



***The Report of the Special Commission  
to conduct a comprehensive study relative to the  
regulation of online gaming, fantasy sports gaming  
and daily fantasy sports***

**July 25, 2017**

## **Acknowledgements**

The Special Commission to conduct a comprehensive study relative to the regulation of online gaming, fantasy sports gaming and daily fantasy sports would like to acknowledge the following individuals for their assistance in preparing this Report: Emiley Lockhart, General Counsel and Policy Director for Senator Eileen Donoghue, Chair of the Senate Committee on Steering and Policy and Joint Committee on Export Development; Rory O’Hanlon, Research Director to the Joint Committee on Economic Development and Emerging Technologies; Matthew Young, Legal Counsel to the Joint Committee on Economic Development and Emerging Technologies; Malia Allen, Research Analyst to the Joint Committee on Economic Development and Emerging Technologies; Garrett Casey, Legislative Director for Senator Eileen Donoghue; Frank Munro, Aide to Senator Eileen Donoghue; Justin Stempeck, Staff Attorney, Massachusetts Gaming Commission; and Dan Krockmalnic, Assistant Attorney General at the Massachusetts Attorney General’s Office. The Special Commission would also like to extend appreciation to all individuals who provided testimony to the panel.

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## **I. EXECUTIVE SUMMARY**

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### **PURPOSE OF THE SPECIAL COMMISSION**

The special commission to investigate, study, and make recommendations on the issue of online gaming and daily fantasy sports (“Special Commission”) was established by Section 137 of Chapter 219 of the Acts of 2016, and passed by the Legislature on July 31, 2016. The purpose of the Special Commission is “to conduct a comprehensive study relative to the regulation of online gaming, fantasy sports gaming and daily fantasy sports.” The legislative charge directed the Special Commission to “review all aspects of online gaming, fantasy sports gaming and daily fantasy sports... [and] submit its final report and its recommendations ... not later than July 31, 2017.”

### **PROCESS**

The bipartisan nine-member Special Commission conducted seven meetings open to the public in the State House from October 2016 through July 2017. The Special Commission invited experts and industry stakeholders from across the country to provide testimony, and also received testimony from the Massachusetts Gaming Commission, the Massachusetts Attorney General’s Office, and others with relevant expertise.

### **SPECIAL COMMISSION FINDINGS**

Understanding the diversity of issues related to fantasy sports and online gaming, the Legislature called upon the Special Commission to specifically consider the “economic development, consumer protection, taxation, legal and regulatory structures, implications for existing gaming, burdens and benefits to the Commonwealth, and any other factors the commission deems relevant.” In consideration of those directives, the Special Commission finds as follows:

- The legal and regulatory framework for gaming, both on the state and federal levels, is complex and nuanced. Any effort to legalize online gaming, including daily fantasy sports, must include a thorough analysis of Massachusetts gaming laws (including the criminalization of lotteries and betting pools), and federal gaming laws (including the Wire Act and the Department of Justice’s memorandum interpreting the Wire Act, the Unlawful Internet Gambling Enforcement Act, and the Professional and Amateur Sports Protection Act).
- Examination of the current gaming landscape in Massachusetts reveals that the Expanded Gaming Act, which passed the Legislature in 2011, contains a number of unique features and central principles which may be applicable for online gaming. While the industry is still emerging in Massachusetts, the licensed casinos themselves are able to offer useful examples of how gaming can be successful for Massachusetts.

- Investigation of the history and mechanics of Daily Fantasy Sports (“DFS”) shows an evolving yet successful industry that is facing increasing scrutiny and regulatory uncertainty – issues that can and should be resolved in Massachusetts.
- Under the authority provided by M.G.L. Chapter 93A, the Massachusetts Attorney General commenced a comprehensive review of DFS and carefully crafted consumer protection regulations. These regulations set the benchmark for the country, and the industry, and the Attorney General’s Office continues to monitor the manner by which DFS operators conduct their business.
- There is an extensive world of online gaming beyond DFS that should be considered in Massachusetts. The Commonwealth would be well served to review the legalized online versions of traditional casino games available in Nevada, New Jersey, and Delaware, and to consider the viewpoints of the state’s licensed casino operators as they relate to expanding casino games online. Moreover, other online games – including online sports betting, social gaming, and online prediction market gaming – are prevalent, growing in popularity, and should be deliberated upon as the state moves forward.
- An analysis of the background and operation, including non-gaming aspects, of the emerging field of eSports, a related but unique part of online gaming where video game players compete with one another in leagues and tournaments, reveals that there are numerous commercial and economic development opportunities potentially available to the state.
- The benefits and burdens of legalized online gaming, including tax revenue, jobs, reduction in illegal activity, transparency, safety of online operations, underage gaming, problem gaming, and cannibalization of existing gaming, will necessarily fluctuate with any change to the status quo and will require ongoing analysis depending on how the Commonwealth proceeds.

## **SPECIAL COMMISSION RECOMMENDATIONS**

The Special Commission received strong advocacy for different approaches to online gaming, and appreciates the need to balance an efficient omnibus approach with the desire to proceed carefully and with caution. The Special Commission recommends: (1) that “online gaming” be defined broadly to encompass all manner of online games (including DFS); (2) that the Legislature work to balance regulation with innovation and develop a robust framework as to how all online gaming should be governed, taxed, and regulated generally; and (3) that, rather than legalizing all online gaming at once, the Legislature retain oversight over which parts of online gaming should be legalized.

- *Defining Online Gaming:* The Special Commission heard from many experts and interested parties about the necessity of defining “online gaming,” and views this charge as one the most important to carry out. Because Massachusetts already enjoys such a broad reading of what constitutes gaming, the Special Commission recommends a correspondingly comprehensive definition of what is considered “online gaming.”

- *Balancing Regulation and Innovation:* The Special Commission recommends the following best practices be considered in any regulatory scheme for online gaming in order to protect consumers, ensure fair play, and encourage this emerging industry: (i) clearly defined terms; (ii) legal gaming age; (iii) geolocation; (iv) suitability and registration/licensure; (v) responsible gaming/preventing compulsive gaming; (vi) fairness in game play; (vii) truth in advertising; (viii) controlling for any apparent conflict of interest; (ix) data/network security; and (x) fund processing/segregation/protection. In addition, the Special Commission suggests the Massachusetts Gaming Commission as the appropriate body to administer the day-to-day governing of online gaming, but further recommends that the authority for deciding whether and to what extent online gaming should be legalized should remain with the Legislature. The Special Commission demurs on identifying an exact tax rate for online gaming, but does recommend specific guidance to consider and further recommends that any revenue from online gaming shall be allocated to the Gaming Revenue Fund.
- *Recommended Legislative Path for Legalization:* At this time, the Special Commission recommends legalizing DFS as a subset of online gaming and enacting legislation that would put into law the proposed regulatory, governance, and taxation system described above. However, the Special Commission recommends not legalizing more expansive online gaming at present, particularly in consideration of the fact that two resort casinos are not yet open, but urges re-evaluation in the near future and legislative oversight to continue to evaluate online gaming and activity at state and federal levels. The Special Commission acknowledges that there is opportunity in these areas, and expects that legalization of additional online gaming is inevitable.
- *Recommended eSports Economic Development Considerations:* Separate from gaming, the Special Commission recommends the Commonwealth consider promoting eSports as an economic development opportunity for the state. Because of the potential for commercial activity and a cultural identity that appeals to the eSports industry, local leaders are already entering the eSports industry and forming teams within Massachusetts. This could be a unique and well-timed opportunity to form partnerships that would benefit economic development in Massachusetts.

## **II. STRUCTURE OF THE SPECIAL COMMISSION**

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The Special Commission on Online Gaming, Fantasy Sports Gaming, and Daily Fantasy Sports was established by the Massachusetts Legislature as part of the 2016 economic development law.<sup>1</sup> The enabling legislation required that the commission be composed of:

1 person who shall be appointed by the governor who shall have industry expertise in fantasy sports gaming; 1 person who shall be appointed by the Massachusetts gaming commission; 1 person who shall be appointed by the attorney general who shall have expertise in fantasy sports gaming consumer protection; 2 people who shall be appointed by the president of the senate, 1 of whom shall be the senate chair of the joint committee on economic development and emerging technologies; 1 person who shall be appointed by the minority leader of the senate; 2 people who shall be appointed by the speaker of the house of representatives, 1 of whom shall be the house chair of the joint committee on economic development and emerging technologies; and 1 person who shall be appointed by the minority leader of the house of representatives. The commission shall be co-chaired by the house and senate chairs of the joint committee on economic development and emerging technologies.

In accordance with the statutory guidelines, the members of the commission are:

- Representative Joseph F. Wagner, House Chair of the Joint Committee on Economic Development and Emerging Technologies and co-chair of the special commission;
- Senator Eileen M. Donoghue, Chair of the Senate Committee on Steering and Policy, Senate Chair of the Joint Committee on Export Development and co-chair of the special commission<sup>2</sup>;
- Senator Jennifer L. Flanagan (Appointed by Senate President Rosenberg);
- Representative Mark J. Cusack (Appointed by Speaker DeLeo);
- Representative James M. Kelcourse (Appointed by House Minority Leader Jones);
- Mr. Hirak Shah, Legal Counsel to Senate Minority Bruce E. Tarr (Appointed by Senate Minority Leader Tarr);
- Mr. Stephen Crosby, Chairman of the Massachusetts Gaming Commission (Appointed by the Massachusetts Gaming Commission);
- Mr. Dan Krockmalnic, Assistant Attorney General (Appointed by Attorney General Healey); and
- Mr. Peter Schoenke, Chairman of the Fantasy Sports Trade Association (Appointed by Governor Baker);

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<sup>1</sup> 2016 Mass. Acts c.219 § 137.

<sup>2</sup> Senator Donoghue served as the Senate Chair of the Joint Committee on Economic Development and Emerging Technologies when the commission was formed.

### **III. PURPOSE AND METHODS OF THE SPECIAL COMMISSION**

The purpose of the Special Commission is to investigate, study, and make recommendations on the issue of online gaming and daily fantasy sports. Specifically, the Special Commission was charged with the following:

[to] review all aspects of online gaming, fantasy sports gaming and daily fantasy sports including, but not limited to: economic development, consumer protection, taxation, legal and regulatory structures, implications for existing gaming, burdens and benefits to the commonwealth and any other factors the commission deems relevant.

In addition, the Special Commission was required to “not include in its review a comprehensive review of the state lottery or its ability to provide lottery products online or over the internet.” The Massachusetts Lottery is been excluded from any of the Special Commission’s Findings or Recommendations.

The bipartisan nine-member Special Commission conducted seven meetings open to the public in the State House from October 2016 through July 2017, after providing ample public notice of all meetings held, notifying various interested parties, and accepting both oral and written testimony. The Special Commission invited experts and industry stakeholders from across the country to provide testimony, and also received testimony from the Massachusetts Gaming Commission, the Massachusetts Attorney General’s Office, and others with relevant expertise.<sup>3</sup>

Following the conclusion of its meetings, the Special Commission analyzed its findings with the intent of releasing a report with legislative recommendations by July 31, 2017, as required by the enabling legislation. This report has been created to advise the Massachusetts Legislature and other policymakers of the Special Commission’s conclusions and recommendations, which are based on findings from those meetings, the Special Commission’s expertise, and other research.

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<sup>3</sup> A complete listing of meeting dates and attendees who offered testimony may be found in Appendix A to this report.



## IV. SPECIAL COMMISSION FINDINGS

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### 1. Existing Legal and Regulatory Framework of Gaming

#### A. Massachusetts State Gaming Laws

Massachusetts law first defined “illegal gaming” in 1895, noting that:

In all statutes the words “gaming,” “illegal gaming,” or “unlawful gaming,” respectively, shall be held to comprehend every act punishable under any law relating to lotteries, policy lotteries or policy, the buying and selling of pools, or registering of bets, as well as all other acts comprehended in said words respectively.<sup>4</sup>

Until the passage of Massachusetts General Laws Chapter 23K (2011 Expanded Gaming Act), gaming in Massachusetts was primarily addressed through numerous statutes criminalizing various behaviors including running an illegal gaming establishment,<sup>5</sup> trying to recover gaming losses,<sup>6</sup> loaning money for purposes of gaming,<sup>7</sup> and running a bet-placing operation.<sup>8</sup> The illegal gaming definition quoted above has been updated several times since 1895 and currently illegal gaming 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.<sup>9</sup>

As is clear from the language of the statute itself, a number of legal carve-outs added over time have modified the original definition. There has been relatively little case law interpreting this definition,<sup>10</sup> with most cases instead focusing on individual violations of the statutes criminalizing certain gaming-related behaviors. 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.”<sup>11</sup> The majority of Massachusetts case law addressing gaming has been in the context of “lotteries” or “betting pools.”

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<sup>4</sup> St. 1895 c. 419.

<sup>5</sup> M.G.L. c. 137, § 2.

<sup>6</sup> M.G.L. c. 137, § 1.

<sup>7</sup> M.G.L. c. 137, § 3.

<sup>8</sup> M.G.L. c. 271, § 17.

<sup>9</sup> M.G.L. c. 4, § 7.

<sup>10</sup> *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).

<sup>11</sup> *Com. v. Theatre Adver. Co.*, 286 Mass. 405, 411 (1934) (internal citations omitted).

### **i. Massachusetts Criminalization of Lotteries and Betting Pools**

Perhaps because criminal sanctions apply to lotteries and pooling of bets and not more broadly to illegal gaming in and of itself, there is very little case law addressing the statutory definition of “illegal gaming,” while there are a number of cases addressing “lotteries” and “pooling of bets.”

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.”<sup>12</sup> 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.<sup>13,14</sup>

In order to evaluate chance-based lotteries, the Commonwealth adopted an approach now known as the “dominant factor test.” The Supreme Judicial Court stated that, “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.”<sup>15</sup>

Massachusetts cases evaluating the chance versus skill balance for lotteries have looked at a number of disparate scenarios. In Plisner, the Court found that a machine where a player

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<sup>12</sup> See Com. v. Stewart-Johnson, 78 Mass. App. Ct. 592, 594 (2011), quoting, Com. v. Lake, 317 Mass. 264, 267 (1944).

<sup>13</sup> M.G.L. c. 271, § 7.

<sup>14</sup> This statute has been widely used as a catch-all for other types of illegal gambling. In 2011 the Massachusetts Appellate Court explained, “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).

<sup>15</sup> Com. v. Lake, 317 Mass. 264, 267 (1944); see also Com. v. Plisner, 295 Mass 457, 464 (1936).

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.<sup>16</sup> In Com. v. Theatre Advertising Co., Inc.,<sup>17</sup> the court found that a game called "Beano," consisting of a combination of darts and bingo, involved more chance than skill and thus constituted an illegal lottery. Finally, in U.S. v. Marder,<sup>18</sup> 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."

Another related area of Massachusetts gaming law that factors into many of the criminal statutes addresses the "pooling" of bets or wagers. 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 ...

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** ... 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.

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<sup>16</sup> 295 Mass. at 244.

<sup>17</sup> 286 Mass. 405, 410 (1934).

<sup>18</sup> 48 F.3d 564 (1st Cir. 1995).

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

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.<sup>19</sup>

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.”<sup>20</sup> “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.”<sup>21</sup>

## **B. Federal Gaming Laws**

There are a number of federal statutes that both directly and indirectly address gaming and have the potential to impact any online gaming. The most significant are addressed here:

### **i. The Wire Act and the Department of Justice Memorandum**

The first of three federal statutes pertaining to “online gaming” is the Interstate Wire Act of 1964 (“Wire Act”).<sup>22</sup> The Wire Act prohibits individuals and entities from engaging in the business of betting or wagering through the knowing use of “a wire communication facility for the transmission in interstate or foreign commerce. . . .”<sup>23</sup> Originally, the Wire Act was recommended as law by U.S. Attorney General Robert Kennedy “to crack down on organized crime members using the telegraph to get results on horse races.”<sup>24</sup> The Wire Act 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

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<sup>19</sup> 218 Mass. 281, 283 (1914).

<sup>20</sup> Id. Note that there is no balancing test of chance versus skill – only that chance must be present.

<sup>21</sup> Com. v. Sousa, 33 Mass. App. Ct. 433, 437 (1992).

<sup>22</sup> 18 U.S.C. 1804 (2012).

<sup>23</sup> Id. § 1084(a); see also id. § 1084(b) (explaining two important limitation to the Wire Act: (1) that the transmission of information for news purposes does not violate the act, and (2) that there is no violation of the Wire Act where transmission of information assisting in the placing of bets or wagers on sporting events is made from one State or foreign country where betting on that event is legal to another).

<sup>24</sup> Whitman, Janet. “Game of Chance--Prosecutors Gamble with Online Probes.” *New York Post*, 10 Sept. 2006.

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.<sup>25</sup>

Over time, the scope of the Wire Act's application grew and at one time the Justice Department viewed the Wire Act as a prohibition on any bet (of any kind, not solely sports betting) made or received through the use of telecommunications technology in the United States. However, this expansive reading of the Wire Act was not held by all courts and in 2002, the Fifth Circuit Court of Appeals explained that:

a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a "sporting event or contest" ... A reading of the case law leads to the same conclusion.<sup>26</sup>

Given the continued confusion surrounding the interpretation of the Wire Act and Unlawful Internet Gambling Enforcement Act (" UIGEA," which also did not define "illegal gambling"), the Department of Justice was formally asked for a clarifying opinion on their interpretation of the Wire Act with respect to states offering online lottery games. In 2011, the Department of Justice issued an explanatory memorandum stating in part that "The Department's Office of Legal Counsel ("OLC") has analyzed the scope of the Wire Act, 18 U.S.C § 1084, and concluded that it is limited only to sports betting."

Specifically, the OLC memorandum analyzed whether the "sporting event or contest" limitation applied to language in subsection 1084(a), prohibiting the use of a wire communication facility to transmit "bets or wagers" in interstate or foreign commerce and 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." For various reasons detailed in the memorandum, the OLC concluded that all provisions in subsection 1084(a) are limited to the prohibition of bets or wagers related to sporting events or contests.

Applicability of the Wire Act has expanded with advancing technological innovations to encompass wagers made over the internet as well.<sup>27</sup> The Wire Act's definition of a "wire communication" includes any communication made through an instrumentality, "used or useful in the transmission of writings, signs, pictures, and sounds . . . by aid of wire, cable, or other like connection between the points of origin and reception. . . ."<sup>28</sup> While Congress' passing of the Wire Act predated the internet, several courts have held that the Wire Act's scope includes internet communications.<sup>29</sup> The First Circuit held in United States v. Lyons that online sports betting violated the Wire Act because "[a]nyone . . . would readily agree that the internet is used and useful in the transmission of writings."<sup>30</sup> The court specifically noted that

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<sup>25</sup> 18 U.S.C. § 1084(a).

<sup>26</sup> In re Mastercard, 313 F.3d 257 (5th Cir. 2002).

<sup>27</sup> See U.S. v. Lyons, 740 F.3d 702, 717 (1<sup>st</sup> Cir. 2014).

<sup>28</sup> 18 U.S.C. 1084 (2012).

<sup>29</sup> See e.g., United States v. Lyons, 740 F.3d 702, 716 (1st Cir. 2014) (noting "[t]he Wire Act's evident applicability to the internet...").

<sup>30</sup> Lyons, 740 F.3d at 716.

even though the Wire Act predated the internet, its definition of wire communications, “so accurately describes it.”<sup>31</sup>

Following the 2011 OLC memorandum, Nevada, Delaware, and New Jersey began to explore gambling over the internet.

## ii. The Unlawful Internet Gambling Enforcement Act (“UIGEA”)

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.”<sup>32</sup> Thus, the focus of the inquiry becomes whether the particular activity is illegal under federal or state law. UIGEA is essentially an enforcement act dealing specifically with payment processing. The initial focus of the statute was the exploding online poker industry and its passage effectively eliminated online poker in the U.S.

Further evidence of the fact that UIGEA defers to other laws on gaming comes in the “Congressional Findings and Purpose” section of the statute. In that section, 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). UIGEA also defines “unlawful internet gambling” as meaning

to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.<sup>33</sup>

Thus any UIGEA violation would only occur subsequent to a finding of a violation of state or federal law.

While UIGEA contains a carve-out for “fantasy sports contests” it did not independently legalize DFS or fantasy sports of any kind. 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.”

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

PASPA was passed in 1992 to effectively outlaw sports betting in all but a few grandfathered states (Nevada, Montana, Oregon and Delaware). PASPA defines “unlawful sports betting” by reference to both government and individual action noting that:

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<sup>31</sup> Id.

<sup>32</sup> See UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 EXAMINATION PROCEDURES, 2010 WL 2018219, at 1, 31 U.S.C. § 5361-5366.

<sup>33</sup> 31 USC § 5362.

It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>34</sup>

Critically, PASPA comes into effect when either a state actor or a private individual takes some action (encapsulated by the six verbs above) with respect to establishing a sports betting enterprise. The exact definitions and limits of the PASPA verbs are not clear and this uncertainty has led to extensive speculation of how a given court would interpret different types of state or individual action. The definition of prohibited action contained in the statute and PASPA's overall constitutionality concerning its power over state rights have recently received extensive legal analysis through New Jersey's repeated attempts to legalize sports betting.<sup>35</sup> Under PASPA, there are a limited number of entities that have an enforcement right, namely, a United States Attorney General, a professional sports organization or an amateur sports organization. This approach is seen in the NCAA case mentioned above in which the NCAA and the four major sports leagues are all plaintiffs.

A number of commentators have additionally discussed PASPA and its potential intersection with DFS, although to date there has been no published legal opinion addressing this type of PASPA application. In light of the number of states that have formally legalized and begun regulating the DFS industry without incident, as well as the many partnerships between DFS operators and major league sports, there appears to be little appetite by the potential plaintiffs to pursue a PASPA violation through a state entity's authorization of DFS.

While the PASPA application in the realm of traditional sports betting remains unsettled, new areas of uncertainty are also emerging, particularly in the online space. This confusion centers on the PASPA terms "sports" and "amateur or professional athlete" which are undefined by statute. In the era of eSports, such ambiguity raises serious questions of legality with respect to whether eSports competitors would be considered PASPA "athletes" and whether eSports qualifies as a PASPA regulated "sport." To date the only state where betting on eSports is legal is Nevada.<sup>36</sup>

## **2. Current Gaming Landscape in Massachusetts**

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<sup>34</sup> 28 U.S.C. § 3702.

<sup>35</sup> See Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389 (3d Cir. 2016). Within the past few weeks, this case was recently accepted for review by the Supreme Court. See also Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013).

<sup>36</sup> Notably, Nevada is not subject to the PASPA prohibition given its grandfathered status, a factor that was critical in its early adoption of eSports betting.

In 2011, Governor Deval Patrick signed Chapter 194 “An Act Establishing Expanded Gaming in the Commonwealth,” legislation (“Expanded Gaming Act” or “Chapter 23K”) designed to provide significant benefits to the Commonwealth by advancing job creation and economic development through the establishment of a gaming industry in Massachusetts. The Expanded Gaming Act allows for up to three destination resort casinos located in three geographically diverse regions across the state, and a single slots facility competitively awarded for one location statewide. The legislation divides the state into three regions to include:



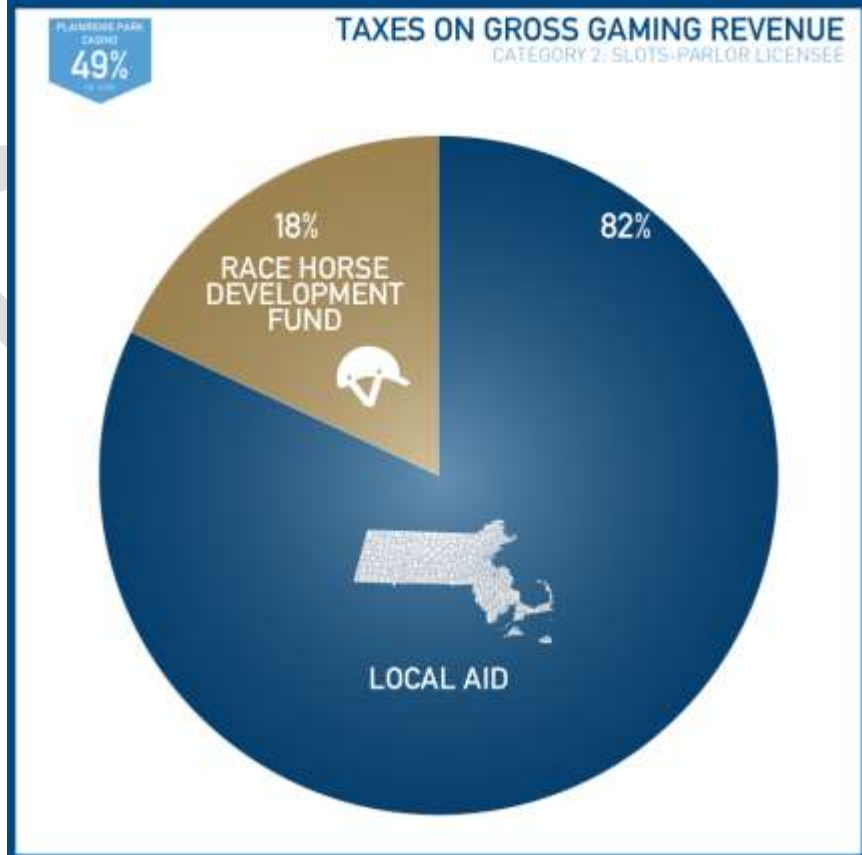
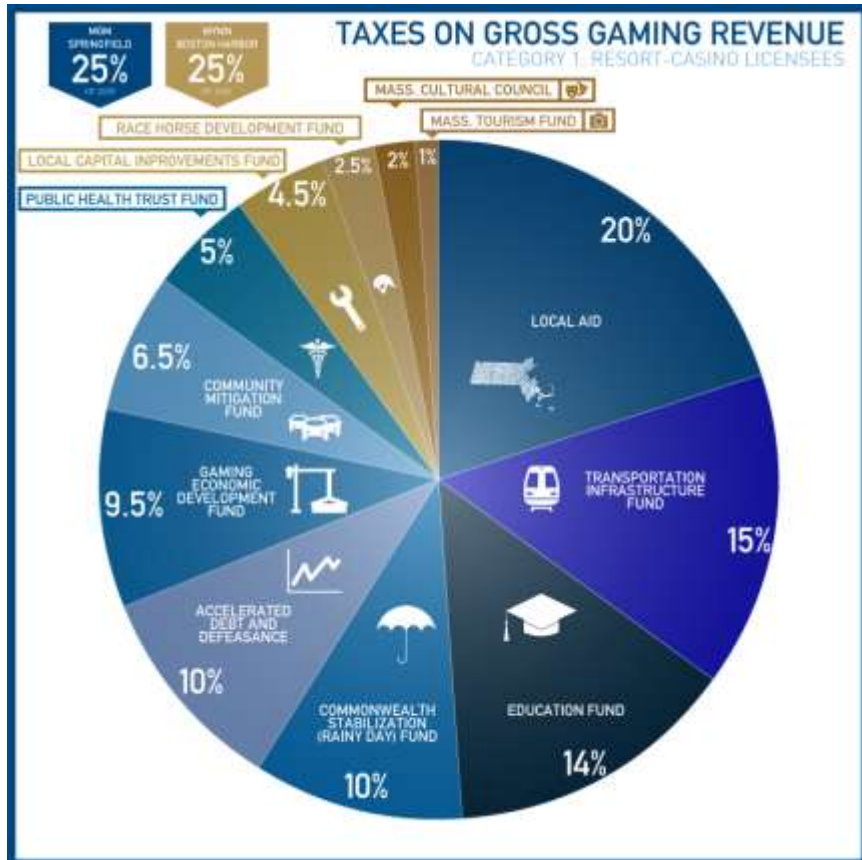
The legislation required a minimum licensing fee of \$85 million for each resort casino, required a capital investment (including a hotel facility) of at least \$500 million, and authorized the Commonwealth to receive 25 percent of the gross gaming revenues generated by the resort-casinos. The slots facility, which can hold up to 1,250 slot machines, has a \$25 million license fee, a minimum capital investment of \$125 million, and taxation at 49 percent of its gross gaming revenue.<sup>37</sup>

The Expanded Gaming Act also specifically identifies a variety of uses for the new revenue generated for the state by the implementation of expanded gaming. The \$250-\$300 million in annual anticipated tax revenue goes to public policy objectives including local aid, infrastructure, stabilization fund, debt reduction, education, culture and tourism. In addition, the legislation provides for mitigation efforts, including public health and addiction services. As determined in the enabling legislation, the distribution of the revenue is as follows:

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<sup>37</sup> In accordance with M.G.L. c.23K, §2, gross gaming revenue shall be the total of all sums actually received from gaming operations less the total of all sums paid out as winnings.





## **A. Massachusetts Gaming Commission and the Licensed Casinos**

The legislation also called for the creation of a five member independent body, the Massachusetts Gaming Commission, to oversee the implementation of the licensing process and serve as the regulatory oversight body for the new industry. The costs for the operation of the state's gaming commission are paid solely by the gaming industry and not by Massachusetts tax dollars. The Massachusetts Gaming Commission is tasked with implementing a number of key principles to ensure the successful implementation of expanded gaming. The principles include: a transparent and competitive bidding process, maximum long-term value to the Commonwealth, protection for host and surrounding communities, mitigation for social impacts and costs, and ensuring the nation's best and most rigorous public safety, regulatory and enforcement mechanisms.

The MGC awarded the slots license to Penn National Gaming, the Region B casino license to MGM and the Region A casino license to Wynn. The Special Commission found the following from testimony provided by the licensees:

- Penn National is based in Pennsylvania and is the nation's largest regional gaming operator with 22 casinos in 13 jurisdictions across North America, including 9,000 employees and nine race tracks. Since opening, Plainridge Park Casino has generated nearly \$160 million in tax revenue for the state, \$29 million of which has been allocated to support horse racing. Plainridge employs 500 team members and has spent \$4.5 million locally. There has been a 56 percent increase of live race days and average daily purses have doubled.
- MGM Casino in Springfield is a \$950 million project that includes broad-based economic development in the city of Springfield, and is noted to be more than just a casino, as the site will also have a movie theater, skating rink, bowling alley, and open outdoor space. The casino is projected to open in 2018 and will bring 3,000 permanent jobs to the area and create 2,000 construction jobs. MGM believes that Massachusetts is an excellent market and is becoming a giant in the industry on the East Coast.
- Wynn Casino in Everett started as a \$1.7 billion investment and is now at \$2.4 billion. The Wynn site is on the former Monsanto chemical plant. Prior to Wynn, costs for cleanup of the site had deterred other investors. The defining features of the project include cleanup of the contaminated site at a cost of \$30-\$40 million through the removal of approximately 550,000 tons of polluted soil, and the creation of 4,000 construction jobs and 4,000 permanent jobs. Completion of the project is expected by June 2019. The City of Everett is now experiencing outreach from more investors, such as hotels, interested in the nearby area, such as hotels.

The Legislature created a number of unique features in the Expanded Gaming Act, which could also be considered for online gaming. First is the importance of an independent commission – members are appointed by the Governor, Attorney General and the State Treasurer. The MGC also has budgetary independence as a state agency. Second is local control. The enabling legislation created a process to allow local input and control of casino projects. A casino must

negotiate agreements with executive officials in the community and seek approval from the surrounding communities. This includes mitigation of any negative consequences. The Community Mitigation Trust Fund has \$15-\$20 million to address unanticipated negative consequences. Third, the Legislature mandated that research be done on the consequences of introducing casinos to Massachusetts, including before and after analysis of bankruptcy rates, property values, crime and other eco-social variables. Fourth is the mandate that responsible gaming strategies be designed to prevent problem gaming. As the only open casino, Plainridge offers these services to players, including designated agents on the floor to serve as a resource for help and offering management tools to budget their play. There is no other state which has these resources for players.

### **3. Daily Fantasy Sports**

#### **A. History of Daily Fantasy Sports**

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

Early fantasy sports aficionados started playing Rotisserie-style fantasy baseball, and the game accumulated a small but devoted following. As the game evolved, players suggested new rules (including weekly head-to-head format, keeper leagues<sup>38</sup>, and others) but largely adhered to the core premise.<sup>39</sup> Over time, the game format migrated outside of baseball to other professional sports. Popularity of the game spiked in conjunction with the mid 1990’s internet boom likely due to the automation of scoring contests, the ready availability of eager contest participants and easy access to sports news and information. In conjunction with the creation of numerous new fantasy sports sites came fantasy sports *support* sites, offering player insights and recommendations on drafting the strongest team.

#### **B. The Rise of Daily Fantasy Sports and Current Status**

Daily Fantasy Sports or “DFS” first started in 2007 with the creation of a company called “Instant Fantasy Sports.”<sup>40</sup> A number of startups offering DFS games emerged in the following

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<sup>38</sup> In a “keeper” league, depending upon the rules, anywhere from one player to an entire team is retained from one sports season to the next.

<sup>39</sup> One of the primary distinctions in fantasy sports leagues comes in the initial allocation of players. Although the original format featured an auction draft, another popular variant is the “snake draft,” where participants are randomly assigned a number designating their pick position in the draft. During the draft the participant that picked first in round one goes last in round two and the participant that picked last in round one goes first in round two.

<sup>40</sup> Caspian Kang, Jay. “How the Daily Fantasy Sports Industry Turns Fans into Suckers.” *The New York Times Magazine*, 6 Jan. 2016, [https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?\\_r=0](https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0)

years all offering a condensed version of the season-long fantasy experience, providing for the drafting of a team and participation in weekly or daily contests. The two current titans of the industry, FanDuel and DraftKings, were formed in 2009 and 2012, respectively. Through multiple rounds of venture capital funding the two companies grew in the DFS space and aggressively marketed their products, culminating in a combined ad-spend of over \$500 million in 2015. The current DFS landscape is dominated by DraftKings and FanDuel, which together account for 85-95 percent of the market.<sup>41</sup> This market share is nearly 4 million players (notably this figure does not account for players that may have accounts with both companies.)<sup>42</sup>

Just as the airwaves and television broadcasts were being inundated with DFS advertising, the industry began to suffer its first major setbacks which included:

- An internal scandal at DraftKings where an employee posted internal information publically that revealed employees had access to potentially valuable game data. The scrutiny of the disclosure was compounded when that same employee then won \$350,000 in a FanDuel contest that week and it became clear that many employees of the sites routinely played in the contests as well.<sup>43</sup>
- Repeated calls for a Congressional investigation;
- A senator's request that the FTC examine DFS for consumer protection violations;
- An FBI/Department of Justice investigation (seemingly focused on DraftKings);
- A Florida grand jury investigation;
- Investigation by several Attorneys General, including a high-profile suit by the New York Attorney General that resulted in a public settlement
- Numerous opinion letters by state Attorneys General opining on the legality of DFS
- Numerous class action lawsuits; and
- Nevada's decision to classify DFS as gaming and require DFS operators that provide their product to state residents to obtain a gaming license

In response to the sudden and intense scrutiny of regulators, legislators, and law enforcement, the DFS industry began a multi-pronged lobbying effort to obtain legal clarity on a state-by-state basis. That effort continues through the present.

To date, daily fantasy sports are expressly legal in twelve states.<sup>44</sup> Amongst these twelve states, there are some common trends and provisions. Five of these states have implemented a tax structure for operators and six states established registration fees, while two additional states provide authority for determining a fee structure to the regulatory body. As displayed in the table below, certain states link the assessments to revenue while others utilize flat fees.

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<sup>41</sup> The remaining market share is split between approximately 18 other smaller companies.

<sup>42</sup> Anderton, Kevin. "FanDuel and DraftKings are dominating the Daily Fantasy Sports Market." *Forbes*, 30 Nov. 2016, <https://www.forbes.com/sites/kevinanderton/2016/11/30/fanduel-and-draftkings-are-dominating-the-daily-fantasy-sports-market-infographic/#7a9bfa37c4f9>

<sup>43</sup> Since this leak, both DraftKings and FanDuel have implemented employee bans on participating in DFS contests.

<sup>44</sup> However, daily fantasy sport contests are currently in operation in 40 states around the country.

<u>State</u>	<u>Tax Rate</u>	<u>Registration Fee</u>	<u>Regulatory Body</u>	<u>Age Limit</u>
Arkansas	8%	--	None	18
Colorado	--	TBD by Regulatory Body	Department of Regulatory Agencies	18
Indiana	--	\$50,000 & then \$5,000 annually	Fantasy Sports Division of the Racing Commission	18
Kansas	--	--	None	18
Maryland	--	--	State Comptroller	18
Massachusetts	--	--	Attorney General	21
Mississippi	8%	\$5,000 for 3 years	Mississippi Gaming Commission	18
Missouri	11.50%	\$10,000 or 10% of net revenue in MO	Missouri Gaming Commission	18
New York	15%*	TBD by Regulatory Body	New York Gaming Commission	18
Tennessee	6%	TBD by Regulatory Body**	Tennessee Secretary of State	18
Vermont	TBD***	\$5,000	Attorney General	18
Virginia	--	\$50,000	Virginia Department of Agriculture and Consumer Services	18

\*The New York law also assesses an additional 0.5% tax that is not to exceed \$50,000 annually.

\*\*The Tennessee Secretary of State requires a \$300 application fee and established a registration fee framework ranging from \$1,000 to \$75,000 based on revenue.

\*\*\*The Vermont legislation directs the Secretary of Administration to submit a registration fee and tax framework by December 15, 2017.

### **C. Marketplace**

During this turbulent time in the industry, there has been a great deal of change in the marketplace in just a few years. In 2015, the projections for DraftKings and FanDuel were bullish on the expectation of continued growth. In July 2015, FanDuel attained a valuation of

approximately \$1.3 billion after a notable funding round.<sup>45</sup> Shortly thereafter, DraftKings approached an estimated valuation of \$2 billion after sizeable contributions from investors.<sup>46</sup> One optimistic market projection, controlling for certain variables, forecasted that the industry could potentially reach \$2.5 billion in revenue by 2020.<sup>47,48</sup>

As noted above, the increased scrutiny and legal uncertainty greatly impacted the industry and its landscape. Most notably, there was a dramatic reduction in dollars spent on advertisements. In the first seven months of 2015, FanDuel spent \$12.7 million on television advertisements while DraftKings spent another \$32.2 million.<sup>49</sup> Over the same seven-month period in 2016, FanDuel reduced spending on television commercials to \$1.2 million and DraftKings dropped to \$3.09 million.<sup>50</sup> The early success of DraftKings and FanDuel, along with an aggressive marketing campaign, kept the market relatively small, which is now presenting a challenge for fundraising in the current environment. In November 2016, DraftKings and FanDuel announced their intent to merge in an effort to establish operation efficiencies and yield cost savings.<sup>51</sup> On June 19, 2017, the Federal Trade Commission announced its intention to block the merger on the basis that the combined firm would control more than 90 percent of the daily fantasy sports industry and deprive customers of the benefits of robust competition.<sup>52</sup> DraftKings and FanDuel officially terminated their effort to merge in July 2017.

Approximately 57.4 million individuals in North America play fantasy sports.<sup>53</sup> Yet, it is estimated that only roughly ten to fifteen percent are daily fantasy sport players.<sup>54</sup> DraftKings and FanDuel have 787,808 registered Massachusetts customers<sup>55</sup> and generated \$17.6 million in revenue from those players in 2016.<sup>56</sup> Nearly 1,100 Massachusetts residents were issued a 1099 on a total of \$13.4 million in prizes in that year.<sup>57</sup> DraftKings also employs 307 Massachusetts

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<sup>45</sup> O’Keeffe, Kate. “Daily Fantasy-Sports Operators Await Reality Check.” *The Wall Street Journal*, 9 Sept. 2015, <https://www.wsj.com/articles/daily-fantasy-sports-operators-await-reality-check-1441835630>

<sup>46</sup> Castellanos, Sara. “Exclusive: Amid controversy, DraftKings is adding more investor funding.” *Boston Business Journal*, 29 Oct. 2015, <https://www.bizjournals.com/boston/blog/startups/2015/10/exclusive-amid-controversy-draftkings-is-adding.html>

<sup>47</sup> Grove, Chris. “Here’s How The One Day Fantasy Sports Industry Hits \$2.5bn By 2020.” *Legal Sports Report*, 19 Dec. 2014, <https://www.legalsportsreport.com/170/revenue-projections-for-daily-fantasy-sports-sites/>

<sup>48</sup> Brown, Ben. “Eilers Research: Daily Fantasy Sports.” *DFS Report*, 2 Nov. 2014, <https://dfsreport.com/1697/eilers-research-daily-fantasy-sports/>

<sup>49</sup> Hichar, Mark. “Presentation to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports.” 28 Mar. 2017. Testimony.

<sup>50</sup> *Id.*

<sup>51</sup> “DraftKings and FanDuel Agree to Strategic Merger of Equals.” *DraftKings*, 17 Nov. 2016, <https://about.draftkings.com/2016/11/17/fanduel-and-draftkings-agree-to-merger/>

<sup>52</sup> “FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Sports Sites, DraftKings and FanDuel.” *The Federal Trade Commission*, 19 June 2017, <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two>

<sup>53</sup> Hichar, Mark. “Presentation to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports.” 28 Mar. 2017. Testimony.

<sup>54</sup> *Hearing of Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports*. 6 June 2017 (Testimony of Peter Schoenke).

<sup>55</sup> Note, it is not known how many customers have accounts on both websites.

<sup>56</sup> DraftKings & FanDuel. “DraftKings and FanDuel: Recommendations to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports.” 15 Jun 2017. Testimony.

<sup>57</sup> *Id.*

residents and pays income tax on approximately \$30 million in salary.<sup>58</sup> At this point in time, neither DraftKings nor FanDuel have paid any corporate taxes to the state because they have not yet reported net profits.

#### **D. Daily Fantasy Sports Game Mechanics**

Both DraftKings and FanDuel offer a similar experience, allowing participants to draft players using a salary cap auction. In that format all participants start with the same amount of imaginary funds to use to draft players to fill their team roster. Real-world players are assigned fictitious “salaries” by the DFS site operators, based on a number of known factors (player past performance, weather, team match ups, etc.) and certain factors unknown to participants. Under this format, participants are allowed to draft the same players, as long as they do not exceed their assigned salary cap. Each imaginary roster accumulates points over the course of the contest based on the real world performance of the professional sports players and at the end of the contest period (either a week or a day), the points are tallied and the results are reported.

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

#### **E. Daily Fantasy Sports and the Massachusetts Gaming Commission**

With the explosion of interest and attention on DFS in the fall of 2015, a new conversation developed in the Commonwealth concerning the legality of the activity, its relationship to gambling, consumer protection concerns and a host of other issues. In the course of this public discussion, the Governor, the Speaker of the House, and the Senate President all suggested, at least casually, that it may be useful if the Gaming Commission offered its perspective on these issues. While fully recognizing that it had no regulatory or policy-making authority over DFS, the Gaming Commission began to research the growing industry and the concerns surrounding it. Through this process, the Gaming Commission benefited from its singularly unique experience developing and regulating a new gaming industry in the state.

The discussions regarding DFS took place at a series of open public meetings held by the Gaming Commission beginning on October 29, 2015 and continuing through January 7, 2016.<sup>59</sup>

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<sup>58</sup> Id.

These discussions included a daylong forum on DFS and online gaming on December 10, 2015.<sup>60</sup>

Early in the discussion, the Gaming Commission decided it would be most useful to synthesize its research and findings in a white paper.<sup>61</sup> While the white paper addressed the specific concerns surrounding the DFS industry, it also looked more holistically at the challenges faced by regulators in confronting new gaming technologies. Ultimately, it suggested an omnibus regulatory approach to this broad category of new technologies, as long as they involved the risk of something of value on the unknown outcome of a future event. The white paper reasoned that empowering a regulatory body with the ability to address such technologies would allow for nimble responses to a quickly changing environment.

#### **4. Massachusetts Attorney General's DFS Regulations**

The Attorney General Office's (AGO) review of the DFS industry began by the first half of 2015 after it received several complaints from DFS players and others pertaining to the fairness, transparency and addictive nature of DFS games. The proliferation of DFS advertising in summer 2015, coupled with press coverage in October 2015 about alleged insider gameplay, significantly increased calls for AGO review of the industry.

At that time, the AGO commenced a comprehensive, and still ongoing, investigation of DFS advertising and the fairness of DFS gameplay, DFS's potential financial risks to consumers, and protections of customer funds held by DFS businesses on account. To conduct its investigation, the AGO sought and received tens of thousands of pages of documents and other materials from DFS companies and others. The AGO also listened to several industry proposals, including company self-regulation and industry-association policing; but did not find a plausible non-regulatory option to assure fairness and transparency or to address problematic gaming behaviors.

The AGO determined that promulgating regulations under its statutory authority pursuant to Chapter 93A to prevent unfair and deceptive business practices in Massachusetts would be the best way to protect the state's consumers, pending possible legislative action at the state or federal level.

##### **A. Authority to Investigate and Regulate Under Chapter 93A**

The primary concern for the Attorney General, through all the publicity and controversies over DFS, was to ensure that consumers, including young people, would not be taken advantage of or treated unfairly. The Massachusetts consumer protection statute, Chapter 93A, makes unlawful

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<sup>59</sup> Transcripts and recorded video of these meetings is available on the Gaming Commission website at: <http://massgaming.com/news-events/article-type/meeting-archives/>

<sup>60</sup> Video and transcript of that forum is available at: <http://massgaming.com/news-events/article/daily-fantasy-sports-educational-forum-december-10-2015-2/>

<sup>61</sup> The white paper is available at: <http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports-1-11-16.pdf>



“unfair or deceptive acts or practices in the conduct of any trade or commerce.” The AGO has express statutory authority to address unfair business practices by both conducting investigations and issuing regulations. *See* 93A, § 2(c) (“The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter...”).

The AGO received input about potential consumer protections from DFS businesses and their supporters, from other regulators, including colleagues at the Massachusetts Gaming Commission, and from consumer advocacy groups and interested members of the public. The AGO issued comprehensive draft consumer protection regulations in November 2015 and conducted the legally-mandated process for both written and verbal public input and comment. The AGO received written comments and held a public hearing in January 2016 in which industry players, members of the public, and other stakeholders participated. In light of those comments, the AGO made several changes to the draft regulations and issued the final regulations at 940 CMR 34.00 *et seq.*, in March 2016. The regulations took effect on July 1, 2016.

## **B. The AGO’s Focus on Consumer Protection**

As the AGO learned about the industry, there were five main topics of concern that emerged as ripe for regulation.

- i.* Minors (and College Sports): Attorney General Healey firmly believes that people under 21 should not be playing in these contests, particularly in light of the very real student loan debt crisis that is burdening young people across the country. The AG also believes that college sports should not be a basis for these contests in order to avoid exacerbating existing pressures on student athletes. Relevant regulatory provisions include (§§ 34.04, 34.08):
  - No gameplay by minors;
  - Requiring parental controls to be made available to help parents and guardians exclude minors;
  - No college sports as basis for DFS contests; and
  - No advertising targeting minors at schools, or featuring high school or college students.
  
- ii.* Responsible Gaming: DFS presents complex issues from an addictive gaming standpoint, due to (i) the ease of play (by app on a laptop or a phone); (ii) the “velocity” of play whereby a consumer can enter thousands of contests each day; and (iii) the very large amounts of money that consumers can put at stake. With respect to financially responsible gaming: the AGO heard multiple stories about Massachusetts consumers playing DFS games at excessive levels and sustaining unaffordable losses. Relevant regulatory provisions include (§§ 34.07, 34.10):
  - Requiring operators to build in functionality for consumers to self-exclude;
  - Requiring operators to build in functionality for third-party-originated exclusions in limited instances, such as for persons who are jointly obligated on credit cards being used for deposits or in other cases of legal dependency;
  - Deposit limits:

- Default limit of \$1,000/month
    - Can be increased only based on proof of ability to afford potential losses
  - Education about gaming addiction:
    - Advertisements and DFS platforms must include information on getting assistance for problem gaming.
- iii.* Game Fairness: The AGO is interested in ensuring that DFS companies “level the playing field” so that game outcomes are not unfairly skewed in favor of those who make a living playing DFS. The regulations also seek to prevent DFS employees and other individuals with access to inside information from participating in games. Relevant regulatory provisions include (§§ 34.06, 34.12):
- Requiring DFS operators to identify and flag Highly-Experienced Players;
  - Requiring DFS operators to create contests that exclude Highly-Experienced Players;
  - Requiring DFS operators to create beginners-only contests;
  - Limitations on the number of entries in a given contest that one player may enter;
  - Precluding gameplay by insiders
    - No employee play;
    - No insider play: professional athletes, agents, employees or others connected to a particular sports industry are not allowed to enter DFS contests within their sport;
  - No automated “scripts” that confer a gameplay advantage (e.g., making last-minute lineup swaps across all contests entered);
  - Requiring certain disclosures by players who also promote DFS gameplay;
  - Limiting players to one account to help identify a player’s experience level; and
  - Prohibiting use of proxy servers (to mask location) or of proxy play (to mask identity).
- iv.* Fairness in Advertising: As with any other business, the AGO wants to ensure that the advertisements for DFS contests do not contain inaccurate representations. Relevant regulatory provisions include (§ 34.07):
- No misleading ads – if an advertisement mentions “average winnings,” that advertisement has to include average *net* winnings as well; and
  - All material terms of promotional offers must be disclosed.
- v.* Data and Funds Security: Given the newness of the industry, coupled with the industry’s state of flux, the AGO had concerns whether the funds of the consumers were being adequately safeguarded by these companies. Relevant regulatory provisions include (§ 34.05):
- Consumer deposits must be held either in trust or in a special purpose entity that is separate from all business operating funds to prevent commingling and access by other creditors in the event of bankruptcy.

The AGO continues to monitor the manner by which DFS operators conduct their businesses and to evaluate the need for enforcement of its regulations and G.L. c. 93A.

## 5. Online Gaming Beyond DFS

Though still in a nascent stage, the non-DFS online gaming industry is one of the fastest-growing industries in the world. Between now and 2020, the global online gambling market is expected to see a compound annual growth rate of nearly 11 percent.<sup>62</sup> In India, online gaming is expected to grow to \$1 billion by 2021 from the current \$360 million - a growth rate of 20 per cent - with the online gamers community reaching 310 million by 2021, according to a recent Google-KPMG report.<sup>63</sup> The global online gambling market was worth around \$37 billion in 2016, as about 85 nations across the world have chosen to legalize online gambling, according to the American Gaming Association.

There are only three states in which commercial non-sports online gaming occurs today: Nevada,<sup>64</sup> New Jersey, and Delaware. There is strong conflict among various states as to whether online gaming should be legalized: New York, New Hampshire, Massachusetts, Pennsylvania, and Hawaii have legislation pending that would authorize online commercial gaming, while in Wyoming, Oregon, Montana, Utah, Illinois, and Louisiana online gaming is expressly prohibited. Most states continue to rely on anti-gambling legislation that predates the internet and has been interpreted to prohibit online gaming.

All of the states that allow online play have active geo-fencing mechanisms in place which prohibit play for anyone located physically outside of the state.

### A. Online Versions of Traditional Casino-Games

#### i. Online Casino Games: the Nevada Story

Online gaming in Nevada, or ‘interactive gaming,’ is defined as:

the conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information.<sup>65</sup>

Interactive gaming in Nevada is limited to internet poker,<sup>66</sup> and it is overseen and regulated by the Gaming Control Board and the Nevada Gaming Commission. Online gaming legislation was introduced to Nevada in 2001 with Assembly Bill 466,<sup>67</sup> and legislators passed Assembly Bill

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<sup>62</sup> ReportBuyer. “Online Gambling – Global Market Research 2015 – 2019.” *PR Newswire*, 14 Dec. 2015, <http://www.prnewswire.com/news-releases/online-gambling---global-market-research-2015-2019-300192519.html>

<sup>63</sup> “Online gaming industry in India to hit \$1 billion by 2021.” *The Economic Times*, 10 May 2017, <http://economictimes.indiatimes.com/industry/media/entertainment/media/online-gaming-industry-in-india-to-hit-1-billion-by-2021/articleshow/58610064.cms>

<sup>64</sup> Nevada allows only online poker.

<sup>65</sup> Nev. Rev. Stat. Ann. § 463.016425 (2011).

<sup>66</sup> *Id.*

<sup>67</sup> Nev. AB. 466 (2001).

258 in the 2011 session to allow internet poker within the state.<sup>68</sup> On December 22, 2011, Nevada Gaming Commission regulations addressing licensing, applications, structure and operations, ownership, manufacturing, and distribution were amended to enable the licensing and operation of internet gambling companies.<sup>69</sup>

Online poker officially launched in Nevada on April 30, 2013, with Ultimate Poker as the sole licensed operator.<sup>70</sup> However, in November 2014, Ultimate Poker shut down and ceased its operations in Nevada. Currently, the Nevada Gaming Commission has licensed two internet poker operators, both of which are rooted in brick-and-mortar casinos: Real Gaming, a company backed by South Point Casino in Las Vegas, and World Series of Poker (WSOP), which is owned by Caesar's Interactive Entertainment, Inc. WSOP also holds an annual poker tournament in Las Vegas, and players can qualify for the events through online play by using WSOP's internet gaming operator, 888 Holdings. To legally participate in online gaming, players must be at least 21 years old, and they must be physically located in Nevada. Operators must also have their servers and databases physically located within the state.

In the 2013 session, legislators passed Assembly Bill 114, which legalized interstate online poker by permitting Nevada to enter into agreements with other states that also allow online gaming.<sup>71</sup> The bill included a "bad actor" clause, which prohibited the participation of companies that continued to operate in the U.S. after the passage of UIGEA (e.g. PokerStars and Full Tilt Poker). Nevada and Delaware entered into a Multi-State Internet Gaming Agreement in 2014, thus increasing the number of available poker players throughout the day, and the two states have been able to share player pools since March 2015.<sup>72</sup>

During the summer of 2016, MGM was approved by the Nevada Gaming Control Board to offer online slot tournaments to resort visitors through their application, easyPlay Mobile Tournaments, thus giving visitors on MGM's Wi-Fi network the opportunity to play on their phones, tablets, or computers for the possibility to win cash prizes.<sup>73</sup> This marks the growth of Nevada's online gaming offerings to include casino games other than internet poker. At the Nevada Gaming Policy Committee's May 13, 2016 meeting, Governor Brian Sandoval and

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<sup>68</sup> Faiss, Robert and Gregory R. Gemignani. "Nevada Gaming Statutes: Their Evolution and History," *Center for Gaming Research Occasional Paper Series*, no. 10, Sep. 2011. *University Libraries, University of Nevada Las Vegas*, [http://gaming.unlv.edu/papers/cgr\\_op10\\_faiss\\_gemignani.pdf](http://gaming.unlv.edu/papers/cgr_op10_faiss_gemignani.pdf)

<sup>69</sup> Schwartz, David. "Nevada Online Gaming Regulations: Changes Adopted December 22, 2011." *Center for Gaming Research*, Dec. 2011. *University Libraries, University of Nevada Las Vegas*, [http://gaming.unlv.edu/reports/NV\\_online\\_reg\\_changes.pdf](http://gaming.unlv.edu/reports/NV_online_reg_changes.pdf)

<sup>70</sup> Holloway, Chad. "Ultimate Poker Historic First Legal Hand of Online Poker in Nevada on Tuesday." *PokerNews*, 30 Apr. 2013, <https://www.pokernews.com/news/2013/04/ultimate-poker-to-deal-historic-first-legal-hand-of-online-p-14874.htm>

<sup>71</sup> Light, Glenn J. and Karl F. Rutledge. "Nevada becomes the first state to legalise inter-state online gaming." *iGamingBusiness Magazine*, no. 79, 1 Mar. 2013, pp. 38-39, <https://www.lrrc.com/files/Uploads/Documents/iGaming%20March.April%202013.pdf>

<sup>72</sup> Hichar, Mark. "Presentation to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports." 28 Mar. 2017. Testimony.

<sup>73</sup> Gouker, Dustin. "Now Playing: MGM Offers Online Slot Tournaments at Vegas Properties." *US Poker*, 18 July 2016, <https://www.uspoker.com/blog/mgm-online-slot-tourneys/14670/>

Gaming Control Board Chairman A.G. Burnett both indicated support for adding an interstate online gaming agreement with New Jersey.<sup>74</sup>

As of March 2015, daily participation rates in Nevada for internet poker stood at 54 players per 1 million residents, with the state’s population hovering around 2.8 million.<sup>75</sup> In comparison to other ring-fenced markets like New Jersey, Italy, France, and Delaware, Nevada has the highest internet poker participation rate per million residents, possibly due to the high concentration of poker players in the state, brand recognition of WSOP, and the large number of tourists that frequent Las Vegas.<sup>76</sup>

Nevada taxes gross online poker revenues at a rate of 6.75 percent.<sup>77</sup> The following table illustrates the reported online poker revenues and total poker revenues in Nevada from February 2014 to November 2014. Revenue from online poker has been markedly disappointing, so online results have not been reported separately from other revenues since December 2014.<sup>78</sup>

Month	IPR	TPR	%
Feb-14	824,000	9,268,000	8.89%
Mar-14	926,000	10,370,000	8.93%
Apr-14	792,000	8,789,000	9.01%
May-14	862,000	10,260,000	8.40%
Jun-14	1,037,000	15,163,000	6.84%
Jul-14	958,000	11,390,000	8.41%
Aug-14	742,000	9,008,000	8.24%
Sep-14	693,000	8,216,000	8.43%
Oct-14	665,000	8,743,000	7.61%
Nov-14	641,000	9,336,000	6.87%
YTD	8,140,000	100,543,000	8.10%

- IPR: Interactive (online) poker revenue
- TPR: Total Poker revenue
- IPR%: Percentage of total poker revenue that was generated online.

Source: UNLV, Center for Gaming Research [http://gaming.unlv.edu/reports/US\\_online\\_gaming.pdf](http://gaming.unlv.edu/reports/US_online_gaming.pdf)

Nevada also established standards to protect consumers and address public health concerns that come with the legalization of internet gaming. Specifically, Regulation 5A (Operation of Interactive Gaming) of the Nevada Gaming Commission and Nevada Gaming Control Board addresses the protection of players’ personally identifiable information and also establishes fund reserves to protect players’ funds in interactive gaming accounts, in case an operator shuts

<sup>74</sup> Wood, Joss. “Governor Sandoval Says Nevada Is Ready To Sign Interstate Online Poker Compact With New Jersey.” *Online Poker Report*, 16 May 2016, <https://www.onlinepokerreport.com/20743/sandoval-ready-shared-nevada-nj-online-poker-liquidity/>

<sup>75</sup> DellaFave, Robert. “In-Depth: The Impacts of Player Pooling for Online Poker in Delaware and Nevada.” *Online Poker Report*, 11 Mar 2015, <https://www.onlinepokerreport.com/15732/nevada-delaware-online-poker-traffic-analysis/>

<sup>76</sup> *Id.*

<sup>77</sup> Nev. Rev. Stat. § 463.770.

<sup>78</sup> Hichar, Mark. “Presentation to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports.” 28 Mar. 2017. Testimony.

down.<sup>79</sup> Regulations 5 and 5A, and Technical Standard 6, outline various provisions to help protect consumers, and include but are not limited to:<sup>80</sup>

- establishing responsible gaming standards for gaming licensees;
- establishing responsible interactive gaming tools like loss limits, deposit limits, tournament limits, buy in limits, and play time limits;
- requiring the issuance of interactive gaming account statements illustrating a player's deposits, withdrawals, wagers, and winnings;
- giving players the ability to self-exclude their accounts from gaming activities;
- placing limits on service offerings and player communications with those individuals who have self-excluded;
- requiring interactive gaming operator advertisements to be truthful and non-deceptive;
- requiring operators to provide links to problem gambling websites and websites for self-exclusion from interactive gaming upon registration;
- limiting one interactive gaming account per player per operator; and
- requiring age and location verification upon registration.

## ii. Online Casino Games: the New Jersey Story

New Jersey legalized internet wagering through Atlantic City casinos in February 2013.<sup>81</sup> The legislation authorized internet casino games for Atlantic City licensees within the state borders for a period of 10 years. The New Jersey Division of Gaming Enforcement officially launched the online gaming industry in November 2013 with six licensed operators.<sup>82</sup>

The law imposes a 15 percent annual tax on internet gaming gross revenues, which is paid into the state's casino revenue fund.<sup>83</sup> Participants must be 21 years of age and be in the state of New Jersey to have access to the games. The law also requires that all internet gaming must take place entirely on servers and computer equipment located within the brick-and-mortar casino based in Atlantic City.<sup>84</sup> The licensees are permitted to offer all casino games, such as poker, slots, and other table games.

To date, the expansion of online gambling in New Jersey has generated over \$100 million in revenue dollars for the state.<sup>85</sup> However, the realized revenue numbers are significantly lower

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<sup>79</sup> "Regulation 5A Operation of Interactive Gaming." *Regulations of the Nevada Gaming Commission and Nevada Gaming Control Board*, <http://gaming.nv.gov/modules/showdocument.aspx?documentid=2942>

<sup>80</sup> Krafcik, Chris and Kevin Cochran. "U.S. Online Responsible Gaming Regulations." *National Council on Problem Gambling*, Jan. 2014, <http://www.ncpgambling.org/wp-content/uploads/2014/08/NCPG-Compliance-Comparison-Online-Responsible-Gaming-Regulations-Updated.pdf>

<sup>81</sup> Hutchins, Ryan. "Gov. Christie signs internet gambling into law." *NewJersey.com*, 26 Feb. 2013, [http://www.nj.com/politics/index.ssf/2013/02/gov\\_christie\\_signs\\_internet\\_ga.html](http://www.nj.com/politics/index.ssf/2013/02/gov_christie_signs_internet_ga.html)

<sup>82</sup> Zernike, Kate. "New Jersey Now Allows Gambling via Internet." *The New York Times*, 26 Feb. 2013, <http://www.nytimes.com/2013/11/27/nyregion/new-jersey-opens-up-for-online-gambling.html>

<sup>83</sup> L.2013, c. 27, § 17.

<sup>84</sup> N.J. STAT. ANN. §§ 5:12-95.17-33 (2013) [http://www.state.nj.us/casinos/law/act/docs\\_article06c/cca-article06C.pdf](http://www.state.nj.us/casinos/law/act/docs_article06c/cca-article06C.pdf)

<sup>85</sup> "New Jersey Online Gambling Revenue." *PlayNJ.com*, July 2017, <https://www.playnj.com/new-jersey/revenue/>

than the initial projections when the law was approved in 2013.<sup>86</sup> Based upon filings by the Division of Gaming Enforcement, the internet gaming revenue continues to climb each year. According to a University of Las Vegas Center for Gaming Research study, New Jersey online gaming accounts for over 90 percent of the legal U.S. online gaming revenue.<sup>87</sup> Approximately 75 percent of the state's internet gaming revenue is derived from online slots and casino games while 25 percent is generated through online poker.<sup>88</sup>

A 2016 report found that 5.3 percent of New Jersey residents gambled exclusively online and 19.2 percent gambled both online and at land-based venues.<sup>89</sup> A majority of online gamblers polled in the survey noted they had previously gambled online before New Jersey legalized it, and another third indicated they began gambling online when it became legal.<sup>90</sup>

The New Jersey Division of Gaming Enforcement requires internet gaming permit holders to pay \$250,000 annually to support compulsive gambling programs.<sup>91</sup> The state also requires a number of additional responsible gaming features. All licensees must:

- display information for problem gambling assistance at various locations on the website;
- provide a mechanism by which a holder of a wagering account may establish the certain controls on wagering activity;
- develop systems capable of identifying and reporting potential problem gamblers;
- offer a number of self-exclusion tools, including a player protection feature that is triggered once a patron's cumulative deposits exceed \$2,500;
- maintain all records of patron activity for at least ten years; and
- limit patrons to one account per website and display certain features at all times, such as a timer.

The enabling legislation requires a study be published on an annual basis to review the impact of internet gaming in the state, too.<sup>92</sup>

### **iii. Online Casino Games: the Delaware Story**

Delaware allows online gaming in the form of internet lottery. Although the Special Commission is required to refrain from examining online lottery, considering that Delaware's

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<sup>86</sup> When the state passed the legislation, government officials anticipated online gaming revenues to contribute upwards of \$180 million annually to the state coffers. However, in its first year the industry only produced \$10.7 million. Since that point, the industry has gained more traction. In FY 2016, the industry yielded \$25.8 million for the state.

<sup>87</sup> Rebeck, David. "RE: New Jersey Internet Gaming One Year Anniversary – Achievements to Date and Goals for the Future." *State of New Jersey*, 2 Jan. 2015, <http://www.nj.gov/oag/ge/2015news/Internetgamingletter.pdf>

<sup>88</sup> *Id.*

<sup>89</sup> Nower, Lia, Kyle Caler, and Rongjin Guan. "The Prevalence of Online and Land-Based Gambling in New Jersey." *Rutgers Center for Gambling Studies*, Calendar Year 2015 Report to the Division of Gaming Enforcement, 2016, <http://www.nj.gov/oag/ge/2016news/2016ResponsibleGamingInternetGamingReport.pdf>

<sup>90</sup> *Id.*

<sup>91</sup> Rebeck, David. "RE: New Jersey Internet Gaming One Year Anniversary – Achievements to Date and Goals for the Future." *State of New Jersey*, 2 Jan. 2015, <http://www.nj.gov/oag/ge/2015news/Internetgamingletter.pdf>

<sup>92</sup> L.2013, c. 27, § 18.

online casino game offerings are under the purview of the State Lottery, a discussion of the state’s online gaming landscape necessitates a brief reference to online lottery.

Delaware’s online games, also referred to as ‘iGaming,’ are regulated by the State Lottery Office.<sup>93</sup> The Delaware Gaming Competitiveness Act of 2012 (formerly House Bill 333) was approved on June 28, 2012, thus amending the Delaware Code and legalizing iGaming.<sup>94</sup> Delaware’s Internet Lottery Rules and Regulations define three forms of iGaming: internet table games (e.g. poker), internet ticket games (e.g. iLottery, which again is not the subject of this report), and internet video lottery (e.g. slot games).<sup>95</sup> iGaming players participating in real-money wagering must be located within the state, and participants must be of legal gambling age (21 years old for table and slot games).

iGaming in Delaware first launched on November 7, 2013 through three brick-and-mortar casinos: Delaware Park, Dover Downs, and Harrington Raceway. The casinos’ online platforms are provided by Scientific Games (SGI) and 888 Holdings.<sup>96</sup> As of March 2015, Delaware had roughly 7.5 online poker players per 1 million residents,<sup>97</sup> and considering the state’s relatively small population of 952,000 residents,<sup>98</sup> the previously mentioned multi-state internet gaming agreement with Nevada aimed at enlarging Delaware’s limited poker player pool.

iGaming revenues as well as new online gaming registrations are tracked on a monthly basis, and the unaudited monthly net proceeds from iGaming are published online. New player registration rates for the past four years are illustrated in the chart below:

2013 (Nov. – Dec.) <sup>99</sup>	3,990
2014 <sup>100</sup>	5,547
2015 <sup>101</sup>	3,952
2016 <sup>102</sup>	3,631

The total iGaming revenue in Delaware as of 2016 was almost \$3,000,000, a notable 67 percent increase from the state’s 2015 iGaming revenue.<sup>103</sup> Currently however, Delaware’s iGaming industry appears to be floundering. 2017 revenues are down about 10.5 percent compared to the previous year: the state’s most recently reported revenues to date, from January 2017 to May

<sup>93</sup> 29 Del. C. § 4826 (2012).

<sup>94</sup> 78 Del. Laws, c.285 (2012).

<sup>95</sup> 10 Del. Admin C. §206.

<sup>96</sup> “iGaming Goes Live In The First State.” *DE Lottery*, 7 Nov. 2013,

<http://www.delottery.com/pressreleases/presses/20131107.asp>

<sup>97</sup> DellaFave, Robert. “In-Depth: The Impacts of Player Pooling for Online Poker in Delaware and Nevada.” *Online Poker Report*, 11 Mar. 2015, <https://www.onlinepokerreport.com/15732/nevada-delaware-online-poker-traffic-analysis/>

<sup>98</sup> “State Population Totals Datasets: 2010-2016.” *U.S. Census Bureau*, 16 Dec. 2016,

<https://www.census.gov/data/datasets/2016/demo/popest/state-total.html>

<sup>99</sup> 2014 and Prior Delaware iGaming Net Proceeds, <http://www.delottery.com/games/igaming/finalstats2014.asp>

<sup>100</sup> *Id.*

<sup>101</sup> 2015 Delaware iGaming Net Proceeds, <http://www.delottery.com/games/igaming/finalstats2015.asp>

<sup>102</sup> 2016 Delaware iGaming Net Proceeds, <http://www.delottery.com/games/igaming/finalstats2016.asp>

<sup>103</sup> Hichar, Mark. “Presentation to the Massachusetts Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports.” 28 Mar. 2017. Testimony.



2017, total \$1,101,710.03,<sup>104</sup> while the revenues from January 2016 to May 2016 totaled \$1,231,072.01.<sup>105</sup> Most of the revenue comes from internet slot games, followed by table games and poker (a separately tallied category). Gross iGaming revenue is taxed at a rate of 100 percent for the first 3.75 million dollars—which is placed in the State Internet Lottery Fund—and then at a rate of 43.5 percent for slot games and 29.4 percent for table games.<sup>106</sup>

Delaware has outlined two major methods for protecting consumers: promoting responsible gaming and providing opportunities for players to exclude themselves from gaming. By statute, iGaming websites must “...include an advertisement for and link to additional information for services for the treatment, education and assistance of compulsive gamblers and their families.”<sup>107</sup> The state online gaming website currently lists contact information for the Delaware Gambling hotline, links to the Delaware Council on Gambling Problems, Inc., and provides information about the state’s self-exclusion program. A player can choose to self-exclude from participating in gambling, which includes iGaming, for one year, five years, or for the player’s lifetime. iGaming agents are charged with establishing procedures—which are submitted to both the state lottery and the Division of Gaming Enforcement—to prevent self-excluded players from registering for an internet gaming account or receiving promotional materials related to internet gaming.<sup>108</sup> Other protections include limiting players to one active gaming account per iGaming agent, and requiring age and location verification in order for players to register for real-money wagering accounts.<sup>109</sup>

#### **iv. Massachusetts Licensed Casinos and Online Gaming**

Although legal online gaming has not yet occurred in Massachusetts, the Special Commission found that the three gaming licensees in Massachusetts have a variety of opinions on online gaming. All three licensees offered candid testimony to the Special Commission about online gaming, which the Special Commission shall summarize as follows:

- Penn National believes online gaming could help improve their edge on the competition, but only if it is limited to brick-and-mortar casinos (Penn has also determined that DFS is not an industry that they are currently interested in pursuing). They view online gaming as an important tool for marketing and have been supporting legislation in Pennsylvania which would call for a 14 percent tax rate on online games, such as slots and poker, and a \$5 million upfront license fee. Penn National noted that there has been an increase in revenue of more than 40 percent at Golden Nugget Atlantic City since the legalization of online gaming and that only 20 percent of their online players were loyalty card members. Penn has cautioned that there would need to be a cost structure in place with a proper balance of margins for online gaming and tax revenue for the Commonwealth for it to be profitable, and estimate that online gaming may carry up to 35 percent higher

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<sup>104</sup> 2017 Delaware iGaming Net Proceeds, <http://www.delottery.com/games/igaming/finalstats.asp>

<sup>105</sup> 2016 Delaware iGaming Net Proceeds, <http://www.delottery.com/games/igaming/finalstats2016.asp>

<sup>106</sup> 29 *Del. C.* § 4815(e).

<sup>107</sup> 29 *Del. C.* § 4826(d).

<sup>108</sup> 10 *Del. Admin C.* §206.

<sup>109</sup> *Id.*

costs, largely due to expenses for the platform provider, royalties, and geolocation services.

- Wynn does not have a presence in the online gaming sphere, and is not a proponent of online gaming in the U.S. based on some concerns with online gaming, including the lack of face-to-face contact with guests. Wynn explained that it takes pride in its high level of customer service and personal interactions with patrons. The company believes it is essential in creating a five-star experience for visitors. While Wynn expects the Legislature will approach online gaming with the same thoughtfulness as the Expanded Gaming Act, it has urged caution before proceeding with online gaming. If the decision is made to proceed with online gaming in Massachusetts, Wynn has expressed a desire to have participation limited to existing licensees.
- MGM recognizes that online gaming is already occurring and looks forward to legal clarity as well as fair and honest controls and financial reporting. MGM believes that online gaming can be complimentary to brick-and-mortar casinos, that an online gaming company should display good character, technical expertise, and financial standing, and – like Wynn and Penn National - that the best way to ensure that is to extend licenses to those licensees who have already exhibited these qualities. MGM noted that the customers of today are not the same as years ago; customers today want variety. Online gaming can further extend the brand online, and technology can be used to market to new customers. With respect to DFS, MGM does not see it as a competitive threat.

## **B. Other Online Games**

In addition to online versions of traditional casino games, the Special Commission investigated the wider world of online gaming. There is a vast variety of illegal online gaming available in the United States. Online sports betting (horse racing, professional and amateur sports, fantasy sports, and eSports) appear to be the most prevalent. According to the American Gaming Association, more than \$150 billion in illegal sports bets are made in the U.S. annually. For instance, about \$4.5 billion, or 97 percent of all bets placed on Super Bowl LI were forecast to be placed illegally.<sup>110</sup>

America's history of game-fixing scandals has created a legal culture that continues to outlaw most of these forms of gambling. However, America's stance on this type of wagering inadvertently may have created the world's largest black market for sports betting. While nearly \$4 billion is bet on sports legally in Las Vegas annually, an estimated \$80 billion to \$380 billion is wagered illegally through a combination of online betting houses, as well as simpler methods like office pools and neighborhood bookmakers.<sup>111</sup> The lack of a legal market has not diminished online gaming's flow of money, and some advocates are pushing for legalization in

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<sup>110</sup> Doty, Steve. "Americans to Bet \$4.7 Billion on Super Bowl 51." *American Gaming Association*, 31 Jan 2017, <https://www.americangaming.org/newsroom/press-releases/americans-bet-47-billion-super-bowl-51>

<sup>111</sup> Hobson, Will. "Sports Gambling in US: Too Prevalent to Remain Illegal?" *The Washington Post*, 27 Feb 2015, [https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c\\_story.html?utm\\_term=.8af0fe9600f6](https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html?utm_term=.8af0fe9600f6)

order to sanction government taxation, permit sports leagues to investigate corruption, and even allow consumer protections to assist compulsive gamblers.

In addition to online sports betting, lesser-known forms of online gaming – social gaming and predicting gaming – have proliferated.

### **i. Social Gaming**

Social gaming is difficult to describe precisely, though the Oxford dictionary defines it as “the activity or practice of playing an online game on a social media platform,” with an emphasis on friends and community involvement. Social games are promoted on Facebook and other social media platforms, as downloadable apps for smart phones, and on internet websites often hosted by traditional brick-and-mortar casinos. New social games are developed every day, and can include role playing, adventure, arcade-style games, and even casino-style games. These games - where a player tends a farm or is a member of the mafia - often require the player to complete tasks for rewards, with experience and mastery leading to the unlocking of new tasks. The player must acquire new items and a larger circle of friends in order to get to the best content.

The key to legality for social games is whether the game allows players to cash in the virtual winnings or points for “real” money or prizes. Games that do not offer a pay-out are currently not classified as gaming (and are thus legal), but social gaming – like all gaming not carved out as expressly legal – is currently illegal in Massachusetts to the extent that it involves pay-out of a prize, defined as something of value. If the virtual money a player earns can be sold or redeemed for a prize of value, that game may be illegal under Massachusetts law.<sup>112</sup>

But even legal social gaming may have some thorny issues to consider. These games may establish gaming behaviors, persuading the player that something may be fun now, and worth betting on with “real” money later. This is an understandable concern for those who are worried about the normalization of gambling behavior, particularly among children. A report compiled using data from a 2009 survey of British adolescents found that gambling for virtual currency had a strong correlation with gambling for real money, and was also an important predictor of problem gambling.<sup>113</sup>

### **ii. Online Prediction Market Gaming**

Prediction markets are loosely defined as a market created around some activity or probability where individuals buy and sell based on what they see as the probability of the event. Prediction markets, also called information markets, idea futures, or event derivatives, can be managed like an open stock market or a closed market akin to a betting pool.<sup>114,115</sup> These markets create games

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<sup>112</sup> Separate from the issue of legality in Massachusetts, there is the potential that these games also may be criminal to the extent that they are a “lottery” or a “pooling of bets” under Massachusetts law.

<sup>113</sup> Marsden, Rhodri. “You Bet Me? How a New Generation of Apps Are Combining Social Media and Gambling.” *The Independent*, 12 Feb 2014, <http://www.independent.co.uk/life-style/gadgets-and-tech/gaming/friendly-wagering-online-social-gaming-sites-let-people-gamble-on-everything-from-losing-weight-to-9124682.html>

<sup>114</sup> “Prediction Market.” *businessdictionary.com*, <http://www.businessdictionary.com/definition/prediction-market.html>

that allow a player to speculate on almost anything these days - from the popularity of videos on YouTube to who will be the next President of the United States.

A small sampling of predictive market betting includes (1) PredictIt, a real-money political prediction market, like a stock market for politics (the U.S. Commodity Futures and Trading Commission provided a special exemption for PredictIt's legality in 2014, based in part around its status as a non-profit, and the small amount of money which can be exchanged; however, state law still precludes many state markets based on how that state defines gambling);<sup>116</sup> (2) Tedbets, which allows two people to bet against each other on the outcome of absolutely anything, from losing weight, to passing a driving test;<sup>117</sup> (3) Hollywood Stock Exchange, which allows players to bet on actors, movies, and more;<sup>118</sup> (4) Smarkets, a United Kingdom-based online betting company which gained popularity for political bets and also ranges in sports and current events. They have grown immensely by offering the lowest commission at 2 percent compared to in-person betting fees at a high of 16 percent, and online retailers at 10 percent (not necessary to be a UK resident to bet);<sup>119</sup> and (5) Trendio, which allowed players to predict what words would be most popular in search engines, is going to be available again soon.<sup>120</sup>

This under-the-radar kind of online gaming is growing in popularity. Like social gaming, Massachusetts gaming laws prevent players from actually winning anything of value, but many sites offer prizes, points and other perks - and many others operate in a black market.

## 6. eSports

Finally, a related-but-unique part of online gaming studied by the Special Commission is the advent of eSports. In recent years, video gaming has become a booming entertainment platform and a multibillion dollar industry. The video gaming industry is estimated to have grossed \$91 billion in the United States in 2016, and video game sales alone hit new heights in January this year, generating \$7.5 billion.<sup>121,122</sup> As the popularity of video games continues to increase, a number of gaming communities have emerged, including organized competitions known as eSports.

The emerging field of eSports, where video game players compete with one another in leagues or one-on-one tournaments, has grown significantly in the past few years, especially among

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<sup>115</sup>Gelman, Andrew and David Rothschild, "Something's Odd About the Political Betting Markets." *Slate*, 12 Jul 2016, [http://www.slate.com/articles/news\\_and\\_politics/moneybox/2016/07/why\\_political\\_betting\\_markets\\_are\\_failing.html](http://www.slate.com/articles/news_and_politics/moneybox/2016/07/why_political_betting_markets_are_failing.html)

<sup>116</sup> <https://www.predictit.org/>

<sup>117</sup> <https://www.tedbets.com/>

<sup>118</sup> <https://www.hsx.com/>

<sup>119</sup> <https://www.smarkets.com/>

<sup>120</sup> <http://trendio.fr/>

<sup>121</sup> DiChristopher, Tom. "Digital Video Games Surge Nearly 10% in January to \$7.5 Billion." *CNBC*, 27 Feb 2017, <http://www.cnbc.com/2017/02/27/digital-video-game-sales-surge-in-january-to-75-billion.html>

<sup>122</sup> Chalk, Andy. "PC Gaming Market Worth \$36 Billion in 2016." *PC Gamer*, 21 Dec 2016, <http://www.pcgamer.com/pc-gaming-market-worth-36-billion-in-2016/>

professional gamers.<sup>123</sup> eSports have been gaining traction as a spectator activity as 40 percent of all eSports viewers do not play the game themselves, and more people globally watch eSports than the World Series or NBA Finals.<sup>124,125</sup> Goldman Sachs valued eSports at \$500 million in 2016,<sup>126</sup> and eSports are expected to grow annually at 22 percent over the next three years. The eSports industry is projected to generate \$1.1 billion in 2017, with \$275.2 million in North America alone (eSports' biggest market is in Asia).<sup>127</sup>

eSports is usually viewed through online streaming and allows players to broadcast themselves or others playing video games over the internet to an audience. Online streaming has gained significant traction in an extremely short period of time, and has become a staple of the video gaming community. Competitive video gaming as a spectator sport is being streamed online to a global audience of over 1.4 billion. In 2016, more than 142 million viewers streamed the eSports tournament "Dota 2 International."<sup>128</sup> The International, one of the world's most popular gaming tournaments, adds another layer of interaction by allowing spectators to purchase a "Battle Pass," which gives them in-game content; and with 25 percent of all sales going towards the tournament prize pool. Last year's prize pool was worth more than \$18.5 million<sup>129</sup> and this year's tournament has already generated more than \$20 million.<sup>130</sup>

eSports are watched by spectators remotely in greater and greater numbers through online broadcasting. The most popular online streaming service, Twitch, is a subscription-based service founded in 2011 that was purchased by Amazon in 2014 for \$970 million.<sup>131</sup> Twitch is more popular in the United States than websites such as Fox News and the Huffington Post,<sup>132</sup> hosts more than 2 million streamers per month, and attracts roughly 9.7 million daily viewers,<sup>133</sup> with about half of users spending more than 20 hours per week consuming content.<sup>134</sup> Mainstream sporting outlets, such as ESPN, also cover eSports with a dedicated page on its website and broadcasts tournaments on its affiliate channels.

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<sup>123</sup> "eSports." *Dictionary.com*, <http://www.dictionary.com/browse/esports>

<sup>124</sup> Schwartz, Nick. "More People Watch eSports than Watch the World Series or NBA Finals." *For the Win (USA Today)*, 19 May 2014, <http://ftw.usatoday.com/2014/05/league-of-legends-popularity-world-series-nba>

<sup>125</sup> Souza, Emily. "The eSports Industry to Dat." *New Zoo*, 9 Sep 2015, <https://newzoo.com/wp-content/uploads/2011/06/Newzoo-eSports-Conference-Slides-2015.pdf>

<sup>126</sup> BI Intelligence. "The eSports Competitive Video Gaming Market Continues to Grow Revenues & Attract Investors." *Business Insider*, 15 Mar 2017, <http://www.businessinsider.com/esports-market-growth-ready-for-mainstream-2017-3>

<sup>127</sup> Elder, Robert. "Esports Will Break a Billion in 2017." *Business Insider*, 22 Jul 2016, <http://www.businessinsider.com/esports-will-break-1-billion-in-2017-2016-7>

<sup>128</sup> <http://www.trackdota.com/leagues/4664> (Note, DOTA is an acronym for Defense of the Ancients)

<sup>129</sup> Savov, Vlad. "Dota 2 Break its Own Record for Biggest Prize Pool in e-Sports." *The Verge*, 26 Jun 2016, <https://www.theverge.com/2016/7/26/12266152/dota-2-the-international-6-prize-pool-record>

<sup>130</sup> <http://www.dota2.com/international/battlepass/> & [http://www.lolesports.com/en\\_US/articles/worlds-2015-viewership](http://www.lolesports.com/en_US/articles/worlds-2015-viewership)

<sup>131</sup> Kim, Eugene. "Amazon Buys Twitch for \$970 Million in Cash." *Business Insider*, 25 Aug 2014, <http://www.businessinsider.com/amazon-buys-twitch-2014-8>

<sup>132</sup> "Top Sites in United States." *Alexa*, 2017, <http://www.alexa.com/topsites/countries/US>

<sup>133</sup> "About." *Twitch*, 2017, <https://www.twitch.tv/p/about/>

<sup>134</sup> "Audience." *Twitch Advertising*, 2017, <http://twitchadvertising.tv/audience/>

Inventor and business magnate Elon Musk recently remarked: “Before long, eSports will be the biggest sport in the world.”<sup>135</sup> In fact, the organizers of the Asian Games declared that eSports will be a demonstration event in Indonesia in the 2018 Games and will have full medal status at the 2022 Games in Hangzhou, China.<sup>136</sup> Additionally, the International Olympic Committee (IOC) may soon be contemplating whether to include eSports at the 2024 Summer Olympics.<sup>137</sup>



### A. Operation of eSports

eSports is run in a fashion similar to many traditional sports. According to testimony to the Special Commission from Marty “Lazerchicken” Strenczewilk, CEO and President of the professional eSports team Splyce, team players live all over the world in team houses. Splyce teams are located in the U.S., Europe, Latin America, and Korea, and together play 11 different eSports.<sup>138</sup> Players tend to only play one game and devote their eSports careers towards becoming the best at their particular game.

Similarly to traditional sports, the eSports athletes’ stories are often inspirations about success through hard work and perseverance. For example, at Splyce, there is a player named “Mickey.” In 2015, Mickey was living at home with his parents in Slovenia playing League of Legends. The following year, Mickey met Splyce players in the game and was asked to join Splyce. He moved to the Berlin team house where five players live with their coach, manager, chef, and physical therapist. Mickey eventually made it all the way to the world championships for League

<sup>135</sup> Bishop, Sam. “Elon Musk: “esports will be the biggest sport in the world”.” *Gamereactor International*, 7 Nov. 2016, <https://www.gamereactor.eu/esports/478833/Elon+Musk+esports+will+be+the+biggest+sport+in+the+world/>

<sup>136</sup> Armour, Nancy. “eSports in the Olympics could happen before you know it.” *USA Today*, 18 Apr. 2017, <https://www.usatoday.com/story/sports/columnist/nancy-armour/2017/04/18/e-sports-asian-games-olympics-video-games/100623442/>

<sup>137</sup> Wolf, Jacob. “eSports in the Olympics by 2020? It could happen.” *ESPN*, 18 Apr. 2016, [http://www.espn.com/esports/story/\\_/id/15232682/esports-olympics-2020-happen](http://www.espn.com/esports/story/_/id/15232682/esports-olympics-2020-happen)

<sup>138</sup> Examples of some of the most popular eSports include Defense of the Agents (DOTA 2), Counter-Strike: GO, Starcraft II, and League of Legends.

of Legends. He played in a large auditorium and in front of tens of millions of people watching online at just 17 years old.

As an emerging sport, eSports is still finding its feet in terms of regulatory and commercialization potential. The hierarchy of control for eSports is unique in that it involves a game publisher (who controls the intellectual property of the game),<sup>139</sup> a tournament organizer, teams,<sup>140</sup> and individual players - far more complex than traditional sports. Revenue streams are still being developed, but generally involve a mix of sponsorships, tournament tickets and other purchases, and prize money.<sup>141</sup> Mr. Stenczewilk explained to the Special Commission that the NBA has 50 monetization streams, while eSports currently has about six. In addition, eSports does not yet have unions or standardized regulations. The World eSports Organization, consisting of eight of the largest teams in the world, is working towards standardized rules in the future, which may include regulations related to issues including player poaching and contract negotiations and enforcement.

## **B. eSports and Gambling**

A significant portion of the current eSports economy involves gambling. The sports-book style wagering on video games allows people to bet on the outcome of a professional or amateur video game competition either at a physical location or on a mobile app. This diverse market spans multiple products and levels of legality – and has the potential to be a driver of growth for eSports.

There is a noteworthy association between eSports viewers and gambling. According to a recent study of eSports viewers, 76 percent of “enthusiasts” have played online casino games (44 percent do so once a week, 32 percent do so multiple times a week) and 81 percent have bet on traditional sporting events (46 percent do so once a week, 35 percent do so multiple times a week).<sup>142</sup>

eSports gambling is a booming business, growing larger by the day. Narus Advisors/Eilers & Krejciik estimate \$5.5 billion of money and items were wagered around eSports in 2016, and forecast \$12.9 billion by 2020. Within the United States, only Nevada offers legal eSports wagering (operators need to apply individually to offer wagering following approval from the Nevada Gaming Control Board.) For example, MGM and William Hill offered betting on Counter-Strike in February 2016.

Notwithstanding its current illegality in most of the United States, currently there is a robust black market for eSports gambling.<sup>143</sup> For example, there is head-to-head eSports wagering

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<sup>139</sup> eSports has an outside party involved in ownership of the games, as teams do not own the games. This would be analogous to an organization owning the copyright to football.

<sup>140</sup> This is similar to professional team ownership, like Robert Kraft owning the New England Patriots. Splyce, like any professional sports team owner, has a massive fan base and brings those people to watch games.

<sup>141</sup> Prize money can be in excess of \$20 million for winning certain tournaments.

<sup>142</sup> Souza, Emily. “The eSports Industry to Date.” *NewZoo*, eSports Conference, 9 Sept. 2015, San Francisco, CA. Presentation. <https://newzoo.com/wp-content/uploads/2011/06/Newzoo-eSports-Conference-Slides-2015.pdf>

<sup>143</sup> Grove, Chris. “Esports Betting: Overview Of The Market And Frequently Asked Questions.” *eSports Betting Report*, 25 Apr. 2016, <https://www.esportsbettingreport.com/guide/>

where two players (or two teams) bet on how well they will perform in the game. This can include smaller aspects than just outcome of the match – for example, the number of head shots in a game or goals scored. This head-to-head wagering involves active participation from the patrons because they are playing in the games they are wagering on. There are a number of companies that facilitate this type of betting online, though none are currently legal in Massachusetts.

Additionally, gamers have found creative workarounds to gambling prohibitions by creating online marketplaces where gamers can bet or sell virtual items (e.g., skins that change the appearance of a weapon used in a video game). The aesthetic enhancements in a game are turned into a currency by which a player can exchange skins for something else that ultimately leads to receiving a prize of monetary value. This form of betting, often referred to as “skin betting,” is exclusively digital and is almost entirely unregulated in the United States (although the United Kingdom is trying to address it). People wagered around \$5 billion in skin betting in 2016.<sup>144</sup> Some of these websites have been ordered to shut down through state-based enforcement actions,<sup>145</sup> but skin betting is an important reminder of how a black market for wagers is naturally flourishing.

### **C. Non-gaming Commercial Potential of eSports**

There are many non-gambling components to the eSports economy, and because eSports is similar to traditional sports, the Special Commission also finds that there are numerous potential commercial and economic development opportunities for eSports.

First, there is the prospect of bringing eSports tournaments to the Commonwealth and reaping the direct and indirect financial benefits from those tournaments. Live eSports competitive tournaments are frequently held throughout the world, and purses for these tournaments can exceed \$20 million, twice the size of the money purse paid out at the PGA Masters.<sup>146</sup> These events have been hosted by casinos as well as by public or private property owners, and they operate in a manner similar to hosting a large conference or traditional sporting event.

For example, the MGM DreamHack Masters event was held at MGM Grand Garden Arena in Las Vegas last year. (In this situation, licensed and regulated eSports betting was being conducted by an operator who was simultaneously hosting the event – interestingly, the event was approved as an “other event” rather than as a “sporting event.”) Non-betting tournaments are also increasing in presence. The ESL One tournament sold out the Theater at Madison Square in New York.<sup>147</sup> There was also an eSports tournament called “The Boston Major” at the Boston

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<sup>144</sup> Barlowe, Katie. “\$5 Billion in Skins Wagered in 2016 Despite Valve Shutdown.” *Casino.org*, 24 Jan. 2017, <https://www.casino.org/news/5-billion-skins-wagered-2016-despite-valve-shutdown>

<sup>145</sup> Green, Will. “Washington State Gambling Commission Orders Valve To Stop Skin Gambling Via Steam.” *eSports Betting Report*, 5 Oct. 2016, <https://www.esportsbettingreport.com/washington-state-valve-skin-betting/>

<sup>146</sup> Rapaport, Daniel. “What to expect from the booming esports industry in 2017.” *Sports Illustrated*, 9 Feb. 2017, <https://www.si.com/tech-media/2017/02/09/esports-industry-expectations-billion-dollar>

<sup>147</sup> Heitner, Darren. “Why 2016 Should Be a Year of Tremendous Growth for eSports.” *Forbes*, 31 Dec. 2015, <https://www.forbes.com/sites/darrenheitner/2015/12/31/why-2016-should-be-a-year-of-tremendous-growth-for-esports/#19f5aaae4767>



Boch Center Wang Theatre in December 2016, which sold more than 9,000 tickets to spectators who watched 16 teams from around the world compete onstage for \$3 million in prizes.<sup>148</sup>

In addition, professional sports teams are beginning to enter the eSports industry. For instance, Delaware North, the parent company of the Boston Bruins, recently invested in a professional eSports team,<sup>149</sup> possibly as a way to explore options to develop and market eSports as a brand and to potentially use TD Garden as a venue for future competitions.

In a further move to add mainstream legitimacy to eSports as a major economic player and increase its economic attractiveness for Massachusetts, a new eSports league (the Overwatch League), announced in July 2017 that it will be the first major eSports league with a traditional city-based team structure, akin to professional sports leagues. Seven teams have been announced thus far: Boston, New York, Los Angeles, Miami-Orlando, San Francisco, Shanghai and Seoul. All teams will be owned by traditional sports and eSports executives, including Massachusetts' own Robert Kraft, CEO and owner of the New England Patriots, who will own the Boston team. This new city-based eSports league has strong structural parallels to traditional sports leagues like the NFL and MLB, including that the teams will buy into the league with a one-time payment, and each will receive an equal share of league-wide net revenues, including eventual broadcast and streaming deals.<sup>150</sup> Also consistent with traditional sports league approaches, the eSports teams will generate their revenue through ticket sales, advertising, sponsorships, and the like, and there will be minimum contracts for players, as well as physical "combines" to evaluate talent.

## 7. The Benefits and Burdens of Legalized Online Gaming

Depending upon the manner in which online gaming is legalized and/or regulated, the benefits and burdens of such a new industry would necessarily fluctuate. In light of this caveat, there are a number of broad categories that will be involved with any change to the status quo.

### A. Tax Revenue<sup>151</sup>

Perhaps the most discussed benefit to a state from legalized online gaming is tax revenue. Many states considering legalization of online gaming see it as a solution to budget shortfalls; however, the tax rate should be carefully evaluated to balance state interests with the potential to cripple an emerging industry. By way of reference, the three jurisdictions with legal online gaming, New

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<sup>148</sup> Christian, Jon. "E-sports gaining traction." *The Boston Globe*, 21 Dec. 2016, <https://www.bostonglobe.com/lifestyle/2016/12/20/sports-gaining-traction/r7nuFmG7knAVa5wD6Vr8nl/story.html>

<sup>149</sup> Wolf, Jacob. "Boston Bruins take a dive into esports with Splyce." *ESPN*, 9 Feb. 2017, [http://www.espn.com/esports/story/\\_/id/18649812/boston-bruins-take-dive-esports-splyce](http://www.espn.com/esports/story/_/id/18649812/boston-bruins-take-dive-esports-splyce)

<sup>150</sup> Tepper, Fitz. "Overwatch is getting a city-based e-sports league with Robert Kraft as an owner." *TechCrunch*, 12 July. 2017, <https://techcrunch.com/2017/07/12/overwatch-is-getting-a-city-based-esports-league-with-robert-kraft-as-an-owner/?ncid=mobilnavtrend>

<sup>151</sup> Licensing or registration fees are also a state benefit; however, it is unclear whether these funds would be an independent source of state revenue.

Jersey, Nevada, and Delaware, have varying tax rates for different types of online gaming.<sup>152</sup> Likewise, jurisdictions that have legalized DFS have used varying tax rates. Any discussion of taxes for online gaming should include research into the profit margins of such operators particularly given their lack of revenue from food, drink, hotel rooms, entertainment, and other sources.

## **B. Jobs**

Legalization of online gaming in the state will both create jobs and help to retain young graduates with high-tech backgrounds. Massachusetts already has a burgeoning social/video game development industry, and serves as the headquarters for DraftKings. Legalizing online gaming could make the Commonwealth a further draw for software developers and technology professionals. Depending upon how the enabling legislation is crafted, emphasis could also be placed on creating in-state employment opportunities to capitalize on the wealth of young talent generated by the state's many colleges and universities each year.

## **C. Reduction in Illegal Activity**

Currently, the full extent of illegal online gaming engaged in by citizens of the Commonwealth is unknown. What is known is that the individuals participating in such contests have no consumer protections, no guarantees of fair games and no avenue for recourse in the event of improper operations. Providing a safe, legal, regulated venue for online gaming is a much more attractive alternative to unknown black market operators. Offering a legal version of the same product at the same cost will strongly encourage players to move to the legal, regulated, and taxed marketplace.

## **D. Transparency**

In an online gaming environment, every user action from the creation of an account to the placing of a wager or the routing of funds is recorded and capable of being stored for review. Online operators incorporate identification protocols for customers playing on their sites. These operators then track how often players play, how much they wager, how much they deposit, where they deposit their funds from, how often they withdraw their funds, where the funds are sent once withdrawn, and innumerable other metrics. This level of data collection allows for careful monitoring of potential money laundering enterprises, and it also allows for the organic integration of problem gaming protections and/or the observation of such behaviors. If online gaming were legalized and regulated, this kind of data would provide a level of information to the state above and beyond that collected at a brick-and-mortar gaming establishment, and likely prove very useful. There would certainly be some concerns regarding the use of the data collected by an operator; however, a regulator with access to the same data would prevent the abuse of such information.

## **E. Safety of Online Operations**

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<sup>152</sup> Online Casino games and online poker in New Jersey are taxed at 15% of revenue. Online poker and online sports betting are taxed at 6.75% in Nevada. Online poker in Delaware is taxed at 100% for the first \$3.75 million and then at 29.4% and at 43.5% for online slots.

Current online gaming operations can and often do include:

- Identity verifications
- Geolocation protections (to make sure only players from a state where online gaming is legal are playing)
- Account funding regulations
- Recording of all game transactions
- The ability to set loss limits, deposit limits, and time limits
- The ability to self-exclude
- Requirements that game operators provide independent verification that their games are fair
- Requirements that game operators provide independent financial audit results

The combination of these requirements and regulations serve to protect consumers and would also provide a regulator with numerous tools to monitor this new industry.

#### **F. Underage Gaming**

One of the larger concerns often raised in discussions of the legalization of online gaming is the prospect of underage gaming. Notably, the Massachusetts Gaming Commission and other sources have explained to the Special Commission that online gaming provides for numerous safeguards against this behavior that are absent in brick-and-mortar facilities. Online gaming sites can require a variety of authentication protocols to verify that the user attempting to log in is the same user that created the account. These steps can include, but are not limited to, dual step verification (requiring that the account owner enter a code sent to their phone or email account) and personal data verification (social security number, password, back account information, etc.). Underage gaming is a serious concern, but incorporating these elements into the design of the game may help to neutralize gaming attempts by underage users, and have proven successful in the legal online gaming market present in many European countries as well as the online gaming market in New Jersey.<sup>153</sup>

#### **G. Problem Gaming**

Much like underage gaming, opponents of legalized online gaming often suggest that legalization will exacerbate problem gaming and create new problem gamers once the ability to game becomes ubiquitous. Given the recent adoption of online gaming, it will be critical to require any legalization effort to include requirements for the study of any associated problem gaming. As noted above, online gaming provides an environment that can be completely controlled from the perspective of setting funding, betting and time limits on any associated play. The amount of data collected by operators would also be invaluable to researchers on problem gaming to the extent it was made available.

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<sup>153</sup> A recent economic impact study of the New Jersey online gaming market found no evidence that any minor had successfully created a gaming account or wagered as an adult in New Jersey. See Meister, Alan and Gene Johnson. "Economic Impact of New Jersey Online Gaming: Lessons Learned – Executive Summary." *iDevelopment & Economics Association (iDEA)*, June 2017, [https://ideagrowth.org/wp-content/uploads/2017/06/Impact-of-NJ-iGaming-Draft-6-16-17\\_ExecSummary\\_FINAL.pdf](https://ideagrowth.org/wp-content/uploads/2017/06/Impact-of-NJ-iGaming-Draft-6-16-17_ExecSummary_FINAL.pdf)

A recent study by Rutgers University showed an increase in problem gambling rates in New Jersey; however, this increase appears to be due to a high rate within a specific subset of the study which contrasted sharply with a lower rate from another sample set within the study.<sup>154</sup> Importantly, the study does not claim that online gaming is the cause of the increased rate of problem gaming.<sup>155</sup> Other studies examining online gaming have found problem gaming rates consistent with worldwide prevalence rates for other types of gambling.<sup>156</sup> While the recent Rutgers study strongly suggests that additional research should be done, it does not support the conclusion that legalized online gaming will result in a significant increase in problem gaming.

Massachusetts has a keen interest in promoting responsible gaming, illustrated by the 2011 Gaming Act, which has been called the “Massachusetts Miracle” because it includes robust problem gambling provisions and provides for extensive research. In addition, Massachusetts works closely with the Massachusetts Council on Compulsive Gambling, a private nonprofit entity that promotes responsible gaming in Massachusetts by offering education and advocacy. MCCG is neither for nor against online gaming, but serves those who play since it began offering services in 1987 for prevention and intervention. MCCG recommended an omnibus approach for online gaming to the Special Commission because most people who are gambling online are also participating in gaming in other venues, like brick-and-mortar casinos and horse racing. MCCG further recommended to the Special Commission guidelines to consider to protect players including: staff training and staff present on the floor to connect players to services; an informed decision-making process (i.e. patrons have access to win/loss statements, rules, money spent, time spent, etc.); and how to access self-exclusion options and how those guidelines will be enforced. MCCG noted to the Special Commission that there has not been a lot of research done on online gaming, but that internationally, between 1 – 10 percent of people will gamble online in their lifetime. MCCG further noted that some of the biggest concerns lay in social casinos and gaming versus gambling.

#### H. Cannibalization of Existing Games

Another argument that has been raised against the legalization of online gaming is that doing so will result in the cannibalization of casino profits. Online gaming does not appear to cannibalize offline gaming.<sup>157</sup> Again, turning to New Jersey as an example finds that existing data simply does not support this conclusion. Instead, the data suggests that online operations have facilitated connections with new customers and reengaged inactive customers.<sup>158</sup> Online gaming appears to be complementary to in-person gambling and not a substitute for it.<sup>159</sup> By way of another example, the Golden Nugget casino in New Jersey saw a multi-year increase in

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<sup>154</sup> *Id.* at p. 34.

<sup>155</sup> *Id.* at p. 34.

<sup>156</sup> *Id.* at p. 32.

<sup>157</sup> Ruddock, Steve. “Five Out Of Five New Jersey Casino Operators Agree: Regulated Online Gambling Is Good For Business.” *Online Poker Report*, 8 Mar. 2017, <https://www.onlinepokerreport.com/25201/online-gambling-helping-nj-casinos/>

<sup>158</sup> *Id.*

<sup>159</sup> Philander, Khalil, Brett Abarbanel, and Toni Repetti. “Consumer spending in the gaming industry: evidence of complementary demand in casino and online venues.” *Journal of International Gambling Studies*, vol. 15, no. 2, 2 June 2015, pp. 256-272. Taylor & Francis Online, <http://dx.doi.org/10.1080/14459795.2015.1042002>

revenue at its physical casino at the same time that its online revenue was increasing.<sup>160</sup> The operators at several of the casinos in New Jersey, including Boyd Gaming, Caesars Interactive and The Golden Nugget have all reported that online gaming has not cannibalized their brick-and-mortar operations.

## V. SPECIAL COMMISSION RECOMMENDATIONS

- **Approach**

The Special Commission is charged with offering recommendations to the Legislature on how to proceed with online gaming. The Special Commission has heard strong advocacy for a robust omnibus approach to online gaming, as well as a more cautious approach to treat each game individually and consider legalization, if any, one game at a time. The Special Commission appreciates the wisdom behind both of these methods, and therefore recommends a blended approach that would take both of these positions into account.

The Special Commission recommends: (1) that “online gaming” be defined broadly to encompass all manner of online games; (2) that the Legislature work to balance regulation with innovation and develop a robust framework as to how all online gaming should be governed, taxed, and regulated generally; and (3) that, rather than legalizing all online gaming at once, the Legislature retain oversight over which parts of online gaming should be legalized.

- **Defining Online Gaming**

The Special Commission heard from many interested experts and parties about the necessity of defining what exactly “online gaming” is, and believes that this charge is one of its most important to carry out.

As explained above in the Findings section, Massachusetts’ gaming laws are unique compared with many other states and have the effect of broadly banning – but not directly criminalizing – gaming unless a particular type of gaming is specifically exempted. Massachusetts case law notes 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.”<sup>161</sup>

Each of the types of gaming exempted and given legal status in Massachusetts also has a corresponding regulatory and governance structure. The Lottery is overseen by the Office of the State Treasurer, the Massachusetts Gaming Commission regulates casino gaming under 23K, pari-mutual wagering on horses is within the jurisdiction of the Division of Racing at the MGC,

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<sup>160</sup> Ruddock, Steve. “Golden Nugget’s Data Blasts a Hole in Online Gambling Cannibalization Arguments.” *Online Poker Report*, 14 Mar. 2017, <https://www.onlinepokerreport.com/24404/online-casino-myth-golden-nugget/>.

<sup>161</sup> *Com. v. Theatre Adver. Co.*, 286 Mass. 4015, 411 (1934) (internal citations omitted).

and charitable gaming (raffles, bazaars, bingo, etc.) is within the oversight of the AGO and the Office of the State Treasurer.

Unlike other states where gaming requires prize, consideration, and chance – that calculation in Massachusetts is less important as it is used primarily in determining whether a game is a “lottery” – it is not used in determining if it is gaming generally, and not even dispositive of whether the activity is illegal. In Massachusetts, the key element to understanding whether something is gaming simply is whether it is a game played for money - a simple wager or a bet on the outcome of an event suffices.

Because Massachusetts already enjoys such a broad reading of what constitutes gaming, the Special Commission recommends a corresponding comprehensive definition of what is considered “online gaming.” Specifically, the Special Commission recommends that online gaming be defined as:

an activity, offered through the internet or through other communications technology, that allows a person utilizing money or currency of any kind, to transmit electronic information to (1) risk something of value (2) on the outcome of an event (3) with an opportunity to win a prize. This term shall not include the purchase of stocks or other investment vehicles, online lottery games conducted by the state lottery commission, online pari-mutuel horse wagering, online bingo, online charitable gaming, or otherwise lawful online contests.

This intentionally-broad definition necessarily includes items like fantasy contests, daily fantasy sports<sup>162</sup>, online versions of traditional casino games, online sports betting, certain social and predictive gaming, and other online games. The definition purposefully avoids narrowing the definition to simply future events, in order to ensure that all betting events – including bets on races already run<sup>163</sup> – will be counted. The definition also specifically excludes “online lottery games,” which are games offered online by the state lottery as established in section 24 of chapter 10, as well as other lawful contests which may be conducted online.

Furthermore, and in a similar vein to how traditional gaming is illegal unless it is permitted under exception, the Special Commission recommends that online gaming should be considered illegal unless permitted under statutory exception. The next section of the recommendations will explain how certain types of online gaming should be legalized, governed, regulated, and taxed.

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<sup>162</sup> “Fantasy contest” includes any fantasy or simulated game or contest, in which: (i) the value of all prizes and awards offered to winning participants are established and made known to the participants in advance of the contest; (ii) all winning outcomes reflect the relative knowledge and skill of the participants and shall be determined predominantly by accumulated statistical results of the performance of individuals, including athletes in the case of sports events; and (iii) no winning outcome is based on the score, point spread, or any performance or performances of any single actual team or combination of such teams or solely on any single performance of an individual athlete or player in any single actual event. 2016 Mass. Acts c.219 § 135.

<sup>163</sup> Historical racing, the practice of wagering money on races that have already happened by de-identifying the date, location, and participants of a race until wagering is complete, is being considered in other jurisdiction like New Jersey. Associated Press. “Betting on horse races already run? Tracks eye new source of cash.” *USA Today*, 1 June 2017, <https://www.usatoday.com/story/sports/horseracing/2017/06/01/betting-on-races-already-run-tracks-eye-new-source-of-cash/102378322/>

But first, the Special Commission suggests amending section 7 of chapter 4 of the Massachusetts General Laws that defines illegal gaming as follows:

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, **including online gaming**, 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) online gaming conducted under chapter XX**; (iv) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (v) a game of bingo conducted under chapter 271; and (vi) charitable gaming conducted under said chapter 271.

The Special Commission further recommends that any general laws related to the criminalization of gaming, including M.G.L. chapter 271, be amended to include “online gaming” as illegal unless conducted under a legislatively-approved framework.

- **Balancing Regulation and Innovation**

The Special Commission appreciates the Legislature’s diligent work on the 2011 Expanded Gaming Act, and particularly its desire to protect the best interests of the people and economy of Massachusetts, and hopes that the same may be done for online gaming as it presents a similarly important challenge and opportunity. The Special Commission recommends the following principles for consideration in any exploration into online gaming so that the state may create an environment that encourages the development of the industry while satisfying public policy objectives.

- A. Recommended Regulations

Regulatory certainty in any market is critical to its success. The MGC noted in its white paper and to the Special Commission that an omnibus regulation package should be considered for online gaming and suggested five tenets to consider: (1) knowing your customer in regards to age, location and other demographics; (2) player protection – securing funds, ensuring transparency, self-exclusion, voluntary limits; (3) security against data hacking and money laundering; (4) suitability and licenses – background checks; and (5) fees and taxes. The Special Commission also heard from other industry and academic experts who suggested additional principles to consider. Based on these findings, the Special Commission recommends the following best practices that should govern any regulatory scheme for online gaming in order to protect consumers, ensure fair play, and encourage this emerging industry:

- i. Clearly defined terms
      - Any and all terms must be defined carefully, appropriately, and thoroughly in the interest of good public policy and to avoid any unintended consequences.
    - ii. Legal Gaming Age
      - The Special Commission recommends that, if the state considers expanding online gaming, players must be at least 21 years of age in order to participate.

Massachusetts law already requires casino gambling participants to be at least 21,<sup>164</sup> and the Attorney General's regulations state that no individuals under the age of 21 may participate in a DFS contest.<sup>165</sup> As indicated in the Findings section of this report, a major discussion point regarding the legalization of online gaming is the potential for underage gaming. Therefore, in addition to setting the age to play as 21, the Commission would recommend the establishment of numerous rigorous authentication protocols to help ensure that no underage players register for an online gaming account or participate in online gaming.

iii. Geolocation

- It would be important from a regulatory perspective to set the standard that no players outside of Massachusetts participate in the state's online gaming offerings. Geolocation protections would therefore be necessary in order to enforce this requirement. Along with recommending the use of geolocation technology to verify that players are physically located in the state, a policy should be developed outlining standards and technological requirements for geolocation protections. The accuracy of the geolocation technology is an important aspect to consider, as Massachusetts is a small state with neighbors who have not legalized online gaming. In addition, the geolocation technology used by online gaming operators would need to be sophisticated enough to weed out players attempting to falsify a Massachusetts IP address. Nevada's regulatory structure requires online gaming operators to choose the type of geolocation technology and which vendors to partner with, while in New Jersey, the state closely regulates which vendors and technologies can be used.<sup>166</sup> Today, many of the geolocation vendors utilize sophisticated multi-tier systems that analyze IP addresses, GPS, and Wi-Fi positioning to verify players' locations.

iv. Suitability and registration/licensure

- The Special Commission recommends that strong suitability standards and operator licensing requirements be established, and that online gaming operators be licensed by a regulatory body in order to function in Massachusetts. In addition, player registration requirements should be developed, and individuals would need to register for an online gaming account in order to play. These principles are crucial for regulation of the industry, enforcement of gaming laws, and protecting consumers. Rigorous standards and licensing processes for online gaming operators and comprehensive player registration requirements should be an essential part of a robust online gaming regulatory scheme, and current Massachusetts gaming law (c. 23K) and the Attorney General's DFS regulations would be a logical starting point for the development of these licensing and registration requirements.

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<sup>164</sup> M.G.L. c. 23K §43.

<sup>165</sup> 940 C.M.R. 34.04.

<sup>166</sup> Ruddock, Steve. "Online Gambling Geo-Location: How New Jersey Differs from Nevada." *Online Poker Report*, 10 Dec. 2013, <https://www.onlinepokerreport.com/9452/cams-ceo-discusses-online-gaming-geo-location-verification/>



- v. Responsible gaming/preventing compulsive gaming
  - In consideration of any expanded online gaming, it is imperative that the state craft significant protections for consumers and adequately support services for problem gambling treatment. The Expanded Gaming Act, implemented under the leadership of the Massachusetts Gaming Commission, set forth high standards for combatting compulsive gambling through responsible gaming practices, education, and dedicated funding to support prevention, treatment, and recovery services. These are essential components to mitigate any potential harms caused by gambling via the internet.
- vi. Fairness in game play
  - The online gaming arena must be closely regulated to ensure fair play and transparency in the gaming offerings. The daily fantasy sports regulations crafted by the Attorney General’s Office provide a sound framework for leveling the playing field and protecting consumers from predatory practices. Any exploration into internet gaming must build in legal and regulatory parameters to create a safe and healthy environment for customers.
- vii. Truth in advertising
  - Online gaming licensees must be held to the highest standards when it comes to advertising and promotions relative to their gaming products. Any legislation and regulatory framework should require responsible gaming messages be prominently displayed, and prohibit misleading ads about winning or other marketing efforts to encourage excessive play. Additionally, the state should go to great lengths in legislation and enforcement to ensure minors are not targeted or exposed to marketing campaigns.
- viii. Controlling for any apparent conflict of interest (e.g., professional sports leagues being allowed to have a financial interest in DFS or other online games)
  - The Special Commission finds that any regulatory scheme should be mindful about the misuse of insider information or any unfair advantages by any particular populations. The AGO addressed this issue very well in its restriction on daily fantasy sports game play by employees, athletes, and others connected with such contests (sports agents, team employees, league officials, etc.).
- ix. Data/network security
  - The Special Commission recommends that any and all operators in the online gaming sphere comply with all applicable state and federal requirements for data security. Given the frequency of financial transactions in this arena, it is important that effective and comprehensive standards are in place relative to financial information, personal information, and user data. Failure to adequately secure online data can cause deleterious results. For example, in February 2017, over two million PlayStation and Xbox users had their account details stolen by hackers, exposing their personal information.<sup>167</sup> The Special Commission further recommends regular audits and third-party testing to examine and analyze platforms.

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<sup>167</sup>McGoogan, Cara. “Hackers steal 2.5 million PlayStation and Xbox players’ details in major breach,” *The Telegraph*, 1 Feb 2017, <http://www.telegraph.co.uk/technology/2017/02/01/hackers-steal-25-million-playstation-xbox-players-details-major/>

- x. Fund processing/segregation/protection
  - It is clear the AGO regulations<sup>168</sup> relative to financial protections are recognized as the standard for the country, and certainly established the framework for the daily fantasy sports industry. Any online gaming expansion must keep those principles in mind. For instance, such central tenets must include: segregation of player funds, financial guarantees (i.e. surety bonds), responsive customer service, limitations on deposits, and secured transactions.

#### B. Recommended governance structure

The Special Commission acknowledges the need for the day-to-day governing of online gaming in one body that can be responsible for (1) creating specific regulations that keep with best practices; (2) auditing and monitoring of the entities and ensuring adequate internal controls/compliance with the regulations; (3) approving and registering companies; and (4) penalizing or removing delinquent companies. The Special Commission suggests the Massachusetts Gaming Commission as the appropriate body for online gaming oversight and careful attention of the industry. However, the Special Commission recommends that the authority for deciding whether online gaming should be legalized shall remain with the Legislature. The Special Commission expects that the MGC and the Legislature will work on approaches for an open, ongoing dialogue about online gaming in order to ensure that the Legislature is apprised in a timely way of developments in the industry and any legislative action that may be useful or necessary.

#### C. Recommended fees and taxation structures

The Special Commission has found a variety of tax structures and rates within the U.S. in use for DFS and other online games. Although the Special Commission demurs on identifying an exact tax rate for online gaming, it does recommend that taxation be of a level (1) such that all regulatory arrangements will be paid for by the online gaming industry and not tax dollars; (2) that will permit the people of the Commonwealth to realize some gain for allowing the industry to legally exist; (3) that takes into account how existing gaming is taxed in Massachusetts; (4) that will not have the effect of suffocating this emerging industry; and (5) that is based on gross gaming revenue<sup>169</sup> rather than any other metric such as net profit. For example, New York is taxing DFS at about 15 percent of gross gaming revenue and has earned \$3 million in the first five months after instituting this structure.<sup>170</sup>

Further, and in keeping with the example set by the Legislature in the Expanded Gaming Act, the Special Commission recommends that all revenue from online gaming shall be allocated using the same formula and percentages as the Gaming Revenue Fund.

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<sup>168</sup> 940 Mass. Code Regs. 34.05.

<sup>169</sup> The total of all sums actually received from gaming operations less the total of all sums paid out as winnings.

<sup>170</sup> Hamilton, Matthew. "New York reaps \$3M in daily fantasy sports' first five months." *Times Union*, 2 Mar. 2017, <http://www.timesunion.com/tuplus-local/article/New-York-reaps-3M-in-daily-fantasy-sports-first-10973693.php>

- **Recommended Legislative Path for Legalization**

The Special Commission recommends a “proceed with caution” approach to legalization. As explained above, to comport with existing gaming law in Massachusetts, the Special Commission recommends that online gaming be illegal - but that there be game-based exceptions that may be legalized by the Legislature and regulated and taxed appropriately.

At this point in time, the Special Commission recommends legalizing DFS as a subset of online gaming and enacting legislation that would put into law the proposed regulatory, governance, and taxation system described above.

The Special Commission does not recommend extending legalization to more online gaming, such as traditional table games, at this time in order to allow brick-and-mortar casinos to open, but urges a re-evaluation of online casino games once that occurs. The licensed casinos are in the process of investing billions of dollars in their facilities and the Special Commission believes that it would be prudent for Massachusetts to monitor the outcomes from these investments before proceeding with more robust online casino gaming. The Special Commission also recommends that, if and when legislation permitting online casino gambling does occur, the existing brick-and-mortar casinos in Massachusetts be offered some form of preferential treatment. For example, through right of first refusal if a certain limited number of licenses are considered in deference to their investment in Massachusetts.

The Special Commission recommends legislative oversight to continue to evaluate online gaming and consider the potential of legalizing other forms of online gaming in the future. Finally, the Special Commission recommends monitoring activity at the U.S. Supreme Court and at the federal level with regard to the online gaming landscape, as the federal legal landscape – including interpretations of PASPA, The Wire Act, and UIGEA – could be shifting in the near future. In closing, the Special Commission acknowledges that there is opportunity in these areas, and expects that legalization of additional online gaming is inevitable.

- **Recommended eSports Economic Development Considerations**

Separate from gaming, the Special Commission recommends the Commonwealth of Massachusetts consider promoting eSports as an economic development opportunity for the state.

It is generally acknowledged that Massachusetts is an avid sports hub, and as such, eSports could easily build itself into the state’s economic landscape. Massachusetts has many venues across the state suitable for various eSports events, many of which are greatly complemented by strong road networks, a diverse range of tourist-friendly cities and towns, airports and readily accessible transit routes, tens of thousands of hotel rooms, and a rich collegiate and technology community with students and seasoned professionals ready to promote the state for eSports development. Working with private industry, it would be feasible for a robust eSports industry to take root in Massachusetts in the next few years.

The positive economic impact from hosting eSports tournaments and building the eSports industry in Massachusetts could yield enormous results. Regardless of gambling prospects, these tournaments are important economic generators in their own right, and any analysis of their potential should also consider the thousands of spectators and other eSports-related personnel that they attract (i.e. fans and personnel will stay in hotel rooms, move around the city, eat at restaurants, purchase merchandise, and generally contribute to the economy) as they enjoy the area around where the actual tournament occurs. Similarly to hosting any large sports tournament or event – the economic potential could be immense.

Additionally, eSports has both traditional sports needs and vast technological components that fit in well with the start-up culture of the Commonwealth and the burgeoning Massachusetts tech industry. Massachusetts is already home to some eSports and related services. For instance, to gain competitive advantage, gamers are increasingly turning to professional assistance in the form of eSports coaches, and companies that connect gamers with coaches are already up and running in Massachusetts.<sup>171</sup> The state could build on this opportunity and create paths to a welcoming and strong eSports community.

Along with commercial activity, the eSports industry could be attracted to Massachusetts because of the regulatory certainty and a level playing field that could be available to the industry. Across the board, players and spectators are looking for guidance on how to uniformly regulate eSports and ensure fair play. Governance of online gaming in Massachusetts generally may be able to support better assurances of fairness and transparency. Additionally, if leagues are unable to establish and enforce their own codes of conduct for fair play, conceivably, the Massachusetts Legislature could consider legislation which would help establish standards and norms and thereby be an attractive location for eSports tournaments, teams, players, and coaches to call home.

Finally, as professional sports teams and their owners are entering the eSports industry – and forming teams within Massachusetts – there could be a unique and timely opportunity to form public-private partnerships that would benefit economic development in Massachusetts. The Special Commission recommends opening a dialogue with interested parties to see if there is an appetite for private and public interests to work together to promote the eSports industry in Massachusetts.

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<sup>171</sup> Bray, Hiawatha. “To gain an edge, online gamers turn to pricey coaches.” *The Boston Globe*, 3 July 2017, <https://www.bostonglobe.com/business/2017/07/03/gain-edge-online-gamers-turn-pricey-coaches/R8xNSJHPewnUhmhYOpqCjO/story.html>

**APPENDIX A – SPECIAL COMMISSION MEETINGS AND TESTIMONY**

<b>Date</b>	<b>Presenters</b>
October 31, 2016	Commission Membership
January 17, 2017	<ul style="list-style-type: none"> <li>• Martha Coakley, former MA Attorney General; Partner, Foley Hoag;</li> <li>• Jeremy Kudon, Partner, Orrick;</li> <li>• Dan Krockmalnic, Assistant Attorney General, MA AGO;</li> <li>• Justin Stempeck, Staff Counsel, MGC; and</li> <li>• Paul Connelly, Director of Licensing, MGC</li> </ul>
February 28, 2017	<ul style="list-style-type: none"> <li>• Stephen Crosby, Chairman of the Massachusetts Gaming Commission;</li> <li>• Eric Schippers, Senior Vice President, Public Affairs and Government Relations, Penn National Gaming;</li> <li>• Jacqui Krum, Senior Vice President and General Counsel, Wynn Resorts Development;</li> <li>• Seth Stratton, Vice President &amp; Legal Counsel for MGM Springfield; and</li> <li>• Marlene Warner, Executive Director, MA Council on Compulsive Gambling</li> </ul>
March 28, 2017	<ul style="list-style-type: none"> <li>• Kevin Mullally, Vice President of Government Relations &amp; General Counsel, Gaming Laboratories International;</li> <li>• Mark Hichar, Partner, Hinckley Allen;</li> <li>• Will Green, Senior Director of Research, American Gaming Association; and</li> <li>• Marty “Lazerchicken” Stenczewilk, CEO &amp; President, Splyce.gg</li> </ul>
May 2, 2017	<ul style="list-style-type: none"> <li>• Peter Schoenke, Chairman of the Fantasy Sports Trade Association;</li> <li>• Marc Edelman, Professor of Law at the Zicklin School of Business, Baruch College, City University of New York; and</li> <li>• John T. Holden, Visiting Scholar at Florida State University</li> </ul>
June 6, 2017	Commission Membership
July 25, 2017	Commission Membership

## **APPENDIX B – SPECIAL COMMISSION MEETING MINUTES**

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**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Monday October 31, 2016  
10:30am – 11:00am**

**Massachusetts State House  
Hearing Room #222  
Boston, MA 02133**

### **Members Present:**

Chairman Joseph F. Wagner, Chairwoman Eileen Donoghue, Representative Mark Cusack, Hiram Shah, Assistant Attorney General Dan Krockmalnic

### **Members Present via conference call:**

Senator Jennifer Flanagan, Representative James Kelcourse, Peter Schoenke

### **Members Absent:**

Chairman Steve Crosby

## **Meeting Minutes**

### **Welcome and Introduction**

Senator Donoghue welcomed and thanked the members of the Special Commission for being in attendance. She started with introductions of the members present in the room and later moved to those present by conference call. Senator Donoghue then spoke about the creation of this special commission through Chapter 219 of the Acts of 2016, or also known as the economic development bill. The special commission is charged with creating a report by the deadline of July 31, 2017 which entails a comprehensive study of the regulations surrounding daily fantasy sports and online gaming. The Senator also stipulated that the special commission is subject to open meeting laws as regulated in Chapter 30A, sections 18-25 and invites the public to attend.

Chairman Wagner welcomed the members and stated that the Special Commission will look to vet more fully the matter of daily fantasy sports. He specified that these matters are of great interest to the public and carry public policy issues with them. He also noted that, as per the session law, the special commission must meet prior to November 1, 2016 and file a comprehensive report of the findings by July 31, 2017. Chairman Wagner commented that this is a new industry area and there's been much great work by the Attorney General's Office in terms of regulations as well as the Massachusetts Gaming Commission's white paper on daily fantasy sports, online gaming areas and other areas. He specified that the Special Commission hopes to meet every 4-6 weeks and is seeking the commission members input on what areas are of importance to them and should be examined. He gave a timeline of 1-2 weeks to submit to the Chairs those areas of particular interest.

Members of the special commission then introduced themselves and spoke briefly about their thoughts on the special commission. Hirak Shah noted that he is very interested in the topic at hand and stated that online gaming and daily fantasy sports have been in the spotlight and that the New York settlement that recently took place proves to be an interesting study.

Representative Mark Cusack offered that he hopes the special commission will put together a package so that Massachusetts may lead the way in this industry and that the state may send a message to rest of the industry, country, and world that Massachusetts is open for business.

Assistant Attorney General Dan Krockmalnic expressed appreciation for the work that the special commission will accomplish.

Senator Donoghue said there is haziness around fantasy and online gaming issues and for the consumer's benefit and also the benefit of the greater public the special commission will put together a very comprehensive report. She closed the meeting by letting members know meeting dates and topics will be circulated in the next few weeks. She again thanked all the members for their attendance and looks forward to the next meeting.

Senator Donoghue adjourned the meeting at 10:57am.

**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Tuesday, January 17th, 2017  
11:00 a.m. – 1:00 p.m.**

**Massachusetts State House  
Hearing Room #222  
Boston, MA 02133**

**Members Present:**

Chairman Joseph F. Wagner, Chairwoman Eileen Donoghue, Representative Mark Cusack, Hiram Shah, Assistant Attorney General Dan Krockmalnic, Senator Jennifer Flanagan, Representative James Kelcourse, Peter Schoenke, Chairman Steve Crosby

**Meeting Minutes**

**Welcome and Introduction**

Chairwoman Donoghue welcomed and thanked the members of the Special Commission for their attendance. She noted that the focus of the commission would surround daily fantasy sports and they would also begin to look into online gaming. Chairwoman Donoghue stated that the minutes from the October 31, 2016 meeting were made available for the committee to look over and asked if the members had any questions or comments regarding the minutes before they were approved. Chairman Wagner stated that there is an ongoing discussion relative to open meeting law as part of the larger discussion on the Joint Rules. Chairwoman Donoghue stated that the committee had complied with the requirements and Chairman Wagner moved to approve the minutes as a reflection of the record from the October 31, 2016. Chairman Crosby abstained from the vote due to absence. The minutes were adopted.

**Testimony**

Chairwoman Donoghue welcomed former Attorney General Martha Coakley to testify before the commission. Martha Coakley thanked the chairs, and the members, and noted that she is now a partner in Foley Hoag's Administrative Law Department and is here to testify on behalf of her client, DraftKings. She noted the success story of the DraftKings Company from its start in the home of one of the founders in Watertown, MA to creating over 100 new jobs in 2016 alone. She discussed the impact of the strong innovation economy and talent in the realm of technology. Ms. Coakley emphasized that Massachusetts set forth the strongest and most comprehensive consumer protection laws, which has leveled the playing field by prohibiting company employees from playing, implementing deposit limits, and organizing games by skill level. The state also has the best in the industry compliance and fraud detection program, and has implemented these in order to promote a fairer and more secure game.

Hiram Shah asked Ms. Coakley if, in her time as Attorney General, there had been complaints from consumers that lead to informing her opinion towards daily fantasy sports. Ms. Coakley replied that she was not aware of any complaints within the Attorney General's Office during her



tenure. However, she further stated that she felt like there was a need for consumer regulations and data protections, and that DraftKings strives to be a proactive and engaged partner in this effort.

Chairman Crosby stated that DraftKings is very important to the state and stressed the importance of getting ahead of the curve as far as the explosion of the next “gaming” industry. Ms. Coakley followed those comments by saying that she thought the best solutions would be to use DraftKings as a model, while being mindful of the quick pace nature of this arena and not to jump to a “one size fits all” solution. She noted past “disrupters” like Myspace, which she experienced in her time as Attorney General.

Chairman Wagner asked a question about gross revenue, investors and other relevant numbers. Ms. Coakley replied by stating that a future presenter at this meeting would be better suited to answer that question. Chairwoman Donoghue asked a question about the explosion of DraftKings onto the scene in professional football, and then continued expansion into other major sports, like golf and baseball. She contrasted it with the Pokémon Go fad. Ms. Coakley responded by saying that DraftKings has looked beyond football in an appropriate way that players can participate in other sporting areas in similar manners. Chairwoman Donoghue mentioned there may need to be an ongoing dialogue relative to DraftKings and their business plan. Ms. Coakley stated that the company was very much interested in being proactive with the legislature while working through the regulations. Ms. Coakley’s remarks concluded at approximately 11:29 a.m.

Next, the commission welcomed Jeremy Kudon, a partner at Orrick. Mr. Kudon went over some of the statistics relative to fantasy sports. He stated that fantasy sports are our new pastime, and while the technology has evolved, the concept remains generally the same. Mr. Kudon said there were roughly a half million users in Massachusetts. He noted that 38 states considered legislation in this area last year. Out of all of those states, they each provide a specific definition and precise language that has three main factors: (1) Contests must reflect relative skill/knowledge; (2) contests are determined by statistics; and (3) contests are not based on the outcome of sports competitions. He noted that Attorney General Healey’s regulations were very influential around the country.

Hirak Shah asked a question to Mr. Kudon regarding any changes in corporate culture and regulations relative to the proposed merger. Mr. Kudon declined to speak to the merger but noted the strong corporate culture with a commitment to innovation. Mr. Shah also inquired on the regulations and Mr. Kudon noted that it is important to be mindful of the other members in the industry, particularly smaller operators, and the regulations shouldn’t be too cumbersome that it discourages competition.

Chairman Crosby asked Mr. Kudon what he thought the key public policy questions are for consideration relative to daily fantasy sports. Mr. Kudon emphasized the need for regulations to be broad so that they don’t stifle innovation or hurt emerging industries. He stressed the importance of industry input and different areas the legislature may need input in. Mr. Kudon said that a broad framework is most likely the place to start, while including an oversight agency to step in and narrowly tailor the regulations.

Chairwoman Donoghue asked Mr. Kudon whether there is a need for differentiations between the regulations needed for online gaming, eSports and daily fantasy sports. His response was yes there is a need for different regulations for online gaming operations and daily fantasy sports. Peter Schoenke stated that there were about 200 industry members and there were also many smaller operators. He emphasized the need to be cautious regarding laws and regulations so that there isn't a burden on small operators and different operations. Mr. Kudon stated that there have been 8 bills passed and 7 implemented countrywide. He clarified to the members that there will be a much better sense of effectiveness in six months because of how new these laws are. This is very different from brick and mortar companies. Mr. Kudon's remarks concluded at approximately 11:48 a.m.

Chairwoman Donoghue next introduced Assistant Attorney General Dan Krockmalnic. Mr. Krockmalnic stated that he works in the consumer protection division of the Attorney General's Office, and provided an overview of his work there and transitioned to the new regulation that have been implemented by the office in this particular area. He noted that the Attorney General's measures were the first in the nation to take action to regulate the industry.

Mr. Krockmalnic noted that the issue appeared on their radar when the Office began to receive complaints from consumers in the summer/fall of 2015, which coincided with the large scale advertising efforts and eventually the insider trading scandal. At that point, the Attorney General's Office considered a number of avenues, but eventually decided to target consumer protection mechanisms to protect Massachusetts residents under the authority provided to them by Chapter 93A of the Massachusetts General Laws. He further noted that they spent several months talking to companies, regulators, and other with expertise. In November 2015, the Attorney General's Office introduced proposed regulations, and then opened a public comment period for input. They also hosted a public meeting.

The regulations became effective in March 2016. Mr. Krockmalnic noted the problems with enforcement specifically surrounding insider analysis. Mr. Krockmalnic outlined the five main concerns with unfair and deceptive business practices: – (1) Minors and college sports; (2) Responsible gaming, especially with the velocity and large amount of money (3) Fairness--ensuring that the playing field is level; (4) Fairness in advertising--that there is no inaccurate representation; and (5) Data and security, especially surrounding funds security.

Mr. Krockmalnic briefly outlined the current regulations set forth by the Attorney General. First, the game is prohibited to anyone under the age of 21; it is prohibited to play based on college events; and there is prohibition on advertisements relative to the aforementioned groups. Second, the operators must allow for participants to self-exclude. There is a required deposit limit, as well as a requirement for operators to engage in education for these gambling problems. Third, the regulations require "highly experienced" players to be flagged, or clearly denoted. There regulations specify that certain contests be limited for beginners only and that players operate only one account. Next, the regulations address advertising, particularly to ensure there are no misleading advertisements relative to net winnings. Lastly, the regulations address the fact that the funds be held in a trust or a separate entity to ensure no problems with money.

Representative Kelcourse asked for clarification on the college restriction. Chairwoman Donoghue asked about consumer complaints and Mr. Krockmalnic noted that amount of complaints has significantly diminished since the regulations took effect. Representative Cusack asked how the Attorney General's office enforces the employee bans from participation. Mr. Krockmalnic said that they can only do so much in this area and that the operators are charged with identifying this. He further noted that employees can play in private leagues. Chairman Crosby noted that comparatively, the Massachusetts Gaming Commission can utilize greater enforcement by demanding that casino operators affirmatively demonstrate good practices.

Chairwoman Donoghue next introduced Justin Stempeck and Paul Connelly of the Massachusetts Gaming Commission. Mr. Stempeck began his remarks by stating that DraftKings and FanDuel are the biggest players in the market currently. Mr. Connelly then spoke about daily fantasy sports and where it fits in the context of online gaming. He said that in 2015 daily fantasy sports emerged on the map and turbulence with legality issues began in 2016. Mr. Connelly predicted that in 2017 the market will potentially see an increase of volatility. A number of issues will need to continue to be addressed including player protection and fairness, issues of visibility in regards to player location and age, what parties are benefitting and operating, and ensuring a secure environment in a monetary and information sense. Mr. Connelly went on to say that licensure issues and the impact on real world sports will need to be further looked into and called for an omnibus approach. He asserted that technology will continue to change but the issues largely identified will need to be addressed.

Mr. Stempeck transitioned to a discussion relative to new industry. He went on to give a definition of eSports: a multiplayer or team based game involving players from all over the world which include many different narrations and ladders systems where a player can advance depending on skill level. Mr. Stempeck said that there are paid, professional players who are involved eSports tournaments - some in a conference center setting - who have sponsors and are playing for tens of thousands of dollars. In 2016, there was \$275 million in revenue in the United States and \$892 million globally.

Mr. Stempeck pointed out that there is extremely high player involvement and viewership. Mr. Stempeck further noted that Amazon purchased Twitch, a live-streaming video platform, for nearly a billion dollars in 2014. He also noted that there is a grey and black market of people betting on other people which is great cause for concern. Mr. Stempeck said that though eSports has a popularity level with daily fantasy sports, there hasn't been a deep dive to make sure the games are fair and legitimate.

Mr. Connelly mentioned that just today the U.S. Supreme Court delayed a ruling on New Jersey's case to legalize sports betting. Mr. Connelly noted how quickly new technology can change things and used Pokémon Go as an example, pointing out how quickly it appeared and then disappeared. Mr. Connelly said it is indicative of what is to come and that we must ask how the government should respond. He emphasized the importance of right-size regulations and an omnibus approach to provide a level of predictability to enter the field and to existing licensees. Mr. Connelly thanked the commission.

Representative Kelcourse asked how to achieve predictability with the many differences between daily fantasy sports. Mr. Connelly answered that while all games have their unique aspects, by and large the issues that need to be addressed are similar.

Chairwoman Donoghue stated that it is very concerning that there are no overarching regulations for eSports on a national level to ensure consumer protections. Mr. Stempeck pointed out that there are online markets that are based off of sports betting, such as “skin betting”. He explained that skin betting is the buying and selling of skins – items with certain patterns or qualities – within the game by third parties with an estimated value of \$7 billion.

Chairwoman Donoghue said is it concerning that teenagers and youth are drawn into these industries. Mr. Stempeck replied that it is a young people driven industry. Mr. Stempeck and Mr. Connolly concluded their remarks at roughly 12:40 p.m.

### **Closing Remarks**

Chairwoman Donoghue asked if there were any questions or closing remarks.

Mr. Krockmalnic asked what topic would be addressed in the next meeting.

Chairwoman Donoghue replied that the next meeting would take place on February 28th and that the agenda will be announced in a forthcoming notice.

Chairwoman Donoghue called for a motion to adjourn. All members answered in favor.

**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Tuesday, February 28, 2017  
11 a.m. – 1 p.m.**

**Massachusetts State House  
Hearing Room #222  
Boston, MA 02133**

**Members Present:**

Chairman Joseph F. Wagner, Chairwoman Eileen Donoghue, Representative Mark Cusack, Assistant Attorney General Dan Krockmalnic, Senator Jennifer Flanagan, Representative James Kelcourse, Peter Schoenke, and Chairman Steve Crosby. Absent: Hiram Shah.

**Meeting Minutes**

**Welcome and Introduction**

At 11:06 a.m., Chairman Wagner welcomed and thanked the members of the Special Commission for their attendance. Chairman Wagner stated that this is the third meeting of the commission and there would be discussion and testimony from some of the players involved in Massachusetts gaming industry. Chairman Wagner invited his co-chair to also provide opening remarks. Chairwoman Donoghue said good morning to the members and noted she looks forward to hearing from all the speakers on the related gaming issues. Chairman Wagner asked that each member of the commission give an introduction of themselves to the room. Chairman Wagner then called for a motion to accept the minutes from the meeting on January 17, 2017. All present members voted in favor. The minutes were adopted.

**Testimony**

Chairman Wagner then welcomed Chairman Crosby to testify before the members. Chairman Crosby stated that he wished to give a status report on the gaming commission, highlights of the Expanded Gaming Act, tax revenue numbers and projections, and critical elements to consider for any online gaming regulations. Chairman Crosby stated that there are things to be learned from the Expanded Gaming Act and that this could be part of an omnibus approach to online gaming.

Chairman Crosby noted that the state legislature authorized three casino licenses and one slots parlor which was awarded to Penn National. Chairman Crosby noted that there was \$250 million invested in the Plainridge casino which has generated \$70 million for local aid.

Chairman Crosby stated that the second license was awarded to MGM Springfield, a \$950 million project and remarked that this project would seek to support broad-based economic development in the city. He noted that it is more than just the casino as the site will also have a movie theater, skating rink, bowling alley, and open outdoor space. The casino is projected to open in 2018 and will bring 3,000 permanent jobs to the area and create 3,000 construction jobs.

Chairman Crosby stated that the Wynn casino in Everett started as a \$1.7 billion investment and is now at \$2.4 billion. Chairman Crosby said the defining feature of the project was the cleanup

of the former Monsanto chemical plant with a cost of \$30 to \$40 million. Chairman Crosby noted that crews removed approximately 550,000 tons of polluted soil from the site. The project is expected to be completed by June 2019 and will create 4,000 permanent jobs.

Chairman Wagner asked for clarification on the number of construction jobs created by the project. Chairman Crosby replied about 4,000, which are vastly union jobs.

Chairman Crosby noted that the legislature created a number of unique features in the Expanded Gaming Act, which could be considered for online gaming. First, is the independence of the commission – members are appointed by the governor, attorney general and the state treasurer. He also noted the importance of budgetary independence as a state agency. Second is the local control. The enabling legislation created a process to allow local input and control of casino projects. A casino must negotiate agreements with executive officials in the community and seek approval of the surrounding communities. This includes mitigation of any negative consequences. The Community Mitigation Trust Fund has \$15 million to \$20 million for mitigation to address unanticipated negative consequences. Third is the mandate that responsible gaming strategies be designed to prevent problem gaming. Plainridge offers these services to players, including designated agents on the floor to serve as a resource for help and offering management tools to budget their play. Chairman Crosby noted that there is no other state which has these resources for players. Fourth, the legislature mandated that research be done on the consequences of introducing casinos to Massachusetts, including before and after analysis of bankruptcy rates, property values, crime and other eco-social variables.

Chairman Crosby noted that these things should be considered in the strategy for online gaming. Chairman Crosby stated that \$250 million to \$300 million in tax revenue goes to public policy objectives for local aid, infrastructure, local capital, stabilization fund, debt reduction, education, racehorse development, and the Massachusetts Cultural Council. Chairman Crosby noted that the White Paper released last year recommended that an omnibus regulation package should be considered for online gaming – which evolves very quickly as an industry. He suggested five tenets to consider: (1) Knowing your customer in regards to age, location and other demographics; (2) Player protection – securing funds, ensuring transparency, self-exclusion, voluntary limits; (3) Security against data hacking and money laundering; (4) suitability and licenses – background checks; (5) Fees and taxes.

Chairman Crosby stated that he appreciated the legislature's hard work on the gaming law by looking out for the people of Massachusetts' best interests and he hopes that the same can be done for online gaming. Chairman Crosby said he hopes to see Massachusetts create an environment which encourages the industry to come to develop new games and a new economic engine. He believes this is a real opportunity for Massachusetts.

Chairman Wagner asked if Chairman Crosby could profile the differences in tax structures in southeastern Massachusetts region.

Chairman Crosby answered the slots parlor pays 49 percent in gross gaming revenue to the Commonwealth. Of that percentage, 9 percent goes to the race horse fund and 40 percent to local funds. Casinos pay 25 percent to the Commonwealth. Should a tribal casino open in the region,

they would pay 17 percent of their gross revenue for regional exclusivity. If a resort casino opened in Region C, the tribal casino would pay zero percent in gross gaming revenues.

Chairman Wagner thanked Chairman Crosby for his testimony and asked if there were any questions from the members.

Chairwoman Eileen Donoghue thanked Chairman Crosby for his experience and thoughts. Chairwoman Donoghue asked a clarifying question on tax revenue projections and further asked if there is anything missing from the list of dedicated revenue streams for certain accounts. Chairwoman Crosby indicated that he believes it is very comprehensive in its current form.

Chairman Crosby's remarks concluded at 11:45 a.m.

Next the commission welcomed Eric Schippers, Senior Vice President of Public Affairs and Government Relations at Penn National Gaming. Mr. Schippers informed the commission that he would be the only speaker providing testimony and that Jeff Morris could not be in attendance.

Mr. Schippers noted that three years ago to the exact day, Penn National received the slots license for the Plainridge Park Casino. Mr. Schippers explained that Penn National is based in Pennsylvania and is the nation's largest regional gaming operator with 22 casinos in 13 jurisdictions across North America, including 9,000 employees and nine race tracks.

Mr. Schippers expressed his appreciation for the comprehensive legislation created by the state legislature. He specifically noted the competitive tax rate, regulatory framework, and responsible gaming policies. Since opening, Plainridge has generated approximately \$120 million in tax revenue for the Commonwealth, \$22 million of which has been allocated to support horse racing. Plainridge employs 500 team members and has spent \$4.5 million locally. There has been a 56 percent increase of live race days and average daily purses have doubled.

Mr. Schippers stated that contrary to what has been reported as "lackluster results", Plainridge is generating the highest win per unit in the nation. This success comes despite the challenge of a location so close to Twin River, about 15 miles, which has three times as many slot machines, 100 live table games and allows for smoking. He also mentioned the project in Tiverton. Mr. Schippers stated that Penn National continues to find creative ways to market to customers, including establishing partnerships with Fenway Park and Patriots Place in Foxborough.

Mr. Schippers stated that Penn National believes iGaming could help improve their edge on the competition but only if it is limited to brick and mortar casinos. They view it as an important tool for marketing. Mr. Schippers noted that Penn National is supporting legislation in Pennsylvania which would call for a 14 percent tax rate on online games, such as slots and poker, and a \$5 million upfront license fee.

Mr. Schippers said there's been an increase in revenue by more than 40 percent at Golden Nugget Atlantic City since the legalization of iGaming and that only 20 percent of their online players were loyalty card members.

Mr. Schippers stated there would need to be cost structure in place with a proper balance of margins for online gaming and tax revenue for the Commonwealth for it to be profitable. There are additional costs up to 35 percent higher for iGaming operators, which are largely due to expenses for the platform provider, royalties, and geolocation services. Mr. Schippers agreed with Chairman Crosby that there needs to be a robust framework and strong responsible gaming policies in place, too. He further noted that there are best practices out there, such as in the UK.

Moving on to DFS, Mr. Schippers said that Penn National has stepped back to say that it is up to the states to decide to what extent they want to regulate the industry. Penn National has determined that it is not an industry they will pursue given that it has not shown to be profitable.

Instead, Penn National is focusing on an effort by the American Gaming Association to repeal the current federal ban on sports betting, the Professional and Amateur Sports Protection Act of 1992. Mr. Schippers stated that \$150 billion in illegal sports bets are made in this country annually. Penn National believes that allowing sports betting would drive volume to their facilities and generate new tax revenue for state and local communities.

Mr. Schippers thanked the commission and asked if there were any questions.

Chairman Wagner thanked Mr. Schippers for his testimony.

Next the commission welcomed Jacqui Krum, Senior Vice President and General Counsel at Wynn Resorts Development.

Ms. Krum noted that Wynn is currently a \$2.4 billion project. The Wynn site is on the former Monsanto chemical plant. Costs for cleanup of the site had deterred other investors. So far, 550,000 tons of polluted soil has been removed. By the end of the year, the hotel tower will be completed and by the end of construction--4,000 construction jobs will be created. The project is expected to be completed by June 2019. The City of Everett is now experiencing outreach from more investors interested in the area, such as hotels.

Ms. Krum she commended the General Court for the adoption of omnibus gaming legislation. She went on to note that Wynn fully expects the legislature will approach online gaming as they had with the expanded gaming act. However, Wynn does not have a presence in the online gaming sphere.

Ms. Krum named some concerns with online gaming, including the lack of face-to-face contact with guests. Wynn takes pride in the ability for employers to interact with patrons. They believe it is essential to creating a 5 star experience for visitors.

Ms. Krum noted that they're open and in favor of sports betting should that come down the pipeline. If the ban was lifted, Ms. Krum stated that Wynn would be in favor of hosting sports betting.



Chairwoman Donoghue asked Ms. Krum to clarify her position on daily fantasy sports.

Ms. Krum stated that she believed it was an issue that had been well handled by the legislature.

Chairman Crosby noted that daily fantasy sports were not tied to brick and mortar institutions.

Chairman Crosby noted that the ambiguity of online lottery was an issue that would need to be addressed. However, Crosby continued, the online lottery is exempted from the scope of this commission.

He asked that Ms. Krum please restate her concern. Ms. Krum restated her concern that the current online lottery proposal is very broad with little regulatory structure.

Chairman Crosby agreed that it is an underlying issue that there are no concrete definitions. He expanded on his point by saying how does the state find that appropriate line for regulation and structure.

Chairman Wagner noted that Sen. Jennifer Flanagan filed an iLottery bill this session as a full disclosure to the commission.

Sen. Flanagan noted that the bill is strictly for lottery products and is under the jurisdiction of the lottery commission.

Chairman Wagner acknowledged the representative from Penn National, Mr. Schippers, who had a comment.

Mr. Schippers stated that he appreciated the distinction between existing products. He used the example of Angry Birds as an online game that can be repackaged in a cannibalistic and be detrimental to what they are trying to accomplish.

Chairman Wagner thanked Ms. Krum for her testimony and called forward the next speaker. The time was 12:12 p.m.

The commission next welcomed, Seth Stratton, Vice President and Legal Counsel for MGM Springfield.

Mr. Stratton stated he was happy for the opportunity to speak to the members. He stated his appreciation for Chairman Crosby's comments outlining the spirit of the gaming act as a guide to best practices when addressing online gaming. He appreciated Chairman Crosby as a tough regulator and gaming advocate.

Mr. Stratton stated that he wished to start with MGM's thoughts. MGM believes that Massachusetts an excellent market and is becoming a giant in the industry on the east coast.

Mr. Stratton noted that MGM Grand has excellent customer loyalty and marketing which will bring customers to Springfield. MGM Springfield will have the opportunity to capitalize on that

database and brand recognition and will be a transformative urban redevelopment, integrated into downtown Springfield and a unique experience and tourist attraction. Despite the tough market, Mr. Stratton said MGM is confident in that region.

Mr. Stratton stated that online gaming is already occurring. With respect to DFS, MGM does not see it as a competitive threat. What is important is clarity of legality and call for fair and honest controls and financial reporting.

Mr. Stratton called companies like DraftKings responsible as opposed to anonymous and unscrupulous companies. MGM believes online gaming can be complimentary to brick and mortar casinos. Mr. Stratton noted that the customers of today are not same as years ago. Customers today want variety. Online gaming can further extend the brand online and technology can be used to further market to new customers.

MGM currently participates in online gaming in New Jersey and Nevada. He noted that he believes that illegal/unregulated gaming isn't good for anyone. He continued that people are better served by lawful, professional entities than black market products.

Mr. Stratton stated he would address any question and thanked the commission.

Chairman Wagner asked if there were any questions.

Chairman Crosby asked Mr. Stratton if online gaming were legalized here, what relationship brick and mortars should have.

Mr. Stratton answered that he agreed with Chairman Crosby's five points given in his earlier remarks to the commission and that there should be a land based licensee or affiliate. Mr. Stratton stated that companies should display good character, technical expertise, and financial standing and the best way to ensure that is to extend licensees that have already exhibited that.

Chairwoman Donoghue asked Mr. Stratton if he could address problems in online gaming in state of New Jersey and Nevada.

Mr. Stratton answered that he is no expert but noted that there are certain protections that are not as robust in New Jersey and Nevada as there are in Massachusetts. MGM makes sure they are consistent with offering those services.

Mr. Krockmalnic asked how Mr. Stratton defines online gaming versus daily fantasy sports and eSports, and where the overlap is.

Mr. Stratton answered that it is a fair question essential to online gaming. There are offerings online that are traditional to land based casinos like sports betting, poker and slots. These games can be played electronically on a smart phone, computer, or by other means. Mr. Stratton said his definition would mean extending those traditional games electronically, which he distinguishes from daily fantasy sports

Chairman Crosby said it is a great question. He stated that it might be useful for the institutions to submit language for definitions. It can be done but it is not simple to draw the lines.

Mr. Stratton's remarks concluded at 12:27 p.m.

The commission welcomed Marlene Warner, Executive Director at the Massachusetts Council on Compulsive Gambling. Ms. Warner thanked the commission for the opportunity to speak.

Ms. Warner stated that (MCCG) is a private nonprofit entity that promotes responsible gaming in Massachusetts by offering education and advocacy. MCCG is neither for nor against online gaming but serves those who play. MCCG began offering services in 1987 for prevention and intervention. She indicated that gaming has certainly evolved since then. Ms. Warner referred to the gaming legislation in 2011 as the "Massachusetts Miracle" because it included robust problem gambling provisions and provided for extensive research.

Ms. Warner recommended an omnibus approach for online gaming. Ms. Warner stated that she wanted to bring a number groups who have put out peer reviewed studies to the commission's attention including the a white papers and research done by the American Gambling Association, the National Center for Responsible Gaming, Harvard Medical School's Division on Addiction, and Southern Cross University in Australia. She noted that most people who are gambling online are also participating in gaming in other venues, like brick and mortar casinos and horse racing.

Ms. Warner noted that there has not been a lot of research done on online gaming. She stated that internationally, between 1 – 10 % of people will gamble online in their lifetime. She stated that there is an increase of concern when there is not an omnibus approach.

Ms. Warner cited a study done by Dr. Voldberg and Dr. Williams, who are professors at UMass Amherst. Their study found that 2 percent of the general adult population has a gambling disorder and 7 percent are a high risk of developing gambling problems.

Ms. Warner stated that definitions are very important, and further noted that her biggest concerns were social casinos and gaming versus gambling. Ms. Warner explained that social casino games are games that refer customers back to brick and mortar casinos while social gaming refers to games played for fun like Candy Crush, Angry Birds or Farmville.

Ms. Warner noted some guidelines to consider to protect players including: staff training and staff present on the floor to connect players to services; an informed decision making process: patrons have access to win/loss statements, rules, money spent, time spent; and how to access self-exclusion options and how those guidelines will be enforced.

Ms. Warner warned against over empowering companies by allowing them to determine when a customer should be reinstated. Any gaming entity needs to have a stake and put money towards efforts for player protection, too.

Ms. Warner concluded her remarks with a story about a woman named Stacia who found herself in trouble with her gambling addiction, especially with online gaming. Stacia turned to MCCG the council for help.

Chairman Wagner noted that some written testimony had been submitted to the commission and invited others who had testified to submit written comments.

Chairman Wagner opened up the floor for any general discussion.

Mr. Schoenke noted the definition at the federal level put forward by Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). He continued that it has determined the baseline for other states. He pointed out that fantasy sports flourished in Maryland since the 2012 law was passed.

Chairman Wagner thanked Mr. Schoenke for his remarks.

### **Closing Remarks**

Chairman Crosby asked what the topic of discussion would be for the next meeting.

Chairman Wagner replied that a discussion would be had with staff to determine that answer and announced that the next hearing would be held on March 28, 2017 with a preliminary agenda to be forthcoming.

Chairman Wagner called for a motion to adjourn. All members voted in favor. The meeting was adjourned. The time was 12:50 p.m.

**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Tuesday March 28, 2017  
11 a.m. – 1 p.m.**

**Massachusetts State House  
Hearing Room 222  
Boston, MA 02133**

**Members Present:**

Chairman Joseph F. Wagner, Chairwoman Eileen Donoghue, Representative Mark Cusack, Assistant Attorney General Dan Krockmalnic, Senator Jennifer Flanagan, Representative James Kelcourse, Peter Schoenke, Chairman Steve Crosby, and Hiram Shah.

**Meeting Minutes**

**Welcome and Introduction**

At 11:04 a.m., Chairwoman Donoghue welcomed and thanked the members of the Special Commission for their attendance. Chairwoman Donoghue asked that each member of panel provide an introduction to the room. Chairwoman Donoghue then called for a motion to accept the minutes from the meeting on February 28, 2017. All present members voted in favor. The minutes were adopted.

**Testimony**

Chairwoman Donoghue introduced Kevin Mullally, Vice President of Government Relations & General Counsel, Gaming Laboratories International. Mr. Mullally provided introductory remarks and background context on the work of Gaming Laboratories International (GLI). He indicated that GLI specializes in testing and other professional services to the global gaming industry to ensure integrity and performance. As such, they often provide a variety of regulatory and policy guidance documents to clients.

He began by drawing an analogy to other regulated industries, such as the stock market, insurance, etc. He stated that there aren't many barriers to the gaming industries in an effort to move online. Mr. Mullally said there aren't a ton of fundamentally new games in the gaming world; rather the delivery methods have just changed.

He further noted that markets can take time to change. He noted a pattern where there may be a gradual ascent, then a big bump/spike, and back to gradual ascent. He further stated that it can take a while for participants and industry to figure it out.

Mr. Mullally said that online gaming, when properly implemented with proper checks and balances, can protect consumers and public policy concerns. He transitioned to highlighting six key pillars of iGaming: 1) preventing underage gaming; 2) geolocation features; 3) network security; 4) player protection; 5) game fairness; and 6) payment processing.

Mr. Mullally continued that online gaming sites have the ability to tap into a number of information points when interacting online with customers, which is unlike a convenience store or a casino. He further stated that online gaming entities have a ton of tools in their toolbox to track data and player activity. According to Mullally, these entities can use 3<sup>RD</sup> party software to verify age and location. The iGaming platform is comprised of multiple components to verify and uphold a number of things to ensure integrity and protections. He expanded further on other components, such as age & identity verification, geolocation, player protections, and security features.

Mr. Mullally concluded his remarks by saying there is a policy decision to be made in this realm. He noted that in Europe, where iGaming is much more common, there are far fewer land-based casinos. The US is different in that sense.

The time was 11:37am.

Chairwoman Donoghue welcomed Mark Hichar to testify before the members. Mr. Hichar thanked the commission for inviting him to present. Mr. Hichar stated that he wanted to touch base on daily fantasy sports in respect to fantasy sports, commercial gaming in the United States, sports betting, eSports and conclude by discussing key federal laws that apply to online gaming and the uncertainty with respect to the current administration's stance on internet gaming and the uncertainty derived from the comments of AG nominee Jeff Sessions.

Mr. Hichar noted a difference in the last year in fantasy sports. Specifically, he noted the additional spending in the first seven months of FanDuel, approximately \$12.7 million, and DraftKings, approximately \$32 million. Last year, spending dropped precipitously, FanDuel spent \$1.2 million and Draft Kings spent \$3 million. Mr. Hichar stated the ads were almost invisible on television.

Mr. Hichar stated that in September 2015 the estimates for total FanDuel entry fees were more than twice what they are today. In September, they were operating in all but five states. Draft Kings was operating in 40 states and FanDuel was operating in 39. Registered players had increased slightly during that period and not as rapidly as was expected in September 2015.

Mr. Hichar noted that of the 10 states that have expressly made fantasy sports lawful, eight of those states passed their laws in 2016. Kansas passed its law in 2015 and Maryland, in 2012.

Mr. Hichar noted that in many other states the legality of fantasy sports is a grey area. In states where fantasy sports is regulated, four of the 10 states regulate through the state's gaming commission and two, Kansas and Massachusetts, don't require licensing or registration at present. He noted that the commission would be happy to know that the language in the regulations promulgated by the attorney general [Maura Healey] in March last year has found its way into legislation passed in other states over the last year.

Mr. Hichar stated that in 19 states, the attorney general has commented or issued formal opinion. In 14 states, the attorney general found that daily fantasy sports were not consistent with their state laws and in some of those states there was a conflict between the view of the state lottery

and attorney general. In three states, negative attorney general opinions were superseded by subsequent legislation: Mississippi, New York and Tennessee.

Mr. Hichar stated that today, there are 17 states in which fantasy sports legislation is currently pending, in many cases more than one bill. These bills would make fantasy sports lawful.

Mr. Hichar transitioned to the topic of commercial online gaming. There are only three states in which commercial non-sports online gaming occurs today: Delaware, Nevada and New Jersey.

Mr. Hichar pointed out that in New York, New Hampshire, Massachusetts, Pennsylvania, and Hawaii there is legislation pending that would authorize online commercial gaming. He then pointed out that in Wyoming, Oregon, Montana, Utah, Illinois, and Louisiana online gaming is expressly prohibited. Mr. Hichar noted that most states continue to rely on anti-gambling legislation that predates the internet but has been interpreted to prohibit online gaming. In Delaware, the online commercial gaming is overseen by the state lottery. This includes poker slots and table games.

Mr. Hichar noted that all of the states which allow online play have active geo-fencing mechanisms in place which prohibit play for anyone located psychically outside of the state.

He noted that the online gaming revenue had a 32 percent increase in the 2016 over the year prior. The market is still finding its legs, according to Hichar. Nevada allows only online poker and its results have been so disappointing that they no longer report their online results separately.

Mr. Hichar moved on to sports betting. He explained the Professional and Amateur Sports Protection Act, also referred to as PASPA or Bradley bill, passed in 1992, sponsored by Bill Bradley. It outlawed any state from operating or sponsoring or licensing sports betting and prohibited any person conducting sports betting pursuant to the law of any state. It grandfathered in certain types of wagering if they were conducted at certain points prior to the passage of the law's passage. Four states were grandfathered in: Nevada Delaware, Oregon and Montana.

Nevada is the only state that conducted head to head sports betting, and it is the only state today that allows this kind of betting. Delaware permitted a three way parlay. Oregon ran a parlay card game and Montana ran sports pools and super bowl square games. Oregon was discontinued because of poor results and other incentives.

Mr. Hichar noted that in 2015, according to estimates from the American Gaming Association, there was \$149 billion spent in illegal sports betting. It is estimated Americans bet \$500 billion worldwide. There was \$4.7 billion bet on last Super Bowl, an estimated \$4.5 billion was bet illegally. In 2016, the AGA estimates \$98 billion was bet on NFL and college football while, \$2 billion was bet legally. Mr. Hichar noted that illegal betting dwarfs the legal sports betting.

Mr. Hichar noted that a case which is of interest to lawyers and those who would like to see sports betting legalized is New Jersey's effort, which could help Atlantic City casinos. New

Jersey, in 2012, enacted a law that authorized sports betting and regulated the leagues under PASPA enforcement.

As soon as New Jersey passed this law, the NCAA, NHL, NFL, NBA, and MLB objected seeking to enjoin any betting on any of the games. The law was struck down and the decision was upheld. There was language that said New Jersey is free to repeal its sports betting laws but not to authorize sports betting. New Jersey then passed a new law that repealed all laws which prohibited sports betting to the extent that those laws applied to Atlantic City casinos and race tracks.

The law says when you repeal the law it's as if it never existed, it would be no different if we passed sports betting law applicable throughout New Jersey except Atlantic City casinos and race tracks. It was also struck down. This case has gone to the Supreme Court. If this case were overturned it would provide a road map of how to authorize sports betting in a state should they choose to do so.

Mr. Hichar noted that gambling in general has been left to the prerogative of the states; it is unusual for federal involvement. It would require a state law violation or violation of federal law. Mr. Hichar stated that PASPA essentially tells state what it can and cannot do.

Mr. Hichar noted that the arguments made in favor of legalizing sports betting are that it exists currently. It's a massive market and it's a massive market without rules, leaving it susceptible to consumers being defrauded without any recourse. Additionally, because there is no regulation, it is not taxed. Opposition arguments, from the leagues, hold that allowing betting on sports will corrupt the integrity of the games.

Mr. Hichar mentioned the editorial from NBA commissioner Adam Silver, who said sports betting should be made lawful under appropriate regulatory circumstances. Major League Baseball indicated it is reevaluating its position on sports betting. Major League Soccer has, also. NHL is more nuanced as the commissioner indicated he has confidence in his players being free from corruption but betting brings a negative element to the game.

Mr. Hichar noted that eSports are games played by teams against each other and has been recognized the US Department of Homeland Security as an athletic event. P1 visas have been granted for players who are considered professional athletes.

Mr. Hichar noted that there are several types of betting: cash gambling, betting on the games, and skin betting. Legal betting occurs in Nevada where there have been eSports tournaments in recent years.

Mr. Hichar stated that skin betting is the questionable variety in which non-functional features have value and there are third party exchanges for real money. Individuals are able to use skins as virtual currency on other types of online games. Valve Corporation, a gaming company, has asked third party sites to stop allowing skin trading in Washington, where it is based because the state had prohibited this sort of trading.



Mr. Hichar noted that the questions that the Supreme Court will answer are: is betting considered gambling or wagering and do you rely on state law or federal law to make that decision, whether or not a partial repeal avoids the language of PASPA which prohibits a state from authorizing online gaming. Mr. Hichar explained that the Wire Act prohibited all online gambling. The Wire Act has been interpreted as applying only to sport wagering. If PASPA were held to be unconstitutional, there would need to be legislation that superseded the Wire Act.

Mr. Hichar concluded with the uncertainty that exists with online gambling industry. In particular, he noted when Sessions was going through his confirmation hearing he promised to revisit past decisions. This comment alarmed those in the industry who were looking to operate under legal circumstances; it would apply to all online sports betting and not just bets on sports.

Mr. Hichar noted that Donald Trump and Ivanka Trump pursued internet gambling and have made statements about how internet gambling should be legalized in 2011. It is not certain Mr. Trump still believes this. There is concern that restoration of the Wire Act bills could come back due to influential individuals close to the president.

Mr. Hichar thanked the commission.

Chairwoman Donoghue called forward Will Green, Senior Director of Research at the American Gaming Association.

Mr. Green thanked the commission for the opportunity to speak. Mr. Green noted that he wanted to offer definitions for different types of eSports.

He stated that the AGA believes the development of regulations is essential for protecting consumers and making sense of what is becoming a very complex market involving eSports or skill based gaming.

Mr. Green stated that he wanted to make the distinction that eSports is not the same thing as betting on eSports and that these distinctions are critical and important for all stakeholders. Some definitions can overlap.

Mr. Green noted that sports book style wagering, also known as eSports wagering, involves people wagering on the outcome of a professional or amateur video game competition. Examples of some of the most popular include Riot games, Valve Corporation, Counter-Strike, and League of Legends. Mr. Green encouraged the commission to think of these as sports themselves. A consumer is able to wager at a physical location or on a mobile app. Operators need to apply individually to offer wagering following approval from the Nevada gaming control board. All operators can offer wagering to that event once approval has been given.

Mr. Green noted that MGM and William Hill offered betting on Counter-Strike in February last year. Mr. Green stated that hopes the commission will consider whether or not wagering in person constitutes internet gaming.

Mr. Green noted that the second form of eSports betting is head to head betting; it involves two players or two teams and betting on their performance. This can include smaller aspects than just outcome of the match like, for example, the number of head shots in a game or goals scored. This head to head wagering involves active participation from the patrons because they are playing in the games they are wagering on. There are a number of companies that facilitate this type of betting online.

Mr. Green noted that the third form of betting, skin betting, is exclusively digital and is almost entirely unregulated. The discussion of skin betting extends beyond the igaming discussion but Mr. Green stated that he wanted to mention it given the magnitude of the skin betting.

Chairwoman Donoghue asked if skin betting was unregulated. Mr. Green answered that it is unregulated in the United States but that the United Kingdom is trying to address it.

Chairman Crosby stated that skin betting is vastly larger than many other types of betting in eSports. Mr. Green agreed and stated he doesn't think it applies to the discussion but wanted to make mention of it because it is the elephant in the room.

Mr. Green explained what skins are; aesthetic features in a game which decorate the weapons in a game. Third party markets created a market place which turns these features into currency. Mr. Green stated that Steam is a part of Valve and is one entity that does this.

Chairwoman asked for clarification as to what Steam and Counter-Strike is.

Mr. Green responded that Steam is separate from the game Counter-Strike where individuals use to turn skins into currency. He stated that the AGA is concerned about the lack of regulation regarding skin betting.

Mr. Green noted he does not consider skilled based slots as eSports though they may use images from video games. These are being offered on casino floors in New Jersey and Nevada. He used Frogger as an example of a skill based slots video game where players play to win cash prizes at a terminal.

They evoke themes, characters, and imagery video games. Mr. Green hopes the commission will consider whether this type of gaming fits under the omnibus of igaming or e-gaming.

Mr. Green stated that another critical aspect of eSports is that there are live events and matches on casino property. These events are hosted by casinos or on property near casinos. For example, MGM DreamHack Masters event was held at MGM Grand Garden Arena last year. Licensed, regulated eSports betting was being conducted by an operator who was simultaneously hosting the event being bet on. Mr. Green stated that eSports allows operators to facilitate a community minded experience.

Mr. Green hopes the commission will carefully consider several questions: do any types of wagering constitute sports betting? No permanent regulation naming it as an actual sport.

Secondly, do any of the aforementioned types of wagering not constitute as internet gaming. What forms do and do not fit in an omnibus gaming regulatory effort?

Mr. Green noted all of these aspects combined create not something of passive speculation but a holistic experience. It could become a vital opportunity for casino properties to host these types of events.

Mr. Green asked that the commission think of eSports and events in Massachusetts as an opportunity similar to hosting the Sweet Sixteen and Final Eight games of the NCAA tournament.

Mr. Green thanked the commission for the opportunity to speak.

Chairwoman Donoghue called forward Marty “Lazerchicken” Strenczewilk, CEO and President of Splyce.gg.

Mr. Strenczewilk noted his daily job involves teaching eSports education. He owns a professional team called Splyce, one of the most successful teams in the world. Splyce players currently play in 11 games. All of the players on Splyce team only play one game; they devote their entire lives towards becoming good at this one game.

Mr. Strenczewilk mentioned one of their partnerships is the Bruins. He was recently educating them about eSports. He noted there is muscle memory involved but the way you improve as a player amounts to the number of hours you put towards the game. Mr. Strenczewilk stated that out of the 40 players on his team, all of them play one game. There are transitions depending on viewership of the games. For example, Counter-Strike players can transition to Call of Duty.

Mr. Strenczewilk told the story of a player on his team, Mickey. Mickey is a Slovenian. In 2015 he was living at home with his parents playing League of Legends. Mickey was still playing on his own in spring of 2016 when he ran into a couple of Splyce players in the game. They began playing together and eventually offered Mickey a trial. Mickey was asked to join Splyce in the summer of 2016. He moved to Berlin into the team house where five players live with their coach, manager, chef and the physical therapist so that they do not get injured.

Mickey made it all the way to the world championship. In San Francisco, he played in a large auditorium and in front of tens of millions of people watching online while he was only 17 years old.

Mr. Strenczewilk stated that the reason he tells the story is that eSports is purely aspirational. Kids are looking up to these players in the same way that he grew up looking up to David Robinson. He wanted to one day be David Robinson. Even though it was far from likely, it didn't keep him from dreaming.

Mr. Strenczewilk compared a gamer named Faker to LeBron James. In order to get up to where LeBron James is as a player is an arduous task. Faker is a global icon. If you wanted to try what Faker doing a player would need a PC at home to play League of Legends, which is free to play.

Within a matter of a couple hours of play a player could do some of what Faker is doing and feel that sense of accomplishment. Maybe one day that player could be Faker.

Mr. Stenczewilk said he would argue that eSports is a sport. It is similar to those who are watching for the players and the events. The difference is that eSports is in the 1970s of the NBA, still figuring it all out. There are no unions, regulations, or monetization streams. Mr. Stenczewilk stated the NBA has 50 monetization streams while eSports has near 6.

Mr. Stenczewilk stated that eSports has another party involved in ownership because teams don't own the games they play. Most publishers just make the games and other independent bodies run tournaments. There are four parties involved: publisher, tournament organizer, the teams and the players - far more complex than traditional sports.

Mr. Stenczewilk noted that most of the controls are in the IP holders hands. Team owners hold brand power like LeBron James of Cavaliers. Splyce has a massive fan base and brings those people to watch those games. He continued, he rarely watches basketball just to watch the game. He is watching for the teams and the players that he loves. There are a lot of purists out there.

Mr. Stenczewilk noted the World eSports Organization, consisting of eight of the largest teams in the world, is working towards a standardized rule set so it's not a Wild West, so there is not teams pouching other players, or enforcing contracts, being able to negotiate with leagues.

Mr. Stenczewilk noted there was an eSports tournament at the Wang last year in Boston.

He noted that eSports tournaments are still trying to figure things out on infrastructure standpoint.

Mr. Stenczewilk stated has players living everywhere in the world including Germany, Los Angeles, North America, Latin American, Korea and Europe. All of those regulatory jurisdictions are challenging. Immigration laws can affect the ability to attend a tournament. This can hamper a player's career and integrity of games where the best players cannot compete. It has happened with his players in the past. Players do have some representation, when it comes to unionization, but it still in the early stages.

Mr. Stenczewilk stated all of these different games act separately. Outside of team ownership, there is not a lot of crossover between games.

Mr. Stenczewilk noted that some of these players are making millions of dollars. eSports has been around for close to 20 years and originated in Korea. There is a lot of hype around players and network coverage of games; it is a cultural phenomenon there.

Mr. Stenczewilk noted there are a number of professional athletes who own eSports teams. It is a fast growing industry and new sport. He referred to Elon Musk when he said this is the future of sports.

Mr. Stenczewilk stated he expects there to be changes in the coming years in regards to capitalism aspect of tournaments - frontrunners will eventually emerge. He noted that eSports is different from traditional sports in the sense that players play from home rather than at TD Garden. Not all players and equipment is regulated. The future of eSports on the professional level will be localized with the ability to access an audience.

Mr. Stenczewilk asked if there any questions.

Chairman Crosby asked how they fund the team.

Mr. Stenczewilk answered that a lot of revenue comes from sponsorships for players. Splyce pays player salaries and therefore own their rights. Splyce takes a small percentage of prize money, and some revenue shares. Prize money for one tournament last year was \$20 million.

Mr. Stenczewilk gave a definition for digital goods. A game facilitator is able to make stickers for IPs once they reach a certain level. Splyce's brand is now a feature in the game. These can be traded and some stickers are more rare than others and, therefore, worth more than others. Some items cannot be sold but some are sold or traded on third party sites. There are young children who are addicted to this kind of trading, this is not the norm.

Mr. Stenczewilk stated the challenge with eSports compared with daily fantasy sports is that it does not fit in the model. NFL players don't typically change much in a year; this is not the same for eSports. The consumer market that companies are trying to reach is similar to traditional sports.

Mr. Stenczewilk stated that regulatory-wise, there is room for improvement. He noted the most important thing he wanted to leave with the commission is the comparison of professional eSports with the NFL and to use that comparison when creating regulations.

Chairman Wagner thanked Mr. Stenczewilk for his remarks.

Mr. Schoenke asked what Mr. Stenczewilk would like to see from the legislature which would help the industry grow.

Mr. Stenczewilk answered establishing standards and norms. Across the board, people are looking for guidance on how to do things correctly. There are times where entities need to guess which laws apply to them.

Chairman Wagner thanked Mr. Stenczewilk for his remarks.

### **Closing Remarks**

Chairman Wagner stated there was no other business before the commission and called for a motion to adjourn. All members answered in favor.

**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Tuesday May 2<sup>nd</sup>, 2017  
11 a.m. – 1 p.m.**

**Massachusetts State House  
Hearing Room 222  
Boston, MA 02133**

**Members Present:**

Chairwoman Eileen Donoghue, Representative Mark Cusack, Assistant Attorney General Dan Krockmalnic, Senator Jennifer Flanagan, Representative James Kelcourse, Peter Schoenke, Chairman Stephen Crosby, and Hirak Shah. Absent: Chairman Joseph F. Wagner

**Meeting Minutes**

**Welcome and Introduction**

At 11:10 a.m., Chairwoman Donoghue welcomed and thanked the members of the Special Commission for their attendance. Chairwoman Donoghue noted that Chairman Wagner had been delayed and the commission would get underway. Chairwoman Donoghue indicated that they would be changing the order of presenters from what was printed on the agenda.

**Testimony**

Chairwoman Donoghue introduced the first presenter, Professor Marc Edelman. Chairwoman Donoghue provided a brief background on Professor Marc Edelman, noting that he is a Professor of Law at the Zinklin School of Business at Baruch College and an attorney with expertise in sports law, gaming, anti-trust, IP and contracts. The Chairwoman indicated to the presenter, who had conferenced called in, that most of the commission members were present and that they may have questions after the presentation was given.

Professor Marc Edelman began by introducing himself and indicating that he would provide testimony beginning with a brief personal background and then move forward by providing information on history of daily fantasy sports, a legal analysis of daily fantasy sports in Massachusetts and then propose best practices for regulating daily fantasy sports at the state level and finally provide takeaways.

Chairwoman Donoghue stated that the commission has previously heard from speakers who addressed the history of daily fantasy sports, and further stated the commission was very interested in hearing Professor Edelman's best practices and legal analysis takeaways.

Professor Edelman started with his personal background noting he graduated from the Wharton School at the University of Pennsylvania and received his law degree from the University of Michigan. He began his career in the anti-trust field and representing player associations. He noted he began legal consulting to companies in the fantasy sports world around 2011. He also frequently publishes articles on fantasy sports law and the fantasy sports industry.

Professor Edelman stated that in the interest of full disclosure, he does provide legal consulting services for close to 100 companies in fantasy sports and daily fantasy sports market. He further indicated that he advises numerous private companies and professional sports teams.

Professor Edelman continued that fantasy sports content must comply with all the gambling regulations and laws in the states in which they operate as well as the federal laws. In most states, the plaintiff can bring a prima facie case in illegal gambling only if they show that the underlying activity entails three elements: consideration; reward; and chance. Professor Edelman continued that most fantasy contests meet the legal definition of consideration and reward. He continued further that the big issue that states have faced over the past several years pertains to skill vs. chance. He said the requisite level of skill needed for fantasy sports varies by state, and it also relies on a review of underlying statutes and common law. Professor Edelman noted that in a majority of states, courts determine if a daily fantasy contest complies with existing law simply by determining whether the contest entails more skill than chance. He further explained that some states that apply this predominant purpose test include California, Kansas, and Massachusetts.

Professor Edelman noted that with respect to regulating fantasy sports, he will list eight best practices that states should keep in mind. He clarified that some of these pieces will not be advocated for by industry stakeholders or other groups, but it is important these are considered for public policy, consumers, and the free market. Edelman continued that the first thing that comes to mind is how to define the term “fantasy sports”. He briefly discussed some of its history and the importance of appropriately defining the term. He said many states consider the definition provided in the UIGEA. However, he stressed caution, as many companies will stretch interpretations and take risks on what activities constitute daily fantasy sports. He noted the proliferation of games like daily fantasy golf and games where users play against the house. He said it is imperative to consider what you want to legalize and what that appropriate definition is.

Professor Edelman continued to his second point, which is determining whether fantasy sports contests constitute games of skill under certain rules and tests. He said it is his understanding that Massachusetts currently permits daily fantasy sports contests. He cautioned that, when permitting these games on the basis of skill (i.e. more skill than chance), there are some games on the web that call themselves “daily fantasy sports” but in fact they do not mathematically prove that they follow more skill than chance. He continued some would likely fail the test. They definitely could be subject to challenges. Professor Edelman noted that one approach to this issue would be to continue to only allow games of skill and not change any preexisting law with respect to fantasy sports. He continued that the second strategy is how to handle and tackle skill vs. chance. He said that the full-season fantasy sport competitions on the major sports should be presumed to be legal games of skill and shouldn’t have a burden to prove otherwise. He noted, in contrast, that people launching new forms of daily fantasy sports should have to prove to regulators that they are skill games before being allowed to operate. He said that Massachusetts is not as concerned about skill vs chance like other states.

His third issue with respect to regulation is how do you charge fees, if at all, to fantasy sports operators? He said among the statutory requirements that are beginning to emerge around the country, involves some form of a licensing fee. He then discussed the impacts of a fixed fee as

revenue source but also as a barrier to entry for new companies. He cited the Indiana and Virginia bills as examples states with high licensing fees (\$50,000). He said while this may not be an issue for sizeable companies, like DraftKings and FanDuel, it can be inhibit companies with less resources from doing business in a particular state. He suggested a structure where companies pay a share of their revenue is more fair and reasonable. He emphasized the importance of competition in this market sphere, especially in light of efforts made by the two biggest companies to merge. He said FanDuel and DraftKings make up 95% of the market share.

He moved on to his fourth point pertaining to what type of disclosures should these companies provide? He noted that Massachusetts handles this area quite well. He specifically noted disclosures relative to contest winners, employees, not allowing employees or professional athletes to enter contests, etc.

Professor Edelman transitioned into his fifth point and indicated that the special commission likely hasn't heard this one before, and it may be a bit more controversial. He said states should think very carefully about whether professional sport leagues, and their owners, be allowed to own shares in daily fantasy sport companies. He continued that this proposal has not gained a great deal of traction because FanDuel and DraftKings have ownership ties to at least one professional sports league. He highlighted two compelling reasons: 1) professional sports leagues have primary jurisdiction under the Professional and Amateur Sports Protection Act (PAPSA) to prevent the proliferation of sports gambling, which raises concerns for conflict of interest; and 2) from an equitable perspective, sport owners should not be allowed to leverage their shared monopoly of the sports industry and then tap into an emerging sports gaming market. He said it allows wealthy owners to take influence from one monopoly and begin to tap into a potentially new market with monopolistic characteristics.

Edelman pivoted into his sixth point on how to minimize gambling addiction risks among participants. He clarified that there is a little evidence of traditional fantasy sports leading to pathological gambling behaviors; however, some believe the emerging daily fantasy sports industry is leading to new cases of gambling addictions. He said that all contests should present warning to users informing them that these games can be addictive. He also highlighted important components like self-exclusion tools. He continued that the burden should be placed on the companies themselves. He credited Massachusetts for putting caps on the amount of money users can enter each month.

He continued on to his seventh point relative to minimum age. He said some states are adopting a minimum age of 18. He also acknowledged that Massachusetts sets it minimum age at 21. He stated that it is a tough issue, but indicated his view that whatever the law provides with respect to gambling at a casino should line up with the minimum age to partake in daily fantasy sport contests.

He moved on to his last point on measures that can be taken to prevent fantasy sport companies from defaulting. He noted that they've seen it several times in the past in this industry, and cited a couple examples. He emphasized the need to separate funds as a very important piece. He also said that states need to follow through and enforce these measures, too. Chairwoman Donoghue



noted that commissioners may have questions and asked that he provide time for those questions. She noted that other speakers are scheduled to present.

Mr. Edelman indicated his intention to highlight four takeaways. He noted that number one is that daily fantasy sports could, and perhaps should, be legalized but it does need to be regulated. He continued to his second point by saying when states move forward with regulations that they can't rely on these operators to call the shots or be responsible for enforcement. He said they do have self-interests...it is important to make regulations for the good of the consumer. He said his third point is self-regulation will not work. He opined that while the Fantasy Sports Trade Association is made up of a lot of good people, it is self-serving. He said outside regulators need to take ownership. He concluded with his fourth point by emphasizing the need to put rules in place that foster a competitive marketplace. Mr. Edelman then thanked the commission.

Chairwoman Donoghue opened the discussion to questions.

Commissioner Schoenke began by mentioning that in his biography, the Professor left out that he was a fantasy sports writer for RotoWire for several years.

Commissioner Schoenke then asked about the status of the Professor's involvement in a client's prior litigation against DraftKings. Professor Edelman stated that to the best of his knowledge litigation has been settled, but he has not been involved in the day to day of that litigation for some time. Furthermore, Professor Edelman indicated the client sent him a signed settlement agreement, so to the best of his knowledge he is not representing any clients currently involved in litigation with DraftKings.

Next, Chairman Stephen Crosby asked a question regarding duty of care. Specifically, he asked whether the state should legislate a duty of care, or legal obligation, assigned to the online gaming operators. Mr. Edelman recommended that a duty of care would be reasonable in a few different areas. First, he recommended that there should be a duty of care regarding the data collected by daily fantasy sports operators. Second, Professor Edelman recommended a duty of care to disclose unusual gaming habits (such as large sums of money being deposited in system or lost by players), and that these instances should be investigated by the company to resolve whether a gambling addiction is present.

Representative Cusack then asked a question regarding the potential conflict of interest present for professional sports team owners who have invested in daily fantasy sports. Professor Edelman stated that he believes this is inherently a conflict of interest. He continued that he is not worried about this affecting the outcome of any games. He said the conflict to him comes directly from the idea that the sports league oversees the operations and is the primary jurisdiction under PAPSA. He said these sports leagues/owners that have the primary authority are now involved in these contests. They have the ability to influence the market greatly, according to Edelman.

Dan Krockmalnic, representing the Attorney General's Office, asked a question to clarify the Professor's use of the term "duty of care." The Professor clarified that he is using the term in the traditional tort sense, that any business operator has a duty to operate with reasonable due

diligence under the circumstances of the business they are operating. Edelman further clarified that daily fantasy sports owners likely do have an elevated duty, above and beyond the traditional business operator, but in a limited way. According to him, such elevated duties include the duty to disclose the explicit terms surrounding the segregation of funds. Additionally, operators should have a duty to track the patterns of gambling to make sure those at risk of addictive gambling, or losing large sums of money, are not engaged in addictive behavior. Finally, he indicated that he believes there also needs to be a duty to make sure operators are not collecting money from underage users or from people outside permitted jurisdictions.

Chairwoman Donoghue then asked Professor Edelman to clarify his position on the DraftKings offering contests based on golf (one tournament, one golfer), and whether this qualified as daily fantasy sports. The professor indicated he does not consider this to be daily fantasy sports because it does not match the definition of daily fantasy sports. The Professor explained that traditional daily fantasy sports is commonly defined by the use of “multiple players involved in multiple contests,” and golf is one player involved in one event. Thus, according to Edelman, both golf and NASCAR are more like traditional sports betting, not daily fantasy sports. The professor then continues on to explain how golf *could* be included under the definition of fantasy sports, if based on performance in a longer contest among multiple players. Chairwoman Donoghue followed up at the end of the Edelman’s explanation and noted that she understands now that golf could fall under fantasy sports, and in other circumstances...illegal betting.

Peter Schoenke interjected and noted he disagreed with Professor Edelman’s position and explained his view. He said further that the analysis involved makes it significantly different from walking into a Vegas casino and making a prop bet. The Professor responded by explaining that it is common across the industry, specifically referencing FanDuel, to not include golf as fantasy sports. Mr. Schoenke noted that FanDuel has offered daily fantasy golf since March.

Professor Edelman indicated that FanDuel only recently started fantasy golf because DraftKings had not been challenged in their use of daily fantasy sports, so Fan Duel must have assumed it was reasonable to offer it themselves. He continued to explain how this exemplifies the importance of the legislature’s attention to detail in drafting regulations so as not to allow the industry to expand on its own accord.

Chairwoman Donoghue thanked Professor Edelman for his testimony and his input in these areas and thanked him for speaking to the committee.

The time was 11:53.

Chairwoman Donoghue then introduced Peter Schoenke as the next speaker before the special commission. Chairwoman Donoghue stated that in addition to being a member of the commission that he is also the Chairman of the Fantasy Sports Trade Association.

Mr. Schoenke thanked the commission for letting him speak before them today and reiterated that he serves as the Chairman of the Fantasy Sports Trade Association. He further noted that he’s been in the fantasy sports world for over 20 years. He clarified that being part of the Fantasy Sports Trade Association is a voluntary position. He also owns and operates a company called

RotoWire.com, which is primarily a fantasy sports information provider where you can subscribe to the website for updates and relevant info. The company also syndicates information to everyone in the business, such as ESPN, Yahoo, Fan Duel, Draft Kings, and a bunch of other companies.

Mr. Schoenke stated that in his role as the chairman of the Fantasy Sports Trade Association, he leads the governmental affairs portion and, as a result, had the opportunity to travel to a lot of states as well as testify in front of Congress on fantasy sports.

Mr. Schoenke spoke briefly on the history of daily fantasy sports and efforts on legislation. He noted that it goes back to about a decade ago, where at the time legislators and groups, such as this commission, when contacted, would immediately denote that the game was legal on the basis of it being a game of skill. He did emphasize that it was also a difficult situation (relative to the legal clarity) when people were losing their jobs because their boss considered fantasy sports to be gambling.

Mr. Schoenke noted an incident occurred in Maryland in 2012, which later inspired action to create a law. Lawmakers proposed a law to clarify fantasy sports and it passed that in 2012. Shortly after that, another law relating to fantasy sports passed in Kansas in 2014 after their gaming commission raised some questions. Obviously in 2015, a lot of states and state officials began to scrutinize the industry. We, the trade association, made an effort to get out there and explain the industry and seek legal clarity to make sure the DFS industry is indeed legal. Schoenke said they had three goals 1) provide clarity it is a game of skill; 2) establish consumer protection mechanisms; and 3) establish regulations that are good for the entire industry. He said there are currently 11 laws that have passed around the country. Eight states passed laws last year. This year, Arkansas and Mississippi have passed laws. In 2017, there are bills pending before 24 states. Mr. Schoenke noted that he travels around the country to testify before these various legislatures and he's hopeful that they can see through legal clarity.

He further noted that the Massachusetts Attorney General regulations have been very critical for their industry. They were the first regulations that came along and they've done a real nice job. A lot of states have relied on it. The industry is happy with them. Massachusetts took a step forward in working with the industry.

He flagged key pieces of law for their association: game of skill; model after UIGEA; definition of daily fantasy sports contest; consumer protections; and registration and tax structures. He said high, flat minimum fees can be very problematic because they can prevent smaller, startup companies from entering the industry, or continue to do business in a state. He emphasized that a lot of companies in the business are small. For example, a company that operates around the company may be discouraged from participating in a certain market if the costs are too high. He noted Indiana as an example. We like to differentiate structures. FTSA proposed an example based on prizes paid out. Colorado is also cited as example that makes an exception for smaller sized groups.

He noted the industry really isn't that big. It is not like casinos in that it can't generate a great deal of revenue for states, which some may have thought at first. He said the industry knows that

if there are going to regulations and consumer protection pieces that it will cost money to implement and enforce these pieces. He noted his slide with a breakdown of the tax assessments around the country. He said 5 out of the 11 states do not currently assess an additional tax. He then pivoted to registration fees. He said that he welcomes a shift to fees that are more conducive for small companies. He stated some are linked to gaming revenues or net revenue. He said some of these registration and fee structures come from other industries.

He said that some jurisdictions have put in place heightened regulations that also have a cost. For example, fingerprinting, which they don't have a problem with, but that can cost \$5k-\$25K in certain states. He also noted investigators and surety bonds. A lot of these costs make sense for brick and motor entities but it doesn't really work for smaller startups and small operations that have been around for years.

He listed other tax structures in other places. He concluded his remarks by saying that Massachusetts is a great example on the consumer protection front and he hopes the state can be cognizant of how the industry operates, such as the smaller ones, and other regulatory costs. Mr. Schoenke thanked the commission for the opportunity to testify. Chairwoman Donoghue asked if there were any questions.

Representative Cusack asked a question pertaining to enacted taxes, and specifically on New York. Mr. Schoenke said that New York is outlier in terms of a higher tax rate, and they were certainly more aggressive in their dealings with the industry.

Chairwoman Donoghue asked a question regarding members of the FTSA. Mr. Schoenke said there are about 200 members and range in size from large to small.

Chairman Stephen Crosby asked how they tier their membership dues. Mr. Schoenke stated that the dues are not substantially tiered and it's been a collective effort. They also raise money from conferences.

Crosby followed up by noting a conundrum in the difficulty of representing large daily fantasy sport operators, such as DraftKings, and tiny companies, especially in the area of fees and assessments. He continued, how do you walk that line?

Mr. Schoenke said that is has been a struggle because this is relatively new. They didn't experience this degree of inequity until recently. He said it's been a challenge at the state level. He said the model they emphasize is a sliding scale, such as ten percent of net revenue or less. Under that model, the bigger and more successful companies pay more to the state and the smaller companies will pay less. He said they've had to deal with learning curves and kneejerk reactions around the country.

Chairman Crosby asked another question regarding skill vs. chance, and whether, on the public policy front, should folks make a distinction as far as gambling on skill and chance. Mr. Schoenke said that there have always been 5 states that maintain if there's any luck involved then it is gambling. Accordingly, they do not operate in those states. With respect to Chairman

Crosby's question on public policy, he said that the larger discussion is beyond their industry. He noted the distinction between sports gambling and daily fantasy sports.

Chairwoman Donoghue then asked a question relative to taxes. Mr. Schoenke noted that the industry is still being taxed in states where there is no additional tax (in reference to his PowerPoint). Consumers with winnings pay taxes, and businesses pay taxes. He said further, in addition to that, these laws have come along with an additional tax on the revenue. Chairwoman Donoghue provided an example of business that is not showing a net profit so they're not paying any taxes. She asked, among his membership, are these operators paying taxes (i.e. showing net profit)? Mr. Schoenke said that some of these companies could be profitable if they wanted to but they're losing money right now in efforts to gain market share. He said Amazon is an example of this strategy. He said that there are number of companies in his trade association that are profitable and paying taxes.

Chairwoman Donoghue thanked Mr. Schoenke and began to introduce John Holden. Chairwoman Donoghue then called from a motion to accept the minutes from the meeting on March 28, 2017 after acknowledging they forgot to adopt them earlier in the meeting. All present members voted in favor. The minutes were adopted.

Chairwoman Donoghue welcomed John. T Holden, a visiting scholar the Florida State University, to the panel.

Mr. Holden thanked Chair Donoghue and other members of the special legislative commission on online gaming, fantasy sports gaming, and daily fantasy sports for the opportunity to remarks. He noted his testimony here is reflection of his personal views and not the views of Florida State or any other third party. He also indicated that he's submitted written testimony to the commission filed jointly with Ryan Rodenberg of Florida State University.

Mr. Holden stated that there are several important considerations in regards to legal and regulatory structures on online gaming, daily fantasy sports, and e-sports related gaming. These considerations include federal law, state law, laws regulating virtual currencies, and general areas on consumer protection. He continued that the rise of daily fantasy sports and traditional fantasy sports demonstrates the interest by Americans in engaging in sports beyond watching them on television or in person. Mr. Holden further stated that Americans are already betting on sports. He said while some are betting in legal markets, like Nevada, many are betting illegally through online sportsbooks and local bookies.

Mr. Holden stated that efforts to curb online sports betting have failed. He said the first important area with respect to online gaming is federal law. He continued that the first such federal statute is the 1961 Wire Act which prohibits those engaged in the business of betting and wagering from utilizing a wire communication facility to transmit bets or wagers on sporting events or contests across state lines. He further stated that it did include several safe harbor provisions. Mr. Holden then explained that a 2011 memo issued by the Department of Justice in 2011 explained that the statute only applied to sporting events and does not encompass other gambling activities. He said it is a contentious memo. He acknowledged testimony made in 1961 by then Assistant Attorney General Robert F. Kennedy indicating that the intention of the act

was to apply only to sports. He said that there is recent talk in Congress on expanding the scope of the Wire Act.

Mr. Holden continued in his testimony by noting the second significant federal statute that is relevant to this subject matter, the Professional and Amateur Sports Protection Act of 1992 (PAPSA). He stated that it provides dual enforcement authority to the professional and amateur sports leagues as well as the Attorney General of the United States to ban state sponsored sports gambling. It is the subject of ongoing litigation with the state of New Jersey and major sports leagues. Holden noted that the statutory text of PAPSA indicates a likely relevant concern for daily fantasy sports and the effort by states to regulate daily fantasy sport operations. He clarified that there have been no suits to date. He said some individuals, such as sports executive, have pushed to revisit PAPSA.

He continued on by highlighting the third notable federal statute pertaining to this discussion, which is the Unlawful Internet Gambling Enforcement Act (UIGEA). He stated that while it is not applicable to certain exempt fantasy sports contests, it relevant to other online gaming transactions made. The statute is particular relevant for payment processors.

Mr. Holden noted that while UIGEA, PAPSA, and the Wire Act are all relevant in this area, the regulation of gambling has historically been left to the purview of the states. This remains true today, according to Holden. He flagged some potential issues pertaining to betting pools, lotteries, and definitions. He provides an example that the pooling of money in daily fantasy sports contests could be problematic in certain states. He further continued with concerns regarding the integrity of sports.

Mr. Holden then pivoted to the role of virtual currencies in this sphere, such as bitcoin. He expanded by noting the rise of a gaming industry fueled by decorative virtual weapon skins associated in games like Counter-Strike. He said there is a potential challenge that comes with the weapon skins not having value according to the terms of services. He continued by emphasizing that many laws are not designed to be used against something with no stated value of nothing. He said virtually all state gaming laws require three elements: 1) chance; 2) consideration; and 3) a prize. Mr. Holden said that if the defendant is using a virtual item with a real or perceived value of zero, there is effectively no consideration. He said a series of cases around the country where courts have found that virtual casinos, such as ones with tokens, do not constitute illegal gambling. He said there are often lucrative secondary markets where these chips can be cashed in for government-backed money by selling to others. He noted steps taken by the United Kingdom to crack down on the trading of virtual currencies.

Mr. Holden further said that gaming, both online and offline, raises a number of consumer protection issues. He emphasized the importance of protecting the integrity of sporting events. He also emphasized the importance of protecting the integrity of fairness and legitimacy of the contests in which the user is participating. He said protecting the integrity of these games should be a priority of regulators and companies. Measures can be taken through the implementation of best practices and protocols, as well as the monitoring of online systems to ensure systems are protected from outside threats. He said operators should also be aware of who is accessing their

websites. This is true in other industries like alcohol and tobacco. These operators should be responsible for verifying and authorizing access to their sites, such as two-step verification.

He said the most important concern from a consumer protection standpoint is problem gambling. Holden stated further that one of the features that should be part of any regulatory system involving online gaming is providing help for anyone suffering from problem gambling. He noted it is speculated that online sites can use data to track and identify problem gambling traits. He continued that the implementation of data-based solutions could be meaningful progression from the self-exclusion models which remain the standard in much of the industry today.

Mr. Holden thanked Chairwoman Donoghue and the commission for the opportunity to speak and asked if there were any questions.

Chairwoman Donoghue asked if there were any questions.

Chairman Stephen Crosby asked a clarifying question regarding the three elements of gambling and further asked about betting on a scrabble game under that test. He followed up by asking what is the preoccupation with chance vs. skill in this sphere.

Mr. Holden responded by saying that has come a time where people are taken a greater look at this question and saying we've done this for so long, but does it continue to make sense? He said he's not sure if it does. He said that if looks like gambling then perhaps it should be treated like gambling. He said we've seen this with daily fantasy sports where many people had different perceptions of what it is. Some thought it looked like gambling, and some didn't think it did. Then, people took a look at these antiquated definitions and said it is not a perfect model.

Chairwoman Donoghue asked a question regarding problem gambling and identifying problem gambling. She asked whose responsibility should that be?

Mr. Holden said that he believes that companies, at a certain size, should be responsible for identifying problem gambling.

Chairwoman Donoghue thanked Mr. Holden for his testimony. She noted that there was no further business matters for the day and made a motion to adjourn. She stated information would be forthcoming for the next commission hearing.

**Special Commission on Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports  
Tuesday June 6<sup>th</sup>, 2017  
11 a.m. – 12 p.m.**

**Massachusetts State House  
Hearing Room 222  
Boston, MA 02133**

**Members Present:**

Chairman Joseph F. Wagner, Chairwoman Eileen Donoghue, Assistant Attorney General Dan Krockmalnic, Senator Jennifer Flanagan, Peter Schoenke, Chairman Steve Crosby, and Hirak Shah. Absent: Representative Mark Cusack, Representative James Kelcourse

**Meeting Minutes**

**Welcome and Introduction**

At 11:14 a.m., Chairman Wagner welcomed and thanked the members of the Special Commission for their attendance. Chairman Wagner noted that the Commission has been working for a number of months, looking at fantasy sports, daily fantasy sports, online gaming, and more, and a number of individuals, including the Gaming Commission, have provided testimony. He continued that there have been discussions regarding different viewpoints and the various elements that need to be addressed in the final report. At this point, the Commission needs to firm up what is important and significant with regard to findings and recommendations, and potential legislative approaches need to be considered.

Chairwoman Donoghue thanked everyone for their cooperation over the past few months. She added that the Commission has been tasked to examine at least three areas: daily fantasy sports, online gaming, and E-sports, and there has been an aggressive schedule to hear and investigate all aspects of the landscape in order to file a meaningful report. The Chairwoman further noted that one thing is clear that the legislature was very mindful in legalizing DFS in anticipation that the commission would take a very close look. She also clarified that, although the lottery has been mentioned a few times, lottery is being dealt with separately and was not included in the scope of the online gaming legislation.

Chairman Wagner then moved to introduce the members of the commission and welcomed comments from the commissioners.

**Discussion**

Commissioner Schoenke began by explaining that the Commission has heard testimony, and from the industry's perspective, Massachusetts is seen as a leader. He indicated that operators have not heard major complaints, and they see the Attorney General's regulations as positive ones. Massachusetts has "done right" from an industry perspective.

Chairman Wagner then asked about what consumer protections look like in other states where gaming is expressly legal. Commissioner Schoenke stated that there are minor differences, and



that there are more than thirty five states currently addressing these regulations. He reiterated that the Attorney General's regulations have done well in Massachusetts, and serve as a model example for the country.

Chairman Wagner next asked a question regarding the omnibus structure, and Commissioner Schoenke restated that the Attorney General is doing a good job, so why fix what is not broken?

Next, Chairman of the Gaming Commission, Steve Crosby, mentioned the sunset provision in statute and clarified that the legislation states that daily fantasy sport contests are legal for two years. He continued on whether the Attorney General's regulations deem the industry legal? Chairman Wagner asked for clarification: is it legal, or are we saying "this is happening." Wagner said he believes the Attorney General backed off her original comments with regard to legal or not.

Assistant Attorney General Krockmalnic explained that the AG takes the position that daily fantasy sports shouldn't be held up against outdated statutes but subject to certain standards. The law took effect last summer, and the AG's position is that when the statute sunsets, requirements for daily fantasy sports need to abide by the regulations.

Chairman Crosby asked again, "would they be legal?" Assistant AG Krockmalnic clarified that it would be as it was previously; if DFS operators comply with the regulations, then AG's Office will not view it as a criminal or a consumer protection issue.

Chairwoman Donoghue then asked about what the industry wanted when the economic development bill was finalized. Commissioner Schoenke responded that the industry wanted legal clarity, and for them the existing regulations are working and would be good going forward.

Chairman Wagner next commented about advertising spending for daily fantasy sports, noting that in 2015, advertising costs were around fifty million dollars, while the number today is less than five million. In addition, the total entry fees were forecasted to be around twenty billion, while now they are just above eight billion.

Commissioner Schoenke explained that a lot of people jumped into the market, but a lot of companies didn't continue. There was a certain amount of overinvestment in the industry.

Chairman Wagner also asked if there was a difference in users, and specifically if there are fewer registered users. Commissioner Schoenke stated that there are around fifty seven million users, but only ten to fifteen percent are daily fantasy sports players. The number of users has been growing—there were twenty to thirty million ten years ago—and those numbers will probably grow again. Since the 1990s, the trend has had an upward trajectory, and it is expected to continue that way in the future.

Next, Chairman Wagner posed a follow up question about trends in the industry. Commissioner Schoenke answered that the fantasy sports industry is still growing, especially considering that daily fantasy sports have been around for less than a decade. He noted that the future is a bit

cloudy regarding the speed of the industry growth, but it should grow over the next five years at a good rate.

Chairman Wagner then asked about investor trends. Commissioner Schoenke said that a lot of states are grappling with the legal issue which affects investments. Legal clarity would be necessary to stabilize that.

Chairman Crosby spoke next about the Attorney General's regulations, commenting that the regulations did a lot for addressing major problems, but there are questions of sustainability, as well as many others. He continued to state that the hope is the people at DraftKings, for example, are quality people, considering that there are holes in the regulatory environment. He then said one big issue is that online gaming is proliferating extremely quickly: there is sports betting, and there's no doubt going to be something else new soon. The job is—if online gambling is legal—to come up with a regulatory environment to deal with all of these questions. From an industry perspective, the favored option would be an omnibus approach, where regulatory power is delegated to someone, possibly the Gaming Commission. He further said a legal clarification is good for industry and players. He offered that providing an agency with clear parameters then it could make sense to give them the power to regulate. If a broad based regulatory structure was adopted, it could encourage growth, innovation, and development within Massachusetts.

Assistant Attorney General Krockmalnic added that though not at this time, perhaps down the line, there might be comments from the Attorney General's Office. He clarified that silence on that front is not complicit assent; an examination is ongoing, and there are still things that cannot be shared. He further clarified that the bottom line takeaway that they haven't heard negative feedback cannot be assumed. The AGO isn't in place to share that information.

Senator Flanagan voiced a concern regarding market saturation; with the casinos set to open up soon, the same concern exists with regard to iLottery. She stated that a broad approach would be best for Massachusetts, for the state could be a leader that others look to. She further suggested that there is potential for industry development; for example, there is a university in her district that offers game design as a major.

Commissioner Hiram Shah, Legal Counsel for Senate Minority Leader Bruce Tarr, said Sen. Tarr would echo the same sentiments. A broad approach would be best in order to protect consumers, while enabling potential industries and technologies in Massachusetts to thrive.

Chairman Crosby then brought up a point about how the gaming commission is here to partner with the lottery and has been directed to protect the lottery. He further noted that there is an inherent overlap and conflict between what is considered online lottery and what is not, as lottery would be fairly expansive. Therefore, several issues arise, including (1) how to write the distinction between online lottery and everything else; (2) if a major online gaming industry evolves, the brick-and-mortar folks need to be involved and casino interests must be considered. Online casino games should thus be anchored in casinos, possibly in partnership with third parties; and (3) licensing fees and taxes: the principle of taxes and regulations to "legalize gambling" requires attention.

## **Closing Remarks**

Chairwoman Donoghue wrapped up the meeting by emphasizing how quickly the industry is changing, noting that we have not seen everything yet. She said prior to serving on this commission she was not aware that people will watch other people play video games. She continued that the task of the commission is not a small one. Massachusetts has been a leader in the industry, and we are now on a new frontier, Donoghue stated. We need to make sure all the tools are in place, and then we need to look at the issue of taxation. Chairman Wagner followed up by asking if anyone would like to submit written comment that they please do so by 5:00 pm on June 16<sup>th</sup>.

Chairman Wagner then called for a motion to accept the minutes form the meeting on May 2, 2017. All present members voted in favor, and the minutes were adopted. Finally, Chairman Wagner called for a motion to adjourn, and all present members answered in favor.

DRAFT