop or an iPad or other mobile device far away from the gaming establishment. Mobile devices, however, also are increasingly used to allow players to walk away from the casino floor and continue to play slot machines and other games offered by the casino at the casino's restaurants, hotel

rooms or at poolside. One system on display at last year's G2E has a tablet attached to a slot machine so that a player could effectively take that slot machine to a restaurant or other on-premises location and keep playing. When the tablet is utilized in that fashion, the screen on the slot machine says "in use elsewhere" or something to that effect and the machine is unavailable to other players until the tablet is returned. Mobile devices also are used to allow players to take the casino with them when they return home and keep playing there, for money when it is legal to do so and for non-extractable prizes when it is not. See "140630 Mobile Gaming - Always on customer" in the *Internet File* on our shared drive.

II. Casino Style Internet Gambling in the United States

a. *Authorized under State Law*

As noted earlier, three states, Delaware New Jersey and Nevada, permit some form of Internet gambling. Of the three, New Jersey is by far the most robust and has licensed Internet games that look like slot machines, games that look like table games and Internet poker. A [report](#) issued by the New Jersey Division of Gaming Enforcement in January, 2015 stated that the state accounts for more than 90% of the legal Internet gaming revenue in the United States. All of the Internet gaming license holders in New Jersey also run brick and mortar casinos. Each is permitted to offer five separate "brands" of games. As a result, by January, 2015, New Jersey had issued seven Internet licenses to operators hosting 16 separate brands and a total of 423 games.

New Jersey Revenues from Internet gaming have been substantially lower than initially predicted. Many believe, however, that the initial predictions were vastly overstated. Those who hold that view also believe that New Jersey actually has done quite well thus far in producing the revenue from this new form of gaming. According to the Division of Gaming Enforcement's [revenue report](#) for the first nine months of 2015, Internet gaming accounted for approximately \$108 million, an increase of nearly 16% over the same period last year. The Division recently authorized [PokerStars](#), the biggest and the most attractive Internet poker site in the world, to start offering Internet poker in New Jersey and [observers](#) anticipate a substantial increase in poker revenues as a result. PokerStars had been banned from New Jersey because it was a "bad actor," the industry label placed on several major poker sites that were operating illegally and were closed down by the Department of Justice on April 15, 2011, a day the Internet gambling industry refers to as [Black Friday](#).

Thus far, Delaware and Nevada are playing far smaller roles in the Internet world. In both states as in New Jersey, Internet gaming licenses are available only to operators of brick-and-mortar casinos. Like New Jersey, Delaware permits all forms of Internet gaming. The state has three licensed casinos all of which are associated with horse tracks. Two of the tracks, Delaware Park and Delaware Downs, are for thoroughbreds, and the third,

Harrington Raceway, is for standardbreds. Compared to New Jersey, Delaware revenues are tiny. Through September of this year, the [state's share](#) amounted to \$1,250,000, down about 23% from \$1,610,000 during the same period last year.

Overall, the gaming industry in Delaware has been suffering to the point where it has sought [legislative relief](#) in the form of tax credits. In a joint effort to increase revenues, Delaware and Nevada entered a [compact](#) under which Delaware players are allowed to play Internet poker on Nevada sites and vice versa. The compact was designed to increase "liquidity," the number of open seats at a virtual poker table available at any given time, in both states. The compact was signed in February, 2014, and [interstate play](#) began in March of this year. While it appeared to provide an initial boost to Delaware poker revenue, [month-to-month decreases](#) quickly appeared.

Finally, Nevada only permits Internet poker. Virtually all of the state's Internet poker offerings are provided by World Series of Poker, a brand owned by [Caesar's Interactive Entertainment, Inc.](#), and operates on [software](#) provided by [888 Holdings](#), a Gibraltar-based company. The Nevada gaming control board does not release Internet [poker revenues](#) but estimates suggest that they are a very small percentage of [overall Nevada gaming revenues](#).

In the main, Internet games in all three jurisdictions are entirely virtual. The potential exists, though to utilize [live dealers](#) who use a real deck of cards and interact verbally with remote players via a voice link over which all players can hear what the dealer and a particular player are saying.

In addition to the three states where Internet gambling is now operating, [ten others](#) -- Pennsylvania, Alabama, Iowa, California, Connecticut, Illinois, New York, Pennsylvania, Rhode Island, Texas and Washington -- have considered authorizing Internet play. Thus far, none have done so. In the spring of this year, it appeared that Pennsylvania would very likely have Internet gaming before the end of the year but the legislative session expired before any of the pending measures were enacted. Now, however, in the midst of budgetary discussions, the [issue may be back on the table](#). Illinois is in the middle of a very serious budget crunch and that may cause legislators to push forward with thus far unsuccessful efforts that thus far have not succeeded.

b. *Massachusetts*

Last term, two Internet gaming bills were filed in the Massachusetts legislature but neither made it out of committee. This year, three bills are pending, two of which deal with the Lottery. The first, [S151](#), was introduced by Sen. Flanagan and referred to the Joint Committee on Consumer Protection and Licensure. That bill would authorize the Lottery to offer online "lottery" games but would allow the Lottery to decide what those games look like. Last term a similar bill died in committee. A hearing on S151 was scheduled for

September 15 but the Legislature's website does not show whether it was actually held on that date or, if it was, what resulted. The second of the two is [S191](#), which was introduced by Sen. Rush and also referred to the Joint Committee on Consumer Protection and Professional Licensure. That bill would authorize and direct the Lottery “to implement online games of skill, including, but not limited to, fantasy sports, so-called, poker, so-called, and other games of skill, subject to the provisions of, and preempted and superseded by, any applicable federal law.” A hearing on that bill also was scheduled for September 15. Again, the Legislature’s website does not say whether the hearing was held or, if it was, what resulted.

The final bill is [S241](#). Introduced by Sen. Tarr, that bill would authorize any of our Category One or Two gaming licensee to conduct operations on the Internet under rules and regulations the Commission promulgates provided that “such operations do not include or reflect gaming mechanisms operated by the state lottery program of [*sic*] those simulating or resembling slot machines.” The bill was referred to the Joint Committee on Economic Development and Emerging Technologies but the Committee has not scheduled a hearing. Sen. Tarr introduced an almost identical bill last year but it died in committee. At our Internet gaming forum, he said that he carved out Internet slot machines because he believed that they had a very high addictive potential.

c. Tribal

The content of Internet games tribes can offer and the platforms available for offering them do not differ from those available to commercial operators. Nevertheless, two aspects of tribal Internet gaming are worth brief mention. First of all, tribes do not need state authorization, through a compact or otherwise, to offer Class II games in brick and mortar casinos. Theoretically, those games resemble bingo games but when offered in tribal casinos on electric platforms they are virtually indistinguishable from other slot machines. In any event, some tribes have taken the position that they have the right to offer those Class II games via the Internet without any state regulation or oversight. California has taken the position that once those games are offered on the Internet, they become Class III games and do require state approval. A [lawsuit](#) on that issue is pending in federal court in San Diego.

Second, a current general theory of Internet gaming is that the [bet takes place where the server is located](#). That being the case, some tribes have taken the position that they have the right to offer at least Class II games over the Internet anywhere in the world, including any state in the United States, as long as the servers are located on tribal land. The General Counsel for Mohegan Sun, which offers Internet [money games](#) in New Jersey and [free play](#) throughout the rest of the country, is a particularly strong proponent of that theory. The theory, however, has not yet been tested.

III. Sports Betting

A second well-established form of Internet gambling involves betting on sports. Primarily four sports -- horseracing, professional sports, fantasy sports and, now, eSports – are involved. Illegal betting on professional sports involves hundreds of millions of dollars, a fact that underlies at least some of the pressure to legalize and regulate all of the betting activity.

a. *Horse Racing*

Of the four, horseracing is probably the most well entrenched. Despite the Wire Act's broad prohibition of sports betting, [The Interstate Horse Racing Act of 1978](#), 15 U.S.C. 3004 et seq., permits state regulated horse racing and interstate off-track betting. As a result, betting is available on a number of Internet sites. [Twin Spires](#), a site controlled by Churchill Downs, is a prominent example. At that site, bettors can wager on races at hundreds of tracks throughout the world. The bettor makes a deposit at the site, goes to the track of choice and places a bet out of the amount that is on deposit. If he or she picks a winner, the winnings are deposited into the bettor's account. The site also contains handicapping information but stand-alone handicapping programs like one operated by [Equibase](#) also provide handicapping information, some for free and, in much more detail, some by paid subscription. Access to the betting sites is available on desktop and mobile devices. Two other major sites are [Xpressbet](#) and [NYRA Rewards](#), which is operated by the New York Racing Association.

Another approach is represented by [Derby Jackpot](#). There, the site presents a new race at a new track every five minutes or so. The bettor, who previously has created a deposit account, picks from one of three straight and three exotic bets, makes the bet from the amount on deposit and then watches the race real time as it is run. Winnings are placed in the bettor's account. Modest handicapping information for each race is available and trackside odds are displayed in real time.

All of these are using forms of advance deposit wagering or ADW as it is commonly known. With an ADW account, a bettor can place a wager via telephone, desktop or mobile device. Transmission of transactional information over the internet and telephone lines is authorized by the same federal law that authorizes simulcast betting at tracks and OTB facilities. In order to receive the racing signal, the ADW provider is charged approximately 4% of the handle, the same amount charged other simulcast sites. Because the overall takeout from the wagering pool is much lower than it is at tracks and many of the OTB sites, however, an ADW site can offer bigger payoffs. In the eyes of some observers, the proliferation of ADW sites is one of, if not the, primary reason that the racing industry has

suffered drastically declining attendance and significantly decreased revenues. A good summary of that problem is available in a [February 17, 2015 article](#) published in [Thoroughbred Racing Commentary](#), an excellent source for industry news.

b. Professional and Collegiate Sports

The Wire Act's prohibition on certain aspects of sports betting coexists with the [Professional and Amateur Sports Protection Act](#) (PASPA), 28 U.S.C. 3701, et seq., a 1992 federal law that directly bans wagers on professional and collegiate sports in all but four states. The four are Nevada, Delaware, Montana and Oregon and they are exempt under a "grandfather" provision of the statute because they allowed sports betting in 1992 when the law was passed. Nevertheless, Montana and Oregon do not currently permit any sports betting. Delaware permits sports betting only on a [parlay system](#) under which the bettor places a single bet on multiple games and must win on all of the games in order to win the parlay. In Nevada, [sports betting](#) is available through licensed bookmakers both in physical locations and online.

The PASPA law also gave New Jersey, which did not then permit sports betting, one year to enact the statutory framework for doing so. The legislature failed to meet that deadline and, therefore, sports betting in New Jersey has been prohibited just as it has been in the other 45 states. Recently, though, New Jersey enacted legislation permitting sports betting. The legislation was immediately challenged in federal court by MLB and the NCAA, NFL and NHL. The state responded by arguing, in essence, that regulation of gambling was primarily a matter of local interest and the federal desire to avoid placing a "label of legitimacy" on sports betting, the foundation on which PASPA rests, was insufficient to override the local interests. The leagues prevailed in the [District Court](#). On appeal to the Third Circuit, a [divided panel](#) likewise ruled against the state. Now, however, the Third Circuit has [granted the state's motion for rehearing](#) en banc at a date yet to be scheduled.

c. Fantasy Sports Betting

Fantasy sports is the newest, hottest and now most controversial offering in the sports betting area. As described in [an article](#) by Ben McGrath published in the New Yorker this past April, the concept began years ago in a much quieter form. That concept involved creating a fantasy team composed of real players from different professional teams, entering the team in a fantasy league at the start of the real team's season and playing through the real season, trading players as the season progressed. At the end, those who "owned" the top teams would get cash prizes made up of the money team "owners" paid to enter the league as the season began. The team's standings at the end depended on the success of the actual players on the fantasy team's roster.

That form of fantasy sports still exists but millions of people now play daily fantasy sports games offered by [FanDuel](#) or Boston's [DraftKings](#), the two major companies in this space, though others such as [StarsDraft](#), which is owned by [Amaya Gaming](#), also offer fantasy games. The typical game involves putting together a team, paying an entry fee to one of the companies and then seeing how the team does based on the success of the players on the contestant's team in the real games played that day. In addition to football, basketball, baseball and hockey, the [DraftKings](#) and [FanDuel](#) sites offer the opportunity for fantasy play on golf, NASCAR racing, college basketball and football, as well as other sports. The entry fees are relatively small but one can create and enter as many teams as one chooses. The payoffs to the winners at the end of the day can be substantial. So, too, can the payoff for other forms of fantasy betting such as [Beat the Streak](#) in which players pick two major league baseball players whom they think can beat Joe DiMaggio's 1941 consecutive game hitting streak of 56 games. The bettors stay with those players until they beat the streak or, as has thus far always happened, end their own streak far short of 56 games.

The professional leagues have embraced the fantasy concept with some enthusiasm. The Red Sox [official website](#) has a link to a fantasy portal operated by [Major League Baseball](#). The Patriots website does not have a similar link but DraftKings has entered into an [arrangement](#) with the Patriots, Cowboys and Chiefs under which there is a DraftKings fantasy area in each of the three teams' home stadiums. In addition, the Kraft Group [reportedly](#) has invested in DraftKings as have several other sports and non-sports companies.

A barrage of advertising by DraftKings and FanDuel on televised NFL games as the 2015-16 season began triggered inquiries by state regulators regarding whether fantasy sports amount to permissible or impermissible betting activity under various federal and state laws. Both companies took the position that their business was conducted exclusively over the Internet and that the UIGEA specifically carved out fantasy sports as an area of lawful Internet gaming activity. A majority of observers, however, think that the carve-out in the statute is much more limited and simply leaves the matter of legality to the law of the state in which the betting activity takes place. A succinct discussion of the legal issues appears in an article by Prof. Nelson Rose that is on file in the Internet folder on our shared drive. Running parallel to discussions of legality is a lively discussion about the policies implicated by widespread availability of fantasy sports betting. The contours of the debate are exemplified by an October 5, 2015 [editorial](#) in the New York Times and a [response](#) by the American Gaming Association.

It appears that several investigations of daily fantasy sports are now underway. Those include an apparent investigation by federal grand juries in [Tampa](#) and in [Boston](#) and investigations by the [New York](#) attorney general's offices. In Illinois, the state [Gaming Board](#) has publicly expressed the view that daily fantasy sports is illegal under Illinois law

and has asked the attorney general for an [opinion](#) on the subject. In addition, several [civil lawsuits](#) are pending in state courts arising out of alleged "insider trading" revelations about the activities of a DraftKings employee.

By far, the most definitive step thus far has been taken by the Nevada Gaming Control Board. On October 15, 2015, A. G. Burnett, the board's chair, issued a [ruling](#) stating that fantasy sports betting was prohibited under Nevada law unless the operators had the appropriate Nevada licenses. In Burnett's view, daily fantasy sports activity constituted a "game" as defined by Nevada law, thus making conduct of the "game" a form of "gambling" for which a license was required. He also stated that daily fantasy sports activities constituted a "sports pool," which also required a Nevada license. Burnett's ruling was supported by a detailed [opinion](#) issued by the Nevada Attorney General on October 16.

In Massachusetts, Attorney General Healey has on several occasions expressed her belief that daily fantasy sports [violates neither state nor federal law](#), though she is interested in ensuring that various consumer protection devices are in place to safeguard the interests of the bettors. MGC staff has prepared a memorandum outlining various statutes and decisions that are relevant to this rapidly evolving issue.

d. eSports Betting

Thus far lurking in the background but soon to emerge with far greater visibility is something known as eSports. Described on [Wikipedia](#), and more thoroughly in an [article](#) published in the New Yorker's November 24, 2014, issue, eSports is "is a term for organized [multiplayer video game](#) competitions, particularly between [professional](#) players. The most common [video game genres](#) associated with electronic sports are [real-time strategy](#), [fighting](#), [first-person shooter](#), and [multiplayer online battle arena](#). Tournaments . . . provide both live broadcasts of the competition, and cash prizes to competitors."

One of the largest eSports sites is Twitch TV. Owned by Amazon, the site [announced](#) this June that it was broadcasting an average of 1.5 million games per month worldwide to an average of 100 million monthly viewers. Two colleges recently decided to treat eSports as a [varsity sport](#), complete with scholarships. Three years ago the State Department agreed to issue foreign professional eSports players [professional athlete visas](#), placing them on the same level as all other international athletes.

Some of the [competitions](#) take place before large live audiences for prizes in the millions of dollars. Recognizing the size of the audience and the popularity of the games, Turner Broadcasting Company recently announced that it plans to run two 10 week tournaments in 2016 with a [live broadcast](#) of a contest on TBS stations throughout the country each Friday night during those 10 week periods.

The games also provide betting opportunities. A company called [Unikrn](#), for example, live streams games played by two professional contestants or teams of contestants, accompanied by a play-by play commentary and betting opportunities for those in jurisdictions where Internet betting is permitted. Rahul Sood, the company's founder and CEO, gave one of the three keynote addresses at this year's G2E conference in Las Vegas. The eSports's fan base today, [Sood said](#), is approximately the size of the NHL's fan base but he predicted that by 2017 it will grow to the size of the NFL's. Among others offering both live-streamed games and betting opportunities are [Vulkun](#) and [EGB](#).

The trajectory of this new form of sports is far from clear. What is clear is the size of the audience it currently enjoys and the certainty that it is an area the Commission ought to watch carefully. The speed of change and the [astonishing technological possibilities](#) awaiting game producers require that kind of observation and, at least at some point, commencement of contingency planning.

IV. [Social Gaming](#)

Running parallel to real money gambling is a form of entertainment known as social gaming. That label stems from the fact that Facebook has historically been the gateway to many of the most popular games. Today, however, the label now applies to all forms of Internet gaming in which prizes remain in the game and cannot be redeemed either for real money or for other tangible rewards.

Some of the games bear no resemblance to casino games. One of the original favorites was a game called FarmVille which one could access exclusively through Facebook, though versions of the game now are available at the website of [Zyngagames](#), its creator. Despite the genre's different origin, games that resemble casino games today proliferate. [DoubleDown](#), an IGT offering, is an example. On a desktop computer, the program often appears on the website of a casino and is initially accessed through [Facebook](#) where the user is told that "DoubleDown Casino will receive the following info: your public profile, email address and birthday" unless the user elects not to provide some or all of that information. As a second step, the casino may request additional personal information before the user is permitted to play. The site also can be accessed as a stand-alone app on a mobile device. If accessed in that fashion, the user goes directly to the DoubleDown site without providing personal information and is presented with a variety of games including those that resemble slot machines and table games.

As another example, [BeeCave Games](#) offers slots and blackjack in a sophisticated package that includes the ability to "chat" with other players at the same blackjack table and an ability to choose players with whom to play. The games can be accessed through Facebook or independently through a mobile app but, if the latter, points are offered to the player for inviting "friends" to join the play.

Virtually all of these games use the “freemium” model in which new players receive an initial amount of play money for free and can purchase more when that supply is exhausted. The vast majority do not offer any tangible rewards for successful play or any ability to convert the play money into real money or other things of value. Some, however, link success on the social gaming site to some form of recognition, tangible or otherwise, when the player visits a brick-and-mortar facility with which the social site is affiliated. Under some circumstances, that link may constitute a "prize" that completes the price, chance, prize trilogy that typically defines regulated and illegal gambling.

Social gaming of this type is a big business. Some estimates suggest that worldwide social gaming revenues will approach \$30 billion in 2015, though that includes all forms of social games, not just those that resemble games available in casinos. Insofar as casino type games are concerned, a January, 2015, report on social gaming prepared by the [UK Gambling Commission](#) observed that “[w]hen average spend per day is multiplied up, only age groups 46 and older have an average yearly spend in excess of \$1,000, on a leading casino-style game. Globally, on a leading gambling-style social game, more than 90% of customers never spend anything. Of the 10% that do spend something, 90% spent less than \$500 in the preceding 12 months (and most who spend anything spend considerably less than this). For a leading gambling-style game, less than 120 people (in the UK) spent more than \$1,000 in the preceding year.” The report and its observations are worth reading in their entirety.

In addition to their potential for generating revenue, casino type social games are also a marketing opportunity for casinos. In that regard, whether they are explicitly associated with a casino or simply presented as a stand-alone operation, an area of possible concern is whether the odds on the casino-type games approximate the odds one is likely to encounter in a real casino. Some [thoughtful commentators](#) have expressed a concern about the possibility that the social gaming odds could be set at a level much more favorable to the player than those he or she is likely to encounter in an actual casino. The extensive UK report did not draw any such conclusions but the issue is worthy of the Commission's attention as the rollout process continues.

V. Skill Based

In addition to the games just described, some sites offer what appear to be true games of skill in which one can play against an opponent for real money. [Skillz](#), for example, offers a very realistic bowling game that one can play on a tablet either alone or in competition for real money with another player. The game has a look and feel that seems to make it a pure game of skill. Nonetheless, elements of chance such as pin placement, the algorithm that determines which pins fall when the ball strikes, the skill of the opponent, the role played by the "oil" on the lane or other game elements likely affect at least some part of the play.

In that regard, it will be important to watch the development of skill based slot machines for which the state of Nevada will likely set the standard at least for the immediate future. Indeed, many of the current versions were on display at the recent G2E gathering in Las Vegas. Many are described in reviews published by [CDC Gaming Reports](#) and [The Motley Fool](#). Some, and perhaps most, of those games can easily migrate easily to the Internet or already exist on the Internet as social games and can migrate to the gaming floor. That migration itself may be a feature of casino gaming to which regulators will have to pay attention to ensure that it does not create an environment for what amounts to loosely regulated or unregulated casino gambling.



October 26, 2015

Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Massachusetts Gaming Commission:

On behalf of Stop Predatory Gambling and the Public Health Advocacy Institute at Northeastern University, we write to demonstrate that a close reading of Massachusetts statutes and their interpretation by the Supreme Judicial Court show that daily fantasy sports operators such as DraftKings and FanDuel are conducting illegal gambling operations in the Commonwealth.

I. What Is “Daily Fantasy Sports” And Why Is It A Problem?

Season-long fantasy sports started as a hobby and a form of community among enthusiasts. It was largely a social activity. The trophy mattered more than the money. With the introduction and massive promotion of “Daily Fantasy Sports” (DFS), it has been turned into a profit-making commercial operation that clearly incorporates the three elements of gambling: consideration, chance, and prize.

FanDuel, DraftKings and other DFS companies have corrupted the traditional structure and recreational nature of hobbyists’ fantasy sports activities (commonly known as “rotisserie leagues”). Daily fantasy sports games restart constantly and typically are played against strangers. Rather than simply hosting leagues for users, daily fantasy sports operators serve as an exchange and profit by retaining a percentage of the moneys wagered (“entrance fees”). Another contrast between traditional fantasy sports leagues and the new breed of DFS is that these companies are multi-billion dollar profit centers with rewards for very few of their players that bear no resemblance to traditional rotisserie leagues that, until recently, defined the term fantasy sports.¹ Most importantly, as outlined below, DFS is a form of illegal gambling under Massachusetts law.

¹ See Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling*, BOSTON GLOBE, August 2, 2015, <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.

II. Under Massachusetts Law, “Daily Fantasy Sports” Constitutes Illegal Internet Sports Gambling

“Daily fantasy sports” is internet sports gambling that is legally indistinguishable from a privately run lottery or numbers game. Both internet gambling and commercial sports gambling are illegal in Massachusetts. Such online gambling operations fall squarely within the state’s legal definition of prohibited lottery gambling.

A. The Massachusetts Legislature Has Prohibited Gambling, and Has Not Created a Carve-Out Exception or Explicit Provision to Legalize Daily Fantasy Sports Enterprises

There is a presumption in Massachusetts law that any lottery or gambling activity that is not *specifically* authorized is prohibited. M.G.L. ch. 271, § 7 prohibits individuals or corporations from setting up or promoting any private lottery. As of 2011, the statute also prohibits any gambling that is “not taking place in a gaming establishment [casino] licensed pursuant to M.G.L. ch. 23K.”

Likewise, M.G.L. ch. 271, § 16A, prohibits the provision of facilities for gambling or “assist[ing] in the provision of facilities or services for the conduct of illegal lotteries, or . . . the illegal registration of bets or the illegal buying or selling of pools upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the happening of any event, or upon the result of a game, competition, political nomination, appointment or election . . .” Thus, far from being authorized, providing facilities for betting on the performances of individual athletes (“the skill, speed or endurance of man”) is expressly prohibited.

In 2011, the Legislature enacted specific exemptions in these two statutes for casino establishments that are regulated under M.G.L. ch. 23K. Express exemptions are the norm in these laws. Both statutes make specific reference to an exemption the MA Legislature created in 2011 for casino establishments, embodied in M.G.L. ch. 23K. If the Legislature had intended to exempt DFS from G.L. ch. 271 § 7 and §16A, it would have included it within the purview of ch. 23K. The legislature did not do so, however, and thus there is no statutory authorization in Massachusetts.²

² In addition, M.G.L. ch. 271, § 5B bans internet gambling. This statute, which contains express exemptions for the state lottery, for certain charitable bingo games, and supermarket sweepstakes, shows that, under Massachusetts law, any form of gambling is illegal unless there is an act of the Legislature, expressly authorizing it.

B. Massachusetts Statutes (as Interpreted by the MA Supreme Judicial Court) **Prohibit Private Lottery Enterprises**

The Supreme Judicial Court has long ago settled on the interpretation of these statutes. A lottery is defined in the following manner:

- The word “lottery” signifies a scheme for distribution of prizes by chance.³
- The fact that skill as well as chance enters into a game does not prevent it from being classified as a lottery.⁴
- There are three elements in a lottery: (1) payment of price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.⁵

DFS meets all of the requirements of the fundamental definition of gambling. It has *payment of price* (the player wagers money), *the possibility of winning a prize* (the player wins cash prizes), and *hazard or chance* (there must be at least enough variance that an unskilled or lesser skilled bettor can, at least occasionally, win the prize).

In deciding a case in which the gambling activity has a mix of skill and chance, Massachusetts applies the *predominance test*. The MA Supreme Judicial Court first set forth the elements of the predominance test in *Commonwealth v. Plissner* in 1936, stating “With reference to cases where both elements [skill and chance] are present, the rule generally stated is that if the element of chance rather than that of skill predominates, the game may be found to be a lottery.”⁶ Importantly, the Court further elaborated with a second, alternative test “that if the element of chance is present in such a manner as to thwart the exercise of skill or judgment in a game, there may be a lottery . . . This test is in harmony with the rule that a result is determined by chance where it is determined ‘by means making the result independent of the will of the manager of the game.’”⁷ The performances of individual athletes on any given day, which form the basis of DFS contests, are independent of the will of the manager of the game.

In 1944, in *Commonwealth v. Lake*, the SJC revisited the issue of applying the predominance test, noting that there are an infinite number of types of games that can involve both skill and chance, and that “in order to render the laws against lotteries effectual to combat the evils at which they are aimed, it has been found necessary to draw a compromise line between the two elements, with the result that by the weight of authority a game is now considered a lottery where the element of chance predominates and is not a lottery where the element of skill predominates.”⁸ The *Lake* Court interpreted the predominance test applying the following standard: “[I]n determining which element predominates, where the game is not one of pure skill or of pure chance, some courts have held, we think rightly, that it is permissible in appropriate instances to *look beyond the bare mechanics of the game itself* and to consider

³ *Commonwealth v. Mackay*, 177 Mass 345 (1901).

⁴ *Commonwealth v. Plissner*, 295 Mass 457 (1936).

⁵ See *Commonwealth v. Lake*, 317 Mass 264 (1944); *Commonwealth v. Frate*, 405 Mass 52 (1989).

⁶ See *Commonwealth v. Plissner*, 295 Mass 457, 464 (Mass. 1936).

⁷ *Id.* at 466.

⁸ *Commonwealth v. Lake*, 317 Mass. 264, 267 (Mass. 1944).

whether as actually played by the people who play it chance or skill is the prevailing factor.”⁹
The crux of the jury’s decision properly focused on:

1. Whether the players have any “appreciable degree of skill;”
2. Whether “to the great majority of players the game would be primarily a game of chance;” and
3. Whether “the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery.”¹⁰

DFS operators deceptively claim that DFS is “a game of skill” but the presence of skill is largely irrelevant. Even if one were to argue that a “skilled” DFS player is not gambling, then it would also be true that a lesser or unskilled player is, in fact, gambling. The very existence of skilled DFS players – playing with an edge and for a profit – depends on the presence of lesser skilled players willing to gamble at a disadvantage against them.

A recent analysis of DFS winners and losers concluded that the majority of DFS customers lack the skill to ever have success and thus are relying largely on chance to recoup some of their investment: “While any player might get lucky on the back of a handful of entries, over time nearly all of the prize money flows to a tiny elite equipped with elaborate statistical modeling and automated tools that can manage hundreds of entries at once and identify the weakest opponents.”¹¹ Another study demonstrates that DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or even those who play completely randomly. As more fully explained below, for the great majority of DFS players, the game is primarily a game of chance.¹²

IV. “Daily Fantasy Sports” Profit Only By Attracting Unskilled Players

FanDuel, DraftKings and similar commercial sports gambling operators (*e.g.*, Victiv, Kountermove, BetAmerica, HotRoster, DailyMVP, FanNation, ScoreStreak, Tradesports) are not the result of a grassroots citizens movement demanding internet gambling. Rather, they are the end result of powerful financial interests seeking to exploit what they wrongly believe is an unregulated area of law at the expense of everyday people.¹³

DFS’s business model only works by attracting unskilled players – sometimes referred to as the “minnows” - to feed the skilled ones – known as the “sharks.” The “sharks” are the

⁹ *Id.* at 267-268 (emphasis added).

¹⁰ *Id.* at 268.

¹¹ Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK, September 10, 2015, <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.

¹² See Ed Miller & Daniel Ginger, *For Daily Sports Operators, the Curse of Too Much Skill*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, July 27, 2015, <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

¹³ Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal And Completely Unregulated*, THINK PROGRESS (May 7, 2015, 8:31 AM), <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/>.

players whose successes are used in marketing to attract masses of “minnows” who place less sophisticated wagers in order to generate a substantial amount of winnings for the “sharks” and profits or “rake” for the game operators. These “sharks” are experts, designing and using highly sophisticated proprietary algorithms to win consistently.

“Minnows” are those who tend to be new sign-ups with limited experience and who lose their money. Finding new “fish” to feed to the “sharks” is the most important requirement for this enterprise to succeed over the next few years, and DFS operators’ unprecedented mass advertising campaigns and marketing deals with pro sports teams and leagues are a key to making it happen. The only real driver of growth and profit for these operations lies in finding as many new “minnows” as possible, without which, the model falls apart.¹⁴

A recent study¹⁵ breaks down the divide between the benefits the sharks reap versus the losses the minnows suffer:

- The top 11 players paid on average \$2 million in entry fees and profited \$135,000 each. They accounted for 17 percent of all entry fees. The winningest player in the study profited \$400,000 on \$3 million in entry fees.
- The rest of the top 1.3 percent of players paid on average \$9,100 in entry fees and profited \$2,400 each, for a 27 percent ROI, which is extremely impressive. These contestants accounted for 23 percent of all entry fees and 77 percent of all profits.
- 5 percent of players are the big fish; they lost \$1,100 on entry fees of \$3,600 on average.
- 80 percent of players were the minnows; they lost \$25 on entry fees of \$49 on average.

Even if the DFS companies try to disguise the nature of their business, their winningest customers (of whom there are only a few) are clear-eyed about what is taking place. As highly successful DFS players recently told the *Wall Street Journal*,

[T]he future of the industry is based on attracting casual fans. "If this is going to get huge, we need the guys who are going to buy in for \$20. They do it for fun," Wiggins says. *But if that happens, number-crunching sharks like Albertson will be lying in wait.* If casual players embrace daily fantasy in bigger numbers, Albertson says, "then we'll really be a printing press."¹⁶

V. Sports Gambling Operators Are Targeting Massachusetts Youth

A key demographic for internet sports gambling operators like FanDuel and DraftKings is youth. This should concern everyone because it is well-established that the younger children start gambling, the more likely it is they will become habitual gamblers and also problem

¹⁴ See Miller, *supra* note 12 (analyzing how DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or play completely randomly); see also Brustein, *supra* note 11.

¹⁵ See Brustein, *supra* note 11.

¹⁶ Brad Regan, *A Fantasy Sports Wizard's Winning Formula*, THE WALL STREET JOURNAL, June 4, 2014, <http://online.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>

gamblers.¹⁷ One report cites data from the Fantasy Sports Trade Association estimating that almost 10 million of the estimated 51.6 million fantasy sports players are under 18.¹⁸ One of the companies to launch its own sports gambling operation, Yahoo, has recruited thousands of minors to play free fantasy sports. The obvious business model is for Yahoo to convert these “for-free” players into “real-money” gamblers. Such youth is at risk for being lured into real-money gambling whether at Yahoo, other DFS gambling sites, or with other illegal gambling operations. This approach is directly akin to the unfair practice used for years by tobacco companies to get youth addicted to smoking by offering them free cigarettes.¹⁹

Internet gambling is especially addictive for youth who have grown up playing video games. By deceptively luring the Commonwealth’s youth into online gambling, these sports gambling operators are setting up an entire generation of young people to become problem gamblers by making exploitive forms of gambling omnipresent in everyday life, whether in their own homes or on the smartphones they carry with them everywhere. When that ubiquitous presence and availability are combined together with the intense passion many young people have for their favorite athletes and sports, and then blend in sophisticated targeted marketing, player data tracking and tendency exploitation, it is clear that DFS presents a dangerous, predatory mix to children in the short and longer term.

VI. Other States Have Recognized That DFS IS Gambling

Nevada is only the most recent state to recognize that DFS is “gambling.”²⁰ A statement released by the Nevada Gaming Control Board states “DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission.”²¹ Likewise, the Washington State Gambling Commission has specifically declared that fantasy sports constitutes gambling, declaring “[F]antasy sports have never been authorized as gambling activities in Washington and are illegal.”²² In addition, the states of Arizona and Louisiana treat DFS as gambling, and prohibit it because the operators are commercial businesses that receive a share of the amounts wagered.²³

¹⁷ NEW YORK COUNCIL ON PROBLEM GAMBLING - KNOW THE ODDS, THE DANGERS OF YOUTH GAMBLING ADDICTION, (May 2013), http://knowtheodds.org/wp-content/uploads/2013/05/NYCPCG_ebook_YouthGambling_052114.pdf

¹⁸ Robert DellaFave, *Identify Verification, Financial Checks At Yahoo Daily Fantasy Sports Lag Far Behind Industry Standards*, LEGAL SPORTS REPORT, July 29, 2015, <http://www.legalsportsreport.com/2405/problems-with-yahoo-dfs-platform/>

¹⁹ Ronald M. Davis & Leonard A Jason, *The Distribution Of Free Cigarette Samples To Minors*, 4(1) AM. J. PREV. MED. 21 (1988 Jan-Feb), <https://industrydocuments.library.ucsf.edu/documentstore/z/x/b/b/zxbb0142/zxbb0142.pdf>.

²⁰ Callum Borchers & Shelley Murphy, *Nevada Orders Fantasy Sports Sites To Shut Down*, BOSTON GLOBE, October 15, 2015, <https://www.bostonglobe.com/business/2015/10/15/nevada-orders-fantasy-sports-sites-shut-down/xgzblWGDtcwskI6mIsGvYI/story.html>.

²¹ A.G. Burnett, Chairman, Nevada Gaming Control Board, *Notice To Licensees, Legality of Offering Daily Fantasy Sports In Nevada*, (October 15, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10481>.

²² Bobby P. Meek, *Exploring the Fantasy World of Internet Gambling*, 18 (May 14, 2015), <https://uarkive.uark.edu/xmlui/bitstream/handle/10826/1161/MEEK-THESIS-2015.pdf?sequence=1>.

²³ Id.

Like these other states, Massachusetts has clearly delineated, through the courts and its statutes, the types of gambling that it deems appropriate and allowable under the current law (a state-run lottery, charitable bingo games, state-regulated casino establishments). The Commonwealth's prohibition on all other gambling contains no exception for DFS enterprises, yet they are proliferating to the point of ubiquity in Massachusetts.²⁴ The lack of any action to stop this illegal enterprise and either to tolerate it or wait until some future legislative action allows it sends the wrong message: that it is acceptable to engage in an illegal enterprise now and, if it generates enough revenue, wait until lobbyists and corporate interests change its legal status. We urge you to take affirmative action to clarify that this type of business enterprise is illegal in the Commonwealth.

²⁴ Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling* (August 2, 2015), <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.

MacLachlan, Amy (MGC)

From: MGC Website <website@massgaming.com>
Sent: Monday, October 26, 2015 11:01 AM
To: MGCcomments (MGC)
Subject: Contact the Commissioner Form Submission

Categories: Green Category

Name

Justin Evans

Email

j.evans03@gmail.com

Subject

Daily Fantasy Sports

Questions or Comments

I understand that there is a hearing on the legality of daily fantasy coming up. I would just like to weigh in as an avid player for the last 2 years. I have not won millions, nor do i expect to. I play for fun, the same reason I play fantasy football on Yahoo or ESPN.

Massachusetts is a hub for innovation, and one of those innovators has been DraftKings. Even now that Ethan has been found free of any wrongdoing, it is clear that there needs to be some kind of oversight board. But to prevent over complicating the matter this should occur at the federal level. Other states have been fighting back against Daily Fantasy, seemingly unaware that these sites generate enormous revenue as all income is taxed. Since DraftKings is based in Boston that is doubly true for Massachusetts.

Given that the attorney general has already given her approval, and the sites have already begun the process of creating a regulatory board, I would ask you to let this process play out. This was an innovative industry born from the UIGEA that shut down online poker, and has done everything within the law. It has simply grown too fast and needs to develop the tools to keep its users protected. As one of those users I am fully confident in their ability to do so.

Thank you for your time,
Justin