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19th Annual
**SARATOGA
INSTITUTE**
ON EQUINE, RACING
& GAMING LAW

TUESDAY, AUGUST 6, 2019
THE SARATOGA HILTON
SARATOGA SPRINGS, NEW YORK

ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER

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Saratoga Institute on Equine, Racing and Gaming Law Tuesday, August 6

Agenda

8:00am – 8:30am

Registration

8:30am – 9:30am

Equine Welfare: Can the sport survive?

Moderator:

Wendy Davis

The University of Arizona, Race Track Industry Program

Panelists:

Andy Belfiore

New York Thoroughbred Horsemen's Association

Jennifer Durenberger, Esq.

New York Racing Association

Dr. George Maylin

SUNY Morrisville, New York Equine Drug Testing

Chris Wittstruck, Esq.

Standardbred Owners Association of New York

9:30am – 10:30am

The New York OTB's: Can they survive?

Moderator:

Teresa Genaro

Panelists:

Jack Jeziorski, Esq.

Monarch Management

David O'Rourke

New York Racing Association

John Signor

Capital District Regional Off-Track Betting

10:30am – 10:45am

Break

10:45am – 11:45am

New York Harness Racing: Can it survive?

Moderator:

Dick Powell
Racing Consultant

Panelists:

Moira Fanning
The Hambletonian Society

Joseph A. Faraldo, Esq.
Standardbred Owners Association

M. Kelly Young
Agriculture and New York State Horse Breeding
Development Fund

11:45am – 12:45pm

Lunch

The Rules of Racing

Bennett Liebman, Esq.
Government Law Center at Albany Law School

12:45pm – 1:45pm

The Big Picture Issues in Gambling

Moderator:

Andrew J. Turro, Esq.
Meyer Suozzi English & Klein, P.C.

Panelists:

Patrick Cummings
Thoroughbred Idea Foundation

L. J. D'Arrigo, Esq.
Harris Beach, PLLC

Robert J. McLaughlin, Esq.
Hodgson Russ LLP

1:45pm – 2:45pm

Tribal Gaming

Moderator:

Robert C. Batson, Esq.
Government Law Center at Albany Law School

Panelists:

Patrick E. Brown, Esq.
Brown & Weinraub, PLLC

Prof. Katherine A. Spilde
San Diego State University

2:45pm – 2:55pm

Break

2:55pm – 3:55pm

The Future of New York Casinos

Moderator:

John J. Poklemba, Esq.
New York State Gaming Commission

Panelists:

John J. Donnelly, Esq.
Donnelly Clark

Jeff Gural
Tioga Downs Casino Resort

Stacey B. Rowland, Esq.
Rivers Casino and Resort

3:55pm – 5:15pm

Sports and Fantasy Gambling

Moderator:

Prof. Keith Miller
Drake Law School

Panelists:

Prof. Jodi S. Balsam
Brooklyn Law School

Michele Fischer
Darting Star LLC

Cornelius D. Murray, Esq.
O'Connell & Aronowitz

Daniel L. Wallach, Esq.
Wallach Legal, LLC



Saratoga Institute on Equine, Racing and Gaming August 6, 2019

SPEAKER BIOGRAPHIES

JODI S. BALSAM is Associate Professor of Clinical Law and Director of Externship Programs at Brooklyn Law School, where she also teaches Sports Law. She is the faculty advisor to the Brooklyn Entertainment and Sports Law Society, and a member of the Executive Committee (and past Chair) of the Association of American Law Schools Section on Law and Sports. Professor Balsam has also taught courses in Sports Law and Sports Contracts at New York University, New York Law School, and Bucerius Law School in Hamburg, Germany. She is a co-author of the sixth edition of Weiler Roberts' *Sports and the Law*, the leading law school casebook in the field, and serves on the editorial board of the *Journal of Legal Aspects of Sport* and the international sports law blog *LawInSport*. Before joining academia, Professor Balsam was the National Football League's Counsel for Operations and Litigation, where she managed litigation in all areas of law, oversaw a variety of policy and operational matters, negotiated and drafted contracts for League special events including the Super Bowl, and administered the League's internal dispute resolution processes and compliance program. Prior to the NFL she was a litigator with Simpson Thacher & Bartlett LLP, where she represented sports and entertainment clients in antitrust matters and complex commercial litigation. She served as a law clerk for Judge Dennis Jacobs of the US Court of Appeals for the Second Circuit and for Judge Charles Brieant of the US District Court for the Southern District of New York. A graduate of Yale College, Professor Balsam received her law degree from NYU School of Law.

ROBERT BATSON, ESQ., is Government Lawyer in Residence at the Government Law Center at Albany Law School where he teaches classes in Federal Indian Law and State Constitutional Law. He served in various legal positions in New York State government between 1976 and 2003 where he specialized in municipal law, administrative law, and government regulation. From 1978 to 1995 he served as a liaison between New York State and the governments of various Indian nations, and he represented the State in negotiations on many issues, including land claims and gaming compacts. He graduated from the University of Rochester and Albany Law School.

ANDY BELFIORE is Executive Director of the New York Thoroughbred Horsemen's Association. She started her career in racing on the backstretch at Belmont Park, working as a hotwalker, groom, exercise rider, and assistant trainer. After ten years with the horses, she moved to the frontside at the track, and spent five years in the communications and marketing departments at NYRA. She left NYRA in 1993 to take the post as editor-in-chief at the *Thoroughbred Daily News*, a position she held for eighteen years. She was named Director of Communications for NYTHA in December, 2011, and took over as Executive Director in 2015. She also serves as Executive

Director of the TAKE2 Second Career Thoroughbred Program Inc. and TAKE THE LEAD Thoroughbred Retirement Program, and is co-Chair of the Backstretch Employee Service Team (BEST) Board of Directors.

PATRICK E. BROWN, ESQ., spent more than a decade providing legal and public policy counsel to the judges of the state's highest court and to Governor Mario M. Cuomo. He has spent the last eighteen years providing legal and strategic advice to companies of all sizes, unions, hospitals and other non-profit organizations, and associations. With his partner, David Weinraub, Mr. Brown founded Brown & Weinraub in 2001. Over the last eighteen years, the firm has grown into one of the state's top ten lobbying firms. His expertise in the areas of ethics, election law, health care, economic development, gaming, and Indian law has proved invaluable to the firm's clients. During his decade of public service, Mr. Brown was Chief Law Assistant to the New York State Court of Appeals, First Assistant Counsel to Governor Cuomo, and Director of Industry and Community Relations at the Department of Economic Development. He was also the state's chief negotiator with Indian Tribes and Nations. Mr. Brown is the Chair of the College Council of SUNY Oneonta. He served as a member of the Town of Coeymans Zoning Board of Appeals for more than a decade and was elected to the Ravena–Coeymans–Selkirk School Board in May 2013. Mr. Brown is a member of the Advisory Board of the Government Law Center at Albany Law School.

PATRICK CUMMINGS is the Executive Director of the Thoroughbred Idea Foundation, a privately-funded think tank launched in 2018 which aims to improve the thoroughbred racing industry for all stakeholders, especially its primary customers – gamblers and owners. A former executive with the Hong Kong Jockey Club and racing technology and data provider Trakus, Pat has been involved in racing for the last two decades in a variety of media and communications roles. He joined the Thoroughbred Idea Foundation following three years leading the HKJC's racing public affairs division and has a wealth of international racing experience. He also covered Dubai racing for a number of media outlets for nearly a decade. Cummings has enjoyed the thrill of horse ownership through several syndicates and is a current member of Kentucky-based Brilliant Racing and the Onamission Syndicate in South Africa. He is originally from Philadelphia, and completed his undergraduate studies at Dickinson College in 2002. He earned his MBA from Baylor University in 2011.

LEONARD J. "LJ" D'ARRIGO, ESQ., is Partner and Co-Leader of the Immigration Practice at Harris Beach, PLLC, where he specializes in corporate and professional immigration involving the full suite of employment-based immigrant (NIW, Outstanding Researcher, Extraordinary Ability, Multi-National Manager, PERM) and non-immigrant petitions (H-1B, H-2, O-1, L-1, E, TN, J-1), as well as all family-based immigration processes. Mr. D'Arrigo assists a diverse group of US and foreign employers to obtain temporary and permanent visas for skilled or professional foreign national employees, including international executives and managers, engineers, researchers, skilled craft workers, physicians and medical personnel, scientists, and university professors, understanding the impact of immigration issues on corporate operations. Specifically, he has developed an expertise in assisting hospitals, technology companies and

research institutions in importing highly skilled labor to fuel growth in the healthcare, education, technology, and semiconductor industries. He assists clients in complying with the employment verification and record-keeping requirements of the Immigration Reform & Control Act of 1986. He performs I-9 and other audits of required employment records, advises on document retention and correction requirements, and offers training on completion and maintenance of I-9 records. Mr. D'Arrigo is also a recognized national leader in the processing of H-2B and H-2A visas for agricultural and seasonal employers, including farms, landscape companies, and the thoroughbred racing industries. He maintains one of the largest attorney-managed H-2A and H-2B programs in the country. He provides guidance to these employers on DOL and USCIS compliance issues, and counsels other attorneys, congressional leaders, and organizations on H-2 legislation and compliance issues throughout the country. Mr. D'Arrigo is a frequent speaker at immigration and employment-related conferences and seminars. He is widely cited and quoted in the media on immigration issues affecting employers.

WENDY DAVIS is the Director of the Race Track Industry Program at the University of Arizona. In addition to her oversight responsibilities of the Program and the Global Symposium on Racing, she is the advisor for the RTIP students as well as an instructor for a number of courses including Animal Racing Laws and Enforcement and Management of the Racing Animal. Davis is very active on a number of curriculum-based committees within the university including the University of Arizona Undergraduate Council and also serves on a number of national equine boards and committees including the Racing Officials Accreditation Program (vice chair), the National Animal Interest Alliance and the American Quarter Horse Association's Youth Committee.

JOHN DONNELLY has over 40 years of experience as a litigation and gaming attorney. He represented and later became the first in-house counsel to Resorts International, Inc., the first casino operating in the United States outside of Nevada. He established the Gaming Law Committee of the New Jersey State Bar and was its initial two-term chair. Mr. Donnelly has served as general or senior counsel to several publicly traded casino corporations. He was the casino representative to the United States Treasury's Bank Secrecy Act Advisory Group on currency Transactions for several years. He has represented the Casino Association of New Jersey and Pennsylvania and Central Credit of New Jersey, New Jersey and Pennsylvania casinos and vendors in implementation of internet and sports wagering, 40 wide-area progressive slot machine systems, and numerous casino vendors and individuals in licensing proceedings. He has experience in gaming-related matters in New Jersey, Pennsylvania, Illinois, Mississippi, Minnesota, New York, Massachusetts, Connecticut, Virginia, and the Bahamas. Mr. Donnelly has also maintained an active commercial litigation practice and has litigated casino-related cases in the federal and state courts of Pennsylvania and New Jersey. He has taught and lectured on casino law at Widener Law School and Drexel University Business School and at numerous gaming conferences. He has published articles on currency transaction compliance, junkets, and other casino-related issues. Mr. Donnelly is admitted in New York, New Jersey,

Pennsylvania, and Washington D.C. He graduated from Seton Hall Law School in 1976 (*cum laude*) where he served as law review notes editor. He clerked for the Hon. Richard J. Hughes, Chief Justice for the Supreme Court of New Jersey. He holds an MBA from Syracuse University.

JENNIFER DURENBERGER, DVM, JD, first began working on the racetrack in 1991 as a veterinary assistant at what was then Canterbury Downs in Shakopee, Minnesota. She received a veterinary degree from Cornell University in 2002. Following an internship at Rood and Riddle Equine Hospital in Lexington, Kentucky, and a short time in private practice, Dr. Durenberger went back to the racetrack. She was employed as an association veterinarian for the New York Racing Association from 2003–2008, at Aqueduct, Belmont Park, and Saratoga. She left New York for California in 2008, working as Commission veterinarian for the California Horse Racing Board from 2008–2010 at Hollywood Park, Santa Anita, Fairplex, and Los Alamitos while completing a law degree. Following a term as an association steward at Delta Downs in Louisiana, Dr. Durenberger accepted the position of Director of Racing for the Massachusetts Gaming Commission. Serving in that capacity from 2012–2015, she oversaw and was the responsible regulatory authority for all pari-mutuel and racing-related activities at the Commonwealth's Standardbred, Thoroughbred, and simulcasting facilities. She currently operates a consulting business based in Saratoga Springs, New York. Dr. Durenberger is an accredited steward and member of the Racing Officials Accreditation Program Education Committee. An at-large member of the ROAP executive board, she also serves on the American Association of Equine Practitioners Ethics and Professional Conduct Committee and on the Jockey Club's Racing Equipment and Safety Committee. Some of her most satisfying work comes from her involvement with the National Thoroughbred Racing Association's Safety and Integrity Alliance.

MOIRA FANNING has been with the Hambletonian Society, based in Cranbury, NJ, for thirty years and was recently named the stakes administration organization's Chief Operating Officer. She has earned this title from the ground up, providing publicity and event planning for decades to both the time-honored Hambletonian Day events and the prestigious Breeders Crown. The Hambletonian Society owns and/or administers 130 of the top events in harness racing. A lifelong involvement with Standardbred racing—first as a caretaker and later in the publicity, marketing and accounting departments of Brandywine Raceway and Garden State Park—led to her involvement with the Breeders Crown series, and later the Society. Fanning has also been active in the US Harness Writers, as the first woman president of that organization, current president of the New Jersey Chapter, a two-time USHWAN (member) of the Year award, and was inducted into the Communicators Hall of Fame in 2011. She currently owns four racehorses in partnership and has happily supplied the “dumb money” at racetracks all over North America for more than forty years.

JOSEPH A. FARALDO, ESQ., is chairman of United States Trotting Association district 8A and of the Association's Harness Racing Medication Collaborative. He is a more than thirty-year member of the USTA board and has also been president and chief executive officer for the Standardbred Owners Association of New York since 1980. He

started in harness racing in 1996 as an owner. A graduate of St. John's School of Law and a practicing attorney, he has long been an advocate of horsemen's rights in the courts and argued the only harness racing case ever heard in the U.S. Supreme Court. Twice honored as SOA "Man of the Year," he helped the passage of slot legislation in New York which created a renaissance in New York racing. He also helped organize and coordinate the first regularly scheduled simulcasting to Europe with the cooperation of Yonkers Raceway and assisted with the return of the International Trot after a twenty-year hiatus. He was the founder and is a director of the North American Amateur Driver's Association. A National Amateur Driver in 1997, he was the US representative to the World Amateur Driver's championships in 1998. He is a two-time Billings amateur driving champ. He conducted the World Cup for Amateurs once again in the United States in 2008, with the cooperation of track managements at Balmoral, Maywood, Freehold, Yonkers, Monticello, and the Meadowlands. In 1994, he was selected as HHI's "Man of the Year," and in 2001 received that organization's Appreciation Award. He received the 2003 Lifetime Achievement Award and the 2011 Excelsior Award, presented by the Monticello-Goshen chapter of the US Harness Writers Association. Mr. Faraldo was nominated for the USHWA's Proximity Award and received that organization's 2007 President's Award. He served as the USTA chairman of the board from 2003–2007, is the recipient of the 2015 USTA President's Award, and is Chair of the USTA's Harness Racing Medication Collaborative, seeking uniform medication rules governing the harness racing model.

MICHELE FISCHER founded Darting Star LLC, a consulting firm specializing in horse racing, in 2018. Darting Star's clients include the Hong Kong Jockey Club, Sportech and BETIA. Prior to Darting Star, she was Vice President of Sales and Business Development at Sportech Racing, which is a pools and tote betting company with customers in more than 35 countries that processes more than \$11 billion in wagers annually. She was at Sportech Racing (formerly part of Scientific Games and Autotote) for 15 years. Ms. Fischer also has experience in television sports production, simulcasting, race office operations, and as an adjunct professor teaching equine marketing and international racing at the University of Louisville Equine Program. She earned a degree in Business Administration (Equine) and an MBA at the University of Louisville.

TERESA GENARO, a native of Saratoga Springs, teaches high school English in Brooklyn and is a freelance turf writer, covering primarily the New York circuit. Her work appears regularly in *The Saratogian*, *BloodHorse*, *New York Breeder*, *Forbes.com*, and *Thoroughbred Racing Commentary*. Her work has also appeared in *The New York Times*, *The Guardian*, and on National Public Radio.

JEFFREY GURAL is Chairman of American Racing and Entertainment, LLC, which owns Tioga Downs Casino and Vernon Downs Casino, of which both conduct Harness Racing. Tioga Downs has recently converted from a racino to a full casino with 950 slot machines, 32 table games and a 165-room hotel. Vernon Downs continues as a racino with approximately 750 Video Lottery Terminals. Mr. Gural is also Managing Partner of New Meadowlands Racetrack LLC, which is the current lessee and operator of the New Meadowlands Racetrack. The Meadowlands recently opened a new \$110 million

grandstand which is a state-of-the-art new facility. Mr. Gural also owns and manages two standardbred breeding farms, one in Stanfordville, NY, and the other in Sayre, PA, where he has thirty-four mares and twenty-three yearlings. Mr. Gural has been an owner and breeder of horses for more than forty-five years. He also has an interest in approximately twenty racehorses mainly to compete on the Grand Circuit. Mr. Gural serves on the Board of Directors for the Harness Horse Breeders of NY. He has been presented with the following special awards: the 2006 Proximity Award from the United States Harness Writers Association, the 2004 LeeAnne Pooler Unsung Hero Award from the United States Harness Writers Association, the 2006 Stanley Bergstein Messenger Award from the Harness Tracks of America, the 2006 Frederick L. Van Lennep Award from The Hambletonian Society, the 2011 President's Award from the United States Harness Writers Association, and the 2011 Harness Horseman's International Man of the Year Award. In real life, Mr. Gural is Chairman of GFP Real Estate LLC, a full service commercial and industrial real estate management firm and currently manages forty-one buildings of which they have an ownership interest in.

JACK JEZIORSKI, ESQ., has been the Executive Vice President at Monarch Content Management for the past seven years. Prior to that, Mr. Jeziorski was General Counsel and Vice President for Wagering Integrity and Compliance at TrackNet Media Group. He was a partner at the Louisville, Kentucky, firm of Stites & Harbison from 2000 to 2007. Mr. Jeziorski received a BA in government from Cornell University and a JD from Cornell Law School.

BENNETT LIEBMAN, ESQ., is as a Government Lawyer in Residence at Albany Law School. He has been associated with the law school since 2002 where he has served as various times as the acting director, executive director and interim director of the Government Law Center. In the course of a three-decade career working for New York State, he served as counsel to Mario Cuomo when he was State Lieutenant Governor, special deputy counsel to Governor Mario Cuomo and deputy secretary for gaming and racing to Governor Andrew Cuomo. For eleven years, he served as a member of the State Racing and Wagering Board including a stint in 1996-1997 as the acting co-chairman of the Board. He is the author of numerous articles on racing and gambling issues.

GEORGE MAYLIN DVM, MS, PhD, has spent the last fifty years devoted to studies in equine pharmacology and regulatory drug testing. He has published more than eighty scientific papers in these areas and serves on the ARCI and RMTC Medication programs. Dr. Maylin was Director of the New York State Equine Drug Testing and Research Program at Cornell University from 1971 to 2010. He has served as the Director of the New York Drug Testing and Research Program at Morrisville State College since 2010. The Program conducts drug testing for the New York State Gaming Commission by law and contract. Over 50,000 blood and urine samples are tested annually from all New York race tracks and testing is also conducted for the New York State Sire Stakes Program. The Laboratory is located in Ithaca, NY, and the horse research farm is located in Morrisville, NY.

ROBERT J. MCLAUGHLIN, ESQ., is Partner, Gaming Industry Leader, and Food & Beverage Practice Leader at Hodgson Russ, LLP. Mr. McLaughlin focuses his practice on gaming and lottery law; financial transactions, including public finance; and government compliance. Mr. McLaughlin co-leads the firm's Gaming Law Practice. Drawing from his extensive experience in both the regulatory and the business sides of the industry, he is experienced in developing compliance policies and procedures in connection with the complex federal and state regulations governing the gaming industry. Mr. McLaughlin is the former director and general counsel for the New York Lottery, the largest and most successful lottery in North America. He is also a former Director of Grant Thornton LLP, where he assisted state and local governments in gaming and local government issues. He has assisted casino developers and operators negotiate purchase, host, and consultant agreements and has filed license applications, registrations, and renewals with the State Gaming Commission. He also assists municipalities in negotiating host agreements or addressing other needs as a result of local gaming facilities. He has drafted numerous rules and policies for sweepstakes, raffles, contests, charitable gaming and fantasy sports. He also represents several vendors in the US lottery industry. Mr. McLaughlin also focuses his practice on financial transactions, including public finance, environmental issues, infrastructure, real estate, and banking. For more than twenty years, he has assisted or represented a local development corporation in the Catskill region with economic development loans. As a former officer and counsel of State agencies, having served in the administration of two governors, he has extensive experience in representing clients before the executive branch of State government, including state agencies. His experience includes lobbying on behalf of clients, negotiating economic development awards, representing clients in administrative hearings before state agencies, defending and pursuing procurement contests and Freedom of Information Law requests, as well as assisting vendors with Vendor Responsibility issues in the State and City of New York. He received his BS and JD from St. John's University. Mr. McLaughlin is admitted to practice in New York, New Jersey, the US District Courts for the Eastern and Southern Districts of New York and District of New Jersey, as well as the US Court of Appeals for the Second Circuit.

PROF. KEITH C. MILLER is the Ellis and Nelle Levitt Distinguished Professor of Law at Drake University in Des Moines, Iowa. Professor Miller teaches the course on Gaming Law at Drake along with courses in the area of Torts. In addition to numerous law review articles, he is co-author of *The Law of Gambling and Regulated Gaming* (2nd Edition), the leading casebook on gaming law. Professor Miller is the Vice-President of Educator Affiliates of the International Masters of Gaming Law (IMGL), a global gambling law network and educational organization. He serves as the Vice-Chair of the Gaming Law Committee for the Business Law Section of the American Bar Association. He has spoken on and moderated panels for the IMGL and the ABA, including the Gaming Law Minefield National Institute, and has conducted symposia and lectured at law schools in the United States and France. Professor Miller also consults on gaming law cases, has been an expert witness in gaming law litigation, and is a frequent resource for media on matters involving gaming law. Professor Miller received a JD from the University of Missouri–Kansas City, where he was the Editor-in-Chief of the *UMKC Law Review*. After practicing law in Kansas City, Missouri, Professor Miller

obtained an LLM degree from the University of Michigan Law School before beginning his career as an academic lawyer. Professor Miller also served as the NCAA Faculty Representative at Drake University from 1995–2000.

CORNELIUS MURRAY, ESQ., is a senior partner with the Health Law Practice and supervising partner of the Appeals, Constitutional Law, and Casino & Gaming practices at O'Connell & Aronowitz in Albany, New York. He has represented numerous and varied clients in the health care industry and is currently General Counsel for the New York State Health Facilities Association, where he focuses on issues involving complex Medicare and Medicaid reimbursement issues, regulatory compliance, and Certificates of Need. Mr. Murray has lectured widely on legal matters affecting the health care industry and on administrative law. He has served as Chair of the Administrative Law Committee of the New York State Bar Association and as Chair of the Legal Task Force of the American Health Care Association. A Fellow of the New York State Bar Foundation, Mr. Murray is a past President of the Albany County Bar Association. He has consistently been listed in the publication *The Best Lawyers in America*, as well as been named to the Upstate New York Super Lawyers list, a distinction earned by less than 5% of attorneys in the state. He received a JD from the University of Michigan Law School and an AB, cum laude, from Harvard University.

DAVID O'ROURKE was appointed the President and Chief Executive Office of the New York Racing Association (NYRA) in March of 2019. He has been with NYRA for more than a decade. Mr. O'Rourke joined the organization in 2008 as director of financial planning, and he was named vice president for corporate development in 2010. In 2013, he was appointed chief revenue officer and senior vice president, responsible for NYRA's business development strategies in industry relations, simulcast markets and contracts, television strategy, advance deposit wagering operations, and capital projects. Mr. O'Rourke played a key role in developing NYRA Bets, the company's ADW platform, and getting NYRA's races on television through Fox Sports and MSG networks. Upon his appointment, NYRA Board Chair Michael Del Giudice said of Mr. O'Rourke, "He possesses broad expertise in nearly every facet of the industry, enjoys deep respect among his NYRA colleagues and industry peers, and understands how the sport and the business will continue to evolve in the future. His combination of skills and obvious leadership ability made this an easy choice and we congratulate David on this appointment."

JOHN J. POKLEMBIA, ESQ., joined the American Transit Insurance Company as General Counsel on November 1, 2012. Prior to becoming a full time employee, Mr. Poklemba represented the Company in various matters as a private attorney in the Albany, New York, area. Upon graduation with honors from St. John's University School of Law, Mr. Poklemba began his legal career in 1975 as Law Secretary in the New York State Supreme Court. He then served as Deputy Counsel in the Office of Court Administration from 1977 to 1981 and as chief Appellate Law Assistant, New York State Appellate Division, Fourth Department, from 1981–1984. In February 1984, Mr. Poklemba was appointed Chief Counsel to the Governor's Director of Criminal Justice. In this capacity, he was responsible for all legal duties involved in supervising and

coordinating the eight New York State Criminal Justice Agencies. In December 1987, Governor Mario Cuomo appointed him to the twin posts of New York State Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services. In the latter office, he supervised the State's Criminal Justice Information and Planning Agency. As Director of Criminal Justice, he served as the Governor's Chief Criminal Justice Advisor and as the State's primary spokesperson and policy maker in the criminal justice field. Among his most important accomplishments were the passage of the Organized Crime Control Act, the development of comprehensive drug enforcement through the Statewide Drug Enforcement Task Force, and nationally recognized technological advances such as the Statewide Criminal Justice Data Communications Network and the Statewide Automated Fingerprint Identification System. In addition to his work in law enforcement, Mr. Poklemba was a leader in modern correctional innovation. His major initiatives included the Shock Incarceration Program, the Earned Eligibility Program, and the establishment of five comprehensive alcohol and substance abuse treatment facilities. Mr. Poklemba moved into private law practice in July of 1991, and was a principal in the law firm of Poklemba & Hobbs, LLC, with offices in Malta and Glens Falls, New York. In 1982, he was appointed chairman of the Governor's Judicial Screening Committee for the Third Judicial Department and a member of the New York State University at Albany Council. In 2003, he was appointed by Governor George Pataki as a member of the Statewide Emergency Communications Committee. He also served as Legislative Counsel to the New York City Patrolmen's Benevolent Association, the New York State Association of Chiefs of Police, and the New York City Deputy Sheriffs Association. On February 1, 2013, Mr. Poklemba was appointed by Governor Andrew Cuomo as a member of the newly created New York State Gaming Commission.

DICK POWELL is a lifelong horse racing fan, and he has worked professionally in the business since 1988. His horse racing consultant business handles business and legislative issues. Mr. Powell is an acknowledged expert on domestic and international simulcasting, account wagering, player rewards and incentives, gaming at racetracks, and fan education. In 2001, he led the effort to bring Video Lottery Terminals (VLTs) to licensed New York racetracks while serving as spokesperson and chief strategist for the Coalition to Promote and Preserve Horse Racing and Breeding in New York. Both Howard Nolan, former New York State Senator and then head of the New York Thoroughbred Breeders, Inc., and Richard Bomze, President of the New York Thoroughbred Horsemen's Association, acknowledged Mr. Powell's indispensable contribution to bringing VLTs to New York. In 2003, Mr. Powell helped set up the first intercontinental simulcast of horse racing from Dubai, United Arab Emirates, where players from the United States, the United Kingdom, and South Africa were able to commingle bets with currencies changed on the fly. This has become the model for international simulcasting and is still being utilized today. Mr. Powell is a graduate of the State University of New York at Binghamton, where he received an MA in sociology.

STACEY ROWLAND, ESQ., became Counsel to Rivers Casino & Resort in January 2017, and provides leadership, guidance, and advisory support, while representing the Casino & Resort on a myriad of issues, including contractual matters, employment and

labor issues, insurance, and regulatory and compliance matters. Prior to joining Rivers Casino & Resort, she was a member of the Government Relations Practice for Bryant Rabbino LLP, where she opened the Albany office of the firm and focused on government relations and regulatory issues. Ms. Rowland has served as the Deputy Superintendent for Intergovernmental and Legislative Affairs for the New York State Department of Insurance (now a part of the Department of Financial Services); Assistant Attorney General; Assistant Counsel to the New York State Comptroller; and Assistant Counsel to the New York State Senate Finance Committee. Ms. Rowland received her JD from Albany Law School and her BA in Economics from Boston University, where she was a member of the track and field team. She is a member of the New York State Bar Association and the Capital District Black and Hispanic Bar Association. She also serves as Chairperson of the Ethics Board for the Town of Colonie and as Treasurer of the Saratoga Sparks Basketball AAU organization.

JOHN SIGNOR is the President and CEO of the Capital District Regional Off-Track Betting Corporation. A graduate of Siena College, Mr. Signor began his professional career working for a public accounting firm in the Hudson Valley area for seven years. During that time, he became a Certified Public Accountant. In 1995, Mr. Signor started his career in government. His first job was for the New York State Division of Budget, under Governor Pataki, as a budget press officer. In 1998, Mr. Signor went to work at the Racing and Wagering Board, now the Gaming Commission, where he served at the head of the Audits and Investigations unit. After a year at the Racing and Wagering Board, Mr. Signor was asked to serve as the Director of Public Affairs at the New York State Department of Health, where he did so for four years. In 2002, Mr. Signor was appointed by the Capital OTB Board of Directors as Executive Vice President and CFO. In 2007, he was appointed by the Capital OTB Board of Directors to his current position as President and CEO. Mr. Signor's love of racing started at Siena College, where he and his friends would frequent the OTB branch across from the college. He grew up in Albany and currently resides in Saratoga.

KATHERINE A. SPILDE, PhD, is Professor of Hospitality and Tourism Management at San Diego State University and a leading authority on tribal economic development in the United States. With a PhD in cultural anthropology and an MBA in entrepreneurial management, Dr. Spilde has worked on public policy and tribal governance in several positions, including Policy Analyst for the National Gambling Impact Study Commission, Director of Research at the National Indian Gaming Association, Senior Research Associate at Harvard's Kennedy School of Government, and Executive Director of the Center for California Native Nations at the University of California in Riverside (UCR). Dr. Spilde has served as Endowed Chair of the Sycuan Institute on Tribal Gaming at San Diego State University since 2008, where she designed and still teaches all five courses leading to the nation's only Bachelor of Science degree in Tribal Casino Operations Management. An award-winning teacher and scholar, Dr. Spilde has published more than fifty academic articles and has worked with tribal, state, federal, and foreign governments on economic development and gaming for over twenty years.

ANDREW J. TURRO, ESQ., is a Member of Meyer, Suozzi, English & Klein, P.C.'s Litigation & Dispute Resolution Department and Employment Law practice, and he also heads the firm's Equine & Racing Law practice. Mr. Turro's equine and racing law practice covers a broad range of matters in which he has represented both individuals (including owners, jockeys, trainers, drivers, and breeders) and professional groups such as the Standardbred Owners Association of New York, before the New York State Gaming Commission and the federal and state courts. Mr. Turro also serves as legal counsel for racing industry groups, including the New York Thoroughbred Horsemen's Association and the Standardbred Owners Association of New York. He has also represented various trainers, owners, and other equine entities in connection with federal and state labor law issues. Mr. Turro is a frequent speaker on equine and racing law matters. He regularly lectures on developments in Racing Law at the Albany Law School Saratoga Institute and University of Arizona annual conference on Racing and Gaming Law. Mr. Turro has also been invited to participate on numerous occasions in the University of Arizona's Race Track Industry Program's Guest Speaker Series, where he lectures on legal precedents and recent developments in Racing Law. He received his BA from the State University of New York at Buffalo; his MA from the University of Chicago; and his JD from Albany Law School. He is a member of the American Bar Association; the New York State Bar Association; the Nassau County Bar Association; and the American Inn of Court, Nassau Chapter, Master. Mr. Turro is admitted to practice in New York State; the US Supreme Court; the US Court of Appeals for the Second and Fourth Circuits; and the US District Court for the Northern, Southern, Eastern, and Western Districts of New York.

DANIEL L. WALLACH, ESQ., is the founder of Wallach Legal LLC, a law firm devoted exclusively to the burgeoning field of sports wagering and gaming law in the United States. Known as "The Sports Betting Attorney," he has counseled professional sports teams, sports betting operators, fantasy sports companies, sports integrity firms, casinos, racetracks, and service providers in navigating the complexities of US gambling laws and regulations. He is a general member of the International Masters of Gaming Law (IMGL), an invitation-only organization for attorneys who have distinguished themselves through demonstrated performance and publishing in gaming law, significant gaming clientele, and substantial participation in the gaming industry. Mr. Wallach is the co-founding director of the University of New Hampshire School of Law's Sports Wagering and Integrity Program, the nation's first law school certificate program dedicated to the study of sports wagering and integrity. He is also a legal analyst and contributing writer for *The Athletic*. Mr. Wallach is a 1991 graduate of Hofstra University School of Law, where he graduated with distinction (in the top 2% of his graduating class) and was the Notes and Comments Editor of the *Hofstra Law Review*. He began his legal career as the judicial law clerk for the Honorable Jacob Mishler, a federal district court judge and the former chief judge of the United States District Court for the Eastern District of New York. Upon the conclusion of his one-year clerkship, Mr. Wallach joined the New York office of Weil, Gotshal & Manges, where he was a member of the Business and Securities Litigation Department (which, at the time, was the nation's largest law firm practice group devoted exclusively to the practice of federal securities litigation).

CHRIS WITTSTRUCK, ESQ., is a licensed Thoroughbred and Standardbred owner. He is a director of the Standardbred Owners Association of New York, where he chairs the Legislative and Racing and Wagering Liaison committees. A member of the United States Harness Writers Association, he is a two-time winner of the John Hervey Award for excellence in Standardbred Journalism, and the 2012 recipient of the Phil Pines Award for Journalistic Excellence of the Monticello–Goshen Chapter. Mr. Wittstruck received the United States Trotting Association's President's Award in 2012; the 2015 Team Valor Stan Bergstein Writing Award in 2015; and the 2015 Service to Youth Award of the Harness Horse Youth Foundation. He received a BA, summa cum laude, and a JD from Saint John's University.

M. KELLY YOUNG serves as Executive Director of the Agriculture and New York State Horse Breeding Development Fund, which sponsors the New York Sire Stakes program. The primary mission of the Fund is to preserve agriculture through the promotion of horse breeding and the conduct of equine research in the state. Prior to this post, Ms. Young served as Deputy Director of Public Policy at the New York Farm Bureau, where she advocated for a decade on legislative and regulatory matters impacting farmers at the state and federal level. Ms. Young is the fifth generation in her family to work in harness racing and grew up on Castleton Farm of New York, a commercial Standardbred breeding farm. Later she was an Associate Editor of the *Horseman and Fair World* magazine and Executive Director of the Harness Horse Breeders of New York State. Ms. Young was selected for a 2013 McCloy Fellowship in Agriculture and is a graduate of Class 13 of the Empire State Food and Agricultural Leadership Institute at Cornell University. She earned a B.A. in Biology from Boston University and currently resides in Colonie, NY.



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New York Gaming Association

New York Racing Association

New York Thoroughbred Horsemen's Association, Inc.

Equine Welfare: Can the sport survive?

Moderator:
Wendy Davis

Panelists:
Andy Belfiore
Jennifer Durenberger, DVM, JD
George Maylin, DVM, MS, PhD
Chris Wittstruck, Esq.

A 3535-A Pretlow Same as [S 1974-A](#)
ADDABBO
 Racing, Pari-Mutuel Wagering and Breeding Law
 TITLE....Establishes the commission on retired
 racehorses
 01/29/19 referred to racing and wagering
 04/24/19 amend and recommit to racing and
 wagering
 04/24/19 print number 3535a
 04/30/19 reported referred to codes
 05/21/19 reported referred to ways and means
 06/05/19 reported referred to rules
 06/17/19 reported
 06/17/19 rules report cal.337
 06/17/19 ordered to third reading rules cal.337
 06/18/19 substituted by s1974a
S01974 ADDABBO AMEND=A
 01/18/19 REFERRED TO RACING, GAMING
 AND WAGERING
 03/06/19 1ST REPORT CAL.231
 03/07/19 2ND REPORT CAL.
 03/11/19 ADVANCED TO THIRD READING
 05/29/19 AMENDED ON THIRD READING
 1974A
 06/11/19 PASSED SENATE
 06/11/19 DELIVERED TO ASSEMBLY
 06/11/19 referred to ways and means
 06/18/19 substituted for a3535a
 06/18/19 ordered to third reading rules cal.337

S1974-A ADDABBO Same as [A 3535-A](#)
 Pretlow
 ON FILE: 05/30/19 Racing, Pari-Mutuel Wagering
 and Breeding Law
 TITLE....Establishes the commission on retired
 racehorses
 01/18/19 REFERRED TO RACING, GAMING
 AND WAGERING
 03/06/19 1ST REPORT CAL.231
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 06/11/19 PASSED SENATE
 06/11/19 DELIVERED TO ASSEMBLY
 06/11/19 referred to ways and means
 06/18/19 substituted for a3535a
 06/18/19 ordered to third reading rules cal.337

STATE OF NEW YORK

3535--A

2019-2020 Regular Sessions

IN ASSEMBLY

January 29, 2019

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on **Racing** and Wagering -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the **racing**, pari-mutuel wagering and breeding law, in relation to establishing the commission on retired racehorses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The **racing**, pari-mutuel wagering and breeding law is
2 amended by adding a new article 7-A to read as follows:

ARTICLE 7-A

COMMISSION ON RETIRED RACEHORSES

3
4
5 Section 710. Commission on retired racehorses.

6 711. Powers and duties of commission.

7 712. Reports on retired racehorses.

8 § 710. Commission on retired racehorses. 1. There is hereby estab-
9 lished a commission on retired racehorses. Such commission on retired
10 racehorses shall consist of seven members, three of whom shall be
11 appointed by the governor, two of whom shall be appointed by the tempo-
12 rary president of the senate and two of whom shall be appointed by the
13 speaker of the assembly. Of the three members appointed by the governor,
14 two shall be appointed upon the recommendation of the gaming commission.
15 One of the appointed members of the commission on retired racehorses
16 shall be representative of owners and breeders of standardbred horses
17 and one shall be representative of owners and breeders of thoroughbred
18 horses. Three of the appointed members of the commission on retired
19 racehorses shall be representative of: (a) persons with expertise in
20 training horses for uses other than **racing**, such as riding schools,
21 steeplechase competitions, show **horse** competitions (e.g., dressage,
22 hunter/jumper, English, Western, and costume competitions), and other
23 recreational uses, (b) persons with experience in the potential farm or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 other rural economic business applications for horses, and (c) persons
2 familiar with the use of horses for recreational or therapeutic uses.

3 2. The members of the commission on retired racehorses shall serve for
4 terms of four years each.

5 3. Every member of the commission on retired racehorses shall serve at
6 the pleasure of the official who appointed him or her. Vacancies in the
7 membership of such commission shall be filled in the manner provided for
8 original appointments.

9 4. The members of the commission on retired racehorses shall receive
10 no compensation for their services, but shall be allowed their actual
11 and necessary expenses incurred in the performance of their duties
12 pursuant to this section.

13 § 711. Powers and duties of commission. 1. The commission on retired
14 racehorses, in cooperation with the gaming commission, shall be respon-
15 sible for the oversight of retired racehorses, including the tracking of
16 such racehorses. For the purposes of this article, a retired racehorse
17 shall mean (a) a New York-bred thoroughbred as defined by subdivision
18 three of section two hundred fifty-one of this chapter which is no long-
19 er engaged in horseracing or (b) a standardbred which meets or ever met
20 the standards set forth in subdivision one of section three hundred
21 thirty-four of this chapter and which is no longer engaged in [horse](#)
22 [racing](#).

23 2. The commission on retired racehorses, in cooperation with the
24 gaming commission, shall be responsible for the creation of a registry
25 which would track retired racehorses in New York state. Such registry
26 shall include information provided by each owner and subsequent owner of
27 a retired racehorse, as provided in section seven hundred twelve of this
28 article. Notwithstanding any other provision of law, the commission on
29 retired racehorses shall maintain and update this registry. The commis-
30 sion on retired racehorses may access any relevant information in the
31 registries designated and administered by the New York state thorough-
32 bred breeding and development fund and the agriculture and New York
33 state [horse](#) breeding development fund to facilitate the implementation
34 of this article.

35 3. The commission on retired racehorses shall work with the gaming
36 commission to identify methods by which the information in the retired
37 racehorse registry may be utilized to address the well-being and/or
38 employment of retired racehorses, including but not limited to strate-
39 gies to address the issue of abandoned racehorses and to prevent the
40 slaughter of retired racehorses. The commission on retired racehorses
41 shall also furnish related future recommendations regarding the funding,
42 care and treatment of retired racehorses. Such recommendations and rele-
43 vant data that support such recommendations shall be submitted to the
44 gaming commission for publication on their website.

45 4. The commission on retired racehorses shall work with the gaming
46 commission to publish on the gaming commission website at least quarter-
47 ly, in such forms as the gaming commission may deem proper, a report of
48 aggregate data from the retired racehorse registry including the number
49 of retired racehorses and any other information which the gaming commis-
50 sion may deem proper. Such report shall also include information on how
51 to report violations as provided in subdivision three of section seven
52 hundred twelve of this article to the commission on retired racehorses.

53 5. The commission on retired racehorses shall share with the gaming
54 commission any suspected violations as provided in subdivision three of
55 section seven hundred twelve of this article at a time and in a manner

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3

1 to be determined and prescribed by the gaming commission for the purpose
2 of assessing civil penalties.

3 § 712. Reports on retired racehorses. 1. Within seventy-two hours
4 after any change in ownership regarding a retired racehorse, boarded in
5 New York state during any part of the calendar year, the new owner or
6 owners of the horse shall report to the commission on retired racehorses
7 that such ownership has changed and shall file a statement listing the
8 name or names of the previous owner or owners and the license number of
9 any license issued by the gaming commission to the previous owner or
10 owners, the name or names, telephone number or telephone numbers and
11 address or addresses of the new owner or owners, the license number of
12 any license issued by the gaming commission to the new owner or owners,
13 the tattoo number of such horse and any other information which the
14 commission on retired racehorses may require. In the event that there
15 are multiple owners of a retired racehorse, one designated owner may
16 register on behalf of all owners.

17 2. Within seventy-two hours after the death of a retired racehorse,
18 the owner or owners of the horse shall report such death to the commis-
19 sion on retired racehorses and shall file a statement including a death
20 certificate by a licensed veterinarian and any other information which
21 the commission on retired racehorses may require.

22 3. Any sole or joint owner of a retired racehorse who is a resident of
23 the state and who fails to file a statement required to be filed by this
24 section shall be subject to a civil penalty not to exceed two hundred
25 fifty dollars for each violation.

26 § 2. Severability. If any clause, sentence, subdivision, paragraph,
27 section or part of this act be adjudged by any court of competent juris-
28 diction to be invalid, such judgement shall not affect, impair or inval-
29 idate the remainder thereof, but shall be confined in its operation to
30 the clause, sentence, subdivision, paragraph, section or part thereof
31 directly involved in the controversy in which such judgement shall have
32 been rendered.

33 § 3. This act shall take effect on April 1, 2020.

LEGISLATIVE HISTORY:

01/03/18 A4167 referred to racing and wagering

EFFECTIVE DATE:

This act shall take effect on the one hundred eightieth day after it shall have become law

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A3535A

SPONSOR: Pretlow

TITLE OF BILL: An act to amend the racing, pari-mutuel wagering and breeding law, in relation to establishing the commission on retired racehorses

PURPOSE:

The purpose of the commission is to monitor the whereabouts and treatment of retired racehorses to further prevent the illegal transport of horses into the inhumane international slaughter industry.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1. The racing, pari-mutuel wagering and breeding law is amended by adding a new article 7A.

Section 2. Effective date.

SUMMARY OF AMENDMENTS:

Amendments were made to clarify reporting requirements, the responsibilities of owners to report to the database of retired racehorses, and to establish an effective date of April 1, 2020.

JUSTIFICATION:

Horses have played a significant role in the history and culture of the United States; more specifically, horses in the racing industry have generated billions of dollars for the state of New York.

Despite what they may have contributed, many horses at a young age which are no longer profitable or affordable for the owner wind up in international slaughterhouses to be inhumanely slaughtered for consumption abroad where horse meat is a major delicacy. In addition to horse slaughter being a huge breach in proper and ethical treatment of animals, this serves as a significant food safety issue for humans considering that the majority of horses are administered drugs and medications that are not meant for any animal intended for human consumption.

This legislation will implement a commission with the intention to ensure the proper treatment of the horses following their racing career and to further prevent the illegal transport of horses to slaughterhouses.

S 6142 ADDABBO Same as [A 8106](#) Woerner
ON FILE: 05/17/19 Racing, Pari-Mutuel Wagering and
Breeding Law
TITLE....Relates to equine drug testing standards
05/17/19 REFERRED TO RACING, GAMING AND
WAGERING
05/29/19 1ST REPORT CAL.915
05/30/19 2ND REPORT CAL.
06/03/19 ADVANCED TO THIRD READING
06/11/19 PASSED SENATE
06/11/19 DELIVERED TO ASSEMBLY
06/11/19 referred to racing and wagering

A8106 Woerner Same as [S 6142](#)
ADDABBO
Racing, Pari-Mutuel Wagering and
Breeding Law
TITLE....Relates to equine drug testing
standards
06/03/19referred to racing and wagering

ADDABBO, CARLUCCI, JORDAN
Add Art 11-A §§1113 - 1125, RWB L
Relates to equine drug testing standards.

STATE OF NEW YORK

6142

2019-2020 Regular Sessions

IN SENATE

May 17, 2019

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on *Racing*, Gaming and Wagering

AN ACT to amend the *racing*, pari-mutuel wagering and breeding law, in relation to equine drug testing standards

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The *racing*, pari-mutuel wagering and breeding law is amended by adding a new article 11-A to read as follows:

ARTICLE XI-A

INTERSTATE COMPACT ON ANTI-DOPING AND DRUG TESTING STANDARDS

Section 1113. Purposes.

1114. Definitions.

1115. Composition and meetings of compact commission.

1116. Operation of compact commission.

1117. General powers and duties.

1118. Other powers and duties.

1119. Compact rule making.

1120. Status and relationship to member states.

1121. Rights and responsibilities of member states.

1122. Enforcement of compact.

1123. Legal actions against compact.

1124. Restrictions on authority.

1125. Construction, savings and severability.

§ 1113. Purposes. The purposes of the compact are:

a. To enable member states to act jointly and cooperatively to create more uniform, effective, and efficient breed specific rules and regulations relating to the permitted and prohibited use of drugs and medications for the health and welfare of the *horse* and the integrity of

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 racing, and testing for such substances, in or affecting a member state;
2 and

3 b. To authorize the New York state gaming commission to participate in
4 the compact.

5 § 1114. Definitions. For the purposes of this article, the following
6 terms shall have the following meanings:

7 a. "Compact commission" means the organization of delegates from the
8 member states that is authorized and empowered by the compact to carry
9 out the purposes of the compact;

10 b. "Compact rule" means a rule or regulation adopted by a member state
11 regulating the permitted and prohibited use of drugs and medications for
12 the health and welfare of the horse and the integrity of racing, and
13 testing for such substances, in live pari-mutuel horse racing that
14 occurs in or affects such states;

15 c. "Delegate" means the chairperson of the member state racing commis-
16 sion or similar regulatory body in a state, or such person's designee,
17 who represents the member state, as a voting member of the compact
18 commission and anyone who is serving as such person's alternate;

19 d. "Equine drug rule" means a rule or regulation that relates to the
20 administration of drugs, medications, or other substances to a horse
21 that may participate in live horse racing with pari-mutuel wagering
22 including, but not limited to, the regulation of the permissible use of
23 such substances to ensure the integrity of racing and the health, safety
24 and welfare of race horses, appropriate sanctions for rule violations,
25 and quality laboratory testing programs to detect such substances in the
26 bodily system of a race horse;

27 e. "Live racing" means live horse racing with pari-mutuel wagering;

28 f. "Member state" means each state that has enacted the compact;

29 g. "National industry stakeholder" means a non-governmental organiza-
30 tion that from a national perspective significantly represents one or
31 more categories of participants in live racing and pari-mutuel wagering;

32 h. "Participants in live racing" means all persons who participate in,
33 operate, provide industry services for, or are involved with live racing
34 with pari-mutuel wagering;

35 i. "State" means each of the several states of the United States, the
36 District of Columbia, the Commonwealth of Puerto Rico, and each territo-
37 ry or possession of the United States; and

38 j. "State racing commission" means the state racing commission, or its
39 equivalent, in each member state. Where a member state has more than
40 one, it shall mean all such racing commissions, or their equivalents.

41 § 1115. Composition and meetings of compact commission. The member
42 states shall create and participate in a compact commission as follows:

43 a. The compact shall come into force when enacted by any two eligible
44 states, and shall thereafter become effective as to any other member
45 state that enacts the compact. Any state that has adopted or authorized
46 pari-mutuel wagering or live horse racing shall be eligible to become a
47 party to the compact. A compact rule shall not become effective in a new
48 member state based merely upon it entering the compact.

49 b. The member states hereby create the interstate anti-doping and drug
50 testing standards compact commission, a body corporate and an interstate
51 governmental entity of the member states, to coordinate the rule making
52 actions of each member state racing commission through a compact commis-
53 sion.

54 c. The compact commission shall consist of one delegate, the chair-
55 person of the state racing commission or such person's designee, from
56 each member state. When a delegate is not present to perform any duty in

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1 the compact commission, a designated alternate may serve. The person who
2 represents a member state in the compact commission shall serve and
3 perform such duties without compensation or remuneration; provided, that
4 subject to the availability of budgeted funds, each may be reimbursed
5 for ordinary and necessary costs and expenses. The designation of a
6 delegate, including the alternate, shall be effective when written
7 notice has been provided to the compact commission. The delegate,
8 including the alternate, must be a member or employee of the state
9 racing commission.

10 d. The compact delegate from each state shall participate as an agent
11 of the state racing commission. Each delegate shall have the assistance
12 of the state racing commission in regard to all decision making and
13 actions of the state in and through the compact commission.

14 e. Each member state, by its delegate, shall be entitled to one vote
15 in the compact commission. A majority vote of the total number of deleg-
16 ates shall be required to propose a compact rule, receive and distribute
17 any funds, and to adopt, amend, or rescind the by-laws. A compact rule
18 shall take effect in and for each member state when adopted by a super
19 majority vote of eighty percent of the total number of member states.
20 Other compact actions shall require a majority vote of the delegates who
21 are meeting.

22 f. Meetings and votes of the compact commission may be conducted in
23 person or by telephone or other electronic communication. Meetings may
24 be called by the chairperson of the compact commission or by any two
25 delegates. Reasonable notice of each meeting shall be provided to all
26 delegates serving in the compact commission.

27 g. No action may be taken at a compact commission meeting unless there
28 is a quorum, which is either a majority of the delegates in the compact
29 commission, or where applicable, all the delegates from any member
30 states who propose or are voting affirmatively to adopt a compact rule.

31 h. Once effective, the compact shall continue in force and remain
32 binding according to its terms upon each member state; provided that, a
33 member state may withdraw from the compact by repealing the statute that
34 enacted the compact into law. The racing commission of a withdrawing
35 state shall give written notice of such withdrawal to the compact chair-
36 person, who shall notify the member state racing commissions. A with-
37 drawing state shall remain responsible for any unfulfilled obligations
38 and liabilities. The effective date of withdrawal from the compact shall
39 be the effective date of the repeal.

40 § 1116. Operation of compact commission. The compact commission is
41 hereby granted, so that it may be an effective means to pursue and
42 achieve the purposes of each member state in the compact, the power and
43 duty:

44 a. to adopt, amend, and rescind by-laws to govern its conduct, as may
45 be necessary or appropriate to carry out the purposes of the compact; to
46 publish them in a convenient form; and to file a copy of them with the
47 state racing commission of each member state;

48 b. to elect annually from among the delegates, including alternates, a
49 chairperson, vice-chairperson, and treasurer with such authority and
50 duties as may be specified in the by-laws;

51 c. to establish and appoint committees which it deems necessary for
52 the carrying out of its functions, including advisory committees which
53 shall be comprised of national industry stakeholders and organizations
54 and such other persons as may be designated in accordance with the
55 by-laws, to obtain their timely and meaningful input into the compact
56 rule making processes;

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1 d. to establish an executive committee, with membership established in
2 the by-laws, which shall oversee the day-to-day activities of compact
3 administration and management by the executive director and staff; hire
4 and fire as may be necessary after consultation with the compact commis-
5 sion; administer and enforce compliance with the provisions, by-laws,
6 and rules of the compact; and perform such other duties as the by-laws
7 may establish;

8 e. to create, appoint, and abolish all those offices, employments, and
9 positions, including an executive director, useful to fulfill its
10 purposes;

11 f. to delegate day-to-day management and administration of its duties,
12 as needed, to an executive director and support staff; and

13 g. to adopt an annual budget sufficient to provide for the payment of
14 the reasonable expenses of its establishment, organization, and ongoing
15 activities; provided, that the budget shall be funded by only voluntary
16 contributions.

17 § 1117. General powers and duties. To allow each member state, as and
18 when it chooses, to achieve the purpose of the compact through joint and
19 cooperative action, the member states are hereby granted the power and
20 duty, by and through the compact commission:

21 a. to act jointly and cooperatively to create a more equitable and
22 uniform pari-mutuel racing and wagering interstate regulatory framework
23 by the adoption of standardized rules for the permitted and prohibited
24 use of drugs and medications for the health, and welfare of the horse
25 and the integrity of racing, including rules governing the use of drugs
26 and medications and drug testing;

27 b. to collaborate with national industry stakeholders and industry
28 organizations, including the Association of Racing Commissioners Inter-
29 national, Inc. and the Racing Medication and Testing Consortium, in the
30 design and implementation of compact rules in a manner that serves the
31 best interests of racing; and

32 c. to propose and adopt breed specific compact equine drugs and medi-
33 cations rules for the health, and welfare of the horse, including rules
34 governing the permitted and prohibited use of drugs and medications and
35 drug testing, which shall have the force and effect of state rules or
36 regulations in the member states, to govern live pari-mutuel horse
37 racing.

38 § 1118. Other powers and duties. The compact commission may exercise
39 such incidental powers and duties as may be necessary and proper for it
40 to function in a useful manner, including but not limited to the power
41 and duty:

42 a. to enter into contracts and agreements with governmental agencies
43 and other persons, including officers and employees of a member state,
44 to provide personal services for its activities and such other services
45 as may be necessary;

46 b. to borrow, accept, and contract for the services of personnel from
47 any state, federal, or other governmental agency, or from any other
48 person or entity;

49 c. to receive information from and to provide information to each
50 member state racing commission, including its officers and staff, on
51 such terms and conditions as may be established in the by-laws;

52 d. to acquire, hold, and dispose of any real or personal property by
53 gift, grant, purchase, lease, license, and similar means and to receive
54 additional funds through gifts, grants, and appropriations;

55 e. when authorized by a compact rule, to conduct hearings and render
56 reports and advisory decisions and orders; and

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5

1 f. to establish in the by-laws the requirements that shall describe
2 and govern its duties to conduct open or public meetings and to provide
3 public access to compact records and information.

4 § 1119. Compact rule making. In the exercise of its rule making
5 authority, the compact commission shall:

6 a. engage in formal rule making pursuant to a process that substan-
7 tially conforms to the Model State Administrative Procedure Act of 1981
8 as amended, as may be appropriate to the actions and operations of the
9 compact commission;

10 b. gather information and engage in discussions with advisory commit-
11 tees, national industry stakeholders, and others, including an opportu-
12 nity for industry organizations to submit input to member state racing
13 commissions on the state level, to foster, promote and conduct a colla-
14 borative approach in the design and advancement of compact rules in a
15 manner that serves the best interests of racing and as established in
16 the by-laws;

17 c. direct the publication in each member state of each equine drug
18 rule proposed by the compact commission, conduct a review of public
19 comments received by each member state racing commission and the compact
20 commission in response to the publication of its rule making proposals,
21 consult with national industry stakeholders and participants in live
22 racing with regard to such process and any revisions to the compact rule
23 proposal, and meet upon the completion of the public comment period to
24 conduct a vote on the adoption of the proposed compact rule as a state
25 rule in the member states; and

26 d. have a standing committee that reviews at least quarterly the
27 participation in and value of compact rules and, when it determines that
28 a revision is appropriate or when requested to by any member state,
29 submits a revising proposed compact rule. To the extent a revision would
30 only add or remove a member state or states from where a compact rule
31 has been adopted, the vote required by this section shall be required of
32 only such state or states. The standing committee shall gather informa-
33 tion and engage in discussions with national industry stakeholders, who
34 may also directly recommend a compact rule proposal or revision to the
35 compact committee.

36 § 1120. Status and relationship to member states. a. The compact
37 commission, as an interstate governmental entity, shall be exempt from
38 all taxation in and by the member states.

39 b. The compact commission shall not pledge the credit of any member
40 state except by and with the appropriate legal authority of that state.

41 c. Each member state shall reimburse or otherwise pay the expenses of
42 its delegate, including any alternate, in the compact commission.

43 d. No member state, except as provided in section eleven hundred twen-
44 ty-three of this article, shall be held liable for the debts or other
45 financial obligations incurred by the compact commission.

46 e. No member state shall have, while it participates in the compact
47 commission, any claim to or ownership of any property held by or vested
48 in the compact commission or to any compact commission funds held pursu-
49 ant to the compact except for state license or other fees or moneys
50 collected by the compact commission as its agent.

51 f. The compact dissolves upon the date of the withdrawal of the member
52 state that reduces membership in the compact to one state. Upon dissol-
53 ution, the compact becomes null and void and shall be of no further
54 force or effect, although equine drug rules adopted through the compact
55 shall remain state rules in each member state that had adopted them, and
56 the business and affairs of the compact shall be concluded and any

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6

1 surplus funds shall be distributed to the former member states in
2 accordance with the by-laws.

3 § 1121. Rights and responsibilities of member states. a. Each member
4 state in the compact shall accept the decisions, duly applicable to it,
5 of the compact commission in regard to compact rules and rule making.

6 b. The compact shall not be construed to diminish or limit the powers
7 and responsibilities of the member state racing commission or similar
8 regulatory body, or to invalidate any action it has previously taken,
9 except to the extent it has, by its compact delegate, expressed its
10 consent to a specific rule or other action of the compact commission.
11 The compact delegate from each state shall serve as the agent of the
12 state racing commission and shall possess substantial knowledge and
13 experience as a regulator or participant in the horse racing industry.

14 § 1122. Enforcement of compact. a. The compact commission shall have
15 standing to intervene in any legal action that pertains to the subject
16 matter of the compact and might affect its powers, duties, or actions.

17 b. The courts and executive in each member state shall enforce the
18 compact and take all actions necessary and appropriate to effectuate its
19 purposes and intent. Compact provisions, by-laws, and rules shall be
20 received by all judges, departments, agencies, bodies, and officers of
21 each member state and its political subdivisions as evidence of them.

22 § 1123. Legal actions against compact. a. Any person may commence a
23 claim, action, or proceeding against the compact commission in state
24 court for damages. The compact commission shall have the benefit of the
25 same limits of liability, defenses, rights to indemnity and defense by
26 the state, and other legal rights and defenses for non-compact matters
27 of the state racing commission in the state. All legal rights and
28 defenses that arise from the compact shall also be available to the
29 compact commission.

30 b. A compact delegate, alternate, or other member or employee of a
31 state racing commission who undertakes compact activities or duties does
32 so in the course of business of their state racing commission, and shall
33 have the benefit of the same limits of liability, defenses, rights to
34 indemnity and defense by the state, and other legal rights and defenses
35 for non-compact matters of state employees in their state. The executive
36 director and other employees of the compact commission shall have the
37 benefit of these same legal rights and defenses of state employees in
38 the member state in which they are primarily employed. All legal rights
39 and defenses that arise from the compact shall also be available to
40 them.

41 c. Each member state shall be liable for and pay judgments filed
42 against the compact commission to the extent related to its partic-
43 ipation in the compact. Where liability arises from action undertaken
44 jointly with other member states, the liability shall be divided equally
45 among the states for whom the applicable action or omission of the exec-
46 utive director or other employees of the compact commission was under-
47 taken; and no member state shall contribute to or pay, or be jointly or
48 severally or otherwise liable for, any part of any judgment beyond its
49 share as determined in accordance with this section.

50 § 1124. Restrictions on authority. a. New York substantive state laws
51 applicable to pari-mutuel horse racing and wagering shall remain in full
52 force and effect.

53 b. Compact rules shall not preclude subsequent rulemaking in New York
54 state on the same or related matter. The most recently adopted rule
55 shall thereby become the governing law.

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7

1 c. New York state shall not participate in or apply this interstate
2 compact to any aspect of standardbred racing.
3 § 1125. Construction, savings and severability. a. The compact shall
4 be liberally construed so as to effectuate its purposes. The provisions
5 of the compact shall be severable and if any phrase, clause, sentence,
6 or provision of the compact is declared to be contrary to the constitu-
7 tion of the United States or of any member state, or the applicability
8 of the compact to any government, agency, person, or circumstance is
9 held invalid, the validity of the remainder of the compact and its
10 applicability to any government, agency, person, or circumstance shall
11 not be affected. If all or some portion of the compact is held to be
12 contrary to the constitution of any member state, the compact shall
13 remain in full force and effect as to the remaining member states and in
14 full force and effect as to the state affected as to all severable
15 matters.
16 b. In the event of any allegation, finding, or ruling against the
17 compact or its procedures or actions, provided that a member state has
18 followed the compact's stated procedures, any rule it purported to adopt
19 using the procedures of this statute shall constitute a duly adopted and
20 valid state rule.
21 § 2. This act shall take effect immediately.

Saratoga Institute Albany Law School 2019 New and Emerging Drugs

George Maylin
New York Drug Testing and Research Program
Ithaca, NY

Challenges For Equine Drug Testing

- Alleged drug use in horse racing has come under national scrutiny from critics outside the sport as well as from within.
- Allegations are that illegal Performance Enhancing Drugs or PEDs are in widespread use and that laboratories cannot detect these drugs.
- These critics do not identify the suspected drugs with rare exception.
- Existing methodologies are capable of detecting many named drugs if their molecular structures are known.
- Detecting possible PEDs from a list of thousands of drugs is like finding a needle in a haystack.
- The list of drugs reported by AORC Laboratories supports this fact.

Ways to enhance the performance of race horses

- Drugs
- Nutrition
- Equipment changes
- Training methods
- Medical devices
- Horsemanship

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**THE BIGGEST LIST OF QUALITY SEASONS!**

AFLEET ALEX, AWESOME AGAIN, BAYERN, BROKEN VOW, DIALED IN, FIRST DUDE, FREUD,
GET STORMY, GHOSTZAPPER, GIO PONTI, LEMON DROP KID, MINESHAFT, MACHO UNO, OXBOW,
SHACKLEFORD, SKY MESA, STORMY ATLANTIC, TAPIZAR, THE FACTOR AND MANY OTHERS.

**MORE
INFO**

Combating A Culture Of Cheating

by Joe Gorajec | 01.17.2017 | 7:50am



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(First in a two-part series.)

Horse racing has a culture of cheating.

Its problem is drugs. It's what the public calls doping. The methods differ, as do the drugs.

At one end of the spectrum, horsemen and veterinarians inject horses on race day with a wide variety of drugs or other foreign substances.

SET THE PACE.

Join the future
of Historic
Horse Racing.

**EXACTA
SYSTEMS**

**ASK RAY?**

questions • tips • rants

Ask Me

PR POLL

Who do you think will win the Eclipse
Award for Outstanding Trainer?

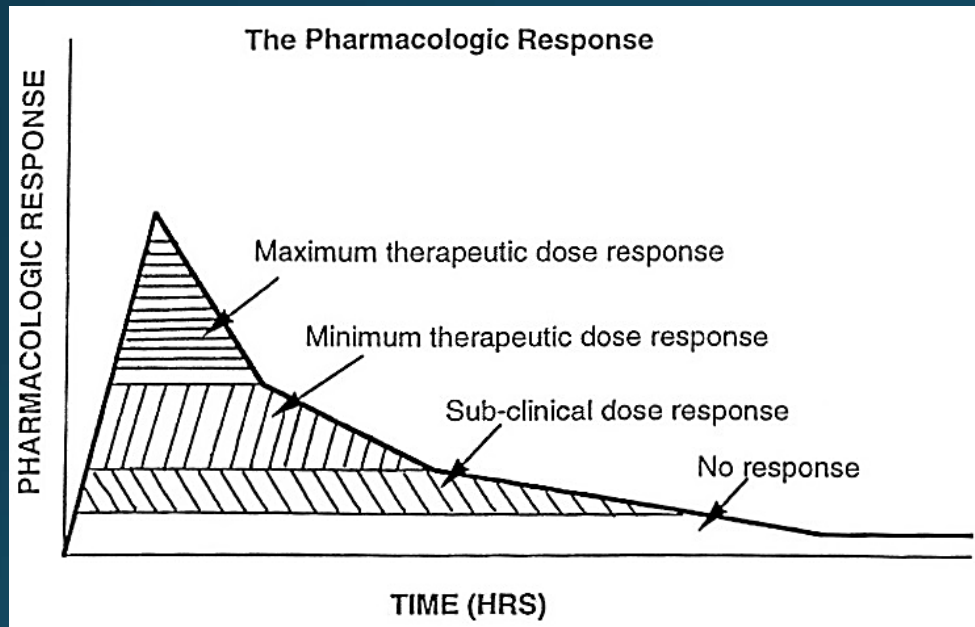
- ☐ Bob Baffert
- ☐ Chad Brown
- ☐ Mark Casse

vote[View Results](#)

Horseracing Integrity Act

In a recent research paper, The Jockey Club, which supports the legislation, wrote that "improper drug use can directly lead to horse injuries and deaths. Horses aren't human, and the only way they can tell us something is wrong is by reacting to a symptom. If that symptom is masked, the results can be devastating . . . we lag behind cheaters and abusers and by the time we have caught up they have moved on to the next designer substance."

Pharmacological Effects of Drugs



- Can the response be detected?
- Can the response be measured accurately?
- Can the response be related to a drug concentration?

Emerging and Designer Drug List

- Fentanyl Drug Analogues..... 79 different known substances
- Methylphenidate (Ritalin) Analogues..... 8 different known substances
- Cannabinoids (Cannabis) Analogues..... 300 different known substances
- Opioids (Morphine) Analogues..... 12 different known substances
- Non-opioid pain killers..... Over 20 compounds
- Nootropics..... 30 different known substances
- Natural Drug Products..... Hundreds of known and unknowns
- HIF Stabilizers (Prolyl Hydroxylase Inhibitors)..... Over 10 known
- Proteins and Peptides..... Many known and unknown
- Bisphosphonates
- Anticoagulant Drugs

Hundreds of new drugs

Fentanyl Analogues

(Analgesic Drugs and Stimulants)

- 2,5-Dimethylfentanyl
- 2,2'-Difluorofentanyl
- 3-Allylfentanyl
- 3-Fluorofentanyl (NFEPP)
- 3-Furanylfentanyl (3FUF)
- 3-Methylbutyrfentanyl
- 3-Methylfentanyl (3-MF)
- 3-Methylfuranylfentanyl[9] (3MFUF, TMFUF)
- 3-Methylthiofentanyl
- 3-Phenylpropanoylfentanyl
- 4-Fluorobutyrfentanyl (4-FBF)
- 4-Chloroisobutyrylfentanyl (4-CIBF)
- 4-Fluoroisobutyrfentanyl (4-FIBF)
- 4-Fluorofentanyl
- para-fluorofuranylfentanyl (p-F-Fu-F) [1802489-71-9]
- para-chlorofuranylfentanyl (p-Cl-Fu-F)
- ortho-methylfuranylfentanyl (o-Me-Fu-F)
- ortho-methoxyfuranylfentanyl (o-MeO-Fu-F)
- ortho-isopropylfuranylfentanyl (o-iPr-Fu-F)
- 4-Phenylfentanyl
- 4-Methoxybutyrfentanyl
- 4-Methylphenethylacetylfentanyl
- Acrylfentanyl
- α -Methylacetylfentanyl
- α -Methylbutyrfentanyl
- α -Methylfentanyl (AMF)
- α -Methylthiofentanyl
- α -Methyl- β -hydroxyfentanyl
- Acetylfentanyl
- Alfentanyl
- Benzodioxolefentanyl
- Benzoylfentanyl
- Benzylfentanyl
- β -Hydroxyfentanyl
- β -Hydroxythiofentanyl
- β -Hydroxy-4-methylfentanyl
- β -Methylfentanyl
- Butyrfentanyl (Bu-F, BUF)
- Brifentanyl
- Carfentanyl
- Cyclopentylfentanyl
- Cyclopropylfentanyl
- EAZ-91-05

Fentanyl Analogues Continued

- meta-fluorofentanyl
- Mirfentanyl
- Ocfentanyl
- Ohmefentanyl
- Orthofluorofentanyl
- Parafluoroisobutylbenzylfentanyl
- R-30490
- Remifentanyl
- Sufentanil
- Tetrahydrofuranylfentanyl
- Tetramethylcyclopropylfentanyl
- Thenylfentanyl
- Thiafentanil
- Thiofentanyl
- Trefentanyl
- Valeryl fentanyl (VF)
- Isobutyrylfentanyl
- Isofentanyl
- Hybrid molecule containing features of both fentanyl & haloperidol
- trans-phenylcyclopropyl-norfentanyl [102504-49-4]
- Pyridin-4-ylethyl-norfentanyl [1443-41-0]
- Furanylfentanyl (Fu-F, FUF)
- Furanylethylfentanyl (FUEF)
- Lofentanyl
- N-Methylcarfentanyl
- Methoxyacetylfentanyl (MAF)

Beta Receptor Agonists

- Bambuterol
- Brombuterol
- Bromochlorobuterol
- Clenbuterol
- Chloprenoline
- Cimaterol
- Cimbuterol
- Clencyclohexerol
- Clenhexerol
- Clenisopenterol
- Clenpenterol
- Clenproperol
- Clenpropanol
- Fenoterol
- Hydroxymethyl
clenbuterol
- Isoxsuprine
- Mabuterol
- Mapenterol
- Procaterol
- Ractopamine
- Ritodrine
- Salbutamol
- Salmeterol
- Terbutaline
- Tulobuterol
- Zilpaterol

Methylphenidate Analogues

- Methylphenidate
- Ethylphenidate
- Propylphenidate
- Isopropylphenidate
- 3,4-Dichloromethylphenidate
- 4-Methylphenidate
- 4-Fluormethylphenidate
- 3-Chloromethylphenidate

Peptide therapeutics: current status and future directions[☆]

Keld Fosgerau and Torsten Hoffmann



Zealand Pharma A/S, Smedeland 36, Glostrup, 2600 Copenhagen, Denmark

Peptides are recognized for being highly selective and efficacious and, at the same time, relatively safe and well tolerated. Consequently, there is an increased interest in peptides in pharmaceutical research and development (R&D), and approximately 140 peptide therapeutics are currently being evaluated in clinical trials. Given that the low-hanging fruits in the form of obvious peptide targets have already been picked, it has now become necessary to explore new routes beyond traditional peptide design. Examples of such approaches are multifunctional and cell penetrating peptides, as well as peptide drug conjugates.

Here, we discuss the current status, strengths and weaknesses of peptide therapeutics, and provide a perspective on future directions.

Proteins and Peptides

- Performance Enhancing Drugs (PED's)
 - Examples include: EPO, Insulin, cancer drugs, and growth hormones
- Growth Hormones
 - Recombinant growth hormones (GH) have been available for a number of years. More recently, GH has been extracted and purified from various species including: laboratory animals, horses, cattle, pigs, and sheep. The peptide composition varies from species to species which complicates identification. This is an active area of on-going research.

Blood manipulation: current challenges from an anti-doping perspective

Jakob Mørkeberg¹

¹Metabolic Mass Spectrometry Facility, Rigshospitalet, Copenhagen, Denmark

The delivery of oxygen is the limiting factor during whole-body endurance exercise in well-trained individuals, so manipulating the amount of hemoglobin in the blood results in changes in endurance exercise capacity. Athletes began using novel erythropoiesis-stimulating agents well before they were approved for medical use. Older manipulation practices, such as autologous blood transfusions or the administration of first-generation recombinant human erythropoietins, are still widely abused due to challenges in their detection. More recent performance enhancement maneuvers include efforts to mask doping and to induce increased endogenous erythropoietin expression. Confessions by athletes have revealed an ongoing yet extremely sophisticated *modus operandi* when manipulating the blood. In this review, weaknesses in detection methods and sample collection procedures are scrutinized and strategies developed to circumvent the test system discussed.

Copy epoetins and hypoxia-inducible factor stabilizers

The expiration of the patent for epoetin in Europe in 2004 allowed the manufacturing of biosimilar EPOs. A biosimilar product is a copy version of an already authorized biological medical product with demonstrated similarity in psychochemical characteristics, efficacy, and safety based on a comprehensive comparability exercise.³⁵ In contrast to biosimilars, copy epoetin products are manufactured, and therefore have not undergone the same strict comparative development program against a reference product. In general, these are less expensive and more accessible through web-based distributors. These agents pose a real threat to clean competition. More than 80 different copy epoetins have been compounded.³⁶ Every novel copy EPO could differ in structure and chemical properties from conventional and biosimilar EPOs such that the direct EPO test may be insensitive to these agents.³⁷ An alternative test method using SDS-PAGE gel electrophoresis, which differentiates EPO molecules based on the molecular masses, enables the identification of some of the copy epoetins, but it is unlikely that all of these copies can be identified with conventional detection methods.

Personal Communication from Ken McKeever

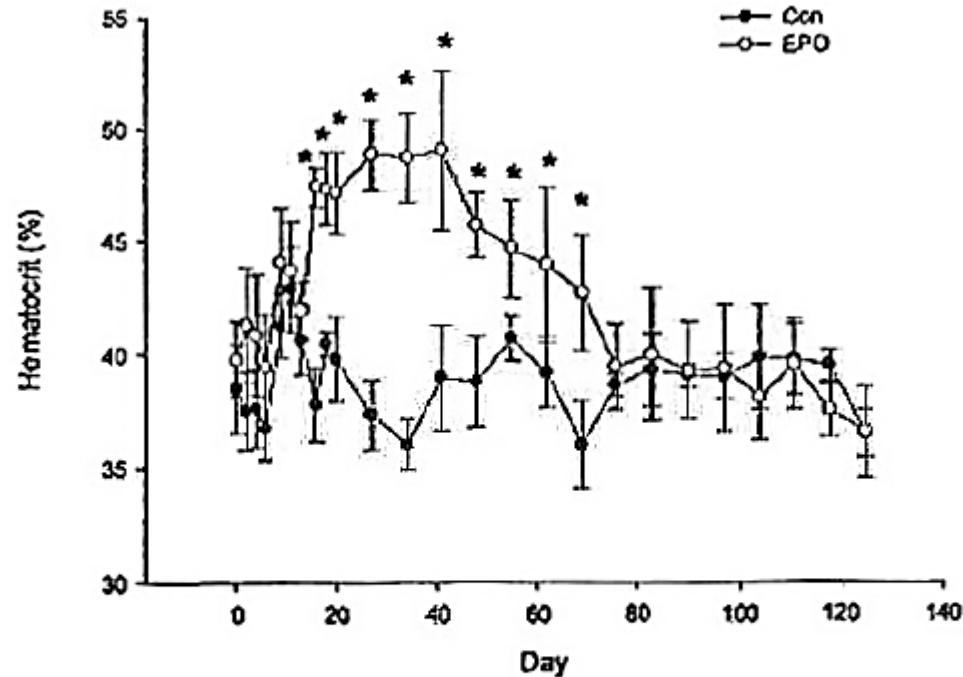


Figure 1: Hematocrit (%) response to 50IU/Kg IV 3x/wk for 3 wks. Values are means (\pm SE) for 4 control and 4 rhuEPO treated horses. The HCT peaks in the week after the last injection and then decreases over the post-treatment recovery period.

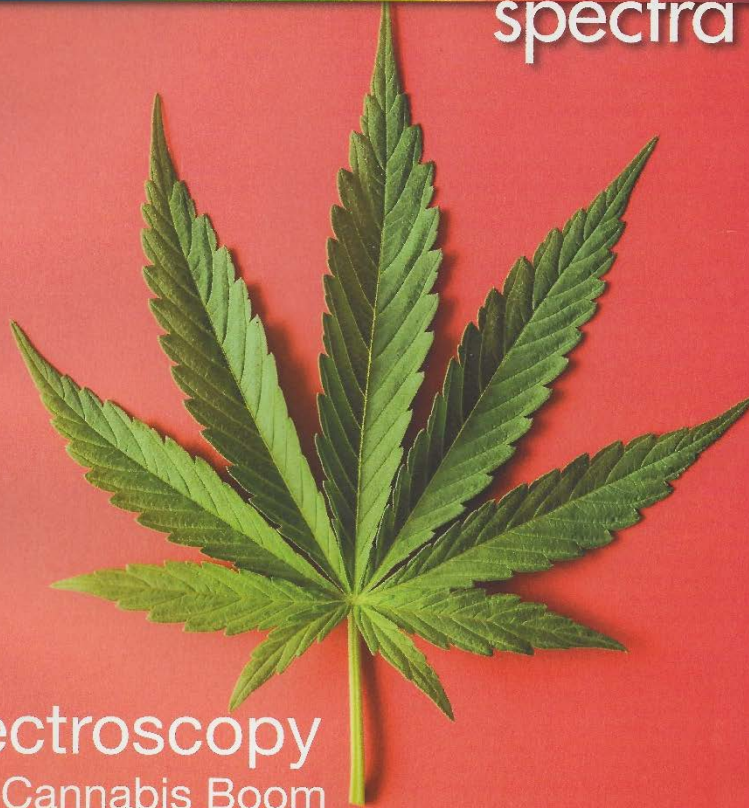
List of Bisphosphonates (Bone Modifiers)

- Alendronate
- Etidronate
- Clodronate
- Zoledronic Acid
- Risedronate
- Ibandronate
- Pamidronate
- Tiludronate

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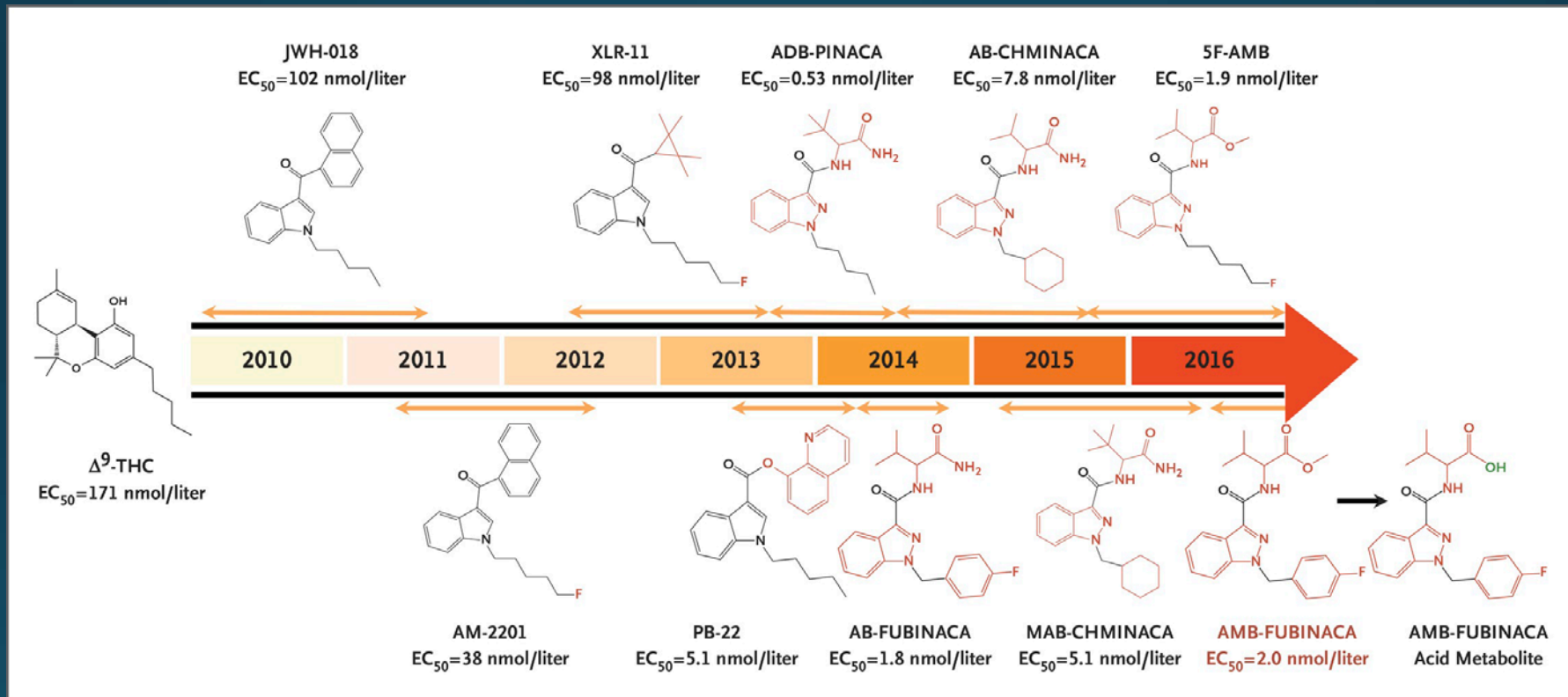
Spectroscopy & the Cannabis Boom

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Evolution of Synthetic Cannabinoid Structures



Nootropic Brain Drugs Rise in Popularity for Today's Cutthroat Corporate Climbers

Excess is out, efficiency is in. Welcome to the world of nootropics.

By Jack Smith IV • 04/14/15 12:40pm



Psychoactive natural products: overview of recent developments

István Ujváry

iKem BT, Budapest, Hungary

Abstract

Natural psychoactive substances have fascinated the curious mind of shamans, artists, scholars and laymen since antiquity. During the twentieth century, the chemical composition of the most important psychoactive drugs, that is opium, cannabis, coca and “magic mushrooms”, has been fully elucidated. The mode of action of the principal ingredients has also been deciphered at the molecular level. In the past two decades, the use of herbal drugs, such as kava, kratom and *Salvia divinorum*, began to spread beyond their traditional geographical and cultural boundaries. The aim of the present paper is to briefly summarize recent findings on the psychopharmacology of the most prominent psychoactive natural products. Current knowledge on a few lesser-known drugs, including bufotenine, glaucine, kava, betel, pituri, lettuce opium and kanna is also reviewed. In addition, selected cases of alleged natural (or semi-natural) products are also mentioned.

Key words

- ethnopharmacology
- mode of action
- natural products
- psychopharmacology
- toxicology

Herbal Medicines for the Management of Opioid Addiction

Safe and Effective Alternatives to Conventional Pharmacotherapy?

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¹ Division of Medical Toxicology, Department of Emergency Medicine, University of Massachusetts Medical School, Worcester, MA, USA

² Department of Medicinal Chemistry, Laboratory for Applied Drug Design and Synthesis, School of Pharmacy, University of Mississippi, University, MS, USA

Abstract

Striking increases in the abuse of opioids have expanded the need for pharmacotherapeutic interventions. The obstacles that confront effective treatment of opioid addiction – shortage of treatment professionals, stigma associated with treatment and the ability to maintain abstinence – have led to increased interest in alternative treatment strategies among both treatment providers and patients alike. Herbal products for opioid addiction and withdrawal, such as kratom and specific Chinese herbal medications such as WeiniCom, can complement existing treatments. Unfortunately, herbal treatments, while offering some advantages over existing evidence-based pharmacotherapies, have poorly described pharmacokinetics, a lack of supportive data derived from well controlled clinical trials, and severe toxicity, the cause for which remains poorly defined. Herbal products, therefore, require greater additional testing in rigorous clinical trials before they can expect widespread acceptance in the management of opioid addiction.

Metabolic characterization of AH-7921, a synthetic opioid designer drug: *in vitro* metabolic stability assessment and metabolite identification, evaluation of *in silico* prediction, and *in vivo* confirmation

Ariane Wohlfarth,^a Karl B. Scheidweiler,^a Shaokun Pang,^b Mingshe Zhu,^c Marisol Castaneto,^a Robert Kronstrand^{d,e} and Marilyn A. Huestis^{a,*}

AH-7921 (3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide) is a new synthetic opioid and has led to multiple non-fatal and fatal intoxications. To comprehensively study AH-7921 metabolism, we assessed human liver microsome (HLM) metabolic stability, determined AH-7921's metabolic profile after human hepatocytes incubation, confirmed our findings in a urine case specimen, and compared results to *in silico* predictions. For metabolic stability, 1 $\mu\text{mol/L}$ AH-7921 was incubated with HLM for up to 1 h; for metabolite profiling, 10 $\mu\text{mol/L}$ was incubated with pooled human hepatocytes for up to 3 h. Hepatocyte samples were analyzed by liquid chromatography quadrupole/time-of-flight high-resolution mass spectrometry (MS). High-resolution full scan MS and information-dependent acquisition MS/MS data were analyzed with MetabolitePilot™ (SCIEX) using multiple data processing algorithms. The presence of AH-7921 and metabolites was confirmed in the urine case specimen. *In silico* prediction of metabolite structures was performed with MetaSite™ (Molecular Discovery). AH-7921 *in vitro* half-life was 13.5 ± 0.4 min. We identified 12 AH-7921 metabolites after hepatocyte incubation, predominantly generated by demethylation, less dominantly by hydroxylation, and combinations of different biotransformations. Eleven of 12 metabolites identified in hepatocytes were found in the urine case specimen. One metabolite, proposed to be di-demethylated, N-hydroxylated and glucuronidated, eluted after AH-7921 and was the most abundant metabolite in non-hydrolyzed urine. MetaSite™ correctly predicted the two most abundant metabolites and the majority of observed biotransformations. The two most dominant metabolites after hepatocyte incubation (also identified in the urine case specimen) were desmethyl and di-desmethyl AH-7921. Together with the glucuronidated metabolites, these are likely suitable analytical targets for documenting AH-7921 intake. Copyright © 2015 John Wiley & Sons, Ltd.

Keywords: high resolution mass spectrometry; human hepatocytes; metabolism; synthetic opioids; *in silico* prediction

Correspondence case report

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(www.drugtestinganalysis.com) DOI 10.1002/dta.1970

Mitragynine (Kratom) - monitoring in sports drug testing

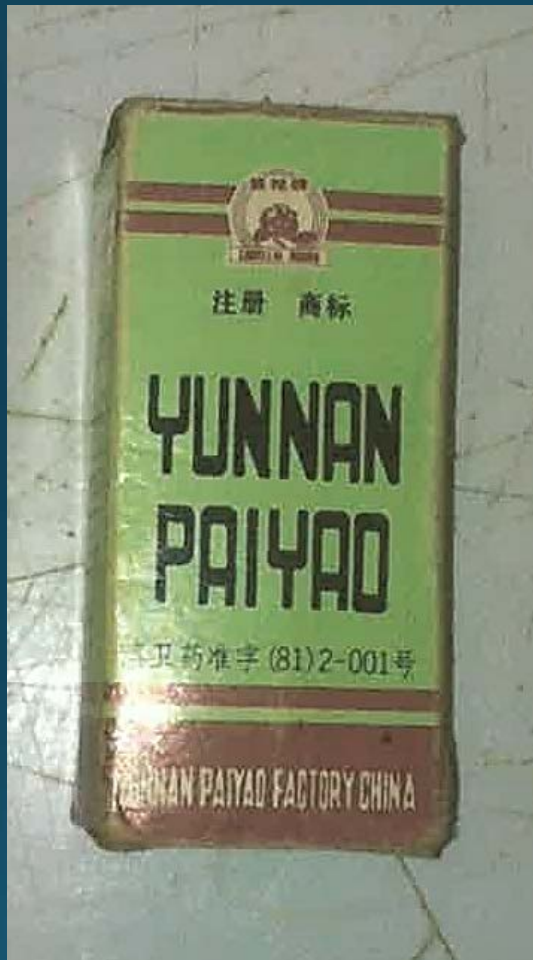
Sven Guddat,^{a,*} Christian Görgens,^a Vanessa Steinhart,^a Wilhelm Schänzer^a
and Mario Thevis^{a,b}

Introduction

In the year 2014, mitragynine (Figure 1), as the main pharmacological active alkaloid of the plant Kratom (*Mitragyna speciosa*), was placed on the Monitoring List of the World Anti-Doping Agency (WADA) to reveal its misuse in professional sports.^[1] The herbal remedy, Kratom, has been used for hundreds of years in Southeast Asia, and has gained popularity in recent years in European countries and in the United States. Many different products, such as dried leaves, powdered material, or purified extracts are widely marketed via the Internet and herbal shops.^[2–4] Most recently, Kratom has been labelled as an ingredient in an energy drink that

injection of urine seems to be feasible for sports drug testing. For a reliable monitoring of mitragynine in athletes' urine specimens, both strategies were followed. Therefore, an LC-MS screening assay has been established to enable the detection of mitragynine and its metabolites after enzymatic hydrolysis considering the minimum required performance level (MRPL) for narcotics of 100 ng/mL. Additionally, an approach based on high resolution/high accuracy MS (Orbitrap MS) after direct injection of native urine has been used to confirm positive findings, providing an overview of different phase I and II metabolites.





Resolution of Alleged Drug Use

Is the perceived use of PEDs real? Assume that it is without proof

Steps:

- Investigate the accusations by trained investigators, “boots on the ground”.
- Develop a system of dependable informants
- Assess performance changes by qualified racing regulators
- Test confiscated contraband for possible drugs
- Narrow the search for the needle in the haystack
- Targeted and non-targeted testing

that date. By applying the stop-time provision, the Board properly determined that Uspango's physical presence in the United States ended in January 1998. And because the earliest time at which Uspango might have met the ten-year physical presence requirement was in March 1998, he cannot meet that criterion. In sum, Uspango is not eligible for cancellation of removal under the Act.

Uspango's Other Arguments

In a final footnote Uspango advances three additional arguments: (1) that the stop-time rule violates equal protection, (2) that ineffective assistance of counsel prevented him from filing his asylum claim early enough to qualify for consideration under pre-Act law and (3) that the INS abused its discretion by serving the Notice two months before he would have satisfied the ten year physical presence requirement under the Act. None of those arguments has merit.

[4-6] First, we have already held that the stop-time provision is constitutional (*Pinho*, 249 F.3d at 189-90).⁶ Second, there is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of counsel advanced by Uspango must be based on the Fifth Amendment's due process guaranty (*Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir.2001)). But to meet the standard for a due process violation, Uspango must show that he was "prevented from reasonably presenting his case" (*id.*, citing *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir.1988)). He has made no effort to do so here.

6. That holding coincides with the decisions of every other Court of Appeals that has considered the constitutionality of the stop-time provision (see *Ram v. INS*, 243 F.3d 510, 517

[7, 8] Finally, there is no support for Uspango's claim that the INS abused its discretion by issuing the Notice when it did. Authority to determine whether and when to initiate removal proceedings rests solely with the INS (*Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); *Xu Cheng Liang*, 206 F.3d at 315). INS' initiation of proceedings against Uspango in January 1998 was well within that authority.

Conclusion

Because Uspango's removal proceedings commenced after the April 1, 1997 effective date of the Act, he is subject to the ten year physical presence requirement and to the stop-time provision introduced by the Act. And because Uspango had concededly not been physically present in the United States for ten years when his proceeding commenced in January 1998, he does not meet the requirements under the Act for cancellation of removal. Uspango's petition for review is therefore DENIED.



Charles CRISSMAN; Wendy Crissman;
*Christine Crissman, Appellants,

v.

DOVER DOWNS ENTERTAINMENT
INC.; Dover Downs, Inc.

(9th Cir.2001); *Afolayan v. INS*, 219 F.3d 784, 789 (8th Cir.2000); *Angel-Ramos v. Reno*, 227 F.3d 942, 948-49 (7th Cir.2000)).

*** (Dismissed as Party per Court's
11/8/2000 Order)**

No. 00-5178.

United States Court of Appeals,
Third Circuit.

Filed: April 30, 2002.

Originally Argued: Dec. 5, 2000.

Reargued En Banc: Nov. 28, 2001.

Trainers of harness racing horses brought § 1983 action against corporation which operated harness racing facility, alleging that corporation's exclusion of trainers from facility violated trainers' due process rights. The United States District Court for the District of Delaware, 83 F.Supp.2d 450, Roderick R. McKelvie, J., granted summary judgment for corporation. The Court of Appeals reversed, 239 F.3d 357. On rehearing en banc, the Court of Appeals, Rendell, Circuit Judge, held that: (1) combination of state's regulation of sport and subsidization of tracks using their video lottery proceeds did not amount to "symbiotic relationship" between state and facility, and (2) state agency's alleged grant of monopoly to facility for six months of year did not establish close nexus between agency and corporation's action.

Affirmed.

Rosenn, Circuit Judge, filed dissenting opinion.

1. Civil Rights ⇌197, 198(3.1)

In determining whether private conduct amounts to state action so as to support § 1983 claim against private actor, court must focus on fact-intensive nature of state-action inquiry, mindful of its central purpose, i.e. to assure that constitutional standards are invoked when it can be said that state is responsible for specific

conduct complained of. 42 U.S.C.A. § 1983.

2. Civil Rights ⇌198(4)

Private conduct amounts to state action, as required to support § 1983 action against private actor, where symbiotic relationship exists between private actor and state, so that by virtue of close involvement of state and interdependence of actors in association formed and in challenged activity, conduct complained of is in fact fairly attributable to state. 42 U.S.C.A. § 1983.

3. Civil Rights ⇌198(6)

Symbiotic relationship did not arise between state and privately owned harness racing facility by virtue of state agency's heavy regulation of sport, even when combined with flow of state funds including subsidization using portion of facilities' video lottery proceeds and payment of substantial commission for housing and operating video lottery; thus, facility owner's exclusion of trainer was not under color of state law, precluding trainer's § 1983 due process action against owner. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

4. Civil Rights ⇌198(6)

State agency's alleged effective grant of harness-racing monopoly to particular track for six months of year, even when combined with agency's heavy regulation of sport, did not establish close nexus between agency and track owner's decision to exclude trainer, as required to support trainer's § 1983 due process action against owner; there was no direct involvement on agency's part in owner's decision. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

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DE, for Appellants, Charles Crissman, Wendy Crissman.

Thomas P. Preston [Argued], Reed Smith, Wilmington, DE, for Appellees, Dover Downs Entertainment Inc., Dover Downs, Inc.

James F. Burnett, Potter, Anderson & Corroon, Wilmington, DE, for Amicus-Appellees, Thoroughbred Racing Associations of North America, Inc., DE Racing Assoc.

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BEFORE: McKEE, ROSENN and CUDAHY,** Circuit Judges.

BEFORE: BECKER, Chief Judge, SLOVITER, MANSMANN,*** SCIRICA, NYGAARD, ALITO, McKEE, RENDELL, BARRY, FUENTES, and ROSENN, Circuit Judges.

OPINION OF THE COURT

RENDELL, Circuit Judge.

We are called upon in this appeal to determine whether the exclusion of Charles and Wendy Crissman from Dover Downs race track was fairly attributable to the state of Delaware. The Crissmans argue that Dover Downs and the state were in a "symbiotic relationship" such that Dover Downs acted under color of state law based on the Supreme Court's reasoning in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6

L.Ed.2d 45 (1961). The District Court held that there was no state action and granted Dover Downs' motion for summary judgment. A panel of this court reversed, but on rehearing en banc, we conclude that the regulation and flow of funds involved here do not equate to the facts in *Burton* and do not otherwise support a conclusion that the state is responsible for the Crissmans' exclusion.¹ Accordingly, we will affirm the District Court.

I.

Our jurisdiction is clear under 28 U.S.C. § 1291, and our review of the District Court's grant of summary judgment is plenary, e.g., *Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir.1999). We apply the same legal standard as the District Court did, determining whether there is a genuine issue as to any material fact, while viewing the facts and inferences from them in the light most favorable to the Crissmans. *Id.*; Fed.R.Civ.P. 56. If the Crissmans have failed to make a showing sufficient to establish the existence of state action, Dover Downs is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II.

Although little is straightforward in determining whether a private actor has acted "under color of state law,"² one di-

** Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for Seventh Circuit, sitting by designation.

*** The Honorable Carol Los Marismann participated in the argument and conference of the en banc court in this appeal, but she died before the filing of the opinion.

1. The panel opinion, later vacated by this Court, appears at 239 F.3d 357 (3d Cir.2001).

2. Where a defendant's conduct is state action under the Fourteenth Amendment, it is also conduct "under color of state law" for § 1983. See *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n. 2, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Because the difference is not significant here, we use the two phrases interchangeably. See *Groman v. Township of*

rective emerges clearly from the Supreme Court's jurisprudence: the facts are crucial. In *Burton's* often-quoted words, "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722, 81 S.Ct. 856. Accordingly, we will begin with a discussion of the facts pertaining to the conduct at issue, namely, the exclusion of the Crissmans from the Dover Downs race track; then we will explore the relationship between the Crissmans and Dover Downs and the nature of the involvement of the state of Delaware.

A. The Crissmans and Dover Downs

Charles and Wendy Crissman live in Delaware and own and train horses. They make their living exclusively from harness racing, and have done so for many years, at least since the late 1970s or early 1980s. In order to participate in racing in Delaware, they are licensed by the Harness Racing Commission of Delaware (the "Commission" or "Harness Racing Commission"), which is part of the state's Department of Agriculture. 3 DEL.C. § 10002. We know little else from the record about the Crissmans.

Dover Downs, Inc., is a private corporation that owns and operates a harness racing facility in Dover, Delaware, where, until 1997, the Crissmans raced their horses. The corporation is a subsidiary of Dover Downs Entertainment, Inc., which apparently has other interests in hotels and NASCAR racing, but which is not named in this suit. Dover Downs is one of two state-licensed harness racing tracks in Delaware, each of which runs races for

half the year. Although excluded from Dover Downs, the Crissmans continue to race at the other track, Harrington Raceway. The Crissmans do not dispute that Dover Downs' facilities were privately built on private land, and are privately owned.

Dover Downs is not only a state-licensed harness racing association, as defined by the harness racing regulations, but is also a state-licensed "video lottery agent." The three lottery agents in Delaware—Dover Downs, Harrington Raceway, and a thoroughbred track—have both racing and video lottery machines (also called video slot machines or "slots"). The video lottery machines were added to the existing harness racing track in 1994 as a separately managed operation. Both activities are subject to extensive regulation by the state.

The general manager of harness racing for Dover Downs, Charles Lockhart, runs the day-to-day operations of Dover Downs' racing facilities and recommended the exclusion of the Crissmans to Dover Downs' president. Lockhart became the general manager on October 20, 1997, only days before he decided to exclude the Crissmans from the harness racing track. A letter was sent to each of the Crissmans—dated October 27, 1997—informing them that they could no longer race at Dover Downs. The one-sentence letter, which was signed by the president of Dover Downs after discussions with Lockhart, stated: "[A]s of this date you are not welcome on the premises of Dover Downs nor will Dover Downs be accepting any horses owned or trained by you." The race track refused to explain this exclusion.³ Despite the Crissmans' repeated

Manalapan, 47 F.3d 628, 638 n. 15 (3d Cir. 1995).

3. A letter sent by Dover Downs' General Counsel to the Crissmans' lawyer in October

1999 stated that "we choose not to debate the merits of our decisions with regard to our right to exclude individuals from our facility."

requests to allow them access, the exclusion continued through the 1997–1998 and 1998–1999 seasons.

Lockhart indicated in his deposition testimony that he excluded the Crissmans because of rumors of licensing denials, doping, and financial irresponsibility, as well as rumors that the Harness Racing Commission was investigating Charles Crissman for false ownership in connection with Delaware-only races. These races, limited to horses wholly owned by Delaware residents or sired by Delaware stallions, were introduced by the race track in the early to mid-1990s, and the rules governing eligibility were formalized in 1998, *see* 3 DEL.C. § 10032. The rules or policies that govern these Delaware-only races could be circumvented through “false ownership”—where the formal owner (presumably a Delaware resident) is not the “true” owner (presumably *not* a Delaware resident). These races make up about five of the thirteen daily races.

Lockhart had heard all of these rumors before beginning his employment with Dover Downs. From 1973 to 1997, Lockhart had worked for an association of harness horse owners, trainers, breeders and drivers. It was in that capacity that he first met Charles Crissman in the late 1970s or early 1980s. Because of Lockhart’s position in the association, horsemen came to him with complaints, including complaints that Charles Crissman was circumventing the Delaware-only racing policies and that he had misrepresented horses that he sold.

There is no evidence in the record that the state authorities were involved in any way in the exclusion. It so happened that Lockhart had known Robert Collison, the

Harness Racing Commission investigator who was looking into the claims of false ownership, for fifteen or twenty years and had discussed Charles Crissman’s alleged misconduct with him before Lockhart began working at the race track. Lockhart himself acknowledged that he had two conversations with Collison about the investigation while Lockhart was employed by Dover Downs, but both of them took place after the Crissmans had been excluded. There was no evidence of any interaction between Lockhart and Collison—and thus between Dover Downs and the state—in connection with the decision to exclude, or the exclusion of, the Crissmans.

B. Involvement of the State of Delaware

The state of Delaware has consistently taken the position that the decision to exclude the Crissmans was Dover Downs’ alone. In February 1999, Delaware’s Department of Justice sent the Crissmans a letter (seemingly in response to a request for some action or intervention on its part) stating that the Commission can only request that racing licensees provide the state with a list of excluded people, and that the Commission’s licensing power “does not supersede the common law right of a track to exclude individuals for lawful grounds.”⁴ It directed the Crissmans to take up their complaints with the track.

In fact, the Crissmans acknowledged at oral argument that the state had no “direct” involvement in Dover Downs’ conduct, arguing instead that state regulation and the flow of funds between Dover Downs and the state by virtue of the video lottery operation made their exclusion “fairly attributable to the state.” Both the

4. A Commission regulation specifically provides: “An association may eject or exclude a person for any lawful reason. An association shall immediately notify the State Steward and the Commission in writing of any person

ejected or excluded by the association.” Delaware Harness Racing Commission Rules and Regulations (“Commission Rules”), ch. IV, IV.E.

harness racing and the slot machines are heavily regulated, as is true in most states where gambling or racing are permitted.

The statute establishing the Harness Racing Commission gives it power to promulgate regulations regarding harness racing operations. These are detailed in their provisions, reaching such aspects of racing as the videotaping systems to be used, the appropriate surface for the race track, and even the colors to be worn by the various starting-gate positions. Delaware Harness Racing Commission Rules and Regulations ("Commission Rules"), ch. IV, III. C, D, H.

The regulations subject certain race track personnel to regulatory approval. Horse owners and trainers, race track owners, and various officials must be licensed by the state, and some of the employees' positions are defined by the Commission Rules. *See, e.g.*, 3 DEL.C. § 10023. Nonetheless, Dover Downs pays, supervises, and is in charge of hiring decisions and, generally, decisions to fire employees. There are a few exceptions. Some judges may be paid by the state, which is then reimbursed by the track, and the state veterinarian is state-appointed, Commission Rules, ch. III, XII.A.1. But neither has a role in managing the track's operations; the judges oversee the fairness of the races and the state veterinarian evaluates the horses' health. Commission Rules, ch. III, XII.A.3. Moreover, there can be no involvement going the other way; no one with an official relationship to

a harness racing association can be an employee of the Commission. 3 DEL.C. § 10007.

The Commission has reserved for itself numerous rights and powers, including the right to regulate admission charges, approve changes to a track's buildings, compel production of books or other documents showing a track's receipts and disbursements, require removal of any of the track's employees or officials, place expert accountants in the track's offices to ensure compliance, and issue subpoenas for the attendance of witnesses and production of documents before the Commission. 3 DEL.C. § 10029. While comprehensive from a regulatory standpoint, these regulations stop short of giving the state any interest or role in the day to day operations of Dover Downs or its decision-making as to how it runs its business.⁵

The state regulations also reflect the state's concern for the finances of harness racing associations like Dover Downs, in that the associations are subject to audits by the Commission and must periodically submit financial statements. 3 DEL.C. §§ 10029(e); 10030; Commission Rules, ch. IV, II.B. The Commission can enforce these measures through several of the special powers it has reserved—particularly the power to place an accountant in a licensee's office, *see* 3 DEL.C. § 10029(e)—and, presumably, through its power to suspend or revoke licenses, 3 DEL.C. § 10026.

5. The regulatory scheme governing racing is similar to Pennsylvania's, which we had the opportunity to consider in *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir.1979), where we held that "the State's relationship to the heavily regulated racing industry [was] not sufficient to establish a symbiotic relationship under *Burton*." *Id.* at 596. The scheme there included detailed regulations, licensing of officials and description of their job duties, state approval of officers

and even stockholders of private racing associations, a substantial state financial interest in tax revenue, as well as a rule calling for the track to "enforce" Racing Commission Rules. Ultimately we found state action because racing officials, who were privately paid but had authority from the Commission to oversee the races, had participated in the decision to expel a trainer from the track. But the regulatory scheme in itself did not make the action "fairly attributable to the state." *Id.*

Nonetheless, Dover Downs makes its own independent fiscal decisions.

The horse racing regulations are only one aspect of the state's relationship with Dover Downs, of course, and we agree with the panel opinion that Dover Downs' video lottery and racing activities should be considered together. Whereas the state has been involved in the regulation of horse racing for some time,⁶ state licensing of video lottery at horse tracks is a fairly recent development.⁷ It was first permitted in Delaware upon the passage in 1993 of an act known as the "Horse Racing Redevelopment Act" (the "Act"), which had as its stated purpose the revitalization of the horse racing industry in Delaware. 69 Del.Laws 446. The video lottery machines were introduced in 1994 and were limited to existing tracks. *See* 29 DEL.C. § 4819(a).⁸ Dover Downs and Harrington Raceway are permitted to house video lottery machines and to become "agents" only because they were racing tracks in existence when the Act was passed. Further, when Dover Downs chose to become a video lottery agent, its racing activities became subject to certain additional restrictions—video lottery agents are required, for instance, to conduct more days of harness racing than they did before the

passage of the Act, and to increase the number of employees. *See* 3 DEL.C. § 10148(1).

Like harness racing, the video lottery is subject to detailed regulations. These include licensing requirements and certain restrictions on the lottery agents, such as caps on the number of machines that can be at any one location. 29 DEL.C. § 4820. The machines, which the state purchases, or in some instances leases, from the manufacturers, are connected to a central state computer, but are housed and operated on private property. *See* 29 DEL.C. §§ 4819(c), 4820 (licensees submit a proposed plan for obtaining video lottery machines but the state lottery director actually leases or purchases them from the manufacturers).

Statutory provisions also govern the handling of proceeds.⁹ A portion of the video lottery proceeds flows directly to the track's racing operation as purse enhancements. 29 DEL.C. § 4815(b)(3)b; 3 DEL.C. § 10048(2). Even racing tracks that are not video lottery agents receive funds from the video lottery, provided that they maintain a certain purse size and number of racing days. 29 DEL.C. § 4821. In addition to this subsidy, Dover Downs acts essentially like a government contractor—

6. Several of the provisions of the statute regulating harness racing in Delaware date back to 1945. *See* 45 Del.Laws 303 (1945).

7. Similar legislation exists in a few other states. *See, e.g.,* W.VA.CODE § 29-22A-2 (2001) (authorizing video lottery machines at horse or dog tracks); S.D. CODIFIED LAWS § 42-7A (2001) (establishing a video lottery business under the direction of an independent state agency). Amici curiae, the Thoroughbred Racing Associations of North America and Delaware Racing Association, suggest that such an arrangement is under consideration in several more states.

8. The statutory provisions governing the video lottery were added to an existing statute,

which permitted a state lottery and described its mechanisms, including the duties of the director of the state lottery to "operate and administer" the lottery, as well as to promulgate rules and regulations. 29 DEL.C. § 4805(a).

9. *See* 29 DEL.C. § 4815. Parts of this section were revised in 1997, but the changes do not affect our analysis. The revised statute allocates funds to jockey organizations and the Delaware Standardbred Breeder's Program, and instead of the video lottery agents' reimbursing the state for equipment costs, these costs are paid out of funds allocated to the state. *See* 29 DEL.C. § 4815(b)(3) (2001).

the state pays Dover Downs a commission for housing and operating the slots. 29 DEL.C. § 4815.

The funds also flow in the other direction, as the state receives a portion of the video lottery proceeds. Indeed, raising money for the state is what makes the lottery permissible under the Delaware Constitution, which generally prohibits gambling, but makes an exception for lotteries "under State control" designed to raise money for the state. DEL. CONST. § 17. The revenues from the slot machines—minus the money won by players—go to a state fund, from which money is paid out as dictated by statute. See 29 DEL.C. § 4815. In addition to the payments to the racing tracks described above, funds flow to the state to reimburse it for administrative costs, to organizations that help compulsive gamblers, and to the state's general fund. See *id.* The revenues coming to the state of Delaware from the video lottery operation have been quite significant—in 1997, video lottery contributions to the state general fund were \$152.3 million and Dover Downs earned \$90.13 million, while the next year they earned \$206 and \$113.12 million, respectively.

Factually, then, the Crissmans complain of an act by an employee of a privately owned race track in which the state was, undisputedly, not directly involved. However, Dover Downs acknowledges that its harness racing and video lottery activities are subject to extensive state regulation, and both the track and the state receive funds from the operation of the video lottery machines. It is the characterization of the relationship formed by these ele-

ments that is at the heart of the disagreement between the parties.

III.

After having been excluded from Dover Downs for two seasons, and on the day before the 1999–2000 season began, the Crissmans filed a complaint in federal district court in Delaware. They made a claim under § 1983 that Dover Downs' exclusion of them without a hearing violated their Fourteenth Amendment Due Process rights. A necessary element of this claim was that Dover Downs had violated these rights while acting "under color of state law." 42 U.S.C. § 1983.

The District Court invited and then considered further evidence specifically on the state action issue before granting Dover Downs' motion for summary judgment on the ground that the Crissmans had not sufficiently shown this element.¹⁰ *Crissman v. Dover Downs, Inc.*, 83 F.Supp.2d 450, 453, 455 (D.Del.2000). The Court concluded that state regulation and receipt of revenue did not make this privately owned harness racing facility a state actor under the test urged by the Crissmans, namely the "symbiotic relationship" test first announced by the Supreme Court in *Burton*. *Id.* at 454. Further, it found no evidence that state officials participated in the decision to exclude the Crissmans. *Id.* at 455. That is, it found no evidence of a "close nexus" between the state and the conduct, which could establish state action under *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

The Crissmans filed a timely appeal of this decision. A panel of this Court re-

10. Dover Downs filed a cross-motion for summary judgment in response to the Crissmans' motion for a preliminary injunction. The District Court's decision on the summary judgment motion resolved both. The parties

agreed that the record for the motions would consist of a stipulation of undisputed facts and the items presented as the record at the preliminary injunction hearing.

versed the District Court's grant of summary judgment for Dover Downs based on its view that the track did have a "symbiotic relationship" with the state of Delaware. *Crissman v. Dover Downs Entm't Inc.*, 239 F.3d 357, 358 (3d Cir.2001). The panel reasoned that *Burton* established an exception to the general rule that the state must be involved in the challenged conduct, and that *Burton* permitted state action to be based on the facts here, namely, facts demonstrating what it termed "overall involvement of the State in the affairs of the private entity." *Id.* at 361. This was the first opinion in which we applied *Burton* to find state action since 1984, and one of only a few to reach that conclusion without a finding that the entity involved was an "instrumentality" of the state.¹¹ Interestingly, the Supreme Court's most recent pronouncement in the area of state action does not reference *Burton*, and the scope of *Burton*, and its applicability here, presents an important issue. We vacated the panel opinion so that this issue could be considered by the entire Court.

IV.

[1] The basic question we must ask, and answer, in the state action arena is whether the exclusion of the Crissmans from Dover Downs can be fairly attributed to the state. See, e.g., *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). The Supreme Court has established a

number of approaches to this general question, which it has recently said are essentially "facts that can bear on the fairness of such an attribution." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). Regardless of whether these are "tests" or "facts,"¹² *Brentwood* directs courts to focus on the fact-intensive nature of the state action inquiry, mindful of its central purpose: to "assure that constitutional standards are invoked 'when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'" *Id.* at 295, 121 S.Ct. 924 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (emphasis in original)).

The Crissmans rely primarily on the "symbiotic relationship test" the Supreme Court announced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Alternatively, but clearly less vigorously, they assert that state action here could also be based on the "close nexus" between the challenged action and the state, which we will discuss below. First we will address *Burton*, its relationship to the general state action inquiry, its scope, and how its facts compare to those before us here.

A. *Burton*

In *Burton*, a restaurant located in the Wilmington Parking Authority, a state-

11. Most of our cases finding state action under *Burton* date from the 1970s and involved universities and libraries. See *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) (University of Pittsburgh and Temple University); *Benner v. Oswald*, 592 F.2d 174 (3d Cir.1979) (Pennsylvania State University); *Chalfant v. Wilmington Inst.*, 574 F.2d 739 (3d Cir.1978) (en banc) (library); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir.1977) (en banc) (University of Pittsburgh); *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir.1976) (library).

12. The Supreme Court pointed out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), that it has never been clear "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in [each] situation." *Id.* at 939, 102 S.Ct. 2744; see also *Groman v. Township of Manalapan*, 47 F.3d 628, 639 n. 16 (3d Cir.1995). *Brentwood* seems to embrace the second understanding.

owned parking facility, refused to serve a customer because of his race. The Court concluded that this discriminatory conduct was state action. The state's parking facility was highly dependent on the revenue from the leases—nearly 70% of the funds necessary to pay the financing for the facility came from leases, while only 30% came from parking revenue. Patrons of the state's activity (parking) benefitted from the lessee's activity (restaurant services). And the activity complained of—the discriminatory service of restaurant patrons—was the source of revenue needed for the state's operation of the project: "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U.S. at 724, 81 S.Ct. 856.¹³

Moreover, the restaurant was on publicly owned land and was located within the exterior walls of a public parking garage. Signs on the garage indicated that the building as a whole was public, and the Supreme Court concluded that the state had "elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 719, 725, 81 S.Ct. 856. The physical location of the restaurant involved the state further in its operations: any improvements the restaurant made to the building would be tax exempt and the state was responsible for physical maintenance and provision of utilities. The Court held that the "symbiosis"—close association of mutual benefit—dictated a finding of state action.

We must consider at the outset the panel's view that *Burton* contains an exception to the principle that the state must have been implicated in the conduct complained of. Justice Souter's recent blanket state-

ment in *Brentwood* seems to leave no room for such an exception. There, he stated categorically that in order to determine whether an action is fairly attributed to the state, we must look at the challenged conduct: "state action may be found *if, though only if*, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood*, 531 U.S. at 295, 121 S.Ct. 924 (emphasis added).

In *Burton*, the Supreme Court characterized the conduct as bearing a very significant relationship to the state: "[T]he profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U.S. at 724, 81 S.Ct. 856; see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 843, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (emphasizing the role this fact played in the outcome of *Burton*). By referring in general terms to *Burton*'s "joint participation test," courts often forget that *Burton* concluded that there the state was "recognized as a joint participant in the challenged activity," and not in the private entity as a whole. *Burton*, 365 U.S. at 725, 81 S.Ct. 856; see also *id.* at 724, 81 S.Ct. 856 (concluding that all of the activities "indicate[] that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn" (emphasis added)).

[2] Accordingly, we conclude that *Burton* stands for the proposition that, if a "symbiotic" relationship does exist, then, by virtue of the close involvement of the state and interdependence of the actors in

13. The conclusion that the state benefitted was based in part on the restaurant's assertion that serving African-Americans would

hurt its business. See *Burton*, 365 U.S. at 724, 81 S.Ct. 856.

the association formed and the challenged activity, the conduct complained of is in fact "fairly attributable" to the state. Instead of examining the conduct and, then, the state's role in it, *Burton* would have us look first at the relationship and test whether the conduct could be linked to the joint beneficial activities—as it was in *Burton* due to the essential revenues flowing from the discriminatory restaurant operation. We view *Burton*, then, not as an exception to the rule that the conduct complained of must be fairly attributable to the state, but, rather, as providing another vantage point or way of assessing the necessary connection to the state.

B. *Burton's* Scope

How, and whether, we then apply *Burton* depends on the extent to which its principles still control our analysis. The Supreme Court has had occasion in the more than 40 years since *Burton* was decided to consider state action in no less than a dozen cases, and while referring to and characterizing the *Burton* "test" in

several opinions, the Supreme Court has never relied upon it again to find state action. Nor, however, has it overruled it.¹⁴

The Court itself, and several of the Justices, have noted the narrow reach of *Burton*. In *American Manufacturers Mutual Insurance v. Sullivan*, 526 U.S. 40, 57, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999), seven Justices opined that "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment, and later cases have refined the vague 'joint participation' test embodied in that case."¹⁵ Further, in *American Manufacturers*, the Supreme Court reversed our court's determination that private insurers became state actors by providing benefits under the extensively regulated and state-controlled workers' compensation system, admonishing our court for having "figuratively thrown up its hands and fallen back on language in our decision in *Burton*." *Id.*

And, curiously, in its most recent pronouncement in *Brentwood*, the Supreme Court reviewed the extensive litany of

14. As the Supreme Court has directed, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). There, it stated that the court of appeals was correct to apply the relevant Supreme Court decision despite what the court of appeals described as the case's "infirmities, [and] its increasingly wobbly, moth-eaten foundations." *Id.*

15. See also *NCAA v. Tarkanian*, 488 U.S. 179, 192, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988) (explaining that there is state action under *Burton* where the state "knowingly accepts the benefits derived from unconstitutional behavior").

Justice O'Connor has written two dissenting opinions indicating *Burton's* narrow scope. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), she wrote:

Our decision in *Burton* ... was quite narrow. We recognized "the limits of our in-

quiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." ... We have since noted that *Burton* limited its "actual holding to lessees of public property," *Jackson v. Metropolitan Edison Co.*, [419 U.S. at 358, 95 S.Ct. 449,] and our recent decisions in this area have led commentators to doubt its continuing vitality....

Id. at 409, 115 S.Ct. 961 (O'Connor, J., dissenting). Similarly, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), she questioned "the continuing vitality of *Burton* beyond its facts" and noted that "the decision in [*Burton*] depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building" and that "the State stood to profit from the restaurant's discrimination." *Id.* at 636, 111 S.Ct. 2077 (O'Connor, J., dissenting).

"facts" that bear on whether there is state action, but did not reference *Burton*. Justice Souter wrote:

[A] challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum [v. Yaretsky]*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)], when the State provides "significant encouragement, either overt or covert," *ibid.*, or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar [v. Edmondson Oil Co., Inc.]*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)] (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957) (per curiam), when it has been delegated a public function by the State, *cf., e.g., West v. Atkins*, [487 U.S. 42, 56, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)]; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

16. "The Crissmans point to the use of the word "symbiosis" in footnote four in *Brentwood* as evidence that the Court still embraces the *Burton* "test," despite the fact that the majority does not cite to *Burton* or expound on the theory. See *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 301 n. 4, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). But the footnote pertains to an unrelated point, the rejection of formalism in determining state action, and "symbiosis" arises only as an example of a criterion that looks to underlying reality. In the footnote,

Brentwood, 531 U.S. at 296, 121 S.Ct. 924. Notably absent is any reference to the "symbiotic relationship test," or to *Burton*. In fact, *Burton* is never mentioned in the majority opinion.¹⁶

The fact remains, however, that *Burton* has not been overruled, nor its reasoning discredited by the Supreme Court in the text of any opinion, despite numerous opportunities. Because the full range of Supreme Court precedent that now guides our analysis appears to narrow, but not to overrule, *Burton*, we must conclude that, while *Burton* remains good law, it was crafted for the unique set of facts presented, and we will not expand its reach beyond facts that replicate what was before the Court in *Burton*.

C. Application of *Burton*

[3] Given the thrust of recent Supreme Court precedent, and given the fact pattern presented by the operation before us, the conduct complained of, and the regulatory scheme, we cannot conclude that the state and Dover Downs had a "symbiotic relationship" as existed in *Burton* such that the exclusion of the Crissmans could be found to be fairly attributable to the state of Delaware. Unlike the state in *Burton*, Delaware was not conducting any operation together with the race track at Dover Downs. It was not operating a mutually beneficial business there. Rather, it licensed Dover Downs to operate as a

the majority's only reference to "symbiosis" is as a criterion of state action "which the dissenters accept," which could be said to imply that the majority *does not* accept it. The dissenting Justices did, in fact, cite *Burton* and include the "symbiotic relationship test" among the approaches they discussed and applied. They found no state action under *Burton* because the private entity acted as a contractor and the state did not profit from the challenged activity." *Id.* at 935, 939 (Thomas, J., dissenting).

harness racing track and as a video lottery agent, it regulated both operations, it authorized the use of video lottery proceeds to subsidize harness racing, it paid Dover Downs a commission for housing and operating the video lottery machines, and it received funds from the video lottery operation.

Although some public property was involved, since the slot machines were owned or leased by the state, the conduct did not take place on state property as in *Burton*, so that there is no basis for finding that the state was in any way putting its support behind the conduct of the private entity. See, e.g., *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 67 (3d Cir.1990) ("The fact that the [newspaper] concessionaires lease their premises from a governmental entity also falls short of triggering state action. . . . In such circumstances, state action will be recognized only when there is a 'symbiotic' relationship between the private and governmental entities, such that the public might reasonably conclude from that relationship that the government has lent its support to the private entity's actions.").

In fact, the type of state-private relationship present here seems more analogous to the fact patterns involved in cases that have addressed whether government regulation and funding convert private action to state action. The Supreme Court made clear early in its state action jurisprudence that state licensing was not enough to make a private entity a state actor, see *Moose Lodge v. Iris*, 407 U.S. 163, 176, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), and the Court has repeatedly opined that regulation—even detailed regulation, as we have here—does not equate to state action, see, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (a heavily regulated utility company was not a state actor).

The Supreme Court has stated with equal force that the flow of funds does not implicate the state in private activity. The state of Delaware subsidizes harness racing by using some of the revenue from the video lottery, but it is clear that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987). Here, the state also pays Dover Downs a substantial commission for housing and operating the video lottery, but, as the Supreme Court directed in *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), neither the fact nor the size of this commission makes Dover Downs anything more than a private contractor that performs a service. In *Rendell-Baker*, a privately operated school that treated students with special needs received at least 90% of its operating budget from the state. *Id.* at 843, 102 S.Ct. 2764. Nonetheless, the Supreme Court characterized the school's "fiscal relationship with the State" as "not different from that of many contractors performing services for the government." *Id.*; see also *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) ("That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."). And, the use of the term "agent" does not change this reasoning. *Brentwood* directs us to look to reality rather than form, and Dover Downs does not function as a traditional agent, who could, for instance, bind the state.

Under the regulatory scheme here, the state does benefit from the proceeds of the video lottery. The Supreme Court has had little opportunity to address the impact on the state action inquiry of the flow of funds in this direction, as most cases have involved the flow of money from the state to private entities. This is not surprising, for it would be a radical concept if the state's receipt of funds from private actors were to convert them into state actors. If this were the case, the state's receipt of tax revenue from a private entity's operations would qualify most corporations as federal actors, which is surely not a desirable result. See *Brown v. Philip Morris Inc.*, 250 F.3d 789, 803 (3d Cir. 2001).

While the Court's ruling in *Burton* did turn to some extent on the state's receipt of and need for the restaurant revenue, we submit that its fact pattern was unique and must be so limited. There, the state would not have been able to finance or pay for the parking facility absent the restaurant's lease, the demand for its parking was potentially increased by the restaurant's

presence, and, as noted above, it financially benefitted directly from the specific discriminatory conduct.

As government's contractual involvement and interaction with private industry in so many ways is not only the norm today, but indeed arguably on the rise, if a financially advantageous contractual relationship providing revenue to the state were enough to make a private entity a state actor, it would tip the careful balance between preserving "an area of individual freedom" and "assuring that constitutional standards are invoked" when the state is responsible for the conduct at issue. *Brentwood*, 531 U.S. at 295, 121 S.Ct. 924.

In sum, the presence of both these elements—regulation and flow of funds—that are separately unpersuasive in the state action inquiry does not amount to more than each alone; the combination brings no greater result—namely, no state action.¹⁷ Delaware is not associated in the harness racing or video lottery operation, nor are the monies that flow to the state tied in any way to the conduct the Crissmans complain of. The deeper involve-

17. This is consistent with the conclusion of most courts of appeals, including our court, that the conduct of employees of state-regulated race tracks is not state action absent a showing of a direct connection between the state and the specific conduct at issue. In *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir.1979), we held that Pennsylvania's regulatory scheme did not make the action of a race track "fairly attributable to the state," although we ultimately found that this was state action based on the direct involvement of racing officials in the conduct. We compared the case to *Jackson and Moose Lodge*, and concluded that the state was not a "joint venturer" with the track such that every act of the track could be said to be an act of the state. *Id.* at 596. See also *Hedges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir.1990) (exclusion of a harness racehorse driver was not state action under *Burton* where the state had no proprietary interest in the track and did not have a

"neighboring, interlinked business, and consequently lack[ed] as direct a financial stake in [the track's] success as was present in *Burton*"); *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 226 (5th Cir.1984) (denial of stall space was state action because of regulation combined with direct participation of a racing official in the decision); *Bier v. Fleming*, 717 F.2d 308, 311 (6th Cir.1983) (exclusion of a harness race driver was not state action where there was extensive regulation and revenue to the state but no evidence that the state participated in the conduct); *Fulton v. Hecht*, 545 F.2d 540, 542-43 (5th Cir.1977) (failure to renew contract to race greyhounds was not state action despite the state's role in auditing the track's books and issuing licenses and permits, the extensive revenue to the state, the presence of a state veterinarian at the track, and the fact that the track was the only one available during one-third of the year).

ment and "interdependence" present in a unique way in the fact pattern considered in *Burton* simply are not present here.¹⁸

D. Third Circuit State Action Jurisprudence

We find nothing in our own jurisprudence regarding state action or *Burton* that would require a different analysis or result. At the same time that the Supreme Court has been developing the law in this area, we have written many opinions of our own focusing on state action, and have referenced *Burton* perhaps more than other courts (and definitely more than the Supreme Court). But, like the Supreme Court in its jurisprudence, we originally noted the presence of *Burton* as a test, but have gradually come to appreciate its limitations.

We have revisited *Burton* periodically as the Supreme Court's state action jurisprudence has evolved. When faced with the question whether *Burton* survived the announcement of the "close nexus test" in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), we concluded that it remained a viable framework. See *Braden v. University of Pittsburgh*, 552 F.2d 948, 957-58 (3d Cir.1977) (en banc). We reached the same conclusion in *Krynicky v. University of Pittsburgh*, 742 F.2d 94, 98-99 (3d Cir. 1984), after the Supreme Court decided the so-called *Lugar* trilogy, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102

S.Ct. 2744, 73 L.Ed.2d 482 (1982), *Ren-dell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), and *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). But *Krynicky* and *Braden* have limited relevance to the situation here, not only because both predate the Supreme Court's most recent pronouncements, but also because they involved universities that we held to be "instrumentalities" of the state—factually and statutorily. We also held that the state was "deeply enmeshed in operations of the University" including "its financing and its basic decision-making processes," *Braden*, 552 F.2d at 959, and that the state had taken the affirmative step of "statutorily accepting responsibility for these institutions," *Krynicky*, 742 F.2d at 102, neither of which is the case here.

We have consistently noted the fact-specific nature of the "involvement and interdependence" present in *Burton*. *Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F.2d 71, 76 (3d Cir.1991). In *Boyle*, we characterized *Burton* as depending on the fact that "the state had many obligations and responsibilities regarding the operation of the restaurant; mutual benefits were conferred; and the restaurant operated physically and financially 'as an integral part of a public building devoted to a public parking service.'" *Id.* Two years later, in *Black v. Indiana Area School District*, 985 F.2d 707 (3d Cir.1993), we took a slightly narrower

18. Our dissenting colleagues argue "tests"—joint venture and partnership—never specifically espoused by the Supreme Court as "tests" for state action. They do so based upon language in *Moose Lodge v. Irvis* to the effect that certain facts did not make the state a partner in any real sense. However, we do not take this reference as establishing that every partnership or venture with the state will result in a finding of state action. Rather, any relationship formed would have to be tested against the attributes found to be hall-

marks of state action in cases such as *Burton*. Thus, even if called by another name, the relationship must permit one to conclude that the action is fairly attributable to the state. Even if the Supreme Court were to espouse affirmatively a state action theory of joint venture or partnership (which does not seem to "fit" given the concept of joint and several liability and the sufficiency of other tests to accomplish the same result), we do not view the facts here as implicating the state in the exclusion of the Crissmans.

view, noting that *Burton* “turned on” the facts listed in *Boyle* and, further, that the profits from the discriminatory conduct were “indispensable” to the finances of a government agency. *Id.* at 711.

And, in our most recent pronouncement in the area of state action, we voiced our doubts as to *Burton*’s continued force. In *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir.2001), we were called upon to decide whether tobacco companies were government actors. Calling *Burton* “seminal, albeit somewhat idiosyncratic,” we noted that the government’s and the cigarette manufacturers’ relationship—forged by beneficial revenue and by labeling regulations—did not constitute the “interdependence” necessary under *Burton*. *Id.* at 803. We stated:

Virtually all enterprises are subject to tax collection and, to varying degrees, to regimes of administrative regulation; were these attributes enough to satisfy the test of *Burton*, substantially all businesses in the country would effectively become federal actors. . . . Moreover, although *Burton* retains much of its precedential value, it should be noted that the Supreme Court has recently cast some degree of doubt upon that decision.

Id. Thus, our own jurisprudence is quite consistent with the limited applicability of *Burton* to its facts—facts not present here.

E. Other Bases for State Action

[4] In the absence of facts equating to those present in *Burton*, the Crissmans still could show that their exclusion was fairly attributable to the state if the situation were to “fit” within one of the other approaches or “tests.” They argue that the “close nexus” test applies. We disagree.

The Crissmans conceded at oral argument that the state had no “direct” involvement in the action, but they nonethe-

less urged the “close nexus” argument in their briefs and maintained at oral argument that it applies here. They argued that “the state has delegated sufficient authority to Dover Downs to make Dover Downs an agent of the state” and that “Dover Downs’ exclusive authority over racing activity for six months each year” establishes the required nexus.

The Crissmans theorize that their exclusion was, in effect, a decision that they were ineligible for Delaware-only races for the six months of the year during which Dover Downs was the only harness racing track in operation. So, they urge, the Commission effectively delegated to the race track its power to determine eligibility, see 3 DEL.C. § 10032(e), making Dover Downs a state actor. But this argument is without merit. The Crissmans challenge their exclusion from the track itself and from *all* of the races, not only from those with limited eligibility. Further, they do not allege that any decision *about their eligibility*—whether they were or were not Delaware residents, for instance—violated their Due Process rights. Cf. *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1084 (2d Cir.1990) (rejecting the argument that a track was a “monopoly” so that its exclusion of a horse owner was a de facto license revocation by the state). Moreover, the section of the statute the Crissmans rely on—3 DEL.C. § 10032—became effective in July 1998, after the initial decision to exclude them.

The Crissmans advance a second argument based on the fact that Dover Downs is the only race track in operation for six months of the year. They contend that since the Commission has the power to designate the days a harness racing track can operate, see 3 DEL.C. § 10023(c), it had granted the track a “six-month monopoly.” This argument relies on the Supreme Court’s suggestion in *Jackson v. Metropol-*

Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), that conduct of “a heavily regulated [business] with at least something of a governmentally protected monopoly will more readily be found to be ‘state’ acts than will the acts of an entity lacking these characteristics.” *Id.* at 453. But *Jackson* itself then proceeded to ask whether the conduct was fairly attributable to the state. *Id.* Even if Dover Downs had a “six-month monopoly,” this would not alter our conclusion that, for the reasons given above, the state can not be said to be responsible for the Crissmans’ exclusion. Indeed, *Jackson* reached the same result—no state action. *See also Fulton v. Hecht*, 545 F.2d 540, 543 (5th Cir.1977) (rejecting the argument that state action was present because the dog track was “granted a monopoly one-third of the year”).

In their opposition to Dover Downs’ petition for rehearing, the Crissmans also pointed to the Commission Rule that provides that an association “shall abide by and enforce the Act and the rules and orders of the Commission” as involving Dover Downs in the state enforcement activity. Commission Rules, ch. 5, I.1 (emphasis added). The panel opinion termed Dover Downs “an executive arm” of the Commission, and, thus, of the state of Delaware, on the ground that this rule delegated to Dover Downs a power traditionally associated with sovereignty. *Crissman v. Dover Downs Entm’t Inc.*, 239 F.3d 357, 362 (3d Cir.2001) (quoting *Jackson*, 419 U.S. 345, 352–53, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (“If we were dealing with the exercise by [the utility] of some power

delegated to it by the State which is traditionally associated with sovereignty our case would be quite a different one.”)). But we are unpersuaded by a single provision in the context of all of the other facts we have noted indicating that the exclusion was not fairly attributable to the state. Moreover, a sensible reading of the verb “enforce” in this context would be “to oversee compliance,” rather than “to enforce” in the sense of actual policing or active governmental or official “enforcement” of rules and regulations.¹⁹ This reading is consistent with our conclusion in *Fitzgerald v. Mountain Laurel Racing*, 607 F.2d 589 (3d Cir.1979), that the Pennsylvania racing scheme, which contained a similar “enforcement” provision, did not make a track’s conduct state action.

In sum, there is no evidence of a close nexus between the exclusion of the Crissmans and the state of Delaware. Further, the Crissmans have not argued, or demonstrated, that their exclusion was state action under any other of the “tests” or “facts” established by the Supreme Court.²⁰

V.

For the reasons above, we conclude that the District Court appropriately granted summary judgment in favor of Dover Downs, and we will accordingly AFFIRM.

ROSENN, Circuit Judge, dissenting.

In 1993, Delaware departed from its role as solely a regulatory body of the three horse racing tracks in the state and decided to mount joint enterprises with each of

19. In fact, the rule has since been amended so that “abide by and enforce” is replaced with “comply with.” 5 Del. Register of Regs. § 3.2.4 (Oct. 1, 2001).

20. Because we will affirm the grant of summary judgment on the basis of the state action

issue, we need not reach the question of whether a constitutional right was denied. Also, given our ruling, we do not need to address the Crissmans’ request that we reverse the District Court’s denial of their motion for a preliminary injunction.

them. Therefore, the expulsion without a hearing of the Crissmans, "licensees in good standing with the Harness Racing Commission for the State of Delaware,"¹ after about twenty-five years as horse trainers and horse owners at the Dover Downs race track fairly may be attributed to the State under 42 U.S.C. § 1983.² I, therefore, respectfully dissent.

I.

The courts have never succeeded in formulating and applying a precise test for the recognition of state action under the Equal Protection Clause. In "sifting [the] facts and weighing [the] circumstances," *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the entrepreneurial involvement of the State in the formerly private operations of Dover Downs is evident. Fortunately, the facts are transparent and undisputed.

The majority concludes that the regulations and flow of funds do not equate to the facts in *Burton* and do not otherwise support the exclusion of the Crissmans from the Dover Downs race track as "fairly attributable to the state of Delaware." (Maj. op. at 233). The majority is correct that the facts do not equate to *Burton*. The facts here are not only distinct from *Burton* but far more impressively support state action.

Dover Downs attempts to portray a relationship with the State at the time the Crissmans were expelled as simply regulatory. I agree that a regulatory relationship alone clearly is insufficient to constitute state action. The Supreme Court so

held in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), and we have so held in *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 596 (1979). Nonetheless, we noted in *Fitzgerald* that:

Where a private enterprise stands, in its operations, as a veritable partner with the state, then it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable.

Id. at 595 (quoting *Braden v. Univ. of Pittsburgh (Braden II)*, 552 F.2d 948, 958 (1977)).

Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), the Supreme Court in essence held that extensive and detailed regulation of a private club generally is insufficient to convert it into a state actor. *Id.* at 176-77, 92 S.Ct. 1965. The Supreme Court, however, also observed that although the Moose Lodge was heavily regulated, it could not be said to be "a partner or even a joint venturer in the club's enterprise," *id.* at 177, 92 S.Ct. 1965, thus implying that a partnership, or even a joint venture relationship between the State and a private enterprise, as we have here, might bring different consequences.

In this case, the record demonstrates that when Delaware enacted the Horse Racing Redevelopment Act (HRRRA) in 1993 to rejuvenate a declining state horse-racing industry and, at the same time, enhance its own revenues, it augmented its regulatory relationship. The State and Dover Downs became joint entrepreneurs

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress."

1. Paragraph 2, Stipulation of Undisputed Facts.
2. 42 U.S.C. § 1983 provides: "Every person who, under color of any . . . regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the

in a lottery and race track enterprise. The slot machines used by Dover Downs were the property of, or leased by, the State, not Dover Downs. The State exercised control over the slot machines by directly connecting them to the central computer system at the State Lottery Office. To this enterprise, the race track contributed its race track premises, its infrastructure, its organization, and its operating capital. In this joint enterprise fashioned and molded by the State, the State acts in a business capacity, not as a regulatory force. Dover Downs is a licensed state lottery agent.

The record also reflects that the state joint video lottery is inextricably linked with harness-racing. The State of Delaware's avowed purpose in creating the video lottery was to provide "assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will . . . cause increased employment." 29 Del.Code Ann. tit. 29, § 4801(b)(1). Under Delaware law, Dover Downs would not be permitted to operate a video lottery if it did not conduct harness racing meets. *Id.* § 4819(a).

Another purpose of the state-created lottery was to establish a joint venture with state race tracks to provide Delaware with additional income. To effectuate this purpose, Delaware shares a portion of the lottery's revenue with Dover Downs to be applied to Dover Downs's harness racing purses under the direction of the Harness Racing Commission. *Id.* § 4815(b)(3)b.2. Thus, the recipients of harness racing purses are direct beneficiaries of money derived from the video lotteries jointly operated by the State and the race track.

Furthermore, the State and Dover Downs also share jointly, although not equally, in the earnings generated by the video lottery.

Because of the entrepreneurial relationship that Delaware has established with Dover Downs, the State stands to gain and indeed receives substantial revenue. The direct stake of Delaware in the financial arrangements it established in 1993 with its race tracks is undisputed.

Finally, it must be noted that the State of Delaware is involved in Dover Downs' harness racing activities. There are many positions that Dover Downs is not permitted to fill without State approval. The Harness Racing Commission requires no fewer than 14 harness racing officials to be licensed³ and it reserves the right to designate other positions that require licenses. Although Dover Downs pays and supervises these officials, the Commission's rules describe their duties and responsibilities in detail. Most importantly, the Commission's rules require Dover Downs not only to abide by, but also to "enforce the [Harness Racing] Act and the rules and orders of the Commission." (emphasis added).

In *Jackson*, the Supreme Court stated that the petitioner's case for state action would have been stronger if the private actor had "exercise[d] . . . some power delegated to it by the State which is traditionally associated with sovereignty." 419 U.S. at 352-53, 95 S.Ct. 449. The power to enforce laws is one such power, the delegation of which renders Dover Downs an arm of the Commission. Of course, heavy state regulation of a private entity alone does not necessarily give rise to a joint venture relationship. However, the undisputed

3. The following individuals must be licensed by the HRC: state steward, board of judges, racing secretary, paddock judge, horse identifier and equipment checker, clerk of the

course, official starter, official charter, official timer, photo finish technician, patrol judge, program director, State veterinarian, and LAXIS veterinarian. (App. at 59).

facts here show a deliberate entwining and interdependence between the State and Dover Downs, not only in the operation of the State Lottery but also in the harness racing operations at the track. Since 1993, the State's concerns for the "economic activity and vitality" of the racetrack operation is a matter of statutory expression. The overall involvement of the State in the race track's affairs is manifest.

The majority analyzes the *Burton* rationale and concludes, especially in light of the Supreme Court decision in *Brentwood*, decided after the District Court's opinion and panel opinion in this case, that *Burton* must be limited to its unique facts. I find no fault with such limitations, especially since the *Brentwood* court carefully refrained from citing *Burton*. However, the facts in this case bear no resemblance to *Burton*. This is a much stronger case for the fair attribution of state action than was the case in *Burton*. Here, we have a joint venture of the State and Dover Downs in the operation of the video lottery and the harness racing track, not merely a symbiotic relationship.

This court has defined a joint venture as "an association of persons or corporations who by contract, express, or implied, agree to engage in a common enterprise for their mutual profit." *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964). The *Richardson* court further described the essential elements of a joint venture as: "(a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services or knowledge; and (c) a right to participate in the expected profits." *Id.* A joint venture relationship may exist where parties engage in an undertaking without entering upon their business undertaking "as strict partners, but engage in a common enterprise for their mutual benefit." *First*

Mechs. Bank v. Comm'r of Internal Revenue, 91 F.2d 275, 278 (3d Cir.1937); accord *Plant-Erickson v. Ditter*, 131 N.J. Eq. 163, 24 A.2d 379, 381 (1942). A modern definition of a joint venture and some of its incidents is set forth in the current edition of *Williston on Contracts*:

"A joint venture is a special combination of two or more persons, whether corporate, individual or otherwise, formed for some specific venture in which a profit is jointly sought without the parties designating themselves as an actual partnership or corporation. The essence of the contract among the joint venturers is that it binds the coventurers. While, as between the parties themselves, a contract is essential for the creation of a joint venture, this is not necessarily so as to third persons; although the parties may never have intended to become joint venturers, under certain circumstances, they may be held estopped to deny their participation in a joint venture, and all members of the joint venture will be held jointly and severally liable on its contracts."

12 Richard A. Lord, *Williston on Contracts* § 36:9 (4th ed.1999) (footnotes omitted). Thus, in *Tompkins v. Commissioner of Internal Revenue*, 97 F.2d 396 (4th Cir. 1938), the Court of Appeals applied essentially the same definition and held that an arrangement between a partnership and a corporation in a specific transaction constituted a joint venture between the partnership and the corporation. The court concluded that the agreement between the partnership and corporation "fulfilled all the requisites of a joint venture although informal and [] never reduced to writing." *Id.* at 399.

In *Irvis*, the Supreme Court observed that although Pennsylvania engaged in extreme and detailed regulation of private clubs, this was insufficient to make the

Moose Lodge a state actor. 407 U.S. at 177, 92 S.Ct. 1965. However, it intimated that had the relationship between the Lodge and the State been a partnership or joint venture, its decision would be different. *Id.* (“[The regulations cannot] be said to make the State . . . a partner or even a joint venturer.”).

Similarly, in *Fitzgerald*, we did not find that the heavy state regulation of race tracks amounted to a symbiotic relationship between the race track and the state, but we noted that the result would have been different had the race track in its operations been a “veritable partner with the state.” 607 F.2d at 595. Under such circumstances, “it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable.” *Id.* (quoting *Braden*, 552 F.2d at 958). We have such a situation here.

The majority draws a comparison between *Fitzgerald* and this case. The only basis for comparison is that both involve horse harness racing activities that are state regulated. The majority notes that in *Fitzgerald* we concluded that the state was not a “joint venturer.” However, *Fitzgerald* is vastly different from this case. *Fitzgerald* did not have slot machines; there was no sharing of profits; the track was not a state agent in the operation of the slot machines, in the collection of the proceeds and in transmitting them to the state; the state and the race track did not commit their separately owned property to the joint enterprise; the state did not use monies generated by the video lottery to cross-fertilize the horse racing activities; and there was no lottery and no joint venture.

The majority acknowledges “that Dover Downs’ video lottery and racing activities should be considered together.” (Maj. op. at 237). However, the majority ignores

the financial structure created by the HRRA. The majority summarily concludes that “Delaware was not conducting any operation together with the race track at Dover Downs. It was not operating a mutually beneficial business there.” (Maj. op. at 243). These conclusions are the backbone of the majority’s decision but the facts and the HRRA are to the contrary.

Delaware transformed the regulatory structure of its relationship with Dover Downs in 1993 when it enacted the Horse Racing Redevelopment Act. One purpose of the Act is “to establish a state-operated lottery . . . which will produce the greatest income for the State.” Del.Code Ann. tit. 29, § 4801(a). A second purpose is to provide “*nonstate supported assistance* in the form of increased economic activity and vitality for Delaware’s harness and thoroughbred horse racing industries, which activity and vitality will enable the industry to improve its facilities and . . . cause increased employment.” *Id.* § 801(b)(1) (emphasis added).

The HRRA authorizes harness race tracks such as Dover Downs to operate slot machines on their premises. As I have stated above, the race track provides its premises, infrastructure, and organization for the enterprise, and the State provides the slot machines. The race tracks, as “video lottery agents,” are responsible for securing and operating the machines and are free to determine the number of machines they choose to house, up to the statutory maximum of 1000. *Id.* § 4820.

The HRRA also provides for the distribution of the profits generated by the race tracks in the operation of the slot machines. Dover Downs is required to send all monies generated by the machines, net of payments to patrons, to an account controlled by the State Lottery Office. *Id.* § 4815(b). The monies received by this account are then distributed in accordance

with the HRRRA. First, the State pays the administrative costs associated with the operation of the lottery, including the salaries of state lottery personnel. Next, Gamblers Anonymous and similar programs receive a share. The State then splits the balance with Delaware race tracks, including Dover Downs. A large percentage of the remaining funds is distributed to racetracks such as Dover Downs "to be applied under the direction of the Delaware Thoroughbred Racing Commission for races conducted at such agent's racetrack." *Id.* § 4815(b)(3)b. Finally, Dover Downs, as a video lottery agent, receives a statutorily designated "commission." *Id.* § 4815(b)(3)c. The State general fund receives the most substantial share of the profits. The flow of funds from the race track to the State is generated by the business arrangement under the HRRRA between Delaware and the race track, not by state regulation of the industry. The relationship established is one that was obviously "mutually beneficial" and "conducted together." The majority's assertion to the contrary has no record support.

Under Delaware law, an arrangement between two individuals and a corporation to which each party made a definite contribution to the enterprise, shared in the profits, and had a proprietary interest in the venture, constitutes a joint venture. *J. Leo Johnson, Inc. v. Carmer*, 156 A.2d 499, 503 (Del.1959). The State and Dover Downs are joint venturers, a "widely recognized legal relationship . . . of modern origin," *id.* at 502, in the operation of the race tracks.

More recently, in *In re McKinney-Ringham Corp.*, No. Civ.A. 15071, 1998 WL 118035 (Del.Ch. Feb.27, 1998), a Delaware court found a relationship between one general partner and six limited partnerships a joint venture because they

shared a community of interest between the managing entity, a right of each party to share in any profits, and a duty to share in the losses of the entity. The majority in this case baldly states that "the state was in [no] way putting its support behind the conduct of the private entity." (Maj. op. at 243). This ignores HRRRA legislation specifically devised to rejuvenate the horse racing industry and enhance the State's Treasury. Operating the video lottery was indeed "a mutually beneficial business." In 1997, the net proceeds generated by the slot machines were \$298.1 million, of which Delaware received \$152.3 million and Dover Downs received \$90.13 million. In 1998, the net proceeds were \$350.82 million, of which Delaware received \$206 million and Dover Downs received \$113.12 million. In the first ten months of 1999, the Delaware race tracks netted \$351.67 million. With tens and hundreds of millions of dollars in proceeds raised annually by the State of Delaware and Dover Downs, they both enjoyed significant mutual benefits from the joint venture that enriched their coffers.

The majority's description of the financial arrangement between the State and the race tracks as a "subsidy" is inaccurate. This inaccuracy is highlighted by the HRRRA which states that one of the purposes of the Act is to provide "nonstate supported assistance." *See ante* p. 251. A subsidy is a grant made by the government to any enterprise whose promotion is considered to be in the public interest. BLACK'S LAW DICTIONARY 1442 (7th ed.1999). Delaware did not grant funds here. The payment of the administration expenses and salaries, the charitable contributions, and the split between the race tracks and the State of the monies earned in the enterprise were profits, not subsidies. The funds generated by Dover Downs are therefore "earned," (maj. op. at 238) not subsidized. Nor is there any basis for the

majority's equivocal characterization of Dover Downs's relationship to the State "like a government contractor." (Maj. op. at 237).

In *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir.1984), we again reviewed our decisions and recent decisions by the Supreme Court relating to state action. We concluded that *Braden* was still good law, that the Supreme Court had not developed a uniform test for ascertaining state action and had even questioned whether such a unitary test was possible. *Id.* at 98. As in *Braden*, we held that the University was "in name and in fact" an instrumentality of the State. *Id.* at 103.

The majority concludes that our decisions in *Krynicky* and *Braden* "have limited relevance" to this case. I disagree. The majority reaches its conclusion because these decisions predate the Supreme Court's most recent pronouncement and because they involved universities that we held to be "instrumentalities" of the state. (Maj. op. at 245). Essentially, the issue there, although in an academic ambience far removed from horse racing tracks, was whether the participation of a state in an otherwise private activity was so significant that the acts of the seemingly private enterprise should be considered state action. That is the issue before us except that in this instance the relationship has more of the characteristics of the partnership asserted by the Crissmans rather than a private entity acting as a state instrumentality.

The *Braden* court observed that *Burton* and *Jackson* stand as two separate models of state action analysis designed by the Supreme Court. 552 F.2d at 958. What emerges from *Braden* and *Krynicky* is another model for state action, "state instrumentalities." The cases stand for the proposition that where a private enterprise stands as a "veritable partner" with the

state in the operation of an educational institution, the enterprise is subject to the same constitutional requirements as the state. *Brentwood Academy v. Tennessee Secondary School Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), is yet another model. The applicability of each approach "rest[s] on the type of setting which may be present." *Braden*, 552 F.2d at 958.

Summarizing, the State of Delaware and Dover Downs engaged in a joint enterprise as a result of the relationship structured between them by the HRRRA. Delaware's participation in and the financial benefits it derives from the operations are so significant that the acts of this seemingly private enterprise must be deemed state action for the purposes of Section 1983. Therefore, even though the State did not participate in the decision to expel or exclude the Crissmans, its relationship to Dover Downs as a joint venturer subjects the act of expulsion to constitutional standards. Accordingly, I would reverse the District Court's grant of summary judgment and remand this case for trial.

II.

Finally, the Crissmans ask this court to reverse the District Court's denial of their motion for a preliminary injunction. A court ruling on a motion for a preliminary injunction must consider the following four factors:

whether the movant has shown a reasonable probability of success on the merits;

whether the movant will be irreparably injured by denial of the relief;

whether granting preliminary relief will result in even greater harm to the non-moving party; and

whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir.1999) (quoting *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir.1996) (en banc)). We review the denial of a preliminary injunction only for "an abuse of discretion, a clear error of law, or a clear mistake on the facts." *Id.* (internal quotations omitted).

I believe the Crissmans have a reasonable chance of succeeding on the merits because the State and Dover Downs are joint venturers, and the substantial evidence presented by the Crissmans supports their claim that they were denied due process of law.

All of the above factors cut in favor of the Crissmans. The Crissmans have suffered irreparable harm due to the denial of the injunction "because the nature of harness racing is such that no adequate remedy exists at law to compensate [them] for losses to income and reputation sustained from an unlawful suspension." *Fitzgerald*, 607 F.2d at 601. There is no evidence that Dover Downs would be harmed if the Crissmans, who are licensees in good standing with the Delaware Harness Racing Commission, were allowed to race. Finally, there is no evidence that the public would be adversely affected if the Crissmans were reinstated at Dover Downs. Thus, the District Court's denial of the Crissmans' motion for preliminary injunctive relief should be reversed.

III.

Accordingly, for the reasons set forth above, summary judgment in favor of Dover Downs, Inc. should be reversed and the case remanded to the District Court, with directions to grant plaintiffs' motion for preliminary injunctive relief, and for

such further proceedings as are consistent with this opinion.

Judge MCKEE joins in this dissent.



**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Overton Wayne PAULEY,
Defendant-Appellant.**

No. 00-4359.

United States Court of Appeals,
Fourth Circuit.

Argued Jan. 25, 2002.

Decided April 22, 2002.

Defendant pleaded guilty in the United States District Court for the Southern District of West Virginia, John T. Copenhaver, Jr., J., to aiding and abetting possession with intent to distribute methamphetamine and marijuana. Defendant appealed. The Court of Appeals, Gregory, Circuit Judge, held that: (1) string of thefts perpetrated by defendant and others were part of same course of conduct; (2) law of the case doctrine did not bar application of murder cross-reference; (3) attribution of entire quantity of drugs stolen during string of thefts as relevant conduct was not abuse of discretion; (4) defendant was not entitled to adjustment for acceptance of responsibility; and (5) defendant's sentence violated *Apprendi*.

Affirmed in part, vacated in part, and remanded.

provided for the granting of net annual return hardship increases where the property was not earning its statutorily prescribed return. This adjustment was then subject to a 15% limitation on the increase in maximum rent that could be assessed against an individual tenant in a 12-month period. It was also provided that increases in net annual return were to be apportioned equitably among the tenants giving due consideration to all previous increases in maximum rents by lease or otherwise. That is to say, subject to the 15% limitation, an authorized increase in net annual return would be assessed first against those tenants who had not experienced a recent increase or adjustment in maximum rent. However, this principle was subject to the primary purpose of assuring the landlord his authorized return. Thus, if necessary to assure that return, all tenants could be raised the 15% maximum, leaving the reconciliation of any inequity to a later proceeding. (Matter of Heyman v. McGoldrick, 281 App.Div. 558, 120 N.Y.S.2d 823.) Amendment 33 changes this by providing that the hardship increase for any one year may be apportioned *only against those apartments that have not yet reached their individual MBR*. The effect is, of course, that the owner-landlord may be deprived of an increase, to which he is entitled, without any provision for compensating him for the loss.

[4] Against this background, it cannot be said that the commissioner acted unreasonably in withholding approval of Amendment 33. The thrust of the Local Emergency Rent Control Act, and particularly the 1971 amendments, alluded to above, is to facilitate the transition from regulation to a free market by preventing imposition of stricter regulations which, due to an inadequate return to landlords, *inhibit maintenance of existing housing stock*. Amendment 33 runs counter to this purpose by denying in certain cases an increase to

which the landlord is entitled. This is not a mere hypothetical possibility, as suggested by Special Term, but has basis in fact. Accordingly, the commissioner could reasonably withhold his approval. It follows from what we have said that the petitioners landlords in the related proceeding are entitled to have their "hardship" applications processed consistent with the law and regulations absent the challenged amendment.⁴

In both cases, the order of the Appellate Division should be affirmed.

FULD, C. J., and BURKE, BREITEL, GABRIELLI, JONES and WACHTLER, JJ., concur.

In each case: Order affirmed, with costs.



33 N.Y.2d 144

Howard JACOBSON, Appellant-Respondent,

v.

NEW YORK RACING ASSOCIATION, INC.,
Respondent-Appellant.

Court of Appeals of New York.

Nov. 21, 1973.

Action by licensed owner and trainer of thoroughbred horses for damages arising from refusal of corporation, which had been given a State franchise to conduct horse racing with pari-mutuel betting, to allow stalls to owner after restoration of owner's suspended license. The Supreme Court, Special Term, Nassau County, Daniel G. Albert, J., dismissed the complaint as to individual defendant, and otherwise denied

4. We note that the City Council of the City of New York has repealed the Maximum Base Rent provisions of the City Rent and

Rehabilitation Law. However, such repeal, effective January 1, 1974, has not mooted the issues presented on these appeals.

the motion to dismiss, 68 Misc.2d 991, 328 N.Y.S.2d 785, and appeal was taken. The Supreme Court, Appellate Division, modified the order by holding that owner was entitled to review of corporation's act in an Article 78 proceeding, and otherwise affirmed, 41 A.D.2d 87, 341 N.Y.S.2d 333, and cross appeals were taken by permission. The Court of Appeals, Jasen, J., held that owner should have an opportunity to prove his allegation in an action for damages, and, by the same token, corporation should be permitted an opportunity to refute them, and that there was no necessity to convert the action into a proceeding pursuant to Article 78.

Order modified, case remitted for further proceedings.

1. Carriers §236(1)

Innkeepers §7, 9

Theaters and Shows §4

At common law a person engaged in a public calling, such as innkeeper or common carrier, was under a duty to serve without discrimination all who sought service, while, on the other hand, proprietors of private enterprises, such as places of amusement and resort, had no such obligation and were privileged to serve whomever they pleased.

2. Action §36

Theaters and Shows §4

Corporation which had been given a franchise by the state to conduct horse racing with pari-mutuel betting could not, with impunity, exclude a licensed owner and trainer when that action allegedly caused injury, and owner and trainer should have opportunity, in action against the corporation, to prove allegations; by the same token, corporation should have an opportunity to refute them and under these circumstances the action would not have to be converted into a proceeding pursuant to Article 78. CPLR 7801 et seq.; McK. Unconsol. Laws, §§ 7902, 7910.

David R. Hyde, O. Carlisle McCandless, Roger S. Fine and Miles M. Tepper, New York City, for appellant-respondent.

Jesse Moss, New York City, and Sue Wimmershoff-Caplan, New York City, of counsel, for respondent-appellant.

S. Chesterfield Oppenheim for Harness Tracks of America, Inc., amicus curiae.

Devereus Milburn and James E. Massey, New York City, for Thoroughbred Racing Ass'ns of the U. S., Inc. and Thoroughbred Racing Protective Bureau, Inc., amici curiae.

JASEN, Judge.

The plaintiff, Howard Jacobson, is a licensed owner and trainer of thoroughbred horses. The defendant, New York Racing Association (NYRA), is a nonprofit racing association incorporated under the Racing Law (Horse Racing Act [L.1926, ch. 440, as amd.], § 1-a). It owns the major thoroughbred racetracks in the State of New York—Aqueduct, Belmont Park and Saratoga—and, pursuant to a 25-year franchise granted by the State Racing Commission (Horse Racing Act, § 7-a, added by L. 1955, ch. 812, § 2), conducts thoroughbred races there with pari-mutuel betting. Since 1952, Jacobson has been granted stall space at these tracks. In 1970, his license was suspended by the State Racing Commission for 45 days. After the license was restored by the Racing Commission, NYRA denied him stall space at its tracks, virtually barring him from thoroughbred racing in the State. Alleging injury, Jacobson commenced an action for damages.

The defendant moved to dismiss the complaint on the grounds that it failed to state a cause of action and that there was another action pending in the United States District Court between the same parties for the same cause. In denying the motion, Special Term distinguished the common-law rule permitting the exclusion of patrons from private places of amusement (*People v. Licata*, 28 N.Y.2d 113, 320

N.Y.S.2d 53, 268 N.E.2d 787; *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, cert. den., 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346) and held that the defendant, as a nonprofit quasi-public association, in possession of a virtual monopoly on thoroughbred racing in the State of New York, did not possess an absolute immunity from justifying its denial of stall space to the plaintiff. The court also held that identity of issue was lacking between the instant action and the cause then pending in Federal court and that there was no reason to dismiss under CPLR 3211 (subd. [a], par. [4]).

The Appellate Division agreed that the complaint was sufficient, but converted the action into a proceeding pursuant to CPLR article 78 to review defendant's action. The essential question, said the Appellate Division, was whether the common-law doctrine of the *Madden* case (*supra*), decided in 1947, had been changed by legislation (Horse Racing Act, § 7-a, added by L. 1955, ch. 812, § 2; Pari-Mutuel Revenue Law, § 4-a, added by L. 1955, ch. 813, § 1) pursuant to which NYRA was created. The court was of the view that the close regulation of NYRA by the State Racing Commission, the delegation to it of the conduct of pari-mutuel betting, and the supervision of the affairs of the NYRA by the Racing Commission established sufficient State presence and participation in the challenged activity to bring into play the constitutional guarantee of due process of law. (U.S.Const., 14th Amdt.) In this regard, the court said the 25-year franchise granted by the State, the franchise fee consisting of the taxable income subject to stipulated deductions (Horse Racing Act, § 7-a) and the disposition, upon dissolution, of the defendant's assets to exempt organizations designated by the Governor (*id.*, § 1-a, subd. 2) became highly significant and indicated that defendant was placed in the role of an instrumentality of the State. Since defendant was performing State action, the court said, it could not be held in damages for a wrongful exercise of power.

Instead, plaintiff was entitled to a review of defendant's action under CPLR article 78. Finally, the Appellate Division agreed that there was no identity of issue or parties between the instant action and the Federal court action seeking damages and injunctive relief for alleged violations of the Federal antitrust laws, and that dismissal under CPLR 3211 (subd. [a], par. [4]) was not indicated. On motion by the defendant, and cross motion by the plaintiff, Appellate Division granted leave to appeal and certified the following question: "Was the order of this court dated March 5, 1973, properly made?"

[1] At common law a person engaged in a public calling, such as an innkeeper or common carrier, was under a duty to serve without discrimination all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, had no such obligation and were privileged to serve whomever they pleased. In *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, *supra*, we recognized the common-law rule, as limited by the Civil Rights Law (§ 40), that the operator of a racetrack licensed by the State may, without reason or sufficient excuse, exclude a patron from the premises provided the exclusion is not based on race, creed, color or national origin. This rule was recently reaffirmed by this court in *People v. Licata*, 28 N.Y.2d 113, 320 N.Y.S.2d 53, 268 N.E.2d 787, *supra*.

On their facts, the *Madden* and *Licata* cases dealt with the right of a proprietor of a private racetrack to exclude a patron. Some courts have deemed the rationale applicable as well to the exclusion of a licensed jockey (*Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439 [D.N.J.], *affd.*, 3 Cir., 242 F.2d 344; *Wilkerson v. Waterford Park*, Cir.Ct. of Hancock County, W. Va., Civil Action No. 3972, *affd.* without opn. W.Va.Sup.Ct., cert. den. 396 U.S. 906, 90 S.Ct. 221, 24 L.Ed.2d 182), owner (*Rocco v. Saratoga Harness Racing*

Assn., Sup.Ct., Saratoga County, July 22, 1971), harness driver (*Matter of Webster v. Roosevelt Raceway*, Sup.Ct., Nassau County, Aug. 18, 1971), groom or trainer (*Kimball v. Windsor Raceway Holdings* [1972], 3 Ont. 307; *Turcotte v. Blue Bonnets Raceway* [1972], Que.C.S. 753), or other racetrack employees (*Warfield v. New York Racing Assn.*, N.Y.L.J., July 28, 1971, p. 11, col. 8 [Sup.Ct., Queens County]; cf. *Adrian Messenger Servs. & Enterprises v. Jockey Club* [1972], 2 Ont. 369).

[2] In our view, it does not follow from the *Madden* and *Licata* cases that NYRA may, with impunity, exclude a licensed owner and trainer when that action allegedly causes injury. NYRA has virtual monopoly power over thoroughbred racing in the State of New York.* Exclusion from its tracks is tantamount to barring the plaintiff from virtually the only places in the State where he may ply his trade and, in practical effect, may infringe on the State's power to license horsemen. In contrast to a racetrack proprietor's common-law right to exclude undesirable patrons, it would not seem necessary to the protection of his legitimate interests that the proprietor have an absolute immunity from having to justify the exclusion of an owner and trainer whom the State has deemed fit to license. (Horse Racing Act, § 9-b, subd. 2, added by L.1951, ch. 324, § 4.) Accordingly, plaintiff should have his opportunity to prove his allegations in an action for damages and, by the same token, defendant its opportunity to refute them. (See *Greenberg v. Hollywood Turf Club*, 7 Cal.App.3d 968, 86 Cal.Rptr. 885, see, also, *Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439, 441, *supra*.) In this regard, it will be plaintiff's heavy burden to prove that the denial of stall space was not a reasonable discretionary business judgment, but was actuated by motives other than those relating to the best interests of racing generally.

* We are advised that in the State there is only one other thoroughbred racetrack with pari-

This general principle that the arbitrary action of a private association is not immune from judicial scrutiny has, for example, been applied in instances of a private hospital arbitrarily denying a licensed physician staff privileges (e. g., *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817, see, generally, Ann., *Physician, Surgeon-Hospital Exclusion*, 37 A.L.R. 3d 645, 661-663; *contra*, *Leider v. Beth-Israel Hosp. Assn.*, 11 N.Y.2d 205, 227 N.Y.S.2d 900, 182 N.E.2d 393; but see *Public Health Law*, § 2801-b, subd. 1, effectively limiting the *Leider* case), and a medical society's arbitrary exclusion of a licensed physician where there is a showing of "economic necessity" for membership and "monopoly power" over the profession (e. g., *Falcone v. Middlesex County Med. Soc.*, 34 N.J. 582, 591, 597, 170 A.2d 791, see, also, *Matter of Salter v. New York State Psychological Assn.*, 14 N.Y.2d 100, 106-107, 248 N.Y.S.2d 867, 871-872, 198 N.E.2d 250, 252-253 [recognizing the rule that admission was compellable but denying relief on the facts]; see, generally, Ann., *Professional Society-Membership*, 89 A.L.R.2d 964; Note, *Judicial Control of Actions of Private Associations*, 76 Harv.L.Rev. 983, 1087-1095). The situation before us is sufficiently analogous to warrant adaptation of this principle.

On this view, the interesting "state action" question need not be reached or decided. We note, however, that as a limit on the reach of the Fourteenth Amendment, the "state action" doctrine is alive and well. (See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L. Ed.2d 627; *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131; cf. *Columbia Broadcasting System v. Democratic Comm.*, 412 U.S. 94, 114-121, esp. at pp. 117-119, 93 S.Ct. 2080, 36 L.Ed.2d 772, *opn. of Burger, Ch. J.*, in which *Stewart* and *Rehnquist, JJ.*, joined.)

Accordingly, the order appealed from should be modified by deleting the provi-

mutuel betting, operated by the Finger Lakes Racing Association, at Canandaigua.

sion converting the action into a proceeding pursuant to CPLR article 78, and, as so modified, should be affirmed, without costs, the certified question answered in the negative, and the case remitted to the Supreme Court, Nassau County, for trial.

FULD, C. J., and BURKE, BREITEL, GABRIELLI, JONES and WACHTLER, JJ., concur.

Order modified, without costs, and case remitted to Supreme Court, Nassau County, for further proceedings in accordance with the opinion herein, and, as so modified, affirmed. Question certified answered in the negative.



33 N.Y.2d 151

David A. BOLM et al., Respondents,

v.

TRIUMPH CORPORATION et al.,
Appellants.

Court of Appeals of New York.

Nov. 21, 1973.

A motorcyclist brought an action for negligence, breach of warranty and "strict liability in tort" against the manufacturer and distributor of his motorcycle contending that the placement of a parcel grid on the motorcycle directly ahead of the rider constituted a negligent defect in the design of the motorcycle which, although it did not cause the collision between plaintiff's motorcycle and an automobile in which he sustained pelvic and genital injuries, enhanced and contributed to those injuries. The Supreme Court, Special Term, Erie County, James O. Moore, J., granted defendants' motion for summary judgment, the Supreme Court, Appellate Division, reversed, 41 A.D.2d 54, 341 N.Y.S.2d 846,

305 N.E.2d—49

and the question of the propriety of the trial court's ruling was certified. The Court of Appeals, Burke, J., held that manufacturers of motor vehicles are liable under general negligence principles for dangers from unknown or latent defects in the vehicles, either in construction or design, which the manufacturers can reasonably foresee will cause injury on impact, even though the defect in question may not have been causally connected with the occurrence of the accident, and that the issue as to the latency or patency of the dangers from the design defect is a question of fact for the jury.

Affirmed.

Jones, J., dissented and filed opinion in which Jasen, J., joined.

1. Automobiles \Rightarrow 16

Manufacturer of motorcycle was liable to motorcyclist for pelvic and genital injuries sustained during collision by virtue of manufacturer's designing of motorcycle so that parcel grid was placed on top of gas tank immediately ahead of rider, if design was unreasonably dangerous and defect was latent or unknown to motorcyclist, and despite fact that design defect was not causally connected with occurrence of accident.

2. Automobiles \Rightarrow 16

Automobile manufacturer is under no duty to design product which is accident-proof or "crash-worthy," and is not liable for injuries resulting from dangers which are patent or obvious, and operator of motor vehicle assumes dangers which inhere in its operation, including probability of many "second collision" injuries.

3. Automobiles \Rightarrow 16

Motor vehicle manufacturer is liable under general negligence principles to user of its product for injuries suffered by reason of unknown or latent defects, either in construction or design, which manufacturer can reasonably foresee will cause injury on

229 W.Va. 123

PNGI CHARLES TOWN GAMING, LLC
d/b/a Charles Town Races and
Slots, Petitioner

v.

Lawrence REYNOLDS, Anthony Mawing,
Alexis Rios-Conde, Jesus Sanchez, Dale
Whitaker, Luis Perez, and Tony Mar-
agh, Plaintiffs Below, Respondents

and

West Virginia Racing Commission,
Defendant Below, Respondent.

No. 101503.

Supreme Court of Appeals of
West Virginia.

Submitted Sept. 20, 2011.

Decided Nov. 18, 2011.

Background: Jockeys, whose racing permits were suspended after they failed to declare to race track's clerk of scales that they were overweight in terms of the weight assigned to the horses that they were scheduled to ride, brought action against Racing Commission for injunction requiring the suspensions to be stayed pending notice and hearing and for damages. Following hearing, the Racing Commission suspended jockeys' permits for 30 days and imposed fine. Jockeys petitioned for review and moved for stay. Following hearing, the Circuit Court, Kanawha County, Paul Zakaib, Jr., J., entered injunction, stayed the suspensions, and prohibited owner of race track from impairing jockeys' use of their permits. Owner appealed.

Holdings: The Supreme Court of Appeals, Workman, C.J., held that:

- (1) owner was required to abide by Commission's decision to impose suspensions, rather than ejecting jockeys, and
- (2) owner waived objections regarding injunction and stay.

Affirmed.

Benjamin, J., dissented and filed opinion in which Ketchum, J., joined.

1. Appeal and Error \S 954(1)

In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, Supreme Court of Appeals reviews the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard.

2. Appeal and Error \S 893(2), 1024.2

In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, Supreme Court of Appeals reviews the circuit court's underlying factual findings under a clearly erroneous standard; it reviews questions of law de novo.

3. Appeal and Error \S 71(3)

Interlocutory orders issuing preliminary injunctions are subject to immediate appellate review.

4. Appeal and Error \S 169

Although the rule requiring all appellate issues to be properly raised first in the circuit court is important, it is not immutable; the failure to properly raise issues below is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom, not a jurisdictional prerequisite to an appeal.

5. Appeal and Error \S 169

Requiring issues to be properly raised at the trial level is a juridical tool, embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of citizens.

6. Public Amusement and Entertainment \S 33

The legislature has police power to regulate horse racing to minimize the great evils that attend its practice, so far as it is possible to do so.

7. States \S 21(2)

The police power of the state is broad and sweeping, inherent in sovereignty and,

except as restricted by constitutional authority, or natural right, in effect is unlimited.

8. Public Amusement and Entertainment §§33, 35(2)

A racing association's right to eject a person from its grounds is not an unfettered right; regulation gives permit holders who are ejected the right to appeal to the Racing Commission. W.Va. Code St. R., § 178-1-4.7 (2010).

9. Statutes §190

A fundamental principle of statutory construction is that, when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case, it is the duty of the courts, not to construe, but to apply the statute.

10. Statutes §222

One of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law.

11. Public Amusement and Entertainment §§33, 35(2)

Owner of race track was required to abide by Racing Commission's decision to impose 30-day suspensions on jockeys, whose racing permits were suspended after they failed to declare to race track's clerk of scales that they were overweight in terms of the weight assigned to the horses that they were scheduled to ride, rather than ejecting them; to allow owner to eject jockeys notwithstanding any measures taken by the Racing Commission upon an appeal of the jockeys would have rendered meaningless the Legislative rule allowing jockeys to appeal ejections to the Racing Commission. W.Va. Code St. R., § 178-1-4.7 (2010).

12. Appeal and Error §181

The raise or waive rule is designed to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.

13. Appeal and Error §190(2)

Owner of race track waived, by failing to object to preliminary injunction against its ejection of jockeys, its objections regarding injunction and stay of circuit court order prohibiting it from impairing jockeys' use of their racing permits.

14. Appeal and Error §181

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds that the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect.

15. Appeal and Error §181

In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice.

16. Appeal and Error §181

The discretionary authority of the Supreme Court of Appeals invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

17. Appeal and Error §190(2)

Any errors regarding injunction and stay issued by the circuit court with regard to ejection by race track owner of jockeys did not rise to the level necessitating the application of the plain error doctrine.

Syllabus by the Court

1. "In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law *de novo*." Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. pt. 1, *State*

v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792 (1996). Syl. Pt. 1, *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002).

2. "One of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law." Syl. Pt. 2, *Smith v. W. Va. State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982).

3. An ejection of a permit holder by either a racing association or the stewards is subject to review by the West Virginia Racing Commission as set forth in West Virginia Code § 19-23-6 (2007 & Supp.2011) and West Virginia Code of State Rules § 178-1-4.7.

4. "A litigant may not silently acquiesce to an alleged error . . . and then raise that error as a reason for reversal on appeal." Syl. Pt. 1, in part, *Maples v. W. Va. Dep't of Commerce, Div. of Parks and Recreation*, 197 W.Va. 318, 475 S.E.2d 410 (1996).

Carte P. Goodwin, Esq., Goodwin & Goodwin, Charleston, WV and Stuart A. McMillan, Esq., Brian M. Peterson, Bowles Rice McDavid Graf & Love, LLP, Charleston, WV, for the Petitioner.

Michael L. Glasser, Esq., Meyer Ford Glasser & Radman, PLLC, Charleston, WV, and Mindy L. Coleman, PHV, Nicholasville, KY, for Amicus Curiae Jockeys' Guild, Inc.

Gregory A. Bailey, Esq., Arnold & Bailey, PLLC, Shepherdstown, WV, and Douglas L. McSwain, PHV, Sturgill, Turner, Barker & Moloney, PLLC, Lexington, KY, for Amicus Curiae NHBPA, CTHBPA, & MPHBPA.

1. The circuit court's Order at issue grants injunctive relief barring CTR & S, a non party, from excluding the Respondents during the Respondents' appeal. The Court has previously found that a non party has standing to pursue an appeal in *State v. Brandon B.*, 218 W.Va. 324, 328, 624 S.E.2d 761, 765 (2005) ("Ultimately, 'the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.' *State ex rel. Abraham Linc Corp. v. Bedell*, 216 W.Va. 99, 111-12, 602 S.E.2d 542, 554-55 (2004) (internal citations omitted) (Davis, J., concurring)."). Because CTR & S is entitled to have the Court

Benjamin L. Bailey, Esq., Christopher S. Morris, Esq., Bailey & Glasser, LLP, Charleston, WV, for the Respondent Jockeys.

Darrell V. McGraw, Jr., Esq., Attorney General, Kelli D. Talbott, Esq., Deputy Attorney General, Anthony E. Eates, Esq., Assistant Attorney General, for the West Virginia Racing Commission.

WORKMAN, C.J.:

The Petitioner, PNGI Charles Town Gaming, LLC, d/b/a Charles Town Races & Slots (hereinafter "CTR & S"), a non-party in the underlying action,¹ appeals the circuit court's Order enjoining it from excluding certain jockeys² from CTR & S's premises pending the outcome of the jockey's administrative appeal of the West Virginia Racing Commission's (hereinafter "Racing Commission") decision³ to the circuit court. The Racing Commission suspended each jockey's occupational permit for thirty days and imposed fines. CTR & S argues that the circuit court erred: 1) in entering a stay of the Racing Commission's order even though West Virginia Code § 19-23-17 (2007) expressly prohibits such a stay; 2) in exercising jurisdiction over CTR & S, a non-party, by concluding that CTR & S was "in active concert or participation with" the Racing Commission under Rule 65(d) of the West Virginia Rules of Civil Procedure; 3) in enjoining CTR & S by abusing its discretion in applying the four factor test set forth by the Court for the issuance of injunctions in *Camden-Clark Memorial Hospital Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002); 4) in failing to follow the procedural requirements set forth in West Virginia Rule of Civil Procedure 65 prior to issuing the injunction in this case;

decide whether a common law right to eject the Respondents exists, it has standing to pursue the instant appeal.

2. The jockeys are the Plaintiffs below and include Lawrence Reynolds, Anthony Mawing, Alexis Rios-Conde, Jesus Sanchez, Dale Whittaker, Luis Perez, and Tony Maragh. For purposes of this appeal, these individuals will be referred throughout collectively as "the jockeys."

3. The West Virginia Racing Commission is the Defendant below.

and 5) by issuing an injunction that infringes upon CTR & S's fundamental common law property right to exclude permit holders, including jockeys, from its premises so long as the exclusion is not based upon race, creed, national origin, or other protected classification. Based upon a review of the respective parties' briefs and oral arguments, the amici curiae briefs,⁴ the record, and all other matters submitted before the Court, the Court affirms the circuit court's decision.

I. Procedural and Factual History

On March 25 and 26, 2009,⁵ each of the seven named jockeys allegedly failed to declare to Michael Garrison, the Clerk of Scales,⁶ that each jockey was overweight in excess of one pound, or if the jockey did declare an overweight amount, the jockey failed to declare an accurate amount and/or the jockey failed to declare to the clerk of scales that the jockey was overweight in excess of two pounds. *See* W. Va.C.S.R. §§ 178-1-17.2 and 178-1-63.3 (respectively providing that any overweight amount in excess of one pound shall be declared by the jockey to the clerk of scales at least one hour before the appointed race and that an overweight amount of more than two pounds in

excess of the weight the horse is to carry shall be declared to the clerk of scales). The jockeys and the clerk of scales allegedly were caught on videotape not properly completing the weigh outs.⁷

On April 8, 2009, the board of stewards⁸ concluded that the jockeys had violated certain provisions of the West Virginia Code of State Rules including failure to declare an overweight amount.⁹ The board of stewards imposed a \$1,000 fine on each of the jockeys and a thirty-day suspension of each of the jockey's occupation permits.

By letter dated April 14, 2009,¹⁰ from CTR & S to Lawrence Reynolds, one of the jockeys involved in the instant matter, CTR & S notified Mr. Reynolds that it was ejecting him from its property "effective immediately." According to the letter, "[a]ny authorization, license or invitation to enter upon the property, now or in the future is hereby revoked."

Also on April 14, 2009, Mr. Reynolds filed a "Verified Complaint for a Temporary Restraining Order,¹¹ Injunctive Relief and Damages" in the Circuit Court of Kanawha County, West Virginia. According to allegations

4. Two briefs were submitted on behalf of the following amici curiae: Jockeys' Guild, Inc., and The National HBPA, Inc.; Charles Town Horsemen's Benevolent & Protective Association, and Mountaineer Park Horsemen's Benevolent & Protective Association.

5. Some of the factual allegations are taken from the West Virginia Racing Commission's Findings of Fact, Conclusions of Law, and Recommended Order entered on April 22, 2010. This Order is part of the record before the Court, however, it is currently on appeal to the Circuit Court of Kanawha County, West Virginia, and is not the subject of the instant appeal. Because the underlying charges are not currently before the Court, the Court is not making any decision relative to the factual allegations.

6. The clerk of scales is not a party to these proceedings, but he was also fined and his occupational permit was indefinitely suspended. Further, he was a CTR & S employee and was terminated from his employment with CTR & S.

7. A "weigh out" refers to the jockey stepping onto a scale in the presence of the clerk of scales prior to a race to ensure that the jockey's weight matches the weight assigned to the horse that the jockey is scheduled to ride. *See* W. Va.C.S.R. § 178-1-2.112 and § 178-1-63.1. According to

West Virginia Code of State Rules and Regulations § 178-1-63.2, "[n]o jockey may carry overweight in excess of two (2) pounds without permission of the owner or trainer, and under no circumstances, shall the overweight exceed seven (7) pounds." *Id.*

8. The stewards are the racing officials at the racetrack that "are strictly responsible to the [West Virginia] Racing Commission for the conduct of all meetings in every detail . . . pertaining to the racing law and rules of the Racing Commission." W. Va.C.S.R. § 178-1-10.2.

9. The board of stewards also found that the jockeys had violated West Virginia Code of State Rules § 178-1-60.1, relating to dishonest or corrupt practices, § 178-1-60.5, relating to conspiracy, § 178-1-60.16, relating to improper, obnoxious, unbecoming or detrimental conduct.

10. The letter was sent to Mr. Reynolds by certified mail on April 14, 2009.

11. Even though the circuit court's Order entered April 16, 2009, calls the relief sought a "TRO," it is more appropriately referred to under West Virginia Rule of Civil Procedure 65(b) as a preliminary injunction.

in the complaint, Mr. Reynolds sought an injunction against the Racing Commission to stay the suspension of his racing permit until such time as the jockey received a proper notice and a hearing on the matter leading to the suspension directed by the board of stewards.

Two days after the complaint was filed, on April 16, 2009, the circuit court heard oral argument from counsel for the jockeys and the Racing Commission regarding the injunction and stay sought by Mr. Reynolds. Thereafter, the circuit court entered an injunction and stayed the sanctions imposed against the jockeys until the conclusion of a hearing¹² before the Racing Commission.¹³

After this ruling by the circuit court, CTR & S took the position that it was not barred by the circuit court's Order from excluding the jockeys from its facility pursuant to its asserted common law authority to exclude patrons from its private property. *See, e.g., Marrone v. Washington Jockey Club*, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679 (1913). Based upon CTR & S's position, on April 16, 2009, the jockeys asked the circuit court to extend the injunction and the stay to include CTR & S. CTR & S was notified of this motion and participated in the hearing on the motion before the circuit court. The circuit court, by Order entered April 16, 2009, found that CTR & S "is in active concert or participation with the Defendant [Racing Commission]" and that "if the Track bars the Plaintiffs from racing at the Track, the irreparable harm that caused the Court to issue the TRO would go unabated. Such conduct would render the Court's TRO a nullity and frustrate the Court's authority to ensure compliance with its lawful orders." The circuit court further stated:

Therefore, the Court ORDERS that PNGI Charles Town Gaming LLC shall

not restrict or impede the rights of the Plaintiffs listed above to enter the Track and engage in their legitimate racing activities. The suspensions of the Plaintiffs' racing permits are stayed, and until the TRO expires, the Track may not impair or impede the Plaintiffs' rights to engage in activities consistent with the Plaintiffs' racing permits.

The Order was to expire "upon conclusion of the *de novo* hearing before the West Virginia Racing Commission, which will occur within thirty days of the filing of the Request for Hearing, unless extended for good cause shown or by agreement of the parties." There are no objections by CTR & S noted in this Order, nor did CTR & S appeal the rulings in the Order.

The administrative *de novo* hearing before the Racing Commission hearing examiner occurred over five days in August and September of 2009. In the recommended decision of hearing examiner, dated April 22, 2010, the hearing examiner found that the jockeys were guilty of "conniving" with the Clerk of Scales "in the commission of a corrupt ... practice" by engaging in "farcical" weigh outs. This decision was adopted by the Racing Commission on May 21, 2010, to take effect on June 1, 2010. The Racing Commission suspended each jockey's occupation permit for thirty days and imposed the maximum fine of \$1,000 each. The Racing Commission initially orally agreed to stay its final order pending appeal. By Order issued on May 24, 2010, the Racing Commission retracted its oral grant of the jockeys' motion to stay, finding that West Virginia Code § 19-23-17 precluded the Racing Commission from granting a stay.

Also on May 24, 2010, CTR & S filed a "Motion to Confirm Expiration of Temporary

12. According to the language in the Order, it was in effect until "the conclusion of the *de novo* hearing." Pursuant to West Virginia Code § 19-23-16(e) (2007):

All of the pertinent provisions of article five [§§ 29A-5-1 et seq.], chapter twenty-nine-a of this code shall apply to and govern the hearing and the administrative procedures in connection with and following such hearing, with like effect as if the provisions of said article five were set forth in this subsection.

W. Va.Code § 19-23-16(e); *see* W. Va.C.S.R. § 178-1-68.1 to -68.6 (setting forth regulations governing the appeal and review of a board of stewards suspension of an occupational permit).

13. Pursuant to a motion by Mr. Reynolds to consolidate his action with the actions filed by the other jockeys named in this appeal, an Agreed Order to Consolidate was also entered by the circuit court on April 16, 2009.

Restraining Order" wherein the racetrack sought to have the circuit court rule that the preliminary injunction was no longer in effect and that it could exclude the jockeys from its premises. On June 1, 2010, the jockeys filed a petition for review in the circuit court of the administrative proceedings in the same civil action already existing regarding the injunction. See W. Va. Code § 19-23-17 ("Any person adversely affected by a decision of the Racing Commission rendered after a hearing held in accordance with the provisions of section sixteen [§ 19-23-16] of this article shall be entitled to judicial review thereof."). The jockeys also filed a motion for an emergency stay with the circuit court. The Racing Commission filed its response opposing the motion the same day. The circuit court granted a temporary stay and set a hearing for June 3, 2010.

On June 3, the circuit court heard arguments¹⁴ regarding whether a stay should be issued and whether CTR & S should be enjoined from preventing the jockeys from racing at CTR & S's racetrack. By Order entered June 3, 2010, the circuit court found that the Track's proposed bar of the Petitioners [jockeys] would result in irreparable harm to the Petitioners and would deprive them of a meaningful opportunity for review of the sanctions imposed on the Petitioners by the Racing Commission. The Court further incorporates by reference the findings and rulings of its April 16, 2009, Order which previously granted injunctive relief to the Petitioners and against the Track on the same grounds as those presented here.

The Court further ordered that CTR & S "shall not restrict or impede the rights of the Petitioners to enter the Track and engage in their legitimate racing activities." It is from

14. There is no transcript of the June 3, 2010, hearing in the record.

15. For reasons set forth in greater detail in Section III.B. *infra*, most of the issues regarding the circuit court's entry of an Order enjoining CTR & S from ejecting the stewards and staying the action of both the Racing Commission and CTR & S until the underlying disciplinary proceeding was complete have been waived. The Court, however, addresses the issue of whether CTR & S has a common law right to eject the jockeys

this Order that the present appeal is brought.

II. Standard of Review

[1-3] Our standard for reviewing the correctness of preliminary injunctions is as follows:

"In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law *de novo*." Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. pt. 1, *State v. Imperial Marketing*, 196 W.Va. 346, 472 S.E.2d 792 (1996).

Syl. Pt. 1, *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002). Moreover, interlocutory orders issuing preliminary injunctions are subject to immediate appellate review. See *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W.Va. 438, 445-47, 582 S.E.2d 885, 892-94 (2003). Applying these principles, the Court reviews the alleged errors raised by CTR & S.

III. Argument

A. Right to Eject a Permit Holder

[4,5] The crux of the instant appeal is whether a West Virginia horse racetrack has an unrestricted common law right to eject a jockey from its premises.¹⁵ CTR & S argues

because it is purely a question of law that needs resolution. As the Court previously has stated:

In the concurring opinion of Justice Cleckley in *State v. Greene*, the following observations were made regarding this Court's authority to address an issue that was not properly preserved at the trial court level:

[A]lthough the rule requiring all appellate issues be [properly] raised first in the circuit court is important, it is not immutable: Our cases have made clear that the failure to

that as a private company that owns a racetrack at Charles Town, West Virginia, and as a property owner, it has the common law right to exclude undesirable persons from its premises. CTR & S contends that this common law right is controlling and unaffected by the actions of the West Virginia Legislature. See W. Va. Code §§ 19-23-1 to -30 (2007 & Supp. 2011)¹⁶ (statutory scheme governing "Horse & Dog Racing"); W. Va. C.S.R. §§ 178-1-1 to -74.3 (legislative rule regarding "Thoroughbred Racing").¹⁷

In contrast, the Racing Commission maintains that CTR & S's ability to eject a jockey is subject to the plenary authority of the Racing Commission as set forth in West Virginia Code § 19-23-6. Further, the ejection of the jockeys by CTR & S is subject to a review by the Racing Commission under West Virginia Code of State Rules § 178-1-4.7, which gives the ejected jockeys the right of appeal to the Racing Commission. Consequently, the Racing Commission argues that CTR & S does not have an unfettered common law right to eject a jockey regardless of any actions taken by the Racing Commission. Lastly, the jockeys argue that CTR & S's appeal was untimely filed and premised upon issues that CTR & S waived below.

[6, 7] The ability of CTR & S to conduct horse racing at its Charles Town racetrack is derived from a grant of authority by the West Virginia Legislature that allows horse racing to take place in this State. As provided in West Virginia Code § 19-23-1(a):

No association¹⁸ shall hold or conduct any horse or dog race meeting at which horse or dog racing is permitted for any

[properly] raise issues below is not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom. Requiring issues to be [properly] raised at the trial level is a juridical tool, embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of our citizens.

Louk v. Cormier, 218 W. Va. 81, 86, 622 S.E.2d 788, 793 (2005) (quoting *State v. Greene*, 196 W. Va. 500, 505-06, 473 S.E.2d 921, 926-27 (1996) (Cleckley, J., concurring)).

16. Two of the statutes, West Virginia Code §§ 19-23-3 and 19-23-6, were amended by the

purse unless such association possesses a license therefor from the West Virginia Racing Commission and complies with the provisions of this article and all reasonable rules and regulations of such Racing Commission.

Id. (Footnote added). As the Court acknowledged in *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 55 S.E.2d 263 (1949):

There cannot, in our opinion, be any doubt as to the power of the Legislature to regulate horse racing, nor does there seem to be any contention on that point. Whatever may be said in favor of horse racing, and much can be said, it must be admitted that great evil attends its practice, such as calls for the intervention of the State, under its police power, to the end that such evil be minimized so far as it is possible to do so. This intervention and control is exercised under the police power of the State, and the use of that power rests with the Legislature. The police power is broad and sweeping, inherent in sovereignty and, except as restricted by constitutional authority, or natural right which, in effect, is unlimited.

Id. at 192, 55 S.E.2d at 270. Likewise, the United States District Court for the Southern District of West Virginia in *Hubel v. West Virginia Racing Commission*, 376 F.Supp. 1 (S.D.W.Va.), *aff'd*, 513 F.2d 240 (4th Cir. 1975), stated that

[t]he power of the legislature to regulate or even abolish horse racing is, of course, well established. See *Harbour v. Colorado State Racing Commission*, 32 Colo. App. 1,

Legislature in 2011; however, the changes were minor and do not impact the decision in this case. For purposes of this opinion, the Court uses the pre-2011 statutes as the 2011 changes were not in effect at the time of the lower court's order that is being appealed.

17. The Thoroughbred Racing Rule that governs this case was effective April 6, 2007.

18. "Racing association" or "person" is defined as "any individual, partnership, firm, association, corporation or other entity or organization of whatever character or description[.]" W. Va. Code § 19-23-3(7).

505 P.2d 22 (1973); *Tweel v. West Virginia Racing Commission*, 138 W.Va. 531, 76 S.E.2d 874 (1953); *State ex rel. Morris v. West Virginia Racing Commission*, 133 W.Va. 179, 55 S.E.2d 263 (1949). The exercise of the state's police power in this area of endeavor is to minimize the potential evil that attends the practice of horse racing. See *Sandstrom v. California Horse Racing Board*, 31 Cal.2d 401, 189 P.2d 17 (1948). It is apparent, therefore, that the state has the inherent authority to require trainers and others associated with horse racing to be licensed and otherwise regulated by the state.

376 F.Supp. at 4.

Horsing racing, therefore, cannot occur in this State unless the association conducting it has been licensed by the Racing Commission. See W. Va.Code § 19-23-1. Further, permits issued by the Racing Commission are required for certain individuals, including jockeys, before they can engage in their trade at a licensed racetrack. See W. Va. Code § 19-23-2.¹⁹ While some people who hold permits are employees of the racetrack, it is significant that the jockeys in the instant case are independent contractors, not racetrack employees.²⁰

Additionally, the Legislature has placed with the Racing Commission, "full jurisdiction over and shall supervise all horse racing

19. West Virginia Code § 19-23-2(a) requires that the following persons obtain a permit from the Racing Commission before participating in horse or dog racing at a licensed race track:

No person not required to be licensed under the provisions of section one [§ 19-23-1] of this article shall participate in or have anything to do with horse or dog racing for a purse or a horse or dog race meeting at any licensee's horse or dog racetrack, place or enclosure, where the pari-mutuel system of wagering upon the results of such horse or dog racing is permitted or conducted, as a horse owner, dog owner, jockey, apprentice jockey, exercise boy, kennel keeper, trainer, groom, plater, stable foreman, valet, veterinarian, agent, clerk of the scales, starter, assistant starter, timer, judge or pari-mutuel employee, or in any other capacity specified in reasonable rules and regulations of the Racing Commission unless such person possesses a permit therefor from the West Virginia Racing Commission and complies with the provisions of this article and all reasonable rules and regulations of such Racing Commission.

meetings,²¹ all dog racing meetings and all persons involved in the holding or conducting of horse or dog racing meetings and, in this regard, it has plenary power and authority.... W. Va.Code § 19-23-6. (Footnote added). Further, West Virginia Code § 19-23-6(8) specifically provides that the Racing Commission has the power

[t]o investigate alleged violations of the provisions of this article, its reasonable rules and regulations, orders and final decisions and to take appropriate disciplinary action against any licensee or permit holder or construction permit holder for the violation thereof or institute appropriate legal action for the enforcement thereof or take such disciplinary action and institute such legal action[.]

Id.

[8] Incorporated into the legislative scheme regulating horse racing is a recognition by the Legislature that an association can eject a person from its grounds. Specifically, West Virginia Code of State Rules and Regulations § 178-1-4.7 provides:

Any person ejected by the stewards or the association from the grounds of an association shall be denied admission to the grounds until permission for his or her reentry has been obtained from the association and the Racing Commission. *How-*

W. Va.Code § 19-23-2(a).

20. The importance of the jockeys status as independent contractors is that CTR & S argued that the Racing Commission could order the re-hire and allow re-entry of a terminated racetrack employee who holds a permit if the Racing Commission decided that the racetrack's actions were unwarranted. The Racing Commission, however, represents to the Court that the termination of a track employee is only of concern to the Racing Commission insofar as the racetrack has the obligation to report violations to the Racing Commission so that action can be taken against the state-issued permit. According to the Racing Commission, it "does not wish to use and has never used its review right under § 4.7[] to do anything other than provide a check and balance on the track's ejection of permit holders who are not employees of the racetrack."

21. "Horse racing meeting" is defined as "the whole period of time for which a license is required by the provisions of section one [§ 19-23-1] of this article." W. Va.Code § 19-23-3(4).

ever, all occupation permit holders who are ejected have the right of appeal to the Racing Commission.

*Id.*²² (Emphasis added). The concept of allowing a licensed racing association like CTR & S to eject a person from its grounds undoubtedly arises from the common law. The United States Supreme Court in *Marone v. Washington Jockey Club*, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679 (1913), first recognized the common law right of a racetrack to exclude a patron by holding that such exclusions by racetracks under the common law were not actionable. See *James v. Churchill Downs, Inc.*, 620 S.W.2d 323, 324 (Ky.Ct.App.1981); *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1, 5 (1959), *superseded by statute as stated in Uston v. Resorts Intern. Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982); see also Bennett Liebman, *The Supreme Court and Exclu-*

sions by Racetracks, 17 Vill. Sports & Ent. L.J. 421 (2010)(recognizing that “[i]n 1913, the United States Supreme Court in *Marone v. Washington Jockey Club*, through a decision authored by Justice Oliver Wendell Holmes, established this principle of total management discretion in racetrack exclusions.”). It is important to note that the issue before the Court does not concern an exclusion of a mere patron from a racetrack.²³

[9] The express language of West Virginia Code of State Rules and Regulations § 178-1-4.7 makes clear that a racing association’s right to eject a person from its grounds is not an unfettered right as argued by CTR & S. To the contrary, the regulation which permits a racing association to eject a person contains the following restrictive language: **“However, all occupation permit holders who are ejected have the right of appeal²⁴ to the Racing Commission.”** W.

22. A new Thoroughbred Racing Rule went into effect on July 10, 2011. The language contained in West Virginia Code of State Rules § 178-1-4.7 remains the same in the new rule; however, in the current rule it is located at West Virginia Code of State Rules § 178-1-6.1.

23. Other jurisdictions have extended this common law right of racetracks to exclude patrons to allow racetracks to exclude permit holders such as jockeys. For instance, in *Calder Race Course, Inc. v. Gattani*, 393 So.2d 15 (Fla.Dist.Ct.App. 1980), the Florida court found that despite the State of Florida’s regulation and control of pari mutuel wagering in racing establishments, that action “standing alone, does not make those commercial enterprises amenable to regulation by the court” and “[u]ntil the Florida Legislature acts or private racing establishments disparage constitutionally guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business.” *Id.* at 16; see *Bresnik v. Beulah Park Ltd. P’ship*, 67 Ohio St.3d 302, 617 N.E.2d 1096, 1098 (1993)(determining that “Beulah Park possesses the common-law right to exclude whomsoever it pleases, provided the General Assembly has not abolished that right.”); *Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439, 440 (D.N.J.1956), *aff’d*, 242 F.2d 344 (3d Cir.1957)(“Although it is intensely regulated, the defendant Club is a private organization. Nothing is more elementary than its right as a private corporation to admit or exclude any persons it pleases from its private property, absent some definite legal compulsion to the contrary.”).

Contrariwise, there is legal authority from other jurisdictions that have rejected a racetrack’s right to unilaterally eject racing permit holders without consequence. See *Cox v. Nat’l Jockey*

Club, 25 Ill.App.3d 160, 323 N.E.2d 104, 108 (1974)(“We ... are of the opinion that with the benefit of receiving a quasi-monopoly comes corresponding obligations one of which is not to arbitrarily exclude a jockey who desires to participate in a racing meet. The arbitrary exclusion of the plaintiff meant that he was deprived of the opportunity to engage in his chosen occupation within a reasonable geographic area and for a significant period of time.”); *Jacobson v. N.Y. Racing Assoc.*, 33 N.Y.2d 144, 350 N.Y.S.2d 639, 305 N.E.2d 765, 768 (1973)(racetrack may not with impunity exclude a state-license racing participant as such action “may infringe on the State’s power to license horsemen”); see also Liebman, *supra* at 458 (stating that “many states have sought to protect licensees in horse racing ... by making changes in the statutes and rules governing the powers of race tracks. A number of states have enacted statutes that require that race tracks have just cause to exclude a licensee from a race track. Others allow excluded licensees an appeal to the state racing commission to contest the exclusion, and some specify the grounds required for any exclusion.”)(Footnotes containing citations to statutory authorities omitted).

24. CTR & S also argues that because of the definition of an appeal, this restrictive language applies only to an appeal of an ejection by the stewards. The term “appeal” is defined in West Virginia Code of State Rules § 178-1-2.7 as “a request for the Racing Commission or its designee to ... review any decisions or rulings of the stewards.” That definition, however, must be read in pari materia with the prefatory language found at the beginning of the definitions section, provides that “[a]s used in this rule and **unless**

Va.C.S.R. § 178-1-4.7 (Footnote and emphasis added). This provision emanates from the United States Supreme decision in *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), wherein the Supreme Court determined that there is a property interest in a license or permit issued by a state racing commission, like the permit issued to the jockeys in the instant matter, sufficient to invoke the Due Process Clause. *Id.* at 64, 99 S.Ct. 2642; see *Hubel*, 376 F.Supp. at 4 ("Once a license has been awarded a horse trainer, however, it cannot be suspended or revoked without affording the trainer due process of law. *Brennan v. Illinois Racing Board*, 42 Ill.2d 352, 247 N.E.2d 881 (1969)."). Consequently, under the express language of the State rule,²⁵ if a racing association ejects a permit holder that permit holder is entitled to appeal the ejection to the Racing Commission. W. Va.C.S.R. § 178-1-4.7.

[10] In providing for an administrative review of the decision to eject, the Legislature has placed the ultimate decision, subject to judicial review, of whether the permit holder should be ejected with the Racing Commission. Pursuant to the West Virginia Constitution, Article VIII, Section 13,

[e]xcept as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

Id. As the Court previously held, "[o]ne of the axioms of statutory construction is that a statute will be read in context with the com-

the context clearly requires a different meaning, the following terms shall have the meaning ascribed in this section." W. Va.C.S.R. § 178-1-2 (Emphasis added). In the context of West Virginia Code of State Rules and Regulations § 178-1-4.7, the meaning of an appeal necessarily has been expanded to include an appeal of ejection by the stewards or by an association as well. *Id.*

25. A fundamental principle of statutory construction is that

"[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus

mon law unless it clearly appears from the statute that the purpose of the statute was to change the common law." Syl. Pt. 2, *Smith v. W. Va. State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982); see also *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 874, 253 S.E.2d 666, 675 (1979) (stating that "the legislature may alter or amend the common law[.]").

[11] It logically follows that the consequence of the Legislature providing a permit holder the right to appeal an ejection to the Racing Commission is that if the Racing Commission disagrees with the ejection and either reverses it or provides for some lesser punishment, such as a thirty-day suspension, then the racing association must abide by the Racing Commission's decision. To allow a racing association, such as CTR & S, to eject a permit holder, such as the jockeys in the instant case, notwithstanding any measures taken by the Racing Commission upon an appeal of the permit holder would render the Legislative rule meaningless. In other words, if the Legislature intended for a racing association to have an unfettered right to eject the permit holder there would have been no reason for the Legislature to add the language "[h]owever, all occupation permit holders who are ejected have the right of appeal to the Racing Commission[.]" W. Va. C.S.R. § 178-1-4.7. Thus, by providing the permit holder with a right to appeal an ejection, the Legislature necessarily conditions the racing association's ability to eject a permit holder on a review by the Racing Commission.²⁶

Accordingly, based upon the foregoing, the Court holds that an ejection of a permit

Point 5, *State v. General Daniel Morgan Post No. 548*, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959).

Syl. Pt. 2, *State ex rel. Miller v. Stone*, 216 W.Va. 379, 607 S.E.2d 485 (2004). There is no alleged error concerning the pertinent rule being ambiguous.

26. It is understandable that a racetrack would want to eject a permit holder for conduct that is alleged to be fraudulent or corrupt. However, the Legislature has expressly placed plenary power and authority concerning such alleged conduct involving permit holders with the Racing Commission. See W. Va. Code § 19-23-6 and W. Va.C.S.R. § 178-1-4.7.

holder by either a racing association or the stewards is subject to review by the West Virginia Racing Commission as set forth in West Virginia Code § 19-23-6 (2007 & Supp. 2011) and West Virginia Code of State Rules § 178-1-4.7.

In the instant case, CTR & S's basis for ejecting the jockeys was grounded in alleged misconduct by the jockeys, including failure to declare overweight amounts during weigh outs before horse races. CTR & S's decision to eject came several days after the board of stewards imposed a thirty-day suspension and fine. On April 16, 2009, the jockeys filed for injunctive relief in circuit court to stay the suspension of the racing permit until such time as the jockeys received a proper notice and a hearing on the matter leading to the suspension directed by the board of stewards. By Order on the same day, the circuit court extended the injunction and stay to preclude CTR & S's ejection of the jockeys pending resolution of their administrative appeal. According to West Virginia Code of State Rules and Regulations, the jockeys, as permit holders, had the right to appeal the ejection and CTR & S is bound by the Racing Commission's decision, subject to judicial review.

B. Issues Regarding Issuance of Injunction and Stay

CTR & S makes several other assignments of error regarding the circuit court's issuance of an injunction and stay of the imposition of sanctions by the Racing Commission.²⁷ The

27. CTR & S argues that: 1) the circuit court lacked discretion to enter a stay of the Racing Commission's order under the provisions of West Virginia Code § 19-23-17; 2) the circuit court erred in concluding that CTR & S was "in active concert or participation with" the Racing Commission under the provisions of West Virginia Rule of Civil Procedure 65(d) by excluding the jockeys from racing at CTR & S's property; 3) the circuit court abused its discretion in issuing the injunction; and 4) the circuit court failed to follow the technical requirements of West Virginia Rule of Civil Procedure 65 such as requiring the jockeys to post a bond.

28. In light of the relief sought by CTR & S to "confirm expiration" of the temporary injunction, it is clear that CTR & S had acted under the April 16, 2009, Order for more than a year, despite its argument before the Court that "the April 16, 2009 TROs expired by their own terms

circuit court found by Order entered April 16, 2009, that CTR & S was bound by the circuit court's injunction and stay issued between the jockeys and the Racing Commission. At the time the injunction was originally entered on April 16, 2009, CTR & S noted no objections to the Order on its face, nor did CTR & S appeal the original Order. Instead, CTR & S acted in accordance with the circuit court's April 16, 2009, Order for thirteen months. Then, after the underlying administrative action against the jockeys had concluded and the jockeys had invoked their rights to appeal the administrative decision to the circuit court, CTR & S, on May 24, 2010, filed a "Motion to Confirm Expiration of Temporary Restraining Order." In this motion, CTR & S sought

an order confirming the expiration²⁸ of the Temporary Restraining Order entered April 16, 2009, against Charles Town Races and Slots. The TRO has expired by its terms, and should not be extended because it interferes with CTR & S's common law right to exclude undesirable persons from its property—a right existing independent of any licensing decision made by the Racing Commission.

(Footnoted added).

CTR & S argues that it did not waive its objections to the injunction because it objected to the later June 3, 2010, Order and, therefore, preserved its rights. It appears from CTR & S's motion submitted to the circuit court in May of 2010 that CTR & S

and were never properly extended." If, indeed, CTR & S really believed that the April 16, 2009, Orders had expired it would have gone forward with ejecting the jockeys. It did not. Moreover, in the June 3, 2010, Order, the circuit court simply extended the injunction and stay it had already put in place on April 16, 2009, until the jockeys' appeal of the Racing Commission's decision to the circuit court was complete. This is confirmed by the language in the June 3, 2010, Order wherein the circuit court specifically states that it "incorporates by reference the findings and rulings of its April 16, 2009, Order which previously granted injunctive relief to the Petitioners and against the Track on the same grounds as those presented here." Thus, in denying CTR & S's motion, the circuit court necessarily was extending its April 16, 2009, Order by rejecting any confirmation that the April 16, 2009, had expired.

acknowledges that it failed to challenge the earlier April 16, 2009, Order. Specifically, CTR & S states in its motion:

[A]t the time the TRO was entered in this case, this precise issue was being litigated in a separate action pending before the Circuit Court of Kanawha County styled *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106 (King, J.), and CTR & S decided not to challenge the Court's TRO in this case until the other case was decided. Moreover, CTR & S chose not [sic] take any independent action until the Racing Commission held its hearing before an administrative law judge.

CTR & S further acknowledges that even though it received a favorable ruling from Judge King in September 24, 2009, it "did not take any action to exclude the jockeys from its property."²⁹

[12-17] CTR & S decided not to challenge the lower court's ruling imposing the injunction and stay, notwithstanding the law providing that interlocutory orders issuing preliminary injunctions are subject to immediate appellate review. *Telecheck Servs., Inc.*, 213 W.Va. at 445-47, 582 S.E.2d at 892-94. CTR & S's decision not to challenge the Order enjoining CTR & S and staying the imposition of sanctions against the jockeys at the time the Order was originally entered

29. CTR & S maintains that this Court implicitly upheld its common law right to exclude the jockeys and rejected "[t]he Racing Commission's reliance on 'plenary power'" and what CTR & S refers to as "a nonspecific rule of racing" to abrogate its common law right to exclude the jockeys when the Court refused the appeal of the circuit court's ruling in *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, No 100098 & 100099, on March 3 2010, under the old appellate rules.

As the Court consistently held under the former appellate rules:

This Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted.

Syllabus, *Smith v. Hedrick*, 181 W.Va. 394, 382 S.E.2d 588 (1989); see *Stone*, 216 W.Va. at 382 n. 3, 607 S.E.2d at 488 n. 3. Consequently, con-

was at CTR & S's own peril. Not only was this decision inapposite to the law providing for an immediate appeal, but also this Court consistently has held that "[a] litigant may not silently acquiesce to an alleged error . . . and then raise that error as a reason for reversal on appeal." Syl. Pt. 1, in part, *Maples v. W. Va. Dep't of Commerce, Div. of Parks and Recreation*, 197 W.Va. 318, 475 S.E.2d 410 (1996); see *State v. Lively*, 226 W.Va. 81, 92, 697 S.E.2d 117, 128 (2010) ("The Court consistently has held that 'silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial.' *State v. Grimmer*, 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979), overruled on other grounds, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980). The raise or waive rule is designed 'to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.' *Wimer v. Hinkle*, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989)."). CTR & S waived its assigned errors regarding the injunction and stay.³⁰

IV. Conclusion

Based upon the foregoing, the decision of the Circuit Court of Kanawha County, West Virginia, is affirmed.

Affirmed.

trary to CTR & S's argument, there was no implicit ruling by this Court regarding its alleged right to exclude the jockeys.

30. CTR & S seeks to have the Court apply the plain error doctrine.

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). The errors regarding the injunction and stay issued by the circuit court do not rise to the level necessitating the application of the plain error doctrine.

Justices BENJAMIN and KETCHUM dissent and reserve the right to file dissenting opinions.

BENJAMIN, Justice, with whom Justice KETCHUM joins, dissenting:

In its decision, the majority reasons that the Racing Commission's power to issue licenses to jockeys deprives PNGI Charles Town Gaming, LLC, d/b/a Charles Town Races & Slots (hereinafter "CTR & S") of its right to run its business in the manner it believes is necessary to protect its business interests and exercise its property rights. Specifically, the majority's holding establishes that the Racing Commission may, by its granting of licenses to jockeys, determine not only the minimum protections for horse racing and gaming customers at CTR & S, but also effectively the maximum protections. In doing so, the majority relies on an incomplete and selective reading of applicable statutory and administrative authority. Further, the majority applies this selective authority in a manner which not only exceeds the constitutional authority of the Racing Commission, but also deprives CTR & S of its business and property rights.

At the outset, I agree with the majority that the Racing Commission may properly, pursuant to the police powers of the state, issue licenses to jockeys to race at tracks within West Virginia and that through this licensing process the Racing Commission may afford to race track customers certain minimum protections for horse racing and gaming. I also do not dispute that the jockeys have a property right in the permits they receive from the Racing Commission *vis-a-vis* the state. However, the police powers of the state are not absolute, being limited strictly by the language of the constitution and by the jurisprudence of this Court. Further, the provision by the State to certain private persons of certain property or due process rights with respect to the State by means of a state license does not destroy or in any way minimize the full legal and natural rights already enjoyed by another private person, in this case a business and property owner. A constitutional "end run" is impermissible in our system of governance. The State cannot through its statutory licensing

process attempt to create statutory rights for one individual which necessarily destroy the natural rights already enjoyed by another individual.

There is absolutely no law, constitutional or otherwise, which gives to jockeys in West Virginia the *right* to race at any track of their choosing regardless of the rights of the property owner. None. The licenses of the Racing Commission provide jockeys with the *privilege* of racing and are a means of ensuring minimum protections to the public for horse racing and gaming. They do not provide jockeys with the *right* to race wherever and whenever they desire. By finding otherwise, the majority has erroneously elevated a state agency-issued *privilege* to a *right* superior in nature and effect to the established property and business rights of CTR & S.

While the Racing Commission certainly can establish minimum racing safeguards at racetracks through its licensing pursuant to the police powers of the state, there is absolutely no legal basis for the majority to limit the property owner, here CTR & S, from imposing more stringent racing safeguards for the protection and assurance of its customers. In prohibiting CTR & S from exercising its prerogative to engage in stricter diligence of fairness in horse racing and gaming at its race track, the majority has improperly denied to CTR & S the full measure of its business and property rights and interfered with CTR & S's ability to determine how best to serve and protect its customers *beyond the minimum requirements established by state authority*.

1. West Virginia Statutory Law Limits the Authority of the Racing Commission

The majority quotes the introduction to § 19-23-6 which reads, "The Racing Commission has full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in the holding or conducting of horse or dog race meetings and, in this regard, it has plenary power and authority..." Eighteen sections then proceed after this language listing the ways by which the Racing Commission may

regulate racing, such as promulgating reasonable rules, investigating violations of those rules and the statute. However, § 19-23-6 concludes by stating that "[t]he Racing Commission shall not interfere in the internal business or internal affairs of any licensee." Seeking to serve and protect its customers to an extent beyond the minimum level of protection afforded by the Racing Commission is a matter solidly within the "internal business or internal affairs" of CTR & S. The majority's selective statutory consideration under the facts of this case highlight the legal error of the majority's overly expansive holding.

2. West Virginia Administrative Law Fails to Support the Majority Holding

The majority also argues that the West Virginia Code of State Rules and Regulations supports its position. It refers to W. Va. C.S.R. § 178-1-6.1 which reads:

Any person ejected by the stewards or the association from the grounds of any association shall be denied admission to the grounds until permission for his or her reentry has been obtained from the association and the Racing Commission. However, all occupation permit holders who are ejected have the right of appeal to the Racing Commission.¹

The majority also states in a footnote that the meaning of appeal in § 178-1-6.1, while defined in § 178-1-2.7 as "a request for the Racing Commission or its designee to hold a hearing and review any decisions or rulings

of the stewards" (emphasis added), "has been expanded to include an appeal of ejection by the stewards or by an association as well." It supports this conclusion by referring to § 178-1-2 which allows the meaning of a defined word to take on more than its definition in the W. Va.C.S.R. where "the context clearly requires a different meaning." In concluding that the context of § 178-1-6.1 requires "appeal" to take on a meaning above and beyond that delineated in § 178-1-2.7, the majority errs. "[A]ppeal," as used in § 178-1-6.1, plainly means only an appeal from a decision of the stewards.

In its opinion, the majority also places emphasis on the last sentence of § 178-1-6.1, but it completely glosses over the language in the preceding sentence. The first sentence of that section requires that for a person ejected by the stewards or the association to regain admittance, that person must obtain permission for reentry from the Racing Commission *and* the association. To read the two sentences of § 178-1-6.1 in the way that the majority does makes the section discordant, especially in light of the limits of the State's police power. Here, the clear language of the drafters of this portion of the West Virginia C.S.R. should be given effect and should be read as written: appeals may only be taken by persons ejected by the stewards, and when a person is ejected by an association, permission must be received from the association before that person may regain admission. The majority erred in not

1. It seems appropriate to note at this juncture that § 178-1-6.1 may be a false favorite; there are two additional sections to § 178-1-6, not just the section on ejection, regarding exclusion and suspension. It is curious that the majority did not mention these other two sections in its opinion. They read:

6.2. The stewards or the association have the power to suspend or exclude from the stands and grounds persons acting improperly or whose behavior is objectionable. The stewards shall enforce the suspension or exclusion.

6.3. When a person is excluded from a racetrack or is suspended, he or she is not qualified, whether acting as agent or otherwise, to subscribe for, to enter or run any horse in any race either in his or her own name or in that of any other person until the stewards rescind their penalty.

Perhaps the majority decided to rely on § 178-1-6.1 because CTR & S's communication with the

jockeys used the word "ejection." However, what CTR & S calls its action is irrelevant; what matters most is whether its actions amounted to an ejection, exclusion, or suspension. Nowhere in the applicable sections of the W. Va.C.S.R. or the W. Va.Code are the terms "ejection," "exclusion," or "suspension" defined, and the majority takes no steps in explaining why "ejection" applies in this case.

It is unquestionable that under §§ 178-1-6.2 and 6.3, there is no right to appeal to the Racing Commission. Under these sections, a person who is excluded or suspended may only regain access to the association's property with the permission of the association. If § 178-1-6.1 does in fact apply as the majority asserts, because it is the only section that is construed by the majority to provide support for its conclusion, I find it unnecessary to explore §§ 178-1-6.2 and 6.3 in any more depth.

giving plain effect to the clear language of the rule.

3. As applied, the Majority Decision Authorizes the Racing Commission to Exceed its Authority.

The Racing Commission derives its authority to regulate from the police powers of the state:

There cannot, in our opinion, be any doubt as to the power of the Legislature to regulate horse racing, nor does there seem to be any contention on that point. Whatever may be said in favor of horse racing, and much can be said, it must be admitted that great evil attends its practice, such as calls for the intervention of the State, under its police power, to the end that such evil be minimized so far as it is possible to do so.

State ex rel. Morris v. West Virginia Racing Commission, 133 W.Va. 179, 192-93, 55 S.E.2d 263, 270 (1949). This authority is therefore limited to that actually conveyed by the police power of the constitution and to the actual and natural rights of those affected by actions of the Racing Commission. This Court has also established that the premise of the police powers of the state is to protect and promote the general welfare of the public:

The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community.

Syl. pt. 5, *Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965). The Court has described the general welfare, in the context of the police power as:

embrac[ing a] whole system of internal regulation by which the state may subject persons and property to all kinds of rea-

sonable restraints and burdens in order to secure the general comfort, health and prosperity of the state, to preserve public order, prevent offenses, and to establish for this intercourse of citizens with citizens those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own rights so far as is reasonably consistent with a like enjoyment of rights by others.

Farley v. Graney, 146 W.Va. 22, 35, 119 S.E.2d 833, 841 (1960) (quoting 4 M.J., Constitutional Law, Section 66, pages 158-59).

The majority holds that the Racing Commission has the authority to require CTR & S to allow jockeys onto its private property so that the jockeys may participate in horse races. From where the majority gleanes this authority is unclear. As this Court has recognized, the state's police power is "broad and sweeping"; however, the police power is confined by the requirement that it be used to create laws that preserve and promote the general welfare. The police power is not unlimited.

Creating laws and rules that regulate horse racing and the "great evil [which] attends its practice," protects the public from, *inter alia*, the dangers inherent in gambling and protects gamblers from potential fraud. See *West Virginia Racing Commission, supra*. I fail to see how the general welfare of the people of West Virginia is promoted by forcing CTR & S to admit onto its premises jockeys whose presence it deems harmful to its business. In no way does this action secure the general comfort, health and prosperity of the state, preserve public order, prevent offenses, or prevent a conflict of right. Instead, the action tramples on the property rights of a private business concerned that its customers be worried that "cheating" might be possible at the track. In reaching its decision, the majority has allowed the Racing Commission to exceed its constitutional authority, in direct disregard for the business and property rights of CTR & S.

The majority reasons that because CTR & S can only do business because of a license it

has received from the Racing Commission, it must submit to the Racing Commission's requirement that jockeys be admitted to race on CTR & S's property. It was also argued to this Court that because the Legislature has the power to abolish all gambling within the State, it must also have the power to require readmittance of the jockeys. It is of no matter that the Legislature has the power to declare wagering illegal, nor does it matter that CTR & S must be licensed by the Racing Commission. The underlying basis for the power of the Racing Commission to act, the police powers of the state, does not give the Racing Commission the constitutional authority, through either the licenses or permits it issues, to reach so far into the manner by which CTR & S conducts its business or to contravene the business and property rights of CTR & S, a private business.

I respectfully dissent to the majority opinion. I am authorized by Justice Ketchum to state that he joins in this dissent.



229 W.Va. 138

**STATE of West Virginia, Plaintiff
Below, Respondent**

v.

**Karen TANNER, Defendant
Below, Petitioner.**

No. 11-0634.

Supreme Court of Appeals of
West Virginia.

Submitted March 27, 2012.

Filed May 24, 2012.

Background: After defendant, who pled guilty to one felony offense of manufacturing a controlled substance, served six months of home confinement, she filed a motion asking the court to release her from home confinement. The Circuit Court, Clay County, Jack Alsop, J., re-

leased defendant from home confinement and placed her on court-supervised parole for a minimum period of two years, with the condition that she not be in the presence or accompaniment of anyone convicted of a felony, including her husband. Defendant appealed.

Holdings: The Supreme Court of Appeals, Davis, J., held that:

- (1) circuit court has same authority as that possessed by Parole Board to release on parole a person who is serving sentence of home confinement ordered by the circuit court;
- (2) when exercising authority of Parole Board to grant parole to person who is being released from home incarceration, circuit court has broad discretion to impose special conditions it deems necessary; and
- (3) circuit court properly exercised its discretion, and did not act in an unreasonable, capricious, or arbitrary manner, when it placed defendant on parole and imposed upon defendant's parole the condition that she not be in presence or accompaniment of anyone convicted of felony, including her husband.

Affirmed.

1. Criminal Law \S 1139, 1147, 1158.1

Supreme Court of Appeals reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard, and Supreme Court of Appeals reviews challenges to circuit court's findings of fact under a clearly erroneous standard, and conclusions of law are reviewed de novo.

2. Statutes \S 181(1)

Primary object in construing a statute is to ascertain and give effect to the intent of the legislature.

3. Statutes \S 188, 190

Where the language of a statute is clear and without ambiguity, the plain meaning is

296 N.Y. 249

**MADDEN v. QUEENS COUNTY
JOCKEY CLUB, Inc.**

Court of Appeals of New York.

April 17, 1947.

1. Civil rights § 6

The operator of a race track could without reason or sufficient excuse exclude a person from attending its races, where exclusion was not founded on race, creed, color, or national origin. Civil Rights Law, § 40; Penal Law, § 514, 700.

2. Carriers § 39, 236(1)

Innkeepers § 7

Theaters and shows § 4

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was under a duty to general public and hence obliged to serve, without discrimination, all who sought service, but proprietors of private enterprises, such as places of amusement and race tracks, were under no such obligation and enjoyed an absolute power to serve whom they pleased.

3. Constitutional law § 217

A license to conduct pari-mutuel betting on horses does not constitute licensee an administrative agent of the state in execution of law or a "franchise", since license tax is not imposed on bettor for the privilege of betting but upon the licensee for the privilege of conducting the pari-mutuel betting; hence exclusion of a spectator from the race track by licensee without sufficient excuse does not violate equal protection of the law. McK. Unconsol. Laws, § 7568.

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise".

4. Franchises § 1

A "franchise" is a special privilege, conferred by the state on an individual, which does not belong to the individual as a matter of common right, and creates a privilege where none existed before; its primary object being to promote the public welfare.

72 N.E.2d—44½

5. Licenses § 1

A "license" is permission to exercise a pre-existing right or privilege which has been subjected to the regulation in interest of the public welfare.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Coleman F. Madden against Queens County Jockey Club, Inc., for a declaratory judgment, declaring that plaintiff has the right, as citizen and taxpayer, upon paying required admission price, to enter defendant's race course. From an order of the Appellate Division of the Supreme Court, 269 App.Div. 644, 58 N.Y.S.2d 272, which reversed, on the law, an order of the Supreme Court at Special Term (Nova, J.), granting a motion by plaintiff for temporary injunction restraining defendant from preventing plaintiff from entering defendant's race track and attending horse races and patronizing the pari-mutuel betting conducted thereon, and denying defendant's cross-motion for a dismissal of the complaint, on the law, and denying plaintiff's motion and granting defendant's cross-motion, plaintiff appeals.

Affirmed.

Raphael H. Weissman, of Brooklyn, for appellant.

Conrad Saxe Keyes and Cyrus S. Jullien, both of New York City, and Joseph B. Cavallaro, of Brooklyn, for respondent.

Martin A. Schenck, Harold C. McCollom, and Kenneth W. Greenawalt, all of New York City, for Westchester Racing Association, Saratoga Association, Metropolitan Jockey Club, and Empire City Racing Association, amici curæ, in support of respondent's position.

FULD, Judge.

"Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Mad-

den, plaintiff herein, a self-styled "patron of the races," was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer—upon paying the required admission price—to enter the race course and patronize the pari-mutuel betting there conducted. Defendant, on the other hand, asserted an unlimited power of exclusion. Special Term, finding that plaintiff was a citizen of good repute and standing, decided that the complaint stated a cause of action and entered an order enjoining defendant from keeping plaintiff off the race track. The Appellate Division, reversing, dismissed the complaint.

[1] The question posed—which this court explicitly declined to consider in 1897, in *Grannan v. Westchester Racing Ass'n*, 153 N.Y. 449, 459, 47 N.E. 896, 899,—is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

[2] At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. See e. g., *People v. King*, 110 N.Y. 418, 427, 18 N.E. 245, 248, 1 L.R.A. 293, 6 Am.St.Rep. 389; see, also, *Wyman, Public Callings and The Trust Problem*, 17 Harv.L.Rev. 156, 217. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. See, e. g., *Woolcott v. Shubert*, 217 N.Y. 212, 111 N.E. 829, L.R.A. 1916E, 248, Ann.Cas.1916B, 726; *Aaron v. Ward*, 203 N.Y. 351, 96 N.E. 736, 38 L.R.A.,N.S., 204; *People ex rel. Burnham*

v. Flynn, 189 N.Y. 180, 82 N.E. 169, 12 Ann.Cas. 420; *Collister v. Hayman*, 183 N.Y. 250, 76 N.E. 20, 1 L.R.A.,N.S., 1188, 111 Am.St.Rep. 740, 5 Ann.Cas. 344. A race track, of course, falls within that classification. See *Marrone v. Washington Jockey Club*, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679, 43 L.R.A.,N.S., 961; [Edward J.] *Madden v. Queens County Jockey Club, Inc.*, 175 Misc. 522, 23 N.Y.S.2d 106; *Corrigan v. Coney Island Jockey Club*, 2 Misc. 512, 22 N.Y.S. 394.

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute—explicitly covering "race courses"—limits the power by prohibiting discrimination on account of race, creed, color, or national origin. Civil Rights Law, Consol. Laws, c. 6, § 40; see, also, Penal Law, Consol.Laws, c. 40, §§ 514, 700. That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on two assumptions, first, that the license to conduct pari-mutuel betting constitutes the licensee an administrative agent of the State in the execution of the law, and, second, that the license to conduct horse racing is a franchise to perform a public purpose.

[3] The first assumption is quickly disposed of. Section 9 of the Pari-Mutuel Revenue Law, L.1940, c. 254, § 9, as amended by L.1946, c. 339, § 1, McK.Unconsol. Laws, § 7568, provides in substance that the licensee shall retain 10% of the total deposits and pay therefrom "to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting," an amount equal to a certain percentage of the total pool. It should be noted that the tax is thus imposed not on the bettor for the privilege of *betting*—analogous to the imposition of a sales tax upon the purchaser from a retail store—but upon the licensee for the privilege of *conducting* pari-mutuel betting. Adopting plaintiff's position, it would be equally valid to argue that every licensee, theatre

manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as “an administrative agency of the state” in the conduct of his everyday business simply because he pays a tax or fee for his license.

Plaintiff's second assumption—that the license is a franchise—requires more lengthy treatment. There is little need to cite authority for the proposition that a race track is normally considered a place of amusement and that—with the possible exception of ancient Rome—amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in “improving the breed of horses.” *L. 1926, c. 440, § 1, McK. Unconsol. Laws, § 7501*; cf. *People ex rel. Empire City Trotting Club v. State Racing Comm.*, 120 App. Div. 484, 485, 486, 105 N.Y.S. 528, 529, 530, affirmed 190 N.Y. 31, 82 N.E. 723. There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law. (*Woolcott v. Shubert*, supra, 217 N.Y. 216, 111 N.E. 830; *Collister v. Hayman*, supra, 183 N.Y. 253, 76 N.E. 20.

[4] Plaintiff's argument results from confusion between a “license,” imposed for the purpose of regulation or revenue, and a “franchise.” A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. See *Smith v. The Mayor, etc., of City of New York*, 68 N.Y. 552, 555; *Matter of Penn-York Natural Gas Corp. v. Maltbie*, 164 Misc. 569, 573, 299 N.Y.S. 1004, 1009; *City of Tulsa v. Southwestern Bell Telephone Co.*, 10 Cir., 75 F.2d 343, 350. It creates a privilege where none existed before, its primary object being to promote the public welfare. See e. g., *Southern R. Co. v.*

South Carolina Public Service Comm., D. C., 31 F.Supp. 707, 711; *City of Oakland v. Hogan*, 41 Cal.App.2d 333, 347, 106 P.2d 987, 994. A familiar illustration is the right to use the public streets for the purpose of maintaining and operating railroads, waterworks and electric light, gas and power lines.

[5] A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public. *Woolcott v. Shubert*, supra; *Collister v. Hayman*, supra. In the *Woolcott* case, supra, for instance, where the power of a theatre owner to bar a critic from his theatre was upheld, this court wrote (217 N.Y., at page 216, 111 N.E., at page 830): “At the common law a theater, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. * * * The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.” Likewise, race tracks may well be affected with a public interest sufficient to justify governmental licensing or other regulation. Recognition of a public interest, however, is neither recognition nor acknowledgment that the State is a partner in the business of horse racing or that the race track operator is the State's administrative agent to collect revenue.

Observing, however, that the conduct of races for stakes had long been declared illegal “except as specially authorized,” plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse

ances for stakes does exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. See *Corrigan v. Coney Island Jockey Club*, supra; cf. *Marrone v. Washington Jockey Club*, supra; *Western Turf Association v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520. Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute.

In short, plaintiff's asserted right must rest either upon common law or upon statutory provision. No such right existed at common law and the Legislature has not chosen to create one. Civil Rights Law, §§ 40, 40-b.

The judgment should be affirmed, with costs.

LOUGHRAN, C.J., and LEWIS, CONWAY, DESMOND, THACHER, and DYE, JJ., concur.

Judgment affirmed.



296 N.Y. 257

WISCHNIE v. DORSCH et al.

Court of Appeals of New York.

April 17, 1947.

1. Landlord and tenant § 165(6)

The purpose of provisions of Labor Law making the owner of the leased building responsible for observance of provisions of the law relating to the keeping of elevators in safe condition, is to insure one injured on an elevator an existing and responsible defendant. Labor Law, §§ 255, 315, subd. 2, 316.

2. Landlord and tenant § 169(3)

In action against owner of tenant-factory building for death of passenger

in fall of freight elevator, owner's cross-complaint against lessee of building, alleging that lessee was in exclusive possession of building under long term written lease, that passenger's death was caused solely by lessee's negligence in failing to keep elevator in good order and repair, and that lessee was liable over to owner because of its failure to so keep the elevator, was sufficient to state a prima facie cause of action against lessee. Labor Law, §§ 255, 315, subd. 2, 316.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Marion Wischnie, as administratrix of the estate of Alex Wischnie, deceased, against Martin Dorsch and others, copartners under the firm name of Armor Elevator Company, and others, and the Brooklyn Realty Corporation, to recover for the death of the deceased in a fall of a freight elevator in a business building owned by the Brooklyn Realty Company in the City of New York, on ground that the Brooklyn Realty Corporation's premises were a tenant-factory building as defined by the Labor Law and that it had been negligent in failing to repair the elevator and maintain it in a safe condition in violation of its duty under sections 255 and 316 of the Labor Law, wherein the Brooklyn Realty Corporation impleaded the Premier Linen Supply & Laundry Service, Inc., and filed a cross-complaint against it, it being the lessee of the entire building in which the elevator was located. From a judgment for the Premier Linen Supply & Laundry Service, Inc., entered on an order of the Appellate Division of the Supreme Court in the First Judicial Department, 268 App.Div. 889, 50 N.Y.S.2d 923, which affirmed, by a divided court, an order of the Supreme Court at Special Term (Eder, J.), entered in New York County, granting a motion by the Premier Linen Supply & Laundry Service, Inc., for dismissal of the cross-complaint, on ground that it did not state facts sufficient to constitute a cause of action, and severing the action as between the Brook-

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Pena v. New Meadowlands Racetrack LLC

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2012 WL 95344

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NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Lou PENA, Plaintiff,
v.
NEW MEADOWLANDS
RACETRACK LLC, et al.,
Defendants.

Civil Action No. 12-2 (SRC).

Jan. 10, 2012.

Attorneys and Law Firms

Christopher Paul Midura, Erica Susan Helms, Karen A. Confoy, Sterns & Weinroth, P.C., Trenton, NJ, for Plaintiff.

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OPINION & ORDER

CHESLER, District Judge.

[*1] This matter comes before the Court on the application of Plaintiff Lou **Pena** (“Plaintiff”) for an Order Temporarily and Preliminarily Enjoining Defendants New **Meadowlands** Racetrack, LLC (“NMR”), Jeffrey Gural (“Gural”), New Jersey Sports and Exposition Authority (“NJSEA”), Dennis Robinson (“Robinson”), and Peter J. Koch (“Koch”).¹ For the reasons that follow, Plaintiff's application will be denied.

BACKGROUND

In brief, this case arises from the exclusion of Mr. **Pena**, a horse trainer, from the New **Meadowlands** Racetrack facility (“**Meadowlands**”). According to the Verified Complaint, Mr. **Pena** has enjoyed a twenty-year career as a trainer of standardbred, harness racing horses, and was named as a top trainer at the **Meadowlands** and Yonkers Racetracks in 2010 and 2011. Mr. **Pena** holds a valid training license in New Jersey, where such licenses are issued by the New Jersey Racing Commission (“NJRC”). **Pena** has been very financially successful in his profession, earning approximately \$15 million dollars in purses over the past two years.

Meadowlands is owned by a New Jersey State agency, the NJSEA, but management of the racetrack was transferred to NMR, a private company, as of December, 2011. Specifically, NJSEA executed a 31-year ground lease of **Meadowlands** to NMR, effective

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December 24, 2011, and the NJRC granted NMR a provisional permit to operate the racetrack. The lease between NJSEA and NMR provides, among other things, that management of the racetrack shall be according to the “sole business judgment” of NMR and Defendant Gural (the Managing Member of NMR), although they must adhere to all applicable laws, rules and regulations pertaining to horseracing. (Ver.Compl., Ex. A .1.) Moreover, NMR “shall have the authority to permit or deny the participation of owners, drivers, trainers and other Persons” at the **Meadowlands** racetrack. *Id.* NMR shall pay rent in the amount of one dollar for the first five years, then the greater of \$500,000 or 10% of NMR's net operating profits for the remaining term of the lease. *Id.*

Defendant Koch was hired as Director of Racing and Racing Secretary for NMR.² According to his Certification, when NMR assumed operation of the racetrack, it required all trainers desiring to race a horse at **Meadowlands** to submit a “2011–12 Standardbred Racing Application.” (Koch Cert., ¶ 8.) On December 13, 2011, Plaintiff submitted a formal application to participate as a trainer for a number of horses. Mr. Koch, as Director of Racing, informed Plaintiff that his participation at the racetrack “is not in the best interest of the ownership of the facility,” via letter (on NMR letterhead) dated December 27, 2011, and via a phone call on December 28, 2011. *Id.* at ¶¶ 15–18; Ver. Compl., Ex. B.

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Mr. Koch avers that the decision to deny Plaintiff's application was made by Mr. Gural in his sole discretion, and was not made by or at the discretion of the NJSEA. Plaintiff, for his part, avers that Mr. Koch did not give any other basis for Plaintiff's exclusion from the racetrack, other than the determination that **Pena** was "detrimental to horse racing at the **Meadowlands**." (Ver.Compl., ¶ 33.) Indeed, Plaintiff avers that Mr. Gural "has made public statements that he does not want **Pena** racing at the **Meadowlands**, for no apparent reason other than that **Pena** is winning so many races." *Id.* at ¶ 39. Mr. **Pena** was not given a hearing prior to his exclusion, nor was he informed of a means by which he could appeal the decision. Plaintiff having nominated and paid for five horses to be eligible to race in various series in the 2012 racing season, he inquired whether these horses would be permitted to race. Mr. Koch informed him that the horses could not race if Mr. **Pena** was listed as the trainer.

***2** Plaintiff asserts that the decision to bar him, a licensee in good standing, from **Meadowlands**, was not authorized by statute, and was a violation of his due process rights under the Fourteenth Amendment to the United States Constitution. He argues that his exclusion is tantamount to a revocation or suspension of his license, and will devastate his business reputation. Plaintiff avers that he has suffered, and will continue to suffer irreparable harm as a result of this unlawful exclusion,

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including harm to his ability to pursue his profession, his reputation, training and racing opportunities. Therefore, Plaintiff seeks an injunction temporarily and preliminarily enjoining the Defendants from further excluding him from the **Meadowlands** racetrack.

Defendants oppose the motion, arguing that NMR lawfully exercised its common law right of exclusion in barring Mr. **Pena** from the racetrack, and that the NJSEA did not participate in the decision to exclude him.

ANALYSIS

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” FED. R. CIV. P. 65; *Winter v. NRDC, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). Injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances. *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir.1988) (citing *United States v. City of Philadelphia*, 644 F.2d 187, 191 n. 1 (3d Cir.1980)). Thus, “a movant ‘must demonstrate *both* a likelihood of success on the merits, and the probability of irreparable harm if relief is not granted.’ “ *Frank's GMC Truck Center*, 847 F.2d at 102 (quoting *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir.1987)). A preliminary injunction cannot be granted where “either or both of these

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prerequisites are absent.” *Id.* (quoting *In Re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir.1982)).

With respect to the first factor, the movant must show a “reasonable probability” of ultimate success on the merits of his claim. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 900 (3d Cir.1989). Here, Plaintiff seeks relief under 42 U.S.C. Section 1983, arguing that his summary exclusion from **Meadowlands** without a hearing violates his due process rights under the Fourteenth Amendment. For the reasons that follow, the Court concludes that Plaintiff has not shown a reasonable probability of success on the merits of this claim, because, on the record before this Court, he has not made an adequate demonstration that his exclusion from the **Meadowlands** racetrack constitutes state action for the purposes of section 1983.

Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation ... of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

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proper proceeding for
redress.

¶³ To prevail under this section, a plaintiff must therefore show 1) the violation of a right secured by the Constitution or federal law, and 2) that the alleged deprivation occurred under color of state law, or constituted state action. *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir.1993). Whether private conduct, such as the conduct of a private person or business, constitutes state action is a fact-intensive inquiry. *Crissman v. Dover Downs Entertainment, Inc.*, 289 F.3d 231, 233–34 (3d Cir.2002) (en banc), cert. denied, 537 U.S. 886, 123 S.Ct. 131, 154 L.Ed.2d 147 (2002). Although the Third Circuit's articulations of the applicable analysis in this context are far from clear, this Court will primarily rely on *Crissman*, an *en banc* decision concluding, after full discovery, that a private racetrack's exclusion of the plaintiffs (licensed race-horse owners and trainers) did not constitute state action for the purposes of section 1983. *Id.* at 247. In that case, the defendant Dover Downs, a private corporation which owned and operated a racetrack facility in Delaware, was a state-licensed harness racing association, and a state-licensed video lottery agent. *Id.* at 234. The general manager of harness racing for Dover Downs excluded the Crissmans from the facility by way of a “one-sentence letter,” and refused to explain the exclusion. *Id.* at 234–35. The Crissmans conceded that the state of Delaware had no direct involvement in

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the decision to exclude them from the racetrack, but argued that heavy state regulation of horse-racing, and state revenue from Dover Downs rendered it a state actor for purposes of section 1983. *Id.*, at 248–39. The District Court concluded that the Crissmans had not demonstrated that state regulation and revenue from Dover Downs rendered it a state actor under the symbiotic relationship test set forth in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). *Id.* Moreover, it concluded that there was no “close nexus” between the state and the exclusionary conduct, and thus there was no state action under the analysis set forth in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). *Id.* A panel of the Third Circuit reversed the District Court, “reasoning that *Burton* had established an exception to the general rule that the state must be involved in the challenged conduct, and that *Burton* permitted state action to be based on ... facts demonstrating what it termed ‘overall involvement of the State in the affairs of the private entity.’ ” *Id.* at 239.

The Third Circuit, sitting *en banc*, overturned this holding, and framed the essential approach as follows: whether the exclusion of the Crissmans from Dover Downs was *fairly attributable* to the state. *Id.* (emphasis added) (noting that the central purpose of the state action inquiry is to ‘assure that constitutional standards are invoked

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when it can be said that the State is responsible for the *specific conduct* of which the plaintiff complains.’) (emphasis added) (citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)). It reasoned that the applicability of *Burton’s* “symbiotic relationship” test is narrow, and was premised on the unique involvement and interdependence of the state and the private entity in that case, where essential state revenues flowed from a discriminatory restaurant operation. *Id.* at 241–42. It then concluded that, in the case of Dover Downs, Delaware “was not conducting any operations together with the race track,” although it regulated the racing activity, and licensed the racetrack, nor was the flow of monies to and from Delaware tied to the exclusion of the Crissmans. *Id.* at 243–45. Indeed, the Court explicitly reiterated that detailed regulation does not equate to state action, nor does the flow of funds to or from the state. *Id.*, at 243–44 (citing *Jackson*, 419 U.S. at 350, and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987)). Hence, Dover Downs’ exclusion of the Crissmans was not fairly attributable to the State of Delaware under the symbiotic relationship analysis.³

³ The Circuit likewise found no “close nexus” between Delaware, and the racetrack’s exclusion of the Crissmans. *Id.* at 246. The Crissmans argued that

the state had delegated sufficient authority to the private racetrack to make it an agent of the state, through the racetrack's power to make eligibility determinations, to operate as a monopoly during certain months of the year, and to enforce the Racing Commission's rules and regulations. *Id.* at 247–48. The Circuit found these arguments unpersuasive because they had no direct bearing on the *specific decision* to exclude the Crissmans. *Id.* (noting that the racetrack's role in overseeing compliance with rules and regulations did not make it an “executive arm” of the Commission.)

Here, Plaintiff argues ⁴ that his exclusion from **Meadowlands** is fairly attributable to the State of New Jersey because: 1) there is a symbiotic relationship between the state and the racetrack, particularly given that a state entity leases the land and facility to NMR; 2) there is a “close nexus” between the exclusion of Plaintiff and the state, because the exclusion was “on behalf of the NJSEA,” and pursuant to an agreement between NMR and the NJSEA. Both arguments fail. First, in considering whether there is a unique “interrelationship” between NMR and the State of New Jersey, such that the exclusion of Mr. **Pena** is fairly attributable to state, the only salient fact distinguishing the case at bar from *Crissman*, based on the current state of the record, is the lease arrangement between NJSEA and NMR. In *Crissman*, Dover Downs was privately owned and

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operated; here, **Meadowlands** is owned by New Jersey, but leased to, and operated by NMR, a private company. However, the mere leasing of property by the state to a private entity “does not give rise to wholesale government responsibility for the actions taken by a ... private tenant.” *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 67 (3d Cir.1990). State action will only be recognized “where the public might reasonably conclude from [the] relationship that the government has lent its support to the private entity's actions.” *Crissman*, 289 F.3d at 243 (quoting *Gannett*, 894 F.2d at 67). The 31-year lease agreement between NJSEA and NMR indicates that, although New Jersey remains the owner of the racetrack, operation of the racetrack is in the hands of NMR. Indeed, NMR is the entity licensed by the NJRC to operate races at the **Meadowlands**. Moreover, the harness races are hardly a “public function,” such that the very operation of the races transforms NMR's behavior into a government function. *Gannett*, 894 F.2d at 67 (citing *Jackson*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477). In short, the Court is not convinced that New Jersey's relationship as a lessor of the **Meadowlands** changes the analysis set forth under *Crissman*, which is otherwise fully applicable to this case. As in *Crissman*, although harness-racing is heavily regulated in New Jersey, and although the state may derive revenue from the **Meadowlands** operation, these factors do not establish a symbiotic

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relationship between the state and NMR such that Mr. **Pena's** exclusion is fairly attributable to New Jersey. 289 F.3d at 242.

***5** Moreover, at this point, Plaintiff has failed to show a close nexus between his exclusion from the **Meadowlands**, and the State of New Jersey, because he has failed to produce evidence of any direct participation by state officials in the exclusionary decision. Though Plaintiff argues that Director Koch's correspondence informing Plaintiff of his exclusion, was "on behalf of NJSEA," and that NMR and NJSEA conspired to exclude Plaintiff, there is no evidence to support this contention. First, although Koch (a privately-paid employee of NMR) is the Racing Secretary for the **Meadowlands**, which entails regulatory duties, those duties are, in New Jersey, unrelated to the discipline or exclusion of horse trainers or drivers. See N.J.A.C. 13:71-8.35; *contra Fitzgerald*, 607 F.2d at 598 (noting that the racing secretary who participated in the expulsion of the plaintiff, a licensed trainer and driver, from the track, had acted pursuant to his "delegated authority from the State [of Pennsylvania]," concluding that plaintiff had violated a Racing Commission Rule regarding inconsistent driving). Moreover, Plaintiff himself vigorously argues that (unlike Fitzgerald) he was not expelled for violation of Racing Commission rules or regulations; rather, the NJRC conducted a recent, extensive investigation of **Pena**, and found no basis to take action

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against his license. (Ver.Compl., ¶ 22.)

These facts suggest that the decision to exclude Plaintiff was not a regulatory decision “packaged” as a decision by NMR, but was indeed a business decision made by NMR as a private entity. Second, Defendants present Koch's uncontradicted certification that the decision to exclude Plaintiff was made in Mr. Gural's sole discretion as the Managing Member of NMR, and “was not made by or at the direction of the NJSEA.” (Koch Cert., ¶ 7.) Indeed, the Court notes that Koch did not exclude Plaintiff during his recent tenure as Racing Secretary when the **Meadowlands** was operated by the State of New Jersey. On the other hand, Plaintiff has been excluded from two facilities which are apparently affiliated with Mr. Gural: Tioga Downs Racing and Vernon Downs Racing, both located in the State of New York. *Id.*, ¶ 12. Third, Plaintiff's only purportedly direct evidence of NJSEA's participation in the decision to exclude him from the **Meadowlands** is the statement in Mr. Koch's December 27, 2011 letter, that Plaintiff's exclusion is “in the best interest of the ownership of this facility.” (Ver.Compl., Ex. B.) The Court is not satisfied that this statement implicates NJSEA in the decision to exclude Plaintiff, particularly since the letter is on NMR letterhead, and is from the Director of Racing for NMR. Given that NMR has just commenced a projected 31-year tenancy and operation of the **Meadowlands** facility, Mr. Koch's

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reference to the “owner” of the racetrack would appear to be a reference to NMR, not a reference to the State of New Jersey's ownership interest in the leased property.

[*6] In sum, as in *Crissman*, there is no evidence at this stage to indicate that Plaintiff's exclusion from the **Meadowlands** is fairly attributable to the state, as opposed to NMR exercising its common law right, as a private operator of a horse-racing facility, to exclude Mr. **Pena** from the racetrack.⁵ See *Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439 (D.N.J.1956), *aff'd*, 242 F.2d 344 (3d Cir.1957). Thus, Plaintiff has failed to demonstrate a reasonable probability that his exclusion resulted from state action. Plaintiff fails to meet his burden of showing a likelihood of success on the merits, precluding the entry of preliminary injunctive relief. Accordingly, his application will be denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 95344

Footnotes

- 1 Lightening Lanes Stables, LLC, also filed an Amicus Brief, which the Court will not consider, as the submission appears to be an improper joinder, and the proposition advanced by the Brief

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(namely, judicial estoppel) is inapplicable to this case.

- 2 Mr. Koch was also the Racing Secretary for **Meadowlands** when it was operated by NJSEA, until September of 2011. In his capacity as Racing Secretary for NMR, Mr. Koch receives no compensation from the NJSEA or other governmental agency. (Koch Cert., § 7.) In New Jersey, the Racing Secretary has various duties related to the orderly running of races, and ensures compliance with related regulations, N.J.A.C. 13:71–8.35, whereas the Racing Commission and other appointed officials address licensing and discipline of horse trainers and drivers. N.J.A.C. § 13:71–7.1 *et seq.*, 13:71–8.1 *et seq.*
- 3 In reaching this conclusion, the Third Circuit distinguished the case relied upon by Plaintiff in this case: *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir.1979). It observed that the private racetrack's exclusion of a licensed trainer and driver without a hearing was deemed state action in that case not because of the “heavily regulated racing industry,” but “based on the direct involvement of racing officials in the conduct.” *Crissman*, 289 F.3d at 236, fn. 5, 245 fn. 17.
- 4 In light of the emergent nature of Plaintiff's application, the Court will address Plaintiff's arguments as set forth in his written brief, and as placed on the record during oral argument on January 9, 2012.
- 5 Indeed, the lease between NJSEA and NMR also recognizes NMR's right to “permit or deny the participation of owners, drivers, trainers and other Persons” at the **Meadowlands** racetrack. (Ver.Compl., Ex. A.1.)

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Related documents

**Selected
topics**

Secondary
Sources

Briefs

Trial Court
Documents

Public Amusement and Entertainment

Licensing and Regulation

State Racing Commission Suspension of Horse
Trainer License

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Equine Welfare: Can the Sport Survive?

**Chris E. Wittstruck, Esq.
Standardbred Owners Association
of New York**

Answer:

Probably Not

**Simply because we are choosing to
destroy ourselves**

What has he done wrong?



Private Exclusion (Ejection):

- Private racetracks have the absolute power to exclude undesirable patrons *Madden v. Queens County Jockey Club*, 296 N.Y. 249, cert. denied, 332 U.S. 761 (1947)
- However, exclusion of a horseman the state deems fit to license requires that the exclusion (here denial of stall space) requires at least a showing that the action is within the realm of a “reasonable discretionary business judgment” in the “*best interests of racing*” *Jacobson v. New York Racing Association*, 33 N.Y.2d 144, 150 (1973)

Licensee Exclusion:

The exceptions

- Civil Rights violation (suspect classifications)
- Contractual protection (i.e. horsemen's agreement)
- State Action (symbiotic relationship) *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); but see *Crissman v. Dover Downs Entertainment*, 289 F.3d 231 (3rd Circuit 2002). If not admitted by the track, its very tough
- Statutory (regulatory) protection Not in N.Y. - YET

West Virginia, Pennsylvania and Illinois

- *PNGI Charles Town Gaming, LLC v. Reynolds*, 727 S.E.2d 799 (2011)
- West Virginia Racing Commission unanimously adopted new procedural rules that allow occupational permit-holders the right to appeal racetrack ejections (2012)
- 58 Pa. Code § 165.231. Hearing Rights; See, also 4 P.S. 325.215 (c)
- Decision dated December 15, 2014 of The State Horse Racing Commission of the Department of Agriculture of the Commonwealth of Pennsylvania (Docket No. HORSE-2014-4). *Re Appeal of Kathryn Papp, DVM* (Ejection From/ Denial of Admission to Penn National Race Course July 4, 2014)
- 230 ILCS 5/9 (e) (hearing requirement)

Ejection vs. Reciprocity

- A trainer receives a 6 month suspension by the Pennsylvania Horse Racing Commission for a serious non-therapeutic drug violation
- [Racing, Pari-Mutuel Wagering and Breeding Law 910](#) affords the horseman a due process hearing to determine whether ruling reciprocity is warranted
- A driver is ejected for complaining to the track superintendent about the unsafe condition of the surface – NO HEARING!

The New York Solution

- A4131 / S4604 (2017/18)
- Would amend Racing, Pari-Mutuel Wagering and Breeding Law 321
- licensee ejected or denied access shall be permitted access to the grounds of and/or participation in a pari-mutuel harness meet pending final determination by the commission on his or her appeal for a hearing.
- In the case of an ejectment or denial of access of a licensee, the respective corporation or association shall have the burden of proof to establish that the presence and participation of the licensee is detrimental to the best interests of racing or to the orderly conduct of a race meet

The Industry Solution

- Education of the general public:
- Mainstream Media? Forget it
- The OTB Parlor? Oh No!
- JUNIOR JOCKEY CAMP with Hall of Fame Jockey Julie Krone



A04131 Summary:

BILL NO A04131
SAME AS SAME AS
SPONSOR Pretlow
COSPNSR
MLTSPNSR

Amd §321, RWB L

Relates to commission hearings of racetrack ejectments and denials of access of commission licensees.

STATE OF NEW YORK

4131

2017-2018 Regular Sessions

IN ASSEMBLY

February 1, 2017

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Racing and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in relation to commission hearings of racetrack ejections and denials of access of commission licensees

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Section 321 of the racing, pari-mutuel wagering and breed-
2 ing law is amended to read as follows:
3 § 321. Hearing of refusal or revocation of license or ejection or
4 denial of access of licensee in good standing. If the state [~~racing and~~
5 ~~wagering board~~] gaming commission shall refuse to grant a license
6 applied for under sections two hundred twenty-two through seven hundred
7 five of this chapter, or shall revoke or suspend such a license granted
8 by it, or shall impose a monetary fine upon a participant in harness
9 racing, or any corporation or association created under or subject to
10 the provisions of this chapter licensed to conduct pari-mutuel harness
11 meets shall eject or deny access to a licensee from the grounds of
12 and/or participation in a pari-mutuel harness meet, the applicant or
13 licensee or party fined may demand, within ten days after notice of the
14 said act of the [~~board~~] commission, corporation or association, a hear-
15 ing before the [~~board~~] commission and the [~~board~~] commission shall give
16 prompt notice of a time and place for such hearing at which the [~~board~~]
17 commission will hear such applicant or licensee or party fined in refer-
18 ence thereto. Pending such hearing and final determination thereon, the
19 action of the [~~board~~] commission in refusing to grant or in revoking or
20 suspending a license or in imposing a monetary fine shall remain in full
21 force and effect, but a licensee ejected or denied access shall be
22 permitted access to the grounds of and/or participation in a pari-mutuel
23 harness meet pending final determination by the commission on his or her
24 appeal for a hearing. The [~~board~~] commission may continue such hearing

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[~~-~~] is old law to be omitted.

LBD00348-01-7

1 from time to time for the convenience of any of the parties. Any of the
2 parties affected by such hearing may be represented by counsel, and the
3 [board] commission may be represented by the attorney general, a deputy
4 attorney general or its counsel. In the conduct of such hearing the
5 [board] commission shall not be bound by technical rules of evidence,
6 but all evidence offered before the [board] commission shall be reduced
7 to writing, and such evidence together with the exhibits, if any, and
8 the findings of the [board] commission, shall be permanently preserved
9 and shall constitute the record of the [board] commission in such case.
10 In connection with such hearing, each member of the [board] commission
11 shall have the power to administer oaths and examine witnesses, and may
12 issue subpoenas to compel attendance of witnesses, and the production of
13 all material and relevant reports, books, papers, documents, correspond-
14 ence and other evidence. The [board] commission may, if occasion shall
15 require, by order, refer to one or more of its members or officers, the
16 duty of taking testimony in such matter, and to report thereon to the
17 [board] commission, but no determination shall be made therein except by
18 the [board] commission. Within thirty days after the conclusion of such
19 hearing, the [board] commission shall make a final order in writing,
20 setting forth the reasons for the action taken by it and a copy thereof
21 shall be served on such applicant or licensee or party fined, as the
22 case may be. In the case of an ejection or denial of access of a
23 licensee, the respective corporation or association shall have the
24 burden of proof to establish that the presence and participation of the
25 licensee is detrimental to the best interests of racing or to the order-
26 ly conduct of a race meet. The action of the [board] commission in
27 refusing to grant a license or in revoking or suspending a license or in
28 imposing a monetary fine, or affirming, modifying or reversing the
29 ejection or denial of access of a licensee, shall be reviewable in the
30 supreme court in the manner provided by the provisions of article seven-
31 ty-eight of the civil practice law and rules.
32 § 2. This act shall take effect immediately.



Thoroughbred Aftercare 2019

New York “Takes the Lead”

Common Misconceptions



- Racehorse owners and trainers don't care what happens when their horses leave the track
- Racehorses are sent to slaughter when their racetrack careers are over
- Injured racehorses are euthanized
- There is nowhere for retired racehorses to go
- Racehorses are too high-strung to be riding horses
- Racehorses have no value when they can no longer run

Aftercare Milestones

- 1983 – Thoroughbred Retirement Foundation, our oldest aftercare organization, founded
- 1992 – New Vocations Racehorse Adoption Program, our largest aftercare program, founded
- 2011 – Thoroughbred Aftercare Alliance created
- 2012 – TAKE2 Program unveiled
- 2013 – New York's TAKE THE LEAD Retirement Program launched
- 2014 – New York's Horsemen pledge \$5 Per Start Donation to the TAA
- 2016 – NYRA matches Horsemen's \$5 Per Start Donation to TAA
- 2019 – New York Horsemen's TAA Donation doubled to \$10 Per Start
- 2019 – New York adds 1.5% aftercare contribution to the price of claimed horses

TAKE2 Second Career Thoroughbred Program



The TAKE2 Second Career Thoroughbred Program was created by then New York Thoroughbred Horsemen's Association President Rick Violette in 2012 to promote second careers for retired racehorses as hunters and jumpers.

TAKE THE LEAD Thoroughbred Retirement



The TAKE THE LEAD Thoroughbred Retirement Program was created by the New York Thoroughbred Horsemen's Association in 2013 to find homes for the horses retiring from the New York Racing Association tracks.

Annual Aftercare Funding from New York Racing

A background image showing a person with blonde hair tied back, wearing a red jacket, holding the head of a dark horse. The image is slightly faded to allow text to be read over it. In the top right corner, there is a small logo for 'Jenny Heart Photography'.

- \$375,000 – New York aftercare contributions from claimed horses*
- \$175,000 – NY Horsemen's \$10 Per Start contribution to TAA**
- \$155,000 – NYTHA contribution to TAKE THE LEAD Program
- \$150,000 – NYTHA contribution to TAKE2 Program
- \$75,000 – NYRA's \$5 Per Start contribution to TAA
- \$55,000 – Additional aftercare funding from NYTHA
- \$15,000 – NY Jockeys' \$1 Per Start contribution to TAKE THE LEAD

TOTAL: \$1 Million

*Based on 1.5% of \$25 million in claims annually at NYRA tracks

**NYTHA-guaranteed minimum

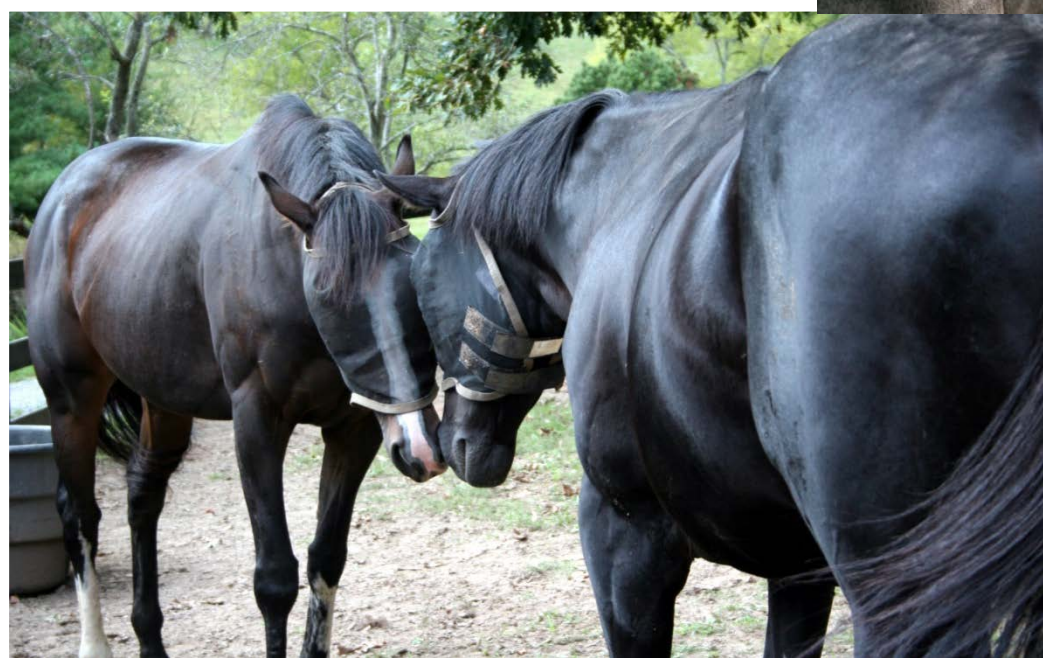
Where Do We Go From Here?

Every stakeholder in the Thoroughbred industry shares the responsibility of ensuring safe and healthy lives for our racehorses when their racetrack careers are over. We have made great strides in the last eight years, but we can still do more.

GOALS:

- Educate Thoroughbred owners on recognizing the right time to retire a horse
- Every owner and trainer includes aftercare in their racing business plan
- Microchip all horses so they can be tracked
- Enact legislation that will effectively prevent New York's horses from being sent to slaughter
- Increase the number of TAA-accredited organizations in New York

TAKE THE LEAD – 500 Horses and Counting



The New York OTB's: Can they survive?

Moderator:
Teresa Genaro

Panelists:
Jack Jeziorski, Esq.
David O'Rourke
John Signor

S 1975 ADDABBO Same as **A 7187 Pretlow**
ON FILE: 01/18/19 Racing, Pari-Mutuel Wagering
and Breeding Law

TITLE....Relates to the disposition of off-track
pools

01/18/19 REFERRED TO RACING, GAMING
AND WAGERING

05/13/19 1ST REPORT CAL.655

05/14/19 2ND REPORT CAL.

05/15/19 ADVANCED TO THIRD READING

05/22/19 PASSED SENATE

05/22/19 DELIVERED TO ASSEMBLY

05/22/19 referred to ways and means

06/18/19 substituted for a7187

06/18/19 ordered to third reading rules cal.388

06/18/19 passed assembly

06/18/19 returned to senate

A7187 Pretlow Same as **S 1975 ADDABBO**
Racing, Pari-Mutuel Wagering and Breeding Law

TITLE....Relates to the disposition of off-track
pools

04/11/19 referred to ways and means

06/05/19 reported referred to rules

06/17/19 reported

06/17/19 rules report cal.388

06/17/19 ordered to third reading rules cal.388

06/18/19 substituted by s1975

S01975 ADDABBO

01/18/19 REFERRED TO RACING, GAMING
AND WAGERING

05/13/19 1ST REPORT CAL.655

05/14/19 2ND REPORT CAL.

05/15/19 ADVANCED TO THIRD READING

05/22/19 PASSED SENATE

05/22/19 DELIVERED TO ASSEMBLY

05/22/19 referred to ways and means

06/18/19 substituted for a7187

06/18/19 ordered to third reading rules cal.388

06/18/19 passed assembly

06/18/19 returned to senate

ADDABBO

Amd §527, RWB L

Adds tracks located in Westchester county to the tracks excepted from being considered regional tracks.

STATE OF NEW YORK

1975

2019-2020 Regular Sessions

IN SENATE

January 18, 2019

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in relation to the disposition of off-track pools

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The opening paragraph of subdivision 1 of section 527 of
2 the racing, pari-mutuel wagering and breeding law, as amended by section
3 4 of part BB of chapter 60 of the laws of 2016, is amended to read as
4 follows:
5 The disposition of the retained commission from pools resulting from
6 regular, multiple or exotic bets, as the case may be, whether placed on
7 races run within a region or outside a region, conducted by racing
8 corporations, harness racing associations or corporations, quarter horse
9 racing associations or corporations or races run outside the state shall
10 be governed by the tables in paragraphs a and b of this subdivision. The
11 rate denominated "state tax" shall represent the rate of a reasonable
12 tax imposed upon the retained commission for the privilege of conducting
13 off-track pari-mutuel *betting*, which tax is hereby levied and shall be
14 payable in the manner set forth in this section. Each off-track *betting*
15 corporation shall pay to the gaming commission as a regulatory fee,
16 which fee is hereby levied, six-tenths of one percent of the total daily
17 pools of such corporation. Each corporation shall also pay twenty
18 percent of the breaks derived from bets on harness races and fifty
19 percent of the breaks derived from bets on all other races to the agri-
20 culture and New York State horse breeding and development fund and to
21 the thoroughbred breeding and development fund, the total of such
22 payments to be apportioned fifty percent to each such fund. For the
23 purposes of this section, the New York city, Suffolk, Nassau, and the
24 Catskill regions shall constitute a single region and any thoroughbred

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD06982-01-9

S. 1975

2

1 **track** located within the Capital District region shall be deemed to be
2 within such single region. A "regional meeting" shall refer to either
3 harness or thoroughbred meetings, or both, except that a franchised
4 corporation shall not be a regional **track** for the purpose of receiving
5 distributions from bets on thoroughbred races conducted by a thorough-
6 bred **track** in the Catskill region conducting a mixed meeting. With the
7 exception of a harness racing association or corporation first licensed
8 to conduct pari-mutuel wagering at a **track** located in Tioga ~~or~~, Sara-
9 toga or Westchester county after January first, two thousand five,
10 racing corporations first licensed to conduct pari-mutuel racing after
11 January first, nineteen hundred eighty-six or a harness racing associ-
12 ation or corporation first licensed to conduct pari-mutuel wagering at a
13 **track** located in Genesee County after January first, two thousand five,
14 and quarter horse tracks shall not be "regional tracks"; if there is
15 more than one harness **track** within a region, such tracks shall evenly
16 divide payments made pursuant to the tables in paragraphs a and b of
17 this subdivision when neither **track** is running. In the event a **track**
18 elects to reduce its retained percentage from any or all of its pari-mu-
19 tuel pools, the payments to the **track** holding the race and the regional
20 **track** required by paragraphs a and b of this subdivision shall be
21 reduced in proportion to such reduction. Nothing in this section shall
22 be construed to authorize the conduct of off-track **betting** contrary to
23 the provisions of section five hundred twenty-three of this article.
24 § 2. This act shall take effect immediately.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S1975

SPONSOR: ADDABBO

TITLE OF BILL:

An act to amend the racing, pari-mutuel wagering and breeding law, in relation to the disposition of off-track pools

PURPOSE:

To allow Yonkers Raceway to maintain its status as a regional track

SUMMARY OF PROVISIONS:

Section 1 amends subdivision 1 of section 527 of the racing, pari-mutuel wagering and breeding law. It adds Westchester County to the exception, already granted to Tioga County, which allows "regional payments" to be paid to racetracks first licensed after January 1, 1986.

Section 2 states the effective date.

JUSTIFICATION:

Current law provides that "racing corporations first licensed to conduct pari-mutuel racing after January first, nineteen hundred eighty-six" are not considered to be regional tracks in that "regional payments" are generally not required to be paid. With MGM's recent acquisition of Yonkers Raceway, the track would fall under this provision and lose its regional track payments. By adding Westchester County to the exception that was provided for Tioga County, Yonkers Raceway will remain a regional track and the disposition of off-track pools will continue identically to their current disposition.

LEGISLATIVE HISTORY:

2017: S9096 - REFERRED TO RULES

2018: S9096 - REFERRED TO RULES

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

Immediately

S 6359 ADDABBO Same as **A 8203** Pretlow (MS)
ON FILE: 06/06/19 Racing, Pari-Mutuel Wagering and Breeding Law
TITLE....Relates to allowing off-track betting corporations to set up special reserve funds
06/06/19 REFERRED TO RULES
06/19/19 ORDERED TO THIRD READING
CAL.1711
06/19/19 PASSED SENATE
06/19/19 DELIVERED TO ASSEMBLY
06/19/19 referred to racing and wagering

A8203 Pretlow (MS) Same as **S 6359**
ADDABBO
Racing, Pari-Mutuel Wagering and Breeding Law
TITLE....Relates to allowing off-track betting corporations to set up special reserve funds
06/07/19 referred to racing and wagering

ADDABBO
Add §509-b, RWB L
Allows off-track betting corporations to set up special reserve funds to use as an alternative to current capital acquisition funds.

STATE OF NEW YORK

6359

2019-2020 Regular Sessions

IN SENATE

June 6, 2019

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in relation to allowing *off-track betting* corporations to set up special reserve funds

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. The racing, pari-mutuel wagering and breeding law is
2 amended by adding a new section 509-b to read as follows:
- 3 § 509-b. Special reserve fund. The corporation may create and estab-
4 lish a special reserve fund for the purpose of making any statutory
5 payments to any New York state entity as required by law, including
6 payments to New York state tracks. Such special reserve fund shall
7 consist of the amounts specified pursuant to subdivision three-a of
8 section five hundred thirty-two of this chapter. No such one percent
9 contribution may be made to the special reserve fund if such one percent
10 contribution is made to the capital acquisition fund under section five
11 hundred nine-a of this chapter. If such one percent contribution is
12 made to the special reserve fund:
- 13 1. such contribution shall not exceed the amount of one percent of the
14 total pari-mutuel wagering pools for the quarter in which such contrib-
15 ution is made;
- 16 2. such contribution shall not reduce the amount of quarterly net
17 revenues, exclusive of surcharge revenues, to an amount less than fifty
18 percent of such net revenues; and
- 19 3. the balance of such fund shall not exceed the lesser of one percent
20 of total pari-mutuel wagering pools for the previous twelve months, or
21 the undepreciated value of the corporation's offices, facilities, and
22 premises.
- 23 § 2. This act shall take effect immediately.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD13147-01-9

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S6359

REVISED 06/07/19

SPONSOR: ADDABBO

TITLE OF BILL: An act to amend the racing, pari-mutuel wagering and breeding law, in relation to allowing off-track betting corporations to set up special reserve funds

PURPOSE:

The purpose of this bill is to create a special reserve fund for off track betting corporations and allow the current 1 percent take out allowed for on exotic bet to be redirected from the capital acquisition fund to the newly created special reserve fund to be disbursed solely for expenses owed to New York State entities such as race tracks, horsemen and breeding funds and state and local governments.

SUMMARY OF PROVISIONS:

Section 1 creates a special reserve fund for off track betting corporations and authorizes the current 1 percent of exotic bets take given to OTBs to be redirected to fund this new fund. Monies in this fund shall only be disbursed to New York State entities.

Section 2 establishes the effective date.

JUSTIFICATION:

Current law does not allow for Off Track Betting. Corporations (OTBs) to have a reserve fund to build a fund balance to help offset payments made for operational expenses. While OTBs do have a capital acquisition fund, such monies cannot be spent on operational expenses, the bulk of which are payments owed to New York based entities such as tracks, horsemen and breeding funds and payments owed to state and local governments.

This legislation would modernize the laws that govern off track betting corporation finance by creating a special reserve fund, financed by redirecting the existing 1 percent of exotic bets revenue stream from the capital acquisition fund to this newly created special reserve fund. This money will then be used to pay off expenses owed to New York State entities such as race tracks, horsemen and breeding funds and state and local governments which is a benefit to all entities involved.

In addition, monies already collected in the capital acquisition fund will remain in such fund and only be allowed to be disbursed for designated capital purposes.

PRIOR LEGISLATIVE HISTORY:

New Bill

FISCAL IMPLICATIONS:

None to state or local governments. However, off track betting corporation statutory payments made to both state and local governments will be paid out in a more efficient and timely manner.

EFFECTIVE DATE:

This act shall take effect immediately.

S 4913 GOUNARDES Same as [A 7718](#) Pretlow
ON FILE: 03/29/19 New York City
TITLE....Provides for the payment of the annual
contributions owed and to be owed on behalf of the
New York city off-track betting corporation to the
New York city employees' retirement system
03/29/19 REFERRED TO CIVIL SERVICE AND
PENSIONS
05/29/19 REPORTED AND COMMITTED TO
FINANCE
06/12/19 COMMITTEE DISCHARGED AND
COMMITTED TO RULES
06/12/19 ORDERED TO THIRD READING
CAL.1319
06/12/19 PASSED SENATE
06/12/19 DELIVERED TO ASSEMBLY
06/12/19 referred to ways and means

A7718 Pretlow Same as [S 4913](#)
GOUNARDES
New York City
TITLE....Provides for the payment of the annual
contributions owed and to be owed on behalf of
the New York city off-track betting corporation to
the New York city employees' retirement system
05/17/19 referred to governmental employees
05/21/19 reported referred to ways and means

GOUNARDES

Provides for the payment of the annual contributions owed and to be owed on behalf of the New York city off-track betting corporation to the New York city employees' retirement system.

STATE OF NEW YORK

4913

2019-2020 Regular Sessions

IN SENATE

March 29, 2019

Introduced by Sen. GOUNARDES -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to provide for the payment of the annual contributions owed and to be owed on behalf of the New York city *off-track betting* corporation to the New York city employees' retirement system

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Statement of legislative findings and intent. The legisla-
2 ture hereby finds that the state has a statutory and constitutional
3 obligation to protect and fund the pension benefits of the former
4 employees and retirees of the defunct New York city *off-track betting*
5 corporation.
6 The New York city *off-track betting* corporation is a public benefit
7 corporation created pursuant to state law and is a participating employ-
8 er in the New York city employees' retirement system. The pension bene-
9 fits of the corporation's former employees and retirees are protected
10 from impairment under article V, section 7 of the state constitution.
11 In 2008, the state legislatively enhanced its role with respect to the
12 New York city *off-track betting* corporation due to its financial diffi-
13 culties, thus becoming its successor for purposes of assuming the statu-
14 tory and constitutional obligation to make pension contributions. The
15 corporation ceased operations in 2010 and has since failed to make annu-
16 al contributions to the New York city employees' retirement system as
17 required under the administrative code of the city of New York.
18 Sections 13-130 and 13-638.2 of the administrative code of the city of
19 New York provide that the employer liabilities of a public benefit
20 corporation that participates in the New York city employees' retirement
21 system, such as the New York city *off-track betting* corporation, are to
22 be paid by the corporation or a successor. On March 8, 2018, the board
23 of trustees of the New York city employees' retirement system adopted a
24 resolution recognizing the state as a successor to the New York city

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 *off-track betting* corporation and a responsible obligor with respect to
2 its required contributions.

3 As a successor to the New York city *off-track betting* corporation, and
4 in the interest of properly funding the pension benefits of its former
5 employees and retirees in compliance with the state constitution, the
6 state will fulfill the past, present, and future obligations of the New
7 York city *off-track betting* corporation to the New York city employees'
8 retirement system as follows:

9 § 2. Definitions. The following words and phrases as used in this act
10 shall have the following meanings unless a different meaning is plainly
11 required by context.

12 1. "Actuary" shall mean the actuary appointed by the board of trustees
13 of the New York city employees' retirement system pursuant to section
14 13-121 of the administrative code of the city of New York.

15 2. "City fiscal year" shall mean a fiscal year of the city of New York
16 as defined in section 226 of the New York city charter.

17 3. "Executive director" shall mean the executive director appointed by
18 the board of trustees of the New York city employees' retirement system
19 pursuant to paragraph 2 of subdivision b of section 13-103 of the admin-
20 istrative code of the city of New York.

21 4. "Interest" shall mean the rate per centum per annum of interest
22 specified in paragraph 2 of subdivision b of section 13-638.2 of the
23 administrative code of the city of New York.

24 5. "NYC administrative code" shall mean the administrative code of the
25 city of New York.

26 6. "NYCERS" shall mean the New York city employees' retirement system,
27 as established by chapter 427 of the laws of 1920.

28 7. "NYCOTB" shall mean the New York city *off-track betting* corpo-
29 ration, as established by chapter 144 of the laws of 1970 and continued
30 pursuant to article 6 of the racing, pari-mutuel wagering and breeding
31 law.

32 8. "State fiscal year" shall mean a fiscal year of the state as
33 defined in section 3 of the state finance law.

34 § 3. Payment of the future annual contributions to be owed by NYCOTB
35 to NYCERS. Notwithstanding the provisions of any general or special
36 state law or local law to the contrary, in state fiscal year 2021 and in
37 each state fiscal year thereafter, the department of audit and control
38 shall take actions necessary to pay in full, subject to appropriation,
39 the annual contribution determined to be owed by NYCOTB to NYCERS under
40 the provisions of the NYC administrative code, including but not limited
41 to sections 13-127, 13-130, 13-133, and 13-638.2 thereof, for the corre-
42 sponding city fiscal year. On or prior to the date specified in section
43 13-133 of the NYC administrative code for the payment of annual contrib-
44 utions by NYCOTB, such moneys, to the extent of such appropriation,
45 shall be payable to NYCERS on the audit and warrant of the comptroller
46 of the state of New York on vouchers certified or approved by the execu-
47 tive director of NYCERS in the manner prescribed by law. Notwithstand-
48 ing the provisions of any general or special state law or local law to
49 the contrary, an annual contribution determined and paid under this
50 section shall not include any amount attributable to any annual contrib-
51 ution previously determined to be owed by NYCOTB to NYCERS for any city
52 fiscal year prior to the 2021 city fiscal year and not yet paid by
53 NYCOTB or the state.

54 § 4. Payment of overdue annual contributions owed by NYCOTB to NYCERS.

55 a. Notwithstanding the provisions of any general or special state law or
56 local law to the contrary, on or before January 2, 2020, the actuary

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1 shall determine the sum of all annual contributions previously determined to be owed by NYCOTB to NYCERS for any city fiscal year prior to the 2021 city fiscal year and not yet paid by NYCOTB, with interest. Such interest, compounded annually, shall be computed on each such overdue annual contribution from the date such contribution was required to be paid pursuant to section 13-133 of the NYC administrative code through January 1, 2020. This sum shall be known as the "amount to be amortized".

9 b. Notwithstanding the provisions of any general or special state law or local law to the contrary, on or before January 2, 2020, the actuary shall further determine an amount that if paid in fifteen equal annual installments beginning on January 1, 2021, would be sufficient to pay in full the amount to be amortized with interest, compounded annually, computed from January 2, 2020, to January 1, 2035. This amount shall be known as the "annual amortization payment". Any annual amortization payment subsequent to the initial annual amortization payment payable on January 1, 2021, shall include the unpaid balance of any prior annual amortization payment, with interest, compounded annually, computed from the date such prior annual amortization payment was required to be paid to the date that such subsequent annual authorization payment is required to be paid.

22 c. Notwithstanding the provisions of any general or special state law or local law to the contrary, in state fiscal year 2021 and in each state fiscal year thereafter until the amount to be amortized, with interest, is paid in full, the department of audit and control shall take actions necessary to pay in full the annual amortization payment, subject to appropriation. On or prior to January 1st of each such state fiscal year, such moneys, to the extent of such appropriation shall be payable to NYCERS on the audit and warrant of the comptroller of the state of New York on vouchers certified or approved by the executive director of NYCERS in the manner prescribed by law.

32 § 5. Deposit of moneys. NYCERS shall deposit all moneys received pursuant to this act in the contingent reserve fund specified in section 13-127 of the NYC administrative code.

35 § 6. This act shall take effect immediately.

FISCAL NOTE.--Pursuant to Legislative Law, Section 50:

SUMMARY OF BILL: The proposed legislation provides a funding mechanism, through unconsolidated provisions of law, for the State of New York (State), as a successor obligor, to appropriate funds to pay past, present, and future New York City *Off-Track Betting* Corporation (NYCOTB) employer contributions, with applicable interest, to the New York City Employees' Retirement System (NYCERS) on behalf of former and retired NYCOTB employees.

Effective Date: Upon enactment.

BACKGROUND: NYCOTB is a defunct public benefit corporation and is a participating employer in NYCERS. NYCOTB retirees currently receive full retirement benefits from NYCERS even though NYCOTB last made partial employer contributions to NYCERS in fiscal years 2010 and 2011 and completely ceased making employer contributions thereafter. Unpaid past and future annual employer contributions, with applicable interest, continue to accrue.

FINANCIAL IMPACT - ANNUAL EMPLOYER CONTRIBUTIONS: The proposed legislation would require the Actuary of the City of New York (Actuary) to calculate the cumulative owed past and current NYCOTB employer contributions, with applicable interest, through and inclusive of fiscal year 2020 (the Amount to be Amortized), on or before January 2, 2020, and

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amortize such cumulative Amount in fifteen equal installments, with applicable interest, to be paid by the State Comptroller, subject to appropriation, commencing on or before January 1, 2021 and ending by January 1, 2035 (the Annual Amortization Payment). The proposed legislation would further require the calculation and, subject to State appropriation, annual payment of future annual NYCOTB employer contributions in accordance with applicable provisions of the Administrative Code of the City of New York (ACCNY).

FINANCIAL IMPACT - SUMMARY: Based on the actuarial assumptions and methods described herein, the enactment of this proposed legislation would, assuming full and timely payment, result in a potential total present value cost to the State of approximately \$289.9 million as of January 1, 2021. Any amount appropriated and paid by the State to NYCERS would be applied as a credit to NYCOTB and relieve any potential additional successor or any potential guarantor of such amounts paid.

The following Table presents an estimate of the annual cost for Fiscal Years 2021 through 2025 as of January 1, 2021.

Fiscal Year	Cost Attributable to Employer Contributions for Fiscal Years Prior to 2021*	Cost Attributable to Employer Contributions for Fiscal Years Subsequent to 2020**	Total
2021	\$16,933,668	\$13,378,824	\$30,312,492
2022	\$16,933,668	\$13,715,186	\$30,648,854
2023	\$16,933,668	\$14,060,844	\$30,994,512
2024	\$16,933,668	\$14,417,094	\$31,350,762
2025	\$16,933,668	\$14,783,804	\$31,717,472

* Equal to a 15-year amortization of \$165,026,521 as of January 1, 2021.

** Estimates of future employer contributions for OTB based on the actuarial assumptions and methods in effect for the June 30, 2018 (Lag) actuarial valuation, including an assumed investment return of 7.0% per annum.

OTHER COSTS: Not measured in this Fiscal Note are the following:

* The initial, additional administrative costs of NYCERS, other New York City agencies and the State to implement the proposed legislation.

* The impact of this proposed legislation on Other Postemployment Benefit (OPEB) costs.

CENSUS DATA: The estimates presented herein are based on the census data used in the Preliminary June 30, 2018 (Lag) actuarial valuation of NYCERS to determine the Preliminary Fiscal Year 2020 employer contributions.

As of June 30, 2018, OTB had 1,187 retirees with an average age of approximately 74.5 years, 370 terminated vested members with an average age of approximately 52.7 years, and 81 active off payroll members with an average age of approximately 45.0 years.

ACTUARIAL ASSUMPTIONS AND METHODS: The estimates of annual employer contributions presented herein have been calculated based on the actuarial assumptions and methods in effect for the June 30, 2018 (Lag) actuarial valuations used to determine the Preliminary Fiscal Year 2020 employer contributions of NYCERS.

RISK AND UNCERTAINTY: The costs presented in this Fiscal Note depend highly on the actuarial assumptions and methods used and are subject to change based on the realization of potential investment, demographic, contribution, and other risks. If actual experience deviates from actu-

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arial assumptions, the actual costs could differ from those presented herein. Costs are also dependent on the actuarial methods used, and therefore different actuarial methods could produce different results. Quantifying these risks is beyond the scope of this Fiscal Note.

STATEMENT OF ACTUARIAL OPINION: I, Sherry S. Chan, am the Chief Actuary for, and independent of, the New York City Retirement Systems and Pension Funds. I am a Fellow of the Society of Actuaries, an Enrolled Actuary under the Employee Retirement Income and Security Act of 1974, a Member of the American Academy of Actuaries, and a Fellow of the Conference of Consulting Actuaries. I meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion contained herein. To the best of my knowledge, the results contained herein have been prepared in accordance with generally accepted actuarial principles and procedures and with the Actuarial Standards of Practice issued by the Actuarial Standards Board.

FISCAL NOTE IDENTIFICATION: This Fiscal Note 2019-03 dated March 21, 2019 was prepared by the Chief Actuary for the New York City Employees' Retirement System. This estimate is intended for use only during the 2019 Legislative Session.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4913

SPONSOR: GOUNARDES

TITLE OF BILL: An act to provide for the payment of the annual contributions owed and to be owed on behalf of the New York city off-track betting corporation to the New York city employees' retirement system

PURPOSE OR GENERAL IDEA OF BILL:

To acknowledge that the state is the successor to the New York city off-track betting corporation ("NYCOTB") for purposes of its pension obligations and to provide for the state's payment of all past, present, and future liabilities of NYCOTB to the New York city employees' retirement system ("NYCERS").

SUMMARY OF PROVISIONS:

This bill would create a statutory mechanism for the payment by the state of the past, present, and future liabilities of NYCOTB to NYCERS, in recognition of the fact, as determined by the board of trustees of NYCERS, that the state is the successor to NYCOTB for this purpose.

With respect to NYCOTB's future annual contributions to NYCERS, as calculated pursuant to the administrative code of the city of New York, the bill requires the state to pay these contributions, subject to appropriations, beginning in state fiscal year 2020. The bill provides that funds appropriated for this purpose will be payable to NYCERS upon receipt by the state comptroller of appropriate vouchers from the executive director of NYCERS on or before the date that annual contributions from NYCOTB are due under the administrative code of the city of New York.

With respect to NYCOTB's overdue annual contributions to NYCERS, the bill provides for their amortization, with interest, over fifteen annual installments beginning on January 1, 2020, and requires the state pay these installments, subject to appropriations. The bill provides that funds appropriated for this purpose will be payable to NYCERS upon receipt by the state comptroller of appropriate vouchers from the executive director of NYCERS.

Finally, the bill confirms that any payments made by the state on behalf of NYCOTB will be deposited by NYCERS in its contingent reserve fund, like all other contributions received from responsible obligors.

JUSTIFICATION:

This bill satisfies the state's statutory and constitutional obligation to protect and fund the benefits of the former employees and retirees of the defunct NYCOTB.

NYCOTB is a state-created public benefit corporation. State law mandated NYCOTB to make certain distributions from its gross revenues to various parties, including racing-industry stakeholders and the state. This structure ultimately deprived NYCOTB of sufficient revenue to function as a going concern. As NYCOTB's financial difficulties mounted, the state legislatively enhanced its role with respect to the corporation pursuant to chapter 115 of the laws of 2008. Thereafter, state appointees oversaw the cessation of NYCOTB's operations and the distribution of its assets. NYCOTB has no assets remaining and has not paid its annual contribution to NYCERS in full since city fiscal year 2009.

Sections 13-130 and 13-638.2 of the administrative code of the city of New York provide that the contributions to NYCERS of a participating public benefit corporation are to be paid by its successor in the event of non-payment. In light of the aforementioned facts, on March 8, 2018, the board of trustees of NYCERS adopted a resolution recognizing the state as a successor to NYCOTB and a responsible obligor with respect to its required contributions.

The state's obligation to NYCERS also has a constitutional dimension, as the pension benefits of NYCOTB's former employees and retirees are protected from impairment under article V, section 7 of the state constitution. The state's proper funding of these pension benefits is a critical component of that constitutional guarantee.

This bill discharges the state's obligation to NYCERS in a prudent manner that appropriately considers the state's fiscal interests. The bill provides the state with ample time to incorporate this obligation into its future budgets, and it divides the overdue contributions of NYCOTB into fifteen installments. If this bill is enacted and implemented, the state will not only make NYCERS whole; it will make good on its commitment to NYCOTB's retirees and former employees.

PRIOR LEGISLATIVE HISTORY:

2018: Amended and recommitted to rules, print number 8945A

FISCAL IMPLICATIONS:

NYCOTB's overdue contributions, including interest to December 31, 2018, total \$119,168,554. NYCOTB's annual contribution for city fiscal year 2019 has been preliminarily calculated to be \$12,706,237. Because this bill does not contemplate payments until state fiscal year 2020, NYCOTB's annual contribution for city fiscal year 2019, plus interest, will become part of the overdue contributions to be amortized beginning on January 1, 2020. NYCOTB's future annual contributions are projected to range from \$12 million to \$17 million, exclusive of interest, each year until city fiscal year 2032. Thereafter, NYCOTB's annual contributions are projected to decrease significantly.

EFFECTIVE DATE:

This act shall take effect immediately.

23

PART HH

24 Section 1. Paragraph (a) of subdivision 1 of section 1003 of
the
25 racing, pari-mutuel wagering and breeding law, as amended by section
1
26 of part GG of chapter 59 of the laws of 2018, is amended to read
as

27 follows:

28 (a) Any racing association or corporation or regional **off-**
track
29 **betting** corporation, authorized to conduct pari-mutuel wagering
under
30 this chapter, desiring to display the simulcast of horse races on
which
31 pari-mutuel betting shall be permitted in the manner and subject to
the
32 conditions provided for in this article may apply to the commission
for
33 a license so to do. Applications for licenses shall be in such form
as
34 may be prescribed by the commission and shall contain such
information
35 or other material or evidence as the commission may require. No
license
36 shall be issued by the commission authorizing the simulcast
transmission
37 of thoroughbred races from a track located in Suffolk county. The
fee
38 for such licenses shall be five hundred dollars per simulcast
facility
39 and for account wagering licensees that do not operate either a
simul-
40 cast facility that is open to the public within the state of New York
or
41 a licensed racetrack within the state, twenty thousand dollars per
year
42 payable by the licensee to the commission for deposit into the
general
43 fund. Except as provided in this section, the commission shall
not
44 approve any application to conduct simulcasting into individual or
group
45 residences, homes or other areas for the purposes of or in
connection
46 with pari-mutuel wagering. The commission may approve simulcasting
into
47 residences, homes or other areas to be conducted jointly by one or
more
48 regional **off-track betting** corporations and one or more of the
follow-

49 ing: a franchised corporation, thoroughbred racing corporation or
a
50 harness racing corporation or association; provided (i) the
simulcasting
51 consists only of those races on which pari-mutuel betting is
authorized
52 by this chapter at one or more simulcast facilities for each of
the
53 contracting **off-track betting** corporations which shall include
wagers
54 made in accordance with section one thousand fifteen, one
thousand
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1 sixteen and one thousand seventeen of this article; provided
further
2 that the contract provisions or other simulcast arrangements for
such
3 simulcast facility shall be no less favorable than those in effect
on
4 January first, two thousand five; (ii) that each **off-track
betting**
5 corporation having within its geographic boundaries such
residences,
6 homes or other areas technically capable of receiving the
simulcast
7 signal shall be a contracting party; (iii) the distribution of
revenues
8 shall be subject to contractual agreement of the parties except
that
9 statutory payments to non-contracting parties, if any, may not
be
10 reduced; provided, however, that nothing herein to the contrary
shall
11 prevent a track from televising its races on an irregular basis
primari-
12 ly for promotional or marketing purposes as found by the commission.
For
13 purposes of this paragraph, the provisions of section one thousand
thir-
14 teen of this article shall not apply. Any agreement authorizing
an
15 in-home simulcasting experiment commencing prior to May fifteenth,
nine-
16 teen hundred ninety-five, may, and all its terms, be extended until
June
17 thirtieth, two thousand [~~nineteen~~] twenty; provided, however, that
any
18 party to such agreement may elect to terminate such agreement
upon
19 conveying written notice to all other parties of such agreement at
least
20 forty-five days prior to the effective date of the termination,
via
21 registered mail. Any party to an agreement receiving such notice of
an

22 intent to terminate, may request the commission to mediate between
the
23 parties new terms and conditions in a replacement agreement between
the
24 parties as will permit continuation of an in-home experiment until
June
25 thirtieth, two thousand [~~nineteen~~] twenty; and (iv) no in-home
simul-
26 casting in the thoroughbred special betting district shall occur
without
27 the approval of the regional thoroughbred track.
28 § 2. Subparagraph (iii) of paragraph d of subdivision 3 of
section
29 1007 of the racing, pari-mutuel wagering and breeding law, as amended
by
30 section 2 of part GG of chapter 59 of the laws of 2018, is amended
to
31 read as follows:
32 (iii) Of the sums retained by a receiving track located in
Westchester
33 county on races received from a franchised corporation, for the
period
34 commencing January first, two thousand eight and continuing through
June
35 thirtieth, two thousand [~~nineteen~~] twenty, the amount used
exclusively
36 for purses to be awarded at races conducted by such receiving
track
37 shall be computed as follows: of the sums so retained, two and one-
half
38 percent of the total pools. Such amount shall be increased or
decreased
39 in the amount of fifty percent of the difference in total
commissions
40 determined by comparing the total commissions available after July
tween-
41 ty-first, nineteen hundred ninety-five to the total commissions
that
42 would have been available to such track prior to July twenty-
first,
43 nineteen hundred ninety-five.
44 § 3. The opening paragraph of subdivision 1 of section 1014 of
the
45 racing, pari-mutuel wagering and breeding law, as amended by section
3
46 of part GG of chapter 59 of the laws of 2018, is amended to read
as
47 follows:
48 The provisions of this section shall govern the simulcasting of
races
49 conducted at thoroughbred tracks located in another state or country
on
50 any day during which a franchised corporation is conducting a race
meet-
51 ing in Saratoga county at Saratoga thoroughbred racetrack until
June

52 thirtieth, two thousand [~~nineteen~~] twenty and on any day regardless
of
53 whether or not a franchised corporation is conducting a race meeting
in
54 Saratoga county at Saratoga thoroughbred racetrack after June
thirtieth,
55 two thousand [~~nineteen~~] twenty. On any day on which a franchised
corpo-
56 ration has not scheduled a racing program but a thoroughbred
racing
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1 corporation located within the state is conducting racing, every
off-
2 track betting corporation branch office and every simulcasting
facility
3 licensed in accordance with section one thousand seven (that [~~have~~]
has
4 entered into a written agreement with such facility's
representative
5 horsemen's organization, as approved by the commission), one
thousand
6 eight, or one thousand nine of this article shall be authorized
to
7 accept wagers and display the live simulcast signal from
thoroughbred
8 tracks located in another state or foreign country subject to
the
9 following provisions:
10 § 4. Subdivision 1 of section 1015 of the racing, pari-mutuel
wagering
11 and breeding law, as amended by section 4 of part GG of chapter 59
of
12 the laws of 2018, is amended to read as follows:
13 1. The provisions of this section shall govern the simulcasting
of
14 races conducted at harness tracks located in another state or
country
15 during the period July first, nineteen hundred ninety-four through
June
16 thirtieth, two thousand [~~nineteen~~] twenty. This section shall
supersede
17 all inconsistent provisions of this chapter.
18 § 5. The opening paragraph of subdivision 1 of section 1016 of
the
19 racing, pari-mutuel wagering and breeding law, as amended by section
5
20 of part GG of chapter 59 of the laws of 2018, is amended to read
as
21 follows:
22 The provisions of this section shall govern the simulcasting of
races
23 conducted at thoroughbred tracks located in another state or country
on
24 any day during which a franchised corporation is not conducting a
race

25 meeting in Saratoga county at Saratoga thoroughbred racetrack until
June
26 thirtieth, two thousand [~~nineteen~~] twenty. Every **off-track**
betting
27 corporation branch office and every simulcasting facility licensed
in
28 accordance with section one thousand seven that have entered
into a
29 written agreement with such facility's representative horsemen's
organ-
30 ization as approved by the commission, one thousand eight or one
thou-
31 sand nine of this article shall be authorized to accept wagers
and
32 display the live full-card simulcast signal of thoroughbred
tracks
33 (which may include quarter horse or mixed meetings provided that
all
34 such wagering on such races shall be construed to be thoroughbred
races)
35 located in another state or foreign country, subject to the
following
36 provisions; provided, however, no such written agreement shall
be
37 required of a franchised corporation licensed in accordance with
section
38 one thousand seven of this article:
39 § 6. The opening paragraph of section 1018 of the racing, pari-
mutuel
40 wagering and breeding law, as amended by section 6 of part GG of
chapter
41 59 of the laws of 2018, is amended to read as follows:
42 Notwithstanding any other provision of this chapter, for the
period
43 July twenty-fifth, two thousand one through September eighth, two
thou-
44 sand [~~eighteen~~] nineteen, when a franchised corporation is conducting
a
45 race meeting within the state at Saratoga Race Course, every **off-**
track
46 **betting** corporation branch office and every simulcasting
facility
47 licensed in accordance with section one thousand seven (that has
entered
48 into a written agreement with such facility's representative
horsemen's
49 organization as approved by the commission), one thousand eight or
one
50 thousand nine of this article shall be authorized to accept wagers
and
51 display the live simulcast signal from thoroughbred tracks located
in
52 another state, provided that such facility shall accept wagers on
races
53 run at all in-state thoroughbred tracks which are conducting
racing

54 programs subject to the following provisions; provided, however, no
such

55 written agreement shall be required of a franchised corporation
licensed

56 in accordance with section one thousand seven of this article.

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A.

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1 § 7. Section 32 of chapter 281 of the laws of 1994, amending
the
2 racing, pari-mutuel wagering and breeding law and other laws relating
to
3 simulcasting, as amended by section 7 of part GG of chapter 59 of
the
4 laws of 2018, is amended to read as follows:

5 § 32. This act shall take effect immediately and the pari-mutuel
tax

6 reductions in section six of this act shall expire and be
deemed

7 repealed on July 1, [~~2019~~] 2020; provided, however, that
nothing

8 contained herein shall be deemed to affect the application,
qualifica-

9 tion, expiration, or repeal of any provision of law amended by
any

10 section of this act, and such provisions shall be applied or
qualified

11 or shall expire or be deemed repealed in the same manner, to the
same

12 extent and on the same date as the case may be as otherwise provided
by

13 law; provided further, however, that sections twenty-three and
twenty-

14 five of this act shall remain in full force and effect only until May
1,

15 1997 and at such time shall be deemed to be repealed.

16 § 8. Section 54 of chapter 346 of the laws of 1990, amending
the

17 racing, pari-mutuel wagering and breeding law and other laws relating
to

18 simulcasting and the imposition of certain taxes, as amended by
section

19 8 of part GG of chapter 59 of the laws of 2018, is amended to read
as

20 follows:

21 § 54. This act shall take effect immediately; provided,
however,

22 sections three through twelve of this act shall take effect on
January

23 1, 1991, and section 1013 of the racing, pari-mutuel wagering and
breed-

24 ing law, as added by section thirty-eight of this act, shall expire
and

25 be deemed repealed on July 1, [~~2019~~] 2020; and section eighteen of
this

26 act shall take effect on July 1, 2008 and sections fifty-one and
fifty-

27 two of this act shall take effect as of the same date as chapter 772
of
28 the laws of 1989 took effect.
29 § 9. Paragraph (a) of subdivision 1 of section 238 of the
racing,
30 pari-mutuel wagering and breeding law, as amended by section 9 of
part
31 GG of chapter 59 of the laws of 2018, is amended to read as follows:
32 (a) The franchised corporation authorized under this chapter
to
33 conduct pari-mutuel betting at a race meeting or races run thereat
shall
34 distribute all sums deposited in any pari-mutuel pool to the holders
of
35 winning tickets therein, provided such tickets be presented for
payment
36 before April first of the year following the year of their
purchase,
37 less an amount which shall be established and retained by such
fran-
38 chised corporation of between twelve to seventeen per centum of
the
39 total deposits in pools resulting from on-track regular bets, and
four-
40 teen to twenty-one per centum of the total deposits in pools
resulting
41 from on-track multiple bets and fifteen to twenty-five per centum of
the
42 total deposits in pools resulting from on-track exotic bets and
fifteen
43 to thirty-six per centum of the total deposits in pools resulting
from
44 on-track super exotic bets, plus the breaks. The retention rate to
be
45 established is subject to the prior approval of the gaming
commission.
46 Such rate may not be changed more than once per calendar quarter to
be
47 effective on the first day of the calendar quarter. "Exotic bets"
and
48 "multiple bets" shall have the meanings set forth in section
five
49 hundred nineteen of this chapter. "Super exotic bets" shall have
the
50 meaning set forth in section three hundred one of this chapter.
For
51 purposes of this section, a "pick six bet" shall mean a single bet
or
52 wager on the outcomes of six races. The breaks are hereby defined as
the
53 odd cents over any multiple of five for payoffs greater than one
dollar
54 five cents but less than five dollars, over any multiple of ten
for
55 payoffs greater than five dollars but less than twenty-five
dollars,

56 over any multiple of twenty-five for payoffs greater than twenty-
five

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A.

1 dollars but less than two hundred fifty dollars, or over any multiple
of
2 fifty for payoffs over two hundred fifty dollars. Out of the amount
so
3 retained there shall be paid by such franchised corporation to
the
4 commissioner of taxation and finance, as a reasonable tax by the
state
5 for the privilege of conducting pari-mutuel betting on the races run
at
6 the race meetings held by such franchised corporation, the
following
7 percentages of the total pool for regular and multiple bets five
per
8 centum of regular bets and four per centum of multiple bets plus
twenty
9 per centum of the breaks; for exotic wagers seven and one-half
per
10 centum plus twenty per centum of the breaks, and for super exotic
bets
11 seven and one-half per centum plus fifty per centum of the breaks.
12 For the period June first, nineteen hundred ninety-five
through
13 September ninth, nineteen hundred ninety-nine, such tax on
regular
14 wagers shall be three per centum and such tax on multiple wagers
shall
15 be two and one-half per centum, plus twenty per centum of the
breaks.
16 For the period September tenth, nineteen hundred ninety-nine
through
17 March thirty-first, two thousand one, such tax on all wagers shall
be
18 two and six-tenths per centum and for the period April first, two
thou-
19 sand one through December thirty-first, two thousand ~~nineteen~~
twenty,
20 such tax on all wagers shall be one and six-tenths per centum, plus,
in
21 each such period, twenty per centum of the breaks. Payment to the
New
22 York state thoroughbred breeding and development fund by such
franchised
23 corporation shall be one-half of one per centum of total daily on-
track
24 pari-mutuel pools resulting from regular, multiple and exotic bets
and
25 three per centum of super exotic bets provided, however, that for
the
26 period September tenth, nineteen hundred ninety-nine through March
thir-

27 ty-first, two thousand one, such payment shall be six-tenths of one
per
28 centum of regular, multiple and exotic pools and for the period
April
29 first, two thousand one through December thirty-first, two
thousand
30 [~~nineteen~~] twenty, such payment shall be seven-tenths of one per
centum
31 of such pools.
32 § 10. This act shall take effect immediately.

John Signor (Capital OTB) Outline for the Albany Law School

Saratoga Equine, Racing and Gaming Program

August 6, 2019

1. History of OTB
2. Six Regional OTBs
3. Only game in town
4. Competition
5. Antiquated State Laws
6. NYC OTB closes, Suffolk bankruptcy
7. New Life – VLT money for Western, Suffolk & Nassau
8. Capital and Catskill remain with only simulcasting
9. Capital OTB profitable
10. Capital OTB TV (See video screen)
11. Capital OTB works with tracks
12. Bad laws means deficits
13. Capital OTB actions to become profitable
 - a. Reduce workforce
 - b. Cut spending by millions
 - c. Close unprofitable branches
 - d. Create EZ Bet concept
 - e. Manage bad laws
 - f. Aggressive promotions and marketing
 - g. New web site, fan friendly, free stream for shows
 - h. State changes law to help cash flow
 - i. Rivers Casino – only OTB in state at casino
14. Still need to address some issues with State
15. Yes, we want to be part of sports betting

2017 TOTAL HANDLE ON RACES RUN IN NEW YORK
On-Track, Off-Track and Out-of-State [IMPORTS]
Guest

	<u>NYRA</u>	<u>Finger Lakes</u>	<u>Batavia</u>	<u>Buffalo</u>	<u>Track Holding Race Monticello</u>	<u>Saratoga Harness</u>	<u>Tioga</u>	<u>Vernon</u>	<u>Yonkers</u>	<u>Total</u>
ON-TRACK LIVE	\$ 299,575,639	\$ 3,773,029	\$ 1,193,644	\$ 1,097,754	\$ 1,364,411	\$ 4,693,709	\$ 913,295	\$ 1,762,565	\$ 9,382,609	\$ 323,756,655
SIMULCAST IMPORTS:										
Imported to NYS Tracks:										
NYRA	\$ 47,218,236	\$ 6,273,395	\$ 324,403	\$ 522,253	\$ 3,236,952	\$ 1,686,651	\$ 128,576	\$ 150,835	\$ 7,194,720	\$ 66,736,021
Finger Lakes	3,472,879	36,934		47,732	296,770	79,496	8,011	9,071	42,170	3,993,063
Batavia	449,839	59,720		162,330	113,900	73,618	6,931	20,782	65,882	953,002
Buffalo	1,013,911	84,083	77,858		63,338	103,710	15,899	15,251	42,990	1,416,840
Monticello	852,740	28,061	11,751	16,058	92,006	16,432		6,871	243,015	1,266,934
Saratoga	11,608,447	450,160	39,252	67,926	782,953	29,572		54,862	601,192	13,634,364
Tioga	535,396	72,637	10,812	16,173	57,836	70,862		27,832	81,004	872,552
Vernon	1,215,156	101,731	22,070	48,053	274,350	224,566	55,033		130,197	2,071,156
Yonkers	20,539,879	696,071	71,565	107,990	783,240	522,367	53,938	49,103		22,824,153
TOTAL TO NYS TRACKS	\$ 86,906,483	\$ 7,765,858	\$ 594,445	\$ 988,515	\$ 5,609,339	\$ 2,853,276	\$ 314,392	\$ 334,607	\$ 8,401,170	\$ 113,768,085
IMPORTED TO NYS OTB's										
Capital	\$ 48,948,832	\$ 2,576,658	\$ 129,646	\$ 227,558	\$ 1,534,351	\$ 1,939,589	\$ 52,349	\$ 243,284	\$ 1,378,565	\$ 57,030,832
Catskill	15,012,413	1,379,899	64,289	131,722	2,134,902	602,184	70,029	28,765	1,788,541	21,212,744
Nassau	44,763,632	2,369,604	81,911	171,802	2,293,401	564,105	34,146	24,817	2,657,376	52,960,794
Suffolk	29,432,186	1,353,171	84,778	147,557	1,223,755	479,600	19,353	31,416	1,297,265	34,069,081
Western	13,247,909	3,000,132	1,156,842	1,327,370	1,857,756	856,681	59,266	157,195	1,205,906	22,869,057
TOTAL TO NYS OTB'S	\$ 151,404,972	\$ 10,679,464	\$ 1,517,466	\$ 2,006,009	\$ 9,044,165	\$ 4,442,159	\$ 235,143	\$ 485,477	\$ 8,327,653	\$ 188,142,508
TOTAL IMPORTS	\$ 1,653,926,890	\$ 108,033,734	\$ 4,934,904	\$ 10,523,253	\$ 72,198,622	\$ 34,212,122	\$ 3,538,010	\$ 3,492,425	\$ 95,633,165	\$ 1,986,493,124
TOTAL HANDLE ON NYS RACING	\$ 2,191,813,984	\$ 130,252,085	\$ 8,240,459	\$ 14,615,531	\$ 88,216,537	\$ 46,201,266	\$ 5,000,840	\$ 6,075,074	\$ 121,744,597	\$ 2,612,160,372

NEW YORK STATE REGIONAL OFF-TRACK BETTING CORPORATIONS
STATEMENT OF REVENUES NET OF EXPENSES
2017

	<u>Capital</u>	<u>Catskill</u>	<u>Nassau</u>	<u>Suffolk</u>	<u>Western</u>	<u>All Regions</u>
Pari-Mutuel Revenue:						
Statutory Take-Out	\$ 29,483,792	\$ 13,932,466	\$ 32,361,045	\$ 17,919,355	\$ 15,287,834	\$ 108,984,492
Breakage	611,095	209,751	611,978	342,697	236,925	2,012,446
Minus Pools	(46,638)	(10,986)	(106,400)	(6,465)	(12,322)	(182,811)
Missed Pools	(32)	3,274		(2,799)	-	443
Derived from Section 532.3.b.(iv) & 532.7	748,754	667,665	1,112,019	422,213	818,021	3,768,672
Total Pari-Mutuel Revenue	\$ 30,796,971	\$ 14,802,171	\$ 33,978,642	\$ 18,675,000	\$ 16,330,458	\$ 114,583,242
Statutory & Simulcast Payments						
New York State (Pari-Mutuel Tax & Breakage)	\$ 1,079,979	\$ 576,467	\$ 1,097,918	\$ 735,005	\$ 625,455	\$ 4,114,824
New York State Racing & Wagering Board Regulatory Fee	873,771	399,800	951,018	524,714	432,122	3,181,425
NYS Thoroughbred Development & Breeding Fund	651,505	278,979	736,115	417,713	297,571	2,381,883
Ag. & NYS Breeding & Dev. Fund Breeders' Fund - Harness	303,253	173,824	352,721	197,164	230,013	1,256,975
In State Thoroughbred Tracks	6,782,085	2,885,215	7,790,375	4,375,431	2,954,272	24,787,378
Out of State Thoroughbred Tracks	3,859,779	1,614,393	4,161,105	2,168,535	1,640,388	13,444,200
In State Harness Tracks	2,335,497	944,895	2,703,121	847,500	1,328,542	8,159,555
Out of State Harness Tracks	299,226	202,737	320,506	203,407	322,228	1,348,104
Special Events	355,063	265,018	347,918	215,714	294,548	1,478,261
Total Statutory & Simulcast Payments	\$ 16,540,158	\$ 7,341,328	\$ 18,460,797	\$ 9,685,183	\$ 8,125,139	\$ 60,152,605
Net Pari-Mutuel Revenue	\$ 14,256,813	\$ 7,460,843	\$ 15,517,845	\$ 8,989,817	\$ 8,205,319	\$ 54,430,637
Other Revenue						
Admission Income & Tax	\$ 24,983	\$ 66,396	\$ 59,129	\$ 87,464	\$ -	\$ 237,972
Lottery Income	220,170	140,406	29,726	76,404	207,591	674,297
Concession Income	55,448	15,397	25,824	8,800	13,336	118,805
Derived from Section 509-a(3)	-	-	-	-	-	-
Transfer from Section 509 Reserve Fund	-	-	-	-	-	-
Interest Income	11,948	-	-	8	1,585	13,541
Enterprise Fund - Net Revenue / (Loss)	(1,435,518)	-	-	16,359,680	5,885,840	20,810,002
Other Income	2,017,076	785,266	8,327,684	2,625,978	2,531,030	16,287,034
Net Revenue from Operations	\$ 15,150,920	\$ 8,468,308	\$ 23,980,208	\$ 28,148,152	\$ 16,844,701	\$ 92,572,289
Operating Expenses						
Branch Expenses	\$ 11,197,492	\$ 7,170,255	\$ 27,143,577	\$ 6,838,102	\$ 9,189,374	\$ 61,538,800
General & Administrative Expenses	4,269,831	2,164,518	4,143,800	6,495,678	8,621,949	25,695,776
Total Operating Expenses	\$ 15,467,323	\$ 9,334,773	\$ 31,287,377	\$ 13,333,780	\$ 17,811,323	\$ 87,234,576
Section 516 Net Revenues from Operations	\$ (316,403)	\$ (866,465)	\$ (7,327,169)	\$ 14,814,372	\$ (966,622)	\$ 5,337,713
Less: Section 509-a(ii) Contributions to Capital Acquisition Fund	\$ 102,760	-	-	-	-	\$ 102,760
Section 509 Contributions to Reserve Fund	-	-	-	-	-	-
Section 527.6 Obligations	-	-	-	-	-	-
Section 516 Net Revenue for Distribution	\$ (419,163)	\$ (866,465)	\$ (7,327,169)	\$ 14,814,372	\$ (966,622)	\$ 5,234,953

NEW YORK STATE REGIONAL OFF-TRACK BETTING CORPORATIONS
STATEMENT OF REVENUES NET OF EXPENSES
2017

	<u>Capital</u>	<u>Catskill</u>	<u>Nassau</u>	<u>Suffolk</u>	<u>Western</u>	<u>All Regions</u>
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Total Pari-Mutuel Revenue	\$ 30,796,971	\$ 14,802,171	\$ 33,978,642	\$ 18,675,000	\$ 16,330,458	\$ 114,583,242
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In State Thoroughbred Tracks	6,782,085	2,885,215	7,790,375	4,375,431	2,954,272	24,787,378
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In State Harness Tracks	2,335,497	944,895	2,703,121	847,500	1,328,542	8,159,555
Out of State Harness Tracks	299,226	202,737	320,506	203,407	322,228	1,348,104
Special Events	355,063	265,018	347,918	215,714	294,548	1,478,261
Total Statutory & Simulcast Payments	\$ 16,540,158	\$ 7,341,328	\$ 18,460,797	\$ 9,685,183	\$ 8,125,139	\$ 60,152,605
Net Pari-Mutuel Revenue	\$ 14,256,813	\$ 7,460,843	\$ 15,517,845	\$ 8,989,817	\$ 8,205,319	\$ 54,430,637
Other Revenue						
Admission Income & Tax	\$ 24,983	\$ 66,396	\$ 59,129	\$ 87,464	\$ -	\$ 237,972
Lottery Income	220,170	140,406	29,726	76,404	207,591	674,297
Concession Income	55,448	15,397	25,824	8,800	13,336	118,805
Derived from Section 509-a(3)	-	-	-	-	-	-
Transfer from Section 509 Reserve Fund	-	-	-	-	-	-
Interest Income	11,948	-	-	8	1,585	13,541
Enterprise Fund - Net Revenue / (Loss)	(1,435,518)	-	-	16,359,680	5,885,840	20,810,002
Other Income	2,017,076	785,266	8,327,684	2,625,978	2,531,030	16,287,034
Net Revenue from Operations	\$ 15,150,920	\$ 8,468,308	\$ 23,960,208	\$ 28,148,152	\$ 16,844,701	\$ 92,572,289
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Branch Expenses	\$ 11,197,492	\$ 7,170,255	\$ 27,143,577	\$ 6,838,102	\$ 9,189,374	\$ 61,538,800
General & Administrative Expenses	4,269,831	2,164,518	4,143,800	6,495,678	8,621,949	25,695,776
Total Operating Expenses	\$ 15,467,323	\$ 9,334,773	\$ 31,287,377	\$ 13,333,780	\$ 17,811,323	\$ 87,234,576
Section 516 Net Revenues from Operations	\$ (316,403)	\$ (866,465)	\$ (7,327,169)	\$ 14,814,372	\$ (966,622)	\$ 5,337,713
Less: Section 509-a(ii) Contributions to Capital Acquisition Fund	\$ 102,760	-	-	-	-	\$ 102,760
Section 509 Contributions to Reserve Fund	-	-	-	-	-	-
Section 527.6 Obligations	-	-	-	-	-	-
Section 516 Net Revenue for Distribution	\$ (419,163)	\$ (866,465)	\$ (7,327,169)	\$ 14,814,372	\$ (966,622)	\$ 5,234,953

**NEW YORK STATE REGIONAL OFF-TRACK BETTING CORPORATIONS
TOTAL HANDLE BY TRACK AND REGION
2017**

	<u>Capital</u>	<u>Catskill</u>	<u>Nassau</u>	<u>Suffolk</u>	<u>Western</u>	<u>All Regions</u>
<u>New York State Thoroughbred:</u>						
NYRA:						
Aqueduct	\$ 13,115,783	\$ 4,836,962	\$ 15,679,306	\$ 10,318,133	\$ 4,410,610	\$ 48,360,794
Belmont	17,697,221	6,426,776	18,602,148	12,546,384	5,461,290	60,733,819
Saratoga	18,135,828	3,748,675	10,482,178	6,567,669	3,376,009	42,310,359
Total NYRA	\$ 48,948,832	\$ 15,012,413	\$ 44,763,632	\$ 29,432,186	\$ 13,247,909	\$ 151,404,972
Finger Lakes	2,576,658	1,379,899	2,369,604	1,353,171	3,000,132	10,679,464
Handle on NYS Thoroughbred Tracks	\$ 51,525,490	\$ 16,392,312	\$ 47,133,236	\$ 30,785,357	\$ 16,248,041	\$ 162,084,436
<u>New York State Harness:</u>						
Batavia	\$ 129,646	\$ 64,289	\$ 81,911	\$ 84,778	\$ 1,156,842	\$ 1,517,466
Buffalo	227,558	131,722	171,802	147,557	1,327,370	2,006,009
Monticello	1,534,351	2,134,902	2,293,401	1,223,755	1,857,756	9,044,165
Saratoga	1,939,589	602,184	564,105	479,600	856,681	4,442,159
Tioga	52,349	70,029	34,146	19,353	59,266	235,143
Vernon	243,284	28,765	24,817	31,416	157,195	485,477
Yonkers	1,378,565	1,788,541	2,657,376	1,297,265	1,205,906	8,327,653
Handle on NYS Harness Tracks	\$ 5,505,342	\$ 4,820,432	\$ 5,827,558	\$ 3,283,724	\$ 6,621,016	\$ 26,058,072
Handle on All New York State Tracks	\$ 57,030,832	\$ 21,212,744	\$ 52,960,794	\$ 34,069,081	\$ 22,869,057	\$ 188,142,508
Out-of-State Thoroughbred	\$ 72,781,217	\$ 33,767,953	\$ 85,421,993	\$ 42,327,451	\$ 33,193,740	\$ 267,492,354
Out-of-State Harness	11,955,706	8,850,008	15,997,531	8,499,460	12,750,134	58,052,839
Handle on Out-of-State Tracks	\$ 84,736,923	\$ 42,617,961	\$ 101,419,524	\$ 50,826,911	\$ 45,943,874	\$ 325,545,193
<u>Special Event Races:</u>						
Kentucky Derby	\$ 1,716,314	\$ 1,629,419	\$ 2,145,370	\$ 1,401,448	\$ 1,940,412	\$ 8,832,963
Preakness Stakes	851,354	742,967	1,175,891	733,834	863,350	4,367,396
Breeders Cup	1,293,106	430,211	801,430	421,122	403,635	3,349,504
Handle on Special Event Races	\$ 3,860,774	\$ 2,802,597	\$ 4,122,691	\$ 2,556,404	\$ 3,207,397	\$ 16,549,863
Total NYS OTB Handle on All Tracks	\$ 145,628,529	\$ 66,633,302	\$ 158,503,009	\$ 87,452,396	\$ 72,020,328	\$ 530,237,564

NEW YORK STATE REGIONAL OFF-TRACK BETTING CORPORATIONS
STATEMENT OF REVENUES NET OF EXPENSES
2017

Select Definitions and Notes

Revenue:

Enterprise Fund: Net revenue or loss from the corporations business enterprise. For Capital OTB the amount relates to the operation of a simulcast television channel. For Western OTB the amount relates to the operation of Batavia Downs Racetrack and Video Gaming Facility. For Suffolk OTB the amount relates to the operation of a Video Gaming Facility.

Operating Expenses:

GASB 45: Certain expense include amounts relating to the Government Accounting Standards Board Statement 45 (GASB 45). GASB 45 requires the recognition of Other Post Employment Benefits (OPEB).

<u>Expense</u>	<u>Capital</u>	<u>Catskill</u>	<u>Nassau</u>	<u>Suffolk</u>	<u>Western</u>	<u>Total</u>
Enterprise Fund	\$ 59,491	\$ -	\$ -	\$ 1,378,100	\$ 748,761	\$ 2,186,352
Branch Expenses	542,617	185,137	8,505,595	147,981	1,123,142	10,504,472
General & Administrative	438,060	98,014	1,500,987	472,862	-	2,509,923
Total	\$ 1,040,168	\$ 283,151	\$ 10,006,582	\$ 1,998,943	\$ 1,871,903	\$15,200,747

Section 516 Net Revenue Available for Distribution: Amounts available after payment of allowable expenses that must be distributed to participating localities on a quarterly basis.

General Notes:

Reference to "section" relates to sections within the New York State Racing, Pari-Mutuel Wagering and Breeding Law.

Distributable Surcharge

In addition to Section 516 Net Revenue, corporations are required to distribute surcharge levied on winning payoffs to participating and other localities on a monthly basis. The following is a summary of the surcharge available for distribution as of 12/31/2017 for each corporation.

	<u>Capital</u>	<u>Catskill</u>	<u>Nassau</u>	<u>Suffolk</u>	<u>Western</u>	<u>Total</u>
Participating Localities	\$ 1,176,772	\$1,003,101	\$ 1,740,109	\$ 717,125	\$ 1,189,203	\$ 5,826,310
Other Localities	424,436	263,988	628,090	294,912	336,786	1,948,212
Total Surcharge	\$ 1,601,208	\$1,267,089	\$ 2,368,199	\$ 1,012,037	\$ 1,525,989	\$ 7,774,522

The above does not include surcharge retained by the corporation for corporate purposes or the capital acquisition fund.

Participating Localities are local governments within the Off-Track Betting Region that have elected to participate under Section 502 of the Racing, Pari-Mutuel Wagering and Breeding Law. Other Localities are local governments which have racetracks located within their borders and receive a portion of the surcharge.

OTB Articles

<https://dailygazette.com/article/2019/07/06/q-a-with-new-nyra-ceo-and-president-david-o-rourke>

https://www.lockportjournal.com/news/local_news/county-legislature-turns-back-otb-audit-call/article_9c0d5769-f501-506e-9008-c7eab49857e4.html

<https://www.timesunion.com/news/article/Budget-opens-the-door-to-OTB-mergers-13634886.php>

<http://niagarafallsreporter.com/western-regional-otb-resolution-invites-state-audit/>

<https://buffalonews.com/2019/06/24/batavia-downs-gaming-plans-more-sports-ticket-giveaways-as-it-cites-clean-record/>

<https://www.newsday.com/long-island/columnists/joye-brown/suffolk-otb-raises-1.19330217>

<https://www.newsday.com/long-island/politics/suffolk-off-track-betting-corporation-raises-1.19070125>

<http://www.thoroughbreddailynews.com/new-yorks-otbs-may-stop-taking-bets-on-racing/>

<https://www.newsday.com/long-island/politics/nassau-county-off-track-betting-1.18785240>

Oregon Hub Handle Numbers

https://www.oregon.gov/Racing/docs/Hub_Data/2019/2019_March_hub_handle.pdf



Financial Condition of New York State Regional Off-Track Betting Corporations

2014-MS-6



Thomas P. DiNapoli

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State of New York Office of the State Comptroller

Division of Local Government and School Accountability

September 2015

Dear Corporation Officials:

A top priority of the Office of the State Comptroller is to help local government officials manage government resources efficiently and effectively and, by so doing, provide accountability for the revenues and expenditures related to local government operations. The Comptroller oversees the fiscal affairs of local governments statewide, as well as compliance with relevant statutes and observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations and Board of Directors governance. Audits also can identify strategies to reduce costs and to strengthen controls intended to safeguard local government assets.

Following is a report of our audit, entitled Financial Condition of New York State Regional Off-Track Betting Corporations. This audit was conducted pursuant to Article V, Section 1 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the New York State General Municipal Law.

This audit's results and recommendations are resources for Corporation officials to use in effectively managing operations and in meeting the expectations of their constituents. If you have questions about this report, please feel free to contact the local regional office for your county, as listed at the end of this report.

Respectfully submitted,

*Office of the State Comptroller
Division of Local Government
and School Accountability*



State of New York Office of the State Comptroller **EXECUTIVE SUMMARY**

Articles V and VI of the New York State Racing, Pari-Mutuel Wagering and Breeding Law (Racing Law), enacted in 1970 and 1973, authorize local governments in New York State to operate systems of off-track pari-mutuel betting as a method of raising revenues for local governments, the State's horse racing industry and New York State. The legislation was also intended to prevent and curb unlawful bookmaking and illegal wagering on horse races and ensure that off-track betting (OTB) activities were conducted in a manner compatible with the well-being of the State's horse racing industry.

Pursuant to the legislation, six regional OTB corporations (Corporations) were created as public benefit corporations: Capital, Catskill, Nassau, New York City, Suffolk and Western. Currently only five corporations remain, after the bankruptcy and subsequent closing of the New York City Corporation in 2010. Each remaining Corporation is governed by a Board of Directors whose members are appointed by the governing bodies of the relevant local governments.

Declining handle, or the total amounts wagered on horse races, has become a long-term trend for the Corporations. For the five-year period from 2009 through 2013, the five Corporations collected almost \$3.7 billion in handle. This amount is down \$1.2 billion (24 percent) from the \$4.9 billion collected during the five-year period from 2004 through 2008,¹ a period over which the Corporations also experienced regular declines.

The Corporations do not retain the majority of the handle. Winning bettors receive a major percentage (77 percent) of the total handle wagered on each race. From the remaining handle, the Corporations then make monthly statutory distributions to the State's horse racing industry and the State and pay monthly surcharge fees to local governments participating in the OTB system. The amount remaining after statutory distributions and surcharges are paid constitutes the Corporations' operating revenues. From these, the Corporations then pay fees to tracks broadcasting races, as well as OTB operating expenses. Any remaining funds (net operating revenues) are then distributed to participating local governments.

Scope and Objective

The objective of our audit was to assess the financial condition of the five regional Corporations for the period January 1, 2009 through August 31, 2014. Our audit addressed the following question:

¹ *Financial Condition of New York State Regional Off-Track Betting Corporations (2009-MS-10)*

- Has the financial condition of the Corporations continued to deteriorate and have officials developed and implemented plans to benefit the Corporations' financial condition?

Audit Results

The financial condition of the Corporations has continued to deteriorate over the course of the last several years. Total handle for the Corporations declined almost 19 percent between 2009 and 2013 and the downward trend is continuing. In the first six months of 2014, handle fell by 7.5 percent when compared to the same period in 2013. Over the five-year period, the Corporations paid more than 48 percent of the handle remaining after compensating bettors in statutory payments to the racing industry and the State and local governments. Although most of the Corporations reduced their operating expenses during the five-year period, the Corporations' net operating revenues – their collective bottom line profit or loss – declined by \$12.4 million due to the combination of the declining handle and “upfront” payments made to the racing industry and governments.

External conditions continue to have an effect on the Corporations' deteriorating financial condition. Over the past five years, the total amount bet on horse racing nationwide has declined 11.4 percent, from \$12.3 billion in 2009 to \$10.9 billion in 2013. The Corporations also compete for declining handle dollars with other gaming entities (e.g., casinos and Internet gaming sites), as well as with out-of-state advance deposit wagering companies that are neither regulated by, nor pay distributions to, the State.²

The Corporations have implemented recommendations previously made by the Office of the State Comptroller³ in an effort to increase handle in a cost-effective way. The Corporations closed underperforming branches, expanded online and telephone wagering operations and increased the number of low-cost remote wagering locations. The Corporations have worked to control costs, with four of the five Corporations achieving a decrease in operating expenses over the five-year period reviewed. However, all these changes have not increased the handle or net operating revenues of the Corporations.

Further, certain amounts the Corporations are required to pay by statute, such as fees to enable OTBs to accept wagers on nighttime races, have added to the Corporations' cost burden over the years. The expectation was that the Corporations would realize additional handle from the nighttime races to offset the added statutory costs, which are based on 2002 total handle amounts. Total handle, however, has declined 67 percent since 2002. Therefore, the increase in revenue has not been realized and, as a result, has negatively impacted the Corporations. For example, Capital OTB officials stated that they are paying Saratoga Harness approximately \$2.5 million annually as required by law, while the net revenue generated from these additional races amounts to only about \$300,000 annually.

Additional external constraints limit the Corporations' ability to increase handle and improve their financial condition. For example, the Corporations must broadcast races from tracks throughout the United States and Canada to generate additional handle. In an effort to control costs, the Corporations have worked together to negotiate the fees paid to these tracks, but they say they have little bargaining power. Track rates have increased significantly between 2009 and 2013, with some tracks increasing rates 300 percent for the period.

² The State enacted legislation in 2014 to require out-of-state advance deposit wagering companies to pay a fee that would go to the Corporations.

³ See *supra*, note 1.

Without significant changes to the statutory environment the Corporations must operate within, the long-term viability of their financial operations is questionable.

Comments of Corporation Officials

The results of our audit and recommendations have been discussed with Corporation officials and their comments, which appear in Appendix A, have been considered in preparing this report.

Introduction

Background

Articles V and VI of the New York State Racing, Pari-Mutuel Wagering and Breeding Law (Racing Law), enacted in 1970 and 1973, authorize local governments in New York State to operate systems of off-track pari-mutuel betting as a method of raising revenues for local governments, the State's horse racing industry and New York State. The legislation was also intended to prevent and curb unlawful bookmaking and illegal wagering on horse races and ensure that off-track betting (OTB) activities were conducted in a manner compatible with the well-being of the State's horse racing industry.

Pursuant to the legislation, six⁴ regional OTB corporations (Corporations) were created. The New York State Racing and Wagering Board (Racing Board) has jurisdiction over the Corporations, along with all other horse racing activities and pari-mutuel betting activities in the State.⁵ The five regional OTB Corporations remaining in operation are Capital, Catskill, Nassau, Suffolk and Western.⁶ The New York City Corporation closed in 2010 after declaring bankruptcy. As provided for under the authorizing legislation, each of the remaining Corporations is a public benefit corporation governed by a Board of Directors whose members are appointed by the governing bodies of the relevant local governments.

The Corporations offer off-track pari-mutuel wagering on thoroughbred and harness horse races held at various racetracks in the State, as well as at racetracks located outside the State that have simulcast contracts with the Corporations. The Corporations accept wagers at various physical locations, as shown in Figure 1, as well as over the phone and via the Internet.

Figure 1: OTB Wagering Locations (as of 2014)

Corporation	Branches	Remote Wagering Locations	Tele-theater
Capital	33	31	2
Catskill	19	12	1
Nassau	6	13	1
Suffolk	5	34	1
Western	26	27	0
Total	89	117	5

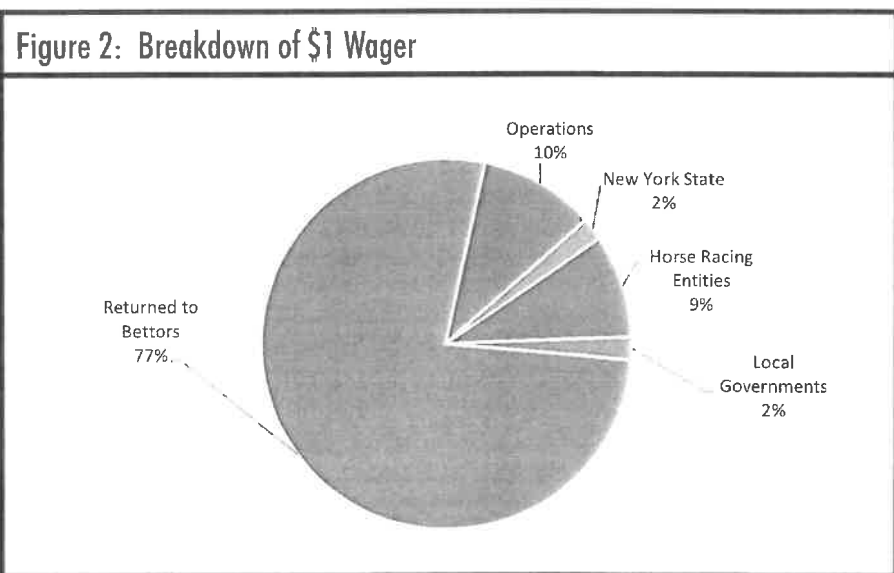
⁴ The legislation authorized seven Corporations, yet only six were actually created.

⁵ In 2013, the Racing Board was merged with the New York State Division of Lottery and other agencies to create the New York State Gaming Commission. For additional information see the Horse Racing section of the Gaming Commission's website at www.gaming.ny.gov/horseracing.

⁶ Western also owns and operates the Batavia Downs Gaming facility, which conducts live harness racing and simulcasts races to and from other racetrack facilities. In addition, Western offers video gaming operations.

Declining handle, or the total amounts wagered on horse races, has become a long-term trend for the Corporations. For the five-year period from 2009 through 2013, the five Corporations collected almost \$3.7 billion in handle.⁷ This amount is down \$1.2 billion (24 percent) from the \$4.9 billion collected during the five-year period from 2004 through 2008, a period over which the Corporations also experienced regular declines. Further, the downward trend appears to be continuing – for the first six months of 2014 the handle dropped by 7.5 percent when compared to the same period for 2013.

The Corporations do not retain the majority of the handle. Winning bettors receive 77 percent of the total handle wagered on each race.⁸ From the remaining handle, the Corporations then make monthly statutory distributions to the State’s horse racing industry and to the State, and pay monthly surcharge fees to local governments that participate in the OTB system. The handle that remains after statutory distributions and surcharges are paid plus other miscellaneous revenues constitutes the Corporations’ operating revenues. From these operating revenues, the Corporations then pay fees to tracks that broadcast races, as well as operating expenses incurred to operate the OTB. Any remaining funds (net operating revenues) are then distributed to participating local governments. Figure 2 details the distribution of a wager once received by the Corporations.



⁷ As presented in this report, the term handle is synonymous with the term “net handle” as used in the Racing Board’s Annual Report and Simulcast report.

⁸ Due to varying presentations of surcharges, other revenues and capital acquisitions, the amount of handle can be shown as totaling from 75 percent to 77 percent. The Corporations’ CPA reports show the amount of handle returned to bettors totaling 77 percent.

The Corporations retain, on average, 10 cents on each dollar wagered to fund their day-to-day operations, including the contractual fees for broadcasting races.

Objective

The objective of our audit was to assess the financial condition of the five regional Corporations for the period January 1, 2009 through August 31, 2014. Our audit addressed the following question:

- Has the financial condition of the Corporations continued to deteriorate and have officials developed and implemented plans to benefit the Corporations' financial condition?

Scope and Methodology

For the period January 1, 2009 through August 31, 2014, we interviewed Corporation officials, reviewed the Racing Law, examined Corporation records and reports and other documentation, and analyzed audited financial statements for the five years ending December 31, 2013. We also reviewed the Corporations' first six months of operations in 2014 in comparison to the same period during 2013 for handle generated by the Corporations.

We conducted our audit in accordance with generally accepted government auditing standards (GAGAS). More information on such standards and the methodology used in performing this audit are included in Appendix C of this report.

**Comments of
Corporation Officials**

The results of our audit and recommendations have been discussed with Corporation officials and their comments, which appear in Appendix B, have been considered in preparing this report.

Financial Condition

The Corporations' financial condition determines their ability to continue to make statutory and contractual payments, cover operating expenses and provide future revenue streams to participating local governments. The financial condition of the State's five regional Corporations has continued to deteriorate over the last several years. Total handle for the Corporations declined by almost 19 percent between 2009 and 2013;⁹ further, in the first six months of 2014, handle fell by 7.5 percent when compared to the same period in 2013.

There are many reasons for the Corporations' declining handle and deteriorating financial condition. Over the past five years, the total amount bet on horse racing across the United States has declined 11.4 percent, from \$12.3 billion in 2009 to \$10.9 billion in 2013. In 2013, the total of horse racing wagers for the United States was down 0.1 percent compared to the prior year, while the Corporations' handle was down considerably more, at 5 percent. The Corporations also have to compete for gambling revenue with other entities in the gaming industry, such as casinos, video gaming and government-sponsored lotteries. In addition, the Corporations continue to contend with out-of-state advance deposit wagering (ADW) companies that collect wagers and provide payouts to gamblers without the statutory payments required of the Corporations.¹⁰

To further compound the issue, the Corporations have experienced dramatic increases in the rates charged by tracks broadcasting (simulcasting) horse racing. The Corporations' operating revenues, what remains after they make required payments and pay operating expenses, declined by a combined \$12.4 million¹¹ between 2009 and 2013. Although the Corporations have implemented recommendations made by the Office of the State Comptroller (OSC) from a prior audit and have reduced some expenses, they have continued to experience fiscal decline.

Given the significant amount of "upfront" payments the Corporations must make to the racing industry and governments in an environment of declining handle, the Corporations may have trouble reducing expenses enough to ensure their long-term viability without legislative action.

⁹ See Appendix A, Figure 9 for additional detail.

¹⁰ The State enacted legislation in 2014 to require out-of-state ADW companies to pay a fee that would go to the Corporations.

¹¹ See Figure 7 for additional detail.

Decline in Handle

All five Corporations have experienced an overall decline in handle over the five-year period 2009 through 2013, which collectively amounted to a decline of approximately \$153 million¹² or nearly 19 percent. Among the Corporations, Suffolk experienced the greatest percentage decline, down 29 percent. It also experienced the largest average annual decline at \$8.8 million. Further, from January through June 2014 each Corporation's handle was down 7.5 percent compared to the same period in 2013, as shown in Figure 3.

Figure 3: Decline in OTB Handle ^a – Comparison of June 2013 to June 2014				
	January – June 2013	January – June 2014	Difference	% Change
Capital	\$75,438,653	\$71,855,984	(\$3,582,669)	(4.8%)
Catskill	\$46,634,426	\$41,419,734	(\$5,214,692)	(11.2%)
Nassau	\$114,118,825	\$103,404,346	(\$10,714,479)	(9.4%)
Suffolk	\$56,055,317	\$53,224,502	(\$2,830,815)	(5.1%)
Western	\$49,837,288	\$46,690,399	(\$3,146,889)	(6.3%)
Total	\$342,084,509	\$316,594,965	(\$25,489,544)	(7.5%)
^a Total handle before paying winning bets.				

Decline in Operating Revenues

As shown in Figure 2, the majority of the Corporations' handle is returned to bettors. The Corporations' remaining handle after paying bettors, called racing and gaming revenues,¹³ totaled about \$925 million for the five-year period. To calculate total operating revenues, the Corporations' racing and gaming revenues are reduced by statutory distributions paid to the racing industry and the State and by surcharges paid to local governments with tracks, before adding in other miscellaneous revenues.

Statutory Distributions and Upfront Surcharges¹⁴ – Statutory distributions and upfront surcharges represent a significant financial outlay for the Corporations. During the five years ended December 31, 2013, the Corporations paid almost \$407.2 million for statutory distributions and surcharges, as shown in Figure 4. Of this amount, \$19.6 million was for legally required monthly distributions to Counties with racetracks, and \$387.5 million was distributed for statutorily required payments.

¹² See Appendix A, Figure 9 for additional detail.

¹³ Reported racing and gaming revenues do not include revenues from video gaming and live racing activities.

¹⁴ The upfront surcharges referenced in this section are distributed to New York State counties with tracks.

Figure 4: Total Statutory Distributions and Surcharges Paid to Counties with Tracks^a

	2009	2010	2011	2012	2013	Total
Capital	\$19,482,082	\$18,234,426	\$17,789,320	\$18,275,909	\$17,920,937	\$91,702,674
Catskill	\$12,184,235	\$11,423,290	\$11,207,100	\$11,268,561	\$10,330,690	\$56,413,876
Nassau	\$27,305,038	\$24,676,380	\$28,320,023	\$25,547,046	\$24,998,962	\$130,847,449
Suffolk	\$15,924,417	\$14,600,475	\$13,233,567	\$12,566,829	\$12,259,473	\$68,584,761
Western	\$13,495,491	\$12,601,917	\$12,011,625	\$11,191,676	\$10,311,172	\$59,611,881
Total	\$88,391,263	\$81,536,488	\$82,561,635	\$78,850,021	\$75,821,234	\$407,160,641

^a These figures exclude the video gaming and live racing component of Western.

The majority of the amounts paid in statutory distributions (78 percent) were payments to the racing industry totaling \$318.9 million. Distributions to racing entities are made to:

- In-state racetracks based on statutory rates depending on the type of wager and other contractual agreements,
- Out-of-state racetracks based on specific contractual agreements and
- Certain horse breeding funds created to support and promote in-state horse breeding and racing.

Among the payments made to in-state racetracks are those made to harness tracks in conformance with New York State's "Hold Harmless" law enacted in 2003. This law authorized the Corporations to accept wagers on nighttime¹⁵ thoroughbred racing. In return, the Corporations were required to pay in-state regional harness tracks a percentage of their handle to compensate them for lost bets plus other "Maintenance of Effort" payments. The Racing Board calculates the amount the Corporations must pay harness tracks based on 2002 total handle figures of \$2.04 billion.¹⁶ Although wagers on nighttime races were expected to generate additional handle for the Corporations, the increase was not realized; in fact, total handle has declined to \$664 million (67 percent).¹⁷ The costs the Corporations have to bear under this law significantly outweigh the benefits received. For example, Capital OTB officials stated that they are paying Saratoga Harness approximately \$2.5 million annually as required by law, while the net revenue generated from these additional races amounts to only about \$300,000 annually.

¹⁵ Post times after 7:30 p.m.

¹⁶ As reported in the *2002 Annual Report and Simulcast Report* of the Racing Board. Total handle includes handle from the New York City OTB until 2010 when it filed for bankruptcy, which partially skews the percentages over the period.

¹⁷ Total handle in 2013 – see Appendix A, Figure 9 for more information.

Also included in the statutory distributions are payments to New York State for pari-mutuel taxes and breakages,¹⁸ regulatory fees to the Racing Board and uncashed tickets. Capital and Western also make contractual payments to the Cities of Albany and Niagara Falls,¹⁹ in lieu of paying other local taxes.

Operating Revenue – All five Corporations’ total operating revenues decreased between 2009 and 2013, by \$28.6 million (24 percent), from \$119.3 million to \$90.7 million, as shown in Figure 5. Figure 6 shows that Suffolk experienced the most significant decline in operating revenue, a 34 percent decline from \$21.9 million in 2009 to \$14.4 million in 2013. Nassau experienced the smallest decline at 17 percent, or \$6 million.

Figure 5: Total Operating Revenues 2009-2013

	2009	2010	2011	2012	2013	Total
Racing and Gaming Revenues	\$207,659,066	\$190,549,416	\$186,188,256	\$174,202,564	\$166,518,221	\$925,117,523
Less: Statutory Distributions and Upfront Surcharges	\$88,391,263	\$81,536,488	\$82,561,635	\$78,850,021	\$75,821,234	\$407,160,641
Operating Revenues	\$119,267,803	\$109,012,928	\$103,626,621	\$95,352,543	\$90,696,987	\$517,956,882

Figure 6: Operating Revenues by Corporation, 2009-2013

	2009	2010	2011	2012	2013	% Change 2009-2013
Capital	\$25,651,136	\$22,550,444	\$20,419,250	\$19,493,243	\$18,662,586	(27%)
Catskill ^a	\$16,447,576	\$15,078,463	\$14,676,196	\$14,294,312	\$12,916,446	(21%)
Nassau	\$35,694,098	\$33,349,242	\$34,962,652	\$31,148,646	\$29,684,166	(17%)
Suffolk	\$21,947,592	\$19,765,651	\$16,769,928	\$14,709,154	\$14,385,373	(34%)
Western ^b	\$19,527,401	\$18,269,128	\$16,798,595	\$15,707,188	\$15,048,416	(23%)
Total	\$119,267,803	\$109,012,928	\$103,626,621	\$95,352,543	\$90,696,987	(24%)

^a Operating revenue includes other non-operating revenue, which is presented differently in the audited financial statements.
^b OTB operations only. Amounts exclude video gaming and live racing activities.

Decline in Net Operating Revenues

The Corporations’ net operating revenues – operating revenues less operating expenses – constitute their collective bottom line profit or loss and a measure of their overall financial viability. The Corporations’ bottom line dropped by \$12.4 million over the five-year period, as shown in Figure 7, even though they reduced total operating expenses.

¹⁸ To avoid better payouts in pennies, “breakage” was developed as a method of rounding off a better’s winnings by reducing the payout to an amount set by statute.

¹⁹ Pursuant to Racing Law, Capital and Western have contractual agreements with the Cities of Albany and Niagara Falls, respectively, whereby each City receives 1 percent of the tele-theater handle in these locations in lieu of any other local tax. Western’s tele-theater closed in 2012.

Figure 7: Net Operating Revenue/(Loss) 2009 - 2013

	2009	2010	2011	2012	2013	Change from 2009-2013
Capital	\$4,461,728	\$2,145,578	(\$150,705)	\$1,141,728	\$1,006,260	(\$3,455,468)
Catskill	\$4,294,189	\$3,495,614	\$2,832,945	\$2,752,723	\$1,628,673	(\$2,665,516)
Nassau	\$1,125,073	(\$136,299)	\$11,942,294	\$1,165,203	(\$2,679,097)	(\$3,804,170)
Suffolk	(\$2,908,224)	(\$2,998,997)	(\$3,799,335)	(\$2,597,776)	(\$2,995,590)	(\$87,366)
Western*	(\$297,483)	(\$1,378,605)	(\$2,106,315)	(\$1,705,780)	(\$2,695,530)	(\$2,398,047)
Total	\$6,675,283	(\$1,127,291)	\$8,718,884	\$756,098	(\$5,735,284)	(\$12,410,567)

* OTB operations only. Amounts exclude video gaming and live racing activities.

The Corporations' operating expenses declined by 9 percent overall during the 2009 through 2013 period. Four Corporations cut their operating expenses: Capital by \$3.5 million, Catskill by almost \$800,000, Nassau by over \$3.2 million and Suffolk by \$7.7 million. Only Western experienced an increase in operating expenses (by more than \$3.7 million); however, this was the result of all of Western's operations, not just the OTB operations.²⁰

Operating Expenses – Track Compensation – In order to collect wagers on races, the Corporations must have a product to broadcast. Therefore, they must contract with the providers of the races. The Corporations enter into agreements with tracks throughout the United States and Canada to simulcast the races run at these tracks. In exchange for allowing the Corporations to broadcast these races, the Corporations pay the hosting tracks a fee, which is based on the handle wagered for the race. Between 2009 and 2013, the Corporations have experienced dramatic increases in the fees paid for these track contracts. During this time, the Corporations worked together to negotiate the track rates; however, Corporation officials say they have little bargaining power. Some track rates increased 300 percent for the period.

In addition, when the Corporations provide ADW and take Internet wagers, they must pay an additional fee to the hosting tracks. Most significantly, the fee for hosting the Indiana Downs races increased 300 percent from 1.5 percent in 2009 to 6 percent in 2013 for ADW wagers placed. This means that for every \$100 wagered on races at Indiana Downs, the Corporations must pay the track \$6 in fees. Corporation officials say they have trouble controlling these increased expenses.²¹ If they do not contract with the tracks, they have no races to broadcast and, therefore, no product to offer to their customers. The increased costs associated with these track contracts have decreased the net operating revenues of the Corporations.

²⁰ Operating expenses for the OTB operation alone have decreased about \$2.1 million (10 percent) over the five-year period. See Appendix A for information about Western's video gaming and live racing revenues.

²¹ Racing Law only limits the fees that can be charged for races run as part of the Triple Crown and the Breeders' Cup.

Distributions to Participating Local Governments—Local governments receive monthly distributions from their respective regional OTB. These distributions represent the allocation of surcharge revenues collected from winning bettors as well as the distribution of net operating revenue based on the operating results of the OTB. The decline in operating revenues, despite the Corporations' cost cutting, has reduced distributions to local governments. As a result, the Corporations have a reduced ability to function as intended as public benefit corporations. The distributions to participating local governments have declined 42 percent to nearly \$10.2 million in 2013, with the most significant reduction being a 69 percent decline (almost \$3.2 million) in Catskill. Figure 8 shows the distributions to local governments made by the Corporations from 2009 to 2013.

Figure 8: Distributions to Participating Local Governments

	2009	2010	2011	2012	2013	Change	% Decline 2009 - 2013
Capital	\$3,665,470	\$4,416,130	\$2,567,525	\$2,341,415	\$2,124,207	(\$1,541,263)	(42%)
Catskill	\$4,612,696	\$3,749,061	\$2,736,569	\$2,879,591	\$1,430,267	(\$3,182,429)	(69%)
Nassau	\$3,572,790	\$3,137,476	\$3,290,558	\$2,971,761	\$2,805,880	(\$766,910)	(21%)
Suffolk	\$2,013,385	\$1,724,051	\$1,480,176	\$1,313,678	\$1,207,759	(\$805,626)	(40%)
Western	\$3,750,116	\$3,040,412	\$2,729,044	\$2,440,822	\$2,596,372	(\$1,153,744)	(31%)
Total	\$17,614,457	\$16,067,130	\$12,803,872	\$11,947,267	\$10,164,485	(\$7,449,972)	(42%)

The many issues that the Corporations are facing, including the statutory payment requirements, downturn in racing interest and significant out-of-state track fee increases, have all contributed to the continued decline of their financial standing. Continuation of these trends will affect not only the Corporations' operations, but also the local governments that receive related distributions.

Implementation of Previous Recommendations

During our prior audit,²² recommendations were made regarding both action to be taken by the Corporations and by State Policymakers. While the recommendations to State Policymakers did not yield any changes in the formulary by which the Corporations distribute the funds collected from placed wagers, the Corporations did take action. For example, the Corporations implemented an innovative practice of negotiating collectively for track rates to try and improve their bargaining power. In addition, the Corporations made improvements in betting locations and methods.

Branch and Betting Locations – While the Corporations' branch operations generate OTB handle, many individual locations also have generated operating losses. For example, all seven Nassau branch locations lost money in 2013, with the largest loss of just over \$1 million being generated by the Green Acres location. The

²² See supra, note 1.

Corporations also operate remote locations, which vary in name – EZ Bet, Fast Track or Qwik Bet. They operate similarly, but at lower costs than branch locations. These remote locations are wagering terminals placed in other businesses (e.g., restaurants, bars and newsstands), allowing bettors to place OTB wagers without having to go to a branch location. Since the last audit, the Corporations have increased remote wagering locations, from 77 to 117 locations throughout the State (52 percent). While locations such as Suffolk’s Jon Thomas Inn generated a net gain of \$688,000, nine remote wagering locations had operating losses in 2013. The most significant operating loss was Catskill’s Norwich location, which generated a net loss of \$17,557 in 2013.

We commend the Corporations for taking steps to reduce the number of low performing branch locations as recommended. In total, the Corporations have reduced their branch locations from 124 locations in 2009 to 89 in 2014, a 28 percent decrease.²³ Although this has reduced the operating costs of the Corporations, it has done little to stem the downturn in handle.

Online and Telephone Wagering – As recommended, the Corporations have expanded online and telephone wagering. For example, in 2009, only Capital and Nassau had Internet wagering, but all five regional Corporations were operating Internet wagering systems by the end of 2013. We commend the Corporations for taking steps to expand telephone and Internet services, but these improvements have not generated an increase in wagers placed.

Recommendations

The Corporations Boards’ should continue:

1. To explore cost cutting measures.
2. Efforts to increase revenues through innovative marketing.
3. To analyze the cost/benefit of branch and remote locations.
4. To negotiate collectively for track rates.

State Policymakers should:

5. Review the formula used to calculate the Corporations’ payments to harness tracks, as required by the 2003 Hold Harmless law.

²³ The total amount saved from the reduction in the number of branch locations could not be separated from the increases incurred to open and operate additional remote locations.

6. Consider examining the formulas used to calculate the Corporations' upfront statutory and surcharge payments to balance the State's revenue objectives with the Corporations' financial viability.

APPENDIX A

ADDITIONAL FINANCIAL INFORMATION

Figure 9: OTB Handle^a by Corporation: 2009 – 2013

	2009	2010	2011	2012	2013	Total	2009 to 2013 Period Decline	2009 to 2013 Percentage Decline
Capital	\$176,566,467	\$165,688,551	\$156,960,633	\$159,563,685	\$153,656,891	\$812,436,227	\$22,909,576	(13%)
Catskill	\$107,401,445	\$99,604,857	\$98,021,201	\$97,613,210	\$87,654,538	\$490,295,251	\$19,746,907	(18%)
Nassau	\$257,581,744	\$235,993,822	\$257,074,414	\$229,698,269	\$219,492,548	\$1,199,840,797	\$38,089,196	(15%)
Suffolk	\$153,501,836	\$139,052,540	\$122,693,944	\$113,311,268	\$109,200,645	\$637,760,233	\$44,301,191	(29%)
Western	\$121,882,680	\$114,037,661	\$106,031,058	\$98,840,851	\$94,245,876	\$535,038,126	\$27,636,804	(23%)
Total	\$816,934,172	\$754,377,431	\$740,781,250	\$699,027,283	\$664,250,498	\$3,675,370,634	\$152,683,674	(19%)

^a Total handle before paying winning bets.

Figure 10: Western OTB Corporation's Total Racing and Gaming Handle^a

	2009	2010	2011	2012	2013
Corporate and Branch Operations	\$121,882,680	\$114,037,661	\$106,031,058	\$98,840,851	\$94,245,876
Batavia Downs	\$7,363,314	\$6,955,322	\$6,776,826	\$7,139,914	\$6,080,417
Video Gaming	\$419,540,825	\$429,634,724	\$473,755,412	\$547,263,631	\$566,510,901
Total	\$548,786,819	\$550,627,707	\$586,563,296	\$653,244,396	\$666,837,194

^a For the purposes of this report, we did not include Western's video gaming and live racing handle revenues in our calculations. They are presented here for the reader's information.

APPENDIX B

RESPONSES FROM CORPORATION OFFICIALS

We provided a draft copy of this global report to the five OTB's we audited and requested responses. We received response letters from all OTBs.

The OTBs coordinated their responses and collectively had areas of concern regarding the future of OTBs due to the declining handle and statutory regulations placed on them. The following comments were excerpted from the responses.

Overall Comments

Nassau OTB – “Although the recommendations in the 2009 audit were implemented, Nassau OTB continues to experience significant decline in revenue. The current antiquated and inequitable statutory model must be changed to allow the Corporations to be able to fulfill their primary purpose of providing much needed revenues to their municipalities. We implore the State Legislature and Governor's office to review the findings and adopt the positive solutions offered therein and herein for the benefit of the taxpayers served by these public benefit corporations.”

Suffolk OTB – “We urge the State Legislature and the Governor to review the findings outlined in the State Comptroller's audit and adopt the recommendations outlined by the five Regional Off-Track Betting Corporations in addition to our recommendations to amend the ADW law. These recommendations will address the antiquated and inequitable statutory requirements and bring NYS in line with other racing jurisdictions, level the playing field and enable the Corporations to eliminate operating deficits, distribute local funds to local governments and fulfill our mission.”

Capital OTB – “Capital OTB's management and its Board of Directors believe that the issues discussed in the report outline the relevant circumstance (economic fluctuations, competition, restrictions for siting remote wager locations and the statutory distributions and surcharges that represent a significant financial outlay for the Corporation) that have resulted in the financial decline within the State's OTBs.”

Catskill OTB – “The New York Regional OTBs distributed over \$57 million to the racing industry during 2013. OTBs do not lose money, but in fact, are required to distribute in excess of revenues received. With the legislative proposals presented, New York OTB can continue to operate for the benefit of ALL participants of OTB revenues.”

Western OTB – “...Western OTB operations continue to decline as noted. The reasons for that decline are appropriately identified and explained within the audit findings, of particular note, the role of statutory distributions and track compensation in this decline are properly identified.”

Advanced Deposit Wagering

Nassau OTB – “Nassau maintains that the statutes regarding multi-jurisdictional advance deposit wagering regulations need to be reexamined.”

Suffolk and Nassau OTB – “In 2013, NYS passed legislation requiring out of state entities that accept wagers from NYS residents to pay a percentage of those wagers to NYS. The NYS Gaming Commission then shares those payments with tracks and the OTB Corporations to partially reimburse them for the lost revenue. Certain out of state entities, have “partnered” with New York State tracks to avoid making these payments.”

Catskill OTB – “Penalties or prohibition should be legislated or regulated, for the out of state ADWs that increase fees over 2013 rates. In 2013 the Legislature acted to regulate ADW by requiring out of state operators of telephone and internet wagering to be licensed effective 2014, and to pay 5% on all wagers from New York residents, a portion of such to offset OTB regulatory fees. These out of state ADWs have since increased fees paid to them by 5% to offset their licensing fee.” “...Protect the NY OTB market by imposing penalties or prohibiting collaboration with in state venues to circumvent ADW regulation.”

Capital OTB – “Enforce legislation that passed in 2013, requiring out-of-state ADW sites to pay a surcharge on bets they take from New York residents. These surcharge dollars go to help support NY racetracks and OTBs. We want to make sure the State is doing everything possible to ensure that these sites are licensed and paying their fair share.”

Statutory Payments and Other Legislative Suggestions

Western OTB – “It is obvious to us that the current statutory model must be altered to allow NYS OTBs to generate needed revenues to their municipalities. As noted on Page 4 of the Audit, “Without significant changes to the statutory environment the Corporations must operate within, the long-term financial viability of their financial operations is questionable.”

Potential legislative changes that will positively address this circumstance are noted:

- Catskill, Capital and Western OTBs – Hold Harmless: “The elimination of such payments are needed as the current statute is based on outdated handle, that at times causes OTBs to pay to the harness tracks an excess above the actual handle OTB receives.”
- Catskill OTB – “Allow OTBs to retain surcharge payable to non-participating counties where a track is located. The original purpose was to offset track admission taxes projected to decline with the onset of OTB. Tracks no longer charge admission, and local governments with tracks now benefit from Video Lottery Terminals (VLT) since operating at those tracks.”
- Capital and Catskill OTBs – “Authorize an OTB operated VLT facility in each OTB region to provide for county taxpayer relief and more population centered facilities.”
- Catskill OTB – “Expand OTB product offerings with on-line gaming, instant racing and/or sports wagering.”
- Capital, Catskill and Western OTBs – “Allow OTB to retain uncashed ticket monies for corporate purposes.”

- Catskill OTB – “Reduce pari-mutuel tax for OTBs.”
- Catskill OTB – “Enforce OTB statutory rates caps on fees payable for out of state harness racing and special event thoroughbred racing.”
- Capital OTB – “Reduce payments OTB Corporations make to New York racetracks (both harness and thoroughbred). New York tracks have been operating as casinos for many years and have generated tens, if not hundreds, of millions of dollars in revenues from their VLT operations. OTB monies that go to tracks, in our view, should be redirected to help fund county budgets and help county taxpayers. Legislature action should be taken to reduce or eliminate these payments to New York tracks/casinos.”
- Catskill, Capital and Western OTB – “Eliminate the provision that allows harness tracks to deny placement of OTB branch sites. This provision gives harness tracks the ability to make OTB less efficient by denying less costly branch sitings.”

APPENDIX C

AUDIT METHODOLOGY AND STANDARDS

We conducted this performance audit in accordance with GAGAS. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To complete the audit objective, we interviewed Corporation officials regarding budgeting practices and monitoring. We reviewed financial activity documents prepared by each Corporation's external accounting firms and financial information provided by each of the Corporations. We analyzed revenue, expense and gambling activity trends to reach our conclusions. We reviewed the applicable State laws governing OTB operations and track wagering.

We compiled data from all currently operating Corporations to create comparison and trend analysis of the operations across the State. We obtained published data for the national horse racing wagering trends for the audit scope period and compared these to the trends from the regional OTB operations.

APPENDIX D

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The Stats on New York Horse Racing in 2016

By Bennett Liebman

Government Lawyer in Residence

Albany Law School

The New York State Gaming Commission has recently issued its annual report for 2016.¹ Unlike all prior years since pari-mutuel racing started in New York in 1940—and this includes the annual reports of the former State Racing and Wagering Board, the State Racing Commission, and the State Harness Racing Commission—this annual report simply consists of a series of charts showing in a summary manner the handle of the State's harness tracks, thoroughbred tracks, and OTBs. Data on the financial conditions of the OTBs is included. There is no text and no attempt to explain any developments in horse racing in New York. There is relatively little historical data. The charts provide far less data than the prior reports of the Commission or its predecessors.

The limited data, however, cannot disguise the continuing slumping nature of New York State horse racing. Handle fell by 5.9% to a total of \$1.388 billion. In 2015, handle had fallen by a similar 6.1%.² Total handle at the racetracks fell by 6.2%. The live handle at every racetrack declined. (Live handle is the amount wagered on the actual live races conducted at that track.)

Accounting for inflation, 2016 represents the lowest handle in the history of pari-mutuels in New York State. The year 1940 was the first year of pari-mutuel racing in New York. There was almost no harness racing, and there was a total of 230 programs run in the state. There was no racing at all for approximately five months. In 2016, there were 1,294 racing programs run in the state.³ Yet, handle in New York was (29.3%)⁴ lower than it was in 1940. Horse racing in New York has become the equivalent of the 1962 Mets in futility.

To provide other bases for comparisons, 1966 New York racing handle was (656%) higher than 2016, 1976 New York racing handle was (725%) higher than 2016, 1986 New York racing handle was (432%) higher than 2016, and 1996 New York racing handle was (193%) higher than 2016. To summarize, New York racing handle is now (13.1%) of what it was fifty years ago. Live harness racing handle is now (.7%)

¹ <https://gaming.ny.gov/about/index.php?ID=3> [last viewed August 29, 2017].

² See Bennett Liebman, "No Dinero from American Pharoah: New York Horse Racing in 2015," <https://saratogainstitute.wordpress.com/2016/07/25/no-dinero-from-american-pharoah-new-york-horse-racing-in-2015/> [last viewed August 29, 2017].

³ Additionally, in 1940 there were no OTBs, no Sunday racing, no account wagering, only win, place and show wagering, no turf wagering, no ability to wager on out-of-state racing, and no broadcasting of horse racing. Also, the number of races per racing program was much smaller in 1940. The predecessors to the New York Racing Association ran only seven races per racing program. It is likely that in 2016, there were eight times more races in New York State than there were in 1940.

⁴ Parentheses will be used for statistics that use real-inflation adjusted numerical comparisons. The website of the Bureau of Labor Statistics is used to calculate the adjusted consumer price index. Mid-year figures (for the month of June) are also used to calculate the annual changes in the consumer price index. https://www.bls.gov/data/inflation_calculator.htm.

of what it was in 1976 and (1.9%) of what it was in 1986.⁵ Live thoroughbred racing handle is now (8.5%) of what it was in 1976 and (14.7%) of what it was in 1986.

Since we in New York have become largely inured to these horrid numbers, it might be preferable to first accentuate the positives about 2016,⁶ spotlight the more interesting facts about the 2016 numbers, and conclude by highlighting, rather than eliminating, the negatives.

Five Positives about 2016.

1. Capital was the only OTB region to show an operating profit in the absence of operating its own video lottery facilities. Capital OTB handle decreased by less than .9%.
2. Saratoga Harness increased its total facility handle by 3.4%. Its handle on simulcast imports increased by 4.5%.
3. Tioga Downs increased its total facility handle by 2.1%.
4. Monticello Raceway, which has negligible on-track handle, had \$72 million bet on its races from outside New York State. It is a decrease from 2015, but is still a substantial number.
5. Saratoga Race Course, while down slightly in handle, still had a daily total facility handle that averaged \$3.87 million.⁷ Unfortunately the \$3.87 million figure is (52.6%) of the daily average for Saratoga for 1976 and (40.6%) of the daily average figure for Saratoga in 1986.⁸

Five Interesting Facts about 2016.

1. NYRA, which by law is not permitted to offer wagering on out-of-state harness racing, has become the major betting site in New York for in-state harness racing. NYRA now has a higher handle on New York State harness races than any of the tracks and OTBs. NYRA's harness handle on New York races is also greater than the live handle at any of the harness tracks.
2. Capital OTB wagers more on NYRA races than any other OTB, despite the proximity to Aqueduct and Belmont of both Nassau OTB and Suffolk OTB. In total, 59.4% of OTB handle is wagered on out-of-state races.
3. Nearly 60% of all New York handle is wagered at the racetracks. In 2011—the first full year without New York City OTB—53.2% of New York handle was wagered at OTBs.
4. Saratoga Race Course, with only 40 days of racing (17.5% of NYRA's racing dates), now accounts for 44% of NYRA's live handle.

⁵ By 1986, harness racing was already experiencing major downturns. From 1975–1986, attendance at harness tracks dropped from 28,089,984 to 18,397,142. See Andrew Beyer, "Harness Racing's Bust in Boom Times," *Washington Post*, October 18, 1987. See also, Howard Cosell, "Harness Racing Is Losing Its Charm, Style and Crowds," *Minneapolis Star and Tribune*, June 19, 1986; Larry Bortstein, "Hitting on Hard Times: Status of Harness Racing in Steady Decline in Recent Years," *Orange County Register*, December 26, 1986.

⁶ Johnny Mercer, "Ac-Cent-Tchu-Ate the Positive," Capitol Records, 1944.

⁷ The one issue here is that NYRA's account wagering is considered a part of its on-track handle. Thus, the actual total facility handle could be somewhat lower than the \$3.87 million figure.

⁸ Saratoga raced only 24 programs in 1976 and 1986. There was no inter-track wagering at other NYRA facilities on Saratoga racing in 1976, and the 1986 figures include the handle on the simulcast sent from Saratoga to Aqueduct. The 2016 figures, besides including account wagering numbers, also include amounts wagered on Saratoga racing at other NYRA facilities and amounts wagered at Saratoga on non-NYRA products.

5. Worldwide handle on New York racing declined slightly to \$2.632 billion. Of that total, 83.4% was wagered on NYRA racing.

The Negatives.

1. Even with a VLT facility at Batavia Downs, Western OTB lost nearly \$900,000.
2. Catskill OTB, historically the most profitable and thrifty of the regional OTBs, lost nearly \$1.1 million in 2016.
3. What would have been a huge loss at Nassau OTB was more than cushioned by Nassau OTB receiving revenues from VLTs at Aqueduct pursuant to 2016 State budget legislation.⁹ Nassau OTB had net revenues of \$5.5 million in 2016. Without the VLT income, it appears that Nassau OTB would have a loss of approximately \$7 million.
4. Total facility handle at Buffalo Raceway decreased by 18.4% in 2016.
5. Total facility handle at Batavia Downs decreased by 10.7% in 2016.
6. Total facility handle at Monticello Raceway decreased by 12.7% in 2016.
7. Assuming the statistics are accurate, average attendance at Monticello was 136. Average live handle per race card at Monticello was \$8,306. The 2016 per program handle is (.56%) of the per program handle at Monticello in 1976.
8. Average attendance per race card at Aqueduct was 2,638.¹⁰ There does not appear to be much synergy from the VLT facility co-located at Aqueduct which produced \$857 million in net win in the 2016 calendar year.
9. Once you subtract the 60,114 people in attendance at the Belmont Stakes in 2016, the average attendance at Belmont Park was 3,532. In reality, the average attendance was significantly less than that since NYRA offers a very low-cost season pass to Belmont at less than one dollar per race day.¹¹ Since season passholders are counted in the Belmont attendance figure whether or not they are in attendance, it is likely that the average attendance at Belmont Park was below the 3,000 level.
10. NYRA underperformed in its first full year as a national simulcast hub taking account wagers from across the country. For the twelve months ending on July 1, 2017, "NYRA Bets" had total handle of \$20.5 million.¹² That is a minimal fraction of the numbers put up by the major national wagering firms such as Churchill Downs, TVG and Xpress Bet.¹³ It also leaves NYRA trailing such minor players in the account wagering field as Am West, Premier Turf Club and the Greyhound Network. NYRA's hub handle in the second quarter of 2017 improved somewhat, but it has large expenses from producing a national TV show for Fox.¹⁴ It will at best take a long time for NYRA's national account wagering system to become financially viable.

⁹ Ch. 60, L. 2016.

¹⁰ In 1964, with 210 racing dates at Aqueduct, the average attendance was 31,237. See Joe Nichols, "Thoroughbred Racing," *New York Times*, December 20, 1964.

¹¹ See <https://www.nyra.com/belmont/tickets/season-passes#> [last viewed August 29, 2017].

¹² See http://www.oregon.gov/Racing/Pages/hub_index.aspx [last viewed August 29, 2017].

¹³ Churchill's hub handle over that twelve-month period of time was \$1.39 billion.

¹⁴ "NYRA, FOX Sports Extend TV Deal Three Years," *Blood-Horse*, August 24, 2017. See <https://www.bloodhorse.com/horse-racing/articles/223263/nyra-fox-sports-extend-tv-deal-three-years> [last viewed August 29, 2017].

We will not mess with “Mr. In-Between” in this analysis. There is not much positive to latch onto. The fact is that New York horse racing is a fraction of what it once was. Video lottery revenues are keeping racing alive, but the heart of the sport of horse racing is barely beating.

John Signor (Capital OTB) Outline for the Albany Law School

Saratoga Equine, Racing and Gaming Program

August 6, 2019

1. History of OTB
2. Six Regional OTBs
3. Only game in town
4. Competition
5. Antiquated State Laws
6. NYC OTB closes, Suffolk bankruptcy
7. New Life – VLT money for Western, Suffolk & Nassau
8. Capital and Catskill remain with only simulcasting
9. Capital OTB profitable
10. Capital OTB TV (See video screen)
11. Capital OTB works with tracks
12. Bad laws means deficits
13. Capital OTB actions to become profitable
 - a. Reduce workforce
 - b. Cut spending by millions
 - c. Close unprofitable branches
 - d. Create EZ Bet concept
 - e. Manage bad laws
 - f. Aggressive promotions and marketing
 - g. New web site, fan friendly, free stream for shows
 - h. State changes law to help cash flow
 - i. Rivers Casino – only OTB in state at casino
14. Still need to address some issues with State
15. Yes, we want to be part of sports betting

New York Harness Racing: Can it survive?

Moderator:

Dick Powell

Panelists:

Moira Fanning

Joseph A. Faraldo, Esq.

M. Kelly Young

S 6615 KRUEGER Same as [A 8433](#) Weinstein
Budget Article VII (Internal # 17 - 2020)
ON FILE: 06/20/19 Public Authorities Law
TITLE....Enacts into law major components of
legislation
06/20/19 REFERRED TO FINANCE
06/20/19 ORDERED TO THIRD READING
CAL.1846
06/20/19 MESSAGE OF NECESSITY - 3 DAY
MESSAGE
06/20/19 PASSED SENATE
06/20/19 DELIVERED TO ASSEMBLY
06/20/19 referred to ways and means
06/20/19 substituted for a8433
06/20/19 ordered to third reading rules cal.699
06/20/19 message of necessity - 3 day message
06/20/19 passed assembly
06/20/19 returned to senate
06/24/19 DELIVERED TO GOVERNOR
06/24/19 SIGNED CHAP.39

A8433 Weinstein Same as [S 6615](#) KRUEGER
Budget Article VII (Internal # 17 - 2019)
Public Authorities Law
TITLE....Enacts into law major components of
legislation
06/20/19 referred to ways and means
06/20/19 reported referred to rules
06/20/19 reported
06/20/19 rules report cal.699
06/20/19 substituted by s6615
S06615 KRUEGER
06/20/19 REFERRED TO FINANCE
06/20/19 ORDERED TO THIRD READING
CAL.1846
06/20/19 MESSAGE OF NECESSITY - 3 DAY
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06/20/19 returned to senate
06/24/19 DELIVERED TO GOVERNOR
06/24/19 SIGNED CHAP.39

S06615 Summary:

BILL NO S06615
 SAME AS SAME AS
 SPONSOR KRUEGER
 COSPNSR
 MLTSPNSR

And Various Laws, generally

Relates to the reporting of performance metrics by the MTA of all services provided by New York city transit authority subways and Long Island rail road and Metro-North commuter railroad trains (Part A); relates to the description of the central business district (Part B); relates to the MTA's reorganization plan (Part C); relates to removing caps on automated enforcement cameras for bus lanes; bus lane photo devices (Part D); relates to the membership of the metropolitan transportation authority; one member may be the director of the division of budget (Part E); relates to switching from the STAR tax exemption to the STAR tax credit (Part G); establishes the empire state entertainment diversity job training development fund (Subpart A); and modifies the definition of a qualified film production facility (Subpart B)(Part H); exempts from tax a portion of global intangible low-taxed income (Part I); modifies the definition of vendor and marketplace provider and increases the cumulative total of a person's gross receipts from sales of property delivered in the state from three hundred thousand to one million dollars (Part J); relates to issuance of bonds and notes; relates to capital grants (Part K); extends the award dates for authorized amounts to be awarded pursuant to applications submitted in response to the request for application number 17648 to September 1, 2019 (Part L); relates to the definition of an authorized entity that may utilize design-build contracts (Part M); makes technical corrections to the "Jose Peralta New York state DREAM act" (Part N); relates to mass transit access for LaGuardia airport (Part O); limits the rate of interest on any judgment or accrued claim against the authority arising out of condemnation proceedings to six percent (Part P); relates to making certain technical corrections to chapter 36 of the laws of 2019 relating to rent control (Part Q); relates to the operational expenses of certain gaming facilities (Part R); relates to video lottery gaming in Orange county (Part S); and increases the number of supreme court judges and county court judges in certain jurisdictions (Part T).

S06615 Actions:

BILL NO S06615
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S06615 Floor Votes:

DATE: 06/21/2019 Assembly Vote

YEA/NAY: 97/38

Abbate	Y	Crespo	Y	Gantt	ER	LiPetri	NO	Perry	Y	Simon	Y
Abinanti	Y	Crouch	NO	Garbarino	NO	Lupardo	Y	Pheffer Amato	Y	Simotas	Y
Arroyo	ER	Cruz	Y	Giglio	NO	Magnarelli	Y	Pichardo	Y	Smith	NO
Ashby	NO	Cusick	Y	Glick	Y	Malliotakis	NO	Pretlow	Y	Smullen	NO
Aubry	Y	Cymbrowitz	Y	Goodell	NO	Manktelow	NO	Quart	Y	Solages	Y
Barclay	Y	Davila	Y	Gottfried	Y	McDonald	Y	Ra	NO	Stec	NO
Barnwell	NO	De La Rosa	Y	Griffin	Y	McDonough	ER	Raia	Y	Steck	Y
Barrett	Y	DenDekker	Y	Gunther	Y	McMahon	Y	Ramos	Y	Stern	Y
Barron	Y	DeStefano	NO	Hawley	NO	Mikulin	NO	Raynor	ER	Stirpe	Y
Benedetto	ER	Dickens	Y	Hevesi	Y	Mill B	Y	Reilly	NO	Tague	NO
Bichotte	Y	Dilan	ER	Hunter	Y	Mill MG	ER	Reyes	Y	Taylor	Y
Blake	Y	Dinowitz	Y	Hyndman	Y	Mill ML	NO	Richardson	ER	Thiele	Y
Blankenbush	NO	DiPietro	NO	Jacobson	Y	Montesano	ER	Rivera	Y	Titus	ER
Brabenec	Y	D'Urso	Y	Jaffee	Y	Morinello	NO	Rodriguez	Y	Vanel	Y
Braunstein	Y	Eichenstein	NO	Jean-Pierre	Y	Mosley	Y	Romeo	Y	Walczyk	NO
Bronson	Y	Englebright	Y	Johns	NO	Niou	Y	Rose D	Y	Walker	Y
Buchwald	Y	Epstein	Y	Jones	Y	Nolan	ER	Rose L	Y	Wallace	Y
Burke	Y	Fahy	Y	Joyner	Y	Norris	NO	Rozic	Y	Walsh	NO
Buttenschon	Y	Fall	Y	Kim	Y	O'Donnell	ER	Ryan	Y	Weinstein	Y
Byrne	NO	Fernandez	Y	Kolb	NO	Ortiz	ER	Salka	Y	Weprin	Y
Byrnes	NO	Finch	Y	Lalor	NO	Otis	Y	Santabarbara	NO	Williams	Y
Cahill	Y	Fitzpatrick	NO	Lavine	Y	Palmesano	NO	Sayegh	ER	Woerner	Y
Carroll	Y	Friend	NO	Lawrence	NO	Palumbo	NO	Schimminger	Y	Wright	Y
Colton	Y	Frontus	Y	Lentol	Y	Paulin	Y	Schmitt	NO	Zebrowski	Y
Cook	Y	Galef	Y	Lifton	Y	Peoples-Stokes	ER	Seawright	Y	Mr Spkr	Y

PART 5

43 Section 1. Clause (B) of subparagraph (ii) of paragraph 1 of subdivi-
44 sion b of section 1612 of the tax law is amended by adding a new
45 subclause 5 to read as follows:

46 (5) forty-nine percent for a video lottery gaming facility authorized
47 pursuant to paragraph five of subdivision a of section sixteen hundred
48 seventeen-a of this article;

49 § 1-a. Clause (A) of subparagraph (iii) of paragraph 1 of subdivision
50 b of section 1612 of the tax law, as added by section 1 of part EE of
51 chapter 59 of the laws of 2019, is amended to read as follows:

1 (A) when a vendor track is located within region one and is located
 2 within Orange county or region two of development zone two, as such zone
 3 is defined in section thirteen hundred ten of the racing, pari-mutuel
 4 wagering and breeding law, or is located within region six of such
 5 development zone two and is located within Ontario county, the addi-
 6 tional vendor fee received by the vendor track shall be calculated
 7 pursuant to subclause one of this clause; provided, however, such addi-
 8 tional vendor fee shall not exceed ten percent.

9 § 2. Paragraph 2 of subdivision b of section 1612 of the tax law, as
 10 amended by section 1 of part 00 of chapter 59 of the laws of 2014, is
 11 amended to read as follows:

12 2. As consideration for the operation of a video lottery gaming facil-
 13 ity, the division, shall cause the investment in the racing industry of
 14 a portion of the vendor fee received pursuant to paragraph one of this
 15 subdivision in the manner set forth in this subdivision. With the
 16 exception of Aqueduct racetrack, a video lottery gaming facility author-
 17 ized pursuant to paragraph five of subdivision a of section sixteen
 18 hundred seventeen-a of this article or a facility in the county of
 19 Nassau or Suffolk operated by a corporation established pursuant to
 20 section five hundred two of the racing, pari-mutuel wagering and breed-
 21 ing law, each such track shall dedicate a portion of its vendor fees,
 22 received pursuant to clause (A), (B), (B-1), (B-2), (C), or (D), ~~(E),~~
 23 ~~(F), or (G)~~ of subparagraph (ii) of paragraph one of this subdivision,
 24 for the purpose of enhancing purses at such track, in an amount equal to
 25 eight and three-quarters percent of the total revenue wagered at the
 26 vendor track after pay out for prizes. One percent of the gross purse
 27 enhancement amount, as required by this subdivision, shall be paid to
 28 the gaming commission to be used exclusively to promote and ensure
 29 equine health and safety in New York. Any portion of such funding to the
 30 gaming commission unused during a fiscal year shall be returned to the
 31 video lottery gaming operators on a pro rata basis in accordance with
 32 the amounts originally contributed by each operator and shall be used
 33 for the purpose of enhancing purses at such track. One and one-half
 34 percent of the gross purse enhancement amount at a thoroughbred track,
 35 as required by this subdivision, shall be paid to an account established
 36 pursuant to section two hundred twenty-one-a of the racing, pari-mutuel
 37 wagering and breeding law to be used exclusively to provide health
 38 insurance for jockeys. In addition, with the exception of Aqueduct race-
 39 track, a video lottery gaming facility authorized pursuant to paragraph
 40 five of subdivision a of section sixteen hundred seventeen-a of this
 41 article or a facility in the county of Nassau or Suffolk operated by a
 42 corporation established pursuant to section five hundred two of the
 43 racing, pari-mutuel wagering and breeding law, one and one-quarter
 44 percent of total revenue wagered at the vendor track after pay out for
 45 prizes, received pursuant to clause (A), (B), (B-1), (B-2), (C), or
 46 (D), ~~(E), (F), or (G)~~ of subparagraph (ii) of paragraph one of this
 47 subdivision, shall be distributed to the appropriate breeding fund for
 48 the manner of racing conducted by such track.

49 Provided, further, that nothing in this paragraph shall prevent each
 50 track from entering into an agreement, not to exceed five years, with
 51 the organization authorized to represent its horsemen to increase or
 52 decrease the portion of its vendor fee dedicated to enhancing purses at
 53 such track during the years of participation by such track, or to race
 54 fewer dates than required herein.

55 § 3. Subdivision h of section 1612 of the tax law, as amended by chap-
 56 ter 174 of the laws of 2013, is amended to read as follows:

1 h. As consideration for the operation of a video lottery gaming
 2 ~~[resort]~~ facility located in ~~[Sullivan county]~~ Orange county, the divi-
 3 sion shall cause the investment in the racing industry at the following
 4 amount from the vendor fee to be paid as follows:

5 As amount to the horsemen for purses at a licensed racetrack in Sulli-
 6 van county ~~[and to the agriculture and New York state horse breeding~~
 7 ~~development fund to maintain racing support payments at the same dollar~~
 8 ~~levels realized in two thousand thirteen, to be adjusted by the consumer~~
 9 ~~price index for all urban consumers, as published annually by the United~~
 10 ~~States department of labor bureau of labor statistics]~~ in an amount
 11 equal to eight and three-quarters percent of the total revenue wagered
 12 at the video lottery gaming facility, after pay out for prizes. The
 13 facility located in Orange county, as defined in paragraph five of
 14 subdivision a of section sixteen hundred seventeen-a of this article
 15 shall pay to the horsemen at a licensed racetrack at Yonkers racetrack
 16 an amount to maintain purses for such horsemen at the same dollar levels
 17 realized in two thousand eighteen, to be adjusted by the consumer price
 18 index for all urban consumers, as published annually by the United
 19 States department of labor bureau of labor statistics. In addition, one
 20 and one-quarter percent of total revenue wagered at the video lottery
 21 gaming facility after pay out for prizes, received pursuant to clause
 22 (B) of subparagraph (ii) of paragraph one of subdivision b of this
 23 section, shall be distributed to the appropriate breeding fund for the
 24 manner of racing conducted by such track. In no circumstance shall net
 25 proceeds of the lottery, including the proceeds from video lottery
 26 gaming, be used for the payment of non-lottery expenses of the gaming
 27 commission, administrative or otherwise.

28 § 4. Subdivision a of section 1617-a of the tax law is amended by
 29 adding three new paragraphs 5, 6, and 7 to read as follows:

30 (5) At a facility located in Orange county to be operated by the enti-
 31 ty otherwise licensed to operate video lottery gaming at Monticello
 32 racetrack, provided that: (i) such licensed entity is no longer operat-
 33 ing video lottery gaming at Monticello racetrack and provided that
 34 Monticello racetrack is conducting racing operations; (ii) such facility
 35 in Orange county is not sited within a thirty mile radius of the video
 36 lottery gaming facility at Yonkers racetrack; and (iii) the licensed
 37 entity, its subsidiaries and affiliates, including the entity licensed
 38 to operate a commercial gaming facility in Sullivan county, and the
 39 entity licensed to operate video lottery gaming at Yonkers racetrack
 40 enter into a mitigation agreement, to be approved by the gaming commis-
 41 sion, which shall include, but not be limited to, terms that require:
 42 (A) the operator of the facility in Orange county to make an annual
 43 payment to the entity licensed to operate video lottery gaming or
 44 commercial gaming at Yonkers racetrack to account for the effects that
 45 siting such facility in Orange county would likely have on the gross
 46 gaming revenue of the entity licensed to operate at Yonkers racetrack;
 47 (B) employment levels at the affected facilities; and (C) that upon
 48 expiration or termination of the agreement, the authority to operate
 49 video lottery gaming in Orange county shall cease. Notwithstanding any
 50 other provision of this subdivision, at no time shall an entity operat-
 51 ing video lottery gaming in Orange county be permitted to apply for or
 52 receive a license to operate a commercial gaming facility in that coun-
 53 ty.

54 (6) Notwithstanding any other provision of law to the contrary, as a
 55 condition of the license to operate a video lottery gaming facility
 56 located in Orange county, such operator shall provide an annual certif-

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1 ication to the New York state gaming commission that the staffing levels
 2 at a commercial gaming facility located in zone two, region one pursuant
 3 to section thirteen hundred ten of the racing, pari-mutuel wagering and
 4 breeding law (or any successor commercial gaming facility located in
 5 said region) are no less than one thousand four hundred seventy-three
 6 full-time, permanent employees. In furtherance of and without limiting
 7 the foregoing, the licensee for the commercial gaming facility located
 8 in zone two, region one pursuant to section thirteen hundred ten of the
 9 racing, pari-mutuel wagering and breeding law (or any successor commer-
 10 cial gaming facility located in such region) shall not conduct any mass,
 11 involuntary layoff events that would trigger worker adjustment and
 12 retraining notification (WARN) act notifications pursuant to article
 13 twenty-five-A of the labor law or otherwise result in the employment
 14 levels at such facility dropping below levels mandated by this section.
 15 For purposes of this section, "full-time, permanent employee" shall mean
 16 an employee who has worked at the facility for a minimum of thirty-five
 17 hours per week for not less than four consecutive weeks and who is enti-
 18 tled to receive the usual and customary fringe benefits extended to
 19 other employees with comparable rank and duties; or two part-time
 20 employees who have worked at the facility for a combined minimum of
 21 thirty-five hours per week for not less than four consecutive weeks and
 22 who are entitled to receive the usual and customary fringe benefits
 23 extended to other employees with comparable rank and duties.

24 (7) The village of Monticello, Sullivan county, the town of Thompson,
 25 Sullivan county, and Sullivan county shall continue to receive assist-
 26 ance payments made pursuant to section fifty-four-1 of the state finance
 27 law.

28 § 5. Section 54-1 of the state finance law is amended by adding a new
 29 subdivision 5 to read as follows:

30 5. The town and county in which the facility defined in paragraph five
 31 of subdivision a of section sixteen hundred seventeen-a of the tax law
 32 is located shall receive assistance payments made pursuant to this
 33 section at the same dollar level realized by the village of Monticello,
 34 Sullivan county, the town of Thompson, Sullivan county, and Sullivan
 35 county. Each village in which the facility defined in paragraph five of
 36 subdivision a of section sixteen hundred seventeen-a of the tax law is
 37 located shall receive assistance payments made pursuant to this section
 38 at the rate of fifty percent of the dollar level realized by the village
 39 of Monticello. Any payments made pursuant to this subdivision shall not
 40 commence until the facility defined in paragraph five of subdivision a
 41 of section sixteen hundred seventeen-a of the tax law has realized
 42 revenue for a period of twelve consecutive months.

43 § 6. This act shall take effect immediately; provided, however, that
 44 no video lottery gaming may be conducted at any facility within Orange
 45 county unless and until the mitigation agreement required by this act is
 46 executed by all parties and approved by the gaming commission.

A3036 Solages (MS) No Same as
Racing, Pari-Mutuel Wagering and Breeding Law
TITLE....Relates to the right to hold race meetings and races at Belmont Park
01/28/19 referred to racing and wagering

STATE OF NEW YORK

3036

2019-2020 Regular Sessions

IN ASSEMBLY

January 28, 2019

Introduced by M. of A. SOLAGES, WOERNER, VANEL, MONTESANO, D'URSO,
LAVINE, THIELE, PALUMBO -- Multi-Sponsored by -- M. of A. M. L. MILLER
-- read once and referred to the Committee on Racing and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in
relation to the right to hold race meetings and races at Belmont Park;
and providing for the repeal of such provisions upon expiration there-
of

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Section 203 of the racing, pari-mutuel wagering and breed-
2 ing law, as amended by chapter 18 of the laws of 2008, is amended to
3 read as follows:
4 § 203. Right to hold race meetings and races. 1. Any corporation
5 formed under the provisions of this article, if so claimed in its
6 certificate of organization, and if it shall comply with all the
7 provisions of this article, and any other corporation entitled to the
8 benefits and privileges of this article as hereinafter provided, shall
9 have the power and the right to hold one or more running race meetings
10 in each year, and to hold, maintain and conduct running races at such
11 meetings. At such running race meetings the corporation, or the owners
12 of horses engaged in such races, or others who are not participants in
13 the race, may contribute purses, prizes, premiums or stakes to be
14 contested for, but no person or persons other than the owner or owners
15 of a horse or horses contesting in a race shall have any pecuniary
16 interest in a purse, prize, premium or stake contested for in such race,
17 or be entitled to or receive any portion thereof after such race is
18 finished, and the whole of such purse, prize, premium or stake shall be
19 allotted in accordance with the terms and conditions of such race. Races
20 conducted by a franchised corporation shall be permitted only between
21 sunrise and sunset.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 2. Notwithstanding any other provision of law to the contrary, a fran-
2 chised corporation shall be permitted to conduct races after sunset at
3 the Belmont Park racetrack, only on the main track in its current
4 configuration, but only if such races conclude before half past ten
5 o'clock post meridian and only if such races occur on Thursdays, Fridays
6 or Saturdays. The franchised corporation shall coordinate with a *harness*
7 *rac*ing association or corporation authorized to operate in Westchester
8 county to ensure that the starting times of all such races are stag-
9 gered.

10 3. A track first licensed after January first, nineteen hundred nine-
11 ty, shall not conduct the simulcasting of thoroughbred races within
12 district one, in accordance with article ten of this chapter on days
13 that a franchised corporation is not conducting a race meeting. In no
14 event shall thoroughbred races conducted by a track first licensed after
15 January first, nineteen hundred ninety be conducted after eight o'clock
16 post meridian.

17 § 2. This act shall take effect immediately and shall expire and be
18 deemed repealed 4 years after the first night of racing conducted after
19 sunset pursuant to this act; provided that the New York Racing Associ-
20 ation shall notify the legislative bill drafting commission of the date
21 of such night of racing in order that the commission may maintain an
22 accurate and timely effective data base of the official text of the laws
23 of the state of New York in furtherance of effecting the provisions of
24 section 44 of the legislative law and section 70-b of the public offi-
25 cers law.

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A3036

SPONSOR: Solages (MS)

TITLE OF BILL:

An act to amend the racing, pari-mutuel wagering and breeding law, in relation to the right to hold race meetings and races at Belmont Park; and providing for the repeal of such provisions upon expiration thereof

PURPOSE OR GENERAL IDEA OF BILL:

To permit limited night racing at Belmont Park racetrack.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 amends section 203 of the racing, pari-mutuel wagering and breeding law as amended by Chapter 18 of the Laws of 2008 by adding subdivision 2 which permits a franchised corporation to conduct races after sunset at Belmont Park racetrack, only on the main track in its current configuration, concluding by 10:30 pm and only on Thursdays, Fridays or Saturdays. Additionally, the franchised corporation shall coordinate with the harness racing association or corporation authorized to operate in Westchester County to ensure that starting times of all such races are staggered.

Section 2 of this bill provides that this act shall take effect immediately and sets a repeal date of 4 years after the first night of racing conducted after sunset pursuant to this act.

JUSTIFICATION:

The future of successful businesses, including professional sports, is dependent upon our younger generations. Like numerous other sports, horseracing needs to find and recruit new generations of spectators, fans and horse players to secure a long-term future in New York State. This includes catering to fans by providing premier events during non-work hours. Recognizing the success that other venues across the country have had conducting night racing, NYRA intends to conduct racing a few nights a week during the annual Belmont Park meet.

PRIOR LEGISLATIVE HISTORY:

A8489 2017-2018 Legislative Session

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

This act shall take effect immediately.

A4736 Pretlow No Same as
Racing, Pari-Mutuel Wagering and Breeding Law
TITLE....Relates to harness racing
02/05/19 referred to racing and wagering

STATE OF NEW YORK

4736

2019-2020 Regular Sessions

IN ASSEMBLY

February 5, 2019

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Racing and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in relation to *harness racing*

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Subdivision 3 of section 301 of the racing, pari-mutuel
2 wagering and breeding law is amended to read as follows:
3 3. The term "racing", as used in this article, shall be construed to
4 mean utilizing only [~~horse racing in which the horses participating are~~
5 ~~harnessed~~] horses that are registered with a recognized breed registry
6 as standard (harness) and where the standardbred horse is attached to a
7 sulky, carriage, or similar vehicle[~~, and shall not include any form of~~
8 ~~horse racing in which the horses participating are~~] or mounted [~~by a~~
9 ~~jockey~~].
10 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD04926-01-9

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A4736

SPONSOR: Pretlow

TITLE OF BILL:

An act to amend the racing, pari-mutuel wagering and breeding law, in relation to harness racing

PURPOSE:

TO ALLOW COMPETITION AND WAGERING ON "RACING UNDER SADDLE" (RUS) AT STANDARDBRED HARNESS RACETRACKS

SUMMARY OF PROVISIONS:

SECTION 1: AMENDS SUBDIVISION 3 OF SECTION 301 OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW TO PERMIT A MOUNTED RIDER AS AN ACCEPTABLE FORM OF STANDARDBRED HARNESS RACING

SECTION 2: EFFECTIVE DATE:.

JUSTIFICATION:

UNDER CURRENT LAW, THE DEFINITION OF HARNESS RACING LIMITS THE RACING OF THIS VERY SPECIFIC BREED AND UNIQUE BREED OF HORSE (STANDARDBRED A/K/A HARNESS HORSE) TO RACING ATTACHED TO "A SULKY, CARRIAGE OR SIMILAR VEHICLE" AND EFFECTIVELY PROHIBITS THE PRACTICE OF "RACING UNDER SADDLE" (RUS) WITH A MOUNTED RIDER. A PROMOTIONAL EVENT-WHICH NO PURSE MONEY WAS AWARDED, WAS HELD AT YONKERS RACEWAY IN 2010. FAN INTEREST IN RUS OR "MONTE RACING" HAS HEIGHTENED AS A RESULT OF THIS EXHIBITION.

WHILE THE YONKERS RUS EXHIBITION CREATED INTEREST AND EXCITEMENT IN THIS NEW FORM OF RACING, IT HAS REMAINED A NOVELTY WITH UNREALIZED POTENTIAL BECAUSE OF THE INABILITY TO PAY PURSES. PERMITTING RUS AT NYS HARNESS TRACKS COULD HAVE SIGNIFICANT BENEFITS FOR THE RACING INDUSTRY, AND THEREFORE FOR THE ENTIRE STATE.

THIS PROPOSAL WOULD SPECIFICALLY LIMIT SUCH RACING AT HARNESS TRACKS ONLY TO REGISTERED STANDARDBRED HORSES (AND, OBVIOUSLY, ONLY AT A TROT OR A PACE). SUCH CHANGES WOULD ALLOW LICENSED HARNESS TRACKS TO CONDUCT EITHER HARNESS RACES OR RUS RACES AND WOULD ALLOW WAGERS TO BE MADE AND PURSES TO BE PAID UNDER THE SAME REGULATORY GUIDELINES CURRENTLY IN PLACE FOR THE CONDUCT OF HARNESS RACES.

LEGISLATIVE HISTORY:

A2118 01/17/17 referred to racing and wagering

A2118 01/03/18 referred to racing and wagering

S1059 01/17/18 ADVANCED TO THIRD READING

S1059 06/20/18 COMMITTED TO RULES

FISCAL IMPLICATIONS:

THE FISCAL IMPACTS OF SUCH A CHANGE WOULD BE ONLY POSITIVE, AS IT WOULD
LIKELY BENEFIT RACING AND AGRICULTURE ACROSS NEW YORK.

EFFECTIVE DATE:

THIS ACT SHALL TAKE EFFECT IMMEDIATELY

A5954 Pretlow No Same as

Tax Law

TITLE....Relates to the Catskill off-track betting corporation providing licensing and financing to the Monticello racetrack

02/20/19 referred to racing and wagering

PRETLOW

Amd §§1617-a & 1612, Tax L; amd §§301 & 527, RWB L

Relates to the Catskill off-track betting corporation providing licensing and financing to the Monticello racetrack and the ability to provide capital improvements.

STATE OF NEW YORK

5954

2019-2020 Regular Sessions

IN ASSEMBLY

February 20, 2019

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Racing and Wagering

AN ACT to amend the tax law and the racing, pari-mutuel wagering and breeding law, in relation to the Catskill off-track betting corporation providing licensing and financing to the Monticello racetrack

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph 1 of subdivision a of section 1617-a of the tax
2 law, as amended by section 1 of part SS of chapter 60 of the laws of
3 2016, is amended to read as follows:

4 (1) Aqueduct, [~~Monticello,~~] Yonkers, Finger Lakes, and Vernon Downs
5 racetracks;

6 § 2. Paragraphs 3 and 4 of subdivision a of section 1617-a of the tax
7 law, as added by section 1 of part SS of chapter 60 of the laws of 2016,
8 are amended and a new paragraph 5 is added to read as follows:

9 (3) a maximum of two facilities, which shall be vendors for all
10 purposes under this article, neither to exceed one thousand video
11 lottery gaming devices, established within region three of zone one as
12 defined by section one thousand three hundred ten of the racing, pari-
13 mutuel wagering and breeding law, one each operated by a corporation
14 established pursuant to section five hundred two of the racing, pari-mu-
15 tuel wagering and breeding law in the Suffolk region and the Nassau
16 region to be located within a facility authorized pursuant to [~~sections~~]
17 section one thousand eight or one thousand nine of the racing, pari-mu-
18 tuel wagering and breeding law; [~~and~~]

19 (4) Aqueduct racetrack, within the lottery terminal facility, pursuant
20 to an agreement between the corporation established pursuant to section
21 five hundred two of the racing, pari-mutuel wagering and breeding law in
22 the Nassau region and the operator of video lottery gaming at Aqueduct
23 racetrack, when such agreement is approved by the gaming commission and
24 as long as such agreement is in place, and when such agreement is accom-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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panied by a detailed spending plan for the corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law in the Nassau region, which includes a plan for the timely payment of liabilities due to the franchised corporation, and when such video lottery devices are hosted by the operator of video lottery gaming at Aqueduct racetrack on behalf of the corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law in the Nassau region in lieu of the development of a facility in Nassau county as authorized by paragraph three of this subdivision [a-of this section]. Such agreement reached by the parties shall identify the agency principally responsible for funding, approving or undertaking any actions of such agreement. Provided, however, nothing in this paragraph shall infringe upon the rights of the corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law in the Nassau region to develop a facility pursuant to paragraph three of this subdivision upon the expiration, termination, or withdrawal of such agreement[~~+~~]; and

(5) a maximum of three facilities, which shall be vendors for all purposes under this article, with a total of one thousand one hundred ten video lottery gaming devices in the county of Broome, Chemung, Chenango, Delaware, Orange, Rockland, Dutchess, Tompkins, Putnam or Ulster and to be operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law, and located within a facility authorized pursuant to section one thousand eight or one thousand nine of the racing, pari-mutuel wagering and breeding law.

§ 3. Clause (G-1) of subparagraph (ii) of paragraph 1 of subdivision b of section 1612 of the tax law, as amended by chapter 175 of the laws of 2013, is amended to read as follows:

(G-1) Notwithstanding ~~[clause]~~ clauses (A) and (B) of this subparagraph, when a video lottery gaming facility is located in ~~[either]~~ the county of Broome, Chemung, Chenango, Delaware, Orange, Rockland, Dutchess, Tompkins, Putnam, Ulster, Nassau or Suffolk and is operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law at a rate of thirty-five percent of the total revenue wagered at the vendor after payout for prizes pursuant to this chapter;

§ 4. Paragraph 2 of subdivision b of section 1612 of the tax law, as amended by section 1 of part 00 of chapter 59 of the laws of 2014, is amended to read as follows:

2. As consideration for the operation of a video lottery gaming facility, the division, shall cause the investment in the racing industry of a portion of the vendor fee received pursuant to paragraph one of this subdivision in the manner set forth in this subdivision. With the exception of Aqueduct racetrack or a facility in the county of Nassau or Suffolk operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law, each such track shall dedicate a portion of its vendor fees, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G) of subparagraph (ii) of paragraph one of this subdivision, for the purpose of enhancing purses at such track, in an amount equal to eight and three-quarters percent of the total revenue wagered at the vendor track after pay out for prizes. Any video lottery gaming facility in the Catskill region, as defined in section five hundred nineteen of the racing, pari-mutuel wagering and breeding law and to be operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel

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1 wagering and breeding law, shall dedicate a portion of its vendor fee
2 for the purpose of enhancing purses at Monticello racetrack in an amount
3 equal to eight and three-quarters percent of the total revenue wagered
4 at the facility after pay out for prizes. One percent of the gross purse
5 enhancement amount, as required by this subdivision, shall be paid to
6 the gaming commission to be used exclusively to promote and ensure
7 equine health and safety in New York. Any portion of such funding to the
8 gaming commission unused during a fiscal year shall be returned to the
9 video lottery gaming operators on a pro rata basis in accordance with
10 the amounts originally contributed by each operator and shall be used
11 for the purpose of enhancing purses at such track. One and one-half
12 percent of the gross purse enhancement amount at a thoroughbred track,
13 as required by this subdivision, shall be paid to an account established
14 pursuant to section two hundred twenty-one-a of the racing, pari-mutuel
15 wagering and breeding law to be used exclusively to provide health
16 insurance for jockeys. In addition, with the exception of Aqueduct race-
17 track or a facility in the county of Nassau or Suffolk operated by a
18 corporation established pursuant to section five hundred two of the
19 racing, pari-mutuel wagering and breeding law, one and one-quarter
20 percent of total revenue wagered at the vendor track after pay out for
21 prizes, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G)
22 of subparagraph (ii) of paragraph one of this subdivision, shall be
23 distributed to the appropriate breeding fund for the manner of racing
24 conducted by such track.

25 Provided, further, that as additional consideration for the operation
26 of video lottery gaming facilities, the Catskill regional off-track-bet-
27 ting corporation shall maintain the same number of race dates at Monti-
28 cello racetrack being conducted at the time it receives a license to
29 conduct harness race meetings at such racetrack.

30 Provided, further, that nothing in this paragraph shall prevent each
31 track from entering into an agreement, not to exceed five years, with
32 the organization authorized to represent its horsemen to increase or
33 decrease the portion of its vendor fee dedicated to enhancing purses at
34 such track during the years of participation by such track, or to race
35 fewer dates than required herein.

36 § 5. Section 1612 of the tax law is amended by adding a new subdivi-
37 sion i to read as follows:

38 i. As consideration for operation of a video lottery gaming facility
39 located in the counties of Broome, Chemung, Chenango, Delaware, Orange,
40 Rockland, Dutchess, Tompkins, Putnam, or Ulster, and operated by a
41 corporation established pursuant to section five hundred two of the
42 racing, pari-mutuel wagering and breeding law, the division shall cause
43 the vendor's fee to be distributed as follows after the pay out of
44 racing support payments: (1) twenty percent shall be transferred to the
45 county in which the vendor facility is located; and (2) the remainder
46 shall be used for payment of the costs of the corporation's functions
47 pursuant to section five hundred sixteen of the racing, pari-mutuel
48 wagering and breeding law, and the net revenue remaining after payment
49 of such costs shall be divided among the participating counties listed
50 in this paragraph on the basis of population as defined in paragraph b
51 of subdivision two of section five hundred sixteen of the racing, pari-
52 mutuel wagering and breeding law.

53 § 6. Section 301 of the racing, pari-mutuel wagering and breeding law
54 is amended by adding a new subdivision 6 to read as follows:

55 6. The board shall have the power to issue licenses to the Catskill
56 regional off-track-betting corporation or to a subsidiary of said corpo-

1 ration for the purpose of conducting harness race meetings at Monticello
2 racetrack and to make capital improvements to said track, provided that
3 such corporation meets the terms and conditions for licensure as
4 provided under this article. Notwithstanding the provisions of articles
5 five and five-a of this chapter, said corporation shall be deemed to be
6 a harness racing corporation with respect to pari-mutuel wagering
7 conducted at said track pursuant to this chapter, except that net reven-
8 ues derived from such pari-mutuel wagering shall be distributed among
9 the counties that participate in such corporation on the basis of popu-
10 lation, as defined as the total population in each participating county
11 shown by the latest preceding decennial federal census of the calendar
12 year in which such distribution is to be made.

13 § 7. The opening paragraph of subdivision 1 of section 527 of the
14 racing, pari-mutuel wagering and breeding law, as amended by section 4
15 of part BB of chapter 60 of the laws of 2016, is amended to read as
16 follows:

17 The disposition of the retained commission from pools resulting from
18 regular, multiple or exotic bets, as the case may be, whether placed on
19 races run within a region or outside a region, conducted by racing
20 corporations, harness racing associations or corporations, quarter horse
21 racing associations or corporations or races run outside the state shall
22 be governed by the tables in paragraphs a and b of this subdivision. The
23 rate denominated "state tax" shall represent the rate of a reasonable
24 tax imposed upon the retained commission for the privilege of conducting
25 off-track pari-mutuel betting, which tax is hereby levied and shall be
26 payable in the manner set forth in this section. Each off-track betting
27 corporation shall pay to the gaming commission as a regulatory fee,
28 which fee is hereby levied, six-tenths of one percent of the total daily
29 pools of such corporation. Each corporation shall also pay twenty
30 percent of the breaks derived from bets on harness races and fifty
31 percent of the breaks derived from bets on all other races to the agri-
32 culture and New York State horse breeding and development fund and to
33 the thoroughbred breeding and development fund, the total of such
34 payments to be apportioned fifty percent to each such fund. For the
35 purposes of this section, the New York city, Suffolk, Nassau, and the
36 Catskill regions shall constitute a single region and any thoroughbred
37 track located within the Capital District region shall be deemed to be
38 within such single region. A "regional meeting" shall refer to either
39 harness or thoroughbred meetings, or both, except that a franchised
40 corporation shall not be a regional track for the purpose of receiving
41 distributions from bets on thoroughbred races conducted by a thorough-
42 bred track in the Catskill region conducting a mixed meeting. With the
43 exception of a harness racing association or corporation first licensed
44 to conduct pari-mutuel wagering at a track located in Tioga [or], Sara-
45 toga or Sullivan county after January first, two thousand five, racing
46 corporations first licensed to conduct pari-mutuel racing after January
47 first, nineteen hundred eighty-six or a harness racing association or
48 corporation first licensed to conduct pari-mutuel wagering at a track
49 located in Genesee County after January first, two thousand five, and
50 quarter horse tracks shall not be "regional tracks"; if there is more
51 than one harness track within a region, such tracks shall evenly divide
52 payments made pursuant to the tables in paragraphs a and b of this
53 subdivision when neither track is running. In the event a track elects
54 to reduce its retained percentage from any or all of its pari-mutuel
55 pools, the payments to the track holding the race and the regional track
56 required by paragraphs a and b of this subdivision shall be reduced in

A. 5954

5

1 proportion to such reduction. Nothing in this section shall be construed
2 to authorize the conduct of off-track betting contrary to the provisions
3 of section five hundred twenty-three of this article.
4 § 8. This act shall take effect on the thirtieth day after it shall
5 have become a law.

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A5954

SPONSOR: Pretlow

TITLE OF BILL:

An act to amend the tax law and the racing, pari-mutuel wagering and breeding law, in relation to the Catskill off-track betting corporation providing licensing and financing to the Monticello racetrack

PURPOSE:

To maintain the State and local video lottery gaming revenue coming from Monticello racetrack, as well as existing racing support payments, and ensure the long-term continuation of harness racing at Monticello racetrack

SUMMARY OF PROVISIONS:

Section 1: Eliminates the authorization for video lottery gaming at Monticello racetrack, consistent with the public announcement by the operator that it would cease such gaming in April 2019

Section 2: Authorizes Catskill OTB to take over the 1,110 video lottery terminals (VLTs) currently in operation at Monticello racetrack and continue the operation of such VLTs at a maximum of 3 different facilities in the Catskill OTB region, excluding any county where a casino is already in operation (Sullivan, Tioga and Westchester).

Section 3: Provides that Catskill OTB shall receive a VLT vendor fee of 35% of net win, the same vendor fee provided to other OTBs operating VLT machines (Western, Suffolk and Nassau).

Section 4: Provides that, as consideration for being granted the authorization to operate the VLT facilities, Catskill OTB shall: (1) continue the current racing support payments in place at Monticello racetrack (8.75% to purses and 1.25% to breeders); and (2) maintain the same number of race dates at Monticello racetrack.

Section 5: Provides that the vendor fee paid to Catskill OTB (after pay out of racing support payments) shall be distributed as follows: (1) 20% to the county in which the VLT facility is located; and (2) 80% for payment of Catskill OTB operating costs with the net revenue remaining after such costs to be divided among the participating counties on the basis of population.

Section 6: Authorizes the Gaming Commission to issue licenses to Catskill OTB to conduct harness race meetings at Monticello racetrack, in order to ensure the long-term continuation of harness racing at such track.

Section 7: Provides that the Monticello Racetrack shall remain a regional track and retain its regional payments after Catskill OTB is

approved to take over operation and conduct harness racing at such track.

Section 8: Effective date language.

EXISTING LAW:

Tax Law sections 1612 and 1617-a authorize Monticello racetrack to operate VLT machines and distributes the net win from such machines as follows:

- * 41% vendor fee (less 10% in racing support payments for purses and breeders);
- * 39% State education aid;
- * 10% marketing allowance;
- * 10% gaming administration to the State

Racing, Pari-Mutuel Wagering and Breeding Law section 1351 provides a 39% tax on casino gross gaming revenue (of which 80% is allocated to State education aid and 20% to local tax relief).

JUSTIFICATION:

On January 23rd, the operator of VLT gaming at Monticello racetrack announced it would be ceasing operation of such gaming in April 2019. The closure of the VLT operation at Monticello racetrack would result in significant loss of revenue for State education aid, local tax relief and racing support payments. In SFY 2017-18, the 1,110 VLT machines at Monticello racetrack generated \$21.4M in State education aid, \$1.2M in local tax relief, and \$5.5M in racing support payments. In addition, the closure of the VLT operation at Monticello racetrack would threaten the long-term viability of harness racing at such track.

This bill would help maintain the State and local VLT revenue coming from the 1,110 VLT machines at Monticello racetrack, as well as the existing racing support payments, and ensure the long-term continuation of harness racing at the track. The bill would accomplish all of these critically important goals by authorizing Catskill OTB to take over operation of both the 1,110 VLT machines and the racetrack, which Catskill OTB would purchase from the existing operator using unspent capital reserves.

To avoid directly competing with the casino in Sullivan County - or the casinos in Tioga and Westchester counties - Catskill OTB would open and operate up to 3 new smaller VLT facilities in other counties within its region.

As consideration for the authorization to operate the 1,110 VLT machines and the racetrack, Catskill OTB would be required to maintain: (1) current levels of State education aid, local tax relief and racing support payments; and (2) the same number of harness race dates at Monticello racetrack currently being conducted.

FISCAL IMPLICATIONS:

The bill is necessary to maintain current levels of State education aid, local tax relief and racing support payments coming from VLT gaming at Monticello racetrack.

EFFECTIVE DATE:

This act shall take effect 30 days after becoming law.

New York State Gaming Commission

Minutes

Meeting of January 28, 2019

A meeting of the Commission was conducted in New York, New York.

1. Call to Order and Establishment of Quorum

Acting Executive Director Robert Williams called the meeting to order at 1:46 p.m. Establishment of a quorum was noted by Acting Secretary Kristen Buckley. In attendance were Chairman Barry Sample and Commissioners John Crotty, Peter Moschetti, John Poklemba, Jerry Skurnik and Todd Snyder.

2. Consideration of Minutes for Meeting of December 10, 2018

The Commission considered previously circulated draft minutes of the meeting conducted on December 10, 2018. The minutes were accepted as circulated.

3. Rulemaking

a. ADOPTION: SGC-42-18-00015-P, Permit Greater Purse-to-Price Ratio in Thoroughbred Claiming Races

The Commission considered an adoption of a proposed rulemaking that would add flexibility to the Thoroughbred claiming-price rule on a case-by-case basis for all or a portion of a race meeting while requiring the track to meet increased requirements to ensure the competitiveness, soundness and safety of the horses that enter any such races.

Chairman Sample directed State Equine Medical Director Scott Palmer to carefully examine each request and for staff to report back in May on the effect of the rule change.

ON A MOTION BY: Commissioner Crotty
APPROVED: 6-0

b. PROPOSED: Cash 4 Life Rules Amendment

The Commission considered proposed amendments to rules relating to the Cash 4 Life draw game.

ON A MOTION BY: Commissioner Snyder
APPROVED: 6-0

c. PROPOSAL: Sports Wagering

The Commission considered a proposal to enable sports wagering as an authorized casino game.

ON A MOTION BY: Commissioner Moschetti
APPROVED: 6-0

4. Adjudications

a. In the Matter of Jahmel Stokes

The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to sustain the Hearing Officer's Report and Recommendation that the applicant's license denial be upheld.

b. In the Matter of S&S Grocery Mart, Inc.

The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to sustain the Hearing Officer's Report and Recommendation that the entity's license be revoked and that the period from the date of suspension to the Commission's final determination be the term of license suspension.

c. In the Matter of Sanam Petroleum Corp.

The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to sustain the Hearing Officer's Report and Recommendation that the entity's license be revoked and that the period from the date of suspension to the Commission's final determination be the term of license suspension and clarifying that the Hearing Officer's Report applies to the licensed entity.

d. In the Matter of BP-BAPS Enterprises Inc.

The Commission, having considered this matter at a meeting conducted

pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to sustain the Hearing Officer's Report and Recommendation that the entity's license be revoked and that the period from the date of suspension to the Commission's final determination be the term of license suspension and clarifying that the Hearing Officer's Report applies to the licensed entity.

e. In the Matter of Harguru Nanak Petroleum Corp.

The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to sustain the Hearing Officer's Report and Recommendation that the entity's license be revoked and that the period from the date of suspension to the Commission's final determination be the term of license suspension and clarifying that the Hearing Officer's Report applies to the licensed entity.

f. In the Matter of 3rd Ave Deli and Grill Corp.

The Commission, having considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1, announced that it had agreed on a 6-0 vote to grant the Office of Commission Counsel's Motion for Summary Judgment finding that the entity's lottery sales agent license should be revoked. It also announced that a Findings and Order would be forthcoming.

5. Consideration of MGM Yonkers, Inc. to conduct harness racing, simulcasting, account wagering on horseracing and video lottery gaming at Yonkers Raceway

a. Harness Licensing

The Commissioner considered and approved, on a 6-0 vote, the application of MGM Yonkers to conduct harness racing in 2019, effective as of the date the purchase transaction closes.

ON A MOTION BY: Commissioner Skurnik
APPROVED: 6-0

b. Simulcasting and Account Wagering Licenses

The Commissioner considered and approved, on a 6-0 vote, the application of MGM Yonkers to conduct simulcasting and account wagering on horseracing in 2019, effective as of the date the purchase transaction closes.

ON A MOTION BY: Commissioner Snyder
APPROVED: 6-0

c. Video Lottery Gaming

The Commissioner considered and approved, on a 6-0 vote, the application of MGM Yonkers for a video lottery gaming license and the issuance of an operation certificate to conduct video lottery gaming at Yonkers Raceway, effective as of the date the purchase transaction closes.

ON A MOTION BY: Commissioner Poklemba
APPROVED: 6-0

d. Material Debt Transactions

The Commissioner considered and approved, on a 6-0 vote, the request of MGM Yonkers to approve material debt transactions in regard to the merger transaction and of the related acquisition of real property and interests.

ON A MOTION BY: Commissioner Snyder
APPROVED: 6-0

6. Old Business/New Business

a. Old Business

No old business was offered for discussion.

b. New Business

No new business was offered for discussion.

7. Scheduling of Next Meeting

The Commission tentatively set February 25, 2019 as the date for the next meeting.

8. Adjournment

The meeting was adjourned at 2:16 p.m.

#

Harness: Uncertain future for harness racing in Florida

Greg Reinhart Jul 12, 2019



Barbara Livingston

Racing will continue at Pompano Park into 2020, but how much longer?

there were several flaws and mistakes in the way they applied for the jai alai license, regardless of whether or not they're even allowed to do it. This case will be decided on the Florida statutes, and we feel that they're in our favor."

This case is the latest in an ongoing fight for the industry's survival in Florida, as casino operators have sought to remove harness racing from Pompano for more than a decade.

"Eldorado, not unlike the owner before them, Isle of Capri, whose name they kept down here, have been trying to get rid of us since the day after they got their casino," remarked Pennacchio. "In 2005 they got their casino, and at least in the time I've been closely involved, they've tried every year one way or another. They've tried to change the law, get a new statute, they've tried to decouple the horses from the casino, and they've never been successful in doing anything like that.

"Eldorado, who took over in May 2017, their approach is a little bit different than the Isle. They're more aggressive in terms of not being a very good partner, doing only what they're required to do by law, and not giving the horsemen any benefit of anything. So, the relationship is probably not as great as it once was with other owners of the raceway."

While on the surface it would appear that a remedy for harness racing is to simply find a new partner if Eldorado is not willing to work with them anymore, Pennacchio explained that the licensing procedures in Florida make that a virtual impossibility.

"We have a contract that runs through June 30, 2020, so they can't do anything until then, but I would suspect if they get to hang on to their jai alai license, that will be the end of harness racing at Pompano, and probably the end of harness racing in Florida, simply because there is only one license, and they have it. Unless they were willing to give up the license, it's pretty much impossible for anybody else to race here," he offered. "To get a new license in Florida is a very difficult situation on the pari-mutuel side."

And while it may not seem like a pressing issue for the industry at-large, given Florida's isolated location in comparison to the rest of harness racing, Pennacchio says their fight should serve as a cautionary tale.

The future of harness racing in the State of Florida once again finds itself in a precarious position as Eldorado Resorts, who operates Pompano Park, is seeking to change its gaming license to Jai Alai when the current contract for the Standardbreds expires next summer.

"They've presented a plan to the zoning commission in Pompano to redevelop the property without harness racing, and to use their gaming requirement to have a casino by installing a jai alai fronton. We have opposed that, and we have just concluded a trial that took six days in Tallahassee. We're waiting for results," said Joe Pennacchio from the Florida Standardbred Breeders & Owners Association. "If we're successful in that we'll go on to the next thing, which is to get them to stay and keep racing. Their legislative requirement is to race 126 days a year.

"I make no prediction on what will come out of the court case. I thought the trial was favorable to us. We have contested it on the fact that we believe

"I sit on the board of the USTA, and we talk about it all the time. The directors are very, very cognizant of the fact that if one state happens, others can follow," he explained. "It's the same thing with the states that are very powerful up north right now in terms of the laws they have in effect. All those laws have expiration dates, and all those states have legislators that may come on and say we don't need this, why are we giving these guys money? Everybody understands that, and nobody wants to start those dominoes falling."

Pennacchio expects the court's verdict in September, and hopefully brighter days are ahead for harness racing in the Sunshine State.

2017
Thoroughbred Tracks, Harness Tracks, and OTBs

Tracks

Aqueduct Racetrack					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	96	231,710	\$66,557,706	\$234,492,285	\$301,049,991

Belmont Park					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	89	391,555	\$94,473,996	\$112,655,091	\$207,129,087

Saratoga Race Course					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	40	1,117,838	\$138,543,937	\$25,608,952	\$164,152,889

Finger Lakes Racetrack					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	142	113,837	\$3,773,029	\$11,333,133	\$15,106,162

Batavia Downs					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	71	202,695	\$1,193,644	\$3,037,870	\$4,231,514

Buffalo Raceway					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	84	*	\$1,097,754	\$4,508,442	\$5,606,196

Monticello Raceway					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	200	13,375	\$1,364,411	\$3,194,670	\$4,559,081

Saratoga Raceway					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	170	*	\$4,693,709	\$38,242,211	\$42,935,920

Tioga Downs					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	57	39,626	\$913,295	\$3,181,896	\$4,095,191

Vernon Downs					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	74	53,028	\$1,762,565	\$6,163,394	\$7,925,959

Yonkers Raceway					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	235	21,790	\$9,382,609	\$68,421,574	\$77,804,183

TOTAL - ALL RACETRACKS					
Year	Race Dates	Attendance	Live Handle	Simulcast Import Handle	Total Facility Handle
2017	1,258	2,185,454	\$323,756,655	\$510,839,518	\$834,596,173

OTBs

Capital OTB			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$57,030,832	\$88,597,697	\$145,628,529

Catskill OTB			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$21,212,744	\$45,420,558	\$66,633,302

Nassau OTB			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$52,960,794	\$105,542,215	\$158,503,009

Suffolk OTB			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$34,069,081	\$53,383,315	\$87,452,396

Western OTB			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$22,869,057	\$49,151,271	\$72,020,328

TOTAL - ALL OTBS			
Year	In-State Handle	Out-of-State Handle	Total Handle
2017	\$188,142,508	\$342,095,056	\$530,237,564

**TOTAL BETTING AT NEW YORK STATE RACE TRACKS
ON-TRACK BETTING BY BREED AND LOCATION OF RACE**

	2017					
	Betting at NYS Thoroughbred Tracks	Percent of Total Thoroughbred	Betting at NYS Harness Tracks	Percent of Total Harness	Total	Percent of Total
<u>SUMMARY OF ON-TRACK BETTING</u>						
LIVE RACING:						
NYRA	\$ 299,575,639	43.6%	\$ -	0.0%	\$ 299,575,639	35.9%
Finger Lakes	3,773,029	0.5%	-	0.0%	3,773,029	0.5%
NYS Harness Tracks	-	0.0%	20,407,987	13.9%	20,407,987	2.4%
All Live Racing at NYS Tracks	\$ 303,348,668	44.1%	\$ 20,407,987	13.9%	\$ 323,756,655	38.8%
IN-STATE SIMULCASTING BETWEEN NYS TRACKS:						
NYRA	\$ 50,691,116	7.3%	\$ 36,215,368	24.6%	\$ 86,906,484	10.4%
Finger Lakes	6,273,394	0.9%	1,492,463	1.0%	7,765,857	0.9%
NYS Harness Tracks	13,764,574	2.0%	5,331,170	3.6%	19,095,744	2.3%
All Simulcasts from NYS Tracks	\$ 70,729,084	10.2%	\$ 43,039,001	29.2%	\$ 113,768,085	13.6%
WAGERING ON NYS RACING AT NYS TRACKS	\$ 374,077,752	54.3%	\$ 63,446,988	43.1%	\$ 437,524,740	52.4%
WAGERING ON OUT OF STATE RACES AT NYS TRACKS:						
Thoroughbred Races	\$ 313,360,377	45.6%	\$ 65,248,108	44.3%	\$ 378,608,485	45.4%
Harness Races	-	0.0%	18,462,948	12.5%	18,462,948	2.2%
All Simulcasts from Out-of-State Tracks	\$ 313,360,377	45.6%	\$ 83,711,056	56.8%	\$ 397,071,433	47.6%
TOTAL BETTING AT NYS TRACKS FROM ALL SOURCES	\$ 687,438,129	99.9%	\$ 147,158,044	99.9%	\$ 834,596,173	100.0%

TOTAL BETTING AT NEW YORK STATE RACE TRACKS
ON-TRACK BETTING ON LIVE AND SIMULCAST IMPORT OF ALL RACES

	<u>Simulcast Imports</u>	<u>2017 Live Racing</u>	<u>On-Track Betting</u>	<u>Simulcast Imports</u>	<u>2016 Live Racing</u>	<u>On-Track Betting</u>
RECEIVING TRACK:						
THOROUGHBRED:						
Aqueduct	\$ 234,492,285	\$ 66,557,706	\$ 301,049,991	\$ 229,038,670	\$ 70,925,172	\$ 299,963,842
Belmont	112,655,091	94,473,996	207,129,087	107,161,032	98,052,769	205,213,801
Saratoga	25,608,952	138,543,937	164,152,889	22,194,436	132,804,332	154,998,768
NYRA*	\$ 372,756,328	\$ 299,575,639	\$ 672,331,967	\$ 358,394,138	\$ 301,782,273	\$ 660,176,411
Finger Lakes	\$ 11,333,133	\$ 3,773,029	\$ 15,106,162	\$ 12,407,476	\$ 4,325,212	\$ 16,732,688
THOROUGHBRED TRACKS	\$ 384,089,461	\$ 303,348,668	\$ 687,438,129	\$ 370,801,614	\$ 306,107,485	\$ 676,909,099
HARNESS:						
Batavia	\$ 3,037,870	\$ 1,193,644	\$ 4,231,514	\$ 3,099,996	\$ 1,294,451	\$ 4,394,447
Buffalo	4,508,442	1,097,754	5,606,196	5,198,133	1,413,056	6,611,189
Monticello	3,194,670	1,364,411	4,559,081	3,519,717	1,719,486	5,239,203
Saratoga	38,242,211	4,693,709	42,935,920	37,534,340	4,655,355	42,189,695
Tioga	3,181,896	913,295	4,095,191	3,439,814	1,039,305	4,479,119
Vernon	6,163,394	1,762,565	7,925,959	6,933,986	2,323,835	9,257,821
Yonkers	68,421,574	9,382,609	77,804,183	70,455,360	10,278,465	80,733,825
HARNESS TRACKS	\$ 126,750,057	\$ 20,407,987	\$ 147,158,044	\$ 130,181,346	\$ 22,723,953	\$ 152,905,299
ALL TRACKS	\$ 510,839,518	\$ 323,756,655	\$ 834,596,173	\$ 500,982,960	\$ 328,831,438	\$ 829,814,398

* Simulcast Imports for NYRA tracks includes \$47,218,236 of inter-track simulcasting of NYRA racing to other NYRA tracks.

2017 DISTRIBUTION OF ON-TRACK BETTING

	NYRA	Finger Lakes	Batavia	Buffalo	Monticello	Saratoga	Tioga	Vernon	Yonkers	All NYS Tracks
Regular	\$ 240,583,058	\$ 4,473,447	\$ 1,071,963	\$ 1,368,950	\$ 880,874	\$ 12,468,746	\$ 1,234,386	\$ 2,097,034	\$ 22,536,682	\$ 286,715,140
Multiple	213,129,272	4,493,053	1,342,599	1,686,021	1,601,944	14,073,270	1,316,733	2,709,702	25,737,272	266,089,866
Exotic	218,619,637	6,139,662	1,810,438	2,522,259	2,076,263	15,805,816	1,544,072	3,119,223	29,530,229	281,167,599
Super Exotic	-	-	6,514	28,966	-	588,088	-	-	-	623,568
Total Handle	<u>\$ 672,331,967</u>	<u>\$ 15,106,162</u>	<u>\$ 4,231,514</u>	<u>\$ 5,606,196</u>	<u>\$ 4,559,081</u>	<u>\$ 42,935,920</u>	<u>\$ 4,095,191</u>	<u>\$ 7,925,959</u>	<u>\$ 77,804,183</u>	<u>\$ 834,596,173</u>
Takeout	\$ 132,059,268	\$ 3,117,228	\$ 892,467	\$ 1,162,259	\$ 968,820	\$ 8,716,804	\$ 823,535	\$ 1,646,263	\$ 15,936,188	\$ 165,322,832
Breakage	3,061,894	67,816	15,687	20,351	15,425	174,498	18,530	28,564	290,292	3,693,057
Total Takeout and Breakage	<u>\$ 135,121,162</u>	<u>\$ 3,185,044</u>	<u>\$ 908,154</u>	<u>\$ 1,182,610</u>	<u>\$ 984,245</u>	<u>\$ 8,891,302</u>	<u>\$ 842,065</u>	<u>\$ 1,674,827</u>	<u>\$ 16,226,480</u>	<u>\$ 169,015,889</u>
State Tax on Handle	\$ 7,830,090	\$ 220,158	\$ 48,728	\$ 70,930	\$ 54,846	\$ 544,374	\$ 53,330	\$ 117,343	\$ 959,592	\$ 9,899,391
State Regulatory Fee	4,033,993	90,637	25,389	33,638	27,355	257,616	24,571	47,556	466,825	5,007,580
State Tax on Breakage	1,113,502	29,290	6,649	8,610	6,723	68,918	8,057	11,705	114,423	1,367,877
Total Tax and Regulatory Fee	<u>\$ 12,977,585</u>	<u>\$ 340,085</u>	<u>\$ 80,766</u>	<u>\$ 113,178</u>	<u>\$ 88,924</u>	<u>\$ 870,908</u>	<u>\$ 85,958</u>	<u>\$ 176,604</u>	<u>\$ 1,540,840</u>	<u>\$ 16,274,848</u>
Racetrack Commission	\$ 116,358,742	\$ 2,728,302	\$ 785,496	\$ 1,019,478	\$ 850,897	\$ 7,648,449	\$ 711,690	\$ 1,416,630	\$ 14,014,957	\$ 145,534,641
Racetrack Breakage	1,948,392	38,526	9,038	11,741	8,702	105,581	10,472	16,858	175,870	2,325,180
Total to Racetrack	<u>\$ 118,307,134</u>	<u>\$ 2,766,828</u>	<u>\$ 794,534</u>	<u>\$ 1,031,219</u>	<u>\$ 859,599</u>	<u>\$ 7,754,030</u>	<u>\$ 722,162</u>	<u>\$ 1,433,488</u>	<u>\$ 14,190,827</u>	<u>\$ 147,859,821</u>
Horse Breeders Fund Share	<u>\$ 3,836,443</u>	<u>\$ 78,132</u>	<u>\$ 32,853</u>	<u>\$ 38,213</u>	<u>\$ 35,271</u>	<u>\$ 266,364</u>	<u>\$ 33,943</u>	<u>\$ 64,734</u>	<u>\$ 494,813</u>	<u>\$ 4,880,766</u>
<u>Racetrack Payouts</u>										
Paid to Simulcast Senders	\$ 17,725,735	\$ 598,954	\$ 139,001	\$ 247,340	\$ 152,013	\$ 2,379,650	\$ 157,857	\$ 315,745	\$ 3,778,267	\$ 25,494,562
Paid to NYRA and Finger Lakes	-	-	40,212	75,064	34,462	544,952	50,832	91,170	978,230	1,814,922
Gross Purses Paid	152,530,210	13,580,900	6,132,131	6,736,700	9,241,449	16,793,493	6,949,196	6,081,368	69,218,916	287,264,363
Minus Pool	1,846,438	16,934	10,300	890	718	52,289	604	52,586	42,044	2,022,803
Uncashed Tickets	1,830,039	84,156	17,072	36,710	25,720	262,922	25,842	34,985	357,810	2,675,256
State Admission Taxes	496,456	95				317		615	2,962	500,445

NOTE: Handle includes on-track live racing and simulcast imports of all racing.

Links to Articles on Harness Racing

<https://harnessracingupdate.com/2019/07/14/bridging-the-breeds/>

<https://www.poughkeepsiejournal.com/story/news/politics/2019/04/18/how-monticello-raceway-casino-folding-into-resorts-world-catskills/3484200002/>

<https://www.usracing.com/news/harness-racing/racing-monticello-raceway>

<https://capitolfax.com/2019/07/11/an-attempt-to-save-a-dying-industry/>

Horse trainers hopeful for industry revival: 124 standardbred horses were foaled in Illinois in 2018, down from peak of more than 2,000, Chicago Tribune July 7, 2019

<https://romesentinel.com/stories/vernon-downs-gets-job-creation-break-as-gaming-revenue-sinks,79261>

<https://www.newyorkupstate.com/casinos/2018/04/vernon-downs-to-open-2018-racing-season-with-no-talk-of-financial-woes.html>

<https://www.poughkeepsiejournal.com/story/news/politics/2019/01/23/monticello-raceway-close-its-casino-operations-but-keep-racetrack-open/2657893002/>

<https://www.recordonline.com/news/20190413/monticello-horsemen-raceway-workers-fear-for-their-jobs>



AGRICULTURE & NEW YORK STATE HORSE BREEDING DEVELOPMENT FUND



2018 ANNUAL REPORT

INTRODUCTION



**Agriculture & NYS
Horse Breeding
Development Fund**

**The Honorable Andrew M. Cuomo,
Governor of the State of New York**

Members of the New York State Legislature

The Trustees of the Agriculture and New York State Horse Breeding Development Fund are pleased to present the Fund's 2018 Annual Report.

Agriculture is one of New York's leading domestic economic sectors and the state is noted for its diversity of products, including Standardbred horses. The Fund administers the New York Sire Stakes program, the nation's oldest harness racing program of its kind. The Fund's primary mission is to promote and preserve agriculture through the promotion of horse breeding and the conduct of equine research in New York State.

The performance of New York-bred horses in the breeding shed and on the racetrack, along with demand for them in the auction ring, demonstrate the value of the New York Sire Stakes program. Last year 743 separate events were contested for New York-breds in three different tiers to provide horses of all abilities the opportunity to earn and learn. Purses totaled \$14.2 million dollars for New York-breds and breeders were returned \$1 million in Breeders Awards.

New York Sire Stakes stars showed their skill on the state's seven harness tracks and across the country. Four National Dan Patch divisional champions all competed in the Sire Stakes program—two winning the Empire Breeders Classic and two remaining undefeated in their freshman campaigns. Almost a quarter of all the horses competing in the Breeders Crown Finals in October were bred in New York—26 of the 107 horses in 12 events. Our horses stole titles in the Hambletonian, Yonkers Trot, and Kentucky Futurity—a New York-bred Trotting Triple Crown—and in the Meadowlands Pace, Little Brown Jug and many other open stakes. They also toppled track and world records in a season to remember.

New York stallions remained among the leading national earners and offspring were highly sought after by breeders. New York boasts the leading trotting sire in the country by average earnings per starter for both 2 year olds and 3 year olds and our stallions are consistently among the top 10 nationally at both gaits by total earnings and average earnings per starter. In addition, New York-breds continued to garner strong prices at the yearling sales, averaging \$46,800 and \$38,478, at both premier sales in the country, the Lexington Selected Yearling Sale and the Harrisburg Yearling Sale, respectively.

In addition, the Fund provided \$150,000 in monies for equine education and promotion and more than \$320,000 in funds for the Harry M. Zweig Memorial Fund for Equine Research at Cornell University College of Veterinary Medicine. These efforts help the Fund fulfill its mission and purpose.

As the demand and quality of New York horses continues to be strong, so will the economic and agricultural benefits that the Standardbred breeding and racing industries provide to the State of New York. The Agriculture and New York State Horse Breeding Development Fund will continue to promote and support this progress and is excited to share these results with you.

ECONOMIC IMPACT

OVERVIEW

Standardbred racing and breeding in New York State generates \$795 million annually. Racing at the state's seven pari-mutual harness tracks generates capital investments, local jobs and state and local taxes, while the breeding industry drives yearling auctions in the state and agricultural benefits like purchasing of farm equipment and farm products and preserving working farmlands. A 2012 study found that each racehorse in the state generates \$92,100 in economic impact and 80 jobs are created for every 100 horses. Both the breeding and racing of Standardbreds in the state are interconnected to generate the largest possible impact on the economy. As you can see in the chart (next page), since the installation of VLTs at racetracks after 2001, the total economic impact of harness racing in the state increased 190% to \$795 million. During the same period, total jobs generated by the industry nearly tripled to just over 6,500.

RACING

A state breeding program can only be successful if it attracts the quality of stallions and mares that can produce champions. The excellence of New York-bred horses was on display at racetracks around the country in 2018. In fact, New York-bred horses swept the Dan Patch Awards for trotters. These divisional honors are voted on by the U.S. Harness Writers Association and celebrate the best horses in the country each year.

In 2018, 3-Year-Old Female Trotter Atlanta became just the 14th filly to win the Hambletonian against male horses and boosted her career earnings over \$1 million. She won eight of 14 races this year, including the Empire Breeders Classic, and was second in the Breeders Crown. She easily scored in New York Sire Stakes divisions at Vernon Downs and Tioga Downs.

3-Year-Old Male Trotter Six Pack trotted a world-record mile of 1:50 in the Stanley Dancer Memorial, and then lowered that mark with a 1:49.1 performance in the Kentucky Futurity. He won the Yonkers Trot, Empire Breeders Classic and legs of the NYSS at Vernon Downs and Yonkers Raceway. The colt earned \$970,573 in 2018 and nearly \$1.17 million in his career.

2-Year-Old Male Trotter Gimpanzee (Chapter Seven-Steamy Windows) went undefeated in nine starts in 2018, including a Breeders Crown, six legs of the New York Sire Stakes and a tour of the winner's circle on the New York Night of Champions at Yonkers Raceway. He earned \$591,358 in his first season.

2-Year-Old Female Trotter Woodside Charm (Chapter Seven-Fireworks) was another New York Sire Stakes and Breeders Crown Champion who went undefeated with seven victories. She won three legs of the NYSS, including a world record finish on the half-mile track at Saratoga in 1:53.4.

While breeders and owners hope for a horse that can compete on the national stage for the largest purses, yearling buyers demand a strong Sire Stakes program when selecting a horse to ensure the greatest potential to earn money and New York provides a secure future. More than \$14.2 million was distributed as purses for New York-bred horses in 2018. That was available for horses competing in three different tiers of the program and in the Empire Breeders Classic. A total of 26 horses earned more than \$100,000 in Sire Stakes action alone in 2018 and the highest single earner took home \$288,583 in Sire Stakes purses for her connections. This earning potential makes New York a very attractive destination for breeding and racing.



ECONOMIC IMPACT

BREEDING

The New York Sire Stakes is unique in that it requires mares to be bred by stallions within the borders of the state. This means that while other states may only generate agricultural benefits from the stallions residing there, New York also benefits from the mares. Additionally, the state's Breeders Award program incentivizes mares who live in the state for at least 180 days, much longer than it would take to just breed them and confirm pregnancy. This longer stay enhances the economic benefit realized by the state. If the offspring of those "resident" mares perform well in the New York Sire Stakes program, the breeder (owner of the mare at the time of the mating) receives a financial award.

Total Breeders Awards in 2018 were \$1 million. Breeders also generate income from selling offspring at yearling sales. Two yearling auctions are held in the state at Goshen in Orange County and at Morrisville State College in Madison County. You can see more information on the results of these sales on page 19. As New York-bred horses continue to be desired by buyers, they will generate strong returns for New York breeders and encourage more investment in the state.



ECONOMIC IMPACT	2001	2013	% CHANGE
Direct Impact	\$117,100,000	\$336,400,000	+ 187%
Indirect Impact	\$156,700,000	\$458,400,000	+ 193%
Total Impact	\$273,800,000	\$794,800,000	+ 190%

JOBS IMPACT	2001	2013	% CHANGE
Direct Jobs	690	1,970	+ 186%
Indirect Jobs	1,560	4,570	+ 193%
Total Jobs	2,250	6,540	+ 191%

NEW YORK SIRE STAKES PARTICIPATING BROODMARES, STALLIONS AND YEARLINGS

State Breeding History

Year	Mares Bred*	Registered NY Stallions	Yearlings Nominated to program*
2018.....	1,239.....	40.....	746
2017.....	1,190.....	42.....	795
2016.....	1,264.....	40.....	1011
2015.....	1,337.....	53.....	942
2014.....	1,671.....	60.....	791
2013.....	1,435.....	60.....	965
2012.....	1,403.....	65.....	939
2011.....	1,613.....	69.....	1,108
2010.....	1,585.....	69.....	1,064
2009.....	1,820.....	78.....	1,285
2008.....	1,833.....	86.....	973
2007.....	2,173.....	93.....	961
2006.....	1,687.....	96.....	1,231
2005.....	1,718.....	125.....	1,118
2004.....	2,309.....	125.....	1,144
2003.....	2,022.....	121.....	672
2002.....	1,988.....	120.....	604
2001.....	1,293.....	101.....	648
2000.....	1,108.....	111.....	524
1999.....	1,070.....	118.....	750
1998.....	1,063.....	104.....	776
1997.....	1,288.....	105.....	662
1996.....	1,500.....	126.....	670
1995.....	1,333.....	140.....	1,046
1994.....	1,525.....	147.....	1,385
1993.....	2,104.....	163.....	1,696
1992.....	2,571.....	191.....	1,791
1991.....	2,990.....	206.....	1,445
1990.....	3,148.....	218.....	1,653

Year	Mares Bred*	Registered NY Stallions	Yearlings Nominated to program*
1989.....	2,588.....	213.....	1,502
1988.....	2,777.....	226.....	1,677
1987.....	2,768.....	221.....	1,735
1986.....	3,118.....	207.....	2,075
1985.....	3,310.....	246.....	2,167
1984.....	3,794.....	245.....	2,252
1983.....	4,030.....	280.....	2,352
1982.....	4,162.....	260.....	2,153
1981.....	4,202.....	230.....	1,647
1980.....	3,750.....	230.....	1,356
1979.....	3,028.....	230.....	1,233
1978.....	2,601.....	231.....	1,335
1977.....	2,460.....	230.....	1,348
1976.....	2,750.....	244.....	1,270
1975.....	2,719.....	247.....	1,374
1974.....	2,896.....	230.....	1,388
1973.....	3,063.....	277.....	1,582
1972.....	3,439.....	288.....	1,518
1971.....	3,823.....	333.....	1,489
1970.....	4,020.....	264.....	1,557
1969.....	4,018.....	271.....	1,235
1968.....	3,713.....	240.....	1,040
1967.....	2,851.....	198.....	752
1966.....	2,187.....	197.....	654
1965.....	1,554.....	193.....	588
1964.....	1,518.....	174.....	521

*Yearlings of 2018 are from mares bred in 2016

2018 BREEDERS' AWARDS PROGRAM



The Breeders' Awards Program is an incentive to promote agriculture through the breeding of Standardbred horses in New York State. The Breeders Awards will be given at all levels of the New York Sire Stakes (NYSS) Racing Program.

The Breeders Awards program provides rewards for each level of New York Sire Stakes (NYSS) racing: Sire Stakes, Excelsior Series and County Fairs. Breeders of 2- and 3-year-old horses participating in a NYSS event in each NYSS racing season will be eligible to receive a residency-based award. Only breeders of horses finishing in positions first through fifth in the NYSS racing program will benefit from the Breeders Awards program.

Mares must be bred in New York to a New York-registered stallion and be residents of the state for 180 consecutive days surrounding conception for the resulting progeny to be eligible to earn Breeders Awards. Each year, mare owners must certify that their mare has met these requirements and the Fund uses inspectors to verify residency status.

Breeders Awards payments are based on NYSS race participation during the calendar year. In 2018, the equivalent of nearly 20 percent of a 2-year-old's earnings were returned to their breeder and more than 15 percent of a 3-year-old's earnings were returned to their breeder. This calculation is made each year depending on the pool of resident mares and the Sire Stakes program earnings of the resulting foals. In addition, 12 breeders earned more than \$15,000 in Breeders Awards and 161 different entities received funds in 2018.

The Fund only paid out Breeders Awards based on mare residency in 2018, having phased out performance-based awards in 2017. The new formula for Breeders Awards ensures the largest possible return to the state in agricultural benefit.

NATIONAL LEADING SIRES 2018

Pacing Sires - 2 Year Olds

Sire Name	2016 Foals	Starters	Earnings	Avg Earnings
SWEET LOU	97	80	3,037,299	31,312
CAPTAIN TREACHEROUS	113	83	3,308,045	29,275
SOME BEACHSOMEWHERE	114	90	2,728,894	23,938
HESTON BLUE CHIP	27	18	638,452	23,646
ART MAJOR	97	67	1,776,966	18,319
BETTOR'S DELIGHT	122	91	2,196,940	18,008
AMERICAN IDEAL	89	71	1,544,961	17,359
ALWAYS A VIRGIN	81	48	1,279,739	15,799
SO SURREAL	55	38	774,272	14,078
YANKEE CRUISER	35	24	435,725	12,449
MCARDLE	58	38	716,200	12,348
TELL IT LIKE IT IS	76	47	926,402	12,190
SAGEBRUSH	22	12	264,658	12,030
WELL SAID	71	54	851,092	11,987
ROCK N ROLL HEAVEN	47	29	558,670	11,887
BIG BAD JOHN	48	37	557,970	11,624
A ROCKNROLL DANCE	79	46	915,773	11,592
WESTERN VINTAGE	32	21	353,681	11,053
RUSTY'S FOR REAL	26	16	287,254	11,048
MR WIGGLES	23	15	238,972	10,390

Trotting Sires - 2 Year Olds

Sire Name	2016 Foals	Starters	Earnings	Avg Earnings
CHAPTER SEVEN	49	33	1,900,983	38,796
MUSCLE HILL	102	68	3,634,384	35,631
FATHER PATRICK	47	31	1,470,701	31,292
E L TITAN	33	24	847,688	25,688
TRIXTON	82	54	1,822,297	22,223
SWAN FOR ALL	87	48	1,644,109	18,898
CANTAB HALL	96	72	1,811,820	18,873
CASH HALL	29	14	543,701	18,748
LOU'S LEGACY	19	15	349,970	18,419
WISHING STONE	31	23	555,213	17,910
BROADWAY HALL	25	16	444,776	17,791
MUSCLE MASSIVE	96	60	1,456,233	15,169
MUSCLE MASS	45	32	660,555	14,679
MAN OF MANY MISSIONS	50	32	730,657	14,613
KADABRA	63	43	909,155	14,431
FULL COUNT	15	12	209,636	13,976
CREDIT WINNER	76	51	1,025,877	13,498
CASSIS	21	13	275,268	13,108
TRIUMPHANT CAVIAR	25	16	313,008	12,520
CRAZED	48	34	560,208	11,671

*minimum 15 registered foals in 2016

NATIONAL LEADING SIRES 2018

Pacing Sires - 3 Year Olds

Sire Name	2015 Foals	Starters	Earnings	Avg Earnings
SOMEBEACHSOMEWHERE	128	109	8,533,376	66,667
I'M GORGEOUS	23	15	1,133,887	49,299
BETTERTHANCHEDDAR	43	36	1,884,075	43,816
AMERICAN IDEAL	104	86	4,247,376	40,840
BETTOR'S DELIGHT	115	93	3,769,772	32,781
ART MAJOR	97	80	3,105,456	32,015
A ROCKNROLL DANCE	69	58	2,054,750	29,779
ROCK N ROLL HEAVEN	99	77	2,843,685	28,724
MACH THREE	103	87	2,778,619	26,977
SHADOW PLAY	111	88	2,990,072	26,938
ALWAYS A VIRGIN	82	62	1,999,540	24,385
WELL SAID	98	79	2,339,689	23,874
YANKEE CRUISER	38	28	900,655	23,701
WESTERN MAVERICK	16	13	363,822	22,739
VERTICAL HORIZON	20	14	442,701	22,135
DRAGON AGAIN	81	64	1,723,579	21,279
CUSTARD THE DRAGON	29	21	580,037	20,001
SPORTSWRITER	145	120	2,865,912	19,765
NO SPIN ZONE	17	9	329,400	19,376
PET ROCK	99	78	1,917,523	19,369

Trotting Sires - 3 Year Olds

Sire Name	2015 Foals	Starters	Earnings	Avg Earnings
CHAPTER SEVEN	71	49	3,651,945	51,436
MUSCLE MASS	85	63	4,262,233	50,144
CANTAB HALL	114	75	5,006,041	43,913
MUSCLE HILL	105	69	3,735,836	35,579
EXPLOSIVE MATTER	81	44	2,346,493	28,969
MY MVP	41	25	1,136,248	27,713
WISHING STONE	16	8	413,025	25,814
STORMIN NORMAND	22	13	560,214	25,464
CREDIT WINNER	85	56	2,152,783	25,327
HOLIDAY ROAD	31	17	736,350	23,753
KADABRA	69	48	1,615,932	23,419
JUSTICE HALL	20	13	454,833	22,742
MANOFMANYMISSIONS	65	45	1,347,188	20,726
SWAN FOR ALL	63	39	1,279,165	20,304
DONATO HANOVER	107	57	2,141,124	20,011
ANDOVER HALL	56	42	1,102,503	19,688
DEJARBRO	81	50	1,337,220	16,509
YANKEE GLIDE	62	42	1,013,308	16,344
BREAK THE BANK K	46	24	732,033	15,914
RC ROYALTY	30	20	467,428	15,581

*minimum 15 registered foals in 2015

2018 SALES RESULTS

NEW YORK-BRED YEARLINGS ARE SOLD AT FOUR MAJOR SALES EACH YEAR

- Goshen Yearling Sale in Goshen, NY
- The Harrisburg Standardbred Sale in Harrisburg, PA
- The Lexington Selected Yearling Sale in Lexington, KY
- The Morrisville College Standardbred Sale in Morrisville, NY

The accompanying chart provides a comparison of purchase prices for New York-bred yearlings to the purchase prices of yearlings sold from all states from 2015 through 2018.

NEW YORK-BREDS IN THE SALES RING

NY BRED YEARLINGS	2015	2016	2017	2018
Average Sale Price – all four sales	\$26,479	\$27,216	\$33,472	\$28,090
Average Sale Price Harrisburg	\$30,593	\$35,607	\$39,403	\$38,478
Average Sale Price Lexington	\$45,204	\$45,949	\$43,912	\$46,800
Average Sale Price Morrisville	\$15,888	\$14,299	\$13,524	\$13,475
Average Sale Price Goshen*	\$14,230	\$13,007	\$16,507	\$13,606
TOTAL NUMBER OF NY-BRED SOLD – ALL SALES	599	640	469	459
Harrisburg	259	253	207	178
Lexington	195	196	125	135
Morrisville	58	7	70	60
Goshen	87	116	67	86
ALL YEARLINGS	2015	2016	2017	2018
Average Sale Price – all four sales	\$26,045	\$30,236	\$31,448	\$31,429
Average Sale Price Harrisburg	\$30,818	\$38,825	\$39,516	\$42,675
Average Sale Price Lexington	\$45,220	\$56,304	\$58,537	\$56,652
Average Sale Price Morrisville	\$15,540	\$13,656	\$13,400	\$13,475
Average Sale Price Goshen*	\$12,600	\$12,158	\$14,300	\$12,912
TOTAL NUMBER OF YEARLINGS SOLD – ALL SALES	1,827	1,659	1,655	1708
Harrisburg	1,010	852	851	830
Lexington	642	573	622	702
Morrisville	62	81	72	60
Goshen*	113	153	110	116

* First year of sale 2015

2018 MARES BRED & PURSES PAID

MARES BRED IN OTHER STATES

STATE	NO. MARES BRED TO STALLIONS STANDING IN THIS STATE	STATE	NO. MARES BRED TO STALLIONS STANDING IN THIS STATE
AL	2	NC	15
CA	10	ND	3
CO	2	OH	2,510
DE	343	PA	1,525
FL	25	TN	1
IA	263	TX	7
IL	414	VA	4
IN	2,392	WV	1
KS	2	WI	15
KY	49		
LA	2	PROVINCE	NO. MARES BRED TO STALLIONS STANDING IN THIS PROV
ME	112	AB	305
MD	95	BC	32
MA	4	MB	57
MI	150	NS	4
MN	276	ON	2,601
MS	5	PE	331
MI	74	PQ	29
NJ	434		
NY	1,239		

PURSES PAID FOR STATE-RESTRICTED RACES

STATE	2015 PURSES	2016 PURSES	2017 PURSES	2018 PURSES
DELAWARE	\$3,600,000	\$3,600,000	\$3,600,000	\$3,124,622
FLORIDA	\$968,377	\$952,970	\$620,000	\$917,127
ILLINOIS	\$4,446,632	\$4,065,289	\$4,625,863	\$3,800,000
INDIANA	\$8,196,000	\$8,040,000	\$8,048,500	\$12,642,686
KENTUCKY*	\$1,600,000	\$1,489,000	\$2,695,000	\$4,148,450
MAINE	\$2,113,626	\$1,907,619	\$1,851,278	\$2,045,618
MARYLAND	\$1,683,285	\$1,716,025	\$1,900,755	\$1,793,650
MICHIGAN	\$910,985	\$818,000	\$1,224,513	\$779,455
NEW JERSEY	\$2,392,900	\$1,783,000	\$1,956,800	\$1,967,685
NEW YORK	\$13,800,000	\$13,800,000	\$14,300,000	\$14,200,550
OHIO	\$5,800,000	\$7,500,000	\$15,900,000	\$16,928,200
ONTARIO, CA	\$15,962,000	\$14,666,000	\$12,350,650	\$12,950,800
PENNSYLVANIA	\$16,000,000	\$16,000,000	\$15,700,000	\$15,726,882

*Not limited to state-sired horses

New York Harness Racing, Where It All Began, Where It Is Today

Bennett Liebman

Government Lawyer in Residence

Albany Law School

Government Law Center



1940: Pari-Mutuel Harness Racing Starts in New York State

- ▶ July 15, 1940 Goshen Historic \$7,061 wagered

*Small Crowd and Slim Betting
Mark Mutuels' Goshen Debut*

- ▶ September 2, 1940 Roosevelt Raceway opens at night \$40,742 wagered

NIGHT RACES DRAW
A SOCIETY THROG

Harness Racing New York: “The Fastest Growing Sport”

- ▶ New York Times, April 28, 1949 Harness Racing: “America’s Fastest Growing Sport”
- ▶ Boston Globe December 31, 1951 “America’s Fastest Growing Sport”
- ▶ Los Angeles Times, Braven Dyer “America’s Fastest Growing Sport”

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a sulky

Q.—Why is harness racing billed as “America’s fastest-growing sport”?

A.—There’s good reason. Since 1943, when the postwar boom in the sport began, purses have grown from \$1,313,028.87 to \$13,119,573.57 last year and the number of horses racing has increased from 3773 to 11,187.

Newsday January 1957: “Fastest Growing Sport”

5.38 million fans at NY harness tracks in 1956.
Handle up 12.2% nationally

Trotters Enjoy 1957 Seen as E

By Jack Schultz

With its greatest season behind, harness racing is looking forward to an even greater campaign in 1957.

The opening of the \$14,000,000 Roosevelt Raceway plant at Westbury, on Aug. 1, is expected to hypo America's "fastest growing sport" to further heights in all categories—attendance, mutuel wagering, revenue to the State and purses for the horsemen.

It will be quite a task to beat the increases enjoyed during the 1956 season when nationally the attendance rose 2.8 percent, the handle jumped 12.2 percent, revenue to the States (which permitted wagering) went up 10.9 percent and purses hiked to 5.3 percent.

New York, led by Roosevelt and Yonkers, paced the nation when 5,388,155 fans (an increase of 6.57 percent) wagered \$325,420,967 (a jump of 15.06 percent), while the State received \$27,474,787.03, 11.69 percent more than it got in '55. The purses jumped 10.55 percent. Roosevelt drew 1,962,963 fans who bet \$122,338,108, while Yonkers attracted 2,019,916 customers who wagered \$140,348,939, with both tracks showing an increase in averages. Roosevelt was up 6.97 percent and Yonkers up 11.28 percent in wagering as the pair gave the state treasury \$23,004,922.85, \$11,187,559.73 coming from Roosevelt and \$12,817,363.12 from Yonkers.

1958 Harness Racing Stats per NY Times

1958 "its greatest year" 12.1 fans million nationally

Harness Racing

Harness racing buffs, increasing in number each year, insist their sport is the "fastest-growing in the nation." To back their claim, these enthusiasts spout numbers and names, figures and faces. When they have finished, at least one strong point is made:

Standardbred racing—trotting and pacing—enjoyed its greatest year in 1958.

In the thirteen states where pari-mutuel harness racing was conducted, 12,125,176 persons turned out and wagered an estimated \$714,000,000. And if those who attended racing at the fair grounds, where there is no betting, are included, the national attendance figure probably topped 20,000,000.

The 1957 attendance (11,807,547) and the handle (\$614,920,402), were surpassed with plenty to spare.

The enthusiasts point out that in New York State the \$465,384,651 bet on the trots topped the \$415,684,906 wagered at Jamaica, Belmont Park and Saratoga.

Of course, the thoroughbred tracks had to compete against standardbred tracks at Roosevelt Raceway, Yonkers Raceway, Monticello, Saratoga, Vernon Downs, Batavia and Buffalo. Actually, the trot and pace did the flat tracks.

1958" 52.8% of NY wagering on harness racing

Chicago Tribune 1961 David Condon

“Harness racing is America’s fastest growing major sport.”

Chicago, David
Chicago Daily Tribune (1923-1963); Aug 10, 1961; ProQuest Historical Newspapers: Chicago Tribune
pg. B1

In the WAKE of the NEWS

By DAVID CONDON

HARNESS RACING is America's fastest growing major sport, and there is one reason: the public believes the sport maintains integrity, that it is one enterprise that still remains more of a sport than a business. . . . Unfortunately, the harness racing executives [and many of them are gathered in our town for the Grand Circuit meeting at Sportsman's Park] are tempted to disillusion the public. . . . There are many who contemplate moving the Hambletonian, the sport's blue-ribbon event, from Du Quoin, Ill., to some eastern track where the gamblers would have more influence than the breeders. . . . Since 1957 the Hambletonian—harness racing's Kentucky Derby—has been contested in southern Illinois at the Du Quoin State Fair grounds. At Du Quoin, where there is no pari-mutuel betting, the purses have been larger than ever before. The times have been faster, testifying to the quality of the Du Quoin strip.



Don Hayes

Now, with Du Quoin having made the Hambletonian truly a great harness racing show, there are those who would like a cut of the melon. . . . those who would like to move it to an eastern pari-mutuel track, where the betting could be emphasized and the fine event minimized.

Last week, we asked Don Hayes—one of the brother partners in Du Quoin—how long his establishment wanted to promote the Hambletonian.

“As long as we can have it,” said Don. “We’ll run it forever, if they let us. Du Quoin is assured of the Hambletonian thru 1962, and harness racing is making a mistake if they do not permit us to keep the race. We’ll never yield to pari-mutuel betting.”

We agree that the Hambletonian has found a sound home at Du Quoin. To move the race to another site would disillusion the public, not only because a traditional event should have a permanent home, but because the public would rather trust the horsemen than the bettors.

50 Years Ago: Harness Racing v. Flats in New York State in 1969

- ▶ 8.878 million attendance at the New York harness tracks v. 6.812 million at thoroughbred tracks .
- ▶ 52.7% of bets in New York were made on harness racing.
- ▶ 1,033 Harness Racing programs in 1969.
- ▶ 74.2% of racing programs in New York were harness racing programs.

Racing's Fall from Grace: Overall Decline in New York Racing Handle*

Even though you can now bet on almost every track in the world wherever you are at any time using any device:

- ▶ 2017 Racing Handle in New York was 13.3% of what it was in 1967
- ▶ 2017 Racing Handle in New York was 13.3% of what it was in 1977.
- ▶ 2017 Racing Handle in New York was 18.3% of what it was in 1987.

- ▶ *Using CPI

The World Turns Upside Down for New York Harness

- ▶ On-track Percentage of Wagering for NY Harness Racing
- ▶ 1967 51.1%
- ▶ 1969 52.7%
- ▶ 1975 – Last Year that Harness Racing Track Handle Exceeded Thoroughbred Track Handle in NY
- ▶ 1977 = 45.9%
- ▶ 1987 = 31.4%
- ▶ 2017 = 10.4% [includes OTB numbers]

Changes in Handle: Total Amount Wagered on Harness in NYS

- ▶ 2017-1967 2.7%
 - ▶ 2017-1977 3.4%
 - ▶ 2017 -1987 7.2%
 - ▶ 2017- 1992 13%
-
- ▶ 2017 amount of wagering on harness racing in NY in 2017 \$142 million.
 - ▶ Using CPI \$337 million was wagered at Monticello 50 years ago.

Changes in Handle: Total Harness Facility Handle

- ▶ 2017-1967 2.8%
- ▶ 2017-1977 5.6%
- ▶ 2017 -1987 13.9%
- ▶ 2017- 1992 18.7%

Changes in Handle: Total of On-Track Live Wagering Handle on Harness in NYS

- ▶ 2017-1967 .39%
 - ▶ 2017-1977 .8%
 - ▶ 2017 -1987 1.9%
 - ▶ 2017- 1992 4%
-
- ▶ \$20.4 million wagered on-track on live harness racing in New York in 2017.

The rules of racing

Panelist:

Bennett Liebman, Esq.

Arizona Thoroughbred Racing Rules AZ ADC R19-2-119

6. Every horse in a race is entitled to racing room. A horse or jockey shall **not deliberately pocket** another horse. In a straightaway race, each horse shall maintain the position in the lane in which the horse starts as nearly as possible.

7. If a horse is ridden or drifts out of its lane in a manner that interferes with or impedes another horse, a foul is committed. The stewards may disqualify the horse committing the foul if the outcome of the race is affected by the foul. The stewards may place the horse committing the foul behind the horse fouled. The provisions of this subsection apply to fouls caused by the horse or the jockey and fouls caused intentionally or unintentionally.

a. If part of an entry is disqualified, the stewards shall decide whether the disqualification extends to all of the entry. If the disqualification does not extend to all of the entry, the stewards shall specify the part of the entry to which the disqualification extends.

b. The stewards shall not penalize a jockey if the stewards rule that the foul under subsection (C)(7) was caused by the horse, despite obvious efforts of the jockey to maintain the horse in its lane position.

c. If the stewards rule that the foul under subsection (C)(7) was caused by the jockey failing to attempt to prevent the foul or willfully riding the horse out of its lane, the jockey shall be subject to imposition of penalties by the stewards.

d. In a race run around a turn, a horse that is in the clear may be taken to any part of the track. If the stewards determine that weaving back and forth in front of another horse is interference or intimidation, the jockey shall be penalized.

8. A jockey shall not cause the jockey's horse to shorten stride with a view to making a complaint. If the stewards decide that an intentional foul was committed in the riding of a race or that a jockey was instructed or induced to ride in a manner that caused a foul, the stewards shall suspend all persons the stewards determine, following a hearing, are guilty of complicity in the foul.

9. When a horse is disqualified by the stewards under A.R.S. Title 5, Chapter 1 and this Chapter, the stewards shall disqualify and replace every horse in the race that belongs wholly or in part to the same owner or is under the management of the same trainer, if the stewards find there is good cause to disqualify and replace the other horses.

10. A horse shall be ridden across the finish line carrying the horse's assigned weight to participate in the purse distribution of a race unless the nomination blank for the race states otherwise.

11. A whip shall not be carried on a 2-year-old in a race on the straightaway before March 1. After April 30, following satisfactory performance out of the gate with a whip and with approval of the starter, a whip may be carried in a race under this subsection.

12. An owner, trainer, handler, or jockey shall not attempt to prevent a horse from running the horse's best and winning.

006.06.4-43. Post to Finish, AR ADC 006.06.4-43

West's Arkansas Administrative Code
Title 006. Department of Finance and Administration
Division 06. Racing Commission
Rule 4. Horse Racing

Ark. Admin. Code 006.06.4-43
Alternatively cited as AR ADC 006 06 003

006.06.4-43. Post to Finish

Currentness

<NOTE: Numbering of these Rules will not be consecutive since the
Commission Rules that apply to other types of racing are omitted.>

2347. (a) When clear, a horse may be taken to any part of the course, but no horse shall, and no jockey shall carelessly or willfully permit his/her mount to, cross or weave in front of another horse, or jostle another horse, in such a way as to impede other horses or constitute or cause interference or intimidation.

(b) A jockey shall not ride carelessly or willfully in a manner that jeopardizes the safety of any horse or other jockey.

(c) No jockey shall carelessly or willfully strike or touch another jockey or another jockey's horse or equipment.

2348. The Stewards or the Commission may fine and/or suspend a jockey for violation of any rule of the Commission, whether or not the horse ridden by the jockey is disqualified in connection with the incident in question.

2349. (a) In the case of any violation of Rule 2347, 2348, or any other applicable rule of the Commission, the offending horse, or the horse of the offending jockey, as the case may be, may be disqualified, if in the opinion of the Stewards, the violation affected the outcome of the race, regardless of whether the foul was accidental, willful or the result of careless riding.

(b) When the Stewards determine that a horse shall be disqualified for interference, they may place the offending horse behind such horses as in their judgment it interfered with, or they may place it last.

(c) Should the Stewards determine that there is more than one incident of interference in a race where disqualification is warranted, the Stewards shall deal with the incidents in the order in which the incident occurs during the race from start to finish; except in the case where the same horses are involved in multiple incidents. Once a horse has been disqualified, it should remain placed behind the horse with which it interfered.

006.06.4-43. Post to Finish, AR ADC 006.06.4-43

2350. No jockey shall unnecessarily cause his horse to shorten his stride with a view to complaint.

2351. All horses shall be ridden out in every race. A jockey shall not ease up or coast to the finish without reasonable cause, even if the horse has no apparent chance to win prize money. A jockey shall give a best effort during a race, and each horse shall be ridden to win.

2352. If two horses run in one interest in any race, each shall give best effort. The practice of declaring to win with one or the other of such horses will not be allowed.

2353. The Stewards shall take cognizance of foul riding and may entertain reports from other racing officials of the Race Meeting whether or not formal complaint is made, but no complaint shall be considered which comes from any person other than the jockey, trainer or owner of the horse interfered with.

2354. No owner, trainer or jockey shall complain frivolously that his horses were crossed or jostled.

2356. The time for the first horse to cross the finish line shall be the official time of the race.

Credits

Amended Jan. 22, 2011; July 10, 2011; Feb. 4, 2019.

Current with amendments received through June 30, 2019

Ark. Admin. Code 006.06.4-43, AR ADC 006.06.4-43

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§ 1699. Riding Rules., 4 CA ADC § 1699

Barclays Official California Code of Regulations Currentness
Title 4. Business Regulations
Division 4. California Horse Racing Board
Article 8. Running the Race (Refs & Annos)

4 CCR § 1699

§ 1699. Riding Rules.

During the running of the race:

(a) A horse shall not interfere with any other horse. Interference is defined as bumping, impeding, forcing or floating in or out or otherwise causing any other horse to lose stride, ground, momentum or position.

(b) A horse which interferes with another as defined in subsection (a) may be disqualified and placed behind the horse so interfered with if, in the opinion of the Stewards, the horse interfered with was not at fault and due to the interference lost the opportunity for a better placing.

(c) Jockeys shall not ride carelessly, or willfully, so as to permit their mount to interfere with any other horse.

(d) Jockeys shall not strike or strike at another horse or jockey so as to impede, interfere with, intimidate, or injure.

(e) If a jockey rides in a manner contrary to this rule, the mount may be disqualified and the jockey may be suspended or otherwise disciplined by the Stewards.

(f) When suspending a jockey for riding contrary to this rule, the Stewards shall issue a minimum suspension of two riding days, and shall issue a suspension greater than the minimum for (1) more than one infraction of this rule by the jockey within any contiguous 60 day calendar period or (2) any infraction which, in the opinion of the stewards, jeopardized the safety of another horse or jockey.

Note: Authority cited: Section 19562, Business and Professions Code. Reference: Sections 19461 and 19562, Business and Professions Code.

HISTORY

1. Amendment filed 4-21-83; effective thirtieth day thereafter (Register 83, No. 17).

2. Amendment filed 8-13-97; operative 9-12-97 (Register 97, No. 33).

§ 1699. Riding Rules., 4 CA ADC § 1699

3. Amendment filed 11-22-2016; operative 1-1-2017 (Register 2016, No. 48).

4. Amendment of subsection (f) filed 3-22-2018; operative 7-1-2018 (Register 2018, No. 12).

This database is current through 6/28/19 Register 2019, No. 26

4 CCR § 1699, 4 CA ADC § 1699

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1416.5. Disqualification in Race, 11 IL ADC 1416.5

West's Illinois Administrative Code
Title 11. Alcohol, Horse Racing, Lottery, and Video Gaming
Subtitle B. Horse Racing
Chapter I. Illinois Racing Board
Subchapter G. Rules and Regulations of Horse Racing (Thoroughbred)
Part 1416. Rules of the Race (Refs & Annos)

11 Ill. Adm. Code 1416.5

1416.5. Disqualification in Race

Currentness

- a) When clear, a horse may be taken to any part of the course, provided that crossing or weaving in front of any horse may constitute interference or intimidation for which the offending jockey may be disciplined.
- b) A horse crossing in front of another horse so as actually to impede the latter may be disqualified, unless the impeded horse was partly in fault or the crossing was wholly caused by the fault of some other horse or jockey.
- c) If a horse or jockey jostles another horse, the aggressor may be disqualified, unless the impeded horse or his jockey was partly in fault or the jostling was wholly caused by the fault of some other horse or jockey.
- d) If a jockey willfully strikes another horse or jockey, or rides wilfully or carelessly so as to injure another horse which is in no way in fault or so as to cause other horses to do so, his horse is disqualified.
- e) When a horse is disqualified under this rule every horse in the same race entered by the same trainer, whether belonging to the same owner or not may also be disqualified at the discretion of the stewards.
- f) Complaints under this rule can only be received from the owner, trainer or jockey of the horse alleged to be aggrieved, and must be made to the clerk of the scales or to the stewards before that jockey has passed the scales. When applicable, the complaint shall be made to the stewards through the outriders (fast officials). But nothing in this rule shall prevent the stewards taking cognizance of foul riding.
- g) Any jockey against whom a foul is claimed shall be given the opportunity to speak with the stewards before any decision is made by them.
- h) A jockey whose horse has been disqualified, or an owner, trainer or jockey who complains frivolously that his horse was crossed or jostled, may be fined or suspended.

1416.5. Disqualification in Race, 11 IL ADC 1416.5

Credits

(Source: Amended at 17 Ill. Reg. 19306, effective October 25, 1993)

Current through rules published in the Illinois Register Volume 43, Issue 26, June 28, 2019.

11 ILAC § 1416.5, 11 IL ADC 1416.5

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.50. Rules of the Race., MD ADC 09.10.01.50

Code of Maryland Regulations
Title 09. Department of Labor, Licensing, and Regulation
Subtitle 10. Racing Commission
Chapter 01. Thoroughbred Rules (Refs & Annos)

COMAR 09.10.01.50

.50. Rules of the Race.

Currentness

A. During the running of a race:

(1) Unless caused wholly or partly by some other horse, a horse may not:

(a) Carry another horse in or out,

(b) Cross or weave in front of another horse without sufficient clearance,

(c) Jostle another horse,

(d) Intimidate another horse, or

(e) Impede another horse; and

(2) A jockey may not:

(a) Strike another horse or jockey,

(b) Ride in a careless manner, or

(c) Unnecessarily cause the horse the jockey is riding to shorten its stride with a view toward claiming foul against another horse or jockey in the race.

A-1. A horse may be disqualified if it, or the jockey riding it, is involved in a violation of §A of this regulation.

.50. Rules of the Race., MD ADC 09.10.01.50

B. When a horse is disqualified under this regulation, every horse in the race belonging wholly or partly to the owner of the disqualified horse may also be disqualified.

C. In addition to being sanctioned for violating other provisions of this regulation, a jockey may be sanctioned if deemed to be responsible for a violation of §A of this regulation.

D. The jockey of a horse participating in a race may delay the results of the race being declared official by notifying an outrider, immediately following the running of the race, of the possibility of a claim of foul.

E. A claim of foul under this regulation may only be made:

(1) By the jockey, the trainer, or the owner of a horse participating in that particular race; and

(2) With the clerk of scales or the stewards before the results of the race being made official.

F. A notification of the possibility of a claim of foul under §D of this regulation or a claim of foul itself may not be frivolous.

G. A jockey against whom a foul is claimed shall be given the opportunity to communicate with the stewards before any decision is made by them.

H. If the stewards perceive that there has been a violation of §A of this regulation, they may take action on their own initiative in the absence of a claim of foul.

I. If the stewards at any time are satisfied that the riding of any race was intentionally foul or that any jockey was instructed or induced so to ride, all persons guilty of complicity shall be suspended and the case shall be reported to the Commission for such additional action as it may consider necessary.

J. If a horse leaves the course, in order to continue to participate in the race, it shall return to the point at which it left and run the course from that point.

K. When one horse pays forfeit for a match, the other need not walk over, but for a sweepstakes, even if all the horses but one have declared forfeit, that horse shall walk over, except by the written consent of all the persons who pay forfeit; in the case of a purse, the consent of the stewards is necessary to dispense with a walkover.

L. When a horse is disqualified, and there is evidence of fraud or attempted fraud, any other horse in the race owned or controlled by the same interest, or trained by the same trainer, also shall be disqualified.

.50. Rules of the Race., MD ADC 09.10.01.50

M. If a provision of this regulation is violated, and an offending horse finishes the race in a position entitling it to any part of the purse, the stewards are charged with determining its proper place in the race, or they may disqualify the horse if, in their judgment, the circumstances justify this action.

Complete through Maryland Register Vol. 46, Issue 11, dated May 24, 2019.

COMAR 09.10.01.50, MD ADC 09.10.01.50

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13:71-20.6 Racing and track rules; driving procedures, NJ ADC 13:71-20.6

New Jersey Administrative Code
Title 13. Law and Public Safety
Chapter 71. Harness Racing (Refs & Annos)
Subchapter 20. Rules of Racing

N.J.A.C. 13:71-20.6

13:71-20.6 Racing and track rules; driving procedures

Currentness

(a) Although a leading horse is entitled to any part of the track except after selecting his position in the home stretch, neither the driver or the first horse nor any other driver in the race shall:

1. Change either to the right or left during any part of the race when another horse is so near him that in altering his positions he compels the horse behind him to shorten his stride, or causes the driver of such other horse to pull him out of his stride;
2. Jostle, strike, hook wheels or interfere with another horse or driver;
3. Cross sharply in front of a horse or cross over in front of a field of horses in a reckless manner, endangering other drivers;
4. Swerve in and out or pull up quickly;
5. Crowd a horse or driver by "putting a wheel under him";
6. "Carry a horse out" or "sit down in front of him", take up abruptly in front of other horses so as to cause confusion or interference among the trailing horses;
7. Let a horse pass inside needlessly, or do any other act which constitutes what is popularly known as helping;
8. Commit any act which impedes the progress of another horse or causes him to "break";
9. Change course after selecting a position in the home stretch and swerve in or out, or bear in or out, in such manner as to interfere with another horse or cause him to change course or take back;

13:71–20.6 Racing and track rules; driving procedures, NJ ADC 13:71-20.6

10. To drive in a careless or reckless manner;

11. Laying off a normal pace and leaving a hole when it is well within the horse's capacity to keep the hole closed;

12. Drivers must set and maintain a pace comparable to the class in which they are racing. Failure to do so by going an excessively slow quarter or any other distance that changes the normal pattern, overall timing, or general outcome of the race, or allowing his horse to go on an unrestrained break will be considered a violation of this section and the judges may impose a penalty which can be a fine, suspension or both.

(b) With the approval of the Racing Commission, a track may extend the width of its homestretch up to 10 feet inward in relation to the width of the rest of the racetrack. In the event the homestretch is expanded pursuant to this subsection, the following shall apply:

1. No horse shall use the extended inside lane except when entering the final homestretch run;

2. The lead horse in the homestretch shall maintain as straight a course as possible while allowing trailing horses full access to the extended inside lane; and

3. Judge's discretion shall prevail in all instances regarding the open stretch.

Credits

Amended by R.1982 d.109, effective April 5, 1982; R.1992 d.268, effective July 6, 1992.

CHAPTER EXPIRATION DATE

<Chapter 71, Harness Racing, expires on August 28, 2024.>

Current through amendments included in the New Jersey Register, Volume 51, Issue 13, dated July 1, 2019.

N.J.A.C. 13:71–20.6, NJ ADC 13:71–20.6

Section 4035.2. Foul riding penalized, 9 NY ADC 4035.2

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 9. Executive Department
Subtitle T. New York State Gaming Commission
Chapter I. Division of Horse Racing and Pari-Mutuel Wagering
Subchapter A. Thoroughbred Racing
Article 1. Rules of Racing
Part 4035. Rules of the Race (Refs & Annos)

9 NYCRR 4035.2

Section 4035.2. Foul riding penalized

(a) When clear, a horse may be taken to any part of the course provided that crossing or weaving in front of contenders may constitute interference or intimidation for which the offender may be disciplined.

(b) A horse crossing another may be disqualified, if in the judgment of the stewards, it interferes with, impedes or intimidates another horse, or the foul altered the finish of the race, regardless of whether the foul was accidental, willful, or the result of careless riding. The stewards may also take into consideration mitigating factors, such as whether the impeded horse was partly at fault or the crossing was wholly caused by the fault of some other horse or jockey.

(c) If a horse or jockey jostles another horse, the aggressor may be disqualified, unless the impeded horse or jockey was partly in fault or the jostle was wholly caused by the fault of some other horse or jockey.

(d) A jockey shall not ride carelessly or willfully such that the jockey's mount, equipment, or any item or object under his or her control interferes with, impedes, intimidates, or injures another horse or jockey in the race, including that a jockey shall not carelessly or willfully strike another horse or jockey or such other jockey's equipment with his or her whip. The stewards may disqualify the horse ridden by the jockey who committed the foul if the foul was willful or careless or may have altered the finish of the race. The stewards may also take into consideration mitigating factors such as whether the impeded horse was partly at fault or if the foul was caused by the fault of some other horse or jockey.

(e)

(1) If two or more horses are coupled in the betting as an entry, and one or more of them shall be disqualified for violation of the rules of racing, the balance of the entry shall also be disqualified if in the judgment of the stewards such violation prevented any other horse or horses from finishing ahead of the other part of the entry. If said violation is without such effect upon the finish of the race, penalty therefor may be applied against the offender and the balance of the entry may go unpunished.

Section 4035.2. Foul riding penalized, 9 NY ADC 4035.2

(2) If any horses trained by the same trainer race uncoupled in any race, and one or more of them shall be disqualified for violation of the rules of racing, any other horses entered by that same trainer shall also be disqualified if in the judgment of the stewards such violation prevented any other horse or horses from finishing ahead of the other part of the entry. If said violation is without such effect upon the finish of the race, penalty therefore may be applied against the offender only.

(f) Complaints under this section may be received only from the owner, trainer or jockey of the horse alleged to be aggrieved and must be made to the clerk of the scales or to the stewards before or immediately after the jockey of the horse alleged to be aggrieved has passed the scales. But nothing in this section shall prevent the stewards taking cognizance of foul riding.

(g) Any jockey against whom a foul is claimed shall be given the opportunity to appear before the stewards before any decision is made by them.

(h) A jockey whose horse has been disqualified or who unnecessarily causes his or her horse to shorten its stride with a view to complaint, or an owner, trainer or jockey who complains frivolously that his or her horse was crossed or jostled, may be punished.

(i) The extent of disqualification shall be determined by the stewards as in this article provided.

Credits

Sec. added by renum. 35.2, Title 19, filed Sept. 5, 1974; amds. filed: Nov. 25, 1980; March 30, 2004; May 25, 2007 as emergency measure, expired 90 days after filing; Sept. 6, 2007 as emergency measure eff. Sept. 6, 2007; emergency measure eff. Dec. 12, 2007, expires Feb. 9, 2008; adopted eff. Jan. 16, 2008; amds. filed June 29, 2010 eff. July 14, 2010; emergency rulemaking eff. July 9, 2013, expired; amd. filed Sept. 10, 2013 eff. Sept. 25, 2013.

Current with amendments included in the New York State Register, Volume XLI, Issue 28 dated July 10, 2019. Court rules under Title 22 may be more current.

9 NYCRR 4035.2, 9 NY ADC 4035.2

Section 4117.4. Racing violations, 9 NY ADC 4117.4

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 9. Executive Department
Subtitle T. New York State Gaming Commission
Chapter I. Division of Horse Racing and Pari-Mutuel Wagering
Subchapter B. Harness Racing
Part 4117. Racing and Track Rules (Refs & Annos)

9 NYCRR 4117.4

Section 4117.4. Racing violations

The following shall be deemed racing infractions:

- (a) Changing either to the right or the left when another horse is so near as to be caused to shorten stride, or to be taken back, or to break stride.
- (b) Jostling, striking or hooking sulky wheels, or interfering with another horse or driver.
- (c) Crossing sharply in front of a horse or a field of horses in a reckless manner.
- (d) Swerving in and out so as to interfere with another horse.
- (e) Taking back quickly in front of a horse or an field of horses so as to cause confusion or interference among the trailing horses.
- (f) Crowding a horse or driver or putting a wheel under him.
- (g) Needlessly permitting a horse to pass inside.
- (h) Carrying a horse out.
- (i) Sitting down in front of a horse.
- (j) Helping another horse to improve its position in the race.
- (k) Impeding the progress of another horse or causing it to break.

Section 4117.4. Racing violations, 9 NY ADC 4117.4

- (l) After selecting a position in the home stretch, swerving from side to side, or bearing in or out so as to interfere with another horse.
- (m) Causing any horse or a field of horses to excessively slow down.
- (n) Driving with design not to win, or in a manner inconsistent with an attempt to win.
- (o) Driving in a careless or reckless manner.
- (p) Driving with indifference or lack of effort.
- (q) Loud shouting or other improper conduct.
- (r) Crossing the inside limits of the course.

Credits

Sec. added by renum. 97.4, Title 19, filed Sept. 5, 1974; amds. filed: March 30, 1992 as emergency measure, expired 90 days after filing; July 28, 1992 eff. Aug. 12, 1992. Added (r).

Current with amendments included in the New York State Register, Volume XLI, Issue 28 dated July 10, 2019. Court rules under Title 22 may be more current.

9 NYCRR 4117.4, 9 NY ADC 4117.4

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260-52-040. Post to finish., WA ADC 260-52-040

Washington Administrative Code
Title 260. Horse Racing Commission
Chapter 260-52. the Race--Paddock to Finish (Refs & Annos)

WAC 260-52-040

260-52-040. Post to finish.

Currentness

- (1) All horses must be ridden out in every race. A jockey may not ease up or coast to the finish, without reasonable cause, even if the horse has no apparent chance to win prize money. A jockey must always give his/her best effort during a race. Each horse must be ridden to win. No jockey may cause his/her horse to shorten its stride so as to give the appearance of having suffered a foul.
- (2) If a jockey strikes or touches another jockey or another jockey's horse or equipment, his/her mount may be disqualified.
- (3) When clear in a race a horse may be ridden to any part of the course. If any horse swerves, or is ridden to either side, so as to interfere with, impede, or intimidate any other horse, the horse may be disqualified.
- (4) A horse may not interfere with another horse and thereby cause the other horse to lose ground or position, or cause the other horse to break stride. When this interference occurs in the part of the race where the other horse loses the opportunity to place where it might reasonably be expected to finish, the stewards may disqualify the interfering horse.
- (5) If the stewards determine the foul was intentional, or due to careless riding, the jockey may be held responsible.
- (6) In a straightaway race, every horse must maintain position as nearly as possible in the lane in which it starts. If a horse is ridden, drifts or swerves out of its lane and interferes, impedes, or intimidates another horse, it may be considered a foul and may result in the disqualification of the offending horse.
- (7) When a horse is disqualified, the stewards may place the offending horse behind the horse(s) it interfered with, place it last, or declare it unplaced and ineligible for any purse money and/or time trial qualification. In the case of multiple disqualifications, under no circumstance may a horse regain its finishing place in front of a horse that it interfered with.
- (8) If a horse is disqualified, any horses that it shares a common ownership with may also be disqualified, if in the opinion of the stewards, the foul was intentional.

260-52-040. Post to finish., WA ADC 260-52-040

(9) When a horse is disqualified in a time trial race, for the purposes of qualifying only, it must receive the time of the horse it is placed behind plus one-hundredth of a second penalty or more exact measurement if photo finish equipment permits, and remain eligible to qualify for the finals or consolations of the race on the basis of the assigned time.

(10) In time trials, horses must qualify on the basis of time and order of finish. Times are determined by the official timer. If the automatic timer malfunctions, averages of a minimum of three hand times must be used for that individual race. In the instance of horses competing in the same race receiving identical times, order of finish must determine qualifiers. In the event two or more horses receive identical times for the final qualifying position, a draw by lot conducted by the stewards will determine the final qualifying positions.

(11) If a horse that qualified for the finals should be unable to enter due to racing soundness or scratched for any other reason other than a positive test or rule violation, the owner will receive last place purse money. If more than one horse is scratched from the final, then those purse moneys will be added together and distributed equally among those owners.

(12) If a qualifier for a final or consolation is disqualified for ineligibility or a rule violation after the time trials are declared official, but prior to entry for the final or consolation, the nonqualifier with the next fastest time must replace the disqualified horse. If a qualifier is disqualified after entry for the final or consolation for any reason other than unsoundness, illness or death, the purse will be redistributed among the remaining qualifiers.

(13) Possession of any electrical or mechanical stimulating or shocking device by a jockey, horse owner, trainer or other person will be considered prima facie evidence of a violation of these rules and is sufficient grounds for the stewards to scratch or disqualify any horse involved, and summarily suspend the individual in possession of the device.

Credits

Statutory Authority: RCW 67.16.020. WSR 10-17-070, S 260-52-040, filed 8/13/10, effective 9/13/10; WSR 10-07-050, S 260-52-040, filed 3/11/10, effective 4/11/10. Statutory Authority: RCW 67.16.020 and 67.16.040. WSR 08-05-088, S 260-52-040, filed 2/15/08, effective 3/17/08. Statutory Authority: RCW 67.16.040. WSR 00-06-069, S 260-52-040, filed 3/1/00, effective 4/1/00. Statutory Authority: RCW 67.16.020 and 67.16.040. WSR 81-08-013 (Order 81-01), S 260-52-040, filed 3/24/81; Rule 211, filed 4/21/61.

Current with amendments adopted through the 19-10 Washington State Register, dated May 15, 2019.

WAC 260-52-040, WA ADC 260-52-040

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Horse Racing and Gambling Blog

Assessing and Updating the Rules of the Race

Posted on [December 15, 2016](#)

By Bennett Liebman

Government Lawyer in Residence

Government Law Center

Albany Law School

Speech before The Racing Officials Accreditation Program

Tucson, Arizona

December 5, 2016

Thank you for having me here today. And thank you for that overly kind introduction which only proves one thing: I'm old.

I got the request to speak here last week; so I'm somewhat of an added starter here. I should be wearing substitute silks. It has been suggested that I drew in from the also-eligible list. I have tried to do some research for the speech, since I've said and written a little on this overall topic for about a decade. I spend a good deal of my time writing articles of critical importance to gambling and horse racing. My recent law journal article on the history of dog racing in New York State was a real page-turner, and you can look forward to even more cutting-edge articles awaiting publication on the history and meaning of the term "pari-mutuel" and how New York racing developed a theme song for the Belmont Stakes.

Stewards and racing officials have been just about my favorite people in the business. Racing officials were incredibly kind and generous to me when I became a commissioner. My friend Leo Connelly brought me out to his office in Syracuse to show me how to watch races. Mark Thomas, who was our assistant state steward at NYRA, gave me all his cassette tapes from the first national class on stewarding. The late NYRA steward Dick Hamilton became a cherished close friend. Wendy Davis let me participate in teaching classes to stewards. In fact, Leo Connelly and I got to be the moderators for the early programs we held here on stewarding during the symposium.

That said, and even though I have said little in recent years on this topic, I find, somewhat unfortunately, that things have changed far little than they should have, and I can actually largely update what I was saying in 2006.

From a historical perspective, horse racing officials were the leaders in sports technology. We were the worldwide leaders. The sports world started using photo-finish cameras in track and field for the 1932 Olympics in Los Angeles. Racing built on this innovation, and racing was the first professional sport to add photo-finish cameras and electronic timing in approximately 1935. In the mid-1940's, racing became the first sport to authorize film and tape reviews of race. Racing was the first sport authorizing objections and inquiries to be resolved by game officials through reliance on film and tape.

Of course, there were some hiccups along the way. You can see that Massachusetts – not surprisingly – had its

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problems in trying to implement photo finishes. They even banned the photo-finish camera for a time. [Click here](#) to find out more, including how to opt out of cookies. [Go back to top](#) [Close](#) [I understand and accept](#)

1930's. And even into the 1970's, especially if you ever spent time at Saratoga harness, you would continue to hear fans complain that the photo-finish camera was rigged or favored either the outside or the inside horse, depending upon what losing horse they wagered on. It may not have come easy, but we were the leaders.

But we've been joined by others in recent years. Every major sport now has significant elements of video replay and post-live action review available. Have we been surpassed? Well, both yes and no. They may have more technology, designated replay officials, elaborate procedures and even bunkered troops reviewing tapes in distant cities. But they're basically reviewing objective decisions. Racing is still the one professional sport using replays to make decisions on judgment calls. The others basically don't.

Look at the other major sports. Baseball reviews catches and safe and out calls and whether the ball left the park. The only thing remotely subjective are the interference plays, and by now the rules on an issue like home plate interference are practically black and white. If it becomes anything near subjective, the initial decision is upheld.



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The NFL calls are also designed to be totally objective. Was the ball caught? Was it a touchdown? Was it out of bounds?

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Hockey is even more restrictive. It's only for goals, and everything is designed to be objective. Was there a goal? Did time expire? Was the net dislodged before a goal?

The NBA is a little trickier. The on-court decisional reviews are supposed to be objective. There are also reviews of fights and flagrant fouls because major penalties have to be assessed immediately, but for the on-court action, the review is objective.

In tennis, where the replays have probably been most successful, we're looking at line calls, and the video decisions are quick and non-controversial.

So we're seeing a replay world, where we are looking at replays largely focusing on objective factors. Nobody is reviewing balk calls, check swings, pass interference, or intentional grounding, boarding, or charging. We also are not reviewing certain decisions that could be objective, but would involve changing the entire ethos or pace of the game. You could arguably objectively review the strike zone in baseball, travelling in basketball, boarding or all offsidess calls in hockey, and foot faults in tennis. Nobody is willing to go that far.

So the issue is what horse racing should be doing in the age of replays, understanding that officials in racing make largely subjective rather than objective calls. I would suggest that racing's goals should include how best to use technology to help the on-site racing officials, how to use technology to assess the performance of racing officials, and how to show our fans that we are working to improve the quality and the consistency of our decisions.

My basic suggestion is that we need to nationally unify our rules governing the running of races, unify our rules on entries, and keep racing commissions out of the review of steward judgment calls.

It ought to be obvious that we need national uniformity in our race rules. There no longer are meaningful borders between states on racing. Everyone bets on everything. New Yorkers arguably have – at least as measured by purses – the best racing in the country. But most of the money bet by New Yorkers is bet on out-of-state tracks. 72% of the money bet at New York State tracks is bet by out-of-staters. And most obviously to me, this should be an obvious move. It's not a hard policy call like our drug rules; it's a no-brainer to have a uniform rule.

And there's a need for a uniform rule. As our jurisdictions moved away from the Gertrude Stein rule that "a foul is a foul" to the more Monty Python notion of "The Meaning of (Foul) Life," states went their separate ways.

New York, for instance, banning interference, impeding and intimidation, or the foul, altered the finish of the race. New York's rule on the meaningfulness of fouls is actually written in the alternative, so it's incredibly hard to analyze it. The model rule is probably written better banning interference, impeding and intimidation where the stewards believe the interference altered the finish of the race.

Other states are even different. Arizona has no ban on intimidation. It does require racing room and you can't keep a horse in the pocket, which reads like some odd attempt to prevent Angel Cordero from retroactively riding in Arizona. Oregon and Colorado also require racing room.

California is as oddly worded as New York and includes language that seems to narrow the situs of a foul only to those areas where the incident would have affected the race finish, while broadening the nature of a foul to include placements to where a horse was reasonably expected to finish.

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Ohio retains the rule that a foul is a foul is a foul. In the UK and Hong Kong, fouls are only determined based on the effect solely of the horses involved in the incident.

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I used to be bothered by the lack of any definition of interference, impeding and intimidation, but you see all the other sports which don't specifically define major terms. There is no baseball rule defining a check swing, no NFL rule on what constitutes holding, and not much in the NHL on what constitutes boarding. It just is what it is.

But how can intimidation or impeding be a foul in one state and not in others? What's the point of a pocketing rule or a racing room rule? Do you have to cross in front of a horse to cause a foul? What if you just force a horse wide? And then California adds making the part of the race in which the foul occurred part of the foul calculus. What ever became of the notion of the hazards of the start?

And obviously we have enormous problems with applying what I'm terming the Monty Python meaningfulness rule. It cannot just be an excuse for scrutinizing fouls in races.

Should we only apply the rule involving placing decisions between the fouler and the foulee? Do we care if the foulee would move up to a position where it would have earned a higher check, or should it only involve cases

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where the horse would have finished in the top 3 or 4 places? And most importantly, what degrees of proof are needed to determine whether a foul affected the result? You can go anywhere from finding that there was no reasonable doubt that it affected the result to some credible evidence that it might have affected the result. We have a mess on our hands. We need a national uniform rule on what a foul is and how it affects the finish of the race.

As an aside, I love the notion of taking a Wayback Machine back to the past to apply the Monty Python rule retroactively to past major events. Secretariat certainly doesn't get taken down in the 1972 Champagne Stakes, where he won by two lengths. Equipoise probably wins three additional races. Dr. Fager probably doesn't get taken down in the 1967 Jersey Derby, where he won by 6 ½ lengths. And maybe we don't even have the disqualification (DQ) controversy in the 1980 Preakness, where Codex beat Genuine Risk by 4 and ½ lengths.

We also need to deal with couplings and uncouplings. Traditionally in racing, horses with the same trainers and/or the same owners were coupled in the wagering. Traditionally, if one part of the entry was DQ'd due to a foul, the entire entry was DQ'd. This got changed over the decades so that the innocent part of the entry was only DQ'd if the incident affected the finish of the innocent entry mate. You also kept entries out of exotic races. Gradually over the years, with the need to fill races and the need to expand wagering opportunities, the coupling rules were weakened extensively.

It's worth going back and reviewing what used to be the fan and commentator history on uncouplings. It once was incredibly unpopular; we had fans protesting and rioting about mistakes on couplings. In 1976, the New York Racing Board allowed it in thoroughbred racing for horses with the same trainer. It proved so unpopular that it was repealed four years later. As late as 1999, Andy Beyer could say that the "practice has generated immense suspicion and hostility." Nonetheless, the pendulum has shifted and uncouplings are basically accepted.

But they're coming under increased scrutiny largely as a result of the running of the million dollar Sword Dancer Handicap at Saratoga about three months ago.

That race was won by the overwhelming favorite, Flintshire, trained by Chad Brown. Flintshire's uncoupled entry mate, Inordinate, ridden by Aaron Gryder, also trained by Chad Brown, moved off the rail in the stretch to make way for Flintshire. The stewards disallowed the foul claim made by the trainer of the horse to the outside of Inordinate. The fan reaction against the free passage of Flintshire has forced an overall review of the issue.

And there really are major reasons to review these rules. First of all, here in Tucson, we have the traditional Stan Bergstein ecumenicalism and parity issues. The coupling rules are far different for harness racing than for thoroughbred racing. There's no reason for that.

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The rules on what horses can be uncoupled differ from jurisdiction to jurisdiction, and the rules on whether to disqualify the innocent party of the entry differ.

In New York, you only disqualify the innocent party if due to the foul, another horse was prevented from finishing ahead of the innocent entry mate. Under the model rules, it's discretionary with the stewards. Some states disqualify the innocent party, where the innocent party was unduly benefitted. My personal favorite might be New Jersey, where the thoroughbred rule largely follows the discretionary model rule and the harness rule provides for the DQ of the innocent entry mate, where the foul may have affected the finish of the race.

You also have issues over whether you can take action against an uncoupled entry due to a foul by the uncoupled mate. In New York, under the literal rule, you could only take such action if the horses have the same trainer, but not where they have the same owner but a different trainer.

The UK has an interesting way of dealing with the entry issue. A maneuver in the interests of a horse under common control is considered a violation. It does not include pure pacemaking, and the jockey is responsible – and potentially the common trainer – for the assistance violation.

It's not too dissimilar from what happened in the 2006 Hambletonian. Trainer-driver Trond Smedshammer, on the tiring leader, pulled his horse off the rail in the stretch to make room for one of his uncoupled trainees. He received a 30-day suspension for helping. In 1969, driver Yves Fillion opened up the rail for his brother Herve with a coupled entry. He got 15 days. And about 74 years ago, the incredibly talented rider Don Meade got a 19-month penalty for signaling to the rider of his entry mate to take care of one of the competitors. In short, we need a uniform rule on this topic and we need to consider applying the UK improper help rule to these entries when there is no actual interference.

Finally, we need to end racing commission review of steward judgment calls. It still happens in some states, and there's no reason for it. All other sports have rejected the secondary review of judgment calls made by game

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officials. The Court of Arbitration for Sport has consistently rejected review of “field of play” decisions. Besides the need for finality, the fact is that the technologic innovations have tried to make sure that the decisions are made at the most knowledgeable level. Let’s face it, the volunteers who serve as racing commissioners are not at the most knowledgeable racing level. They should not be reviewing steward judgment calls.

There are a few categories of calls that can be addressed through administrative appeal.

Obviously, bad faith decisions. You can’t uphold decisions made by the 2002 Olympic figure skating judges who agreed to vote jointly for their home country skaters. You can’t uphold decisions by crooked NBA ref Tim Donaghy, and you can’t uphold the early 1980’s Great Barrington Fair stewards’ decision, where the stewards took down the first two finishers to put up an exacta they had wagered on.

You can’t uphold obvious mistakes of fact, where the wrong horse was ID’d. Most obviously, in 1986, when the Saratoga stewards took down the horse Allumeuse in a race where he was not involved in the incident.

You also can’t uphold decisions made based on a mistake of law. If the rule says “you can’t run inside the pylons,” and the judges don’t take down the horse because they saw that the horse received no advantage from running inside the pylons, that’s a mistake of law that needs to be addressed.

That really isn’t too different than the George Brett pine tar decision. The penalty for excess pine tar was that you tossed out the bat. You did not declare the batter out. It also was the last play of the game. So no field of play decisions were affected. It was the equivalent of DQ’ing a horse because it was late to the paddock or ran in the wrong silks.

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So what does racing do to utilize new technology? The problem is that racing stewards make judgment calls. These are not the kind of decisions that replay officials make in other sports. They make objective fact calls. What would they rule on: running inside the pylons, leaving the course in a steeplechase?

Moreover, until racing has actual uniform rules on what constitutes a foul, you can't have officials in a bunker in Lexington or Columbus or in a highrise in Manhattan making DQ decisions. And even if you did have a uniform rule of the race, you would have to get individual racing commissions to cede jurisdiction to a central body. If the past is any prologue, that is not about to happen.

So how does racing use technology as we go forward? In the non-steward field, inevitably down the road, we are going to see technology, rather than humans, review the finish line camera results and other portions of the running of the race. There is a strong likelihood that individual racetracks and/or state budget offices will work on racing commissions to limit the number or put an end to the use of patrol judges and placing judges.

Eventually, we will get to automated timing and microchip identification of horses that are engaged in workouts, and we will be seeing a shakeout in how and where racing will employ the use of clockers.

These are depressing results for many of us who like heavy doses of tradition in horse racing. But it's likely to happen. This hotel, as we speak, is holding a luncheon for the Arizona production of "Fiddler on the Roof." Horse racing is much like Anatevka, because without our traditions, we would be as shaky as a fiddler on the roof.

Moving on to stewardship, if we are serious about judging fouls on the basis of how they affected the finish, we will need technology that accurately measures the speed of horses throughout the race. Did a bump or a jostle actually affect the speed of the horse? How many lengths were actually lost when a horse was forced to check? How much distance was lost as a result of a horse being forced wide? Can we develop algorithms that would legitimately estimate how a horse would likely have finished if it was not fouled or impeded? If we want stewards to make informed calls on whether an incident affected the result, we need to provide stewards with the most information possible. We will need a Trakus 2.0 or maybe even a Trakus 3.0 to do this.

Perhaps we need to let stewards consult with designated replay review officials in the bunker during the inquiry. This is not too dissimilar to the NFL review. In the NFL, game officials make the call with the help of review officials. Wouldn't you want the stewards to be able to talk to a Mike Pereira-type when they reviewed the race? This could work to provide expertise and limit steward inconsistencies. I've always thought that it would be nice to have a devil's advocate present in the stewards' stand, and this video replay assistant could deliver that outside voice.

Perhaps a subsequent day review would be the best way to use replay officials in racing. This could work similarly to the NHL review session, but without the power given to the NHL replay officials. The day after the game, the NHL replay officials gather in Toronto to review the issues that came up in the prior games. They review hits and checks to see if they merit suspensions. They generally determine whether incidents merit greater punishment.

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and whether in-game calls were correct. Thus, they serve as a way to review the overall work of the game officials and to provide a more detailed and accurate view of what actually took place in the game.

In racing, they could review the basically objective incidents that could not be called on-track due to time limitations. Now this should involve whip violations, how often was the horse struck, how high was the hand, where was the horse struck, at what point in the race was the whip used, and did the whip strike another horse or another rider. They also could review the objective elements in a harness race, including running inside the pylons, staying in lane during the stretch, and resolving lapped on breaks at the finish line. You might even use the subsequent day review to look for foreign objects on tracks.

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On a more subjective level, you could review the tapes of riding incidents to help determine issues of the severity of jockey or driver misconduct. If it's truly dangerous riding, the replay officials can suggest increases in the penalties for jockeys or drivers.

They can review tapes to see if the rider or driver ran the horse on its merits. They would have time to review tapes to see review form reversals and to check on races with suspect payouts. I'm not proposing that the review officials have independent authority, but they ought to be able to make recommendations to the proper authorities and accept

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This could potentially work to improve stewarding decisions and decrease inconsistency without affecting the sovereignty of racing commissions and racing stewards.

So in conclusion, let me reiterate what I've said this afternoon. Horse racing was the early leader in technology. It is still basically the one professional sport where the in-game officials use replays to make subjective decisions.

To make stewarding consistent, we need uniform rules of the race, uniform rules in couplings, and we need to keep racing commissions out of in-game decisions.

Because replay officials generally make only objective calls, racing would get less benefit from replay officials than other sports get.

Racing can be helped by better technology in making the decision of whether a foul affected the result of the race. Let's hope we can afford the technology.

There should be times when stewards could consult replay officials during the race review to obtain additional expertise and to get a different perspective on the running of the race.

We definitely ought to be able to have expert replay officials review tapes of the race in the days after the race to help make decisions on objective issues that could not have been called due to time restraints on the game officials and to provide subjective input on the severity of any misconduct that occurred in a race.

Most importantly, we can improve stewarding through technology, but we need to put our own house in order first.

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REVERSING THE REFS: AN ARGUMENT FOR LIMITED REVIEW IN HORSE RACING

*Bennett Liebman**

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I. Introduction

In the sports world, common practice is that the official on the spot has the final judgment call. Courts and scholars have cited many reasons for this deference, particularly the need for finality¹ and the reluctance of courts to become "super referees."² No court to date has recognized a cause of action against an official on an honest error in judgment or a misapplication of a

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¹ Mel Narol, *Refereeing Athletic Officials' Calls Is Ruled Out-of-Bounds for Courts*, NAT'L L.J., Sept. 29, 1986, at 24.

² *Id.*



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game rule.³ As such, the general rule is that, in the absence of bad faith or corruption, the decisions of judges, umpires or referees are final and are presumed to be correct.⁴

This concept of non-interference with the decision of a sports official has even been accepted by the Court of Arbitration for Sport. In the decision upholding the award at the Athens 2004 Summer Olympics of the gold medal to American Paul Hamm for the Men's Individual Gymnastics All-Around, the court stated, "In short, Courts may interfere only if an official's field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy."⁵

Under the radar, a line of horse racing cases have developed in which State Racing Commissions have reversed decisions of officials – referred to as either stewards or judges⁶ – in determining fouls in races.⁷ In these cases, courts have generally

³ WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 82 (The Lawyers Coop. Publ'g Co. 1990).

⁴ JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS §2.15 154 (The Bobbs-Merrill Co. Inc. 1979). See also Kenneth W. Biedzynski, *Comment: Sports Officials Should Only Be Liable For Acts Of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 380 n.19 (1994).

⁵ Yang Tae Young v/FIG, CAS 2004/A704, § 3.17 at <http://www.tas-cas.org/en/pdf/yang.pdf> (last viewed 4/24/2006) [hereinafter Yang Tae Young].

⁶ Traditionally, the main racing officials at thoroughbred tracks have been referred to as stewards. In harness racing, the officials are often referred to as judges. See Jewel Klein & Ray Garrison, *Practice and Procedure Before Racing Commissions*, 78 KY. L.J. 477, 481 (1990).

⁷ Neil Milbert, *Top Pacers, Trotters Drawn to American-National Opener*, CHI. TRIB., May 18, 1996, at Sports2; Larry Bortstein, *Derby Dispute Settled*, ORANGE COUNTY REGISTER, Aug. 6, 1991, at C7; Bill Christine, *Tight Spot Is Still Del Mar Winner*, LOS ANGELES TIMES, Feb. 27, 1991, at C7; Vinnie Perrone, *Controversial Calls Won't Hurt Stewards; Three Track Rulings Reversed on Appeal*, WASHINGTON POST, June 17, 1995, at B7; Dick Rockne, *Horse Racing/Emerald Downs -- Race Winner Bumped After Bump-And- Run*, SEATTLE TIMES, Sept., 6, 1999, at C8; John Chunn, *All Firmed Up Wins Cup Appeal*, TORONTO STAR, Oct. 6, 1995, at C10; Mike Welsch, *Rolled Stocking DQ Reversed*, DAILY RACING FORM, May 12, 2004; Tom Keyser, *Time for Timonium, Fairest of them All*, BALTIMORE SUN, Aug. 20, 2000, at 18E; Jon White, *Stewards Should Have Final Say*, DAILY RACING FORM, Dec. 24, 1999; Associated Press, *SPORTS NEWS, OMAHA, NEB.*, Oct. 3, 1984 [hereinafter Sports News]; Robert Yates, *Notes Servis Wants Derby's Blanket of Roses*, ARKANSAS DEMOCRAT-GAZETTE, Apr. 28, 2004.

upheld the racing commission.⁸ In the sport of horse racing, the officials on the site do not always have the final call. As one racing steward remarked, "This is the only sport I know where judgment calls are overturned."⁹ The purpose of this article is to contrast the case law dealing with the issues of overruling the referees in all other sports and the officials in horse racing. The article suggests an approach that would bring review of horse racing decisions more in line with the case law governing the review of decisions of other sports officials, advocating non-interference with judgment calls made by on-site officials in horse racing.

II. Non-Interference with Judgment Calls

A. The Early Cases Involving Regulated Sports

How did we reach the presumption that referees' decisions are final? The initial decisions finding no recourse from the decisions of the on-track officials came from regulated sports industries – especially horse racing. Stewards were long considered "the rulers of the racetrack" with significant – if not absolute power – over licensees in racing.¹⁰

In light of this – and ironically today – the first case supporting finality for sports officials involved thoroughbred

⁸ O'Neil v. Pallot, 257 So.2d 59 (Fla. Dist. Ct. App. 1972); Longo v. McMurray, 321 N.W.2d 701 (Mich. Ct. App. 1982); Smith v. Bd. of Horse Racing, 956 P.2d 752 (Mont. 1998); Sports News, *supra* note 7; Bortstein, *supra* note 7; Vinnie Perrone, *Appeals Court Decides In Lady Winner's Favor; Reverses Lower Court Ruling on 1989 Race*, WASHINGTON POST, Jan. 24, 1992, at F8; Dick Rockne, *Horse Racing -- My Constant Star Loses Victory*, SEATTLE TIMES, Oct. 9, 1998, at F5.

⁹ Jay Hovdey, *38 Days Later, Tight Spot Wins the Del Mar Derby*, LOS ANGELES TIMES, Sept. 27, 1990, at C1; See also Larry Bortstein, *Tight Spot Wins – Again*, ORANGE COUNTY REGISTER, Sept. 27, 1990, at C2 (quoting Steward Samuel's statement, "Decisions like these are judgment calls like balls and strikes or 'safe' or 'out' in baseball... They shouldn't be overturned by someone who doesn't have the experience looking at races or at films of races that we do.").

¹⁰ Bart Barnes & Clem Florio, *The Aftermath; Firestones to File Appeal; Owners of Genuine Risk Will File Appeal of Stewards' Preakness Decision*, WASHINGTON POST, May 20, 1980, at D1.

racing.¹¹ In a New York case, a bettor sued the proprietors of Aqueduct Racetrack in Queens, New York. On June 7, 1944, the plaintiff, Shapiro, placed two \$50 win bets on Breezing Home in the sixth race.¹² After the starter pressed the button to open the gate, only three of the six horses started running.¹³ The starter immediately realized that there had been unfairness in the start of the race and signaled a false start.¹⁴ The assistant starter, who was a sixteenth of a mile down the track, picked up the false start indication, put up a red flag, and called out to the riders that there had been a recall.¹⁵ All of the horses pulled up except Breezing Home, who alone finished the race.

After the false start, the racing stewards gave Breezing Home's trainer an opportunity to withdraw his horse from the race, but the trainer elected to keep his horse in the race. To give Breezing Home a fairer opportunity, the stewards gave the horses a twenty-five minute rest. Finally, in the rerun of the race, Breezing Home finished fifth in the field of six. Shapiro sued the racetrack for breach of contract claiming as damages the amount he would have won if Breezing Home had been declared the winner of the race.

The court found that there was no contract between the racetrack and Shapiro. The track was only bound to distribute the win pool as determined by the stewards. In this case, the stewards had determined that Breezing Home did not win the sixth race at Aqueduct. Moreover, the court held that the decision of the stewards was controlling.

The court then noted the need to give finality to the decisions of sports officials. It stated:

As in other professional competitive sports, such as tennis, baseball, football, basketball, hockey, boxing and soccer, it has been found of great practical

¹¹ Shapiro v. Queens County Jockey Club, 53 N.Y.S.2d 135, 136 (N.Y. Mun. Ct. 1945).

¹² *Id.*

¹³ JOHN O. HUMPHREYS, RACING LAW 215-16, The Nat'l Ass'n of State Racing Comm'rs (1963).

¹⁴ Shapiro, 53 N.Y.S. 2d at 136.

¹⁵ *Id.*

importance to have umpires, referees, timekeepers and other officials in said sports, who are experienced, mentally alert, fair and otherwise well qualified to make immediate decisions, and whose decisions must be final and binding. In more than one sense, such officials are truly judges of the facts, since they are closer to the actual situation and characters involved, at the time, and as and when, and under the circumstances in which the events occurred. Surely their immediate reactions and decisions of the questions which arose during the conduct of the sport should receive greater credence and consideration than possibly the remote, subsequent, matter-of-fact observation by a court in litigation subsequently instigated by a disgruntled loser of a wager.¹⁶

The New York courts took a similar approach to the issue of official finality in boxing. In a bizarre 1953 case, a legal question arose concerning a ten-round fight between Billy Graham and Joey Giardello, whose real name was Tilelli.¹⁷ The closely contested fight ended in an unpopular split decision among the officials. Two officials – including the referee and one judge – voted for Giardello, while another judge voted for Graham. After the decision was announced, two members of the State Athletic Commission went into a meeting room and determined that the judge who had voted for Giardello had scored two rounds improperly.¹⁸ They changed the scorecards to correct the error

¹⁶ *Id.*

¹⁷ *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 698 (Spec. Term 1953). Both fighters are now in the Boxing Hall of Fame. See *Enshrinees: Roster of Hall of Famers* available at <http://www.ibhof.com/ibhfrost.htm> (last viewed Mar. 3, 2005). In the opinion of *Tilelli*, 120 N.Y.S.2d 697, Giardello is mistakenly referred to as “Giardella.”

¹⁸ The State Athletic Commission was the government agency which supervises boxing in New York State. In many ways, boxing and pari-mutuel racing are alike in their regulatory structure. Both are the only sports under direct governmental control, and both are supervised by boards or commissions pursuant to State regulatory structure established by legislation. Both boards appoint the on-site officials who supervise the sporting event. See NY CLS Unconsol Ch. 7 §§ 1-

and named Graham the winner of the fight.¹⁹ Giardello sued to be renamed the winner of the fight.

While the court held that the Athletic Commission had the summary power to take immediate action to prevent a fraud, it also held that its actions against Giardello could not stand.²⁰ The commissioners presented no evidence of standards that determined whether the judge had scored the rounds improperly.²¹ As the court stated, "The commissioners were not presumably appointed on the basis of their expertness in judging prize fights, but because of personal stature and administrative capacity. The judges and referees, however, are in turn designated by the commission on the basis of their specialized skill, experience and integrity in judging boxing bouts."²²

Moreover, the scoring of a boxing match is an art, and not a science. It is not a rote exercise such as the scoring of a tennis match.²³ Thus, the decision of the judges had to be confirmed, and Giardello was named the victor of the fight.²⁴

Three years later, a Wisconsin court followed the ruling in *Tilelli* in a similar boxing case.²⁵ In that case, the plaintiff, Durando, knocked down opponent Mueller in the fourth round.²⁶ Mueller got up before the count of ten but promptly fell down again due to weakness, rather than any punch.²⁷ The referee began a second count of Mueller and again did not reach ten.²⁸ The fight continued, and Mueller ended up winning.²⁹ Durando appealed the decision to the Athletic Commission, alleging that the referee misinterpreted the rules of the Wisconsin State

4 (2005); N.Y. CLS RACING & WAGERING § 1002 (2005).

¹⁹ *Id.*

²⁰ *Tilelli*, 120 N.Y.S.2d at 703.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *State ex rel. Durando v. State Athletic Comm'n*, 75 N.W. 2d 451 (Wis. 1956).

²⁶ *Id.* at 452.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Athletic Commission.³⁰ The rules required a mandatory “8” count for any fighter who was knocked down.³¹ Additionally, the rules required that if a fighter arises before the count reaches ten but goes down again due to weakness, then the original count continues. Durando contended if you added the initial “8” count plus the time of the second credited knockdown, then Mueller should have been counted out under the rules of the Wisconsin State Athletic Commission.³²

Durando appealed the decision to the Athletic Commission. The Commission ruled that “an error by the referee in the application of Rule 121 may not be reversed by the commission in the absence of a showing of fraud on the part of the referee.”³³ Durando sued. The court determined that the Athletic Commission’s interpretation of its rules was entitled to great weight.³⁴ In addition, the Court could not find any specific rule that authorized the Commission to overrule the referee.³⁵ Accordingly, the court agreed with the Athletic Commission and refused to determine that Durando had won the fight.³⁶ The Court determined that the Athletic Commission’s interpretation of its rules was entitled to great weight.³⁷ In the Proximity Trot, a non-betting race held on September 20, 1971, the filly Modern Yankee driven by Delvin Miller,³⁸ finished in second position.³⁹

³⁰ *Durando*, 75 N.W. 2d at 452.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 453-54.

³⁵ *Durando*, 75 N.W. 2d at 453-54.

³⁶ *Id.*

³⁷ *Id.* at 453-54.

³⁸ Delvin Miller was one of the most illustrious people in the history of harness racing. At the time of his death in 1996, *Sports Illustrated* stated that he was “the only professional athlete to compete in eight decades. More than that, though, Miller was Mr. Harness Racing, a driver, trainer, owner, breeder, track official and, most important, the sport’s unofficial ambassador of goodwill.” William F. Reed, *An Iron Horseman*, *SPORTS ILLUSTRATED*, Sept. 2, 1996 at 20. “[W]hat Palmer was to golf and Babe Ruth was to baseball, Mr. Miller was to harness racing.” See also Gene Collier, *Delvin Miller Legendary Hall Of Fame Harness Race Driver*, *PITTSBURGH POST-GAZETTE*, August 21, 1996 at B-6.

³⁹ *Miller*, 352 N.Y.S.2d at 261.

The three judges who observed the race determined that the horse had been off-stride – had gone off her required trotting gait – for about 280 feet of the one mile race until about 50 feet from the finish of the race.⁴⁰ After reviewing the race tapes that evening, the judges kept Modern Yankee in second place.⁴¹

The next evening, however, the judges again reviewed the tapes of the race and reached a different conclusion.⁴² They determined that Modern Yankee had violated the breaking rule because his driver failed to display sufficient effort to pull his horse back to a proper gait.⁴³ The State Harness Racing Commission upheld the disqualification decision of the judges, and the court upheld this finding based on the powers that the rules of the Harness Racing Commission had granted the judges.⁴⁴ The Commission's rules empowered the judges "to determine all questions of fact relating to the race and to investigate every apparent rule violation."⁴⁵ Given the power that had been granted the judges, the New York court upheld the decision of the Harness Racing Commission.⁴⁶

The "no change in the officials' decision" doctrine in horse racing reached its apex in 1959.⁴⁷ At a race in Tropical Park in Florida in 1959, the officials looking at a wet print of the photo finish declared one horse the winner.⁴⁸ After viewing the dry print of the photo (after pari-mutuel payments had begun) the stewards discovered that there was a dead heat.⁴⁹ However, the stewards determined that their decision was irrevocable. On appeal to the racing commission in Florida, the chairman of the commission ruled that an honest mistake had been made. Since it was an honest mistake by the onsite officials, the initial decision finding no dead heat would stand.

⁴⁰ *Id.* at 262.

⁴¹ *Id.* at 261.

⁴² *Id.* at 261-62.

⁴³ *Id.*

⁴⁴ *Id.* at 262.

⁴⁵ *Id.* at 261.

⁴⁶ *Id.* at 262.

⁴⁷ JOHN O. HUMPHREYS, RACING LAW 218-19 (1963).

⁴⁸ *Id.* at 219.

⁴⁹ *Id.*

The initial decisions finding no recourse from the decisions of the on-track officials came from regulated sports industries – especially horse racing. Stewards were long considered “the rulers of the racetrack” with significant if not absolute power over licensees in racing.⁵⁰ Humphreys and Bayse commented that, “By tradition, the decision of racing stewards or judges is final as to actual competitive racing activity.”⁵¹ Non-regulated sports, however, would follow the trend of regulated sports.

B. The Non-Regulated Sports

In non-regulated sports, the first reported case involved an attempt to overturn a referee’s call in Georgia in 1981.⁵² In *Waddell*,⁵³ the referee clearly misapplied the rules of the game. In a high school football game between Osborne and Lithia Springs High Schools, Osborne led by a 7-6 score with 7:01 left in the fourth quarter. Osborne was punting from its own 47 yard line with 4th down and 21 yards to go. On the punt, a “roughing the kicker” penalty was assessed against Lithia Springs, a 15 yard penalty making a 4th down and 6 yards to go. This was an improper call under the applicable rules. Under the rules, the penalty should have been 15 yards and an automatic first down for Osborne; also Osborne should have kept possession of the ball.⁵⁴

Instead, Osborne punted.⁵⁵ Lithia Springs took possession of the ball and drove for a field goal to put them ahead by a score of 9-7. On Osborne’s possession, Lithia Springs intercepted a pass and scored a final touchdown, winning the game by a score of 16-7.⁵⁶

Osborne protested the game to the high school association and

⁵⁰ Bart Barnes & Clem Florio, *The Aftermath: Firestones to File Appeal*, WASHINGTON POST, May 20, 1980, at D1.

⁵¹ 3 JOHN O. HUMPHREYS & WENDELL M. BAYSE, RACING LAW 89-90 (1973).

⁵² *Georgia High School Ass’n v. Waddell*, 285 S.E.2d 7 (Ga. 1981).

⁵³ *Id.*

⁵⁴ *Waddell*, 285 S.E.2d at 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

was denied.⁵⁷ Subsequently, parents of the Osborne High players brought suit against the high school association. The trial court ruled for Osborne High, holding that the plaintiffs had a property right in the football game and that the referee denied plaintiffs their property right and equal protection of the laws by failing to correctly apply the rules.⁵⁸ The court ordered the two teams to meet again with play resuming where it should have been had the referee made the correct decision on the roughing the kicker penalty.⁵⁹

The trial court decision was quickly appealed to the Georgia Supreme Court.⁶⁰ The court, with little analysis, simply reinstated the original outcome of the game, stating, "We now go further and hold that courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies."⁶¹

Three years later, an Iowa court followed the decision in *Waddell*.⁶² In a game between Purdue University and the University of Iowa, a college basketball referee, Jim Bain, called a foul on an Iowa player in the last seconds of the game. As a result of the foul call, the Purdue player was awarded free throws, and the successful free throws resulted in a win for Purdue. Because of the loss, Iowa did not win the Big Ten Conference Championship. Some Iowa fans blamed Bain for making an erroneous foul call that led to their team's loss.⁶³

Among these fans were the Gillispies, who operated a novelty store in Iowa City that specialized in University of Iowa sports memorabilia.⁶⁴ The Gillispies started selling t-shirts featuring a picture of a man with a rope around his neck and the caption "Jim Bain Fan Club."⁶⁵ Bain sued the Gillispies for damages. The

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Waddell*, 285 S.E.2d at 8.

⁶⁰ *Id.*

⁶¹ *Id.* at 9.

⁶² *Bain v. Gillispie*, 357 N.W.2d 47, 49 (Iowa Ct. App. 1984).

⁶³ *Id.* at 48.

⁶⁴ *Id.*

⁶⁵ *Id.* John Riley, *A Fan's Suit: Referee Rebounds From a Bad Call -- With*

Gillispies counterclaimed, alleging that Bain had engaged in professional malpractice. They claimed damages based on what they would have earned if Iowa had won the Big Ten Championship. They also claimed exemplary damages "because Bain's calls as a referee were baneful, outrageous, and done with a heedless disregard for the rights of the Gillispies."⁶⁶

The trial court dismissed the Gillispies' counterclaim and found that the Gillispies had no rights.⁶⁷ The trial court stated:

This is a case where the undisputed facts are of such a nature that a rational fact finder could only reach one conclusion—no foreseeability, no duty, no liability. Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is a liability to a merchandiser like the Gillispies, why not to the thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks." There is no tortious doctrine of athletic official's malpractice that would give credence to the Gillispies' counterclaim.⁶⁸

The appellate court agreed with the trial court, holding that "absent corruption or bad faith, which is not alleged, we hold no such tort exists."⁶⁹

A similar result was obtained in a New Hampshire case.⁷⁰ Snow was a competitor in an 800 meter race at a high school track meet. To advance to the "Meet of Champions," Snow needed at least a fifth place finish. He finished in seventh place. Snow,

an Assist From the Courts, THE NATIONAL LAW JOURNAL, Oct. 1, 1984, at 10.

⁶⁶ *Id.* at 48.

⁶⁷ *Id.*

⁶⁸ *Id.* at 49-50.

⁶⁹ *Id.*

⁷⁰ *Snow v. N.H. Interscholastic Athletic Ass'n*, 449 A.2d 1223 (N.H. 1982).

however, claimed he had been fouled in the course of the race. The meet director refused to rule a foul because no track judge had seen the infraction. In the absence of a ruling of a foul, the Athletic Association refused to allow Snow to compete in the "Meet of Champions."

The trial court granted Snow's petition for injunction and ordered the Athletic Association to allow Snow to compete at the "Meet of Champions."⁷¹ It found that Snow had a due process right to continue to participate in his chosen sport.⁷² On appeal, however, the New Hampshire Supreme Court quickly brushed aside Snow's due process claim.⁷³ It found that its due process precedents "cannot be interpreted as subjecting to judicial scrutiny every umpire's call or referee's decision in a competitive event. The role of the courts in this area is exceedingly limited and we did not intend . . . to merge the stadium bench and judicial bench."⁷⁴ Thus, the Athletic Association's determination of no foul was upheld by the courts.

Since the mid-1980's, there have been no cases where a court has overruled a sports referees' decision.⁷⁵ The rule remains "that in the absence of bad faith or corruption, the decisions of sports officials in athletic contests will be presumed to be correct. While claims involving officials' judgment calls, misinterpretation, or misapplication of the rules have been attempted, courts have consistently declined to intervene."⁷⁶

The rules of a game often require immediate rulings by human judges, and even certain knowledge that a mistake

⁷¹ *Snow*, 449 A.2d at 1224.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Lindlad v. U.S. of Am. Wrestling Ass'n*, 230 F.3d 1036 (7th Cir. 2000), is not to the contrary. In that case, the plaintiff was entitled to protest the results of a match that determined the selection of the United States participant in Greco-Roman wrestling at the 2000 Olympics. The reason for the allowance of the protest was an arbitrator's finding that the Wrestling Association had not complied with the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C §§ 220521-220529.

⁷⁶ Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW J. 213, 224 (1997).

occurred will not reverse the outcome.⁷⁷

C. The Olympics Examples

While the issue of overruling the calls of game officials has not been a major issue in American sports since the mid-1980's, it has become a common place issue in rulings concerning the Olympic Games. The International Olympic Committee (IOC) established "the independent Court of Arbitration for Sport (CAS), which became operative in 1984."⁷⁸ The CAS was to arbitrate sports-related disputes.

The IOC now requires that Olympic athletes enter into binding arbitration agreements under which disputes are to be determined by the CAS.⁷⁹ The CAS has a very broad jurisdiction,⁸⁰ and it serves as a "final and binding court of arbitration for all sports related disputes, including doping cases."⁸¹ Given this broad jurisdiction, it is hardly surprising that the CAS has become involved in the issue of whether the decisions of the on-site sports officials are subject to review.

The first occasion of the CAS's involvement with the referees came in the 1996 Atlanta Olympics.⁸² A French heavyweight boxer "was disqualified by a referee for allegedly punching an

⁷⁷ Richard Lempert, *Symposium: Legal Implications of Human Error: Legal Error and Procedure: Comment: Error Behind the Plate and in the Law*, 59 S. CAL. L. REV. 407, 409 (1986).

⁷⁸ James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 506 (1992).

⁷⁹ James A. R. Nafziger, *American Law In A Time Of Global Interdependence: U.S. National Reports To The XVIth International Congress Of Comparative Law: Section II Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 166-67 (2002).

⁸⁰ *Id.*

⁸¹ Richard H. McLaren, *Introducing The Court Of Arbitration For Sport: The Ad Hoc Division At The Olympic Games*, 12 MARQ. SPORTS L.J. 515, 516 (2001).

⁸² Due to concerns about the CAS's perceived lack of independence from the IOC, the International Council of Arbitration for Sport (ICAS) was established by the IOC in 1993. The ICAS, rather than the IOC, now oversees the CAS. Starting with the Olympic Games in Atlanta in 1996, the CAS began to arbitrate decisions directly affecting judging of events in the Olympic Games. See Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORT L. 75, 83 (1998).

opponent below the belt.”⁸³ The boxer, Christopher Mendy, appealed to the CAS to review the decision of whether the punch was a low blow.⁸⁴ Rather than decide de novo on whether the punch was a low blow, the CAS simply decided that this was a field of play judgment and deferred to the decision of the on-site officials. As a result, Mendy’s disqualification was upheld.⁸⁵

The same situation held true in the Sydney Olympics in 2000. Again, the CAS held that it would not interfere with the judgment of on-site officials. It confirmed “the principle of the *lex sportiva*[:] . . . decisions made during the course of competition will not be reversed later in the arbitration hearing.”⁸⁶

In one case, Olympic Athlete Bernardo Segura finished first in the 20 km walk but was disqualified for failure to maintain at least one foot on the ground throughout the event. Three judges during the course of the race had determined that he was in violation of the rules.⁸⁷ Segura complained that the judges had been in error for failing to notify him that he was in apparent violation of the rules. The panel held that they could not review a determination of the “rules of the game” unless they were applied in bad faith.⁸⁸ Further, the panel held that the court could not “reverse the judges’ decision unless it was shown that the error on the part of the judges in failing to communicate the disqualification to Segura promptly would have compelled the reversal of the decision.”⁸⁹ Since Segura could not make the

⁸³ Melissa R. Bitting, *Mandatory, Binding Arbitration For Olympic Athletes: Is the Process Better or Worse for “Job Security?”*, 25 FLA. ST. U.L. REV. 655, 676 (1998).

⁸⁴ DIGEST OF CAS AWARDS 1986-1998 409 (Matthieu Reeb ed., Kluwer Law International 2001); See also GABRIELLE KAUFMAN-KOHLER, ARBITRATION AT THE OLYMPICS 113–14 (2001).

⁸⁵ See generally R. Jake Locklear, *Note: Arbitration in Olympic Disputes: Should Arbitrators Review the Field of Play Decisions of Officials?*, 4 TEX. REV. ENT. & SPORTS L. 199, 220 (2003). See also KAUFMAN-KOHLER, *supra* note 74.

⁸⁶ Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes*, 35 VAL. U.L. REV. 379, 399 (2001).

⁸⁷ Bernardo Segura v. IAAF, No. 13 (Arbitration CAS Ad Hoc Div. O.G. Sydney Sept. 30, 2000).

⁸⁸ McLaren, *supra* note 76, at 398-99.

⁸⁹ *Id.* at 399.

assertion that the failure to communicate cost him the medal, the panel upheld the decision.⁹⁰

In the case of Rumyana Nekyova, the CAS made similar statements about non-interference with the calls of the on-site officials.⁹¹ Nekyova complained to the CAS that the determination of her second place finish in the Women's Single Skill event was incorrect on the grounds that the equipment relied upon was inaccurate.⁹² The CAS upheld her placement and again restated its belief that it could not reverse judgment calls and technical decisions made during an event.⁹³

In 2002, the CAS again restated its belief that the decisions of on-field judges should not be disturbed. In the 1,500 meter men's short track skating event, Korean skater Kim Dong-Sung finished first but was disqualified for improperly blocking American skater Apolo Anton Ohno.⁹⁴ The CAS ruled for Ohno and upheld the disqualification. The CAS stated, "It is clear that CAS Panels do not review 'field of play' decisions made on the playing field by judges, referees, umpires or other officials, who are responsible for applying the rules or laws of the particular game."⁹⁵

The field of play line of decisions were recently reexamined and followed in the 2004 Athens Olympics in the case of gymnasts Paul Hamm and Yang Tae Yang.⁹⁶ American gymnast Hamm was originally declared to be the winner of the men's individual gymnastics all around event final, while Republic of Korea gymnast Yang finished third and received a bronze medal. It was determined, however, that the start value – based on the

⁹⁰ *Id.*

⁹¹ Rumyana Dimitrova Nekyova v. FISA, No. 12 (Arbitration CAS Ad Hoc Div. O.G. Sydney Sept. 29, 2000).

⁹² McLaren, *supra* note 76, at 399.

⁹³ McLaren, *supra* note 76, at 399.

⁹⁴ *CAS Rejects Appeal Over Short Track Spat*, KOREA TIMES, Feb. 25, 2002; Harvey Araton, *Sports of The Times; Games Are Speeding To a Merciful Finish*, N.Y. TIMES, Feb. 24, 2002, at 8, 2; Sam Stanton, *Russia, S. Korea won't pull out*, SACRAMENTO BEE, Feb. 23, 2002, at C10.

⁹⁵ Korean Olympic Committee v. International Skating Union, CAS OG 02/007.

⁹⁶ Yang Tae Young, *supra* note 5.

degree of difficulty of the routine – for Yang’s performance on the parallel bars was in error.⁹⁷ The evaluation of the start value is made during performance of the routine,⁹⁸ and the judges mistook a Belle for a Morisue.⁹⁹ Subsequent video analysis showed that instead of the 9.9 value used by the judges in determining the grading for Yang’s routine, the start value should have been 10. Had Yang’s routine been graded with a 10 value, then his overall score would have positioned him in first place with a score slightly higher than that of Hamm.¹⁰⁰

The CAS, however, turned down Yang’s appeal, stating that Yang filed his protest too late. Further, the panel further concluded that the determination of the start value implicated the issue of “interfering with a field of play decision.”¹⁰¹

In addition, the competition judges conceded that they had improperly determined the start value of Yang’s routine on the parallel bars.¹⁰² Nonetheless, the CAS panel noted, “An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition.”¹⁰³ In following previous decisions, the CAS was clear in their decision and stated that “[i]n short, Courts may interfere only if an official’s field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy from exercising it.”¹⁰⁴

Also, the CAS panel cited the uncertainty of the outcome of the competition as a reason to leave the judges’ ruling in place.¹⁰⁵ The judging error concerned the parallel bars, and Yang still had

⁹⁷ *Id.* at 6.

⁹⁸ *Id.*

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.*

¹⁰¹ Yang Tae Young, *supra* note 5, at 41.

¹⁰² Yang Tae Young, *supra* note 5, at 41.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 38. The panel also voiced the opinion that an absolute refusal to hear any field of play decision would be defensible “since it would uphold, critically, the authority of the umpire, judge or referee, whose power to control competition, already eroded by the growing use of technology such as video replays, would be fatally undermined if every decision could be judicially reviewed.” *Id.* at 37.

¹⁰⁵ *Id.* at 38.

to compete in the high bar event. Had Yang been the points leader at the end of the parallel bars, the case points out that:

[he] might have risen to the occasion, [or] he might have frozen (his marks on the high bar were in fact below expectation and speculation is inappropriate). So it needs to be clearly stated that while the error *may* have cost Yang a gold medal, it did not necessarily do so.¹⁰⁶

Thus, since the start value error was a field of play decision,¹⁰⁷ the panel found that there was no absolute certainty that Yang would have received the gold medal had the mistake in the start value not been made.¹⁰⁸

In the world of international and Olympic sports, the Court of Arbitration for Sport has consistently found that there is no review of field of play decisions made by the on-site officials. Only where the decision is tainted by fraud, arbitrariness or corruption, should the decision of the on-site official be reviewed. Thus, apart from the world of horse racing, there is little interference with the decisions of on-site officials.

III. Interfering with the Decisions of the Stewards in Horse Racing

A. The Horse Racing Decisions Overturning the Stewards

Despite established case law upholding sports officials' decisions, recent courts, reviewing horse racing decisions, have frequently upheld decisions of state racing commissions that reverse the decision of the on-site racing stewards.

This trend had its genesis in Florida in 1972.¹⁰⁹ An appellate court in Florida reversed a decision of the stewards on whether a

¹⁰⁶ Yang Tae Young, *supra* note 5, at 42.

¹⁰⁷ *Id.* The panel noted that this case did not involve second guessing the judges since they all agreed that an error had been committed.

¹⁰⁸ *Id.* at 38.

¹⁰⁹ O'Neil v. Pallot, 257 So. 2d 59. (Fla. Dist. Ct. App. 1972).

foul occurred in a harness race at the Pompano Track on March 20, 1970.¹¹⁰ The petitioners' horse, Tropical Time, led throughout the race and finished first. After the race, the driver of the second-place horse claimed a foul against the petitioners' horse. The stewards disqualified the petitioners' horse and placed it second behind the horse of the respondent.¹¹¹

The petitioners appealed to the Florida Racing Commission, which serves as a division of the Florida Board of Business Regulation.¹¹² At the Racing Commission hearing, the driver of Tropical Time contended that he had not interfered with the respondent's horse.¹¹³ A disinterested witness agreed with the driver.¹¹⁴ Two stewards testified that there had been interference, and the driver of the respondent's horse claimed interference in an affidavit.¹¹⁵ The Racing Commission determined that there had been no interference in the race, and reinstated the petitioners as the winners of the race.¹¹⁶

After an internal appeal to the Board of Business Review, the appellate court overturned the decision of the Board of Business Review and reinstated the decision of the Racing Commission, determining that the decision of the Racing Commission to reverse the stewards was supported by competent, substantial evidence.¹¹⁷ Under Florida law, the presumption of correctness to the stewards only applied to "judgments and to decisions entered after a full administrative hearing where the parties affected have been offered a opportunity to be represented by counsel, present witnesses in their behalf and cross-examine witnesses against them."¹¹⁸ Without these legal safeguards, the stewards' decision could not be given a presumption of correctness.¹¹⁹

¹¹⁰ *Id.* at 62.

¹¹¹ *Id.* at 60.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *O'Neil*, 257 So. 2d at 60.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *O'Neil*, 257 So. 2d at 61.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Next, the court determined that the Board of Business Review sat as an appellate court in this matter and could not reweigh the evidence.¹²⁰ If there was competent, substantial evidence to uphold the decision of the Racing Commission, then that decision had to be affirmed. Thus, the court upheld the steward's original decision.¹²¹

A Michigan court reached a similar decision involving a harness race run at Wolverine Raceway on July 14, 1979.¹²² In this race, there was an incident between the first place finisher, Mighty Phantom, and the second place horse, Happy Sharon. The allegation was that, during the race, Mighty Phantom moved off the rail, forcing Happy Sharon further to the outside to avoid a collision. At the time of the race, Happy Sharon's driver claimed a foul against Mighty Phantom, but the judges disallowed the foul.¹²³ The racing judges apparently believed that while there may have been interference in the race, it did not affect the outcome.¹²⁴

Happy Sharon's driver appealed to the racing commissioner.¹²⁵ The racing commissioner accepted the hearing officer's recommendation that the decision be reversed.¹²⁶

The owners of Mighty Phantom then brought suit, appealing the racing commissioner's decision.¹²⁷ A trial court reversed the racing commissioner, holding that it "would not reverse the race judges' decision absent a clear abuse of their discretion and concluded that no abuse of discretion was shown by the record."¹²⁸

Happy Sharon's driver then appealed, and the appellate court reversed the lower court, reinstating the racing commissioner's

¹²⁰ *Id.*

¹²¹ *Id.* at 62.

¹²² *Longo v. McIlmurray*, 321 N.W.2d 701 (Mich. Ct. App. 1982).

¹²³ *Id.* at 702.

¹²⁴ *Id.*

¹²⁵ See Klein & Garrison, *supra* note 6, at 478 (stating that Michigan is the only state that has a single-member racing commission).

¹²⁶ *Longo*, 321 N.W.2d at 702.

¹²⁷ *Id.*

¹²⁸ *Longo*, 321 N.W.2d at 703.

decision. The appellate court, like the trial court, was faced with the issue of how much weight to give the decision of the judges. This was particularly tricky in that Michigan had rules giving the judges considerable authority, including the authority "to determine all questions of fact relating to the race."¹²⁹

The appellate court first had to decide the proper demarcation between the powers of the judges and the powers of the racing commissioner.¹³⁰ The racing judges had the power to determine questions of fact regarding the race, and the racing commissioner had the power to investigate and review the decision, *de novo*.¹³¹ If appealed by bringing a lawsuit in district court, the court should only have considered whether the decision was supported by substantial evidence.¹³²

Here, substantial evidence supported a finding of interference.¹³³ The bigger issue was whether the interference had affected the order of finish. None of the witnesses testified that the outcome of the race had been affected.¹³⁴ Instead, the hearing officer had determined that "when 'the interfering and objecting horses finished first and second in a race, it is difficult, if not impossible, to say that the outcome was not affected even though interference took place. . .'"¹³⁵ The court found that the hearing officer was in a better position than the trial court to determine whether the outcome was affected.¹³⁶ Accordingly, based on the opinion of the hearing officer, the court found that the decision of the commissioner was supported by substantial evidence, and the decision of the race judges was overturned.¹³⁷

In Montana, a decision of the stewards was also reversed.¹³⁸

¹²⁹ *Id.*

¹³⁰ *Id.* at 704.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Longo*, 321 N.W.2d at 703.

¹³⁴ *Id.* at 702 (There was both a hearing and a rehearing of the case at the racing commissioner level.).

¹³⁵ *Id.* at 705.

¹³⁶ *Klein & Garrison*, *supra* note 6, at 489.

¹³⁷ *Longo*, 321 N.W.2d at 704.

¹³⁸ *Smith v. Bd. of Horse Racing*, 956 P.2d 752 (Mont. 1998).

At the Montana State Fair's Budweiser Derby, a horse, Mickey's Hot Sauce, was disqualified from first place. During the race, two horse trainers claimed that Mickey's Hot Sauce had interfered with their horses. The stewards determined that there had been interference and disqualified Mickey's Hot Sauce. In the course of their deliberations, the stewards failed to discuss the claim with Randy Smith, the owner and trainer of Mickey's Hot Sauce.

Smith appealed the disqualification to the Montana Board of Horse Racing and faced a significant burden of proof. Montana had in place a rule which provided that "[o]n review of a stewards' decision disqualifying a horse in a race, the board shall not substitute its judgment for (second guess) that of the stewards as to the weight of the evidence on questions of fact."¹³⁹ Based on this rule, the Board of Horse Racing denied Smith's appeal.

Smith then appealed to a district court, which similarly affirmed the stewards' decision. Nonetheless, a unanimous Montana Supreme Court overturned the decision of the stewards, finding that the stewards had not given Mr. Smith an opportunity to plead his case.¹⁴⁰

Further, the Board's deference to the stewards on questions of fact is unconstitutional, where the stewards made their factual determination without "affording both sides an opportunity to be heard."¹⁴¹ Thus, the decision of the stewards was reversed.

In several other cases, while decisions of the stewards were not overturned, the courts gave no presumption of finality to a

¹³⁹ *Id.* at 753 (discussing MONT. ADMIN. R. 8.22.302 (2002)).

¹⁴⁰ *Id.* at 754.

¹⁴¹ *Id.* The notion that the on-site officials need to give all sides an opportunity to be heard before making decisions can quickly reach levels of near absurdity. Racing stewards only have a short time to ascertain the facts of the case. Typically, they only talk to the jockeys who participated in the race under review. In a boxing match – which is also subject to pervasive state regulation – would a referee have to give Mike Tyson, his trainer, and his manager an opportunity to be heard before Tyson could be disqualified for biting off Evander Holyfield's ear? Would boxing judges have to talk to both fighters and their representatives before scoring rounds of fights? If baseball games were subject to due process rights, could an umpire call a third strike on Derek Jeter without having to give Yankees manager Joe Torre and Yankees owner George Steinbrenner an opportunity to be heard?

stewards' decision. In an Ohio case, the appellate court upheld the stewards' decision to affirm the horse, Wall Street Dancer, as the winner of the 1990 Miller High Life Cradle Stakes.¹⁴² Wall Street Dancer finished first in the race but arguably fouled the second place finisher, Bobby M. The jockey on Bobby M. lodged an objection against Wall Street Dancer, but the stewards disallowed the objection.

The owners of Bobby M. appealed to the Ohio State Racing Commission.¹⁴³ By a 4-1 vote, the commission upheld the stewards' decision, ruling that the decision was "supported by a preponderance of the reliable, probative, and substantial evidence of record."¹⁴⁴

Bobby M. appealed to a trial court, where the case was assigned to a referee. The referee recommended a reversal. He found that "the commission's ruling was not supported by reliable, probative and substantial evidence."¹⁴⁵ The trial court, however, refused to follow the recommendation of the referee. The trial court determined that the decision of the commission was supported by substantial evidence.

Next, the owners of Bobby M. appealed the trial court's decision to the Ohio Court of Appeals. In a unanimous decision, the court affirmed the trial court's decision, framing the issue as whether the commission decision was supported by "substantial, reliable and probative evidence."¹⁴⁶ While the court believed that the videotape of the race suggested interference, it reviewed all the testimony in the case. The three stewards all testified that there was no interference.¹⁴⁷ A disinterested jockey in the race did not believe that there had been any interference.¹⁴⁸ This evidence constituted substantial, probative evidence in support of the commission's decision that there was no interference.

¹⁴² *Miller v. Ohio State Racing Comm'n*, No.94APE06-886, 1995 Ohio App. LEXIS 768 (Ohio Ct. App. Feb. 28, 1995).

¹⁴³ *Id.* at *2.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *3.

¹⁴⁶ *Id.* at *7-8.

¹⁴⁷ *Miller*, No.94APE06-886, 1995 Ohio App. LEXIS 768 at *6.

¹⁴⁸ *Id.* at *7.

The court also found that the owners of Bobby M. presented “substantial evidence to the contrary.”¹⁴⁹ The owners of Bobby M. presented the jockey and an outside expert, who both testified that there had been interference.¹⁵⁰ Through these witnesses, the owners of Bobby M. had produced sufficient evidence to support the position that there was no interference in the race.¹⁵¹

The court in this decision gave no thought to the issue of whether the decisions of on-site officials have finality. Instead, the court’s focus was on the racing commission. It is the job of the members of the racing commission to weigh the evidence before them to determine its credibility. The court reviews the commission’s decision, not that of the stewards. Thus, the decision of the stewards was given no presumption of finality.

Similarly, a New Jersey appellate court gave no indication that the decision of on-site officials in horse racing had any finality.¹⁵² In the \$700,000 Sweetheart Pace Horse Race on July 8, 1981, a horse named Savilla Lobell finished first and was disqualified at the track by the judges, who placed the horse in tenth place.¹⁵³ When the State Steward upheld the judges’ decision, the owners of Savilla Lobell appealed to the New Jersey Racing Commission. The Racing Commission reversed the decision of the judges and reinstated Savilla Lobell as the winner of the Sweetheart.¹⁵⁴ That decision was further appealed and was reversed by the appellate court on procedural grounds. It found that the owners of the horses who finished behind Savilla Lobell and moved up by the disqualification were not given proper notice of the commission hearing, and the commission’s order was conclusory and failed to contain necessary findings of fact and conclusions of law.¹⁵⁵ There is nothing in the decision of the appellate court indicating that the decision of the on-site judges

¹⁴⁹ *Id.* at *8.

¹⁵⁰ *Id.*

¹⁵¹ *Miller*, No.94APE06-886, 1995 Ohio App. LEXIS 768 at *8.

¹⁵² *Pitts v. Division of New Jersey Racing Comm’n*, 447 A.2d 1348 (N.J. Super. Ct. App. Div. 1982).

¹⁵³ *Id.* at 1349.

¹⁵⁴ *Id.* at 1350.

¹⁵⁵ *Id.* at 1351.

was to be given any sort of presumption of validity. In fact, the New Jersey Racing Commission ultimately overruled the judges at the track and reinstated Savilla Lobell as the winner of the Sweetheart Pace.¹⁵⁶

B. Reversals as the Rare Exception

Decisions involving clear factual mistakes or mistakes of law may be reversed in jurisdictions such as New York or California. One court stated, "The Board may review nonfactual decisions of the Stewards for reasons other than the wagering outcome."¹⁵⁷ For example, at Saratoga Harness, the judges refused to disqualify a horse that had gone inside the pylons marking the inside rail of the course. The applicable Racing and Wagering Board rule mandated that:

any horse or sulky which shall leave the course is disqualified and ruled out; except that in races contested at a track without a continuous hub rail, if in the opinion of the judges, a horse or sulky is forced off the course as a result of the actions of another horse or driver, the judges may determine the appropriate order of finish.¹⁵⁸

In this case a driver drove his horse inside the rail, without being forced off by another driver or horse, and went on to win the race. Another driver objected that the first place finisher had violated the above stated rule, but the judges disallowed the claim. On appeal, the Racing and Wagering Board upheld the decision of its judges. However, in an unpublished opinion, a court reversed the decision of the Racing and Wagering Board.¹⁵⁹ The court found that the judges and the Racing Board had misinterpreted the rule, and the winner of the race was

¹⁵⁶ *Id.* at 1350.

¹⁵⁷ *Cramer v. N.Y. State Racing Ass'n*, 525 N.Y.S.2d 938, 941 (App. Div. 1988).

¹⁵⁸ See Matt Graves, *Crawford's Case Was Well Worth the Wait*, ALBANY TIMES UNION, Dec. 16, 1992, at D5.

¹⁵⁹ *Id.*

disqualified.¹⁶⁰

Where there has been an undeniable mistake of fact, stewards' decisions have been altered, sometimes by the stewards themselves. For example in August of 1986, at Saratoga Race Course, the thoroughbred stewards misidentified a horse that had caused interference. They disqualified the wrong horse. They disqualified the horse, Allumeuse, when they meant to disqualify Syntonic. Later that day, the stewards altered their own decision and reinstated Allumeuse as the winner of the race, well after the pari-mutuel payoffs had been made to the bettors.¹⁶¹

These New York reversals of the stewards for manifest mistakes of fact and mistakes of law would also be permissible under the California law governing reversals of steward decisions. That statute allows reversals where the stewards "mistakenly interpreted the law" and where there is "new evidence of a convincing nature." In the Saratoga Harness case, there was a mistake of law by the judges, and in the Allumeuse case, there was new evidence that the horse had been improperly identified.

As such, even in horse racing jurisdictions like New York where stewards' judgment calls on the facts are not disturbed, decisions involving clear factual mistakes or mistakes of law are sometimes reversed. This differentiates racing from other sports where in addition to judgment calls, cases involving misapplication of the rules¹⁶² and obvious mistakes¹⁶³ are not subject to reversal.

IV. Policy Issues and Finality in Horse Racing

A. The Arguments in Support of Finality of Stewards' Calls

On-site horse racing stewards' judgment calls should be final

¹⁶⁰ *Id.*

¹⁶¹ A good description of the Allumeuse incident can be found at Tim Wilkin, *Allumeuse Error Not Forgotten*, ALBANY TIMES UNION, Aug. 2, 2001, at C1.

¹⁶² See Feiner, *supra* note 62.

¹⁶³ See Lempert, *supra* note 64.

for three reasons: (1) finality has practical advantages, (2) stewards have more horse racing expertise than those who would overrule them, and (3) the rules governing horse racing are often subjective. First, finality has practical advantages. Even though mistakes are sometimes made, a final call wastes less time in games, races, and later in the courts. There must be one final and determinative call, no matter what a subsequent review may show.¹⁶⁴ Even a change in declaring the winner upon review cannot affect the pay-off once the "official" results have been posted.¹⁶⁵ In general, "[s]ports officials need to be able to perform their difficult and often thankless task in an independent, professional and competent manner unfettered by the threat of administrative hearings and litigation because of their game calls."¹⁶⁶ Andrew Beyer, the longtime horse racing columnist of the *Washington Post*, has written:

Any sport would be thrown into utter chaos if the judgment calls of its officials could be appealed and overturned. What happened yesterday is as if baseball Commissioner Peter Ueberroth reversed the outcome of a game because films showed that an umpire had miscalled a key play.¹⁶⁷

Second, another argument in support of a presumption of finality in stewards' decisions is that the stewards are in the best position to judge the race, as opposed to racing commissioners. Stewards are allegedly chosen for their expertise in reviewing racing and have experience in judging races because they do it daily. Kent Hollingsworth, the editor of the weekly turf publication, the *Blood-Horse* wrote, "Judgment calls should be made by stewards, rather than by racing commissioners, because racing commissioners do not see nine races every day, six days a week, year after year."¹⁶⁸ On the other hand, racing

¹⁶⁴ *Vaccaro v. Joyce*, 593 N.Y.S.2d 913, 916-17 (N.Y. Sup. Ct. 1991).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Andrew Beyer, *Chief's Crown Declared Flamingo Stakes Winner*, WASHINGTON POST, Apr. 10, 1985, at B1.

¹⁶⁸ White, *supra* note 7 (quoting Kent Hollingsworth).

commissioners are all political appointees of the governor,¹⁶⁹ and, in every state other than Michigan and New York, are part-time officials.¹⁷⁰ In short, racing commissioners do not necessarily have the background or experience to overrule decisions of stewards who are allegedly chosen for their expertise in reviewing races. Most racing commentators have been strongly opposed to the review of stewards' decisions by racing commissions. The *Washington Post* columnist Andrew Beyer has written that

[i]f a racing commission has the power to overturn decisions by the stewards, it should do so only in rare and extreme cases—when the stewards have been grossly, inexcusably wrong, when they have abused their authority. But the appeals process has gone amok. . .when a judgment call by amateurs overrules a judgment call by professionals.¹⁷¹

Third, stewards' decisions in horse racing should be final because of the subjective nature of the rules governing disqualifications of horses in races. For instance, the New York rule on fouls in thoroughbred races reads:

A horse crossing another may be disqualified, if in the judgment of the stewards, it interferes with, impedes or intimidates another horse, or the foul altered the finish of the race, regardless of whether the foul was accidental, willful, or the result of careless riding. The stewards may also take into consideration mitigating factors, such as whether the impeded horse was partly at fault or the crossing

¹⁶⁹ Klein & Garrison, *supra* note 6, at 478.

¹⁷⁰ *Id.*

¹⁷¹ Andrew Beyer, *For Treatment of Stewards, Post Foul*, WASHINGTON POST, June 24, 1995, at C7. See also Al Dahl, *Appealing Tribunal*, CALGARY SUN, Oct. 1, 1998, at 81 ("You may recall a potentially big argument in baseball recently over whether Mark McGwire was robbed of a home run by a not-so-visually-acute umpire. And you may recall baseball's instant reaction to McGwire's appeal. Judgment calls made by game officials are not appealable. Matter of fact, that's what North America's racing commissioners suggested when they drew up a model list of rules. Too bad we didn't listen in Alberta."). See also Ross Pedicord, *Judging the Stewards a Bad Idea*, BALTIMORE SUN, June 18, 1995, at 16D.

was wholly caused by the fault of some other horse or jockey.¹⁷²

This rule is almost entirely subjective. There are no definitions for “crossing,” “weaving,” “contenders,” “interference,” “intimidation,” “impedes,” or even “clear.” The determination of whether or not an incident is a foul is left almost entirely to the subjective determination of the stewards.

There is not much difference with the joint model rule on fouls in thoroughbred racing as developed by the Association of Racing Commissioners and the North American Pari-Mutuel Regulators Association.¹⁷³ This rule reads, in part, “The offending horse may be disqualified, if *in the opinion of the stewards*, the foul altered the finish of the race, regardless of whether the foul was accidental, willful or the result of careless riding (emphasis added).”¹⁷⁴ Again, ambiguities pervade this definition. There are no definitions for “clear,” “interfere,” “impede,” “intimidate,” or “finish.” The stewards are left to their own judgment with these amorphous standards, and it makes little sense for the judgments of the professional stewards under these circumstances to be second-guessed or nitpicked by part-time amateurs.

B. The Arguments in Support of Commission Review

While there may be many arguments against authorizing commission review of stewards’ on-site decisions, there are also a fair number of arguments that would support some review of stewards’ decisions. In horse racing, the decision of the stewards comes well after all the action has occurred in the horse race. Thus, unlike a baseball game, football game, or even the situation in the Hamm Olympic case, the stewards’ decision does not and cannot play any role in altering the strategy or the psyche of the participants.

Additionally, a commission or court review of a stewards’

¹⁷² N.Y. COMP. CODES R. & REGS. tit. 9, § 4035.2(a)-(b) (2004).

¹⁷³ NAPRA-010-035, at http://www.napraonline.com/PublicPages/2001web/Rules/Race_Rules.pdf (last modified Jan. 29, 2005). This model rule is typical of most thoroughbred foul rules in the United States.

¹⁷⁴ *Id.*

decision does not affect the finality of the pari-mutuel wagers. Whatever the stewards decide will not be affected by any subsequent decision. "Purchasers of race tickets must be held to know this and to consent to be bound by the judgment of those regularly charged with the duty of decision."¹⁷⁵

Thus, a review of a disqualification decision is not subject to any time constraints that might otherwise be imposed by the need to make the results official for pari-mutuel purposes. Since there are no significant time constraints, a reviewing body could be in a better position than the stewards to review all the evidence and speak with all the participants. The reviewing body would also have access to video tape replays. Thus, a reviewing body with the same technical aids as the stewards and additional time to assess all the evidence could be in a better position than the stewards to determine disqualifications.

One commentator has taken the position that the United States cases limiting review of on-site sports officials' decisions are based "in social convenience rather than rigorous legal reasoning."¹⁷⁶ That commentator asks, "[W]hy should sporting organizations not have a duty of care to persons in a proximate relationship to provide reasonably available measures to ensure fair and accurate results?"¹⁷⁷

Similar issues have been raised by attorneys representing individuals challenging actions taken by the stewards. They have cited the notion that their clients deserve some measure of due process.¹⁷⁸ Additionally, commentators have raised the notion that some stewards' reversed decisions are so arbitrary that they merit reversal. They believe that reversal is necessary to serve stewards a message to get the decision right. One racing writer has stated, "Sometimes it is difficult to overturn a judgment call, but not when judgment calls are so obviously wrong. . . [The]

¹⁷⁵ *Finlay v. E. Racing Ass'n, Inc.*, 30 N.E.2d 859, 861 (Mass. 1941). See also *Gardner v. N.Y. Racing Ass'n, Inc.*, 525 N.Y.S.2d 116, 118 (N.Y. App. Term 1988).

¹⁷⁶ G. M. Kelly, *Prospective Liabilities of Sports Supervisors*, 63 AUSTL. L.J. 669, 677 (1989).

¹⁷⁷ *Id.* at 678.

¹⁷⁸ Snider, *supra* note 132 .

decisions should be reversed and the stewards should be told in no uncertain terms that if they blow any more, they'll be issued one-way tickets to Finger Lakes."¹⁷⁹

C. A Suggested Resolution

While there is a case to be made for allowing racing commissions and courts to reverse decisions of racing stewards, the arguments for allowing this review simply do not counter the many arguments against review of on-site decisions. The pro-review arguments do not come close to demonstrating why horse racing officials should be treated so markedly different than officials in other sports. Nor do they adequately deal with the issue that review of stewards' decisions substitutes review of a knowledgeable, professional panel (the stewards) with the review by an inexperienced panel of volunteers (the commissioners). Finally, the pro-review arguments in no manner deal with the fact that disqualification decisions in horse racing are almost entirely subjective decisions. There are no formal standards that a commission can use to review disqualification decisions by stewards in racing.

Nonetheless, horse racing does present a case for the review of certain manifestly wrong decisions. No harm is presented to the public, the participants, or to the independence of stewards themselves if obvious factual mistakes are corrected. Similarly, where stewards have made a mistake of law, the public interest is better served by correcting the errors. The sanctity of judgment calls by the stewards is not threatened by this limited review of disqualification calls made by the stewards.

These standards are little different than what New York has done by administrative and court action and what California has accomplished through statute. Judgment calls of stewards should not be reviewed by racing commissions or courts, but these reviewing bodies may correct factual calls when, much like the rules for instant replay in professional football, there is "indisputable visual evidence" of a mistake.¹⁸⁰ While this

¹⁷⁹ Finley, *supra* at note 144.

¹⁸⁰ See <http://www.nfl.com/news/990526replaytechnology.html>, (last

standard has been subject to criticism,¹⁸¹ the traditional criticism is that football replays take up a lot of time and slow down the game.¹⁸² These time issues will not be a problem at all in horse racing where time is essentially no object on a review of stewards' decisions.

Similarly, there has been some criticism of the concept that mistakes of law by stewards should be subject to review. For example, it has been criticized as an outcome determinative test. If the referee made a judgment call, it is not reviewable, but if that mistake can be characterized as a misapplication of a rule or a law, it can be reviewed.¹⁸³ Nonetheless, reviews of mistakes of law made by administrative agencies are common throughout American civil procedure,¹⁸⁴ and these alleged mistakes can commonly be handled by administrative agencies and courts. Given the fact that the stewards in horse racing only intervene after the race has been completed and cannot affect the strategy or the mindset of the performers, a standard allowing racing commissions and courts to reverse the stewards for mistakes of

viewed Jan. 29, 2005).

¹⁸¹ See Jack Achiezer Guggenheim, *Essay: Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 VT. L. REV. 567 (2000).

¹⁸² See Doug Robinson, *Time to Ice Instant Replay*, DESERET MORNING NEWS, Apr. 5, 2004.

¹⁸³ In the case of amateur wrestling which allows appeals of "misapplication of rules." See Locklear, *supra* note 76. See also Steven J. Thompson, *Olympic Team Arbitrations: The Case of Olympic Wrestler Matt Lindblad*, 35 VAL. U.L. REV. 407, 409 (2001).

¹⁸⁴ See, e.g. NY CPLR § 7803.3 authorizing courts to review an "error of law" made by an administrative agency, and 5 U.S.C. § 706(2)(A) authorizing courts to set aside agency actions "otherwise not in accordance with law." See generally Paul E. McGrail, *The Pine Tar Incident in Ward*, COURTING THE YANKEES, 146-47. The "Pine Tar Incident" is itself another example of a reversal due to a mistake of law. In a 1983 baseball game, George Brett of the Kansas City Royals hit a critical home run against the New York Yankees. The Yankees challenged the home run by stating that Brett had violated a rule which did not permit the use of the substance pine tar 18 inches beyond the handle of the bat. The umpires looked at the bat, and Brett was called out for this violation. The Royals appealed to the American League commissioner, who ruled that there was a mistake in interpreting the rule. The punishment for this violation was throwing the bat out of use and not calling the player out. Brett's home run was reinstated, and play was resumed from the time of Brett's home run.

law would on balance serve the public interest and make it possible to correct non-factual decisions made in horse racing.

A system allowing only this limited review of stewards' decisions could be enacted by legislation as in California or could be determined by individual racing commissions – whether by rule or by administrative action. Indeed these commissions, much like the Court on Arbitration of Sport, could determine that stewards' judgment calls, while technically within the jurisdiction of the commission, should not be subject to any review.

Horse racing should have a system that is in line with the decision making system of other sports. Judgment calls should not be reviewed, but there should be room to review mistakes of law and those occasions where there is indisputable visual evidence of a mistake of fact. This system of review should balance the rights of most participants in horse racing: the stewards, the commissions, and the licensees. Ultimately, the fairness of the system should hopefully inspire a rational decision making process which would be beneficial to the most important participants in horse racing: its fans.

1 Riding and Track—If a horse or rider shall touch another horse or rider, or do anything that impairs the race, intentionally or not, it is foul riding, and the horse shall be adjudged distanced. And if the Judge of the race was intentionally foul, or that the rider was a party or parties so offending shall not be allowed to ride a horse over this Course in any race under the Rules. Although a leading horse is entitled to any space from the right to the left, or from the inside to the outside of the track, when a horse is so near him that he impedes the horse behind to shorten his stride, or prevents him from doing so, it is foul riding. As soon as a horse, the track is taken so soon after getting the lead, or as soon as a horse passed to shorten his stride, it is foul riding.

Saratoga Association 1866 Rules on Fouls

XVIII. Foul Riding and Fault to the Track. — If a horse or rider shall cross, jostle, or strike another horse or rider, or do any thing that impedes another horse, accidentally or not, it is foul riding, and the horse that impedes, the other shall be adjudged distanced; and if the Judges are satisfied that the riding was intentionally foul, or that the rider was instructed so to ride, the party or parties so offending shall not be allowed to ride, enter, or attend a horse over this Course in any race. Although a lead-

ing horse is entitled to any part of the track, if he crosses from the right to the left, or from the inner to the outer side of the track when a horse is so near him that in changing his position he compels the horse behind him to shorten his stride, or if he causes the rider to pull him out of his stride, it is foul riding; and if, in passing a leading horse, the track is taken so soon after getting the lead as to cause the horse passed to shorten his stride, it is foul riding; and in single heat races, every horse belonging to the same owner, or in which he may have a share, running in the same race, will be disqualified from winning. All complaints of foul riding must be made before the horses start in another heat; and if it happens in the last heat, then before the Judges leave the stand.

55—*Crossing or Jostling in the Race.*

American Race
Congress 1891

A leading horse is entitled to any part of the course, but if swerve to either side so as to compel another to shorten his stride and to impede him, it is a cross.

A horse which crosses or jostles another so as to impede him is disqualified, whether the cross or jostle happened through the willful or careless riding of the jockey or the swerving of the horse, unless the Judges think that the cross or jostle was wholly caused by the fault of some other horse or jockey, or that the other horse or his jockey was partly in fault.

A horse may be disqualified if his jockey strikes another horse or jockey, and shall be disqualified if he rides either willfully or carelessly so as to injure another horse, which is in no way his fault.

56—*Extent of Disqualification.*

When a horse is disqualified under these rules, every horse in the race belonging wholly or in part to the same owner is also disqualified.

Jockey Club 1894

108. (I) A leading horse is entitled to any part of the course, but, when there is a clear opening to pass him, he shall not impede another horse by crossing so as to compel him to shorten his stride.

(II) A horse crossing another so as actually to impede him is disqualified, unless the impeded horse was partly in fault or the crossing was wholly caused by the fault of some other horse or jockey.

(III) If a horse or his jockey jostle so as actually to impede another horse, the aggressor is disqualified, unless the impeded horse or his jockey was partly in fault or the jostle was wholly caused by the fault of some other horse or jockey.

(IV) If a jockey willfully strike another horse or jockey, or ride willfully or carelessly so as to injure another horse, which is in no way in fault, or so as to cause other horses to do so, his horse is disqualified.

(V) When a horse is disqualified under this rule, every horse in the race belonging wholly or partly to the same owner is also disqualified.

The Big Picture Issues in Gambling

Moderator:

Andrew J. Turro, Esq.

Panelists:

Patrick Cummings

Leonard J. (L.J.) D'Arrigo, Esq.

Robert J. McLaughlin, Esq.

The Big Picture – Issues in Racing

Pat Cummings
Executive Director, Thoroughbred Idea Foundation



Three main topics demanding attention

- Pricing
- Transparency
- Product development

Pricing

- Racing's pricing question...

- the cost to bettors,
- the rights of bet-takers to retain breakage,
- the influence of rebates

...has grown more pressing in light of sports betting legalization and the availability of alternatives to racing in the wagering marketplace

Transparency

- North American racing's disparate, arcane rules are outdated for modern audiences
- Serious questions about the preparedness and professionalism of stewards adjudicating the sport in North America based on decisions made, lack of public availability and reporting standards



► **PAT CUMMINGS | THOROUGHBRED IDEA FOUNDATION**

KENTUCKY DERBY ENDS WITH HISTORIC DISQUALIFICATION

D HOMES DURING SEARCHES FOLLOWING EASTER SUNDAY BOMBINGS THAT KILLED MORE THAN 250 PEOPLE

Transparency

- Kentucky Derby decision seems appropriate relative to rules in place, but stewards' own report fails to explain rationale. Procedural failures apparent.
- KHRC, its board members, stewards all subject to lawsuit from Maximum Security owners

Transparency

- Long-standing rules philosophy used to adjudicate races in North America – known as Category 2 – being questioned.
- U.S., Canada, Turkey only racing jurisdictions continuing to use Category 2.
- Category 1 alternative yields far greater consistency, shifts burden of consideration for stewards

Product Development

- Horse racing has been generally absent in the discussion of “sports betting.”
- Fixed odds betting a growing platform for British customers on American racing, estimated between \$1-2b annually.
- Tote system security, stability questioned regularly with endless “last flash” odds shifts.
- Gray market operators actively soliciting in American market, accredited as media and employing award-winning industry writers.

Grey Market Influence Rising



US Racing @USRacingToday · Jul 17

LNJ Foxwoods' United wins the second at Del Mar. The Richard Mandella trainee was ridden by Flavien Prat. 🐎🏆

#DelmarOpeningDay #DelMar #SanDiego #HorseRacing #CaliforniaRacing
#California #RichardMandella #FlavienPrat #LNJFoxwoods



The Big Picture – Issues in Racing

Pat Cummings
Executive Director, Thoroughbred Idea Foundation





thoroughbred
IDEA
— foundation —



TIF Reports:
Horse Racing and 'Legal' Sports Betting

February 1, 2019

THE IDEA

North American horse racing is facing a momentous threat to its business: the rapid expansion of legal sports betting.

In May 2018, the United States Supreme Court overturned the 1992 law established by the Professional and Amateur Sports Protection Act (PASPA), which had effectively banned individual states from offering betting on sports, with few exceptions – Nevada being the most notable.

What has transpired in the ensuing months is, as ESPN writer David Purdum described, “the American sports betting gold rush.”¹

Eight states and the District of Columbia have advanced legislation authorizing sports betting in their jurisdictions in the eight months since PASPA was overturned, and up to 30 states are expected to permit some sort of legal sports betting within the next three years. As a result, well-established sports – most of which already enjoy significantly greater distribution and popularity than horseracing – will see millions of Americans take added interest in their games via legal gambling options.

How is this a threat to horse racing?

While sports betting has long existed in an unorganized fashion, its legalization will swiftly lead to a massive development of supporting infrastructure – including marketing, data services and customer management – **that will transform the competitive landscape of the gaming industry.**

Racing’s existing customers, including our best customers, will be wooed by fabulously funded sports betting agencies, while future generations of potential customers will be avalanched by customized fixed-odds betting products

featuring their favorite leagues, teams, and players. The opportunities will be endless.

Adding to this competition for bettors, the cost of a sports bet is significantly lower than horseracing’s takeout, typically two-to-three times cheaper. Average takeout in racing, before any bigger players receive substantial rebates, is approximately 20%. For sports betting, it’s closer to 5%.

With greater efficiencies and innovation in the future, experts suggest sports betting pricing will eventually push lower than ever before. If racing gets it right, the cost of wagering should go the way of \$35 commissions for stock trades.

Markets and industries evolve. North American horse racing must adapt to compete.

The established leagues which oversee the sports that will serve as the major conduits for betting – Major League Baseball, the National Basketball Association, National Football League and National Hockey League, among others – after decades of opposing legalization, are now embracing it, recognizing the value of the added attention this will bring to their product.

Gambling will be good for their business – and like responsible businesses that wish to grow the pie for their investors and participants, they are aiming to please customers. *Sports Business Journal* named these customers – “The American Sports Gambler” – the most influential person in sports business in 2018.²

What is the product these customers want? Fixed-odds betting.

Outside of occasional casino-based future wagers on the Kentucky Derby or Breeders’ Cup, American horse racing has not offered fixed-odds wagering in any legal capacity since the

¹ http://www.espn.com/chalk/story/_/id/25145786/why-nba-other-professional-leagues-jumping-sports-gambling

² http://www.espn.com/chalk/story/_/id/25559213/american-sports-gambler-beats-adam-silver-roger-goodell-most-influential-2018

reign of on-course bookmakers in the early 1900s. The venerable pari-mutuel system of betting in horse racing will be a stark contrast to the booming fixed-odds products available to the sports bettor.

In other words, this threat presents an irresistible opportunity for horse racing.

Over roughly the next two to three years, racing must adapt to these new market conditions – accepting fixed-odds and exchange wagering on its product; developing a new funding model to support the sport in light of this disruptive, well-financed and aggressive competition; significantly boosting and improving our marketing efforts; and innovating to create new types of bets for customers who will soon be taken by agile, forward-thinking sports betting outlets.

The future of horse racing on the continent will depend on it.

THE “AMERICAN SPORTS BETTING GOLD RUSH”

The Consumer Electronics Show (CES) is the largest convention annually in Las Vegas. More than 180,000 converged on the city in the second week of January from all corners of the globe to hawk or gawk at the newest technology, attend insightful sessions with industry leaders and network.

A short drive south of the Strip is the South Point, a full-service hotel, casino and entertainment complex, and also the home of the Vegas Sports and Information Network (VSIN), which launched in February 2017 as “the first multi-

channel network dedicated to sports gambling information.”³

Talent on the network includes the legendary broadcaster Brent Musburger, whose references to gambling in mainstream sports coverage over a five-decade career behind the microphone were as appreciated by many viewers as they were cringe-worthy for network executives.

Times have changed.

To coincide with the 2019 CES, VSIN hosted a three-hour summit to discuss the explosive growth of sports betting, assembling two distinctive panels. The first panel included three long-time bookmakers (Johnny Avello, Vinny Magliulo and Jimmy Vaccaro), a group with more than 120 years of collective time setting markets, taking bets and serving the sports gambling industry – almost exclusively in Nevada.

The second panel was markedly different.

Among those participants was Bobby Skoff from Swish Analytics, “a machine learning platform for sports betting, fantasy and data,”⁴ Davyeon Ross from Shottracker, “a sensor based system that automatically captures statistical and performance analytics for an entire team in real-time,”⁵ and Darren Rovell, formerly of CNBC and ESPN, now the senior executive producer for The Action Network, described as “the market leader and most trusted source for sports fans, enhancing their betting and entertainment experience through original news, premium insights, betting tools, data and odds.”⁶

Accurate estimates of the existing illegal sports betting market in America are elusive. According to one piece from *Wired*, “experts estimate total

³ <https://globo.newswire.com/news-release/2017/01/30/912056/0/en/VSiN-First-Media-Network-Dedicated-to-Sports-Betting-Information-Launches-on-Biggest-Gambling-Day-of-the-Year.html>

⁴ <https://swishanalytics.com/about/>

⁵ <https://shottracker.com/>

⁶ <https://www.actionnetwork.com/about>

wagers at anywhere from \$80 to \$150 billion annually.”⁷

The legal market handle on racing in the United States in 2018 was \$11.26 billion.⁸

When asked at VSIN’s summit how large was the projected legal market for sports betting, Jimmy Vaccaro did not waver.

“Whatever you think it will be, multiply it by five, and that might be low.”

“LEGAL” MEANS MUCH MORE THAN SIMPLY ALLOWED BY LAW

Maury Wolff, a long-time professional bettor, was a horseplayer selected as one of the 30 members of the Wagering Systems Task Force (WSTF), a group organized by the National Thoroughbred Racing Association (NTRA) in 2004 to review some growing concerns in racing.

While many of the recommendations from the WSTF remain unresolved, Wolff is keen to highlight the even more challenging threat looming for racing today.

“Sports betting is hardly a new competitor, but the current change is in its legality. The word ‘legal’ means much more than ‘simply allowed by law.’

“‘Legal’ means infrastructure, strategic planning, investment and innovation, mobile delivery, customer service standards, marketing and advertising – lots of advertising. And importantly, it comes with the assuredness of being paid. That adds up to a lot.”

All sports betting in America, now and in the foreseeable future, is conducted at fixed-odds. Prices are set and changed by the operator of the sportsbook. You bet at a price and know what return you will get if you win.

Conversely, in horse racing, the price is only set when the market is closed and additional money cannot change the odds. The pari-mutuel system, in which the weight of all the bettors’ money on any possible combination of outcomes determines the price, is foreign to other types of event-based wagering.

The “gold rush” of American sports betting is all in fixed-odds markets. But horseracing’s competitive challenge is not just the kind of bet offered, it’s the price of the bet – pari-mutuel wagering on horse racing is expensive.

“Racing has largely not understood it has a pricing problem. But even those of us fortunate enough to get substantial discounts [rebates] are paying more than sports bettors,” says Wolff.

“That’s inevitable, horse racing bettors have to pay the cost of production – sports bettors don’t. But gambling isn’t a morality play and you will shop or bet where you find the best deal. And if that’s the NFL instead of Belmont, so be it.”

The cost of horse racing betting in today’s market – through takeout – is too high. The most substantial players in racing receive rebates to help mitigate that cost. Ordinary players tend not to receive such rebates.

A widespread, “legal” fixed-odds sports betting product will naturally shine a spotlight on the cost chasm between racing’s pari-mutuel product and the emerging, well-distributed alternative.

THIS ISN’T YOUR FATHER’S NEIGHBORHOOD BOOKIE

If you think that the average American won’t be inclined to sit and engage a two or three-hour sporting event awaiting a final result, more so

⁷ <https://www.wired.com/story/the-sports-betting-revolution-will-be-muted-online/>

⁸ <http://www.equinbase.com/content/news/releases/010419release.cfm>

than they already are now – then you're not thinking.

Gambling on sports in America will be intensely customer-driven, on markets of the bettors' own choosing.

Swish Analytics' Bobby Skoff explains:

"Odds-making over the course of the history of sports betting in Nevada and even overseas has been very manual. It has been large trading teams sitting around trying to figure out exactly what certain spread totals and different kind of prop lines should be. We've started to really dive into automating that process by building models off historical and real-time data.

"What that does is provide more accurate pricing overall. Eventually in the US we'll come to a mature state where I believe people will start to compete on price. You won't just download your favorite app, but do some price shopping as we all do in other sectors in our lives...and it allows you to start providing newer experiences that previously never really existed. Building automated infrastructure that allows you to take whatever is happening on the field at any given time and turning that into a compelling, bet-able market that is risk-averse and safe for the sports book, but also compelling to the customer.

Skoff goes farther, noting that similar to some more time-consuming, customized requests that exist in some European markets at present, automation will enable sports betting customers to request and obtain pricing on almost any outcome, of any sporting event for which data exists, at any time.

"Bet Request is what we call it. [Now], you can start tweeting to sports books in Europe – 'I don't see this on your site, but I'd love to bet on LeBron James to score exactly 42 points tonight because it's my 42nd birthday and I think I'm lucky' – well, the sports book will tweet back and say 'wait an hour, go to this link, our guys will figure what the right price is for that exact bet and we'll hang it out there and you can place a bet on it.' We're looking to innovate that very quickly, to automate that entire process."

"I think we can all agree in a mobile world, in a world where a much younger audience which grew up with technology, they want what they want when they want it and nothing else. That's the point we are innovating towards. Machine learning and data science is at the core of allowing that to happen.

We see a lot of popularity in our synthetic markets. [A customer says] 'I want to bet on Steph[en Curry] over 5 ½ three-pointers and Steph under 10 ½ assists.' Those markets are correlated, so you need to take some approach in understanding how to price that correctly. We have spent a ton of time on figuring out how to provide that in real time to the customer as quickly as possible."

This is the betting environment in which racing will need to compete.

TEAMS AND LEAGUES RESPOND IMMEDIATELY TO OPPORTUNITY

The swift reaction and support of teams, leagues, broadcast partners and gambling-related sponsors to the May decision of the Supreme Court cannot be ignored.

Here are just some of the developments that have occurred in this rapidly-evolving market over the last seven months:

- The NBA, NHL and shortly thereafter MLB announced deals with MGM Resorts International as official sports betting partners in July, October and November, respectively.

"Our collaboration will result in the best possible gaming and entertainment experience for consumers through the use of accurate, real-time NBA and WNBA data, and our collective efforts to maintain and enhance the integrity of our games," said NBA Commissioner Adam Silver.⁹

"The new sports betting landscape presents a unique opportunity for fan engagement utilizing technology and data that are exclusive to our league...Fan engagement, technological advancement and innovation are paramount to our progressive approach and will be at the forefront of everything we do," said NHL Commissioner Gary Bettman.¹⁰

"There's been a huge change in public opinion," [MLB Commissioner Rob] Manfred said. MLB will make a limited part of its Statcast data available to MGM on an exclusive basis. That data also is available to the 30 clubs. 'It has presented an opportunity for all sports

*and baseball in particular,' he added. 'We have to take advantage of every opportunity to drive engagement by fans.'"*¹¹

- The NBA signed separate deals ensuring official data from the league's games can reach other legal betting entities.

*"Under identical multiyear deals, Genius Sports Group and Sportradar AG will be the official gatekeepers of the NBA and WNBA's betting data, serving as middlemen of sorts between the leagues and gambling houses across the country."*¹²

- NBC Sports Washington, the broadcast rights holder for the NBA's Washington Wizards, hosted a gambling-related broadcast on its alternate channel, engaging viewers in a series of predictive contests during a January game against the Milwaukee Bucks, the first of eight such broadcasts for the season.

"We are encouraged by the early engagement data," NBC Sports Washington GM Damon Phillips told The Action Network's Darren Rovell. *"We had close to 4,000 responses. Fans who participated in Predict the Game spent significantly more time on our digital platforms than regular users."*¹³

Rovell wrote:

⁹ <http://www.nba.com/article/2018/07/31/mgm-resorts-international-becomes-official-gaming-partner-nba-official-release>

¹⁰ <https://www.cbc.ca/sports/hockey/nhl/nhl-sports-gambling-partnerships-1.4882268>

¹¹ <https://www.usatoday.com/story/sports/mlb/2018/11/27/mgm-resorts-is-mlbs-official-gaming-partner-after-nba-nhl/38627859/>

¹² <https://www.bloomberg.com/news/articles/2018-11-28/nba-breaks-fresh-ground-for-sports-with-first-gambling-data-deal>

¹³ <https://www.actionnetwork.com/nba/nbc-sports-washington-betting-broadcast-alternate-wizards-2019>

"There have been plenty of predictive win products that let you play along with the game, but this was the first time there was an integrated product with a rightsholder...the alternative broadcast tested the future of a seamless sports gambling product and was the first broadcast by any of the four American major sports leagues to do so."

- A December report noted that NBC Sports, whose broadcast rights include the NFL, NHL, NASCAR, the PGA Tour, Premier League and the Triple Crown series, registered a variety of website domains – including NBCSportbook.com and NBCSportsSportsbook.com.¹⁴
- Despite a combined record of two wins from 146 combined tournaments over the last five full years, legendary golfers Tiger Woods and Phil Mickelson squared-off in a made-for-TV, and made-for-gambling head-to-head, winner-take-all match in November.

Golfweek writer Dan Kilbridge investigated the sport's growing acceptance, and eventual integration, with gambling.

"PGA Tour commissioner Jay Monahan sees sports gambling as a way to help accomplish his greatest challenge entering 2019: expanding viewership and bringing more fans to golf..."

Monahan said: *"On a normal week, first tee time at 7 (a.m.), last group off the course at 6 (p.m.). And that's Thursday, Friday, Saturday, Sunday. Different markets around the world. We have something that no other sport has in*

terms of ability to engage people for long periods of time with multiple competitions or multiple ways to present it."

*"For a sport that has often arrived late to trends," Kilbridge wrote, "Monahan and the Tour seem to be getting ahead on gambling. They've quietly built an integrity and monitoring program over the past several years to watch for tampering. They've been in talks with gambling outlets and daily fantasy operators and recently announced a deal with IMG Arena, which will distribute Shot Link and other data directly to betting operators."*¹⁵

Turner president David Levy, speaking at the CES Convention in Las Vegas, summarized the impact succinctly.

"If you bet on a sports game, you are almost 80 to 90 percent more likely to watch more of the event. If you watch more of the event, you are engaged. If you're engaged, guess what happens to ratings? One of the Nielsen metrics is time-spent-viewing. If you are spending more time watching sports, ratings will go up."

The inference, then, is that the value of those broadcast rights will also rise, and so too the values of the teams.

"It doubled the value of the professional sports franchises in a second," said Dallas Mavericks

¹⁴ <https://domainnamewire.com/2018/12/24/nbc-registers-domain-names-for-sports-betting/>

¹⁵ <https://golfweek.com/2019/01/13/golf-on-tv-pga-tour-commissioner-jay-monahan-understands-opportunity-with-gambling/>

owner Mark Cuban in the immediate aftermath of the Supreme Court's decision.¹⁶

The key point here is the fundamental difference in the revenue model for horseracing compared to other sports.

Sports leagues and franchises are funded through distribution deals – primarily television. Betting on sports is, for those leagues, a massive marketing windfall, not a revenue source. Whatever small piece of the action the leagues might receive from sports betting agencies, if any, is merely incidental to the vastly increased consumer attention to their games that betting will create. North American racing, however, cannot survive without betting revenue.

Given the financial implications of the Supreme Court decision, and the commensurate rapid responses from leagues and teams, racing must react on its own in order to survive in this dynamic market.

A reliance on the pari-mutuel system, and at its current pricing, is a path to more widespread horse racing industry failure.

Change is necessary.

THE RACING INDUSTRY RESPONSE

Off-the-cuff reactions from some racing insiders has been that there will be some benefit to racing with the addition of sports betting, or that racing needs to find a way to get a cut of the proceeds.

We believe that such an opinion is misguided.

Fighting for racing to “get a cut” of the sports betting market **could** yield some additional revenue for horsemen.

Roughly two decades ago, racing generally leveraged many of its pre-existing locations as acceptable zones for gambling and in many jurisdictions, landed comfortable deals to share in slot revenues.

There could be some places where racing may try to secure this. But sports betting often produces far smaller margins than slot play. The number of outlets to be licensed in some states could far exceed the number of racetracks, and those independent locations will fight relentlessly to leave racing out, far more than racing will fight to be included.

Passive deals where racing can be cut into the mix are unlikely to have much impact.

Our more active suggestion – racing must compete.

We believe the most meaningful way racing will benefit, directly, is to meet the exploding sports betting industry where it is – with fixed-odds and exchange offerings to its existing and potential customers, and the development of new ways to bet on the sport.

Furthermore, the cost of a racing wager – takeout – must decline if racing is to survive in this market.

Jockey Club Chairman Stuart S Janney III offered a reference in his closing remarks at the 66th Annual Round Table Conference on Matters Pertaining to Racing last August in Saratoga Springs.

“Finally, lobby for a horse racing fixed-odds betting pilot. Virtually all sports bets are placed with fixed-odds, as you heard, and customers are accustomed to it. They want to know the payoff they'll win. Especially in this area of sports

¹⁶http://www.espn.com/chalk/story/_/id/23511326/dallas-mavericks-owner-mark-cuban-says-sports-betting-ruling-doubled-franchise-values-overnight

betting, shouldn't horse racing be able to offer fixed-odds like everyone else?"¹⁷

The answer to Chairman Janney's closing question is a resounding **YES**.

So who has the burden to ensure that racing does this?

We believe this falls almost exclusively to the horsemen's organizations to drive the conversation and begin structuring deals.

Racetracks, many of which have slots facilities or full-fledged casinos as part of their business, will certainly seek to be in the sports betting business. Some already are - Monmouth, Parx, Penn National and Charles Town (the latter three of which have full casinos on their property) have already launched sports books.

But will these tracks exploit this opportunity to generate increased revenue for themselves, or will racing be a part of that in some capacity?

It is incumbent upon horsemen's groups to be proactive. They must ensure that any sports betting bill their jurisdiction considers clearly identifies horse racing as one of the sports upon whose outcomes sports betting licensees can offer wagering products. This would automatically legalize fixed-odds betting on horse races along with other sports, allowing racing to compete on the same terms.

The path to structuring a deal is, admittedly, less clear. The guaranteed takeout model which the industry has relied upon for decades does not apply to booked racing bets, but rather, the "house" winning.

The mechanics of this are not simple, and every jurisdiction is in a different place in the sports betting legalization cycle at present.

New Jersey, without question, is farthest along.

Betfair, now part of FanDuel Group which also operates the only legal ADW in the state - 4NJBets.com - has offered exchange wagering to residents of the Garden State since April 2016.

With analytics on players in both the traditional tote and the newer exchange markets, FanDuel suggests that not only do they **not** see any cannibalization with the exchange now an option, they report incremental growth, with dual-product customers growing total handle by an average of 15% and representing the largest share of growth in 4NJBets.com annual business.

FanDuel also operates a sports book at The Meadowlands.

English bookmaker William Hill¹⁸ has partnered with Monmouth Park since 2013, launching a sportsbook in mid-2018, shortly after the Supreme Court ruling enabled such an action.

The book even offered fixed-odds prop bets on the 2018 Haskell Invitational - one which featured six head-to-head matchups, paying out on whichever horse finished ahead of the other, and a second which paid out on the official winning margin of the race. Another required bettors to select the winner of three races (including the Haskell) and the winner of the Cubs/Cardinals baseball game that night.

The head-to-head props handled \$15,012 with the margin prop collecting \$4,396. The four-way racing/baseball parlay handled the least at \$4,233.¹⁹

¹⁷<http://jockeyclub.com/default.asp?section=RT&year=2018&area=8>

¹⁸ [William Hill recently reached an agreement to operate a sports book at Iowa's Prairie Meadows if the state approves such wagering.](#)

¹⁹ <http://live.drf.com/nuggets/44061-monmouth-some-racing-sports-figures>

New Jersey's Division of Gaming Enforcement approved the application for these wagers just days before the race and as the *Asbury Park Press* reported, "while there aren't a large number of wagers available, **it marks the first step in the process of creating synergy between the horse racing product and sports betting, with plans for expansion.**"²⁰

With almost no advanced marketing of these bets, no history of fixed-odds wagering on horse racing, the bets being offered only to customers betting in a very limited area of the facility (the William Hill Sportsbook), and without any other distribution (simulcast), the total of the fixed-odds bets on the Haskell still exceeded several exotic betting pools offered on the day's races.

In late 2018, the New Jersey Thoroughbred Horsemen's Association announced a deal to launch a mobile sportsbook in concert with Toronto-based theScore. While the terms were not disclosed, this represented the first such agreement in the market.²¹

Racing cannot grow or thrive solely in a market where it continues to offer **only** its existing menu of pari-mutuel options – win, place, show, exacta, trifecta, superfecta, high-five, double, pick three, pick four, pick five, pick six (and whatever outrageously expensive jackpot varieties one could imagine).

It should not go unnoticed that there ARE some clear benefits to pari-mutuel betting that should ensure its survival – notably the ability to earn potentially huge payoffs through exotic wagering, risks that bookmakers offering fixed-odds returns are generally unwilling to take.

²⁰<https://www.app.com/story/sports/horses/2018/07/27/haskell-2018-parlay-head-head-bets-approved-sports-book/850621002/>

²¹ <https://mobile.thescore.com/2018/12/thescore-announces-plans-to-launch-mobile-sportsbook-in-new-jersey/>

But to remain competitive and provide liquidity to the most significant players in pari-mutuel pools, racing's tote business must also adapt to this new competition in order to retain customers, and this includes the need for the industry to analyze if its betting menu is appropriately priced at its current levels.

If racing gets it right, the current cost of wagering should go the way of Blockbuster Video stores and of \$35 commissions per stock trade.

Markets and industries evolve.

Seth Klarman, billionaire investor and fund manager, and also passionate horse owner whose runners have accounted for more than 3,300 starts, recently gave a rare interview to *The New Yorker* regarding the state of the global markets.

"I think people who fail to evolve and learn are part of the problem."²²

North American racing's betting markets and opportunities must evolve. Racetracks, horsemen's groups and regulators are vital to this evolution as they establish a modern funding model for the sport.

How **could** the future of North American horse racing wagering look? Here is just a small sampling of the possibilities.

- Tracks installing photo finish cameras at the half-mile pole, taking fixed-odds bets on the winner at that pole.
- Offering mid-race, fixed-odds markets after the first quarter-mile of a race (exchange wagering offers in-race

²² <https://www.newyorker.com/news/daily-comment/the-investor-seth-klarman-in-a-rare-interview-offers-a-warning-davos-should-listen>

wagering throughout the race already).

- An over/under on the number of Chad Brown trained winners on Travers Day at Saratoga.
- An over/under on the number of Chad Brown trained winners on Travers Day after the first seven races.
- Customers creating their own parlays, any combination of races and sporting events. Want a pick three that encompasses Parx's first race, Aqueduct's third and Mahoning Valley's fifth? Machine-learning should help automate pricing these markets to please both the market-makers and the customers.
- How many winners will Jose Ortiz ride this...year, month, at Saratoga, or tomorrow at Gulfstream?

Pari-mutuel pooled trifectas, superfectas and multi-race Pick n wagers still have a place in the future, filling a market gap that fixed-odds operators are unlikely to want. A robust fixed-odds market should enliven development of the tote to focus on offering better service for exotic wagers, integrating technology available today with predictive pricing on those markets.

TRANSPARENCY, INTEGRITY ENHANCEMENTS NEEDED

Commensurate with the growth of fixed-odds and exchange wagering, racing must improve the integrity functions of the sport. This includes all of the current requirements of stewards, but brought to a much higher standard of public

disclosure and reporting. The stewards' reports found in Australia, Hong Kong and Singapore would serve as meaningful examples of what North America needs. Customers need more direct proof that stewards are looking out for their best interests, and racing's participants should want this too. The status quo is far too casual.

Fixed-odds and exchange wagering also require vigorous monitoring to protect both the integrity of the sport and the betting customers. In November, the Sports Wagering Integrity Monitoring Association (SWIMA) was launched, modeled after the Europe Sport Security Association. "The organization...will bring together key gaming stakeholders, including state and tribal regulatory bodies, federal, state and tribal law enforcement, in an effort to uncover and prevent fraud and other illegal activities related to sports betting and sporting events."²³

Racing's current monitoring entity, the Thoroughbred Racing Protective Bureau, describes its activities as follows:

"The TRPB, a wholly owned subsidiary of the Thoroughbred Racing Associations of North America, operates as a national investigative agency in the horse racing industry...The mandate is to expose and investigate all activity prejudicial to horse racing and to maintain public confidence in the sport of Thoroughbred racing."²⁴

Its website, under the "wagering security" tab, reports it is still "under construction" as of late January 2019.

Firms such as Sportradar have emerged, offering services "that identify betting-related manipulation in sport."²⁵ The same should be

²³ <https://sportshandle.com/mgm-caesars-among-founding-members-of-sports-betting-integrity-monitoring-group/>

²⁴ <http://www.trpb.com/index.html>

²⁵ <https://integrity.sportradar.com/products-and-services/monitoring-and-detection/>

required for racing, but particularly in a legal fixed-odds environment.

SECURING RACING'S FUTURE

The Board of Directors of the Thoroughbred Idea Foundation comprises a wide cross section of the sport – owners, breeders, horseplayers, former jockeys, industry executives – all business people who have enjoyed great success on the track and quite a bit away from it as well. Our group is well aware of the dynamics that exist beyond our industry, and this paper implores the industry to embrace much-needed change.

We believe this paper should serve as a call to action to begin down the path towards modernization, creating new ways to bet on the sport and ensuring racing's sustainable future. Furthermore, there is a fairly narrow window of time to accomplish this and still remain competitive in the minds of the American consumer, maybe two or three years, and a bit longer in some states that are slower to adopt legal sports betting.

Action is required.

The Round Table meeting in August featured a presentation by consultants from McKinsey who rightly noted the rise of sports betting, but contrary to our opinion, suggested racing had little reason to worry about the loss of customers, or cannibalization, due to sports betting. They cited their own research that showed 4% of horseplayers surveyed would “bet less on racing if sports betting were legal in their state.”²⁶

We believe most of the surveyed interpreted the word “legal” as “allowed by law,” and not Maury Wolff's far more eloquent depiction of a legal product as noted earlier in this paper.

They cite racing “prospering in other countries” which also offer a legal sports betting product. Taking two of their example jurisdictions – racing turnover has grown in Hong Kong over the last five years, with handle up 18% from the 2013-14 fiscal year through 2017-18. But, soccer betting during the same five-year period is up 66%.²⁷ Australia, in just the last fiscal year published, saw a rise in racing betting of 6.9% while sports betting was up 15.3%.²⁸

Racing may not be in dire straits in those jurisdictions, but the growth rates in sports betting are exponentially exceeding those in horse racing. The comparison isn't as rosy as described.

Racing needs to change.

This means that the stakeholders that set racing's funding model – most especially horsemen – must agree on a path forward that includes fixed-odds and exchange wagering. Concurrently, they should also address the pricing scheme that exists through tote betting now and adjust it while they can.

The clock is ticking – racing's actions on these matters must occur before sports betting takes off and leaves its relatively single-minded pari-mutuel brethren at the gate. Different states will have different timelines. Some may strike more favorable terms than others. Some will approach it in a different fashion. Some will have to adjust models after launch.

Horsemen – now is the time to lead and preserve your future by embracing the unassailable change that is sweeping the land. Take the reins and start now. The future of the sport depends on it.

²⁶<http://jockeyclub.com/default.asp?section=RT&year=2018&area=6>

²⁷<https://corporate.hkjc.com/corporate/english/history-and-reports/annual-13-14.aspx>

²⁸ <https://responsiblegambling.vic.gov.au/about-us/news-and-media/latest-edition-australian-gambling-statistics/>



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TIF Reports: Changing the Rules
**Consistency in the adjudication of North
American racing is possible with a shift to the
Category 1 philosophy**
(abridged version)
November 8, 2018

THE IDEA

Following the 2018 Saratoga race meeting, veteran *Daily Racing Form* (DRF) columnist Mike Watchmaker offered his assessment of the 40-day stand. Among his comments was a significant frustration regarding the adjudication of races.

*"It is not hyperbole to suggest the inconsistency from the stewards at this Saratoga meet was among the worst ever seen. It's not even a stretch to make that claim. It's a valid position...Forget about the demonstrable evidence that what was a foul one day was not another day. No one knew from race to race what an actionable foul was. It felt like the goal-posts were always moving"*¹

Watchmaker offered several examples of the perceived inconsistency. His DRF colleague Mike Welsch took to Twitter on July 26 to opine on the stewards' decisions from that day's races. The original tweet garnered no fewer than 261 engagements, which included 179 likes.

*"Hard to believe of the 3 races the Saratoga stewards were called upon to adjudicate today the last was the only number they took down. After calling the first 2 'as is' there is no way that last winner could be disqualified. Has to be some measure of consistency."*²

History is littered with the cries of athletes, fans, reporters and bettors who feel a sport's officials made a "bad call." But whether it is real or perceived, inconsistent officiating can be maddening and has the potential to erode confidence and impact future participation.

Horse racing is no different. The virulence of opinions regarding inconsistency in the officiating of racing, not just from Saratoga's summer meet, but across the entire North American racing landscape for a considerable period, has prompted the Thoroughbred Idea Foundation to pursue the topic.

There is an alternative to the inconsistency, and with it comes far fewer inquiries, far fewer demotions. What racing **would** get is greater consistency, clarity and a betting sport where the participants – be them jockeys, trainers, owners or bettors – understand what fouls warrant demotions.

The philosophy applied in North America is identified by the International Federation of Horseracing Authorities (IFHA) as Category 2.

Currently, only two major racing jurisdictions in the world adjudicate races using Category 2: the United States of America and Canada.

As this paper reveals, **the Thoroughbred Idea Foundation recommends that North American racing jurisdictions move away from Category 2 and adopt a Category 1 interference philosophy.**

Per the IFHA definition,³ Category 2 jurisdictions are (emphasis added where underlined):

"Countries whose Rules provide that if the interferer is guilty of causing interference and such interference has affected the result of the race then the interferer is placed behind the sufferer irrespective of whether the sufferer would have finished in front of the interferer had the incident(s) not occurred."

¹ <https://www.drf.com/news/watchmaker-stewards-inconsistency-marred-saratoga-meet>

² <https://twitter.com/DRFWelsch/status/1022615996430004224>

³ <http://www.arcimodelrules.online/2017/10/05/interference-flat-racing/>

In contrast, Category 1 jurisdictions are those where:

*"If, in the opinion of the Staging Authority's relevant judicial body, a horse or its rider causes interference and finishes in front of the horse interfered with but irrespective of the incident(s) the sufferer would not have finished ahead of the horse causing the interference, the judge's placings will remain unaltered"*⁴

Adopting Category 1 across North America would yield a sport with a greater understanding of how a race is adjudicated, far fewer instances in which the stewards are called upon to review a race, fewer demotions, comes with an enhanced penalty structure for jockeys guilty of careless riding and increased confidence for all stakeholders in the adjudication of the race.

Make no mistake, a shift from Category 2 to Category 1 will not eliminate the likelihood of a stewards' review in instances of close finishes with possible interference.

On balance, **we believe racing in North America will offer a more consistent experience for all industry stakeholders when Category 1 is adopted.**

Switching to Category 1 would be a confidence-building improvement to the sport.

The forthcoming details in this paper will outline the current state of race adjudication under the Category 2 philosophy, then compare it to the Category 1 experience. We will also reveal the changing rate of incidents within jurisdictions which have recently switched from Category 2 to Category 1, the history of North American rules changes and the far-reaching benefits of adopting Category 1.

Even if just a perception, an inconsistently-adjudicated sport serves as a blow to confidence for owners and horseplayers, frustrates racing fans and confuses jockeys, the race's human participants who must perform within the rule structure.

TERMINOLOGY

For the purposes of more universal understanding, we will use a standard term throughout this paper – "reviewed incidents." A reviewed incident refers to any occasion on which the stewards of any jurisdiction reviewed the footage of a race in consideration of a possible foul. A reviewed incident can be an inquiry, prompted by the stewards themselves, or an objection lodged by a jockey, trainer or owner, based on the jurisdiction.

Reviewed incidents do not include occasions where a foul was not under consideration, but a formal "inquiry" was lodged. For example, a horse that bobbed at the start and lost the jockey would not be considered a reviewed incident even though it prompted an inquiry, so long as no other horse was being considered as having caused the situation. A horse that may not have been afforded a fair start because of the role of a stalls handler / assistant starter would also not qualify as a "reviewed incident."

When referring to a stewards' decision where a horse was moved from its original finishing position and placed to some lower position, we will identify this as a "demotion" and not a "disqualification."

The use of the word "demotion" is universally understood while "disqualification," in many international jurisdictions, means placing a horse last following an egregious "win-at-any-cost" act by a jockey.

⁴ <https://www.ifhaonline.org/default.asp?section=Resources&story=992>

Again, this paper will refer to a horse being removed from its original position to a lower one as a “demotion” and not a “disqualification.”

CATEGORY 2 **IN NORTH AMERICA**

To understand the basic daily impact of current in-race adjudication in North America under Category 2, we reviewed the last full calendar year on two major American circuits – the New York Racing Association tracks (Aqueduct, Belmont and Saratoga) and southern California (Santa Anita, Los Alamitos Thoroughbred and Del Mar – identified in this paper as SoCal). All figures were derived from the publicly available reports published by the New York State Gaming Commission and the California Horse Racing Board.

In the following chart, take note of the numbers of reviewed incidents, demotions and the number of races within the circuit, yielding the percentage of races with reviewed incidents and demotions.

Races in 2017			
NYRA	2,089	SoCal	1,816
Reviewed Incidents		Demotions	
NYRA	73	NYRA	19
SoCal	89	SoCal	36
% Races with RI		% Races with Demotion	
NYRA	3.49%	NYRA	0.91%
SoCal	4.90%	SoCal	1.98%

Nearly 3.5% of races in New York had a reviewed incident, while the occurrence in California was higher, at just shy of 5% of races. But significantly higher were the number of demotions in SoCal – something which occurred in nearly 2% of all

races run while the NYRA tracks were approaching 1%.

The stewards in SoCal were far more active, demoting horses twice as often as the New York stewards, despite New York running 15% more races in 2017.

For the horseplayer wagering American dollars on American races via a legal, American wagering outlet, this disparity leaves an impression that a demotion in one jurisdiction might not be replicated in another, yielding an inconsistent experience and potentially eroding customer confidence.

Here are abridged rules the stewards in New York apply when considering a reviewed incident.⁵ Take note of the underlined portions of the excerpt. The full version of the rules reside in the full version of this white paper.

§ 4035.2. Foul riding penalized.

(b) A horse crossing another may be disqualified, if in the judgment of the stewards, it interferes with, impedes or intimidates another horse, or the foul altered the finish of the race, regardless of whether the foul was accidental, willful, or the result of careless riding..

(d) The stewards may disqualify the horse ridden by the jockey who committed the foul if the foul was willful or careless or may have altered the finish of the race.

§ 4039.20. Stewards determine extent of disqualification.

The stewards are vested with the power to determine the extent of disqualification in case of fouls. The

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[https://www.gaming.ny.gov/pdf/legal/New%20York%20State%20Gaming%20Commission%20rules%20Chapter%201%20,Subchapter%20A%20\(Thoroughbred%20Racing\)%20updated%202018-08.pdf](https://www.gaming.ny.gov/pdf/legal/New%20York%20State%20Gaming%20Commission%20rules%20Chapter%201%20,Subchapter%20A%20(Thoroughbred%20Racing)%20updated%202018-08.pdf)

stewards may place the offending horse behind such horses as, in the stewards' judgment, the offending horse interfered with, or the stewards may place the offending horse last, and the stewards may disqualify the offending horse from participation in any part of the purse.

The rules in California are less verbose, but offer a very similar set of qualifications for the stewards to consider when a foul may have occurred.⁶ Once again, take note of the underlined section.

During the running of the race:

(a) A horse shall not interfere with any other horse. Interference is defined as bumping, impeding, forcing or floating in or out or otherwise causing any other horse to lose stride, ground, momentum or position.

(b) A horse which interferes with another as defined in subsection (a) may be disqualified and placed behind the horse so interfered with if, in the opinion of the Stewards, the horse interfered with was not at fault and due to the interference lost the opportunity for a better placing.

Both states' rules are clearly from the Category 2 philosophy. In New York, stewards are asked to determine if the incident "may have altered the finish of the race." In California, stewards can demote a horse if they believe "the horse interfered with was not at fault and due to the interference lost the opportunity for a better placing."

This language requires stewards to do a significant amount of interpreting. The more room for interpretation, the greater the chances

of inconsistencies across groups of stewards from one local jurisdiction to another.

A May 2018 meeting of the California Horse Racing Board saw several stakeholders present complaints to the board in light of what they believed were inconsistent decisions from the stewards at Santa Anita.⁷

Longtime industry professional and horseplayer Bob Ike shared his frustration.

"I've been in the game for 33 years. To me, that means I've watched about 60,000 races live, and probably triple that when you count the replays that I go back and watch. And I've probably gambled, of those 33 years, about 95 percent of the racing days here in Southern California. I don't bet other circuits. I just play Southern California.

But as of May 6th, the eighth race that day, I've stopped gambling on Southern California races, and I'll continue to do so until I believe that there is better and more consistent officiating. I might bet on other circuits or I might not bet at all, but I just cannot play Southern California anymore with the kind of consistent inconsistency that I think I've seen from the stewards. And I think I speak for a lot of other horse players also."

Madeline Auerbach, vice-chairman of the CHRB, summarized the issue in these remarks:

"...If you look at stewards' decisions all over the country and the way racing is conducted, there is always a level of unhappiness. And even though this is beyond the level of unhappiness, I do want to point out that it's not -- no

⁶ http://www.chrb.ca.gov/policies_and_regulations/CHRB_Rule_Book_0718v2.pdf

⁷ http://www.chrb.ca.gov/Board/board_meeting_transcripts/transcript_18-05-24.pdf

matter what we do, it won't be perfect...And we hear you; consistency, and something that we can count on, is what we're all looking for."

Focusing solely on whether or not the suffering horse would have finished in front of the interfering horse, Category 1 brings a greater opportunity for consistency.

MAJOR CATEGORY 2 FLAWS

Among the primary flaws with the Category 2 philosophy, clear-cut winners can be demoted for interference which had minimal impact on the race – penalizing the jockey, owners, trainers, bettors, and in some cases, even the racetrack itself.

Now imagine the application of Category 2 rules in a Kentucky Derby or Breeders' Cup Classic. A winner that rolls clear only to lose the race in the stewards' room. The outcry would be deafening.

There are plenty of examples of prestigious North American races where "controversial" demotions of clear winners received significant coverage.

Secret Gesture, a 1 ¼-length winner, was demoted from first to third in the 2015 Beverly D when her shifting ground led to a check from Stephanie's Kitten, who was then caught for second by Watsdachances.⁸

Powerscourt went on to a 1 ½-length win in the 2004 Arlington Million from Kicken Kris, himself a length clear of the third placer, but was demoted behind Kicken Kris after shifting in.⁹ Jockey Kent Desormeaux, who rode Kicken Kris, even flagged his whip, celebrating after the race as he was certain he would be promoted by the

stewards due to the interference of a horse who was, otherwise, easily the best on the day.

Three recent incidents across North America within a week brought the drawback to the existing Category 2 philosophy into focus, where clear, basically eased-down winners were demoted following earlier interference. The races in question all involved two-year-old maidens:

- Laurel Park, Race 2, September 14
- Woodbine, Race 2, September 16
- Remington Park, Race 6, September 20

In the race at Laurel, Passcode broke from gate seven and angled across the field, causing Follow The Dog to steady on the backstretch. Passcode was never challenged and won by 3 ¾ lengths, but was demoted to second behind Follow The Dog.¹⁰ Passcode returned a 2 ½ length winner in her subsequent start as the 6-5 favorite.

At Woodbine, first-time starter She Calls It ran off to a 6 ¼-length win under jockey Jesse Campbell, but caused two horses to steady in the vicinity of the quarter pole when commencing a rally. The filly was eased down in a super impressive win, but demoted to fifth for the interference.¹¹

She Calls It returned a 2 ¼-length winner in her next start when, somewhat remarkably, she was only the 5-2 second choice in a field of 12.

Another first-time starter, Eskendar pinched some space from fellow debuter Street Conscious at Remington near the half-mile pole in this six-furlong race. Eskendar went on to win by five lengths but was demoted to second behind the aggrieved horse.

Despite still being eligible for maiden company, Eskendar returned in a listed stakes race at Delta

⁸ <https://www.youtube.com/watch?v=5Hn0I2erJF0>

⁹ <https://youtu.be/G9k-WZBrIU0?t=1109>

¹⁰ <https://www.youtube.com/watch?v=mydIDYr2Z5s>

¹¹ <https://www.youtube.com/watch?v=yszVFOm8pAo>

Downs and finished second as the 5-2 second choice. The filly who was the adjudged winner at Remington, Street Conscious, finished 22 lengths sixth behind her in the same race.

These three horses “won” by a combined 15 lengths and all were demoted for fouls occurring no less than a quarter mile from the finish. With these rulings, the stewards believed the suffering horses were denied a better finishing position or the interference in some way may have altered the final results of the race.

Under the Category 1 philosophy, none of these examples, would have seen a change in the order of finish. **The winners were too good, their margins of victory too significant.** Relative to the rule, there was no evidence that had the interference not occurred, the horses that suffered interference would have finished in front of the interfering horses.

The Category 1 rules are distinctly written to benefit the “best horse.” Racing should want to promote a sport where the best horse wins. The Category 1 philosophy aims to ensure that standard. In these cases above, the best horse was denied a clear win by the stewards’ decisions, penalizing far more stakeholders than would be the case in Category 1.

The bettors, who successfully backed a clear winner, lost. The owners, trainers and jockeys lost. The next time each of the demoted maiden winners returns in a maiden race, despite having won clear in their previous attempts, the host racetrack might find themselves with an uncompetitive betting race and a short favorite. The consequences of a single jockey’s action, or a horse’s uncontrolled shifting, reach deeper in North America than anywhere else in the racing world.

In races with much closer finishes, stewards in Category 1 jurisdictions won’t hesitate in hoisting the inquiry sign if needed, but the burden of proof is significantly tougher.

In the NYRA and SoCal races from 2017 which saw a combined 55 demotions, no less than \$2.12 million in prize money and wagers were redistributed as a result of those decisions.¹² The totals across North America put the total figure much higher, estimated by TIF at more than \$10 million annually. Under Category 1, significantly less would have been redistributed as demotions would have declined.

On balance, is the Category 2 philosophy fairer to more stakeholders than Category 1? We believe not.

The Category 1 Alternative

As mentioned, North America remains the sole spot in the world of racing to retain the Category 2 philosophy. The rest of the world has changed over to Category 1, albeit with varying speeds.

Among the most notable jurisdictions to change in recent years is Japan – where the top flight races of the Japan Racing Association, numbering more than 3,400 per year, are now governed by Category 1 since changing to this philosophy in 2013.

The change was prompted, unfortunately, by a demotion in one of Japan’s most esteemed races, the 2010 Japan Cup, in which betting and fan favorite Buena Vista, a clear two-length winner past the post, was demoted and placed second because, in the opinion of the stewards, her shifting-in caused Rose Kingdom the opportunity for a better placing.

North American racing, and its current raceday stewards, are sitting on a ticking time bomb of

¹² Only wagers redistributed in win, place and show pools could be determined. The figure is greater than \$2.12 million once factoring in redistributed exotic wagers.

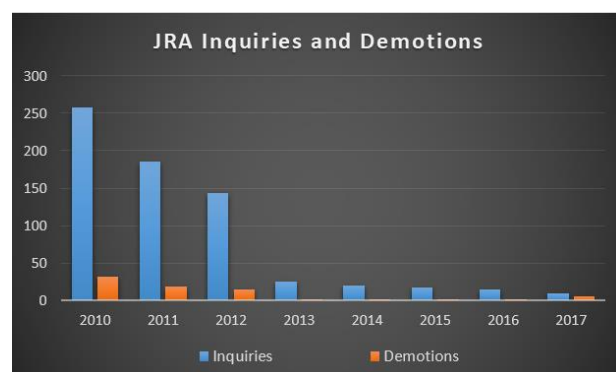
negative publicity and shattered confidence, set to explode when a major race winner, well clear, is demoted as a result of the Category 2 rules in place.

It is necessary to note that we believe the stewards would not be at fault for this. They are merely interpreting the rules as provided. The rules philosophy needs to change.

Take note of the figures below, provided by the JRA to the IFHA for use at its 2018 International Conference, relative to the number of inquiries and demotions in the years before the switch (orange) and subsequent years since Category 1 was adopted (dark blue).¹³

A bar graph of the data is also provided, exhibiting the dramatic differences from 2010-2012 under Category 2 and then the subsequent years after the Category 1 adoption.

JRA Inquiries and Demotions					
Year	Inquiries	Demotions	Races	% Races w/Inquiries	% Races w/Demotion
2010	258	32	3,454	7.47%	0.93%
2011	185	19	3,453	5.36%	0.55%
2012	143	14	3,454	4.14%	0.41%
2013	25	1	3,454	0.72%	0.03%
2014	20	2	3,451	0.58%	0.06%
2015	17	1	3,454	0.49%	0.03%
2016	14	2	3,454	0.41%	0.06%
2017	9	5	3,455	0.26%	0.14%



¹³ The JRA data does not differentiate between a "reviewed incident," as discussed in this paper, and an "inquiry."

In the first five full years since enacting Category 1, JRA races have been subject to a stewards' inquiry on 85 occasions, or roughly 59% the number of inquiries held just in 2012 alone, the last year of Category 2. The number of demotions in those five years is still less than the total for 2012 as well.

What was once an incredibly litigious racing culture, with rates of inquiry even greater than those seen in California in 2017, has become one where the number of reviewed incidents and demotions have grown rare.

France and Germany, the last two European holdouts to Category 2, switched to Category 1 with the commencement of their 2018 flat seasons. Henri Pouret, Deputy Director General of Racing Operations for France Galop, in his remarks to the IFHA's International Conference on October 8, 2018, noted that the number of stewards' inquiries had dropped by one-third and the number of demotions declined by one-half through that point of the season, their first under Category 1.

At the same presentation, Dr Oscar Bertoletti, representing OSFAF, the organization which oversees the industry in Central and South America, noted that Panama, the last remaining Latin American holdout in Category 2, has also made the shift as of September 2018.

Great Britain, perhaps the closest international jurisdiction to North America, particularly given the rising participation at and distribution of the Royal Ascot meeting, and vice versa through the Breeders' Cup and several other major racing events, has been a Category 1 stalwart.

Hong Kong, whose exposure in America has grown since allowing for commingling into their massive tote pools, also flies the Category 1 flag. Both experience miniscule demotion rates as a

product of their rules philosophy. See their figures in the following chart, combined with Japan for 2017. The rates of review and demotions are significantly lower than what is experienced in North America.

Races in 2017					
GB	10,288	HK	807	JPN	3,455
Reviewed Incidents			Demotions		
GB	119	GB	20		
HK	6	HK	0		
JPN	9	JPN	5		
% Races with RI		% Races with Demotion			
GB	1.16%	GB	0.19%		
HK	0.74%	HK	0.00%		
JPN	0.26%	JPN	0.14%		

Using the rate of reviewed incidents and demotions from Great Britain in 2017 (1.16% for RI, 0.19% for demotions), the subsequent chart shows a projection of North America reviewed incidents and demotions if the same rate was experienced, as well as those of NYRA and SoCal.

Projected 2017 RI and Demotions (Using 2017 Great Britain rate - 1.16% inquiries, 0.19% demotion)			
Circuit	Races	RI	Demotions
North America	42,137	487	81
NYRA	2,089	24 (73)	4 (19)
SoCal	1,816	21 (81)	3 (36)
Actual figures for RI & Demotions in ()			

Had the rates been equal, NYRA would have seen demotions drop nearly five times, with SoCal down 12-fold.

Contemplating the Change

Any change in the rules of racing within a North American jurisdiction will require individual

jurisdictions to amend their rules of racing. The topic was up for discussion at the University of Arizona's 2017 Global Symposium on Racing.¹⁴ The panel featured two current North American stewards, the California Horse Racing Board's Scott Chaney and the Illinois Racing Board's chief state steward Eddie Arroyo, as well as the Japan Racing Association's Atsushi Koya.

Both Arroyo and Chaney offered positive opinions should North America switch to Category 1 at some point in the future, and easily identified the tradeoffs that stakeholders must accept regardless of the model. Select passages are bolded and underlined for emphasis.

*Chaney: "When you switch to Category 1, make no mistake, **you are sacrificing fairness and equity, and things like that, for certainty and consistency and 'easier-to-understand.'**"*

*From a steward sitting in the stand, I like Category 1 because we don't get **any grief. Everyone kind of agrees what the result is going to be, it's straightforward.** [In Japan], out of 3,500 races, you change the result only maybe 5-10 times. As a steward, you take criticism, but I think it's important to know you are giving up something [with either Category]."*

Arroyo was introduced to the Category 1 philosophy at a 2015 conference and offered his remarks from that point.

"When they showed us Category 1 compared to Category 2, we had a quick grin and said 'this will never fly.' The topic wasn't discussed much in the last year and we went to [another conference in 2017] and there was more discussion."

¹⁴ <https://vimeo.com/248492656/1038b6374c>

We began to look at the difference in the Categories and it became quite apparent that there is some merit to [Category 1].

But, after I returned from the meeting, when we had an inquiry and adjudicated the race, we then talked about how we would have handled the race if we were a Category 1 country. I will tell you, it made it so much simpler, we always would come to the same conclusion and we'd come to the conclusion fast. The benefit of Category 1, and I'm not 100% sold on it, everyone understands what the stewards are going to do when the incident happens. Under Category 2, you don't know.

It simplifies what we do, but at the same time, if we all did it, and you know how hard it is in this country to get everyone to apply the same rule, we would be really consistent, not just in our state, but across the country. It needs some discussion, but I think it has a future.

With roughly five decades of experience in the stewards' booth, Arroyo and Chaney addressed the main points in the debate between the Categories. Without question, Category 2 introduces much greater subjectivity in the hopes of a just and equitable result. Category 1 yields a philosophy that is more consistent and easy-to-understand.

On balance, we believe North American racing would benefit from the switch to Category 1.

France was a strong holdout, but finally switched to Category 1 following the IFHA's adoption of a model rule that covered the topic. The reasons for retaining Category 2, as explained in this *Racing Post* article from October 2017 below,

sounds quite similar to the cries that might be heard from North American naysayers to adopting Category 1.

"French resistance to observing interference rules that apply elsewhere... has crumbled in the face of a new clause to be introduced to the International Federation of Horseracing Authorities' international agreement.

"France...so far remained in Category 2, with the French authorities citing their punters' reliance on exotic bet types, rather than defending, for example, worthy winners." ¹⁵

Arguments such as those which were routinely offered by the French fell by the wayside, and their adoption of Category 1, along with that of Germany, leaves North America as a global outlier remaining in Category 2. The positive comments from Stewards Arroyo and Chaney are encouraging in the quest to achieve a more consistent approach which values clarity over a more subjective philosophy.

Jack Wolf, founder of partnership Starlight Racing, a winner of no less than two dozen graded races, and a Thoroughbred Idea Foundation board member, offers his thoughts having experienced both sides of the current system as an owner.

"Safety is obviously paramount, but quite clearly from a consistency perspective, Category 1 must be adopted. My horses have been involved on both sides of victory and defeat through demotions in graded stakes, and in each case I felt bad when we were moved up and pretty upset when taken down. The best horse should be allowed to win the race."

¹⁵ <https://www.racingpost.com/news/france-comes-into-line-with-britain-and-ireland-on-interference/303182>

Dubai World Cup and Breeders' Cup winning jockey Aaron Gryder supports a change.

"I've ridden all over the world in the last decade, with extended stops in Hong Kong and the Middle East and just about everywhere in North America. There is no doubt in my mind that the Category 1 philosophy I experienced overseas is much more straightforward for everyone involved in the race."

Penalties with Category 1

We cannot overstate this: the safety of in-race participants – horses and jockeys – is of paramount concern no matter the rules philosophy in place.

Whether Category 1 or Category 2, racing cannot tolerate extreme or inappropriate riding tactics which jeopardize safety, making a sport in which human athletes are already trailed by an ambulance even more dangerous. Stewards must ensure that the jockeys licensed to ride in a jurisdiction are legitimately credentialed to do so and that new apprentices are skilled enough to not create excessive hazards to their colleagues.

When faced with the prospects of far fewer demotions, one is left to wonder if racing would suffer from an outbreak of fouls, or a win-at-all-cost mentality from jockeys, jeopardizing the safety of in-race participants.

Category 1 jurisdictions are not replete with carnage from racing where few horses are demoted due to interference. A penalty structure, which includes suspensions and monetary fines, serves as a deterrent for careless riding.

Despite demoting only 11 horses from 85 inquiries in the 17,268 races over five full years since shifting to Category 1 (2013-2017), the stewards of the Japan Racing Association

delivered 199 suspensions to jockeys over the period. Monetary fines are also included in many Category 1 jurisdictions' penalty structures, with both fines and suspension durations increasing with the number of repeated offenses for guilty jockeys.

Atsushi Koya, currently the senior manager, general affairs of the JRA's Nakayama Racecourse, led Japan's conversion to Category 1 in his previous role as a steward. He outlined the benchmarks used by Japan in their new Category 1 model.

"Usually, the starting point on the suspension is nine calendar days in the JRA. If [in] a graded race, like the Japan Cup, the number of suspension days should be increased to 16 calendar or 23 calendar days. We review the penalty record of the jockey when deciding the penalty for the interference. If there is a penalty record in the recent couple of months and the jockey interfered again, the suspension would be increased."

Concerns of jockeys losing control and riding in a reckless manner are unfounded in any of these jurisdictions.

France, the world's most recent adopter of Category 1, outlined their adjusted penalty structure when announcing the change.

"[A] dangerous riding offence will result in a minimum of 6 days suspension (8 days for apprentices and in Group races, up to 15 to 20 days in case of a fall). If the interference is not caused by dangerous riding but still causes demotion, the penalty shall be a 2 to 4

days suspension (150€ to 2 days if the finishing order isn't affected).¹⁶

Under the Category 1 approach, the post-race penalty for interference in a race is limited almost solely to the jockey. The owner and trainer keep their share of the prize money, a winning bettor stays that way.

If a dangerous, “win-at-all-cost” approach was applied by a jockey in a particular race, the rules can be bolstered with a true disqualification clause – removing a horse from the race after it has been run as a function of an egregious foul. This is the non-American use of the term “disqualification,” and matches its use in other sports.

In the circumstance of a disqualification, all parties associated or supporting the disqualified horse lose – owner, trainer, jockey and the bettors. While its application is rare, its placement in the rules is designed as the harshest deterrent.

The IFHA adopted the disqualification element in its model rule, based in Category 1 philosophy, and is in place in many jurisdictions.

“Racing Authorities may, within their Rules, provide for the disqualification of a horse from a race in circumstances in which the Staging Authority’s relevant judicial body deems that the rider has ridden in a dangerous manner.”¹⁷

A switch to Category 1 should not yield more careless or dangerous riding. This has not been the case in the history of jurisdictions to make the change. **The threat of the disqualification rule and an appropriate penalty structure for riding offenses does its job.**

Implementing Category 1

The Thoroughbred Idea Foundation recognizes the challenges with adopting and implementing change in the sport. The challenge itself is not a reason change should be avoided. Change is needed.

The first major step to implementing a rules philosophy change would be an adoption of the IFHA-backed model rule. A full version of that rule can be found in the Appendix. Fortunately, the topic is on the agenda for discussion at the 2018 Model Rules Committee in Tucson this December. If a model rule is adopted by the committee, now or in the future, individual jurisdictions would be required to take their own steps to accept and adopt.

Commensurate with the model rules update, training would be required for North American racing officials. Already a function of the Racing Officials Accreditation Program (ROAP) which oversees the accreditation and continuing education of stewards, the infrastructure is in place to effect such change.

France approved the change to Category 1 in October 2017 and implemented the new rules on March 31, 2018. “We have lots of racecourses in France and lots of stewards,” said Henri Pouret at the IFHA International Conference in October 2018.

“500 of them had to be trained to apply the new rule, which is a lot of work to do. The position about the change was, overall, in favor of it. Not against. Some were in favor because they considered that it was easier, in a way, to apply the new rule.”

¹⁶ <http://www.france-galop.com/en/content/new-interference-rules-apply-france-march-31st>

¹⁷ <https://www.ifhaonline.org/default.asp?section=Resources&story=992>

Mr Pouret explained the steps taken once France decided to adopt Category 1. First, he indicated, updated written guidelines were provided to the stewards, which came in concert with support from the trainers' and jockeys' associations, and a series of interactive seminars were held across the country supplemented with video case studies.

"The implementation of the change has been eased because the stewards in the provinces were supportive with the new guidelines as they consider that it is easier to let the result stand rather than demote a horse."

Communication to horseplayers is equally essential, requiring support from racetrack broadcast entities, national broadcasters, journalists, social influencers and key bettors. In North America, even advanced deposit wagering (ADW) outlets should be involved in sharing news of the change.

Changing the Rules

Adopting Category 1 would be a significant change to the ecosystem of North American racing. Let's tackle some of the main questions associated with this topic, as have been discussed throughout this paper.

1. Is it possible for a jurisdiction with a long history and a large stakeholder base to transition from Category 2 to Category 1?

Yes. France adopted the change in October 2017 after years of discussion and implemented the new rules six months later. Japan implemented Category 1 a little more than two years after a classic Category 2 demotion was made in their richest international race, the Japan Cup.

2. Will Category 1 yield a more consistent approach when it comes to considering whether to review an incident, or once an incident is already under review?

Yes. The application of a subjective approach by the stewards is greatly reduced in Category 1. The result is a more consistent set of rulings. Even long-time American stewards that have learned about Category 1 interference rules agree.

3. If Category 1 is adopted, will the stewards still be called-upon in instances of very close finishes where some interference may have occurred?

Yes. This is universal regardless of the Category. There is still some element of interpretation required, but on a far less frequent basis under Category 1.

4. How much fairer is Category 1 than 2?

There is no perfect solution. Interference in a race cannot be adjudicated to the point that a single solution will yield an entirely fair result. The point made by California-based steward Scott Chaney, referenced earlier, is the standard when it comes to this topic: Category 1 sacrifices equity in exchange for clarity and consistency. Category 2 does the opposite. We believe there is tremendous value in adopting a philosophy which emphasizes clarity and consistency for stakeholders – prime values to bolster market confidence.

On balance, we believe North America should adopt Category 1, beginning with the Model Rules Committee and then going forward with individual jurisdictional adoption. This would be a significant improvement and confidence boost for the financial drivers of the sport – horseplayers and owners.

Appendix A

International Federation of Horseracing Authorities **Model Rule on Interference**

IFHA - October 3, 2017

If, in the opinion of the Staging Authority's relevant judicial body, a horse or its rider causes interference and finishes in front of the horse interfered with but irrespective of the incident(s) the sufferer would not have finished ahead of the horse causing the interference, the judge's placings will remain unaltered.

If, in the opinion of the Staging Authority's relevant judicial body, a horse or its rider causes interference and finishes in front of the horse interfered with and if not for the incident(s) the sufferer would have finished ahead of the horse causing the interference, the interferer will be placed immediately behind the sufferer.

Racing Authorities may, with their Rules, provide for the disqualification of a horse from a race in circumstances in which the Staging Authority's relevant judicial body deems that the rider has ridden in a dangerous manner.

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12. Only wagers redistributed in win, place and show pools could be determined. The figure is greater than \$2.12 million once factoring in redistributed exotic wagers.
13. The JRA data does not differentiate between a "reviewed incident," as discussed in this paper, and an "inquiry."
14. <https://vimeo.com/248492656/1038b6374c>
15. <https://www.racingpost.com/news/france-comes-into-line-with-britain-and-ireland-on-interference/303182>
16. <http://www.france-galop.com/en/content/new-interference-rules-apply-france-march-31st>

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Questions or Comments?

With questions or comments on this report, please reach out us by email (ThoroughbredIdeaFoundation@gmail.com) or via social media, on Twitter @RacingIdeas.

DOL Wage and Hour Audits: Lessons from the Backstretch

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2018: 300-750% increase in worksite investigations, I-9 audits and, worksite arrests.

- 5,981 I-9 audits (2017: 1,691); 6,848 worksite investigations

Significant and increasing penalties: see Handbook for Employers

- **Civil Penalties: Unlawful Employment:**
 - Hiring/continuing to employ unauthorized aliens \$375 - \$16,000 per violation
 - Failing to comply with I-9 requirements: \$110 - \$1,100
- **Criminal Penalties: Pattern of practice of violations**
 - Up to \$3,000 per employee and/or 6 months' imprisonment
- **Document Fraud: Fraud or false statements or misuse of visas, immigration & identity documents**
 - Civil fraud: \$375 - \$6,500 per document
 - Criminal fraud: fines, imprisonment up to 5 years, forfeiture of assets
- **Unlawful Discrimination: \$375 - \$16,000 per individual and other remedies**
 - Recent IBM Case: \$44,140 for citizenship preferences in ads

Fine calculation: six-figure assessments common, \$11 million Walmart fine

- Aggravating/mitigating factors: business size, good faith, seriousness of offense; if unauthorized aliens were employed, history of employer

Employer Obligations



The perfect storm: (1) our current culture of unprecedented enforcement; and (2) the impossibility of perfect compliance with immigration and WHD regulations.

Wage Requirements under H-2B and FLSA

- The H-2B regulations require that workers be employed on a **full-time basis**, which the Department of Labor defines as at least **35 hours** per week. You are required to pay all workers the prevailing wage rate listed on the application for all hours up to 40 hours per week. Under the Fair Labor Standards Act, for any hours over and above 40 per week, you must pay workers the overtime rate of time and a half.
- Employers are required to offer to each worker employment for a total number of work hours equal to at least $\frac{3}{4}$ of the workdays of each 12-week period (6 week period of job order is less than 120 days), that was listed in the application unless prevented by unforeseeable circumstances outside employer's control.
- "Corresponding Workers": DOL will expect employers to pay ALL workers in the same or similar position ("corresponding workers") the same hourly rate of pay as your H-2B workers unless a legally valid reason for a difference in pay rate for workers performing the same duties exists. This issue has come up in recent DOL H-2B Audits. The burden is on the employer to justify any differences in wage rates among similarly situated employees.

Permissible Deductions



- The employer must make all deductions from the worker's paycheck required by law. The job order/H-2 application must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited.
- Authorized deductions are limited to:
 - ✓ Deductions which the employer is required to withhold by law or court order; Deductions for the reasonable cost of board, lodging, and facilities furnished to the employee; and
 - ✓ Deductions where the employee previously and voluntarily authorized payment to a third party, which may include union dues paid in accordance with a collective bargaining agreement. Such deductions may not be made if the employer, agent, or recruiter (or any affiliated person) derives any payment, rebate, commission, profit, or benefit, either directly or indirectly.

Prohibited Deductions



- **Which deductions are prohibited?**

The job order/H-2 application must specify all deductions NOT required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited. An employer will not meet the wage payment requirements when unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the required amount or where the worker fails to receive such amount free and clear because the worker "kicks back" directly or indirectly to the employer (or to another person for the employer's benefit) all or part of the wages. The principles applied in determining whether payments are received free and clear are explained in more detail in 29 CFR Part 531.

Payroll Records/Time Cards



- Employers are required to provide ALL workers, even if not on the H-2B visa program, with weekly pay statements/earnings records identifying all deductions and reimbursements clearly itemized, and hours worked AND hours offered. These pay statements should include the following information:
 - Employer name, address, and phone number
 - Employee name and foreign address
 - Dates covered by payment
 - Basis of payment (hourly, salary, etc.)
 - Rates paid (regular and overtime)
 - Hours worked (regular and overtime)
 - Allowances or credits (meals, uniforms, etc.)
 - Gross wages
 - Any deductions from wages
 - Net wages
- According to IRS regulations, employers must pay all regular local, state and federal payroll taxes, including Social Security and unemployment (FICA, FUTA and SUTA). Employers are also responsible for assisting workers in obtaining Social Security cards upon their arrival. DOL requires that employers keep time sheets or time records of all hours worked by employees in a given week. This can be a manual time card system or electronic.
- Keep copies of all pay statements in the event of an Audit by DOL.



Transportation/Subsistence Expenses

Under the FLSA, employers are required to either pay or reimburse transportation and subsistence expenses for workers to the place of employment after the worker completes 50% of the period of employment in the job order. The current subsistence rate for meals is \$12.46 per day without receipts or \$55/day with proper receipts. Payment of return transportation and subsistence is required if the worker completes the job order period or is dismissed early.

- We recommend that employers reimburse workers for transportation costs and visa-related fees in the first work week to avoid violation of the FLSA. Any such reimbursement should be by check so that there is appropriate evidence of the required reimbursement. Workers may also sign an acknowledgement of reimbursement.
- Please note that the employer is responsible for subsistence and travel reimbursement from the worker's hometown to the consulate where they will apply for their visas, this includes any required hotel accommodations.
- The employer is also responsible for visa processing costs: Payment or reimbursement of visa, border crossing, recruiter fees, and related government mandated fees in the first workweek. The Current Consular Processing Fee is \$190. DOL prohibits passing on fees associated with the H-2B applications or employment, such as application/petition costs, attorney fees, recruitment fees or other related fees to the H-2B worker.
- Employers should maintain documentation in their files confirming the payment or reimbursement for H-2B related costs. It is a best practice for workers to sign a statement in their native language confirming receipt of this reimbursement.



Other Obligations

Tools, Supplies and Equipment

- Employers are responsible for providing all tools, supplies and equipment required to perform the job, including uniforms, shoes, etc. Employers may not charge workers a fee for these expenses and should ensure that bard foreman or supervisors are not charging on the back-end. .

Copies of Job Order/Employment Contract to Workers

- Employers must provide workers with copies of the job order in their native language no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and, if necessary and made available by the DOL, another language common to your workers.
- It is advisable that employers have the workers sign a statement in their native language confirming receipt of this documentation.

Termination/Early Departure of Workers

- Employers must notify DOL and USCIS when an H-2B worker abandons or voluntarily leaves the job or is terminated for cause. This is an often overlooked requirement, which results in significant fines and penalties against employers. Any departure prior to the end date of the H-2B contract must be reported, even if it is at worker request.
- Employers must report the termination or departure of any H-2B worker both to the USCIS and USDOL in writing within 2 business days of the termination or departure.



The WHD Site Visit

Documents/Copies Requested by Investigator:

- ✓ Copies of most recent pay stubs for H-2B workers: this is to confirm that the workers are being paid at least the prevailing wage rate
- ✓ Copies of ID's of those they interview (management and H-2B visa holders)
- ✓ Payroll Reports for up to 3 years
- ✓ Business cards of employer representative
- ✓ Copy of newspaper advertising for H-2B positions
- ✓ Will ask to see where the USDOL Wage/Hour Division "Employee Rights Under the H-2B Program" notice (<https://www.dol.gov/whd/posters/pdf/H2B-eng.pdf>) is posted

Questions Asked to Company Management:

- ✓ How many H-2B employees are employed at the office?
- ✓ What are their jobs/titles?
- ✓ What are their job duties?
- ✓ Where do the H-2B workers physically work?
- ✓ What is the H-2B employee's start/hire date?
- ✓ Where is the H-2B employees' housing located?
- ✓ Transportation: (do you provide transportation to/from housing to work location, or use of vehicles, etc.)?
- ✓ If H-2B's workers are able to be included in employee activities and if they are, is there sign-up sheets for those activities? (used to confirm/prove they are actually at work location)
- ✓ Will ask if they can visit and take photos of work area(s)
- ✓ Do your H-2B workers stay until the end date listed on petitions/visa?

The WHD Site Visit: Worker Questions

Questions Asked to Workers (approx. 10 questions)

- What is your hourly pay?
- Are you paid OT for any hours over 40?
- Were you required to pay any travel expensed to the U.S. for which you were not reimbursed?
- Did you have to reimburse the employer for any costs associated with your visa?
- Did you have to purchase anything or items to be able to work?
- What is your job title?
- What are your job duties?
- Where do you work – location?
- Have you been threatened, bullied, etc. during your employment?
- The investigator will ask to review the worker's visa and passport to compare against photo that they have in the file to confirm identity



Bottom line: Now is the time for employers to review current practices and develop best practices and procedures to maximize compliance efforts that can be used as a defense in WHD proceedings later on.

The information in this presentation is intended as general background information on immigration law and enforcement. It is not to be considered as legal advice with regard to any immigration issue. Immigration law and forms change often and information becomes rapidly outdated.

Additional information on immigration issues, as well as updates on new developments, can be found on our web site at <https://www.harrisbeach.com/practice/immigration-law>.



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Immigration Blog

Knowledge Has No Borders



DOL WAGE AND HOUR AUDIT: LESSONS FROM THE BACKSTRETCH

By Leonard J. D'Arrigo

June 6, 2019

The recent U.S. Department of Labor Wage and Hour (WHD) investigation outcome of leading thoroughbred trainer Chad Brown has rocked the racing industry with the assessment of over \$1.6 million in back wages and Civil Money Penalties (CMPs). This should serve as a wake-up call to all seasonal businesses that historically have struggled to find reliable seasonal labor.

Like many other trainers and seasonal employers, Chad was undoubtedly caught up in a perfect storm: (1) our current culture of unprecedented enforcement; and (2) the impossibility of perfect compliance with immigration and WHD regulations.

Now more than ever, employers must prioritize and review their current compliance practices to make sure that they meet all regulatory requirements under the Fair Labor Standards Act (FLSA) and corresponding H-2B regulations.

In reality, perfect compliance is virtually impossible – especially for those employers that participate in the H-2B program. WHD violations can range from miscalculating overtime rates for employees, which is clearly a more serious offense, to seemingly insignificant violations for not having a screen door on worker housing.

For the racing industry, the problem is compounded by the fact that many trainers operate out of horse stables and do not have sophisticated time-keeping systems, payroll, or even I-9 compliance systems in place. For many years, compliance with Wage and Hour, I-9, and immigration regulations were somewhat of an afterthought. Backstretch workers such as horse grooms and hotwalkers have notoriously erratic schedules and often work long hours. This is difficult to manage. However, we have learned that anything other than perfect compliance is costly. As we hear of other audits unfold at racetracks across the country, many trainers and seasonal business owners could quite easily find themselves in a very similar circumstance.

So what exactly are the rules and what can an employer do to ensure full compliance?

DOL Wage and Hour has jurisdiction over many areas of workplace compliance, including the Fair Labor Standards Act, OSHA, and immigration related provisions. The FLSA rule regarding overtime pay is fairly clear; however, the Immigration provisions of the H-2B program are arguably the most challenging for trainers to comply with. WHD found the following violations under the FLSA and H-2B program in the investigation of Chad Brown, which many employers unintentionally violate:

- Failing to pay the H-2B employees the wages that were offered in the application and advertising: Employers are required to advertise and pay the higher of the State or Federal minimum wage, or the DOL prevailing wage rate to H-2B workers and U.S. workers in the same occupation for the particular area of employment.
- Collecting payment from employees for H-2B visa related costs: All costs associated with the H-2B visa program must be paid by the employer and not passed onto the workers. This, however, often occurs without the knowledge of the trainer or business owner who delegates management of the program to lower-level managers, who often engage in a scheme of charging workers for participating in the program. The employer is however ultimately responsible.
- Failing to reimburse employees' transportation and subsistence costs for travel from their home countries:

Immigration Blog

Knowledge Has No Borders



Employers are required to reimburse employees for subsistence and travel expenses from their home to the place of employment. This includes meals, lodging and transportation. The daily subsistence rate is currently set at \$12.46/day or up to \$55/day with receipts.

- Misrepresenting to employees the place of employment and job terms and conditions, such as the availability of free housing: Trainers struggle with the location of employment as they often have workers in Belmont and Saratoga during the same period of need. These locations require separate applications, which most trainers do not file as they are improperly advised in many cases by non-attorney visa preparation providers.
- Failing to disclose required information in a language understood by the employees: By law, employers are required to provide a copy of the job order contract outlining the terms and conditions of employment in the workers' native language prior to arrival to the U.S. This is frequently overlooked by trainers who rely on agents and recruiters to facilitate this stage of the process; and
- Failing to post a notice of employees' H-2B rights at the work location: This is another often over-looked provision, which is seemingly minor, but can carry significant penalties. Employers must display DOL worker rights posters at the worksite in both English and Spanish.

I. Wage Requirements under H-2B and FLSA

The H-2B regulations require that workers be employed on a full-time basis, which the Department of Labor defines as at least 35 hours per week. You are required to pay all workers the prevailing wage rate listed on the application for all hours up to 40 hours per week. Under the Fair Labor Standards Act, for any hours over and above 40 per week, you must pay workers the overtime rate of time and a half.

Employers are required to offer to each worker employment for a total number of work hours equal to at least $\frac{3}{4}$ of the workdays of each 12-week period (6 week period of job order is less than 120 days), that was listed in the application unless prevented by unforeseeable circumstances outside employer's control.

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Which deductions from pay are permitted?

The employer must make all deductions from the worker's paycheck required by law. The job order/H-2 application must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited.

Authorized deductions are limited to:

- Deductions which the employer is required to withhold by law or court order;
- Deductions for the reasonable cost of board, lodging, and facilities furnished to the employee; and
- Deductions where the employee previously and voluntarily authorized payment to a third party, which may include union dues paid in accordance with a collective bargaining agreement. Such deductions may not be made if the employer, agent, or recruiter (or any affiliated person) derives any payment, rebate, commission, profit, or benefit, either directly or indirectly.

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The principles applied in determining whether deductions are reasonable and the permissibility of deductions for payments to third persons are explained in more detail in DOL regulations at 29 CFR Part 531.

Which deductions are prohibited?

The job order/H-2 application must specify all deductions NOT required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited. An employer will not meet the wage payment requirements when unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the required amount or where the worker fails to receive such amount free and clear because the worker "kicks back" directly or indirectly to the employer (or to another person for the employer's benefit) all or part of the wages. The principles applied in determining whether payments are received free and clear are explained in more detail in 29 CFR Part 531.

Deviation in Hours from Application

It is expected that employers offer H-2B workers the number of hours stated on the application forms and advertising. DOL has, however, indicated that a 5-hour deviation from the stated number of hours is permissible. It is advisable to have your workers sign a statement that any hours over the amount stated on the application is voluntary.

II. Tax Withholding Issues

According to IRS regulations, employers are required to pay all regular local, state and federal payroll taxes, including Social Security and unemployment (FICA, FUTA and SUTA). Employers must also assist workers in obtaining Social Security cards upon their arrival.

III. Payroll Records and Time Cards

Employers are required to provide ALL workers, even if not on the H-2B visa program, with weekly pay statements/ earnings records identifying all deductions and reimbursements clearly itemized, and hours worked AND hours offered. These pay statements should include the following information:

- Employer name, address, and phone number
- Employee name and foreign address
- Dates covered by payment
- Basis of payment (hourly, salary, etc.)
- Rates paid (regular and overtime)
- Hours worked (regular and overtime)
- Allowances or credits (meals, uniforms, etc.)
- Gross wages
- Any deductions from wages
- Net wages

According to IRS regulations, employers must pay all regular local, state and federal payroll taxes, including Social Security and unemployment (FICA, FUTA and SUTA). Employers are also responsible for assisting workers in obtaining Social Security cards upon their arrival. DOL requires that employers keep time sheets or time records of all hours worked by employees in a given week. This can be a manual time card system or electronic.

Keep copies of all pay statements in the event of an Audit by DOL.

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IV. Record Keeping

The employer must retain, for a period of three (3) years, the H-2B recruitment report, resumes (if any), advertising, and evidence of contact with applicants.

V. Transportation/Subsistence Reimbursement

Under the FLSA, employers are required to either pay or reimburse transportation and subsistence expenses for workers to the place of employment after the worker completes 50% of the period of employment in the job order. The current subsistence rate for meals is \$12.46 per day without receipts or \$55/day with proper receipts. Payment of return transportation and subsistence is required if the worker completes the job order period or is dismissed early.

We recommend that employers reimburse workers for transportation costs and visa-related fees in the first work week to avoid violation of the FLSA. Any such reimbursement should be by check so that there is appropriate evidence of the required reimbursement. Workers may also sign an acknowledgement of reimbursement.

Please note that the employer is responsible for subsistence and travel reimbursement from the worker's hometown to the consulate where they will apply for their visas, this includes any required hotel accommodations.

The employer is also responsible for visa processing costs: Payment or reimbursement of visa, border crossing, recruiter fees, and related government mandated fees in the first workweek. The Current Consular Processing Fee is \$190. DOL prohibits passing on fees associated with the H-2B applications or employment, such as application/petition costs, attorney fees, recruitment fees or other related fees to the H-2B worker.

Employers should maintain documentation in their files confirming the payment or reimbursement for H-2B related costs. It is a best practice for workers to sign a statement in their native language confirming receipt of this reimbursement.

VI. Tools, Supplies and Equipment

Employers are responsible for providing all tools, supplies and equipment required to perform the job, including uniforms, shoes, etc. Employers may not charge workers a fee for these expenses and should ensure that bard foreman or supervisors are not charging on the back-end.

VII. Copies of Job Order/Employment Contract to Workers

Employers must provide workers with copies of the job order in their native language no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and, if necessary and made available by the DOL, another language common to your workers.

It is advisable that employers have the workers sign a statement in their native language confirming receipt of this documentation.

VIII. Termination/Early Departure of Workers

Employers must notify DOL and USCIS when an H-2B worker abandons or voluntarily leaves the job or is terminated for cause. This is an often overlooked requirement, which results in significant fines and penalties against employers. Any departure prior to the end date of the H-2B contract must be reported, even if it is at worker request.

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Employers must report the termination or departure of any H-2B worker both to the USCIS and USDOL in writing within 2 business days of the termination or departure.

IX. H-2B Visa Costs

All costs associated with the H-2B visa program are the responsibility of the employer, including advertising costs, legal/agent preparation fees, filing fees, travel costs, tools or equipment, etc. Employers may not pass on ANY costs associated with the visa to the employees. Employers should advise lower-level managers of this restriction and ensure that they are not charging workers any fee for participating in the program. The employer is ultimately responsible for the actions of their lower-level managers and supervisors.

X. Worker Arrivals

Unrealistically, the DOL expects that all H-2B workers will arrive at the same time pursuant to the start date indicated on the application. DOL does not permit staggered arrivals as they must correspond with the stated date of need. If some workers arrive later, which is common due to unexpected processing delays, the employers should write a memo to the H-2B worker's personnel file explaining the circumstances surrounding the late/staggered arrivals, such as consular processing delays, passport renewals, travel delays, etc. DOL has been taking a no tolerance approach to this, assessing significant fines.

XI. The DOL WHD Site Visit

A. Documents/Copies Requested by Investigator:

- Copies of most recent pay stubs for H-2B workers: this is to confirm that the workers are being paid at least the prevailing wage rate
- Copies of ID's of those they interview (management and H-2B visa holders)
- Payroll Reports for up to 3 years
- Business cards of employer representative
- Copy of newspaper advertising for H-2B positions
- Will ask to see where the USDOL Wage/Hour Division "Employee Rights Under the H-2B Program" notice (<https://www.dol.gov/whd/posters/pdf/H2B-eng.pdf>) is posted

B. Questions Asked to Company Management:

- How many H-2B employees are employed at the office?
- What are their jobs/titles?
- What are their job duties?
- Where do the H-2B workers physically work?
- What is the H-2B employee's start/hire date?
- Where is the H-2B employees' housing located?
- Transportation: (do you provide transportation to/from housing to work location, or use of vehicles, etc.)?
- If H-2B's workers are able to be included in employee activities and if they are, is there sign-up sheets for those activities? (used to confirm/prove they are actually at work location)
- Will ask if they can visit and take photos of work area(s)
- Do your H-2B workers stay until the end date listed on petitions/visa?

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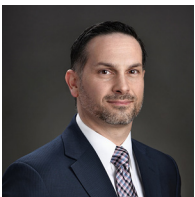
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C. Questions Asked to Workers (approx. 10 questions)

- What is your hourly pay?
- Are you paid OT for any hours over 40?
- Were you required to pay any travel expensed to the U.S. for which you were not reimbursed?
- Did you have to reimburse the employer for any costs associated with your visa?
- Did you have to purchase anything or items to be able to work?
- What is your job title?
- What are your job duties?
- Where do you work – location?
- Have you been threatened, bullied, etc. during your employment?
- The investigator will ask to review the worker's visa and passport to compare against photo that they have in the file to confirm identity

Bottom line: Now is the time for employers to review current practices and develop best practices and procedures to maximize compliance efforts that can be used as a defense in WHD proceedings later on.



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US LOTTERIES AND THE WIRE ACT

Robert J. McLaughlin, Esq.
August 6, 2019

History of US Gaming

- General anti-gambling prohibition in US until Depression
- During Depression, states began allowing pari-mutual betting on horse racing
- In 1950s, Charitable Gaming was permitted
- In 1960/1970 – State-run Lottery
- 1970 – NJ Casinos
- 1988 – Tribal Gaming
- 1990/2000+ - Commercial Casinos
- 2010/Current – Fantasy Sports
- 2018 – Sports Wagering, eSports, Loot Boxes
- Future??

Federal Gaming Statutes

Federal statutes targeted to restrict or limit interstate gambling, include, without limitation, the following:

- Wire Act (18 U.S.C. § 1084)
- Johnson Act (15 U.S.C. § 1172)
- Lottery Act (18 U.S.C. § 1301, et. seq.)
- Travel Act (18 U.S.C. § 1952)
- Interstate Transportation of Wagering Paraphernalia (18 U.S.C. § 1953)
- Illegal Gambling Business Act of 1970 (18 U.S.C. § 1955)
- Professional and Amateur Sports Protection Act (28 U.S.C. § 3701)
- Unlawful Internet Gambling Enforcement Act (31 U.S.C. § 5361, et. seq.)

US Lotteries

An Evolution of Games

- Daily Games
- Jackpot Games – State
- Jackpot Games – National
- Instant/Scratch-off
- Raffles
- Internet/Mobile

The Wire Act

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

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

2011 Department of Justice Opinion – Wire Act

- Congress expressly distinguished lottery games from “bookmaking” or “wagering pools with respect to a sporting event”.
- Congress’s decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute (Transportation of Wagering Paraphernalia Act), but not in the contemporaneous Wire Act further suggests that Congress did not intend to reach non-sports wagering in the Wire Act. See, *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) (construing one federal statute in light of another congressional enactment the same year).
- In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.

2018 Department of Justice Opinion – Wire Act

- The Department of Justice’s (“DOJ”) Office of Legal Counsel issued an opinion on January 14, 2019 (“Opinion”) stating that the Federal Wire Act applies to all forms of internet gaming.
- By maintaining that the Wire Act prohibits all interstate wagering activity, the Opinion contradicts DOJ’s previously stated 2011 position.
- While the 2011 DOJ opinion let sunlight shine on internet gaming, including lotteries, fantasy sports, and online casinos and poker, the Opinion reinstated a “cloud” on internet gaming and its future in the US.

UIGEA

- UIGEA prohibits the knowing acceptance by a person engaged in the business of betting or wagering of any financial instrument for unlawful Internet gambling from another person.
- The UIGEA does not make gambling activity illegal.
- Rather, the UIGEA makes the acceptance of certain financial transactions unlawful.
- Consistent with its plain meaning, the determination of whether the transaction constitutes unlawful Internet gambling turns on how the law of a state from which the bettor initiates the bet would treat the bet, i.e., if it is illegal under that state's law, it constitutes "unlawful Internet gambling" under UIGEA.

UIGEA

Financial instruments or transactions covered by the UIGEA include:

- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction, as the Secretary of Treasury and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation

2018 Department of Justice Opinion – Wire Act

- The Opinion discusses the impact the 2006 Unlawful Internet Gambling Enforcement Act (“UIGEA”) had on the Wire Act.
- The 2011 opinion specifically did not address this question.
- The OLC concludes the Opinion discussion with the statement that UIGEA “in no way” alters or limits existing prohibitions of the Wire Act.

New Hampshire Lottery Commission v. Barr

- Where a statute is ambiguous, a Court must look at more than grammar to determine its meaning.
- “Statutes should be interpreted ‘as a symmetrical and coherent regulatory scheme.’” Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015).
- Limiting the Wire Act to sports gambling conforms to this rule.
- Declares that §1084 (a) of the Wire Act applies only to transmissions related to bets of wages at a sporting event or contest. The 2018 OLC Opinion is set aside.

Thank you

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Tribal Gaming

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The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development[†]

Randall K. Q. Akee, Katherine A. Spilde, and Jonathan B. Taylor

The Indian Gaming Regulatory Act (IGRA), passed by the US Congress in 1988, was a watershed in the history of policymaking directed toward reservation-resident American Indians. IGRA set the stage for tribal government-owned gaming facilities. It also shaped how this new industry would develop and how tribal governments would invest gaming revenues. Since then, Indian gaming (the casinos and bingo halls owned by tribal governments in the United States are also sometimes referred to as *tribal gaming* or *tribal government gaming*) has approached commercial, state-licensed gaming in total revenues. Gaming operations have had a far-reaching and transformative effect on American Indian reservations and their economies. Specifically, Indian gaming has allowed marked improvements in several important dimensions of reservation life. For the

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[†]To access the Data Appendix, visit
<http://dx.doi.org/10.1257/jep.29.3.185>

first time, some tribal governments have moved to fiscal independence. Native nations have invested gaming revenues in their economies and societies, often with dramatic effect. Table 1 provides selected characteristics of American Indian social and economic conditions over the past two decades: incomes for American Indians grew at six times the US rate; female labor force participation rose; unemployment fell; and reservation housing quality improved. Relative improvement across a range of census indicators was particularly strong in the 1990s, the first census decade after IGRA's passage, and continued in the 2000s, albeit at a slower pace.

While on average there have been large improvements, the effect of Indian gaming varies tremendously across tribes. Some tribes have had spectacular successes; others have found gaming to be a small part of their economic portfolio and of limited importance to their tribal government revenues and communities. Annual Indian gaming revenues increased from about \$100 million in 1988 to \$28 billion dollars in 2013 (National Indian Gaming Commission 2014; Senate Committee on Indian Affairs 1988). The number of tribal gaming operations went from fewer than 30 to about 450 across 31 states. Tribal gaming affects reservations with fewer than 100 residents to those with populations that number in the tens of thousands. In addition to the variation arising from differential access to markets, corporate governance, and managerial skill, there are instances where state-tribal conflict has held Indian gaming below its potential.

The focus of this paper is on Indian Country, a broad term often used to describe tribal lands in the United States. The term also has specific meaning in US law (18 USC §1151). In 2012, the contiguous 48 states held 324 reservations (or trust lands or joint use areas) in 32 states, home to more than 300 federally recognized tribes (Osier 2012) and 540,000 people self-reporting that they were American Indian or Alaska Native alone (that is, not in combination with other races) (US Census 2011a). An additional 33 federally recognized tribes were affiliated with 33 census tribal statistical areas in California, New York, Oklahoma, and Washington.¹ After the reservations themselves, it is typical to find the next-highest concentration of members of a tribe living in the reservation environs or in nearby cities: say, Navajo living in Flagstaff, Arizona, or Oglala Lakota in Rapid City, South Dakota. Of course, many American Indians maintain civic, economic, social, and cultural ties with reservation communities regardless of where they live. The discussion here focuses on conditions in the contiguous 48 states and does not characterize distinctive Native Hawaiian and Native Alaskan histories, policies, or conditions.

We begin with an overview of policymaking leading up to the political and legal fights for Native self-determination, of which Indian gaming is an outgrowth. We consider the steps, starting in the late 1980s with a key US Supreme Court decision

¹ In all 50 states, the population reporting American Indian or Alaska Native (AIAN) alone was 2,932,248, and the number of Americans reporting AIAN alone or in combination with one or more races was 5,220,579 (US Census 2011a).

Table 1

Selected Indicators of Social and Economic Condition

(Indians on reservations in the contiguous 48 states in bold vs. US all-races averages in parentheses)

	Amount (in percent unless indicated as \$)			Change (in percentage points unless indicated as %)		
	Census 1990	Census 2000	ACS 2006–10	1990s	2000s	Both decades
Real per capita income	\$7,673 (\$24,951)	\$10,227 (\$27,798)	\$11,406 (\$26,893)	33.3% (11.4%)	11.5% (–3.3%)	48.6% (7.8%)
Real median household income	\$21,201 (\$52,001)	\$28,689 (\$54,077)	\$28,298 (\$51,076)	35.3% (4.0%)	–1.4% (–5.5%)	33.5% (–1.8%)
Child poverty	55.6 (18.3)	44.3 (16.6)	43.9 (19.2)	–11.4 (–1.7)	–0.4 (2.6)	–11.8 (0.9)
Family poverty	47.7 (10.0)	35.7 (9.2)	32.2 (10.1)	–12.0 (–0.8)	–3.5 (0.9)	–15.4 (0.1)
Unemployment	25.7 (6.2)	21.9 (5.7)	18.9 (7.9)	–3.9 (–0.5)	–3.0 (2.1)	–6.9 (1.6)
Labor force participation	50.9 (65.3)	51.5 (63.9)	52.4 (65.0)	0.6 (–1.3)	0.9 (1.1)	1.5 (–0.3)
Male labor force participation	57.4 (74.4)	54.7 (70.7)	54.1 (70.9)	–2.7 (–3.7)	–0.6 (0.2)	–3.3 (–3.5)
Female labor force participation	44.8 (56.8)	48.5 (57.5)	50.8 (59.4)	3.7 (0.8)	2.3 (1.9)	6.0 (2.6)
Overcrowded homes*	16.1 (4.7)	14.7 (5.7)	8.2 (3.1)	–1.4 (1.1)	–6.5 (–2.6)	–7.9 (–1.6)
Homes without complete plumbing	20.9 (0.8)	13.7 (0.6)	8.6 (0.5)	–7.2 (–0.1)	–5.1 (–0.1)	–12.4 (–0.3)
Homes without complete kitchens*	11.1 (1.1)	10.9 (1.3)	10.7 (2.7)	–0.2 (0.2)	–0.2 (1.4)	–0.4 (1.6)
High school degree only	29.3 (30.0)	31.2 (28.6)	35.0 (29.0)	1.9 (–1.4)	3.8 (0.4)	5.8 (–1.0)
College graduate or more	4.0 (20.3)	6.0 (24.4)	7.4 (27.9)	2.0 (4.1)	1.5 (3.5)	3.4 (7.6)

Notes: Numbers for “Indians on reservations” are in bold; numbers for “all races nationwide” are in parentheses underneath. Dollars are 2009 dollars.

* Due to data limitations, the reservation figures for overcrowded homes and homes without complete kitchens are the all-races, rather than Indian, statistics (Akee and Taylor 2014).

and the Indian Gaming Regulatory Act of 1988, which led to the expansion of Indian gaming. We then turn to a discussion of how the growth of Indian gaming has affected Native Americans living on or near reservations, and how it has affected nearby localities and regions. We conclude with thoughts about the future of Indian gaming and the research agenda in this area.

A Brief Policy History of Indian Country

Most American Indian reservations were established by treaties and executive orders in the 19th century. Since then, Indian policy has oscillated between policies seeking to dissolve American Indian communities and tribes, and policies supportive of American Indian self-rule under duly constituted governments (for overviews, see American Indian Lawyer Training Program 1988, pp. 8–15; Cornell 1988, p. 14; Wilkins 2002, p. 105).

Under the “Allotment Era” inaugurated in 1887 by the Dawes Act, federal law privatized reservation lands (for example, apportioning 160 acres per household) and marked large portions of reservation lands as “surplus” suitable for sale to private citizens. As with many laws, the Dawes Act was supported by a coalition of well-intentioned, as well as opportunistic, political forces (Carlson 1981), but the underlying idea was that individual ownership would usher Indians (and their land) into the mainstream economy. By 1934, 86 million acres of reservation land—62 percent of the total—had transferred out of Indian ownership via sale, foreclosure, lien, and fraud (Wilkinson 1988, p. 20). As a result of the impoverishing effects of the Dawes Act (for example, as documented in Meriam et al. 1928), the Indian Reorganization Act of 1934 (IRA) ushered in a “New Deal for Indians.” The law ended land allotment on American Indian reservations, promoted constitutional self-government, and pointed to federally chartered tribal corporations as the primary vehicles for stimulating American Indian economic progress (Wilkins 2002). By the 1950s, policy for American Indians shifted again, to the “Termination Era,” which was marked by legislation disbanding particular tribes and by passage of PL 83-280, which transferred certain tribes’ criminal (and limited civil) jurisdiction to state governments.

By the late 1960s and early 1970s, American Indian assertions of tribal sovereignty via litigation and political action heralded the contemporary “Self-Determination Era,” in which the federal government delegated powers and responsibilities to tribal governments. This era provided greater autonomy to tribal governments in the determination of their political institutions, economic activities, and development (Wilkins 2002). One example of this increased autonomy arose from the Indian Educational Assistance and Self-Determination Act of 1975. Under that act and successive amending legislation, Native nations tailored federal programs (such as education services) to tribal cultures and reservation conditions by contracting to deliver the federal program services directly or by compacting with the US government to operate multiple programs under multifunction arrangements similar to federal block grants to states.

Over the last few decades, executive orders from presidents of both parties have consistently supported principles of Indian self-government and a government-to-government relationship between the federal and tribal governments (Nixon 1970; Carter 1979; Reagan 1983; Bush 1991; Clinton 1994, 2000; Bush 2004; Obama 2009). In addition, federal policy increasingly treats tribes like states, or otherwise gives Indian governments latitude in crafting policies for housing, healthcare, education,

workforce development, crime, and natural resources.² In this period, many tribes sued the US government to defend property rights in salmon, oil, water, and timber that had been weakened by non-Indian encroachment or mismanagement by federal officials and agencies.

Through all of the various federal policy approaches toward American Indians, there is consensus that federally directed development has failed to produce sustained economic growth on reservations. Economic bright spots in Indian Country had been few (Cornell and Kalt 1992, p. 3). American Indians residing on reservations have regularly been among the poorest people in the United States. In the 1970 US Census, the per capita income of Indians on major US reservations was 32 percent of the US average. It rose to 41 percent of the national average in 1980 but fell to 32 percent again by 1990 (Akee and Taylor 2014). The decline in the 1980s has been attributed to the pronounced retreat of federal funding directed toward Indian Country in that decade (Trosper 1996).

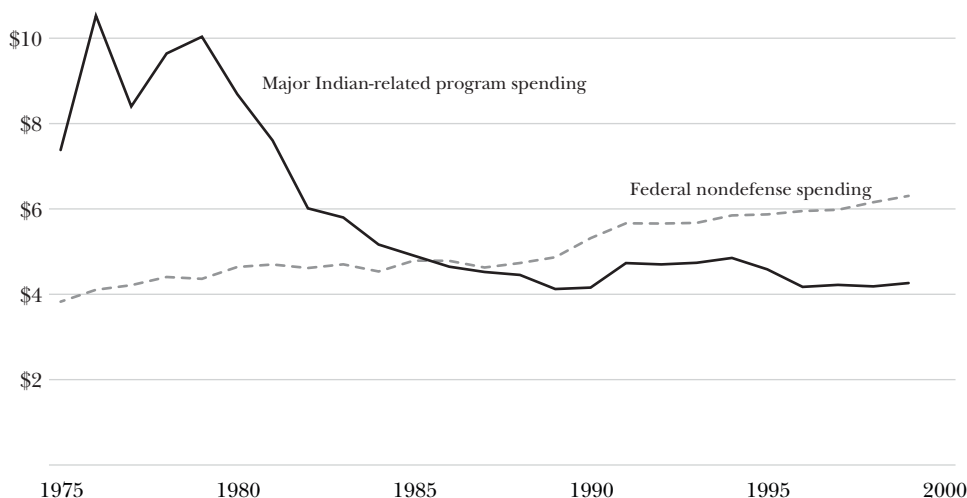
A number of obstacles to effective political rule and economic development help explain the persistence of reservation poverty. The historical legacy of Indian Country involves a loss of indigenous culture and language, the isolation of tribal communities on marginal lands, and the destruction of traditional tribal government structures (Cornell and Kalt 1995, p. 406). Potential investors confronted unfamiliar (or nonexistent) courts, laws, and commercial codes on American Indian reservations. Property interests were often unclear or held in federal trust, hindering transactions. In particular, inheritance rules often led to fractionated ownership, so that sometimes approval had to be sought from scores of owners—some of whom owned only a few square feet—before a property could be bought or sold (GAO 1992; Russ and Stratmann 2013).

Tribal governments were poorly equipped in the 1970s and 1980s to meet these challenges. Weak institutions of self-governance resulted in increased opportunism and corruption in some places. To make matters worse, tribal governments did not generally have the ability to raise revenues via taxation as most states and counties do (Fletcher 2004). For example, tribal governments cannot tax tribal lands held in trust by the federal government (McCullough 1994). Historically, issuing bonds was also prohibitively difficult (Clarkson 2007, p. 1015), although a few tribes have now managed to do so (Brashares and O’Keefe 2013).

Federal programs did not put things right. Expenditures in the “major programs affecting the nation’s Indian population, particularly those programs targeting Indians in federally recognized tribes” totaled \$4.4 billion in 1999 (Walke 2000), but as shown in Figure 1, this funding had decreased dramatically in the 1980s on a per capita basis (per service-eligible Indian), and did not keep pace with

² For example, amendments to the Clean Air Act and Clean Water Act explicitly established rules under which tribes can attain “treatment as state status” for making and enforcing environmental standards. More recently, Title XI of the Wall Street Reform and Consumer Protection Act of 2010 (better-known as the Dodd–Frank Act) defines tribes as states in the definition: “the term “State” means any State, territory, or possession of the United States . . . or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of title 25.”

Figure 1

Federal Spending on Major Indian Programs per Capita*(thousands of 2014 dollars)*

Source: Walke (2000); and FRED (2014) for deflating nominal dollars.

Notes: Per the Congressional Research Service (CRS), *Indian-related* includes program spending directed at “American Indian and Alaska Native tribes and their members because of their political status as Indians, not because of their racial classification or simply because they are citizens” (Walke 2000, p. 199). It includes the Bureau of Indian Affairs, the Office of Special Trustee for American Indians, the Indian Health Service (IHS), the Administration for Native Americans (Department of Health and Human Services), the Office of Indian Education (Department of Education), the Indian housing development program (Department of Housing and Urban Development), and the Indian and Native American Training Program (Department of Labor). The American Indian population denominator is the Indian Health Service’s tabulation of service-eligible Indians—a population smaller than the nationwide American Indian and Alaska Native population but larger than the on-reservation population—both as recorded by the Census Bureau. *Federal nondefense* excludes both national defense expenditures and interest on the federal debt and is divided by intercensal population estimates (Walke 2000, p. 203, 207).

national per capita nondefense spending thereafter. The US Commission on Civil Rights (2003, p. iii) found federal spending for Indians “not sufficient to address the basic and very urgent needs of indigenous peoples.” For example, per capita federal Indian healthcare spending was half what the federal government spent on prisoner health care at the time (p. 44).

Given these issues, external *and* internal investors often fled the scene (Cornell and Kalt 1998). The few extant instances of successful economic development in Indian Country were primarily confined to natural resource extraction industries and federal grant-funded projects. Tribes with confirmed treaty rights and large land bases were able to extract resource rents from low-cost, low-sulfur coal (Crow), old-growth timber (Warm Springs), hydropower (Salish & Kootenai), trophy elk (White Mountain Apache), and other resources. Tribes were sometimes able to move downstream: for example, they could collect fees on the right to harvest lumber or to use hydropower or coal, and then invest the proceeds in sawmills, power

plants, and other value-adding segments. Prior to vigorous self-determination, such resource development took place under federal supervision and was often limited in scale and efficiency (Krepps and Caves 1994, p. 134).

Tribal governments sought capital where they could, but often found that federal grants for economic development were the only viable option. Some tribes were able to build motels, industrial parks, and malls with federal grants. But such projects depended upon the grant-making trends of the day and were often poorly matched to competition, labor force, or demand (Cornell and Kalt 2007). These projects typically received only a single cycle of investment and left a swath of white elephants still visible in Indian Country.

Against this backdrop, some tribal governments asserted that they had the right to offer high-stakes bingo or legal card games on reservations in states where such activity was not expressly prohibited to everyone and that state and county gambling regulations did not apply on the reservation. Tribes in the vanguard sometimes sought and received federal approval of their gaming ordinances, as well as federal loans and loan guarantees to underwrite facilities: for an example, see Cattelino's (2008) discussion of the experience of the Seminole tribe in Florida.

***Cabazon v. California* and the Indian Gaming Regulation Act**

As American Indian tribal governments began developing gaming establishments in the late 1970s and early 1980s, local and state officials asserted jurisdiction, and arrests and lawsuits followed. Several court decisions in the 1970s distinguished between criminal/prohibitory and civil/regulatory authority on American Indian reservations. For example, the US Supreme Court held in *Bryan v. Itasca County* (426 US 373 [1976]) that a state could not impose a tax on property (specifically, on a mobile home) located on an Indian reservation. As this legal doctrine evolved, the general rule emerged that if an activity is considered criminal and is prohibited by state laws, then those state prohibitions apply on Indian reservations in the 16 states where Congress had transferred criminal jurisdiction in the Termination Era under PL 83-280.³ By contrast, if states merely regulate an otherwise legal activity—such as gambling—then the activity is a matter of civil regulatory authority and the state's jurisdiction does not generally extend onto Indian reservations. In 1982, the Supreme Court clarified this distinction when it declined to hear an appeal of a lower court ruling holding that Florida's gaming statute was civil/regulatory rather than criminal/prohibitory and therefore did not apply to the Seminole Tribe's high-stakes bingo operation (*Seminole Tribe of Florida v. Butterworth* 658 F. 2d 310 [US Court of Appeals, 5th Circuit 1981]).

³ Six states were required by the act to assume jurisdiction over American Indians residing on reservations in their states: Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin. Ten other opted to do so: Arizona, Florida, Idaho (subject to tribal consent), Iowa, Montana, Nevada, North Dakota (subject to tribal consent), South Dakota, Utah, and Washington (Goldberg, n.d.).

Across the country in southern California, the Morongo and Cabazon Bands built card room facilities that local and state governments sought to shut down, a controversy that eventually reached the US Supreme Court in *California v. Cabazon Band of Mission Indians* (480 US 202 [1987]). The federal government filed an *amicus* brief on behalf of the tribes in the *Cabazon* case, demonstrating that these businesses were supported by federal loans and loan guarantees, that the US Department of Interior had approved the tribal gaming ordinances, and that there was a significant federal interest in the success of these operations. The Court reasoned that because California's gambling laws in general were civil/regulatory—allowing charitable bingo nights and regulating card rooms, for example—rather than criminal/prohibitory, then state statutes could not be applied to tribal gaming operations. Moreover, the Court noted (p. 203):

The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them by promoting and overseeing tribal bingo and gambling enterprises. Such policies and actions are of particular relevance in this case since the tribal games provide the sole source of revenues for the operation of the tribal governments and are the major sources of employment for tribal members.

Thus, the Court ruled that the federal and tribal interests in tribal self-government and economic self-determination outweighed California's stated interest in preventing infiltration of tribal gaming by criminal elements. The state could also not forbid non-Indians from participating in high-stakes bingo and commercial card games on the reservation.

As the *Cabazon* claims wound toward the Supreme Court ruling in 1987, Congress began to discuss legislation that would apply to Indian gaming. The resultant Indian Gaming Regulatory Act passed in 1988. It created a National Indian Gaming Commission (NIGC) and established a three-class structure that delineated the roles of tribal, state, and federal governments. Class I gaming comprises traditional American Indian games of chance, which is considered social gambling for low stakes. Tribal governments regulate Class I exclusively, applying their own customs and traditions. Class II gaming encompasses bingo, pull-tabs, and nonbanked card games such as poker. Tribal governments and the NIGC jointly regulate Class II games, with tribal governments as the primary regulators. Finally, Class III gaming includes all other games, including house-banked card games and casino-style slot machines. Because the Class III games were perceived to be the biggest competitive threat to commercial casino jurisdictions and to hold the most potential to attract gambling customers, before a tribe can offer Class III gaming, it must negotiate a compact governing the scope and regulation of gaming with the state within whose borders the facility will be located.

Congress aimed to design an arrangement that would encourage states—some of which already possessed gaming regulatory expertise—to negotiate Indian gaming regulation in good faith, without diminishing tribal sovereignty or weakening tribal

bargaining power. While it might appear that states should have welcomed tribal gaming since it could potentially bring additional tax revenue, the law forbids states from requesting a share of tribal gaming revenue as a condition of signing a compact. The Indian Gaming Regulatory Act does allow tribal reimbursement of state regulation of Indian gaming and permits voluntary tribal contributions to local governments but does not allow revenue sharing or other indirect state taxation.

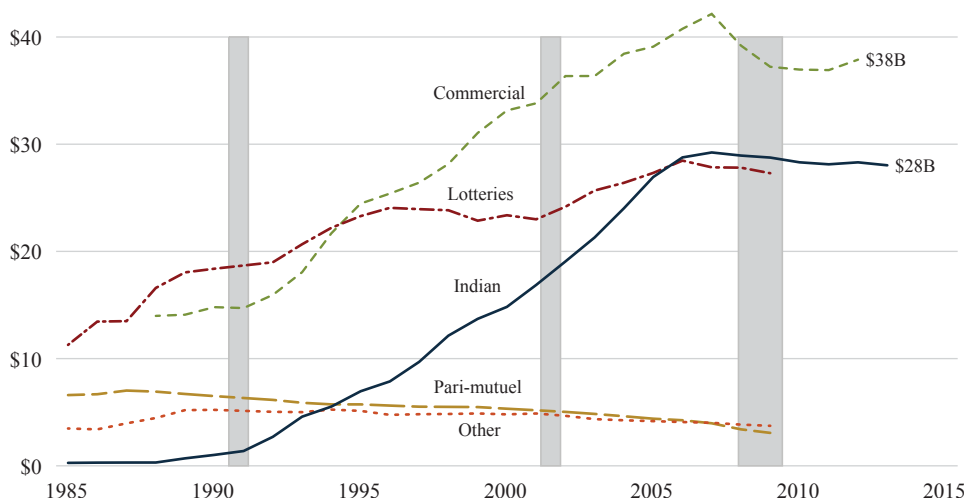
Of course, states could block Class III gaming entirely by refusing to agree to tribal government requests for compact negotiations, but the Indian Gaming Regulatory Act (IGRA) also allowed tribes to sue states for failing to negotiate in good faith. The most common reason a state would refuse to negotiate with a tribe was a disagreement on the permitted scope of gaming in the state, and this conflict delayed compacting for over a decade in a number of states, including California and Florida. However, the power of tribes to sue states under IGRA was ultimately ruled unconstitutional in *Seminole Tribe of Florida v. Florida* (517 US 44 [1996]), making ambiguity and litigation the order of the day in many states. Matters were further complicated in states like South Dakota that had substantial non-Indian gaming that would compete with tribes.

The negotiations between states and tribes over compacts to govern the scope of permitted gaming and the regulation of Class III gaming proceeded smoothly in some states and in some cases yielded results better than the tribes might have expected. In Michigan, for example, the state agreed to defer to tribal regulatory commissions so long as Indian casinos displayed signs explaining that Michigan did not regulate them (GAO 1998). The tribes of Minnesota and Mississippi negotiated compacts without an expiration date, virtually eliminating the “hold-up problem” that makes it more difficult to attract investment funds for casinos if the state leaves open the possibility of revisiting the compact in the future—a problem that continued to affect tribal casino development elsewhere. From 1991 to 1995, new compacts between tribes and states were successfully negotiated at a pace of about two dozen per year. By the end of the 1990s, compacts concerning Class III operations had been agreed for about 140 reservations that were home to about half of the population of American Indians living on reservations in 2000 (Taylor and Kalt 2005). As of 2010, reservations that were home to more than 90 percent of Indians living on reservations had gaming operations (Akee and Taylor 2014).

Among the tribes that have not signed a compact, some chose not to develop casinos for internal reasons such as religious or moral opposition to gaming industries. For instance, the Hopi Tribe has chosen repeatedly to reject casino development. Seneca, Navajo, and others chose not to pursue gaming compacts for a long period and then reversed course later. In some instances, tribes opened casinos and then closed them due to low consumer demand (for example, the Lummi Nation, the Hualapai Tribe, and the La Posta and Santa Ysabel Bands).

In states with permitted gaming, tribes could generally open Class II gaming operations without a compact. Class III gaming, however, involves a significant house advantage in card games and electronic gaming devices, more employment, and therefore more governmental revenue for tribes. These revenues are

Figure 2

Indian Gaming Revenues in Comparison to Other Sectors'*(billions of 2013 dollars)*

Sources: National Indian Gaming Commission (2014); American Gaming Association (2014); International Gaming and Wagering Business (various years); Christiansen (1999); Christiansen (2001); National Bureau of Economic Research (2012); US Census (2011c); FRED (2014); GAO (1997).

Notes: "Lotteries" are state lotteries. "Pari-mutuel" wagering most commonly takes the form of horse and dog racing. "Other" includes charitable gaming, charitable bingo, legal bookmaking, and card rooms. The grey areas represent recessions.

the ultimate goal for many tribes. As the owners of the gaming facility, tribal governments generally earmark gaming revenues for specific tribal budget items, offsetting federal funding shortfalls across myriad programs. Tribal governments are obligated by the Indian Gaming Regulatory Act of 1988 to invest 100 percent of net gaming revenues in ways that improve tribal welfare. Section 11 of IGRA requires that net revenues from "any tribal gaming" be used for five primary purposes: 1) to fund tribal government operations or programs; 2) to provide for the general welfare of the Indian tribe and its members; 3) to promote tribal economic development; 4) to donate to charitable organizations; or 5) to help fund operations of local government agencies. Consistent with IGRA's requirements, tribal governments are investing gaming revenues into a variety of tribal programs and services (health, law enforcement, and education, to name a few) and promoting economic diversification in ways that seek to benefit tribal citizens.

In the aftermath of the 1988 legislation, Indian gaming revenues grew at a rapid pace, as shown in Figure 2. By 1992, the revenues from Indian gaming eclipsed charitable bingo and other charitable gambling (not independently displayed). Three years later, Indian gaming revenues overtook those of pari-mutuel wagering, which most commonly takes the form of horse and dog racing. In 2006, Indian gaming outpaced state lotteries. More recently, revenues have plateaued both for

commercial gaming and Indian gaming. At present, revenues from Indian gaming are roughly three-quarters of the size of commercial gaming.

While the tribal gaming industry has grown substantially, the political requirements imposed by the Indian Gaming Regulatory Act, specifically the tribal-state compact process, have meant that more than 25 years later, the tribal gaming industry has not grown to meet market demand in all locations. Tribal-state disputes have concerned the types of allowable games (Washington), demands for revenue sharing (New Mexico), the terms of intergovernmental gambling competition (South Dakota), and conflict over the permitted scope of games (Florida). Compacts in states like California and South Dakota placed binding constraints on the number of electronic gaming machines, and the experience of tribes nationwide suggests that tribes in those states could have developed bigger facilities earlier.

Perhaps the biggest constraint is that the Indian Gaming Regulatory Act required tribal governments to locate the facilities exclusively on tribal trust lands. While section 20 of IGRA specifies a process for tribal, state, and federal approval of gaming facilities on subsequently acquired lands (in recognition of the complex history of Indian land claims), it has proven arduous to do so. As of 2013, only eight tribes had applied for and received approval from the US Secretary of the Interior to have such lands taken into trust ownership status by the federal government for tribal government gaming.⁴ Consequently, the geographic distribution of Indian gaming reflects the historic contingencies of American Indian land cessions and federal reservation-making, not the market demand for an early 21st century leisure industry.

As of year-end 2013, one commercial directory identified 468 open Indian gambling establishments in 31 states. Their sizes ranged from the Forest County Potawatomi Community's 780,000 square-foot Potawatomi Hotel & Casino in Milwaukee, Wisconsin, to very small travel-mart slot rooms of only a few hundred square feet (Casino City 2013). As the range in sizes implies, the ability of tribes to reach customers varies widely. The National Indian Gaming Commission (2014) publishes data on the distribution of tribal gaming revenue. For fiscal year 2013, the 252 tribal gaming facilities that earned \$25 million or less represented 56 percent of all operations but only 7.4 percent of all Indian gaming revenue. By contrast, the 78 operations that took in \$100 million or more represented 17 percent of the facilities but 71 percent of the sector's revenues. A skewed distribution is not surprising, arising as it does from access to urban population centers. It is similarly unsurprising that some populous reservations have large casinos (for example, the Gila River Indian Community in Chandler, Arizona, near Phoenix) and others have small ones (for example, the Pine Ridge Reservation in South Dakota). The converse is true too. Small reservation communities are located across the market spectrum; some have access to urban areas (the San Manuel Band in California) and some are in remote locations (the Campo Band in California).

⁴ They are the Enterprise Rancheria of Maidu Indians (CA), Forest County Potawatomi Community (WI), Fort Mojave Indian Tribe (AZ, CA, NV), Kalispel Indian Community (WA), Kaw Nation (OK), Keweenaw Bay Indian Community (MI), Northern Cheyenne Tribe (MT), and Northfork Rancheria of Mono Indians (CA) (Hart 2014).

The Consequences of Gaming for Indian Nations

The effects of tribal gaming on American Indian nations have been profound. Kevin Washburn (2008), Assistant Secretary of Indian Affairs at the US Department of the Interior, has said, “Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of American Indian reservations.” While there is considerable heterogeneity of results across different tribal communities, gaming has been welcome for the vast majority.

In contrast to grant-funded federal development efforts, Indian gaming yielded sustained revenues for almost all tribes that built facilities. This break with the past was possible for a number of reasons. First, tribes entered early in the gaming industry’s growth cycle. Outside the state of Nevada and Atlantic City, New Jersey, only a few non-Indian governments had begun to allow gaming in the 1980s. Second, while a few regions witnessed multiple tribes introducing gaming, in many cases a given tribe might be the sole operator for miles. Third, tribes worked hard to capture margins by starting conservatively, sometimes with temporary buildings, to avoid overcapitalizing their businesses while assessing what was, in the early 1990s, a poorly understood opportunity. Fourth, tribes went to capital markets, retained attorneys, hired management consultants, and developed the facilities on their own initiative to exploit opportunities they themselves evaluated. Not all tribes succeeded. But in contrast to federally conceived, single-cycle, grant-funded investments in hotels, mini-malls, and other flavors-of-the-month, gaming development was self-determined and grew with internal consistency checks and market feedback.

One of the measures of achievement of the Indian Regulatory Gaming Act of 1988 is that many tribal governments now have an ample flow of revenues for the first time. Indian gaming revenues have allowed tribes to invest in new programs to address poverty and provide public goods.⁵ One of the most common investments has been in education, including school construction (for example, Mille Lacs Ojibwe), college scholarships (for example, the Osage Nation 2015), and Native language revitalization programs (Cherokee). Tribes have developed “wrap-around services” to help their citizens get jobs and keep them (Sisseton-Wahpeton Oyate). Tribes have combined conventional, traditional Native religious and non-Indian religious treatment in drug rehabilitation programs (Taylor 2006). Improvements in tribal services have resulted from an increase in government resources and employment. As a result, tribes have reduced emergency response times from hours to minutes (at Gila River Indian Community, HPAIED 2008, p. 152). Tribes have invested in their cultural lives, specifically museums, ceremonial grounds (Kalispel) (Taylor 2006, p. 36), artifact repatriation (San Carlos Apache), and arts patronage. Services have increased dramatically across reservations. There have been improvements in elder care services (Tohono O’odham), foster care (Fond du Lac), policing

⁵ Unless otherwise cited, the examples in this paragraph are drawn from the reports of Honoring Nations, an awards program for excellence in Native governance housed at Harvard’s Kennedy School of Government (HPAIED 2014).

(Flandreau), endangered species management (Nez Perce), water quality (Sandia Pueblo), financial literacy (Umatilla), and public works (Lummi).

Tribal governments have also used the revenues from gaming to fund other economic development, based on the widely shared view that Indian gaming will not provide sustained economic growth indefinitely. Typically, the pattern begins with developing adjacent hotels, conference halls, amphitheaters, and other amenities that increase the drawing power and visit durations of gaming facilities. In many cases, tribes have invested in nearby retail businesses, outlet malls, and other businesses that take advantage of customer traffic. Finally, they turn toward more distinct sectors as varied as banking (Citizen Potawatomi Nation), commercial real estate (San Manuel), and federal facilities management (Winnebago), often redeploying the management experience gained in tribal gaming development.

The operation of tribal gaming facilities has also changed labor markets on reservations. Opening tribal gaming facilities increases the demand for both high- and low-skill labor on the reservation. New employment opportunities exist in management and professional positions in the gaming and tourism industries. Over time, tribes have replaced external executives with internal tribal members in those management positions as citizens have gained relevant experience and education in the industry. Cozzetto (1995) found a decline in Indian welfare dependence coincident with gaming facility openings. Others have found that a substantial fraction of American Indian employees of tribal gaming come from the ranks of the unemployed (Cornell, Kalt, Krepps, and Taylor 1998). As programs and government services have grown, so too has tribal government employment. In the past 20 years, the proportion of American Indians on reservations employed in public service (including tribal government employment) has increased by 5 percentage points, a 20 percent increase (Akee and Taylor 2014). A similar increase is not observed in other sectors of the tribal economy, nor is this duplicated in the non-Indian population in the same time period. It is also important to note that the number of gaming management contracts (often with external, non-Indian casino companies) has decreased over time, indicating that tribal employees are now managing tribal enterprises. No new external management contracts have been approved by the National Indian Gaming Commission since 2010 (National Indian Gaming Commission 2015). For instance, the San Pasqual Mission Band of Indians bought out their five-year management contract after just one year and began to manage gaming operations with their own hires (Contreras 2005), a pattern that repeats across Indian Country.

Tribal gaming affects local and regional migration patterns as well. Tribal member income and employment have increased (Reagan and Gitter 2007) and therefore helped to stop or reverse “brain drain” off of the reservation. Improving economic opportunities appear to have brought return migration as well. In the first decade after the Indian Gaming Regulatory Act of 1988, there was an increase in tribal populations (Evans and Topoleski 2002). American Indians increasingly view their tribal governments as capable of creating desirable places to live and work. There are instances of interest rates falling when these revenue-generating tribal governments choose to borrow, as well. The Squaxin Island Tribe north of

Olympia, Washington, for example, found that its cost of capital dropped several percentage points after the introduction of gaming operations (Taylor 2006, p. 44).

Reservation life has improved in measurable ways in the wake of tribal gaming. There was a relatively large convergence in the average conditions of American Indians on reservations towards that of the rest of the US population in the 1990s, as shown earlier in Table 1. Convergence continued, though more moderately in the 2000s. Real per capita income earned by Indians living on reservations in the contiguous 48 states grew by 33.3 percent in the 1990s (compared to the national average of 11.4 percent) and by 11.5 percent over the 2000s (compared to the national average of -3.3 percent). Consistent gains were made over the 1990–2010 period for educational attainment, income, and female labor participation, accompanied by similar reductions in poverty and overcrowded homes. In most instances, improvements on Indian reservations outpaced national changes over the period. Larger gains were observed for those reservations operating a casino or bingo hall by 2000 (Taylor and Kalt 2005).

Some tribal governments—typically ones without very large populations—have distributed a percentage of their gaming revenues to citizens. These per capita disbursements typically take the form of annual or semi-annual checks sent directly to tribal members above the age of 18 (or held in escrow for minors). As of 2009, 120 tribes had filed revenue allocation plans with the Bureau of Indian Affairs, a prerequisite under the Indian Gaming Regulatory Act for tribes' allocating revenue per capita in this way (Taggart and Conner 2011). The amounts distributed may vary according to the revenue in a given year. The total amount of payments is not typically disclosed publicly; however, several tribal governments announce the size of their payments, which range from a few hundred to thousands of dollars per person annually. This change in household income can have profound effects on previously poverty-stricken households. Cornell et al. (2008) provide an overview of determining eligibility and other issues confronting tribes that make these kinds of per capita payments.

A few empirical studies have examined the effects of the per capita income disbursements or casino operations on American Indian populations and adjacent non-Indian communities. For example, Akee, Copeland, Keeler, Angold, and Costello (2010) found that an increase in unearned income from per capita payments resulted in increased educational attainment for children in poverty-stricken households. For each additional \$1,000 in unearned income at the household level, there was an increase of about 6 to 7 percentage points in high school graduation rates for children from previously poverty-stricken households. Additionally, American Indian children in households with higher incomes due to the per capita transfer payments attended school about four more days per quarter. In related work examining the effect of casino operations on American Indians, Wolfe, Jakubowski, Haveman, and Courey (2012) found that casino operations are correlated with decreases in smoking by 9 percent, in heavy drinking by 5 percent, and in obesity by 2.7 percent. Evans and Topoleski (2002) found that reservations with gaming experienced increases in employment of about 26 percent and an increase in population size of about 11 percent, four or more years after casino operations began.

Although the vast majority of empirical research on Indian gaming has found benefits to those living on or near the reservations, Indian casinos have been associated with controversial and even deleterious effects in some communities. Tribal governments vary in their capacity to withstand political division, to administer programs effectively, and to produce public goods that their citizens want. One controversial outcome has been the disenrollment of tribal citizens, which has resulted in significant conflicts in a number of American Indian communities (Gonzales 2003). Reducing the size of the tribal population can potentially benefit existing tribal members if there are per capita distributions of gaming revenues. Fights over control of the gaming facility itself have also accentuated factional division in Indian communities leading, in extreme cases, to standoffs (Picayune Rancheria) and even constitutional crises (Winnebago of Wisconsin). On occasion, casino competition has intensified intertribal conflict, especially where off-reservation casinos are proposed. For example, in November 2014 California citizens voted against Proposition 48, which would have ratified a tribal-state gaming compact for the Northfork tribe to open a gaming facility away from its reservation land but closer to population centers. Some of the opposition came from other tribes whose facilities would have faced heightened competition from the proposed new facility.

Finally, it should be noted that for all the good news coming from Indian Country since the passage of the Indian Gaming Regulatory Act of 1988, the accumulated economic and social deficits on reservations are so large that even if Indian income growth keeps its pace, it will take decades for American Indians to close the gap with the average American (Taylor and Kalt 2005, p. 7; Akee and Taylor 2014, p. 36). Indeed, given that standards of living in the United States are recovering from the Great Recession and given that there is no apparent successor to gaming waiting in the wings for Indian Country, it will remain critical for tribal policymakers to get other aspects of development right.

Consequences for State and Local Economies

During the late 1980s, at the time of the *Cabazon* decision and the debates over the Indian Gaming Regulatory Act, state and local governments expressed concerns that Indian gaming facilities would produce negative externalities in two broad categories. First, it was argued that rising visitation to the reservations would have an adverse impact on local governments' infrastructure and services, clogging highways, overloading emergency services, or overtaking waste treatment facilities. Second, it was argued, Indian gaming facilities would market an inherently risky product—gambling—which would have negative social impacts in host communities such as bankruptcy, organized crime infiltration, disordered gambling, drug abuse, suicide, and other social ills.

The Indian Gaming Regulatory Act contained explicit provisions to address potential adverse effects of the tribal gaming industry. Among five sanctioned uses of net tribal gaming revenues are: “to donate to charitable organizations” and “to help

fund operations of local government agencies” (25 USC §2710(b)(2)(B)). In addition, IGRA envisioned that tribes could reimburse states’ regulatory costs (25 USC §2710(d)(3)(C)(iii)). Indeed, many state-tribal compacts have clauses governing payments for local impact mitigation or regulatory reimbursement clauses. A number of state-tribal compacts also have clauses governing investment in responsible gaming initiatives, including corporate and tribal policies and procedures that help prevent or ameliorate the consequences of disordered gambling (for definitions, see National Center for Responsible Gaming 2011, p. 3). Broadly speaking, IGRA and its compacting process encourage cooperation in the production of intergovernmental public goods. Comprehensive or national-level research about the relationship between tribes and local governments is thin. However, the available evidence does not suggest that the early fears of state and local government have been borne out.

For example, what of the initial fears related to the social costs of disordered gambling behavior resulting from increased access to gambling through the expansion of Indian gaming? Empirical research of gambling pathology has failed to identify large net costs. For example, a 16-year, 100-community randomized multi-level regression performed by the National Opinion Research Center (NORC) at the University of Chicago for the National Gambling Impact Study Commission found that when a casino is opened, communities near the casinos experienced reductions in unemployment (one percentage point), some changes in wage distribution across sectors, and no discernible change in bankruptcy, crime, or infant mortality (Johnson 1999). For comparison, NORC calculated that the national annual costs of problem and pathological gambling, \$5 billion in 1998, were 3 percent of the estimated \$166.5 billion in annual national costs for alcohol abuse (Gerstein et al. 1999, p. 53). Himmelstein, Warren, Thorne, and Woolhandler (2005, p. 67) found that about half of all bankruptcy filers cited medical emergencies as a contributing cause, whereas uncontrolled gambling was listed as a contributing cause by only 1 percent of bankruptcy filers.

Indeed, some research at the state level reveals that newly expanded opportunities to gamble offer casino guests access to information about problem gambling that they previously lacked, while having little long-term effect on the prevalence of problem gambling. A study in California found that between 1990 and 2006, when more than 40 new tribal facilities opened in the state, California experienced a reduction in gambling participation generally (Volberg, Nysse-Carris, and Gerstein 2006, p. 54). This finding is not all that unexpected once one considers that access to other forms of gambling in the state, including the lottery, card rooms, and horse racing, existed in 1990, along with proximity to full-scale gambling in neighboring Nevada. The report finds that “[based] on the survey data, it is possible to compare lifetime participation rates for several gambling activities in 1990, 1999 and 2006 . . . Casino gambling increased slightly between 1990 and 1999 but then decreased between 1999 and 2006” (p. 53). This decline in participation rates and duration reflect what is known as the “novelty effect,” wherein gamblers are initially drawn to a new gambling product or service but their overall participation then reverts to the mean over time.

Another claim often made by state and local governments against Indian gaming argues that Indian casinos diminish state and local tax collections (Washington Research Council 2002; Anders, Siegel, and Yacoub 1998). Much of the empirical support for the claim remains unpersuasive.⁶ After all, reservation economic activity requires goods and services from off-reservation communities, which incur local and state taxes on sales and income. Survey data from Washington State tribes, for example, indicate that two-thirds of the 27,376 workers employed in tribal casinos, governments, and nongaming enterprises in 2010 were non-Indians (Taylor 2012). Detailed procurement information from four of those tribes indicates that at least 94 percent of all tribal goods and services in 2004 came from off-reservation suppliers (Taylor 2006). Thus, even when consumer spending shifts from off-reservation (and state-taxable) restaurants, movie theaters, and bars to Indian casinos, spas, and hotels, the overall effects on input markets may be negligible. Indian gaming may cause a shift in spending patterns, but it is likely that state revenue from taxes on input labor, goods, and services would be virtually unchanged. In one study, Taylor (2005) found no discernible effect of the introduction of casinos on taxable sales and property in the state of Washington for 268 communities over 13 years.

Moreover, tribe–state gaming compacts often contain revenue-sharing provisions. Although state insistence on tax revenue or revenue-sharing as a condition of compact approval was prohibited by the Indian Gaming Regulatory Act, the US Secretary of the Interior has approved compacts with revenue-sharing provisions under the condition that the states contribute to the economic value of the tribe’s facilities in some way (Martin 2003). Such contributions range from giving tribes statewide casino exclusivity (for example, Mashantucket Pequot and Mohegan in Connecticut) to deploying condemnation powers to allow a tribe to purchase property for their business and selling a state-owned convention center for \$1 (Seneca in New York). Such terms make states quasi-joint venture partners—contributors to and beneficiaries of Indian gaming development. Over the years, such revenue flows have in certain places been substantial, for example: \$1 billion in 11 years to Arizona (Arizona Department of Gaming 2014), and \$6.7 billion in 22 years to Connecticut (Connecticut Department of Consumer Protection 2014). In 2012, nationwide Indian gaming revenue sharing with states was estimated to be \$1.5 billion (Meister 2014).

In addition to direct fund transfers, nearby off-reservation communities also benefit from Indian gaming’s economic spillovers—spillovers that may exceed those of commercial gaming for at least three reasons. First, in many places, Indian gaming attracts customers from further away than more competitively distributed amenities, making Indian gaming facilities net contributors to the local or regional economies, all else equal. Oklahoma’s Indian gaming, for example, recruits customers heavily

⁶ As one example, an article on the subject mistook Maricopa County (Arizona) tax revenue declines coincident with tribe-state *compacting* for the effects of Indian casino *openings* (Anders, Siegel, and Yacoub 1998). The examples in the analysis actually pre- and post-date a purported casino-driven fall in revenue by many months and appear, by the paper’s own data, to have actually left contemporaneous Maricopa County revenue undisturbed (Taylor 2005).

from neighboring Texas—which does not have casinos. The opening of Seneca Niagara Falls Casino at year's end 2002 coincided with precipitous revenue decline across the border in Ontario (Gardner 2005; Niagara Falls Canada 2006), as western New Yorkers pulled leisure spending back from Canada. Even within state borders, destination effects can be pronounced. Second, Indian gaming often takes place in poorer-than-average regions of the country—not just the reservations are poorer, but the surrounding counties, too. In such regions, chances are better that underutilized resources, especially labor, see net gains in utilization, with larger consequences for the regional economy. Third, the investment of tribal gaming revenue is geographically restricted to the tribe's governing jurisdiction rather than distributed wherever in the global economy a commercial casino company's shareholders might be.

Evidence on these effects is accumulating. In one study, the presence of an Indian casino in an adjacent California county was associated with greater real median family income growth from 1990 to 2000 (Center for California Native Nations 2006). A follow-up to that parsimonious difference-in-difference analysis found a diminished but persistent effect in the subsequent decade (Akee, Spilde, and Taylor 2014). Evans and Kim (2006) found that Indian casinos reduced unemployment and increased wages for low-skilled workers. A re-examination of the National Opinion Research Center (NORC) study discussed above (Johnson 1999), which examined more closely the counties proximate to Indian gaming introductions, found that the effects were more positive than those of commercial non-Indian casinos and that those counties had a reduced reliance on welfare (Taylor, Krepps, and Wang 2000).

Indian gaming often does attract funds that could have been spent on entertainment at other casinos or on nongaming leisure activity. But of course, the same can be said of a wide variety of entertainment-related destinations. One would not want to overstate the social welfare benefits of Indian gaming by treating every job in the industry or every dollar of revenue flowing to the tribes as an addition to social welfare. But neither would an economist argue that an entertainment venue has zero social benefit on the grounds that the entertainment dollars could have been spent somewhere else. The true gain to social welfare, of course, lies somewhere in-between.

Where Indian gaming development increases unreimbursed infrastructure burdens on surrounding governments, such costs are the consequences of growth in regional economic activity, the state taxation of which would at least partially rectify the harm. Of course, the degree to which incremental taxes exceed, meet, or fall short of the burden depends upon the tribal-state compact terms governing local impact mitigation and revenue sharing, intrastate fiscal allocation mechanisms, and the attributes of the burden itself. The Indian Gaming Regulatory Act has specific clauses that allow for the reimbursement of non-Indian infrastructure burdens under the terms of the state-tribal compact. On the other hand, there may be adverse effects for other leisure activities and businesses in a region. As gaming operations begin in a region, consumers may shift their leisure spending towards the new, previously unavailable gaming activities. Assessing whether the overall benefits to consumer surplus from the introduction of a new leisure activity

outweigh potential losses to other pre-existing leisure activity businesses has not been adequately examined.

Conclusion

Indian gaming is no longer in its infancy. Indian tribes will face new competitors as state-sanctioned casinos continue to spread. As Eadington pointed out in this journal (1999, p. 190), overall casino gambling as an industry has been undergoing a long progression from concentrated availability in Las Vegas and Atlantic City to dispersed localities around the country. Technological change is now raising the possibility of online gaming operations that may rival or complement brick-and-mortar operations. These changes mean that the days of regional exclusivity for a large number of Indian gaming operations are probably numbered, and so too are the days of build-it-and-they-will-come operations.

In the years ahead, tribal governments will face stronger incentives to improve tribal gaming performance. At various times and places, certain Indian gaming facilities have faced competitive pressures that have been severe (Ohkay Owingeh), devastating (Penobscot), and unsustainable (Lummi). Tribes will benefit from research exploring these cases and generally explaining the variation observed in casino performance. Market access to large numbers of nearby customers is a first-order explanation, of course, but beyond that governance quality, management abilities, amenity diversity, and service quality all play a role.

Tribal incentives to diversify the nongaming aspects of their governance and economies will strengthen, too. The low-hanging fruits of self-administration—such as correcting principal-agent slippage in federal timber management (Krepps and Caves 1994)—may already have been harvested in many places. Likewise, tribes may have already reaped the bulk of the benefits of tailoring federal programs to local needs and conditions. Tribal leaders increasingly confront the politically difficult work of cutting underperforming programs, improving performance from tribal agencies, and reducing popular budget items. Tribally owned enterprises face the challenges that government-owned businesses face around the globe (Grant and Taylor 2007). Native fertility is higher than for Americans generally (US Census 2011b), and to reverse the incentives for emigration from tribal areas, tribal governments will need both to diversify the tribally owned sector and to develop policies that encourage private business formation and recruitment on the reservations as well (Cornell, Jorgensen, Record, and Timeche 2007).

While commercial casino gaming is spreading to new jurisdictions across the United States, it is not clear that this type of gaming expansion will bring the pronounced social and economic development benefits that tribal gaming brings to communities that are on or near tribal lands. The requirements under the Indian Gaming Regulatory Act of 1988 that tribal gaming facilities be owned by tribal governments and that revenues be invested in the general welfare of the community and take place on tribal trust lands has resulted in an intense and particularly local concentration of tribal gaming's benefits that may be difficult to replicate.

The requirements of the Indian Gaming Regulatory Act have triggered the development of tribal institutions too. For example, IGRA requires tribes to establish independent gaming commissions for licensing casino personnel and regulating gaming facilities. National Indian Gaming Commission regulations further specify minimum internal control standards governing cash-handling and customer blandishments. On their own initiative, tribal governments have added to these mandatory structures and created independent boards that separate the governance of the tribal polity from that of tribal businesses, and many have promulgated policies that handle everything from personnel disputes to budgeting, appropriating, and investing tribal gaming revenues. A steady flow of gaming revenues also loosened a tight liquidity constraint holding back the development of institutions unrelated to gaming operations. For example, the Tulalip Tribes north of Seattle were able to take back criminal jurisdiction from the state of Washington by developing competent judicial, policing, and prosecutorial staffs. The Osage and Citizen Potawatomi Nations of Oklahoma (and many others) have modernized their constitutions. Moreover, the preponderance of tribal programs winning Harvard's Honoring Nations awards for excellence in tribal governance have been created by tribes that operate gaming facilities. Most such reforms and innovations might not have been accomplished as quickly or successfully (or at all) without gaming revenues for salaries and professional services.

It is also the case that on a few reservations, gaming revenues have raised the stakes of internal political conflict, straining to the breaking point the weak political institutions bequeathed by historical federal policies. Some tribes have emerged from such crises with stronger constitutions (for example, the Ho-Chunk Nation in Wisconsin), but tribes have also been deeply riven by disenrollment controversies and constitutional crises. Generally, we see that institutional reforms and programmatic innovation are the norm and deleterious crises the exception, but more systematic research is needed to link gaming and institutional change.

There continues to be a great need for research on the impact of the gaming industry on long-run outcomes for American Indians. Evaluations of gaming are typically general in scope, not focused on Indian gaming in particular (for example, Grinols 2004; Walker 2007; Eadington 1999). How are the spread of Indian gaming and the rise in local incomes related to factors such as Native family composition, indigenous language proficiency, reservation brain drain, or expectations and beliefs about the future? After nearly three decades of additional investments in educational and social programs, what lessons can we extract for socioeconomic recovery in other Native and non-Native populations (Besaw et al. 2004)? A generation of American Indians born after the 1987 *Cabazon* decision and the passage of the Indian Gaming Regulatory Act of 1988 is coming of age. Indian gaming has profoundly changed the trajectories of many individual lives and the patterns of economic development on American Indian reservations. Additionally, it has laid the institutional foundation for sustained change and provided an environment across Indian Country that is attractive for investment of capital and human resources, in some cases for the first time in generations.

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ARTICLE: INDIAN GAMING AND BEYOND: TRIBAL ECONOMIC DEVELOPMENT AND DIVERSIFICATION

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Highlight

The timing of the South Dakota Law Review symposium on Economic Development in Indian Country coincides with the 20th anniversary of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§2701-2721, the federal law that established the legal and regulatory framework for tribal government gaming.

When Congress enacted IGRA, it codified tribes' sovereign rights to conduct gaming on Indian lands, a right that the United States Supreme Court recognized in *California v. Cabazon Band of Mission Indians*.¹ One of IGRA's key policy goals was the promotion of tribal economic development. Twenty years later, Indian gaming has made significant headway toward achieving this goal. Tribal gaming is a \$ 26.5 billion industry that has generated hundreds of thousands of jobs and has leveraged an unprecedented diversification of reservation economies across the United States. Tribal gaming's economic impacts are about more than just quantifiable dollars or jobs - they are transformative. In this article, the authors - economist Alan Meister, law professor Kathryn Rand, and political scientist Steven Light - demonstrate how the legal, political, and regulatory underpinnings of Indian gaming created the foundation for its phenomenal economic success, and provide a detailed account of tribal gaming's economic impacts on and off reservations. The authors also explore the economic future of Indian gaming.

Text

¹ 480 U.S. 202 (1987).

[*375]

I. INTRODUCTION

Economic development in Indian Country, the topic of this symposium issue, is nearly synonymous with tribal gaming. No other modern industry has had such a substantial economic impact on tribal economies, and no other tribal [*376] industry has made such significant contributions outside of tribal economies.

Just two decades ago, as Congress deliberated over the bill that would become the Indian Gaming Regulatory Act of 1988 (IGRA), ² Indian gaming consisted of a few tribes' high-stakes bingo halls and card rooms in a handful of states. Today tribal gaming is one of the fastest growing segments of legalized gambling in the United States, fed by the robust demand for casino gaming. In 1988, Indian gaming in a few bingo halls earned about \$ 121 million; in calendar year 2007, revenues from 425 gaming facilities operated by 230 tribes in 28 states topped \$ 26.5 billion.³

How did Indian gaming become a multi-billion-dollar industry? What are its economic and fiscal impacts, both on and off the reservation? And what does the future hold for Indian gaming and tribal economic development? We take up each of these questions in turn.

II. A BRIEF HISTORY OF INDIAN GAMING

A. California v. Cabazon Band of Mission Indians

The modern Indian gaming industry has its roots in the relatively modest bingo halls and card rooms operated by a number of tribes, most notably in California and Florida, in the late 1970s and 1980s. Almost as soon as tribes opened high-stakes bingo halls, states worked to close them.⁴ By relying on the general principle of federal Indian law that states may not regulate tribal lands or tribal governments, tribes created a market advantage: tribes could offer games with higher stakes, longer hours, and bigger jackpots than were allowed under state regulations.⁵

In 1987, the year before Congress enacted IGRA, the U.S. Supreme Court decided California v. Cabazon Band of Mission Indians.⁶ The case arose out of California's attempts to close a high-stakes bingo hall operated by the Cabazon Band of Mission Indians on its reservation near Palm Springs. As California law permitted charitable bingo games, but limited jackpot amounts and restricted the use of revenue to charitable purposes, the state considered the tribe's bingo games illegal. California acknowledged that states ordinarily lacked authority over tribal lands, but argued that Public Law 280 authorized application of California's bingo regulations on the tribes' reservations.⁷

² 25 U.S.C. §§2701-2721 (2000).

³ Alan Meister, Casino City's Indian Gaming Industry Report 10-11, 14 (Newton: Casino City Press 2008) (2008-09).

⁴ Tribes prevailed in challenging state assertion of authority over reservation gambling operations. See *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

⁵ See Kevin K. Washburn, Federal Law, State Policy, and Indian Gaming, 4 Nev. L.J. 285, 294-95 (2004).

⁶ 480 U.S. 202 (1987).

⁷ See *id.* at 207-08; Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588-90 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in Titles 18 U.S.C. and 28 U.S.C. (2006)).

Enacted in 1953, [*377] Public Law 280 gave certain states, including California, a broad grant of criminal jurisdiction and a limited grant of civil jurisdiction over tribes within their borders.⁸

The Cabazon Court explained that if California's gambling laws were criminal prohibitions against gambling, the state could enforce them against the tribes under Public Law 280.⁹ The extent of the state's civil jurisdiction was another matter. In an earlier case, the Supreme Court had ruled that Public Law 280's grant of civil jurisdiction did not provide broad authority for state regulation generally but rather was limited to private civil litigation in state court - that is, the statute conferred adjudicatory, rather than regulatory, civil jurisdiction.¹⁰ Thus, if California's gambling laws were civil regulatory laws, the state did not have authority to enforce them against the tribes.

The "criminal/prohibitory-civil/regulatory" distinction required examination of state public policy concerning gambling to determine whether state law constituted a criminal prohibition against gambling generally or mere civil regulation of legalized gambling. At the time, California operated a state lottery and permitted pari-mutuel horserace wagering, bingo, and card games. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," the Cabazon Court reasoned, "we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."¹¹ Cabazon's bottom line was that as long as gambling did not violate state public policy, tribes could operate and regulate their own gaming establishments free of state interference.¹²

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B. The Indian Gaming Regulatory Act of 1988

After Cabazon, states and commercial gaming interests turned to Congress, where they vociferously lobbied for state regulation.¹³ Tribes, armed with their victory in the Supreme Court, argued for exclusive tribal regulation or,

⁸ In Public Law 280 states, state governments exercise some power over tribes; in non-Public Law 280 states, the state has less authority over tribes within its borders.

⁹ 480 U.S. at 208.

¹⁰ See Bryan v. Itasca County, 426 U.S. 373 (1976). For an examination of Bryan and its impact on tribal gaming law, see Kevin K. Washburn, The Legacy of Bryan v. Itasca County: How an Erroneous \$ 147 County Tax Notice Helped Bring Tribes \$ 200 Billion in Indian Gaming Revenue, 92 Minn. L. Rev. 919 (2008).

¹¹ Cabazon, 480 U.S. at 210-11. The Court also rejected the state's assertion of jurisdiction on other grounds, including the federal Organized Crime Control Act of 1970 and the strength of the state's interest. See id. at 213-14, 216-21.

¹² Id. at 213 n.13. Despite the fact that California's gaming laws were enforceable through criminal penalties, the Court explained that the state's approach to gambling was regulatory rather than prohibitory, as California permitted gaming (albeit subject to regulation) rather than prohibited it altogether. The fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law" falling within the state's criminal jurisdiction under Public Law 280. Id. at 211. Instead, said the Court, the "shorthand test" under the "criminal/prohibitory" and "civil/regulatory" distinction is whether state public policy condones the conduct. Id. at 209. Had California law strictly prohibited gambling through criminal penalties, then, under the Cabazon analysis, its laws would have been enforceable on the tribes' reservations through the state's Public Law 280 criminal jurisdiction. See, e.g., Washburn, Federal Law, State Policy, and Indian Gaming, supra note 5, at 289. Presumably, only Public Law 280 states would have authority to enforce their criminal/prohibitory laws on reservations. But even in non-Public Law 280 states, federal law, notably the Johnson Act, 15 U.S.C. § 1175(a) (2000), limited tribes' ability to operate gaming. See, e.g., Alex Tallchief Skibine, Scope of Gaming, Good Faith Negotiations and the Secretary of Interior's Class III Gaming Procedures: Is I.G.R.A. Still a Workable Framework After Seminole?, 5 Gaming L. Rev. 401, 401 (2001).

¹³ Alexander Tallchief Skibine, Cabazon and Its Implications for Indian Gaming, in Indian Gaming: Who Wins? 67, 68 (Angela Mullis & David Kamper eds., 2000). According to U.S. Senator Harry Reid (D-Nev.), one of IGRA's architects, after the Court decided Cabazon, "there was little choice except for Congress to enact laws regulating gaming on Indian lands. The alternative would have been for the rapid and uncontrolled expansion of unregulated casino type gambling on Indian lands." Harry Reid,

short of that, federal regulation. Faced with these disparate positions, Congress's Cabazon "fix" took the form of a political compromise meant to bridge the gap between the state and tribal positions, to balance state and tribal authority, and to ensure that gaming was available to tribal governments as a means of generating revenue in accord with federal interests in tribal self-sufficiency and reservation economic development.¹⁴

Congress enacted IGRA on October 17, 1988, with the purpose of codifying tribes' right to conduct *gaming* on *Indian* lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, and to provide sufficient regulation to ensure legality and to protect the financial interests of gaming tribes.¹⁵ To give effect to the political compromise between state and tribal authority, IGRA categorizes types of gambling by "class" and assigns regulatory authority accordingly.¹⁶ Bingo and similar games, or "Class II" gaming, are regulated by tribes with some federal oversight.¹⁷ State interests in preventing the infiltration of organized crime and controlling gambling generally were most persuasive to Congress in the context of the "cash business" of casinos. At the same time, casino-style gaming was more lucrative than bingo and had greater potential to fuel reservation economic development, a key goal of federal Indian policy. So, for casino-style gambling, or "Class III" gaming, IGRA requires a "tribal-state compact," a negotiated agreement between the tribe and the state governing casino-style gaming on the tribe's reservation.¹⁸

[*379] Generally speaking, IGRA expressly prohibits states from seeking, through a tribal-state compact, to tax or charge the tribe a fee for the right to engage in casino-style gaming.¹⁹ However, there are three types of direct payments made by tribes to states and local governments in relation to gaming, commonly known as revenue sharing.²⁰ First, IGRA allows for direct payments to defray the costs of regulating Class III gaming activities.²¹ Second, IGRA allows tribes to use gaming profits to "help fund operations of local government agencies."²² Third, despite IGRA's prohibition against direct state taxation, the U.S. Secretary of the Interior, who is responsible for reviewing and approving gaming compacts between tribes and states,²³ has allowed voluntary compact payments by tribes to states in exchange for the state's grant of valuable economic benefits.²⁴ Such payments to a state must be deemed "appropriate in light of the benefit conferred on the tribe."²⁵ Specifically, the Secretary has

Commentary, The *Indian Gaming* Act and the Political Process, in *Indian Gaming* and the Law 17 (William R. Eadington ed., 2d ed. 1998).

¹⁴ For a detailed discussion of IGRA's legislative history, see Roland J. Santoni, The *Indian Gaming* Regulatory Act: How Did We Get Here? Where Are We Going?, 26 Creighton L. Rev. 387 (1993). See also Kathryn R.L. *Rand* & Steven Andrew *Light*, *Indian Gaming* Law and Policy 29-33 (2006).

¹⁵ 25 U.S.C. § 2702 (1988). Additionally, Congress enacted IGRA to establish an independent federal regulatory authority in the form of the National *Indian Gaming* Commission (NIGC). *Id.*

¹⁶ *Id.* § 2703.

¹⁷ *Id.* §§2703(7), 2710(a)-(c). "Class I" gaming consists of traditional tribal games of chance, associated with tribal ceremonies, and is subject to exclusive tribal jurisdiction. *Id.* §§2703(6), 2710(a)(1).

¹⁸ *Id.* §§2703(8), 2710(d). To engage in Class III gaming, a tribe first must formally request that the state enter into compact negotiations with the tribe. Once the state receives the tribe's request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* § 2710(d)(3)(A). Although IGRA does not dictate that a tribal-state compact must provide for state regulation of Class III gaming, compacts typically have done so. Carole E. Goldberg et al., Amici Curiae Brief of Indian Law Professors in the Case of Hotel Employees and Restaurant Employees International Union v. Wilson, in *Indian Gaming*: Who Wins?, *supra* note 13, at 62. The tribe retains the right to concurrent regulation of its Class III gaming, so long as tribal regulation is not inconsistent with or less stringent than the state's regulation as provided in the compact. *Id.* § 2710(d)(5). Under IGRA, the state's good faith duty is enforceable through a legal cause of action in federal court. See *id.* § 2710(d)(3)(A), (d)(7)(A)(i). In its landmark decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996), however, the Supreme Court ruled that state sovereign immunity was a valid defense to IGRA's cause of action. As a result, tribes may utilize IGRA's enforcement mechanism only when the state consents to suit. "The Court's decision dramatically turned the tables on tribes by removing the protections for tribal authority from IGRA." Kathryn R.L. *Rand* & Steven Andrew *Light*, How Congress Can and Should "Fix" the *Indian Gaming* Regulatory Act: Recommendations for Law and Policy Reform, 13 Va. J. Soc. Pol'y & L. 396, 415 (2006).

adopted a practice whereby payments by a tribe must not exceed the value of the benefits received by the tribe.²⁶ While acceptable types of benefits to tribes have not been enumerated by the Secretary, one example is given: "substantial exclusivity."²⁷ According to the Secretary's practice, other benefits may be conferred upon a tribe in exchange for revenue sharing, but an economic analysis of the benefits is required in order to demonstrate appropriateness.²⁸

Many tribes make one or more of these three types of direct payments to [*380] state and local governments. The percentages and dollar amounts of direct payments by tribes vary substantially, depending on a host of factors, including: prevailing economic climate; whether the gaming at issue was new or existing; actual or expected performance of gaming operations, depending on whether gaming at issue was new or existing; degree of competition; types of gaming offered; and the relative bargaining positions of a state and tribe at the time revenue sharing was negotiated.²⁹ In calendar year 2007, the total of all identifiable direct payments to state and local governments was approximately \$ 1.3 billion.³⁰

As a legal codification of the political compromise between tribal and federal interests on the one hand and state interests on the other, IGRA's compact provisions reflect congressional efforts to balance these competing interests as well as state and tribal authority.³¹ Overall, through IGRA, Congress sought to encourage and protect Indian gaming as a means of furthering federal and tribal goals of tribal economic development, self-sufficiency, and strong tribal governments.

III. THE INDIAN GAMING INDUSTRY³²

A. Current State of Indian Gaming

¹⁹ 25 U.S.C. § 2710(d)(4) (providing that aside from reimbursement of the state's regulatory costs, "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe ..."). Additionally, "no State may refuse to enter into the negotiations ... based upon the lack of authority ... to impose such a tax, fee, charge, or other assessment." *Id.* A state's demand for direct taxation is evidence that the state has failed to negotiate in good faith. *Id.* § 2710(d)(7)(B)(iii)(II).

²⁰ For a discussion, see Meister, *supra* note 3, at 6-7.

²¹ 25 U.S.C. § 2710(d)(3)(C)(iii) (including in the list of permissible compact provisions "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activities").

²² *Id.* § 2710(b)(2)(B)(v).

²³ *Id.* § 2710(d)(3)(B) (providing that a tribal-state compact may take effect "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register").

²⁴ See Oversight Hearing on the Indian Gaming Regulatory Act Before the S. Comm. on Indian Affairs, 108th Cong. 2 (2003) (statement of Aurene M. Martin, Acting Assistant Secretary-Indian Affairs, Dep't of the Interior), available at <http://indian.senate.gov/2003hrgs/070903hrg/martin.PDF>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *id.*

In calendar year 2007, the most current year for which data are available, there were 230 tribes operating 425 gaming facilities in 28 states.³³ Twenty-three of these states had some form of Class III gaming, while five states only had Class II *gaming*. In total, *Indian gaming* generated approximately \$ 26.5 billion in gaming revenue and \$ 3.1 billion in non-gaming revenue (i.e., revenue from hotels, restaurants, entertainment, and shopping at *Indian gaming* facilities).³⁴ *Indian gaming* facilities, including non-gaming operations, directly supported approximately 346,000 jobs and paid about \$ 12 billion in wages to employees.³⁵

B. Growth of *Indian Gaming*

Since IGRA's enactment in 1988, the scope of tribal gaming operations has undergone an impressive transformation from small bingo facilities to large- [*381] scale casinos.³⁶ A growing number of tribes have created resort/destination casinos with wide-ranging non-gaming offerings, including hotels, restaurants, entertainment, shopping, and much more. On a nationwide basis, tribal gaming revenue has grown from approximately \$ 121 million in 1988 to an estimated \$ 26.5 billion in calendar year 2007.³⁷ This reflects a 200-fold increase over twenty years. Even over just the past six years, from 2001 to 2007, *Indian gaming* revenue has more than doubled (from \$ 13.2 billion).³⁸

Also notable has been the tremendous growth of non-*gaming* revenue at *Indian gaming* facilities nationwide.³⁹ Non-gaming revenue rose approximately 9% in calendar year 2007, nearly double the growth rate of gaming revenue and more than double that generated in 2001.⁴⁰ These statistics reflect trends toward an increase in and a greater variety of non-*gaming* amenities at *Indian gaming* facilities, the expansion of existing facilities, and movement toward resort/destination casinos.⁴¹

Along the path from the passage of IGRA through 2007, *Indian gaming* has progressed through several different stages of development. From 1988 through 1995, *Indian gaming* grew at a very rapid pace, with an average annual growth rate of 72%.⁴² Then for about the next decade, from 1996 through 2005, the annual growth rate settled down to around 15%.⁴³ Generally speaking, this growth pattern comports with what is known about markets more broadly. In their infancy, markets tend to grow faster than when they are more mature.

²⁹ Alan Meister, Tribal-State Gaming Compacts and Revenue Sharing: A California Case Study, 7 Gaming L. Rev. 347, 350 (2003).

³⁰ Meister, *supra* note 3, at 55. Note that data on some local revenue sharing were not available. Thus, the figure noted above is conservative.

³¹ See generally Steven Andrew Light & Kathryn R.L. Rand, *Indian Gaming* and Tribal Sovereignty: The Casino Compromise (2005) (providing an in-depth examination of the political and legal compromises present in *Indian gaming* law).

³² See Meister, *supra* note 3, and unless otherwise noted, all data referred to in this section comes from that source.

³³ *Id.* at 10-11.

³⁴ *Id.* at 13.

³⁵ *Id.* at 54.

³⁶ *Id.* at 14.

³⁷ *Id.* at 14 tbl.7.

³⁸ *Id.*

³⁹ *Id.* at 13 tbl.6.

⁴⁰ *Id.* at 13 tbl. 5 and tbl. 6, 14 tbl. 7.

⁴¹ *Id.* at 48-50.

⁴² *Id.* at 14 tbl. 7. All cited average annual growth rates are compound annual growth rates (CAGRs).

⁴³ *Id.*

Since about 2005, Indian gaming on a nationwide basis has started to see a noticeable slowdown. The gaming revenue growth rate dropped from 15% in calendar years 2002 through 2005 to 10% in 2006, and then most recently down to 5% in 2007. ⁴⁴ That is not to say that Indian gaming has performed poorly in recent years - just not as well as it has in the past. In fact, the 5% growth rate in 2007 is still quite respectable, especially considering the state of the U.S. economy and the nationwide performance of commercial casinos, which experienced only about 2% growth in 2007. ⁴⁵

The continuing slowdown of the Indian gaming industry over the last few years largely reflects the negative impact of public policies that artificially restrict the supply of Indian gaming. ⁴⁶ These public policies include existing [*382] and proposed legislation, regulations, and tribal-state gaming compacts. ⁴⁷ As discussed below, this slowdown of Indian gaming somewhat clouds the short-term and long-term future outlook of Indian gaming. ⁴⁸

An important point should be made about the foregoing data, analyses, and observations regarding the growth of Indian gaming. Although Indian gaming is often talked about in aggregate nationwide terms, it is important to keep in mind that it is in fact very fragmented. ⁴⁹ As noted above, there are 230 distinct tribes with 425 unique gaming facilities in 28 states. ⁵⁰ Furthermore, the economic performance of Indian gaming has varied widely from state to state, tribe to tribe, and facility to facility. This wide variation has depended on a variety of factors, including: legal, regulatory, and political environments; class of Indian gaming; types of games offered; and market conditions, such as the size of the potential customer base, proximity to that customer base, patron demographics, competition, and the maturity level of the market. ⁵¹

Thus, while Indian gaming on the whole has performed well over time, this is not necessarily the case in any particular state, or for any particular tribe or facility. In fact, there has been a high degree of concentration of gaming revenue within the industry - that is, a large proportion of gaming revenue is generated by a small number of Indian gaming tribes and facilities. According to statistics from the National Indian Gaming Commission (NIGC), in 2007, the top 6% of Indian gaming facilities generated over 40% of total gaming revenue, the top 18% generated over 70% of total revenue, and the top 30% generated 85% of total revenue. ⁵² On the flip side, this means that many Indian gaming facilities generated a relatively small amount of gaming revenue - at the bottom, nearly one-third of Indian gaming facilities generated less than 3% of total revenue.

⁴⁴ Id.

⁴⁵ Id. at 42.

⁴⁶ Id. at 50-51. It is noted that the downturn in the U.S. economy began at the end of 2007. Thus, the performance of Indian gaming in calendar year 2007 was only minimally impacted by the general economic climate.

⁴⁷ Id. at 51. Federal statutes, regulations, and tribal-state compacts have had the effect of restricting the scope and growth of the industry. For example, because IGRA authorizes tribes to conduct only "such gaming" as is permitted by state law, see 25 U.S.C. §§2710(b)(1)(A), 2710(d)(1)(B) (1988), in some states Indian gaming is limited to Class II gaming, as noted above. For a discussion of the "scope of gaming" issue, see Rand & Light, Indian Gaming Law and Policy, supra note 14, at 70-79. And in some states, tribal-state compacts limit the type and number of games a tribe may offer in its gaming facility, or limit the number of facilities a tribe may operate. In other words, the market for Indian gaming would allow for greater growth in the absence of the restrictions placed on the industry by federal law and regulations, as well as tribal-state compacts.

⁴⁸ See infra Part VI.B.

⁴⁹ On the differences in tribal experiences with Indian gaming in relation to a "spectrum of success," see infra Part V.

⁵⁰ Meister, supra note 3, at 10-11.

⁵¹ Id. at 48.

⁵² National Indian Gaming Commission, Press Release, NIGC Announces 2007 Indian Gaming Revenues (June 18, 2008), <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx> [hereinafter NIGC Press Release].

Gaming revenue has also been very geographically concentrated within Indian gaming. The top two revenue-generating states, California and Connecticut, accounted for about 39% of all gaming revenue at Indian gaming facilities in 2007.⁵³ Furthermore, the top five states - Oklahoma, Arizona, and [*383] Florida, along with California and Connecticut - accounted for roughly 62%, and the top ten states - adding Washington, Minnesota, Wisconsin, Michigan, and New York - accounted for approximately 86% of all gaming revenue at Indian gaming facilities.⁵⁴

IV. THE ECONOMIC AND FISCAL IMPACTS OF INDIAN GAMING⁵⁵

A. Overview

On the whole, Indian gaming has made and continues to make significant contributions to the U.S. economy.⁵⁶ Specifically, it has stimulated economic activity, created jobs, and provided wages - all of which have benefitted tribal economies and generated tax revenue to federal, state, and local governments.⁵⁷ In addition, as explained above, many tribes make direct payments to other governments in the process of operating gaming facilities. The sections below describe these positive economic and fiscal contributions of Indian gaming to the U.S. economy, from both theoretical and empirical points of view.⁵⁸

B. Methodologies

1. Economic Contribution Analysis⁵⁹

In order to measure the contribution of Indian gaming to the U.S. economy, previous research and analyses by one of the authors of this article has utilized input-output analysis. Input-output analysis is a standard economic tool for modeling an economy by accounting for the economic interdependence among industries, households, and government institutions. It can be used to measure the economic contribution of one or more projects, businesses, or industries to an economy. Using an input-output analysis, the initial economic activity of an industry in an economy can be traced to determine secondary economic activity that is driven by the initial activity.

The initial economic activity is referred to as the direct effect. This direct effect is the "input" into the input-output analysis. In the case of the Indian [*384] gaming industry, the direct effect is casino patron expenditures, both gaming and non-gaming. As the initial spending at gaming facilities is in turn spent and re-spent throughout the economy, there is subsequent secondary economic activity. This includes the iteration of businesses purchasing from other businesses, and household spending that is stimulated by employee wages earned directly (at the casino) or indirectly (from other businesses) as a result of the operation of Indian gaming facilities.⁶⁰ These

⁵³ Meister, supra note 3, at 21 tbl.14.

⁵⁴ Id.

⁵⁵ See Meister, supra note 3, and unless otherwise noted, all data referred to in this section comes from that source.

⁵⁶ Meister, supra note 3, at 54.

⁵⁷ Id. Although states may not tax tribal gaming, Indian gaming facilities generate numerous activities that are subject to state and federal taxation, including income earned by employees living off the reservation, money or prizes won by non-reservation residents, and goods and services provided by non-tribal vendors. See infra Part IV.B.1.

⁵⁸ In addition to economic benefits, Indian gaming also generates social benefits (e.g., increases in tribal programs and services for Native Americans; decreased reliance on welfare programs by Native Americans; and the promotion of tribal economic development, tribal self-sufficiency, and strong tribal governments). In addition, there may at some level be social and economic costs. For an analysis of how and why to disaggregate and consider tribal gaming's costs and benefits to different stakeholders and jurisdictions, and across study areas, see Light & Rand, Indian Gaming and Tribal Sovereignty, supra note 31, at 77-104.

⁵⁹ Meister, supra note 3, at 5-6.

⁶⁰ The two types of secondary effects discussed above are commonly referred to as indirect and induced effects.

secondary effects continue until leakages, including imports, profits, and savings, stop the re-spending cycle. The total economic contribution of an industry is equal to the sum of the direct and secondary effects. An input-output analysis typically generates multipliers that can be applied to the direct effect to compute the secondary effects, and thus the total effect.

In conducting an economic contribution analysis, a study area must be defined. The study area is the geographic region in which one wishes to measure economic contribution. It can be defined as one or more states, counties, cities, or zip codes. The study area used in the economic impact analyses cited herein was the United States.⁶¹

An input-output analysis yields three standard measures of economic activity: output, wages, and jobs. Output equals the dollar value of production or sales. Wages consist of income earned by households, including self-employed individuals. Wages include tips and benefits, such as health insurance and retirement payments. Jobs are person-years of employment.

The input-output analysis cited herein was conducted using the IMPLAN economic impact modeling system.⁶² IMPLAN was originally developed by the U.S. Department of Agriculture's Forest Service in cooperation with the Federal Emergency Management Agency and the U.S. Department of the Interior's Bureau of Land Management.⁶³ IMPLAN has been in use since 1979 and is widely used and accepted for conducting economic impact and economic contribution analyses.⁶⁴ The data and accounts underlying IMPLAN closely follow the accounting conventions used in the "Input-Output Study of the U.S. Economy" by the U.S. Bureau of Economic Analysis and the rectangular format recommended by the United Nations.⁶⁵

Because of Indian gaming's unique situation, namely that gaming facilities are operated by tribal governments rather than commercial enterprises, the standard IMPLAN model and underlying data were customized in the cited analyses to reflect the average wage per employee and average output (i.e., [*385] revenue) per employee at Indian gaming facilities; transfers of profits from Indian gaming operations to tribes and the uses of such profits by tribal governments; and direct payments made by tribes to federal, state, and local governments.⁶⁶

2. Fiscal Benefits Analysis⁶⁷

Fiscal benefits generally refer to the financial gains to governmental bodies from a project, business, or industry. These benefits may accrue to federal, state, and local governments. In terms of Indian gaming, significant fiscal benefits are generated for each of these types of governments. First and foremost, however, Indian gaming directly benefits tribal governments. As intended by IGRA, tribal governments are the primary beneficiaries of Indian gaming.⁶⁸ Tribes may use gaming revenue to fund tribal government operations and programs, provide for the general welfare of their constituents, and promote tribal economic development.⁶⁹ Since 1988, tribes have historically used gaming profit to support a variety of social and economic programs and services, including health

⁶¹ Id. at 5.

⁶² Id. at 5-6. See Minnesota IMPLAN Group, Inc., http://implan.com/index.php?option=com_frontpage&Itemid=1 (last visited Jan. 28, 2009).

⁶³ Doug Olson & Scott Lindall, IMPLAN Professional Software, Analysis, and Data Guide (1999).

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Meister, *supra* note 3, at 6.

⁶⁷ Id. at 6-7.

⁶⁸ One of Congress's purposes in adopting IGRA's regulatory scheme was "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(2) (1988).

⁶⁹ See id. § 2710(b)(2)(b).

care, housing development, educational programs, elderly care, vocational training, environmental services, loans, scholarships, and business development.⁷⁰

Indian gaming also generates significant fiscal benefits for non-tribal governments. In the cited research,⁷¹ two types of non-tribal fiscal benefits were identified and quantified: tax revenue and direct payments by tribes.

The first type of fiscal benefit to federal, state, and local governments is tax revenue. There are only a few situations where taxes resulting from Indian gaming are not paid to non-tribal governments: first, tribes, as sovereign governments, do not pay corporate income taxes on revenue or property taxes on tribal land; second, tribal members who both live and work on an Indian reservation do not pay state income taxes; and third, no state or local sales/excise taxes are levied on purchases by tribal members on reservations. However, taxes are paid in all other circumstances, including all secondary economic activity generated by Indian gaming. Taxes on secondary economic activity include: corporate profits tax, income tax, sales tax, excise taxes, property tax, and personal non-taxes, such as motor vehicle licensing fees, fishing/hunting license fees, other fees, and fines. Tax revenue is calculated by applying appropriate tax [*386] rates to taxable profit, income, and purchases. In the cited research,⁷² IMPLAN was used to estimate tax revenue generated by Indian gaming.

The second type of fiscal benefit to federal, state, and local governments is direct payments. As noted above, there are three types of direct revenue-sharing payments made in relation to Indian gaming: payments to defray the costs of regulating Class III gaming activities, payments to local governments to help fund operations of local government agencies, and voluntary compact payments by tribes to states in exchange for being granted valuable economic benefits. In the cited research,⁷³ data were collected from tribal and non-tribal governments, where possible, and estimated when not available.

C. Economic and Fiscal Impacts in Calendar Year 2007

Using the aforementioned methodologies for measuring economic and fiscal impacts, it was estimated that in 2007 Indian gaming directly and indirectly generated approximately \$ 85.8 billion in output, 732,000 jobs, \$ 29.4 billion in wages, and \$ 14.8 billion in tax revenue and direct payments to federal, state, and local governments.⁷⁴

V. THE SPECTRUM OF SUCCESS⁷⁵

As noted above, 230 tribes operated some 425 gaming establishments in 2007. This number increased in 2008. Though tribes - and tribal casinos, for that matter - are far from uniform, most tribes that have chosen to operate gaming do so as a means of overcoming historically rooted socioeconomic adversity.⁷⁶ One recent example is the

⁷⁰ For summaries and discussions of tribal uses of gaming revenue, see generally Meister, *supra* note 3; Light & Rand, Indian Gaming and Tribal Sovereignty, *supra* note 31; Rand & Light, Indian Gaming Law and Policy, *supra* note 14; National Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2005* (2006), available at http://indiangaming.org/NIGA_econ_impact_2005.pdf.

⁷¹ Meister, *supra* note 3, at 55-60.

⁷² *Id.* at 6, 55.

⁷³ *Id.* at 6-7, 55-60.

⁷⁴ *Id.* at 54-55.

⁷⁵ See Light & Rand, Indian Gaming and Tribal Sovereignty, *supra* note 31, at 9-11 (discussing the "spectrum" of tribal experiences with gaming and the "spectrum of success" of gaming tribes).

⁷⁶ Only 230 of the 562 federally recognized tribes (41%) operate gaming. Because IGRA authorizes Indian gaming only in those states that allow some form of legalized gambling, gaming simply is not an option for tribes located in states that disallow any form of gambling. See 25 U.S.C. §§2710(b)(1), 2710(d)(1) (1988) (limiting Class II and Class III gaming to tribes in those states that "permit ... such gaming for any purpose by any person, organization, or entity"). In some states, Indian gaming is limited to bingo and similar games because state public policy or other law prohibits casino-style gaming. For example, although

Navajo Nation's decision to open its first casino, the Fire Rock Casino near Gallup, New Mexico, in 2008. Faced with an unemployment rate of more than 50% and poverty levels exceeding 40%, the Nation expects the casino's projected \$ 32 million in annual revenue and 1,000 new jobs, along with the additional benefits from other planned casinos, to [*387] improve the quality of life for the Nation's more than 200,000 reservation residents.⁷⁷

As many tribes face high poverty and unemployment rates and accompanying social ills, basic quality-of-life indicators for tribal members living on reservations still lag significantly behind those of other ethnic groups in the United States,⁷⁸ yet there have been marked improvements for many Native American communities, largely due to gaming revenue.⁷⁹ And as detailed above, the economic and social benefits of tribal gaming extend beyond reservation boundaries as well, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged.⁸⁰

A. The Ends of the Spectrum

Gaming is a major source of government revenue for many tribes. Yet annual revenue among the 425 tribal casinos across the United States ranges from more than \$ 1 billion to less than \$ 3 million.⁸¹ As noted above, in 2007, just 6% of tribal gaming operations earned more than \$ 250 million, accounting for nearly 42% of the total industry revenue. On the other end of the spectrum, over half of all tribal gaming facilities earned \$ 25 million or less, and one out of every seven casinos earned less than \$ 3 million.⁸²

[*388] In terms of simple economics, this spectrum of success for tribal casinos is explained in large part by the old saw of "location, location, location" - one merely need compare a rural bingo hall on the Great Plains to a Las Vegas-style casino near major metropolitan areas, such as the phenomenally successful Connecticut casinos, Foxwoods Resort Casino, owned by the Mashantucket Pequots, and Mohegan Sun, owned by the Mohegan Tribe. For some, though, the uneven distribution of gaming profits among tribes is evidence of failed federal policy. Time magazine's December 2002 cover story, "Wheel of Misfortune," highlighted the Oglala Sioux Tribe in South Dakota

Alaska is home to some 225 tribes and Native Villages, it has only a handful of tribal gaming operations offering mainly bingo and pull-tabs. Isolated locales or lack of financial resources also may restrict a tribe's ability to open or sustain a casino. Again using Alaska as an example, the state's extraordinarily rural locales and limited reservation land may further restrict any possible expansion of tribal gaming in Alaska, even with changes in state gambling policy. See David Hulen, *Alaska Plays by Own Rules*, Anchorage Daily News, May 7, 1995, at B1. Lastly, in some states, there are no federally recognized tribes.

⁷⁷ See, e.g., Navajo Nation Opens its First Casino in New Mexico, *Forbes*, Nov. 20, 2008, available at <http://www.usatoday.com/travel/destinations/2008-12-17-fire-rock-casino> N.htm?csp=Forbes; Dennis Wagner, Navajos Bet First Casino Is a Winner, *Ariz. Republic*, Nov. 17, 2008, available at <http://www.azcentral.com/arizonarepublic/news/articles/2008/11/17/20081117navajocasino1115.html>.

⁷⁸ See *Light & Rand, Indian Gaming* and Tribal Sovereignty, *supra* note 31, at 98 (discussing U.S. Census data concerning tribes).

⁷⁹ See *id.* at 98-101 (providing examples of improvements in reservation quality of life); Jonathan B. Taylor & Joseph P. Kalt, Cabazon, The *Indian Gaming* Regulatory Act, and the Socioeconomic Consequences of American *Indian* Governmental *Gaming* (2005), <http://www.ksg.harvard.edu/hpaied/pubs/cabazon.htm>; Stephen Cornell et al., American *Indian Gaming* Policy and its Socio-Economic Effects: A Report to the National Gambling Impact Study Commission (1998), <http://indiangaming.org/library/studies/1004-erg> 98rept to ngisc.pdf. On the whole, from 1990 to 2000, both gaming and non-gaming tribes experienced economic growth at a rate three times that of the U.S. economy, but American Indians living on reservations remained four times as likely to live in poverty as the "average" American. Harvard Project on American Indian Economic Development et al., *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination* (2008).

⁸⁰ See Part IV, *supra*; see also Jonathan B. Taylor, Matthew B. Krepps, & Patrick Wang, The National Evidence on the Socioeconomic Impacts of American *Indian Gaming* on Non-*Indian* Communities (2000), available at <http://www.ksg.harvard.edu/hpaied/pubs/pub> 006.htm. For a summary of tribal gaming's economic benefits to states and communities, see *Light & Rand, Indian Gaming* and Tribal Sovereignty, *supra* note 31, at 84 tbl.4.1. For a discussion of studies

as an example of "needy Native Americans" left behind by IGRA.⁸³ According to the article, the tribe's individual members did not benefit "at all" from Indian gaming because the modest profits of the tribe's Prairie Wind Casino would have amounted to "a daily stipend of just 16 [cents] for each of the 41,000 tribe members."⁸⁴

But, as Congress intended, tribal success may take more forms than mere profits as calculated in cash payments to individual tribal members (known as per capita payments).⁸⁵ Even modest casino profits may serve federal and tribal goals of building strong tribal governments, encouraging tribal self-sufficiency, and improving the quality of reservation life.⁸⁶ Tribal casinos also provide jobs and wages, in many cases to a high proportion of tribal members. In addition, even when tribal profits are not redistributed via per capita payments, gaming revenue still benefits tribal members, as IGRA requires tribes to use gaming revenue to fund tribal government operations or programs, provide for the general welfare of their members, and promote tribal economic development.⁸⁷ As John Yellow Bird Steele, then President of the Oglala Sioux Tribe, said in response to the Time magazine story, "Our gaming facility is not among the largest, but we would be hard pressed to replace the jobs and revenue that gaming generates."⁸⁸

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B. Indian Gaming in South Dakota

Indian gaming in South Dakota shares many similarities with Indian gaming in North Dakota.⁸⁹ Like tribes in North Dakota, the nine tribes with land in South Dakota - the Cheyenne River Sioux Tribe, the Crow Creek Sioux Tribe, the Flandreau-Santee Sioux Tribe, the Lower Brule Sioux Tribe, the Oglala Sioux Tribe, the Rosebud Sioux Tribe, the Sisseton-Wahpeton Oyate, the Standing Rock Sioux Tribe, and the Yankton Sioux Tribe - have long histories of government-to-government relations with the United States, along with strong traditions of tribal identity

of Indian gaming's socio-economic impacts, see Light & Rand, Indian Gaming and Tribal Sovereignty, supra note 31, at 77-104.

⁸¹ Together, the Mashantucket Pequot Tribe's Foxwoods Resort Casino and the Mohegan Tribe's Mohegan Sun Casino, both located in Connecticut, earned \$ 2.5 billion in 2007, and individually they are the highest revenue-generating Indian gaming facilities in the United States. Meister, supra note 3, at 29.

⁸² Though the NIGC does not report individual casino revenue, it groups tribal casinos according to annual gaming revenue ranges. Its data indicate that 59 tribal gaming operations earned less than \$ 3 million in 2007. See NIGC Press Release, supra note 50.

⁸³ Donald L. Barlett & James B. Steele, Indian Casinos: Wheel of Misfortune - Who Gets the Money? (Part I), Time, Dec. 16, 2002, at 44, 49.

⁸⁴ Id.

⁸⁵ Under IGRA, tribes may make per capita payments to tribal members after preparing a general revenue use plan in accordance with the five approved expenditures set forth in IGRA and with the approval of the Interior Secretary. 25 U.S.C. § 2710(b)(3) (1988).

⁸⁶ Rand & Light, How Congress Can and Should "Fix" the Indian Gaming Regulatory Act, supra note 18, at 423-26; Light & Rand, Indian Gaming and Tribal Sovereignty, supra note 31, at 137-44.

⁸⁷ 25 U.S.C. § 2710(b)(2)(B).

⁸⁸ Rick Hill, Some Home Truths About Indian Gaming, Indian Country Today, Dec. 27, 2000, at A5. The Time magazine article was roundly criticized by tribal leaders. Tex G. Hall, then President of the National Congress of American Indians and chair of the Three Affiliated Tribes in North Dakota, called Time's treatment of Indian gaming "misleading," pointing out the benefits of tribal gaming in the Great Plains. "My tribe's casino, very modest by Las Vegas standards," he wrote, "provides jobs to our people that are extraordinarily important to our economy, and revenue that our tribal government uses to provide services to the 10,000 members of our tribe. This is the case for the majority of tribes with gaming ventures." Tex G. Hall, "Letter to the Editors of Time Magazine," December 13, 2002, available at <http://www.americanindian.ucr.edu/discussions/gaming/letters/nc ai.html>.

and sovereignty that continue to shape the tribes' priorities as well as intergovernmental relations with state and federal government.

Another similarity is the staggering socioeconomic deficits faced by tribes in North and South Dakota during the 20th and into the 21st centuries. Reservations in North and South Dakota historically have been among the nation's poorest jurisdictions. In the early 1990s, unemployment rates on reservations in the states generally exceeded 50% and in some areas, topped 80% - unimaginable to most Americans familiar with single-digit unemployment rates.⁹⁰ In large part due to their relative isolation on reservations in rural states, economic opportunities available to South Dakota tribes are few. Tribal communities in the Dakotas typically achieved minimal commercial development - often not much beyond a local grocery store or gas station, and some homes went without such basic services as electricity, running water, or telephone service. South Dakota's counties with reservation communities are among the nation's poorest.⁹¹

Congress's enactment of IGRA in 1988 coincided with South Dakota's legalization of limited casino-style gambling in Deadwood.⁹² Like tribes [*390] elsewhere, tribes in South Dakota saw an opportunity to earn revenue, provide jobs, and address the dire socioeconomic conditions on their reservations. Three tribes, the Sisseton-Wahpeton Oyate, the Flandreau-Santee Sioux Tribe, and the Yankton Sioux Tribe, quickly negotiated compacts with the governor and opened the Dakota Sioux Casino near Watertown, the Royal River Casino at Flandreau, and the Fort Randall Casino near Wagner, respectively. These were followed shortly by the Lower Brule Sioux Tribe's Golden Buffalo Casino and the Crow Creek Sioux Tribe's Lode Star Casino.⁹³ Today, each of the nine tribes in South Dakota operates at least one gaming facility.⁹⁴

Tribal gaming in South Dakota furthers reservation economic development, provides jobs on the reservations, and provides reliable revenue for tribal social programs.⁹⁵ The tribes have used gaming revenue to fund tribal government positions and services, provide health care and child care, build infrastructure, and generally provide for the welfare of tribal members.⁹⁶ As the comments of Charles Colombe, a past president of the Rosebud Sioux

⁸⁹ For a detailed description of tribes and Indian gaming in North Dakota, see Light & Rand, Indian Gaming and Tribal Sovereignty, *supra* note 31, at 111-18. For gaming statistics on Indian gaming in South Dakota and North Dakota, see Meister, *supra* note 3, at 11-13, 36, 38, 56-59.

⁹⁰ See N.D. Indian Gaming Ass'n, Opportunities and Benefits of North Dakota Tribally Owned Casinos 3 (2000).

⁹¹ In South Dakota, Buffalo County, home to the Crow Creek Sioux Tribe and boasting a population that is 80% American Indian, is the poorest county in the U.S., with a poverty rate of more than 30% and a per capita income of \$ 5,200. See U.S. Census Bureau, State and County QuickFacts for Buffalo County, S.D., 2005 County-Level Poverty Rates for South Dakota, <http://quickfacts.census.gov/qfd/states/46/46017.html> (last visited Jan. 29, 2009); see also USDA Economic Research Service, <http://www.ers.usda.gov/Data/PovertyRates/PovListpct.asp?S=T=SD&view=Percent> (last visited Jan. 29, 2009). Shannon, Ziebach, Todd, Corson, Dewey, and Jackson Counties in South Dakota have per capita incomes below \$ 10,000, as does Sioux County in North Dakota. *Id.* The Cheyenne River Reservation is located in Dewey and Ziebach Counties, the Oglala Sioux Tribe's Pine Ridge Reservation is located in Shannon and Jackson Counties, the Rosebud Reservation is in Todd County, and the Standing Rock Reservation is in Corson County. See generally South Dakota Office of Tribal Government Relations, Nine Tribes of South Dakota, <http://www.state.sd.us/oia/tribes.asp> (last visited Jan. 29, 2009). The Standing Rock Reservation straddles the border between North and South Dakota; on the North Dakota side, the reservation is located in Sioux County. *Id.*

⁹² See Associated Press, 20 Years Later, Gaming Industry Booming in South Dakota, *Aberdeen Am. News*, Oct. 9, 2007, available at <http://www.aberdeennews.com/apps/pbcs.dll/article?AID=/20071009/FRONTPAGE/710090325>.

⁹³ See South Dakota Legislative Research Council, The Impact of the Indian Gaming Regulatory Act on State-Tribal Relations (Issue Memorandum 94-42) (Aug. 7, 2000), at 2.

⁹⁴ There are 12 tribal gaming facilities in South Dakota: Bear Soldier Bingo (Standing Rock Sioux Tribe); Children's Village Bingo (Oglala Sioux Tribe); CRST Bingo (Cheyenne River Sioux Tribe); Dakota Connection Casino & Bingo (Sisseton-Wahpeton Oyate); Dakota Sioux Casino (Sisseton-Wahpeton Oyate); Fort Randall Casino (Yankton Sioux Tribe); Golden Buffalo Casino and Resort (Lower Brule Sioux Tribe); Grand River Casino & Resort (Standing Rock Sioux Tribe); Lode Star Casino and Hotel

Tribe, indicate, the pressing needs of tribal members in South Dakota drive tribal government priorities: "What sort of sneakers do you get for a 12-year-old boy in foster care? What's the right size coat for a nine-year-old girl?"⁹⁷ While gaming revenue by itself cannot eradicate the dire socioeconomic conditions that persist on reservations in the Dakotas and throughout the Great Plains, it is undoubtedly making a difference in the quality of life for many tribal members.⁹⁸

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VI. THE ECONOMIC FUTURE OF INDIAN GAMING

As stated at the outset of this article, Indian gaming is nearly synonymous with tribal economic development. Increasingly, though, tribes are using gaming as a foundation from which to grow and diversify gaming and non-gaming economic development initiatives, both on and off the reservation. In this section, we identify some current economic trends in Indian gaming, offer some measured predictions about the economic future of Indian gaming, and assess opportunities for tribal economic diversification.

A. Current Economic Trends

1. Revenue Sharing

One ongoing trend has been an increase in direct payments by tribes to state and local governments, fueled in part by state budget crises and states' resistance to increasing taxes. In 2007, total revenue sharing by tribes was approximately \$ 1.3 billion, including reimbursements of regulatory costs, local revenue sharing, and state revenue sharing.⁹⁹ This was up approximately 3.4% from 2006. As with the 2006 revenue-sharing growth rate (9%), it was a little lower than the growth rate for gaming revenue at Indian gaming facilities. However, this was not the case in 2004 and 2005, when revenue sharing grew faster than gaming revenue. Revenue sharing grew 24% in 2004 and 19% in 2005, as compared to approximately 15% growth of gaming revenue in both years. Overall, since 2003, the earliest date for which data are available, the average annual growth rate of revenue sharing is approximately 14%.

Generally, the increases in revenue sharing have come about as part of new and renegotiated tribal-state gaming compacts. In some ways, the increased revenue sharing has been to the mutual benefit of the tribes and states involved in the new or amended compacts. The tribes have typically received some sort of benefit in exchange for the increased revenue-sharing payments. These benefits have included the introduction of new gaming facilities, increases in the number of gaming machines that can be operated, the operation of games not previously allowed,

(Crow Creek Sioux Tribe); Prairie Wind Casino (Oglala Sioux Tribe); Rosebud Casino (Rosebud Sioux Tribe); and Royal River Casino & Hotel (Flandreau-Santee Sioux Tribe). See Meister, *supra* note 3, at 96. Additionally, the Standing Rock Sioux Tribe operates the Prairie Knights Casino & Resort in Fort Yates, North Dakota, and the Sisseton-Wahpeton Oyate operates the Dakota Magic Casino in Hankinson, North Dakota. See *id.* at 87.

⁹⁵ See, e.g., South Dakota Legislative Research Council, *supra* note 75, at 2.

⁹⁶ See Roy F. Janisch, Sovereignty, Indian Gaming, and Economic Development on the Lake Traverse Reservation of the Sisseton-Wahpeton Sioux Tribe (Oyate), 50 *Am. Behavioral Scientist* 353, 361 (2006); Mark Van Norman, Address to the Western Governors' Association (Mar. 29, 2005) (transcript on file with authors). South Dakota also provides an example of Indian gaming revenue fueling tribal philanthropy: the Shakopee Mdewakanton Sioux Community, which operates the highly successful Mystic Lake Casino near the Twin Cities of Minneapolis and St. Paul, Minnesota, has helped to fund the Oglala Sioux Tribe's shelter for victims of domestic violence, ambulance station, and casino expansion on the Pine Ridge Reservation. Heron Marquez Estrada, Tribe Puts Money to Good Work, *Star Trib.* (Minneapolis-St. Paul) (Oct. 3, 2007) available at <http://www.startribune.com/local/11591151.html>.

⁹⁷ See Van Norman, *supra* note 92.

⁹⁸ See Light & Rand, Indian Gaming and Tribal Sovereignty, *supra* note 31, at 115-16, 140-44.

⁹⁹ Meister, *supra* note 3, at 55. Note that data on some local revenue sharing were not available. Thus, the figure used above is conservative.

geographic and product exclusivity, and the relaxation of certain gaming regulations, such as wager limits and hours of operation. In some cases, tribes also have agreed to the expansion of certain regulations or stricter regulations, including increases in the minimum gambling age and mitigation of potentially negative socioeconomic impacts of *Indian gaming*.¹⁰⁰

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2. Tribal-Corporate Partnerships

Another ongoing trend in *Indian gaming* has been the development of tribal-corporate partnerships and joint ventures. Several tribes have partnered with casino giant Harrah's Entertainment, which owns or manages casino resorts in four continents primarily under the Harrah's, Caesars, and Horseshoe brand names. For Native American tribes in the United States, Harrah's manages Harrah's Ak-Chin Casino Resort outside of Phoenix, Arizona, owned by the Ak-Chin Indian Community; Harrah's Rincon Casino & Resort near San Diego, California, owned by the Rincon Band of Luiseno Mission Indians; and Harrah's Cherokee Casino & Hotel in Cherokee, North Carolina, owned by the Eastern Band of Cherokee Indians.¹⁰¹

In 2008, the MGM Grand at Foxwoods opened a \$ 700 million tribally-owned joint venture between the Mashantucket Pequot Tribe and MGM Mirage, another casino giant that owns and operates casinos in Nevada, Mississippi, and Michigan, and has large investments in casinos in Nevada, New Jersey, Illinois, and Macau. The MGM Grand at Foxwoods boasts 1,400 slot machines, 825 hotel rooms, 5 restaurants, and a 4,000-seat theater.¹⁰²

Station Casinos, a leading operator of casinos in Nevada, also has partnered with tribes. It currently manages Thunder Valley Casino near Sacramento, California on behalf of the United Auburn Indian Community, and it is also currently working with tribes to develop three casinos in California and one in Michigan.¹⁰³ If and when these facilities are developed, Station Casinos would also manage them on behalf of the respective tribes.

Another interesting and unique partnership involved the Seminole Tribe of Florida and Hard Rock International, the music-based entertainment and leisure company operating over 130 casino, hotel, and cafe venues in more than 40 countries around the world.¹⁰⁴ In 2004, the Seminole Tribe opened two Seminole Hard Rock Hotels and Casinos in Florida. Just three years later, the Seminole Tribe acquired the Hard Rock brand, making the tribe the owner of a global business.¹⁰⁵ In another Hard Rock-related venture, the Cherokee Nation announced in late 2008 an

¹⁰⁰ See Steven Andrew Light, Kathryn R.L. Rand, & Alan P. Meister, Spreading the Wealth: *Indian Gaming* and Revenue-Sharing Agreements, 80 *N.D. L. Rev.* 657 (2004) (discussing tribal-state revenue-sharing agreements).

¹⁰¹ See Harrah's Ak-Chin Casino Resort, <http://www.harrahsakchin.com/casinos/harrahs-phoenix-ak-chin/hotel-casino/property-home.shtml> (last visited Feb. 3, 2009); Harrah's Rincon Casino & Resort, <http://www.harrahsrincon.com/casinos/harrahs-rincon-san-diego/hotel-casino/property-home.shtml> (last visited Feb. 3, 2009); Harrah's Cherokee Casino & Hotel, <http://www.harrahscherokee.com/casinos/harrahs-cherokee/hotel-casino/property-home.shtml> (last visited Feb. 3, 2009); see also Harrah's Casinos, <http://www.harrahs.com/index.shtml> (last visited Feb. 3, 2009).

¹⁰² See MGM Grand at Foxwoods, <http://www.mgmfoxwoods.com/index.aspx> (last visited Feb. 3, 2009); MGM Grand at Foxwoods Opens, *Newsday* (Long Island, NY) (May 18, 2008), <http://www.newsday.com/travel/ny-h5685809may18.0.5555215.story>.

¹⁰³ See Station Casinos, <http://www.stationcasinos.com/corp/investor-relations/> (last visited Feb. 3, 2009).

¹⁰⁴ See Hard Rock Cafe International: Corporate History, <http://www.hardrock.com/corporate/history/> (last visited Feb. 3, 2009).

¹⁰⁵ See Hard Rock Cafe International: Corporate Ownership, <http://www.hardrock.com/corporate/ownership/> (last visited Feb. 3, 2009).

agreement to brand its expanding hotel and casino [*393] near Tulsa, Oklahoma under the Hard Rock Casino name. ¹⁰⁶

Several tribes also have successfully partnered with hotel chains. The Marriott Residence Inn Capitol in Washington, D.C. is a franchise of Marriott International owned by the Four Fires Partnership, which consists of the San Manuel Band of Mission Indians and the Viejas Band of Kumeyaay Indians, both of southern California, and the Forest County Potawatomi Community and the Oneida Tribe of Indians, both in Wisconsin. Three of the Four Fires tribes also opened a second franchise, a \$ 53 million, 239-suite Marriott Residence Inn in Sacramento, California. ¹⁰⁷ In Arizona, the Gila River Indian Community owns the Sheraton Wild Horse Pass Resort and Spa and the Fort McDowell Yavapai Nation owns the Radisson Fort McDowell Resort and Casino. ¹⁰⁸ In Green Bay, Wisconsin, the Oneida Tribe of Wisconsin owns the Radisson Hotel and Conference Center. ¹⁰⁹ And in New Mexico, the Santa Ana Pueblo owns the Hyatt Regency Tamaya Resort & Spa. ¹¹⁰

3. Private Entrepreneurship on Reservations

Tribes also are diversifying their economies by introducing and growing private-sector businesses on reservations. ¹¹¹ Increasingly, tribes are providing seed money, start-up funds, and technical assistance to small business entrepreneurs. In South Dakota, the Lakota Fund program (now known as Oweesta) was the first micro-enterprise peer-lending fund established on a reservation. The program has grown into a national service provider for Native community development financial institutions, including business revolving loan funds, credit unions, banks, venture capital institutions, and housing loan funds. ¹¹² On the Navajo Nation's reservation, the tribal government has worked to streamline the process for obtaining business-site leases on the reservation in [*394] an effort to attract more private enterprise to reservation communities. ¹¹³

B. The Future Outlook for Indian Gaming

¹⁰⁶ CNE Signs Agreement with Hard Rock, Cherokee Phoenix (Okla.) (Nov. 14, 2008), <http://www.cherokee-phenix.org/3165/Article.aspx> (last visited Feb. 3, 2009). The licensing agreement would be with Hard Rock Holdings, LLC and HRHH IP, LLC, which are distinct entities from Hard Rock International, which is now owned by the Seminole Tribe of Florida. See id.

¹⁰⁷ See Jim Adams, Unique Partnership Celebrates Hotel Opening, Indian Country Today, Mar. 16, 2005, at C1-C2, available at http://www.hotel-online.com/News/PR2005_1st/Mar05_FourFires.html.

¹⁰⁸ See Joseph Siano, Tribal Lands Sprout Big Hotels, N.Y. Times, June 30, 2002, available at <http://query.nytimes.com/gst/fullpage.html?sec=travel&res=9B03E5DE1F3FF933A05755C0A9649C8B63>.

¹⁰⁹ See id.

¹¹⁰ Id.

¹¹¹ See Lorie M. Graham, An Interdisciplinary Approach to American Indian Economic Development, *80 N.D. L. Rev.* 597 (2004) (describing numerous factors influencing tribal economic development); Robert J. Miller, Economic Development in Indian Country: Will Capitalism or Socialism Succeed?, *80 Or. L. Rev.* 757 (2001) (calling for greater attention to private enterprise development on reservations).

¹¹² See Oweesta, <http://www.oweesta.org/> (last visited Feb. 3, 2009); Graham, supra note 107, at 618 (describing the Lakota Fund program as "in congruence with Lakota cultural norms ... allowing members to build and use wealth on their own terms"); see also R.H. Tipton III, Note, Microenterprise Through Microfinance and Microlending: The Missing Piece in the Overall Tribal Economic Development Puzzle, 29 Am. Ind. L. Rev. 173 (2004) (proposing a tribal microfinance program to assist small business entrepreneurs who are ineligible for traditional funding).

¹¹³ See Capitalism's Last Frontier, The Economist, Apr. 3, 2008, available at http://www.economist.com/business/displaystory.cfm?story_id=10966109.

In light of its historical development and performance, where does Indian gaming go from here? Despite the slower growth of Indian gaming in recent years, there is a fairly optimistic outlook for Indian gaming's continued success. But there are also uncertainties, and much depends on how far into the future one wishes to look.

In the short term, through 2009 and perhaps beyond, there is a high degree of uncertainty due to the state of the general U.S. economy. Until the economy turns around, it is likely that on a nationwide basis Indian gaming will continue to see slower growth than it has experienced historically. Throughout 2008, amidst the downturn in the economy, many Indian gaming facilities reported revenue declines and layoffs. For example, in September 2008, Foxwoods Resort Casino, one of the largest revenue-generating Indian casinos in the United States, laid off approximately 700 workers.¹¹⁴

In the mid term, after the economy turns around, Indian gaming should experience strong growth again. There are a few likely sources for the mid-term growth: expansions of gaming in undersupplied states, where tribes were previously restricted in terms of supply but are now able to expand (e.g., California, Washington, and Arizona); conversion from Class II machines to more lucrative Class III machines (e.g., continuing in Oklahoma and possibly in Florida, where the Seminole Tribe's gaming compact is being challenged); continued growth in Class II markets if recently enacted or proposed gaming regulations do not significantly reduce the performance of Class II gaming machines; continued growth in smaller, less mature Indian gaming markets that have limited competition and unmet demand; and the abundance of new gaming developments planned across the country (e.g., proposed and planned gaming facilities and facility expansions).

In the long term, many gaming tribes face favorable market conditions. However, there is still great uncertainty for Indian gaming. This is especially true in light of existing legal challenges and proposed legislation and regulations aimed at restricting Indian gaming and limiting its expansion. The fact is that any number of these policy shifts could critically impact Indian gaming. In South Dakota, for example, Indian gaming at the twelve tribal gaming facilities generated just over \$ 97 million in 2007, down from over \$ 100 million in 2006.¹¹⁵ The Indian gaming market in South Dakota is artificially constrained by compact limits on the number of slot machines the tribes may operate.¹¹⁶ [*395] The Flandreau Santee Sioux Tribe recently filed a federal claim accusing Governor Mike Rounds of failing to negotiate in good faith, and the outcome of the case may impact the growth of Indian gaming in South Dakota.¹¹⁷

Even if non-market factors (i.e., legal challenges, legislation, and regulations) do not slow down the growth of the Indian gaming industry, there are market limitations that may contribute to slower growth. There is potential competition, both within and outside of Indian gaming, and markets can naturally slow as they mature and if they become saturated.

¹¹⁴ Jim Finkle, Big U.S. Casino Foxwoods to Cut 700 Jobs, Reuters, Sept. 30, 2008, available at <http://www.reuters.com/article/CASINO/idUSN3047031320080930>.

¹¹⁵ Meister, *supra* note 3, at 38.

¹¹⁶ *Id.* The tribal-state compacts are available through the South Dakota Office of Tribal Government Relations, <http://www.state.sd.us/oia/agreements.asp> (last visited Feb. 3, 2009). By way of comparison, the Sisseton-Wahpeton Oyate's reservation straddles the border between North Dakota and South Dakota, and operates casinos in both states. In South Dakota, where slots are limited by the tribal-state compact, the tribe's Dakota Sioux Casino offers 200 Class III machines and 145 Class II machines. See Dakota Sioux Casino, <http://www.dakotasioux.com/slots.htm> (last visited Feb. 3, 2009). In North Dakota, where the tribal-state compact places no limit on the number of slot machines, the tribe's Dakota Magic Casino offers over 900 machines. See Dakota Magic Casino & Hotel, <http://www.dakotamagic.com/slots.htm> (last visited Feb. 3, 2009).

¹¹⁷ See Amelia Quiroga, Indian Gambling - South Dakota Indian Gambling Revenue Down, US Up, Associated Press, Sept. 2008, available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=4461&Itemid=33.

C. Tribal Economic Diversification ¹¹⁸

As a result of the short-, mid-, and long-term uncertainties surrounding the future of Indian gaming, it is wise for tribes to consider expanding beyond gaming into non-gaming business ventures. In so doing, tribes develop sources of revenue other than gaming, thus diversifying their economic base, minimizing risk, and providing greater long-term economic stability.

However, not all non-gaming business ventures are alike. They differ in many respects and may be grouped into four levels of diversification: non-gaming amenities within or adjacent to gaming facilities, tourist-reliant non-gaming businesses, on-reservation businesses that export products off the reservation, and off-reservation businesses.

1. Non-Gaming Amenities Within/Adjacent to Gaming Facilities

The most commonly used form of diversification by gaming tribes is the operation of non-gaming amenities within or adjacent to gaming facilities. These non-gaming businesses have typically included hotels, restaurants, spas, retail outlets, entertainment, and meeting and convention space. While these non-gaming businesses can have a positive effect on the core gaming business by providing a deeper and wider range of offerings for patrons and by increasing the perceived quality and attractiveness of a facility, they are considered to be the lowest level of diversification because the non-gaming businesses are still largely dependent on the success of gaming.

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2. Tourist-Reliant Non-Gaming Businesses

The second level of diversification is tourist-reliant non-gaming businesses outside of casinos. These businesses rely on customers drawn onto the reservation, and have included restaurants, golf courses, retail/outlet malls, ski resorts, RV parks, water parks, gas stations, grocery stores, travel centers, and museums/cultural centers. While less dependent on gaming than the first level of diversification, this level may still be largely reliant on gaming patrons.

3. On-Reservation Businesses that Export Products Off the Reservation

The third level of diversification is on-reservation businesses that export products off the reservation. These businesses are completely independent of gaming. The types of businesses have typically been quite diverse in nature and often dependent on geographic location, available natural resources, and core competencies of tribes. Such ventures have included natural resources, such as agriculture, fisheries, forestry, ranching, mining, and energy production, as well as water bottling, construction, manufacturing, apparel, and financial services such as banking and mutual fund management. Others have included industrial parks and business parks, information technology services, transportation logistics, commercial printing, various types of media outlets, sports promotions, and even a professional sports team.

4. Off-Reservation Businesses

The highest and least frequently used level of diversification is off-reservation businesses. These types of businesses are not as common, as they may forfeit some of the valuable benefits, such as comparative advantage in taxation or sovereign immunity, that tribal enterprises enjoy when located on reservation lands. As such, they may be higher-risk business ventures. However, they do not restrict tribes to their reservations or limit the types of opportunities available. Recent examples of off-reservation businesses have included hotels and restaurants. The largest example of a tribal off-reservation business is the Seminole Tribe of Florida's acquisition of the Hard Rock brand, mentioned above. The tribe not only acquired the Hard Rock Hotels that were part of two of their casinos,

¹¹⁸ Alan Meister, Continuing Legal Education course at Fredericks, Peebles & Morgan: Indian Gaming & Beyond: Yesterday, Today, & Tomorrow (Jan. 22, 2009) (on file with author).

but also more than sixty other properties comprising Hard Rock Cafes, Hard Rock Live Concert Venues, other Hard Rock Hotels, and the world's largest and most valuable music memorabilia collection.

Lastly, some tribes have explored commercial gaming and the development and management of gaming facilities for other tribes. While not unrelated to gaming, these opportunities offer geographic diversification of gaming. Attempts at this type of diversification have come from the experienced and highly successful Connecticut gaming tribes, the Mashantucket Pequot Tribal Nation and the Mohegan Tribe, which have sought gaming opportunities in commercial gaming markets (e.g., Pennsylvania and New York) and in other [*397] states (e.g., casino development and management for tribes in California, Washington, and Wisconsin). ¹¹⁹

VII. CONCLUSION

When Congress enacted IGRA, it codified tribes' sovereign right to conduct gaming on Indian lands, a right that the U.S. Supreme Court recognized in *Cabazon v. California Band of Mission Indians*. Congress recognized what American Indian people already knew - that most reservation economies were, to put it mildly, challenged in terms of resources and opportunities - and what some tribes had already realized: that gaming operations could change that equation. One of IGRA's key policy goals, therefore, was the promotion of tribal economic development.

Twenty years later, Indian gaming has made significant headway toward achieving this goal. The legal, political, and regulatory underpinnings of tribal gaming created the foundation for the industry's massive economic success. Tribal gaming is a \$ 26.5 billion industry that generates additional tens of billions of dollars in tax and other revenue and hundreds of thousands of jobs both on and off the reservation. However, Indian gaming's economic impacts are about more than just quantifiable dollars or jobs - they are transformative, whether one is in South Dakota at one end of the spectrum, or Connecticut at the other.

The Indian gaming industry continues to leverage an unprecedented diversification of reservation economies across the United States. At an ever-increasing pace, American Indian people are creating more fully developed and diversified economies that can capture otherwise externalized dollars and generate well-paying jobs on the reservation. As the industry matures, it presents new opportunities for economic diversification through tribal-corporate partnerships, venture capital and seed-money programs, and private enterprise development on reservations. Tribal governments are constructing and enhancing institutions that can further the maturation of tribal legal, regulatory, and financing capacity.

At a time when it appears that the gaming industry is impervious neither to a larger economic downturn nor to legal, political, and regulatory curtailment, the challenges to tribal gaming are substantial. Not all of those challenges are wholly external to reservations and reservation life. Most require tribal governments and American Indian people to take responsibility for their own destinies and determine what the future will hold. For many tribes, gaming may be a means to an end rather than an end in itself. In the long run, developing beyond gaming might well be the ultimate, and most desirable, outcome.

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¹¹⁹ See, e.g., Mashantucket Pequot Slots Parlor Plan Opposed, Hartford Courant, Nov. 14, 2008, available at <http://www.courant.com/business/hc-bizdiqbrf1114.art3nov14%2C0%2C5829400.story>; Erica Jacobson, Foxwoods to Help Revive Casino in Bahamas, Metrowest Daily News (Mass.), Feb. 25, 2008, available at <http://www.metrowestdailynews.com/state/x774167759>.

SPORTS BETTING AND INDIAN GAMING: SHOULD TRIBAL CASINOS GET IN THE GAME?

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INTRODUCTION

When the U.S. Supreme Court decided in *Murphy v. National Collegiate Athletic Association*¹ (NCAA) that the federal Professional and Amateur Sports Protection Act² (PASPA) was unconstitutional, the Court effectively lifted the widespread ban on legalized sports betting in the United States. All states—and presumably, all eligible federally acknowledged American Indian tribes—now

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¹ 138 S. Ct. 1461 (2018).

² See 28 U.S.C. §§ 3701–04 (2012), *invalidated by Murphy*, 138 S. Ct. 1461.

could exercise their sovereign authority to legalize sports wagering.³

After its passage in 1992, PASPA formally outlawed sports betting nationwide, with the notable exception of the licensed sports pools in Nevada.⁴ Yet in practice, the law was markedly ineffective, as evidenced by the estimated \$150 billion illegal U.S. gambling market.⁵ PASPA's underlying presumptions and policy goals grew increasingly anachronistic, utterly failing to slake the public's thirst to gamble on sports contests, especially with the advent of online and mobile technology, and as evidenced by the popularity of Super Bowl and March Madness office pools, online poker, Fantasy Sports leagues and Daily Fantasy Sports (DFS) sites, competitive video gaming and eSports, social games, and the like.⁶ Additionally, PASPA did not contemplate the massive growth and marketing of big-time professional sports leagues—or, ironically, that of collegiate sports and the NCAA—or social media's role in popularizing individual sports personalities and online influencers. The bottom line? Regardless of the outcome in the Supreme Court's decision, PASPA was a losing bet.

The subsequent flood of media stories after *Murphy* was decided focused on the apparent inevitability that a majority of states in the near term would legalize sports betting.⁷ Gaming operators, casinos, industry and trade affiliates, and consultants of all stripes were readying to "cash in." As not many state legislatures

³ See A.J. Perez, *What it Means: Supreme Court Strikes Down PASPA Law that Limited Sports Betting*, USA TODAY (May 14, 2018, 3:23 PM), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/>.

⁴ See §§ 3701–04. PASPA also "grandfathered" more limited sports betting in the form of sports lotteries in Oregon, Delaware, and Montana. See, e.g., I. Nelson Rose, *States Grandfathered-in Under PASPA*, GAMBLING AND THE LAW (Jan. 3, 2018), <http://www.gamblingandthelaw.com/states-grandfathered-in-under-paspa/>.

⁵ See *Embracing America's Passion for Sports Betting: The Case for Overturning a Failed Law and Returning Power to the State and Tribal Sovereign Governments*, AMERICAN SPORTS BETTING COALITION, <https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d888419202bd897172a0/1517344904408/Embracing+America%27s+Passion.pdf> (last visited Mar. 10, 2019).

⁶ See GREENBERG QUINLAN ROSNER RESEARCH, *LEGALIZING SPORTS BETTING: A WINNING WAGER*, REPORT TO THE AMERICAN GAMING ASSOCIATION, (Apr. 24, 2017), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d93b419202bd8971b2fa/1517345084101/Rev_Public+AGA+National+Poll+Memo+042417+FINAL.pdf.

⁷ See, e.g., Ryan Rodenberg, *How Close Is My State to Legalizing Sports Betting?*, ESPN.COM (June 28, 2018), http://www.espn.com/chalk/story/_/id/22516292/gambling-ranking-every-us-state-current-position-legalizing-sports-betting ("Movement toward legal sports betting hit a fever pitch during the first part of 2018."); Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html> (stating that the Court's decision "open[ed] the door to legalizing the estimated \$150 billion in illegal wagers on professional and amateur sports that Americans make every year"); Ariane de Vogue & Maegan Vazquez, *Supreme Court Lets States Legalize Sports Gambling*, CNN (May 14, 2018, 3:45 PM), <https://www.cnn.com/2018/05/14/politics/sports-betting-ncaa-supremecourt/>

were in session, and the fall 2018 midterm election came and went, reality set in. State lawmaking and rulemaking, as well as operational development and implementation of mobile and casino-based sports wagering, will take time.

Yet in disrupted industries, first movers have the competitive advantage.⁸ And monopolies maintain it. A key question for the gaming industry, then, is how the Court's decision will impact American Indian tribes in the largest current legalized gaming market: the \$32.4 billion Indian gaming segment,⁹ in which many tribal-state compacts contemplate tribal market exclusivity in a particular state.¹⁰ Under PASPA, tribes also effectively were prohibited from offering sports betting;¹¹ now, express state legalization opens the door to tribal sports betting, as well. In a post-PASPA world, should tribes get in the game?

Answering that question—like anything that lumps together the experiences of the 242 sovereign tribes that currently operate nearly 500 gaming facilities in twenty-nine states¹²—is complex. Tribal gaming is governed by an extensive framework of federal law and regulations, as well as an array of tribal-state compacts.¹³ Like a tribe's choice to open a casino under the regulatory framework of the federal Indian Gaming Regulatory Act of 1988¹⁴ (IGRA), its determination to enter the nascent sports betting market is much more than a business decision. For a sovereign government with responsibilities to enrolled tribal citizens as well as to non-tribal community members, such a judgment carries political, legal, economic, social, cultural, and moral implications.

To make a calculated decision whether to get in the sports-betting game, we posit that a tribe should carefully evaluate three major barriers to market entry:

—*Legality and regulation*, particularly IGRA's interplay with state law, the framework of existing tribal-state compacts, and ensuring alignment with interpretations and directives from the National Indian Gaming Commission (NIGC);

—*Feasibility and profitability*, such as compact terms, fixed or sunk costs

index.html ("The Supreme Court cleared the way on Monday for states to legalize sports betting . . .").

⁸ See First Mover, Investopedia, <https://www.investopedia.com/terms/f/first-mover.asp> (last updated Mar. 27, 2018) (definition of "first mover").

⁹ Press Release, Nat'l Indian Gaming Comm'n, 2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion (June 26, 2018), <https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion>.

¹⁰ See KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY, at 159-60 (2d ed. 2014) (discussing the "substantial exclusivity" provisions associated with revenue-sharing agreements in tribal-state gaming compacts) [hereinafter RAND & LIGHT, INDIAN GAMING LAW AND POLICY].

¹¹ See Dave Palermo, *Tribal Position On Sports Betting Will Come Into Focus At Phoenix Conference*, LEGAL SPORTS REP. (Sept. 14, 2017, 1:31 PM), <https://www.legalsportsreport.com/15573/tribal-gaming-and-sports-betting-niga-2017/>.

¹² 2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion, *supra* note 9.

¹³ See generally RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 10, at 37-72 (providing an overview of the various federal statutes, regulations, and requirements for tribal-state gaming compacts that apply to Indian gaming).

¹⁴ See 25 U.S.C. §§ 2701-21 (2012).

and plug-and-play options for a sports book, and the marginal rate of return for sports books versus slots or similar fixed-odds games; and

—*Market and competition*, including whether other tribal and/or commercial operators offer sports betting in the same or a similar market, the advantages of partnering with commercial operators or other tribes, and how mobile betting apps and similar technology can scale.

In this essay, we address each barrier. Together, they establish the potential risk and reward for tribal sports betting. Our intent is to surface and highlight these hurdles, and to identify threshold solutions for how to surmount them.¹⁵ The considerations we raise are relevant for states, local governments, and commercial industry entities, as well. However, we believe they are more complex in the context of Indian gaming, which is subject to federal, state, and tribal regulation as well as to commercial pressures.

I. LEGALITY AND REGULATION: THE FIRST BARRIER TO MARKET ENTRY

A. Threshold Requirements

Generally speaking, a tribe may not offer sports betting unless it is legal under state law. Under IGRA, a tribe may operate gaming only on “Indian lands” in states that “permit[] such gaming for any purpose by any person.”¹⁶ “Such gaming” conceivably can be read broadly; for instance, in the form of all “casino-style” games. In 2001, however, the NIGC opined that a state specifically must have legalized sports betting in order for a tribe to offer it.¹⁷

¹⁵ In this essay, which accompanies the other leading-edge articles in this Symposium issue, we forgo laying out the complete backdrop for Indian gaming law and policy, including tribal sovereignty and tribes’ relationship to the U.S. Constitution, IGRA’s statutory requirements, Indian gaming regulations and case law, and the current size and scope of the tribal gaming industry, which we have described extensively elsewhere. See, e.g., STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005) [hereinafter LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY]; RAND & LIGHT, INDIAN GAMING LAW AND POLICY, supra note 10; KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW: CASES AND MATERIALS (2d ed. forthcoming 2019). We also defer to other Symposium authors to discuss in detail PASPA, the *Murphy* decision, and the more technical dimensions of legalized sports betting, particularly in the commercial sector. (We further note that some of the background specific to tribal sports betting is aptly addressed in this Symposium. See Francisco Olea, *The Professional and Amateur Sports Protection Act and Its Legal Implications: How Its Invalidity Will Impact Indian Gaming’s Legal and Regulatory Framework*, 9 UNLV GAMING L. J. 35 (2019)). Rather than detailing all of these other considerations, we instead leverage the fact of being embedded within this Symposium to get right to the heart of the matter: the key considerations counseling “go or no go” on tribal sports betting.

¹⁶ 25 U.S.C. § 2710(d)(1)(B).

¹⁷ See Letter from Kevin K. Washburn, Gen. Counsel, Nat’l Indian Gaming Comm’n, to Joseph M. Speck, Nic-A-Bob Prods., Re: WIN Sports Betting Game, at

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For Class III gaming, IGRA requires a “compact entered into by the Indian tribes and the State.”¹⁸ The NIGC has classified sports betting as Class III gaming, requiring a tribal-state compact.¹⁹ Under NIGC regulations, Class III gaming includes “[a]ny sports betting and pari-mutuel wagering.”²⁰ (Nevertheless, some argue that this classification is not, as of yet, settled law, so that some forms of sports betting could fall within Class II.²¹ It is accurate, and therefore relevant, to note that this characterization has not yet been formally tested.)

At a minimum, then, a tribe’s decision to pursue sports wagering is conditioned on state law and IGRA’s requirements, presumably including those for compacts.

B. Compacting

Assuming state legalization of sports betting, the next step is to determine whether the existing tribal-state compact allows the tribe to open a sports book, or whether a new or revised compact is required. Alternatively, a tribe could proceed without a compact on the assumption that the tribe’s sports book (or sports-betting-type games) fall within Class II; this would require the tribe to accept some currently significant level of risk, including the possibility of litigation and civil or criminal penalties.²² Given NIGC regulations and the accompanying risk (as well as cost) of litigation, most tribes—and certainly, states—

2 (Mar. 13, 2001) [hereinafter Washburn Letter], <https://www.nigc.gov/images/uploads/game-opinions/WIN%20Sports%20Betting%20Game-Class%20III.pdf>.

Whether the NIGC will enforce this as a specific requirement after *Murphy* remains to be seen. In New Mexico, the Pueblo of Santa Ana opened a sports book at its Santa Ana Star Casino & Hotel in 2018, despite the fact that New Mexico had not passed legislation authorizing sports betting in the state. The NIGC general counsel informally commented that New Mexico fell into a “gray area,” as state law neither prohibited nor permitted sports betting, while the tribal-state compact with the Pueblo of Santa Ana authorized the tribe to operate “any or all forms of casino-style gaming.” See Steve Ruddock, *How New Mexico Sports Betting Started in a State Without a Sports Betting Law*, LEGAL SPORTS REP. (Nov. 19, 2018, 5:13 PM), <https://www.legalsportsreport.com/26007/pueblo-tribe-new-mexico-sports-betting/>.

¹⁸ 25 U.S.C. § 2710(d)(1)(C).

¹⁹ Washburn Letter, *supra* note 17.

²⁰ 25 C.F.R. § 502.4(c) (2018). In a game classification opinion from 2001, the NIGC stated that “sports betting . . . is a Class III form of gaming.” Washburn Letter, *supra* note 17.

²¹ See, e.g., Christopher E. Babbitt, Jonathan Bressler, & Claire Chung, *United States: Supreme Court to Decide Future of Sports Betting: Implications for Tribal Casinos*, MONDAQ (Feb. 21, 2018), <http://www.mondaq.com/unitedstates/x/675562/Gaming/Native+American+Law+Alert>. See also *id.* (“Montana, for example, currently authorizes sports pools and sports tab games, which are non-banked games in which players bet against and settle with each other, not a traditional sportsbook. . . . [T]he NIGC’s position [that sports betting is Class III gaming] has not been litigated, and the law on sports wagering is still developing.”).

²² See, e.g., *id.* The NIGC has enforcement authority, including the power to levy

likely will proceed on the assumption that sports betting is a Class III game.

There are hundreds of gaming compacts now in effect; many are based on “model” compacts such that the compact provisions are the same or similar for all tribes within a particular state, while others are more individualized.²³ Any existing compact will require careful review to determine what amendments may be necessary for a tribe to offer sports betting, as well as the implications of such revisions and/or offering additional Class III games at the tribe’s casino. Though some tribes have compacts that allow the tribe to add a sports book conditioned upon state legalization (triggered at the outset, that is, by federal authorization to do so—and as it turns out, via *Murphy*—followed by state sanction),²⁴ for most tribes, sports betting likely will require an amendment to an existing compact (or a new compact, if one is not in place).

C. Negotiating Revenue Sharing and Other Issues

Any compact negotiations almost certainly would include the single biggest political demand a state may legally make of a gaming tribe: revenue sharing.²⁵

civil fines and order closure of tribal gaming facilities. See 25 U.S.C. § 2713 (2012). The federal Johnson Act prohibits the use of unauthorized “gambling devices” in Indian country. See 15 U.S.C. § 1175 (2012).

²³ For a (mostly up-to-date) list and links to compacts, see *Indian Gaming Compacts*, U.S. DEPARTMENT OF THE INTERIOR, <https://www.bia.gov/as-ia/oig/gaming-compacts> (last visited Feb. 10, 2019). Many states make gaming compacts publicly available. See, e.g., *Tribal Compacts and Amendments*, STATE OF WIS. DEP’T OF ADMIN., <https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx> (last visited Jan. 4, 2019).

²⁴ For example, the Mississippi Band of Choctaw Indians was able to act quickly to open sports books at its casinos due to specific language in the existing compact allowing the tribe to offer sports betting “only if such wagers are allowed on non-Tribal lands under the law of the State.” Thus, when sports wagering became legal in Mississippi by virtue of the 2017 amendments to the [state’s] Gaming Control Act, it also became an “authorized” form of gaming for the Choctaw Tribe under its long-ago negotiated compact with the state. Adam Candee, *Mississippi Sports Betting Could Go Live at Tribal Casinos Quickly*, LEGAL SPORTS REP. (June 12, 2018, 3:30 PM), <https://www.legalsportsreport.com/21178/tribal-casinos-mississippi-sports-betting/>. See also Nicholas Garcia, *Choctaw Believed To Be First Tribe Outside Nevada To Offer Sports Betting*, LEGAL SPORTS REP. (Sept. 3, 2018, 8:00 AM), <https://www.legalsportsreport.com/23406/Choctaw-tribe-sports-betting>. In New Mexico, the Pueblo of Santa Ana relied on compact language authorizing the tribe to operate “any or all casino-style gaming” to open a sports book at its casino after PASPA was struck down. See Ruddock, *How New Mexico Sports Betting Started*, *supra* note 17.

²⁵ See generally Steven Andrew Light, Kathryn R.L. Rand, & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004). Here, law and politics come into play; due to both, the negotiation or renegotiation of compact terms historically has placed the state in the driver’s seat. Although IGRA requires states and tribes to negotiate in “good faith,” the U.S. Supreme Court’s 1996 *Seminole Tribe* decision fundamentally undercut that require-

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On the other hand, state legalization of commercial sports betting may diminish tribal exclusivity over Class III gaming and thus put existing revenue-sharing payments at risk.²⁶

Under IGRA, tribes (and states) need to assess revenue sharing within accepted parameters established by the Secretary of the U.S. Department of the Interior, including exclusivity and tribal economic impact analysis.²⁷ If the payments to a state are perceived as too high relative to anticipated net revenue, revenue sharing will be problematic under both Interior Department and Ninth Circuit precedent.²⁸ Moreover, as we explain below,²⁹ the extent of any state revenue sharing demands must take into account the relatively low net return to sports books, which should confine "good faith" negotiation to a limited range of outcomes.

Although issues related to revenue sharing are likely to dominate most compact negotiations, other specifics also will come into play: What *exactly* will be authorized under state law and/or a compact, for tribes and/or commercial casinos? What kinds of wagers, for what sports, in which locations, and utilizing what technology? What changes will be required in state or tribal regulations and regulatory agencies? In short, tribal-state gaming compacts are sophisticated and

ment. See 25 U.S.C. § 2710(d)(7)(A)–(B) (2012); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). Sports betting undoubtedly will bring the state to the table, but there is no guarantee of fairness or equity in the negotiations or outcomes, and a state might simply walk away until its conditions are met. *But see* Olea, *supra* note 15, at 44 ("Because some tribes may have little to no interest in adding sports gambling to their already established gaming facilities, the states may have to incentivize amending the compact beyond offering sports gambling in the Indian gaming facilities.") Olea observes that states like Arizona may have compacts with "poison pill" provisions that effectively render the compact, including limitations on tribal gaming and requirements for revenue sharing, null and void upon state authorization or legalization of new forms of gaming or gaming offered by non-tribal entities. *Id.* This would appear to give tribes in those states greater political leverage, at least in bringing the state to the table—although we do not believe it guarantees political advantage to the tribe once there. In Olea's view, "tribes wishing to include sports gambling as an enhancement to their Indian gaming facility offerings should have *little to no trouble* in the states where there is no 'poison pill' provision in their gaming compacts *and* the state legalizes sports gambling." *Id.* (emphasis added). We believe this may significantly overestimate the generosity of states under such circumstances; it is likely that a state still will introduce the need to renegotiate compact terms, at the very least creating political, if not economic, contention. See generally Light et al., *supra* note 25, at 677–78.

²⁶ In Connecticut, for example, the Mashantucket Pequots and the Mohegan Tribe took the position that if the state authorized non-tribal sports betting, it would violate the exclusivity supporting the tribes' revenue-sharing payments to the state under the existing compacts. See Christopher Keating, *Sports Betting Off the Table This Year in Connecticut*, HARTFORD COURANT (Aug. 28, 2018, 5:00 PM), <http://www.courant.com/politics/hc-pol-no-sports-betting-20180828-story.html#>.

²⁷ See Light et al., *supra* note 25, at 677.

²⁸ See Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011).

²⁹ See *infra* Part II.A, Sports Book 101.

complex contracts with terms that vary significantly by state and by tribe; any negotiations should be expected to be complicated and time-consuming.³⁰

Further, even successful negotiations may not result in a valid compact. IGRA requires that the Interior Secretary review and approve gaming compacts,³¹ and state law often requires prior legislative approval.³² These multiple tiers of approval create the risk that duly negotiated compact terms may not be approved as required for a valid compact.

It should be noted, too, that while tribal gaming as a whole is the largest segment of the U.S. casino industry,³³ national figures alone obscure the wide range of profitability by state and by tribe. Tribal gaming in just two states—California and Oklahoma—accounts for 41% of total tribal gaming revenue nationwide; the top ten states (California, Oklahoma, Florida, Washington, Arizona, Connecticut, Minnesota, Michigan, Wisconsin, and New York, by rank) account for 84% of national revenue.³⁴ The remaining 16% is spread across eighteen states.³⁵ Profitability also varies by facility;³⁶ a relatively few tribal casinos are true destination casino resorts akin to the casino properties on the Las Vegas Strip. More typically, tribal casinos are relatively small, with limited amenities, and located in rural areas.³⁷ Only around 7% of tribal casinos earn \$250 million or more each year, and these account for approximately 46% of national revenue.³⁸ On the other end of the spectrum, approximately 37% of

³⁰ See Nick Sortal, *Sports Gambling? Probably Not Soon, If Your State Has Tribal Gaming*, CDC GAMING REP. (May 30, 2018, 12:01 AM), <https://www.cdcgamingreports.com/commentaries/sports-gambling-probably-not-soon-if-your-state-has-tribal-gaming/> (providing summary analysis of state law and gaming compact issues in Florida, California, Arizona, Oklahoma, and Connecticut).

³¹ 25 U.S.C. § 2710(d)(8) (2012).

³² See, e.g., Max Reiss, *The Details on How Sports Gambling Died This Year in Connecticut*, NBC CONNECTICUT (Aug. 30, 2018, 7:17 PM), <https://www.nbcconnecticut.com/news/politics/The-details-on-how-Sports-Gambling-Died-this-Year-in-Connecticut-492112721.html> (describing how a tentative deal struck between the tribes and the governor reportedly was rejected by state legislators).

³³ In 2015, tribal gaming accounted for about 45% of national casino industry revenue, while commercial casinos accounted for about 43% and the remaining 12% was generated by racinos. ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT 13 (2018).

³⁴ *Id.*

³⁵ *Id.*

³⁶ NAT'L INDIAN GAMING COMM'N, FY13-FY17 GAMING REVENUES BY RANGE, <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenues-byRange.pdf>.

³⁷ See John L. Smith, *Small Tribal Casinos' Dilemma: Growing Gaming in Indian Country*, CDC GAMING REP. (Oct. 22, 2018, 8:00 PM), <https://www.cdcgamingreports.com/commentaries/small-tribal-casinos-dilemma-growing-gaming-in-indian-country/>.

³⁸ NAT'L INDIAN GAMING COMM'N, FY13-FY17 GAMING REVENUES BY RANGE, <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenues-byRange.pdf>.

tribal casinos earn \$10 million or less each year, accounting for just around 2% of the total.³⁹ As a result of these differences, the negotiation of revenue sharing is a non-standardized endeavor.

D. *Outside of IGRA*

A more subtle, and certainly complicating, question is whether IGRA must apply at all.

IGRA governs Indian gaming, defined as gaming by "Indian tribes" on "Indian lands," with tribal sovereignty as a defining factor of the statutory regulatory scheme.⁴⁰ However, tribes have the option of waiving their sovereign governmental authority recognized by IGRA to pursue instead sports betting as a licensed commercial operator (or commercial partner) under state law.⁴¹ Presumably, such a tribally-owned sports book would be subject to state licensing, taxation, audit, and similar requirements, but would sidestep IGRA's constraints, particularly its geographical Indian land restrictions and Class III compacting requirements.

Whether this option is available to a tribe depends, obviously, on its willingness to act as a purely commercial gaming operator—thereby forgoing IGRA's admittedly imperfect provisions, which nevertheless include broad protection of tribal sovereignty, valued highly by tribes and tribal citizens—as well as on state law and regulations, and other variables, such as the tribe's ability to secure external financing.⁴²

³⁹ *Id.*

⁴⁰ See 25 U.S.C. §§ 2702, 2703(4)-(5) (2012).

⁴¹ For example, the Mohegan Tribe's Mohegan Gaming & Entertainment operates commercial casinos in Atlantic City, Louisiana, and Pennsylvania. These casinos operate under state law and are subject to the same regulations and taxation as other commercial casinos. See Martin Derbyshire, *The Four Types of Land-Based PA Casino Licenses Explained*, PAONLINECASINO.COM (Mar. 31, 2018), <https://www.paonlinecasino.com/2266/four-casino-license-types/> (describing the categories of licenses authorized under state law and listing the Mohegan Sun at Pocono Downs as having a "Category 1" racino license).

⁴² See LIGHT & RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY*, *supra* note 15, at 9. Tribes as purely commercial gaming operators remain a rare, and therefore largely untested, occurrence. In a recent example, last year, the Laguna Pueblo of New Mexico made a failed attempt to purchase the Isle of Capri Casino Hotel Lake Charles in Louisiana. See *New Mexico Tribe Fails on Bid to Buy Louisiana Casino*, U.S. NEWS (Feb. 5, 2018, 1:22 PM), <https://www.usnews.com/news/best-states/new-mexico/articles/2018-02-05/new-mexico-tribe-fails-on-bid-to-buy-louisiana-casino>.

II. FEASIBILITY AND PROFITABILITY: THE SECOND BARRIER TO MARKET ENTRY

A. Sports Book 101

Sports books are distinct animals in the gaming world, with player wagering activity influencing the odds, and incorporating features both of games of skill and games of chance.⁴³ Adding a sports book to a casino floor involves considerations beyond those for expansion of table games or slot machines.

Thus, in evaluating the next barrier to market entry, we believe it makes sense to begin with a brief description of the sports books themselves. Our refresher account is not in any way exhaustive; we intend it to help spotlight two specific issues relevant to tribes' consideration of whether to add sports books to their casino operations: feasibility as governed by oddsmaking or line-setting expertise and ensuring bet integrity; and profitability as limited by the structure of the betting pool and its limited margin.

A typical casino sports book offers "line" bets on sports and sporting contest outcomes (baseball, basketball, boxing, football, golf, hockey, etc.).⁴⁴ High-scoring sports, such as basketball and football, typically use point-spread lines; under a point spread, the favorite team must win by a certain number of points for the bettor to win.⁴⁵ Low-scoring sports, such as baseball and soccer, use money lines, which focus on which team wins regardless of points scored.⁴⁶ An oddsmaker (or typically, a team of oddsmakers) sets the line; given Nevada's extensive experience and robust regulatory structure, Las Vegas oddsmakers are considered trustworthy and often set the state and national opening line on a particular game.⁴⁷ The oddsmaker's objective in setting the line is to manage house risk

⁴³ See VEGAS.COM, *Sports Betting*, <https://www.vegas.com/gaming/gaming-tips/sports-betting/> (last visited Mar. 7, 2018).

⁴⁴ This simplified description of a sports book is intended to illustrate broad points related to our central arguments and draws on sources designed for non-expert audiences. See SANFORD WONG & SUSAN SPECTOR, *THE COMPLETE IDIOT'S GUIDE TO GAMBLING LIKE A PRO* 159-76 (3d ed. 2003). See also *Sports Betting*, VEGAS.COM, <https://www.vegas.com/gaming/gaming-tips/sports-betting> (last visited Dec. 20, 2018); Keith Sargeant, *Sports Betting 101: Here's a Quick Tutorial on Placing Bets in N.J.*, NJ.COM (June 14, 2018, 12:11 AM), https://www.nj.com/news/index.ssf/2018/06/sports_betting_101_here_are_the_terms_youll_need_t.html; Ed Grabianowski, *How Sports Betting Works*, HOWSTUFFWORKS, <https://entertainment.howstuffworks.com/sports-betting2.htm> (last visited Mar. 10, 2019).

⁴⁵ See *Sports Betting*, *supra* note 44.

⁴⁶ See Sargeant, *supra* note 44. There are many more options for wagering on sporting contests, including "proposition" bets, such as betting on which player will score the first touchdown in a football game, and "in-game" bets, such as which team will score more points in a given quarter. These "prop bets" are highly favored in certain sports and also in other countries. Herein, we use generalizable basics about sports betting and sports books in developing our core arguments.

⁴⁷ See Rodenberg, *supra* note 7; Grabianowski, *supra* note 44.

and encourage better interest by having a "centered game," meaning roughly equal numbers of bets on both sides of the sporting event's outcome.⁴⁸ Oddsmakers may shift the line in response to betting patterns in order to incentivize and maintain a centered game.⁴⁹ Given the art of setting the line and establishing a centered game, as well as the fact that the sporting contest's outcome and all related variables that might influence the outcome are outside of house control, sports books carry more risk for the casino than games with fixed odds, such as table games and slot machines.⁵⁰

Moreover, effective risk management generally requires a high volume of bets along with a centered game.⁵¹ As is the case for online poker, which is player banked rather than banked by the house, for sports betting, "player liquidity"—or the number of people placing bets at a particular sports book—matters.⁵² The smaller the pool of potential and actual players, the lower the player liquidity, resulting in both a lower "handle" (total dollar value of bets placed) and a higher risk for the casino.⁵³ Keeping in mind that many tribal casinos are located in rural areas with relatively small populations, and are less often "destination resorts" than "convenience casinos," these variables at least partially govern liquidity and therefore, feasibility.⁵⁴

Sports wagers are structured so that the casino collects a commission, or "vig," on the bets.⁵⁵ The vig is how the casino directly profits from the sports book.⁵⁶ For illustrative purposes, assume a point-spread line on the outcome of a particular sports contest, with 100 bettors and a typical 11/10 vig, such that a player would bet \$110 to win \$100. A centered game would look something like

⁴⁸ *Sportsbook Profit Margins*, SPORTSINSIGHTS.COM, <https://www.sportsinsights.com/betting-tools/sportsbook-profit-margins/> (last visited Mar. 10, 2019).

⁴⁹ Grabianowski, *supra* note 44.

⁵⁰ See *Sportsbook Profit Margins*, *supra* note 48.

⁵¹ See Michael Kaplan, *Wall Street Firm Uses Algorithms to Make Sports Betting Like Stock Trading*, WIRED (Nov. 1, 2010, 12:00 PM), <https://www.wired.com/2010/11/ff-midas/>.

⁵² See Brad R. Humphreys, *An Overview of Sports Betting Regulation in the United States* 7 (W. Va. U., Working Paper No. 17-31, 2017), <https://business.wvu.edu/file/s/d/964afc55-3ba5-4658-8f1e-9be9fb0bd7cc/17-31.pdf>.

⁵³ See *id.*

⁵⁴ See John L. Smith, *Small Tribal Casinos' Dilemma: Growing Gaming in Indian Country*, CDC GAMING REP. (Oct. 22, 2018, 8:00 PM), <https://www.cdcgamingrep.org/commentaries/small-tribal-casinos-dilemma-growing-gaming-in-indian-country/>.

⁵⁵ See WONG & SPECTOR, *supra* note 44. See also *Vigorish*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vigorish> (*Vigorish* is defined as "a charge taken (as by a bookie or a gambling house) on bets[.]").

⁵⁶ See Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan 30, 2015), <https://www.complex.com/sports/2015/01/how-betting-lines-work/how-do-sportsbooks-make-money>.

this: if fifty bets are placed on the favorite and fifty bets are placed on the underdog, then the total betting handle would be \$11,000 (based on 100 bets at \$110 each). If the favorite wins (by at least the number of points in the spread), then those fifty bettors each get \$210 (their original \$110 bet plus \$100 in winnings), while the fifty underdog bettors lose their original bet and get nothing. After paying out \$10,500 to the winners (fifty multiplied by \$210), the casino sports book collects \$500 in net "profit"—or about a 4.5% gross return on the handle.⁵⁷ The return on sports betting, then, is inherently low—and the net, even lower. Profitable sports books therefore also are reliant on volume, as well as on the nongaming spend their patrons generate, such as food and beverage.

Here, the takeaways are that oddsmaking is complex and conditioned on a number of variables both within and outside the sports book's control, that successful oddsmaking determines betting integrity as well as profits, and that profit margins for sports books are slim.

B. Sports Books as Amenities

Given the relatively low margin for sports books, casinos such as those on the Las Vegas Strip have offered sports books as peripheral "amenities" more than casino-floor profit-drivers.⁵⁸ Gaming or nongaming amenities attract people to the casino, with the design to entice them to spend additional dollars throughout the casino-resort property.⁵⁹ With a sports book, patrons might purchase food and beverage while watching the game, or be more likely to stay and play other casino games,⁶⁰ spend a night at the casino's hotel and go to a show, and so on.

The contributions of nongaming amenities to a Las Vegas Strip casino's bottom line are nontrivial—and these days, decisive. While once nongaming revenue took a backseat to gaming profits, recently, the ratio has reversed. In 2017, the Strip reported gaming revenue at 42.4% of the total, with nongaming revenue (rooms, food, and beverage) accounting for 57.6%, the highest share ever reported by the Nevada Gaming Control Board.⁶¹ Today, nongaming amenities include concerts or similar entertainment, dining, lodging, nightlife (and daytime, considering the proliferation of dayclub pool parties), professional conferences

⁵⁷ This is why the major leagues' demand of an "integrity fee" of 1% of the handle has been met with opposition from casinos—1% of the handle is 20% to 30% of the casino's margin. See *infra* text accompanying note 66.

⁵⁸ See Anthony F. Lucas, *Examining the Link Between Poker Room Business Volume and Gaming Activity in Slot and Table Games: A Closer Look at a Key Assumption in the Full Service Theory*, 17 UNLV Gaming Research & Rev. J. 43, 44-45 (2013).

⁵⁹ *Id.* at 45.

⁶⁰ *Id.* at 48.

⁶¹ Thomas Moore, *Nevada Resort Revenue Hits Record Levels in 2017*, LAS VEGAS SUN (Jan. 12, 2018), <https://lasvegassun.com/news/2018/jan/12/nevada-resort-revenue-hits-record-levels-in-2017/>.

and meetings, retail, spas, and sporting events, now including eSports (i.e., competitive video gaming) and professional franchises, like the NHL's Vegas Golden Knights.⁶² The list of top reasons for coming to Las Vegas now finds conventions or corporate meetings, visiting family or friends, and general business trips ranking above gambling itself.⁶³ Nationwide, nongaming amenities now generate between 45% and 75% of commercial casino resort revenue.⁶⁴

Tribal casinos remain substantially more reliant on slots and other gaming devices, including Class II machines, than does the commercial industry. In 2016, tribal gaming revenue nationwide was \$31.5 billion, while nongaming revenue was \$4.2 billion—the highest figure to date, but still less than 12% of total tribal revenue.⁶⁵ While nongaming revenue at tribal casinos is growing,⁶⁶ it lags far behind that of commercial casinos.

As with gaming revenue, tribal casino nongaming revenue varies by location and operation. Large, destination casino resorts are in the best position to capitalize on nongaming amenities, although this varies with local competition. For a relatively few tribal casinos, typical amenities look more and more like those on the Strip, including upscale hotels and restaurants, luxury retail, nightclubs, brand-name concerts or shows, convention centers, custom-designed golf courses, and spas. But in many smaller casinos, particularly those in rural areas, amenities may be as straightforward as basic hotels and bars, buffet restaurants or diners, gas stations, convenience stores, and RV parks.⁶⁷ Such casinos do not boast a wide array of nongaming amenities, limiting the value of a sports book as a way to get customers in the door to spend dollars in other areas on the property. Nevertheless, in rural areas, a sports book might bring in customers to bet and watch games in a social setting with the big screen (or multiple screens), with less competition from sports bars or other venues typically found in more

⁶² Richard N. Velotta, *Las Vegas Resorts Relying More on Nongaming Options, Expert Says*, LAS VEGAS REV.-J. (Apr. 26, 2018, 7:06 PM), <https://www.reviewjournal.com/business/tourism/las-vegas-resorts-relying-more-on-non-gaming-options-expert-says/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MEISTER, *supra* note 33, at 30 (analyzing proprietary data from calendar year 2016).

⁶⁶ "On a nationwide basis, nongaming revenue at Indian gaming facilities grew 8.2%, from about \$3.9 billion in 2015 to an all-time high of \$4.2 billion in 2016. . . . The continued growth of nongaming revenue is indicative of the importance of nongaming amenities in the evolution of Indian gaming facilities." MEISTER, *supra* note 33, at 30. Overall, nongaming revenue growth has been faster than gaming revenue growth in the Indian gaming sector, however. "It is notable that the growth rate for nongaming revenue was once again higher than that for gaming revenue. This has been true in 11 of the last 15 years . . ." *Id.*

⁶⁷ See Buck Wargo, *Just Like Vegas: Regional and Tribal Casinos Want to Make Nongaming Amenities Profitable*, CDC GAMING REP. (July 22, 2018, 12:13 AM), <https://www.cdccgamingreports.com/just-like-vegas-regional-and-tribal-casinos-want-to-make-non-gaming-amenities-profitable/>.

urban areas.⁶⁸

Regardless of location, a sports book is likely to attract new patrons, particularly Millennials or the Generation Z cohort. Such "Digital Natives" live on their mobile devices, already are regular participants in fantasy sports leagues or Daily Fantasy Sports, and have proven less interested in traditional casino games of chance than in videogames, social games, and games of skill in which they control elements of the outcomes.⁶⁹

Crucially, the next generations of consumers both prefer and expect instant mobile access. As we discuss above,⁷⁰ IGRA's requirements may be a significant constraint on a tribe's ability to compete with the availability of mobile betting within a state's physical borders.

C. Additional Considerations

Let's now look at feasibility and profitability specifically for tribal sports books. First, feasibility: as we establish above,⁷¹ the preconditions for establishing a sports book include significant expertise to set a reliable line, build a sufficient pool of bettors, and establish and manage myriad types of sophisticated bets. A sports book also requires a substantial commitment of human resources, physical space, technology, and general operations specific to wagering.⁷² Identifying and managing these sunk, fixed, and variable costs will be critical for any tribe, especially for those in rural markets or whose gross gaming revenues are at the lesser pole of what we have labeled the "spectrum of success" for tribal gaming.⁷³ A sports book may or may not grow the tribe's customer base, while overcoming local limitations on facility size, infrastructure, or labor pool may not be worth the investment. On the other hand, technology provides the ability to scale; for instance, if authorized under state law, a tribe's purchase of mobile

⁶⁸ See Glenn Smithson, *Casino Success in a Rural Market*, INDIAN GAMING MAG., Nov. 2017, at 26. See generally *Small Tribal Casinos' Dilemma: Growing Gaming in Indian Country*, *supra* note 54.

⁶⁹ Kathryn Rand & Steven A. Light, *eSports and NextGen Betting*, 16 INT'L CTR. YOUTH GAMBLING PROBS. & HIGH-RISK BEHAV., at 1 (Winter 2016). Gen Z alone now comprises 25% of the population, outnumbering Millennials and Baby Boomers, and is entering the workforce at a rapid rate. Kathryn Dill, *7 Things Employers Should Know About the Gen Z Workforce*, FORBES (Nov. 6, 2016, 3:00 PM), [https://www.forbes.com/sites/kathryndill/2015/11/06/7-things-employers-shouldknow-about-the-gen-z-workforce/#67adclb2fad7](https://www.forbes.com/sites/kathryndill/2015/11/06/7-things-employers-should-know-about-the-gen-z-workforce/#67adclb2fad7).

⁷⁰ See *supra* Part I, Legality and Regulation.

⁷¹ See *supra* Part II.A, Sports Book 101.

⁷² See Payton Guion, *These Are the Job Openings Sports Betting Will Bring to New Jersey*, NJ.COM (May 16, 2018, 11:51 AM), https://www.nj.com/politics/index.ssf/2018/05/sports_betting_will_brings_these_jobs_to_new_jersey.html; David Elliot, *Casinos Getting Ready for Sports Betting*, WLOX (July 16, 2018, 7:16 PM), <http://www.wlox.com/story/38656759/casinos-getting-ready-for-sports-betting/>.

⁷³ See LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 15, at 9–11 (describing tribal gaming as a "spectrum of success").

gaming app architecture could facilitate player liquidity via customer acquisition and pooling at low marginal cost, and could be a true game changer for many tribes.⁷⁴

As for profitability, as we describe above,⁷⁵ the rate of return for a sports book is low, due to reliance on the total pool of player funds and the need to set odds that generate a centered game. Sports betting also carries inherent risk for the sports book, as the line is contingent on external factors that are not always predictable, and the house cannot directly set and maintain firm odds for payout on the handle.⁷⁶

To surmount these barriers to market entry, a tribe would want to consider contracting with an established oddsmaking outfit, providing immediate capability, capacity, and credibility. A "plug-and-play" technology solution and suite of sports book services, like those marketed by such prominent bookmakers or games manufacturers as William Hill or IGT,⁷⁷ would substantially reduce risk, fixed costs, learning curves, regulatory uncertainties, and overall, barriers to entry.⁷⁸ Depending on the nature and extent of plug-and-play products and services, however, it is possible that acquisition of such commercial products and services could be construed as constituting a "management contract" pursuant to IGRA, thereby requiring NIGC review and approval—presumably not an insurmountable barrier, albeit one that is untested in this context.⁷⁹

Profitability projections for tribal sports books must take into account the likelihood of increased revenue-sharing payments to the state. When opening up settled compacts to the politics of negotiation, state officials are almost certain to demand increased revenue sharing to allow a tribe to expand into sports wagering. With its relatively low margin, sports betting profits may not offset the risks inherent in renegotiating compact terms.

An additional variable impacting profitability is the so-called "integrity fee"

⁷⁴ See Garcia, *supra* note 24.

⁷⁵ See *supra* Part II.A, Sports Book 101.

⁷⁶ Olea, *supra* note 15, at 46, makes a similar point.

⁷⁷ See IGT, *IGT Pioneers Tribal Gaming Sports Betting with Mississippi Band of Choctaw Indians*, CISION PR NEWswire (Sept. 12, 2018, 6:45 AM), <https://www.prnewswire.com/news-releases/igt-pioneers-tribal-gaming-sports-betting-with-mississippi-band-of-choctaw-indians-300710851.html>; Michelle Schenk, *IGT is "Your Best Bet" at G2E*, IGT (Oct. 4, 2018), <https://www.igt.com/products-and-services/lottery/lottery-blog/2018/october/igt-is-your-best-bet-at-g2e-2018>.

⁷⁸ See David G. Schwartz, *How It Felt to Book Delaware's First Sports Bet*, FORBES (June 7, 2018, 8:55 AM), <https://www.forbes.com/sites/davidschwartz/2018/06/07/how-it-felt-to-book-delawares-first-sports-bet/#26640b9d3bc6>. See also Olea, *supra* note 15, at 43 ("Tribes that have little to no experience in running sports books or related sports gambling operations within their facilities may seek to hire additional experienced personnel, perhaps under management contract, to get their operation to a functional level.").

⁷⁹ See 25 U.S.C. §§ 2710(d)(9) (2012) (authorizing management contracts for Class III gaming subject to approval). See also *id.* § 2711(a)(1) (2017) (authorizing management contracts for Class II gaming subject to approval).

proposed by major sports leagues, including the NBA and MLB.⁸⁰ The leagues have demanded as much as one percent of the total handle, positing it as a fee to help secure the integrity of the sports or of the product.⁸¹ States have responded with arguments that this label at best is disingenuous; rather, the leagues are simply seeking to charge an unnecessary rights fee, royalty, or tax, and that state gaming regulation is sufficient to ensure integrity of the games.⁸² As an additional cost borne by any sports book, such a fee will precipitously reduce profitability at the margin and, for tribal sports books in particular, may be negotiated between the state and the leagues and simply passed on to the tribe.

As an overarching consideration, the realities of the growing sports betting market may or may not live up to the hype—whether at first, or at all. Contributing to the uncertainty, predictive data often are based on national, rather than state, local, or (certainly, most rarely) tribal markets. New Jersey's recent introduction of online gaming is instructive; then-Governor Chris Christie admitted the state had "overplayed its hand" in its initial projections and budgeting around online gaming revenue (with actuals of just \$34 million in 2014, its first year, as opposed to the state's projected \$200 million influx).⁸³ Another lesson: once hailed as the savior for New Jersey's budgetary woes, online poker has been the big loser in that state, contributing less than 10% of total revenue in 2018 and down about 11% year-over-year.⁸⁴ However, being first-to-market may bring a greater advantage in sports betting than it did for online gaming: New Jersey legalized sports betting in June 2018, and as of early fall, the online sports betting handle from the three commercial providers that had been in the market for just a few weeks (DraftKings, playMGM, and SugarHouse) accounted for over one-third of the state's total sports betting revenue.⁸⁵

Tribes also should consider the cost of aligning the capacity of their own

⁸⁰ See generally Darren Heitner, *NBA and MLB Face Challenge in Persuading States to Award a Sports Betting Integrity or Rights Fee*, FORBES (May 18, 2018, 7:00 AM), <https://www.forbes.com/sites/darrenheitner/2018/05/18/the-nbas-and-mlbs-challenge-in-convincing-states-to-award-a-sports-betting-integrity-or-rights-fee/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Ryan Hutchins, *Christie Overplayed Hand on NJ Online Gaming*, NJ.COM (Feb. 26, 2014), https://www.nj.com/politics/2014/02/christie_made_bad_bet_on_online_gambling_revenue.html.

⁸⁴ Steven Stradbrooke, *New Jersey Online Gaming Has Solid, If Not Record-Setting August*, CALVINAYRE.COM (Sept. 12, 2018), <https://calvinayre.com/2018/09/12/business/new-jersey-online-gambling-revenue-august/> (noting that by August 2018, the market solidified, posting solid year-over-year gains amid multiple record-setting months, up 16.5% overall to \$190.2 million, with \$175.4 million of that from casino products). See Steven Stradbrooke, *New Jersey Online Poker Revenue Sinks to a New Low*, CALVINAYRE.COM (Oct. 12, 2018), <https://calvinayre.com/2018/10/12/business/new-jersey-online-poker-sinks-record-low/>.

⁸⁵ Chris Grove, *New Jersey Sports Betting Revenue Soars with Introduction of Online Bets*, FORBES (Sept. 13, 2018, 10:24 AM), <https://www.forbes.com/sites/chrisgrove/2018/09/13/nj-sportsbetting-revenue-mobile-boost/#38e1ad0a5f19>.

regulatory commissions or agencies with the specific regulatory requirements for sports books, including personnel, expertise, technology and analytics, and ongoing operations, such as monitoring, compliance, and enforcement. Outside of Nevada—the “gold standard” given its relatively long history with legalized sports betting and the state’s robust Gaming Commission and Gaming Control Board—few states or tribes have experience in regulating sports betting. Replicating the Nevada model may not be feasible given available tribal government funds or competing tribal community priorities, either in the short or the long run, or the projected market may not justify the necessary investment.

Taking into account revenue-sharing payments, regulatory costs, facility and operational investments, the possibility of a league “integrity fee,” and relatively small markets, many if not most tribal casinos may not realize sufficient net revenue to justify a sports book—at least under a stand-alone model. An inter-tribal sports book may offer a more practicable alternative to a greater number of tribes.⁸⁶

III. MARKET AND COMPETITION: THE THIRD BARRIER TO ENTRY

A. Market Constraints

Any good business plan includes a market analysis, including scope, competitors, and projected share. Here, too, tribes are likely to face some of the same challenges as commercial operators, along with additional challenges particular to tribal sports books.

As noted above,⁸⁷ a sports book requires sufficient player liquidity, or volume of bets placed on a particular sporting event. Similar to liquidity in poker, this involves having a large enough pool of players to play against, and in the sports betting context, to achieve a centered game and a sufficient prize pool. For sports books—and ultimately, the total casino operations themselves—this also means having sufficient liquidity and handle both to absorb losses due to the inherent uncertainties of sports betting (without the fixed odds of, say, slot machines), and to net sufficient win for the house. The gaming market’s size, whether in terms of population, current customers, potential players (here, bettors), or relative openness to player access through mobile apps or as constrained by physical player presence requirements, all determine potential player liquidity

⁸⁶ See Gordon R. Friedman, *New Oregon Casino Plan: Tribal Leaders Announce Proposed 2021 Opening in Salem*, THE OREGONIAN (last updated May 2, 2017), https://www.oregonlive.com/politics/index.ssf/2017/05/tribal_leaders_announce_new_ca.html (describing an intertribal partnership in Oregon and the increased chances for Secretary of the Interior and Governor approval when multiple tribes unite) (last visited Mar. 10, 2019).

⁸⁷ See *supra* Part II.A, Sports Book 101.

to support a sports book.⁸⁸

Returning for a moment to the lessons learned from states' recent legalization and rollout of online gaming, a key reason online gaming revenue has faltered is because of the negative impacts on player liquidity of intrastate market borders—a person must be located within a state to play—as opposed to illegal online and mobile gaming that uses the same architecture but taps into a global market.⁸⁹

B. Market Competition

If legal sports betting spreads as predicted, tribes, as well as commercial operators, will need to weigh market competition. As customers have more choices on where to place their bets, sports books that are less conveniently located, provide fewer amenities, or offer a narrower array of bets and games will lose out in a competitive market. With state-by-state legalization, markets near state borders will be particularly competitive, as is the case now for many destination casino resorts.⁹⁰

For tribal casinos in particular, if a state authorizes commercial sports books alongside tribal sports books, tribes may or may not have an advantage over commercial operators, or may simply be on equal footing. Factors would include the specific provisions of state authorizing legislation and compacts, as well as market accessibility.

C. Innovative Approaches

As demonstrated by online gaming, state-by-state legalization effectively limits the size and scope of particular gaming markets—rather than accessing a national market, intrastate legalization accesses only the market within the state's borders. Some states are cognizant of this limitation, leading to innovations to maximize player access and liquidity. For example, in 2014, Nevada and Delaware entered into the Multi-State Internet Gaming Agreement to pool online poker players in an effort to increase player liquidity and thus state revenue; New Jersey players joined the pool under the agreement in 2018.⁹¹

⁸⁸ See *id.*

⁸⁹ See Michael Gentile, *A Declining New Jersey Online Poker Market Highlights the Need for Shared Liquidity*, POKERFUSE (Sept. 18, 2018, 10:44 PM), <https://pokerfuse.com/news/industry/210053-declining-new-jersey-online-poker-market-highlights-need/>.

⁹⁰ See John Wolfson, *America's Casino-Saturation Problem*, THE NEW YORKER (Nov. 18, 2014), <https://www.newyorker.com/business/currency/americas-casino-saturation-problem> (describing competition among casinos near state borders along the East Coast).

⁹¹ See Interview with Allison Keyes, *Delaware, Nevada Sign First Multistate Internet Gaming Deal*, NPR (Feb. 28, 2014, 5:00 AM), <https://www.npr.org/2014/02/>

Another innovation, intended to maximize intrastate markets, comes in the form of mobile player apps. In Nevada, for example, state law allows casinos to offer a mobile sports betting app so that players can place bets from anywhere in the state—they do not need to be physically present at the casino's sports book to place a bet. Even though Nevada's market in theory is limited to the nearly three million people who reside there, throw in the more than forty-two million people who visited Las Vegas in 2017,⁹² and Nevada remains the largest gaming market in the U.S. by far.⁹³ Outside of Nevada, the baseline market for in-state wagering—such as in California or Washington on the West Coast, or Connecticut, Massachusetts, and New York on the East Coast—is much larger than that available to most tribal casinos located on Indian reservations.⁹⁴ As many tribal casinos are located in rural areas within states or within rural states themselves, tribal markets often are even further constrained in terms of population, customer, and prospective player base. For example, tribal casinos in rural northern Minnesota have access to very different and much more limited markets than does the Mystic Lake Casino Hotel located near the Twin Cities of Minneapolis-St. Paul.⁹⁵

28/283773407/delaware-nevada-sign-first-multi-state-internet-gaming-deal; Brian Pempus, *Traffic on World Series of Poker's Online Site Could Triple Under Nevada, New Jersey Deal, Expert Says*, CARD PLAYER (Apr. 18, 2018), <https://www.card-player.com/poker-news/22719-traffic-on-world-series-of-poker-s-online-site-could-soon-triple-under-nevada-new-jersey-deal-expert-says>.

⁹² LAS VEGAS CONVENTION & VISITORS AUTH., YEAR-END SUMMARY FOR 2017 (2017) <https://www.lvcva.com/stats-and-facts/visitor-statistics/> (follow the hyperlink then click on "Year-End Summary for 2017" link).

⁹³ See AM. GAMING ASS'N, STATE OF THE STATES 2018: THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY 17 (2018), https://www.americangaming.org/sites/default/files/AGA%202018%20State%20of%20the%20States%20Report_FINAL.pdf (ranking the Las Vegas Strip as the top single-jurisdiction casino market in the U.S. with \$6.4 billion in revenue in 2017; Atlantic City was second with \$2.4 billion).

⁹⁴ See Richard N. Velotta, *Foxwoods Property Has Biggest Casino in North America*, LAS VEGAS REV.-J., (Sept. 1, 2018, 4:15 PM), <https://www.reviewjournal.com/business/casinos-gaming/foxwoods-property-has-biggest-casino-in-north-america/> (noting that a relatively small number of tribal casinos are located near highly populous areas; as one example, the Mashantucket Pequot's Foxwoods Casino boasts some 12 million visitors a year). But see CTR. FOR POLICY ANALYSIS, UNIV. OF MASS. DARTMOUTH, BRING IT ON HOME: AN OVERVIEW OF GAMING BEHAVIOR IN NEW ENGLAND iii, v, 29 (2013), https://www.umassd.edu/media/umassdartmouth/seppce/center-for-policy-analysis/Bring_it_home.pdf (also noting that new competition has had a negative impact due to expanded legalized gaming in the region).

⁹⁵ See, e.g., Timothy Williams, *\$1 Million Each Year for All as Long as Tribe's Luck Holds*, N.Y. TIMES (Aug. 9, 2012), <https://www.nytimes.com/2012/08/09/us/more-casinos-and-internet-gambling-threaten-shakopee-tribe.html> (reporting on the Shakopee Mdewakanton Tribe's annual per capita payments of \$1 million from revenue from its casino near Minneapolis); Sharon Schmickle, *Has Casino Money Improved Lives on Minnesota's Indian Reservations?*, MINNPOST (Dec. 10, 2012), <https://www.minnpost.com/politics-policy/2012/12/has-casino-money-improved->

If a tribal sports betting market is limited by statute, compact, or regulation to players on a particular reservation or within a tribe's casino, opening and operating a sports book will be riskier even than operating house-banked gaming machines in locales with low player liquidity.⁹⁶ Tribes should consider sharing player pools just as New Jersey, Nevada, and Delaware have done for online gaming.⁹⁷

CONCLUSION

Even before the Supreme Court decided *Murphy*, the biggest brand names in gaming worldwide were positioning themselves to capitalize on the fan base for America's most recognizable sports leagues. Sports wagering already is up and running in five states; analysts predict that it will be legal in as many as thirty-two states within five years, including up to fourteen within the next two years.⁹⁸ Many of these states are among the twenty-eight states that currently have tribal casinos.⁹⁹

As of this writing, there is no firm sense and little data pointing to how many

lives-minnesota-s-indian-reservations/ (describing the contrast between the financial success of the Shakopee Mdewakanton and tribes in northern Minnesota, including the Red Lake Band of Chippewa Indians and the Leech Lake Band of Ojibwe, with more than 40% of community members living in poverty).

⁹⁶ See generally Jamie Hinks, *Sue Schneider Looks at Poker Liquidity*, CALVINAYRE.COM (Mar. 15, 2011), <https://calvinayre.com/2011/03/15/poker/sue-schneider-looks-at-poker-liquidity/>.

⁹⁷ Tribes might accomplish this with recommended state legislation and compact provisions, along with intertribal agreements, similar to intertribal partnerships to open new casinos. In Oregon, for example, tribes have started exploring the possibility of an intertribal casino. See Friedman, *supra* note 86 (noting that the Confederated Tribes of Siletz Indians has "consulted with Oregon's other tribes, hoping to attract them to join the casino venture as partners"). See also *id.* (describing an intertribal partnership to open a casino near Salem, Oregon); Kenneth R. Gosselin, *East Windsor Casino Takes Shape in New Renderings*, HARTFORD COURANT (June 13, 2018, 8:30 PM), <https://www.courant.com/real-estate/property-line/hc-east-windsor-casino-renderings-20180613-story.html> (illustrating a recent partnership: "New renderings show MMCT Venture LLC—the joint venture formed by the Mashantucket Pequot and Mohegan tribes to develop the \$300 million venue [in East Windsor, CT]—plans a one-story casino with an attached five-story parking garage nestled into a former movie theater site off I-91.").

⁹⁸ See Cork Gaines & Shayanne Gal, *Here Are the States Where Sports Betting is Expected to Be Legal Within 5 Years*, BUSINESS INSIDER (May 19, 2018, 8:13 PM), <https://www.businessinsider.com/states-legalize-sports-betting-gambling-2018-5> (citing proprietary January 2018 study by boutique research firm Eilers & Krejcik Gaming).

⁹⁹ See Wayne Parry, *18 States May Introduce Sports Betting Bills in 2018: Industry Report*, CHI. SUN-TIMES (Jan. 9, 2018, 12:25 PM), <https://chicago.suntimes.com/business/sports-betting-legalized-illinois-eilers-krejck-gaming-report/>. See also *Frequently Asked Questions: In Which States Does Indian Gaming Occur?*, NAT'L INDIAN GAMING COMM'N, <https://www.nigc.gov/commission/faqs> (listing states in which tribes currently conduct gaming, although note that this list may or may not be fully up-to-date).

of the 242 gaming tribes within those states will seek to open sports books. Currently, only three tribes operate sports books at their casinos: the Fort Mojave Indian Tribe in Nevada, and the recently-opened sports books at the Mississippi Band of Choctaw Indians' casinos in Mississippi and the Pueblo of Santa Ana's Santa Ana Star Casino in New Mexico.¹⁰⁰ Time is of the essence; being first to market in a state or even an entire region is a current possibility for many tribes, but not for long.

In addition to careful evaluation and data-based decision making concerning the three barriers to market entry we discuss herein, tribes also should consider innovative approaches, such as the possibility of acting as a purely commercial operator in order to take full advantage of state legalization, or partnering with other tribes to create a shared liquidity pool across the United States. Particularly in smaller markets and rural areas, tribes may want to opt for lower-cost and lower-risk opportunities, such as skill-based video slot machines or similar video game gambling machines, or expanding nongaming amenities to include eSports, to open up younger markets. The commercial viability of such products and solutions are demonstrated by recent investments by established commercial brands or industry solution suppliers that set market terms, such as MGM International and IGT, or cutting-edge platforms for arcade-style skills-based video game gambling like GameCo,¹⁰¹ or eSports wagering such as Unikrn,¹⁰² that are disrupting the traditional casino gaming segment.

Given the high profile of sports betting and relative speed with which legislation is being introduced, the coming year should provide much useful data to tribes in the form of the experiences of first-to-market states and tribes, the next waves of state legislation, and the inevitable accompanying tribal-state compact negotiations.

After all of this analysis, the answer to the question we posed at the outset—in a post-PASPA world, should tribes get in the game?—varies significantly by tribe. In other words, the answer is, "It depends." Far from a cop-out answer, however, this assessment acknowledges the value to public officials and others of engaging in informed analysis, rather than making decisions based solely on the hype surrounding this tectonic shift on the public policy of sports wagering. For some tribes, waiting on the sidelines may be the right decision; for others, the time to get in the game is now.

¹⁰⁰ Garcia, *supra* note 24; Geoff Grammer, *Sports Wagering to Hit New Mexico Next Week at Santa Ana*, ALBUQUERQUE J. (Oct. 9, 2018, 9:26 PM), <https://www.Abjournal.com/1231258/sports-wagering-in-new-mexico-to-start-next-week-at-santaana.html>.

¹⁰¹ See GAMECO, <https://gameco.com/> (last visited Mar. 10, 2019).

¹⁰² See UNIKRN, <https://unikrn.com/about> (last visited Mar. 10, 2019).

The future of New York casinos

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**upstate New York gaming economic development act of 2013, 2013 N.Y. A.N.
8101**

Enacted, July 30, 2013

Reporter

2013 N.Y. ALS 174; 2013 N.Y. LAWS 174; 2013 N.Y. A.N. 8101

**NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 236TH ANNUAL LEGISLATIVE SESSION >
CHAPTER 174 > ASSEMBLY BILL 8101**

Notice

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Synopsis

AN ACT to amend the racing, pari-mutuel wagering and breeding law, the penal law and the state finance law, in relation to commercial gaming; to amend the executive law, the state finance law and the Indian law, in relation to authorizing the settlement of disputes between the Oneida Nation of New York, the state, Oneida county and Madison county; to amend the Indian law and the tax law, in relation to identifying nations and tribes; to amend the tax law and the state finance law, in relation to video lottery gaming; to amend part HH of chapter 57 of the laws of 2013 relating to providing for the administration of certain funds and accounts related to the 2013-14 budget, in relation to the commercial gaming revenue fund; to amend chapter 50 of the laws of 2013 enacting the state operations budget, in relation to commercial gaming revenues; to amend the racing, pari-mutual wagering and breeding law, in relation to directing the state gaming commission to annually evaluate video lottery gaming; to amend the racing, pari-mutuel wagering and breeding law and the state finance law, in relation to account wagering on simulcast horse races; to repeal section 11 of the executive law relating to fuel and energy shortage state of emergency; and to repeal clause (G) of subparagraph (ii) of paragraph 1 of subdivision b of section 1612 of the tax law relating to vendor's fees Became a law July 30, 2013, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1.

This act shall be known and may be cited as the "upstate New York gaming economic development act of 2013."

Section 2.

The racing, pari-mutuel wagering and breeding law is amended by adding a new article 13 to read as follows:

ARTICLE 13

DESTINATION RESORT GAMING**Title 1.**

- General provisions
- 2. Facility determination and licensing
- 3. Occupational licensing
- 4. Enterprise and vendor licensing and registration
- 5. Requirements for conduct and operation of gaming
- 6. Taxation and fees
- 7. Problem gambling
- 8. Miscellaneous provisions
- 9. Gaming inspector general

TITLE 1**GENERAL PROVISIONS****Section 1300.**

Legislative findings and purpose.

- 1301. Definitions.
- 1302. Auditing duties of the commission.
- 1303. Equipment testing.
- 1304. Commission reporting.
- 1305. Supplemental power of the commission.
- 1306. Powers of the board.
- 1307. Required regulations.
- 1308. Reports and recommendations.
- 1309. Severability and preemption.

Section 1300.

Legislative findings and purpose. The legislature hereby finds and declares that:

- 1. New York state is already in the business of gambling with nine video lottery facilities, five tribal class III casinos, and three tribal class II facilities;
- 2. New York state has more electronic gaming machines than any state in the Northeast or Mideast;
- 3. While gambling already exists throughout the state, the state does not fully capitalize on the economic development potential of legalized gambling;
- 4. The state should authorize four destination resort casinos in upstate New York;
- 5. Four upstate casinos can boost economic development, create thousands of well-paying jobs and provide added revenue to the state;
- 6. The upstate tourism industry constitutes a critical component of our state's economic infrastructure and that four upstate casinos will attract non-New York residents and bring downstate New Yorkers to upstate;
- 7. The casino sites and the licensed owners shall be selected on merit;

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8. Local impact of the casino sites will be considered in the casino evaluation process;
9. Tribes whose gaming compacts are in good standing with the state will have their geographic exclusivity protected by this article;
10. Revenue realized from casinos shall be utilized to increase support for education beyond that of the state's education formulae and to provide real property tax relief to localities;
11. Casinos will be tightly and strictly regulated by the commission to guarantee public confidence and trust in the credibility and integrity of all casino gambling in the state and to prevent organized crime from any involvement in the casino industry;
12. The need for strict state controls extends to regulation of all persons, locations, practices and associations related to the operation of licensed enterprises and all related service industries as provided in this article;
13. The state and the casinos will develop programs and resources to combat compulsive and problem gambling;
14. The state will ensure that host municipalities of casinos are provided with funding to limit any potential adverse impacts of casinos;
15. Political contributions from the casino industry will be minimized to reduce the potential of political corruption from casinos; and
16. As thoroughly and pervasively regulated by the state, four **upstate** casinos will work to the betterment of all New York.

Section 1301.

Definitions. As used in this article the following terms shall, unless the context clearly requires otherwise, have the following meanings:

1. "Affiliate". A person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person.
2. "Applicant". Any person who on his or her own behalf or on behalf of another has applied for permission to engage in any act or activity which is regulated under the provisions of this article.
3. "Application". A written request for permission to engage in any act or activity which is regulated under the provisions of this article.
4. "Authorized game". Any game determined by the commission to be compatible with the public interest and to be suitable for casino use after such appropriate test or experimental period as the commission may deem appropriate. An authorized game may include gaming tournaments in which players compete against one another in one or more of the games authorized herein or by the commission or in approved variations or composites thereof if the tournaments are authorized.
5. "Board". The New York state gaming facility location board established by the commission pursuant to section one hundred nine-a of this chapter.
6. "Business". A corporation, sole proprietorship, partnership, limited liability company or any other organization formed for the purpose of carrying on a commercial enterprise.
7. "Casino". One or more locations or rooms in a gaming facility that have been approved by the commission for the conduct of gaming in accordance with the provisions of this article.
8. "Casino key employee". Any natural person employed by a gaming facility licensee, or holding or intermediary company of a gaming facility licensee, and involved in the operation of a licensed gaming facility in a supervisory capacity and empowered to make discretionary decisions which regulate gaming facility operations; or any other employee so designated by the commission for reasons consistent with the policies of this article.

9. "Casino vendor enterprise". Any vendor offering goods or services which directly relate to casino or gaming activity, or any vendor providing to gaming facility licensees or applicants goods and services ancillary to gaming activity. Notwithstanding the foregoing, any form of enterprise engaged in the manufacture, sale, distribution, testing or repair of slot machines within the state, other than antique slot machines, shall be considered a casino vendor enterprise for the purposes of this article regardless of the nature of its business relationship, if any, with gaming facility applicants and licensees in this state.
10. "Close associate". A person who holds a relevant financial interest in, or is entitled to exercise power in, the business of an applicant or licensee and, by virtue of that interest or power, is able to exercise a significant influence over the management or operation of a gaming facility or business licensed under this article.
11. "Commission". The New York state gaming commission.
12. "Complimentary service or item". A service or item provided at no cost or at a reduced cost to a patron of a gaming facility.
13. "Conservator". A person appointed by the commission to temporarily manage the operation of a gaming facility.
14. "Credit card". A card, code or other device with which a person may defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor, but not a card, code or other device used to activate a preexisting agreement between a person and a financial institution to extend credit when the person's account at the financial institution is overdrawn or to maintain a specified minimum balance in the person's account at the financial institution.
15. "Debt". Any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent, including debt convertible into an equity security which has not yet been so converted, and any other debt carrying any warrant or right to subscribe to or purchase an equity security which warrant or right has not yet been exercised.
16. "Encumbrance". A mortgage, security interest, lien or charge of any nature in or upon property.
17. "Executive director". The executive director of the New York state gaming commission.
18. "Family". Spouse, domestic partner, partner in a civil union, parents, grandparents, children, grandchildren, siblings, uncles, aunts, nephews, nieces, fathers-in-law, mothers-in-law, daughters-in-law, sons-in-law, brothers-in-law and sisters-in-law, whether by the whole or half blood, by marriage, adoption or natural relationship.
19. "Game". Any banking or percentage game located within the gaming facility played with cards, dice, tiles, dominoes, or any electronic, electrical, or mechanical device or machine for money, property, or any representative of value which has been approved by the commission.
20. "Gaming" or "gambling". The dealing, operating, carrying on, conducting, maintaining or exposing for pay of any game.
21. "Gaming device" or "gaming equipment". Any electronic, electrical, or mechanical contrivance or machine used in connection with gaming or any game.
22. "Gaming employee". Any natural person, not otherwise included in the definition of casino key employee, who is employed by a gaming facility licensee, or a holding or intermediary company of a gaming facility licensee, and is involved in the operation of a licensed gaming facility or performs services or duties in a gaming facility or a restricted casino area; or any other natural person whose employment duties predominantly involve the maintenance or operation of gaming activity or equipment and assets associated therewith or who, in the judgment of the commission, is so regularly required to work in a restricted casino area that registration as a gaming employee is appropriate.

23. "Gaming facility". The premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities.
24. "Gaming facility license". Any license issued pursuant to this article which authorizes the holder thereof to own or operate a gaming facility.
25. "Gross gaming revenue". The total of all sums actually received by a gaming facility licensee from gaming operations less the total of all sums paid out as winnings to patrons; provided, however, that the total of all sums paid out as winnings to patrons shall not include the cash equivalent value of any merchandise or thing of value included in a jackpot or payout; provided further, that the issuance to or wagering by patrons of a gaming facility of any promotional gaming credit shall not be taxable for the purposes of determining gross revenue.
26. "Holding company". A corporation, association, firm, partnership, trust or other form of business organization, other than a natural person, which, directly or indirectly, owns, has the power or right to control, or has the power to vote any significant part of the outstanding voting securities of a corporation or any other form of business organization which holds or applies for a gaming license; provided, however, that a "holding company", in addition to any other reasonable use of the term, shall indirectly have, hold or own any such power, right or security if it does so through an interest in a subsidiary or any successive subsidiaries, notwithstanding how many such subsidiaries may intervene between the holding company and the gaming facility licensee or applicant.
27. "Host municipality". A city, town or village in which a gaming facility is located or in which an applicant has proposed locating a gaming facility.
28. "Intermediary company". A corporation, association, firm, partnership, trust or other form of business organization, other than a natural person, which is a holding company with respect to a corporation or other form of business organization which holds or applies for a gaming license, and is a subsidiary with respect to a holding company.
29. "Junket". An arrangement intended to induce a person to come to a gaming facility to gamble, where the person is selected or approved for participation on the basis of the person's ability to satisfy a financial qualification obligation related to the person's ability or willingness to gamble or on any other basis related to the person's propensity to gamble and pursuant to which and as consideration for which, any of the cost of transportation, food, lodging, and entertainment for the person is directly or indirectly paid by a gaming facility licensee or an affiliate of the gaming facility licensee.
30. "Junket enterprise". A person, other than a gaming facility licensee or an applicant for a gaming facility license, who employs or otherwise engages the services of a junket representative in connection with a junket to a licensed gaming facility, regardless of whether or not those activities occur within the state.
31. "Junket representative". A person who negotiates the terms of, or engages in the referral, procurement or selection of persons who may participate in, a junket to a gaming facility, regardless of whether or not those activities occur within the state.
32. "Operation certificate". A certificate issued by the commission which certifies that operation of a gaming facility conforms to the requirements of this article and applicable regulations and that its personnel and procedures are sufficient and prepared to entertain the public.
33. "Person". Any corporation, association, operation, firm, partnership, trust or other form of business association, as well as a natural person.
34. "Registration". Any requirement other than one which requires a license as a prerequisite to conduct a particular business as specified by this article.
35. "Registrant". Any person who is registered pursuant to the provisions of this article.

36. "Restricted casino areas". The cashier's cage, the soft count room, the hard count room, the slot cage booths and runway areas, the interior of table game pits, the surveillance room and catwalk areas, the slot machine repair room and any other area specifically designated by the commission as restricted in a licensee's operation certificate.
37. "Qualification" or "qualified". The process of licensure set forth by the commission to determine that all persons who have a professional interest in a gaming facility license, or casino vendor enterprise license, or the business of a gaming facility licensee or gaming vendor, meet the same standards of suitability to operate or conduct business with a gaming facility.
38. "Slot machine". A mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the individual playing or operating the machine to receive cash, or tokens to be exchanged for cash, or to receive merchandise or any other thing of value, whether the payoff is made automatically from the machine or in any other manner, except that the cash equivalent value of any merchandise or other thing of value shall not be included in determining the payout percentage of a slot machine.
39. "Sports wagering". The activity authorized by section one thousand three hundred sixty-seven of this article, provided that there has been a change in federal law authorizing such activity or upon ruling of a court of competent jurisdiction that such activity is lawful.
40. "Subsidiary". A corporation, a significant part of whose outstanding equity securities are owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company, or a significant interest in a firm, association, partnership, trust or other form of business organization, other than a natural person, which is owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company.
41. "Table game". A game, other than a slot machine, which is authorized by the commission to be played in a gaming facility.
42. "Transfer". The sale or other method, either directly or indirectly, of disposing of or parting with property or an interest therein, or the possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise; provided, however, that the retention of a security interest in property delivered to a corporation shall be deemed a transfer suffered by such corporation.

Section 1302.

Auditing duties of the commission. The commission shall audit as often as the commission determines necessary, but not less than annually, the accounts, programs, activities, and functions of all gaming facility licensees, including the audit of payments made pursuant to section one thousand three hundred fifty-one of this chapter. To conduct the audit, authorized officers and employees of the commission shall have access to such accounts at reasonable times and the commission may require the production of books, documents, vouchers and other records relating to any matter within the scope of the audit. All audits shall be conducted in accordance with generally accepted auditing standards established by the American Institute of Certified Public Accountants. In any audit report of the accounts, funds, programs, activities and functions of a gaming facility licensee issued by the commission containing adverse or critical audit results, the commission may require a response, in writing, to the audit results. The response shall be forwarded to the commission within fifteen days of notification by the commission.

Section 1303.

Equipment testing. Unless the commission otherwise determines it to be in the best interests of the state, the commission shall utilize the services of an independent testing laboratory that has been

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qualified and approved by the commission pursuant to this article to perform the testing of slot machines and other gaming equipment and may also utilize applicable data from the independent testing laboratory, or from a governmental agency of a state other than New York, authorized to regulate slot machines and other gaming equipment.

Section 1304.

Commission reporting. The commission shall report monthly to the governor, the senate and the assembly, the senate finance committee and the assembly ways and means committee, and the chairs of the senate racing, gaming and wagering committee and the assembly racing and wagering committee on economic **development** and emerging technologies on the total gaming revenues, prize disbursements and other expenses for the preceding month and shall make an annual report to the same recipients which shall include a full and complete statement of gaming revenues, prize disbursements and other expenses, including such recommendations as the commission considers necessary or advisable. The commission shall also report immediately to the aforementioned on any matter which requires immediate changes in the laws in order to prevent abuses or evasions of the laws, rules or regulations related to gaming or to rectify undesirable conditions in connection with the administration or operation of gaming in the state.

Section 1305.

Supplemental power of the commission. The commission shall have all powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to:

1. execute all instruments necessary or convenient for accomplishing the purposes of this article;
2. enter into agreements or other transactions with a person, including, but not limited to, a public entity or other governmental instrumentality or authority in connection with its powers and duties under this article;
3. require an applicant for a position which requires a license under this article to apply for such license and approve or disapprove any such application or other transactions, events and processes as provided in this article;
4. require a person who has a business association of any kind with a gaming licensee or applicant to be qualified for licensure under this article;
5. determine a suitable debt-to-equity ratio for applicants for a gaming license;
6. deny an application or limit, condition, restrict, revoke or suspend a license, registration, finding of suitability or approval, or fine a person licensed, registered, found suitable or approved for any cause that the commission deems reasonable;
7. monitor the conduct of licensees and other persons having a material involvement, directly or indirectly, with a licensee for the purpose of ensuring that licenses are not issued to or held by and that there is no direct or indirect material involvement with a licensee, by an unqualified or unsuitable person or by a person whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places as provided in this article;
8. gather facts and information applicable to the commission's obligation to issue, suspend or revoke licenses, work permits or registrations for:
 - (a) a violation of this article or any regulation adopted by the commission;
 - (b) willfully violating an order of the commission directed to a licensee;
 - (c) the conviction of certain criminal offenses; or
 - (d) the violation of any other offense which would disqualify such a licensee from holding a license, work permit or registration;
9. conduct investigations into the qualifications of any regulated entity and all applicants for licensure;

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10. request and receive from the division of criminal justice services and the federal bureau of investigation, criminal history information as defined in paragraph (c) of subdivision one of section eight hundred forty-five-b of the executive law for the purpose of evaluating applicants for employment by any regulated entity, and evaluating licensees and applicants for licensure under this article;
11. be present, through its agents, at all times, in a gaming facility for the purposes of:
 - (a) certifying revenue;
 - (b) receiving complaints from the public relating to the conduct of gaming and wagering operations;
 - (c) examining records of revenues and procedures and inspecting and auditing all books, documents and records of licensees;
 - (d) conducting periodic reviews of operations and facilities for the purpose of regulations adopted hereunder; and
 - (e) exercising its oversight responsibilities with respect to gaming;
12. inspect and have access to all equipment and supplies in a gaming facility or on premises where gaming equipment is manufactured, sold or distributed;
13. seize and remove from the premises of a gaming licensee and impound any equipment, supplies, documents and records for the purpose of examination and inspection;
14. demand access to and inspect, examine, photocopy and audit all papers, books and records of any affiliate of a gaming licensee or gaming vendor whom the commission suspects is involved in the financing, operation or management of the gaming licensee or gaming vendor; provided, however, that the inspection, examination, photocopying and audit may take place on the affiliate's premises or elsewhere as practicable and in the presence of the affiliate or its agent;
15. require that the books and financial or other records or statements of a gaming licensee or gaming vendor be kept in a manner that the commission considers proper;
16. levy and collect assessments, fees, fines and interest and impose penalties and sanctions as authorized by law for a violation of this article or any regulations promulgated by the commission;
17. collect taxes, fees and interest under this article;
18. restrict, suspend or revoke licenses issued under this article;
19. refer cases for criminal prosecution to the appropriate federal, state or local authorities;
20. adopt, amend or repeal regulations for the implementation, administration and enforcement of this article; and
21. determine a suitable duration for each license, registration or finding of suitability or approval.

Section 1306.

Powers of the board. The New York state resort gaming facility location board shall select, following a competitive process and subject to the restrictions of this article, no more than four entities to apply to the commission for gaming facility licenses. In exercising its authority, the board shall have all powers necessary or convenient to fully carry out and effectuate its purposes including, but not limited to, the following powers. The board shall:

1. issue a request for applications for zone two gaming facility licenses pursuant to section one thousand three hundred twelve of this article;
2. assist the commission in prescribing the form of the application for zone two gaming facility licenses including information to be furnished by an applicant concerning an applicant's antecedents, habits, character, associates, criminal record, business activities and financial affairs, past or present pursuant to section one thousand three hundred thirteen of this article;

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3. develop criteria, in addition to those outlined in this article, to assess which applications provide the highest and best value to the state, the zone and the region in which a gaming facility is to be located;
4. determine a gaming facility license fee to be paid by an applicant;
5. determine, from time to time, whether tribal-state gaming compacts are in or remain in good standing for the purposes of determining whether a gaming facility may be located in areas designated by subdivision two of section one thousand three hundred eleven of this article;
6. determine, with the assistance of the commission, the sources and total amount of an applicant's proposed capitalization to develop, construct, maintain and operate a proposed gaming facility license under this article;
7. have the authority to conduct investigative hearings concerning the conduct of gaming and gaming operations in accordance with any procedures set forth in this article and any applicable implementing regulations;
8. issue detailed findings of facts and conclusions demonstrating the reasons supporting its decisions to select applicants for commission licensure;
9. report annually to the governor, the speaker of the assembly and the temporary president of the senate, its proceedings for the preceding calendar year and any suggestions and recommendations as it shall deem desirable;
10. promulgate any rules and regulations that it deems necessary to carry out its responsibilities;
11. have the power to administer oaths and examine witnesses; and request and receive criminal history information as defined in paragraph (c) of subdivision one of section eight hundred forty-five-b of the executive law of the division of criminal justice services, pursuant to subdivision eight-a of section eight hundred thirty-seven of the executive law, in connection with executing the responsibilities of the board relating to licensing including fingerprinting, criminal history information and background investigations, of entities applying for a gaming facility license. At the request of the board, the division of criminal justice services shall submit a fingerprint card, along with the subject's processing fee, to the federal bureau of investigation for the purpose of conducting a criminal history search and returning a report thereon. The board shall also be entitled to request and receive, pursuant to a written memorandum of understanding filed with the department of state, any information in the possession of the state attorney general relating to the investigation of organized crime, gaming offenses, other revenue crimes or tax evasion. Provided however, the attorney general may withhold any information that (a) would identify a confidential source or disclose confidential information relating to a criminal investigation, (b) would interfere with law enforcement investigations or judicial proceedings, (c) reveal criminal investigative techniques or procedures, that, if disclosed, could endanger the life or safety of any person, or (d) constitutes records received from other state, local or federal agencies that the attorney general is prohibited by law, regulation or agreement from disclosing.

Section 1307.

Required regulations. 1. The commission is authorized:

- (a) to adopt, amend or repeal such regulations, consistent with the policy and objectives of this article, as amended and supplemented, as it may deem necessary to protect the public interest in carrying out the provisions of this article; and
 - (b) to adopt, amend or repeal such regulations as may be necessary for the conduct of hearings before the commission and for the matters within all other responsibilities and duties of the commission imposed by this article.
2. The commission shall, without limitation, include the following specific provisions in its regulations in accordance with the provisions of this article:

- (a) prescribing the methods and forms of application and registration which any applicant or registrant shall follow and complete;
- (b) prescribing the methods, procedures and form for delivery of information concerning any person's family, habits, character, associates, criminal record, business activities and financial affairs;
- (c) prescribing such procedures for the fingerprinting of an applicant, employee of a licensee, or registrant, and methods of identification which may be necessary to accomplish effective enforcement of restrictions on access to the casino and other restricted casino areas of the gaming facility;
- (d) prescribing the method of notice to an applicant, registrant or licensee concerning the release of any information or data provided to the commission by such applicant, registrant or licensee;
- (e) prescribing the manner and procedure of all hearings conducted by the commission or any presiding officer;
- (f) prescribing the manner and method of collection of payments of taxes, fees, interest and penalties;
- (g) defining and limiting the areas of operation, the rules of authorized games, odds, and devices permitted, and the method of operation of such games and devices;
- (h) regulating the practice and procedures for negotiable transactions involving patrons, including limitations on the circumstances and amounts of such transactions, and the establishment of forms and procedures for negotiable instrument transactions, redemptions, and consolidations;
- (i) prescribing grounds and procedures for the revocation or suspension of operating certificates, licenses and registrations;
- (j) governing the manufacture, distribution, sale, deployment, and servicing of gaming devices and equipment;
- (k) prescribing for gaming operations the procedures, forms and methods of management controls, including employee and supervisory tables of organization and responsibility, and minimum security and surveillance standards, including security personnel structure, alarm and other electrical or visual security measures; provided, however, that the commission shall grant an applicant broad discretion concerning the organization and responsibilities of management personnel who are not directly involved in the supervision of gaming operations;
- (l) prescribing the qualifications of, and the conditions pursuant to which, engineers, accountants, and others shall be permitted to practice before the commission or to submit materials on behalf of any applicant or licensee;
- (m) prescribing minimum procedures for the exercise of effective control over the internal fiscal affairs of a licensee, including provisions for the safeguarding of assets and revenues, the recording of cash and evidence of indebtedness, and the maintenance of reliable records, accounts, and reports of transactions, operations and events, including reports to the commission;
- (n) providing for a minimum uniform standard of accountancy methods, procedures and forms; a uniform code of accounts and accounting classifications; and such other standard operating procedures, as may be necessary to assure consistency, comparability, and effective disclosure of all financial information, including calculations of percentages of profit by games, tables, gaming devices and slot machines;

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(o) requiring quarterly financial reports and the form thereof, and an annual audit prepared by a certified public accountant licensed to do business in this state, attesting to the financial condition of a licensee and disclosing whether the accounts, records and control procedures examined are maintained by the licensee as required by this article and the regulations promulgated hereunder;

(p) governing the gaming-related advertising of licensees, their employees and agents, with the view toward assuring that such advertisements are not deceptive; and

(q) governing the distribution and consumption of alcoholic beverages on the premises of the licensee.

3. The commission shall, in its regulations, prescribe the manner and procedure of all hearings conducted by the commission.

Section 1308.

Reports and recommendations. The commission shall carry on a continuous study of the operation and administration of casino control laws which may be in effect in other jurisdictions, literature on this subject which may from time to time become available, and federal laws which may affect the operation of casino gaming in this state. It shall be responsible for ascertaining any defects in this article or in the rules and regulations issued thereunder, formulating recommendations for changes in this article. The commission shall make available to the governor and the legislature within its annual report an accounting of all revenues, expenses and disbursements, a review of its licensing and enforcement activities conducted pursuant to section one thousand three hundred forty of this article and shall include therein such recommendations for changes in this article as the commission deems necessary or desirable.

Section 1309.

Severability and preemption. 1. If any clause, sentence, subparagraph, paragraph, subdivision, section, article or other portion of this article or the application thereof to any person or circumstances shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this article or the application of such portion held invalid to any other person or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, subparagraph, subdivision, section, article or other portion thereof directly involved in such holding or to the person or circumstance therein involved.

2. If any provision of this article is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this article shall prevail over such other provision and such other provision shall be deemed to be superseded to the extent of such inconsistency or conflict. Notwithstanding the provisions of any other law to the contrary, no local government unit of this state may enact or enforce any ordinance or resolution conflicting with any provision of this article or with any policy of this state expressed or implied herein, whether by exclusion or inclusion. The commission shall have exclusive jurisdiction over all matters delegated to it or within the scope of its powers under the provisions of this article.

TITLE 2

FACILITY DETERMINATION AND LICENSING

Section 1310.

Development zones and regions.

1311. License authorization; restrictions.

1312. Requests for applications.

1313. Form of application.

1314. License applicant eligibility.

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1315. Required capital investment.

1316. Minimum license thresholds.

1317. Investigation of license applicants.

1318. Disqualifying criteria.

1319. Investigative hearings.

1320. Siting evaluation.

1321. Intentionally omitted.

Section 1310.

Development zones and regions. 1. There are hereby created two **development** zones to be known as the zone one and zone two. Zone one shall include the city of New York and the counties of Nassau, Putnam, Rockland, Suffolk and Westchester. Zone two shall include all the other counties of the state.

2. Each zone shall be divided into development regions.

(a) The three **development** regions in zone one shall be comprised of the following counties:

- (1) Region one shall consist of Putnam, Rockland and Westchester counties;
- (2) Region two shall consist of Bronx, Kings, New York, Queens and Richmond counties. No gaming facility shall be authorized in region two; and
- (3) Region three shall consist of Nassau and Suffolk counties.

(b) The six **development** regions in zone two shall be comprised of the following counties:

- (1) Region one shall consist of Columbia, Delaware, Dutchess, Greene, Orange, Sullivan and Ulster counties;
- (2) Region two shall consist of Albany, Fulton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie and Washington counties.
- (3) Region three shall consist of Clinton, Essex, Franklin, Hamilton, Jefferson, Saint Lawrence and Warren counties;
- (4) Region four shall consist of Cayuga, Chenango, Cortland, Herkimer, Lewis, Madison, Oneida, Onondaga, Oswego and Otsego counties;
- (5) Region five shall consist of Broome, Chemung (east of State Route 14), Schuyler (east of State Route 14), Seneca, Tioga, Tompkins, and Wayne (east of State Route 14) counties; and
- (6) Region six shall consist of Allegany, Cattaraugus, Chautauqua, Chemung (west of State Route 14), Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler (west of State Route 14), Steuben, Wayne (west of State Route 14), Wyoming, and Yates counties.

Section 1311.

License authorization; restrictions. 1. The commission is authorized to award up to four gaming facility licenses, in regions one, two and five of zone two. The duration of such initial license shall be ten years. The term of renewal shall be determined by the commission. The commission may award a second license to a qualified applicant in no more than a single region. The commission is not empowered to award any license in zone one. No gaming facilities are authorized under this article for the city of New York or any other portion of zone one.

As a condition of licensure, licensees are required to commence gaming operations no less than twenty-four months following license award. No additional licenses may be awarded during the

twenty-four month period, nor for an additional sixty months following the end of the twenty-four month period. Should the state legislatively authorize additional gaming facility licenses within these periods, licensees shall have the right to recover the license fee paid pursuant to section one thousand three hundred six of this article.

This right shall be incorporated into the license itself, vest upon the opening of a gaming facility in zone one or in the same region as the licensee and entitle the holder of such license to bring an action in the court of claims to recover the license fee paid pursuant to section one thousand three hundred fifteen of this article in the event that any gaming facility license in excess of the number authorized by this section as of the effective date of this section is awarded within seven years from the date that the initial gaming facility license is awarded. This right to recover any such fee shall be proportionate to the length of the respective period that is still remaining upon the vesting of such right.

Additionally, the right to bring an action in the court of claims to recover the fee paid to the state on the twenty-fourth day of September, two thousand ten, by the operator of a video lottery gaming facility in a city of more than one million shall vest with such operator upon the opening of any gaming facility licensed by the commission in zone one within seven years from the date that the initial gaming facility license is awarded; provided however that the amount recoverable shall be limited to the pro rata amount of the time remaining until the end of the seven year exclusivity period, proportionate to the period of time between the date of opening of the video lottery facility until the conclusion of the seven year period.

2. Notwithstanding the foregoing, no casino gaming facility shall be authorized:

(a) in the counties of Clinton, Essex, Franklin, Hamilton, Jefferson, Lewis, Saint Lawrence and Warren;

(b) within the following area:

(1) to the east, State Route 14 from Sodus Point to the Pennsylvania border with New York; (2) to the north, the border between New York and Canada; (3) to the south, the Pennsylvania border with New York; and (4) to the west, the border between New York and Canada and the border between Pennsylvania and New York; and

(c) in the counties of Cayuga, Chenango, Cortland, Herkimer, Lewis, Madison, Oneida, Onondaga, Oswego and Otsego.

Section 1312.

Requests for applications. 1. The board shall issue within ninety days of a majority of members being appointed a request for applications for a gaming facility license in regions one, two and five in zone two; provided, however, that the board shall not issue any requests for applications for any region in zone one; and further provided that the board shall not issue any requests for applications with respect to any gaming facility subsequently legislatively authorized until seven years following the commencement of gaming activities in zone two. All requests for applications shall include:

- (a) the time and date for receipt of responses to the request for applications, the manner they are to be received and the address of the office to which the applications shall be delivered;**
- (b) the form of the application and the method for submission;**
- (c) a general description of the anticipated schedule for processing the application;**
- (d) the contact information of board employees responsible for handling applicant questions; and**
- (e) any other information that the board determines.**

2. Board activities shall be subject to section one hundred thirty-nine-j and section one hundred thirty-nine-k of the state finance law.

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3. Requests for applications pursuant to subdivision one of this section shall be advertised in a newspaper of general circulation and on the official internet website of the commission and the board.

4. The board shall establish deadlines for the receipt of all applications. Applications received after the deadline shall not be reviewed by the board.

Section 1313.

Form of application. 1. The commission and the board shall prescribe the initial form of the application for gaming licenses which shall require, but not be limited to:

- (a) the name of the applicant;
- (b) the mailing address and, if a corporation, the name of the state under the laws of which it is incorporated, the location of its principal place of business and the names and addresses of its directors and such stockholders as to be determined by the commission;
- (c) the identity of each person having a direct or indirect interest in the business and the nature of such interest; provided, however, that if the disclosed entity is a trust, the application shall disclose the names and addresses of all beneficiaries; provided further, that if the disclosed entity is a partnership, the application shall disclose the names and addresses of all partners, both general and limited; and provided further, that if the disclosed entity is a limited liability company, the application shall disclose the names and addresses of all members;
- (d) an independent audit report of all financial activities and interests including, but not limited to, the disclosure of all contributions, donations, loans or any other financial transactions to or from a gaming entity or operator in the past five years;
- (e) clear and convincing evidence of financial stability including, but not limited to, bank references, business and personal income and disbursement schedules, tax returns and other reports filed by government agencies and business and personal accounting check records and ledgers;
- (f) information and documentation to demonstrate that the applicant has sufficient business ability and experience to create the likelihood of establishing and maintaining a successful gaming facility;
- (g) a full description of the proposed internal controls and security systems for the proposed gaming facility and any related facilities;
- (h) the designs for the proposed gaming facility, including the names and addresses of the architects, engineers and designers, and a timeline of construction that includes detailed stages of construction for the gaming facility and non-gaming structures, where applicable, and a proposed date to open for gaming;
- (i) the number of construction hours estimated to complete the work;
- (j) a description of the ancillary entertainment services and amenities to be provided at the proposed gaming facility;
- (k) the number of employees to be employed at the proposed gaming facility, including detailed information on the pay rate and benefits for employees;
- (l) completed studies and reports as required by the commission, which shall include, but not be limited to, an examination of the proposed gaming facility's:
 - (1) economic benefits to the region and the state;
 - (2) local and regional social, environmental, traffic and infrastructure impacts;
 - (3) impact on the local and regional economy, including the impact on cultural institutions and on small businesses in the host municipality and nearby municipalities;

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- (4) cost to the host municipality, nearby municipalities and the state for the proposed gaming facility to be located at the proposed location; and
- (5) the estimated state tax revenue to be generated by the gaming facility;
- (m) the names of proposed vendors of gaming equipment;
- (n) the location of the proposed gaming facility, which shall include the address, maps, book and page numbers from the appropriate registry of deeds, assessed value of the land at the time of application and ownership interests over the past twenty years, including all interests, options, agreements in property and demographic, geographic and environmental information and any other information requested by the commission;
- (o) the type and number of games to be conducted at the proposed gaming facility and the specific location of the games in the proposed gaming facility;
- (p) the number of hotels and rooms, restaurants and other amenities located at the proposed gaming facility and how they measure in quality to other area hotels and amenities;
- (q) whether the applicant's proposed gaming facility is part of a regional or local economic plan; and
- (r) whether the applicant purchased or intends to purchase publicly-owned land for the proposed gaming facility.

2. Applications for licenses shall be public records; provided however, that trade secrets, competitively-sensitive or other proprietary information provided in the course of an application for a gaming license under this article, the disclosure of which would place the applicant at a competitive disadvantage, may be withheld from disclosure pursuant to paragraph (d) of subdivision two of section eighty-seven of the public officers law.

Section 1314.

License applicant eligibility. 1. Gaming facility licenses shall only be issued to applicants who are qualified under the criteria set forth in this article, as determined by the commission.

- 2. As a condition of filing, each potential license applicant must demonstrate to the board's satisfaction that local support has been demonstrated.
- 3. Within any **development** region, if the commission is not convinced that there is an applicant that has met the eligibility criteria or the board finds that no applicant has provided substantial evidence that its proposal will provide value to the region in which the gaming facility is proposed to be located, no gaming facility license shall be awarded in that region.

Section 1315.

Required capital investment. 1. The board shall establish the minimum capital investment for a gaming facility by zone and region. Such investment shall include, but not be limited to, a casino area, at least one hotel and other amenities; and provided further, that the board shall determine whether it will include the purchase or lease price of the land where the gaming facility will be located or any infrastructure designed to support the site including, but not limited to, drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues. The board may consider private capital investment made previous to the effective date of this section, but may, in its discretion, discount a percentage of the investment made. Upon award of a gaming license by the commission, the applicant shall be required to deposit ten percent of the total investment proposed in the application into an interest-bearing account. Monies received from the applicant shall be held in escrow until the final stage of construction, as detailed in the timeline of construction submitted with the licensee's application and approved by the commission, at which time the deposit plus interest earned shall be returned to the applicant to be applied for the final stage. Should the applicant be unable to complete the gaming facility, the deposit shall be forfeited to the state. In place of a cash deposit, the commission may allow for an applicant to secure a

deposit bond insuring that ten percent of the proposed capital investment shall be forfeited to the state if the applicant is unable to complete the gaming facility.

2. Each applicant shall submit its proposed capital investment with its application to the board which shall include stages of construction of the gaming facility and the deadline by which the stages and overall construction and any infrastructure improvements will be completed. In awarding a license, the commission shall determine at what stage of construction a licensee shall be approved to open for gaming; provided, however, that a licensee shall not be approved to open for gaming until the commission has determined that at least the gaming area and other ancillary entertainment services and non-gaming amenities, as required by the board, have been built and are of a superior quality as set forth in the conditions of licensure. The commission shall not approve a gaming facility to open before the completion of the permanent casino area.
3. A licensee who fails to begin gaming operations within twenty-four months following license award shall be subject to suspension or revocation of the gaming license by the commission and may, after being found by the commission after notice and opportunity for a hearing to have acted in bad faith in its application, be assessed a fine of up to fifty million dollars.
4. The board shall determine a licensing fee to be paid by a licensee within thirty days after the award of the license which shall be deposited into the commercial gaming revenue fund. The license shall set forth the conditions to be satisfied by the licensee before the gaming facility shall be opened to the public. The commission shall set any renewal fee for such license based on the cost of fees associated with the evaluation of a licensee under this article which shall be deposited into the commercial gaming fund. Such renewal fee shall be exclusive of any subsequent licensing fees under this section.
5. The commission shall determine the sources and total amount of an applicant's proposed capitalization to develop, construct, maintain and operate a proposed gaming facility under this article. Upon award of a gaming license, the commission shall continue to assess the capitalization of a licensee for the duration of construction of the proposed gaming facility and the term of the license.

Section 1316.

Minimum license thresholds. No applicant shall be eligible to receive a gaming license unless the applicant meets the following criteria and clearly states as part of an application that the applicant shall:

1. in accordance with the design plans submitted with the licensee's application to the board, invest not less than the required capital under this article into the gaming facility;
2. own or acquire, within sixty days after a license has been awarded, the land where the gaming facility is proposed to be constructed; provided, however, that ownership of the land shall include a tenancy for a term of years under a lease that extends not less than sixty years beyond the term of the gaming license issued under this article;
3. meet the licensee deposit requirement;
4. demonstrate that it is able to pay and shall commit to paying the gaming licensing fee;
5. demonstrate to the commission how the applicant proposes to address problem gambling concerns, workforce **development** and community **development** and host and nearby municipality impact and mitigation issues;
6. identify the infrastructure costs of the host municipality incurred in direct relation to the construction and operation of a gaming facility and commit to a community mitigation plan for the host municipality;

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7. identify the service costs of the host municipality incurred for emergency services in direct relation to the operation of a gaming facility and commit to a community mitigation plan for the host municipality;
8. pay to the commission an application fee of one million dollars to defray the costs associated with the processing of the application and investigation of the applicant; provided, however, that if the costs of the investigation exceed the initial application fee, the applicant shall pay the additional amount to the commission within thirty days after notification of insufficient fees or the application shall be rejected and further provided that should the costs of such investigation not exceed the fee remitted, any unexpended portion shall be returned to the applicant;
9. comply with state building and fire prevention codes;
10. formulate for board approval and abide by an affirmative action program of equal opportunity whereby the applicant establishes specific goals for the utilization of minorities, women and veterans on construction jobs.

Section 1317.

Investigation of license applicants. 1. Upon receipt of an application for a gaming facility license, the commission shall cause to be commenced an investigation into the suitability of the applicant. In evaluating the suitability of the applicant, the commission shall consider the overall reputation of the applicant including, without limitation:

- (a) the integrity, honesty, good character and reputation of the applicant;
 - (b) the financial stability, integrity and background of the applicant;
 - (c) the business practices and the business ability of the applicant to establish and maintain a successful gaming facility;
 - (d) whether the applicant has a history of compliance with gaming licensing requirements in other jurisdictions;
 - (e) whether the applicant, at the time of application, is a defendant in litigation involving its business practices;
 - (f) the suitability of all parties in interest to the gaming facility license, including affiliates and close associates and the financial resources of the applicant; and
 - (g) whether the applicant is disqualified from receiving a license under this article; provided, however, that in considering the rehabilitation of an applicant for a gaming facility license, the commission shall not automatically disqualify an applicant if the applicant affirmatively demonstrates, by clear and convincing evidence, that the applicant has financial responsibility, character, reputation, integrity and general fitness as such to warrant belief by the commission that the applicant will act honestly, fairly, soundly and efficiently as a gaming licensee.
2. If the investigation reveals that an applicant has failed to:
- (a) establish the applicant's integrity or the integrity of any affiliate, close associate, financial source or any person required to be qualified by the commission;
 - (b) demonstrate responsible business practices in any jurisdiction; or
 - (c) overcome any other reason, as determined by the commission, as to why it would be injurious to the interests of the state in awarding the applicant a gaming facility license, the commission shall deny the application, subject to notice and an opportunity for hearing.
3. If the investigation reveals that an applicant is suitable to receive a gaming facility license, the entity shall recommend that the commission commence a review of the applicant's entire application.

Section 1318.

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Disqualifying criteria. 1. The commission shall deny a license to any applicant who the commission determines is disqualified on the basis of any of the following criteria, subject to notice and an opportunity for hearing:

- (a) failure of the applicant to prove by clear and convincing evidence that the applicant is qualified in accordance with the provisions of this article;
- (b) failure of the applicant to provide information, documentation and assurances required by this article or requested by the commission, or failure of the applicant to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;
- (c) the conviction of the applicant, or of any person required to be qualified under this article as a condition of a license, of any offense in any jurisdiction which is or would be a felony or other crime involving public integrity, embezzlement, theft, fraud or perjury;
- (d) committed prior acts which have not been prosecuted or in which the applicant, or of any person required to be qualified under this article as a condition of a license, was not convicted but form a pattern of misconduct that makes the applicant unsuitable for a license under this article; or
- (e) if the applicant, or of any person required to be qualified under this article as a condition of a license, has affiliates or close associates that would not qualify for a license or whose relationship with the applicant may pose an injurious threat to the interests of the state in awarding a gaming facility license to the applicant;
- (f) any other offense under present state or federal law which indicates that licensure of the applicant would be inimical to the policy of this article; provided, however, that the disqualification provisions of this section shall not apply with regard to any misdemeanor conviction;
- (g) current prosecution or pending charges in any jurisdiction of the applicant or of any person who is required to be qualified under this article as a condition of a license, for any of the offenses enumerated in paragraph (c) of subdivision one of this section; provided, however, that at the request of the applicant or the person charged, the commission may defer decision upon such application during the pendency of such charge;
- (h) the pursuit by the applicant or any person who is required to be qualified under this article as a condition of a license of economic gain in an occupational manner or context which is in violation of the criminal or civil public policies of this state, if such pursuit creates a reasonable belief that the participation of such person in gaming facility operations would be inimical to the policies of this article. For purposes of this section, occupational manner or context shall be defined as the systematic planning, administration, management, or execution of an activity for financial gain;
- (i) the identification of the applicant or any person who is required to be qualified under this article as a condition of a license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this article. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state. A career offender cartel shall be defined as any group of persons who operate together as career offenders;
- (j) the commission by the applicant or any person who is required to be qualified under this article as a condition of a license of any act or acts which would constitute any offense under paragraph (c) of subdivision one of this section, even if such conduct has not been or may not be prosecuted under the criminal laws of this state or any other jurisdiction;
- (k) flagrant defiance by the applicant or any person who is required to be qualified under this article of any legislative investigatory body or other official investigatory body of any state or of the United

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States when such body is engaged in the investigation of crimes relating to gaming, official corruption, or organized crime activity; and

- (I) failure by the applicant or any person required to be qualified under this article as a condition of a license to make required payments in accordance with a child support order, repay an overpayment for public assistance benefits, or repay any other debt owed to the state unless such applicant provides proof to the executive director's satisfaction of payment of or arrangement to pay any such debts prior to licensure.

Section 1319.

Hearings. The commission and the board shall have the independent authority to conduct hearings concerning the conduct of gaming and applicants for gaming facility licenses in accordance with any procedures set forth in this article and any applicable implementing regulations.

Section 1320.

Siting evaluation. In determining whether an applicant shall be eligible for a gaming facility license, the board shall evaluate and issue a finding of how each applicant proposes to advance the following objectives.

1. The decision by the board to select a gaming facility license applicant shall be weighted by seventy percent based on economic activity and business development factors including:
 - (a) realizing maximum capital investment exclusive of land acquisition and infrastructure improvements;
 - (b) maximizing revenues received by the state and localities;
 - (c) providing the highest number of quality jobs in the gaming facility;
 - (d) building a gaming facility of the highest caliber with a variety of quality amenities to be included as part of the gaming facility;
 - (e) offering the highest and best value to patrons to create a secure and robust gaming market in the region and the state;
 - (f) providing a market analysis detailing the benefits of the site location of the gaming facility and the estimated recapture rate of gaming-related spending by residents traveling to an out-of-state gaming facility;
 - (g) offering the fastest time to completion of the full gaming facility;
 - (h) demonstrating the ability to fully finance the gaming facility; and
 - (i) demonstrating experience in the development and operation of a quality gaming facility.
2. The decision by the board to select a gaming facility license applicant shall be weighted by twenty percent based on local impact and siting factors including:
 - (a) mitigating potential impacts on host and nearby municipalities which might result from the development or operation of the gaming facility;
 - (b) gaining public support in the host and nearby municipalities which may be demonstrated through the passage of local laws or public comment received by the board or gaming applicant;
 - (c) operating in partnership with and promoting local hotels, restaurants and retail facilities so that patrons experience the full diversified regional tourism industry; and
 - (d) establishing a fair and reasonable partnership with live entertainment venues that may be impacted by a gaming facility under which the gaming facility actively supports the mission and the operation of the impacted entertainment venues.

3. The decision by the board to select a gaming facility license applicant shall be weighted by ten percent based on workforce enhancement factors including:
- (a) implementing a workforce **development** plan that utilizes the existing labor force, including the estimated number of construction jobs a proposed gaming facility will generate, the **development** of workforce training programs that serve the unemployed and methods for accessing employment at the gaming facility;
 - (b) taking additional measures to address problem gambling including, but not limited to, training of gaming employees to identify patrons exhibiting problems with gambling;
 - (c) utilizing sustainable **development** principles including, but not limited to:
 - (1) having new and renovation construction certified under the appropriate certification category in the Leadership in Energy and Environmental Design Green Building Rating System created by the United States Green Building Council;
 - (2) efforts to mitigate vehicle trips;
 - (3) efforts to conserve water and manage storm water;
 - (4) demonstrating that electrical and HVAC equipment and appliances will be Energy Star labeled where available;
 - (5) procuring or generating on-site ten percent of its annual electricity consumption from renewable sources; and
 - (6) developing an ongoing plan to submeter and monitor all major sources of energy consumption and undertake regular efforts to maintain and improve energy efficiency of buildings in their systems;
 - (d) establishing, funding and maintaining human resource hiring and training practices that promote the **development** of a skilled and diverse workforce and access to promotion opportunities through a workforce training program that:
 - (1) establishes transparent career paths with measurable criteria within the gaming facility that lead to increased responsibility and higher pay grades that are designed to allow employees to pursue career advancement and promotion;
 - (2) provides employee access to additional resources, such as tuition reimbursement or stipend policies, to enable employees to acquire the education or job training needed to advance career paths based on increased responsibility and pay grades; and
 - (3) establishes an on-site child day care program;
 - (e) purchasing, whenever possible, domestically manufactured slot machines for installation in the gaming facility;
 - (f) implementing a workforce **development** plan that:
 - (1) incorporates an affirmative action program of equal opportunity by which the applicant guarantees to provide equal employment opportunities to all employees qualified for licensure in all employment categories, including persons with disabilities;
 - (2) utilizes the existing labor force in the state;
 - (3) estimates the number of construction jobs a gaming facility will generate and provides for equal employment opportunities and which includes specific goals for the utilization of minorities, women and veterans on those construction jobs;
 - (4) identifies workforce training programs offered by the gaming facility; and
 - (5) identifies the methods for accessing employment at the gaming facility; and

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(g) demonstrating that the applicant has an agreement with organized labor, including hospitality services, and has the support of organized labor for its application, which specifies:

- (1) the number of employees to be employed at the gaming facility, including detailed information on the pay rate and benefits for employees and contractors in the gaming facility and all infrastructure improvements related to the project; and
- (2) detailed plans for assuring labor harmony during all phases of the construction, reconstruction, renovation, development and operation of the gaming facility.

Section 1321.

Intentionally omitted.

TITLE 3

OCCUPATIONAL LICENSING

Section 1322.

General provisions.

1323. Key employee licenses.

1324. Gaming employee registration.

1325. Approval, denial and renewal of employee licenses and registrations.

Section 1322.

General provisions. 1. It shall be the affirmative responsibility of each applicant or licensee to establish by clear and convincing evidence its individual qualifications, and for a gaming facility license the qualifications of each person who is required to be qualified under this article.

2. Any applicant, licensee, registrant, or any other person who must be qualified pursuant to this article shall provide all legally required information and satisfy all lawful requests for information pertaining to qualification and in the form specified by regulation. All applicants, registrants, and licensees shall waive liability as to the state, and its instrumentalities and agents, for any damages resulting from any disclosure or publication in any manner, other than a willfully unlawful disclosure or publication, of any material or information acquired during inquiries, investigations or hearings.
3. All applicants, licensees, registrants, intermediary companies, and holding companies shall consent to inspections, searches and seizures while at a gaming facility and the supplying of handwriting exemplars as authorized by this article and regulations promulgated hereunder.
4. All applicants, licensees, registrants, and any other person who shall be qualified pursuant to this article shall have the continuing duty to provide any assistance or information required by the commission, and to cooperate in any inquiry, investigation or hearing conducted by the commission. If, upon issuance of a formal request to answer or produce information, evidence or testimony, any applicant, licensee, registrant, or any other person who shall be qualified pursuant to this article refuses to comply, the application, license, registration or qualification of such person may be denied or revoked.
5. Each applicant or person who must be qualified under this article shall be photographed and fingerprinted for identification and investigation purposes in accordance with procedures set forth by regulation.
6. All licensees, all registrants, and all other persons required to be qualified under this article shall have a duty to inform the commission of any action which they believe would constitute a violation of this article. No person who so informs the commission shall be discriminated against by an applicant, licensee or registrant because of the supplying of such information.

Section 1323.

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Key employee licenses. 1. No licensee or a holding or intermediary company of a licensee may employ any person as a casino key employee unless the person is the holder of a valid casino key employee license issued by the commission.

2. Each applicant for a casino key employee license must, prior to the issuance of any casino key employee license, produce information, documentation and assurances concerning the following qualification criteria:

(a) Each applicant for a casino key employee license shall produce such information, documentation and assurances as may be lawfully required to establish by clear and convincing evidence the financial stability, integrity and responsibility of the applicant, including but not limited to bank references, business and personal income and disbursements schedules, tax returns and other reports filed with governmental agencies, and business and personal accounting and check records and ledgers. In addition, each applicant shall, in writing, authorize the examination of all bank accounts and records as may be deemed necessary by the commission.

(b) Each applicant for a casino key employee license shall produce such information, documentation and assurances as may be required to establish by clear and convincing evidence the applicant's good character, honesty and integrity. Such information shall include data pertaining to family, habits, character, reputation, criminal history information, business activities, financial affairs, and business, professional and personal associates, covering at least the ten year period immediately preceding the filing of the application. Each applicant shall notify the commission of any civil judgments obtained against such applicant pertaining to antitrust or security regulation laws of the federal government, of this state or of any other state, jurisdiction, province or country. In addition, each applicant shall, upon request of the commission, produce letters of reference from law enforcement agencies having jurisdiction in the applicant's place of residence and principal place of business, which letters of reference shall indicate that such law enforcement agencies do not have any pertinent non-sealed information concerning the applicant, or if such law enforcement agency does have such information pertaining to the applicant, shall specify what that information is. If the applicant has been associated with gaming operations in any capacity, position or employment in a jurisdiction which permits such activity, the applicant shall, upon request of the commission, produce letters of reference from the gaming enforcement or control agency, which shall specify the experience of such agency with the applicant, his or her associates and his or her participation in the gaming operations of that jurisdiction; provided, however, that if no such letters are received from the appropriate law enforcement agencies within sixty days of the applicant's request therefor, the applicant may submit a statement under oath that he or she is or was during the period such activities were conducted in good standing with such gaming enforcement or control agency.

(c) Each applicant employed by a gaming facility licensee shall be a resident of the state prior to the issuance of a casino key employee license; provided, however, that upon petition by the holder of a license, the commission may waive this residency requirement for any applicant whose particular position will require him to be employed outside the state; and provided further that no applicant employed by a holding or intermediary company of a licensee shall be required to establish residency in this state.

(d) For the purposes of this section, each applicant shall submit to the commission the applicant's name, address, fingerprints and written consent for a criminal history information as defined in paragraph (c) of subdivision one of section eight hundred forty-five-b of the executive law, to be performed. The commission is hereby authorized to exchange fingerprint data with and receive criminal history record information from the state division of criminal justice services and the federal bureau of investigation consistent with applicable state and federal laws, rules and regulations. The applicant shall pay the fee for such criminal history information as established pursuant to article thirty-five of the executive law. The state division of criminal

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justice services shall promptly notify the commission in the event a current or prospective licensee, who was the subject of such criminal history information pursuant to this section, is arrested for a crime or offense in this state after the date the check was performed.

3. The commission shall deny a casino key employee license to any applicant who is disqualified on the basis of the criteria contained in section one thousand three hundred eighteen of this title, subject to notice and hearing.
4. Upon receipt of such criminal history information, the commission shall provide such applicant with a copy of such criminal history information, together with a copy of article twenty-three-A of the correction law, and inform such applicant of his or her right to seek correction of any incorrect information contained in such criminal history information pursuant to regulations and procedures established by the division of criminal justice services. Except as otherwise provided by law, such criminal history information shall be confidential and any person who willfully permits the release of such confidential criminal history information to persons not permitted to receive such information shall be guilty of a misdemeanor.
5. Upon petition by the holder of a license, the commission may issue a temporary license to an applicant for a casino key employee license, provided that:
 - (a) The applicant for the casino key employee license has filed a completed application as required by the commission;
 - (b) The petition for a temporary casino key employee license certifies, and the commission finds, that an existing casino key employee position of the petitioner is vacant or will become vacant within sixty days of the date of the petition and that the issuance of a temporary key employee license is necessary to fill the said vacancy on an emergency basis to continue the efficient operation of the casino, and that such circumstances are extraordinary and not designed to circumvent the normal licensing procedures of this article;
6. Unless otherwise terminated pursuant to this article, any temporary casino key employee license issued pursuant to this section shall expire nine months from the date of its issuance.

Section 1324.

Gaming employee registration. 1. No person may commence employment as a gaming employee unless such person has a valid registration on file with the commission, which registration shall be prepared and filed in accordance with the regulations promulgated hereunder.

2. A gaming employee registrant shall produce such information as the commission by regulation may require. Subsequent to the registration of a gaming employee, the executive director may revoke, suspend, limit, or otherwise restrict the registration upon a finding that the registrant is disqualified on the basis of the criteria contained in section one thousand three hundred eighteen of this title. If a gaming employee registrant has not been employed in any position within a gaming facility for a period of three years, the registration of that gaming employee shall lapse.
3. No gaming employee registration shall be denied or revoked on the basis of a misdemeanor conviction of any of the offenses enumerated in this article as disqualification criteria or the commission of any act or acts which would constitute any offense under section one thousand three hundred eighteen of this title, provided that the registrant has affirmatively demonstrated the registrant's rehabilitation, pursuant to article twenty-three-A of the correction law.
4. For the purposes of this section, each registrant shall submit to the commission the registrant's name, address, fingerprints and written consent for a criminal history information to be performed. The commission is hereby authorized to exchange fingerprint data with and receive criminal history information as defined in paragraph (c) of subdivision one of section eight hundred forty-five-b of the executive law from the state division of criminal justice services and the federal bureau of investigation consistent with applicable state and federal laws, rules and regulations. The registrant shall pay the fee for such criminal history information as established pursuant to article thirty-five of

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the executive law. The state division of criminal justice services shall promptly notify the commission in the event a current or prospective licensee, who was the subject of a criminal history information pursuant to this section, is arrested for a crime or offense in this state after the date the check was performed.

5. Upon receipt of such criminal history information, the Commission shall provide such applicant with a copy of such criminal history information, together with a copy of article twenty-three-A of the correction law, and inform such applicant of his or her right to seek correction of any incorrect information contained in such criminal history information pursuant to regulations and procedures established by the division of criminal justice services. Except as otherwise provided by law, such criminal history information shall be confidential and any person who willfully permits the release of such confidential criminal history information to persons not permitted to receive such information shall be guilty of a misdemeanor.

Section 1325.

Approval, denial and renewal of employee licenses and registrations. 1. Upon the filing of an application for a casino key employee license or gaming employee registration required by this article and after submission of such supplemental information as the commission may require, the commission shall conduct or cause to be conducted such investigation into the qualification of the applicant, and the commission shall conduct such hearings concerning the qualification of the applicant, in accordance with its regulations, as may be necessary to determine qualification for such license.

2. After such investigation, the commission may either deny the application or grant a license to an applicant whom it determines to be qualified to hold such license.
3. The commission shall have the authority to deny any application pursuant to the provisions of this article following notice and opportunity for hearing.
4. When the commission grants an application, the commission may limit or place such restrictions thereupon as it may deem necessary in the public interest.
5. After an application for a casino key employee license is submitted, final action of the commission shall be taken within ninety days after completion of all hearings and investigations and the receipt of all information required by the commission.
6. Licenses and registrations of casino key employees and gaming employees issued pursuant to this article shall remain valid for five years unless suspended, revoked or voided pursuant to law. Such licenses and registrations may be renewed by the holder thereof upon application, on a form prescribed by the commission, and payment of the applicable fee. Notwithstanding the forgoing, if a gaming employee registrant has not been employed in any position within a gaming facility for a period of three years, the registration of that gaming employee shall lapse.
8. The commission shall establish by regulation appropriate fees to be paid upon the filing of the required applications. Such fees shall be deposited into the commercial gaming revenue fund.

TITLE 4

ENTERPRISE AND VENDOR LICENSING AND REGISTRATION

Section 1326.

Licensing of vendor enterprises.

1327. Duration and renewal of vendor registration.
1328. Junket operator licensing.
1329. Lobbyist registration.
1330. Registration of labor organizations.

1330-a.**Casino gaming expenditures.****Section 1326.**

Licensing of vendor enterprises. 1. Any business to be conducted with a gaming facility applicant or licensee by a vendor offering goods or services which directly relate to gaming activity, including gaming equipment manufacturers, suppliers, repairers, and independent testing laboratories, shall be licensed as a casino vendor enterprise in accordance with the provisions of this article prior to conducting any business whatsoever with a gaming facility applicant or licensee, its employees or agents; provided, however, that upon a showing of good cause by a gaming facility applicant or licensee, the executive director may permit an applicant for a casino vendor enterprise license to conduct business transactions with such gaming facility applicant or licensee prior to the licensure of that casino vendor enterprise applicant under this subdivision for such periods as the commission may establish by regulation.

2. In addition to the requirements of subdivision one of this section, any casino vendor enterprise intending to manufacture, sell, distribute, test or repair slot machines within the state shall be licensed in accordance with the provisions of this article prior to engaging in any such activities; provided, however, that upon a showing of good cause by a gaming facility applicant or licensee, the executive director may permit an applicant for a casino vendor enterprise license to conduct business transactions with the gaming facility applicant or licensee prior to the licensure of that casino vendor enterprise applicant under this subdivision for such periods as the commission may establish by regulation; and provided further, however, that upon a showing of good cause by an applicant required to be licensed as a casino vendor enterprise pursuant to this subdivision, the executive director may permit the casino vendor enterprise applicant to initiate the manufacture of slot machines or engage in the sale, distribution, testing or repair of slot machines with any person other than a gaming facility applicant or licensee, its employees or agents, prior to the licensure of that casino vendor enterprise applicant under this subdivision.
3. Vendors providing goods and services to gaming facility licensees or applicants ancillary to gaming shall be required to be licensed as an ancillary casino vendor enterprise and shall comply with the standards for casino vendor license applicants.
4. Each casino vendor enterprise required to be licensed pursuant to subdivision one of this section, as well as its owners; management and supervisory personnel; and employees if such employees have responsibility for services to a gaming facility applicant or licensee, must qualify under the standards, except residency, established for qualification of a casino key employee under this article.
5. Any vendor that offers goods or services to a gaming facility applicant or licensee that is not included in subdivision one or two of this section including, but not limited to site contractors and subcontractors, shopkeepers located within the facility, gaming schools that possess slot machines for the purpose of instruction, and any non-supervisory employee of a junket enterprise licensed under subdivision three of this section, shall be required to register with the commission in accordance with the regulations promulgated under this article.

Notwithstanding the provisions aforementioned, the executive director may, consistent with the public interest and the policies of this article, direct that individual vendors registered pursuant to this subdivision be required to apply for either a casino vendor enterprise license pursuant to subdivision one of this section, or an ancillary vendor industry enterprise license pursuant to subdivision three of this section, as directed by the commission. The executive director may also order that any enterprise licensed as or required to be licensed as an ancillary casino vendor enterprise pursuant to subdivision three of this section be required to apply for a casino vendor enterprise license pursuant to subdivision one of this section. The executive director may also, in his or her discretion, order that an independent software contractor not otherwise required to be

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registered be either registered as a vendor pursuant to this subdivision or be licensed pursuant to either subdivision one or three of this section.

Each ancillary casino vendor enterprise required to be licensed pursuant to subdivision three of this section, as well as its owners, management and supervisory personnel, and employees if such employees have responsibility for services to a gaming facility applicant or licensee, shall establish their good character, honesty and integrity by clear and convincing evidence and shall provide such financial information as may be required by the commission. Any enterprise required to be licensed as an ancillary casino vendor enterprise pursuant to this section shall be permitted to transact business with a gaming facility licensee upon filing of the appropriate vendor registration form and application for such licensure.

6. Any applicant, licensee or qualifier of a casino vendor enterprise license or of an ancillary casino vendor enterprise license under subdivision one of this section, and any vendor registrant under subdivision five of this section shall be disqualified in accordance with the criteria contained in section one thousand three hundred eighteen of this article, except that no such ancillary casino vendor enterprise license under subdivision three of this section or vendor registration under subdivision five of this section shall be denied or revoked if such vendor registrant can affirmatively demonstrate rehabilitation pursuant to article twenty-three-A of the correction law.
7. No casino vendor enterprise license or ancillary casino vendor enterprise license shall be issued pursuant to subdivision one of this section to any person unless that person shall provide proof of valid business registration with the department of state.
8. For the purposes of this section, each applicant shall submit to the commission the name, address, fingerprints and a written consent for a criminal history information to be performed, for each person required to qualify as part of the application. The commission is hereby authorized to exchange fingerprint data with and receive criminal history record information from the state division of criminal justice services and the federal bureau of investigation consistent with applicable state and federal laws, rules and regulations. The applicant shall pay the fee for such criminal history information as established pursuant to article thirty-five of the executive law. The state division of criminal justice services shall promptly notify the commission in the event a current or prospective qualifier, who was the subject of a criminal history record check pursuant to this section, is arrested for a crime or offense in this state after the date the check was performed.
9. Subsequent to the licensure of any entity pursuant to subdivision one of this section, including any finding of qualification as may be required as a condition of licensure, or the registration of any vendor pursuant to subdivision three of this section, the executive director may revoke, suspend, limit, or otherwise restrict the license, registration or qualification status upon a finding that the licensee, registrant or qualifier is disqualified on the basis of the criteria set forth in section one thousand three hundred eighteen of this article.
10. After notice and hearing prior to the suspension of any license, registration or qualification issued pursuant to subdivision seven of this section the commission shall have the obligation to prove by substantial evidence that the licensee, registrant or qualifier is disqualified on the basis of the criteria set forth in section one thousand three hundred eighteen of this article.

Section 1327.

Duration and renewal of vendor registration. 1. A casino vendor registration shall be effective upon issuance, and shall remain valid for five years unless revoked, suspended, voided by law, limited, or otherwise restricted by the commission. Such registrations may be renewed by the holder thereof upon application, on a form prescribed by the commission, and payment of the applicable fee. Notwithstanding the foregoing, if a vendor registrant has not conducted business with a gaming facility for a period of three years, the registration of that vendor registrant shall lapse.

2. The commission shall establish by regulation reasonable and appropriate fees to be imposed on each vendor registrant who provides goods or services to a gaming facility, regardless of the

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nature of any contractual relationship between the vendor registrant and gaming facility, if any. Such fees shall be paid to the commission.

Section 1328.

Junket operator licensing. 1. No junkets may be organized or permitted except in accordance with the provisions of this article. No person may act as a junket representative or junket enterprise except in accordance with this section.

2. A junket representative employed by a gaming facility licensee, an applicant for a gaming facility license or an affiliate of a gaming facility licensee shall be licensed as a casino key employee; provided, however, that said licensee need not be a resident of this state. No gaming facility licensee or applicant for a gaming facility license may employ or otherwise engage a junket representative who is not so licensed.
3. Junket enterprises that, and junket representatives not employed by a gaming facility licensee or an applicant for a gaming facility license or by a junket enterprise who, engage in activities governed by this section shall be licensed as an ancillary casino vendor enterprise in accordance with subdivision three of section one thousand three hundred twenty-six of this title, unless otherwise directed by the commission; provided, however, that any such junket enterprise or junket representative who has disqualified shall be entitled to establish his or her rehabilitation from such disqualification pursuant to article twenty-three-A of the correction law. Any non-supervisory employee of a junket enterprise or junket representative licensed as an ancillary casino vendor enterprise in accordance with subdivision three of section one thousand three hundred twenty-six of this title shall be registered.
4. Prior to the issuance of any license required by this section, an applicant for licensure shall submit to the jurisdiction of the state and shall demonstrate that he or she is amenable to service of process within this state. Failure to establish or maintain compliance with the requirements of this subdivision shall constitute sufficient cause for the denial, suspension or revocation of any license issued pursuant to this section.
5. Upon petition by the holder of a gaming facility license, an applicant for a casino key employee license intending to be employed as a junket representative may be issued a temporary license by the commission in accordance with regulations promulgated, provided that:
 - (a) the applicant for licensure is employed by a gaming facility licensee; and
 - (b) the applicant for licensure has filed a completed application as required by the commission.
6. The commission shall have the authority to immediately suspend, limit or condition any temporary license issued pursuant to this section, pending a hearing on the qualifications of the junket representative.
7. Unless otherwise terminated, any temporary license issued pursuant to this section shall expire twelve months from the date of its issuance, and shall be renewable by the commission for one additional six month period.
8. Every agreement concerning junkets entered into by a gaming facility licensee and a junket representative or junket enterprise shall be deemed to include a provision for its termination without liability on the part of the gaming facility licensee, if the commission orders the termination upon the suspension, limitation, conditioning, denial or revocation of the licensure of the junket representative or junket enterprise. Failure to expressly include such a condition in the agreement shall not constitute a defense in any action brought to terminate the agreement.
9. A gaming facility licensee shall be responsible for the conduct of any junket representative or junket enterprise associated with it and for the terms and conditions of any junket engaged in on its premises, regardless of the fact that the junket may involve persons not employed by such a gaming facility licensee.

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10. A gaming facility licensee shall be responsible for any violation or deviation from the terms of a junket. Notwithstanding any other provisions of this article, the commission may order restitution to junket participants, assess penalties for such violations or deviations, prohibit future junkets by the gaming facility licensee, junket enterprise or junket representative, and order such further relief as it deems appropriate.
11. The commission shall, by regulation, prescribe methods, procedures and forms for the delivery and retention of information concerning the conduct of junkets by gaming facility licensees. Without limitation of the foregoing, each gaming facility licensee, in accordance with the rules of the commission, shall:
 - (a) Maintain on file a report describing the operation of any junket engaged in on its premises; and
 - (b) Submit to the commission a list of all its employees who are acting as junket representatives.
12. Each gaming facility licensee, junket representative or junket enterprise shall, in accordance with the rules of the commission, file a report with the commission with respect to each list of junket patrons or potential junket patrons purchased directly or indirectly by the gaming facility licensee, junket representative or enterprise.
13. The commission shall have the authority to determine, either by regulation, or upon petition by the holder of a gaming facility license, that a type of arrangement otherwise included within the definition of "junket" shall not require compliance with any or all of the requirements of this section. In granting exemptions, the commission shall consider such factors as the nature, volume and significance of the particular type of arrangement, and whether the exemption would be consistent with the public policies established by this article. In applying the provisions of this subdivision, the commission may condition, limit, or restrict any exemption as it may deem appropriate.
14. No junket enterprise or junket representative or person acting as a junket representative may:
 - (a) Engage in efforts to collect upon checks that have been returned by banks without full and final payment;
 - (b) Exercise approval authority with regard to the authorization or issuance of credit;
 - (c) Act on behalf of or under any arrangement with a gaming facility licensee or a gaming patron with regard to the redemption, consolidation, or substitution of the gaming patron's checks awaiting deposit;
 - (d) Individually receive or retain any fee from a patron for the privilege of participating in a junket; and
 - (e) Pay for any services, including transportation, or other items of value provided to, or for the benefit of, any patron participating in a junket.

Section 1329.

Lobbyist registration. 1. For purposes of this section, the terms "lobbyist", "lobbying", "lobbying activities" and "client" shall have the same meaning as those terms are defined by section one-c of the legislative law.

2. In addition to any other registration and reporting required by law, each lobbyist seeking to engage in lobbying activity on behalf of a client or a client's interest before the commission shall first register with the secretary of the commission. The secretary shall cause a registration to be available on the commission's website within five days of submission.

Section 1330.

Registration of labor organizations. 1. Each labor organization, union or affiliate seeking to represent employees who are employed in a gaming facility by a gaming facility licensee shall register with the commission biennially, and shall disclose such information as the commission may require, including the names of all affiliated organizations, pension and welfare systems and all

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officers and agents of such organizations and systems; provided, however, that no labor organization, union, or affiliate shall be required to furnish such information to the extent such information is included in a report filed by any labor organization, union, or affiliate with the Secretary of Labor pursuant to 29 U.S.C. Section 431 et seq. or Section 1001 et seq. if a copy of such report, or of the portion thereof containing such information, is furnished to the commission pursuant to the aforesaid federal provisions. The commission may in its discretion exempt any labor organization, union, or affiliate from the registration requirements of this subdivision where the commission finds that such organization, union or affiliate is not the certified bargaining representative of any employee who is employed in a gaming facility by a gaming facility licensee, is not involved actively, directly or substantially in the control or direction of the representation of any such employee, and is not seeking to do so.

2. No person may act as an officer, agent or principal employee of a labor organization, union or affiliate registered or required to be registered pursuant to this section if the person has been found disqualified by the commission in accordance with the criteria contained in section one thousand three hundred eighteen of this article. The commission may, for purposes of this subdivision, waive any disqualification criterion consistent with the public policy of this article and upon a finding that the interests of justice so require.
3. Neither a labor organization, union or affiliate nor its officers and agents not otherwise individually licensed or registered under this article and employed by a gaming facility licensee may hold any financial interest whatsoever in the gaming facility or gaming facility licensee whose employees they represent.
4. The commission may maintain a civil action and proceed in a summary manner, without posting bond, against any person, including any labor organization, union or affiliate, to compel compliance with this section, or to prevent any violations, the aiding and abetting thereof, or any attempt or conspiracy to violate this section.
5. In addition to any other remedies provided in this section, a labor organization, union or affiliate registered or required to be registered pursuant to this section may be prohibited by the commission from receiving any dues from any employee licensed or registered under this article and employed by a gaming facility licensee or its agent, if any officer, agent or principal employee of the labor organization, union or affiliate has been found disqualified and if such disqualification has not been waived by the commission in accordance with subdivision two of this section.

Section 1330-a.

Casino gaming expenditures. 1. (a) In addition to any other registration or reporting required by law, any entity licensed under section sixteen hundred seventeen-a of the tax law, or which possesses a pari-mutuel wagering license or franchise awarded pursuant to article two or three of this chapter that makes an expenditure of more than one thousand dollars for any written, typed, or other printed communication, or any internet-based communication, or any television or radio communication, or any automated or paid telephone communications, in support or opposition to any referendum authorized by the state legislature following second passage of a concurrent resolution to amend the state constitution to permit or authorize casino gaming to a general public audience, shall file any reports required pursuant to the election law simultaneously with the gaming commission and shall provide such additional reports as required by the gaming commission. This requirement shall apply irrespective of whether such entity makes such expenditure directly or indirectly via one or more persons. The gaming commission shall promulgate regulations to implement the requirements of this section.

- (b) Casino gaming expenditures do not include expenditures in connection with:
 - (i) a written news story, commentary, or editorial or a news story, commentary, or editorial distributed through the facilities of any broadcasting station, cable or satellite unless such

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publication or facilities are owned or controlled directly or indirectly by the person making such expenditure; or

(ii) a communication published on the Internet, unless the communication is a paid advertisement.

(c) For purposes of this section, the term "person" shall mean person, group of persons, corporation, unincorporated business entity, labor organization or business, trade or professional association or organization, or political committee.

(d) A knowing or willful violation of the provisions of this section shall subject the person to a civil penalty equal to up to one hundred thousand dollars or the cost of the communication, whichever is greater, imposed by the gaming commission for each violation.

2. A copy of all communications paid for by the casino gaming expenditure, including but not limited to broadcast, cable or satellite schedules and scripts, advertisements, pamphlets, circulars, flyers, brochures, letterheads and other printed matter and statements or information conveyed to one thousand or more members of a general public audience shall be filed with the gaming commission with the statements required this article.

TITLE 5

REQUIREMENTS FOR CONDUCT AND OPERATION OF GAMING

Section 1331.

Operation certificate.

1332. Age for gaming participation.

1333. Hours of operation.

1334. Internal controls.

1335. Games and gaming equipment.

1336. Certain wagering prohibited.

1337. Gratuities.

1338. Limitation on certain financial access.

1339. Credit.

1340. Alcoholic beverages.

1341. Licensee leases and contracts.

1342. Required exclusion of certain persons.

1343. Exclusion, ejection of certain persons.

1344. List of persons self-excluded from gaming activities.

1345. Excluded person; forfeiture of winnings; other sanctions.

1346. Labor peace agreements for certain facilities

Section 1331.

Operation certificate. 1. Notwithstanding the issuance of a license therefor, no gaming facility may be opened or remain open to the public, and no gaming activity, except for test purposes, may be conducted therein, unless and until a valid operation certificate has been issued to the gaming facility licensee by the commission. Such certificate shall be issued by the executive director upon a determination that a gaming facility complies in all respects with the requirements of this article and regulations promulgated hereunder, and that the gaming facility is prepared in all respects to receive and entertain the public.

2. An operation certificate shall remain in force and effect unless revoked, suspended, limited, or otherwise altered by the commission in accordance with this article.
3. It shall be an express condition of continued operation under this article that a gaming facility licensee shall maintain either electronically or in hard copy at the discretion of the gaming facility licensee, copies of all books, records, and documents pertaining to the licensee's operations and approved hotel in a manner and location approved by the commission, provided, however, that the originals of such books, records and documents, whether in electronic or hard copy form, may be maintained at the offices or electronic system of an affiliate of the gaming facility licensee, at the discretion of the gaming facility licensee. All such books, records and documents shall be immediately available for inspection during all hours of operation in accordance with the rules of the commission and shall be maintained for such period of time as the commission shall require.

Section 1332.

Age for gaming participation. 1. No person under the age at which a person is authorized to purchase and consume alcoholic beverages shall enter, or wager in, a licensed gaming facility; provided, however, that such a person may enter a gaming facility by way of passage to another room, and provided further, however, that any such person who is licensed or registered under the provisions of this article may enter a gaming facility in the regular course of the person's permitted activities.

2. Any person disqualified pursuant to subdivision one of this section entitled to funds, cash or prizes from gambling activity shall forfeit same. Such forfeited funds, cash or prizes shall be remitted to the commission and deposited into the commercial gaming revenue fund.

Section 1333.

Hours of operation. 1. Each gaming facility licensed pursuant to this article shall be permitted to operate twenty-four hours a day unless otherwise directed by the commission.

2. A gaming facility licensee shall file with the commission a schedule of hours prior to the issuance of an initial operation certificate. If the gaming facility licensee proposes any change in scheduled hours, such change may not be effected until such licensee files a notice of the new schedule of hours with the commission. Such filing must be made thirty days prior to the effective date of the proposed change in hours.
3. Nothing in this section shall be construed to limit a gaming facility licensee in opening its casino later than, or closing its casino earlier than, the times stated in its schedule of operating hours; provided, however, that any such alterations in its hours shall comply with the provisions of subdivision one of this section and with regulations of the commission pertaining to such alterations.

Section 1334.

Internal controls. 1. Each applicant for a gaming facility license shall create, maintain, and file with the commission a description of its internal procedures and administrative and accounting controls for gaming operations that conform to commission regulations and provide adequate and effective controls, establish a consistent overall system of internal procedures and administrative and accounting controls and conform to generally accepted accounting principles, and ensure that gaming facility procedures are carried out and supervised by personnel who do not have incompatible functions. A gaming facility licensee's internal controls shall contain a narrative description of the internal control system to be utilized by the gaming facility, including, but not limited to:

- (a) Accounting controls, including the standardization of forms and definition of terms to be utilized in the gaming operations;
- (b) Procedures, forms, and, where appropriate, formulas covering the calculation of hold percentages; revenue drop; expense and overhead schedules; complimentary service or item; junkets; and cash equivalent transactions;

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- (c) Procedures within the cashier's cage for the receipt, storage and disbursal of chips, cash, and other cash equivalents used in gaming; the cashing of checks; the redemption of chips and other cash equivalents used in gaming; the pay-off of jackpots; and the recording of transactions pertaining to gaming operations;
- (d) Procedures for the collection and security of moneys at the gaming tables;
- (e) Procedures for the transfer and recordation of chips between the gaming tables and the cashier's cage;
- (f) Procedures for the transfer of moneys from the gaming tables to the counting process;
- (g) Procedures and security for the counting and recordation of revenue;
- (h) Procedures for the security, storage and recordation of cash, chips and other cash equivalents utilized in the gaming;
- (i) Procedures for the transfer of moneys or chips from and to the slot machines;
- (j) Procedures and standards for the opening and security of slot machines;
- (k) Procedures for the payment and recordation of slot machine jackpots;
- (l) Procedures for the cashing and recordation of checks exchanged by casino patrons;
- (m) Procedures governing the utilization of the private security force within the gaming facility;
- (n) Procedures and security standards for the handling and storage of gaming apparatus including cards, dice, machines, wheels and all other gaming equipment;
- (o) Procedures and rules governing the conduct of particular games and the responsibility of gaming facility personnel in respect thereto;
- (p) Procedures for the orderly shutdown of gaming facility operations in the event that a state of emergency is declared and the gaming facility licensee is unable or ineligible to continue to conduct gaming facility operations during such a state of emergency, which procedures shall include, without limitation, the securing of all keys and gaming assets.

2. No minimum staffing requirements shall be included in the internal controls created in accordance with subdivision one of this section.

Section 1335.

Games and gaming equipment. 1. This article shall not be construed to permit any gaming except the conduct of authorized games in a casino in accordance with this article and the regulations promulgated hereunder.

- 2. Gaming equipment shall not be possessed, maintained or exhibited by any person on the premises of a gaming facility except in a casino or in restricted casino areas used for the inspection, repair or storage of such equipment and specifically designated for that purpose by the gaming facility licensee with the approval of the commission. Gaming equipment that supports the conduct of gaming in a gaming facility but does not permit or require patron access, such as computers, may be possessed and maintained by a gaming facility licensee or a qualified holding or intermediary company of a gaming facility licensee in restricted areas specifically approved by the commission. No gaming equipment shall be possessed, maintained, exhibited, brought into or removed from a gaming facility by any person unless such equipment is necessary to the conduct of an authorized game, has permanently affixed, imprinted, impressed or engraved thereon an identification number or symbol authorized by the commission, is under the exclusive control of a gaming facility licensee or gaming facility licensee's employees, or of any individually qualified employee of a holding company or gaming facility licensee and is brought into or removed from the gaming facility following twenty-four hour prior notice given to an authorized agent of the commission.

Notwithstanding any other provision of this section, computer equipment used by the slot system operator of a multi-casino progressive slot system to link and communicate with the slot machines of two or more gaming facility licensees for the purpose of calculating and displaying the amount of a progressive jackpot, monitoring the operation of the system, and any other purpose that the commission deems necessary and appropriate to the operation or maintenance of the multi-casino progressive slot machine system may, with the prior approval of the commission, be possessed, maintained and operated by the slot system operator either in a restricted area on the premises of a gaming facility or in a secure facility inaccessible to the public and specifically designed for that purpose off the premises of a gaming facility with the written permission of the commission. Notwithstanding the foregoing, a person may, with the prior approval of the commission and under such terms and conditions as may be required by the commission, possess, maintain or exhibit gaming equipment in any other area of the gaming facility, provided that such equipment is used for nongaming purposes. Notwithstanding any other provision of this article to the contrary, the commission may, by regulation, authorize the linking of slot machines of one or more gaming facility licensees and slot machines located in casinos licensed by another state of the United States. Wagering and account information for a multi-state slot system shall be transmitted by the operator of such multi-state slot system to either a restricted area on the premises of a gaming facility or to a secure facility inaccessible to the public and specifically designed for that purpose with the written permission of the commission, and from there to slot machines of gaming facility licensees, provided all locations are approved by the commission.

3. Each gaming facility shall contain a count room and such other secure facilities as may be required by the commission for the counting and storage of cash, coins, tokens, checks, plaques, gaming vouchers, coupons, and other devices or items of value used in wagering and approved by the commission that are received in the conduct of gaming and for the inspection, counting and storage of dice, cards, chips and other representatives of value. The commission shall promulgate regulations for the security of drop boxes and other devices in which the foregoing items are deposited at the gaming tables or in slot machines, and all areas wherein such boxes and devices are kept while in use, which regulations may include certain locking devices. Said drop boxes and other devices shall not be brought into or removed from a gaming facility, or locked or unlocked, except at such times, in such places, and according to such procedures as the commission may require.
4. All chips used in gaming shall be of such size and uniform color by denomination as the commission shall require by regulation.
5. All gaming shall be conducted according to rules promulgated by the commission. All wagers and pay-offs of winning wagers shall be made according to rules promulgated by the commission, which shall establish such limitations as may be necessary to assure the vitality of casino operations and fair odds to patrons. Each slot machine shall have a minimum payout of eighty-five percent.
6. Each gaming facility licensee shall make available in printed form to any patron upon request the complete text of the rules of the commission regarding games and the conduct of gaming, pay-offs of winning wagers, an approximation of the odds of winning for each wager, and such other advice to the player as the commission shall require. Each gaming facility licensee shall prominently post within a casino, according to regulations of the commission such information about gaming rules, payoffs of winning wagers, the odds of winning for each wager, and such other advice to the player as the commission shall require.
7. Each gaming table shall be equipped with a sign indicating the permissible minimum and maximum wagers pertaining thereto. It shall be unlawful for a gaming facility licensee to require any wager to be greater than the stated minimum or less than the stated maximum; provided, however, that any wager actually made by a patron and not rejected by a gaming facility licensee prior to the commencement of play shall be treated as a valid wager.

8. Testing of slot machines and associated devices.

- (a) Except as herein provided, no slot machine shall be used to conduct gaming unless it is identical in all electrical, mechanical and other aspects to a model thereof which has been specifically tested and licensed for use by the commission. The commission shall also test or cause to be tested any other gaming device, gaming equipment, gaming-related device or gross revenue related device, such as a slot management system, electronic transfer credit system or gaming voucher system as it deems appropriate. In its discretion and for the purpose of expediting the approval process, the commission may utilize the services of a private testing laboratory that has obtained a plenary license as a casino vendor enterprise to perform the testing, and may also utilize applicable data from any such private testing laboratory or from a governmental agency of a state authorized to regulate slot machines and other gaming devices, gaming equipment, gaming-related devices and gross-revenue related devices used in gaming, if the private testing laboratory or governmental agency uses a testing methodology substantially similar to the methodology approved or utilized by the commission. The commission, in its discretion, may rely upon the data provided by the private testing laboratory or governmental agency and adopt the conclusions of such private testing laboratory or governmental agency regarding any submitted device.
- (b) Except as otherwise provided in paragraph (e) of this subdivision, the commission shall, within sixty days of its receipt of a complete application for the testing of a slot machine or other gaming equipment model, approve or reject the slot machine or other gaming equipment model. In so doing, the commission shall specify whether and to what extent any data from a private testing laboratory or governmental agency of a state was used in reaching its conclusions and recommendation. If the commission is unable to complete the testing of a slot machine or other gaming equipment model within this sixty day period, the commission may conditionally approve the slot machine or other gaming equipment model for test use by a gaming facility licensee provided that the commission represents that the use of the slot machine or other gaming equipment model will not have a direct and materially adverse impact on the integrity of gaming or the control of gross revenue. The commission shall give priority to the testing of slot machines or other gaming equipment that a gaming facility licensee has certified it will use in its gaming facility in this state.
- (c) The commission shall, by regulation, establish such technical standards for licensure of slot machines, including mechanical and electrical reliability, security against tampering, the comprehensibility of wagering, and noise and light levels, as it may deem necessary to protect the player from fraud or deception and to insure the integrity of gaming. The denominations of such machines shall be set by the licensee; the licensee shall simultaneously notify the commission of the settings.
- (d) The commission shall, by regulation, determine the permissible number and density of slot machines in a licensed gaming facility so as to:
- (1) promote optimum security for gaming facility operations;
 - (2) avoid deception or frequent distraction to players at gaming tables;
 - (3) promote the comfort of patrons;
 - (4) create and maintain a gracious playing environment in the gaming facility; and
 - (5) encourage and preserve competition in gaming facility operations by assuring that a variety of gaming opportunities is offered to the public.

Any such regulation promulgated by the commission which determines the permissible number and density of slot machines in a licensed gaming facility shall provide that all casinos shall be included in any calculation of the permissible number and density of slot machines in a licensed gaming facility.

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(e) Any new gaming equipment that is submitted for testing to the commission or to a state licensed independent testing laboratory prior to or simultaneously with submission of such new equipment for testing in a jurisdiction other than this state, may, consistent with regulations promulgated by the commission, be deployed by a gaming facility licensee on the casino fourteen days after submission of such equipment for testing. If the gaming facility or casino vendor enterprise licensee has not received approval for the equipment fourteen days after submission for testing, any interested gaming facility licensee may, consistent with commission regulations, deploy the equipment on a field test basis, unless otherwise directed by the executive director.

9. It shall be unlawful for any person to exchange or redeem chips for anything whatsoever, except for currency, negotiable personal checks, negotiable counter checks, other chips, coupons, slot vouchers or complimentary vouchers distributed by the gaming facility licensee, or, if authorized by regulation of the commission, a valid charge to a credit or debit card account. A gaming facility licensee shall, upon the request of any person, redeem that licensee's gaming chips surrendered by that person in any amount over one hundred dollars with a check drawn upon the licensee's account at any banking institution in this state and made payable to that person.
10. It shall be unlawful for any gaming facility licensee or its agents or employees to employ, contract with, or use any skill or barker to induce any person to enter a gaming facility or play at any game or for any purpose whatsoever.
11. It shall be unlawful for a dealer in any authorized game in which cards are dealt to deal cards by hand or other than from a device specifically designed for that purpose, unless otherwise permitted by the rules of the commission.

Section 1336.

Certain wagering prohibited. 1. It shall be unlawful for any casino key employee licensee to wager in any gaming facility in this state.

2. It shall be unlawful for any other employee of a gaming facility licensee who, in the judgment of the commission, is directly involved with the conduct of gaming operations, including but not limited to dealers, floor persons, box persons, security and surveillance employees, to engage in gambling in any gaming facility in which the employee is employed or in any other gaming facility in this state which is owned or operated by the gaming facility licensee or an affiliated licensee.
3. The prohibition against wagering set forth in subdivisions one and two of this section shall continue for a period of thirty days commencing upon the date that the employee either leaves employment with a gaming facility licensee or is terminated from employment with a gaming facility licensee.

Section 1337.

Gratuities. 1. It shall be unlawful for any casino key employee or boxman, floorman, or any other gaming employee who shall serve in a supervisory position to solicit or accept, and for any other gaming employee to solicit, any tip or gratuity from any player or patron at the gaming facility where he is employed.

2. A dealer may accept tips or gratuities from a patron at the table at which such dealer is conducting play, subject to the provisions of this section. All such tips or gratuities shall be immediately deposited in a lockbox reserved for that purpose, unless the tip or gratuity is authorized by a patron utilizing an automated wagering system approved by the commission. All tips or gratuities shall be accounted for, and placed in a pool for distribution pro rata among the dealers, with the distribution based upon the number of hours each dealer has worked, except that the commission may, by regulation, permit a separate pool to be established for dealers in the game of poker, or may permit tips or gratuities to be retained by individual dealers in the game of poker.
3. Notwithstanding the provisions of subdivision one of this section, a gaming facility licensee may require that a percentage of the prize pool offered to participants pursuant to an authorized poker

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tournament be withheld for distribution to the tournament dealers as tips or gratuities as the commission by regulation may approve.

Section 1338.

Limitation on certain financial access. In order to protect the public interest, the commission shall adopt regulations that include provisions that:

1. limit the number and location of and maximum withdrawal amounts from automated teller machines;
2. prohibit authorized automated teller machines from accepting electronic benefit cards, debit cards, or similar negotiable instruments issued by the state or political subdivisions for the purpose of accessing temporary public assistance;
3. prohibit the use of specified negotiable instruments at gaming facilities and the use of credit cards, debit cards, and similar devices in slot machines or at table games; and
4. prohibit consumers from cashing paychecks at gaming facilities.

Section 1339.

Credit. 1. Except as otherwise provided in this section, no gaming facility licensee or any person licensed under this article, and no person acting on behalf of or under any arrangement with a gaming facility licensee or other person licensed under this article, shall:

- (a) Cash any check, make any loan, or otherwise provide or allow to any person any credit or advance of anything of value or which represents value to enable any person to take part in gaming activity as a player; or
- (b) Release or discharge any debt, either in whole or in part, or make any loan which represents any losses incurred by any player in gaming activity, without maintaining a written record thereof in accordance with the rules of the commission.

2. No gaming facility licensee or any person licensed under this article, and no person acting on behalf of or under any arrangement with a gaming facility licensee or other person licensed under this article, may accept a check, other than a recognized traveler's check or other cash equivalent from any person to enable such person to take part in gaming activity as a player, or may give cash or cash equivalents in exchange for such check unless:

- (a) The check is made payable to the gaming facility licensee;
 - (b) The check is dated, but not postdated;
 - (c) The check is presented to the cashier or the cashier's representative at a location in the gaming facility approved by the commission and is exchanged for cash or slot tokens which total an amount equal to the amount for which the check is drawn, or the check is presented to the cashier's representative at a gaming table in exchange for chips which total an amount equal to the amount for which the check is drawn; and
 - (d) The regulations concerning check cashing procedures are observed by the gaming facility licensee and its employees and agents. Nothing in this subdivision shall be deemed to preclude the establishment of an account by any person with a gaming facility licensee by a deposit of cash, recognized traveler's check or other cash equivalent, or a check which meets the requirements of subdivision seven of this section, or to preclude the withdrawal, either in whole or in part, of any amount contained in such account.
3. When a gaming facility licensee or other person licensed under this article, or any person acting on behalf of or under any arrangement with a gaming facility licensee or other person licensed under this article, cashes a check in conformity with the requirements of subdivision two of this section, the gaming facility licensee shall cause the deposit of such check in a bank for collection or payment, or shall require an attorney or casino key employee with no incompatible functions to present such check to the drawer's bank for payment, within:

- (a) seven calendar days of the date of the transaction for a check in an amount of one thousand dollars or less;
- (b) fourteen calendar days of the date of the transaction for a check in an amount greater than one thousand dollars but less than or equal to five thousand dollars; or
- (c) forty-five calendar days of the date of the transaction for a check in an amount greater than five thousand dollars.

Notwithstanding the foregoing, the drawer of the check may redeem the check by exchanging cash, cash equivalents, chips, or a check which meets the requirements of subdivision seven of this section in an amount equal to the amount for which the check is drawn; or he or she may redeem the check in part by exchanging cash, cash equivalents, chips, or a check which meets the requirements of subdivision seven of this section and another check which meets the requirements of subdivision two of this section for the difference between the original check and the cash, cash equivalents, chips, or check tendered; or he or she may issue one check which meets the requirements of subdivision two of this section in an amount sufficient to redeem two or more checks drawn to the order of the gaming facility licensee. If there has been a partial redemption or a consolidation in conformity with the provisions of this subdivision, the newly issued check shall be delivered to a bank for collection or payment or presented to the drawer's bank for payment by an attorney or casino key employee with no incompatible functions within the period herein specified. No gaming facility licensee or any person licensed or registered under this article, and no person acting on behalf of or under any arrangement with a gaming facility licensee or other person licensed under this article, shall accept any check or series of checks in redemption or consolidation of another check or checks in accordance with this subdivision for the purpose of avoiding or delaying the deposit of a check in a bank for collection or payment or the presentment of the check to the drawer's bank within the time period prescribed by this subdivision.

In computing a time period prescribed by this subdivision, the last day of the period shall be included unless it is a Saturday, Sunday, or a state or federal holiday, in which event the time period shall run until the next business day.

4. No gaming facility licensee or any other person licensed or registered under this article, or any other person acting on behalf of or under any arrangement with a gaming facility licensee or other person licensed or registered under this article, shall transfer, convey, or give, with or without consideration, a check cashed in conformity with the requirements of this section to any person other than:
- (a) The drawer of the check upon redemption or consolidation in accordance with subdivision three of this section;
 - (b) A bank for collection or payment of the check;
 - (c) A purchaser of the gaming facility license as approved by the commission; or
 - (d) An attorney or casino key employee with no incompatible functions for presentment to the drawer's bank.

The limitation on transferability of checks imposed herein shall apply to checks returned by any bank to the gaming facility licensee without full and final payment.

5. No person other than a casino key employee licensed under this article or a gaming employee registered under this article may engage in efforts to collect upon checks that have been returned by banks without full and final payment, except that an attorney-at-law representing a gaming facility licensee may bring action for such collection.

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6. Notwithstanding the provisions of any law to the contrary, checks cashed in conformity with the requirements of this article shall be valid instruments, enforceable at law in the courts of this state. Any check cashed, transferred, conveyed or given in violation of this article shall be invalid and unenforceable for the purposes of collection but shall be included in the calculation of gross gaming revenue.

7. Notwithstanding the provisions of subdivision two of this section to the contrary, a gaming facility licensee may accept a check from a person to enable the person to take part in gaming activity as a player, may give cash or cash equivalents in exchange for such a check, or may accept a check in redemption or partial redemption of a check issued in accordance with subdivision two of this section, provided that:

(a)

(1) The check is issued by a gaming facility licensee, is made payable to the person presenting the check, and is issued for a purpose other than employment compensation or as payment for goods or services rendered;

(2) The check is issued by a banking institution which is chartered in a country other than the United States on its account at a federally chartered or state-chartered bank and is made payable to "cash," "bearer," a gaming facility licensee, or the person presenting the check;

(3) The check is issued by a banking institution which is chartered in the United States on its account at another federally chartered or state-chartered bank and is made payable to "cash," "bearer," a gaming facility licensee, or the person presenting the check;

(4) The check is issued by a slot system operator or pursuant to an annuity jackpot guarantee as payment for winnings from a multi-casino progressive slot machine system jackpot; or

(5) The check is issued by an entity that holds a gaming facility license in any jurisdiction, is made payable to the person presenting the check, and is issued for a purpose other than employment compensation or as payment for goods or services rendered;

(b) The check is identifiable in a manner approved by the commission as a check authorized for acceptance pursuant to paragraph (a) of this subdivision;

(c) The check is dated, but not postdated;

(d) The check is presented to the cashier or the cashier's representative by the original payee and its validity is verified by the drawer in the case of a check drawn pursuant to subparagraph one of paragraph (a) of this subdivision, or the check is verified in accordance with regulations promulgated under this article in the case of a check issued pursuant to subparagraph two, three, four or five of paragraph (a) of this subdivision; and

(e) The regulations concerning check-cashing procedures are observed by the gaming facility licensee and its employees and agents. No gaming facility licensee shall issue a check for the purpose of making a loan or otherwise providing or allowing any advance or credit to a person to enable the person to take part in gaming activity as a player.

8. Notwithstanding the provisions of subdivisions two and three of this section to the contrary, a gaming facility licensee may, at a location outside the gaming facility, accept a personal check or checks from a person for up to five thousand dollars in exchange for cash or cash equivalents, and may, at such locations within the gaming facility as may be permitted by the commission, accept a personal check or checks for up to five thousand dollars in exchange for cash, cash equivalents, tokens, chips, or plaques to enable the person to take part in gaming activity as a player, provided that:

(a) The check is drawn on the patron's bank or brokerage cash management account;

- (b) The check is for a specific amount;
 - (c) The check is made payable to the gaming facility licensee;
 - (d) The check is dated but not post-dated;
 - (e) The patron's identity is established by examination of one of the following: valid credit card, driver's license, passport, or other form of identification credential which contains, at a minimum, the patron's signature;
 - (f) The check is restrictively endorsed "For Deposit Only" to the gaming facility licensee's bank account and deposited on the next banking day following the date of the transaction;
 - (g) The total amount of personal checks accepted by any one licensee pursuant to this subdivision that are outstanding at any time, including the current check being submitted, does not exceed five thousand dollars;
 - (h) The gaming facility licensee has a system of internal controls in place that will enable it to determine the amount of outstanding personal checks received from any patron pursuant to this subdivision at any given point in time; and
 - (i) The gaming facility licensee maintains a record of each such transaction in accordance with regulations established by the commission.
9. A person may request the commission to put that person's name on a list of persons to whom the extension of credit by a gaming facility as provided in this section would be prohibited by submitting to the commission the person's name, address, and date of birth. The person does not need to provide a reason for this request. The commission shall provide this list to the credit department of each gaming facility; neither the commission nor the credit department of a gaming facility shall divulge the names on this list to any person or entity other than those provided for in this subdivision. If such a person wishes to have that person's name removed from the list, the person shall submit this request to the commission, which shall so inform the credit departments of gaming facilities no later than three days after the submission of the request.

Section 1340.

- Alcoholic beverages. 1. Notwithstanding any law to the contrary, the authority to grant any license or permit for, or to permit or prohibit the presence of, alcoholic beverages in, on, or about any premises licensed as part of a gaming facility shall exclusively be vested in the commission.
2. Unless otherwise stated, and except where inconsistent with the purpose or intent of this article or the common understanding of usage thereof, definitions contained in the alcoholic beverage control law shall apply to this section. Any definition contained therein shall apply to the same word in any form.
3. Notwithstanding any provision of the alcoholic beverage control law to the contrary, the commission shall have the functions, powers and duties of the state liquor authority but only with respect to the issuance, renewal, transfer, suspension and revocation of licenses and permits for the sale of alcoholic beverages at retail for on-premise consumption by any holder of a gaming facility license issued by the commission including, without limitation, the power to fine or penalize a casino alcoholic beverage licensee or permittee; to enforce all statutes, laws, rulings, or regulations relating to such license or permit; and to collect license and permit fees and establish application standards therefor.
4. Except as otherwise provided in this section, the provisions of the alcoholic beverage control law and the rules, regulations, bulletins, orders, and advisories promulgated by the state liquor authority shall apply to any gaming facility holding a license or permit to sell alcoholic beverages under this section.

5. Notwithstanding any provision to the contrary, the commission may promulgate any regulations and special rulings and findings as may be necessary for the proper enforcement, regulation, and control of alcoholic beverages in gaming facilities when the commission finds that the uniqueness of gaming facility operations and the public interest require that such regulations, rulings, and findings are appropriate.
6. Notwithstanding any provision of law to the contrary, any manufacturer or wholesaler licensed under the alcoholic beverage control law may as authorized under the alcoholic beverage control law, sell alcoholic beverages to a gaming facility holding a retail license or permit to sell alcoholic beverages for consumption on the premises issued under this section, and any gaming facility holding a retail license or permit to sell alcoholic beverages issued under this section may, as authorized under the alcoholic beverage control law, purchase alcoholic beverages from a manufacturer or wholesaler licensed under the alcoholic beverage control law.
7. It shall be unlawful for any person, including any gaming facility licensee or any of its lessees, agents or employees, to expose for sale, solicit or promote the sale of, possess with intent to sell, sell, give, dispense, or otherwise transfer or dispose of alcoholic beverages in, on or about any portion of the premises of a gaming facility, unless said person possesses a license or permit issued under this section.
8. It shall be unlawful for any person holding a license or permit to sell alcoholic beverages under this section to expose, possess, sell, give, dispense, transfer, or otherwise dispose of alcoholic beverages, other than within the terms and conditions of such license or permit, the provisions of the alcoholic beverage control law, the rules and regulations promulgated by the state liquor authority, and, when applicable, the regulations promulgated pursuant to this article. Notwithstanding any other provision of law to the contrary the holder of a license or permit issued under this section may be authorized to provide complimentary alcoholic beverages under regulations issued by the commission.
9. In issuing a casino alcoholic beverage license or permit, the commission shall describe the scope of the particular license or permit, and the restrictions and limitations thereon as it deems necessary and reasonable. The commission may, in a single casino alcoholic beverage license, permit the holder of such a license or permit to perform any or all of the following activities, subject to applicable laws, rules and regulations:
 - (a) To sell any alcoholic beverage by the glass or other open receptacle including, but not limited to, an original container, for on-premise consumption within a facility; provided, however, that no alcoholic beverage shall be sold or given for consumption; delivered or otherwise brought to a patron; or consumed at a gaming table unless so requested by the patron.
 - (b) To sell any alcoholic beverage by the glass or other open receptacle for on-premise consumption within a gaming facility.
 - (c) To sell any alcoholic beverage by the glass or other open receptacle or in original containers from a room service location within an enclosed room not in a gaming facility; provided, however, that any sale of alcoholic beverages is delivered only to a guest room or to any other room in the gaming facility authorized by the commission.
 - (d) To possess or to store alcoholic beverages in original containers intended but not actually exposed for sale at a fixed location on a gaming facility premises, not in a gaming facility; and to transfer or deliver such alcoholic beverages only to a location approved pursuant to this section; provided, however, that no access to or from a storage location shall be permitted except during the normal course of business by employees or agents of the licensee, or by licensed employees or agents of wholesalers or distributors licensed pursuant to the alcoholic beverage control law and any applicable rules and regulations; and provided further, however, that no provision of this section shall be construed to prohibit a casino alcoholic beverage licensee from obtaining an off-site storage license from the state liquor authority.

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10. The commission may revoke, suspend, refuse to renew or refuse to transfer any casino alcoholic beverage license or permit, and may fine or penalize the holder of any alcoholic beverage license or permit issued under this section for violations of any provision of the alcoholic beverage control law, the rules and regulations promulgated by the state liquor authority, and the regulations promulgated by the commission.
11. Jurisdiction over all alcoholic beverage licenses and permits previously issued with respect to the gaming facility is hereby vested in the commission, which in its discretion may by regulation provide for the conversion thereof into a casino alcoholic beverage license or permit as provided in this section.
12.
 - (a) Prior to issuing any license under this section, the commission, or its designee, shall consult with the state liquor authority, or its designee, to confirm that such application and such gaming facility conforms with all applicable provisions of the alcoholic beverage control law, and all applicable rules, regulations, bulletins, orders and advisories promulgated by the state liquor authority;
 - (b) Prior to commencing enforcement actions against any gaming facility licensed under this section, the commission, or its designee, shall consult with the state liquor authority, or its designee, with respect to the application of the applicable provisions of the alcoholic beverage control law, and all applicable rules, regulations, bulletins, orders and advisories promulgated by the state liquor authority on the alleged conduct of such licensee; and
 - (c) The commission, or its designee, shall consult with the state liquor authority, or its designee, on a regular basis, but no less than once every three months, regarding any pending applications and enforcement matters.

Section 1341.

Licensee leases and contracts. 1. Unless otherwise provided in this subdivision, no agreement shall be lawful which provides for the payment, however defined, of any direct or indirect interest, percentage or share of: any money or property gambled at a gaming facility; any money or property derived from gaming activity; or any revenues, profits or earnings of a gaming facility. Notwithstanding the foregoing:

- (a) Agreements which provide only for the payment of a fixed sum which is in no way affected by the amount of any such money, property, revenues, profits or earnings shall not be subject to the provisions of this subdivision; and receipts, rentals or charges for real property, personal property or services shall not lose their character as payments of a fixed sum because of contract, lease, or license provisions for adjustments in charges, rentals or fees on account of changes in taxes or assessments, cost-of-living index escalations, expansion or improvement of facilities, or changes in services supplied.
- (b) Agreements between a gaming facility licensee and a junket enterprise or junket representative licensed, qualified or registered in accordance with the provisions this article and the regulations of the commission which provide for the compensation of the junket enterprise or junket representative by the gaming facility licensee based upon the actual gaming activities of a patron procured or referred by the junket enterprise or junket representative shall be lawful if filed with the commission prior to the conduct of any junket that is governed by the agreement.
- (c) Agreements between a gaming facility licensee and its employees which provide for gaming employee or casino key employee profit sharing shall be lawful if the agreement is in writing and filed with the commission prior to its effective date. Such agreements may be reviewed by the commission.

- (d) Agreements to lease an approved gaming facility or the land thereunder and agreements for the complete management of all gaming operations in a gaming facility shall not be subject to the provisions of this subdivision.
- (e) Agreements which provide for percentage charges between the gaming facility licensee and a holding company or intermediary company of the gaming facility licensee shall be in writing and filed with the commission but shall not be subject to the provisions of this subdivision.
- (f) Written agreements relating to the operation of multi-casino or multi-state progressive slot machine systems between one or more gaming facility licensees and a licensed casino vendor enterprise or an eligible applicant for such license, which provide for an interest, percentage or share of the gaming facility licensee's revenues, profits or earnings from the operation of such multi-casino or multi-state progressive slot machines to be paid to the casino vendor enterprise licensee or applicant shall not be subject to the provisions of this subdivision if the agreements are filed with and approved by the commission.

2. Each gaming facility applicant or licensee shall maintain, in accordance with the rules of the commission, a record of each written or unwritten agreement regarding the realty, construction, maintenance, or business of a proposed or existing gaming facility or related facility. The foregoing obligation shall apply regardless of whether the gaming facility applicant or licensee is a party to the agreement. Any such agreement may be reviewed by the commission on the basis of the reasonableness of its terms, including the terms of compensation, and of the qualifications of the owners, officers, employees, and directors of any enterprise involved in the agreement, which qualifications shall be reviewed according to the standards enumerated in section one thousand three hundred twenty-three of this article. If the commission disapproves such an agreement or the owners, officers, employees, or directors of any enterprise involved therein, the commission may require its termination.

Every agreement required to be maintained, and every related agreement the performance of which is dependent upon the performance of any such agreement, shall be deemed to include a provision to the effect that, if the commission shall require termination of an agreement, such termination shall occur without liability on the part of the gaming facility applicant or licensee or any qualified party to the agreement or any related agreement. Failure expressly to include such a provision in the agreement shall not constitute a defense in any action brought to terminate the agreement. If the agreement is not maintained or presented to the commission in accordance with commission regulations, or the disapproved agreement is not terminated, the commission may pursue any remedy or combination of remedies provided in this article.

For the purposes of this subdivision, "gaming facility applicant" includes any person required to hold a gaming facility license who has applied to the commission for a gaming facility license or any approval required.

3. Nothing in this article shall be deemed to permit the transfer of any license, or any interest in any license, or any certificate of compliance or any commitment or reservation without the approval of the commission.

Section 1342.

Required exclusion of certain persons. 1. The commission shall, by regulation, provide for the establishment of a list of persons who are to be excluded or ejected from any licensed gaming facility. Such provisions shall define the standards for exclusion, and shall include standards relating to persons:

- (a) Who are career or professional offenders as defined by regulations promulgated hereunder; or
- (b) Who have been convicted of a criminal offense under the laws of any state or of the United States, which is punishable by more than twelve months in prison, or any crime or offense involving moral turpitude.

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The commission shall promulgate definitions establishing those categories of persons who shall be excluded pursuant to this section, including cheats and persons whose privileges for licensure or registration have been revoked.

2. Any enumerated class listed in subdivision one of section two hundred ninety-six of the human rights law shall not be a reason for placing the name of any person upon such list.
3. The commission may impose sanctions upon a licensed gaming facility or individual licensee or registrant in accordance with the provisions of this article if such gaming facility or individual licensee or registrant knowingly fails to exclude or eject from the premises of any licensed gaming facility any person placed by the commission on the list of persons to be excluded or ejected.
4. Any list compiled by the commission of persons to be excluded or ejected shall not be deemed an all-inclusive list, and licensed gaming facilities shall have a duty to keep from their premises persons known to them to be within the classifications declared in subdivisions one and two of this section and the regulations promulgated thereunder, or known to them to be persons whose presence in a licensed gaming facility would be inimical to the interest of the state or of licensed gaming therein, or both, as defined in standards established by the commission.
5. Prior to placing the name of any person on a list pursuant to this section, the commission shall serve notice of such fact and of the opportunity for a hearing to such person by personal service or by certified mail at the last known address of such person.
6. Within thirty days after service of the petition in accordance with subdivision five of this section, the person named for exclusion or ejection may demand a hearing before the executive director or the executive director's designee, at which hearing the executive director or the executive director's designee shall have the affirmative obligation to demonstrate by substantial evidence that the person named for exclusion or ejection satisfies the criteria for exclusion established by this section and the applicable regulations. Failure to demand such a hearing within thirty days after service shall preclude a person from having an administrative hearing, but shall in no way affect his or her right to judicial review as provided herein.
7. The commission may make a preliminary placement on the list of a person named in a petition for exclusion or ejection pending completion of a hearing on the petition. The hearing on the application for preliminary placement shall be a limited proceeding at which the commission shall have the affirmative obligation to demonstrate by substantial evidence that the person satisfies the criteria for exclusion established by this section and the applicable regulations. If a person has been placed on the list as a result of an application for preliminary placement, unless otherwise agreed by the executive director and the named person, a hearing on the petition for exclusion or ejection shall be initiated within thirty days after the receipt of a demand for such hearing or the date of preliminary placement on the list, whichever is later.
8. If, upon completion of the hearing on the petition for exclusion or ejection, the executive director determines that the person named therein does not satisfy the criteria for exclusion established by this section and the applicable regulations, the executive director shall issue an order denying the petition. If the person named in the petition for exclusion or ejection had been placed on the list as a result of an application for preliminary placement, the executive director shall notify all gaming facility licensees of the person's removal from the list.
9. If, upon completion of a hearing on the petition for exclusion or ejection, the executive director determines that placement of the name of the person on the exclusion list is appropriate, the executive director shall make and enter an order to that effect, which order shall be served on all gaming facility licensees. Such order shall be subject to review by the commission in accordance with regulations promulgated thereunder, which final decision shall be subject to review pursuant to article seventy-eight of the civil practice law and rules.

Section 1343.

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Exclusion, ejection of certain persons. 1. A gaming facility licensee may exclude or eject from its gaming facility any person who is known to it to have been convicted of a crime or disorderly conduct committed in or on the premises of any gaming facility.

2. Nothing in this section or in any other law of this state shall limit the right of a gaming facility licensee to exercise its common law right to exclude or eject permanently from its gaming facility any person who disrupts the operations of its premises, threatens the security of its premises or its occupants, or is disorderly or intoxicated.

Section 1344.

List of persons self-excluded from gaming activities. 1. The commission shall provide by regulation for the establishment of a list of persons self-excluded from gaming activities at all licensed gaming facilities. Any person may request placement on the list of self-excluded persons by acknowledging in a manner to be established by the commission that the person is a problem gambler and by agreeing that, during any period of voluntary exclusion, the person may not collect any winnings or recover any losses resulting from any gaming activity at such gaming facilities.

2. The regulations of the commission shall establish procedures for placements on, and removals from, the list of self-excluded persons. Such regulations shall establish procedures for the transmittal to licensed gaming facilities of identifying information concerning self-excluded persons, and shall require licensed gaming facilities to establish procedures designed, at a minimum, to remove self-excluded persons from targeted mailings or other forms of advertising or promotions and deny self-excluded persons access to credit, complimentaries, check cashing privileges, club programs, and other similar benefits.
3. A licensed gaming facility or employee thereof acting reasonably and in good faith shall not be liable to any self-excluded person or to any other party in any judicial proceeding for any harm, monetary or otherwise, which may arise as a result of:
 - (a) the failure of a licensed gaming facility to withhold gaming privileges from, or restore gaming privileges to, a self-excluded person; or
 - (b) otherwise permitting a self-excluded person to engage in gaming activity in such licensed gaming facility while on the list of self-excluded persons.
4. Notwithstanding any other law to the contrary, the commission's list of self-excluded persons shall not be open to public inspection. Nothing herein, however, shall be construed to prohibit a gaming facility licensee from disclosing the identity of persons self-excluded pursuant to this section to affiliated gaming entities in this state or other jurisdictions for the limited purpose of assisting in the proper administration of responsible gaming programs operated by such gaming affiliated entities.
5. A licensed gaming facility or employee thereof shall not be liable to any self-excluded person or to any other party in any judicial proceeding for any harm, monetary or otherwise, which may arise as a result of disclosure or publication in any manner, other than a willfully unlawful disclosure or publication, of the identity of any self-excluded person.

Section 1345.

Excluded person; forfeiture of winnings; other sanctions. 1. A person who is prohibited from gaming in a licensed gaming facility by any order of the executive director, commission or court of competent jurisdiction, including any person on the self-exclusion list pursuant to subdivision one of section one thousand three hundred forty-four of this title, shall not collect, in any manner or proceeding, any winnings or recover any losses arising as a result of any prohibited gaming activity.

2. For the purposes this section, any gaming activity in a licensed gaming facility which results in a prohibited person obtaining any money or thing of value from, or being owed any money or thing of value by, the gaming facility shall be considered, solely for purposes of this section, to be a fully executed gambling transaction.

3. In addition to any other penalty provided by law, any money or thing of value which has been obtained by, or is owed to, any prohibited person by a licensed gaming facility as a result of wagers made by a prohibited person shall be subject to forfeiture following notice to the prohibited person and opportunity to be heard. A licensed gaming facility shall inform a prohibited person of the availability of such notice on the commission's website when ejecting the prohibited person and seizing any chips, vouchers or other representative of money owed by a gaming facility to the prohibited person as authorized by this subdivision. All forfeited amounts shall be deposited into the commercial gaming revenue fund.
4. In any proceeding brought by the commission against a licensee or registrant for a willful violation of the commission's self-exclusion regulations, the commission may order, in addition to any other sanction authorized, an additional fine of double the amount of any money or thing of value obtained by the licensee or registrant from any self-excluded person. Any money or thing of value so forfeited shall be disposed of in the same manner as any money or thing of value forfeited pursuant to subdivision three of this section.

Section 1346.

Labor peace agreements for certain facilities. 1. As used in this section:

- (a) "Gaming facility" means any gaming facility licensed pursuant to this article or a video lottery gaming facility as may be authorized by paragraph three of subdivision (a) of section one thousand six hundred seventeen-a of the tax law, as amended by section nineteen of the chapter of the laws of two thousand thirteen that added this section licensed by the commission. A gaming facility shall not include any horse racing, bingo or charitable games of chance, the state lottery for education, or any gaming facility operating pursuant to the federal Indian Gaming Regulatory Act, 25 U.S.C. Section 2710 et seq. A gaming facility shall include any hospitality operation at or related to the gaming facility.
- (b) "Labor peace agreement" means an agreement enforceable under 29 U.S.C. Section 185(a) that, at a minimum, protects the state's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with operation of the relevant gaming facility.
- (c) "License" means any permit, license, franchise or allowance of the commission and shall include any franchisee or permittee.
- (d) "Proprietary interest" means an economic and non-regulatory interest at risk in the financial success of the gaming facility that could be adversely affected by labor-management conflict, including but not limited to property interests, financial investments and revenue sharing.

2. The state legislature finds that the gaming industry constitutes a vital sector of New York's overall economy and that the state through its operation of lotteries and video lottery facilities and through its ownership of the properties utilized for horse racing by The New York Racing Association Inc. has a significant and ongoing economic and nonregulatory interest in the financial viability and competitiveness of the gaming industry. The state legislature further finds that the award or grant of a license by the commission to operate a gaming facility is a significant state action and that the commission must make prudent and efficient decisions to maximize the benefits and minimize the risks of gaming. The state legislature further recognizes that casino gaming industry integration can provide a vital economic engine to assist, nurture, develop, and promote regional economic development, the state tourism industry and the growth of jobs in the state. Additionally, the state legislature also finds revenues derived directly by the state from such gaming activity will be shared from gross gaming receipts, after payout of prizes but prior to deductions for operational expenses.

Therefore, the state legislature finds that the state has a substantial and compelling proprietary interest in any license awarded for the operation of a gaming facility within the state.

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3. The commission shall require any applicant for a gaming facility license who has not yet entered into a labor peace agreement to produce an affidavit stating it shall enter into a labor peace agreement with labor organizations that are actively engaged in representing or attempting to represent gaming or hospitality industry workers in the state. In order for the commission to issue a gaming facility license and for operations to commence, the applicant for a gaming facility license must produce documentation that it has entered into a labor peace agreement with each labor organization that is actively engaged in representing and attempting to represent gaming and hospitality industry workers in the state. The commission shall make the maintenance of such a labor peace agreement an ongoing material condition of licensure.

A license holder shall, as a condition of its license, ensure that operations at the gaming facility that are conducted by contractors, subcontractors, licensees, assignees, tenants or subtenants and that involve gaming or hospitality industry employees shall be done under a labor peace agreement containing the same provisions as specified above.

4. If otherwise applicable, capital projects undertaken by a gaming facility shall be subject to article eight of the labor law and shall be subject to the enforcement of prevailing wage requirements by the department of labor.

5. If otherwise applicable, capital projects undertaken by a gaming facility shall be subject to section one hundred thirty-five of the state finance law.

6. If otherwise applicable, any gaming facility entering into a contract for a gaming facility capitol project shall be deemed to be a state agency, and such contract shall be deemed to be a state contract, for purposes of article fifteen-A of the executive law and section two hundred twenty-two of the labor law.

TITLE 6

TAXATION AND FEES

Section 1348.

Machine and table fees.

1349. Regulatory investigatory fees.

1350. Additional regulatory costs.

1351. Tax on gaming revenues; permissive supplemental fee.

1352. Commercial gaming revenue fund.

1353. Determination of tax liability.

1354. Unclaimed funds.

1355. Racing support payments.

Section 1348.

Machine and table fees. In addition to any other tax or fee imposed by this article, there shall be imposed an annual license fee of five hundred dollars for each slot machine and table approved by the commission for use by a gaming licensee at a gaming facility; provided, however, that not sooner than five years after award of an original gaming license, the commission may annually adjust the fee for inflation. The fee shall be imposed as of July first of each year for all approved slot machines and tables on that date and shall be assessed on a pro rata basis for any slot machine or table approved for use thereafter.

Such assessed fees shall be deposited into the commercial gaming revenue fund established pursuant to section one thousand three hundred fifty-two of this article.

Section 1349.

Regulatory investigatory fees. The commission may establish fees for any investigation into a violation of this article or regulation promulgated hereunder by a gaming facility licensee to be paid by the gaming facility licensee including, but not limited to, billable hours by commission staff involved in the investigation and the costs of services, equipment or other expenses that are incurred by the commission during the investigation.

Section 1350.

Additional regulatory costs. 1. Any remaining costs of the commission necessary to maintain regulatory control over gaming facilities that are not covered by the fees set forth in section one thousand three hundred forty-nine of this title; any other fees assessed under this article; or any other designated sources of funding, shall be assessed annually on gaming licensees under this article in proportion to the number of gaming positions at each gaming facility. Each gaming licensee shall pay the amount assessed against it within thirty days after the date of the notice of assessment from the commission.

2. If the fees collected in section one thousand three hundred forty-nine of this title exceed the cost required to maintain regulatory control, the surplus funds shall be credited in proportional shares against each gaming licensee's next assessment.

Section 1351.

Tax on gaming revenues; permissive supplemental fee. 1. For a gaming facility in zone two, there is hereby imposed a tax on gross gaming revenues. The amount of such tax imposed shall be as follows; provided, however, should a licensee have agreed within its application to supplement the tax with a binding supplemental fee payment exceeding the aforementioned tax rate, such tax and supplemental fee shall apply for a gaming facility:

- (a) in region two, forty-five percent of gross gaming revenue from slot machines and ten percent of gross gaming revenue from all other sources.
- (b) in region one, thirty-nine percent of gross gaming revenue from slot machines and ten percent of gross gaming revenue from all other sources.
- (c) in region five, thirty-seven percent of gross gaming revenue from slot machines and ten percent of gross gaming revenue from all other sources.

Section 1352.

Commercial gaming revenue fund. 1. The commission shall pay into an account, to be known as the commercial gaming revenue fund as established pursuant to section ninety-seven-nnnn of the state finance law, under the joint custody of the comptroller and the commissioner of taxation and finance, all taxes and fees imposed by this article; any interest and penalties imposed by the commission relating to those taxes; the appropriate percentage of the value of expired gaming related obligations; all penalties levied and collected by the commission; and the appropriate funds, cash or prizes forfeited from gambling activity.

2. The commission shall require at least monthly deposits by the licensee of any payments pursuant to section one thousand three hundred fifty-one of this article, at such times, under such conditions, and in such depositories as shall be prescribed by the state comptroller. The deposits shall be deposited to the credit of the commercial gaming revenue fund as established by section ninety-seven-nnnn of the state finance law. The commission may require a monthly report and reconciliation statement to be filed with it on or before the tenth day of each month, with respect to gross revenues and deposits received and made, respectively, during the preceding month.

Section 1353.

Determination of tax liability. The commission may perform audits of the books and records of a gaming facility licensee, at such times and intervals as it deems appropriate, for the purpose of determining the sufficiency of tax or fee payments. If a return or deposit required with regard to

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obligations imposed is not filed or paid, or if a return or deposit when filed or paid is determined by the commission to be incorrect or insufficient with or without an audit, the amount of tax, fee or deposit due shall be determined by the commission. Notice of such determination shall be given to the licensee liable for the payment of the tax or fee or deposit. Such determination shall finally and irrevocably fix the tax or fee unless the person against whom it is assessed, within thirty days after receiving notice of such determination, shall apply to the commission for a hearing in accordance with the regulations of the commission.

Section 1354.

Unclaimed funds. Unclaimed funds, cash and prizes shall be retained by the gaming facility licensee for the person entitled to the funds, cash or prize for one year after the game in which the funds, cash or prize was won. If no claim is made for the funds, cash or prize within one year, the funds, cash or equivalent cash value of the prize shall be deposited in the commercial gaming revenue fund.

Section 1355.

Racing support payments. 1. If an applicant who possesses a pari-mutuel wagering franchise or license awarded pursuant to article two or three of this chapter, or who possessed in two thousand thirteen a franchise or a license awarded pursuant to article two or three of this chapter or is an articulated entity or such applicant, is issued a gaming facility license pursuant to this article, the licensee shall:

- (a) Maintain payments made from video lottery gaming operations to the relevant horsemen and breeders organizations at the same dollar level realized in two thousand thirteen, to be adjusted annually pursuant to changes in the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics;
- (b) All racetracks locations awarded a gaming facility license shall maintain racing activity and race dates pursuant to articles two and three of this chapter.

2. If an applicant that does not possess either a pari-mutuel wagering license or franchise awarded pursuant to article two or three of this chapter is issued a gaming facility license pursuant to this article, the licensee shall pay:

- (a) an amount to horsemen for purses at the licensed racetracks in the region that will assure the purse support from video lottery gaming facilities in the region to the licensed racetracks in the region to be maintained at the same dollar levels realized in two thousand thirteen to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics; and
- (b) amounts to the agricultural and New York state horse breeding development fund and the New York state thoroughbred breeding and development fund to maintain payments from video lottery gaming facilities in the region to such funds to be maintained at the same dollar levels realized in two thousand thirteen to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics.

TITLE 7

PROBLEM GAMBLING

Section 1362.

Prevention and outreach efforts.

1363. Advertising restrictions.

Section 1362.

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Prevention and outreach efforts. 1. Each gaming facility licensee, management company, and holding company involved in the application and ownership or management of a gaming facility shall provide to the commission, as applicable, an applicant's problem gambling plan. An applicant's problem gambling plan shall be approved by the commission before the commission issues or renews a license. Each plan shall at minimum include the following:

- (a) The goals of the plan and procedures and timetables to implement the plan;
- (b) The identification of the individual who will be responsible for the implementation and maintenance of the plan;
- (c) Policies and procedures including the following:
 - (1) The commitment of the applicant and the gaming facility licensee to train appropriate employees;
 - (2) The duties and responsibilities of the employees designated to implement or participate in the plan;
 - (3) The responsibility of patrons with respect to responsible gambling;
 - (4) Procedures for compliance with the voluntary exclusion program;
 - (5) Procedures to identify patrons and employees with suspected or known problem gambling behavior, including procedures specific to loyalty and other rewards and marketing programs;
 - (6) Procedures for providing information to individuals regarding the voluntary exclusion program and community, public and private treatment services, gamblers anonymous programs and similar treatment or addiction therapy programs designed to prevent, treat, or monitor problem gamblers and to counsel family members;
 - (7) Procedures for responding to patron and employee requests for information regarding the voluntary exclusion program and community, public and private treatment services, gamblers anonymous programs and similar treatment or addiction therapy programs designed to prevent, treat, or monitor compulsive and problem gamblers and to counsel family members;
 - (8) The provision of printed material to educate patrons and employees about problem gambling and to inform them about the voluntary exclusion program and treatment services available to problem gamblers and their families. The applicant shall provide examples of the materials to be used as part of its plan, including, brochures and other printed material and a description of how the material will be disseminated;
 - (9) Advertising and other marketing and outreach to educate the general public about the voluntary exclusion program and problem gambling;
 - (10) An employee training program, including training materials to be utilized and a plan for periodic reinforcement training and a certification process established by the applicant to verify that each employee has completed the training required by the plan;
 - (11) Procedures to prevent underage gambling;
 - (12) Procedures to prevent patrons impaired by drugs or alcohol, or both, from gambling; and
 - (13) The plan for posting signs within the gaming facility, containing information on gambling treatment and on the voluntary exclusion program. The applicant shall provide examples of the language and graphics to be used on the signs as part of its plan;
- (d) A list of community, public and private treatment services, gamblers anonymous programs and similar treatment or addiction therapy programs designed to prevent, treat, or monitor problem gamblers and to counsel family members; and
- (e) Any other information, documents, and policies and procedures that the commission requires.

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2. Each applicant or gaming facility licensee shall submit any amendments to the problem gambling plan to the commission for review and approval before implementing the amendments.
3. Each gaming facility licensee shall submit an annual summary of its problem gambling plan to the commission.
4. Each gaming facility licensee shall submit quarterly updates and an annual report to the commission of its adherence to the plans and goals submitted under this section.

Section 1363.

Advertising restrictions. 1. As used in this section:

- (a) "advertisement" shall mean any notice or communication to the public or any information concerning the gaming-related business of a gaming facility licensee or applicant through broadcasting, publication or any other means of dissemination, including electronic dissemination. Promotional activities are considered advertisements for purposes of this section.
- (b) "direct advertisement" shall mean any advertisement as described in paragraph (a) of this subdivision that is disseminated to a specific individual or individuals.

2. Advertising shall be based upon fact, and shall not be false, deceptive or misleading, and no advertising by or on behalf of a gaming facility licensee shall:

- (a) Use any type, size, location, lighting, illustration, graphic depiction or color resulting in the obscuring of any material fact;
- (b) Fail to clearly and conspicuously specify and state any material conditions or limiting factors;
- (c) Depict any person under the age of twenty-one engaging in gaming and related activities; or
- (d) Fail to designate and state the name and location of the gaming facility conducting the advertisement. The location of the gaming facility need not be included on billboards within thirty miles of the gaming facility.

3. Each advertisement shall, clearly and conspicuously, state a problem gambling hotline number.

4. Each direct advertisement shall, clearly and conspicuously, describe a method or methods by which an individual may designate that the individual does not wish to receive any future direct advertisement:

(a) The described method must be by at least two of the following:

- (1) Telephone;
- (2) Regular U.S. mail; or
- (3) Electronic mail.

(b) Upon receipt of an individual's request to discontinue receipt of future advertisement, a gaming facility licensee or applicant shall block the individual in the gaming facility licensee's database so as to prevent the individual from receiving future direct advertisements within fifteen days of receipt of the request.

5. Each gaming facility licensee or applicant shall provide to the commission at its main office a complete and accurate copy of all advertisements within five business days of the advertisement's public dissemination. Gaming facility licensees or applicants shall discontinue the public dissemination upon receipt of notice from the commission to discontinue an advertisement.

6. A gaming facility licensee or applicant shall maintain a complete record of all advertisements for a period of at least two years. Records shall be made available to the commission upon request.

TITLE 8**MISCELLANEOUS PROVISIONS****Section 1364.**

Smoking prohibited.

1365. Conservatorship.

1366. Zoning.

1367. Sports wagering.

Section 1364.

Smoking prohibited. Smoking shall not be permitted, and no person shall smoke in the indoor areas of facilities licensed pursuant to this article, except that the provisions of section one thousand three hundred ninety-nine-q of the public health law shall be applicable to facilities licensed pursuant to this article.

Section 1365.

Conservatorship. 1. Upon revocation or suspension of a gaming facility license or upon the failure or refusal to renew a gaming facility license, the commission may appoint a conservator to temporarily manage and operate the business of the gaming licensee relating to the gaming facility. Such conservator shall be a person of similar experience in the field of gaming management and, in the case of replacing a gaming facility licensee, shall have experience operating a gaming facility of similar caliber in another jurisdiction, and shall be in good standing in all jurisdictions in which the conservator operates a gaming facility. Upon appointment, a conservator shall agree to all licensing provisions of the former gaming licensee.

2. A conservator shall, before assuming, managerial or operational duties, execute and file a bond for the faithful performance of its duties payable to the commission with such surety and in such form and amount as the commission shall approve.
3. The commission shall require that the former or suspended gaming licensee purchase liability insurance, in an amount determined by the commission, to protect a conservator from liability for any acts or omissions of the conservator during the conservator's appointment which are reasonably related to and within the scope of the conservator's duties.
4. During the period of temporary management of the gaming facility, the commission shall initiate proceedings under this article to award a new gaming facility license to a qualified applicant whose gaming facility shall be located at the site of the preexisting gaming facility.
5. An applicant for a new gaming facility license shall be qualified for licensure under this article; provided, however, that the commission shall determine an appropriate level of investment by an applicant into the preexisting gaming facility.
6. Upon award of a new gaming facility license, the new gaming facility licensee shall pay the original licensing fee required under this article.

Section 1366.

Zoning. Notwithstanding any inconsistent provision of law, gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations.

Section 1367.

Sports wagering. 1. As used in this section:

- (a) "Casino" means a licensed gaming facility at which gambling is conducted pursuant to the provisions of this article;

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- (b) "Commission" means the commission established pursuant to section one hundred two of this chapter;
- (c) "Collegiate sport or athletic event" means a sport or athletic event offered or sponsored by or played in connection with a public or private institution that offers educational services beyond the secondary level;
- (d) "Operator" means a casino which has elected to operate a sports pool;
- (e) "Professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event;
- (f) "Prohibited sports event" means any collegiate sport or athletic event that takes place in New York or a sport or athletic event in which any New York college team participates regardless of where the event takes place;
- (g) "Sports event" means any professional sport or athletic event and any collegiate sport or athletic event, except a prohibited sports event;
- (h) "Sports pool" means the business of accepting wagers on any sports event by any system or method of wagering; and
- (i) "Sports wagering lounge" means an area wherein a sports pool is operated.

2. No gaming facility may conduct sports wagering until such time as there has been a change in federal law authorizing such or upon a ruling of a court of competent jurisdiction that such activity is lawful.

3.

- (a) In addition to authorized gaming activities, a licensed gaming facility may when authorized by subdivision two of this section operate a sports pool upon the approval of the commission and in accordance with the provisions of this section and applicable regulations promulgated pursuant to this article. The commission shall hear and decide promptly and in reasonable order all applications for a license to operate a sports pool, shall have the general responsibility for the implementation of this section and shall have all other duties specified in this section with regard to the operation of a sports pool. The license to operate a sports pool shall be in addition to any other license required to be issued to operate a gaming facility. No license to operate a sports pool shall be issued by the commission to any entity unless it has established its financial stability, integrity and responsibility and its good character, honesty and integrity.

No later than five years after the date of the issuance of a license and every five years thereafter or within such lesser periods as the commission may direct, a licensee shall submit to the commission such documentation or information as the commission may by regulation require, to demonstrate to the satisfaction of the executive director of the commission that the licensee continues to meet the requirements of the law and regulations.

- (b) A sports pool shall be operated in a sports wagering lounge located at a casino. The lounge shall conform to all requirements concerning square footage, design, equipment, security measures and related matters which the commission shall by regulation prescribe.
- (c) The operator of a sports pool shall establish or display the odds at which wagers may be placed on sports events.
- (d) An operator shall accept wagers on sports events only from persons physically present in the sports wagering lounge. A person placing a wager shall be at least twenty-one years of age.

- (e) An operator shall not admit into the sports wagering lounge, or accept wagers from, any person whose name appears on the exclusion list.
- (f) The holder of a license to operate a sports pool may contract with an entity to conduct that operation, in accordance with the regulations of the commission. That entity shall obtain a license as a casino vendor enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of section one thousand three hundred twenty-seven of this article and in accordance with the regulations promulgated by the commission.
- (g) If any provision of this article or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

4.

- (a) All persons employed directly in wagering-related activities conducted within a sports wagering lounge shall be licensed as a casino key employee or registered as a gaming employee, as determined by the commission. All other employees who are working in the sports wagering lounge may be required to be registered, if appropriate, in accordance with regulations of the commission.
- (b) Each operator of a sports pool shall designate one or more casino key employees who shall be responsible for the operation of the sports pool. At least one such casino key employee shall be on the premises whenever sports wagering is conducted.

5. Except as otherwise provided by this article, the commission shall have the authority to regulate sports pools and the conduct of sports wagering under this article to the same extent that the commission regulates other gaming. No casino shall be authorized to operate a sports pool unless it has produced information, documentation, and assurances concerning its financial background and resources, including cash reserves, that are sufficient to demonstrate that it has the financial stability, integrity, and responsibility to operate a sports pool. In developing rules and regulations applicable to sports wagering, the commission shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework. The commission shall promulgate regulations necessary to carry out the provisions of this section, including, but not limited to, regulations governing the:

- (a) amount of cash reserves to be maintained by operators to cover winning wagers;
- (b) acceptance of wagers on a series of sports events;
- (c) maximum wagers which may be accepted by an operator from any one patron on any one sports event;
- (d) type of wagering tickets which may be used;
- (e) method of issuing tickets;
- (f) method of accounting to be used by operators;
- (g) types of records which shall be kept;
- (h) use of credit and checks by patrons;
- (i) type of system for wagering; and
- (j) protections for a person placing a wager.

6. Each operator shall adopt comprehensive house rules governing sports wagering transactions with its patrons. The rules shall specify the amounts to be paid on winning wagers and the

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effect of schedule changes. The house rules, together with any other information the commission deems appropriate, shall be conspicuously displayed in the sports wagering lounge and included in the terms and conditions of the account wagering system, and copies shall be made readily available to patrons.

TITLE 9

GAMING INSPECTOR GENERAL

Section 1368.

Establishment of the office of gaming inspector general.

1369. State gaming inspector general; functions and duties.

1370. Powers.

1371. Responsibilities of the commission and its officers and employees.

Section 1368.

Establishment of the office of gaming inspector general. There is hereby created within the commission the office of gaming inspector general. The head of the office shall be the gaming inspector general who shall be appointed by the governor by and with the advice and consent of the senate. The inspector general shall serve at the pleasure of the governor. The inspector general shall report directly to the governor. The person appointed as inspector general shall, upon his or her appointment, have not less than ten years professional experience in law, investigation, or auditing. The inspector general shall be compensated within the limits of funds available therefor, provided, however, such salary shall be no less than the salaries of certain state officers holding the positions indicated in paragraph (a) of subdivision one of section one hundred sixty-nine of the executive law.

Section 1369.

State gaming inspector general; functions and duties. The state gaming inspector general shall have the following duties and responsibilities:

1. receive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in the commission;
2. inform the commission members of such allegations and the progress of investigations related thereto, unless special circumstances require confidentiality;
3. determine with respect to such allegations whether disciplinary action, civil or criminal prosecution, or further investigation by an appropriate federal, state or local agency is warranted, and to assist in such investigations;
4. prepare and release to the public written reports of such investigations, as appropriate and to the extent permitted by law, subject to redaction to protect the confidentiality of witnesses. The release of all or portions of such reports may be deferred to protect the confidentiality of ongoing investigations;
5. review and examine periodically the policies and procedures of the commission with regard to the prevention and detection of corruption, fraud, criminal activity, conflicts of interest or abuse;
6. recommend remedial action to prevent or eliminate corruption, fraud, criminal activity, conflicts of interest or abuse in the commission; and
7. establish programs for training commission officers and employees regarding the prevention and elimination of corruption, fraud, criminal activity, conflicts of interest or abuse in the commission.

Section 1370.

Powers. The state gaming inspector general shall have the power to:

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1. subpoena and enforce the attendance of witnesses;
2. administer oaths or affirmations and examine witnesses under oath;
3. require the production of any books and papers deemed relevant or material to any investigation, examination or review;
4. notwithstanding any law to the contrary, examine and copy or remove documents or records of any kind prepared, maintained or held by the commission;
5. require any commission officer or employee to answer questions concerning any matter related to the performance of his or her official duties. The refusal of any officer or employee to answer questions shall be cause for removal from office or employment or other appropriate penalty;
6. monitor the implementation by the commission of any recommendations made by the state inspector general; and
7. perform any other functions that are necessary or appropriate to fulfill the duties and responsibilities of the office.

Section 1371.

Responsibilities of the commission and its officers and employees. 1. Every commission officer or employee shall report promptly to the state gaming inspector general any information concerning corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment, or by a person having business dealings with the commission relating to those dealings. The knowing failure of any officer or employee to so report shall be cause for removal from office or employment or other appropriate penalty under this article. Any officer or employee who acts pursuant to this subdivision by reporting to the state gaming inspector general or other appropriate law enforcement official improper governmental action as defined in section seventy-five-b of the civil service law shall not be subject to dismissal, discipline or other adverse personnel action.

2. The commission chair shall advise the governor within ninety days of the issuance of a report by the state gaming inspector general as to the remedial action that the commission has taken in response to any recommendation for such action contained in such report.

Section 3.

Section 225.00 of the penal law is amended by adding eighteen new subdivisions 13 through 30 to read as follows:

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

15. "Casino gaming" means games authorized to be played pursuant to a license granted under article thirteen of the racing, pari-mutuel wagering and breeding law or by federally recognized Indian nations or tribes pursuant to a valid gaming compact reached in accordance with the federal Indian Gaming Regulatory Act of 1988, *Pub. L. 100-497, 102 Stat. 2467*, codified at 25 U.S.C. Sections 2701-21 and 18 U.S.C. Sections 1166-68.
16. "Cash equivalent" means a treasury check, a travelers check, wire transfer of funds, transfer check, money order, certified check, cashiers check, payroll check, a check drawn on the account of the authorized gaming operator payable to the patron or to the authorized gaming establishment, a promotional coupon, promotional chip, promotional cheque, promotional token, or a voucher recording cash drawn against a credit card or charge card.
17. "Cheques" or "chips" or "tokens" means nonmetal, metal or partly metal representatives of value, redeemable for cash or cash equivalent, and issued and sold by an authorized casino operator for use at an authorized gaming establishment. The value of such cheques or chips or tokens shall be considered equivalent in value to the cash or cash equivalent exchanged for such cheques or chips or tokens upon purchase or redemption.
18. "Class I gaming" and "Class II gaming" means those forms of gaming that are not Class III gaming, as defined in subsection eight of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. Section 2703.
19. "Class III gaming" means those forms of gaming that are not Class I or Class II gaming, as defined in subsections six and seven of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. Section 2703 and those games enumerated in the Appendix of a gaming compact.
20. "Compact" or "gaming compact" means the agreement between a federally recognized Indian tribe and the state of New York regarding Class III gaming activities entered into pursuant to the federal Indian Gaming Regulatory Act, *Pub. L. 100-497, 102 Stat. 2467*, codified at 25 U.S.C. Sections 2701-21 and 18 U.S.C. Sections 1166-68 (1988 & Supp. II).
21. "Gaming equipment or device" means any machine or device which is specially designed or manufactured for use in the operation of any Class III or video lottery game.
22. "Gaming regulatory authority" means, with respect to any authorized gaming establishment on Indian lands, territory or reservation, the Indian nation or tribal gaming commission, its authorized officers, agents and representatives acting in their official capacities or such other agency of a nation or tribe as the nation or tribe may designate as the agency responsible for the regulation of Class III gaming, jointly with the state gaming agency, conducted pursuant to a gaming compact between the nation or tribe and the state of New York, or with respect to any casino gaming authorized pursuant to article thirteen of the racing, pari-mutuel wagering and breeding law or video lottery gaming conducted pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.
23. "Premises" includes any structure, parking lot, building, vehicle, watercraft, and any real property.
24. "Sell" means to sell, exchange, give or dispose of to another.
25. "State gaming agency" shall mean the New York state gaming commission, its authorized officials, agents, and representatives acting in their official capacities as the regulatory agency of the state which has responsibility for regulation with respect to video lottery gaming or casino gaming.
26. "Unfair gaming equipment" means loaded dice, marked cards, substituted cards or dice, or fixed roulette wheels or other gaming equipment which has been altered in a way that tends to deceive or tends to alter the elements of chance or normal random selection which determine the result of the game or outcome, or the amount or frequency of the payment in a game.
27. "Unlawful gaming property" means:

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- (a) any device, not prescribed for use in casino gaming by its rules, which is capable of assisting a player:
 - (i) to calculate any probabilities material to the outcome of a contest of chance; or
 - (ii) to receive or transmit information material to the outcome of a contest of chance; or
 - (b) any object or article which, by virtue of its size, shape or any other quality, is capable of being used in casino gaming as an improper substitute for a genuine chip, cheque, token, betting coupon, debit instrument, voucher or other instrument or indicia of value; or
 - (c) any unfair gaming equipment.
28. "Video lottery gaming" means any lottery game played on a video lottery terminal, which consists of multiple players competing for a chance to win a random drawn prize pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.
29. "Voucher" means an instrument of value generated by a video lottery terminal representing a monetary amount and/or play value owed to a customer at a specific video lottery terminal based on video lottery gaming winnings and/or amounts not wagered.

Section 4.

The penal law is amended by adding ten new sections 225.55, 225.60, 225.65, 225.70, 225.75, 225.80, 225.85, 225.90 and 225.95 to read as follows:

Section 225.55

Gaming fraud in the second degree.

A person is guilty of gaming fraud in the second degree when he or she:

1. with intent to defraud and in violation of the rules of the casino gaming, misrepresents, changes the amount bet or wagered on, or the outcome or possible outcome of the contest or event which is the subject of the bet or wager, or the amount or frequency of payment in the casino gaming; or
2. with intent to defraud, obtains anything of value from casino gaming without having won such amount by a bet or wager contingent thereon.

Gaming fraud in the second degree is a class A misdemeanor.

Section 225.60

Gaming fraud in the first degree.

A person is guilty of gaming fraud in the first degree when he or she commits a gaming fraud in the second degree, and:

1. The value of the benefit obtained exceeds one thousand dollars; or
2. He or she has been previously convicted within the preceding five years of any offense of which an essential element is the commission of a gaming fraud.

Gaming fraud in the first degree is a class E felony.

Section 225.65

Use of counterfeit, unapproved or unlawful wagering instruments.

A person is guilty of use of counterfeit, unapproved or unlawful wagering instruments when in playing or using any casino gaming designed to be played with, received or be operated by chips, cheques, tokens, vouchers or other wagering instruments approved by the appropriate gaming regulatory authority, he or she knowingly uses chips, cheques, tokens, vouchers or other wagering

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instruments other than those approved by the appropriate gaming regulating authority and the state gaming agency or lawful coin or legal tender of the United States of America.

Possession of more than one counterfeit, unapproved or unlawful wagering instrument described in this section is presumptive evidence of possession thereof with knowledge of its character or contents.

Use of counterfeit, unapproved or unlawful wagering instruments is a class A misdemeanor.

Section 225.70

Possession of unlawful gaming property in the third degree.

A person is guilty of possession of unlawful gaming property in the third degree when he or she possesses, with intent to use such property to commit gaming fraud, unlawful gaming property at a premises being used for casino gaming.

Possession of unlawful gaming property in the third degree is a class A misdemeanor.

Section 225.75

Possession of unlawful gaming property in the second degree.

A person is guilty of possession of unlawful gaming property in the second degree when:

1. He or she makes, sells, or possesses with intent to sell, any unlawful gaming property at a casino gaming facility, the value of which exceeds three hundred dollars, with intent that it be made available to a person for unlawful use; or
2. He or she commits possession of unlawful gaming property in the third degree as defined in section 225.70 of this article, and the face value of the improper substitute property exceeds five hundred dollars; or
3. He or she commits the offense of possession of unlawful gaming property in the third degree and has been previously convicted within the preceding five years of any offense of which an essential element is possession of unlawful gaming property.

Possession of unlawful gaming property in the second degree is a class E felony.

Section 225.80

Possession of unlawful gaming property in the first degree.

A person is guilty of possession of unlawful gaming property in the first degree when:

1. He or she commits the crime of unlawful possession of gaming property in the third degree as defined in section 225.70 of this article and the face value of the improper substitute property exceeds one thousand dollars; or
2. He or she commits the offense of possession of unlawful gaming property in the second degree as defined in subdivision one or two of section 225.75 of this article and has been previously convicted within the preceding five years of any offense of which an essential element is possession of unlawful gaming property.

Possession of unlawful gaming property in the first degree is a class D felony.

Section 225.85

Use of unlawful gaming property.

A person is guilty of use of unlawful gaming property when he or she knowingly with intent to defraud uses unlawful gaming property at a premises being used for casino gaming.

Use of unlawful gaming property is a class E felony.

Section 225.90

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Manipulation of gaming outcomes at an authorized gaming establishment.

A person is guilty of manipulation of gaming outcomes at an authorized gaming establishment when he or she:

1. Knowingly conducts, operates, deals or otherwise manipulates, or knowingly allows to be conducted, operated, dealt or otherwise manipulated, cards, dice or gaming equipment or device, for themselves or for another, through any trick or sleight of hand performance, with the intent of deceiving or altering the elements of chance or normal random selection which determines the result or outcome of the game, or the amount or frequency of the payment in a game; or
2. Knowingly uses, conducts, operates, deals, or exposes for play, or knowingly allows to be used, conducted, operated, dealt or exposed for play any cards, dice or gaming equipment or device, or any combination of gaming equipment or devices, which have in any manner been altered, marked or tampered with, or placed in a condition, or operated in a manner, the result of which tends to deceive or tends to alter the elements of chance or normal random selection which determine the result of the game or outcome, or the amount or frequency of the payment in a game; or
3. Knowingly uses, or possesses with the intent to use, any cards, dice or other gaming equipment or devices other than that provided by an authorized gaming operator for current use in a permitted gaming activity; or
4. Alters or misrepresents the outcome of a game or other event on which bets or wagers have been made after the outcome is made sure but before it is revealed to players.

Possession of altered, marked or tampered with dice, cards, or gaming equipment or devices at an authorized gambling establishment is presumptive evidence of possession thereof with knowledge of its character or contents and intention to use such altered, marked or tampered with dice, cards, or gaming equipment or devices in violation of this section.

Manipulation of gaming outcomes at an authorized gaming establishment is a class A misdemeanor provided, however, that if the person has previously been convicted of this crime within the past five years this crim shall be a class E felony.

Section 225.95

Unlawful manufacture, sale, distribution, marking, altering or modification of equipment and devices associated with gaming.

A person is guilty of unlawful manufacture, sale, distribution, marking, altering or modification of equipment and devices associated with gaming when if he or she:

1. Manufactures, sells or distributes any cards, chips, cheques, tokens, dice, vouchers, game or device and he or she knew or reasonably should have known it was intended to be used to violate any provision of this article; or
2. Marks, alters or otherwise modifies any associated gaming equipment or device in a manner that either affects the result of the wager by determining win or loss or alters the normal criteria of random selection in a manner that affects the operation of a game or determines the outcome of a game, and he or she knew or reasonably should have known that it was intended to be used to violate any provision of this article.

Unlawful manufacture, sale, distribution, marking, altering or modification of equipment and devices associated with gaming is a class A misdemeanor provided, however, that if the person has previously been convicted of this crime within the past five years this crim shall be a class E felony.

Section 5.

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Section 109-a of the racing, pari-mutuel wagering and breeding law is REPEALED and a new section 109-a is added to read as follows:

Section 109-a.

Separate board for facility siting. The commission shall establish a separate board to be known as the New York gaming facility location board to perform designated functions under article thirteen of this chapter, the following provisions shall apply to the board:

1. The commission shall select five members and name the chair of the board. Each member of the board shall be a resident of the state of New York. No member of the legislature or person holding any elective or appointive office in federal, state or local government shall be eligible to serve as a member of the board.
2. Qualifications of members. Members of the board shall each possess no less than ten years of responsible experience in fiscal matters and shall have any one or more of the following qualifications:
 - (a) significant service as an accountant economist, or financial analyst experienced in finance or economics;
 - (b) significant service in an academic field relating to finance or economics;
 - (c) significant service and knowledge of the commercial real estate industry; or
 - (d) significant service as an executive with fiduciary responsibilities in charge of a large organization or foundation.
3. No member of the board:
 - (a) may have a close familial or business relationship to a person that holds a license under this chapter;
 - (b) may have any direct or indirect financial interest, ownership, or management, including holding any stocks, bonds, or other similar financial interests in any gaming activities, including horse racing, lottery or gambling;
 - (c) may receive or share in, directly or indirectly, the receipts or proceeds of any gaming activities, including horse racing, lottery or gambling;
 - (d) may have a beneficial interest in any contract for the manufacture or sale of gaming devices, the conduct of any gaming activity, or the provision of any independent consulting services in connection with any establishment licensed under this chapter.
4. Board members are entitled to actual and necessary expenses incurred in the discharge of their duties but may not receive compensation for their service on the board.
5.
 - (a) The commission shall provide staff to the board.
 - (b) The board shall contract with an outside consultant to provide analysis of the gaming industry and to support the board's comprehensive review and evaluation of the applications submitted to the board for gaming facility licenses.
 - (c) The board may contract with attorneys, accountants, auditors and financial and other experts to render necessary services.
 - (d) All other state agencies shall cooperate with and assist the board in the fulfillment of its duties under this article and may render such services to the board within their respective functions as the board may reasonably request.
6. Utilizing the powers and duties prescribed for it by article thirteen of this chapter, the board shall select, through a competitive process consistent with provisions of article thirteen of this chapter,

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not more than four gaming facility license applicants. Such selectees shall be authorized to receive a gaming facility license, if found suitable by the commission. The board may select another applicant for authorization to be licensed as a gaming facility if a previous selectee fails to meet licensing thresholds, is revoked or surrenders a license opportunity.

Section 6.

Subdivision 2 of *section 99-h of the state finance law*, as amended by section 1 of part V of chapter 59 of the laws of 2006, is amended to read as follows:

2. Such account shall consist of all revenues resulting from tribal state compacts executed pursuant to article two of the executive law ~~and~~ a tribal-state compact with the St. Regis Mohawk tribe executed pursuant to chapter five hundred ninety of the laws of two thousand four and the Oneida Settlement Agreement referenced in section eleven of the executive law .

Section 7.

Subdivision 3 of *section 99-h of the state finance law*, as amended by section 1 of part W of chapter 60 of the laws of 2011, is amended to read as follows:

3. Moneys of the account, following the segregation of appropriations enacted by the legislature, shall be available for purposes including but not limited to:
 - (a) reimbursements or payments to municipal governments that host tribal casinos pursuant to a tribal-state compact for costs incurred in connection with services provided to such casinos or arising as a result thereof, for economic development opportunities and job expansion programs authorized by the executive law; provided, however, that for any gaming facility located in the city of Buffalo, the city of Buffalo shall receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact, and provided further that for any gaming facility located in the city of Niagara Falls, county of Niagara a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact shall be distributed in accordance with subdivision four of this section, and provided further that for any gaming facility located in the county or counties of Cattaraugus, Chautauqua or Allegany, the municipal governments of the state hosting the facility shall collectively receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact; and provided further that pursuant to chapter five hundred ninety of the laws of two thousand four, a minimum of twenty-five percent of the revenues received by the state pursuant to the state's compact with the St. Regis Mohawk tribe shall be made available to the counties of Franklin and St. Lawrence, and affected towns in such counties. Each such county and its affected towns shall receive fifty percent of the moneys made available by the state ; and provided further that the state shall annually make twenty-five percent of the negotiated percentage of the net drop from all gaming devices the state actually receives pursuant to the Oneida Settlement Agreement confirmed by section eleven of the executive law as available to the county of Oneida, and a sum of three and one-half million dollars to the county of Madison. Additionally, the state shall distribute for a period of nineteen and one-quarter years, an additional annual sum of two and one-half million dollars to the county of Oneida. Additionally, the state shall distribute the one-time eleven million dollar payment received by the state pursuant to such agreement with the Oneida Nation of New York to the county of Madison by wire transfer upon receipt of such payment by the state ; and (b) support and services of treatment programs for persons suffering from gambling addictions. Moneys not segregated for such purposes shall be transferred to the general fund for the support of government during the fiscal year in which they are received.

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Subdivision 3 of *section 99-h of the state finance law*, as amended by section 1 of part QQ of chapter 59 of the laws of 2009, is amended to read as follows:

3. Moneys of the account, following appropriation by the legislature, shall be available for purposes including but not limited to:

- (a) reimbursements or payments to municipal governments that host tribal casinos pursuant to a tribal-state compact for costs incurred in connection with services provided to such casinos or arising as a result thereof, for economic development opportunities and job expansion programs authorized by the executive law; provided, however, that for any gaming facility located in the city of Buffalo, the city of Buffalo shall receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact, and provided further that for any gaming facility located in the city of Niagara Falls, county of Niagara a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact shall be distributed in accordance with subdivision four of this section, and provided further that for any gaming facility located in the county or counties of Cattaraugus, Chautauqua or Allegany, the municipal governments of the state hosting the facility shall collectively receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact; and provided further that pursuant to chapter five hundred ninety of the laws of two thousand four, a minimum of twenty-five percent of the revenues received by the state pursuant to the state's compact with the St. Regis Mohawk tribe shall be made available to the counties of Franklin and St. Lawrence, and affected towns in such counties. Each such county and its affected towns shall receive fifty percent of the moneys made available by the state ; and provided further that the state shall annually make twenty-five percent of the negotiated percentage of the net drop from all gaming devices the state actually receives pursuant to the Oneida Settlement Agreement as confirmed by section eleven of the executive law as available to the county of Oneida, and a sum of three and one-half million dollars to the county of Madison. Additionally, the state shall distribute for a period of nineteen and one-quarter years, an additional annual sum of two and one-half million dollars to the county of Oneida. Additionally, the state shall distribute the one-time eleven million dollar payment received by the state pursuant to such agreement with the Oneida Nation of New York to the county of Madison by wire transfer upon receipt of such payment by the state ; and (b) support and services of treatment programs for persons suffering from gambling addictions. Moneys not appropriated for such purposes shall be transferred to the general fund for the support of government during the fiscal year in which they are received.

Section 8.

Subdivision 3 of *section 99-h of the state finance law*, as amended by section 23 of part HH of chapter 57 of the laws of 2013, is amended to read as follows:

3. Moneys of the account, following the segregation of appropriations enacted by the legislature, shall be available for purposes including but not limited to:

- (a) reimbursements or payments to municipal governments that host tribal casinos pursuant to a tribal-state compact for costs incurred in connection with services provided to such casinos or arising as a result thereof, for economic development opportunities and job expansion programs authorized by the executive law; provided, however, that for any gaming facility located in the county of Erie or Niagara, the municipal governments hosting the facility shall collectively receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact and provided further that for any gaming facility located in the county or counties of Cattaraugus, Chautauqua or Allegany, the municipal governments of the state hosting the facility shall collectively receive a minimum of twenty-five percent of the negotiated percentage of the net drop from electronic gaming devices the state receives pursuant to the compact; and provided further that pursuant to chapter five hundred ninety of the laws of two

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thousand four, a minimum of twenty-five percent of the revenues received by the state pursuant to the state's compact with the St. Regis Mohawk tribe shall be made available to the counties of Franklin and St. Lawrence, and affected towns in such counties. Each such county and its affected towns shall receive fifty percent of the moneys made available by the state ; and provided further that the state shall annually make twenty-five percent of the negotiated percentage of the net drop from all gaming devices the state actually receives pursuant to the Oneida Settlement Agreement confirmed by section eleven of the executive law available to the county of Oneida, and a sum of three and one-half million dollars to the county of Madison. Additionally, the state shall distribute, for a period of nineteen and one-quarter years, an additional annual sum of two and one-half million dollars to the county of Oneida. Additionally, the state shall distribute the one-time eleven million dollar payment actually received by the state pursuant to the Oneida Settlement Agreement to the county of Madison by wire transfer upon receipt of such payment by the state ; and (b) support and services of treatment programs for persons suffering from gambling addictions. Moneys not segregated for such purposes shall be transferred to the general fund for the support of government during the fiscal year in which they are received.

Section 9.

Section 99-h of the state finance law, as amended by chapter 747 of the laws of 2006, is amended by adding a new subdivision 3-a to read as follows:

3-a.

Ten percent of any of the funds actually received by the state pursuant to the tribal-state compacts and agreements described in subdivision two of this section that are retained in the fund after the distributions required by subdivision three of this section, but prior to the transfer of unsegregated moneys to the general fund required by such subdivision, shall be distributed to counties in each respective exclusivity zone provided they do not otherwise receive a share of said revenues pursuant to this section. Such distribution shall be made among such counties on a per capita basis, excluding the population of any municipality that receives a distribution pursuant to subdivision three of this section.

Section 10.

The state finance law is amended by adding a new section 97-nnnn to read as follows:

Section 97-nnnn.

Commercial gaming revenue fund. 1. There is hereby established in the joint custody of the comptroller and the commissioner of taxation and finance an account in the miscellaneous special revenue fund to be known as the "commercial gaming revenue fund".

2. Such account shall consist of all revenues from all taxes and fees imposed by article thirteen of the racing, pari-mutuel wagering and breeding law; any interest and penalties imposed by the New York state gaming commission relating to those taxes; the percentage of the value of expired gaming related obligations; and all penalties levied and collected by the commission. Additionally, the state gaming commission shall pay into the account any appropriate funds, cash or prizes forfeited from gambling activity.
3. Moneys of the account shall be available as follows, unless otherwise specified by the upstate New York gaming economic development act of two thousand thirteen, following appropriation by the legislature:
 - a. eighty percent of the moneys in such fund shall be appropriated or transferred only for elementary and secondary education or real property tax relief.
 - b. ten percent of the moneys in such fund shall be appropriated or transferred from the commercial gaming revenue fund equally between the host municipality and host county.

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- c. ten percent of the moneys in such fund, as attributable to a specific licensed gaming facility, shall be appropriated or transferred from the commercial gaming revenue fund among counties within the region, as defined by section one thousand three hundred ten of the racing, pari-mutuel wagering and breeding law, hosting said facility for the purpose of real property tax relief and for education assistance. Such distribution shall be made among the counties on a per capita basis, subtracting the population of host municipality and county.
4. a. As used in this section, the term "base year gaming revenue" shall mean the sum of all revenue generated to support education from video lottery gaming as defined by section sixteen hundred seventeen-a of the tax law in the twelve months preceding the operation of any gaming facility pursuant to either article thirteen of the racing, parimutuel wagering and breeding law or pursuant to paragraph four of section one thousand six hundred seventeen-a of the tax law.
- b. Amounts transferred in any year to support elementary and secondary education shall be calculated as follows:
- (i) an amount equal to the positive difference, if any, between the base year gaming revenue amount and the sum of all revenue generated to support education from video lottery gaming as defined by section sixteen hundred seventeen-a of the tax law in the current fiscal year provided that such positive amount, if any, shall be transferred to the state lottery fund; and
 - (ii) the amount of revenue collected in the prior state fiscal year, to be distributed pursuant to paragraph a of subdivision three of this section, and in excess of any amounts transferred pursuant to subparagraph (i) of this paragraph in such prior fiscal year, if any.
- c. Notwithstanding any provision of law to the contrary, amounts appropriated or transferred from the commercial gaming revenue fund pursuant to subparagraph (ii) of this paragraph shall not be included in:
- (i) the allowable growth amount computed pursuant to paragraph dd of subdivision one of section thirty-six hundred two of the education law, (ii) the preliminary growth amount computed pursuant to paragraph ff of subdivision one of section thirty-six hundred two of the education law, and (iii) the allocable growth amount computed pursuant to paragraph gg of subdivision one of section thirty-six hundred two of the education law.
5. Notwithstanding the foregoing, monies received pursuant to:
- a. sections one thousand three hundred forty-five and one thousand three hundred forty-eight of this article shall be exclusively appropriated to the office of alcoholism and substance abuse services to be used for problem gambling education and treatment purposes.
 - b. section one thousand three hundred forty-nine of this article shall be exclusively appropriated to the commission for regulatory investigations.
 - c. section one thousand three hundred fifty of this article shall be exclusively appropriated to the commission for costs regulation.

Section 11.

The penal law is amended by adding a new section 156.40 to read as follows:

Section 156.40

Operating an unlawful electronic sweepstakes.

1. As used in this section the following words and terms shall have the following meanings:

- (a) "Electronic machine or device" means a mechanically, electrically or electronically operated machine or device that is owned, leased or otherwise possessed by a sweepstakes sponsor or promoter, or any sponsors, promoters, partners, affiliates, subsidiaries or contractors thereof;

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that is intended to be used by a sweepstakes entrant; that uses energy; and that displays the results of a game entry or game outcome to a participant on a screen or other mechanism at a business location, including a private club; provided, that an electronic machine or device may, without limitation:

- (1) be server-based;
 - (2) use a simulated game terminal as a representation of the prizes associated with the results of the sweepstakes entries;
 - (3) utilize software such that the simulated game influences or determines the winning or value of the prize;
 - (4) select prizes from a predetermined finite pool of entries;
 - (5) utilize a mechanism that reveals the content of a predetermined sweepstakes entry;
 - (6) predetermine the prize results and stores those results for delivery at the time the sweepstakes entry results are revealed;
 - (7) utilize software to create a game result;
 - (8) require deposit of any money, coin or token, or the use of any credit card, debit card, prepaid card or any other method of payment to activate the electronic machine or device;
 - (9) require direct payment into the electronic machine or device, or remote activation of the electronic machine or device;
 - (10) require purchase of a related product having legitimate value;
 - (11) reveal the prize incrementally, even though it may not influence if a prize is awarded or the value of any prize awarded;
 - (12) determine and associate the prize with an entry or entries at the time the sweepstakes is entered; or
 - (13) be a slot machine or other form of electrical, mechanical, or computer game.
- (b) "Enter" or "entry" means the act or process by which a person becomes eligible to receive any prize offered in a sweepstakes.
 - (c) "Entertaining display" means any visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play or simulated game play.
 - (d) "Prize" means any gift, award, gratuity, good, service, credit or anything else of value, which may be transferred to a person, whether possession of the prize is actually transferred, or placed on an account or other record as evidence of the intent to transfer the prize.
 - (e) "Sweepstakes" means any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.

2. A person is guilty of operating an unlawful electronic sweepstakes when he or she knowingly possesses with the intent to operate, or place into operation, an electronic machine or device to:

- (a) conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize; or
- (b) promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

3. Nothing in this section shall be construed to make illegal any activity which is lawfully conducted as the New York state lottery for education as authorized by article thirty-four of the tax law; pari-mutuel wagering on horse races as authorized by articles two, three, four, five-A, and ten of the

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racing, pari-mutuel wagering and breeding law; the game of bingo as authorized pursuant to article fourteen-H of the general municipal law; games of chance as authorized pursuant to article nine-A of the general municipal law; gaming as authorized by article thirteen of the racing, pari-mutuel wagering and breeding law; or pursuant to the federal Indian Gaming Regulatory Act.

Operating an unlawful electronic sweepstakes is a class E felony.

Section 12.

The legislature hereby finds that long-standing disputes between the Oneida Nation of New York and the State of New York, Madison County and Oneida County, have generated litigation in state and federal courts regarding property and other taxation, the status of Oneida Nation lands and transfer of such lands to the United States to be held in trust for the Oneida Nation, and that such litigation and disputes have caused decades of unrest and uncertainty for the citizens and residents of the Central New York region of this state. The legislature further finds that it is in the best interests of all citizens, residents and political subdivisions of this state to remove any uncertainty that such litigation or disputes have created regarding the title to and jurisdictional status of land within the state. The legislature recognizes that negotiated settlement of these disputes will facilitate a cooperative relationship between the state, the counties and the Oneida Nation. Therefore, the legislature declares that the following provisions are enacted to implement the settlement agreement that has been negotiated and executed by the governor on behalf of the people of this state.

Section 13.

Section 11 of the executive law is REPEALED and a new section 11 is added to read as follows:

Section 11.

Indian settlement agreements. 1. Oneida settlement agreement. Notwithstanding any other provision of law, upon filing with the secretary of state, the settlement agreement executed between the governor, the counties of Oneida and Madison, and the Oneida Nation of New York dated the sixteenth day of May, two thousand thirteen, to be known as the Oneida Settlement Agreement, including, without limitation, the provisions contained therein relating to arbitration and judicial review in state or federal courts and, for the sole purpose thereof, a limited waiver of the state's Eleventh Amendment sovereign immunity from suit, shall upon its effective date be deemed approved, ratified, validated and confirmed by the legislature. It is the intention of the legislature in enacting this section to ensure that the settlement agreement shall be fully enforceable in all respects as to the rights, benefits, responsibilities and privileges of all parties thereto.

Section 14.

Notwithstanding any inconsistent provision of law, the NationState compact entered into by the State on April 16, 1993 and approved by the United States Department of the Interior on June 4, 1993, which approval was published at 58 Fed. Reg. 33160 (June 15, 1993), is deemed ratified, validated and confirmed nunc pro tunc by the legislature.

Section 15.

Sections 2 and 3 of the Indian law are renumbered sections 3 and 4 and a new section 2 is added to read as follows:

Section 2.

New York state Indian nations and tribes. The term "Indian nation or tribe" means one of the following New York state Indian nations or tribes: Cayuga Nation, Oneida Nation of New York,

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Onondaga Nation, Poospatuck or Unkechaugue Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Band of Seneca and Tuscarora Nation.

Section 16.

The Indian law is amended by adding a new section 16 to read as follows:

Section 16.

Indian settlement agreements. Notwithstanding any other provision of law, the provisions of the Oneida Settlement Agreement referenced in section eleven of the executive law shall be deemed to supersede any inconsistent laws and regulations.

Section 17.

Subdivision 18 of *section 282 of the tax law*, as added by section 3 of part K of chapter 61 of the laws of 2005, is amended to read as follows:

18. "Indian nation or tribe" means one of the following New York state Indian nations or tribes: Cayuga Indian Nation of New York, Oneida Indian Nation of New York, Onondaga Nation of Indians, Poospatuck or Unkechaugue Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Band of Senecas, Seneca and Tuscarora Nation of Indians.

Section 18.

Subdivision 14 of *section 470 of the tax law*, as added by section 1 of part K of chapter 61 of the laws of 2005, is amended to read as follows:

14. "Indian nation or tribe." One of the following New York state Indian nations or tribes: Cayuga Indian Nation of New York, Oneida Indian Nation of New York, Onondaga Nation of Indians, Poospatuck or Unkechaugue Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Band of Senecas, Seneca and Tuscarora Nation of Indians.

Section 19.

Intentionally omitted.

Section 20.

Intentionally omitted.

Section 21.

Intentionally omitted.

Section 22.

Intentionally omitted.

Section 23.

Intentionally omitted.

Section 24.

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Intentionally omitted.

Section 25.

Section 104 of the racing, pari-mutuel wagering and breeding law is amended by adding a new subdivision 21 to read as follows:

21. The commission shall promptly make available for public inspection and copying via electronic connection to the commission's website a copy of any report received from the New York state board of elections pursuant to article fourteen of the election law.

Section 26.

Section 1617-a of the tax law is amended by adding a new subdivision g to read as follows:

g.

Every video lottery gaming license, and every renewal license, shall be valid for a period of five years, except that video gaming licenses issued before the effective date of this subdivision shall be for a term expiring on June thirtieth, two thousand fourteen.

The gaming commission may decline to renew any license after notice and an opportunity for hearing if it determines that:

- (1) the licensee has violated section one thousand six hundred seven of this article;
 - (2) the licensee has violated any rule, regulation or order of the gaming commission;
 - (3) the applicant or its officers, directors or significant stockholders, as determined by the gaming commission, have been convicted of a crime involving moral turpitude; or
 - (4) that the character or fitness of the licensee and its officers, directors, and significant stockholders, as determined by the gaming commission is such that the participation of the applicant in video lottery gaming or related activities would be inconsistent with the public interest, convenience or necessity or with the best interests of video gaming generally.
- (h) The gaming commission, subject to notice and an opportunity for hearing, may revoke, suspend, and condition the license of the video gaming licensee, order the video gaming licensee to terminate the continued appointment, position or employment of officers and directors, or order the video gaming licensee to require significant stockholders to divest themselves of all interests in the video gaming licensee.

Section 27.

Clause (G) of subparagraph (ii) of paragraph 1 of subdivision b of *section 1612 of the tax law* is REPEALED and a new clause (G) is added to read as follows:

- (G) Notwithstanding any provision to the contrary, when a vendor track is located within regions one, two, or five of **development zone two** as defined by section thirteen hundred ten of the racing, pari-mutuel wagering and breeding law, such vendor track shall receive an additional commission at a rate equal to the percentage of revenue wagered at the vendor track after payout for prizes pursuant to this chapter less ten percent retained by the commission for operation, administration, and procurement purposes and payment of the vendor's fee, marketing allowance, and capital award paid pursuant to this chapter and the effective tax rate paid on all gross gaming revenue paid by a gaming facility within the same region pursuant to section thirteen hundred fifty-one of the racing, pari-mutuel wagering and breeding law. The additional commission shall be paid to the vendor track within sixty days after the conclusion of the state fiscal year based on the calculated percentage during the previous fiscal year.

Section 28.

Intentionally omitted.

Section 29.

Intentionally omitted.

Section 30.

The opening paragraph of subparagraph (ii) of paragraph 1 of subdivision b of *section 1612 of the tax law*, as amended by section 6 of part K of chapter 57 of the laws of 2010, is amended to read as follows:

less a vendor's fee the amount of which is to be paid for serving as a lottery agent to the track operator of a vendor track or the operator of a resort facility :

Section 31.

Section 1 of part HH of chapter 57 of the laws of 2013 relating to providing for the administration of certain funds and accounts related to the 2013-14 budget, is amended by adding a new subdivision 39 to read as follows:

39. Commercial gaming revenue fund:

a. Commercial gaming revenue account.

Section 32.

Subdivision a of *section 1617-a of the tax law*, as amended by section 2 of part O-1 of chapter 57 of the laws of 2009, is amended to read as follows:

a. The division of the lottery is hereby authorized to license, pursuant to rules and regulations to be promulgated by the division of the lottery, the operation of video lottery gaming :

- (1) at Aqueduct, Monticello, Yonkers, Finger Lakes, and Vernon Downs racetracks,
- (2) or at any other racetrack licensed pursuant to article three of the racing, pari-mutuel wagering and breeding law that are located in a county or counties in which video lottery gaming has been authorized pursuant to local law, excluding the licensed racetrack commonly referred to in article three of the racing, pari-mutuel wagering and breeding law as the "New York state exposition" held in Onondaga county and the racetracks of the non-profit racing association known as Belmont Park racetrack and the Saratoga thoroughbred racetrack ,
- (3) at facilities established, pursuant to a competitive process to be determined by the state gaming commission within regions one, two, and five of zone two as established by section one thousand three hundred ten of the racing, pari-mutuel wagering and breeding law following local governmental consultation and consideration of market factors including potential revenue impact, anticipated job *development* and capital investment to be made. The facilities authorized pursuant to this paragraph shall be deemed vendors for all purposes under this article, and need not be operated by licensed thoroughbred or harness racing associations or corporations .

Such rules and regulations shall provide, as a condition of licensure, that racetracks to be licensed are certified to be in compliance with all state and local fire and safety codes, that the division is afforded adequate space, infrastructure, and amenities consistent with industry standards for such video gaming operations as found at racetracks in other states, that racetrack employees involved in the operation of video lottery gaming pursuant to this section are licensed by the racing and wagering board, and such other terms and conditions of licensure as the division may establish. Notwithstanding any inconsistent provision of law, video lottery gaming at a racetrack pursuant to

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this section shall be deemed an approved activity for such racetrack under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations. No entity licensed by the division operating video lottery gaming pursuant to this section may house such gaming activity in a structure deemed or approved by the division as "temporary" for a duration of longer than eighteen-months. Nothing in this section shall prohibit the division from licensing an entity to operate video lottery gaming at an existing racetrack as authorized in this subdivision whether or not a different entity is licensed to conduct horse racing and pari-mutuel wagering at such racetrack pursuant to article two or three of the racing, pari-mutuel wagering and breeding law.

The division, in consultation with the racing and wagering board, shall establish standards for approval of the temporary and permanent physical layout and construction of any facility or building devoted to a video lottery gaming operation. In reviewing such application for the construction or reconstruction of facilities related or devoted to the operation or housing of video lottery gaming operations, the division, in consultation with the racing and wagering board, shall ensure that such facility:

- (1) possesses superior consumer amenities and conveniences to encourage and attract the patronage of tourists and other visitors from across the region, state, and nation.
- (2) has adequate motor vehicle parking facilities to satisfy patron requirements.
- (3) has a physical layout and location that facilitates access to and from the horse racing track portion of such facility to encourage patronage of live horse racing events that are conducted at such track.

Section 33.

Subparagraph (ii) of paragraph 1 of subdivision b of *section 1612 of the tax law* is amended by adding a new clause (H-1) to read as follows:

(H-1) Notwithstanding clauses (A), (B), (C), (D), (E), (F), (G) and (H) of this subparagraph where the vendor is authorized pursuant to paragraph three of subdivision a of section sixteen hundred seventeen-a of this article, at a rate of forty percent of the total revenue wagered at the facility after payout for prizes. All facilities authorized pursuant to paragraph three of subdivision a of section sixteen hundred seventeen-a of this article shall not be eligible for any vendor's capital award but are entitled to the vendor's marketing allowance of ten percent authorized by subparagraph (iii) of this paragraph. Facilities authorized by paragraph three of subdivision a of section sixteen hundred seventeen-a of this article shall pay

- (i) an amount to horsemen for purses at the licensed racetracks in the region that will assure the purse support from video lottery gaming facilities in the region to the licensed racetracks in the region to be maintained at the same dollar levels realized in two thousand thirteen to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics; and
- (ii) amounts to the agricultural and New York state horse breeding *development* fund and the New York state thoroughbred breeding and *development* fund to maintain payments from video lottery gaming facilities in the region to such funds to be maintained at the same dollar levels realized in two thousand thirteen to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics.

Section 34.

Section 54-l of the state finance law, as added by section 1 of part J of chapter 57 of the laws of 2011, paragraph b of subdivision 2 as amended by section 1 of part EE of chapter 57 of the laws of 2013, is amended to read as follows:

54-l.

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State assistance to eligible cities and eligible municipalities in which a video lottery gaming facility is located. 1. Definitions. When used in this section, unless otherwise expressly stated:

- a. "Eligible city" shall mean a city with a population equal to or greater than one hundred twenty-five thousand and less than one million in which a video lottery gaming facility is located and operating as of January first, two thousand nine pursuant to section sixteen hundred seventeen-a of the tax law.
 - b. "Eligible municipality" shall mean a county, city, town or village in which a video lottery gaming facility is located pursuant to section sixteen hundred seventeen-a of the tax law that is not located in a city with a population equal to or greater than one hundred twenty-five thousand.
 - c. "Newly eligible city" shall mean a city with a population equal to or greater than one hundred twenty-five thousand and less than one million in which a video lottery gaming facility pursuant to section sixteen hundred seventeen-a of the tax law is located and which was not operating as of January first, two thousand thirteen.
 - d. "Newly eligible municipality" shall mean a county, city, town or village in which a video lottery gaming facility is located pursuant to section sixteen hundred seventeen-a of the tax law that is not located in a city with a population equal to or greater than one hundred twenty-five thousand and which was not operating as of January first, two thousand thirteen.
 - e. "Estimated net machine income" shall mean the estimated full annual value of total revenue wagered after payout for prizes for games known as video lottery gaming as authorized under article thirty-four of the tax law during the state fiscal year in which state aid payments are made pursuant to subdivision two of this section.
2. a. Within the amount appropriated therefor, an eligible city shall receive an amount equal to the state aid payment received in the state fiscal year commencing April first, two thousand eight from an appropriation for aid to municipalities with video lottery gaming facilities.
 - b. Within the amounts appropriated therefor, eligible municipalities shall receive an amount equal to fifty-five percent of the state aid payment received in the state fiscal year commencing April first, two thousand eight from an appropriation for aid to municipalities with video lottery gaming facilities.
 - c. A newly eligible city shall receive a state aid payment equal to two percent of the "estimated net machine income" generated by a video lottery gaming facility located in such eligible city. Such state aid payment shall not exceed twenty million dollars per eligible city.
 - d. A newly eligible municipality shall receive a state aid payment equal to two percent of the "estimated net machine income" generated by a video lottery gaming facility located within such newly eligible municipality as follows:
 - (i) twenty-five percent shall be apportioned and paid to the county; and (ii) seventy-five percent shall be apportioned and paid on a pro rata basis to eligible municipalities, other than the county, based upon the population of such eligible municipalities. Such state aid payment shall not exceed twenty-five percent of an eligible municipality's total expenditures as reported in the statistical report of the comptroller in the preceding state fiscal year pursuant to section thirty-seven of the general municipal law.
3. a. State aid payments made to an eligible city or to a newly eligible city pursuant to ~~paragraph~~ paragraphs a and c of subdivision two of this section shall be used to increase support for public schools in such city.
 - b. State aid payments made to ~~an~~ eligible ~~municipality~~ municipalities and newly eligible municipalities pursuant to ~~paragraph~~ paragraphs b and d of subdivision two of this section shall be used by such eligible municipality to: (i) defray local costs associated with a video lottery gaming facility, or (ii) minimize or reduce real property taxes.

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4. Payments of state aid pursuant to this section shall be made on or before June thirtieth of each state fiscal year to the chief fiscal officer of each eligible city and each eligible municipality on audit and warrant of the state comptroller out of moneys appropriated by the legislature for such purpose to the credit of the local assistance fund in the general fund of the state treasury.

Section 35.

Section 1 of chapter 50 of the laws of 2013, State Operations budget, is amended by repealing the items hereinbelow set forth in brackets and by adding to such section the other items underscored in this section.

NEW YORK STATE GAMING COMMISSION

STATE OPERATIONS

2013-14 For payment according to the following schedule:

APPROPRIATIONS REAPPROPRIATIONS

Special Revenue Funds - ~~111,604,700~~ 0

Other

111,772,700

All Funds ~~111,604,700~~ 0

.....

111,772,700

SCHEDULE

ADMINISTRATION OF GAMING COMMISSION PROGRAM ... ~~4,000,000~~ 1,168,000

Special Revenue Funds - Other

Miscellaneous Special Revenue Fund

Commercial Gaming Revenue Account

For services and expenses related to the administration and operation of the commercial gaming revenue account, providing that moneys hereby appropriated shall be available to the program net of refunds, rebates, reimbursements and credits. A portion of this appropriation may be used for suballocation to the New York state gaming facility location board or other agencies for services and expenses, including fringe benefits. Notwithstanding any provision of law to the contrary, the money hereby appropriated may not be, in whole or in part, interchanged with any other appropriation within the state gaming commission, except those appropriations that fund activities related to the administration of gaming commission program.

PERSONAL SERVICE

Personal service--regular 100,000

Amount available for personal service 100,000

NONPERSONAL SERVICE

Travel 10,000

Fringe benefits 55,000

Indirect costs 3,000

Amount available for nonpersonal service 68,000

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Special Revenue Funds - Other

Miscellaneous Special Revenue Fund

New York State Gaming Commission Account

For services and expenses related to the administration and operation of the administration of gaming commission program, providing that moneys hereby appropriated shall be available to the program net of refunds, rebates, reimbursements and credits. Notwithstanding any provision of law to the contrary, the money hereby appropriated may not be, in whole or in part, interchanged with any other appropriation within the state gaming commission, except those appropriations that fund activities related to the administration of gaming commission program. Notwithstanding any other provision of law to the contrary, the OGS Interchange and Transfer Authority and the IT Interchange and Transfer Authority as defined in the 2013-14 state fiscal year state operations appropriation for the budget division program of the division of the budget, are deemed fully incorporated herein and a part of this appropriation as if fully stated.

PERSONAL SERVICE

Personal service--regular 527,000
 Holiday/overtime compensation 10,000
 Amount available for personal service 537,000

NONPERSONAL SERVICE

Supplies and materials 13,000
 Travel 80,000
 Contractual services 99,000
 Equipment 30,000
 Fringe benefits 228,000
 Indirect costs 13,000
 Amount available for nonpersonal service 463,000

Section 36.

Section 104 of the racing, pari-mutuel wagering and breeding law is amended by adding a new subdivision 22 to read as follows:

22. The commission shall annually conduct an evaluation of video lottery gaming to consider the various competitive factors impacting such industry and shall consider administrative changes that may be necessary to ensure a competitive industry and preserve its primary function of raising revenue for public education.

Section 37.

Clause (H) of subparagraph (ii) of paragraph 1 of subdivision b of *section 1612 of the tax law*, as amended by chapter 454 of the laws of 2012, is amended to read as follows:

(H) notwithstanding clauses (A), (B), (C), (D), (E), (F) and (G) of this subparagraph, the track operator of a vendor track shall be eligible for a vendor's capital award of up to four percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, which shall be used exclusively for capital project investments to improve the facilities of the vendor track which promote or encourage increased attendance at the video lottery gaming facility including, but not limited to hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance facility amenities; provided that such capital investments shall be approved by the division, in consultation with the state racing and wagering board, and that such vendor track demonstrates that such capital expenditures will increase patronage at such vendor track's facilities and increase the amount of revenue generated to support state

education programs. The annual amount of such vendor's capital awards that a vendor track shall be eligible to receive shall be limited to two million five hundred thousand dollars, except for Aqueduct racetrack, for which there shall be no vendor's capital awards. Except for tracks having less than one thousand one hundred video gaming machines, and except for a vendor track located west of State Route 14 from Sodus Point to the Pennsylvania border within New York, each track operator shall be required to co-invest an amount of capital expenditure equal to its cumulative vendor's capital award. For all tracks, except for Aqueduct racetrack, the amount of any vendor's capital award that is not used during any one year period may be carried over into subsequent years ending before April first, two thousand fourteen. Any amount attributable to a capital expenditure approved prior to April first, two thousand fourteen and completed before April first, two thousand sixteen ; or approved prior to April first, two thousand eighteen and completed before April first, two thousand twenty for a vendor track located west of State Route 14 from Sodus Point to the Pennsylvania border within New York, shall be eligible to receive the vendor's capital award. In the event that a vendor track's capital expenditures, approved by the division prior to April first, two thousand fourteen and completed prior to April first, two thousand sixteen, exceed the vendor track's cumulative capital award during the five year period ending April first, two thousand fourteen, the vendor shall continue to receive the capital award after April first, two thousand fourteen until such approved capital expenditures are paid to the vendor track subject to any required co-investment. In no event shall any vendor track that receives a vendor fee pursuant to clause (F) or (G) of this subparagraph be eligible for a vendor's capital award under this section. Any operator of a vendor track which has received a vendor's capital award, choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement in accordance with generally accepted accounting principles, shall reimburse the state in amounts equal to the total of any such awards. Any capital award not approved for a capital expenditure at a video lottery gaming facility by April first, two thousand fourteen shall be deposited into the state lottery fund for education aid; and

Section 38.

Item (iii) of clause (I) of subparagraph (ii) of paragraph 1 of subdivision b of *section 1612 of the tax law*, as added by section 1 of part O of chapter 61 of the laws of 2011, is amended to read as follows:

- (iii) less an additional vendor's marketing allowance at a rate of ten percent for the first one hundred million dollars annually and eight percent thereafter of the total revenue wagered at the vendor track after payout for prizes to be used by the vendor track for the marketing and promotion and associated costs of its video lottery gaming operations and pari-mutuel horse racing operations, as long as any such costs associated with pari-mutuel horse racing operations simultaneously encourage increased attendance at such vendor's video lottery gaming facilities, consistent with the customary manner of marketing comparable operations in the industry and subject to the overall supervision of the division; provided, however, that the additional vendor's marketing allowance shall not exceed eight percent in any year for any operator of a racetrack located in the county of Westchester or Queens; provided, however, a vendor track that receives a vendor fee pursuant to clause (G) of subparagraph (ii) of this paragraph shall not receive the additional vendor's marketing allowance ; provided, however, except for a vendor track located west of State Route 14 from Sodus Point to the Pennsylvania border within New York shall continue to receive a marketing allowance of ten percent on total revenue wagered at the vendor track after payout for prizes in excess of one hundred million dollars annually . In establishing the vendor fee, the division shall ensure the maximum lottery support for education while also ensuring the effective implementation of section sixteen hundred seventeen-a of this article through the provision of reasonable reimbursements and compensation to vendor tracks for participation in such program. Within twenty days after any award of lottery prizes, the division shall pay into the state treasury, to the credit of the state lottery fund, the balance of all moneys received from the sale of all tickets for the lottery in which such prizes were awarded remaining after provision for the payment of prizes as herein provided. Any revenues derived from the sale of advertising on lottery tickets shall be deposited in the state lottery fund.

Section 39.

Subdivision a of *section 1617-a of the tax law* is amended by adding a new paragraph 4 to read as follows:

(4) at a maximum of two facilities, neither to exceed one thousand video lottery gaming devices, established within region three of zone one as defined by section one thousand three hundred ten of the racing, pari-mutuel wagering and breeding law, one each operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law in the Suffolk region and the Nassau region to be located within a facility authorized pursuant to sections one thousand eight or one thousand nine of the racing, pari-mutuel wagering and breeding law. The facilities authorized pursuant to this paragraph shall be deemed vendors for all purposes under this article.

Section 40.

Section 1612 of the tax law, as amended by chapter 2 of the laws of 1995, paragraph 1 of subdivision a as amended by chapter 147 of the laws of 2010, subparagraph (A) of paragraph 1 of subdivision a as amended by section 1 of part S of chapter 59 of the laws of 2012, paragraph 2 of subdivision a as amended by section 1 of part P of chapter 61 of the laws of 2011, paragraphs 3, 4 and 5 and the second undesignated and closing paragraph of subdivision a as amended by section 1 of part Q of chapter 61 of the laws of 2011, subdivision 6 as amended by section 1 of part O-1 of chapter 57 of the laws of 2009, the opening paragraph of paragraph 1 of subdivision b as amended by section 1 of part R of chapter 61 of the laws of 2011, subparagraph (ii) of paragraph 1 of subdivision b as amended by section 6 of part K of chapter 57 of the laws of 2010, clause (F) of subparagraph (ii) of paragraph 1 of subdivision b as amended by section 1 of part T of chapter 59 of the laws of 2013, clause (H) of subparagraph (ii) of paragraph 1 of subdivision b as amended by chapter 454 of the laws of 2012, clause (I) of subparagraph (ii) of paragraph 1 of subdivision b as added by section 1 of part O of chapter 61 of the laws of 2011, paragraphs 2 and 3 of subdivision 6 as amended by section 1 of part J of chapter 55 of the laws of 2013, subdivision c as amended by section 2 of part CC of chapter 61 of the laws of 2005, paragraph 1 of subdivision c as amended by section 2 of part R of chapter 61 of the laws of 2011, subdivision d as amended and subdivision e as added by chapter 18 of the laws of 2008, subdivisions f and g as amended by chapter 140 of the laws of 2008, paragraph 1 of subdivision f as amended by section 2 of part J of chapter 55 of the laws of 2013, subdivision h as added by section 13 of part A of chapter 60 of the laws of 2012, is amended to read as follows:

Section 1612.

Disposition of revenues. a. The division shall pay into an account, to be known as the lottery prize account, under the joint custody of the comptroller and the commissioner, within one week after collection of sales receipts from a lottery game, such moneys necessary for the payment of lottery prizes but not to exceed the following percentages, plus interest earned thereon:

(1) sixty percent of the total amount for which tickets have been sold for a lawful lottery game introduced on or after the effective date of this paragraph, subject to the following provisions:

(A) such game shall be available only on premises occupied by licensed lottery sales agents, subject to the following provisions:

(i) if the licensee does not hold a license issued pursuant to the alcoholic beverage control law to sell alcoholic beverages for consumption on the premises, then the premises must have a minimum square footage greater than two thousand five hundred square feet;

(ii) notwithstanding the foregoing provisions, television equipment that automatically displays the results of such drawings may be installed and used without regard to the square footage if such premises are used as:

(l) a commercial bowling establishment, or

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- (II) a facility authorized under the racing, pari-mutuel wagering and breeding law to accept pari-mutuel wagers;
- (B) the rules for the operation of such game shall be as prescribed by regulations promulgated and adopted by the division, provided however, that such rules shall provide that no person under the age of twenty-one may participate in such games on the premises of a licensee who holds a license issued pursuant to the alcoholic beverage control law to sell alcoholic beverages for consumption on the premises; and, provided, further, that such regulations may be revised on an emergency basis not later than ninety days after the enactment of this paragraph in order to conform such regulations to the requirements of this paragraph; or
- (2) sixty-five percent of the total amount for which tickets have been sold for the "Instant Cash" game in which the participant purchases a preprinted ticket on which dollar amounts or symbols are concealed on the face or the back of such ticket, provided however up to five new games may be offered during the fiscal year, seventy-five percent of the total amount for which tickets have been sold for such five games in which the participant purchases a preprinted ticket on which dollar amounts or symbols are concealed on the face or the back of such ticket; or
- (3) fifty-five percent of the total amount for which tickets have been sold for any joint, multi-jurisdiction, and out-of-state lottery except as otherwise provided in paragraph one of subdivision b of this section for any joint, multi-jurisdiction, out-of-state video lottery gaming; or
- (4) **fifty percent of the total amount for which tickets have been sold for games known as:**
 - (A) the "Daily Numbers Game" or "Win 4", discrete games in which the participants select no more than three or four of their own numbers to match with three or four numbers drawn by the division for purposes of determining winners of such games, (B) "Pick 10", offered no more than once daily, in which participants select from a specified field of numbers a subset of ten numbers to match against a subset of numbers to be drawn by the division from such field of numbers for the purpose of determining winners of such game, (C) "Take 5", offered no more than once daily, in which participants select from a specified field of numbers a subset of five numbers to match against a subset of five numbers to be drawn by the division from such field of numbers for purposes of determining winners of such game; or
- (5) **forty percent of the total amount for which tickets have been sold for:**
 - (A) "Lotto", offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers, as also prescribed by such rules and regulations and (B) with the exception of the game described in paragraph one of this subdivision, such other state-operated lottery games which the division may introduce, offered no more than once daily, commencing on or after forty-five days following the official publication of the rules and regulations for such game.

The moneys in the lottery prize account shall be paid out of such account on the audit and warrant of the comptroller on vouchers certified or approved by the director or his or her duly designated official.

Prize money derived from ticket sales receipts of a particular game and deposited in the lottery prize account in accordance with the percentages set forth above may be used to pay prizes in such game. Balances in the lottery prize account identified by individual games may be carried over from one fiscal year to the next to ensure proper payout of games.

b.

1. Notwithstanding section one hundred twenty-one of the state finance law, on or before the twentieth day of each month, the division shall pay into the state treasury, to the credit of the state lottery fund created by section ninety-two-c of the state finance law, not less than forty-five percent of the total amount for which tickets have been sold for games defined in paragraph four of subdivision a of this section during the preceding

month, not less than thirty-five percent of the total amount for which tickets have been sold for games defined in paragraph three of subdivision a of this section during the preceding month, not less than twenty percent of the total amount for which tickets have been sold for games defined in paragraph two of subdivision a of this section during the preceding month, provided however that for games with a prize payout of seventy-five percent of the total amount for which tickets have been sold, the division shall pay not less than ten percent of sales into the state treasury and not less than twenty-five percent of the total amount for which tickets have been sold for games defined in paragraph one of subdivision a of this section during the preceding month; and the balance of the total revenue after payout for prizes for games known as "video lottery gaming," including any joint, multi-jurisdiction, and out-of-state video lottery gaming, (i) less ten percent of the total revenue wagered after payout for prizes to be retained by the division for operation, administration, and procurement purposes; (ii) less a vendor's fee the amount of which is to be paid for serving as a lottery agent to the track operator of a vendor track or the operator of any other video lottery gaming facility authorized pursuant to section one thousand six hundred seventeen a of this article :

(A) having fewer than one thousand one hundred video gaming machines, at a rate of thirty-five percent for the first fifty million dollars annually, twenty-eight percent for the next hundred million dollars annually, and twenty-five percent thereafter of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(B) having one thousand one hundred or more video gaming machines, at a rate of thirty-one percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, except for such facility located in the county of Westchester, in which case the rate shall be thirty percent until March thirty-first, two thousand twelve.

Notwithstanding the foregoing, not later than April first, two thousand twelve, the vendor fee shall become thirty-one percent and remain at that level thereafter; and except for Aqueduct racetrack, in which case the vendor fee shall be thirty-eight percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(C) notwithstanding clauses (A) and (B) of this subparagraph, when the vendor track is located in an area with a population of less than one million within the forty mile radius around such track, at a rate of thirty-nine percent for the first fifty million dollars annually, twenty-eight percent for the next hundred million dollars annually, and twenty-five percent thereafter of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(D) notwithstanding clauses (A), (B) and (C) of this subparagraph, when the vendor track is located within fifteen miles of a Native American class III gaming facility at a rate of forty-one percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(E) notwithstanding clauses (A), (B), (C) and (D) of this subparagraph, when a Native American class III gaming facility is established, after the effective date of this subparagraph, within fifteen miles of the vendor track, at a rate of forty-one percent of the total revenue wagered after payout for prizes pursuant to this chapter;

(E-1) for purposes of this subdivision, the term "class III gaming" shall have the meaning defined in 25 U.S.C. Section 2703(8).

(F) notwithstanding clauses (A), (B), (C), (D) and (E) of this subparagraph, when a vendor track, is located in Sullivan county and within sixty miles from any gaming facility in a contiguous state such vendor fee shall, for a period of six years commencing April first, two thousand eight, be at a rate of forty-one percent of the total revenue wagered at the vendor track after payout for

prizes pursuant to this chapter, after which time such rate shall be as for all tracks in clause (C) of this subparagraph.

- (G) notwithstanding clauses (A), (B), (C), (D), (E) and (F) of this subparagraph, when no more than one vendor track located in the town of Thompson in Sullivan county at the site of the former Concord Resort at which a qualified capital investment has been made and no fewer than one thousand full-time, permanent employees have been newly hired, is located in Sullivan county and is within sixty miles from any gaming facility in a contiguous state, then for a period of forty years the vendor's fee shall equal the total revenue wagered at the vendor track after payout of prizes pursuant to this subdivision reduced by the greater of (i) twenty-five percent of total revenue after payout for prizes for "video lottery games" or (ii) for the first eight years of operation thirty-eight million dollars, and beginning in the ninth year of operation such amount shall increase annually by the lesser of the increase in the consumer price index or two percent, plus seven percent of total revenue after payout of prizes. In addition, in the event the vendor fee is calculated pursuant to subclause (i) of this clause, the vendor's fee shall be further reduced by 11.11 percent of the amount by which total revenue after payout for prizes exceeds two hundred fifteen million dollars, but in no event shall such reduction exceed five million dollars. Provided, further, no vendor is eligible for the vendor's fee described in this clause who operates or invests in or owns, in whole or in part, another vendor license or is licensed as a vendor track that currently receives a vendor fee for the operation of video lottery gaming pursuant to this article.

Provided, however, that in the case of ~~no more than one vendor track~~ a resort facility located in the town of Thompson in Sullivan county ~~at the site of the former Concord Resort~~ with a qualified capital investment, and one thousand full-time, permanent employees if at any time after three years of opening operations of the licensed video gaming facility ~~or licensed vendor track~~, the ~~vendor track~~ resort facility experiences an employment shortfall, then the recapture amount shall apply, for only such period as the shortfall exists.

For the purposes of this section "qualified capital investment" shall mean an investment of a minimum of six hundred million dollars as reflected by audited financial statements of which not less than three hundred million dollars shall be comprised of equity and/or mezzanine financing as an initial investment in a county where twelve percent of the population is below the federal poverty level as measured by the most recent Bureau of Census Statistics prior to the qualified capital investment commencing that results in the construction, development or improvement of at least one eighteen hole golf course, and the construction and issuance of certificates of occupancy for hotels, lodging, spas, dining, retail and entertainment venues, parking garages and other capital improvements at or adjacent to the licensed video gaming facility or licensed vendor track which promote or encourage increased attendance at such facilities.

For the purposes of this section, "full-time, permanent employee" shall mean an employee who has worked at the video gaming facility ~~or vendor track~~ or related and adjacent facilities for a minimum of thirty-five hours per week for not less than four consecutive weeks and who is entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties; or two part-time employees who have worked at the video gaming facility, vendor track or related and adjacent facilities for a combined minimum of thirty-five hours per week for not less than four consecutive weeks and who are entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties.

For the purpose of this section "employment goal" shall mean one thousand five hundred full-time permanent employees after three years of opening operations of the licensed video gaming facility ~~or licensed vendor track~~.

For the purpose of this section "employment shortfall" shall mean a level of employment that falls below the employment goal, as certified annually by vendor's certified accountants and the chairman of the empire state development corporation.

For the purposes of this section "recapture amount" shall mean the difference between the amount of the vendor's fee paid to a vendor ~~track~~ with a qualified capital investment, and the vendor fee otherwise payable to a vendor ~~track~~ pursuant to clause (F) of this subparagraph, that is reimbursable by the vendor track to the division for payment into the state treasury, to the credit of the state lottery fund created by section ninety-two-c of the state finance law, due to an employment shortfall pursuant to the following schedule only for the period of the employment shortfall:

- (i) one hundred percent of the recapture amount if the employment shortfall is greater than sixty-six and two-thirds percent of the employment goal;
- (ii) seventy-five percent of the recapture amount if the employment shortfall is greater than thirty-three and one-third percent of the employment goal;
- (iii) forty-nine and one-half percent of the recapture amount if the employment shortfall is greater than thirty percent of the employment goal;
- (iv) twenty-two percent of the recapture amount if the employment shortfall is greater than twenty percent of the employment goal;
- (v) eleven percent of the recapture amount if the employment shortfall is greater than ten percent of the employment goal.

(G-1) Notwithstanding clause (A) and (B) of this subparagraph, when a video lottery gaming facility is located in either the county of Nassau or Suffolk and is operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law at a rate of thirty-five percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(H) Notwithstanding any provision to the contrary, when a vendor track is located within regions one, two, or five of development zone two as defined by section thirteen hundred ten of the racing, pari-mutuel wagering and breeding law, such vendor track shall receive an additional commission at a rate equal to the percentage of revenue wagered at the vendor track after payout for prizes pursuant to this chapter less than ten percent retained by the commission for operation, administration, and procurement purposes and payment of the vendor's fee, marketing allowance, and capital award paid pursuant to this chapter and the effective tax rate paid on all gross gaming revenue paid by a gaming facility within the same region pursuant to section thirteen hundred fifty-one of the racing, pari-mutuel wagering and breeding law. The additional commission shall be paid to the vendor track within sixty days after the conclusion of the state fiscal year based on the calculated percentage during the previous fiscal year.

(H) (I) notwithstanding clauses (A), (B), (C), (D), (E), (F), and ~~(G)~~ (G-1) of this subparagraph, the track operator of a vendor track shall be eligible for a vendor's capital award of up to four percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, which shall be used exclusively for capital project investments to improve the facilities of the vendor track which promote or encourage increased attendance at the video lottery gaming facility including, but not limited to hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance facility amenities; provided that such capital investments shall be approved by the division, in consultation with the state racing and wagering board, and that such vendor track demonstrates that such capital expenditures will increase patronage at such vendor track's facilities and increase the amount of revenue generated to support state education programs. The annual amount of such vendor's capital awards that a vendor track shall be eligible to receive shall be limited to two million five hundred thousand dollars, except for Aqueduct racetrack, for which there shall be no vendor's capital awards. Except for tracks having less than one thousand one hundred video gaming machines, each track operator shall be required to co-invest an amount of capital expenditure equal to its cumulative vendor's

capital award. For all tracks, except for Aqueduct racetrack, the amount of any vendor's capital award that is not used during any one year period may be carried over into subsequent years ending before April first, two thousand fourteen. Any amount attributable to a capital expenditure approved prior to April first, two thousand fourteen and completed before April first, two thousand sixteen shall be eligible to receive the vendor's capital award. In the event that a vendor track's capital expenditures, approved by the division prior to April first, two thousand fourteen and completed prior to April first, two thousand sixteen, exceed the vendor track's cumulative capital award during the five year period ending April first, two thousand fourteen, the vendor shall continue to receive the capital award after April first, two thousand fourteen until such approved capital expenditures are paid to the vendor track subject to any required co-investment. In no event shall any vendor track that receives a vendor fee pursuant to clause (F) or (G) of this subparagraph be eligible for a vendor's capital award under this section. Any operator of a vendor track which has received a vendor's capital award, choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement in accordance with generally accepted accounting principles, shall reimburse the state in amounts equal to the total of any such awards. Any capital award not approved for a capital expenditure at a video lottery gaming facility by April first, two thousand fourteen shall be deposited into the state lottery fund for education aid; and

(I) (J) Notwithstanding any provision of law to the contrary, free play allowance credits authorized by the division pursuant to subdivision f of section sixteen hundred seventeen-a of this article shall not be included in the calculation of the total amount wagered on video lottery games, the total amount wagered after payout of prizes, the vendor fees payable to the operators of video lottery facilities, vendor's capital awards, fees payable to the division's video lottery gaming equipment contractors, or racing support payments.

(iii) less an additional vendor's marketing allowance at a rate of ten percent for the first one hundred million dollars annually and eight percent thereafter of the total revenue wagered at the vendor track after payout for prizes to be used by the vendor track for the marketing and promotion and associated costs of its video lottery gaming operations and pari-mutuel horse racing operations, as long as any such costs associated with pari-mutuel horse racing operations simultaneously encourage increased attendance at such vendor's video lottery gaming facilities, consistent with the customary manner of marketing comparable operations in the industry and subject to the overall supervision of the division; provided, however, that the additional vendor's marketing allowance shall not exceed eight percent in any year for any operator of a racetrack located in the county of Westchester or Queens; provided, however, a vendor track that receives a vendor fee pursuant to clause (G) of subparagraph (ii) of this paragraph shall not receive the additional vendor's marketing allowance

provided, however, a vendor that receives a vendor fee pursuant to clause (G-1) of subparagraph (ii) of this paragraph shall receive an additional marketing allowance at a rate of ten percent of the total revenue wagered at the video lottery gaming facility after payout for prizes. the division shall ensure the maximum lottery support for education while also ensuring the effective implementation of section sixteen hundred seventeen-a of this article through the provision of reasonable reimbursements and compensation to vendor tracks for participation in such program. Within twenty days after any award of lottery prizes, the division shall pay into the state treasury, to the credit of the state lottery fund, the balance of all moneys received from the sale of all tickets for the lottery in which such prizes were awarded remaining after provision for the payment of prizes as herein provided. Any revenues derived from the sale of advertising on lottery tickets shall be deposited in the state lottery fund.

2. As consideration for the operation of a video lottery gaming facility, the division, shall cause the investment in the racing industry of a portion of the vendor fee received

pursuant to paragraph one of this subdivision in the manner set forth in this subdivision. With the exception of Aqueduct racetrack or a facility in the county of Nassau or Suffolk operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law or a facility in the county of Nassau or Suffolk operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law, each such track shall dedicate a portion of its vendor fees, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G) of subparagraph (ii) of paragraph one of this subdivision, solely for the purpose of enhancing purses at such track, in an amount equal to eight and three-quarters percent of the total revenue wagered at the vendor track after pay out for prizes. One percent of such purse enhancement amount shall be paid to the gaming commission to be used exclusively to promote and ensure equine health and safety in New York. Any portion of such funding to the gaming commission unused during a fiscal year shall be returned to the video lottery gaming operators on a pro rata basis in accordance with the amounts originally contributed by each operator and shall be used for the purpose of enhancing purses at such track. In addition, with the exception of Aqueduct racetrack, one and one-quarter percent of total revenue wagered at the vendor track after pay out for prizes, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G) of subparagraph (ii) of paragraph one of this subdivision, shall be distributed to the appropriate breeding fund for the manner of racing conducted by such track.

Provided, further, that nothing in this paragraph shall prevent each track from entering into an agreement, not to exceed five years, with the organization authorized to represent its horsemen to increase or decrease the portion of its vendor fee dedicated to enhancing purses at such track during the years of participation by such track, or to race fewer dates than required herein.

3. Nothing in paragraph two of this subdivision shall affect any agreement in effect on or before the effective date of this paragraph, except that the obligation to pay funds to the gaming commission to promote and ensure equine health and safety shall supersede any provision to the contrary in any such agreement.

c.

1. The specifications for video lottery gaming, including any joint, multi-jurisdiction, and out-of-state video lottery gaming, shall be designed in such a manner as to pay prizes that average no less than ninety percent of sales.
2. Of the ten percent retained by the division for administrative purposes, any amounts beyond that which are necessary for the operation and administration of this pilot program shall be deposited in the lottery education account.

d. Notwithstanding any law, rule or regulation to the contrary, any successor to the New York Racing Association, Inc. with respect to the operation and maintenance of video lottery gaming at Aqueduct racetrack shall be deemed the successor to the New York Racing Association, Inc. for purposes of being subject to existing contracts and loan agreements, if any, entered into by the New York Racing Association, Inc. directly related to the construction, operation, management and distribution of revenues of the video lottery gaming facility at Aqueduct racetrack.

e. The video lottery gaming operator selected to operate a video lottery terminal facility at Aqueduct will be subject to a memorandum of understanding between the governor, temporary president of the senate and the speaker of the assembly. Notwithstanding subparagraph (i) of paragraph a of subdivision eight of section two hundred twelve of the racing, pari-mutuel wagering and breeding law, the state, pursuant to an agreement with the video lottery gaming operator to operate

a video lottery terminal facility at Aqueduct, may authorize, as part of such agreement or in conjunction with such agreement at the time it is executed, additional development at the Aqueduct racing facility. The selection will be made in consultation with the franchised corporation, but is not subject to such corporation's approval. The franchised corporation shall not be eligible to compete to operate or to operate a video lottery terminal facility at Aqueduct. The state will use its best efforts to ensure that the video lottery terminal facility at Aqueduct is opened as soon as is practicable and will, if practicable, pursue the construction of a temporary video lottery terminal facility at Aqueduct subject to staying within an agreed budget for such video lottery terminal facility and subject to such temporary facility not having an adverse impact on opening of the permanent facility at Aqueduct. To facilitate the opening of the video lottery gaming facility at Aqueduct as soon as is practicable, the division of the lottery may extend the term of any existing contract related to the video lottery system.

f. As consideration for the operation of the video lottery gaming facility at Aqueduct racetrack, the division shall cause the investment in the racing industry of the following percentages of the vendor fee to be deposited or paid, as follows:

1. Six and one-half percent of the total wagered after payout of prizes for the first year of operation of video lottery gaming at Aqueduct racetrack, seven percent of the total wagered after payout of prizes for the second year of operation, and seven and one-half percent of the total wagered after payout of prizes for the third year of operation and thereafter, for the purpose of enhancing purses at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course. One percent of such purse enhancement amount shall be paid to the gaming commission to be used exclusively to promote and ensure equine health and safety in New York. Any portion of such funding to the gaming commission unused during a fiscal year shall be returned on a pro rata basis in accordance with the amounts originally contributed and shall be used for the purpose of enhancing purses at such tracks.
2. One percent of the total wagered after payout of prizes for the first year of operation of video lottery gaming at Aqueduct racetrack, one and one-quarter percent of the total wagered after payout of prizes for the second year of operation, and one and one-half percent of the total wagered after payout of prizes for the third year of operation and thereafter, for an appropriate breeding fund for the manner of racing conducted at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.
3. Four percent of the total revenue wagered after payout of prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.
4. Three percent of the total revenue wagered after payout for prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for general thoroughbred racing operations at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.
5. Paragraphs one, two, three and four of this subdivision shall be known collectively as the "racing support payments".

g. In the event the state elects to construct a video lottery terminal facility at the Aqueduct racetrack, all video lottery terminal revenues payable to the video lottery

gaming operator at the Aqueduct racetrack remaining after payment of the racing support payments shall first be used to repay the state's advances for (i) confirmation of the chapter eleven plan of reorganization and cash advances for the franchised corporation's operations following confirmation of the chapter eleven plan of reorganization and (ii) the amount expended by the state to construct such video lottery terminal facility at Aqueduct racetrack pursuant to an agreement with the state. Subparagraphs (i) and (ii) of this paragraph shall be defined as the state advance amount and the amounts payable to the division of the lottery.

- h. As consideration for the operation of a video lottery gaming resort facility located in Sullivan county, the division shall cause the investment in the racing industry at the following amount from the vendor fee to be paid as follows:

As amount to the horsemen for purses at a licensed racetrack in Sullivan county and to the agriculture and New York state horse breeding development fund to maintain racing support payments at the same dollar levels realized in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of labor bureau of labor statistics. In no circumstance shall net proceeds of the lottery, including the proceeds from video lottery gaming, be used for the payment of non-lottery expenses of the gaming commission, administrative or otherwise.

(f-1) As consideration for operation of video lottery gaming facility located in the county of Nassau or Suffolk and operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and breeding law, the division shall cause the in the racing industry of the following percentages of the vendor fee to be deposited or paid as follows:

- (1)** Two and three tenths percent of the total wagered after payout of prizes for the purpose of enhancing purses at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain purse support from video lottery gaming at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.
- (2)** five tenths percent of the total wagered after payout of prizes for the appropriate breeding fund for the manner of racing at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.
- (3)** one and three tenths percent of the total revenue wagered after payout of prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments for capital

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expenditures from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.

- (4) Nine tenths percent of the total revenue wagered after payout for prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for general thoroughbred racing operations at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments for general thoroughbred racing operations from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.

Section 41.

Subdivision a of *section 1617-a of the tax law* is amended by adding a new paragraph 5 to read as follows:

- (5) at a facility established pursuant to a competitive process to be determined by the state gaming commission, established within region three of zone one as established by section one thousand three hundred ten of the racing, pari-mutuel wagering and breeding law, limited to Nassau county. Such facility may only be authorized by the state gaming commission following local governmental consultation and consideration of market factors such as potential revenue impact, job *development* and capital investment. The facility authorized pursuant to this paragraph shall be deemed a vendor for all purposes under this article, and need not be operated by licensed thoroughbred or harness racing associations or corporations. The facility authorized pursuant to this paragraph shall be deemed vendors for all purposes under this article.

Section 42.

Section 1612 of the tax law, as amended by chapter 2 of the laws of 1995, paragraph 1 of subdivision a as amended by chapter 147 of the laws of 2010, subparagraph (A) of paragraph 1 of subdivision a as amended by section 1 of part S of chapter 59 of the laws of 2012, paragraph 2 of subdivision a as amended by section 1 of part P of chapter 61 of the laws of 2011, paragraphs 3, 4 and 5 and the second undesignated and closing paragraph of subdivision a as amended by section 1 of part Q of chapter 61 of the laws of 2011, subdivision 6 as amended by section 1 of part O-1 of chapter 57 of the laws of 2009, the opening paragraph of paragraph 1 of subdivision b as amended by section 1 of part R of chapter 61 of the laws of 2011, subparagraph (ii) of paragraph 1 of subdivision b as amended by section 6 of part K of chapter 57 of the laws of 2010, clause (F) of subparagraph (ii) of paragraph 1 of subdivision b as amended by section 1 of part T of chapter 59 of the laws of 2013, clause (H) of subparagraph (ii) of paragraph 1 of subdivision b as amended by chapter 454 of the laws of 2012, clause (I) of subparagraph (ii) of paragraph 1 of subdivision b as added by section 1 of part O of chapter 61 of the laws of 2011, paragraphs 2 and 3 of subdivision 6 as amended by section 1 of part J of chapter 55 of the laws of 2013, subdivision c as amended by section 2 of part CC of chapter 61 of the laws of 2005, paragraph 1 of subdivision c as amended by section 2 of part R of chapter 61 of the laws of 2011, subdivision d as amended and subdivision e as added by chapter 18 of the laws of 2008, subdivisions f and g as amended by chapter 140 of the laws of 2008, paragraph 1 of subdivision f as amended by section 2 of part J of chapter 55 of the laws if 2013, subdivision h as added by section 13 of part A of chapter 60 of the laws of 2012, is amended to read as follows:

Section 1612.

Disposition of revenues. a. The division shall pay into an account, to be known as the lottery prize account, under the joint custody of the comptroller and the commissioner, within one week after collection of sales receipts from a lottery game, such moneys necessary for the payment of lottery prizes but not to exceed the following percentages, plus interest earned thereon:

- (1) sixty percent of the total amount for which tickets have been sold for a lawful lottery game introduced on or after the effective date of this paragraph, subject to the following provisions:
 - (A) such game shall be available only on premises occupied by licensed lottery sales agents, subject to the following provisions:
 - (i) if the licensee does not hold a license issued pursuant to the alcoholic beverage control law to sell alcoholic beverages for consumption on the premises, then the premises must have a minimum square footage greater than two thousand five hundred square feet;
 - (ii) notwithstanding the foregoing provisions, television equipment that automatically displays the results of such drawings may be installed and used without regard to the square footage if such premises are used as:
 - (I) a commercial bowling establishment, or
 - (II) a facility authorized under the racing, pari-mutuel wagering and breeding law to accept pari-mutuel wagers;
 - (B) the rules for the operation of such game shall be as prescribed by regulations promulgated and adopted by the division, provided however, that such rules shall provide that no person under the age of twenty-one may participate in such games on the premises of a licensee who holds a license issued pursuant to the alcoholic beverage control law to sell alcoholic beverages for consumption on the premises; and, provided, further, that such regulations may be revised on an emergency basis not later than ninety days after the enactment of this paragraph in order to conform such regulations to the requirements of this paragraph; or
- (2) sixty-five percent of the total amount for which tickets have been sold for the "Instant Cash" game in which the participant purchases a preprinted ticket on which dollar amounts or symbols are concealed on the face or the back of such ticket, provided however up to five new games may be offered during the fiscal year, seventy-five percent of the total amount for which tickets have been sold for such five games in which the participant purchases a preprinted ticket on which dollar amounts or symbols are concealed on the face or the back of such ticket; or
- (3) fifty-five percent of the total amount for which tickets have been sold for any joint, multi-jurisdiction, and out-of-state lottery except as otherwise provided in paragraph one of subdivision b of this section for any joint, multi-jurisdiction, out-of-state video lottery gaming; or
- (4) **fifty percent of the total amount for which tickets have been sold for games known as:**
 - (A) the "Daily Numbers Game" or "Win 4", discrete games in which the participants select no more than three or four of their own numbers to match with three or four numbers drawn by the division for purposes of determining winners of such games,
 - (B) "Pick 10", offered no more than once daily, in which participants select from a specified field of numbers a subset of ten numbers to match against a subset of numbers to be drawn by the division from such field of numbers for the purpose of determining winners of such game,
 - (C) "Take 5", offered no more than once daily, in which participants select from a specified field of numbers a subset of five numbers to match against a subset of five numbers to be drawn by the division from such field of numbers for purposes of determining winners of such game; or
- (5) **forty percent of the total amount for which tickets have been sold for:**
 - (A) "Lotto", offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers,

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as also prescribed by such rules and regulations and (B) with the exception of the game described in paragraph one of this subdivision, such other state-operated lottery games which the division may introduce, offered no more than once daily, commencing on or after forty-five days following the official publication of the rules and regulations for such game.

The moneys in the lottery prize account shall be paid out of such account on the audit and warrant of the comptroller on vouchers certified or approved by the director or his or her duly designated official.

Prize money derived from ticket sales receipts of a particular game and deposited in the lottery prize account in accordance with the percentages set forth above may be used to pay prizes in such game. Balances in the lottery prize account identified by individual games may be carried over from one fiscal year to the next to ensure proper payout of games.

b.

1. Notwithstanding section one hundred twenty-one of the state finance law, on or before the twentieth day of each month, the division shall pay into the state treasury, to the credit of the state lottery fund created by section ninety-two-c of the state finance law, not less than forty-five percent of the total amount for which tickets have been sold for games defined in paragraph four of subdivision a of this section during the preceding month, not less than thirty-five percent of the total amount for which tickets have been sold for games defined in paragraph three of subdivision a of this section during the preceding month, not less than twenty percent of the total amount for which tickets have been sold for games defined in paragraph two of subdivision a of this section during the preceding month, provided however that for games with a prize payout of seventy-five percent of the total amount for which tickets have been sold, the division shall pay not less than ten percent of sales into the state treasury and not less than twenty-five percent of the total amount for which tickets have been sold for games defined in paragraph one of subdivision a of this section during the preceding month; and the balance of the total revenue after payout for prizes for games known as "video lottery gaming," including any joint, multi-jurisdiction, and out-of-state video lottery gaming, (i) less ten percent of the total revenue wagered after payout for prizes to be retained by the division for operation, administration, and procurement purposes; (ii) less a vendor's fee the amount of which is to be paid for serving as a lottery agent to the track operator of a vendor track:

(A) having fewer than one thousand one hundred video gaming machines, at a rate of thirty-five percent for the first fifty million dollars annually, twenty-eight percent for the next hundred million dollars annually, and twenty-five percent thereafter of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(B) having one thousand one hundred or more video gaming machines, at a rate of thirty-one percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, except for such facility located in the county of Westchester, in which case the rate shall be thirty percent until March thirty-first, two thousand twelve.

Notwithstanding the foregoing, not later than April first, two thousand twelve, the vendor fee shall become thirty-one percent and remain at that level thereafter; and except for Aqueduct racetrack, in which case the vendor fee shall be thirty-eight percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(C) notwithstanding clauses (A) and (B) of this subparagraph, when the vendor track is located in an area with a population of less than one million within the forty mile radius around such track, at a rate of thirty-nine percent for the first fifty million dollars annually, twenty-eight percent for the next hundred million dollars annually, and twenty-five percent thereafter of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

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- (D) notwithstanding clauses (A), (B) and (C) of this subparagraph, when the vendor track is located within fifteen miles of a Native American class III gaming facility at a rate of forty-one percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;
- (E) notwithstanding clauses (A), (B), (C) and (D) of this subparagraph, when a Native American class III gaming facility is established, after the effective date of this subparagraph, within fifteen miles of the vendor track, at a rate of forty-one percent of the total revenue wagered after payout for prizes pursuant to this chapter;
- (E-1) for purposes of this subdivision, the term "class III gaming" shall have the meaning defined in 25 U.S.C. Section 2703(8).
- (F) notwithstanding clauses (A), (B), (C), (D) and (E) of this subparagraph, when a vendor track, is located in Sullivan county and within sixty miles from any gaming facility in a contiguous state such vendor fee shall, for a period of six years commencing April first, two thousand eight, be at a rate of forty-one percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, after which time such rate shall be as for all tracks in clause (C) of this subparagraph.
- (G) notwithstanding clauses (A), (B), (C), (D), (E) and (F) of this subparagraph, when ~~no more than one vendor track~~ a resort facility to be operated by other than a presently licensed video lottery gaming operator or any entity affiliated therewith selected by the division following a competitive process located in ~~the town of Thompson in~~ Sullivan county ~~at the site of the former Concord Resort~~ at which a qualified capital investment has been made and no fewer than one thousand full-time, permanent employees have been newly hired, is located in Sullivan county and is within sixty miles from any gaming facility in a contiguous state, then for a period of forty years the vendor's fee shall equal the total revenue wagered at the vendor track after payout of prizes pursuant to this subdivision reduced by the greater of (i) twenty-five percent of total revenue after payout for prizes for "video lottery games" or (ii) for the first eight years of operation thirty-eight million dollars, and beginning in the ninth year of operation such amount shall increase annually by the lesser of the increase in the consumer price index or two percent, plus seven percent of total revenue after payout of prizes. In addition, in the event the vendor fee is calculated pursuant to subclause (i) of this clause, the vendor's fee shall be further reduced by 11.11 percent of the amount by which total revenue after payout for prizes exceeds two hundred fifteen million dollars, but in no event shall such reduction exceed five million dollars.

Provided, however, that in the case of ~~no more than one vendor track~~ a resort facility located in ~~the town of Thompson in~~ Sullivan county ~~at the site of the former Concord Resort~~ with a qualified capital investment, and one thousand full-time, permanent employees if at any time after three years of opening operations of the licensed video gaming facility ~~or licensed vendor track~~, the ~~vendor track~~ resort facility experiences an employment shortfall, then the recapture amount shall apply, for only such period as the shortfall exists.

For the purposes of this section "qualified capital investment" shall mean an investment of a minimum of six hundred million dollars as reflected by audited financial statements of which not less than three hundred million dollars shall be comprised of equity and/or mezzanine financing as an initial investment in a county where twelve percent of the population is below the federal poverty level as measured by the most recent Bureau of Census Statistics prior to the qualified capital investment commencing that results in the construction, development or improvement of at least one eighteen hole golf course, and the construction and issuance of certificates of occupancy for hotels, lodging, spas, dining, retail and entertainment venues, parking garages and other capital improvements at or adjacent to the licensed video gaming facility or licensed vendor track which promote or encourage increased attendance at such facilities.

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For the purposes of this section, "full-time, permanent employee" shall mean an employee who has worked at the video gaming facility ~~—vendor track—~~ or related and adjacent facilities for a minimum of thirty-five hours per week for not less than four consecutive weeks and who is entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties; or two part-time employees who have worked at the video gaming facility, vendor track or related and adjacent facilities for a combined minimum of thirty-five hours per week for not less than four consecutive weeks and who are entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties.

For the purpose of this section "employment goal" shall mean one thousand five hundred full-time permanent employees after three years of opening operations of the licensed video gaming facility ~~or licensed vendor track~~.

For the purpose of this section "employment shortfall" shall mean a level of employment that falls below the employment goal, as certified annually by vendor's certified accountants and the chairman of the empire state development corporation.

For the purposes of this section "recapture amount" shall mean the difference between the amount of the vendor's fee paid to a vendor ~~—track—~~ with a qualified capital investment, and the vendor fee otherwise payable to a vendor ~~—track—~~ pursuant to clause (F) of this subparagraph, that is reimbursable by the vendor track to the division for payment into the state treasury, to the credit of the state lottery fund created by section ninety-two-c of the state finance law, due to an employment shortfall pursuant to the following schedule only for the period of the employment shortfall:

- (i) one hundred percent of the recapture amount if the employment shortfall is greater than sixty-six and two-thirds percent of the employment goal;
 - (ii) seventy-five percent of the recapture amount if the employment shortfall is greater than thirty-three and one-third percent of the employment goal;
 - (iii) forty-nine and one-half percent of the recapture amount if the employment shortfall is greater than thirty percent of the employment goal;
 - (iv) twenty-two percent of the recapture amount if the employment shortfall is greater than twenty percent of the employment goal;
 - (v) eleven percent of the recapture amount if the employment shortfall is greater than ten percent of the employment goal.
- (G) notwithstanding clauses (A), (B), (C), (D), (E) and (F) of this subparagraph, when no more than one vendor track located in the town of Thompson in Sullivan county at the site of the former Concord Resort at which a qualified capital investment has been made and no fewer than one thousand full-time, permanent employees have been newly hired, is located in Sullivan county and is within sixty miles from any gaming facility in a contiguous state, then for a period of forty years the vendor's fee shall equal the total revenue wagered at the vendor track after payout of prizes pursuant to this subdivision reduced by the greater of (i) twenty-five percent of total revenue after payout for prizes for "video lottery games" or (ii) for the first eight years of operation thirty-eight million dollars, and beginning in the ninth year of operation such amount shall increase annually by the lesser of the increase in the consumer price index or two percent, plus seven percent of total revenue after payout of prizes. In addition, in the event the vendor fee is calculated pursuant to subclause (i) of this clause, the vendor's fee shall be further reduced by 11.11 percent of the amount by which total revenue after payout for prizes exceeds two hundred fifteen million dollars, but in no event shall such reduction exceed five million dollars.

Provided, however, that in the case of no more than one vendor track located in the town of Thompson in Sullivan county at the site of the former Concord Resort with a qualified capital

investment, and one thousand full-time, permanent employees if at any time after three years of opening operations of the licensed video gaming facility or licensed vendor track, the vendor track experiences an employment shortfall, then the recapture amount shall apply, for only such period as the shortfall exists.

For the purposes of this section "qualified capital investment" shall mean an investment of a minimum of six hundred million dollars as reflected by audited financial statements of which not less than three hundred million dollars shall be comprised of equity and/or mezzanine financing as an initial investment in a county where twelve percent of the population is below the federal poverty level as measured by the most recent Bureau of Census Statistics prior to the qualified capital investment commencing that results in the construction, development or improvement of at least one eighteen hole golf course, and the construction and issuance of certificates of occupancy for hotels, lodging, spas, dining, retail and entertainment venues, parking garages and other capital improvements at or adjacent to the licensed video gaming facility or licensed vendor track which promote or encourage increased attendance at such facilities.

For the purposes of this section, "full-time, permanent employee" shall mean an employee who has worked at the video gaming facility, vendor track or related and adjacent facilities for a minimum of thirty-five hours per week for not less than four consecutive weeks and who is entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties; or two part-time employees who have worked at the video gaming facility, vendor track or related and adjacent facilities for a combined minimum of thirty-five hours per week for not less than four consecutive weeks and who are entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties.

For the purpose of this section "employment goal" shall mean one thousand five hundred full-time permanent employees after three years of opening operations of the licensed video gaming facility or licensed vendor track.

For the purpose of this section "employment shortfall" shall mean a level of employment that falls below the employment goal, as certified annually by vendor's certified accountants and the chairman of the empire state development corporation.

For the purposes of this section "recapture amount" shall mean the difference between the amount of the vendor's fee paid to a vendor track with a qualified capital investment, and the vendor fee otherwise payable to a vendor track pursuant to clause (F) of this subparagraph, that is reimbursable by the vendor track to the division for payment into the state treasury, to the credit of the state lottery fund created by section ninety-two-c of the state finance law, due to an employment shortfall pursuant to the following schedule only for the period of the employment shortfall:

- (i) one hundred percent of the recapture amount if the employment shortfall is greater than sixty-six and two-thirds percent of the employment goal;
- (ii) seventy-five percent of the recapture amount if the employment shortfall is greater than thirty-three and one-third percent of the employment goal;
- (iii) forty-nine and one-half percent of the recapture amount if the employment shortfall is greater than thirty percent of the employment goal;
- (iv) twenty-two percent of the recapture amount if the employment shortfall is greater than twenty percent of the employment goal;
- (v) eleven percent of the recapture amount if the employment shortfall is greater than ten percent of the employment goal.

(G-1) Notwithstanding clause (A) and (B) of this subparagraph, when a video lottery gaming facility is located in either the county of Nassau or Suffolk and is operated by a corporation established pursuant to section five hundred two of the racing, pari-mutuel wagering and

breeding law at a rate of thirty-five percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(G-2) Notwithstanding clause (A) and (B) of this subparagraph, when a video lottery gaming facility is located in the county of Nassau established pursuant to a competitive process pursuant to paragraph (5) of section six thousand seventeen-a of this article at a rate of thirty-five percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter;

(H) notwithstanding clauses (A), (B), (C), (D), (E), (F) and (G) of this subparagraph, the track operator of a vendor track shall be eligible for a vendor's capital award of up to four percent of the total revenue wagered at the vendor track after payout for prizes pursuant to this chapter, which shall be used exclusively for capital project investments to improve the facilities of the vendor track which promote or encourage increased attendance at the video lottery gaming facility including, but not limited to hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance facility amenities; provided that such capital investments shall be approved by the division, in consultation with the state racing and wagering board, and that such vendor track demonstrates that such capital expenditures will increase patronage at such vendor track's facilities and increase the amount of revenue generated to support state education programs. The annual amount of such vendor's capital awards that a vendor track shall be eligible to receive shall be limited to two million five hundred thousand dollars, except for Aqueduct racetrack, for which there shall be no vendor's capital awards. Except for tracks having less than one thousand one hundred video gaming machines, each track operator shall be required to co-invest an amount of capital expenditure equal to its cumulative vendor's capital award. For all tracks, except for Aqueduct racetrack, the amount of any vendor's capital award that is not used during any one year period may be carried over into subsequent years ending before April first, two thousand fourteen. Any amount attributable to a capital expenditure approved prior to April first, two thousand fourteen and completed before April first, two thousand sixteen shall be eligible to receive the vendor's capital award. In the event that a vendor track's capital expenditures, approved by the division prior to April first, two thousand fourteen and completed prior to April first, two thousand sixteen, exceed the vendor track's cumulative capital award during the five year period ending April first, two thousand fourteen, the vendor shall continue to receive the capital award after April first, two thousand fourteen until such approved capital expenditures are paid to the vendor track subject to any required co-investment. In no event shall any vendor track that receives a vendor fee pursuant to clause (F) or (G) of this subparagraph be eligible for a vendor's capital award under this section. Any operator of a vendor track which has received a vendor's capital award, choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement in accordance with generally accepted accounting principles, shall reimburse the state in amounts equal to the total of any such awards. Any capital award not approved for a capital expenditure at a video lottery gaming facility by April first, two thousand fourteen shall be deposited into the state lottery fund for education aid; and

(I) Notwithstanding any provision of law to the contrary, free play allowance credits authorized by the division pursuant to subdivision f of section sixteen hundred seventeen-a of this article shall not be included in the calculation of the total amount wagered on video lottery games, the total amount wagered after payout of prizes, the vendor fees payable to the operators of video lottery facilities, vendor's capital awards, fees payable to the division's video lottery gaming equipment contractors, or racing support payments.

(iii) less an additional vendor's marketing allowance at a rate of ten percent for the first one hundred million dollars annually and eight percent thereafter of the total revenue wagered at the vendor track after payout for prizes to be used by the vendor track for the marketing and promotion and associated costs of its video lottery gaming operations and pari-mutuel

horse racing operations, as long as any such costs associated with pari-mutuel horse racing operations simultaneously encourage increased attendance at such vendor's video lottery gaming facilities, consistent with the customary manner of marketing comparable operations in the industry and subject to the overall supervision of the division; provided, however, that the additional vendor's marketing allowance shall not exceed eight percent in any year for any operator of a racetrack located in the county of Westchester or Queens; provided, however, a vendor track that receives a vendor fee pursuant to clause (G) of subparagraph (ii) of this paragraph shall not receive the additional vendor's marketing allowance. In establishing the vendor fee, the division shall ensure the maximum lottery support for education while also ensuring the effective implementation of section sixteen hundred seventeen-a of this article through the provision of reasonable reimbursements and compensation to vendor tracks for participation in such program. Within twenty days after any award of lottery prizes, the division shall pay into the state treasury, to the credit of the state lottery fund, the balance of all moneys received from the sale of all tickets for the lottery in which such prizes were awarded remaining after provision for the payment of prizes as herein provided. Any revenues derived from the sale of advertising on lottery tickets shall be deposited in the state lottery fund.

2. As consideration for the operation of a video lottery gaming facility, the division, shall cause the investment in the racing industry of a portion of the vendor fee received pursuant to paragraph one of this subdivision in the manner set forth in this subdivision. With the exception of Aqueduct racetrack, each such track shall dedicate a portion of its vendor fees, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G) of subparagraph (ii) of paragraph one of this subdivision, solely for the purpose of enhancing purses at such track, in an amount equal to eight and three-quarters percent of the total revenue wagered at the vendor track after pay out for prizes. One percent of such purse enhancement amount shall be paid to the gaming commission to be used exclusively to promote and ensure equine health and safety in New York. Any portion of such funding to the gaming commission unused during a fiscal year shall be returned to the video lottery gaming operators on a pro rata basis in accordance with the amounts originally contributed by each operator and shall be used for the purpose of enhancing purses at such track. In addition, with the exception of Aqueduct racetrack, one and one-quarter percent of total revenue wagered at the vendor track after pay out for prizes, received pursuant to clause (A), (B), (C), (D), (E), (F), or (G) of subparagraph (ii) of paragraph one of this subdivision, shall be distributed to the appropriate breeding fund for the manner of racing conducted by such track.

Provided, further, that nothing in this paragraph shall prevent each track from entering into an agreement, not to exceed five years, with the organization authorized to represent its horsemen to increase or decrease the portion of its vendor fee dedicated to enhancing purses at such track during the years of participation by such track, or to race fewer dates than required herein.

3. Nothing in paragraph two of this subdivision shall affect any agreement in effect on or before the effective date of this paragraph, except that the obligation to pay funds to the gaming commission to promote and ensure equine health and safety shall supersede any provision to the contrary in any such agreement.

c.

1. The specifications for video lottery gaming, including any joint, multi-jurisdiction, and out-of-state video lottery gaming, shall be designed in such a manner as to pay prizes that average no less than ninety percent of sales.

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2. Of the ten percent retained by the division for administrative purposes, any amounts beyond that which are necessary for the operation and administration of this pilot program shall be deposited in the lottery education account.
- d. Notwithstanding any law, rule or regulation to the contrary, any successor to the New York Racing Association, Inc. with respect to the operation and maintenance of video lottery gaming at Aqueduct racetrack shall be deemed the successor to the New York Racing Association, Inc. for purposes of being subject to existing contracts and loan agreements, if any, entered into by the New York Racing Association, Inc. directly related to the construction, operation, management and distribution of revenues of the video lottery gaming facility at Aqueduct racetrack.
- e. The video lottery gaming operator selected to operate a video lottery terminal facility at Aqueduct will be subject to a memorandum of understanding between the governor, temporary president of the senate and the speaker of the assembly. Notwithstanding subparagraph (i) of paragraph a of subdivision eight of section two hundred twelve of the racing, pari-mutuel wagering and breeding law, the state, pursuant to an agreement with the video lottery gaming operator to operate a video lottery terminal facility at Aqueduct, may authorize, as part of such agreement or in conjunction with such agreement at the time it is executed, additional development at the Aqueduct racing facility. The selection will be made in consultation with the franchised corporation, but is not subject to such corporation's approval. The franchised corporation shall not be eligible to compete to operate or to operate a video lottery terminal facility at Aqueduct. The state will use its best efforts to ensure that the video lottery terminal facility at Aqueduct is opened as soon as is practicable and will, if practicable, pursue the construction of a temporary video lottery terminal facility at Aqueduct subject to staying within an agreed budget for such video lottery terminal facility and subject to such temporary facility not having an adverse impact on opening of the permanent facility at Aqueduct. To facilitate the opening of the video lottery gaming facility at Aqueduct as soon as is practicable, the division of the lottery may extend the term of any existing contract related to the video lottery system.
- f. As consideration for the operation of the video lottery gaming facility at Aqueduct racetrack, the division shall cause the investment in the racing industry of the following percentages of the vendor fee to be deposited or paid, as follows:
 1. Six and one-half percent of the total wagered after payout of prizes for the first year of operation of video lottery gaming at Aqueduct racetrack, seven percent of the total wagered after payout of prizes for the second year of operation, and seven and one-half percent of the total wagered after payout of prizes for the third year of operation and thereafter, for the purpose of enhancing purses at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course. One percent of such purse enhancement amount shall be paid to the gaming commission to be used exclusively to promote and ensure equine health and safety in New York. Any portion of such funding to the gaming commission unused during a fiscal year shall be returned on a pro rata basis in accordance with the amounts originally contributed and shall be used for the purpose of enhancing purses at such tracks.
 2. One percent of the total wagered after payout of prizes for the first year of operation of video lottery gaming at Aqueduct racetrack, one and one-quarter percent of the total wagered after payout of prizes for the second year of operation, and one and one-half percent of the total wagered after payout of prizes for the third year of operation and thereafter, for an appropriate

breeding fund for the manner of racing conducted at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.

3. Four percent of the total revenue wagered after payout of prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.
4. Three percent of the total revenue wagered after payout for prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for general thoroughbred racing operations at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course.
5. Paragraphs one, two, three and four of this subdivision shall be known collectively as the "racing support payments".

(f-2) As consideration for operation of a video lottery gaming facility located in the county of Nassau established pursuant to a competitive process pursuant to paragraph (5) of section six thousand seventeen a of this article, the division shall cause the in the racing industry of the following percentages of the vendor fee to be deposited or paid as follows:

- (1) Two and three tenths percent of the total wagered after payout of prizes for the purpose of enhancing purses at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain purse support from video lottery gaming at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.
- (2) five tenths percent of the total wagered after payout of prizes for the appropriate breeding fund for the manner of racing at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.
- (3) one and three tenths percent of the total revenue wagered after payout of prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments for capital expenditures from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.

(4) Nine tenths percent of the total revenue wagered after payout for prizes to be deposited into an account of the franchised corporation established pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law to be used for general thoroughbred racing operations at Aqueduct racetrack, Belmont Park racetrack and Saratoga race course, provided, however, that any amount that is in excess of the amount necessary to maintain payments for general thoroughbred racing operations from video lottery gaming at Aqueduct racetrack at the same level realized in in two thousand thirteen, to be adjusted by the consumer price index for all urban consumers, as published annually by the United States department of bureau of labor statistics, shall be instead be returned to the commission.

- g. In the event the state elects to construct a video lottery terminal facility at the Aqueduct racetrack, all video lottery terminal revenues payable to the video lottery gaming operator at the Aqueduct racetrack remaining after payment of the racing support payments shall first be used to repay the state's advances for (i) confirmation of the chapter eleven plan of reorganization and cash advances for the franchised corporation's operations following confirmation of the chapter eleven plan of reorganization and (ii) the amount expended by the state to construct such video lottery terminal facility at Aqueduct racetrack pursuant to an agreement with the state. Subparagraphs (i) and (ii) of this paragraph shall be defined as the state advance amount and the amounts payable to the division of the lottery.
- h. In no circumstance shall net proceeds of the lottery, including the proceeds from video lottery gaming, be used for the payment of non-lottery expenses of the gaming commission, administrative or otherwise.

Section 43.

Section 1001 of the racing, pari-mutuel wagering and breeding law, as added by chapter 363 of the laws of 1984, subdivisions n, o and p as added by chapter 445 of the laws of 1997, is amended to read as follows:

Section 1001.

Definitions. As used in this article, the following terms shall have the following meanings:

- a. "Simulcast" means the telecast of live audio and visual signals of running, harness or quarter horse races ~~conducted in the state~~ for the purposes of pari-mutuel wagering;
- b. "Track" means the grounds or enclosures within which horse races are conducted by any person, association or corporation lawfully authorized to conduct such races in accordance with the terms and conditions of this chapter or the laws of another jurisdiction ;
- c. "Sending track" means any track from which simulcasts originate;
- d. "Receiving track" means any track where simulcasts originated from another track are displayed;
- e. "Applicant" means any association ~~or~~ , corporation or business entity applying for a simulcast license in accordance with the provisions of this article;
- f. "Operator" means any association ~~or~~ , corporation or business entity operating a simulcast facility in accordance with the provisions of this article;
- g. "Regional track or tracks" means any or all tracks located within a region defined as an off-track betting region, except that for the purposes of section one thousand eight of this article any track located in New York city, or Nassau, Suffolk and Westchester counties, shall be deemed a regional track for all regions located in district one, as defined in this section;

- h. " ~~The board~~ Commission " means the state ~~racing and wagering board~~ gaming commission ;
- i. "Branch office" means an establishment maintained and operated by an off-track betting corporation, where off-track pari-mutuel betting on horse races may be placed in accordance with the terms and conditions of this chapter and rules and regulations issued pursuant thereto;
- j. "Simulcast facility" means those facilities within the state that are authorized pursuant to the provisions of this article to display simulcasts for pari-mutuel wagering purposes;
- k. "Off-track betting region" means those regions as defined in section five hundred nineteen of this chapter;
- l. "Simulcast theater" means a simulcast facility which is also a public entertainment and wagering facility, and which may include any or all of the following: a large screen television projection and display unit, a display system for odds, pools, and payout prices, areas for viewing and seating, a food and beverage facility, and any other convenience currently provided at racetracks and not inconsistent with local zoning ordinances;
- m. "Simulcast districts" means one or more of the following named districts comprised of the counties within which pari-mutuel racing events are conducted as follows:
- | | |
|------------|--|
| District 1 | New York City,
Suffolk, Nassau, and
Westchester counties |
| District 2 | Sullivan county |
| District 3 | Saratoga county |
| District 4 | Oneida county |
| District 5 | Erie, Genesee and Ontario counties |
- n. "Initial out-of-state thoroughbred track" means the track commencing full-card simulcasting to New York prior to any other out-of-state thoroughbred track after 1:00 PM on any calendar day.
- o. "Second out-of-state thoroughbred track" means the track (or subsequent track or tracks where otherwise authorized by this article) conducting full-card simulcasting to New York after the race program from the initial out-of-state thoroughbred track that has commenced simulcasting on any calendar day.
- p. "Mixed meeting" means a race meeting which has a combination of thoroughbred, quarter horse, Appaloosa, paint, and/or Arabian racing on the same race program.
- q. "Account wagering" means a form of pari-mutuel wagering in which a person establishes an account with an account wagering licensee and subsequently communicates via telephone or other electronic media to the account wagering licensee wagering instructions concerning the funds in such person's account and wagers to be placed on the account owner's behalf.
- r. "Account wagering licensee" means racing associations, and corporations; franchised corporations, off-track betting corporations, and commission approved multi-jurisdictional account wagering providers that have been authorized by the commission to offer account wagering.
- s. "Dormant account" means an account wagering account held by an account wagering licensee in which there has been no wagering activity for three years.
- t. "Multi-jurisdictional account wagering provider" means a business entity domiciled in a jurisdiction, other than the state of New York, that does not operate either a simulcast facility that is open to the public within the state of New York or a licensed or franchised racetrack within the state, but which is licensed by such other jurisdiction to offer pari-mutuel account wagering on races such provider simulcasts and other races it offers in its wagering menu to persons located in or out of the jurisdiction issuing such license.

Section 44.

Section 1002 of the racing, pari-mutuel wagering and breeding law, as added by chapter 363 of the laws of 1984, subdivision 2 as amended by chapter 18 of the laws of 2008, is amended to read as follows:

Section 1002.

General jurisdiction. 1. The ~~state racing and wagering board~~ **commission** shall have general jurisdiction over the simulcasting of horse races **and account wagering** within the state, and the ~~board~~ **commission** may issue rules and regulations in accordance with the provisions of this article.

2. The ~~board~~ **commission** shall annually submit reports on or before July first following each year in which simulcasting **and account wagering** is conducted to the director of the budget, the chairman of the senate finance committee and the chairman of the assembly ways and means committee evaluating the results of such simulcasts **and account wagering** on the compatibility with the well-being of the horse racing, breeding and pari-mutuel wagering industries in this state and make any recommendations it deems appropriate. Such reports may be submitted together with the reports required by subdivision two of section two hundred thirty-six and subparagraph (iii) of paragraph a and subparagraph (i) of paragraph b of subdivision one of section three hundred eighteen of this chapter.

Section 45.

Section 1003 of the racing, pari-mutuel wagering and breeding law, as added by chapter 363 of the laws of 1984, subdivision 1 as separately amended by chapters 2 and 70 of the laws of 1995, paragraph (a) of subdivision 1 as amended by section 1 of part U of chapter 59 of the laws of 2013, the opening paragraph of paragraph a of subdivision 2 as amended by chapter 538 of the laws of 1999 and subdivision 5 as amended by chapter 287 of the laws of 1985, is amended to read as follows:

Section 1003.

Licenses for simulcast facilities. 1. (a) Any racing association or corporation or regional off-track betting corporation, authorized to conduct pari-mutuel wagering under this chapter, desiring to display the simulcast of horse races on which pari-mutuel betting shall be permitted in the manner and subject to the conditions provided for in this article may apply to the ~~board~~ **commission** for a license so to do. Applications for licenses shall be in such form as may be prescribed by the ~~board~~ **commission** and shall contain such information or other material or evidence as the ~~board~~ **commission** may require. No license shall be issued by the ~~board~~ **commission** authorizing the simulcast transmission of thoroughbred races from a track located in Suffolk county. The fee for such licenses shall be five hundred dollars per simulcast facility **and for account wagering licensees that do not operate either a simulcast facility that is open to the public within the state of New York or a licensed racetrack within the state, twenty thousand dollars** per year payable by the licensee to the ~~board~~ **commission** for deposit into the general fund. Except as provided ~~herein in this section~~, the ~~board~~ **commission** shall not approve any application to conduct simulcasting into individual or group residences, homes or other areas for the purposes of or in connection with pari-mutuel wagering. The board may approve simulcasting into residences, homes or other areas to be conducted jointly by one or more regional off-track betting corporations and one or more of the following: a franchised corporation, thoroughbred racing corporation or a harness racing corporation or association; provided (i) the simulcasting consists only of those races on which pari-mutuel betting is authorized by this chapter at one or more simulcast facilities for each of the contracting off-track betting corporations which shall include wagers made in accordance with section one thousand fifteen, one thousand sixteen and one thousand seventeen of this article; provided further that the contract provisions or other simulcast arrangements for such simulcast facility shall be no less favorable than those in effect on January first, two thousand five; (ii) that

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each off-track betting corporation having within its geographic boundaries such residences, homes or other areas technically capable of receiving the simulcast signal shall be a contracting party; (iii) the distribution of revenues shall be subject to contractual agreement of the parties except that statutory payments to non-contracting parties, if any, may not be reduced; provided, however, that nothing herein to the contrary shall prevent a track from televising its races on an irregular basis primarily for promotional or marketing purposes as found by the board. For purposes of this paragraph, the provisions of section one thousand thirteen of this article shall not apply. Any agreement authorizing an in-home simulcasting experiment commencing prior to May fifteenth, nineteen hundred ninety-five, may, and all its terms, be extended until June thirtieth, two thousand fourteen; provided, however, that any party to such agreement may elect to terminate such agreement upon conveying written notice to all other parties of such agreement at least forty-five days prior to the effective date of the termination, via registered mail. Any party to an agreement receiving such notice of an intent to terminate, may request the board to mediate between the parties new terms and conditions in a replacement agreement between the parties as will permit continuation of an in-home experiment until June thirtieth, two thousand fourteen; and (iv) no in-home simulcasting in the thoroughbred special betting district shall occur without the approval of the regional thoroughbred track.

- (b) Any agreement authorizing in-home simulcasting pursuant to this section shall be in writing, and upon written request, a copy shall be provided to the representative horsemen's group of the racing association or corporation that is party to said agreement. Such agreement shall include a categorical statement of new and incremental expenses directly related and attributable to the conduct of in-home simulcasting. The representative horsemen's group may, within thirty days of receiving the agreement, petition the board for a determination as to the appropriateness and reasonableness of any expenses attributed by either the racing association or corporation or the off-track betting corporation.

2. Before it may grant such license, the ~~board~~ **commission** shall review and approve a plan of operation submitted by such applicant including, but not limited to the following information:

- a. A feasibility study denoting the revenue earnings expected from the simulcast facility and the costs expected to operate such facility. No feasibility study shall be received for a simulcast facility that is applying to renew its license. The form of the feasibility study shall be prescribed by the ~~board~~ **commission** and may include:
 - (i) the number of simulcast races to be displayed;
 - (ii) the types of wagering to be offered;
 - (iii) the level of attendance expected and the area from which such attendance will be drawn;
 - (iv) the level of anticipated wagering activity;
 - (v) the source and amount of revenues expected from other than parimutuel wagering;
 - (vi) the cost of operating the simulcast facility and the identification of costs to be amortized and the method of amortization of such costs;
 - (vii) the amount and source of revenues needed for financing the simulcast facility;
 - (viii) the probable impact of the proposed operation on revenues to local government;
- b. The security measures to be employed to protect the facility, to control crowds, to safeguard the transmission of the simulcast signals and to control the transmission of wagering data to effectuate common wagering pools;
- c. The type of data processing, communication and transmission equipment to be utilized;

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- d. The description of the management groups responsible for the operation of the simulcast facility;
 - e. The system of accounts to maintain a separate record of revenues collected by the simulcast facility, the distribution of such revenues and the accounting of costs relative to the simulcast operation;
 - f. The location of the facility and a written confirmation from appropriate local officials that the location of such facility and the number of patrons expected to occupy such facility are in compliance with all applicable local ordinances;
 - g. The written agreements and letters of consent between specified parties pursuant to sections one thousand seven, one thousand eight and one thousand nine of this article.
3. Within forty-five days of receipt of the plan of operation provided in subdivision two of this section, the ~~board~~ **commission** shall issue an order approving the plan, approving it with modifications or denying approval, in which latter case the ~~board~~ **commission** shall state its reasons therefor. Within such period the ~~board~~ **commission** may request additional information or suggest amendments. If the ~~board~~ **commission** fails to approve the plan, the applicant may request a public hearing to be held within thirty days of the issuance of an order denying it. The ~~board~~ **commission** shall issue its final determination within ten days of such hearing. The applicant may submit an amended application no sooner than thirty days after a denial.
4. No racing association, **franchised corporation** or corporation or regional off-track betting corporation shall be allowed to operate a simulcast facility except according to the provisions of an approved plan of operation. No change in such plan of operation may occur until an amendment proposing a change to the plan is approved by the ~~board~~ **commission**. A plan of operation may be amended from time to time at the request of either the operator or the ~~board~~ **commission**. The operator shall have the right to be heard concerning any amendment to the plan and the ~~board~~ **commission** shall dispose of such proposed amendments as expeditiously as practicable, but no later than thirty days following submission by the operator or, in the case of amendments proposed by the ~~board~~ **commission**, objection by the operator.
5. For the purpose of maintaining proper control over simulcasts conducted pursuant to this article, the ~~state racing and wagering board~~ **commission** shall license any person, association or corporation participating in simulcasting, as the ~~board~~ **commission** may by rule prescribe, including, if the ~~board~~ **commission** deem it necessary so to do, any or all persons, associations or corporations who create, distribute, transmit or display simulcast signals. In the case of thoroughbred racing simulcasting or harness racing simulcasting, such licenses shall be issued in accordance with and subject to the provisions governing licenses for participants and employees in article two or article three of this chapter as may be applicable to such type of racing.

Section 46.

Section 1012 of the racing, pari-mutuel wagering and breeding law, as amended by chapter 18 of the laws of 2008, subdivision 4-b as added by chapter 402 of the laws of 2011 and subdivision 5 as amended by section 10 of part U of chapter 59 of the laws of 2013, is amended to read as follows:

Section 1012.

~~Telephone accounts and telephone~~ **Account** wagering. ~~Any regional off-track betting corporation, and any franchised corporation, harness, thoroughbred, quarter horse racing association or corporation licensed to conduct pari-mutuel racing may maintain telephone betting accounts for wagers placed on races and special events offered by such corporation or association.~~

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Racing associations and corporations, franchised corporations, off-track betting corporations and multi-jurisdictional account wagering providers may apply to the commission to be licensed to offer account wagering.

1. Racing associations and corporations, franchised corporations, off-track betting corporations and multi-jurisdictional account wagering providers may form partnerships, joint ventures, or any other affiliations or contractual arrangement in order to further the purposes of this section. Multi-jurisdictional account wagering providers involved in such joint affiliations or contractual arrangements shall follow the same distributional policy with respect to retained commissions as their in-state affiliate or contractual partner.
2. The commission shall promulgate rules and regulations to license and regulate all phases of account wagering.
3. The commission shall specify a non-refundable application fee which shall be paid by each applicant for an account wagering license or renewal thereof.
4. Account wagering licensees shall utilize personal identification numbers and such other technologies as the commission may specify to assure that only the account holder has access to the advance deposit wagering account.
5. Account wagering licensees shall provide for: a. withdrawals from the wagering account only by means of a check made payable to the account holder and sent to the address of the account holder or by means of an electronic transfer to an account held by the verified account holder or b. that the account holder may withdraw funds from the wagering account at a facility approved by the commission by presenting verifiable personal and account identification information.
6. Account wagering licensees may engage in interstate wagering transactions only where there is compliance with chapter fifty-seven of title fifteen of the United States code, commonly referred to as the "interstate horse racing act".
7. The account holder's deposits to the wagering account shall be submitted by the account holder to the account wagering licensee and shall be in the form of one of the following: a. cash given to the account wagering licensee; b. check, money order, negotiable order of withdrawal, or wire or electronic transfer, payable and remitted to the account wagering licensee; or c. charges made to an account holder's debit or credit card upon the account holder's direct and personal instruction, which instruction may be given by telephone communication or other electronic means to the account wagering licensee or its agent by the account holder if the use of the card has been approved by the account wagering licensee.
8. a. Each wager shall be in the name of a natural person and shall not be in the name of any beneficiary, custodian, joint trust, corporation, partnership or other organization or entity.
b. A wagering account may be established by a person completing an application form approved by the commission and submitting it together with a certification, or other proof, of age and residency. Such form shall include the address of the principal residence of the prospective account holder and a statement that a false statement made in regard to an application may subject the applicant to prosecution.
c. The prospective account holder shall submit the completed application to the account wagering licensee. The account wagering licensee may accept or reject an application after receipt and review of the application and certification, or other proof, of age and residency for compliance with this section.
d. No person other than the person in whose name an account has been established may issue wagering instructions relating to that account or otherwise engage in wagering transactions relating to that account.
9. A wagering account shall not be assignable or otherwise transferable.

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10. Except as otherwise provided in this article or in regulations which the commission may adopt pursuant thereto, all account wagers shall be final and no wager shall be canceled by the account holder at any time after the wager has been accepted by the account wagering licensee.
11. Dormant accounts shall be treated as abandoned property pursuant to section three hundred of the abandoned property law.
12. Account wagering providers must possess appropriate totalizator and accounting controls that will safeguard the transmission of wagering data and will keep a system of accounts which will maintain a separate record of revenues and an accounting of costs relative to the operation of the wagering provider.
13. Wagers placed with the account wagering providers shall result in the combination of all wagers placed with such provider with the wagering pools at the host track so as to produce common pari-mutuel betting pools for the calculation of odds and the determination of payouts from such pools, which payout shall be the same for all winning tickets, irrespective of whether a wager is placed at a host track or at an account wagering provider.
14. Any ~~regional off track betting corporation and any franchised corporation, harness, thoroughbred, quarter horse racing association or corporation licensed to conduct pari-mutuel racing~~ account wagering licensee may require a minimum account balance in an amount to be determined by such entity.
2. 15. a. Any regional off-track betting corporation may suspend collection of the surcharge imposed under section five hundred thirty-two of this chapter on winning wagers placed in ~~telephone~~ wagering accounts maintained by such regional corporation.
- b. In a city of one million or more any regional off-track betting corporation, with the approval of the mayor of such city, may suspend collection of the surcharge imposed under section five hundred thirty-two of this chapter in winning wagers placed in ~~telephone~~ wagering accounts maintained by such regional corporation.
- ~~3. Any telephone account maintained by a regional off track betting corporation, franchised corporation, harness, thoroughbred, quarter horse association or corporation, with inactivity for a period of three years shall be forfeited and paid to the commissioner of taxation and finance. Such amounts when collected shall be paid by the commissioner of taxation and finance into the general fund of the state treasury.~~
4. 16. The maintenance and operation of such ~~telephone~~ wagering accounts provided for in this section shall be subject to rules and regulations of the ~~state racing and wagering board commission~~. The ~~board~~ commission shall include in such regulation a requirement that ~~telephone~~ wagering account information pertaining to surcharge and nonsurcharge ~~telephone~~ wagering accounts shall be separately reported.
- 4-a. 17. For the purposes of this section, "telephone ~~betting~~ wagering accounts" and "telephone wagering" shall mean and include all those wagers which utilize any wired or wireless communications device, including but not limited to wireline telephones, wireless telephones, and the internet, to transmit the placement of wagers on races and special events offered by any regional off-track betting corporation, and any harness, thoroughbred, quarter horse racing association or corporation licensed or franchised to conduct pari-mutuel racing in ~~New York~~ this state.
- 4-b. 18. Every racing association, off-track betting corporation, franchised corporation, harness, thoroughbred, quarter horse racing association or corporation or other entity licensed or franchised in this state to conduct pari-mutuel racing and wagering, or authorized to conduct races within the state, which operates ~~an account~~ a wagering ~~platform~~ account for the acceptance of wagers, shall locate the call center where such wagers are received within the state of New York.

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~~5. The provisions of this section shall expire and be of no further force and effect after June thirtieth, two thousand fourteen.~~

Section 47.

The racing, pari-mutuel wagering and breeding law is amended by adding a new section 1012-a to read as follows:

Section 1012-a.

Multi-jurisdictional account wagering providers. A multi-jurisdictional account wagering provider shall only be licensed under the following conditions:

1. the multi-jurisdictional account wagering provider is licensed by the state in which it is located and, if required, by each state in which it operates;
2. the character and the background of the multi-jurisdictional account wagering provider is such that granting the applications for a license is in the public interest and the best interest of honest horse racing;
3. the multi-jurisdictional account wagering provider shall utilize the services of an independent third party to perform identity and verification services with respect to the establishment of wagering accounts for persons who are residents of the state of New York;
4. the commission shall be allowed access to the premises of the multi-jurisdictional account wagering provider to visit, investigate and place such expert accountants and other persons it deems necessary for the purpose of insuring compliance with the rules and regulations of the commission;
5. if not already registered, the multi-jurisdictional account wagering provider shall agree promptly to take those steps necessary to qualify to do business in New York state, and to maintain such status in good standing throughout the license period;
6. multi-jurisdictional account wagering providers shall pay a market origin fee equal to five per centum on each wager accepted from New York residents. Multi-jurisdictional account wagering providers shall make the required payments to the market origin account on or before the fifth business day of each month and such required payments shall cover payments due for the period of the preceding calendar month; provided, however, that such payments required to be made on April fifteenth shall be accompanied by a report under oath, showing the total of all such payments, together with such other information as the commission may require. A penalty of five per centum and interest at the rate of one per centum per month from the date the report is required to be filed to the date the payment shall be payable in case any payments required by this subdivision are paid when due. If the commission determines that any moneys received under this subdivision were paid in error, the commission may cause the same to be refunded without interest out of any moneys collected thereunder, provided an application therefor is filed with the commission within one year from the time the erroneous payment was made. The commission shall pay into the racing regulation account, under the joint custody of the comptroller and the commission, the total amount of the fee collected pursuant to this section.

Section 48.

Subdivision 2 of *section 1017 of the racing, pari-mutuel wagering and breeding law*, as amended by chapter 18 of the laws of 2008, is amended to read as follows:

2. a. Maintenance of effort. Any off-track betting corporation which engages in accepting wagers on the simulcasts of thoroughbred races from out-of-state or out-of-country as permitted under subdivision one of this section shall submit to the ~~board~~ **commission**, for its approval, a schedule of payments to be made in any year or portion thereof, that such off-track corporation engages in nighttime thoroughbred simulcasting. In order to be approved by the ~~board~~ **commission**, the payment

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schedule shall be identical to the actual payments and distributions of such payments to tracks and purses made by such off-track corporation pursuant to the provisions of section one thousand fifteen of this article during the year two thousand two, as derived from out-of-state harness races displayed after 6:00 P.M. If approved by the ~~board~~, commission, such scheduled payments shall be made from revenues derived from any simulcasting conducted pursuant to this section and section one thousand fifteen of this article.

- b. Additional payments. During each calendar year, to the extent, and at such time in the event, that aggregate statewide wagering handle after 7:30 P.M. on out-of-state and out-of-country thoroughbred races exceeds one hundred million dollars, each off-track betting corporation conducting such simulcasting shall pay to its regional harness track or tracks, an amount equal to two percent of its proportionate share of such excess handle. In any region where there are two or more regional harness tracks, such two percent shall be divided between or among the tracks in a proportion equal to the proportion of handle on live harness races conducted at such tracks during the preceding calendar year. Fifty percent of the sum received by each track pursuant to this paragraph shall be used exclusively for increasing purses, stakes and prizes at that regional harness track. For the purpose of determining whether such aggregate statewide handle exceeds one hundred million dollars, all wagering on such thoroughbred races accepted by licensed multi-jurisdictional account wagering providers from customers within New York state shall be excluded.

Section 49.

Section 503 of the racing, pari-mutuel wagering and breeding law is amended by adding a new subdivision 12-a to read as follows:

12-a.

To enter into, amend, cancel and terminate agreements for the performance among themselves, licensed racing associations and corporations, and multi-jurisdictional account wagering providers, as defined in section one thousand one of this chapter, of their respective functions, powers and duties on a cooperative or contract basis.

Section 50.

The racing, pari-mutuel wagering and breeding law is amended by adding a new section 115-b to read as follows:

Section 115-b.

Market origin credits. 1. Notwithstanding any other provision of law to the contrary, any racing associations and corporations, franchised corporations, and off-track betting corporations that makes a payment of the regulatory fees imposed by this chapter may reduce such payment by an amount equal to the market origin credit allocated to such racing association or corporation, franchised corporation, or off-track betting corporation by the commission. The commission shall allocate credits in an amount equal to ninety percent of the amount received from the market origin fee paid pursuant to subdivision six of section one thousand twelve-a of this chapter for the period from the sixteenth day of the preceding month through the fifteenth day of the current month. The commission shall notify participants of allocations on or before the twentieth day of the current month.

2. The commission shall allocate credits to racing associations and corporations, franchised corporations, and off-track betting corporations in the following amounts:
- a. Forty percent of the amount received from the market origin fee paid pursuant to subdivision six of section one thousand twelve-a of this chapter to regional off-track betting corporations. Allocations to individual regional off-track betting corporations shall be made based on a ratio where the numerator is the regional corporation's total in-state handle for the previous

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calendar year as calculated by the commission and the denominator is the total in-state handle of all the regional off-track betting corporations for the previous calendar year as calculated by the commission;

- b. Fifty percent of the amount received from the market origin fee paid pursuant to subdivision six of section one thousand twelve-a of this chapter to the racing associations and corporations and franchised corporations. Allocations to individual racing associations and corporations and franchised corporations shall be made as follows:
 - (i) Sixty percent to thoroughbred racing associations and franchised corporations. Five-sixths shall be allocated to a franchised corporation and one-sixth shall be allocated to a thoroughbred racing association.
 - (ii) Forty percent to harness racing associations and corporations. Allocations to individual harness racing associations and corporations shall be made based on a ratio where the numerator is the association's or corporation's total in-state handle on live racing for the previous calendar year as calculated by the commission and the denominator is the total in-state on live handle for all harness racing associations and corporations for the previous calendar year as calculated by the commission.
3. As a condition for any racing association or corporation or franchised corporation to claim any market origin credits allocated to it, such racing association or corporation or franchised corporation must make payments for moneys otherwise to be used to pay the regulatory fee as follows:
 - (i) Payment of an amount equal to forty percent of the allocated credits into an account used solely for the purpose of enhancing purses at such racing association or corporation or franchised corporation. Such payment shall be made within five days from receipt of notification of an allocation by the commission of an allocation of market origin credits;
 - (ii) Payment of an amount equal to twenty percent of the allocated credits to the state's breeding funds. Sixty percent of the payments to the breeding funds shall be allocated to the New York state thoroughbred breeding and *development* fund corporation established pursuant to section two hundred fifty-two of this chapter, and forty percent to the agriculture and New York state horse breeding *development* fund established pursuant to section three hundred thirty of this chapter. Such payment shall be made within five days from receipt of notification of an allocation by the commission of an allocation of market origin credits.
4. The commission shall promulgate any rules and regulations necessary for the administration of the market origin credit.

Section 51.

Section 99-i of the state finance law, as added by section 26 of part F3 of chapter 62 of the laws of 2003, is amended to read as follows:

99-i.

- Racing regulation account. 1. There is hereby established in the joint custody of the comptroller and the ~~racing and wagering board~~ gaming commission a special revenue fund to be known as the "racing regulation account".
2. The racing ~~revenue~~ regulation account shall consist of all money received by the ~~board~~ commission as regulatory fees and market origin fees pursuant to the provisions of the racing, pari-mutuel wagering and breeding law.
 3. Moneys of this account shall be available to the ~~board~~ commission to pay for the costs of carrying out the purposes of the racing, parimutuel wagering and breeding law; provided, however, an amount equal to five percent of the amount received by the account from the market origin fee imposed by subdivision six of section one thousand twelve-a of the racing, pari-mutuel wagering

upstate New York gaming economic development act of 2013, 2013 N.Y. A.N. 8101

and breeding law shall be transferred to the state department of taxation and finance and the department shall deem this transfer as a payment of a pari-mutuel tax .

4. All payments from the fund shall be made on the audit and warrant of the comptroller.

(f) Sections forth through forty-eight of this act shall take effect January 1, 2014; except that the New York state gaming commission may accept and review applications for licenses for account wagering and for multi-jurisdictional account wagering providers commencing on October 1, 2013.

Section 52.

This act shall take effect immediately; provided, however, that:

- (a) sections one, two, five, nine, ten, twenty-seven and thirty-one of this act shall take effect on the first of January next succeeding the date upon which the people shall approve and ratify amendments to subdivision 1 of section 9 of article I of the constitution by a majority of the electors voting thereon relating to casino gambling in the state;
- (b) sections six, seven, fourteen and sixteen of this act shall take effect on the same date as the agreement between the Oneida Nation of New York and the state of New York entered into on the sixteenth day of May, 2013 takes effect; provided, further, that the amendments to subdivision 2 of *section 99-h of the state finance law* made by section six of this act shall take effect on the same date as the reversion of such section as provided in section 2 of chapter 747 of the laws of 2006, as amended; provided, further, that the amendments to subdivision 3 of *section 99-h of the state finance law* made by section seven of this act shall be subject to the expiration and reversion of such subdivision as provided in section 3 of part W of chapter 60 of the laws of 2011, as amended when upon such date the provisions of section seven-a of this act shall take effect; provided, further, that the amendments to subdivision 3 of *section 99-h of the state finance law* made by section seven-a of this act shall be subject to the the expiration and reversion of such section as provided in section 2 of chapter 747 of the laws of 2006, as amended when upon such date the provisions of section eight of this act shall take effect; provided, further, however, that the amendment to *section 99-h of the state finance law* made by section nine of this act shall not affect the expiration of such section and shall be deemed repealed therewith; provided, further, that the state gaming commission shall notify the legislative bill drafting commission upon the occurrence of such agreement between the Oneida Nation and the state of New York becoming effective in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of *section 44 of the legislative law* and *section 70-b of the public officers law*;
- (c) *section 1368 of the racing, pari-mutuel wagering and breeding law*, as added by section two of this act, shall take effect upon a change in federal law authorizing the activity permitted by such section or upon a ruling by a court of competent jurisdiction that such activity is lawful. The state gaming commission shall notify the legislative bill drafting commission upon the occurrence of the change in federal law or upon the ruling of a court of competent jurisdiction in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of *section 44 of the legislative law* and *section 70-b of the public officers law*;
- (d) section thirty-five of this act shall be deemed to have been in full force and effect on and after April 1, 2013;
- (e) notwithstanding the foregoing, sections thirty-two, thirty-three, thirty-four, forty-one and forty-two of this act, shall only be effective in the event that an amendment to the constitution to authorize casino gambling is defeated.
- (f) section forty through forty-eight of this act shall take effect January 1, 2014; except that the New York state gaming commission may accept and review applications for licenses for account wagering and for multi-jurisdictional account wagering providers commencing on October 1, 2013.

History

Enacted July 30, 2013

NEW YORK ADVANCE LEGISLATIVE SERVICE
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End of Document

PART S Chapter 39, L. 2019

Authorizing a VLT facility for Orange County signed June 24, 2019.

43 Section 1. Clause (B) of subparagraph (ii) of paragraph 1 of
subdivi-
44 sion b of section 1612 of the tax law is amended by adding a
new
45 subclause 5 to read as follows:

46 (5) forty-nine percent for a video lottery gaming facility
authorized
47 pursuant to paragraph five of subdivision a of section sixteen
hundred
48 seventeen-a of this article;

49 § 1-a. Clause (A) of subparagraph (iii) of paragraph 1 of
subdivision
50 b of section 1612 of the tax law, as added by section 1 of part EE
of
51 chapter 59 of the laws of 2019, is amended to read as follows:
S. 6615 45

1 (A) when a vendor track is located within region one and is
located
2 within Orange county or region two of development zone two, as such
zone
3 is defined in section thirteen hundred ten of the racing, pari-
mutuel
4 wagering and breeding law, or is located within region six of
such
5 development zone two and is located within Ontario county, the
addi-
6 tional vendor fee received by the vendor track shall be
calculated
7 pursuant to subclause one of this clause; provided, however, such
addi-
8 tional vendor fee shall not exceed ten percent.

9 § 2. Paragraph 2 of subdivision b of section 1612 of the tax law,
as
10 amended by section 1 of part OO of chapter 59 of the laws of 2014,
is
11 amended to read as follows:

12 2. As consideration for the operation of a **video lottery** gaming
facil-
13 ity, the division, shall cause the investment in the racing industry
of
14 a portion of the vendor fee received pursuant to paragraph one of
this
15 subdivision in the manner set forth in this subdivision. With
the
16 exception of Aqueduct racetrack, a video lottery gaming facility
author-
17 ized pursuant to paragraph five of subdivision a of section
sixteen
18 hundred seventeen-a of this article or a facility in the county

of
19 Nassau or Suffolk operated by a corporation established pursuant
to

20 section five hundred two of the racing, pari-mutuel wagering and
breed-
21 ing law, each such track shall dedicate a portion of its vendor
fees,
22 received pursuant to clause (A), (B), (B-1), (B-2), (C), or (D) [~~(E),~~
23 ~~(F), or (G)~~] of subparagraph (ii) of paragraph one of this
subdivision,
24 for the purpose of enhancing purses at such track, in an amount equal
to
25 eight and three-quarters percent of the total revenue wagered at
the
26 vendor track after pay out for prizes. One percent of the gross
purse
27 enhancement amount, as required by this subdivision, shall be paid
to
28 the gaming commission to be used exclusively to promote and
ensure
29 equine health and safety in New York. Any portion of such funding to
the
30 gaming commission unused during a fiscal year shall be returned to
the
31 **video lottery** gaming operators on a pro rata basis in accordance
with
32 the amounts originally contributed by each operator and shall be
used
33 for the purpose of enhancing purses at such track. One and one-
half
34 percent of the gross purse enhancement amount at a thoroughbred
track,
35 as required by this subdivision, shall be paid to an account
established
36 pursuant to section two hundred twenty-one-a of the racing, pari-
mutuel
37 wagering and breeding law to be used exclusively to provide
health
38 insurance for jockeys. In addition, with the exception of Aqueduct
race-
39 track, a video lottery gaming facility authorized pursuant to
paragraph
40 five of subdivision a of section sixteen hundred seventeen-a of
this
41 article or a facility in the county of Nassau or Suffolk operated
by a
42 corporation established pursuant to section five hundred two of
the
43 racing, pari-mutuel wagering and breeding law, one and one-
quarter
44 percent of total revenue wagered at the vendor track after pay out
for
45 prizes, received pursuant to clause (A), (B), (B-1), (B-2), (C),
or
46 (D) [~~(E), (F), or (G)~~] of subparagraph (ii) of paragraph one of
this
47 subdivision, shall be distributed to the appropriate breeding fund
for
48 the manner of racing conducted by such track.

22 (B) of subparagraph (ii) of paragraph one of subdivision b of
23 this section, shall be distributed to the appropriate breeding fund for
24 manner of racing conducted by such track. In no circumstance shall
25 proceeds of the lottery, including the proceeds from video
26 gaming, be used for the payment of non-lottery expenses of the
27 commission, administrative or otherwise.
28 § 4. Subdivision a of section 1617-a of the tax law is amended
by
29 adding three new paragraphs 5, 6, and 7 to read as follows:
30 (5) At a facility located in Orange county to be operated by the
31 entity otherwise licensed to operate video lottery gaming at
32 Monticello racetrack, provided that: (i) such licensed entity is no longer
33 operating video lottery gaming at Monticello racetrack and provided
34 that Monticello racetrack is conducting racing operations; (ii) such
35 facility in Orange county is not sited within a thirty mile radius of the
36 video lottery gaming facility at Yonkers racetrack; and (iii) the
37 licensed entity, its subsidiaries and affiliates, including the entity
38 licensed to operate a commercial gaming facility in Sullivan county, and
39 the entity licensed to operate video lottery gaming at Yonkers
40 racetrack enter into a mitigation agreement, to be approved by the gaming
41 commission, which shall include, but not be limited to, terms that
42 require: (A) the operator of the facility in Orange county to make an
43 annual payment to the entity licensed to operate video lottery gaming
44 or commercial gaming at Yonkers racetrack to account for the effects
45 that siting such facility in Orange county would likely have on the
46 gross gaming revenue of the entity licensed to operate at Yonkers
47 racetrack; (B) employment levels at the affected facilities; and (C) that
48 upon expiration or termination of the agreement, the authority to
49 operate video lottery gaming in Orange county shall cease. Notwithstanding
50 any other provision of this subdivision, at no time shall an entity
operat-

23 extended to other employees with comparable rank and duties.
24 (7) The village of Monticello, Sullivan county, the town of
Thompson,
25 Sullivan county, and Sullivan county shall continue to receive
assist-
26 ance payments made pursuant to section fifty-four-1 of the state
finance
27 law.
28 § 5. Section 54-1 of the state finance law is amended by adding a
new
29 subdivision 5 to read as follows:
30 5. The town and county in which the facility defined in paragraph
five
31 of subdivision a of section sixteen hundred seventeen-a of the tax
law
32 is located shall receive assistance payments made pursuant to
this
33 section at the same dollar level realized by the village of
Monticello,
34 Sullivan county, the town of Thompson, Sullivan county, and
Sullivan
35 county. Each village in which the facility defined in paragraph five
of
36 subdivision a of section sixteen hundred seventeen-a of the tax law
is
37 located shall receive assistance payments made pursuant to this
section
38 at the rate of fifty percent of the dollar level realized by the
village
39 of Monticello. Any payments made pursuant to this subdivision shall
not
40 commence until the facility defined in paragraph five of
subdivision a
41 of section sixteen hundred seventeen-a of the tax law has
realized
42 revenue for a period of twelve consecutive months.
43 § 6. This act shall take effect immediately; provided, however,
that
44 no video lottery gaming may be conducted at any facility within
Orange
45 county unless and until the mitigation agreement required by this act
is
46 executed by all parties and approved by the gaming commission.

51 ing video lottery gaming in Orange county be permitted to apply for
or
52 receive a license to operate a commercial gaming facility in that
coun-
53 ty.

54 (6) Notwithstanding any other provision of law to the contrary,
as a
55 condition of the license to operate a video lottery gaming
facility
56 located in Orange county, such operator shall provide an annual
certif-

S. 6615

47

1 ication to the New York state gaming commission that the staffing
levels
2 at a commercial gaming facility located in zone two, region one
pursuant
3 to section thirteen hundred ten of the racing, pari-mutuel wagering
and
4 breeding law (or any successor commercial gaming facility located
in
5 said region) are no less than one thousand four hundred seventy-
three
6 full-time, permanent employees. In furtherance of and without
limiting
7 the foregoing, the licensee for the commercial gaming facility
located
8 in zone two, region one pursuant to section thirteen hundred ten of
the
9 racing, pari-mutuel wagering and breeding law (or any successor
commer-
10 cial gaming facility located in such region) shall not conduct any
mass,
11 involuntary layoff events that would trigger worker adjustment
and
12 retraining notification (WARN) act notifications pursuant to
article
13 twenty-five-A of the labor law or otherwise result in the
employment
14 levels at such facility dropping below levels mandated by this
section.
15 For purposes of this section, "full-time, permanent employee" shall
mean
16 an employee who has worked at the facility for a minimum of thirty-
five
17 hours per week for not less than four consecutive weeks and who is
enti-
18 tled to receive the usual and customary fringe benefits extended
to
19 other employees with comparable rank and duties; or two part-
time
20 employees who have worked at the facility for a combined minimum
of
21 thirty-five hours per week for not less than four consecutive weeks
and
22 who are entitled to receive the usual and customary fringe
benefits

PART S Chapter 39, L. 2019

Authorizing a VLT facility for Orange County signed June 24, 2019.

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22 received pursuant to clause (A), (B), (B-1), (B-2), (C), or (D) [~~(E)~~,
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25 eight and three-quarters percent of the total revenue wagered at
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26 vendor track after pay out for prizes. One percent of the gross
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30 gaming commission unused during a fiscal year shall be returned to
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33 for the purpose of enhancing purses at such track. One and one-
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49 operate video lottery gaming in Orange county shall cease. Notwithstanding
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S. 6615

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enti-
18 tled to receive the usual and customary fringe benefits extended
to
19 other employees with comparable rank and duties; or two part-
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20 employees who have worked at the facility for a combined minimum
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21 thirty-five hours per week for not less than four consecutive weeks
and
22 who are entitled to receive the usual and customary fringe
benefits

GAMING LEGAL TRENDS

AND

ISSUES

NY:	Sports betting New York City casinos
NJ:	Caesars purchase by Eldorado Hard Rock & Ocean competition
PA:	Expansion auction Sports book Internet "Stadium" competition
CT:	Bridgeport/Hartford
MA:	Encore Wynn case Tribes
DE:	Tax cut Sale of Delaware Downs
DC:	Sports Book
VA:	Historical slots

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1. Rule of the REITS
2. Internet Providers and past bad acts
3. Sports book
4. Loot Boxes

State of the States 2019

THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY



AMERICAN
GAMING
ASSOCIATION



Gambling Compliance



Dear Gaming Industry Colleague:

I am pleased to present ***State of the States 2019: The AGA Survey of the Commercial Casino Industry***, the American Gaming Association's (AGA) signature research report and the definitive economic analysis of U.S. commercial gaming in 2018.

2018 was a transformative year for the U.S. commercial gaming sector and for the AGA. In May, the U.S. Supreme Court issued a landmark ruling finding the *Professional and Amateur Sports Protection Act of 1992* (PASPA) unconstitutional, freeing states to decide for themselves whether to legalize sports betting. By the end of the year, residents in eight states were able to place a legal sports wager with more expected to join them in 2019. With expanding legalization came new business opportunities, and the gaming industry's previously strained relationship with professional sports leagues began to thaw: more than two dozen business partnerships were signed in 2018 between professional sports teams and leagues and gaming operators and suppliers.

Helped in part by the expansion of sports betting, the commercial casino gaming sector logged its fourth consecutive year of gaming revenue growth in 2018—surging nearly 3.5 percent to \$41.7 billion, a new historic high. New commercial casino properties opened in Colorado, Massachusetts, New Jersey and New York, and voters in Arkansas approved a constitutional amendment, making it the 25th state to legalize commercial casino gaming (and the 41st state overall with legal casino gaming, including tribal casino operations).

For AGA, 2018 was an important year as well. In the wake of the Supreme Court decision we engaged congressional lawmakers to avert new federal regulations on sports wagering, educating policymakers about the robust state and tribal regulatory structures already in place across the country. AGA also helped inform state legislatures considering sports betting legislation, emphasizing that the right policies are critical to the success of a legal marketplace. As a result, states unanimously

rejected harmful policies such as league royalties and official data mandates. Further, AGA advocacy efforts helped spark regulatory reforms in Louisiana and Ohio that simplify and streamline shipping of gaming equipment, resulting in greater efficiencies for manufacturers, operators and regulators.

Finally, the AGA launched its revamped website, offering members and the public better access to industry news, AGA research and advocacy initiatives. I encourage you to visit us at www.americangaming.org and take full advantage of the AGA's resources.

On a personal note, in December I was honored to be named the new President and Chief Executive Officer of AGA. As just the third CEO of the AGA in its history, I am eager to build on the successes of my predecessors who helped to enable this remarkable time for gaming: the industry is growing, acceptance of gaming as a mainstream form of entertainment is at an all-time high and the opportunities to continue to advance the industry's agenda are abundant. I look forward to working with you over the coming years to pursue our common interests.

With detailed information on the U.S. gaming market and financial performance data in all of the commercial gaming states, *State of the States 2019* provides the most comprehensive economic guide to the commercial casino industry, and we'd like to thank our partners at GamblingCompliance for their invaluable assistance in its creation.

I hope you will find this a useful reference and, as always, we value your continued feedback.

Sincerely,



William C. Miller, Jr.
President and CEO
American Gaming Association

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About This Report

This report is designed to provide a comprehensive overview of the commercial casino industry in each of the 24 states with legal commercial casino gaming.

For each of the 24 jurisdictions, the report analyzes gaming revenue and gaming taxes generated by commercial casino locations for the calendar year 2018. In addition, the report provides an overview of the primary competition faced by casinos in each state and summarizes the year's major gaming policy discussions.

A table at the beginning of this report provides a comparative summary of the main licensing, taxation and responsible gaming requirements applied to casino operators and suppliers of electronic gaming devices and table game equipment.

This report defines commercial casino locations as licensed land-based casinos, riverboat casinos, racetrack casinos (racinos) and jai alai frontons. It also includes casino locations in states such as Delaware, New York, Ohio and Rhode Island that offer electronic gaming devices classified as video lottery terminals and are operated by commercial casinos under the authority of those states' lotteries.

For the purposes of identifying commercial casino location numbers, we do not include other forms of commercial gaming locations, such as bars, taverns or truck stops with electronic gaming devices, animal racetracks without gaming machines such as horse and dog tracks, slot-route operation locations, instant racing terminal locations or off-track betting operations, lottery/retail locations, tribal gaming locations as defined by the National Indian Gaming Commission, card rooms or other locations at which gaming is incidental to the primary business.

State gaming and tax revenue totals do not include revenue and taxes from these non-commercial casino locations—with the exception of Nevada, due to its unique nature, in which revenue and tax data from some locations which offer gaming as incidental to their primary business is included.

Also excluded from state gaming revenue and tax totals are monies derived from convenience locations with electronic gaming devices, such as video lottery terminals or videogaming terminals, in Illinois, Louisiana, Montana, Nevada, Oregon, South Dakota and West Virginia. The competitive impact of each of the above operations, however, is noted where warranted.

This report uses the term “electronic gaming device” (EGD) to refer to the various types of EGDs installed in casinos, commonly known as “slot machines.” Although the general public may not differentiate between the various types of EGDs, there are often important regulatory and technological distinctions between them and specific legal definitions are applied to different categories of EGDs in different states. State-specific terminology for EGDs includes video lottery terminals (VLTs), video gaming terminals (VGTs), video poker and electronic gaming machines, among others.

All references to “gaming revenue” are used as a substitute for more specific financial terms—including “casino win,” “adjusted gross receipts,” “gross gaming revenue” and others—as reported by state regulatory agencies. Gaming regulatory agencies in each state report monthly and annual revenue differently and readers should consult those agencies' websites for further information.

In general, gaming revenue refers to the amount earned by commercial casinos after winnings have been paid out to patrons. Importantly, gaming revenue does not equate to profits earned by commercial casinos from their operations. Such revenue is earned before properties pay for various operating expenses, marketing and employee salaries, as well as various taxes and fees, among other things. Due to reporting restrictions, commercial casino gaming revenue does not include revenue derived from pari-mutuel betting at commercial casino race- and sportsbooks, except for such revenue derived at Nevada commercial casinos.

Similarly, gaming tax revenue figures listed in the report reflect only specific gaming taxes paid by casinos out of monies won from patrons. They do not include various other taxes that apply

to casinos as they do to most other businesses. They also do not include the federal excise tax of 0.25 percent generally applied to sports betting handle across most states. For the purposes of calculating state gaming tax revenue totals, reported tax figures include monies directed to state and local governments and the specific casino revenue funds established by those entities. They also include further mandatory allocations of gaming revenue from commercial casinos to non-government entities, such as problem gambling services, race purses, breeding programs and other funds used to support local racing industries.

In certain states, gaming is operated under the authority of the state government, and a portion of casino revenue is then redistributed to private operators. Where this is the case, this report considers the effective tax rate applied to gaming operators to be the portion of gaming revenue retained by the state or its designated beneficiaries.

Information on supplier licensing in the table in this report is limited to those supplier entities that either manufacture EGDs or table games, or distribute or otherwise sell them to casinos. In many states, additional licensing requirements are applicable to the suppliers of various other goods and services to casinos. Readers are advised to consult the websites of state gaming regulatory agencies for more specific information.

About the American Gaming Association

The American Gaming Association is the premier national trade group representing the \$261 billion U.S. casino industry, which supports 1.8 million jobs nationwide. AGA members include commercial and tribal casino operators, as well as suppliers and other entities affiliated with the gaming industry. It is the mission of the AGA to achieve sound policies and regulations consistent with casino gaming's modern appeal and vast economic contributions.

www.americangaming.org

About GamblingCompliance

GamblingCompliance is the leading provider of independent legal, regulatory and business intelligence to the global gaming industry, based in London, Washington D.C. and Taipei. Through our subscription services and customized research solutions, we offer market participants, regulators, governments and investors easily accessible and up-to-date information on market realities and a reliable and independent service to monitor legislative and regulatory developments.

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EXECUTIVE SUMMARY

State of the Industry

America's commercial casino industry enjoyed another record-setting year in 2018, with nationwide consumer spending on casino gaming reaching a highest-ever annual total of \$41.68 billion.

The figure represented an increase of 3.5 percent over 2017 and marked the industry's fourth straight year of gains in gaming revenue. The commercial casino industry has also grown every year but one—2014—since the U.S. economy came out of recession in 2009.

Twelve of the 24 states with commercial casinos reported record annual gaming revenue in 2018, reflective of strong local economies in many parts of the country and the addition of new casino properties in certain markets.

Overall, just two states with commercial casino gaming—Illinois and West Virginia—reported lower revenue in 2018 versus the prior year, the latter seeing a decline of just one-tenth of one percent.

ECONOMIC IMPACT

The nation's 465 commercial casinos were not the only beneficiaries of revenue growth in 2018, as the industry generated a total of \$9.71 billion in direct gaming tax revenue for state and local governments and designated causes.

Notably, the \$9.71 billion figure—a record haul and an increase of 3.1 percent over 2017—reflects only specific state and local taxes that are applied directly to gaming activities. It does not include the billions more paid by the industry in the form of income, sales and various other corporate taxes, nor does the total reflect payroll taxes paid by gaming operators and suppliers.

According to the most recent statistics from Oxford Economics, the U.S. commercial casino industry directly employed more than 361,000 people in 2017 and those employees earned more than \$17 billion in wages, benefits and tips that year.

The tax and other economic benefits derived from commercial gaming operations drive strong support for the casino industry among the American public.

AGA research shows that the vast majority—nearly 90 percent—of Americans view gaming as acceptable form of entertainment, and just over one-third of Americans—35 percent—say they visited a casino the past year. Beyond the entertainment value, Americans have embraced the positive local economic impact of the industry: 60 percent say that casinos help their local economies.

SPORTS BETTING

While 2018 set a record for commercial gaming revenue, the year will be better remembered for the landmark U.S. Supreme Court ruling that paved the way for the expansion of legal sports betting.

In May, following a years-long legal challenge brought by the state of New Jersey, the Supreme Court overturned the Professional and Amateur Sports Protection Act (PASPA), the 1992 federal law that had essentially restricted lawful sports betting to Nevada.

Following the decision, legal sports wagering quickly spread to seven additional states before the end of the year: Delaware, Mississippi, New Jersey, New Mexico, Pennsylvania, Rhode Island and West Virginia.

The expansion helped propel total industry-wide revenue from sports betting to approximately \$430.2 million, up from \$261.3 million in 2017, with the market set to grow exponentially in future years as additional states pass laws to regulate sports wagering.

Still, legal and regulated sports betting barely scratched the surface of an entrenched black market—comprised of offshore sportsbooks and street bookies—previously estimated to be worth as much as \$150 billion in annual wagering handle.

With PASPA's demise, AGA encouraged state and tribal governments to adopt regulatory structures that will allow licensed operators to compete with the illegal market by recognizing the appeal of mobile betting and setting tax rates that are reflective of the low-margin nature of sports wagering.

AGA also led the industry in pushing back against any possible pre-emption by the federal government that would constrain the ability of state and tribal governments—with their proven track records in regulating casino gaming—from making their own policy choices on sports betting.

TRIBAL GAMING

2018 also marked the 30th anniversary of the Indian Gaming Regulatory Act (IGRA), the federal law passed by Congress in 1988 to establish parameters to govern tribal gaming on the lands of sovereign tribal nations.

Since IGRA took effect, the tribal gaming market has grown immensely to become an integral component of the overall gaming industry as well as an undeniable economic driver for tribal, state and local governments alike.

Revenue figures for 2018 had not yet been released at the time of writing. However, figures for 2017 showed tribal casinos reaching a record total of \$32.40 billion in annual gaming revenue.

In 2018, Indiana became the 29th state with tribal gaming when the state's first tribal casino commenced operations on land just south of the Michigan border. New tribal casinos also opened during the year in California, Iowa, New Mexico, New York, Oklahoma and Oregon.

NEW MARKETS & COMPETITIVE CHALLENGES

In November, Arkansas voters approved a referendum authorizing up to four commercial casinos that will establish Arkansas as the 25th state to host commercial casino gaming when the new locations open in 2019.

As gaming expands, state policymakers have become increasingly aware of the need to take steps to ensure the sustained health of their gaming markets and to allow operators and suppliers of gaming equipment to benefit from innovative technologies.

In 2018, various states including Louisiana, Maryland and Ohio adopted regulatory reforms that were designed to make their industries more competitive with those of neighboring jurisdictions and ease unnecessary compliance burdens on licensed gaming companies.

RESPONSIBLE GAMING

In 2018, the gaming industry reiterated its commitment to responsible gaming as industry groups and academic researchers came together to form the Responsible Gaming Collaborative.

The Collaborative, the first-of-its-kind for the industry, was created to challenge existing regulatory paradigms in the field of responsible gaming and encourage evidence-based policies that are proven to be effective.

Polling conducted by the AGA suggests nine in ten regular casino patrons are aware of the responsible gaming resources available to them, with the same proportion saying they set a budget for gaming prior to their visits.

Still, while these statistics are encouraging, the gaming industry remains steadfast in its commitment to supporting responsible play by all casino patrons and to providing appropriate resources and support for the small minority who do develop gambling problems.

STATE BY STATE REGULATIONS, TAXES & FEES

	COLORADO	DELAWARE	FLORIDA	ILLINOIS	INDIANA	IOWA
Statutory Funding for Responsible Gaming	2% casino gaming revenue	\$1 million or 1% of casino gaming revenue, whichever greater. \$250,000 or 1% of interactive gaming revenue, whichever greater.	\$250,000 per casino	Subject to annual appropriation	Riverboats: 3.33% of supplemental wagering tax Racinos: \$500K per licensee	Up to \$6 million annually
Statewide Self-Exclusion	No	Yes	Yes	Yes	Yes	Yes
Gambling Age	21	21	21	21	21	21
Smoke-Free (Y/N/Partial)	Yes	Yes	Yes	Yes	No	No
Complimentary Alcohol	Yes	No	No	No	No	Yes
Credit	No	Yes	No	Yes	Yes	No
Restrictions on Operating Hours	No	No	No	No	No	No
Number of Licenses Allowed	Unlimited	3	8*	10	13*	Unlimited
Number of Commercial Casinos	33	3	8	10	13	19
Tax Rate	Graduated rate ranging from 0.25% on gaming revenue up to \$2 million to 20% on gaming revenue of more than \$13 million	57–58% effective rate on gaming machine revenue; 20% effective rate on table games revenue	35% on gaming machine revenue	Graduated rate ranging from 15% on gaming revenue up to \$25 million to 50% on gaming revenue of more than \$200 million	Land-Based/Riverboats: Graduated rate ranging from 15% on gaming revenue of up to \$25 million to 40% on gaming revenue of more than \$600 million. Casinos, with one exception, also pay a supplemental wagering tax of 3.5–4%. Racinos: Graduated rate ranging from 25% of revenue up to \$100 million to 35% on revenue exceeding \$200 million.	Land-Based/Riverboats: Graduated rate ranging from 5% on gaming revenue up to \$1 million to 22% on gaming revenue of more than \$3 million. Racino: 22% or 24% on gaming revenue, depending on various conditions.
Casino License Renewal Term and Fee	Every two years \$3,700–\$7,400	\$3 million annually	\$2 million annually	License renewal every 4 years with \$5,000 annual fee.	Riverboats: \$5,000 annually; Racinos: \$100 per gaming machine annually	Land-Based: \$5 per person per facility capacity (min. \$1,250) Racinos: \$1,000 annually
Supplier License Renewal Term and Fee	Manufacturer/Distributor: Every two years \$3,700–\$7,400	Gaming vendor: Every three years \$4,000	Gaming machine business entity license: \$1,000 for a one-year license, \$2,000 for a three-year license.	Supplier license: Every 4 years with \$5,000 annual fee.	Supplier license \$7,500 annually	Distributor: \$1000 annually; Manufacturer: \$250 annually
Minimum Investment	No	No	No	No	No	No
Admissions Fee	No	No	No	Yes	No	No
Taxation of Promotional Credits (Y/N/Partial)	Yes	Partial	No	Yes	Partial	Partial
Withholdings on Winnings	Yes	No	No	Yes	Yes	Yes

Number of licenses allowed * = Assuming no additional race tracks open in the state.

KANSAS	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MISSISSIPPI
2% casino gaming revenue	1% casino gaming revenue; max. \$500K per facility.	Land-Based: 3% on gaming machine revenue. Racino: \$100,000 from gaming machine revenue and 9% table game revenue	\$425 per gaming machine and \$500 per table game	At least \$5M annually	\$2 million annually	Subject to annual appropriation
Yes	Yes	Yes	Yes	Yes	Yes	Yes
21	21	21	21	21	21	21
No	Partial	Partial	Yes	Yes	Partial	No
No	Yes	No	No	Yes	Yes	Yes
No	Yes	No	Yes	Yes	Yes	Yes
No	No	No	No	No	No	No
4*	20*	2	6	4	3	Unlimited
4	20	2	6	2	3	28
27% on gaming revenue (minimum)	Riverboats: 21.5% on gaming revenue, with additional taxes and fees applied by local governments. Racinos: effective rate of around 36% of gaming revenue. Land-Based: either 21.5% on gaming revenue or an annual fee of \$60 million, whichever is greater, plus rent and various other payments to local authorities.	Racinos: 39% on gaming machine revenue and 1% on handle; 16% on table game revenue Land-Based: 46% on gaming machine revenue; 16% on table game revenue	40–61% on gaming machine revenue; 20% on table game revenue	Casino Resort: 25% on gaming revenue; Slot Parlor: 49% on gaming revenue	19% on gaming revenue	Graduated rate ranging from 4% on gaming revenue up to \$50,000 per month to 8% on gaming revenue of more than \$134,000 per month, plus additional host municipality license fee at an average rate of 3–4% on gaming revenue annually
Maximum initial term of 15 years	Riverboats: \$100,000 annually Land-Based: Fees est. by contract with 20-year initial term and 10-year renewal option.	\$80,000 annually	\$3 million for every 500 gaming machines; 15-year initial license term	\$600 per gaming machine annually	\$25,000 annually	Additional host municipality license fee at an average rate of 3–4% on gaming revenue annually
Gaming Supplier Certification is valid for two years. No licensing fees.	Manufacturer: \$15,000 annually; Supplier: \$3,000 annually	Gaming machine distributor: \$75,000 annually; Table games distributor: \$1,000 annually; Gambling service vendor: \$2,000 annually	Manufacturer: \$5,000 annually; Distributor: \$1,000 annually	Gaming vendor: \$15,000 every three years	Supplier: \$5,000 annually	Manufacturer: \$1,000 annually; Distributor: \$500 annually
Yes	No	No	Yes	Yes	No	Yes
No	Yes	No	No	No	No	No
No	Yes	Yes	Partial	No	Yes	Partial
Yes	Yes	Yes	Yes	Yes	Yes	Yes

STATE BY STATE REGULATIONS, TAXES & FEES *(continued)*

	MISSOURI	NEVADA	NEW JERSEY	NEW MEXICO	NEW YORK
Statutory Funding for Responsible Gaming	\$0.01 of admission fee	\$2 per gaming machine	\$600,000 annually plus \$250,000 per Internet Gaming licensee	0.25% on gaming revenue	N/A
Statewide Self-Exclusion	Yes	No	Yes	Yes	Yes
Gambling Age	21	21	21	21	Land-Based: 21 Racinos: 18
Smoke-Free (Y/N/Partial)	Partial	No	No	No	Yes
Complimentary Alcohol	No	Yes	Yes	No	Yes
Credit	Yes	Yes	Yes	No	No
Restrictions on Operating Hours	No	No	No	Yes	Land-Based: No Racinos: Yes (May operate no more than 20 hours a day)
Number of Licenses Allowed	Unlimited	Unlimited	Unlimited	5*	13*
Number of Commercial Casinos	13	217	9	5	13
Tax Rate	21% on gaming revenue	6.75% on gaming revenue	9.25% effective rate on gaming revenue; 17.5% effective rate on Internet gaming	46.25% effective rate on gaming machine revenue	Land-Based: 37%–45% on gaming machine revenue; 10% on table game revenue. Racinos: 65% on gaming machine revenue
Casino License Renewal Term and Fee	\$25,000 annually	\$250 per gaming machine as excise tax, plus additional \$80 per gaming machine annually. Table game fees are dependent on the number of games in operation.	License renewal every 5 years; fee of \$500 per gaming machine annually.	\$4,000 and \$25 per gaming machine annually.	Land-Based: \$500 per gaming machine and table game (annually). Racinos: N/A
Supplier License Renewal Term and Fee	Supplier: \$5,000 annually	Manufacturer: \$1,000 annually; Distributor: \$500 annually; Interactive gaming systems: \$25,000 annually.	Gaming related casino service industry enterprise: \$5,000 every 5 years	Manufacturer: \$2,000 annually; Distributor: \$400 annually	Investigation fees
Minimum Investment	No	No	Yes	No	Yes
Admissions Fee	Yes	No	No	No	No
Taxation of Promotional Credits (Y/N/Partial)	Yes	No	Partial	Yes	Yes
Withholdings on Winnings	Yes	No	Yes	Yes	Yes

Number of licenses allowed * = Assuming no additional race tracks open in the state.

OHIO	OKLAHOMA	PENNSYLVANIA	RHODE ISLAND	SOUTH DAKOTA	WEST VIRGINIA
Land-Based: 2% on gaming revenue; Racinos: 0.5% on gaming revenue	N/A	\$2 million or 0.2% casino gaming revenue, whichever greater, plus additional \$3 million	\$100,000 per casino	Up to \$30,000 transferred annually from state Gaming Fund	Subject to annual appropriation
Yes	No	Yes	Yes	No	Yes
21	18	21	18	21	21
Yes	No	Partial	Partial	Yes	No
No	No	Yes	Yes	Yes	Yes
Yes	No	Yes	Partial	No	Yes
No	No	No	No	No	No
11*	2*	13	2	Unlimited	5*
11	2	12	2	25	5
Land-Based: 33% on gaming revenue Racinos: 33.5% on gaming machine revenue	Graduated rate ranging from 35% on gaming revenue up to \$10 million to 50% on gaming revenue of more than \$70 million	54% on gaming machine revenue; 35% on electronic table game revenue; 16% on table game revenue	Gaming operators retain between 26–28.5% on gaming machine revenue; 17%–19% on table game revenue	9% on gaming revenue	53.5% on gaming machine revenue; 35% on table game revenue
Land-Based: \$1.5 million license fee every three years; Racinos: \$10,000 every three years.	\$50,000 annually	Land-Based/ Racinos: \$1.5 million every five years; Resort casinos: \$150,000 every five years.	N/A	\$200 and \$2,000 per device annually	\$500,000–\$2.5 million annually
Gaming-related vendor: \$15,000 every three years	Manufacturer: \$10,000 annually; Distributor: \$5,000 annually	Initial fees for Manufacturers: \$170,000; Suppliers: \$85,000. Renewal fees every 5 years Manufacturers: \$150,000; Suppliers: \$75,000	Gaming vendor: \$750 annually	Manufacturer or Distributor: \$1,000 first year, \$250 annual renewal	Manufacturer: \$10,000 annually; Supplier: \$100 annually
Yes	No	No	No	No	No
No	No	No	No	No	No
No	Yes	No	Partial	Yes	Partial
Yes	Yes	Yes	Yes	No	Yes

LEGAL STATUS OF GAMBLING TYPES IN THE U.S.

STATE	Commercial Casinos / Racinos	Tribal Casinos	Card Rooms	Electronic Gaming Devices *	iGaming	Single Game Sports Betting	Lottery	iLottery **	NOTES
Alabama	■ ¹	■							Class II games only
Alaska		■							Class II games only
Arizona		■				■			
Arkansas	■		■		■	■	■		Casino gaming and sports betting legal, but not active; instant racing terminals, electronic games of skill and live table games available at racetracks
California		■	■			■			
Colorado	■	■				■			Only limited-stakes gaming at commercial casinos
Connecticut		■				■			
Delaware	■			■	■	■			Only video lottery terminals & table games at racetracks; iGaming includes casino games and poker; online sports betting legal but not active
D.C.					■	■			Sports betting legal, but not active
Florida	■	■	■			■			Card rooms restricted to tribal casinos or racetracks
Georgia						■	■		
Hawaii									
Idaho		■				■			
Illinois	■		■			■	■		Instant racing games approved but not yet operational
Indiana	■	■				■			Class II games only
Iowa	■	■				■			
Kansas	■	■				■			
Kentucky			■			■	■		Instant racing terminals at racetracks
Louisiana	■	■	■			■			
Maine	■					■	■		iLottery includes only subscription services
Maryland	■					■			Only VLTs and table games at casinos & racetracks
Massachusetts	■					■			
Michigan	■	■				■	■		
Minnesota		■	■			■			
Mississippi	■	■			■	■			Mobile sports betting only available at a casino property; state lottery authorized but not active
Missouri	■					■			
Montana		■	■	■		■			Sports pools and sports tab games legal, but not commercially operational
Nebraska		■				■			Class II games only

LEGAL STATUS OF GAMBLING TYPES IN THE U.S. *(continued)*

STATE									NOTES
	Commercial Casinos / Racinos	Tribal Casinos	Card Rooms	Electronic Gaming Devices *	iGaming	Single Game Sports Betting	Lottery	iLottery **	
Nevada	■	■		■	■	■			iGaming includes only poker
New Hampshire							■	■	
New Jersey	■				■	■	■		iGaming includes online casino and poker
New Mexico	■	■				■	■		Electronic gaming devices legal, but currently limited to charitable gaming venues; Tribal sports betting is active but does not include online betting
New York	■	■				■	■	■	Sports betting not active; iLottery includes only subscription services
North Carolina		■					■	■	iLottery includes only subscription services
North Dakota		■					■	■	iLottery includes only subscription services
Ohio	■						■		Racetracks only permitted to have VLTs
Oklahoma	■	■					■		
Oregon		■		■		■	■		Limited EGDs and instant racing terminals at racetracks; Lottery believes it could offer single game sports betting, but not currently active
Pennsylvania	■			■	■	■	■	■	iGaming legal but not operational, includes online casinos and poker; online sports betting legal but not active
Rhode Island	■					■	■		No online sports betting
South Carolina							■		
South Dakota	■	■		■			■		Only limited-stakes gaming at commercial casinos
Tennessee							■		
Texas		■					■		Class II games only
Utah									
Vermont							■		
Virginia				■			■	■	Instant racing terminals are legal but not operational; iLottery includes only subscription services
Washington		■	■				■		
West Virginia	■			■		■	■		
Wisconsin		■					■		
Wyoming		■		■			■		Instant racing terminals at racetracks

Note: There are several different forms of gaming that are permitted in various states under charitable gambling laws. The chart above does not attempt to detail the legal status of these operations in the U.S.

* Refers to electronic gaming devices, such as VGTs, VLTs, instant racing or video poker machines, in non-casino locations

** iLottery comprises online computer sales and/or mobile device sales as well as online subscription services.

¹ As of Nov. 2016, certain racetracks are permitted under county law to operate electronic bingo devices. For years, the legal status of these machines has been the subject of protracted dispute among state and local officials. For the purpose of this report, we do not consider Alabama to have commercial gaming.

STATE BY STATE SPORTS BETTING REGULATIONS, TAXES & FEES

At the close of 2018, legal sports betting was offered in eight states, including six states that had joined Nevada in authorizing sports betting at commercial casinos and New Mexico where one tribal casino opened a sportsbook in October.

	Authorized Locations	Tax Rate	Mobile/Online	Amateur Restrictions	Initial License Fee	License Renewal Fee	League Fee
Delaware	Commercial casinos and retail lottery outlets	50% on sports betting revenue	Statewide, but not active	In-state collegiate teams	None	None	None
Mississippi	Commercial casinos, Tribal casinos	11-12% effective rate on sports betting revenue	On property	None	None	None	None
Nevada	Commercial casinos	6.75% on sports betting revenue	Statewide	None	\$500	None	None
New Jersey	Commercial casinos, Racetracks	Land-Based: 9.75% effective rate on sports betting revenue Mobile/Online: 14.25% effective rate on sports betting revenue	Statewide	In-state collegiate teams	\$100,000	Undetermined	None
New Mexico	Tribal casinos	None	No	None	None	None	None
Pennsylvania	Commercial casinos	36% on sports betting revenue	Statewide, but not active	None	\$10 million	\$250,000 every 5 years	None
Rhode Island	Commercial Casinos	51% on sports betting revenue	No	In-state collegiate teams	None	None	None
West Virginia	Commercial casinos	10% on sports betting revenue	Statewide	None	\$100,000	\$100,000 after 1 year	None

U.S. GAMING LOCATIONS BY STATE (as of Dec. 31, 2018)

State	COMMERCIAL CASINOS			Tribal Casinos ⁱⁱ	Card Rooms ⁱⁱⁱ	Electronic Gaming Device Locations ^{iv}
	Land-Based Casinos	Riverboat Casinos ⁱ	Racinos			
Alabama				3		
Alaska				2		
Arizona				25		
California				76	73	
Colorado	33			2		
Connecticut				2		
Delaware			3			
Florida	4 ^v		4	7	16	
Idaho				10		
Illinois		10				6,773
Indiana	2	9	2	1		
Iowa	16	1	2	4		
Kansas	4			5		
Louisiana	1	15	4	5		1,674
Maine	1		1			
Maryland	5		1			
Massachusetts	1		1			
Michigan	3			24		
Minnesota				40	2	
Mississippi	13	15		3		
Missouri		13				
Montana				13	150	1,418
Nebraska				5		
Nevada	217			4		1,982 ^{vi}
New Jersey	9					
New Mexico			5	27		
New York	4		9 ^{vii}	16		
North Carolina				3		
North Dakota				9		
Ohio	4		7			
Oklahoma			2	139		
Oregon				10		2,200
Pennsylvania	6		6			
Rhode Island	2					
South Dakota	25			12		1,336
Texas				2		
Washington				34	45 ^{viii}	
West Virginia	1		4			1,245
Wisconsin				27		
Wyoming				4		
TOTAL	351	63	51	514	286	16,628

ⁱ Casinos that are on or connected to a waterway, including in a moat

ⁱⁱ Tribal casinos with either Class II and/or Class III games, as listed by the National Indian Gaming Commission as of Dec. 31, 2018

ⁱⁱⁱ Card rooms in states that do not have commercial casinos with poker facilities

^{iv} Non-casino or card room locations with legally authorized electronic gaming devices, including but not limited to video lottery terminals and video gaming terminals

^v Includes three jai alai frontons

^{vi} Properties have 15 or fewer machines

^{vii} Includes one land-based casino that offers only VLT machines, as opposed to full casino gaming

^{viii} Properties operate blackjack and other house and player-banked games in addition to poker

SOURCES: American Gaming Association, National Indian Gaming Commission, State Gaming Regulatory Agencies

COMMERCIAL CASINO GAMING CONSUMER SPEND (GGR) BY STATE

2017 vs. 2018

In 2018, 22 of the 24 commercial gaming states reported increases in annual gross gaming revenue (GGR). The largest increase came in Massachusetts, reflecting the August opening of the state's first casino-resort in Springfield. The steepest decline came in Illinois, where commercial casinos continue to face stiff competition from electronic gaming devices in bars and truck stops. Twelve states—Colorado, Florida, Kansas, Maine, Maryland, Massachusetts, Michigan, New York, Ohio, Oklahoma, Pennsylvania and Rhode Island—recorded record gaming revenue.

State	2017	2018	% Change
Colorado	\$828,054,920	\$842,103,912	1.70%
Delaware*	\$428,802,187	\$432,512,143	0.87%
Florida	\$546,586,992	\$569,015,684	4.10%
Illinois	\$1,407,993,353	\$1,373,455,620	-2.45%
Indiana	\$2,239,892,939	\$2,240,835,178	0.04%
Iowa	\$1,462,923,851	\$1,467,332,138	0.30%
Kansas	\$389,660,760	\$408,573,550	4.85%
Louisiana	\$2,561,260,150	\$2,561,460,458	0.01%
Maine	\$136,708,968	\$143,733,223	5.14%
Maryland	\$1,614,336,584	\$1,746,364,081	8.18%
Massachusetts	\$164,786,230	\$273,072,584	65.71%
Michigan	\$1,400,536,681	\$1,444,099,784	3.11%
Mississippi	\$2,080,088,536	\$2,142,059,922	2.98%
Missouri	\$1,737,556,614	\$1,754,466,296	0.97%
Nevada	\$11,571,113,000	\$11,917,370,000	2.99%
New Jersey	\$2,659,013,594	\$2,903,477,507	9.19%
New Mexico	\$227,502,828	\$235,445,003	3.49%
New York	\$2,348,834,339	\$2,587,743,241	10.17%
Ohio	\$1,776,359,721	\$1,863,936,633	4.93%
Oklahoma	\$124,873,978	\$139,606,077	11.80%
Pennsylvania	\$3,226,917,156	\$3,251,196,919	0.75%
Rhode Island	\$624,851,061	\$656,548,911	5.07%
South Dakota	\$105,448,612	\$106,323,642	0.83%
West Virginia	\$624,639,622	\$623,764,685	-0.14%
TOTAL	\$40,288,742,676	\$41,684,497,193	3.46%

SOURCE: State Gaming Regulatory Agencies

* Delaware 2017 total adjusted from *State of the States 2018* to include revenue from sports lottery retailers

COMMERCIAL CASINO DIRECT GAMING TAX REVENUE BY STATE

2017 vs. 2018

During 2018, commercial casinos paid a total of \$9.71 billion in direct gaming taxes to state and local governments across the country. In general, state tax totals reflected underlying trends in state gaming revenue. However, in certain cases, there was a divergence between gaming revenue and tax revenue due to the relative performance of lower-taxed table games versus higher-taxed electronic gaming devices. The \$9.71 billion total reflects only taxes applied to direct gaming revenue and does not include the billions more paid by the commercial casino industry as a result of income, sales, property and other corporate taxes.

State	2017	2018	% Change
Colorado	\$121,032,780	\$125,525,944	3.71%
Delaware*	\$209,269,506	\$207,812,131	-0.70%
Florida	\$191,305,445	\$199,155,488	4.10%
Illinois	\$475,454,057	\$462,169,020	-2.79%
Indiana	\$603,350,632	\$599,639,668	-0.62%
Iowa	\$336,045,285	\$339,248,754	0.95%
Kansas	\$105,208,411	\$110,333,019	4.87%
Louisiana	\$602,458,550	\$607,684,130	0.87%
Maine	\$54,570,835	\$57,970,062	6.23%
Maryland**	\$658,153,544	\$709,982,321	7.87%
Massachusetts	\$80,745,253	\$109,449,657	35.55%
Michigan	\$340,535,838	\$349,629,374	2.67%
Mississippi	\$252,093,737	\$257,622,472	2.19%
Missouri	\$445,721,865	\$446,511,944	0.18%
Nevada	\$867,187,745	\$850,617,016	-1.91%
New Jersey	\$247,961,857	\$276,542,672	11.53%
New Mexico**	\$105,220,058	\$108,893,314	3.49%
New York	\$1,022,542,311	\$1,101,631,865	7.73%
Ohio	\$593,980,120	\$622,621,927	4.82%
Oklahoma**	\$55,690,174	\$63,096,638	13.30%
Pennsylvania	\$1,432,858,471	\$1,478,160,340	3.16%
Rhode Island	\$314,090,141	\$322,090,358	2.55%
South Dakota	\$15,483,002	\$14,707,960	-5.01%
West Virginia	\$293,005,855	\$289,969,398	-1.04%
TOTAL	\$9,423,965,471	\$9,711,065,471	3.05%

SOURCE: State Gaming Regulatory Agencies

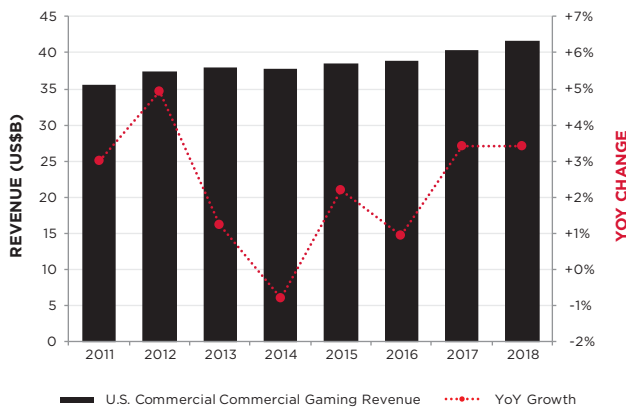
* Delaware 2017 total adjusted from *State of the States 2018* to include revenue from sports lottery retailers and tax payments to race purses

** Maryland, New Mexico, Oklahoma 2017 totals all adjusted from *State of the States 2018* to include tax payments to horse racing industry.

ANNUAL U.S. COMMERCIAL GAMING REVENUE (US\$B)

2011 to 2018

The U.S. commercial casino industry reported record annual gaming revenue of \$41.68 billion in 2018, maintaining a steady rate of growth.



SOURCE: GCRS estimates, State Gaming Commissions

COMMERCIAL CASINO DIRECT, INDIRECT AND INDUCED JOBS AND WAGES BY STATE

2017

According to the most recent research available, the U.S. commercial casino industry directly employed more than 361,000 workers in 2017 and those employees earned roughly \$17.42 billion in annual wages, benefits and tips.

While Nevada accounts for the lion's share of jobs and wages supported by the industry, the number of people working for gaming companies, or at vendors that provide goods and services to casinos, has continued to rise as gaming has expanded to most of the country over the past two decades.

Overall, commercial casinos supported more than 737,000 direct, indirect or induced jobs in 2017 in the 24 commercial gaming states. Those employees earned approximately \$34.34 billion in wages, benefits and tips.

Notably, these figures do not include the hundreds of thousands of additional jobs created as a result of tribal gaming operations, nor does it include the jobs supported by the economic activity of the gaming industry in the 26 non-commercial casino states.

State	Jobs	Wages, Benefits and Tips
Colorado	9,638	\$508,458,209
Delaware	5,299	\$217,559,889
Florida	8,180	\$379,528,247
Illinois	15,396	\$863,915,973
Indiana	22,133	\$1,013,224,278
Iowa	15,662	\$617,961,418
Kansas	3,685	\$138,843,253
Louisiana	32,717	\$1,364,766,542
Maine	1,468	\$61,776,481
Maryland	15,364	\$712,690,169
Massachusetts	1,646	\$77,225,189
Michigan	16,371	\$899,761,970
Mississippi	32,884	\$1,395,598,200
Missouri	19,987	\$883,686,104
Nevada	409,444	\$18,655,292,402
New Jersey	39,007	\$2,136,729,631
New Mexico	2,299	\$88,410,558
New York	17,247	\$1,016,458,991
Ohio	19,953	\$804,173,751
Oklahoma	1,162	\$51,275,598
Pennsylvania	33,171	\$1,792,045,489
Rhode Island	5,215	\$257,536,155
South Dakota	1,175	\$46,898,771
West Virginia	8,347	\$360,625,270
TOTAL	737,450	\$34,344,442,538

SOURCE: Oxford Economics

Figures reflect the total direct, indirect and induced employment and labor income. Wages includes salaries, tips, benefits and other labor income.

TOP 20 U.S. COMMERCIAL CASINO MARKETS

2018

In 2018, all 20 of the largest commercial casino markets by total gaming revenue maintained their previous ranking. The Baltimore-Washington region, which surpassed New York City last year to become nation's fourth largest, was again among the fastest-growing among major casino markets, with revenue increasing by 6.4 percent from 2017. Meanwhile, the Poconos region in Northern Pennsylvania encountered the greatest decline as revenue dropped by 4.8 percent.

	Market	State(s)	2018 Revenue	Last Ranking
1	Las Vegas Strip	NV	\$6.59B	1 ▬
2	Atlantic City	NJ	\$2.51B	2 ▬
3	Chicagoland	IL/IN	\$1.95B	3 ▬
4	Baltimore-Washington D.C.	MD/WV	\$1.88B	4 ▬
5	New York City	NY	\$1.45B	5 ▬
6	Detroit	MI	\$1.44B	6 ▬
7	Philadelphia	PA	\$1.30B	7 ▬
8	Gulf Coast	MS	\$1.22B	8 ▬
9	St. Louis	MO/IL	\$1.04B	9 ▬
10	The Poconos	PA	\$943.0M	10 ▬
11	Lake Charles	LA	\$940.0M	11 ▬
12	Boulder Strip	NV	\$857.0M	12 ▬
13	Kansas City	MO/KS	\$796.0M	13 ▬
14	Reno/Sparks	NV	\$772.2M	14 ▬
15	Blackhawk/Central City	CO	\$702.2M	15 ▬
16	Shreveport/Bossier City	LA	\$677.1M	16 ▬
17	Downtown Las Vegas	NV	\$649.9M	17 ▬
18	Cincinnati Area	OH/IN	\$618.3M	18 ▬
19	New Orleans	LA	\$606.5M	19 ▬
20	Pittsburgh/Meadowlands	PA	\$604.3M	20 ▬

SOURCE: Gambling Compliance, State Gaming Regulatory Agencies



COMPENDIUM

State of the States

© Elijah Lovkoff / Alamy Stock Photo

America's commercial casino industry reported total gross gaming revenue of \$41.68 billion in 2018, an increase of 3.5 percent over 2017, according to data published by state regulatory agencies.

All but two of the 24 states with commercial casinos reported gains in revenue from 2017, indicative of strong macroeconomic trends and a more stable competitive environment in many gaming markets than in recent years.

The state with the largest year-over-year increase in commercial gaming revenue in 2018 was **Massachusetts** (+65.7%), reflecting the August opening of MGM Springfield, the state's first casino-resort with table games.

Elsewhere, the two commercial casinos in **Oklahoma** (+11.8%) benefited from strong local economic growth and a full year of extended operating hours as approved by a 2017 state law, while revenue in **New York** (+10.2%) was lifted by the opening of a fourth and final upstate casino-resort in February.

Following more than a decade of declining revenue since the mid-2000s, **New Jersey** (+9.2%) continued its recovery in 2018 as two commercial casinos reopened in Atlantic City and casinos' internet gaming operations reported another year of strong growth.

Nevada (+3.0%) remained by far the largest commercial gaming market in revenue terms, with 2018's performance bolstered by growth in revenue from electronic gaming devices (EGDs) and from baccarat, the historically volatile game-of-choice for international high-rollers.

Of the two states reporting lower revenue totals in 2018, **Illinois** (-2.5%) commercial casinos continued to suffer from the expanded competition presented by EGDs located in the state's bars, taverns and other non-casino venues.

Although revenue from commercial casinos in **West Virginia** (-0.1%) fell for a seventh straight year amid stiff competition from neighboring states, the decline was much less pronounced than in previous years.

Reversing a multi-year trend, revenue growth

from commercial casinos' EGDs outpaced that of table games in 2018. Across the 18 states that report separate revenue statistics for EGDs and table games, revenue from EGDs grew 3.4 percent year-over-year, while table game revenue increased 2.4 percent.

Unsurprisingly, sports betting revenue was also sharply higher in 2018 following the historic U.S. Supreme Court ruling that allowed states to join Nevada in regulating full-fledged sportsbook operations.

Overall, the seven states with commercial sports betting by year's end reported total revenue of \$430.2 million, compared with \$261.3 million from operations that were limited to Nevada and Delaware (parlay cards only) in 2017.

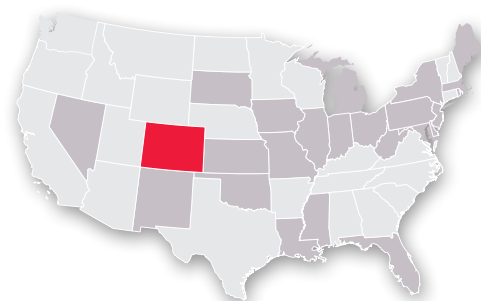
The record commercial gaming revenue total in 2018 resulted in record tax revenue for state and local governments. Overall, states received \$9.71 billion from taxes directly resulting from gaming revenues, an increase of 3.1 percent on the prior year.

Notably, growth in tax revenue does not completely align with that of gaming revenue, in part because a number of states apply lower tax rates to table games or sports betting than they do to EGDs.

Pennsylvania remained the largest commercial gaming state by gaming tax revenue in 2018, with commercial casinos generating nearly \$1.5 billion for state and local governments and associated programs. Gaming tax revenue also surpassed a billion dollars for the second straight year in New York, and double-digit increases in tax revenue were reported in Massachusetts, New Jersey and Oklahoma.

Colorado

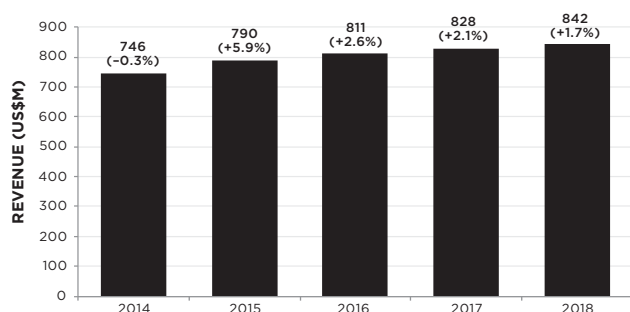
Number of Commercial Casinos	33
Casino Format	Land-Based Casinos
Regulatory Authority	Colorado Division of Gaming; Colorado Limited Gaming Control Commission
Gross Casino Gaming Revenue 2018	\$842.1M
Casino Tax Revenue 2018	\$125.5M



In 2018, total statewide commercial casino gaming revenue was \$842.1 million, representing a 1.7 percent increase from 2017 and a new record for the Centennial State's commercial casino industry.

Colorado: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Colorado Department of Revenue

MARKET OVERVIEW

Colorado offers commercial casino gaming at 33 facilities in three historic towns—Black Hawk, Central City and Cripple Creek—which were approved for gaming by voters in a 1990 statewide ballot initiative. The first three casinos opened in 1991 with strict restrictions on betting amounts and operating hours. Each of the casinos operate both electronic gaming devices and table games.

Commercial casinos are regulated by the Colorado Division of Gaming, which is supported by the Colorado Limited Gaming Control Commission—a five-member regulatory body appointed by the governor. The Commission is responsible for communicating the rules and regulations governing limited gaming in Colorado, setting gaming tax rates and issuing all gaming licenses in the state.

Colorado continues to be one of just two states, along with South Dakota, that subjects its commercial casinos to limits on maximum wagers. A successful ballot measure in 2008, however, relaxed some of the state's gaming restrictions by permitting additional table games, including craps and roulette, establishing a higher single-bet limit of \$100 and extending operating hours.

There is no statutory limit on the number of commercial casinos that may operate across the three towns eligible to host casino gaming in Colorado.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$842.1 million, up 1.7 percent against 2017.

Total statewide revenue from electronic gaming devices was \$732.0 million, up 1.3 percent relative to 2017, while table game revenue was \$110.1 million, up 4.2 percent.

Gaming revenue in Black Hawk was \$623.2 million, up 0.3 percent relative to 2017. Gaming revenue in Cripple Creek was \$139.9 million, up 3.8 percent, while in Central City, gaming revenue shot up to \$79.0 million, an increase of 9.9 percent over 2017.

Gaming revenue in Colorado has risen steadily each year since 2014 reflecting the state's rapidly growing population, strong economy and stable regional competition.

Gaming Tax Distribution

Colorado Gaming Tax

CASINO GAMING REVENUE	TAX RATE APPLIED
\$0-\$2M	0.25%
\$2M-\$5M	2%
\$5M-\$8M	9%
\$8M-\$10M	11%
\$10M-\$13M	16%
\$13M+	20%

Colorado applies a graduated tax to commercial casino gaming revenue, ranging from 0.25 percent on revenue up to \$2 million, to 20 percent on gaming revenue of more than \$13 million.

Although Colorado's gaming regulator is responsible for establishing gaming tax rates on an annual basis, the current schedule has

not changed since 2013. That is, in part, due to the passage of Amendment 50 in 2008, which required statewide voter approval for any increase in gaming tax rates beyond the levels in place at that time.

In 2018, Colorado commercial casinos generated \$125.5 million in gaming tax revenue, up 3.7 percent compared to the prior year. The increased tax payments reflected the increase in revenue statewide as well as a higher effective tax rate of 14.9 percent due to certain casinos reaching revenue totals that placed them in a higher tax bracket.

All gaming tax revenue, including license and application fees, are placed in the Limited Gaming Fund. After deducting a portion of the funds for gaming oversight and regulation, the remaining money—approximately \$111 million in 2018—is distributed according to the following formula:

- 50 percent to the "state share," which funds grant programs that benefit higher education, tourism and select industries in Colorado
- 28 percent to a fund dedicated to historic preservation and restoration
- 12 percent to the two counties that host commercial casinos
- 10 percent to the three historic cities that host commercial casinos

Competitive Landscape

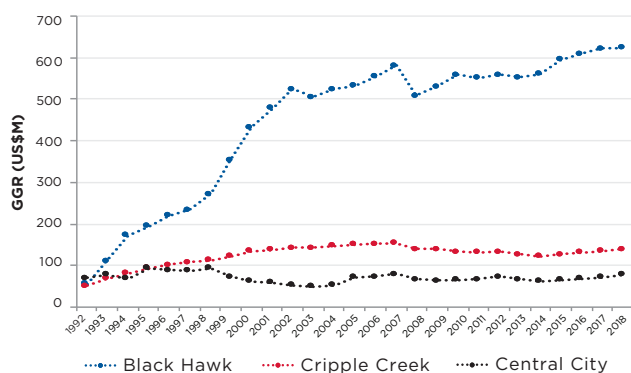
Commercial casinos face some competition from two tribal casinos in the southern part of Colorado, which are not regulated or taxed by the state. Still, with nearly 300 miles of sparsely populated land between the closest commercial and tribal casinos, the market overlap is minimal.

The competitive environment for Colorado's commercial casinos is likely to remain stable in the near term. A 2014 ballot initiative to expand gaming at Colorado racetracks was easily defeated by voters and there have not been any additional proposals to explore the issue again since that referendum.

Colorado: Annual Gaming Revenue By Market (US\$M)

1992 to 2018

In 2018, casinos in Black Hawk continued to account for the lion's share of Colorado's gaming market, bringing in three-quarters of the state's commercial casino gaming revenue.



SOURCE: Colorado Division of Gaming

regulatory controls. The report also clarified that a public ballot initiative would be required to establish new taxes for sports betting, if not to legalize the activity.

Illegal Gaming

A bill enacted in June tightened Colorado's anti-gambling laws by establishing new definitions for illegal gaming machines, ensuring prohibitions can be applied to "simulated gambling devices," which offer games of skill that mimic casino games.

The legislation was passed after a series of reported raids by Colorado authorities on businesses operating electronic gaming devices under the guise of skill-based arcades, and came three years after lawmakers enacted a law targeting so-called sweepstakes cafés.

POLICY AND REGULATORY REVIEW

Sports Betting

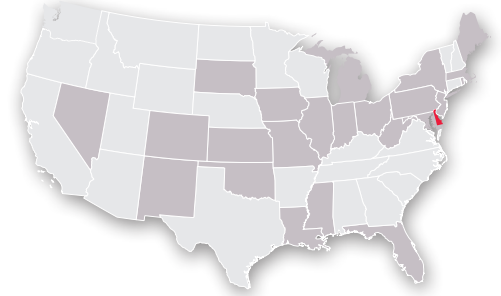
In August, Attorney General Cynthia Coffman established the parameters for future legislative debate on sports betting by publishing a formal legal opinion on relevant statutory and constitutional matters.

The opinion held that while state lawmakers would need to pass new legislation to authorize sports wagering, a statewide constitutional referendum would not be required. The opinion further concluded that sports betting is neither a lottery game nor a form of "limited gaming" exclusive to commercial casinos.

A few months later, Colorado's Department of Revenue produced a white paper mapping out more specific policy options for state lawmakers to consider. Among other things, the department's report recommended that lawmakers authorize sports betting at racetracks, commercial casinos and via mobile devices, subject to strict

Delaware

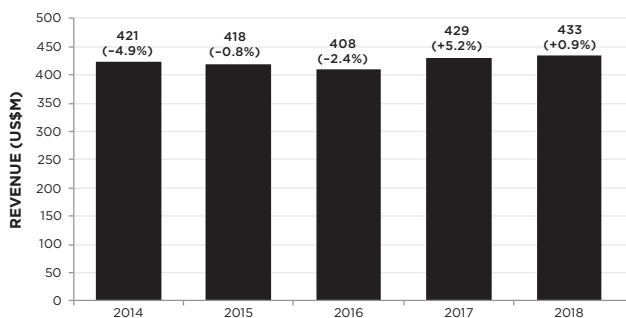
Number of Commercial Casinos	3
Casino Format	Racinos
Notable Forms of Gaming	Internet Gaming; Sports Betting
Regulatory Authority	Delaware Lottery; Delaware Division of Gaming Enforcement
Gross Casino Gaming Revenue 2018	\$432.5M
Gaming Tax Revenue 2018	\$207.8M



In 2018, total statewide commercial casino gaming revenue was \$432.5 million, up 0.9 percent. The year-over-year increase was partially driven by the first-to-market launch of sports betting at the state's three racinos.

Delaware: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Delaware Lottery

MARKET OVERVIEW

Delaware offers commercial casino gaming at three racinos, each of which operates electronic gaming devices, table games, internet gaming and, as of June, single-game sports wagering.

The racinos, which opened in 1995 and 1996, are operated under the authority of the Delaware Lottery, with the Division of Gaming Enforcement responsible for performing licensing investigations and law enforcement matters related to casino gaming. Each racino is limited to a maximum of 2,500 electronic gaming devices, but can apply for approval to operate up to 1,500 additional machines.

In 1994, the Delaware legislature approved the Horse Racing Redevelopment Act, which authorized racetracks to install electronic gaming devices. Table games and limited sports betting (parlay wagers on professional football games) were approved by the legislature in 2009 and 2010 respectively. Internet gaming was approved in 2012.

Less than a month after the Supreme Court ruling in May that overturned PASPA—the federal ban on sports betting—Delaware opened the first legal sportsbooks in the nation outside of Nevada.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$432.5 million, up 0.9 percent against 2017.

The increase reflected growth in sports betting revenue that resulted from the mid-year opening of full sportsbook operations at the state's three racinos. In 2018, total statewide sports betting revenue—including about \$12 million from parlay cards sold at retail venues—was \$22.2 million, up 25.1 percent year-over-year.

Total statewide revenue from electronic gaming devices was \$352.4 million, down 0.5 percent against 2017, while table game revenue came in at \$55.3 million, essentially unchanged from the prior year. Internet gaming remained a relatively minor component of the state's gaming market, contributing \$2.6 million in total revenue in 2018, versus \$2.4 million in 2017.

Gaming Tax Distribution

Delaware's commercial casinos are subject to an effective tax rate of between 57–58 percent on their gross revenue from electronic gaming devices and, as of July, a 20 percent tax on their gross table game revenue, both inclusive of payments used to subsidize race purses. Notably, legislative provisions allowing racinos to offset a small portion of their tax payments from electronic gaming devices to pay for capital improvements are set to take effect in mid-2019.

The effective taxation structure applied to internet gaming offerings is roughly the same as the structure applied to the equivalent games in racinos. However, racinos are entitled to a share of internet gaming revenue only after the total amount generated in any year surpasses \$3.75 million.

Meanwhile, Delaware racinos and sports lottery retailers retain approximately 35 percent of revenue from sports betting. The state keeps 50 percent of revenue left over after payment of commissions to providers of the Delaware

Lottery's sports betting system and risk-management services.

In 2018, Delaware's racinos and sports lottery retailers generated total gaming tax revenue of approximately \$207.8 million, a slight decline of 0.7 percent from 2017. Of that amount, approximately \$167.8 million was returned to Delaware's General Fund. Monies in the fund are appropriated annually for various purposes, including public and higher education, health and social services and public safety. An additional \$40 million was allocated to Delaware's racing industry for the purpose of supplementing race purses.

Competitive Landscape

For more than a decade, Delaware racinos have battled a significant expansion of gaming competition in neighboring Maryland, New Jersey and Pennsylvania.

In 2017, Pennsylvania passed a massive expansion of gaming to allow, among other things, up to 10 new satellite casinos, internet gaming, land-based and online sports betting and electronic gaming devices (VLTs) at retail locations, such as truck stops.

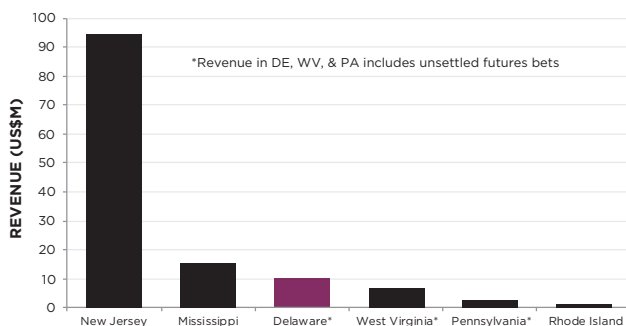
As of the end of 2018, the only new forms of wagering to have commenced in Pennsylvania were sports wagering and internet lottery sales, with satellite casinos, retail gaming and internet gaming all expected to launch in 2019.

Meanwhile, two Atlantic City casinos re-opened their doors in mid-2018, further intensifying competition in the region.

United States ex-Nevada: Post-PASPA Sportsbook Revenue (US\$M)

2018

The new sportsbooks installed at Delaware's three racinos brought in \$10.2 million in revenue in just over six months of operation. The total was dwarfed by New Jersey, which generated \$94.2 million at nine brick and mortar facilities and eight online sportsbooks over the same time period.



SOURCE: State regulators

POLICY AND REGULATORY REVIEW

Sports Betting

In June, Delaware became the first U.S. state to capitalize on the Supreme Court ruling that overturned the federal ban on sports betting. As one of four states grandfathered in under the 1992 ban, Delaware was able to launch single-game betting without any new legislation.

In 2009, then-Gov. Jack Markell (D) pushed legislation to expand the Delaware Sports Lottery beyond parlay wagers on football into full-scale sports betting. The move was challenged by major sports leagues and, ultimately, the U.S. Third Circuit Court of Appeals blocked the state from moving forward with single-game wagering.

The 2009 legislation, however, provided the framework for regulated sports betting in the First State and, following the Supreme Court

decision, state officials determined that additional legislation was not necessary for the state to begin offering betting on professional and collegiate sports—with the exception of games involving Delaware-based teams.

While parlay bets on NFL and collegiate football games continue at licensed retailers, such as bars and convenience stores, single-game wagering across all major sports is offered exclusively at the state's three racinos.

While online sports betting is legal in Delaware, it is not yet available.

Taxation

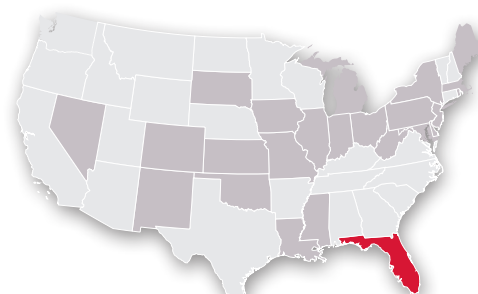
Following years of lobbying on the part of Delaware's commercial casinos, a gaming tax relief bill was finally passed in 2018.

Delaware's tax rate was 22.5 percent when electronic gaming devices were first introduced at racetracks in the mid-1990s. Over the next two decades, the gaming tax rate was increased on seven occasions. Legislation signed into law by Gov. Jay Carney (D) in June reduced the state's take of electronic gaming device revenue from 43.5 to 42.5 percent and table game revenue from 29.4 to 15.5 percent.

It also suspended the combined \$13.2 million annual licensing fee that racinos are obliged to pay in order to host table games.

Florida

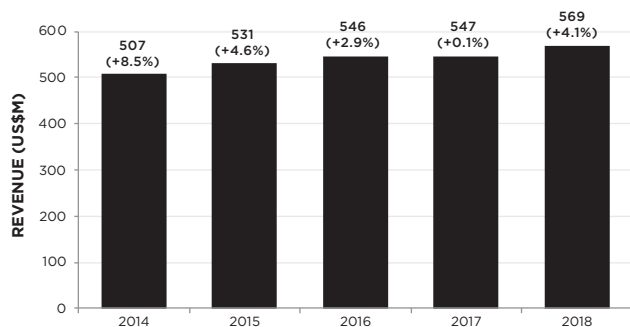
Number of Commercial Casinos	8
Casino Format	Land-Based Casinos; Racinos
Notable Forms of Gaming	Jai Alai Betting
Regulatory Authority	Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering
Gross Casino Gaming Revenue 2018	\$569.0M
Gaming Tax Revenue 2018	\$199.2M



In 2018, total statewide commercial casino gaming revenue was \$569.0 million, up 4.1 percent. It was the market's ninth consecutive year of growth.

Florida: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Florida Division of Pari-Mutuel Wagering

MARKET OVERVIEW

Florida offers commercial casino gaming at eight properties, each of which is limited to the operation of electronic gaming devices. The four land-based casinos and four racinos are regulated by the Florida Department of Business and Professional Regulation.

In 2004, voters amended the Florida Constitution to allow electronic gaming devices at eligible pari-mutuel wagering facilities in Broward County and Miami-Dade County, subject to voter approval in those counties. Broward voters approved commercial casino operations in 2005 and Miami-Dade voters followed suit in 2008. The first Broward casino, Gulfstream Park, opened in 2006, and the first in Miami-Dade, Magic City Casino, opened in 2009.

To qualify for a casino license, a property must have been in existence in 2004, when the state constitutional amendment was enacted, and also have conducted live racing or jai alai games during calendar years 2002 and 2003.

Commercial casinos are limited to a maximum of 2,000 electronic gaming devices each and are required to pay an annual licensing fee of \$2 million plus a \$250,000 regulatory fee to help fund Florida's compulsive gambling program.

MARKET PERFORMANCE

In 2018, total statewide commercial casino gaming revenue was \$569.0 million, up 4.1 percent against 2017. Notably, with the exception of 2009, statewide gaming revenue has risen every year since the inception of commercial casino gaming in Florida in 2006.

Part of the growth in 2018 was the result of South Florida's pari-mutuel facilities rebounding from 2017, when they were forced to shutter for several days due to Hurricane Irma.

Mardi Gras Casino in Hallandale Beach, in particular, sustained significant damage and was fully closed for more than two months. While the facility partially reopened in December 2017, its gaming floor did not return to operation until May 2018 when the casino, refurbished and under new ownership, reopened as the Big Easy Casino.

Gaming Tax Distribution

Florida's commercial casinos are taxed at a rate of 35 percent of electronic gaming device revenue.

In 2018, Florida commercial casinos generated total tax revenue of \$199.2 million, up 4.1 percent from 2017.

Under Florida law, all tax revenue from commercial casinos is deposited into Florida's Educational Enhancement Trust Fund (EETF). The fund was established in 1986 to allocate annual revenue from the then-newly created Florida Lottery to Florida school districts, public colleges and universities. Additional sums are also used to provide financial aid to Florida students. Each year, the Florida Legislature determines which programs are funded and at what level under the EETF.

Electronic gaming device revenue was originally taxed at a 50 percent rate, but the rate was lowered to 35 percent in 2010 when Florida agreed to a tribal gaming compact with the Seminole Tribe. In recent years, lawmakers have also discussed further lowering the rate as part of legislation to expand gaming outside of Miami-Dade and Broward counties.

Competitive Landscape

Florida's commercial casinos face significant competition from the state's seven tribal casinos. In accordance with federal court rulings and a 2010 gaming compact, only the Seminole Tribe's casinos may offer house-banked card games, specifically blackjack and baccarat, in addition to electronic gaming devices. Ball and dice games, such as live roulette and craps, are not permitted at either commercial or tribal casinos.

Card rooms at racetracks and jai alai frontons in other Florida counties also offer gaming, but are limited to the operation of non-banked card games, such as poker. Live table games, including roulette and craps, are available on some "cruise ships to nowhere" that depart from several points along Florida's coast. These games are not subject to state regulation as they are operated in international waters.

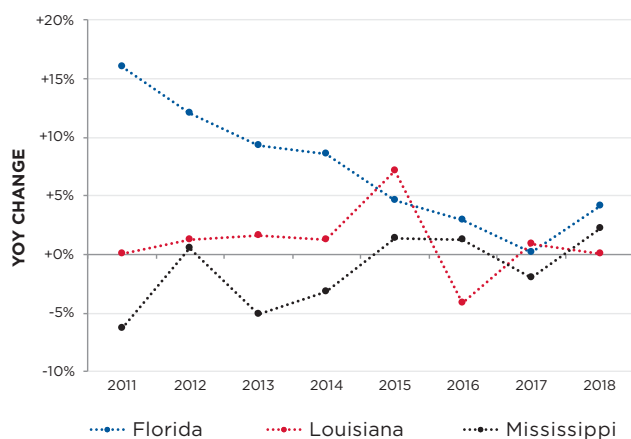
Florida's gaming landscape has remained largely stable for the past decade, despite ongoing debate about potential expansion among members of the state legislature. Lawmakers have intensely discussed a series of proposals in recent years to expand the range of games at Seminole Tribe casinos, permit electronic gaming devices at additional Florida racetracks and possibly authorize a handful of commercial casino-resorts, without being able to reach an agreement on a package of gambling reforms.

Following a voter referendum held in 2018, any such expansion of commercial gaming would now have to originate from a citizen-led initiative and be approved in a statewide ballot.

Southeast U.S.: Annual Commercial Casino Gaming Revenue Growth By State (US\$M)

2011 to 2018

After seven consecutive years of slowing growth in gaming revenue, Florida's commercial casinos posted a 4.1 percent year-over-year gain in 2018, outpacing the two nearest commercial gaming states.



SOURCE: FL Division of Pari-Mutuel Wagering, LA Gaming Control Board, MS Gaming Commission

POLICY AND REGULATORY REVIEW

Expansion

Florida voters overwhelmingly approved a constitutional amendment in November that will set a much higher bar for any future expansion of commercial casino gaming in the Sunshine State.

The ballot measure, Amendment 3, was approved by more than 70 percent of voters and gives Florida residents the “exclusive right to decide whether to authorize casino gambling” in the state. Rather than a simple vote by the legislature, any new commercial gaming expansion, would require 60 percent of Florida voters to approve a new constitutional amendment.

Greyhound Racing

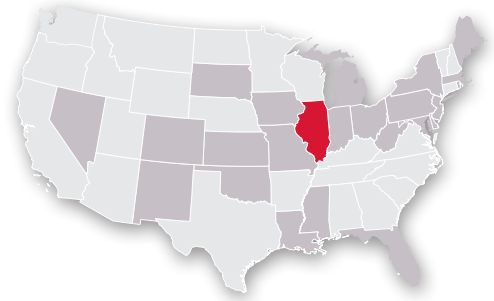
Florida voters also passed an additional ballot measure, Amendment 13, which effectively bans live greyhound racing in the state by the end of 2020.

The measure allows racetracks to keep other approved gaming operations, including card rooms and electronic gaming devices, as well as accept bets on greyhound races in other states.

Prior to the November vote, live greyhound racing was banned in 40 states, and only active in six. Of those, Florida has by far the largest footprint with 12 of the nation's 17 active dog tracks. Wagering at Florida's dog tracks topped \$200 million last fiscal year.

Illinois

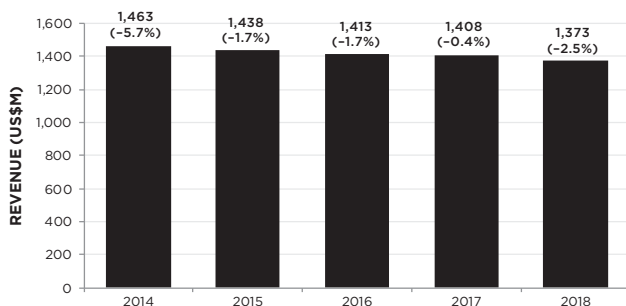
Number of Commercial Casinos	10
Casino Format	Riverboat Casinos
Regulatory Authority	Illinois Gaming Board
Gross Casino Gaming Revenue 2018	\$1.37B
Casino Tax Revenue 2018	\$462.2M



In 2018, total statewide commercial casino gaming revenue was \$1.37 billion, down 2.5 percent. It was the market's sixth straight year of contracting revenue since electronic gaming devices were deployed in retail locations, such as bars and taverns, in 2012.

Illinois: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Illinois Gaming Board

MARKET OVERVIEW

Illinois offers commercial casino gaming at 10 riverboat casinos, which are regulated by the Illinois Gaming Board.

In 1990, the Illinois legislature approved the Riverboat Gambling Act, which authorized the Gaming Board to grant up to 10 casino licenses. Each casino may operate up to 1,200 gaming positions—covering both electronic gaming devices and table games—at a maximum of two riverboat vessels docked at a single specified site.

Illinois' first casino, Argosy Casino Alton, opened in 1991. The state's most recent casino, Rivers Casino in Des Plaines, opened in 2011. There have been multiple attempts over the last few years to authorize additional commercial casinos in Illinois and expand other forms of gaming, but so far, no proposal has been signed into law.

In 2009, the legislature approved the Video Gaming Act, which authorized retail establishments, such as restaurants, bars and truck stops, in participating municipalities to each operate up to five limited-stakes electronic gaming devices (referred to as video gaming terminals, or VGTs). The first VGTs became operational in 2012 and the market has since ballooned with annual VGT revenue surpassing that of Illinois commercial casinos for the first time in 2018.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.37 billion, down 2.5 percent against 2017. The drop in revenue, largely attributable to the continued expansion of VGTs in retail locations throughout the state, represented the sharpest decline of any state last year.

Consistent with the national trend, the performance of electronic gaming devices lagged that of table games at the state's commercial casinos. Electronic gaming device revenue was \$1.07 billion, down 2.9 percent relative to 2017. In contrast, statewide table game revenue was \$300.6 million, down just 0.9 percent.

Since 2012, the year VGTs were first deployed to Illinois bars and other convenience venues, total statewide commercial casino revenue has declined 16.2 percent. Over the same period, casino admissions have fallen from over 16 million customers in 2012 to just under 11 million in 2018—a drop of 32.5 percent.

Gaming Tax Distribution

Illinois Gaming Tax

CASINO GAMING REVENUE	TAX RATE APPLIED
\$0-\$25M	15%
\$25M-\$50M	22.5%
\$50M-\$75M	27.5%
\$75M-\$100M	32.5%
\$100M-\$150M	37.5%
\$150M-\$200M	45%
\$200M+	50%

Illinois applies a graduated tax to commercial casino gaming revenue, ranging from 15 percent on gaming revenue up to \$25 million, to 50 percent on gaming revenue of more than \$200 million. Illinois also imposes an admissions tax of \$2 per patron at Jumers Casino and \$3 at all other casinos.

In 2018, Illinois commercial casinos generated total gaming tax revenue of approximately \$462.2 million, down 2.8 percent against 2017.

Of that amount, roughly \$382.5 million was paid to the state government with the majority of state tax revenue then redistributed to Illinois' Education Assistance Fund that supports public education programs. Approximately \$79.7 million in taxes was generated for local governments that host casinos.

Competitive Landscape

Illinois' commercial casinos compete with rival properties in several neighboring states. For instance, casinos in the Chicago area face competition from a trio of properties in northwestern Indiana, while two casinos in southwestern Illinois compete with properties in Missouri for customers from the St. Louis market.

As a result of a 2015 gaming reform law in Indiana, some riverboat casino properties in the state have begun exploring the possibility of moving to larger venues located on dry land, further intensifying competition in the Greater Chicago market.

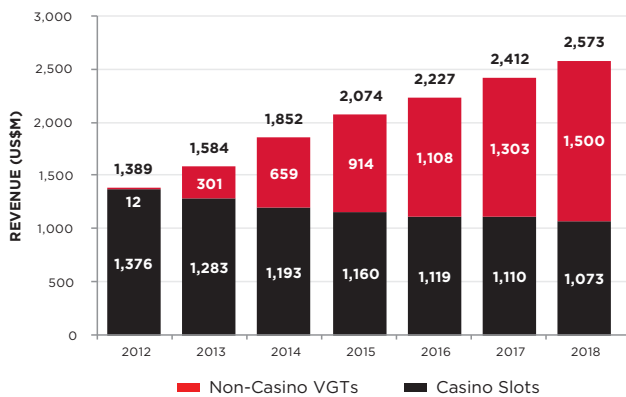
The proliferation of VGTs at retail establishments across Illinois continues to be the greatest competitive challenge for commercial casinos in the state. At the end of 2018, there were 30,694 VGTs installed at 6,773 convenience venues in Illinois, up from 28,271 VGTs and 6,359 venues at the close of 2017.

With all available licenses awarded, no additional casino openings are expected in Illinois in the near term. However, the installation of so-called historical racing devices at the state's three horse racetracks is in play after rules governing such devices were advanced by Illinois racing officials in 2018.

Illinois: Annual Gaming Machine Revenue By Gaming Type (US\$M)

2012 to 2018

Total statewide VGT revenue grew to \$1.5 billion in 2018, up 15.1 percent, while revenue from electronic gaming devices in commercial casinos declined for a seventh straight year. VGTs in bars and other convenience venues now account for 58 percent of all electronic gaming device revenue in Illinois.



SOURCE: Illinois Gaming Board

Historical Racing

In July 2018, the Illinois Racing Board voted to allow for the deployment of historical racing devices at the state's three remaining horse racing tracks.

Historical horse racing devices, also known as instant racing terminals, allow wagers to be placed on the results of races that have already occurred without the gambler knowing in advance which race they are wagering on.

Regulators published draft rules in December, allowing for a comment period of at least 90 days before a committee of the Illinois General Assembly votes on whether to adopt the proposal. If the committee approves the rules, historical racing devices could be installed at racetracks as early as mid-2019.

The proposal faces fierce opposition, however, from Illinois' commercial casino industry, which argues the devices would further cannibalize a saturated Illinois gaming market. In addition, the Illinois Thoroughbred Horsemen's Association has raised concerns about some of the rules.

POLICY AND REGULATORY REVIEW

Expansion

Efforts to pass a comprehensive gaming expansion bill in Illinois, a regular point of discussion in the General Assembly in recent years, once again failed to garner enough momentum to move forward in 2018.

Among other things, proposed legislation would increase the number of commercial casinos in Illinois from 10 to 16, including a new casino-resort in downtown Chicago, authorize electronic gaming devices at racetracks, and allow for additional gaming positions at riverboat casinos.

After passing in the Illinois Senate in 2017, gaming expansion was ultimately not taken up for formal consideration in the Illinois House during the second year of the 2017-18 legislative session. The House did, however, hold two hearings on gaming expansion and sports betting.



IN FOCUS

Sports Betting

The legal sports betting landscape in the United States was fundamentally redrawn in 2018 by the U.S. Supreme Court’s decision to overturn the federal ban on sports betting and open the door for states throughout the country to decide whether and how to legalize wagering on sporting events.

The May decision to invalidate 1992’s Professional and Amateur Sports Protection Act (PASPA) quickly saw single-event sports betting, previously confined to Nevada, expand to a total of eight states by year’s end.

Three states—New Jersey, West Virginia and Rhode Island—passed legislation to legalize sports betting during 2018, while four other states—Delaware, Mississippi, New Mexico and Pennsylvania—moved forward under the terms of existing state laws put in place before the Supreme Court ruling.

In addition, 15 other states plus the District of Columbia considered some form of legislation to regulate sports wagering within their borders, with those states and many more preparing to introduce bills in 2019.

Taking center stage in the first few months of the post-PASPA era was New Jersey, the state that successfully challenged the 1992 federal ban in court.

Commercial casinos and racetracks in the Garden State took their first sports bets in June, exactly one month after the Supreme Court decision.

A few weeks later, New Jersey established a new regulatory paradigm by launching online sports wagering operations and allowing players to register for betting accounts remotely, without having to visit a land-based casino, as is the policy for mobile betting in Nevada.

In their first six-and-a-half months of operation, New Jersey sportsbooks reported over \$1.2 billion in total betting handle, bringing in \$94 million in revenue. By the end of the year, bettors were increasingly migrating to the online market, with three quarters of bets being placed online or via a mobile device, rather than at a retail sportsbook.

“We really didn’t know what was going to happen in the United States, and New Jersey in particular, as it related to mobile wagering, but we knew we needed it,” said David Rebuck, Director of the New Jersey Division of Gaming Enforcement. “And the numbers have been extraordinary.”

As sports betting expanded, it became increasingly apparent that states are prepared to adopt divergent regulatory models.

Like New Jersey, Pennsylvania and West Virginia are allowing commercial casino operators to offer sports betting at their land-based facilities and via online platforms available anywhere within the states’ borders.

Mobile sports wagering in Mississippi, by contrast, is permitted strictly within the four walls of casino properties.

Sports betting has also been launched by tribes in Mississippi and New Mexico as a form of tribal gaming. In Delaware and Rhode Island, meanwhile, sports betting is hosted at commercial casinos but operated by state lotteries.

As 2018 drew to a close, the District of Columbia Council approved legislation authorizing land-based and online wagering through the D.C. Lottery, while allowing commercial gaming operators to partner with D.C. sports arenas to offer retail and mobile sportsbook operations on-site at those sports facilities. Additionally, voters in Arkansas approved a ballot measure authorizing sports betting at four future casino locations in the state.

One of the more notable trends following the Supreme Court decision was the shift in position of professional sports leagues, many of which had long opposed legalized sports betting. By the close of the year, the National Basketball Association, Major League Baseball and the

National Hockey League had inked a total of six official betting partnerships involving sportsbook operators MGM Resorts International, FanDuel and The Stars Group. Individual teams had also signed marketing and data agreements with William Hill, Caesars Entertainment and the Chickasaw Nation, among others.

“A year ago, we wouldn’t have been having this discussion,” said NHL Commissioner Gary Bettman when announcing his league’s partnership with MGM. “But the world changed, and we’re adapting to it.”

Still, sports leagues and the gaming industry continued to clash over how leagues should be treated under sports betting legislation.

Representatives of several major leagues actively lobbied state and federal lawmakers for requirements that operators purchase their official data to settle in-play bets, and for leagues to have input into the types of wagers that may be offered on their games.

The NBA, MLB and PGA Tour, meanwhile, urged states to grant leagues a royalty or “integrity fee” to be paid by operators out of the amounts bet on their events.

At year’s end, no state had enacted a law including either an integrity fee or official data mandate, although legislative discussions on both issues were expected to continue in 2019.

Meanwhile, the Supreme Court’s ruling also ignited debate in Congress over potential new federal legislation for sports wagering.

In December, Sens. Charles Schumer, the Democratic Senate Minority Leader from New York, and Orrin Hatch, a Utah Republican who has now retired, introduced legislation that would establish federal standards for sports betting and require states to have their regimes approved by the U.S. Attorney General.

The Senate bill received a frosty reception from industry stakeholders who argue that federal intervention is unwarranted based on the successful track record of state and tribal regulators.

Both regulators and the industry came together over the latter half of 2018 to ensure that regulations and integrity concerns could be addressed collectively. State regulators from Nevada, New Jersey, Pennsylvania, Louisiana, Michigan and Mississippi agreed in 2018 to establish a forum to discuss best practices and cooperate in various areas including sharing betting information.

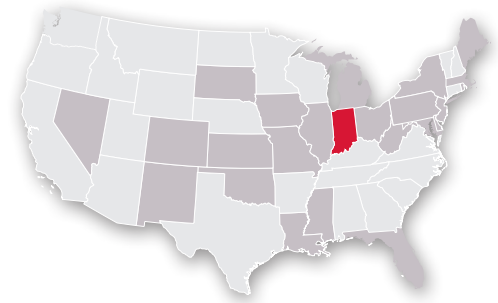
In November, commercial gaming operators announced the formation of the Sports Wagering Integrity Monitoring Association in order to pool data related to any suspicious transactions and share it with regulators and other law enforcement bodies.

Speaking at a September 27 hearing of a subcommittee of the U.S. House of Representatives’ Judiciary Committee, Nevada’s chief gaming regulator warned that federal regulation of sports betting “would only add unnecessary cost and delay to the licensing process, increased taxation, and create additional complications.”

“Nevada takes the view that states are the best equipped to regulate sports betting within their own borders,” added Becky Harris, then-chair of the Nevada Gaming Control Board.

Indiana

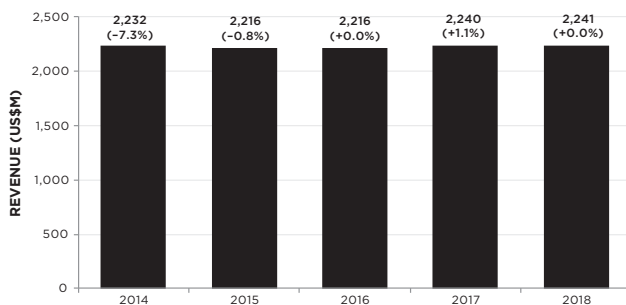
Number of Commercial Casinos	13
Casino Format	Land-Based Casinos; Riverboat Casinos; Racinos
Regulatory Authority	Indiana Gaming Commission
Gross Casino Gaming Revenue 2018	\$2.24B
Gaming Tax Revenue 2018	\$599.6M



In 2018, total statewide commercial casino gaming revenue was \$2.24 billion, virtually even with the prior year, despite admissions at Hoosier State riverboats declining for the fifth straight year.

Indiana: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Indiana Gaming Commission

MARKET OVERVIEW

Indiana offers commercial casino gaming at nine riverboat casinos and two land-based casinos, each of which operates electronic gaming devices and table games. In addition, there are two racinos which are currently limited to the operation of electronic gaming devices. All 13 commercial casinos are regulated by the Indiana Gaming Commission (IGC).

In 1993, the Indiana legislature approved the Riverboat Gambling Act, which authorized the IGC to grant up to 10 casino licenses. Indiana's first commercial casino, Tropicana Evansville, opened in 1995. Legislation authorizing an 11th commercial casino within a "historic hotel district" was approved in 2003, which paved the way for the opening of French Lick Resort Casino in 2006.

As part of a tax relief effort, the state legislature authorized the installation of up to 2,000 electronic gaming devices at each of Indiana's two racetracks in 2007. Racetracks will further benefit from a 2015 law that allows them to offer live-dealer table games beginning in 2021.

Some restrictions applied to commercial casinos have been relaxed in recent years. In 2011, legislation passed allowing for riverboat casinos to become permanently moored crafts. In 2015,

the Riverboat Gambling Act was amended again to allow riverboat casinos to move onto dry land adjacent to their home docks. Since then, one casino has moved its entire operation on land, another opened a high-limit gaming room next to its existing vessel and a third is currently constructing a new land-based facility expected to open at the end of 2019.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$2.24 billion, essentially unchanged from 2017. The revenue total included \$1.89 billion in revenue from electronic gaming devices, down 0.9 percent from 2017, and \$349.1 million from table games, up 5.4 percent.

While the Indiana market has stabilized following the opening of 11 casinos in neighboring Ohio between 2012 and 2014, a full year of operations at the state's first tribal casino, located in South Bend, dampened revenues at certain commercial casinos in northwestern Indiana.

Continuing the trend of the last several years, the number of admissions at Indiana riverboat casinos also fell in 2018 to 14.2 million, down 7.5 percent from 2017. The closure of some Ohio River casinos for several days in February due to flooding likely contributed to the decline in visitors and associated admissions taxes.

Indiana applies a graduated tax to land-based and riverboat casino gaming revenue, ranging from 15 percent on gaming revenue of up to \$25 million, to 40 percent on gaming revenue of more than \$600 million.

As of July 2018, land-based and riverboat casinos, with one exception, are also subject to a supplemental wagering tax of 3.5–4 percent on total gaming revenue. The supplemental tax was enacted by the legislature in 2017 to replace a fee that was formerly applied on casino admissions.

Racinos, meanwhile, are taxed at a rate of 25 percent of revenue up to \$100 million; 30 percent on revenue between \$100 million to \$200 million; and 35 percent on revenue exceeding \$200 million.

In 2018, commercial casinos paid a total of \$599.6 million in taxes, down 0.6 percent from 2017. The slight decrease reflected lower casino admissions during the first half of the year, when admissions fees were still charged to riverboat casino patrons.

Pursuant to state law, the majority of gaming tax revenue is held in Indiana's General Fund and used for general state budgetary purposes. Additional funds are used to cover gaming regulatory costs, support Indiana's horse racing industry and are distributed among Indiana's local city and county governments, among other things.

Gaming Tax Distribution

Indiana Land-Based and Riverboat Gaming Tax

CASINO GAMING REVENUE	TAX RATE APPLIED
\$0–\$25M	15%
\$25M–\$50M	20%
\$50M–\$75M	25%
\$75M–\$150M	30%
\$150M–\$600M	35%
\$600M+	40%

Competitive Landscape

In January, the Pokagon Tribe opened Indiana's first tribal gaming facility—Four Winds Casino—in South Bend, near the Michigan border. The tribal casino is restricted to the operation of certain electronic gaming devices, but competes with commercial casinos along Lake Michigan in northwestern Indiana.

Indiana's commercial casinos also compete with various facilities in neighboring states. For instance, riverboat casinos in southeastern Indiana compete with a trio of Ohio casinos and racinos serving the Cincinnati market. Meanwhile, riverboat casinos in northwestern Indiana compete with Illinois casinos located in the

Greater Chicago area.

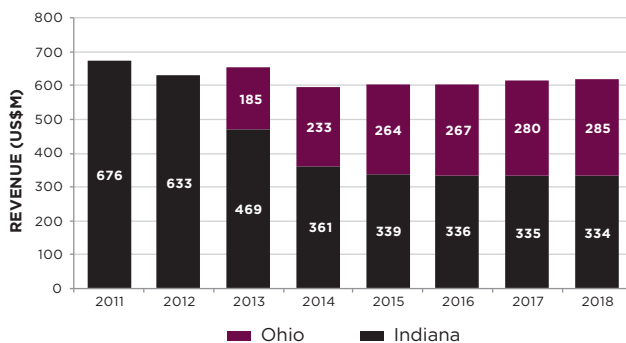
In 2018, Illinois lawmakers again considered a number of gaming expansion proposals that would have impacted Indiana casinos—including the authorization of a resort casino in downtown Chicago—but none were passed before the end of the legislative session.

Meanwhile, Indiana, along with all of its bordering states—Ohio, Illinois, Kentucky and Michigan—have explored the possibility of authorizing sports betting within their borders. Given that legislation has been drafted in all five of these states, Indiana lawmakers will likely face pressure to consider legislation in 2019.

Cincinnati Area: Annual Gaming Revenue By State (US\$M)

2011 to 2018

Annual revenue at Indiana's three Cincinnati-area commercial casinos has fallen every year since two commercial casino venues on the Ohio side of the border opened in early 2013.



**Indiana casinos: Hollywood Lawrenceburg, Rising Star, Belterra.
Ohio casinos: JACK Cincinnati, Belterra Park

SOURCE: Indiana Gaming Commission

POLICY AND REGULATORY REVIEW

Sports Betting

Companion bills introduced in the House and Senate in January 2018 proposed legalized sports betting at the state's riverboat casinos, racinos and off-track betting facilities, subject to a 9.25 percent tax rate. The main difference between the bills was that the House version contained a 1 percent "integrity fee" on wagering handle allocated to the sports leagues.

Although the 2018 Indiana legislative session closed without a vote on either bill, momentum picked up in October when lawmakers held a sports betting hearing to receive input from the gaming industry as well as sports leagues. Following the hearing, a legislative study committee charged with investigating the merits of legalized sports betting voted unanimously in favor of the 2019 General Assembly crafting a bill.

Fantasy Sports

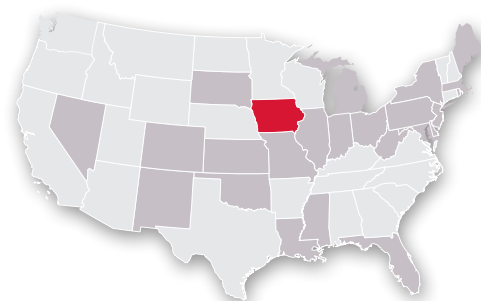
In a ruling that could have implications on the issue of data rights within future sports betting legislation, the Indiana Supreme Court ruled in October that online fantasy sports sites are not in violation of players' "right of publicity" under Indiana law.

The ruling was in response to a suit brought by three college athletes against DraftKings and FanDuel for using their names, images and statistics in fantasy sports contests without obtaining their prior consent or providing compensation.

In their decision, state Supreme Court justices sided unanimously with the fantasy-sports operators because their use of player data falls within an exception to the right of publicity law that allows for commercial use of "material that has newsworthy value."

Iowa

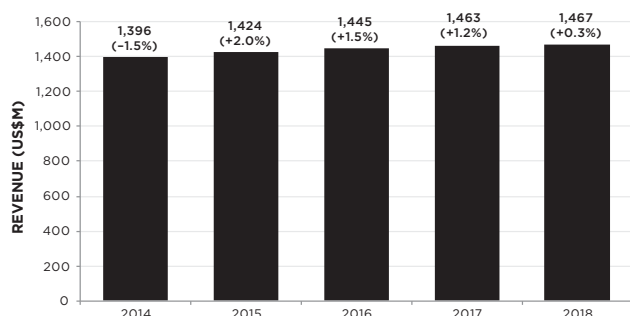
Number of Commercial Casinos	19
Casino Format	Land-Based Casinos; Riverboat Casinos; Racinos
Regulatory Authority	Iowa Racing and Gaming Commission
Gross Casino Gaming Revenue 2018	\$1.47B
Gaming Tax Revenue 2018	\$339.2M



In 2018, total statewide commercial casino gaming revenue was \$1.47 billion, up 0.3 percent. The modest year-over-year increase came despite a continued decline in the number of visitors to Hawkeye State casinos.

Iowa: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Iowa Racing and Gaming Commission

MARKET OVERVIEW

Iowa offers commercial casino gaming at 16 land-based casinos, one riverboat casino and two racinos. The 19 properties, all of which operate electronic gaming devices and table games, are regulated by the Iowa Racing and Gaming Commission (IRGC).

In 1989, Iowa became the first state to legalize riverboat casinos with the passage of the Excursion Gambling Boat Act. The first three of Iowa's riverboats—Casino Belle, The President and Diamond Lady—opened on April 1, 1991.

The installation of electronic gaming devices at racetracks was authorized in 1994, while table games were approved in 2005. Iowa's first racino, Bluffs Run Casino in Council Bluffs (now the Horseshoe Council Bluffs), opened in 1995.

For commercial casinos to operate in Iowa, a sponsoring charitable organization must partner with a gaming operator under an agreement that sees an average of 3 percent of casino gaming revenue distributed to the charitable organization. Racetracks, meanwhile, must be licensed to conduct pari-mutuel wagering in order to qualify for a license to offer casino games.

There are no statutory limits on the number of commercial casinos that may operate in Iowa. However, counties seeking to host a casino or racino must secure the approval of a majority of its residents via a county-wide referendum. A second voter referendum to re-approve the casino license is required eight years after initial approval.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.47 billion, up 0.3 percent against 2017. It was the market's third consecutive year of modest growth. Over the same period, admissions to Iowa casinos have fallen 6.6 percent to 20.3 million, which has been offset by increased revenue per admitted patron.

Electronic gaming devices, which accounted for 89.3 percent of total statewide gaming revenue in 2018, generated \$1.31 billion in revenue, essentially unchanged from 2017. Meanwhile, table game revenue was \$156.8 million, up 3.0 percent against 2017.

Gaming Tax Distribution

Iowa Land-Based and Riverboat Gaming Tax

GAMING REVENUE	TAX RATE APPLIED
\$0-\$1M	5%
\$1M-\$3M	10%
\$3M+	22 %

In Iowa, land-based and riverboat casinos are subject to a graduated tax rate on gaming revenue that ranges from 5 percent to 22 percent. Racino gaming revenue, meanwhile, is taxed at 22 percent or 24 percent, depending on various conditions, including prior-year revenue and whether the racino has a riverboat casino in its host county.

In 2018, Iowa's commercial casinos generated total gaming tax revenue and regulatory fees of \$339.2 million, up just under 1 percent from 2017.

Of that amount, approximately \$293 million was collected by the state General Fund and allocated to various beneficiaries, including the Rebuild Iowa Infrastructure Fund, the Iowa Skilled Worker & Job Creation Fund and the Environment First Fund. Additional monies were used to help service state debts incurred through various projects including flood rebuilding and mitigation, prison construction and bridge safety.

Per Iowa law, the majority of riverboat casino tax revenue is distributed to the state's General Fund, with 1.8 percent of overall gaming revenue being redirected to cities and counties that host casinos.

Competitive Landscape

Iowa was one of the first states to legalize commercial casinos outside Nevada and New Jersey. Since then, neighboring states Illinois, Missouri and South Dakota have begun operating commercial casinos. In addition, Minnesota, Nebraska and Wisconsin house nearly 75 tribal gaming facilities, making for a competitive Midwest gaming market.

Iowa's casinos also compete with four tribal casinos. The Meskwaki Bingo Casino, owned and operated by the Sac and Fox Tribe, is surrounded by four of the six largest cities in Iowa, including Des Moines and Cedar Rapids. Two other tribal casinos in Iowa, as well as three tribal casino properties located on the Nebraska side of the border, all compete with the Hard Rock Casino in Sioux City.

Meanwhile, in November, despite ongoing legal challenges from the states of Iowa and Nebraska, the Ponca Tribe opened the Prairie Flower Casino across the border from Omaha, Nebraska. The tribal casino, which is limited to electronic gaming devices, competes with commercial casinos in Council Bluffs.

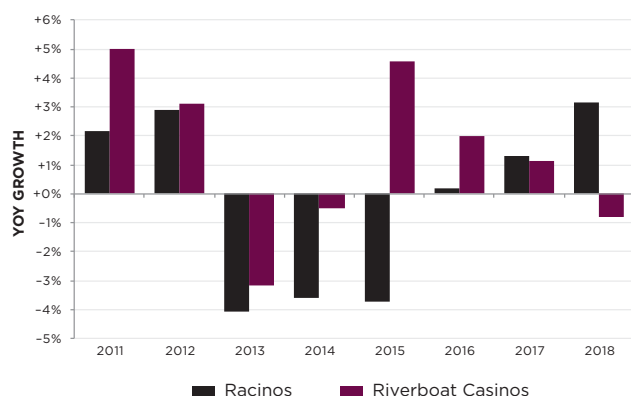
Notably, casinos in eastern Iowa continue to face growing competition from electronic gaming devices (VGTs) in Illinois retail venues. First authorized in 2009, the Illinois VGT market has

expanded rapidly in recent years with more than 30,000 VGTs in operation in the state at the end of 2018.

Iowa: Annual Commercial Casino Gaming Revenue Growth Rate By Property Type (US\$M)

2011 to 2018

Racinos continued their rebound in 2018, posting revenue gains of 3.2 percent after lagging in performance compared to Iowa's riverboat casinos for many years.



SOURCE: Iowa Racing and Gaming Commission

POLICY AND REGULATORY REVIEW

Responsible Gaming

Legislation passed in April 2018 mandated the Iowa Racing and Gaming Commission to develop a centralized electronic database where patrons may register for self-exclusion from the state's commercial casinos.

The legislation was designed to assist commercial casinos in preventing access to their gaming floors by self-excluded patrons. Established in 2004, Iowa's statewide self-exclusion scheme, in which patrons may bar themselves from gambling at all state-licensed commercial casinos through one single point of registration, was previously managed by commercial casino operators in collaboration with the Iowa Gaming Association. Now, the self-exclusion program is administered by the IRGC.

Sports Betting

Iowa was one of 18 states to consider legislation to authorize sports betting in 2018.

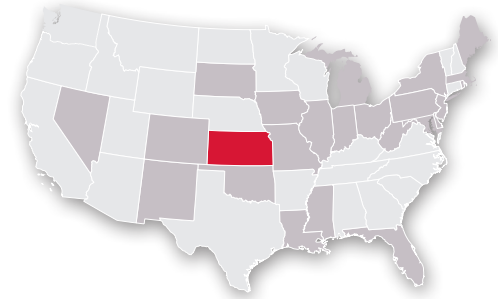
In February, a bill authorizing commercial casinos to offer sports betting at their properties and via mobile devices was recommended for passage by a committee in the Iowa House with jurisdiction over matters of state government.

However, despite later being approved by another committee, the bill was not brought up on the House floor for a vote before the state legislature adjourned in April 2018.

Meanwhile, the Iowa Lottery Board has explored the feasibility of Iowa retailers using lottery terminals for sports betting should the legislature pass an authorizing law.

Kansas

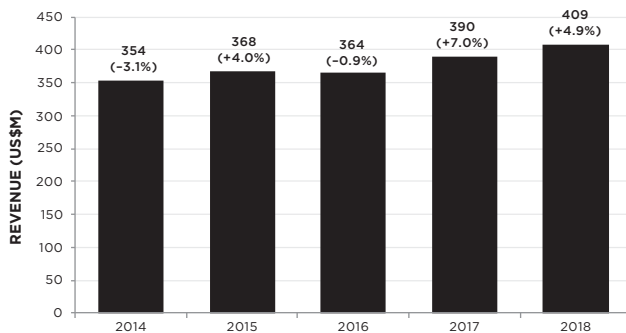
Number of Commercial Casinos	4
Casino Format	Land-Based Casinos
Regulatory Authority	Kansas Racing and Gaming Commission
Gross Casino Gaming Revenue 2018	\$408.6M
Gaming Tax Revenue 2018	\$110.3M



In 2018, total statewide commercial casino gaming revenue was \$408.6 million, up 4.9 percent. The year-over-year increase was mostly driven by the first full year of operations at the state's fourth casino, which opened in the spring of 2017.

Kansas: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Kansas Racing and Gaming Commission

MARKET OVERVIEW

Kansas offers commercial casino gaming at four state-owned casinos, which are developed and managed by private companies. The casinos, each of which operate electronic gaming devices and table games, are regulated by the Kansas Racing and Gaming Commission (KRGCC).

In 2007, the legislature approved the Kansas Expanded Lottery Act, which authorized the creation of four “lottery gaming facilities”, one in each of the four designated gaming zones throughout the state. The state's first commercial casino, Boot Hill Casino, opened in 2009, and its most recent, Kansas Crossing Casino, opened in 2017.

Private casino developers that were contracted to build the commercial casinos and manage their operations were subject to an upfront “privilege fee” of \$25 million for casinos in the state's northeastern and south-central gaming zones and \$5.5 million for casinos in the southeastern and southwestern zones.

Kansas law also allows for the operation of electronic gaming devices at racetracks, although no tracks are currently in operation. The Kansas Lottery is responsible for considering and approving any proposed racino contracts, and the

county where any proposed racino is located must have approved gaming via a public vote.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$408.6 million, up 4.9 percent against 2017. It was the market's biggest year, in revenue terms, since its inception in 2009.

Total statewide revenue from electronic gaming devices was \$357.7 million, up 6.0 percent from 2017, while table game revenue was \$50.8 million, down 2.3 percent.

The increased revenue, in part, reflected the first full year of operations at Kansas Crossing Casino, located near the Missouri border. In addition, the Kansas economy rebounded substantially in 2018 following a relatively stagnant economic period over 2016 and 2017.

Gaming Tax Distribution

Kansas commercial casinos are required by statute to pay a minimum tax rate of 27 percent on gaming revenue, which includes a 22 percent contribution to the state, 3 percent to local governments and 2 percent to fund problem gambling treatment. While all four casinos pay exactly 27 percent, the Kansas Lottery has the authority to negotiate a higher rate for any new casinos in the future.

In 2018, Kansas' commercial casinos generated total gaming tax revenue of \$110.3 million, up 4.9 percent from 2017.

Per Kansas law, the state portion of gaming tax revenue is distributed to the Expanded Lottery Act Revenues Fund, which also receives initial licensing fees collected from casino operators. Appropriations from the fund are determined annually at the direction of the state legislature. In 2018, funds were allocated for state debt reduction, public employees retirement liabilities and an initiative to increase the number of engineering graduates at Kansas universities.

Competitive Landscape

With commercial casinos now built in all four authorized gaming zones, no additional casino openings are expected in Kansas in the near term.

Although the state's last racetrack was shuttered in 2009, there have been consistent legislative efforts since then to revive the industry by allowing tracks to install electronic gaming devices and lowering the gaming tax rates that would be applied to racino operations. So far, however, all of those efforts have failed.

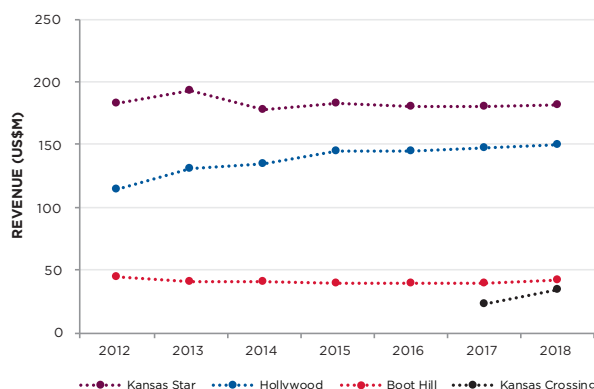
Kansas' five tribal casinos, all located in the northeastern corner of the state, compete with Hollywood Casino at Kansas Speedway located just outside of Kansas City. Hollywood Casino also competes with four Kansas City-area casinos across the Kansas-Missouri border.

Meanwhile, Kansas Crossing Casino, which opened in 2017, competes with several tribal casinos in northeastern Oklahoma, including one casino owned by the Quapaw Tribe and located on the Oklahoma-Kansas state line.

Kansas: Annual Gaming Revenue By Property (US\$M)

2012 to 2018

The opening of Kansas Crossing Casino in 2017 continued to boost total statewide gaming revenue in 2018. While the Kansas Star, Hollywood and Boot Hill casinos posted gains between 1 and 5 percent, Kansas Crossing revenue was up 50 percent in its first full year of operations.



SOURCE: Kansas Racing and Gaming Commission

POLICY AND REGULATORY REVIEW

Expansion

During 2018, Kansas lawmakers once again rejected legislation that would have opened the door to install electronic gaming devices at a racetrack venue in Sedgwick County, home of the shuttered Wichita Greyhound Park.

The proposed legislation, which would have authorized a local referendum on expanded gaming at the former greyhound track, was approved by separate committees in the Kansas House and Senate in April. However, the Senate's version of the bill was later defeated by a vote on the floor, killing the measure.

Although electronic gaming devices at racetracks were authorized under Kansas' Expanded Lottery Act, a local referendum on the issue in Sedgwick County was defeated in 2007.

In addition to enabling a second vote in Sedgwick County, the 2018 bills would have reduced taxes for racetracks and protected the state government from monetary liabilities in the event an existing commercial casino operator were to successfully sue for compensation over the added competition.

Sports Betting

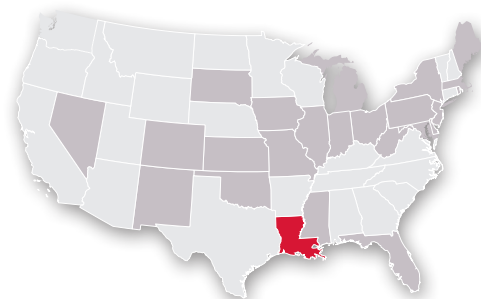
Kansas was one of 18 states to consider legislation to authorize sports betting in 2018.

Committees in the Kansas House and Senate held several hearings in March and April 2018 on the potential regulation of sports wagering as proposed by at least four separate bills in the legislature. Ultimately, however, neither the House nor the Senate voted on any of the bills before the legislature adjourned in early May 2018.

In December 2018, a joint panel of senators and representatives convened a further hearing to receive additional testimony from different stakeholders regarding Kansas' sports betting policy options. The panel declined to endorse any specific policy recommendations.

Louisiana

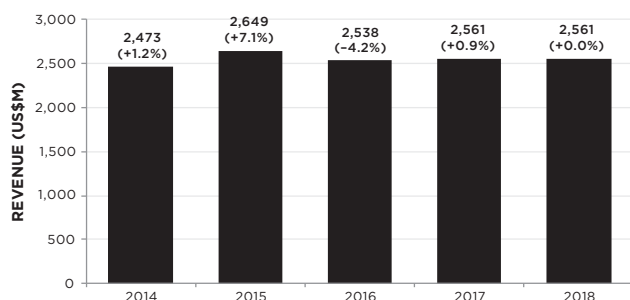
Number of Commercial Casinos	20
Casino format	Land-Based Casinos; Riverboat Casinos; Racinos
Regulatory Authority	Louisiana Gaming Control Board
Gross Casino Gaming Revenue 2018	\$2.56B
Casino Tax Revenue 2018	\$607.7M



In 2018, total statewide commercial casino gaming revenue was \$2.56 billion, virtually even with the prior year's total as revenue at the state's four racinos, up 2.3 percent, offset slight declines in riverboat and land-based casino performance.

Louisiana: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Louisiana Gaming Control Board

MARKET OVERVIEW

Louisiana offers commercial casino gaming at 15 riverboat casinos and one land-based casino, each of which operates electronic gaming devices and table games. Four racinos—limited to offering electronic gaming devices—are also operational. All 20 properties are regulated by the Louisiana Gaming Control Board.

Commercial casino gaming was first authorized in 1991, when the Louisiana legislature passed a law allowing a maximum 15 riverboat casinos, either sailing or permanently moored on specific waterways in different areas of the state. The following year, legislation passed authorizing a single land-based casino in downtown New Orleans. Harrah's New Orleans Hotel and Casino opened in 1999 and operates under the terms of a contract originally awarded by a local development board. Racinos were approved by the legislature in 1997.

In 2018, the state legislature passed a law that will allow riverboat casinos to move to larger, land-based facilities within close proximity of their original vessels. Several properties have already expressed an interest in moving onshore after new regulations are finalized, likely in early 2019.

MARKET PERFORMANCE

In 2018, total statewide commercial casino gaming revenue was essentially flat at \$2.56 billion, with uneven market performance across different regions of Louisiana.

While riverboat casinos and racinos in the Lake Charles market reported combined total revenue of \$939.7 million, up 4.5 percent, commercial casinos in the Baton Rouge area saw revenue decline 17.4 percent to \$255.9 million, following implementation of a citywide smoking ban in May.

Elsewhere, revenue reported by the six riverboat casinos and one racino in the Shreveport/Bossier market of northwestern Louisiana was \$677.1 million, down 0.3 percent compared to 2017, while revenue reported by racinos and the land-based casino in the New Orleans area was \$606.5 million, up 1.0 percent.

Gaming Tax Distribution

Revenue from each type of commercial casino establishment in Louisiana—riverboat casinos, racinos and the New Orleans land-based casino—is subject to a different tax structure.

Riverboat casinos pay a maximum effective tax rate of 27.5 percent, comprised of a state gaming tax of 21.5 percent of revenue plus additional local taxes which vary according to location.

Racino revenue is taxed at an effective rate of about 36 percent. That rate comprises an 18 percent contribution to the Louisiana horse racing industry taken off the top, with the remaining revenue subject to a state tax of 18.5 percent and local taxes of 4 percent.

The New Orleans land-based casino pays the greater of either a 21.5 percent tax on gaming revenue or an annual fee of \$60 million. The land-based casino must also remit rent and various other payments to local authorities, as established under its operating contract.

In total, Louisiana's commercial gaming properties generated tax revenue of \$607.7 million in 2018, up 0.9 percent from the previous year. The bump in tax revenue, despite flat gaming revenue in 2018,

was attributable to stronger revenue performance at higher-taxed racinos than lower-taxed riverboat properties last year.

In accordance with state law, the majority of gaming tax revenue is remitted to Louisiana's General Fund. From there, monies are appropriated at the direction of the legislature and used to pay for public education, public retirement systems, highway construction and fire and police protection, among other things.

In addition, the state's horse racing industry received nearly \$64 million in 2018 from taxes on racinos' gaming revenue.

Competitive Landscape

With the opening of the Golden Nugget in Lake Charles in 2014, all available riverboat licenses have been awarded in Louisiana and no additional commercial casino licenses may be issued without voter approval through a statewide referendum.

Various Louisiana commercial casinos are reliant upon out-of-state visitation for a portion of their revenue. For instance, riverboat casinos in the Lake Charles area draw many players from the Houston area, while those in the Shreveport/Bossier region compete with tribal casinos located in southeastern Oklahoma for customers from the Dallas-Fort Worth area and from southwestern Arkansas.

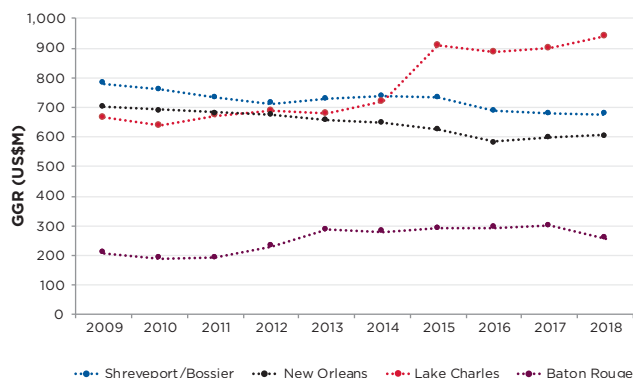
Riverboat casinos in the Shreveport/Bossier area may face more competition in the coming years after voters in neighboring Arkansas approved a constitutional amendment allowing for the development of four casino-resorts, including sportsbooks, in the state.

Meanwhile, Louisiana's commercial casinos compete with five tribal casinos scattered throughout the state. There are also nearly 13,000 electronic gaming devices offered in Louisiana at 1,674 non-casino locations, such as bars, restaurants, truck stops and off-track betting parlors. In 2018, total statewide revenue from gaming devices in such locations was \$595.7 million, up 3.4 percent from the year prior.

Louisiana: Annual Gaming Revenue By Market (US\$M)

2009 to 2018

In 2018, the Lake Charles region posted the largest year-over-year increase in gaming revenue, while Baton Rouge, the state's smallest gaming market, experienced the steepest decline. Revenue was mostly flat in the state's other two regions.



SOURCE: Louisiana Gaming Control Board

POLICY AND REGULATORY REVIEW

Riverboat Casinos

In May 2018, Gov. John Bel Edwards (D) signed legislation cementing the most significant overhaul of Louisiana's commercial gaming regulations in at least two decades.

The bill, reflecting the recommendations of the Riverboat Economic Development and Gaming Task Force, allows the state's 15 riverboat casinos to move to new land-based facilities up to 1,200 feet inland from their current location. The measure also eliminated the state's 30,000 square-foot limit on gaming floor space in favor of a cap on the maximum number of gaming positions—2,365—permitted within each riverboat casino.

The Task Force was established by a 2016 resolution of the state legislature with a mandate to draw up recommendations that would make Louisiana riverboat casinos more competitive with gaming properties in nearby jurisdictions.

Fantasy Sports

In November 2018, voters in 47 of Louisiana's 64 parishes approved a ballot initiative legalizing fantasy sports contests within their jurisdiction. The "Louisiana Fantasy Sports Contests Parish Measure," which required a simple majority for passage, was added to the ballot after Gov. Edwards signed a bill into law allowing voters to decide on a parish-by-parish basis if betting on fantasy sports should be permitted.

The bill authorizes the Louisiana Gaming Control Board to license and regulate fantasy sports operators. The state legislature and the Control Board will also be responsible for drafting rules and regulations for the operation of fantasy sports, including taxation rates and licensing procedures. One issue that will need to be addressed is how to utilize geolocation services to ensure that betting is only accessible in the parishes that have approved it.

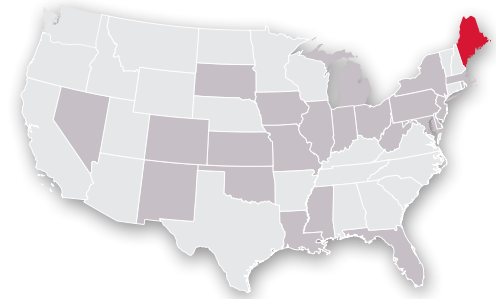
Regulatory Reform

The Louisiana Department of Public Safety & Corrections released a memo announcing two policy changes, effective May 1, 2018, relating to the requirements for transporting gaming equipment to Louisiana's commercial casinos.

The agency will no longer require gaming manufacturers to remove software from devices and ship the components separately to casinos. In addition, the notification period for incoming and outgoing shipments was reduced from ten to five business days. Notably, the policy change does not apply to certain electronic gaming devices destined for use at racetracks, retail establishments and truck stops.

Maine

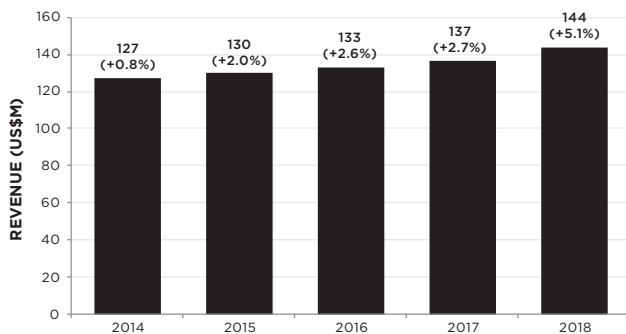
Number of Commercial Casinos	2
Casino Format	Land-Based Casinos; Racinos
Regulatory Authority	Maine Gambling Control Board
Gross Casino Gaming Revenue 2018	\$143.7M
Gaming Tax Revenue 2018	\$58.0M



In 2018, total statewide commercial casino gaming revenue was \$143.7 million, up 5.1 percent. The year-over-year increase was the largest since Oxford Casino opened in 2012.

Maine: Annual Commercial Casino Gaming Revenue (US\$M)

2013 to 2017



SOURCE: Maine Gambling Control Board

MARKET OVERVIEW

Maine offers commercial casino gaming at one land-based casino-resort and one racino. Both properties offer electronic gaming devices and table games and are subject to oversight by the Maine Gambling Control Board (MGCB).

Commercial casino gaming was first authorized in 2003 after voters approved a statewide referendum allowing the installation of electronic gaming devices at racetracks. The MGCB was established in 2004 and the state's first casino opened at Bangor Raceway—what is now Hollywood Casino Bangor—the following year.

In 2011, Hollywood Casino received legislative and voter approval to add table games to its gaming floor. Maine's second casino, located in Oxford County, was authorized via a separate voter referendum held in 2010 and operations began two years later in 2012.

Under Maine's regulatory framework, a maximum of two commercial casino gaming facilities may be operated after approval in a local referendum. There is also a statewide cap of 3,000 electronic gaming devices, with the allocation split evenly between the two properties.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$143.7 million, up 5.1 percent compared to 2017.

Despite being one of the smallest commercial gaming markets in the U.S. in terms of number of properties and annual revenue, Maine has seen positive growth every year but one since the opening of its first casino in 2005.

Electronic gaming devices were responsible for the continued market growth in 2018, generating a total of \$118.1 million in revenue, up 6.9 percent on the prior year. Meanwhile, table game revenue was \$25.7 million, down 1.7 percent.

Extending the trend of the last few years, Oxford Casino, located 35 miles north of Portland, continued to post year-over-year growth, while Hollywood Casino Bangor posted lower revenue in 2018. In total, Oxford Casino generated revenue of \$95.5 million in 2018, up 10.6 percent, while Hollywood Casino reported \$48.3 million in revenue, down 4.3 percent compared with the previous year.

Gaming Tax Distribution

Maine's two commercial casinos are subject to different tax rates. Hollywood Casino, as a racino property, pays 39 percent of electronic gaming device revenue and 1 percent of handle in taxes, while Oxford Casino, as a standalone casino, is subject to a tax rate of 46 percent of EGD revenue. Both casinos pay 16 percent of their table game revenue in taxes.

In 2018, Maine's commercial casinos generated total gaming tax revenue of \$58.0 million, up 6.2 percent from 2017. The slightly higher growth in tax revenue compared to gaming revenue reflected the contrasting performance in 2018 of the higher-taxed Oxford Casino versus the lower-taxed Hollywood Casino.

The biggest recipient of gaming tax dollars in Maine is higher education through the funding of scholarships to state and community colleges. Gaming tax revenue is also used to support health care, agriculture, the state's horse racing industry and the local governments that host commercial casinos. An additional beneficiary is a state fund established in 2000 to provide prevention-related services and other healthcare programs for Maine families.

Competitive Landscape

Maine's commercial casinos operate at the outer edge of a New England market that has been reshaped in recent years by Massachusetts' 2011 approval of up to four commercial casino properties.

In June 2015, Plainridge Park Casino—a slots parlor in Plainville—became the first Massachusetts casino to open. MGM Springfield opened in August 2018 and Encore Boston Harbor is slated to begin operations in mid-2019. The location of Massachusetts' fourth casino has not yet been determined.

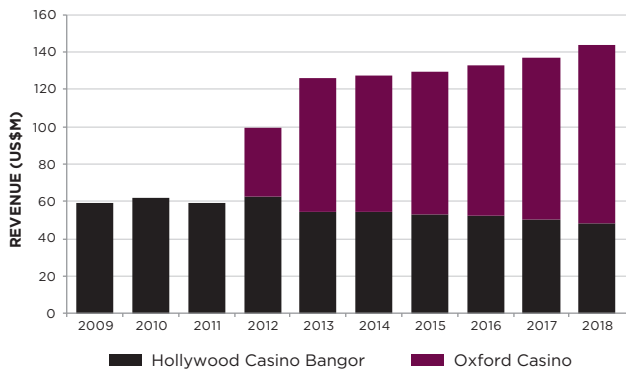
While there are currently no tribal casinos in Maine, several tribes have sought approval from state lawmakers and voters, via a referendum, to build casinos on reservation land. All of these efforts have so far been unsuccessful.

Maine's two commercial casinos also compete for gaming dollars with two harness racing tracks and four off-track betting locations where pari-mutuel wagering and advance deposit wagering are permitted.

Maine: Annual Gaming Revenue By Property (US\$M)

2009 to 2018

In 2018, Oxford Casino continued to capture an increasing share of the market in Maine, accounting for 66.4 percent of total statewide gaming revenue, up from 63.1 percent in 2017.



SOURCE: Maine Gambling Control Board

POLICY AND REGULATORY REVIEW

Tribal Gaming

In November, the Maine Supreme Court declined to wade into a longstanding legislative debate over the status of tribal gaming when justices decided not to take up a request for an opinion on whether federal law would allow the Houlton Band of Maliseet Indians to open a casino on its land without any additional action by state lawmakers.

The request was filed by Maine's House of Representatives, where legislation to authorize tribal gaming has been consistently proposed in recent years. In declining to issue an opinion, the Maine Supreme Court said the matter did not meet the threshold of being "of serious and immediate nature."

Fantasy Sports

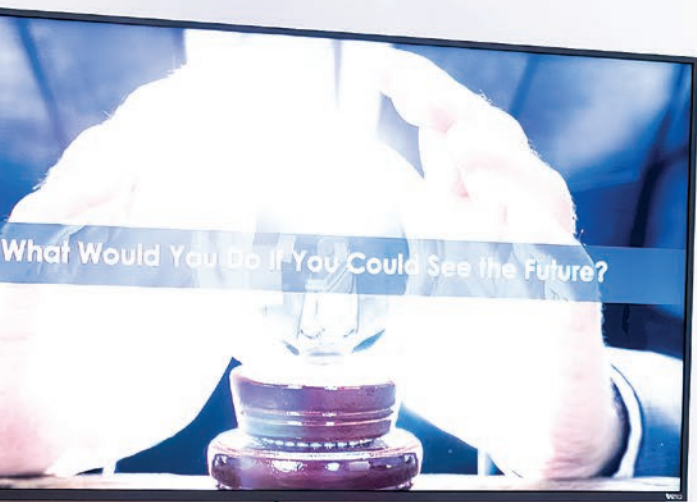
Maine continued to move forward in 2018 with efforts to regulate online fantasy sports contests when the MGCB's Gambling Control Unit promulgated a formal set of rules that would apply to fantasy games.

The proposed regulations were subject to a public hearing in December and were expected to be finalized and adopted in early 2019. Maine is one of 19 states with laws on the books to affirmatively legalize and regulate fantasy sports.

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Innovation



One of the gaming industry's most significant challenges is introducing new and innovative products into one of the most tightly regulated consumer business environments in the country.

Despite this restrictive regulatory regime, casino patrons give the industry relatively high marks when it comes to bringing innovative products to market. According to a survey conducted for the American Gaming Association (AGA) in early 2019, the vast majority of Americans who had visited a casino in the past year think that, when it comes to “casino gambling and new technology,” the industry is either “staying ahead” (29%) or “keeping up” (57%) with overall societal trends. Conversely, only a fraction (14%) of casino customers say casinos are “falling behind” on the innovation spectrum.

The survey also found that customers envision technological change transforming the casino experience in the near future. In fact, when asked how similar or different the “technology involved in the games and experiences on the casino floor will be” a decade from now, nearly 8-in-10 customers say it will either be “somewhat different” (43%) or “completely different” (35%) than it is today.

Despite customers' optimism, there are some industry observers who contend that the products on casinos' gaming floors have not been able to evolve at the same speed as those offered in other entertainment industries. This has led to fears that casinos could struggle not only to maintain their existing customer base, but also to attract the next generation of consumers.

Others argue such fears, while not totally without merit, are overblown, and the gaming industry actually has a strong record of innovating within the unique regulatory constraints that are applied to operators and game developers.

In recent years, casinos have rolled out a new breed of electronic gaming devices based partly on player skill that blend traditional slot machines with arcade-style video games. While it is still too early to establish the long-term success of skill-based games, their introduction is a testament to the ongoing ingenuity in the sector.

Stadium-style gaming is another new feature in some casinos. The hybrid games combine the speed of electronic gaming devices with live table games by allowing players to sit at rows of terminals and place electronic bets on table games managed by a live-dealer.

Traditional gaming devices are also incorporating ever-more sophisticated graphics, sound and cabinets, plus 3-D and holographic displays. Meanwhile, casino-resorts in Las Vegas and Atlantic City are embracing competitive video gaming through eSports arenas and lounges.

Daniel Sahl, Associate Director of the Center for Gaming Innovation at the University of Nevada Las Vegas (UNLV), observed that a continued focus on innovation is especially important in light of how various other consumer industries have been disrupted in recent years.

Although new technologies and consumer preferences have not yet affected casinos as fundamentally as they have in the travel or lodging sectors, “it would be foolish to ignore the pace and significance of the changes that have occurred around us and assume that we are immune,” Sahl said.

Innovating for the gaming industry has historically been challenging for several reasons.

One challenge cited by industry executives is the fact that casino games are typically designed by independent gaming equipment providers who then sell or lease the games to casino operators to offer to their patrons.

While casino operators gather extensive data on which games perform well on their floors and why, game manufacturers are in part reliant upon operators to share that information so that they might more effectively reconfigure their products based on consumer feedback.

Then there is the strict regulatory environment in which the gaming industry operates.

Gaming manufacturers are generally required to be licensed in every jurisdiction where they sell their games, imposing significant compliance costs that simply do not apply to other sectors of the economy. For example, between commercial and tribal gaming locations in the U.S., a major game manufacturer might need to maintain licensure in more than 300 unique jurisdictions.

In addition, casino games typically must be tested and approved by regulators or private testing laboratories before they can be deployed to gaming floors, significantly slowing the rollout process and making it extremely difficult to perform consumer-testing on new games while they remain in the development phase. These standards themselves also differ state-to-state.

“Many of the great consumer tech and entertainment innovations of the last decade—Netflix, Airbnb, and Uber for example—had the benefit of surprising flexibility when developing and introducing their innovations. They, along with thousands of other innovative start-ups, offered and adjusted their products and technology with little oversight. These opportunities are more limited in our highly regulated market where a wide range of sanctions can be applied to any company that offers gaming without a license, and getting licensed is an intensive process.”

Daniel Sahl | Associate Director
Center for Gaming Innovation,
University of Nevada, Las Vegas

Recent years have seen notable progress on regulatory reforms designed to encourage greater innovation.

For example, a 2015 law passed by the Nevada legislature cleared the path for the development of skill-based casino games and the rollout of cashless wagering on gaming floors.

Since then, Nevada regulators have also launched a program, “New Innovation Beta” (NIB), that allows new games to be placed in casinos for live testing before completing the full state approval process.

Although yet to be fully implemented, additional legislation passed in 2017 allows independent game developers to bypass formal licensing in Nevada if an established gaming manufacturer assumes responsibility for their work.

During 2018, Louisiana, Michigan and Ohio were among the states that took steps to loosen the often-burdensome regulations associated with the shipment of new gaming devices to their casinos. Meanwhile, Rhode Island’s annual budget included provisions to encourage “gaming innovation pilot initiatives,” including stadium gaming, at the state’s two commercial casinos.

Future reforms, Sahl suggested, should include fostering closer collaboration between different regulatory agencies and addressing how the casino industry can best prepare itself for an increasingly cashless society. He proposed that the industry should consider how it can become more social media friendly, while still protecting the integrity of its games as well as customers’ privacy.

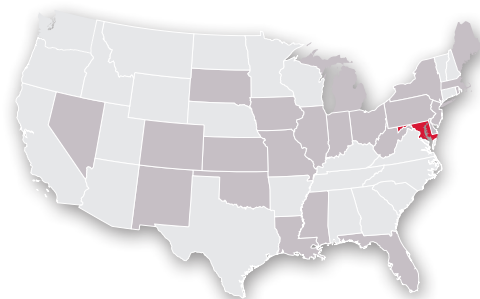
Although photography and live streaming have historically not been permitted in casinos, “it is important to ask whether zero tolerance for mobile devices and social media in gaming spaces is the only approach we can take when considering that sharing special and fun moments through social media has become such an integral part of the entertainment experience,” Sahl added.

Overall, he was optimistic about how the gaming industry and its regulators are embracing innovation.

“While a cautious approach to introducing new products can slow down the pace at which they are offered, a careless approach could lead to serious consequences and damage our integrity,” Sahl said. “I do think, however, that in addition to having a willingness to try new products in gaming, we also need to give these games time to find their footing with players.”

Maryland

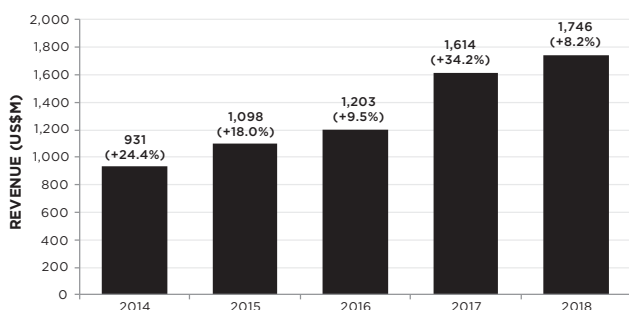
Number of Commercial Casinos	6
Casino Format	Land-Based Casinos; Racinos
Regulatory Authority	Maryland Lottery and Gaming Control Agency; Maryland Lottery and Gaming Control Commission
Gross Casino Gaming Revenue 2018	\$1.75B
Gaming Tax Revenue 2018	\$710.0M



In 2018, total statewide commercial casino gaming revenue was \$1.75 billion, up 8.2 percent. The sizeable increase in revenue was mostly driven by MGM National Harbor, which in just two years, has become one of the most profitable casinos in the country.

Maryland: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Maryland Lottery and Gaming Control Agency

MARKET OVERVIEW

Maryland offers commercial casino gaming at six properties, each of which operates electronic gaming devices and table games. The five land-based casinos and one racino are regulated by the Maryland Lottery and Gaming Control Agency (MLGCA), which relies on a seven-member advisory commission to determine the outcome of licensing investigations and oversee internal controls and law enforcement matters related to the facilities.

Commercial casino gaming was first approved in 2008 when Maryland voters passed a constitutional amendment allowing a total of five casinos limited to electronic gaming devices. The state's first casino—Hollywood Casino Perryville—opened in 2010.

The market expanded in 2012 when lawmakers and voters authorized table games at all casino properties as well as a license for a sixth commercial casino in Prince George's County, near Washington D.C. The sixth casino, MGM National Harbor, opened in December 2016.

In accordance with the 2012 expanded gaming law, Maryland's six commercial casinos can house no more than a combined 16,500 electronic gaming devices. There are also limits on the number of electronic gaming devices at individual casinos in different parts of the state.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.75 billion, up 8.2 percent compared to 2017.

Total revenue from electronic gaming devices was \$1.09 billion, up 9.3 percent versus 2017. Meanwhile, table game revenue was \$653.9 million, up 6.4 percent year-over-year.

The increase in statewide commercial gaming revenue, the fourth fastest rate in the country in 2018, reflected, in large part, the strong performance of MGM National Harbor in its second full year of operation. The property posted total gaming revenue of \$709.1 million in 2018, an increase of 16.6 percent, making it the third most profitable commercial casino in the U.S. outside of Nevada.

The Greater Baltimore-Washington D.C. commercial gaming market, anchored by MGM National Harbor, Live! Casino & Hotel, and Hollywood Casino in West Virginia, has risen to become the fourth largest in the country behind only the Las Vegas Strip, Atlantic City and Chicagoland. In just seven years, the market has grown from \$544 million in statewide gaming revenue to nearly \$1.8 billion.

Gaming Tax Distribution

Maryland's commercial casinos pay some of the highest tax rates on proceeds from electronic gaming devices—between 40 and 61 percent, depending on the specific casino—in the country.

Meanwhile, table games, which account for about 37 percent of total revenue in Maryland—

considerably higher than the national average—are taxed at 20 percent. In addition to taxes on revenue, casinos must pay an annual assessment of \$425 per electronic gaming device and \$500 per table game to help fund responsible gaming programs.

Overall in 2018, Maryland's commercial casinos generated total gaming tax revenue of \$710.0 million, up 7.9 percent from 2017.

Of that amount, almost \$500 million was distributed to Maryland's Education Trust Fund, which supports public education and construction of new schools, including public colleges, throughout the state. In addition, approximately \$88 million was distributed in the form of local impact grants and contributions to local jurisdictions.

The remaining tax revenue supported the state's horse racing industry, responsible gaming initiatives and the state's General Fund.

Competitive Landscape

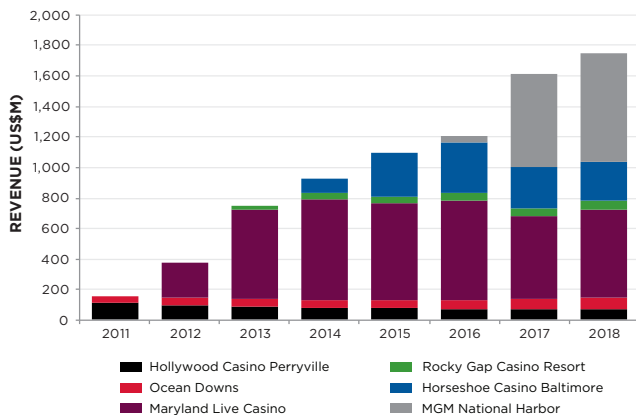
Maryland's six commercial casinos operate in an increasingly competitive Mid-Atlantic region that includes properties in Delaware, eastern Pennsylvania and New Jersey. The state's three largest casinos, MGM National Harbor, Live! Casino and Horseshoe Casino Baltimore, also compete with Hollywood Casino in Charles Town, West Virginia, for customers in the Baltimore-Washington D.C. metro area.

Meanwhile, expanded gaming is on the horizon in bordering Virginia. In 2018, Virginia lawmakers enacted legislation to allow the shuttered Colonial Downs racetrack, located just outside of Richmond, to operate historical racing devices on-site and at as many as ten affiliated off-track betting facilities in different parts of the state. Lawmakers also pitched several proposals to allow commercial casinos in Virginia, while the federally recognized Pamunkey Indian Tribe said it was looking to obtain land to develop a casino.

Maryland: Annual Gaming Revenue By Property (US\$M)

2011 to 2018

Gaming revenue was up at all of Maryland's casinos, except for Baltimore's Horseshoe Casino, in 2018. MGM National Harbor, in its second full year of operations, solidified its status as the most lucrative casino in the state, while Ocean Downs posted the largest year-over-year gain of 24 percent.



SOURCE: GCRS estimates, State Gaming Commissions

POLICY AND REGULATORY REVIEW

Sports Betting

Although no bill was enacted, sports betting legislation was fiercely debated in the Maryland General Assembly in 2018.

In the House of Delegates, a bill was passed, by a margin of 124-14, authorizing sports wagering at the state's commercial casinos and horse racetracks subject to approval by voters in a statewide referendum.

Despite the wide margin by which the House bill passed, it was not taken up by the Senate prior to the Assembly adjourning in April, in part due to stakeholder disagreement as to whether racetracks should be eligible for sports betting licenses, in addition to casinos.

Taxation

Maryland voters approved, by a nearly 7-1 margin, a November ballot initiative that earmarks all state revenue from commercial casino taxes for Maryland's Education Trust Fund. The initiative was placed on the ballot after Maryland legislators approved a measure—dubbed the “lockbox bill”—intended to stop lawmakers from using casino funds to help balance the state budget.

The Education Trust Fund was created in 2009, a year after voters approved the installation of electronic gaming devices at up to five casinos. At the time, lawmakers promised voters that the new revenue stream would go toward education, but without the legal requirement to do so, some gaming tax funds have been channeled into the state's General Fund.

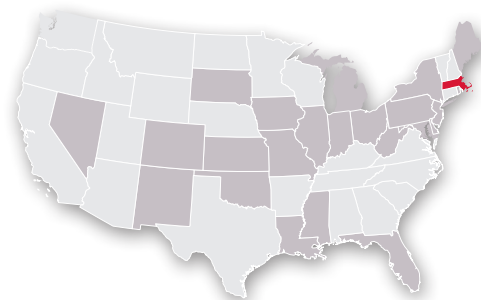
Regulatory Reform

In 2018, the Maryland Lottery and Gaming Control Agency held its annual open comment period allowing all casino gaming licensees to submit requests for regulatory changes. In May, the MLGCA agreed to accept 17 of 36 proposed amendments submitted by operators and suppliers.

Among other things, regulators agreed to shorten the minimum distance between ATM machines and table games from 10 feet to seven feet. They also raised the threshold for automatic processing of electronic gaming device jackpots from \$25,000 to \$50,000.

Massachusetts

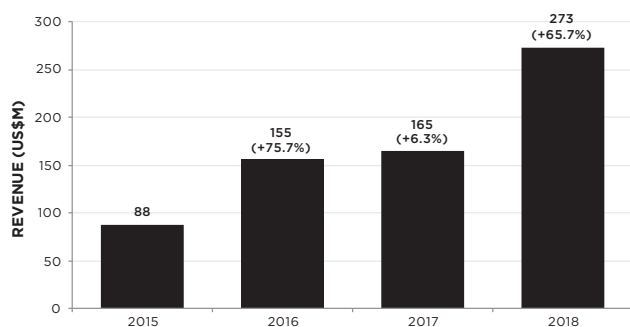
Number of Commercial Casinos	2
Casino Format	Land-Based Casinos; Racinos
Regulatory Authority	Massachusetts Gaming Commission
Gross Casino Gaming Revenue 2018	\$273.1M
Gaming Tax Revenue 2018	\$109.4M



In 2018, total statewide commercial casino gaming revenue was \$273.1 million, up 65.7 percent. The massive year-over-year increase was driven by MGM Springfield, which opened in late 2018.

Massachusetts: Annual Commercial Casino Gaming Revenue (US\$M)

2015 to 2018



SOURCE: Massachusetts Gaming Commission

MARKET OVERVIEW

Massachusetts offers commercial casino gaming at one casino-resort operating electronic gaming devices and table games and at one racino, which is restricted to electronic gaming devices.

In 2011, the legislature, after multiple failed attempts, passed a law authorizing commercial gaming at three casino-resorts in different regions of the state, plus an additional “Category 2” facility limited to electronic gaming devices. The law also established the Massachusetts Gaming Commission to issue licenses for the four properties and to regulate their operations.

The Category 2 license was awarded to Plainridge Park, a harness racing track in Plainville, which opened an adjoining casino in 2015. The first casino-resort license was awarded to MGM Resorts, which opened a two million-square-foot complex in Springfield in August 2018.

Wynn Resorts won the third license and chose Everett, just north of Boston, as the host city for a \$2.5 billion casino-resort. The casino, named Encore Boston Harbor, is scheduled to open in 2019.

The license for Massachusetts' fourth and final casino was designated for the Mashpee Wampanoag Tribe, which has broken ground on a tribal casino in Taunton in the state's southeastern

region. This project has stalled, however, due to legal challenges against the federal government's decision to acquire land for the project.

Massachusetts' commercial casino-resort operators are required to pay an upfront license fee of \$85 million and invest a minimum of \$500 million developing their facilities. Plainridge Park, which is limited to electronic gaming devices, was required to pay an initial license fee of \$25 million and invest \$125 million in new construction.

Market Performance

With the opening of MGM Springfield in August 2018, commercial casino gaming revenue in Massachusetts vaulted to \$273.1 million in 2018, a nearly 66 percent increase on the previous year.

Electronic gaming devices still accounted for the lion's share of total statewide gaming revenue, generating \$239.3 million in 2018, a 45.2 percent increase over 2017. Meanwhile, table games, which made their debut in Massachusetts in August, produced \$33.7 million for MGM Springfield in their first five months in operation.

Gaming revenue is expected to continue its ascent in 2019 with a full year of operations at MGM Springfield and the scheduled opening of Encore Boston Harbor in June 2019.

Gaming Tax Distribution

When Massachusetts authorized commercial casino gaming in 2011, it established different tax rates for its Category 1 (casino-resort) and Category 2 (slots-parlor) licensees.

Plainridge Park, which holds a Category 2 license, is subject to a 49 percent tax on electronic gaming device revenue. MGM Springfield, and the forthcoming commercial casino-resorts in Massachusetts, are subject to a much lower rate of 25 percent of gaming revenue. In addition, all commercial casino facilities must pay a \$600 annual fee for each of their electronic gaming devices.

In 2018, Massachusetts' two commercial

casinos generated total gaming tax revenue of \$109.4 million, up 35.6 percent from 2017. The lag in tax revenue as compared to gaming revenue reflected the lower tax rate paid by MGM Springfield, which in its first half-year, accounted for the vast majority of new revenue in Massachusetts in 2018.

More than 80 percent of tax revenue generated by Plainridge Park is distributed to Massachusetts' Gaming Local Aid Fund, which was created under the 2011 gaming law to help support the budgetary needs of city and town governments across the state. The remaining tax revenue from Plainridge Park goes toward the state's horse racing industry.

Tax revenue from casino-resorts is more broadly distributed. Beneficiaries include the Gaming Local Aid Fund, transportation and infrastructure projects, K-12 and higher education programs, a statewide economic development fund and the horse racing industry, among other state and local community needs.

Competitive Landscape

Plainridge Park and MGM Springfield will face in-state competition from the other two casino licensees in Massachusetts once they overcome legal and regulatory hurdles that have set back their opening dates. Additionally, the Aquinnah Wampanoag Tribe is moving closer to developing a tribal casino with electronic gaming devices on Martha's Vineyard after rebuffing a court challenge in 2017.

To the south, Connecticut's two tribal casinos and Rhode Island's two commercial casinos compete with Massachusetts casino venues and have the advantage of customer databases that date back decades. In addition, both of Rhode Island's casinos opened sportsbooks at the end of 2018. Rhode Island's Twin River Casino, in particular, competes with Plainridge Park, located just 20 miles north, for customers from nearby Providence and Pawtucket.

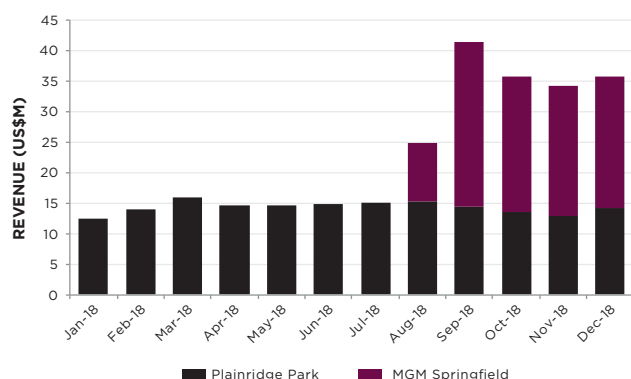
A specific competitive threat to MGM Springfield was diminished in September 2018 when a federal judge ruled against two Connecticut

tribes seeking to build a commercial casino that was approved by the Connecticut legislature in 2017. That casino has been proposed for East Windsor, near the Massachusetts border. The tribes and Connecticut officials have not given up, however, arguing in December that the next U.S. Department of Interior Secretary should approve compact changes that will allow the casino to open.

Massachusetts: Monthly Gaming Revenue By Property (US\$M)

2018

Revenue from electronic gaming devices at Plainridge Park remained relatively stable throughout 2018, generating between \$12 million and \$16 million each month. Meanwhile, MGM Springfield brought in more than \$100 million in its first five months of operation.



SOURCE: Massachusetts Gaming Commission

POLICY AND REGULATORY REVIEW

Responsible Gaming

In early 2018, Massachusetts gaming regulators declined to make a first-of-its-kind responsible gaming program a formal compliance requirement for the state's commercial casinos when they agreed to allow operators to continue offering the PlayMyWay play management system on a voluntary basis.

After receiving feedback from casino licensees, the Massachusetts Gaming Commission agreed to allow each of the state's two casinos to determine how they would roll out the play management tool at their properties. In 2018, PlayMyWay was expanded to MGM Springfield having been offered at Plainridge Park Casino for the previous two years.

The system, variants of which exist in certain international markets but nowhere else in the United States, allows enrolled patrons to set time and spending limits on their electronic gaming device play and receive notifications when they approach or surpass those limits.

Tribal Gaming

Plans for a tribal casino-resort in southeastern Massachusetts suffered a serious setback in 2018 when the federal government's Department of Interior reversed an earlier determination and concluded that the Mashpee Wampanoag tribe was not eligible to receive land-in-trust to accommodate its \$1 billion project.

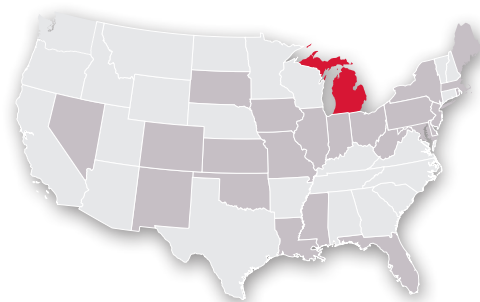
Aligning with rulings by federal courts, the Interior Department said the Mashpee tribe could not qualify for trust-land because it was not "under federal jurisdiction" at the time Congress passed a federal law related to tribal lands in the mid-1930s. The Mashpee gained formal recognition in 2007.

Although the reversal is being contested in federal courts, the ruling by the U.S. Interior Department raised the prospect of a commercial casino being built in the region of

southeastern Massachusetts that had been set aside for the Mashpee tribe under the state's 2011 Expanded Gaming Act. In late 2018, the Massachusetts Gaming Commission began to consult on the future of so-called "Region C" and whether it should reassess matters in light of the ongoing Mashpee litigation.

Michigan

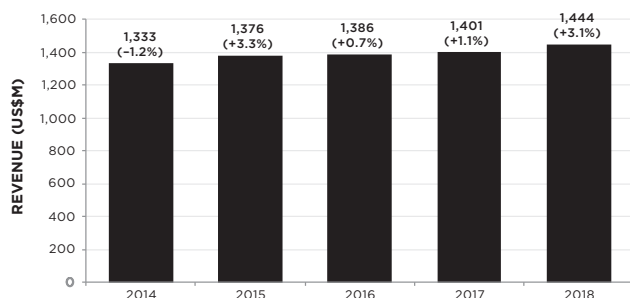
Number of Commercial Casinos	3
Casino Format	Land-Based Casinos
Regulatory Authority	Michigan Gaming Control Board
Gross Casino Gaming Revenue 2018	\$1.44B
Gaming Tax Revenue 2018	\$349.6M



In 2018, total statewide commercial casino gaming revenue was \$1.44 billion, up 3.1 percent. The revenue total, the highest ever recorded in Michigan, reflected the continued economic rebound in Detroit, where all three casinos are located.

Michigan: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Michigan Gaming Control Board

MARKET OVERVIEW

Michigan offers commercial casino gaming at three casinos, each of which operates electronic gaming devices and table games. The casinos are regulated by the Michigan Gaming Control Board, which is also responsible for issuing operator and supplier licenses.

Commercial casinos were first authorized in 1996, when Michigan voters approved an initiative permitting a maximum of three casinos in Detroit. A state law passed the following year established rules to further govern the three commercial casinos.

Each of the casino operators opened temporary gaming facilities in 1999 and 2000. Since then, all three Detroit facilities have expanded to house other resort amenities, including hotel and meeting space.

In 2004, a successful ballot initiative made gaming expansion in Michigan significantly more difficult. The constitutional amendment required that any new commercial gambling facility, or the addition of electronic gaming devices at existing venues, must first receive the approval of a majority of voters both statewide and in the locality where gaming will take place.

Despite the measure, racetrack operators in Michigan have tried multiple times to gain approval for installing electronic gaming devices at tracks. So far, however, all of these efforts have been unsuccessful.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.44 billion, up 3.1 percent compared to 2017. It was the market's fourth consecutive year of growth and the highest gaming revenue total ever recorded by Michigan's commercial casino industry, surpassing the previous record set in 2011.

The growth in the market reflected an improving economy, particularly in Detroit, which has been steadily rebounding since declaring bankruptcy in 2013. A labor strike at Caesars Windsor Hotel & Casino also benefited Detroit casinos as the Canadian casino, located on the opposite bank of the Detroit River, was forced to close for 60 days in April and May.

Electronic gaming devices, which traditionally account for a larger share of revenue in Michigan than in most other states, continued their dominance in 2018, posting total revenue of \$1.17 billion, up 2.6 percent year-over-year. Meanwhile, table game revenue rose to \$272 million, a 6.3 percent increase against 2017.

Growth was not spread evenly across each of Detroit's three commercial properties. The city's largest casino, MGM Grand Detroit, posted \$619.2 million in revenue, a 4.6 percent increase relative to the year prior. Meanwhile, the two smaller casinos, MotorCity and Greektown, posted slightly smaller gains of 2.3 and 1.7 percent respectively in 2018.

Gaming Tax Distribution

Michigan commercial casino gaming revenue is taxed at 19 percent, with 10.9 percent directed to the host city (Detroit) and 8.1 percent allocated for the state. In addition to revenue-based taxes, casinos are required to remit annual services fees to state and municipal governments. The annual municipal services fee must be at least \$4 million per casino.

In 2018, Michigan's three commercial casinos generated total gaming tax revenue of \$349.6 million, up 2.7 percent from 2017.

The City of Detroit uses the gaming taxes it receives to fund a variety of public needs, including law enforcement, public safety programs, economic development and job creation programs, anti-gang and youth development programs, tax relief and infrastructure improvements. Meanwhile, gaming tax revenue that the state receives is allocated to the Michigan School Aid Fund, which benefits K-12 public education.

Competitive Landscape

Due to the constitutional amendment passed in 2004, the number of commercial casinos in Michigan is not expected to change from the current total of three anytime in the near future.

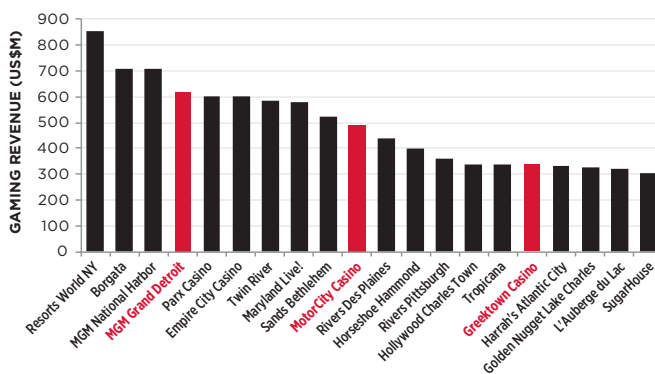
The three Detroit facilities do face competition from Michigan's 24 tribal casinos, although the closest property is more than 100 miles away. The much greater competitive challenge comes from the Caesars casino-resort in Windsor, Ontario located just minutes away from Detroit's casinos.

In addition, Hollywood Casino Toledo, located just 10 miles from the Ohio-Michigan border, draws some of its business from Michigan residents. Meanwhile, Michigan's Pokagon Band of Potawatomi Indians opened a new casino in January 2018 on land just across the state border in South Bend, Indiana.

Top 20 U.S. Commercial Casino Properties Outside Nevada, By Gaming Revenue (US\$M)

2018

MGM Grand Detroit recaptured its spot as the fourth highest revenue-generating commercial casino outside Nevada in 2018. All three Detroit casinos were in the top 20 nationwide.



SOURCE: GCRS estimates, State Gaming Commissions

Regulatory Reform

The internet gambling bill was just one of multiple pieces of gaming legislation that received approval by the legislature only to be vetoed by Gov. Snyder in the waning hours of the 2018 session.

The outgoing governor also vetoed a gambling reform measure that, among other things, would have streamlined the licensing process for gaming suppliers and increased the ownership percentage institutional investors may hold in gaming companies without being subject to licensing.

Snyder also vetoed bills to authorize and regulate fantasy sports contests, permit online betting on horse races and loosen regulations on charitable gaming. The five measures were essentially advanced in the legislature as a single package of gaming reforms, leaving Gov. Snyder to decide whether to sign all or none into law.

POLICY AND REGULATORY REVIEW

Internet Gaming

In 2018, Michigan was one stroke of a pen away from becoming the fifth state to authorize internet gaming.

A bill passed by the state House and Senate in late December would have permitted Michigan's commercial and tribal casinos to apply for separate licenses to offer online casino games, poker and sports betting to players within Michigan's borders.

However, Gov. Rick Snyder (R) vetoed the bill just days before leaving office at the end of the year. Snyder insisted the measure required further study due to the risk of lost tax revenue from Michigan's internet lottery program.



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IN FOCUS

Tribal Gaming

Perhaps the biggest challenge facing tribal gaming is how to continue the phenomenal success of the last 30 years.

Revenue figures for 2018 will not be released until later this year, but tribal gaming operations produced \$32.4 billion in gaming revenue in 2017. It was the seventh consecutive year of increases and tribes are on a pace to surpass commercial casinos in annual gaming revenue before 2030.

The landmark moment for tribal gaming occurred three decades ago with the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. Ironically, while IGRA was originally intended to restrict the growth of tribal casinos there are now more tribal than commercial casino properties across the country and more states with tribal gaming than commercial casino gaming.

In 2018, tribal gaming expanded to a 29th state after the Pokagon Tribe opened the first casino on sovereign tribal land in Indiana. Commercial casinos operate in 24 states.

Speaking at an event in Washington D.C. to commemorate the 30th anniversary of IGRA, Ernie Stevens, the Chairman of the National Indian Gaming Association (NIGA), described tribal gaming as “the most successful tool for economic development for many Indian tribes in over two centuries.”

“From our experience implementing it here at the NIGC, IGRA represents one of the most successful federal Indian laws to date,” added Jonodev Chaudhuri, Chairman of the National Indian Gaming Commission, the federal agency established under IGRA to oversee tribal gaming. “In the last 30 years, IGRA has brought Indian Country unprecedented economic development and growth.”

Recent developments, however, are raising questions about the future growth of tribal gaming and whether the sector can continue to grow at such a torrid pace.

An August 2018 ruling by the U.S. Court of Appeals for the Ninth Circuit in California underscored legal concerns over how tribal governments can participate in internet gaming

and online sports betting, given that IGRA’s scope is restricted to gaming activities that occur on tribal reservations.

Another major concern for tribes is the difficulty of obtaining new land.

During the Obama administration, the U.S. Department of the Interior placed more than 500,000 acres of land into trust for tribes. That led to the approval of several major tribal casino projects in California and Washington, among other states.

By contrast, under President Donald Trump, the process of taking land into trust for tribal gaming and other purposes has come to a grinding halt.

There may not be a better example of this tighter land policy than the Interior Department’s September 2018 reversal of an Obama administration decision to place 321 acres in trust for the Mashpee Wampanoag Tribe in Massachusetts.

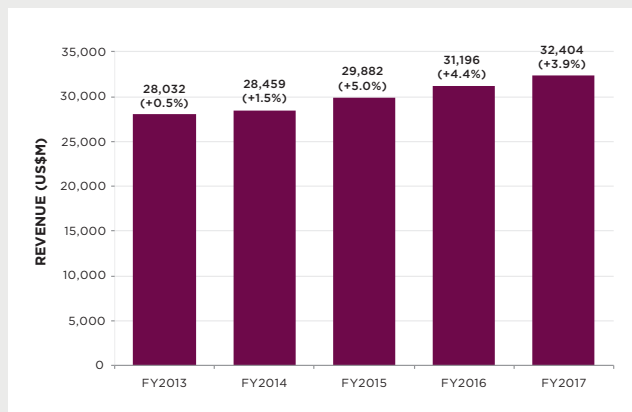
In the absence of trust land, IGRA allows for tribes to develop casinos on newly acquired land only under limited circumstances.

Those circumstances include when both federal and state governments agree an off-reservation casino would be in the tribe’s best interest and not detrimental to the surrounding community. The federal government can also take land into trust for gaming purposes in the case of newly-recognized tribes or those being restored to federal recognition, when the tribe in question does not already have an established reservation.

The process became more complicated in 2009, however, when the U.S. Supreme Court ruled that the Interior Department cannot take land into trust for tribes unless they were under the federal government’s jurisdiction before June 18, 1934 when Congress passed the Indian Reorganization Act. The Mashpee tribe was not formally recognized until 2007.

United States: Annual Tribal Casino Gaming Revenue (US\$M)

FY2013 to FY2017



SOURCE: National Indian Gaming Commission

“These lands are locked, and we cannot really tap into these lands because of so many bureaucratic processes,” said Patrice Kunesh, Director of the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis. “All of these (processes) take time, they take money and they discourage a lot of investors over time because time is money.”

While there certainly are challenges ahead, it would be a mistake to discount the prospects of tribal gaming.

Sovereign tribal nations continued to expand into the commercial gaming market in 2018, as tribes look to leverage the expertise they have developed in successfully operating tribal casinos under IGRA.

In June, the commercial gaming enterprise of the Seminole Tribe of Florida entered the Atlantic City market with the opening of the rebranded Hard Rock Hotel Casino located in the heart of the city’s boardwalk.

Tribes from Alabama, Oklahoma and Connecticut also moved forward with plans to operate commercial casinos in Pennsylvania, Arkansas and Ontario, Canada.

In addition, tribes joined commercial gaming enterprises in launching sportsbook operations in the wake of May’s historic U.S. Supreme Court ruling overturning the federal ban on sports betting.

The Mississippi Band of Choctaw Indians launched sports betting at its three tribal casinos in September, becoming the first tribe outside of Nevada to offer wagering on sporting events at a tribal casino. The Pueblo of Santa Ana followed suit one month later by opening a sportsbook at its Santa Ana Star Casino near Albuquerque, New Mexico.

Tribes in Mississippi and New Mexico are very much in the minority in that they did not need to amend the tribal-state gaming compacts that govern their casino operations or otherwise obtain additional state approvals in order to launch sports betting.

Compact negotiations and other legal issues are likely to complicate the rollout of sports wagering for tribes and for those states with prominent tribal gaming markets, according to Jason Giles, executive director of NIGA.

Still, Giles expressed optimism that tribes would eventually emerge as leaders in the sports betting marketplace.

He pointed to the example of now-ubiquitous ticket-in ticket-out (TITO) technologies for electronic gaming devices, which were pioneered by tribal casinos before later being adopted by the commercial gaming industry.

“I’m thinking there’s something we can do in Indian Country (for sports betting) that will take us down the same path,” Giles said.

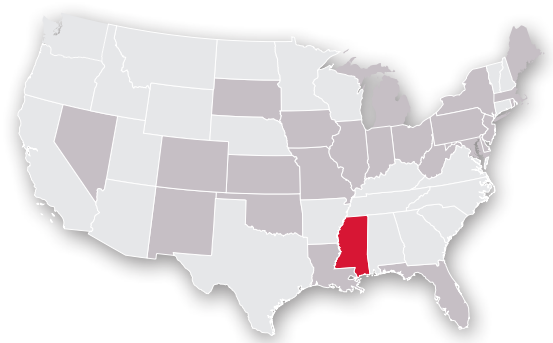
After a recent trip to Oklahoma, the new President and CEO of the American Gaming Association, Bill Miller, is bullish about tribal gaming’s future.

Tribal gaming, Miller noted, has joined oil and agriculture as an economic engine of Oklahoma.

The cyclical nature of oil and agriculture make Oklahoma a “boom or bust state,” Miller said, but tribal gaming “smooths out the economy” over the long run.

Mississippi

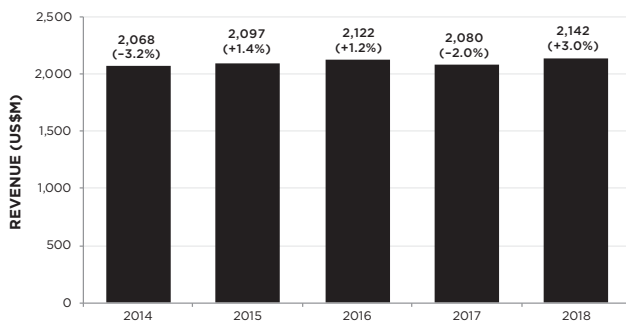
Number of Commercial Casinos	28
Casino Format	Land-Based Casinos; Riverboat Casinos
Notable Forms of Gaming	Sports Betting
Regulatory Authority	Mississippi Gaming Commission
Gross Casino Gaming Revenue 2018	\$2.14B
Casino Tax Revenue 2018	\$257.6M



In 2018, total statewide commercial casino gaming revenue was \$2.14 billion, up 3.0 percent, as growth at Mississippi's Gulf Coast casinos offset declines in the Mississippi River gaming market.

Mississippi: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Mississippi Gaming Commission

MARKET OVERVIEW

Mississippi offers commercial casino gaming at 28 land-based and riverboat casinos located along the Mississippi River and the Gulf Coast. The casinos are regulated by the Mississippi Gaming Commission.

The Mississippi legislature first authorized casino gaming in 1990, strictly limiting it to facilities docked on waterways. After Hurricane Katrina in 2005, the legislature passed a new law authorizing commercial casinos on the state's Gulf Coast to rebuild on dry land so long as those casinos remained within 800 feet of the water.

Mississippi's first commercial casino, Isle of Capri Biloxi, opened in 1992 and its most recent, Scarlet Pearl Casino, opened in 2015.

While there is no statutory limit on the number of commercial casinos that can be established in Mississippi, casino projects must meet certain minimum criteria in order to receive a license. Under regulations enacted in 2013, any new casino must offer at least 300 hotel rooms, a minimum 40,000 square-foot gaming floor, a fine-dining restaurant and a further "amenity" unique to the Mississippi market that will encourage tourism.

Amid a sustained decline in gaming revenue at casinos along the Mississippi River, Caesars

Entertainment announced in November that it would be closing Tunica Roadhouse Casino by the end of January 2019.

Mississippi became the fourth state to offer single-game sports betting on August 1, 2018, exactly 26 years from the day the state's first commercial casino opened on the Gulf Coast. By the end of the year, 23 of 28 commercial casinos had opened sportsbooks.

Market Performance

In 2018, Mississippi's commercial casinos generated total gaming revenue of \$2.14 billion, up 3.0 percent relative to 2017.

Consistent with recent years, overall market growth was driven by the dozen commercial casinos situated on Mississippi's Gulf Coast. Those casinos reported combined revenue from electronic gaming devices and table games of \$1.24 billion in 2018, an increase of 3.4 percent compared to 2017. In contrast, riverboat casinos on the Mississippi River reported a slight decline in revenue.

Revenue from the newly authorized sports betting market in Mississippi also helped boost commercial casinos in 2018, adding a total of \$15.2 million in revenue across 23 properties in five months of operation.

Gaming Tax Distribution

Mississippi imposes a graduated tax based on monthly gaming revenue. Casinos pay a 4 percent tax on gross gaming revenue that falls below \$50,000 per month; 6 percent on revenue between \$50,000 and \$134,000 per month; and 8 percent on gaming revenue exceeding \$134,000.

In addition, each of the local Mississippi municipalities that host commercial casinos charge an additional annual license fee at an average rate of 3–4 percent of gaming revenue. Revenue from sports wagering is taxed at the same state and local rates as revenue from traditional casino games.

In 2018, Mississippi commercial casinos contributed a total of \$257.6 million in gaming taxes, up 2.2 percent from 2017. That included \$1.8 million in tax revenue from sportsbooks, which were in operation from August through December.

Roughly half of all gaming tax revenue in Mississippi is distributed to the state's General Fund, which is then appropriated to support various state budgetary needs, including education programs, transportation, local public safety programs and social welfare initiatives.

A further \$3 million is allocated each month for Mississippi's Special Bond Sinking Fund, which is used to pay for improvements to state roads and bridges.

Competitive Landscape

Mississippi's commercial casinos compete in a crowded statewide gaming market that also includes three tribal casinos owned by the Mississippi Band of Choctaw Indians. Unlike the 28 commercial properties along the Gulf Coast and the Mississippi River, the three tribal casinos are located in the center of the state. They do, however, compete with four casinos in Vicksburg for customers from Jackson—the state's largest city.

Commercial casino operators also face significant competition from properties in neighboring states. Along the southern border, Gulf Coast casinos draw some of their business from Louisiana residents and could be impacted in future years by a 2018 law allowing Louisiana riverboat casinos to move their facilities onshore and expand their gaming floors.

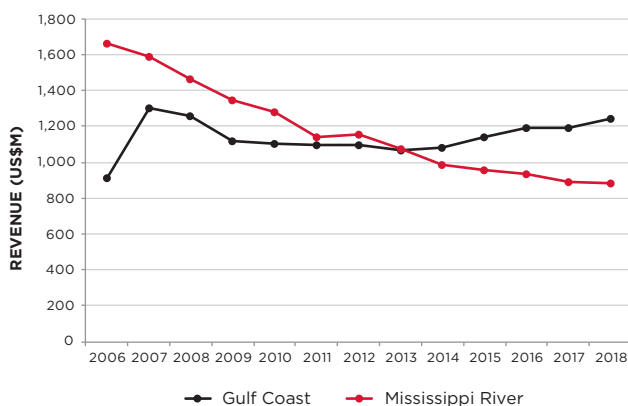
A more immediate threat to Mississippi casinos, specifically those in the Tunica/Lula area, is the expansion of gaming in Arkansas. In November 2018, Arkansas voters approved a statewide referendum authorizing four casinos, including one in nearby West Memphis. This follows the addition of electronic gaming devices at two Arkansas racetracks over the last five years, which had already reduced the number of customers from Arkansas and Tennessee at Tunica/Lula casinos.

As the only state in the South with sports betting, Mississippi casinos are poised to draw new customers from nearby states. The regional advantage may not last long, however, as Arkansas voters approved sports betting in November via the same ballot measure that authorized the state's first commercial casinos.

Mississippi: Annual Gaming Revenue By Region (US\$M)

2006 to 2018

Mississippi's tale of two gaming markets continued in 2018 with the state's Gulf Coast casinos posting higher revenue for the fifth consecutive year while revenue at riverboats moored on the Mississippi River declined again, as it has every year but one since 2006.



SOURCE: Mississippi Gaming Commission

POLICY AND REGULATORY REVIEW

Sports Betting

Having passed a fantasy sports bill in 2017 that also authorized wagering “on the outcome of any athletic event,” Mississippi was primed to move quickly following the Supreme Court ruling that struck down the federal ban on sports betting.

In June 2018, the Mississippi Gaming Commission (MGC) unanimously approved final regulations governing sports betting at the state's 28

commercial casinos. Just over a month later, on August 1, two casinos located in Biloxi and Tunica opened sportsbooks to the public. Since then, two dozen other sportsbooks have launched in the state, including three at tribal casinos owned by the Mississippi Band of Choctaw Indians—the first tribe to offer sports betting outside of Nevada.

The regulations allow any casino license holder to apply for permission from the MGC to offer sports betting. Notably, Mississippi does not require casinos to pay an initial licensing fee or any renewal fees in order to accept sports wagers.

Mississippi did not include online sports wagering in its authorizing law. However, regulations do allow for patrons to place bets via their mobile devices when they are physically located on-property at a casino.

State Lottery

Mississippi became the 45th U.S. state to establish a state lottery after Gov. Phil Bryant (R) signed legislation into law in August 2018.

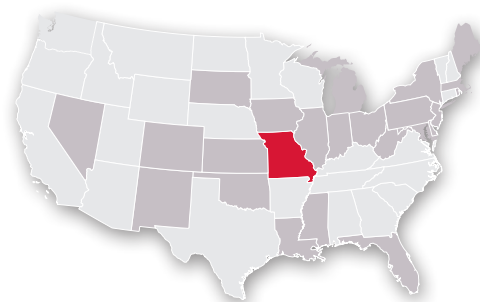
The lottery bill overcame vocal opposition from religious groups in the state, but importantly, avoided confrontation with the Mississippi casino industry, which remained neutral on the measure after bill sponsors included language to ensure that lottery-operated electronic gaming devices (or VLTs) could not be deployed at retail outlets.

The bill established the Mississippi Lottery Corporation, to be run by a five-member board of directors appointed by the Governor and confirmed by the Senate. The board will be responsible for filling leadership positions at the new agency and approving contracts and multistate lottery agreements, among other oversight responsibilities.

Once the lottery is up and running, likely sometime in mid-to-late 2019, it is estimated that it will raise approximately \$80 million to \$100 million annually in tax revenue.

Missouri

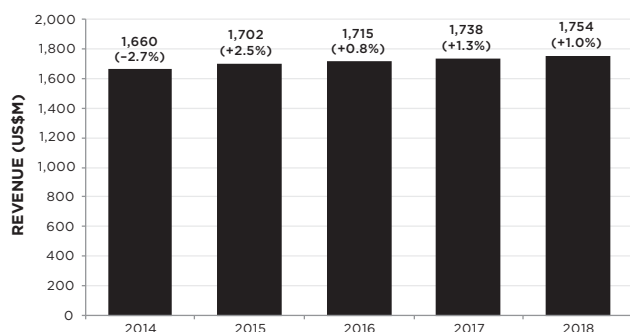
Number of Commercial Casinos	13
Casino Format	Riverboat Casinos
Regulatory Authority	Missouri Gaming Commission
Gross Casino Gaming Revenue 2018	\$1.75B
Gaming Tax Revenue 2018	\$446.5M



In 2018, total statewide commercial casino gaming revenue was \$1.75 billion, up 1.0 percent, as continued declines in admissions to riverboats in the Show Me State were offset by higher per-patron spending.

Missouri: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Missouri Gaming Commission

MARKET OVERVIEW

Missouri offers commercial casino gaming at 13 riverboat casinos, each of which operates electronic gaming devices and table games. The casinos are regulated by the Missouri Gaming Commission.

In 1992, Missouri voters approved a constitutional amendment to allow “gambling excursion boats” on the Missouri and Mississippi Rivers, subject to approval from voters in casinos’ host communities. The state’s first commercial casino, the President Riverboat Casino, opened the following year.

In 1998, voters approved a referendum allowing riverboat casinos to “float” on artificial moats rather than an actual river. As a result, several riverboats are today virtually indistinguishable from land-based casinos. The most recent casino, Isle Casino Cape Girardeau, opened in 2012.

In accordance with a 2008 state constitutional amendment, no additional commercial casinos can be added to the Missouri market without the approval of voters via a statewide constitutional referendum.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.75 billion, up 1.0 percent compared to 2017. It was the market's fourth consecutive year of growth, marking a turnaround from 2012–2014 during which statewide revenue contracted each year by an average of 2.8 percent.

Statewide table game revenue reached \$252.9 million in 2018, up 1.9 percent from the previous year. Meanwhile, revenue from electronic gaming devices increased by less than 1 percent to \$1.50 billion.

Continuing a trend of declining visitation to Missouri casinos, admissions in 2018 dropped to 39.8 million, 1.1 million fewer guests than 2017. Overall, Missouri riverboat admissions have declined by 23 percent since 2012 when the state, with one less property, welcomed 51.6 million guests. However, as admissions have decreased, average revenue per patron has climbed to \$44.13, which has more than offset the decline in visitation.

Gaming Tax Distribution

Missouri commercial casino gaming revenue is taxed at 21 percent. Additionally, there is a \$2 admission fee for every two hours that each patron is on board a riverboat.

In 2018, Missouri's commercial casinos generated total gaming tax revenue of \$446.5 million, including admissions fees, up 0.2 percent from 2017.

The majority of gaming tax revenue, approximately \$330 million in 2018, is reserved for Missouri's Gaming Proceeds for Education Fund. The fund was created by the Missouri legislature in 1993 and distributes funding annually to statewide education programs.

Also in 2018, approximately \$80 million in admissions fees were paid to special state funds and local governments that host Missouri's casinos. Some of the beneficiaries of those funds last year included a Missouri veterans program, the state's National Guard and a pair of financial assistance funds for college-bound students. Admission fees have also provided nearly \$5 million since 2001 to Missouri's Compulsive Gamblers Fund.

Competitive Landscape

With the final commercial casino license awarded in 2011, the state's competitive landscape for gaming is expected to remain stable for the foreseeable future.

Regionally, however, Missouri casinos contend with a robust and growing gaming market. Casinos in the greater Kansas City and St. Louis area face direct competition from rival properties in Kansas City, Kansas and in East St. Louis, Illinois, respectively. Along the short Missouri-Oklahoma border, four casinos operated by Oklahoma tribes attract customers from across the state line.

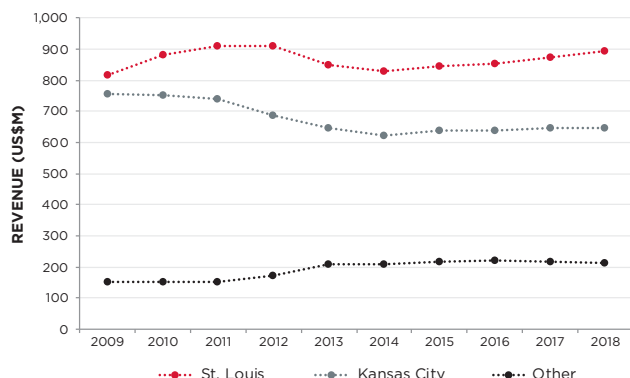
To the north, Iowa boasts more than 20 casinos, including two within 50 miles of the Missouri border. Meanwhile, to the south, Arkansas poses an emerging threat after voters there approved a statewide referendum in November 2018 authorizing the development of four commercial casinos and sports betting.

In recent years, Missouri casinos in the eastern part of the state have also faced increased competition from the rapid growth of electronic gaming devices (VGTs) at non-commercial casino locations, such as bars and truck stops, in Illinois.

Missouri: Annual Gaming Revenue By Area (US\$M)

2009 to 2018

Despite growing competition from gaming venues in Illinois, the St. Louis casino market grew by 2.2 percent in 2018. Meanwhile, revenue was flat at riverboat casinos in the Kansas City area and slightly down at casinos in other parts of the state.



SOURCE: Missouri Gaming Commission

Regulatory Reform

During 2018, the Missouri Gaming Commission continued a process to remove or revise aspects of its regulations considered to be unnecessary, duplicative or obsolete.

The commission moved to revoke or amend dozens of regulations during the course of the year, in line with mandates from the state legislature and Gov. Eric Greitens (R) for state agencies to identify and eliminate any rules considered to be uncompetitive.

Among the changes adopted by the commission in 2018 was removing a requirement for commercial casinos to obtain a formal legal affidavit certifying the compliance of their promotional activities with state and federal regulations.

POLICY AND REGULATORY REVIEW

Expansion

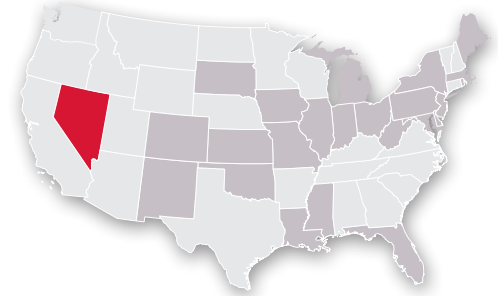
In February, a Missouri Senate committee with jurisdiction over veterans' affairs advanced a bill authorizing the Missouri Lottery Commission to operate electronic gaming devices at bars, truck-stops and veterans organizations.

Various aspects of the legislation were modeled on the VGT market of Illinois, Missouri's eastern neighbor and home to the United States' largest distributed gaming market.

In addition to lottery-operated electronic gaming devices, legislators included a provision that would have authorized the Missouri Gaming Commission to regulate sports betting in the event the federal prohibition was lifted. The bill, however, was never called up for a vote on the Senate floor before the legislature adjourned in May.

Nevada

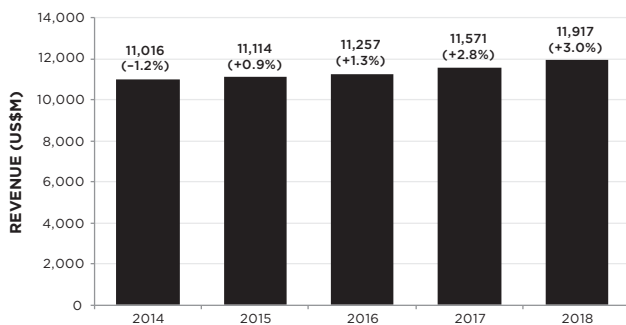
Number of Commercial Casinos	217
Casino Format	Land-Based Casinos
Notable Forms of Gaming	Internet Poker; Sports Betting
Regulatory Authority	Nevada Gaming Control Board; Nevada Gaming Commission
Gross Casino Gaming Revenue 2018	\$11.92B
Casino Tax Revenue 2018	\$850.6M



In 2018, total statewide commercial casino gaming revenue was \$11.92 billion, up 3.0 percent. With strong growth both on and off the Las Vegas Strip, the Silver State continued its dominance as the U.S. gaming leader despite losing its monopoly on sports betting.

Nevada: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Nevada Gaming Control Board

MARKET OVERVIEW

America's oldest commercial casino market by nearly 50 years, Nevada continues to be a premier international gaming destination, welcoming millions of visitors to its casino-resorts each year. Despite the proliferation of commercial casinos across 24 states since the early 1990s, Nevada still dwarfs all other gaming markets, home to nearly half of all commercial casinos in the U.S. and about 30 percent of nationwide commercial gaming revenue.

Following the Supreme Court ruling in May 2018 that reversed the federal prohibition on sports betting, Nevada lost its standing as the only U.S. state permitted under federal law to offer single-game wagering on professional and amateur sporting events. By the end of the year, eight states, including Nevada, had operational sportsbooks within one or more of their commercial or tribal casinos.

In 2011, Nevada became the first state to adopt regulations for legal internet gaming. Limited to online poker games, internet gaming sites commenced operations in 2013.

The state's commercial casinos are regulated by the Nevada Gaming Control Board (NGCB) and Nevada Gaming Commission (NGC). All casinos are required to obtain a "non-restricted" gaming license, issued by the NGC, in order to operate in the state. Retail establishments with gaming as an incidental part of their business, such as bars and convenience stores, generally require a "restricted" gaming license and can operate no more than 15 electronic gaming devices.

There is no cap on the number of restricted or non-restricted licenses available in Nevada or on the number of electronic gaming devices or table games that may be offered at each casino in the state. However, under state law, only holders of non-restricted gaming licenses are eligible to obtain licenses to operate sports betting or internet poker games.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$11.92 billion, up 3.0 percent compared to 2017. It was Nevada's fourth consecutive year of growth and the state's highest revenue total since 2007.

Total revenue from electronic gaming devices was \$7.71 billion, up 3.8 percent relative to 2017, while revenue from table games, sports betting and other games was \$4.20 billion, up 1.6 percent. Among table games, baccarat, historically the most volatile game due to its popularity with international high-roller players, generated the most revenue in 2018 (\$1.21 billion), up 4.7 percent against 2017, while revenue from blackjack fell by 5.0 percent—the steepest decline of any table game.

Notably, Nevada sportsbooks brought in a record revenue haul of approximately \$301.0 million in 2018, up 21 percent from 2017, despite Nevada losing its monopoly last year as the only state with legal, single-game sports wagering. The seven other states that offered sports betting in 2018 combined for \$129.6 million in revenue.

As in previous years, the Las Vegas Strip continued to account for over half of all gaming

revenue in Nevada. In 2018, total gaming revenue at commercial casinos on the Las Vegas Strip was \$6.59 billion, up 2.0 percent from 2017. Excluding the Strip, total statewide casino gaming revenue was \$5.33 billion, up 4.3 percent.

Gaming Tax Distribution

Nevada commercial casinos are subject to a state tax of 6.75 percent on all gross gaming revenue exceeding \$134,000 per month, with lower rates applying to revenue below that threshold.

Casino operators are also subject to a tax on live entertainment offerings hosted within their resorts. Quarterly and annual fees are also assessed according to the number of electronic gaming devices and table games installed on their floors.

Meanwhile, host counties and municipalities may impose additional fees.

In 2018, Nevada collected a total of \$850.6 million in state gaming and live entertainment tax revenue from commercial casinos, a decrease from \$867.2 million in 2017. Reported tax revenue does not align with 2018's increase in underlying gaming revenue due to the timing of state tax collections, which are generally assessed against the revenue reported by operators during the prior month.

Nevada commercial casinos generated state gaming tax revenue of \$750.2 million from levies and fees assessed against their gaming revenue or game offerings. A further \$100.5 million was collected from casino-resorts by state gaming regulators in the form of taxes on live entertainment.

In accordance with state law, the majority of tax revenue from gaming is directed to Nevada's General Fund and redistributed on a biennial basis at the direction of the legislature for purposes that include statewide education programs, transportation services and general budgetary needs. Additional monies are funneled to local school systems and county governments.

Competitive Landscape

As one of the world's foremost destinations for entertainment and business conventions, Las Vegas faces a somewhat different competitive environment than most other U.S. gaming markets.

While Las Vegas' commercial casinos compete for drive-in patrons to some extent with southern California tribal casinos, the city also competes with various national and international locations for discretionary tourist and business traveler dollars.

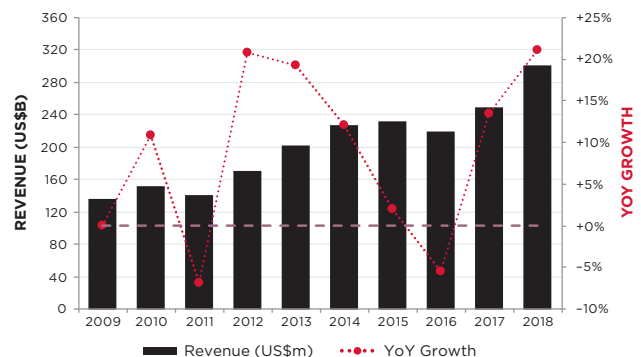
Although a range of major non-gaming entertainment amenities are being developed by Las Vegas casino-resorts, the competitive environment at least in terms of gaming supply is expected to remain largely stable until 2020 when the first of two major casino-resorts on the north end of the Strip—the \$4 billion Asian-themed Resorts World Las Vegas—is scheduled to be completed. The other major north Strip property, the long-stalled Fontainebleau project, is slated to open as The Drew Las Vegas in the early 2020s.

Outside of Las Vegas, commercial casinos in Reno and other parts of northern Nevada have historically been impacted by competition from the dozens of tribal casinos in northern California. That market is set to continue growing with three additional tribal gaming resorts in the Sacramento area currently under construction or in the planning phase.

Nevada: Annual Sports Betting Revenue & Year-Over-Year Growth (US\$m)

2009 to 2018

Nevada sportsbooks set a new record for sports betting revenue by generating approximately \$300 million in 2018, the same year the state lost its nationwide monopoly on single-game sports wagering.



SOURCE: Nevada Gaming Control Board

POLICY AND REGULATORY REVIEW

Corporate Social Responsibility

Nevada gaming regulators responded to heightened scrutiny of sexual harassment in the global entertainment and business worlds by crafting specific rules requiring all licensed gaming companies to implement comprehensive plans to prevent and address harassment in their workplaces.

Such plans should meet a set of minimum standards established by the NGCB and must include formal written policies related to the reporting and investigation of any claims of harassment.

Nevada gaming businesses would be required under the regulations to confirm, on an annual basis, their compliance with the state's standards.

In addition, the regulatory amendments clarify that any licensees failing to comply with state, federal or local laws on sexual harassment risk disciplinary action, including possible revocation of their gaming license.

After receiving support from various industry stakeholders as well as outgoing Gov. Brian Sandoval (R), the proposed regulations were approved unanimously by the NGCB in November and forwarded to the NGC for final adoption, expected in 2019.

Sports Betting

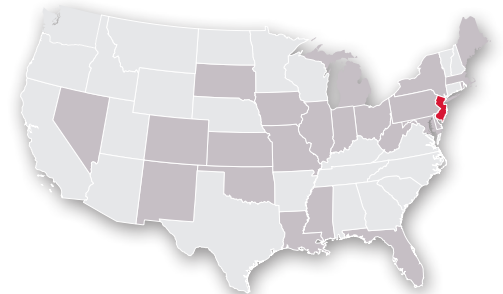
Following the Supreme Court's ruling on PASPA, Nevada took steps to prepare for the new era in the sports betting industry by updating various regulations applied to the state's established sportsbook operations.

A series of regulatory amendments approved by the NGCB near the close of 2018 would grant regulators broader authority to permit or prohibit wagering events based on the integrity frameworks of sports governing bodies. Among other things, the rules would also allow Nevada sportsbooks to accept interstate wagers in the event that federal law is changed to allow it.

The regulatory changes were crafted after the NGCB requested input from the industry on how Nevada can remain a leader on sports wagering in light of the Supreme Court ruling. The revisions are subject to final approval by the NGC before coming into effect.

New Jersey

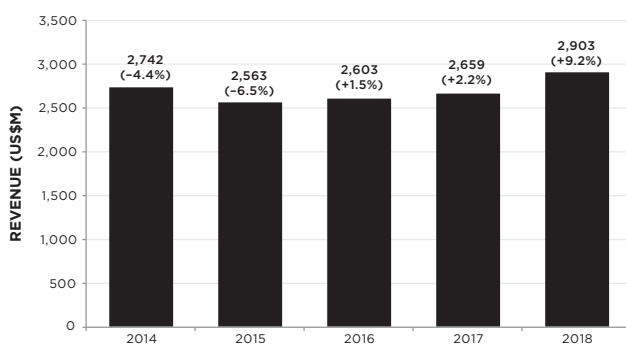
Number of Commercial Casinos	9
Casino Format	Land-Based Casinos
Notable Forms of Gaming	Internet Gaming; Sports Betting
Regulatory Authority	New Jersey Division of Gaming Enforcement; New Jersey Casino Control Commission
Gross Casino Gaming Revenue 2018	\$2.90B
Gaming Tax Revenue 2018	\$276.5M



In 2018, total statewide commercial casino gaming revenue was \$2.90 billion, up 9.2 percent. The strong growth, buoyed by the reopening of two Atlantic City casinos, helped the Garden State solidify its status as the nation's third largest commercial gaming state.

New Jersey: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: New Jersey Division of Gaming Enforcement

MARKET OVERVIEW

In New Jersey, there are currently nine commercial casinos operating in Atlantic City. The casinos, which each operate electronic gaming devices and table games, are regulated by the New Jersey Division of Gaming Enforcement and the New Jersey Casino Control Commission.

New Jersey voters first approved casino gaming in 1976 via a constitutional amendment that restricted casinos to Atlantic City. The state's first commercial casino opened in 1978. The New Jersey Constitution does not limit the number of casinos that can operate in Atlantic City, although state regulations do require casinos to meet certain minimum criteria regarding hotel-room offerings in order to qualify for a gaming license.

Atlantic City's gaming market has contracted in recent years partially as a result of competition from new casinos across the Northeast and Mid-Atlantic regions. However, after the closing of five casinos between 2014 and 2016, Atlantic City welcomed the reopening of two of the shuttered casino properties in 2018.

Some of the optimism surrounding the resurgence of New Jersey's gaming market is due to the state's successful challenge of the federal prohibition on sports betting, which was overturned by the Supreme Court in May. Just weeks later, New Jersey became the third state in the nation, after Nevada and Delaware, to offer single-game wagering on sporting events. By the close of the year, sportsbooks were open at seven Atlantic City casinos and two racetracks.

In addition to brick and mortar commercial casinos in Atlantic City, New Jersey is one of four states to offer legal internet gaming, which was approved in 2013. Atlantic City casinos deployed internet gaming platforms the same year, allowing players who are verified to be inside state lines to wager on poker and other casino games online.

At the close of 2018, a total of 18 internet casinos and eight online sportsbooks were operational.

Market Performance

Total statewide gaming revenue reached \$2.90 billion in 2018, representing the highest revenue total since 2012 and an increase of 9.2 percent from the prior year.

Total statewide revenue from electronic gaming devices was \$1.80 billion, up 4.7 percent relative to 2017; table game revenue was \$709.9 million, up 2.3 percent. Meanwhile, online wagering continued to grow in popularity among New Jersey residents and visitors, with revenue reaching \$298.7 million in its sixth year of operation, an increase of 21.6 percent over 2017.

The much-anticipated launch of sports betting in New Jersey in June created a new revenue stream for the state's casinos and racetracks. In just over six months, sportsbook operators collected \$94.2 million in revenue on \$1.25 billion in handle. Notably, more than 60 percent of wagering handle was registered online, rather than in physical sportsbooks located in New Jersey casinos or racetracks.

Despite the growth in total gaming revenue for the year, the reopening of the former Trump Taj Mahal and Revel properties did appear to dampen revenue at other Atlantic City casinos confronted by the extra competition. Overall, only one of the seven other casinos reported an increase in revenue in 2018. The rebranded Hard Rock and Ocean Resort casinos reported gaming revenue of \$332.2 million and \$90.0 million, respectively, after reopening in late June.

Gaming Tax Distribution

New Jersey commercial gaming revenue is taxed at varying rates depending on the type of gaming offered and whether games are played at land-based facilities or via online platforms.

Land-based commercial casino gaming revenue is taxed at an effective rate of 9.25 percent. That rate comprises an 8 percent state gaming tax and a 1.25 percent obligation for investment in economic development projects in Atlantic City and throughout New Jersey.

Internet casino gaming revenue, meanwhile, is taxed at an effective rate of 17.5 percent, comprising a 15 percent state gaming tax and a 2.5 percent community investment obligation.

Revenue from land-based sports betting was taxed at an effective rate of 8.5 percent, while online sports betting wagering was taxed at 13 percent until December, when those rates increased to 9.75 and 14.25 percent, respectively.

In 2018, New Jersey commercial casinos and racetracks generated \$276.5 million in total tax revenue from gaming operations, up 11.5 percent from 2017.

Of that total, approximately \$231.9 million was deposited into the New Jersey Casino Revenue Fund, where monies are appropriated each fiscal year for the exclusive benefit of New Jersey's senior citizens and disabled residents. Specific beneficiaries of the revenue fund in 2018 included home assistance programs as well as home-meal and transportation services for seniors.

On top of the casino revenue fund amounts, approximately \$39.5 million was also distributed by operators into a separate fund that supports economic development and community projects in Atlantic City. Additional recipients of gaming tax revenue in 2018 included New Jersey's General Fund and local municipal and county governments that host racetracks with sportsbook operations.

Competitive Landscape

Bucking a long-term decline stretching back more than a decade, New Jersey's gaming market grew markedly in 2018 with the addition of sports betting, both in-person and online, and the reopening of two large casino-resorts.

The Trump Taj Mahal, which closed in 2016, reopened on June 28 after a \$300 million property investment by the Seminole Tribe of Florida and rebranded the Hard Rock Hotel & Casino. That same day, the former Revel casino, which was closed in 2014 and later acquired by a Colorado developer, reopened as Ocean Resort Casino.

Further signaling a comeback for the city, Harrah's Atlantic City announced plans in November for a \$56 million renovation of one of its hotel towers.

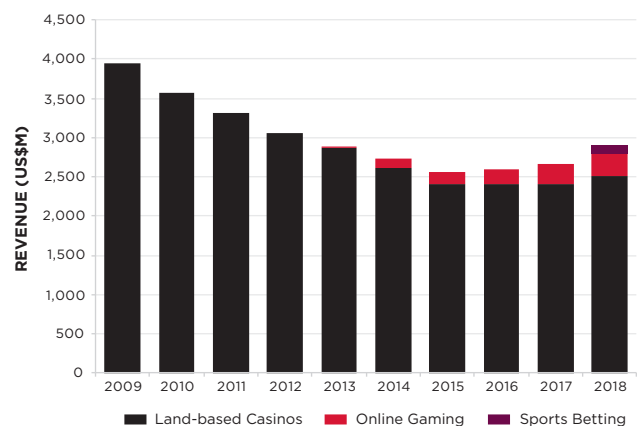
Continued expansion in the Northeast region, however, threatens to dampen Atlantic City's recovery. In February, the \$1.2 billion Resorts World Catskills in New York opened just 30 miles from the New Jersey border. Meanwhile, in neighboring Pennsylvania, a fifth Philadelphia-area commercial casino is expected to open in 2020.

Pennsylvania lawmakers also voted in 2017 to authorize up to 10 satellite or mini-casinos, electronic gaming devices at non-casino locations and sports wagering both at casinos and online.

New Jersey: Annual Gaming Revenue Breakdown (US\$M)

2009 to 2018

In 2018, internet gaming continued to grow in popularity and sports betting provided a new stream of revenue for casino operators in New Jersey. Land-based commercial casinos, however, still accounted for more than 86 percent of all gaming revenue generated in the state.



SOURCE: Gambling Compliance

POLICY & REGULATORY REVIEW

Sports Betting

New Jersey wasted little time capitalizing on its successful challenge of the federal ban on single-game sports wagering.

Within four weeks of the Supreme Court's May ruling, the state legislature passed a bill to allow New Jersey's commercial casinos and racetracks to apply for licenses to offer both land-based and online sports betting. More detailed implementing regulations were then brought into effect by the state's Division of Gaming Enforcement, one day after Gov. Phil Murphy (D) signed the bill into law.

With these regulations, New Jersey became the first U.S. state to institute an online sports wagering market where players can establish betting accounts remotely without having to first register in-person at a casino or other gaming venue, as is required in Nevada. State law allows each New Jersey casino and racetrack to deploy a maximum of three "skins"—branded websites or mobile apps—under their sports betting licenses.

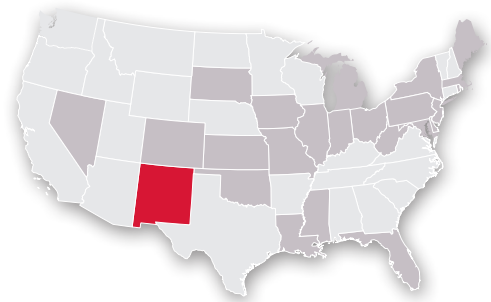
Internet Gaming

In April, New Jersey officially joined a joint collaboration between Nevada and Delaware on internet gaming when the three states began pooling online poker players via a single, interstate network.

The offering of joint poker games to players from all three states is designed to enable a wider range of poker tournaments offering a range of prize pools with higher jackpots. Nevada and Delaware first started pooling online poker players in 2015 and New Jersey signed on to the Multi-State Internet Gaming Agreement in 2017.

New Mexico

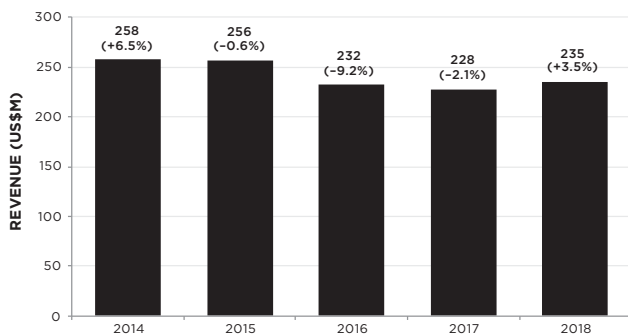
Number of Commercial Casinos	5
Casino Format	Racinos
Regulatory Authority	New Mexico Gaming Control Board
Gross Casino Gaming Revenue 2018	\$235.4M
Casino Tax Revenue 2018	\$108.9M



In 2018, total statewide commercial casino gaming revenue was \$235.4 million, up 3.5 percent. It marked the first year of growth for New Mexico commercial gaming since 2014.

New Mexico: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: New Mexico Gaming Control Board

MARKET OVERVIEW

New Mexico offers commercial casino gaming at five racinos. Electronic gaming devices at the properties are regulated by the New Mexico Gaming Control Board.

Commercial casino gaming at racetracks was first authorized in 1997 when the New Mexico legislature passed the Gaming Control Act. The state's four existing racetracks added electronic gaming devices to their properties in 1999. The state's fifth racino, Zia Park, opened in 2005 and multiple applications for a sixth racino were under evaluation as of the end of 2018.

Although there is no statutory limit on the number of racinos that may operate in New Mexico, under the state's existing compacts with its federally-recognized tribes, only six racinos are allowed in New Mexico. Additionally, New Mexico law authorizes only racetracks that host a minimum number of live races to operate electronic gaming devices.

Generally, racinos may operate a maximum of 600 electronic gaming devices. However, racinos are authorized to execute "allocation agreements," whereby one track may allocate up to 150 of its authorized number of electronic gaming devices to another racino. Table games are not permitted at any commercial gaming properties.

Notably, New Mexico is the only state that maintains restrictions on the operating hours at all of its commercial casino properties. Electronic gaming devices at racetracks may only be operated on days when live or simulcast horse races are being held, up to 18 hours per day, and may not exceed a total of 112 operating hours in a one-week period.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$235.4 million, up 3.5 percent compared to 2017.

It was New Mexico's first year of growth following three consecutive years of declining revenue. The increase reflected a market that seems to have stabilized following several years of intense competition from tribal casinos across the state. The gaming market was also boosted by some of the largest job and wage gains, per capita, in the country last year.

Gaming Tax Distribution

New Mexico commercial casino gaming revenue is taxed at an effective rate of 46.25 percent.

In 2018, New Mexico commercial casinos generated total state gaming tax revenue of \$108.9 million, an increase of 3.5 percent from 2017. Of that amount, roughly \$61.2 million was distributed to the state's General Fund. Monies in the fund are allocated each year for state budgetary expenditures by the New Mexico Department of Revenue, subject to approval by the state legislature.

Elsewhere, approximately \$47.1 million in racino gaming revenue was distributed to New Mexico's horse racing industry for the purpose of supplementing race purses. Approximately \$589,000 was allocated to the funding of problem gambling services.

Competitive Landscape

New Mexico commercial casinos face considerable competition from the state's 27 tribal casinos. Unlike the state's racinos, tribal casinos are permitted to offer table games. In addition, one New Mexico tribe opened a sportsbook at its casino in October.

Additional competition also looms in the form of a sixth racino license, which was put up for bidding by the New Mexico Racing Commission in 2018. At the end of the year, a decision on the license was on hold, pending the resolution of a legal challenge.

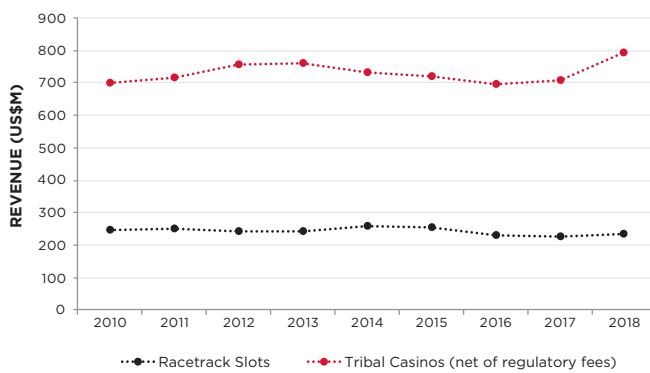
Regionally, the competitive landscape for New Mexico's racinos is expected to remain stable unless lawmakers in neighboring Texas and Arizona open their states to commercial casino gaming.

New Mexico racinos face limited competition from licensed non-profit organizations, such as veteran and fraternal groups, which are authorized to operate a maximum of 15 electronic gaming devices with restricted payouts.

New Mexico: Annual Gaming Revenue By Property Type (US\$M)

2010 to 2018

While New Mexico's five commercial racinos rebounded in 2018 from three straight years of revenue declines, they are outnumbered by tribal casinos by more than five-to-one and account for less than one-quarter of all casino gaming revenue in the state.



SOURCE: New Mexico Gaming Control Board

POLICY AND REGULATORY REVIEW

Sports Betting

In October, New Mexico became the sixth state to offer legal sports wagering at one of its casinos—even though state lawmakers did not actually approve any legislation to authorize the activity.

Citing language in New Mexico's tribal-state gaming compact, the Pueblo of Santa Ana opened a sportsbook at the Santa Ana Star Casino near Albuquerque. The compact expressly allows tribes to offer "any or all forms of Class III gaming," as defined by the 1988 federal law that governs tribal gaming. The term "Class III gaming" encompasses sports betting in addition to casino-style games, according to federal regulations.

Separately, the New Mexico Lottery prepared to launch a limited form of sports wagering. Lottery commissioners adopted rules in October authorizing the creation of a sports lottery game in which players can wager on the outcome of at least three sporting events. Lottery attorneys claimed that existing laws granted the lottery authority to offer the parlay wagers without any legislative change. The game is expected to go on sale sometime in 2019.

Expansion

In 2018, the New Mexico Racing Commission opened up a bidding process for the state's sixth and final racino license. The racing board received a total of five applications but refrained from awarding the license before the end of the year pending resolution of a legal challenge filed by one of the applicants.

The Racing Commission's consideration of a sixth license also faced objections from the operators of the state's five existing racinos, who argued an additional racino would cause them economic harm and create instability in New Mexico's racing industry.

If a license is awarded by the commission, the winning bidder would be eligible to apply for a separate license from the gaming board to install up to 750 electronic gaming devices at its facility.

IN FOCUS

Responsible Gaming



As new forms of gaming are legalized in the U.S., the industry and its regulators are taking a more proactive role in researching gaming's societal impact and developing effective best practices to promote responsible gaming.

In 2018, a group of industry associations, academic institutions and advocacy groups rolled out a first-of-its-kind initiative which aims to guide commitments in the complex field of responsible gaming.

The goal of the Responsible Gaming Collaborative, which includes participation by the American Gaming Association alongside Yale and Harvard medical schools and industry associations representing tribal gaming, thoroughbred racing, gaming equipment manufacturers and state lotteries, is to identify which responsible gaming measures are effective, and to align state policies and industry best practices with initiatives that are proven to work.

To that end, the Collaborative will conduct a comprehensive review of current gaming policies, identifying programs that succeed and those that fail to meet their objectives.

Researchers will also determine whether government resources are being properly targeted toward effective programs and prevention, as well as work with state regulators and other stakeholders to understand the best approaches to tackling problem gaming.

The gaming industry is estimated to spend \$300 million annually on responsible gaming measures. Yet the spending of many resources, including industry contributions to state governments across the country, remains inconsistent and no programs currently exist to ensure accountability.

Russell Sanna, Executive Director of the National Center for Responsible Gaming, noted that problem gambling in general remains an under-researched field, especially with the growth of legalized sports betting and other new forms of gaming on the horizon.

"A problem gambler is going to have problems whether it's sports betting or lotteries," Sanna said. "Where you need to peel back the onion is with adolescents, college students, the military and minority groups...who need access to treatment."

In the U.S., only 15 percent of the estimated 2.5 million people categorized as problem gamblers seek treatment—a percentage that Sanna described as a major concern.

At the same time, policymakers have tended to focus on ensuring that the small number of patrons who do develop problems can stop gambling and obtain treatment, rather than exploring what can be done to prevent addiction and encourage all consumers to gamble responsibly in the first place.

Beyond the new Collaborative, Massachusetts has also taken a pioneering approach to responsible gaming research.

Part of the extensive research agenda mandated by the state's 2011 gaming law was a multi-year cohort study to review the social, economic and clinical impacts of new casinos as they were introduced in Massachusetts over a period of several years.

Researchers say the comprehensive Social and Economic Impacts of Gambling in Massachusetts (SEIGMA) research is unprecedented, potentially allowing the industry and academics to learn more than ever before about how gaming expansion affects society.

"They are spending millions on research to understand these issues," Sanna said.

Early findings of the SEIGMA research published in 2018 suggest Massachusetts' first commercial casino has not had a negative impact.

“Other than the very clear revenue, employment, and spending of (Plainridge Park Casino), there is little evidence of marked social or economic changes to date in Massachusetts that can be attributed to gambling.”

Social and Economic Impacts of
Expanded Gambling in Massachusetts,
September 2018

According to study findings presented to the Massachusetts Gaming Commission in September, several factors that would typically suggest increased problem gambling issues did not show any increases in the first few years after the 2015 opening of Plainridge Park Casino in Plainville, either at the state or local level.

Those factors include problem gambling treatment reported by the state’s Department of Public Health, personal bankruptcy filings, or social impacts that include divorces, restraining orders or child welfare involvement.

In addition, the SEIGMA study showed no increase in attendance at Gamblers Anonymous meetings near Plainridge Park in Southeastern Massachusetts.

Researchers note that the findings are preliminary and future SEIGMA research will include assessing the impacts of the much larger casino-resorts opening in Western Massachusetts and Greater Boston, as well as follow-up studies on the Plainridge Park effects.

Other responsible gaming initiatives pioneered in Massachusetts include the PlayMyWay play management system that incorporates technology into electronic gaming devices to enable players to set their own limits on the amount of money or time they want to spend playing, and then receive notifications as they approach or surpass those limits.

In 2018, the Massachusetts Gaming Commission agreed that PlayMyWay should continue to be offered on a voluntary basis by casino operators, without a formal set of regulations dictating exactly how the program should be implemented.

Elsewhere, Massachusetts casinos are also required to offer on-site advisors and information regarding responsible gaming through the GameSense program.

On a national level, a poll conducted in late 2018 of more than 2,000 casino visitors found a high level of awareness among casino patrons of responsible gaming resources.

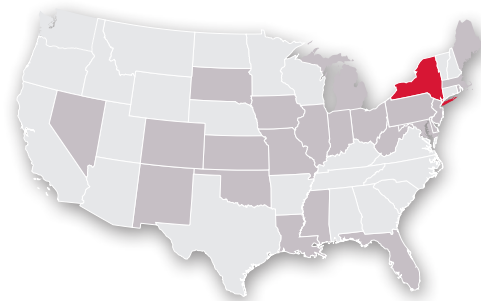
The research, commissioned by AGA, found that eight-in-ten casual casino visitors and nine in ten avid casino patrons are aware of responsible gaming resources.

Nine-in-ten patrons set a budget prior to visiting a casino and 90 percent of those consumers report success in tracking their spending, the AGA poll found.

As a medical issue, problem gambling is not going away, said Sanna of the National Center for Responsible Gaming. “It’s about giving people the information they need to understand the risk.”

New York

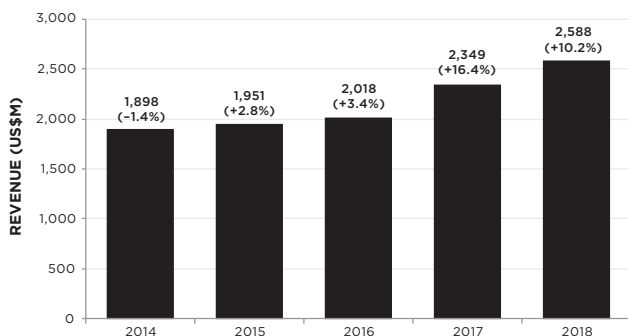
Number of Commercial Casinos	13
Casino Format	Land-Based Casinos; Racinos
Regulatory Authority	New York State Gaming Commission
Gross Casino Gaming Revenue 2018	\$2.59B
Casino Tax Revenue 2018	\$1.10B



In 2018, total statewide commercial casino gaming revenue was \$2.59 billion, up 10.2 percent. The revenue increase reflected the February opening of the fourth, and most expansive, casino-resort in upstate New York.

New York: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: New York Lottery

MARKET OVERVIEW

With the opening of Resorts World Catskills in February, New York expanded its burgeoning commercial gaming market and is now home to eight racinos with electronic gaming devices, four casino-resorts offering electronic gaming devices and table games and one large scale land-based property offering video lottery terminals.

Commercial casino gaming was first authorized by a 2001 law that allowed for the operation of electronic gaming devices at racetracks under the authority of the New York Lottery. In 2013, the New York Lottery and the New York State Racing Commission were merged into the New York State Gaming Commission, which now regulates all gaming facilities in the state.

Also in 2013, lawmakers passed the Upstate New York Gaming Economic Development Act, authorizing a maximum of four commercial casino-resorts in different regions of upstate New York. The first of these commercial casinos, Tioga Downs Casino & Resort, commenced operations in December 2016, while the newest of them, Resorts World Catskills, opened in February 2018.

The 2013 measure prohibited any commercial casino-resort from operating in designated tribal gaming exclusivity zones or in certain specified areas, including New York City, until at least seven years after the first commercial casino-resort license was awarded. New York's Constitution allows for seven commercial casinos in total.

Notably, land-based casinos paid initial license fees ranging from \$20 million to \$50 million and must continue paying an annual fee of \$500 for each gaming device and table game they offer.

Racinos are not required to pay annual fees. Instead, licensing and regulatory costs are paid out of revenue generated from their electronic gaming devices. There is no cap on the number of gaming devices that can be placed at a single racino.

Market Performance

In 2018, total statewide gaming revenue was \$2.59 billion, up 10.2 percent compared to 2017, as the Empire State surpassed Louisiana as the fourth largest commercial gaming state after Nevada, Pennsylvania and New Jersey.

The sharp increase largely reflected the opening of the state's fourth commercial casino-resort, Resorts World Catskills, in February. The Catskills casino reported total gaming revenue of \$140.6 million in its first 11 months of operation.

Revenue from electronic gaming devices at New York's 13 commercial casinos and racinos totaled \$2.43 billion in 2018, an increase of 7.6 percent over 2017. Meanwhile, the addition of a fourth commercial casino venue with table games helped statewide table game revenue surge to \$159.2 million from \$92.3 million in 2017.

In spite of the expansion of commercial casino gaming in upstate New York, gaming venues located within the Greater New York City market continued to account for the lion's share of total statewide gaming revenue in 2018.

Resorts World New York in Queens and Empire City Casino at Yonkers Raceway reported combined gaming revenue of \$1.45 billion, or roughly 56 percent of the total statewide commercial gaming market last year. The two properties' share of the market is decreasing, however, as they accounted for 67 percent of the overall market in 2017 and 72 percent the year prior.

Gaming Tax Distribution

New York Effective Gaming Tax Rates

SECTOR	EFFECTIVE GAMING TAX RATE
Racino EGDs	~65%
Casino EGDs	37-45%
Casino Table Games	10%

New York commercial casinos and racinos are taxed at different rates based on the location of the property and the type of gaming the property offers.

Racinos, after paying out prizes and deducting marketing and administrative expenses, return approximately 65 percent of their revenue to the state.

Revenue from electronic gaming devices in New York's four commercial casino-resorts is taxed between 37 percent and 45 percent, depending on the region in which the casino is located.

Table game revenue generated by commercial casino-resorts is taxed at 10 percent, regardless of the property's location.

In 2018, New York's commercial casino industry generated \$1.10 billion in total gaming tax revenue, up 7.7 percent compared to 2017. Racinos contributed approximately \$940.7 million of that amount, all of which was distributed to the state's Education Fund. Monies in the Education Fund

are used to provide aid for local school districts across New York and are disbursed annually at the direction of the state legislature and Comptroller's Office.

Education is also one of the primary beneficiaries of tax revenue from casino-resorts. Overall, \$127.2 million in tax revenue generated by commercial casino-resorts was used to fund statewide education programs and provide property tax relief to New York citizens. The remaining \$34.4 million was shared by local municipal and county governments that either host or are located near commercial casino-resorts.

Competitive Landscape

In February, New York's 13th commercial casino, the \$1.2 billion Resorts World Catskills, opened its doors in Sullivan County, roughly 100 miles north of New York City.

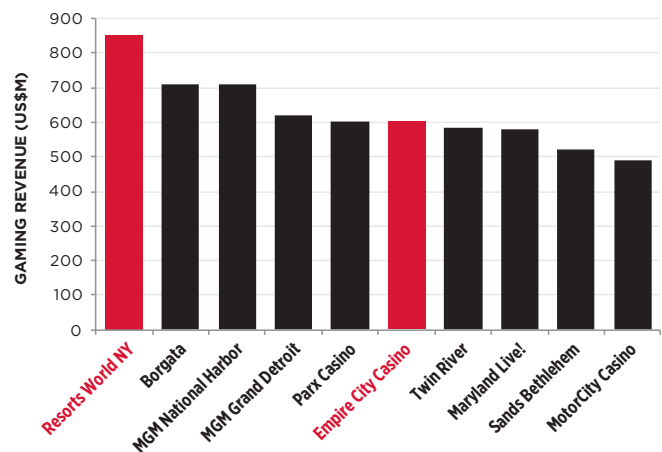
New York's tribal gaming market also expanded in 2018 with the opening of Point Place Casino near Syracuse—the Oneida Indian Nation's third full-scale, tribal casino in the state.

Elsewhere, New York's commercial casinos face competition from out-of-state casinos in Connecticut, Pennsylvania and New Jersey, which historically have drawn customers from the New York City market in particular. With legal sports wagering in the latter two of those states, sports fans from the New York area are expected to cross state lines in even greater numbers in 2019 to bet on their favorite teams.

Top 10 U.S. Commercial Casino Properties Outside Nevada, By Gaming Revenue (US\$M)

2018

New York boasted two of the top ten grossing commercial casinos outside of Nevada in 2018. With \$852 million in total revenue, Resorts World New York held onto the top spot, while Empire City Casino fell two spots to sixth after posting a slightly lower revenue total than the prior year.



*Chart excludes casinos in Nevada and Mississippi due to lack of data

SOURCE: GCRS estimates, State Gaming Commissions

POLICY AND REGULATORY REVIEW

Sports Betting

Although New York passed legislation in 2013 to authorize sports betting at the four commercial casino-resorts in upstate New York, contingent upon a change in federal law, lawmakers were asked to consider additional legislation in 2018 that would allow the four casinos to also deploy online sports betting platforms and authorize electronic betting terminals at the state's nine racinos.

An expanded sports betting bill was passed by a state Senate committee but neither that measure, nor an identical bill in the New York Assembly, advanced any further before the legislature adjourned in late June 2018. The two bills were also notable for mandating that sports leagues receive a small percentage of the amounts bet on their games as a "royalty." Betting operators would also have been required to use leagues' official data for any in-play wagers offered.

In the absence of new legislation to authorize online sports wagering, the New York Gaming Commission said it was drafting regulations to implement sports betting limited to physical sportsbooks at casino-resorts in accordance with the state's 2013 casino law. However, officials said several issues, including official league data, required further study and no draft regulations were promulgated before the end of the year.

Taxation

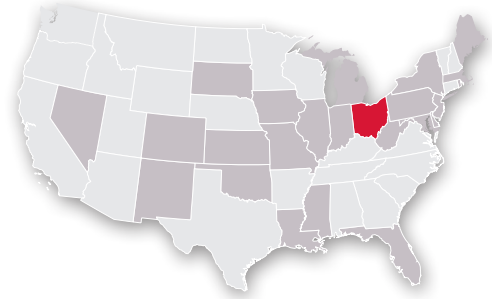
In 2018, at least two of New York's four commercial casino-resorts lobbied for some form of tax relief as they struggled to meet initial revenue projections in a competitive gaming market.

Representatives of Del Lago Resort and Casino in Seneca County said the commercial casino needed support to overcome an increased investment in promotions by the Seneca Nation since the tribe ceased making revenue-sharing payments to the state in 2017 over a compact dispute. Meanwhile, the owners of Rivers Casino & Resort in Schenectady reportedly sought permission to reinvest a small portion of taxable gaming revenue in marketing its property—similar to an allowance afforded to New York's racinos.

Despite the efforts, the New York legislature did not include any tax relief for casino-resorts in the 2018 state budget. Lawmakers did, however, agree to extend for a further year an allowance for racinos to invest a portion of their gaming revenue in capital improvements.

Ohio

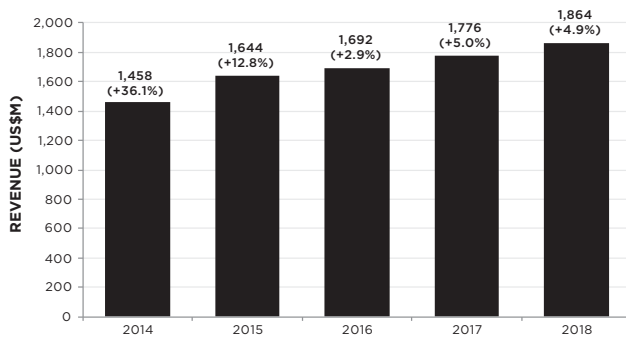
Number of Commercial Casinos	11
Casino Format	Land-Based Casinos; Racinos
Regulatory Authority	Ohio Casino Control Commission, Ohio Lottery Commission
Gross Casino Gaming Revenue 2018	\$1.86B
Gaming Tax Revenue 2018	\$622.6M



In 2018, total statewide commercial casino gaming revenue was \$1.86 billion, up almost 5 percent. The figure, a record total for Ohio, reflected the continued strong performance of the state's racinos.

Ohio: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Ohio Casino Control Commission, Ohio Lottery

MARKET OVERVIEW

Ohio offers commercial casino gaming at four casino-resorts, each of which operates electronic gaming devices and table games, and at seven racinos, which only offer electronic gaming devices. The land-based casinos are regulated by the Ohio Casino Control Commission while the racinos are regulated by the Ohio Lottery Commission.

In 2009, Ohio voters approved a ballot initiative authorizing commercial casinos in Cincinnati, Cleveland, Columbus and Toledo. Ohio's first casino, Hollywood Casino Toledo, opened in 2012, and the three other casinos were operational by March 2013.

Ohio's first racino also opened in 2012, roughly nine months after then-Gov. John Kasich (R) signed an executive order approving electronic gaming devices (specifically video lottery terminals, or VLTs) at racetracks. Ohio's seventh racino opened in September 2014. There is no limit on the number of racetrack permits available in the state.

Each land-based casino can offer any form of gaming that is also authorized in either Indiana, Michigan, Pennsylvania or West Virginia, with a maximum of 5,000 electronic gaming devices

per property. Land-based casino operators were required to pay a \$50 million initial license fee and invest a minimum of \$250 million developing their properties.

Racinos were also subject to a \$50 million initial license fee and required to spend a minimum of \$80 million improving their facilities within five years of adding electronic gaming devices. Each racino may operate up to 2,500 electronic gaming devices.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$1.86 billion, up 4.9 percent against 2017. The revenue total was a record haul for Ohio's commercial gaming industry, which has grown every year since its inception in 2012.

Revenue from electronic gaming devices was \$1.60 billion, up 6.0 percent, while table game revenue was \$268.0 million, down 1.2 percent.

Ohio's seven suburban racinos continued to drive the majority of gaming revenue growth in the state, posting total gaming revenue of \$1.03 billion in 2018, up 7.2 percent. The state's four land-based casinos saw more modest growth with total reported gaming revenue of \$837.5 million, an increase of 2.3 percent against 2017.

Overall, revenue was up at 10 of Ohio's 11 commercial gaming properties, with the largest reported gain at JACK Thistledown Racino, which collected \$127 million from electronic gaming devices, a 10.4 percent increase over 2017.

Gaming Tax Distribution

Ohio levies a 33 percent tax on casinos' gross gaming revenue, while racinos pay a slightly higher 33.5 percent effective tax rate on their revenue from electronic gaming devices.

In 2018, casinos and racinos generated total gaming tax revenue of \$622.6 million, up 4.8 percent from 2017. Casinos accounted for approximately \$275 million of the total, while

electronic gaming devices at racinos generated about \$347 million.

Roughly half of casino tax revenue is distributed to Ohio's 88 county governments to support local budgetary needs, including law enforcement, infrastructure improvements and other public services. Another 34 percent is earmarked for the Ohio Student Fund, which distributes dollars to all school districts, while 5 percent is returned to the host cities where casinos are located. The remaining funds are used to treat problem gambling and cover the costs of the agencies that regulate gaming in Ohio.

Under Ohio law, all racino gaming tax revenue must be used for the purpose of funding state education programs. Accordingly, racino tax revenue flows into the Lottery Profits Education Fund, which supports primary and secondary schools in Ohio.

Competitive Landscape

While Ohio is one of the most recent entrants to the commercial casino market, its 11 casinos and strong market performance have seen the Buckeye State quickly establish itself as a fiercely competitive gaming jurisdiction.

In addition to in-state competition from pari-mutuel wagering, including off-track betting and advance deposit wagering on horse races, certain Ohio casinos also compete for patrons with gaming venues located in neighboring states.

For instance, three West Virginia racinos located along or near the Ohio River draw customers from Youngstown, Canton and other Ohio towns located near the state line.

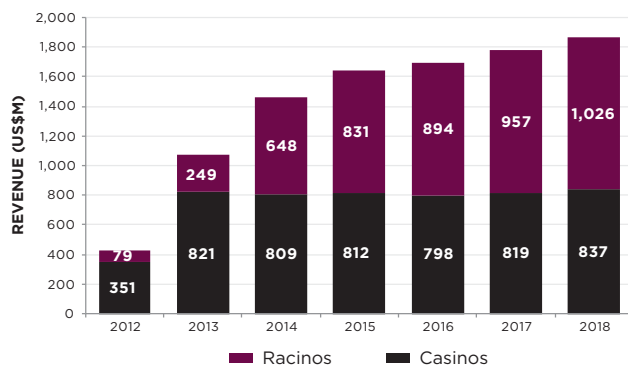
Casinos in the Cincinnati area compete with riverboat casinos stationed on the Indiana side of the Ohio River. The Cincinnati market's casinos would also be vulnerable to any approval of gaming in Kentucky, where lawmakers have repeatedly considered bills to authorize commercial gaming, although none have been enacted.

Meanwhile, in Pennsylvania, a wide-ranging gaming expansion bill passed in 2017 paved the way for the addition of up to 10 satellite casinos, internet gaming, sports wagering and electronic gaming devices at truck stops—all of which stand to exert competitive pressure on Ohio's gaming industry.

Ohio: Annual Gaming Revenue By Property Type (US\$M)

2012 to 2018

Casinos and racinos both reported higher revenue totals in 2018, leading to a record statewide total. The breakdown of revenue retained by each segment remained about the same, with racinos accounting for approximately 55 percent of total statewide gaming revenue.



SOURCE: Ohio Casino Control Commission, Ohio Lottery

POLICY AND REGULATORY REVIEW

Illegal Gaming

In an effort to crack down on businesses offering illegal gaming devices, the Ohio Casino Control Commission (OCCC) adopted final rules in 2018 to regulate skill-based amusement machines.

The move follows passage of a 2015 state law that granted the OCCC regulatory authority over skill-based amusement gaming. The agency spent most of 2017 developing rules and license fees for the games.

The new rules, which went into effect in April, cover areas such as licensing, compliance and enforcement in the skill game industry. Mirroring casino regulations, operators and vendors of machines are required to be licensed and key employees are subject to background checks and licensure.

Regulators argue that the new rules will make it easier for law enforcement to determine whether a business is operating legally and crack down on electronic gaming devices operating unlawfully in Ohio.

Regulatory Reform

The Ohio Casino Control Commission also adopted a number of regulatory reforms in 2018.

A series of changes to shipping regulations for electronic gaming devices was submitted to the state's "Common Sense Initiative" (CSI) office, which was created in 2011 to ease the regulatory burden on businesses in the Buckeye State.

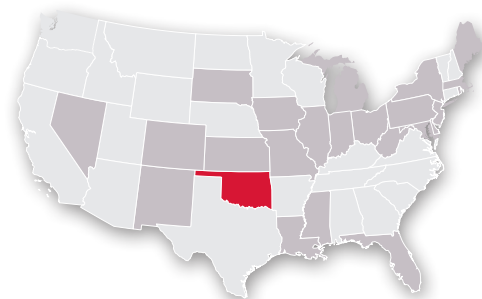
The revisions proposed to eliminate the requirement that all electronic gaming devices be transported to Ohio casinos in an inoperable state and reduce the advance notice period required for the shipping of gaming equipment. The amendments also mean an OCCC agent will no longer need to be present when electronic gaming devices are delivered to a casino.

Another OCCC resolution delegated authority to the agency's Executive Director to approve minor changes to casinos' internal controls as long as the changes have already been approved for another casino in the state.

Previously, any changes to minimum internal control standards required formal review by the full seven-member commission followed by votes on dozens of often immaterial changes.

Oklahoma

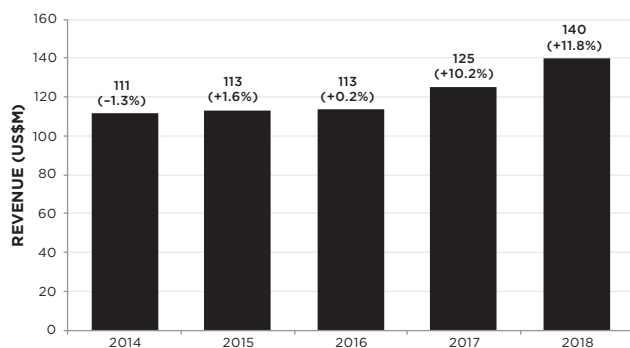
Number of Commercial casinos	2
Casino Format	Racinos
Regulatory Authority	Oklahoma Horse Racing Commission
Gross Casino Gaming Revenue 2018	\$139.6M
Gaming Tax Revenue 2018	\$63.1M



In 2018, total statewide commercial casino gaming revenue was \$139.6 million, up 11.8 percent. Dwarfed by tribal casinos, Oklahoma's two racinos had their best year yet in 2018, partially due to a 2017 policy change allowing the facilities to remain open 24 hours a day.

Oklahoma: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Oklahoma State Auditor and Inspector

MARKET OVERVIEW

Oklahoma's gaming market, while dominated by tribal casinos, includes commercial casino gaming at two racetrack casinos, which are regulated by the Oklahoma Horse Racing Commission. The racinos may only operate electronic gaming devices (EGDs), with a maximum of 750 EGDs permitted at Remington Park in Oklahoma City and 250 machines at Cherokee Casino Will Rogers Downs in Claremore.

The racinos were first authorized in 2004, when Oklahoma voters ratified the State-Tribal Gaming Act, which also established a regulatory framework for tribal gaming in the state. Three Oklahoma racetracks subsequently added gaming devices in 2005, but one, Blue Ribbon Downs, closed in 2009.

To convert from a racetrack to a racino, a racetrack operator must first be licensed to conduct live racing and accept pari-mutuel wagers. Then, racetracks may apply to the Racing Commission for a gaming license, which is subject to an annual \$50,000 fee.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$139.6 million, up 11.8 percent from 2017. The total represented a new record for Oklahoma's two commercial casinos, and the largest year-over-year percentage increase of any state with the exception of Massachusetts, which opened a new casino-resort in August.

The strong performance reflected, in part, the continued growth in Oklahoma's economy in 2018, particularly in the Oklahoma City metropolitan area. It was also the first full year during which commercial casinos were permitted to operate on a 24-hour basis, in accordance with legislation that took effect in mid-2017.

Remington Park, which is located in the heart of Oklahoma City, accounted for more than 85 percent of total statewide commercial gaming revenue in 2018. The racino, owned by a commercial subsidiary of the Chickasaw Nation of Oklahoma, also grew at a faster pace than its counterpart in the northeast corner of the state, posting total gaming revenue of \$119.1 million, up 12.6 percent relative to 2017.

Meanwhile, total revenue from electronic gaming devices at Will Rogers Downs, owned by the Cherokee Nation, was \$20.6 million in 2018, up 7.4 percent from the previous year.

Gaming Tax Distribution

Oklahoma taxes commercial casino revenue at different rates based on the amount of revenue generated. Rates range in a graduated scale from 35 percent on revenue up to \$10 million, to 50 percent on revenue of more than \$70 million.

In total, Oklahoma racinos paid \$63.1 million in total gaming taxes in 2018, an increase of 13.3 percent from the prior year.

Commercial gaming tax revenue is shared between the state government and Oklahoma's horse racing industry. Roughly \$29 million in tax payments were remitted to the state in 2018, with monies used to fund higher education programs and reform Oklahoma's education sector, as well as for general budgetary purposes.

In addition, racinos distributed \$34.1 million in 2018 to help subsidize horse racing purses, breeding programs and other horse racing industry expenses.

Competitive Landscape

Oklahoma's two racinos are overshadowed by the state's 130-plus tribal casinos. For perspective, Oklahoma tribal casinos reported almost \$2.3 billion in revenue from Class III electronic gaming devices and table games in Oklahoma's 2017-18 fiscal year that ended June 30. On top of that, tribal casinos earned additional revenue from popular Class II electronic bingo games.

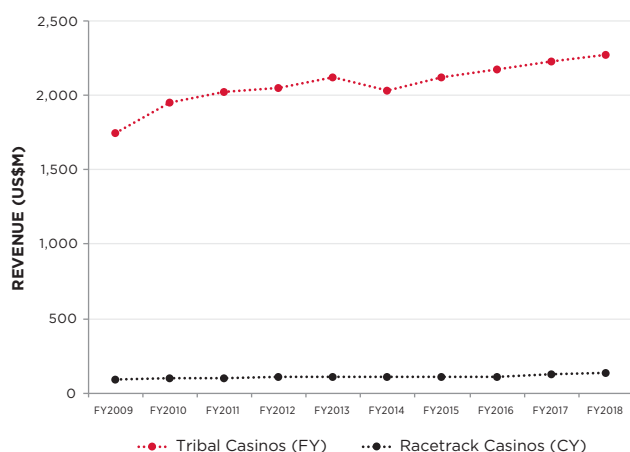
Oklahoma's tribal casinos received a further boost from the passage of a 2018 bill authorizing craps tables and roulette wheels at tribal casinos, strengthening tribes' exclusivity over table game offerings.

While Oklahoma casinos have benefited from relatively sparse regional competition, the approval of commercial gaming, including sports betting, in neighboring Arkansas via a statewide referendum in November is likely to diminish some of the gaming dollars spent by Arkansas residents at Oklahoma casinos in the coming years.

Oklahoma: Annual Gaming Revenue By Venue Type (US\$M)

2009 to 2018

In 2018, Oklahoma's two racinos brought in nearly \$140 million, marking a record annual revenue haul. The racinos compete with more than 130 tribal casinos, scattered throughout the state, which generated more than \$2 billion in revenue.



SOURCE: Oklahoma State Auditor & Inspector, Oklahoma Gaming Compliance Unit

POLICY AND REGULATORY REVIEW

Tribal Gaming

In August, the Bureau of Indian Affairs (BIA) approved Oklahoma's amended compact with 13 tribes to allow for additional types of table gaming so they can now offer "ball and dice" games at tribal casinos.

The compacts were amended after a bill was signed into law by Gov. Mary Fallin (R) in May 2018 authorizing craps and roulette at tribal casinos. Previously, Oklahoma's tribal casinos could only operate card games, as well as electronic gaming devices.

Tribes that install craps and roulette tables will be required to pay the state 10 percent of their monthly net winnings from each new game, which is estimated to generate between \$20 and \$50 million annually for the state by the second year of operations.

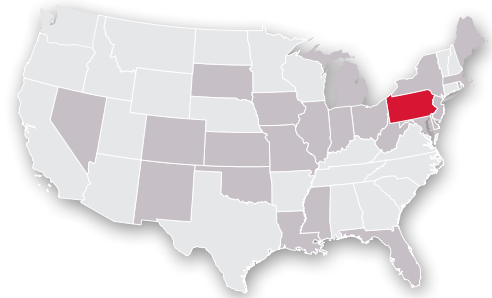
Expansion

In June, the BIA approved a tribal gaming compact between Oklahoma and the Shawnee Tribe that authorized the tribe to begin offering certain Class III gaming activities and provided certain geographical exclusivity. The compact also reinforced limits on the number of electronic gaming devices at existing racetracks and the prohibition on certain games at non-tribal gaming venues.

The tribe broke ground in May 2018 on the Golden Mesa Casino in Guymon, which is located in the Oklahoma Panhandle. The facility, which is being developed in partnership with the Chickasaw Nation, is expected to open in the summer of 2019.

Pennsylvania

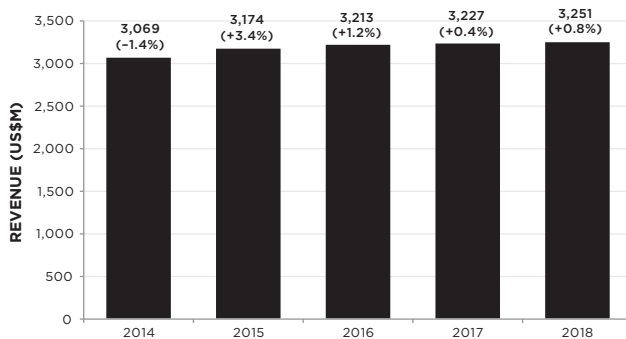
Number of Commercial Casinos	12
Casino Format	Land-Based Casinos; Racinos
Notable Forms of Gaming	Sports Betting; Internet Gaming (legalized but not yet operational)
Regulatory Authority	Pennsylvania Gaming Control Board
Gross Casino Gaming Revenue 2018	\$3.25B
Gaming Tax Revenue 2018	\$1.48B



In 2018, total statewide commercial casino gaming revenue was \$3.25 billion, up 0.8 percent. It was the state's fourth consecutive year of growth, firmly cementing its status as the largest commercial gaming market outside of Nevada.

Pennsylvania: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Pennsylvania Gaming Control Board

MARKET OVERVIEW

Pennsylvania offers commercial casino gaming at six land-based casinos and six racinos, each of which operates electronic gaming devices and table games. The properties are regulated by the Pennsylvania Gaming Control Board (PGCB).

In 2004, the Pennsylvania legislature passed the Race Horse Development and Gaming Act, which authorized electronic gaming devices at racetracks, standalone casinos and three smaller casino-resorts. Table games, such as blackjack and roulette, were approved by the legislature in 2010.

Pennsylvania's first commercial casino, Mohegan Sun Pocono, opened in 2006. In 2014, the PGCB issued a license for a 13th commercial casino, slated for South Philadelphia, but due to a number of regulatory setbacks and legal challenges, the project remains under development.

A wide-ranging gaming expansion bill, passed in 2017, authorized up to 10 additional "satellite" or mini-casinos, each limited to a maximum of 750 electronic gaming devices and 40 table games. Following auctions held by the PGCB in 2018, five of the satellite casino licenses were purchased for a total of \$127 million.

As part of the 2017 gaming expansion, Pennsylvania commercial casinos were permitted to apply for licenses to offer internet gaming. By the end of 2018, 10 of Pennsylvania's 13 casinos had submitted applications, with operations expected to launch sometime in 2019.

The 2017 gaming measure also included a provision authorizing sports wagering at commercial casinos and via online platforms in the event the federal ban was lifted. Following the Supreme Court's landmark ruling in May, the PGCB approved a set of sports betting regulations, and the state's first sportsbook opened in November. By the end of the year, three sportsbooks had opened within Pennsylvania casinos.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$3.25 billion, up 0.8 percent against 2017, as Pennsylvania retained its status as the second largest commercial casino state, after Nevada, in terms of annual gaming revenue.

The year saw a reversal of the previous trend that had seen table game revenue outperform that of electronic gaming devices. Total statewide revenue from electronic gaming devices in 2018 was \$2.37 billion, up 1.4 percent against 2017. By contrast, table game revenue was \$878.8 million, down 1.3 percent.

In the first month and a half of legal sports wagering following the mid-November launch, Pennsylvania casinos collected \$2.5 million in revenue from a total handle of \$17.6 million.

Gaming Tax Distribution

Pennsylvania commercial casinos pay a 54 percent tax rate on electronic gaming device revenue, a 16 percent tax rate on table game revenue and a 34 percent tax rate on revenue from electronic versions of table games. Sports betting revenue is subject to a 36 percent tax rate, which includes a two percent tax for local municipalities.

With one of the highest effective tax rates in the country, Pennsylvania again collected more direct gaming tax revenue than any other state, including Nevada, in 2018. In total, the state's commercial

casinos generated \$1.48 billion in gaming tax revenue, up 3.2 percent from 2017.

Gaming tax revenue in Pennsylvania is primarily used for the purpose of reducing school taxes paid by Pennsylvania property owners. In 2018, the state's Property Tax Relief Fund received a total of \$1.11 billion in gaming tax proceeds.

The remaining tax revenue is used to support economic development, tourism, the state horse racing industry and the municipalities that host casinos.

Competitive Landscape

Pennsylvania's casinos operate at the intersection of the fiercely competitive Northeast and Mid-Atlantic markets. Individual Pennsylvania casinos compete against rival properties in Delaware and northern Maryland to the south; New York City and New Jersey to the east; Ohio to the west; and West Virginia to the southwest.

While out-of-state competition increased during 2018 with the reopening of two commercial casino properties in Atlantic City, the most significant competitive forces over the coming years are expected to emanate from within Pennsylvania's borders.

The planned Live! Hotel & Casino Philadelphia is expected to move forward in 2019 following a consolidation of its ownership in 2018, adding another commercial casino to a Greater Philadelphia market that is already served by Harrah's Philadelphia Casino and Racetrack, SugarHouse Casino, Parx Casino and Valley Forge Casino Resort.

Meanwhile, the passage of a sweeping gaming expansion bill in 2017 is likely to dramatically shift the gaming landscape in Pennsylvania over the next few years.

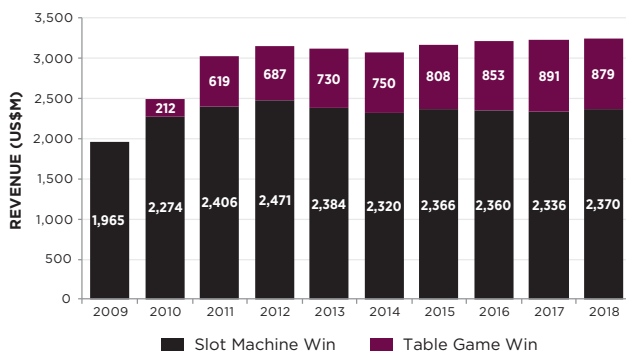
Auctions in 2018 for newly-authorized satellite casinos resulted in five licenses being awarded to commercial casino operators already active in Pennsylvania. The forthcoming satellite casinos may not be located within 25 miles of an existing Pennsylvania casino or racino, except if the location is within 25 miles of the auction-winner's own casino.

Following the lead of states like Illinois and neighboring West Virginia, Pennsylvania, via the 2017 expansion bill, also approved the deployment of electronic gaming devices (VGTs) in non-casino locations throughout the state. Counties that currently host commercial casinos can opt out of allowing VGTs in their jurisdictions. During 2018, the PGCB issued licenses to various VGT manufacturers and truck-stop locations, with the first machines expected to be operational sometime in 2019.

Pennsylvania: Annual Gaming Revenue By Segment (US\$M)

2009 to 2018

In 2018, an uptick in electronic gaming device revenue at Pennsylvania casinos offset a small decline in table game revenue. The totals defied a recent trend that had seen table games outperform EGDs the previous three years.



SOURCE: Pennsylvania Gaming Control Board

POLICY AND REGULATORY REVIEW

Sports Betting

Following the Supreme Court's May ruling that overturned the federal ban on sports betting, Pennsylvania joined the vanguard of states offering wagers on sporting events.

Within a few weeks of the ruling, the PGCB adopted temporary regulations enabling the state's commercial casinos to begin applying for sports wagering licenses in accordance with the

2017 gaming expansion law. Penn National Race Course opened Pennsylvania's first sportsbook on November 17, 2018, with Rivers Casino in Pittsburgh and SugarHouse Casino in Philadelphia following suit one month later.

The state's existing commercial casino licensees are eligible to obtain sports wagering certificates, subject to a one-time fee of \$10 million. Licensees may offer sportsbooks at their casinos, affiliated off-track betting facilities and online. Each casino is permitted to deploy a single online sports betting "skin," or website, under their license.

Sports betting revenue is taxed at 36 percent, more than five times the rate levied on Nevada's sportsbooks.

Internet Gaming

Under the 2017 gaming expansion bill, Pennsylvania's casinos were given a 120-day exclusive window to apply for internet gaming licenses once implementing regulations had been established by the PGCB.

During the 120-day window, which closed in mid-August, ten of Pennsylvania's commercial casino licensees filed applications for certificates to offer online casino games and poker.

In accordance with the 2017 law, applications were then opened to out-of-state gaming operators. Two such operators—MGM and Golden Nugget—stepped forward to seek internet gaming certificates during a later stage of the licensing process that ended in October.

Unlike sports wagering, Pennsylvania regulations do not restrict holders of internet gaming licenses to offering just one single branded website or "skin." However, temporary regulations adopted by the PGCB in April will require the websites of internet casinos to clearly identify the land-based casinos with which they are affiliated.

IN FOCUS

Gaming Machines



Nationwide, there are nearly 900,000 electronic gaming machines in commercial and tribal casinos as well as at non-casino locations such as bars, taverns and truck stops. Nearly half (47%) of these games are located in commercial casinos, while slightly fewer (41%) are found in tribal casinos. Nevada has an installed base of more than 160,000 machines, far and away the largest number of any state. Oklahoma and California had the second and third largest number of operating machines in 2018, each with more than 74,000.

NUMBER OF GAMING MACHINES BY STATE

2018

State	Machines in Commercial Casinos	Machines in Tribal Casinos	Machines in Non-Casino Locations	Total
Alabama		6,441		6,441
Alaska		90		90
Arizona		16,762		16,762
California		74,100		74,100
Colorado	12,677	1,395		14,072
Connecticut		8,595		8,595
Delaware	6,240		456*	6,696
Florida	7,439	15,378		22,817
Idaho		3,604		3,604
Illinois	9,711		30,694	40,405
Indiana	18,229	1,800		20,029
Iowa	16,333	2,781		19,114
Kansas	5,029	3,463		8,492
Louisiana	22,900	5,704	12,880	41,484
Maine	1,665			1,665
Maryland	11,535			11,535
Massachusetts	3,731			3,731
Michigan	8,986	22,228		31,214
Minnesota		21,325		21,325
Mississippi	26,989	3,159		30,148
Missouri	16,625			16,625
Montana		1,810	15,755	17,565
Nebraska		674		674
Nevada	140,587	1,129	18,961	160,677
New Jersey	17,947			17,947
New Mexico	2,838	16,493	640**	19,971
New York	24,707	12,703		37,410
North Carolina		4,419		4,419
North Dakota		3,959		3,959
Ohio	18,686			18,686
Oklahoma	1,000	73,410		74,410
Oregon		7,650	11,619	19,269
Pennsylvania	25,443			25,443
Rhode Island	5,180			5,180
South Dakota	2,853	2,824	9,072	14,749
Texas		3,737		3,737
Washington		31,559		31,559
West Virginia	5,602		7,581	13,183
Wisconsin		18,061		18,061
Wyoming		1,675		1,675
TOTAL	412,932	366,928	107,658	887,518***

SOURCE: Eilers & Krejcik Gaming, LLC

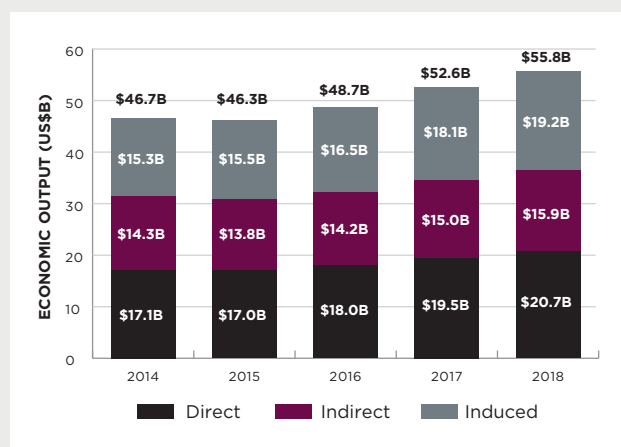
* Charitable VLTs

** Located at qualified veteran and fraternal organizations

*** Excludes facilities in Arkansas and Kentucky that offer Instant Racing machines

GLOBAL GAMING SUPPLIER INDUSTRY: ECONOMIC OUTPUT

According to research by the Association of Gaming Equipment Manufacturers (AGEM) and Applied Analysis, the gaming supplier industry generated a total of \$55.8 billion in economic output during 2018, reflecting an increase of 6.0 percent from 2017. Companies developing equipment, software and other goods and services for gaming operators directly employed 61,715 workers during 2018 and paid approximately \$5.6 billion in direct wages and salaries to their employees. Indirect and induced wages accounted for another \$8.5 billion in personal incomes.



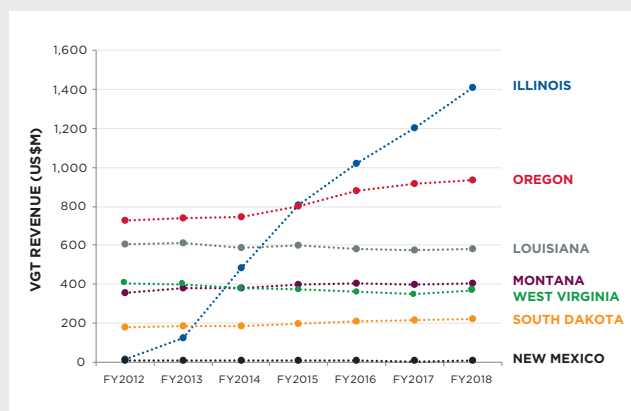
SOURCES: Association of Gaming Equipment Manufacturers (AGEM) and Applied Analysis.

DISTRIBUTED GAMING

In 2018, Illinois consolidated its position as by far the largest distributed gaming jurisdiction in the U.S. with some 30,700 'VGT' machines installed in more than 6,770 establishments by year's end. Distributed gaming refers to electronic gaming devices located in non-commercial casino venues such as bars, restaurants and truck stops. These route-operated gaming devices are legal in eight states, including Nevada, and are expected to launch in Pennsylvania in 2019.

Selected States: Annual VGT Revenue (US\$M)

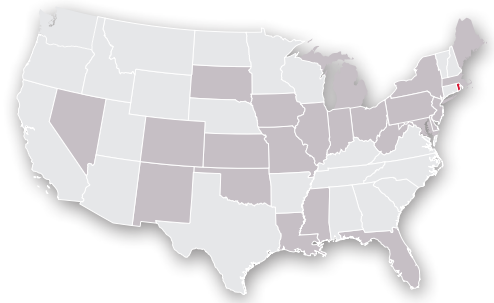
FY2012 to FY2018



SOURCE: IGB, OR Lottery, LGCB, MT DoJ, WV Lottery, SD Lottery, NMGC

Rhode Island

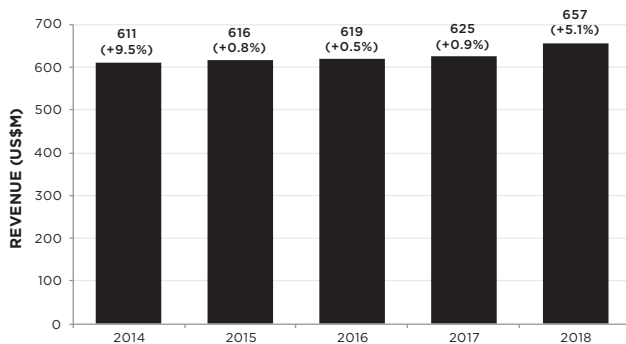
Number of Commercial Casinos	2
Casino Format	Land-Based Casinos
Notable Forms of Gaming	Sports Betting
Regulatory Authority	Rhode Island Lottery
Gross Casino Gaming Revenue 2018	\$656.5M
Casino Tax Revenue 2018	\$322.1M



In 2018, total statewide commercial casino gaming revenue was \$656.5 million, up 5.1 percent. The year-over-year growth was driven by strong performance in both the electronic gaming device and table game sectors. Nominal revenue was also generated from the state's newly regulated sports betting market.

Rhode Island: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: Rhode Island Lottery

MARKET OVERVIEW

Rhode Island offers commercial casino gaming at two casinos operated under the authority of the Rhode Island Lottery.

In 1992, the Rhode Island legislature passed a bill permitting electronic gaming devices at the state's two pari-mutuel wagering venues. In 2012, state voters approved the addition of table games at Twin River Casino in Lincoln.

In 2016, voters approved a ballot measure permitting the struggling Newport Grand Casino to relocate to the town of Tiverton on the Massachusetts border. The measure also authorized the relocated casino to offer table games. The new facility, Twin River Tiverton Casino Hotel, opened its doors on September 1, 2018.

In June, the legislature passed a bill authorizing the state lottery to offer and operate sports betting at both commercial casinos. Regulations were adopted later in the year, and in November Rhode Island became the eighth state, and the first in New England, to offer legal sports wagers.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$656.5 million, up 5.1 percent relative to 2017.

While electronic gaming devices continued to outperform table games in Rhode Island, revenue from electronic gaming devices finally rebounded in 2018, moving into positive territory for the first time since 2012. Total statewide revenue from electronic gaming devices in 2018 was \$504.6 million, up 4.9 percent, while table game revenue was \$150.9 million, up 6.2 percent against 2017.

Meanwhile, in their first five weeks of operation, Rhode Island's sportsbooks generated just over \$1 million in revenue from a total handle of \$13.8 million.

Gaming Tax Distribution

Rhode Island's two commercial casinos retain roughly 26 percent to 28.85 percent of their revenue from electronic gaming devices, depending on each facility's operating contract and state regulation. An additional annual allowance is made for certain marketing expenses. The state's overall take of electronic gaming device revenue, after administrative and technology expenses are deducted, is about 60 percent.

By contrast, table game revenue is taxed at a rate of either 17 or 19 percent depending on each casino's total net revenue in relation to the previous fiscal year. If a property's revenue is up from the prior year it pays an additional two percent.

The new sports betting revenue stream is taxed at 51 percent with the remaining amount split between the operating partner of the state lottery (32%) and the casino hosting the sportsbook operation (17%). In addition, the host communities of Lincoln and Tiverton each receive an annual payment of \$100,000.

In total, Rhode Island's commercial casinos generated \$322.1 million in 2018 in tax revenue

for the state's General Fund, up 2.6 percent from 2017. Gaming revenue in the General Fund is appropriated annually at the direction of the legislature and is used to pay for various state services, including education, public safety programs and healthcare.

A small fraction of gaming tax revenue is also remitted annually to the towns of Lincoln and Tiverton as well as to the Narragansett Indian Tribe.

Competitive Landscape

Rhode Island's two commercial casinos operate in an increasingly competitive New England market that is set to become even more crowded in the next few years as additional casinos open in Massachusetts and possibly Connecticut.

The most direct competitors to Rhode Island's casinos are Plainridge Park Casino in Massachusetts, which is just 20 miles from Providence, and the Foxwoods and Mohegan Sun tribal casinos in southeastern Connecticut. All three casinos draw customers from the Ocean State, although Rhode Island's casinos gained some competitive advantage in 2018 by becoming the only gaming facilities in the region authorized to offer sports wagering.

In Massachusetts, MGM Springfield opened in August 2018 and Encore Boston Harbor is scheduled to open in mid-2019. A tribal government began construction in 2016 on a casino in the Massachusetts city of Taunton, located roughly 20 miles from Providence. The project has been stalled, however, due to legal challenges over the federal land acquisition.

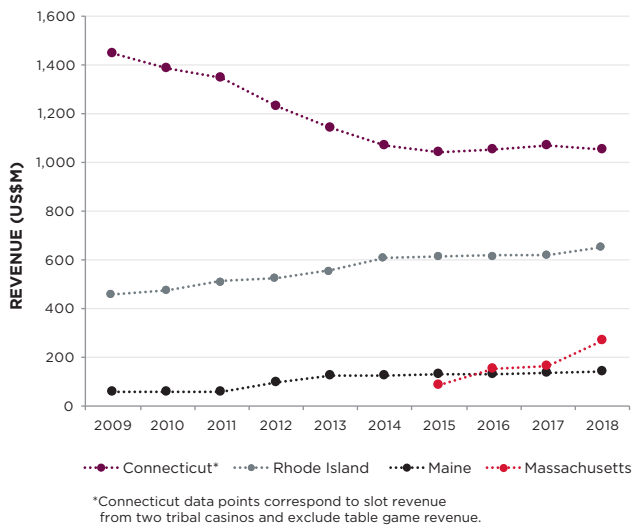
Meanwhile, in Connecticut, state lawmakers granted legislative approval in 2017 for the owners of the Mohegan Sun and Foxwoods casinos to co-develop a commercial casino in the town of East Windsor, north of Hartford. The project, however, is on hold due to litigation. In addition, further legislation was introduced in Connecticut's General Assembly to open a competitive bidding process on a separate commercial casino license.

Notably, Connecticut's plans for the East Windsor casino replicate Rhode Island's own strategy of positioning a casino in Tiverton, which is on the Massachusetts border, in order to mitigate the impact of new gaming competition across the state line.

New England: Annual Gaming Revenue By State (US\$M)

2009 to 2018

In 2018, Rhode Island's two commercial casinos posted a 5.1 percent year-over-year increase in revenue and outperformed two other New England states even as Massachusetts' first major casino-resort opened in August.



SOURCE: State gaming commissions

POLICY AND REGULATORY REVIEW

Sports Betting

Within weeks of the landmark Supreme Court ruling overturning the federal sports betting ban, Rhode Island legislators overwhelmingly adopted a measure to legalize sports betting and added it to the 2019 state budget, which Gov. Gina Raimondo (D) approved in June. The Rhode Island Lottery contracted with a technology partner for sports wagering in August and the first legal sports bets were placed at Twin River Casino on November 26.

The new law authorized sports wagering exclusively at the state's two land-based casinos. Online sports betting was prohibited, except on casino premises via approved mobile betting applications.

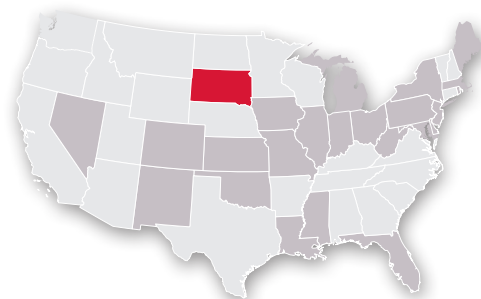
Gaming Technology

The 2019 state budget also authorized "gaming innovation pilot initiatives," including stadium gaming. An emerging form of gaming largely targeted at millennials, stadium gaming allows players to bet on multiple live table games from one electronic gaming device while watching live dealers on large video screens.

The hybrid table game devices were installed at Tiverton Casino Hotel prior to its opening in September and then at Twin River Casino in November. The new games are estimated to generate approximately \$4 million in tax revenue for the state.

South Dakota

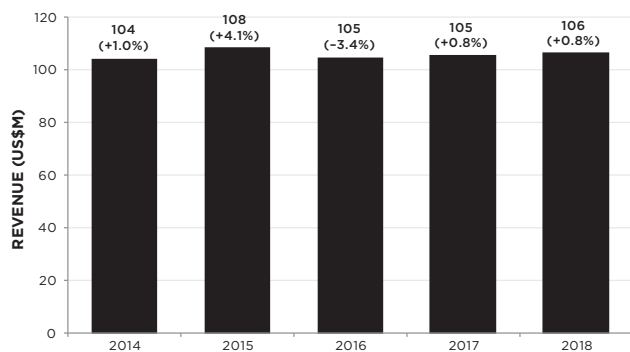
Number of Commercial Casinos	25
Casino Format	Land-Based Casinos
Regulatory Authority	South Dakota Commission on Gaming
Gross Casino Gaming Revenue 2018	\$106.3M
Gaming Tax Revenue 2018	\$14.7M



In 2018, total statewide commercial casino gaming revenue was \$106.3 million, up 0.8 percent. The modest overall growth was driven entirely by increased revenue from table games in the resort mountain town of Deadwood.

South Dakota: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: South Dakota Commission on Gaming

MARKET OVERVIEW

South Dakota offers commercial casino gaming at 25 locations exclusively within the city limits of historic Deadwood, located on the edge of the Black Hills National Forest near the Wyoming and Montana borders.

The casinos, which operate both electronic gaming devices and table games, are regulated by the South Dakota Commission on Gaming.

Commercial casino gaming was first approved by South Dakota voters in a 1988 statewide referendum. The state legislature passed a corresponding law the following year, confirming South Dakota as the third commercial gaming state along with Nevada and New Jersey.

While South Dakota's gaming law initially contained strict wagering limits and restrictions on the types of games and prize amounts that commercial casinos could offer, these restrictions have been loosened in recent years. Deadwood casinos can now accept wagers up to \$1,000 (up from \$100 prior to 2012) and can offer the most popular casino table games, including blackjack, poker, craps and roulette.

There are no limits on the number of commercial casinos that may operate within the city limits of Deadwood. Commercial casino operators may operate up to 30 table games or electronic gaming devices for each license they possess. There is no limit on the number of licenses any operator may hold.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$106.3 million, up 0.8 percent against 2017. Overall, annual gaming revenue at South Dakota's commercial casinos has been remarkably stable over the last decade, hovering just over the \$100 million mark every year since 2008.

The slight increase in 2018 was fully attributable to table game revenue, which totaled \$13.2 million, up 10.0 percent from 2017. In contrast, revenue from electronic gaming devices was down slightly at \$93.1 million, just \$322,000 lower than the total for 2017.

For the sixth year in a row, the number of electronic gaming devices and table game units offered in Deadwood casinos declined. At the end of fiscal year 2018, the city offered a combined total of 2,952 gaming devices and tables, down from a total of 3,176 the previous year.

Gaming Tax Distribution

South Dakota levies a 9 percent tax on commercial casino revenue. In addition, a gaming device tax is applied to both table games and electronic gaming devices, in the amount of \$2,000 per unit per year.

In 2018, commercial casinos in Deadwood generated total gaming tax revenue of \$14.7 million, down 5.0 percent from 2017—the second consecutive year gaming revenue has risen while tax revenue has declined. The lower tax revenue was attributable to a reduction in the number of gaming positions and associated device taxes at Deadwood casinos in 2018 as compared to the year prior.

Of the 9 percent of gaming revenue collected, 1 percent is distributed to South Dakota's General Fund, and the remaining 8 percent is divided between the state's Gaming Commission Fund, the South Dakota Department of Tourism and Lawrence County where Deadwood is located.

The Commission Fund provides up to \$6.8 million annually to the City of Deadwood and up to \$100,000 to the State Historical Preservation Grant and Loan Fund, with all remaining funds going to the state's General Fund, Lawrence County municipalities and schools, and Deadwood historic preservation. In addition, the Commission Fund is authorized to provide up to \$30,000 annually for state gambling addiction programs.

Competitive Landscape

With more than two dozen casinos in Deadwood and no major population center within hundreds of miles, South Dakota relies heavily on tourists to patronize the historic town's commercial casinos.

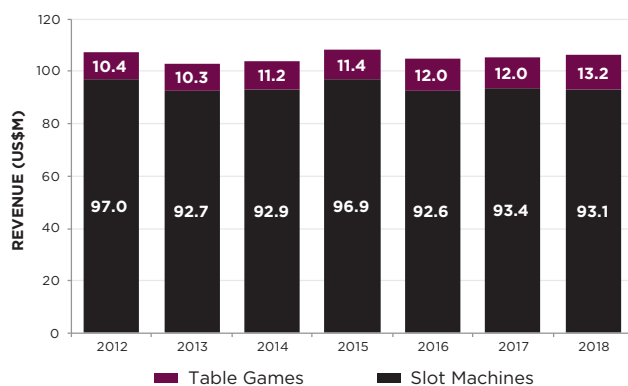
As Deadwood sits on the western edge of the state the town is unable to capture the majority of gaming dollars spent by South Dakota's residents, particularly those in Sioux Falls—the state's largest city, located in the southeastern corner of the state. Residents in that part of the state generally spend their gaming dollars at one of the state's 12 tribal casinos, at nearby tribal casinos in Minnesota, or at Iowa's Grand Falls Casino, which is just minutes from Sioux Falls.

South Dakota's casinos also compete with a network of more than 9,000 electronic gaming devices operated by the South Dakota Lottery at 1,335 convenience locations, such as bars and taverns, throughout the state.

South Dakota: Annual Gaming Revenue By Segment (US\$M)

2012 to 2018

Despite legalization of craps and roulette in 2015, electronic gaming devices continue to dominate South Dakota's commercial casino market. In 2018, the gap was only slightly narrowed as table game revenue increased by 10 percent while EGD revenue was essentially flat.



SOURCE: South Dakota Commission on Gaming

Under the new regulations, providers of associated equipment are required to pay an initial licensing fee of \$500 and must renew their license each year at a cost of \$250.

Sports Betting

In 2018, Deadwood's commercial casino operators started to lay the groundwork for the legalization of sports betting by filing a proposed constitutional amendment that would add wagering on sporting events to the list of games permitted in South Dakota's commercial and tribal casinos.

The petition, initiated by the Deadwood Gaming Association, requires signatures from 10 percent of the total number of votes cast in the most recent gubernatorial election, or about 34,000 signatures, to qualify for the ballot.

Should the constitutional referendum make it onto the 2020 ballot and be approved by a majority of voters, the South Dakota State Legislature would then have to pass authorizing legislation that sets forth a regulatory framework and tax structure for sports wagering.

POLICY AND REGULATORY REVIEW

Regulatory Reform

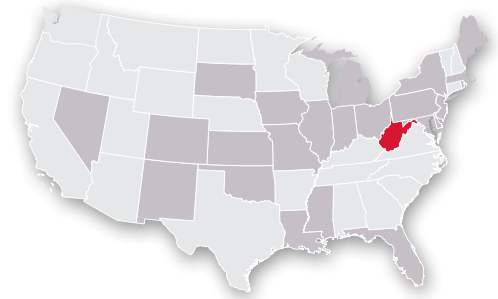
In March, Gov. Dennis Daugaard (R) signed into law a pair of bills that more closely aligned South Dakota's regulatory regime with that of Nevada.

In particular, the legislation reformed the state's gaming act to make cheating and other fraudulent activity at casinos a felony. The bills also created a new licensing category for providers of "associated equipment" to casinos.

Associated equipment refers to components or software used in connection with casino games—but not the technology that supports a game's operation—such as dice, playing cards and computerized systems for monitoring electronic gaming devices.

West Virginia

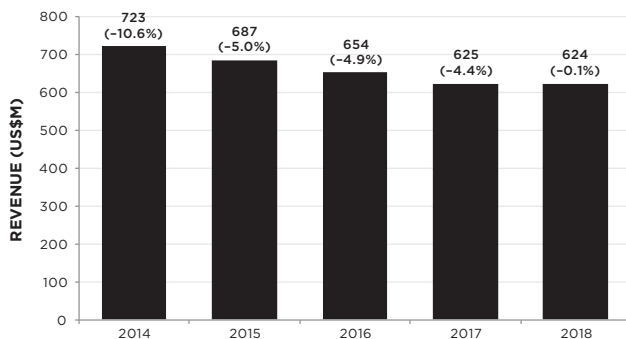
Number of Commercial Casinos	5
Casino Format	Land-Based Casinos; Racinos
Notable Forms of Gaming	Sports Betting
Regulatory Authority	West Virginia Lottery Commission
Gross Casino Gaming Revenue 2018	\$623.8M
Gaming Tax Revenue 2018	\$290.0M



In 2018, total statewide commercial casino gaming revenue was \$623.8 million, down 0.1 percent. The slight decline in revenue reflected weaker performance in the EGD sector mostly offset by revenue from table games and the newly regulated sports betting market.

West Virginia: Annual Commercial Casino Gaming Revenue (US\$M)

2014 to 2018



SOURCE: West Virginia Lottery

MARKET OVERVIEW

West Virginia offers commercial casino gaming at four racinos and one land-based casino. Each of the five venues operates electronic gaming devices and table games under the authority of the West Virginia Lottery Commission.

The state authorized commercial casino gaming in 1994 when the West Virginia legislature endorsed the operation of electronic gaming devices at racetracks, subject to local approval. Legislation allowing racinos to add table games was approved in 2007.

In 2008, voters approved casino gaming at The Greenbrier, a historic hotel, and legislators authorized table games at the property the following year.

Under West Virginia's regulatory framework, a racino must have a valid racetrack license in order to operate electronic gaming devices and table games. Racinos are statutorily permitted to have up to 400 machines, but may apply to the Lottery Commission for authorization to install more.

The state legislature, anticipating a favorable ruling by the Supreme Court, passed a bill in March 2018 legalizing sports betting. Following the repeal of PASPA in May, the West Virginia Lottery Commission adopted regulations allowing for both land-based and online sports wagering. Hollywood Casino at Charles Town opened the state's first sportsbook in September followed by the launch of an online betting platform in December.

Market Performance

In 2018, total statewide commercial casino gaming revenue was \$623.8 million, down less than \$1 million, or 0.1 percent, against 2017. It was the state's seventh consecutive year of declining revenue amid an increasingly saturated Mid-Atlantic gaming market.

Total revenue from electronic gaming devices in 2018 was \$509.7 million, down 1.5 percent from 2017, while total table game revenue was up slightly to \$107.7 million, an increase of 0.5 percent.

Despite the continued decline of West Virginia's gaming market due to growing regional competition, there are signs that revenue may be stabilizing. After three consecutive years of revenue declines in the range of 4–5 percent, West Virginia's casinos in 2018 narrowly missed breaking even with the prior year's total.

New revenue from West Virginia's sportsbooks helped close the revenue gap, generating about \$6.6 million in their first four months of operation.

Gaming Tax Distribution

Revenue from electronic gaming devices at West Virginia's five casino properties is taxed at 53.5 percent, while table games are taxed at 35 percent. The tax rate for sports betting is set at 10 percent.

In 2018, commercial casinos generated total gaming tax revenue of approximately

\$290.0 million, down about 1 percent from 2017. That included \$634,266 in sports wagering tax revenue.

The majority of gaming tax revenue is remitted to the state government, including to funds associated with the West Virginia Lottery. Lottery funds are allocated to the state's public schools, tourism promotion, state parks and services for senior citizens. County and municipal governments also receive a small percentage of gaming tax proceeds, as do West Virginia's horse and greyhound racing industries.

Taxes collected from sportsbook operations are placed in the newly-created West Virginia Lottery Sports Wagering Fund, which distributes the first \$15 million to the State Lottery Fund before remaining monies are used to help support health-insurance programs for public sector employees.

Competitive Landscape

West Virginia's commercial casinos have faced a dramatic increase in out-of-state competition over the past decade. Since 2006, the neighboring states of Maryland, Ohio and Pennsylvania have opened nearly 30 commercial casino properties.

Additional expansion is also on the horizon in Pennsylvania, West Virginia's northern neighbor. In line with a 2017 Pennsylvania law, satellite casino venues offering a limited number of electronic gaming devices and table games are now being sited in three counties located close to West Virginia's border. Pennsylvania's sweeping gaming expansion bill also authorized electronic gaming devices (VLTs) at truck stops, with those operations expected to commence sometime in 2019.

Meanwhile, in Virginia, lawmakers took a first step toward keeping its residents' gambling dollars in-state by enacting legislation to allow Colonial Downs Racetrack, located outside of Richmond, to operate historical racing devices on-site and at up to ten off-track betting facilities. The racetrack, shuttered since 2014, is scheduled to reopen in

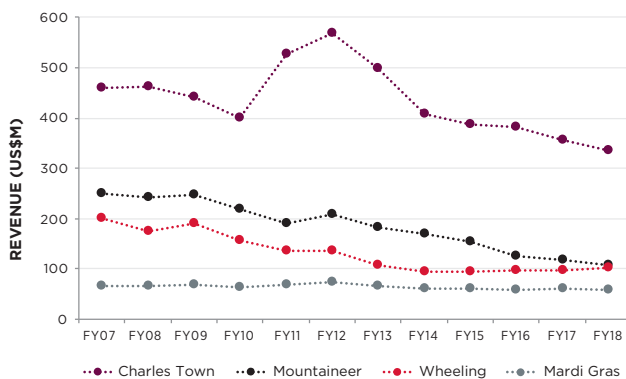
spring 2019, with the first wave of OTB facilities to follow. Virginia lawmakers also pitched several proposals in 2018 to authorize commercial casinos, while the federally recognized Pamunkey Indian Tribe said it was looking to obtain land to develop a tribal casino.

Within the state's borders, West Virginia casinos compete with a network of some 8,000 limited-stakes VLTs situated at retail establishments, such as bars and taverns.

West Virginia: Annual Commercial Casino Gaming Machine Revenue by Racino Property (US\$M)

FY2007 to FY2018

West Virginia's commercial gaming market, situated in the increasingly competitive Mid-Atlantic region, has experienced a significant downturn over the last 10 years. Over the last six years, in particular, the market has shrunk by 34 percent following the opening of several new casino venues in Maryland.



SOURCE: West Virginia Lottery

POLICY AND REGULATORY REVIEW

Sports Betting

Having passed a sports betting bill contingent on the repeal of PASPA in March 2018, West Virginia was able to move quickly once the Supreme Court overturned the federal ban on sports wagering two months later.

In June, the West Virginia Lottery Commission adopted emergency rules governing sports betting and they were enacted by the secretary of state shortly thereafter. Under the regulations, the state's land-based casino and four racinos became eligible to apply for sports betting licenses, valid for five years, at an upfront cost of \$100,000 each.

Hollywood Casino opened the first sportsbook in the Mountain State on September 1 and all four other casinos followed suit before the end of the year.

Online sports betting was also authorized by the state law, with regulations allowing each casino and racino to deploy up to three "skins," or individually branded websites, under their licenses.

STATE REGULATORY & INDUSTRY CONTACTS

For further information about the gaming industry or regulatory requirements in specific states please contact the state regulators or state gaming association listed below.

STATE	STATE REGULATORY AUTHORITY	STATE GAMING ASSOCIATION
Colorado	Colorado Division of Gaming colorado.gov/pacific/enforcement/gaming Colorado Limited Gaming Control Commission colorado.gov/pacific/enforcement/limited-gaming-control-commission	Colorado Gaming Association coloradogaming.com
Delaware	Delaware Lottery delottery.com Delaware Division of Gaming Enforcement dge.delaware.gov	
Florida	Florida Division of Pari-Mutuel Wagering myfloridalicense.com/DBPR/pari-mutuel-wagering	
Illinois	Illinois Gaming Board igb.illinois.gov	Illinois Casino Gaming Association illinoiscasinogaming.org
Indiana	Indiana Gaming Commission in.gov/igc	Casino Association of Indiana casinoassociation.org
Iowa	Iowa Gaming and Racing Commission irgc.iowa.gov	Iowa Gaming Association iowagaming.org
Kansas	Kansas Racing and Gaming Commission krgc.ks.gov Kansas Lottery kslottery.com	
Louisiana	Louisiana Gaming Control Board lgcb.dps.louisiana.gov	Louisiana Casino Association casinosofla.com
Maine	Maine Gambling Control Unit maine.gov/dps/gamb-control	
Maryland	Maryland Lottery and Gaming Control Commission; Maryland Lottery and Gaming Control Agency mdgaming.com	
Massachusetts	Massachusetts Gaming Commission massgaming.com	
Michigan	Michigan Gaming Control Board michigan.gov/mgcb	Michigan Gaming Association michigangaming.com

STATE REGULATORY & INDUSTRY CONTACTS *(continued)*

STATE	STATE REGULATORY AUTHORITY	STATE GAMING ASSOCIATION
Mississippi	Mississippi Gaming Commission msgamingcommission.com	Mississippi Gaming and Hospitality Association msgaming.org
Missouri	Missouri Gaming Commission mgc.dps.mo.gov	Missouri Gaming Association missouricasinos.org
Nevada	Nevada Gaming Control Board; Nevada Gaming Commission gaming.nv.gov	Nevada Resorts Association nevadaresorts.org
New Jersey	New Jersey Division of Gaming Enforcement nj.gov/oag/ge New Jersey Casino Control Commission nj.gov/casinos	Casino Association of New Jersey casinoassociationofnewjersey.org
New Mexico	New Mexico Gaming Control Board nmgcb.org	
New York	New York State Gaming Commission gaming.ny.gov	New York Gaming Association newyorkgaming.org
Ohio	Ohio Casino Control Commission casinocontrol.ohio.gov Ohio Lottery Commission ohiolottery.com	
Oklahoma	Oklahoma Horse Racing Commission ohrc.org	
Pennsylvania	Pennsylvania Gaming Control Board gamingcontrolboard.pa.gov	
Rhode Island	Rhode Island Lottery rilot.com	
South Dakota	South Dakota Commission on Gaming dor.sd.gov/Gaming	Deadwood Gaming Association deadwood.com
West Virginia	West Virginia Lottery Commission wvlottery.com	





JULY 30, 2013 Albany, NY

Governor Cuomo Signs Upstate NY Gaming Economic Development Act

Governor Andrew M. Cuomo today signed the Upstate NY Gaming Economic Development Act, a comprehensive new law that, pending approval of a referendum this fall, will establish four destination gaming resorts in Upstate New York and boost tourism and economic development in communities across the region. Under the casino gaming plan outlined in the new law, all localities in the state will share in increased education aid, or lower property taxes, no matter where the casinos are located.

Our focus has been to bring jobs and boost local economies in Upstate New York, where decades of decline have taken their toll in our communities," Governor Cuomo said. "This new law will bring the state one step closer to establishing world-class destination gaming resorts that will attract tourists to Upstate New York and support thousands of good paying jobs as well as new revenue for local businesses. For too many years, gaming revenue has left New York for our neighboring states. Today, we are putting New York State in a position to have those dollars spent here in our communities, which will benefit our local economies and tourism industries, as well as support education and property tax relief."

Senator John Bonacic said, "Casino gaming surrounds us in other States. By legalizing it in New York we can create thousands of jobs and allow for billions of dollars in investment. Gaming can substantially improve the Catskills economy. Governor Cuomo has brought is to the brink of success here. Anyone who wants more money for education and more jobs should vote for the gaming referendum this November."

Assembly Member Gary Pretlow said, I commend Governor Cuomo for signing this new law that will bring New York State a step closer to bringing casinos to the Catskills, the Southern Tier and the Capital Region. These destination resorts would mean good news for the local communities, the local economies, and the people of our state. Gaming has the potential to create new jobs for New Yorkers and bring downstate residents and tourists to the attractions of Upstate, and this exciting new law will bring put us in a position to make casino gaming an economic driver here in New York State.

The new law signed today by the Governor includes these key details:

Locations of Destination Gaming Resorts: The new law authorizes four upstate destination gaming resorts to enhance tourism development. Destination gaming resorts will be selected competitively based on the economic development impact of the resort. Destination gaming resorts are authorized in three regions of the state: the Hudson ValleyCatskill area, the Capital District-Saratoga area, and the Central-Southern Tier. One region may have up to two casinos if determined by the state siting board. No destination gaming resorts can be authorized in Westchester, Rockland, Putnam, New York City, or Long Island. There will be a 7-year exclusivity period during which no further destination gaming resorts will be licensed by the State.

Regulation and Selection: The State Gaming Commission will oversee regulation of destination gaming resorts. The Gaming Commission will appoint a siting board of individuals with expertise in finance and development, which will determine the required minimum amount of capital expenditures and license fee required of a destination gaming resort applicant in each region and make the selections.

- The tax rate on slot machines will be equal to the tax rate of existing video lottery gaming facilities within each region which currently ranges from 37 percent to 45 percent depending on the region.
- The tax rate on table games will be 10 percent.
- Existing payments to the racing industry for purses and breeding will be maintained.
- There will be no destination gaming resorts in regions with tribal exclusivity agreements.

The board will be required to evaluate destination gaming resort applications based on specific criteria: 70 percent of the decision on siting a destination gaming resort will be based on economic activity and business development factors; 20 percent on local impact and siting factors; and 10 percent on workforce factors. Local support for the Resort application must be demonstrated as a threshold application requirement.

The Gaming Commission is authorized to investigate the suitability of the gaming license applicant, including character and financial stability, and sets criteria for licensing individuals and businesses employed by or doing business with the resort. Destination gaming resorts and all related service industries will be strictly and comprehensively regulated by the Gaming Commission. The minimum gambling age in destination gaming resorts will be 21, and no smoking will be authorized in the four destination gaming resorts.

All Localities Benefiting from Education Aid Increases: 10 percent of the States tax revenues will be split equally between the host municipality and the host county. 10 percent of the States tax revenues will go to other counties in the region of the destination gaming resort to provide tax relief or educational assistance. 80 percent of the States tax revenues will be used statewide for elementary and secondary education or property tax relief. The educational aid will be additive and will not be part of the States existing education formulae. If the gaming referendum passes, 10 percent of the net gaming revenue retained by the State from Indian gaming facilities will be distributed to counties in each respective exclusivity zone that do not otherwise receive a share of exclusivity revenues.

Addressing Problem Gambling and Cheating: Funds for problem gambling will be added through the imposition of a \$500 annual fee on all slot machines and table games. Destination gaming resorts will be required to develop comprehensive problem gambling programs, and part of the decision for siting a destination gaming resort will be determined by the quality of the applicants problem gambling program. All destination gaming resorts will be required to have exclusion policies, and the new law provides for individuals to exclude themselves from the destination gaming resorts. New categories of gaming specific crimes are included to prevent cheating at destination gaming resorts. Cyber sweepstakes cafes are specifically made criminal.

Preventing Corruption: A state gaming inspector generals position is authorized to prevent corruption at the Gaming Commission.

Agreements with Indian Gaming: The exclusivity of Indian gaming zones is affirmed.

Video Lottery Terminals: The new law authorizes Nassau and Suffolk OTB to establish one video lottery gaming facility each at an OTB site with a maximum of 1,000 machines at each

site. In the event that the gaming referendum does not pass, the Gaming Commission is authorized to competitively site up to four video lottery gaming facilities, one per region, in the Capital District, Central-Southern Tier, Catskills, and Nassau County, based on revenue generation and economic development criteria. Additional video lottery gaming facilities in New York will secure new funding for educational assistance.

MGM SPRINGFIELD CASINO: APRIL 15, 2019



MGM SPRINGFIELD CASINO

(<https://www.mgmspringfield.com/en.html>)

2,550 slots, 120 gaming tables, including poker, a luxury cinema, entertainment, shopping, spa experiences and a diverse food and beverage portfolio awaits you in the new 125,000 sf. MGM Springfield. Spend the day enjoying all that this magnificent venue has to offer including an exciting outdoor space with markets, vendors and skating.

\$30 Casino Bonus (\$10 Food – South End Market (<https://www.mgmspringfield.com/en/restaurants/south-end-market.html>) & \$20 Free Slot Play)

(Bonuses are given and determined by the casino and as such are subject to change without notice by the casino.)

\$25 per person

Must be 21+ age – Must present valid ID to collect winnings

Tour Includes

Transportation

\$30 Casino Bonus (\$10 Food - South End Market (<https://www.mgmspringfield.com/en/restaurants/south-end-market.html>) & \$20 Free Slot Play)

(Bonuses are given and determined by the casino and as such are subject to change without notice by the casino.)

Meal

Meal not included

Departure Times/Return Times

Estimated arrival time: 10:00 AM. Depart Casino at 6:00 PM.

Depart	From	Return
7:00 am	Wade Terminal	9:00 pm
7:30 am	Crossgates Mall Macy's Overflow Lot	8:30 pm
7:45 am	Latham Farms Sams Club	8:15 pm

If the tour is SOLD OUT online, please contact us as additional tickets may be available, 518-355-4500

Special Requests & Additional Information

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8 7	6 5
12 11	10 9
16 15	14 13
20 19	18 17
24 23	22 21
28 27	26 25
32 31	30 29
36 35	34 33
40 39	38 37
44 43	42 41
48 47	46 45
52 51	50 49
54 53	L.A.V.
56 55	

SEATING PREFERENCE: If yes, please let us know your preference in the special requirements section on the booking page with the specific seat, seat location and if you would like to sit near someone. Check out our seat assignment policy page for our seating chart. If no preference is made, your seat will be assigned by Wade Tours. Check out the seating chart to the left!!

We encourage you to book early to accommodate any special needs and to assure that members of your party will be seated together. We reserve the right to assign seats when necessary.

CERTIFICATES/REWARDS/CREDIT: If you have a gift card/certificate, travel club reward or on account credit, we ask that reservations are made through the telephone or in store.

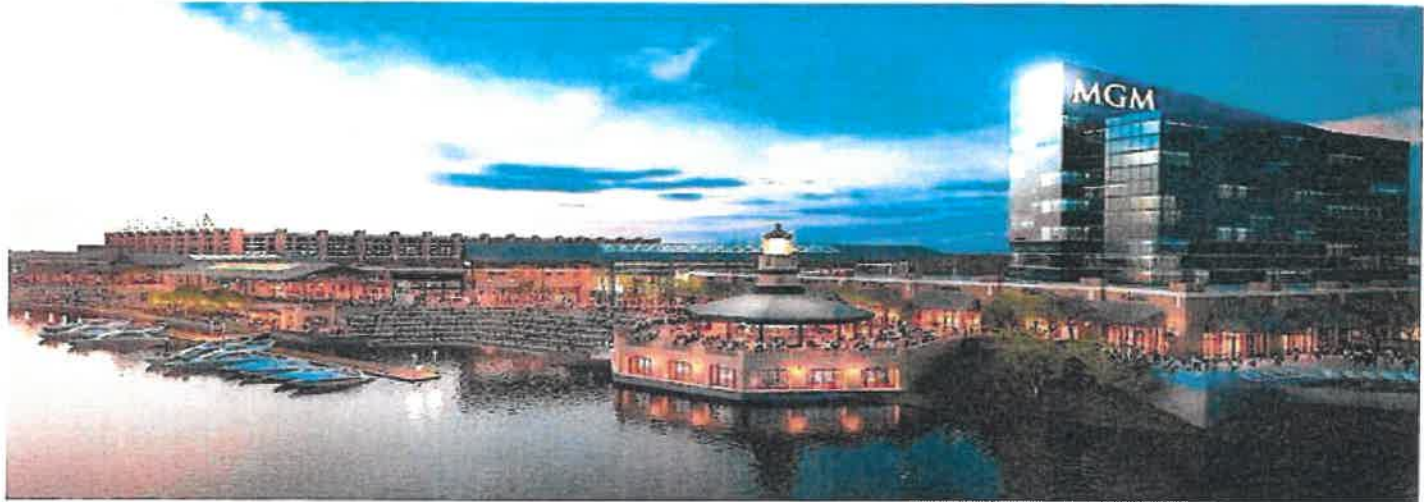
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Cancellations **MUST** be made directly with a reservationist. Cancellations made by email or voice mail cannot be accepted. **NO REFUNDS FOR CANCELLATIONS WITHIN 48 BUSINESS HOURS PRIOR TO DEPARTURE ON ALL TOURS.** Travel Club promos & Reward Certificates are non-refundable. Casino Trips are non-refundable but are transferable.

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Mohegan and Mashantucket Pequot would still be green-lighted for casino project in East Windsor

Connecticut's tribes and Bridgeport city near casino deal that could replace MGM plan



The tribes' plan would be much smaller than the USD 675 million MGM proposal on Bridgeport's waterfront. It would need approval from the legislature and Gov. Ned Lamont, either before the legislative session ends next week or during a special session this summer. MGM is expected to file a lawsuit, claiming a violation of its rights. Lawmakers see the Bridgeport casino as a long shot.

The city of Bridgeport and Connecticut's two Native American tribes are nearing a deal that could bring a casino to the state's largest city. The project, which would block MGM Resorts International's efforts to build its own Bridgeport casino, would need approval from the legislature and Gov. Ned Lamont, either before the legislative session ends next week or during a special session this summer. Under the proposed terms, the Mohegan and Mashantucket Pequot tribes would remain free to move forward with the Tribal Winds casino project in East Windsor.

"There is no 'either/or' solution when it comes to East Windsor and Bridgeport, and we shouldn't be playing two Connecticut communities against each other," Andrew Doba, a spokesman for the tribes, said in a written statement. "We continue to have conversations with the administration, legislative leaders, the Bridgeport delegation and the mayor on a global solution that will also bring some level of investment in the Park City." Doba said the tribes hope to reach a resolution "sooner rather than later."

Although the tribes' plan would be much smaller than the \$675 million MGM proposal on the harbor, it appears more likely to win approval in the General Assembly — where the tribes' supporters have fought MGM vociferously for years. The tribes would construct a Bridgeport casino with a minimum of 2,000 slot machines, 100 gaming tables, a 500-room hotel, with a spa, restaurants and retail space, according to a working draft of the legislation draft shared with *Hearst Connecticut Media*.

"We're trying to find a happy medium that is good for the state, good for the tribal nations and good for the city of Bridgeport," said Rep. Chris Rosario, D-Bridgeport, who has participated in the negotiations. "The idea of the city of Bridgeport settling for a slot box, or some parlor, that's out."

A casino deal between Bridgeport and the tribes represents a shift for the city's legislative delegation, who for years have maintained that they support an open, competitive bidding process to bring a new casino to the state's largest city.

Lawmakers, however, see the Bridgeport casino as a long shot, *Hartford Courant* reported. With only days remaining in the legislative session that ends Wednesday at midnight, an extended debate on casinos could crowd out numerous other bills and cause legislation to fail. Lawmakers are often reluctant to stage an extended debate in the final days of the session unless the outcome is clear.

House Speaker Joe Aresimowicz of Berlin, who decides which bills are debated in the House, said it will be "extremely hard" to debate the bill before Wednesday. "I would put the odds somewhere around 20 percent," he told reporters. "This is like a Hail Mary pass to try to get this to work out."

Negotiations over the casino have included the tribes, legislators and Bridgeport Mayor Joe Ganim. A spokeswoman for Lamont said the governor has not been involved in the talks, but Lamont told reporters he is "glad to see those conversations have started up again." "There's an opportunity to do some type of resort gaming in Bridgeport as well," he said. "I think that's a real positive. I'd love to hear more about it."

MGM, as well as some Bridgeport legislators, have frequently lobbied for an open bidding process on a casino in the city, which would allow MGM to build its proposed \$675 million venue on Bridgeport Harbor. If a tribal casino in Bridgeport is approved, MGM is expected to file a lawsuit, claiming a violation of its rights.

"Conversations and proposals are certainly very fluid in the final days of the legislative session," MGM spokesman Bernard Kavalier said. "We continue to track developments closely."

The debate over a Bridgeport casino is a decades-long saga that includes a proposal by Donald Trump and a 1995 vote in the state Senate during the tenure of Republican Gov. John G. Rowland. Bridgeport lawmakers worked for nearly four years on the casino proposal before the state Senate voted 24-10 in late 1995 to reject a casino on the city's harbor that dealt a major blow to the beleaguered city, which had staked much of its hope for the future on the project and the thousands of jobs it would create.

The vote was also a defeat for Rowland, who had embraced the casino proposal as his own and spent significant political capital trying to persuade reluctant lawmakers to support the project, which called for the Mashantucket Pequot tribe to develop an \$875 million casino and entertainment complex in the city's Steel Point section.

Lawmakers said MGM will continue to make its best efforts to preserve its \$1 billion casino in Springfield and its long-running desire to build on Bridgeport's waterfront. Concerning MGM's expected opposition to a Bridgeport casino by the tribes, Aresimowicz said, "They are going to sue, in my opinion, no matter what."

"In East Windsor, there's going to be a lawsuit no matter what, whether you build Bridgeport or not," said House Majority Leader Matt Ritter, D-Hartford.

Rep. J. P. Sredzinski of Monroe, the top House Republican on the committee that oversees gambling, said he, too, expects litigation from MGM and says the chances of a casino in Bridgeport are low. "I would say less than 20 percent," Sredzinski said.

MGM opens major casino resort in Springfield, Mass.

Nancy Trejos, USA TODAY Published 9:16 a.m. ET Aug. 23, 2018 | Updated 11:21 a.m. ET Aug. 24, 2018



(Photo: MGM Springfield)

Seven years ago, a tornado ripped through downtown Springfield, Massachusetts, turning a big part of the hometown of Theodor Seuss Geisel, a.k.a. Dr. Seuss, into rubble.

This western Massachusetts town is finally able to show off its recovery with the opening of the new **MGM Springfield** ([https://www.mgmspringfield.com/en.html?](https://www.mgmspringfield.com/en.html?kbid=2584521&sekwoid=AL14737131288275450767!e!g!springfield%20mgm&ef_id=WqxIPAAABZcdheL8:20180823125839:s#/)

[kbid=2584521&sekwoid=AL14737131288275450767!e!g!springfield%20mgm&ef_id=WqxIPAAABZcdheL8:20180823125839:s#](https://www.mgmspringfield.com/en.html?kbid=2584521&sekwoid=AL14737131288275450767!e!g!springfield%20mgm&ef_id=WqxIPAAABZcdheL8:20180823125839:s#/)), a 2 million-square-foot complex with gaming, restaurants, a hotel, spa, movie theater and shops.

MGM is betting big on Springfield with a 125,000-square-foot casino featuring 2,550 slots, 120 table games, a high-limit room and a poker room with 23 tables. It also has brought in celebrity chefs **Michael Mina** (<https://www.michaelmina.net/>) and Meghan Gill, season 14 winner of *Hell's Kitchen*, to run restaurants.

And it's leveraging its clout with musicians and comedians by promising to bring in big acts to the MassMutual and Symphony Hall performance venues. First up is Stevie Wonder on Sept. 1.

"This has helped put us on the map," says Springfield Mayor Domenic Sarno, who has been in office since 2007. "Cities such as Springfield have gone through some tough times — the economy, things changing and people going to the suburbs and rural areas. ... It's a redefining time, a re-establishment of core urban cities, and MGM has played a pivotal role in that."

Foxwoods Casino: A gamble that paid off

(<https://www.usatoday.com/story/travel/2017/04/07/foxwoods-casino-gamble-paid-off/99990532/>)

MGM Resorts International has expertise in spreading its Las Vegas magic to other parts of the USA. MGM runs 13 casino resorts on the Vegas Strip, including Bellagio, Mandalay Bay and Luxor. The hospitality and entertainment company also operates the MGM National Harbor in Maryland, MGM Grand Detroit, Borgata Hotel Casino and Spa in Atlantic City, Beau Rivage Biloxi and Gold Strike Casino Resort in Tunica, Mississippi.

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7/13/2018

MGM Springfield a mega casino resort has opened in Massachusetts

MGM is working with local attractions to cross-promote each other. The resort is offering free bus service called the Loop that will stop at various museums and attractions all around downtown Springfield.

"It appears that they paid a tremendous amount of attention to the historic significance of our area," says Greg Procino, vice president of basketball operations for the Basketball Hall of Fame. "There is a sense of pride in the city that Springfield is taking a big step forward."

MGM has also partnered with [Springfield Museums \(https://springfieldmuseums.org/\)](https://springfieldmuseums.org/), a collection of five museums, to display some of its exhibits within the resort. "Cabinet of Curiosities: Springfield Innovations from the Springfield Museums" showcases objects such as a 1925 Edison Western Union Stock Ticker, a 1915 Springfield-made Telegraphone and an 1895 Edison Home Phonograph.

MGM was deliberate with its design of the resort, incorporating such historic venues as the First Congressional Church, The Massachusetts National Guard Armory and Chandler Union Hotel into the 14-acre property to make it feel more like a campus than a big-box hotel. The Chandler Union Hotel, for instance, has been converted into Gill's The Chandler Steakhouse.

The 19th-century Armory is now the center of an outdoor plaza made to look like a classic New England town common. It will host events, weekend farmer's market and seasonal entertainment such as an ice skating rink.

"They made a very conscious effort to integrate the resort with downtown Springfield," says Kay Simpson, president of Springfield Museums. "They will be encouraging their guests to actually venture out of the casino to explore downtown Springfield."

2

The hotel itself has 250 guestrooms and suites. There are three bars and lounges. There is also 34,000 square feet of meeting and convention space.

Retail offerings include Indian Motorcycle, an apparel store by the Springfield-based company.

In addition to the steakhouse, there is the South End Market with quick casual dining spots such as Jack's Lobster Shack. There is Tap Sports Bar, which features a 10-lane bowling alley and arcade. Mina is opening Cal Mare, which will offer Italian fare.

Mina has restaurants in major cities such as Las Vegas, San Francisco and Boston. But he was willing to take a gamble on a lesser-known destination as Springfield because of his long-term partnership with MGM.

"When you're part of a casino, you're a part of your own little city," he says.

While MGM was not allowed to build a standalone performance venue, it has entered into a partnership with existing halls such as Mass Mutual, which has 8,000 seats. Symphony Hall has 2,500 seats.

"We purposely sought out not to build everything on property," says Sarah Moore, vice president of brand activation and retail for MGM. "People don't understand the profound history of this city. So much has happened here, it was once a thriving economy. The infrastructure was there. The bones are there, and we're bringing it back to life."

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Wynn receives final approvals to open Encore Boston Harbor casino



Encore Boston Harbor in Everett. —AP Photo/Steven Senne, File
AP, June 12, 2019

BOSTON (AP) — Massachusetts gambling regulators have given Wynn Resorts the final approvals needed to open its nearly \$3 billion Boston-area casino.

The state's Gaming Commission on Wednesday authorized Wynn to conduct three trial gambling days next week after commission staff inspected the casino's 3,158 slot machines, 143 table games and 88 poker tables.

The commission also confirmed Wynn has met or exceeded most of its license requirements.

Company officials acknowledged they're still working to meet a goal to have women comprise 50% of the casino staff. They so far represent 44%.

7/13/2019

Wynn receives final approvals to open Encore Boston Harbor casino | Boston.com

The Everett resort officially opens June 23.

The company paid Massachusetts a record \$35.5 million in fines last month for failing to disclose the allegations of sexual misconduct against company founder Steve Wynn, who denies the allegations but resigned as CEO.

Sports and fantasy gambling

Moderator:

Prof. Keith Miller

Panelists:

Prof. Jodi S. Balsam

Michele Fischer

Cornelius D. Murray, Esq.

Daniel L. Wallach, Esq.

To be argued by:
Cornelius D. Murray, Esq.
Time requested: 20 minutes

**STATE OF NEW YORK – SUPREME COURT
APPELLATE DIVISION – THIRD DEPARTMENT**

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and
ANNE REMINGTON,

*Plaintiffs-Respondents-Cross-
Appellants,*

-against-

No. 528026

HON. ANDREW CUOMO, as Governor of the State of New York, and the
NEW YORK STATE GAMING COMMISSION,

Defendants-Appellants-Respondents.

**OPENING BRIEF FOR PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS**

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Dated: April 9, 2019

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PRELIMINARY STATEMENT

“What’s in a name? That which we call a rose
by any other name would smell as sweet.”
William Shakespeare, *Romeo and Juliet*, Act
II, Scene 2, lines 1-2.

“When I use a word,” Humpty Dumpty said,
in a rather scornful tone, “it means just what
I choose it to mean – neither more nor less.”
Lewis Carroll, *Through The Looking Glass*,
Ch. 6, p. 205 (Charles L. Dodgson) (1934)
(first published in 1871).

Plaintiffs-Respondents-Cross-Appellants (hereinafter “Plaintiffs”) are citizens of New York State who either suffer from gambling disorders or are victims of the financial and emotional havoc caused by family members with such disorders. They have brought this action to declare Chapter 237 of the Laws of 2016 of the State of New York unconstitutional and to enjoin permanently the State and its agencies and officials from implementing Chapter 237. The issue in this case is whether the New York State Legislature’s enactment of Chapter 237, which purports to authorize, regulate and tax

Interactive Fantasy Sports (“IFS”),¹ violates New York State Constitution’s long-standing prohibition against gambling enshrined in Article I, § 9 of the Bill of Rights since 1894 for the expressed purpose of protecting people like the Plaintiffs from the evils of gambling. See Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). The answer to that question depends on whether we live in a Shakespearean world inhabited by Romeo and Juliet where substance trumps form, and a rose is, in fact, a rose; or whether we live in a parallel universe of alternative facts, like the one inhabited by Humpty Dumpty – and now by the New York State Legislature – where “gambling” is not “gambling” simply because the Legislature has decided to call it something else.

IFS involves contestants betting money on the future performance in real-life athletic events by real-life athletes on a so-

¹ The Legislature uses the term “Interactive Fantasy Sports” (IFS); Daily Fantasy Sports is a subset of IFS and, as the name implies, refers to games of shorter duration. While traditional IFS games might, for example, last for an entire baseball season, DFS games typically apply only to games played on a certain day. In the case of football, a DFS contest might last over a weekend. See Defendants-Appellants-Respondents’ Brief at 12. Plaintiffs contend both are illegal and for the same reason. For purposes of this Brief, unless otherwise indicated, Plaintiffs will use the terms interchangeably.

called “fantasy team” roster chosen by IFS contestants and over whom the contestants have no control. The winner is determined by which contestant’s fantasy team performs best in actual future sporting events.

Supreme Court, Albany County (Connolly, J.) found that while the rosters may be “fantasy” teams, the sporting events are real, the players are real, their performances are real, and the IFS contestants who have chosen them on their so-called fantasy teams have absolutely no control over how those athletes will perform. Yet how those athletes perform are future contingent events that materially affect the outcome of any IFS contests. Simply put, IFS involves wagering on future contingent events – namely, the performance of athletes, a classic form of sports betting.

Notwithstanding, therefore, the strong presumption of constitutionality applicable to any statute, Supreme Court concluded “beyond a reasonable doubt” that IFS was, in fact, gambling. Ironically, however, at the very same time the Court said that the Legislature could choose to remove IFS from the definition of

“gambling” under the Penal Law while not substituting any other provision – civil or criminal – to prevent it. The result is that major DFS operators like FanDuel and DraftKings continue to operate freely and openly in this State, notwithstanding the requirement in Article I, § 9 that no such gambling shall hereafter be authorized or allowed in this State.

Defendants-Appellants-Respondents (hereinafter “the State” or “Defendants”) are the Governor and the New York State Gaming Commission, the agency responsible under Chapter 237 for licensing and regulating companies like FanDuel and DraftKings that offer IFS contests.

The State has appealed from Supreme Court’s judgment that Chapter 237 is unconstitutional to the extent that IFS is “gambling,” and Plaintiffs have cross-appealed from so much of the Court’s ruling which held that the Legislature could leave an enforcement vacuum. This Brief will address why the Court correctly ruled that IFS is, in fact, “gambling” prohibited by Article I, § 9, but also why it erred in leaving an enforcement vacuum which enables IFS to continue

unabated despite the mandate of Article I, § 9 that the Legislature pass laws to prevent offenses against it.

QUESTIONS PRESENTED

1. Does Chapter 237 of the Laws of 2016 purporting to authorize, regulate and tax interactive fantasy sports violate the prohibitions against gambling as set forth in Article I, § 9 of the Bill of Rights of the New York State Constitution?

Supreme Court answered this question “yes.”

2. Did the Legislature violate the mandate of Article I, § 9 which directs the Legislature to pass laws to prevent gambling when it chose to exclude such activity from the definition of “gambling” in the Penal Law without substituting any other provision, civil or criminal, to prevent its occurrence?

Supreme Court answered this question “no.”

STATEMENT OF THE CASE

A. The Evolution of the Constitutional Prohibition Against Gambling

New York State's constitutional prohibition against gambling has a long history. It began with the prohibition against "lotteries" adopted in 1821: "No lotteries shall hereafter be authorized or any sale of lottery tickets allowed within the State." See Charles Z. Lincoln, *Constitutional History of New York*, Vol. III, p. 46. In 1894, the prohibition was expanded to read as follows: "nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking *or any other kind of gambling* ... hereafter be authorized or allowed within the State" (emphasis supplied). In the very next legislative session following the 1894 Amendment, the Penal Code was amended to make pool-selling and bookmaking a felony (L. 1895, ch. 572, § 1) [R. 450-451].² That statute specified that the prohibition encompassed any contest involving gambling on "the skill, speed, or power of

² References to numbers in brackets preceded by "R." refer to the numbered pages of the Record on Appeal.

endurance of man or beast” involving “any unknown or contingent event whatsoever” [R. 450]. Nearly a century later, in 1984, the Office of the Attorney General stated:

From the history it is indisputable that since at least 1877 when the Penal Code specifically defined as criminal wagering on the outcome of “contests of speed, *skill* or power of endurance of man or beast”, New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today.* 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4, 1984 WL 186643, *4 (emphasis supplied).

In that same 1984 opinion, the Attorney General concluded: “If the state government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, either single contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution.” *Id.* at *13.

Since the 1894 adoption of the amendment prohibiting gambling, four major exemptions have been carved out of the general

prohibition. None applies here. The first, in 1938, allowed pari-mutuel wagering on horse-racing; the second, in 1957, authorized the conduct of games of chance such as bingo and lottery, on a local option basis for prizes which were limited in amount and games could only be operated by bona fide religious or non-profit organizations. The third exception came in 1966 to allow lotteries operated by the State in which the proceeds are to be used exclusively for education. In 2013, the People approved an additional amendment to allow casinos to be operated at no more than seven locations throughout the State. The Constitution has never been amended to carve out an exception for sports betting.

**B. The Attorney General's Enforcement Action
Against FanDuel and DraftKings**

In October 2015, New York's Attorney General commenced an investigation of FanDuel, Inc. and DraftKings, Inc., the two major operators of daily fantasy sports in New York State, who had begun to conduct IFS gambling on internet platforms, inviting contestants to play for prizes (usually substantial monetary awards) on the condition that they paid "entry fees" which provided the funds to pay

the awards after FanDuel and DraftKings had first extracted a “vig,” gambling parlance for a cut of the betting pool [R. 170, 173]. This is a classic example of bookmaking.³ By virtually identical letters dated November 10, 2015 [R. 104-107, 109-112], the Attorney General informed both FanDuel and DraftKings that “[t]he illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution” [R. 105, 110].

The Attorney General followed up by filing separate but virtually identical complaints against both entities in Supreme Court, New York County [R. 555-589, 591-623]. The complaints quoted the Chief Executive Officer of one DFS operator who described DFS like a “sports betting parlor on steroids” [R. 556, 592].

The DraftKings complaint went on to describe how DFS operated [R. 562-567]. It quoted its CEO, Jason Robbins, who stated that DraftKings makes money in a way that “is almost identical to a casino” [R. 575]. In the cease and desist letters, the Attorney General

³ Penal Law § 225.00(9) defines “bookmaking” as “accepting bets from members of the public as a business ... upon the outcome of future contingent events.”

also stated that DraftKings (and FanDuel) customers are clearly placing bets on events outside of their control or influence, specifically the future real-life performance of professional athletes in real athletic contests [R. 104, 109]. Further, each DraftKings [FanDuel] “wager represents a wager on a ‘contest of chance’ where winning or losing depends on numerous elements of chance to a ‘material degree’” [R. 104, 109].

The Attorney General also wrote to the New York *Daily News* on November 19, 2015, stating that:

(1) “Daily Fantasy Sports is much closer to online poker than it is to traditional fantasy sports”;

(2) “FanDuel and DraftKings take a cut of every bet. That is what bookies do”;

(3) “these companies are based on business models that are identical to other forms of gambling”;

(4) “the argument of FanDuel and DraftKings ‘that they run games of skill’ ... is nonsense”; and

(5) that “[g]ames of chance often involve some

amount of skill; this does not make them legal.”

[R. 139-141].

After proceeding in court against FanDuel and DraftKings, the Attorney General’s office filed a Memorandum of Law in support of its Motion for a Preliminary Injunction to enjoin them from accepting entry fees, wagers or bets from any New York consumers regarding any competition, or gaming contest run on their respective websites [R. 169-203].

In that Memorandum of Law, the Attorney General stated:

- “DFS is nothing more than a rebranding of sports betting. It is plainly illegal” [R. 170].
- “DFS operators themselves profit from every bet, taking a ‘rake’ or a ‘vig’ from all wagering on their [web]sites.” *Id.*
- “[A] DFS wager depends on a ‘future contingent event’ wholly outside the control or influence of any bettor[.]” *Id.*
- “[G]ambling often mixes elements of chance and skill ... In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses” [R. 171].
- “[T]he key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not

more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS.” *Id.*

- “DFS contests are causing the precise harm that New York’s gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors’ offices addicted to DFS” [R. 172].
- “Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses” [R. 180].
- “Because DFS is not an authorized form of gambling [under Article I, § 9], FanDuel and DraftKings are in direct violation of the state constitution” [R. 188].
- “[T]he main purported ‘skill’ in DFS is no different than it is for poker, blackjack or other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events” [R. 193].

These arguments resonated with the Supreme Court Justice assigned to decide the case. By decision and order dated December 11, 2015, Justice Manuel J. Mendez granted the Attorney General’s motion for a preliminary injunction [R. 92-102]. Justice Mendez held, *inter alia*, that (1) the Attorney General had established the likelihood of success on the merits, and (2) that the balance of

equities favored the Attorney General due to the interest in protecting the public, particularly those with gambling addictions [R. 100].

**C. The Legislature Enacts Chapter 237
Purporting to Authorize Interactive Fantasy
Sports**

On June 14, 2016, six months after the decision by Justice Mendez, the bill that ultimately became Chapter 237 was introduced in both the Assembly and the Senate, sponsored by Assemblyman Gary Pretlow and Senator John Bonacic, respectively. It was accompanied by a massive lobbying effort from the gambling industry which spent more than \$2 million between 2015 and 2017. *See* Report of the New York State Joint Commission on Public Ethics [R. 1255]. Three days after its introduction, the bill passed both houses of the Legislature – but not without some pushback.

During the debate in the Assembly, a transcript of which is included in the record [R. 662-691]. Assemblyman Andrew Goodell stated:

Now what I thought was interesting about

your bill is that it first declares that fantasy sports is not gambling and then, if I'm correct, imposes almost all the regulatory oversight that we normally impose on gambling, including requirements for notice about compulsory gambling and the problems with it. We put it under the Gaming Commission whose sole responsibility is to regulate gambling, or one of its primary responsibilities I should say. We have the funds going to education just like we do with the lottery which we all agree is a form of gambling. We restrict the age to 18, which is the same type of age restriction we have on gambling. We prohibit certain people who have a conflict of interest from engaging in it, just like we do in other situations involving gambling like in horse racing. I mean, obviously, jockeys and trainers are not allowed to bet on horse racing for obvious reasons.

[R. 670].

A transcript of the Senate debate is also included in the record

[R. 693-700]. There, Senator Liz Krueger spoke out as well:

If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck. This is another gambling bill. This continues New York State's path into dreaming that all of our economic development and research problems can be solved by increasing the number of people who use all of their disposable income in different styles of

gambling.

Maybe we can roll them all together in a movie theater that serves liquor, and everybody can just spend their days sitting in their chairs, drinking, watching the movies, and choosing their type of online gambling.

It's not a very attractive future for the State of New York. It's not really in the best interests of the people of New York. I'm particularly entertained by the resolution on our desks clarifying that if New Jersey increases some kind of gambling for themselves, we'll explore how we can do even more. I'm not even sure we could figure out how to do even more, but I'm confident we'll see more bills in the future that just continue down this rabbit hole [R. 699].

Thereafter, the Governor signed into law Chapter 237 of the Laws of 2016, effective August 3, 2016 [see R. 82-90]. Chapter 237 added Article 14 to the Racing, Pari-Mutuel Wagering and Breeding Law (the "Racing Law") which purported to authorize and regulate the operation of interactive fantasy sports under the auspices of the New York State Gaming Commission. It declared that interactive fantasy sports games are not games of chance, but rather, "fantasy or simulation sports games" based upon "the skills of contestants" and

are not based on the current membership of an actual team. Racing Law § 1400(1)(a). The Legislature also declared that IFS contests are not wagers on future contingent events out of contestants' control because the contestants control the athletes they choose on their fantasy teams, and the outcome of each contest is not dependent upon the performance of any single player or actual team. § 1400(1)(b). The Legislature declared that IFS conduct was, therefore, not "gambling" as defined in § 225.00(2) of the Penal Law. Racing Law, § 1400(2). "Entry fees" are defined as the amount paid to an IFS registered operator by a contestant in order to participate in the contest. § 1401(4). The law defines a "highly experienced player" as one who has entered more than 1,000 contests offered by a single IFS operator or has won more than three prizes valued at \$1,000 each from a single IFS fantasy sports operator. § 1401(g).

Sections 1402 and 1403 define the registration process to become a licensed IFS operator. Provisions in § 1404 require that the number of experienced players participating in any event must be identified and the operator must include information about where

compulsive players can find “assistance.” Section 1404, subdivision (2) requires that no contestant may submit more than 150 entries in any contest, or 3% of all entries, whichever is less. Section 1405 lists the powers and duties of the Gaming Commission and directs it to promulgate regulations to implement Article 14 of the Racing Law. Section 1407 contains provisions for a state tax of 15% on gross revenues generated by IFS operators, with an additional tax of .5%, not to exceed \$50,000.

D. The Attorney General Settles with FanDuel and DraftKings

After Chapter 237 was enacted purporting to legalize IFS, the Attorney General discontinued the lawsuits against FanDuel and DraftKings, entering into virtually identical settlement agreements [R. 453-466, 468-482]. While the Attorney General discontinued the litigation to enjoin both DraftKings and FanDuel from continuing to operate interactive fantasy sports, the settlement agreements included penalties of \$6 million each to be paid by both FanDuel and DraftKings for past activities, including false advertising [R. 453-454, 462, 468-469, 478]. The Attorney General’s office came down

hard on DraftKings for its deceptive advertising, which suggested that it was easy to win at DFS, notwithstanding the fact that its own internal data showed differently [R. 454-456, 469-471]. In fact, at one point DraftKings had advertised the ease of winning “massive jackpots” and promoted DFS as making “winning easier than milking a three-legged goat” [R. 568].

In the Settlement Agreements, the Attorney General’s Office made several findings:

- DraftKings identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or providing safeguards [R. 473].
- Shortly after founding DraftKings, its CEO, Jason Robbins, explained in a Reddit forum online that DraftKings is listed in the “gambling space”, offered a “mash-up between poker and fantasy sports,” and made money in a way virtually “identical to a casino.” Similarly, in documents prepared for potential investors, DraftKings placed itself in the gambling sector. Moreover, DraftKings sought out and entered sponsorship agreements with various concerns popular with gamblers, including the World Series of Poker and the Belmont Stakes. *Id.*
- DraftKings routinely fielded requests and complaints from customers with addiction and compulsive game play issues who asked that their accounts be shut down.

DraftKings records show customer service inquiries from players featuring subjects such as: “Gambling Addict – Do Not Reopen,” “Please cancel account. I have a gambling problem;” and “Gambling Addiction needing disabled account” [R. 473-474].

- Despite targeting a vulnerable population and receiving complaints from customers, DraftKings never provided warnings about addiction or resources to help with compulsive behavior in any of its marketing [R. 474].
- FanDuel identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or provide adequate safeguards [R. 457].
- In a 2010 pitch to investors, FanDuel revealed the results of a survey that it used as indicating that over half bet on sports online and that nearly 20% self-identified as “a bit of an addict,” while only 9% reported that they did not gamble. In that same pitch, FanDuel told investors its target market for DFS was male sports fans who “cannot gamble online legally.” *Id.*

E. The Plaintiffs Commence This Action

After the Attorney General’s office abandoned its lawsuit against DraftKings and FanDuel, the Plaintiffs, all of whom are either persons with gambling disorders or those victimized by gambling, brought this action contending that their rights had been violated because the Bill of Rights (Article I, § 9 of the New York

State Constitution) specifically provides that no “pool-selling, bookmaking or any other kind of gambling ... shall hereafter be authorized or allowed within the State.”

Each Plaintiff has a tragic story to tell about how their lives have been affected by gambling. Plaintiff Jennifer White is a resident of Grand Island, Erie County, New York, and is a citizen and taxpayer of the State of New York, eligible to vote in elections [R. 45]. She is a direct victim of gambling as her life was nearly ruined by her father’s gambling addiction. *Id.* As early as 1992, when Plaintiff White was only 13 years of age, Ms. White’s father constantly patronized off-track betting facilities throughout Western New York. *Id.* Plaintiff White’s mother was thereafter besieged by phone calls from creditors, loan sharks appearing at her door, cars being repossessed, all culminating in a divorce [R. 46]. As late as 2011, when Ms. White’s mother died in the hospital as a result of sepsis following an acute cellulitis infection, she learned that her father had accessed her mother’s bank card, making withdrawals of approximately \$1,100 while present at the Seneca Niagara Casino in

Niagara Falls [R. 46]. Over a ten-year period, Ms. White's father amassed over \$500,000 in gambling losses. *Id.* See also [R. 48].

Plaintiff Katherine West is a resident, citizen, taxpayer and eligible voter of the State of New York. She resides in the City of Buffalo [R. 46]. Plaintiff West's husband is a compulsive gambler who "maxed out" the family's credit card, overdrew the checking accounts, cleaned out the savings account, invaded the funds set aside for their children's college fund, all of which directly affected her health, causing depression, acute headaches, and stomach disorders which in turn caused her to miss work, thereby exacerbating her own financial stress, all while trying to hide her husband's problems from their daughters [R. 46]. Ms. West was forced to take time off from work to search for him in casinos, while struggling to cover his debts. *Id.*

The third Plaintiff is Charlotte Wellins, a citizen, taxpayer and eligible voter in the State of New York who resides in Wellesley Island, New York. *Id.* Her husband was a compulsive gambler who signed his name to loans without her knowledge. *Id.* His gambling

led to the loss of their home (which had been mortgaged to the hilt), bankruptcy, divorce, and the forced uprooting of their children from their home and schools, plus the loss of their college education funds [R. 47]. *See also* [R. 49].

The final Plaintiff is Anne Remington, a citizen and taxpayer of the State of New York residing in Jefferson County [R. 47]. Ms. Remington is afflicted with a gambling addiction that nearly ruined her life and family. *Id.* Her initial game of choice was scratch-off instant lottery tickets that started with an occasional purchase and then progressed to the point of lacking money to buy groceries or gas for her family. *Id.* Ms. Remington had been entrusted with control over her family's finances (checkbook, savings, everything). *Id.* By her own admission, Ms. Remington's obsession with scratch-offs made her a liar, a cheat, and a person who grew to hate herself. *Id.* She invaded her family's check book, then the savings account, until both were depleted. *Id.* She got to the point where she fended off creditors calling her and turned off the home phone, and when her husband inquired as to why it was unplugged, blamed it on the

family's pet cat. *Id.* The power company threatened to turn off Ms. Remington's power, cable, Internet and phone service because of unpaid bills. *Id.* When Ms. Remington's husband inquired as to what was happening, she blamed it on a bookkeeping error on the part of the public utilities serving her residence. *Id.* Ms. Remington kept the books in her husband's business, and ultimately he learned the truth when his business was lost. *Id.* Things got so bad that on February 25, 2015, Ms. Remington was arrested for writing bad checks on her account that her husband had closed [R. 48]. By that time, Ms. Remington had already been attending gambling addiction support groups, but would continue to stop to gamble on her way to meetings. *Id.* Ms. Remington has been "clean" for the past twelve years, but she is always concerned about a relapse. *Id.*

These tragic stories are grim reminders of why Article I, § 9 of the Bill of Rights of the New York State Constitution was adopted in the first place. Allowing a virtual casino to enter the living room of every New Yorker via DFS and the internet is sure to exacerbate the

very evils Article I, § 9 was intended to prevent. Indeed, the Attorney General's office itself has acknowledged that:

- “DFS contests are causing the precise harms that New York’s gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors’ offices addicted to DFS” [R. 172].
- “Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses” [R. 180].

Plaintiffs now must rely on the courts to protect their constitutional rights as set forth in Article I, § 9 of the Bill of Rights which directs the Legislature to pass laws that prohibit gambling. It was adopted for the precise purpose of protecting people like the Plaintiffs. See Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). *International Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964) (prohibition was intended to protect a family man from his own imprudence. *Id.* at 15). “[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them.”

Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893, 925 (2003).

**PROCEDURAL HISTORY AND
DECISION BELOW**

After the filing of the Complaint, the State moved to dismiss arguing that the Legislature’s determination that interactive fantasy sports did not constitute gambling was a rational implementation of its authority to determine the scope of the Constitutional gambling prohibition [R. 113-114]. By Decision and Order dated August 31, 2017, Supreme Court denied the State’s motion to dismiss, holding that any such motion was premature, given the allegations of the Complaint which, for purposes of a motion to dismiss, are presumed to be true [R. 424-429].

Thereafter, both parties cross-moved for summary judgment based on a stipulated set of facts [R. 440-444]. On October 26, 2018, Supreme Court issued its Decision and Order [R. 7-34] which recognized that while a statute enjoys a strong presumption of constitutionality, the Plaintiffs had nevertheless demonstrated “beyond a reasonable doubt” that Chapter 237 was unconstitutional

[R. 21-22]. The Court noted, *inter alia*, the “intentionally broad language and application of the constitutional prohibition, the common understanding at the time [of adoption] and of the meaning of the prohibition and of the particular words ‘bookmaking’ and ‘gambling’ and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests” [R. 30]. The Court went on to say that “to countenance such redefining of the term [“gambling”] would effectively eviscerate the constitutional prohibition[.]” *Id.*, citing *Dalton v. Pataki*, 11 A.D.3d 62 (3d Dep’t 2004), *aff’d in part and modified in part*, 5 N.Y.3d 343 (2005).

The Court, however, also ruled that despite the fact that DFS was gambling prohibited by Article I, § 9, the Legislature could legally exclude IFS from the definition of “gambling” contained in the Penal Law [R. 30-32]. The Court reasoned that the Legislature was not required to criminalize IFS [R. 32]. This resulted in there being no civil or criminal statute left on the books to prevent DFS, despite the Constitutional prohibition against it and mandate to pass laws to prevent gambling.

The State has appealed to this Court from that portion of Supreme Court's Order and Judgment declaring DFS to be unconstitutional, and Plaintiffs have cross-appealed from that part of the judgment which upheld the constitutionality of the Legislature's exclusion of IFS from the definition of "gambling" under the Penal Law.

SUMMARY OF ARGUMENT

While statutes are normally entitled to a presumption of constitutionality, that presumption evaporates if the alleged factual basis underlying the statute's enactment is irrational. Here the Legislature has "found" that IFS is not "gambling" because contestants who must pay to play are not betting on real teams, but "fantasy teams" despite the fact that whether that fantasy team wins or loses the contest depends in turn on how real life athletes chosen by the contestant for that fantasy team's roster perform in subsequent real-life athletic events. The Legislature also found that those performances were not "future contingent events."

Supreme Court below correctly found that neither of these findings was sufficient to support the exclusion of IFS from the definition of gambling.” The Constitution is not for sale, no matter how many millions the gambling lobby may spend to get the Legislature to circumvent it. If IFS is to be allowed in the State, the route to do so is the amendment process in Article XIX of the Constitution, where the People, not the Legislature, get to decide the issue.

Supreme Court correctly determined that IFS is constitutionally prohibited and that Chapter 237 is, therefore, unconstitutional to the extent it purports to permit it.

The Court erred, however, in finding that the Legislature could decriminalize IFS, leaving a statutory and regulatory enforcement vacuum such that IFS can continue to operate, notwithstanding the mandate in Article I, § 9 of the Constitution that the Legislature must pass laws to prevent gambling. That part of the Supreme Court’s judgment should be reversed.

ARGUMENT

POINT I

Chapter 237 Lacks the Factual Support Necessary For It To Enjoy the Strong Presumption of Constitutionality To Which Statutes are Otherwise Entitled

The State's principal argument relies on the proposition that statutes are entitled to a strong presumption of constitutionality. State's Brief at 20. The Courts have consistently held, however, that a statute's presumed constitutionality is rebuttable and subject to an important qualifier – "the existence of necessary factual support for its provisions." *Spielvogel v. Ford*, 1 N.Y.2d 558, 562 (1956). *Defiance Milk Products Co. v. DuMond*, 309 N.Y. 537, 540-546 (1956). "It is not a conclusive presumption, or a rule of law that makes legislative action invulnerable to constitutional assault." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). In *Hurd v. City of Buffalo*, 41 A.D.2d 402 (4th Dep't 1983), for example, the Fourth Department, whose reasoning was later upheld by the Court of Appeals (34 N.Y.2d 628 [1974]), noted that despite a strong presumption of a statute's constitutionality, "courts may nevertheless

inquire as to whether its enactment was permissible under the Constitution.” 41 A.D.2d at 404. In *Hurd*, the Court found that the City of Buffalo had acted illegally in levying an annual real property tax upon its citizenry that included money to pay pension and retirement benefits, which resulted in the tax levy exceeding the annual 2% tax cap imposed on operating expenses by the State Constitution. The City of Buffalo had attempted to rationalize the levy by arguing that yearly ongoing pension payments would serve a useful purpose for more than one year. The Appellate Division rejected this rationale, noting that despite the fiscal difficulties of the City, the Constitutional mandate could not be circumvented by legislation as the taxpayers of the City of Buffalo could not be deprived of their constitutional rights. *Id.* at 405. In affirming that holding, the Court of Appeals stated emphatically that it could not accept “specious devices to evade ... [and] nullify [Constitutional provisions].” 34 N.Y.2d 628, 629 (1974). The Court of Appeals further stated:

The plan made express in the Constitution,
and sustained by historical antecedents

reflecting purpose, must therefore be treated as a limitation of the exercise of the powers to the extent, and perhaps only to the extent, that measures to evade are palpably in violation of the plan and purpose.

34 N.Y.2d 628, 629 (1974).

Just as the rights of the citizens of Buffalo in *Hurd* could not be compromised by a rationale that sought to circumvent the Constitution, neither should the Plaintiffs' rights in this case to be protected from gambling be compromised by a rationale that subverts the Constitutional prohibition against it. That right is not merely statutory. It is a right firmly embedded in Article I, § 9 of the Bill of Rights of the New York State Constitution. As such, the Legislature has even less latitude to infringe upon that right. *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993) (“[T]he guiding principle of statutory interpretation is to give effect to the plain language ... especially should this be so in the interpretation of a written Constitution”).

It is necessary, therefore, to examine the legislative rationales for Chapter 237 to see whether or not they support the presumption of constitutionality. That inquiry must begin with an analysis of exactly what the Legislature did and did not do in enacting Chapter

237. It did *not* change the definition of “gambling” in Penal Law § 225.00(2), which reads as follows:

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

The key elements, therefore, of gambling are (1) whether a contestant stakes or risks something of value, (2) upon a contest of chance⁴ *or* a future contingent event not under his control or influence, (3) with the understanding he will receive something of value in the event of a certain outcome.

Instead of amending the definition of gambling, the Legislature simply declared that IFS did not meet that definition (Racing Law, § 1400[1][a], [b]). Whether or not that was a rational determination

⁴ A “contest of chance” is defined as “***any** contest, game ... in which the outcome depends to a material degree upon an element of chance *notwithstanding that skill of the contestants may also be a factor therein.**” Penal Law, § 225.00(1). (emphasis supplied)

requires an analysis of how IFS is conducted compared to the definition of gambling in § 225.00(2).

There is no dispute how IFS is played. Contestants pay an entry fee to participate, accompanied by a roster or fantasy team of real life athletes which the contestants choose and submit along with their entry fee. The winner or winners are determined by the aggregate performance of each roster of athletes in subsequent real-life athletic events held on a given day or perhaps on a weekend.⁵ The contestants with the best performing rosters are declared the winners and awarded monetary (or cash equivalent) prizes funded by the entry fees paid by all contestants. There is also no question that the outcome of the DFS contests are dependent on a future contingent event – namely the performance of the athletes. The contestants have no control over how the athletes actually perform. Indeed, without the occurrence of that future contingent event, there could be no contest.

⁵ In DFS involving NFL football, for example, the contests may apply to how fantasy team players perform in actual games played over a weekend, commencing with games played on a Thursday night and ending with games played the following Monday night.

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DFS, therefore, encompasses all three elements of gambling set forth in Penal Law § 225.00(2). First, there is little doubt that the entry fee paid is *something of value*, which a contestant puts *at risk* in order to play. Second, there is no question that a contestant has absolutely *no control* over how the athletes on his/her fantasy team will actually perform in future athletic events, such that the outcome of IFS is to a very material degree, dependent on a *future contingent* event. Finally, there is also no doubt that there is an understanding that if the contestant's roster outperforms the roster of other contestants, he/she will *receive something of value*.

Despite the fact that DFS meets all the elements of "gambling" as defined in Section 225.00(2) of the Penal Law, the Legislature, in enacting Chapter 237, has excluded it from the otherwise general definition of the term. The Legislature offers two rationales as to why IFS is not "gambling"

- Interactive fantasy sports are not games of chance because they consist of fantasy or simulation games or contests in which the fantasy or simulation sports teams are selected based on the skill and knowledge of the participants, and not based on the current

membership of an actual team that is a member of an amateur or professional sports organization (Racing Law, § 1400[1][a]); and

- Interactive fantasy sports contests are not wagers on future contingent events not under the contestant's control or influence, because contestants have control over which players they choose and the outcome of each contest is not dependent on the performance of any one player or actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the choices of others' roster choices (Racing Law, § 1400[1][b]).

Neither of these supposed rationales, however, provides the necessary factual support for the presumption of constitutionality required under the precedents cited above.

A. Interactive Fantasy Sports Contests are Games of Chance

The first rationale advanced by the Legislature to circumvent the Constitutional prohibition against gambling and to justify the exclusion of IFS from the definition of “gambling” is that IFS contests are not games of chance because:

- They consist of fantasy or simulation games or contests;

- In which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants; and
- And are not based on the current membership of an actual team (Racing Law, § 1400[b][1]).

This desperate attempt to evade the Constitutional prohibition is almost laughable and easily refuted. The Legislature attempts to draw a distinction between real-life athletes and fantasy teams – a distinction without a difference because even in so-called fantasy games, the outcome is determined by the performance of real life athletes in real – not fantasy – athletic events. Assume two individuals were to bet against each other as follows: each individual must select a fantasy team of five real-life basketball players – each from a different NBA professional team. The first contestant chooses a player from the New York Knicks, the Boston Celtics, the Los Angeles Lakers, the Milwaukee Bucks, and the Chicago Bulls. The other player chooses one player each from five other different teams – the Cleveland Cavaliers, the Portland Trail Blazers, the Oklahoma City Thunder, the Golden State Warriors, and the Phoenix Suns. The winner is determined by which roster of real-life players on that

contestant's fantasy team will score more points on a certain date when all of the actual teams are playing. The fact that the fantasy teams are not real does not negate the fact that all the athletes on the teams are, in fact, real, and the outcome of the bet is determined by how those players actually perform, which is beyond the power of the bettor to control.

It has been recognized by the Legislature itself from the earliest days of the adoption of the Constitution in 1894 that gambling included wagers or bets on the selling of pools based upon the result of any trial or contest of skill of *man* or beast. See L. 1895, ch. 1, § 1 amending § 351 of the Penal Law. The timing of the adoption of Penal Law § 351 in 1895 is especially instructive as it occurred immediately following the adoption of the constitutional amendment.

“The contemporaneous construction given by the Legislature to a constitutional mandate it is charged with carrying out must be given great deference.” *New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976), citing *People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879) (“Great deference is certainly due

to a legislative exposition of a constitutional prohibition, and especially when it is made almost contemporaneously with such provision and may be supposed to result from the same view of policy and modes of reasoning which prevailed among the framers of the instrument propounded”). *Id.* at 406. The Attorney General has said much the same:

From the history it is indisputable that since at least 1877, when the Penal Code specifically defined as criminal wagering on the outcome of contests of speed, *skill* or power of endurance of *man* or beast, New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the Constitutional level in 1894 and has remained by explicit language in the Constitution until today.* 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4 (emphasis supplied).

The fact that IFS involves “fantasy” teams or “simulated” teams or simulated games is, therefore, irrelevant. The inescapable truth is that IFS games nevertheless depend for their outcome on the actual performance of real-life players on real-life teams – the same skill of man referred to in Penal Law § 351 enacted back in 1895.

There is also no merit to the skill versus chance argument advanced by the State. That is a false dichotomy, as skill is certainly present in many games that are still universally recognized as gambling. There is no doubt that IFS contestants may exercise skill in selecting their rosters, but that is no different from poker players who exercise skill in playing their cards or from bettors in horse racing who employ their handicapping skills before placing bets. While it is true pari-mutuel wagering on horse racing is permitted, that is only because it is an expressed exception in the Constitution itself to the general prohibition against gambling. It is the exception that proves the rule. If pari-mutuel wagering on horse racing is an exception, it must be gambling in the first place or otherwise no exception would be required. Moreover, the Penal Law definition of a “contest of chance” states that it is one in which “the outcome depends in a material degree upon an element of chance, *notwithstanding that skill of the contestants may be a factor therein*” (emphasis supplied). Penal Law § 225.00(1).

The State argues, nevertheless, that IFS is not gambling because there is no longer a *material* degree of chance. It seeks to buttress its arguments by reliance on alleged expert reports which the Attorney General's office itself had previously dismissed as "self-serving" and "purchased by DFS operators" [R. 195]. The reports submitted by the gambling industry do not support the position they, and now the Legislature, espouse. As previously stated, analyses to show that "skill" dominates "luck" in IFS contests are totally unremarkable as we know that a skilled poker player, for example, will defeat a novice over time, but poker is still gambling. The Legislature itself has decided that "domination" of skill over chance is not a deciding factor in determining whether a game is one of chance. "Materiality" of chance, however, is. See Penal Law § 225.00(1). In addition, the so-called expert studies relied upon by the State as "extrinsic evidence" to support its argument that IFS is not gambling were based on games in which there were no limit on the numbers of entries skilled or experienced players could submit, and there were no classified rankings, where only certain players could

participate, based on their skill / experience. Chapter 237 of the Laws of 2016, however, places limits on the number of entries players can submit in any single contest (Racing Law, § 1404[2]) and experienced players must be identified such that less skilled contestants can decide whether or not to play. These provisions were inserted to level the playing field. See the State's Memorandum of Law submitted below [R. 1243]. As noted, however, by the Massachusetts Institute of Technology professors who submitted the "Luck and the Law" analysis that appears in the Record at 1184-1205, "the simplest way to increase the role of skill in a contest is to increase the number of games per player" [R. 1199]. The same professors also note that tournaments which are divided up into classes of different skilled players (*e.g.*, having beginners play in a separate pool) are likely to have a larger element of luck than those in which everyone plays on the same pool. *Id.* They observe that skill is no longer a distinguishing characteristic when players' skills are similar. *Id.* The irony is that the Legislature's attempt to level the playing field by limiting the number of entries and classifying

skill levels reduces the element of skill which it says is the reason why DFS is not gambling.

The same experts also make it clear that while skill may play a greater role chance in than determining the outcome of some DFS contests, there is still a material degree of luck present [R. 1197, figure 6]. According to the State's own experts, in fantasy football, the skill / luck ratio is 55/45; in hockey, it is 60/40; in baseball, it is 75/25; and in basketball, it is approximately 85/15. Who boarding an airplane would not consider it "material" if the chances it were to crash were even as low as 15% (the basketball ratio), not to mention as high as 45% (the football ratio)?

Other data submitted as "evidence" relate to the studies allegedly performed by other experts, all of which show that "top performers" consistently beat "average performers" [R. 1168]. Again, this is neither remarkable nor probative. While the percentage of success with respect to the four major professional sports vary from the estimates of other experts, the more important point is that no fantasy sports operator can assure the relative skill of the

contestants in each contest. If the contests pit contestants of equal skill against each other, luck will play a much more important role in the outcome.

The studies also focus on the performance of skilled versus unskilled players over the course of time – e.g., season-long. *See* “Luck of the Law” [R. 1187]. The distinguishing aspect, however, of DFS, a subset of IFS, is that games are played on a daily basis. It is well-known that “on any given night,” a team in last place in baseball can defeat the team in first place, or the league’s leading hitter may go hitless, while a light-hitting shortstop like Bucky Dent could hit a miraculous home run as he did in 1978 to lead the Yankees to an improbable win over the Red Sox to win the American League East Division in a one-game playoff in route to a World Series title. Who else can forget the Miracle on Ice when a bunch of amateur Americans defeated the heavily favored Russian professionals on the way to winning the Gold Medal in hockey for the United States in 1980?

Nor can anyone overlook other indisputable events that could affect the outcome which fell into the category of luck – an injury, a bad hop, a wrong call by a referee or umpire, and, of course, the weather conditions. No contestant has any control over these factors that could directly affect the outcome of an athletic event.

Finally, the Legislature decrees that interactive fantasy sports contests are not games of chance because “they are based on the skill and knowledge of the participants.” This is total speculation. No one knows for certain who all the individuals are that will decide to enter into an IFS contest. Some may have little or no skill whatsoever and simply fill out a roster the same way people pick random numbers in a lottery. There could be no skill or knowledge whatsoever, and yet Section 1400(1)(a) of the Racing Law states that interactive fantasy sports are not games of chance because the fantasy teams are “selected based upon the skill and knowledge of the participants.” The Legislature cannot know or find that as a “fact”.

The State also argues that IFS involves skill rather than chance because the contestants act more like “general managers” of

real-life sports teams since, in addition to selecting athletes for a fantasy team, the contestants must also stay within a salary cap as GM's do in real life sports and be guided in their roster selection by the past performances of the athletes they choose. They argue that "just as the skill of general managers in picking a roster ... influences significantly – although does not completely determine the outcome of future sporting events ... the skill of fantasy sports materially influences the outcome of the contests in which they participate." State's Brief, at 36.

This is a gross exaggeration. Bettors in horse racing must also take into consideration the funds they have available to bet, and calculate the future odds of horses they bet on. Moreover, in real life, general managers have the option of changing their rosters over the course of a season by hiring new players, getting rid of poorly performing players, and engaging in trades with other teams. No such options are available to DFS contestants who participate in daily or weekend games as they are "stuck" with the roster they have selected after betting is closed before the real-life games begin. They

have far less control over the outcome than general managers of real sports teams.

The State also cites other states that have chosen to exclude IFS from the definition of gambling based on a skill / chance dichotomy. What other states legislate by statute is irrelevant here in New York where the prohibition is embedded in the Constitution and not subject to a statutory change. Note also that many other states have concluded that IFS is indeed gambling [R. 256-343].

B. Interactive Fantasy Sports Contests Involve Wagers Based on Future Contingent Events

Even if this Court were to conclude that “chance” is not a “material” element affecting the outcome of an IFS contest, it is nevertheless true that under the Penal Law “a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance *or* a future contingent event not under his control or influence.” Penal Law § 225.00(2) (emphasis supplied). The significance of the disjunctive “or” in § 225.00(2) is that gambling occurs regardless of whether chance is a material factor in the outcome of a contest if the wager depends on the outcome of a future

contingent event. In this case, it is indisputable that the outcome of any IFS contest must inevitably be based upon a future contingent event – the performance of real-life athletes in real-life games. It is equally indisputable that an IFS contestant has absolutely no control over how those athletes will perform in those games, as the State itself has stipulated [R. 441].

The absurd response by the Legislature to this argument is that the real-life performance of athletes is not a “future contingent event” because they have been assigned to fantasy teams. This stretches credulity beyond the breaking point since those fantasy teams contain real-life athletes that must perform in real-life games so there can be doubt that future contingent events must determine the outcome of the contests.⁶ The Legislature may have entered into the

⁶ The distinction between a real team and a fantasy team is irrelevant as in either case the performance of the athlete is real. The New York State Gaming Commission itself ignores the difference between a game and an event within a game. In recently published proposed regulations to allow sports wagering at casinos, it defines a “wager” as “a transaction on an authorized sporting event ... *or an occurrence therein.*” (emphasis supplied) See proposed 9 N.Y.C.R.R. 5329.1(m). Notice of Proposed Rule-Making, N.Y. State Register, March 20, 2019 at 8-9.

fantasy land of Humpty Dumpty, but there is no requirement that the courts should blindly follow.

**C. Exceptions to Constitutional Prohibitions
Are To Be Strictly and Narrowly Construed**

While ignoring the rebuttability of the proposition that statutes are presumptively constitutional, the State has failed to mention another rule of interpretation that applies both to statutes and, with even more force, to a constitutional prohibition. That rule requires that exceptions to prohibitions are to be strictly and narrowly construed. Indeed, the Court of Appeals has made it clear that exceptions to broad prohibitions should be clearly stated:

... from an absolute constitutional prohibition on gambling in New York of any kind, expressly including "bookmaking," which has stood almost 80 years in the New York Constitution (Article I, § 9), a specific exception is carved out in 1939 (emphasis supplied).

Finger Lakes Racing Association v. New York State Off-Track Pari-Mutuel Betting Commission, 30 N.Y.2d 207, 216 (1972).

If an exception is to be made to the general prohibition against gambling, it must be via an amendment to the Constitution pursuant to Article XIX of the New York State Constitution, as been done on four separate occasions to expressly permit pari-mutuel wagering on horse racing, charitable bingo and other games of chance with limited prize amounts, a state-operated lottery, and casinos at seven locations throughout the State. IFS is no different. If there is to be such an exception – that is for the People to decide in a state-wide referendum pursuant to Article XIX of the Constitution. It is their choice, not the Legislature's.

POINT II

The Office of the Attorney General Itself is On Record That DFS is Gambling and Industry Experts Concur

While the Office of the Attorney General now asks this Court to uphold the proposition that IFS is not gambling prohibited by the Constitution, only recently that Office argued precisely the opposite while prosecuting FanDuel and DraftKings. There is no reason for

the change in its position because there has been no intervening change in the Constitution.

In a Special to the N.Y. *Daily News* dated November 19, 2015, then Attorney General Schneiderman stated:

Daily fantasy sports is much closer to online poker than it is to traditional fantasy sports ... FanDuel and DraftKings take a bite out of every *bet*. That is what bookies do, and it is illegal in New York ... In fact, as our court papers lay out, these companies are based on business models that are identical to other forms of *gambling* ... Consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock and assure victory. Let's say it's Eli Manning, and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard – a yard that could make the difference between someone on DraftKings or FanDuel winning or losing tens of thousands of dollars. What did that have to do with the bettor's skill? It's the classic risk involved in sports betting. Games of choice involve some amount of skill; this does not make them legal. Good poker players often beat novices. But poker is still gambling, and running a poker room – or online casino – is illegal in New York (emphasis supplied) [R. 139-140].

In *People v. DraftKings* (Sup. Ct. N.Y. County, Index No. 453054/2015), the Attorney General submitted documents including an interview of DraftKings' CEO, who stated that "our concept is a mashup between poker and fantasy sports. Basically you pick a team, deposit your *wager*, and if your team wins, you get the pot" [R. 144] (emphasis supplied). Later on, the same individual is quoted as saying, "[t]he concept is also identical to a casino ... specifically [p]oker. We make money when people win pots" [R. 158].

Another document introduced by the Attorney General in *People v. DraftKings*, described how Fan Duel and DraftKings eschew the label of gambling here in the United States to avoid criminal prosecution, whereas in England they applied for a gambling license [R. 161-167]. In a Memorandum in *People ex rel. Schneiderman v. DraftKings*, the Attorney General stated at p. 1 as follows: "Like any sports wager, a DFS wager depends on a 'future contingent event' wholly outside the influence of any bettor ... Until the occurrence of that future contingent event, the winners and losers are *unknown* and *unknowable*" [R. 170 (emphasis in original)].

The Attorney General's Memorandum of Law also emphasized that skill and chance are not mutually exclusive and that the presence of skill in a game is hardly dispositive of whether such a contest is gambling, noting that "the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, [referring to DFS] chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS" [R. 171].⁷

In yet another filing in the *DraftKings* case, the Attorney General stated, "DFS is also a contest of chance ... Chance is pervasive at every level of DFS – the unpredictable performance of

⁷ It would also be folly to expect a court to have to calibrate precisely what percentage of a game is skill and what percentage chance in order to determine whether or not it is "gambling." No such precision is or should be required. So long as a game involves a material element of chance, it is "gambling" irrespective of the role played by skill. See *Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 791 (1986); *People v. Delacruz*, 23 Misc.3d 720, 725 (N.Y. City Crim. Ct. 2009). See also State's Memorandum of Law submitted while prosecuting *DraftKings* [R. 192].

an athlete in a given game (*e.g.*, amount of points scored); to the pronouncements of the league office (*e.g.*, athlete suspensions); to the whims of nature (*e.g.*, rained out games). DFS cannot escape its status as a contest of chance, and thus wagering on its outcome is gambling” [R. 216-217].

In the same Memorandum, the Attorney General stated: “Of course, DFS is not a game of skill. Similarly, none of the constitutional claims put forth by DraftKings have any merit” [R. 218]. The Attorney General also stated:

The notion that DFS exists as a contest separate and apart from actual sports is baseless: there are and can be no winners or losers without the happening of a future contingent event outside of their influence or control. There is no “successful roster” until the relevant athletes compete in actual skill games. DFS cannot escape the law by pretending that it is somehow different from every other sports *bet* that has ever been placed in New York. There is nothing special about DFS. It is simply a way to *wager* on a future contingent event – and thereby qualifies as illegal gambling (emphasis added) [R. 223].

The Attorney General continued:

DFS Operators should be held to their public statements. When pitching their games to the public (and making arguments in their legal papers), the DFS Operators talk about games of “skill” and profess shock that anyone could think that what they offer is sports gambling. But when the spotlight is off, the story changes dramatically. When DFS Operators describe themselves to investors or potential business partners, they liken DFS to “poker,” say it exists in the “gambling space,” and operates in a way “identical to a casino.” The DFS Operators even register themselves as gambling concerns abroad, in order to access those lucrative markets [R. 227].

Certain facts are, therefore, absolutely undeniable. The outcome of any DFS contest ultimately depends on the performance of actual athletes in actual games. A contestant who enters a roster of players in a DFS football contest, for example, would have no control whatsoever over how many yards a running back on his “fantasy team” roster may subsequently gain, how many touchdowns he may score, what plays may be called, or whether he may slip on the wet turf due to rain. In the real world, those are all significant elements of chance. Nothing passed by the Legislature can change this indisputable reality.

The Attorney General's Memorandum of Law also argued that a Court's acceptance of DraftKings' contention "that all contests where contestants pay a fee to a neutral administrator for a chance to win a predetermined prize are legal would have truly absurd consequences" ... [and] "would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution ... The end result would be to reverse the clear prohibitions on pool-selling, bookmaking, and other kinds of gambling set out in the Constitution and carried into the New York Penal Law" [R. 234-235].

Many gambling industry CEOs agree with the aforementioned arguments of the Attorney General made while prosecuting FanDuel and DraftKings. Sheldon Adelson, the Chief Executive Officer of the Las Vegas Sands Corporation which owns the Marina Bay Sands in Singapore that in turn controls the Venetian Resort Hotel Casino and the Sands Expo and Convention Center, states unequivocally that DFS is "gambling" [R. 43, 348]. "There's no question about it." *Id.* He went on to say that although he is in the gambling business, he opposes DFS because it "exploits poor people" [R. 349].

MGM Casinos chairman Jim Murren said those who argue that DFS is not gambling are “absolutely utterly wrong. I don’t know how to run a football team, but I do know how to run a casino and this is gambling” [R. 43]. The Chief Executive Officer of one DFS company stated that DFS are like “a sports betting parlay on steroids” [R. 53]. Shortly after its founding, DraftKings’ CEO reportedly stated in a thread in the online form Reddit.com that “this concept where you can basically *bet* your team will win is new and different from traditional leagues that last an entire season” (emphasis supplied) [R. 65]. DraftKings’ CEO further emphasized that “the concept is different from traditional fantasy leagues. Our concept is a mash-up between poker and fantasy sports. Basically, you pick a team, *deposit your wager*, and if your team wins, you get the pot.” *Id.* (emphasis added). In 2012, the same DraftKings CEO stated that “it operates in the “*gambling* space” (emphasis supplied) [R. 70, 172]. He further stated that DraftKings makes money in a way that “is almost identical to a casino” [R. 71, 158].

On its website, DraftKings embedded key words related to gambling. This led search engines like Google to suggest DraftKings to users looking for gambling. The key words included “fantasy golf *betting*,” “weekly fantasy basketball *betting*,” “weekly fantasy hockey *betting*,” “weekly fantasy football *betting*,” “weekly fantasy college football *betting*,” “weekly fantasy college basketball *betting*,” “Fantasy College Football *betting*,” “daily fantasy basketball *betting*,” and “Fantasy College Basketball *betting*.” (emphasis supplied) [R. 177-178].

Numerous DFS players struggling with gambling addictions have called customer service to cancel their accounts and to plead with DraftKings to permanently block them from playing. DraftKings “records show customer inquiries from DFS players seeking assistance with subjects like ‘Gambling Addict [–] do not reopen,’ ‘Please cancel account. I have a gambling problem,’ and ‘Gambling Addiction needing disabled account’” [R. 181],

Indeed, a former New York Attorney General said it best:

To summarize, we find that sports betting is not permissible under Article I, § 9, of the

New York Constitution. *The specific constitutional bans against bookmaking and pool selling as well as the general ban against “any other form of gambling” not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports betting program ...*

If the state government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays*, such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42, 1984 WL 186643, *13).

POINT III

If It Looks Like a Duck, Walks Like a Duck ...

Interactive Fantasy Sports has all the earmarks of “gambling.” It involves betting on the performance of real-life athletes and future sporting events over which the contestants have no control. Bets are pooled by the operators of the contest who take a piece of the action (the so-called “vig”). The Legislature itself chose to place the regulation of interactive fantasy sports in the Racing, Pari-Mutuel

Wagering and Breeding Law that deals exclusively with gambling issues. Regulatory oversight is vested in the New York Gaming Commission. Even though the Legislature “declared” that IFS is not gambling, the law nevertheless contains provisions to protect “compulsive players” and to allow “compulsive players” to self-exclude themselves from participation. This is indeed curious, given the fact that IFS is supposedly not gambling.

Perhaps the most telling argument that IFS is, in fact, gambling can be found in the wording of Chapter 237 itself. The Legislature was careful to exclude from the Penal Law definition of gambling only DFS that is conducted by operators “registered” as such by the New York State Gaming Commission. Racing Law § 1402(4). But DFS is still DFS regardless of whether it is registered or not. If unregistered DFS is gambling, merely registering the activity does not change its nature.

Not even the major executives of FanDuel and DraftKings can in good faith claim otherwise, given their own previous representations that they operate in “gambling space.”

The Attorney General's opinion of 1984 still resonates today:

To summarize, we find that sports betting is not permissible under Article I, § 9 of the New York Constitution. *The specific Constitutional bans against book-making and pool-selling, as well as a general ban against any other form of gambling not expressly authorized by the Constitution, would operate to invalidate a statute establishing a sports betting program* ...

If the State government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays*, such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42).

Senator Liz Krueger succinctly summarized the situation during the legislative debate that precluded passage of Chapter 237: “If it looks like a duck, it swims like a duck, it quacks like a duck, it’s a duck” [R. 699].

POINT IV

The Legislature Is Not Free to Define “Gambling” Any Way It Wishes

The State argues that the Constitutional Convention of 1894, which adopted Article I, § 9, essentially gave the Legislature the latitude to define “gambling” since the term is not otherwise defined, and that in directing the Legislature to “pass applicable laws to prevent offenses against this section,” the Constitution itself left everything in the hands of the Legislature.⁸

The fact that gambling is not otherwise defined, however, is not a license for the Legislature to ignore certain kinds of gambling, let alone pass laws to enable rather than to prevent it, as it has done here. Words that are not otherwise defined have their common and ordinary meaning. *See King v. Cuomo*, 81 N.Y.2d 247, 253-254 (1993). Otherwise, as Supreme Court pointed out in this case, the prohibition against gambling, a protection embodied in the Bill of

⁸ *See*, for example, written testimony submitted jointly by counsel representing DraftKings arguing that because the term “gambling” is not defined in the Constitution, the Legislature is free to amend or clarify its statutory definition as it sees fit [R. 1002].

Rights in Article I of the New York Constitution, would exist only at the sufferance of the Legislature [R. 21].

While this case is undoubtedly being watched by the Legislature to see how far it can “push the envelope,” the constitutional prohibition against gambling is in imminent danger of death by a thousand cuts. During the 2017-18 Legislative session, John Bonacic, Senate Chair of the Racing, Gaming and Wagering Committee, sponsored a bill (S. 3898A) that would have allowed interactive poker as a “game of skill” [R. 1303]. In the Assembly, his counterpart, Gary Pretlow, Chair of the Committee on Racing and Wagering, introduced a similar bill, A.5250 [R. 1317-1325]. Bonacic and Pretlow were also the main sponsors of Chapter 237 of the Laws of 2016.

The recent attempts to chip away at the constitutional prohibition against gambling reflect a lack of legislative understanding of the breadth of the prohibition. As the Attorney General pointed out in 1984, in the ensuing years following the 1894 adoption of Article I, § 9 which prohibited lotteries, book-making,

pool-selling *or any other kind of gambling*, the Legislature has consistently viewed sports wagering as illegal. 1984 N.Y. Op. Att’y Gen. 1, reprinted at 1984 N.Y. AG LEXIS 94*.

The State’s brief attempts to make much of the fact that in 1965 the Legislature adopted Penal Law § 225.00 defining a “game of chance” as one in which the outcome depends in a *material degree* upon an element of chance. It is difficult, however, to see how that helps Defendants’ cause as it is clear from Point I of this Memorandum that there are material elements of chance in all sporting events.⁹ If there were no element of chance in athletic events, the outcomes would be pre-ordained and there would be no “sport” at all. Moreover, as the Attorney General noted in the 1984 Opinion rendered long after Penal Law § 225.00 was enacted,

⁹ See *Plato’s Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1st Dep’t 1985), *aff’d on other grounds*, 68 N.Y.2d 797 (1986) (so long as a game involves a material element of chance, it is gambling regardless of the role played by skill). See also *People v. Turner*, 165 Misc.2d 222 (Crim. Ct., N.Y. Co. 1995). See also *Dalton v. Pataki*, 11 A.D.3d 62, 90 (3d Dep’t 2004), *aff’d in part and modified in part* 5 N.Y.3d 243, 264 (2005) (a game of chance has three elements – consideration, chance, and prize without reference to skill) as cited by Supreme Court below in this case [R. 22-23].

“... even in the penal sense ... a sports betting program may not be operated under the current constitutional provisions.”

Defendants would also have this Court ignore former Penal Law § 351, enacted in 1895 (L. 1895, ch. 572, § 1) immediately after the adoption of the 1894 Constitutional prohibition against gambling.

While § 351 was repealed and superseded by the adoption of Penal Law § 225.00 in 1965, the 1965 law did not authorize sports wagering, as the Attorney General’s 1984 opinion made clear. More importantly, and as previously emphasized, courts have consistently held that the contemporaneous enactment by a Legislature of a statute implementing a very recent Constitutional provision is entitled to “great deference.” *See New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976). *See also People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879) (“Great deference is certainly due to a legislative exposition of a Constitutional prohibition, and especially when it is almost contemporaneous with such provision and may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of

the instrument propounded.”) In *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1 (1897), the court held that the “obvious purpose of [Penal Law § 351] is to prevent the offenses mentioned in Section 9 of Article One of the Constitution.” *Id.* at 7.

In enacting Chapter 237 in 2016, some 122 years after the Constitutional Convention of 1894 that adopted Article I, § 9 prohibiting gambling, the 2016 Legislature ignored more than a century of prior enactments by the Legislature that interpreted the ban in Article I, § 9 as applying to all forms of sports wagering. *See also Kolb v. Holling*, 285 N.Y. 104, 112 (1941) (“The practical construction put upon a constitutional provision ... by the Legislature ... is entitled to great weight, if not controlling influence, when such practical construction has continued in existence over a long period of time.”)

Even if, however, the term “gambling” in Article I, § 9 were ambiguous, that would not give the Legislature the broad discretion it claims here. The State relies on *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) for support, but that

reliance is misplaced and ignores the cases that preceded it. In *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27 (1982), the Court of Appeals was called upon to interpret Article XI, § 1 of the Constitution which, like the prohibition against gambling, was adopted at the 1894 Constitutional Convention. *Id.* at 47. Article XI, § 1 of the Constitution states:

“The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated.”

The Court in *Levittown* went on to interpret the meaning of the obligation that fell to the Legislature to carry out. The Court, not the Legislature, rendered the binding interpretation of the constitutional provision, stating as follows:

With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, *it is nevertheless the responsibility of the courts to adjudicate contentions that the actions taken by the Legislature and the executive fail to conform to the mandate of the Constitution which*

constrains the activities of all three branches.
(57 N.Y.2d at 39) (emphasis supplied)

In *Levittown*, the Court of Appeals went on to hold that the language in Article XI, § 1 imposed upon the Legislature a duty to provide “a sound basic education.” *Id.* at 48. Thereafter, in *Campaign for Fiscal Equity v. State of New York I*, 86 N.Y.2d 307 (1995), the Court of Appeals expanded further on that definition holding that it meant that New York’s public schools must be able to teach “the basic literary, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” 86 N.Y.2d at 316.

Accordingly, *King v. Cuomo*, 81 N.Y.2d 247 (1993), *Board of Education, Levittown v. Nyquist*, 57 N.Y.2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) all teach that while the Legislature may enjoy considerable deference in carrying out a constitutional mandate, it is up to the courts in the first instance to define the meaning of that mandate.

Courts are not required to stand by helplessly while the Legislature interprets the Constitution any way it wants. The difference between what Plaintiffs and the State cite as precedent turns on the distinction between the “interpretation” versus the “implementation” of a constitutional mandate. It is the Judiciary’s sole prerogative to interpret “gambling”; it falls to the Legislature to implement laws to prevent it. Thus, the determination on whether daily fantasy sports falls within the definition of “gambling” is for the Judiciary, not the Legislature, to decide. Supreme Court properly interpreted the term.

For all the foregoing reasons (Points I-IV), IFS is gambling and the Legislature, therefore, violated the constitutional prohibition against allowing it when it enacted Chapter 237 of the Laws of 2016 purporting to authorize, regulate and tax IFS.

POINT V

That Part of Supreme Court's Judgment Upholding the Exclusion of Interactive Fantasy Sports from the Penal Law's Definition of Gambling Should Be Reversed and Declared Unconstitutional

Notwithstanding Supreme Court's judgment that the Legislature's rationale "that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion," it held that the provisions of Chapter 237 purporting to exclude IFS from the definition of "gambling" in Article 225 of the Penal Law were not unconstitutional [R. 31, 32].

The Court reasoned that while the Legislature could not authorize IFS, the Constitution did not mandate that the Legislature necessarily criminalize it, citing 1984 N.Y. Op. Att'y Gen. 1, 22-23, which noted the "faulty premise" in equating "what is forbidden to criminals with what is allowed to the State" [R. 32]. The Court erred because, in upholding the exclusion of IFS from the Penal Law definition of gambling, it effectively allowed IFS to continue, a result which flies directly in the face of the mandate in Article I, § 9, that

“no gambling ... pool-selling, book-making, or any other kind of gambling ... shall be authorized *or allowed* within this State and the Legislature shall pass appropriate laws *to prevent* offenses against any other provision of this section” (emphasis added).

It is true that the Legislature could have “decriminalized” IFS by excluding IFS from the definition of gambling in the Penal Law but only if it had simultaneously substituted some other prohibition – not necessarily penal in nature - which would have prevented any gambling. It could, for example, have enacted a civil law prohibiting gambling and imposing civil fines to prevent any person or entity from operating IFS. Instead, it left a statutory and regulatory vacuum by decriminalizing gambling while not substituting something else in its place to prevent it.¹⁰ The Legislature did so intentionally, as Article 225 was the only statute on the books prohibiting this type of gambling. By deleting IFS from the definition of “gambling,” the Legislature sought not only to

¹⁰ Racing Law § 1412, added by Chapter 237, purports to prohibit DFS that is not authorized pursuant to the rest of Chapter 237, but Supreme Court struck down that part of Chapter 237 which purports to authorize and regulate IFS [R. 33].

decriminalize such activity, it sought to permit that which is strictly forbidden by the Constitution.

The supreme irony is that as a result of this Court's decision, the current situation is one in which IFS operators, such as FanDuel and DraftKings, continue to operate in New York with total impunity in defiance of this Court's decision that the authorization for such activity was unconstitutional. According to newspaper reports, neither company is "hitting pause in their operations." David Boies, Esq., outside counsel for DraftKings, is quoted as saying, "Their product is not gambling under state law." Lombardo, David, "Online Games in Legal Limbo, Still Running." *Albany Times Union* (November 20, 2018). A FanDuel spokesperson is quoted as saying "the decision makes clear that the New York Legislature's decision ... cannot be delayed in court ... [and] we will continue to offer fantasy sports to New Yorkers." Tom Precious, *Buffalo News* (November 20, 2018). The Supreme Court's decision currently leaves the State powerless to do anything about it, as there is no longer any criminal or civil statute to prevent FanDuel and DraftKings from engaging in

IFS because, as this Court noted, the Constitutional prohibition against gambling is not “self-executing” [R. 31]. It therefore falls to the Legislature to pass laws to prevent gambling. Despite the Legislature’s affirmative duty to pass laws to prevent gambling, it has taken precisely the opposite course, and it has done so deliberately.

This is precisely why Chapter 237 should be struck down in its entirety, and not just partially, as Supreme Court did. The Legislature did not exclude IFS from the Penal Law definition of “gambling” because it intended to substitute in its place some alternative measure to prevent it. Quite to the contrary, it inserted the exclusion for the obvious and sole purpose of enabling IFS to occur, so that the State could regulate and tax it. This is precisely why the exclusion is unconstitutional because it had the effect - an effect that was the Legislature’s deliberate objective – to enable that which is constitutionally prohibited. Lest there be any doubt as to the Legislature’s motive, one need only look at the Assembly and Senate sponsors’ Memoranda in Support of the legislation which

ultimately became Chapter 237. They stated that the purpose of the bill was to “provide for the registration, regulation and taxation of interactive fantasy sports contests in New York State” [R. 352]. Obviously, such registration, regulation and taxation could not occur unless the Legislature sought to exclude IFS from the definition of “gambling.”

The case law is very clear. A statute must be interpreted not just by looking at its words in the abstract, but rather in context to discern its true meaning by ascertaining the legislative intent. *Friedman v. Connecticut General Life Insurance Company*, 9 N.Y.3d 105, 115 (2007) (“A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent”). See McKinney Cons. Laws of N.Y., Book 1, Statutes, § 97. See *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) (“The primary consideration of courts in interpreting statutes is to ascertain and give effect to the intention of the Legislature”). Absent the removal of IFS from the definition of “gambling” in Article 225 of the Penal Law, the Legislature would have been unable to authorize,

regulate and tax it. The purpose of such removal was not just to decriminalize IFS, it was to authorize it, which the Constitution specifically prohibits.

The provisions of Chapter 237 of the Laws of 2016 excluding IFS from the Penal Law definition of “gambling” cannot, therefore, be severed from the rest of Chapter 237. Given that the purpose of such exclusion was to enable and allow IFS, its effect would be to “invalidate the dog while preserving the tail.” *See Association of Surrogates, et al. v. State of New York*, 79 N.Y.3d 39, 48 (1992). *See also CWM Chemical Services, LLC v. Roth*, 6 N.Y.3d 410, 423 (2006), quoting Judge Cardozo:

"The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots" (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 [1920]).

See also Boreali v. Axelrod, 71 N.Y.2d 1, 14 (1987):

It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder ... intact ... since the product of such an effort would be a regulatory scheme that neither the Legislature nor the [agency] intended.

In enacting Chapter 237, the Legislature itself never intended for there to be unregulated or unlicensed IFS. *See Racing, Pari-Mutuel Wagering and Breeding Law*, § 1402(a)(1). As a result, however, of the incongruity in Supreme Court's present decision, that is exactly what is taking place right now and will continue if that part of the lower court's decision is upheld.

CONCLUSION

This Court should modify Supreme Court's Decision, Order and Judgment dated October 26, 2018 by deleting so much thereof as declared that the provisions of Chapter 237¹¹ excluding IFS from the scope of New York State Penal Law definition of "gambling" is constitutional and in its place declare that "Chapter 237 of the Laws

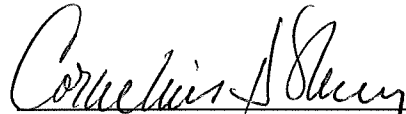
¹¹ *See, specifically*, *Racing, Pari-Mutuel Wagering and Breeding Law* §§ 1400(2) and 1402(4).

of 2016, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of “gambling” at Article 225, violates Article I, § 9 of the New York State Constitution, and as so modified, affirm the judgment that Chapter 237 is unconstitutional insofar as it purports to allow the State to authorize, regulate and tax interactive fantasy sports.

DATED: April 9, 2019
Albany, New York

O’CONNELL AND ARONOWITZ

By:

A handwritten signature in cursive script, appearing to read "Cornelius D. Murray", is written over a horizontal line.

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April 2013

Global Match-Fixing and the United States' Role in Upholding Sporting Integrity

Kevin Carpenter

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Global Match-Fixing and the United States' Role in Upholding Sporting Integrity

Kevin Carpenter*

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INTRODUCTION

Match-fixing has never been more prominent on the global stage than at the current time for a number of reasons including: the badminton scandal at the London 2012 Olympic Games, the recent Europol announcement that 680 soccer games were suspected of being fixed worldwide implicating 425 match officials, club officials, players and criminals¹, and the arrest and questioning of some of the most wanted criminals in the field.² Yet in the United States, considered one of the big closed danger markets for sports betting³, it does not appear to be particularly high on the agenda for government or sports governing bodies ('SGBs'). This opinion piece will explore and explain various

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1. 'Update – Results from the Largest Match-Fixing Investigation in Europe', europol.europa.eu, 6 February 2013

2. 'Football match-fixing suspect arrested in Italy', BBC News Europe online, 21 February 2013

3. 'Match-fixing: a winnable war?' Panel at Sport & iGaming conference 2012, London, 29 November 2012

aspects of match-fixing and why the US has an important role in the fight.

I. WHAT IS MATCH-FIXING AND WHAT ARE THE DRIVERS?

There is no one settled definition for match-fixing, however I formulated the following for a presentation I gave back in 2011 which I believe encapsulates it most succinctly: *A dishonest activity by participants, team officials, match officials or other interested parties to ensure a specific outcome in a particular sporting match or event for competitive advantage and/or financial gain which negatively impacts on the integrity of the sport.*

This can then be broken down into two strands: betting-related match-fixing (largely illegal betting) and sporting match-fixing (non-betting related). There has been far greater focus on the former principally due to the vast sums involved, with it being suggested by INTERPOL (the international police organisation) that sports betting has become a \$1 trillion a year industry.⁴ There is also the overarching and menacing presence of organised crime, a term which has a greater impact on key stakeholders, particularly politicians, than match-fixing.

It has been repeatedly shown that betting-related match-fixing is driven by high level and increasingly sophisticated criminals, be it the mafia or illegal gambling rings in Asia for instance.⁵ They have been able to take an increasing stranglehold on sports as a direct consequence of globalisation⁶ The following have flowed from an ever globalised world to provide greater opportunities for corruption through sports and gambling and therefore new challenges for all stakeholders in sport: the number of betting possibilities (including the advent of in-play betting and spread betting), betting exchange and great advances in technology.

II. RECENT MATCH-FIXING IN GLOBAL SPORTS

Whilst it is interesting to discuss match-fixing in the abstract it is equally important to provide real instances of where match-fixing has taken place in the past few years.

Being the biggest sport in the world by viewing figures and participation it is hardly surprising that soccer has been targeted, with a significant degree of success, by match-fixers. A number of match-fixing scandals across Africa and Asia (dubbed 'Asiagate') have surfaced in this time, many of them linked with the notorious Singaporean match-fixer Wilson Raj Perumal and the global operation run through his shady Football4U company, through which he has

4. 'Fifa determined to tackle international match-fixing', Bill Wilson, BBC News Business, 10 October 2012

5. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 27, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

6. 'Match-fixing: How gambling is destroying sport', Declan Hill, BBC Sport, 5 February 2013

profited from the vast sums made by Asian gambling syndicates.⁷ The striking nature of these investigations especially for the world governing body of soccer, Fédération Internationale de Football Association ('FIFA'), is that they involved the alleged fixing of senior international matches. Concerns first came to light in Zimbabwe when the football association ('ZIFA') revealed in February 2011 that there was an investigation taking place into tours in which the national team had taken part in between 2007 and 2009. Players involved in those tours subsequently admitted to throwing matches for money.⁸ The probe revealed that not only had Asian gaming syndicates paid each player in the Zimbabwe squad \$3,200–\$4,500 in cash for each match lost, but also that in July 2011, Monomotapa Football Club had twice impersonated the country's national team and played Malaysia in international friendlies. As planned, they lost 4-0 and were handsomely rewarded. It has since been announced that 80 Zimbabwean footballers have been suspended by ZIFA pending the outcome of hearings in front of a newly established independent ethics committee. The international friendlies are thought to have been arranged specifically for the purposes of match-fixing through sports betting.⁹ These scandals undermined the entire sport in the country. This culminating recently in ZIFA President Cuthbert Dube questioning the integrity of the team in its most recent match, having let a 3-1 lead slip to miss out on qualification for the Africa Cup of Nations, and disbanding the team soon after. This suspicion may have stemmed from the players having told the ethics committee that during the infamous 2009 tour representatives from betting syndicates were present in the changing room at half time dictating to them how the game should unfold!¹⁰ Mr Perumal was caught in the act back in 2011, imprisoned in Finland for a year, and is currently in protective custody in Hungary.

Italy, a nation somewhat notorious in this area, was the subject of yet another tranche of allegations and prosecutions last year. The highest profile actor caught in the crossfire on this occasion was current Italian league champions Juventus, who have a chequered history as regards match-fixing¹¹, with their manager Antonio Conte being served a four month ban (reduced from 10 months upon appeal) for failing to report allegations of match-fixing during his tenure at Siena.¹² There were also the extreme actions of Verona striker Emanuele Pesoli who held a four day hunger strike whilst chaining

7. 'Zimbabwe: Fifa Praise Asiagate Measures', Hope Chizuzu, *The Herald*, 14 February 2012

8. 'Corrupt players will be punished – Zifa chief', Farayi Mungazi, *BBC Sport*, 25 February 2011

9. 'Zimbabwe suspends 80 footballers as part of 'Asiagate' match-fixing probe', David Smith, *The Guardian online*, 1 February 2012

10. 'Zimbabwe chief disbands team', Associated Press, *ESPN Soccernet*, 2 November 2012

11. See 2006 *Calciopoli* scandal (sporting related match-fixing)

12. 'National Court for Sports Arbitration issued its final ruling on Antonio Conte's position', *Italian Sports Law Research Center, LawInSport*, 1 November 2012

himself to the Italian football headquarters following a three year match-fixing ban being imposed upon him.¹³ Perhaps of greatest concern was player Simone Bentivoglio describing an “atmosphere of complete terror” in Italian football having accepted a plea bargain for charges brought against him.¹⁴

Tennis has also seen itself at the centre of more than a handful of match-fixing controversies. Perhaps the most high profile case being in 2007 when Nikolay Davydenko, ranked number four in the world at the time, was involved in a match which betting exchange Betfair said bore all the hallmarks of having been fixed, with around \$10 million having been placed on the game, most of which was placed on his lower ranked opponent. Despite being cleared of all the charges, and therefore innocent in the eyes of the law, Mr Davydenko has been associated with Alimzhar Tokhtakhounov, who in 2002 was accused by the FBI of fixing figure skating events at that year’s Winter Olympics in Salt Lake City.¹⁵

The tennis authorities continue to keenly monitor and investigate alleged instances of match-fixing activity. The Association of Tennis Professionals (‘ATP’), organiser of the worldwide tennis tour for men, handed down a life ban and \$100,000 fine to Austrian Daniel Koellerer, who had been as high as number 55 in the world. He was found guilty of three offences in relation to match-fixing, both of his own matches and trying to coerce other players to participate in match-fixing between October 2009 and July 2010.¹⁶ Koellerer appealed to CAS in November 2011 but this was rejected.¹⁷ In 2012 CAS once again sided with the tennis authorities in the face of an appeal against a life ban for match-fixing, this time by Serbian player David Savic, “The CAS Panel rejected the Player’s arguments and concluded that the disputed facts had been proven not only by a preponderance of the evidence, but indeed to the Panel’s comfortable satisfaction.”¹⁸

Even though the above are just a small flavour of the breadth and depth of match-fixing it shows that it is a worldwide, large-scale, multi-discipline problem which creates significant difficulties in terms of detection and prevention. As INTERPOL Secretary General American Ronald K. Noble said in 2012, “As corruption in sports has become a global concern, our response must be global and holistic.”¹⁹

13. ‘Emanuele Pesoli ends hid hunger strike over match-fixing ban’, BBC Sport, 15 August 2012

14. ‘Midfielder tells of ‘terror’ in Italian game’, Adam Digby, ESPN Soccernet, 24 August 2012

15. ‘Match-fixing in tennis’, David White, Tennisbet.com, 26 June 2009

16. ‘Former world No 55 Koellerer banned for life as tennis tackles match-fixing’, Mike Dickson, Daily Mail online, 31 May 2011

17. CAS 2011/A/2490 Daniel Kollerer v Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee

18. ‘Media Release: The Court of Arbitration for Sport confirms the life ban imposed on David Savic but lifts the fine’, tas-cas.org, 6 September 2012

19. ‘Keeping sport clean needs enhanced policing and prevention, INTERPOL Chief tells summit’, Interpol.int, 25 April 2012

III. HISTORY OF MATCH-FIXING IN THE UNITED STATES

Match-fixing is not a new phenomenon to the US or American sports. Indeed one of the most famous (or infamous depending on your view) proven cases came from the 1919 baseball World Series involving the Chicago White Sox. The match-fixing conspiracy was organised by White Sox player Arnold “Chick” Gandil who had longstanding ties to underworld figures, including New York Gangster Arnold Rothstein who financed the caper through his lieutenant, a former boxing champion. Gandil enlisted several of his teammates who were motivated by the resentment for the club’s owner who had been underpaying his players for some years. A year later a Grand Jury was convened to investigate the alleged scandal, which had been rumoured even before the Series has started with a sudden spike on the Sox’s opponents the Cincinnati Reds. The investigation led to life bans from the sport for all eight players involved.²⁰ The delayed payment or non-payment of players is still a significant reason why players agree to fix matches in other sports today.²¹

College basketball has also been subject to a number of match-fixing scandals.²² In 1951 a various schools, including City College, Manhattan College and Kentucky, were implicated in point shaving scandals which led to the arrest of 32 players, who had fixed 86 games in total, and suspensions from the NCAA. The fixers themselves, Cornelius Kelleher and brothers Benjamin and Irving Schwartzberg, who were bookmakers and convicted felons, were also booked on bribery and conspiracy charges.²³ Point shaving is the (highly illegal) act of purposefully holding down the score of a sporting event in order to impact who will win bets against a point spread.²⁴ It is a form of match-fixing more widely referred to as ‘spot-fixing’. Spot-fixing does not involve making sure a team loses a game, rather it is actions taken to ensure certain events take place during the game, and is exclusively within the realm of betting-related match-fixing.

The most high-profile instance of match-fixing in recent US sports history was that carried out by former NBA referee Tim Donaghy. This was yet another series of incidents of point shaving which were investigated and made public by the FBI, who has its own division of officers specifically tasked with dealing with gambling and fixing in sports.²⁵ Donaghy was found to have bet on games in which he had officiated, and made decisions affecting the point

20. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 9, SportAccord, November 2011

21. See FIFPro Black Book Eastern Europe, Section 5.5.2, February 2012

22. See also these scandals: 1959 – NBA, Jack Molina and a suspected mafia murder; 1978 – Boston College, betting syndicates and organised crime

23. ‘Explosion: 1951 scandals threaten college hoops’, Joe Goldstein, ESPN.com, 19 November 2003

24. ‘What is Point Shaving?’, Charlie Zegers, basketball.about.com, accessed 26 February 2013

25. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 43, SportAccord, November 2011

spread in those games, during the 05/06 and 06/07 NBA seasons. He pleaded guilty to two federal charges related to the investigation and was sentenced to 15 months imprisonment, followed by three years of supervised release. This led to the NBA revising the guidelines on the behaviour of its referees, it having been revealed that, despite a ban on gambling in their contracts, all of them admitted to having engaged in some form of gambling.²⁶ It had been suggested by a prominent bookmaker that referees had to be the prime suspects because the players make too much money to risk losing their careers over match-fixing.²⁷ I have heard this defence raised a number of times in the US where match-fixing is concerned. However, the Bountygate integrity scandal, where some New Orleans Saints players intentionally broke the NFL rules for as little as \$1000 when they were earning millions each season, dispels this theory I suggest.

Just over the border the US's North American cousins have had the most recent problems with match-fixing. Last September a television programme was aired on the Canadian Broadcasting Corporation news channel revealing that at least one game in the semi-professional Canadian Soccer League ('CSL') had been compromised by match-fixing.²⁸ This was discovered having obtained the wire-tap evidence from the Bochum trial, the biggest match-fixing case ever to come to trial, which centred on a Europe-based crime syndicate that made a reported \$9.8m profit from corrupting players, referees, coaches and federation officials.²⁹ Many of those involved were given severe prison sentences by the German court. These revelations led the Canadian Soccer Association ('CSA') to sever its ties with the CSL by refusing to sanction it. More worryingly, anonymous sources admitted that the CSA isn't equipped to tackle the domestic match-fixing problem.³⁰

IV. THE SERIOUSNESS OF THE THREAT AND WHY FIGHT IT?

As a major fan of US sports born across the Atlantic it has always seemed that US sport is as much about entertainment as it is about the eventual outcome, which is of course much of its attraction. Yet as a result sometimes the integrity of the sport is conveniently put to the back of the minds of SGBs and fans alike. Take doping in baseball for example and the Balco scandal (among others). So perhaps it is reasonable to ask: if a contest is more intense and entertaining then why worry about match-fixing?

What if you were told that the illegal gains from match-fixing represent up

26. 'NBA to revamp ref gambling rules; Jackson, Nunn see roles reduced', Chris Sheridan, ESPN.com, 26 October 2007

27. 'Expert explains the many ways a crooked referee could fix bets', Wayne Drehs, ESPN.com, 23 July 2007

28. 'EXCLUSIVE: Canadian soccer match fixed by global crime syndicate', CBC.ca, 12 September 2012

29. 'EXCLUSIVE: Canadian soccer match fixed by global crime syndicate', CBC.ca, 12 September 2012

30. 'CSA cuts ties with Canadian Soccer League', Ben Ryecroft, CBC.ca, 31 January 2013

to \$8.8 billion, which is six times more than the global trade in illegal small arms?³¹ Or that in South Korea in 2011 a soccer player was found dead in a hotel room accompanied by a suicide note referring to a match-fixing ring?³² Or the possibility that soccer players are being trafficked from Africa to play in minor professional soccer leagues (perhaps in the US), told to match-fix and then being abandoned? Another quote from Ronald K. Noble of INTERPOL may convince you, “Organised criminals frequently engage in loan-sharking and use intimidation and violence to collect debts, forcing their desperate, indebted victims into drug smuggling and their family members into prostitution”.³³ This shows not only are we dealing with vast sums of money and organised crime but also facing other related heinous crimes as duress through the threat of violence, human trafficking and money laundering.

Given all of this, what steps do SGBs in the US take to ensure their prized sports are not beset by match-fixing and its associated evils?

V. CURRENT APPROACH TAKEN BY US SPORTS GOVERNING BODIES TO MATCH-FIXING

It is widely viewed, although not by all (including myself), that the ultimate responsibility to keep sport clean from match-fixing lies with SGBs. In a report undertaken for the UK Government in February 2010 by the Sports Betting Integrity Panel (‘SBIP’) the Panel formulated a uniform code of conduct on integrity which it recommended should be implemented across all sports. As part of its report, in coming to the code, the SBIP examined how 12 major SGBs each dealt with the following threats:

1. Placing a bet;
2. Soliciting a bet;
3. Offering a bribe;
4. Receiving a bribe;
5. Misuse of privileged/inside information;
6. Failing to perform to one’s merits; and
7. Reporting obligations.

Worryingly, in 38% of instances the SGBs made no provision for at least one or more of the threats, indeed the IAAF (athletics) and Royal & Ancient/PGA (golf) made no provision in their rules for any of the seven.

Thankfully the major US sports all have rules in place for direct participants, be they players, officials, coaches etc., in relation to betting. In

31. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 34, SportAccord, November 2011

32. ‘Match-fixing South Korean footballers banned for life’, BBC News Asia-Pacific online, 17 June 2011

33. ‘FIFA’s historic contribution to INTERPOL in fight against match-fixing’, FIFA.com, 9 May 2011

fact the NCAA takes the hardest stance on this issue.³⁴ However I doubt that they cater for all of the seven threats. Number 5 is becoming an increasing problem in the match-fixing field, especially with the advent of social media, as players can reveal information sensitive to betting such as injuries on the roster and team selections.

Many of the deficiencies that US SGBs have in their rules could be remedied by developing a closer relationship with legitimate betting operators, be this through specific anti-corruption units, early warning systems or memorandums of understanding. Major League Soccer ('MLS') is to be applauded as they utilise FIFA's own Early Warning System which monitors betting patterns in legalised markets, including Las Vegas. MLS will also from next season be banning mobile phones and other electronic devices from the locker rooms from 60 minutes before and throughout the game.³⁵ So why won't US SGBs in general engage with betting operators?

VI. THE US ATTITUDE TO SPORTS BETTING

A great deal has been written on sports betting in the US in the past 12 months or so given the high profile litigation currently taking place between the State of New Jersey on one side and the NFL, NBA, NHL, MLB, NCAA and the Department of Justice on the other regarding the constitutionality of the Professional and Amateur Sports Protection Act ('PASPA') (more below). I will not be going into the details of the case but it does highlight some important historical and policy issues that can be seen to impact the fight against match-fixing.

From the scandals described earlier sports betting has always been present, and indeed prevalent, in American society. To give an indication of the scale of sports betting in the country one study estimates that in 2008 \$2.8 billion was wagered legally in Nevada, compared to \$380 billion wagered illegally across the US.³⁶ However historically there has never been effective regulation of it by either state or federal government. This came to a head in 1992 when the professional and college sports convinced Congress to pass PASPA into law, making betting on sports a federal offence in all but four states, the principal of which being Nevada for Las Vegas. They convinced Congress to do this on the following grounds:

1. Stopping the spread of sports gambling;
2. Maintain sport's integrity; and
3. Reducing the promotion of sports gambling among America's youth.

34. 'Integrity in Sport: Understanding and preventing match-fixing' at page 43, SportAccord, November 2011

35. 'Here's Why Soccer Match-Fixing Is Not a US Problem', Brian A. Shactman, CNBC.com, 5 February 2013

36. 'Game Over? The Potential Demise of the Professional and Amateur Sports Protection Act', Jason J. Ranjo, Rutgers Law Journal, Volume 42:213

Although the message PASPA continues to send out in reality is: we know sports betting is happening (and on a grand scale), but due to the perception across the US that gambling is an evil in society, we will drive it further underground into the black market and ignore it! This reasoning is counter-intuitive at best, especially in the context of protecting the integrity of sport.

US SGBs are also accused of hypocrisy and the selective application of integrity where sports betting is concerned. Just this past season in the NFL, the referee lockout during the early weeks of the season, and the numerous blatant errors made by the replacement referees, led to howls of derision that the replacements, and especially the league, had seriously compromised the game's integrity. One article even went as far as to say that, "Roger Goodell's (the Commissioner of the NFL) stance on sports betting has become almost disingenuous [as a result]."³⁷

When one looks at Great Britain, considered one of the most liberal jurisdictions for sports betting but also one of the best regulated by the Gambling Commission ('GC'), the stance taken by US SGBs appears even more irrational. The GC was set up under the Gambling Act 2005 to regulate commercial gambling in Great Britain. It is an independent non-departmental public body sponsored by the Department for Culture, Media and Sport³⁸ (no such equivalent department exists within US government). Ever since its establishment the GC's remit covered sports betting and betting integrity issues. It has also has an intelligence unit specifically for betting integrity.³⁹ Since it became operational in September 2007, despite the amount of betting on sport and advertising by bookmakers (both onshore and offshore), there have only been two significant match-fixing issues, both in cricket, which suggests the model is working well.

However what the GC, and other national regulators around the world, freely admit is that they only have jurisdiction for their own territory. They do talk to other regulators, share their experiences with them and provide intelligence to other countries when asked but they can't force other countries to take action. Which is where the US, and other illegal gambling markets, must begin to engage and alter their regulatory frameworks. The European Union are going through a similar process at this moment in time. After all, match-fixing is a problem that can only be effectively tackled by concerted action on a global scale.

VII. EUROPE LOOKING TO LEAD THE WAY

European political institutions have taken it upon themselves to lead a co-ordinated and (hopefully) coherent fight against match-fixing. The European

37. 'NFL Replacement Referees Have Compromised The Game's Integrity And League's Position on Sports Betting', Darren Heitner, *Forbes.com*, 23 September 2012

38. 'About Us', gamblingcommission.gov.uk, accessed 27 February 2013

39. 'Betting in sports and integrity at the London Olympics: an insight from the UK Gambling Commission – Part 1', Kevin Carpenter, *LawInSport*, 26 July 2012

Union ('EU') is approaching this in a number of ways.

One being by working with the Council of Europe ('COE') towards a possible international legal instrument against the manipulation of sports results, notably match-fixing ('the Convention').⁴⁰ Functions of the Convention are intended to include (amongst others):

- Betting monitoring systems:
- Judicial co-operation: and
- Uniform sanctions.

Once the Convention is finalised the COE hope to be able to convince countries outside of Europe, including the US, to sign up to it.⁴¹ It is worth stressing at this point that the COE is an entirely separate and distinct body from the EU. It covers almost the entirety of Europe with its 47 member countries while the EU only has 27 Member States. The COE seeks to develop common and democratic principles based on the European Convention on Human Rights.

Another approach by the EU to tackle the thorny issue of match-fixing is happening through the auspices of its review of online gambling within the Community. 'Safeguarding the integrity of sports and preventing match-fixing' is one of five priority areas in the "Towards a comprehensive European framework for online gambling" Communication published by the European Commission (the executive arm of the EU) in October 2012.⁴² Member States themselves are urged to take the following steps:

1. Set up national contact points which bring together all relevant actors within each Member State that are involved in preventing match-fixing;
2. Equip national legal and administrative systems with the tools, expertise and resources to combat match-fixing; and
3. Consider sustainable ways to finance measures taken to safeguard sports integrity.

The final step is one which is often not given great enough importance in the debate about match-fixing. It is laudable having grand plans for trans-national policies and co-operation but who is going to pay for it? In the age of worldwide economic austerity a major obstacle to progress in this area will be governments setting aside the necessary funds. Governments increasingly have to lead as sports themselves are often reticent to do so. One set of stakeholders who have shown the means and will to spend on this issue are the betting operators themselves, which in the US draws a sharp intake of breath. In reality policy makers need to have a more cordial attitude towards policy makers for

40. 'Match-fixing: European Commission to participate in negotiations for Council of Europe Convention to combat manipulation of sports results', Practical Law Company, 22 November 2012

41. Presentation by Stanislas Frossard of the Council of Europe at SportEU 2012 conference, Lausanne, 22 June 2012

42. SWD(2012) 345 final

them to continue, and even enhance, this investment.

The US should also look at a wholesale review of its legal framework for gambling (both online and offline) and match-fixing as currently it can be described as a patchwork at best with the following plethora of federal legislation⁴³, before that at individual state level is also considered:

- The Wire Act;
- The Travel Act;
- The Interstate Transportation of Wagering Paraphernalia Act;
- The Illegal Gambling Business Act;
- The Unlawful Internet Gambling Enforcement Act;
- The Sports Bribery Act; and of course
- PASPA.

This creates great uncertainty and opportunities for unscrupulous individuals, including match-fixers, and illegal operators to fall through the cracks. FIFA's Head of Security, Ralf Mutschke, had this to say at the recent jointly hosted Asian Football Confederation and INTERPOL conference on match-fixing in Kuala Lumpur, Malaysia, "We have to bring in the governments because they have to change legislation and laws, because a lot of countries do not have proper laws fighting match manipulation and corruption."⁴⁴

VIII. OTHER JURISDICTIONS WITH SIGNIFICANT ILLEGAL SPORTS BETTING

It may have seemed so far that the US has been singled out for criticism. Although much of it is justified, it is also fair to say that other nations are more culpable in providing the unregulated gambling markets that allow match-fixing to thrive. Asia is the part of the world most often associated with match-fixing, and for good reason, with the volume of illegal betting and match-fixing estimated to be worth \$500 billion in Asian markets alone.⁴⁵ Indeed it is said, with significant evidence in support, that the most prevalent match-fixing ring globally is to be found in Singapore, headed by the most wanted man in the field Dan Tan, who it has been reported recently has been assisting Singapore authorities with their investigations, Italian police authorities having had a warrant out for his arrest.⁴⁶

One of the major criminal match-fixing successes in recent times has been the four Soccer Gambling ('SOGA') operations led and co-ordinated by INTERPOL. SOGA operations have in total led to more than 7000 arrests, the

43. 'The Professional and Amateur Sports Act (PASPA): A Bad Bet for the States', Eric Meer, UNLV Gaming Law Journal, Volume 2:281

44. 'FIFA head warns over match-fixing', FoxSports.com, 20 February 2013

45. 'FIFA aware of match-fixing fears', Robin Scott-Elliot, The Independent online, 11 March 2011

46. 'Football 'match-fixer' Dan Tan with Singapore police', BBC News Europe online, 21 February 2013

closure of illegal gambling dens which handled more than US\$2 billion worth of illegal bets and the seizure of nearly US\$27 million in cash.⁴⁷ The latest of these operations, SOGA IV, was in the summer 2012, took two months in total and successful raids were carried out by law enforcement officers across Asia in China, Macau, Hong Kong, Malaysia, Singapore, Vietnam and Indonesia.⁴⁸

India, with a population of around 1.2 billion (four times that of the US), is another notorious jurisdiction for illegal sports betting and the match-fixing that comes with it. The national sport in India is cricket, which has faced high profile cases of match-fixing over the years including that of former South Africa national captain Hansie Cronje, with a recent Sunday Times investigation described the situation thus, “The millions of cricket mad gamblers in the teeming cities and slums of India are helping are helping to finance something altogether more sinister – the subversion of the sport by a network of match-fixers.”⁴⁹ This investigation also detailed further illegality associated with match-fixing, the use of honey traps, attractive women who ‘cosy up’ to players and persuade them to work for underground bookmakers.

Let’s now look at how the greatest sporting spectacle on earth approached this multi-faceted threat last summer and what can be learned in the US and worldwide in both regulated and unregulated jurisdictions.

IX. MATCH-FIXING AND LONDON 2012

London 2012 marked a watershed for the Olympic Games as it was the first time the Host City Contract contained a sports betting monitoring and co-operation clause to combat the threat of match-fixing. In the lead up to the games the International Olympic Committee (‘IOC’), especially its President Jacques Rogge, promoted the message that match-fixing was the most significant threat to the Games, “Doping affects one individual athlete, but the impact of match-fixing affects the whole competition. It is much bigger.” Accordingly a lot of work was undertaken by many stakeholders to ensure the Olympic Games were not subject to their first ever betting-related match-fixing scandal.

At the Sport & Gambling 2012 conference, held in London on 9 October 2012, the IOC’s Paquerette Zappelli and the GC’s Nick Tofliuk gave a joint presentation entitled ‘Lessons from London 2012’. This was a fascinating insight into what perhaps was the most successful match-fixing operation to date.

At the outset the view was taken that the best way to co-ordinate all the different actors would be to establish a Joint Assessment Unit (‘JAU’). The

47. ‘Arrests across Asia in INTERPOL-led targeting illegal soccer gambling networks’, Interpol.int, 18 July 2012

48. ‘Arrests across Asia in INTERPOL-led targeting illegal soccer gambling networks’, Interpol.int, 18 July 2012

49. ‘Bollywood honeytrap seduces cricket stars into match fixing’, Mazher Mahmood, The Sunday Times, 11 March 2012

JAU would be a mechanism for the collection, collation and assessment of information, both before and during the London Olympics, by the following stakeholders:

- London Organising Committee of the Olympic Games ('LOCOG');
- IOC;
- UK police force;
- Non-Olympic sports;
- SGBs;
- Betting operators and associations;
- INTERPOL; and
- Media.

The challenge for the JAU would be two-fold: to protect stakeholder interests and putting theory into practice. A central tenet to the JAU's approach would be to ensure that if any threat were to arise the response would be proportional, which would primarily be a media management issue. One view is that proportionality should underpin the shaping of match-fixing policy, regrettably however it is seemingly all too often overlooked.

Clear and robust relationships between the above stakeholders were paramount, as was timing. The delivery model designed to evaluate the JAU was tested thoroughly through scenario based testing sessions. This raised awkward questions of capabilities and competencies, both for the JAU and its various stakeholders, highlighting the importance of depth of understanding of all the organisations involved.

Perhaps the most valuable thing to take from the JAU's approach was that they profiled each of the Olympic sports in detail to find their respective inherent risks and vulnerabilities. To do this they looked to find where the culture was already compromised by corruption (i.e. through weak or compromised governance, doping or match-fixing). Having completed the profiling they were then able to allocate resources appropriately to the sports they had identified as being of greater risk.

Given the overall sports betting turnover at London 2012 was about 10 times higher than for Beijing 2008, the fact that there were no betting-related scandals uncovered during London 2012 indicates that the model may be able to be used internationally, perhaps as a basis for a WADA-type body in the future (more of which later). What the JAU did not cover, and was never intended to do so, was what unfolded during the badminton women's doubles tournament.

On Tuesday 31 July four pairs took to the court for two of the final matches of the group stages. They had already qualified for the next stage of the tournament. Farcical scenes then ensued whereby the players served

woefully into the net and missed easy shots in an attempt to deliberately lose their matches and gain favourable draws in the knockout stages.⁵⁰ During both matches the crowd audibly voiced their disapproval of the debacle. This made headline news around the world drawing heavy criticism from all quarters.⁵¹ This included Lord Coe, Chairman of LOCOG, who described it as, “depressing, who wants to sit through something like that? I know the badminton federation [the ‘BWF’]...will take that really seriously...it is unacceptable.”⁵² Thankfully the BWF did as Lord Coe hoped and, having called a disciplinary meeting the following day, disqualified all eight players from the tournament.

The fallout from this scandal brought a great deal of soul searching for the sport, not just for the BWF but also for the national badminton governing bodies. All four of the pairs received short bans from their national SGB, the prevailing view seeming to be that the offending players had been punished severely enough by being excluded from the opportunity to win an Olympic medal. Given the part of the world where the pairs came from (South Korea, China and Indonesia), the Far East being a hotbed for match-fixing activity and gambling syndicates, there were some suspicions (often voiced through social media) as to whether there was a betting corruption element in addition to the sporting motivations to fix the matches? I put this question to Ms Zapelli and Mr Tofliuk at the Sport & Gambling conference. They said that although it had been prudent for the JAU to investigate the matter there was no evidence found of the misdemeanours being related to betting.

Often the opportunity for sporting-related match-fixing stems from a structural flaw in the tournament/competition.⁵³ The BWF, having been caught out on the grandest of stages, has already changed the rules for Olympic doubles at Rio 2016. Following the group stage, all pairs finishing second in their groups will be placed into a second draw to determine who they face in the knockout phase. For pairs that top their group, they would have fixed positions equivalent to seeded placing’s in the knockout stage. The BWF hope this will prevent such a “regrettable spectacle” ever happening again.⁵⁴

Even with the unforeseen badminton scandal, publicly London 2012 was viewed as a success in the fight against match-fixing, particularly as regards the most insidious betting-related form.

X. IS THERE A SIGNIFICANT APPETITE FOR A WORLDWIDE MATCH-

50. ‘Disgraced South Koreans have bans reduced’, Reuters, 22 August 2012

51. ‘An athlete’s perspective on match-fixing: what sports’ governing bodies should learn from Shuttlegate’, Emma Mason, LawInSport, 9 November 2012

52. ‘China ‘to probe badminton loss’ as players charged’, BBC News China, 1 August 2012

53. ‘An athlete’s perspective on match-fixing: what sports’ governing bodies should learn from Shuttlegate’, Emma Mason, LawInSport, 9 November 2012

54. ‘Olympics doubles rules changed for Rio 2016 after match-fixing scandal’, Duncan Mackay, insidethegames.biz, 30 November 2012

FIXING AGENCY?

A further aspect of match-fixing that is much discussed is the possibility of a an independent organisation along the lines of the World Anti-Doping Agency ('WADA') to be the central body to fight match-fixing worldwide. Chris Eaton, former Head of Security at FIFA and now Director of Sport Integrity at the newly formed International Centre for Sport Security ('ICSS') based in Doha, would not go as far as to model such a body on WADA, rather he favours, "an intelligence-collecting, analysing and information sharing multi-agency global body – more similar to a Financial Action Task Force ('FATF') type of structure – that would be tasked to provide timely advice to governments, police and sport bodies and to provide direct support to any ad-hoc international investigative task forces."⁵⁵

I strongly believe that funding is the critical hurdle to the establishment of a worldwide match-fixing body in any form. With the continuing grim economic climate globally how will governments, who ultimately need to show willingness to contribute to the pot, economically and politically justify spending money on such a body? Furthermore SGBs themselves cannot agree on who should be responsible for driving out the scourge with Eaton having this to say, "It's about avoiding paying for it, because there's a significant cost to doing these things and ultimately they will have to do it anyway [eventually], so my suggestion is that the earlier they invest in this, the less it will cost them."⁵⁶ Even if a worldwide body were to be set-up I suspect it would be lacking in teeth anyway until the US, and the other nations detailed above that through inaction and lack of regulation encourage illegal betting, are convinced politically to take a stand.

XI. WHERE DOES THIS LEAVE SPORT AND WHAT ACTION DOES THE US
NEED TO TAKE?

Despite having been reported as an issue as far back as the time of the ancient Greeks⁵⁷ match-fixing is still really in its infancy in terms of research an understanding, particularly when compared with other threats to the integrity of sport such as doping. Betting-related match-fixing will remain the primary focus in this field for all stakeholders in sport because transnational criminal organisations continue to take advantage of changes in regulations, flaws in legal and judicial systems, the opening-up of borders and the growth of free trade, all of which are direct consequences globalisation.⁵⁸

Governments and the world of sport, particularly in the US, are not as

55. 'The insidious spread of gambling fraud', Chris Eaton, ICSS Journal, December 2012

56. 'Independent agency needed to fight match-fixing', Brian Homewood, ChicagoTribune.com, 30 November 2012

57. 'Match-fixing: How gambling is destroying sport', Declan Hill, BBC Sport, 5 February 2013

58. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 5, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

familiar as they should be with the risks to which they are exposed because they do not always fully understand the world of betting and gambling.⁵⁹ Increased awareness and transparency would be two significant benefits should the US, and other unlicensed jurisdictions, move from a model of outright prohibition to one where sports betting is legalized, regulated and taxed.⁶⁰ The licensed gambling industry contributes \$4.5 billion to the EU sports sector alone. Yet with the grim economic climate showing no signs of abating for some years to come, people will look to make a quick buck from sports betting (particularly illegal sports betting) which will fuel its growth if concerted action is not taken. Indeed the economy will provide the biggest challenge in finding the necessary resources that all actors need to effectively tackle the problem. This is undoubtedly the largest issue yet to be resolved or even properly addressed. Needless to say resources from US, Chinese and Indian governments, for example, would go a long way in plugging the shortfall.

John Abbott, Chair of the INTERPOL's Integrity in Sport Steering Group, said at a conference in Brazil in November that the five key elements for a successful strategy against match-fixing are: partnerships, information exchange, co-ordination, prevention strategies and pro-activity.⁶¹ Outright prohibition of sports betting achieves none of these.

For all the good work being done by INTERPOL and others, the key broker in the continuing progress against this threat of upmost severity to the integrity of sport is in my view the IOC because it is seemingly the only body, sporting or otherwise, with the necessary political, social and sporting clout. For that reason the IOC is perhaps best placed to overcome the historic and continuing moral, social and political hurdles in the US.

Although sport is about entertainment, this is ultimately generated and maintained by upholding the integrity of sport. The unique emotions felt through sport, which are like no other in life, stem from sport's natural unpredictability which is without doubt its most important commodity. Match-fixing in any form seeks to destroy this for pure unadulterated and selfish greed. This is why all countries and sports need to stand united and fight match-fixing together.

59. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 55, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

60. 'The Professional and Amateur Sports Act (PASPA): A Bad Bet for the States', Eric Meer, UNLV Gaming Law Journal, Volume 2:281

61. 'Protecting sport from organized crime the focus of INTERPOL panel at International Anti-Corruption Conference', Interpol.int, 12 November 2012

HANDBOOK ON PROTECTING SPORT FROM COMPETITION MANIPULATION

INTERPOL IOC INTEGRITY IN SPORT INITIATIVE





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Foreword by the President of the International Olympic Committee

Protecting the clean athletes is a key priority under Olympic Agenda 2020, the strategic roadmap for the future of the Olympic Movement. In essence, this means protecting the clean athletes from corrupting influences of any kind. This includes making the environment in which the athletes operate safe from match-fixing and other manipulation that threaten the integrity of sport.

Sport does not operate in isolation from other areas of society. Sport is global—therefore the threats that undermine the integrity of sport and athletes do not stop at national borders. To counter the global nature and scale of crime, the world of sport needs partners. Protecting the integrity of sport is a team effort and this is why our partnership with INTERPOL plays a key role in our global strategy to combat match-fixing, and any manipulation of competitions and related corruption.

As the world's largest law enforcement organization, INTERPOL brings a unique ability and expertise to protect the integrity of sport. This Handbook is a tangible result of our partnership. It provides stakeholders in the sports movement with important information on how to protect the clean athletes from competition manipulation, while also outlining ways how sports organisations and law enforcement agencies can cooperate effectively.

This Handbook complements other measures taken by the IOC and INTERPOL, such as training, education and capacity-building at national and international levels. All these measures are already having a positive impact in the fight to protect the integrity of sport. Standing together, we can ensure that sport is clean and safe.

Thomas Bach
IOC President

Foreword by the INTERPOL Secretary General

Competition manipulation has become an increasingly global concern, with organized criminal syndicates operating on a massive scale, targeting a wide range of sports. Despite member countries' efforts to respond to competition manipulation, it is clear that the solution lies through a coordinated approach. Partnership development is crucial in order to collect critical operational and strategic information to create a clearer picture of the situation across the globe. It is these partnerships which have shown the links between match-fixing, sports betting and organized crime.

This is why in addition to a range of initiatives to raise awareness and to facilitate the sharing of information, intelligence and best practices among our member countries, INTERPOL coordinates joint investigations and operations to dismantle the organized networks behind crimes in sport.

Our cooperation with the International Olympic Committee (IOC) is an example of a successful strategic partnership which is yielding positive results. This booklet, jointly developed by the IOC and INTERPOL, is part of our wider united efforts to enhance match-fixing training programmes, to assist prevention and to develop investigative skills.

This book is not only a guide for law enforcement officers seeking to tackle match-fixing cases, but it is also a useful tool for every sports club, association and federation to understand the dynamics of competition manipulation; and to learn how to put in place internal measures to prevent match-fixing and other corruption, as well as to protect the dignity of athletes. By expanding our common knowledge about this threat and how to counter it, this initiative seeks to protect all disciplines within the Olympic Movement, and the principles enshrined in it.

Together, we can succeed in protecting the value and ethics of sports.

Jürgen Stock
INTERPOL Secretary General

Preface

Competition manipulation poses a significant threat to the integrity of sport, both nationally and internationally. It removes the unpredictability of sport and jeopardises its very core values—its social, cultural and educational values—while at the same time undermining its economic role.

Criminal groups are profiting from the manipulation of sports competitions and unregulated gambling, which, as a relatively recent form of transnational crime, undoubtedly attracts the attention of the international community. Sports organisations are faced with an increasing number of competition manipulation incidents and allegations of corruption. The sums of money being bet on sport have increased markedly in recent years and the use of the internet has made it extremely easy to bet on sports competitions throughout the world. With large profits to be made and relatively little chance of detection, competition manipulation has become more and more attractive to criminals and organised crime groups.

In recent years, sports organisations have become more aware of this threat. International Olympic Committee (IOC) President Thomas Bach, like former President Jacques Rogge before him, identified the manipulation of sports competitions as one of the biggest challenges facing sport today, together with doping. He has underlined the need for concerted action in order to combat this global phenomenon and to protect clean athletes.

*The Olympic Movement is all about the clean athletes. They are our best ambassadors, they are our role-models, they are our treasure. Therefore we have first and foremost to protect the clean athletes. We have to protect them from doping, match-fixing, manipulation and corruption.*¹

¹ Agenda 2020 available at: www.olympic.org/Documents/Olympic_Agenda_2020/Olympic_Agenda_2020-20-20_Recommendations-ENG.pdf

Sports organisations must demonstrate leadership in protecting sport from competition manipulation. This starts at home and includes adopting organisational good governance principles emphasising transparency, accountability and responsibility relating to selection processes and tenure for senior officials, in all sponsorship arrangements and in procedures for awarding contracts of all types.

This Handbook has been prepared by the International Olympic Committee (IOC) and the International Criminal Police Organisation (INTERPOL) with whom the IOC signed an agreement in 2014. The partnership aims to support effective investigations of crimes related to sport and breaches of sports regulations and to specifically implement actions designed to Recognise, Resist and Report competition manipulation, enhance capacity at the national and international levels as well as to provide operational support to regulatory enforcement so as to effectively prevent and respond to integrity infringements.

This Handbook complements global Capacity Building and Training being undertaken by the IOC and INTERPOL that aims to assist sport in protecting clean athletes and clean competitions, particularly as they relate to competition manipulation. Tools for effective international cooperation regarding sports integrity already exist and have proven to be effective. It is now a matter of supporting their systematic use and making them a cornerstone of a common strategy. This Handbook should be read, understood and acted upon by all national and international sports governing bodies and their staff.

We must act now, and we must act fast.

Key Terms

There are a number of key terms associated with competition manipulation that are defined here for clarity in understanding and shared meaning.

Betting Monitoring Report

A detailed analysis of what happened in the betting market relating to a specific competition/match. It may be used to support/corroborate suspicions of competition manipulation. It can be used in evidence and employees from the monitoring systems may contribute to proceedings as expert witnesses.

Competition manipulation

An intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others.²

Corruption

Corruption is any course of action or failure to act by individuals or organisations, public or private, in violation of law or trust for profit or gain.³ Competition manipulation is a form of corruption. It occurs when a person offers, promises or grants an unjustified advantage to a sports organisation, a player, an official or any other third party, within or outside the organisation, on behalf of him/herself or a third party in an attempt to incite them to violate the regulations of the organisation.

² Article 3.4, Council of Europe Convention on the Manipulation of Sports Competitions.

³ INTERPOL, INTERPOL Group of Experts on Corruption, Global Standards on Anti-Corruption, 2007.

Court of Arbitration for Sport (CAS)

Is an independent institution that provides services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.

Disciplinary body

An independent deciding/judicial body provided for in a sport federation's regulations which is authorised to conduct proceedings into and sanction any breach of regulations. It comprises, in general, at least three members, including a chairperson. This body should be convened at such times as necessary, or as feasibly convenient, upon receipt of a report of potential competition manipulation.

Evidence

Evidence is information that is gathered in order to establish facts. Any type of evidence may be produced, such as but not limited to documents, reports from officials, declarations from parties, declarations from witnesses, audio and video recordings, expert opinions and all other proof that is relevant to the case.

Fact

A fact is something that actually happened and can be proven to have happened, or at least can be corroborated by other information. It is not an assumption, conjecture or innuendo. The facts are the key to determining the outcome of any case, dispute or contentious issue. They are directly linked to the specific regulation or code of conduct at issue.

Fact-finder

The individual responsible for conducting inquiries to establish the facts in relation to a suspicion or allegation of match manipulation and submitting the results in accordance with disciplinary procedure. All available evidence/information should be gathered to establish facts. Care should be taken to gather all facts relevant to the inquiry and not just facts that confirm the fact-finder's bias.⁴

Inside Information

Information relating to any competition that a person possesses by virtue of his or her position in relation to a sport or competition, excluding any information already published or common knowledge, easily accessible to interested members of the public or disclosed in accordance with the rules and regulations governing the relevant Competition.

Integrity Betting Intelligence System (IBIS)

The IOC's mechanism for the exchange of information between betting operators, regulators and the sports movement.

⁴ See further INTERPOL-IOC, 2016, Handbook on Conducting Fact-Finding Inquiries into Breaches of Sports Integrity.

Single Point of Contact (SPOC)

An individual designated by his/her sports federation/organisation to act on all matters related to competition manipulation. The primary responsibilities of a SPOC typically include:

- Establish and maintain integrity initiatives within the sports organisation;
- Receive information related to competition manipulation including from IBIS;
- Conduct inquiries as a ‘fact-finder’ or appoint a responsible individual;
- Serve as a contact person for the IOC and other entities;
- Conduct, by mandate, fact-finding inquiries for, or in close cooperation with the independent judicial body of the sports organisation;
- Liaise with relevant authorities such as police or law enforcement agencies.

Source

Any individual who provides relevant information to aid an inquiry or a criminal investigation is usually referred to as a source. In the context of a fact-finding inquiry, there are two types of source: those who are free to provide this information or not as they see fit and those who are bound by sports organisations’ codes or regulations that stipulate that they must report and/or cooperate with the inquiry.

1

Understanding Competition Manipulation

1 What is Sports Integrity?

Sport's positive contribution to society can only be achieved through sport that is with integrity and ethics. Sport that is practised with integrity is played with honesty, according to the rules and provides a safe, fair, inclusive and well governed environment. Integrity in sport leads to enhanced participation, financial viability and a successful, positive brand that is judged by the media, athletes, spectators, fans, participants and the general public.

Breaches to sports integrity include the following:

- Competition manipulation;
- Winning beyond the rules of the game;
- Doping;
- Lack of safety in sport;
- Abuse and violence;
- Inequity and harassment;
- Anti-social behaviour and attitudes by parents, spectators, coaches and players;
- Weak governance that leads to unethical behaviour such as corruption and competition manipulation;
- Unsportsmanlike conduct;
- Criminal behaviour.

Breaches to sports integrity can have far-reaching repercussions including:

- Sports disciplinary proceedings;
- Criminal proceedings;
- Reputational damage;
- Fan and sponsor loss;
- Loss of broadcaster interest.

2 What is Competition Manipulation?

The manipulation of sports competitions is defined as:

“An intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others.”⁵

In short, competition manipulation is the improper influencing of the course or result of a competition for an advantage. The term “match-fixing” is often used yet the term ‘match’ is not terminology used by all sports (e.g. marathon, cycling race, sailing regatta) and implies only that the result is fixed. The term “competition manipulation” includes influencing specific actions during the course of the competition and hence includes both ‘result fixing’ and ‘spot fixing’ which is the action or practice of dishonestly determining the outcome of a specific part of a competition before it is played. Both terms are used in this Handbook interchangeably. There are two principal types of competition manipulation:

⁵ Article 3.4, Council of Europe Convention on the Manipulation of Sports Competitions.

For sporting purposes

Where the manipulation is perpetrated to provide a sporting advantage, for example in league promotion/relegation or a perceived advantageous competition draw or any other sporting advantage;

For financial gain through betting

Where the manipulation is designed to pre-determine an event related to the competition that is expected to be offered on the betting markets (results, total goals scored etc.). This type of manipulation includes the risk of being used by professional criminals to launder money through sports bets.

As manipulation frequently takes place on the 'field of play', athletes and referees/officials are at particular risk of being approached to manipulate or to carry out the manipulation of a competition.

Non-Betting Related Factors and the Risks they Pose for Sport

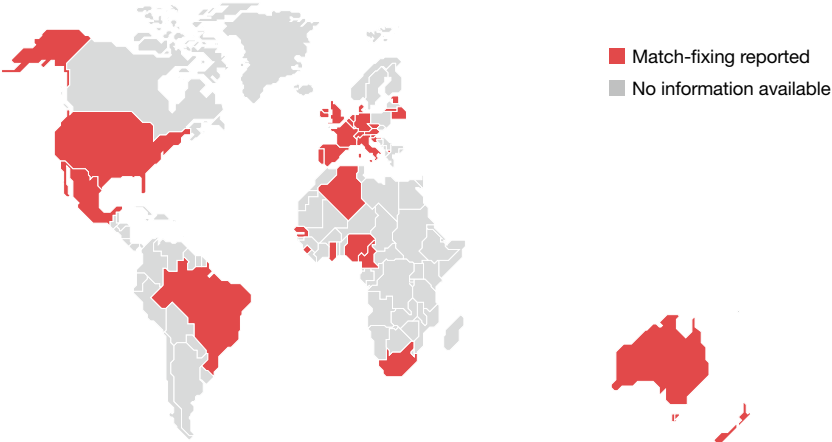
Non-Betting Related Risks	Why is it a Risk?
Competition Format	Competitions that have limited importance with regards to whether participants win or lose e.g. at the end of a championship, competition without direct elimination; 'friendly' competitions; competitions of importance for only one of the participants; competitions with weak chances of success for one of the participants. Such competitions are at greater risk of being manipulated for betting purposes due to the limited sporting advantages linked to winning.
Athletes/officials character	A lack of confidence, low self-esteem, naivety or greed may make vulnerable athletes/officials more likely to be unable to refuse a corruptor's approach (see 2.3 on page 22).
Financial insecurity including salaries not paid on time or not paid at all, very low salaries paid in some sports in lower divisions	Enhanced willingness and need to get money by any means, including immorally and illegally. Particularly low salaries can make athletes vulnerable to the temptation to manipulate. Payment of equitable salaries on time will help to minimise the risk.
Addictive actions (drugs, alcohol, prostitution, abuse, etc.)	The corruptor may threaten violence or 'blackmail' the athlete to get him to manipulate competitions.

2.1 Competition Manipulation Allegations

There is evidence of competition manipulation in many sports in recent times including badminton, basketball, cricket, cycling, football, handball, horse racing, snooker, tennis, volleyball and wrestling. All sports are vulnerable and those who take part in them – whether as players, officials, administrators or support personnel – need to be aware of the dangers of competition manipulation and encouraged to resist and report any suspicions.

In 2015, open source media reports revealed allegations of competition manipulation in 52 countries.⁶ However, the media only reports on what they are told by police, their sources or through their own investigative journalism. The risk is that where police are not present or are not aware of the problem, organised crime will continue its activities and infest sports and society.

Competition Manipulation Allegations 2015⁷



⁶ Based on English, French, Spanish and Polish speaking media sources. Source: INTERPOL, 2016.

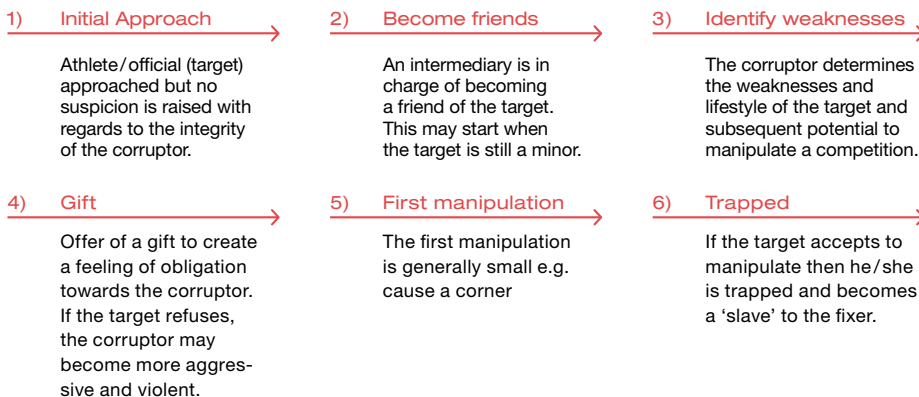
⁷ Ibid, INTERPOL, 2016.

2.2 Modus operandi in a competition manipulation case

How might a corruptor approach a target?

Corruptors tend to approach their targets either directly, through gifts, money, sexual favours; or indirectly, through family and friends. Many tricks are then used to convince the target to accept to manipulate, typically through 'grooming' of the target or using threats e.g. by exploiting some previous or a created issue, using violence or intimidation.

The 'grooming' of an athlete/official takes place over a period of time whereby typically the following steps are undertaken by a 'corruptor':



2.3 Factors that a corruptor may consider in the grooming of a sports participant

While the motivations to commit fraud and corruption are often due to financial need—perceived or real—and a personal appetite for wealth, other factors and weaknesses may include:

- Whether the salary of the athlete/official has been paid;
- Addiction (drugs, sex, alcohol);
- Excessive gambling and gambling debts;
- Bad sports results and lack of recognition and reward;
- Pressure, opportunity and rationalisation;
- Living beyond personal income and high personal debt;
- Desire for personal progression, greed, naivety of the target, unfulfilled ambition;
- Pressure from family and friends to succeed;
- ‘Fluid moral values’ and a desire to challenge and/or abuse the ‘system’.⁸

⁸ Albrecht, S.W., Howe, K.R., Rommey, M. 1984, *Deterring Fraud: The Internal Auditors’ Perspective*, Altamonte Springs, Institute of Auditors Research Foundation.

3 The Relationship between Crime and Sport

“There is growing evidence that sport is corrupted by match-fixing and illegal betting. These illegal activities jeopardise the integrity of the competitions, damage the social, educational and cultural values reflected by sports, and threaten the economic role of sports. The phenomenon of match-fixing brings to the surface its links to other criminal activities such as corruption, organised crime and money-laundering. Recent cases reveal the magnitude of the problem and indicate the dire need to address it through appropriate investigative and law enforcement tools. In fact, a criminal justice response against match-fixing would demonstrate that sporting manipulation is not a ‘simple’ breach of sporting rules, but also an offence against the public in a broader sense.”⁹

Why are criminals interested in sport?

- High profit and low risk;
- Anonymity;
- Exploitation of easy targets (naïve sports people, absence of effective sport regulations and their implementation);
- Absence of consistent legislation and powers;
- Ineffective supervision and regulation of gambling;
- Criminal organisations (CO) have become transnational (TCO);
- Limited law enforcement experience;
- Internet has no borders meaning police investigations are difficult and allows TCOs to use all the possibilities of the financial markets and tax havens.

⁹ UNODC-IOC Report, July 2013, Criminalization approaches to combat match-fixing and illegal/irregular betting: a global perspective. Comparative Study on the Applicability of Criminal Law Provisions Concerning Match-Fixing and Illegal/Irregular Betting, Lausanne/Vienna, p. 16, available at: www.unodc.org/documents/corruption/Publications/2013/Criminalization_approaches_to_combat_match-fixing.pdf

Examples of Risks of Criminal Activities in Sport

The following table identifies certain types of activities that criminals may enter into in order to capitalise on certain features of sports organisations and their stakeholders in order to benefit.

Criminal Activity	What is the Link with Sport?	How to Minimise the Risk?
Illegal betting and money laundering ¹⁰	<ul style="list-style-type: none"> – The internet has increased opportunities for sports betting and subsequently the opportunities for laundering dirty money. – To ensure they win a sports bet, organised crime approaches athletes/officials to manipulate competitions. – Athletes/officials are relatively easy to approach. – Large amounts of money are often paid across borders yet many sports organisations lack financial means which may encourage them to accept money from doubtful sources. – Players/officials may be badly advised and even susceptible to becoming engaged in doubtful financial transactions in order to preserve a certain image. 	<ul style="list-style-type: none"> – Strong sports governance and improved financial transparency; – Combat cyber-criminality; – Develop effective information sharing between organisations nationally (through national platforms) and internationally (through the IOC Integrity Betting Intelligence System [IBIS] and INTERPOL); – Consistent education and prevention programmes.
Fraud and Corruption	Fraud within sport is typically based on deception with the intention of obtaining an advantage at the expense of other individuals or organisations.	By ensuring clear regulation, jurisdiction and prosecution when the rules are broken.
Human trafficking and smuggling	Criminals lure young people to another country with promises of a better life for the victims.	<ul style="list-style-type: none"> – Regulation and monitoring of athlete transfers; – Education of children and their families of the risks.
Drug trafficking	For performance enhancing purposes and financial benefits.	Effective regulation and controls.

¹⁰ “Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources”. Source: INTERPOL, available at: www.interpol.int/fr/Crime-areas/Financial-crime/Money-laundering

Functioning of the Bochum Competition Manipulation Scandal 2009 and its links with crime

In 2009, the German police in Bochum uncovered a massive match-fixing scheme involving hundreds of fixes in football matches across numerous European countries and Canada. The following diagram outlines the various actors involved in either uncovering the scheme or the scheme itself.

German Police	<ul style="list-style-type: none"> Police in Bochum in 2009 conduct a series of 'wire taps' intending to get evidence of organised crime activities of a Croatian crime gang. The taps uncovered evidence of match-fixing in football.
Football matches in Europe and Canada	<ul style="list-style-type: none"> 380 suspected fixes in 9 European countries: Germany, Belgium, Switzerland, Turkey, Slovenia, Hungary, Croatia, Austria, Bosnia; and Canada. Around 200 people, including 32 players suspected of being involved.
Singapore China	<ul style="list-style-type: none"> Operations run out of Singapore with bribes of up to €100,000 paid per match to players, referees, coaches and other match officials in order to make millions of euros on the sports betting markets. Singapore financiers funded by Chinese organised crime groups.
Money Trail	<ul style="list-style-type: none"> The money trail relating to the fixes involved (but not necessarily limited to): Germany, Malaysia, China, Isle of Man, Singapore, Russia, Austria, Turkey, Malta, the Netherlands and Slovenia.
Croatia	<ul style="list-style-type: none"> Croatian Ante Sapina identified as 'leader of the gang'.
European police	<ul style="list-style-type: none"> 13 European law enforcement agencies conduct investigations.
INTERPOL	<ul style="list-style-type: none"> INTERPOL issue international arrest warrant for Tan Seet Eng (Dan Tan), Singaporean fixer. He is subsequently arrested and charged.
Criminal and Sports Sanctions	<ul style="list-style-type: none"> After criminal trial, prison terms were issued in 2011 for a number of those involved. Parallel to the criminal trial, the sports disciplinary bodies sanctioned those involved. The Swiss Football Association were the first federation to sanction football players including nine Swiss League players – seven professionals and two amateurs from Thun, Gossau, Fribourg and Wil – who were suspended for at least one year in May 2010.

4 Understanding Sports Betting

Competition manipulation in sport is often related to betting. The nature and scale of betting on sports competitions has changed radically in recent years with a huge expansion in the range of betting opportunities. While this is a complex area, it is important for those involved in protecting sport from competition manipulation to have a basic understanding of sports betting in order to know how to respond to the threat that it poses to sports integrity.

“Sports betting” means any wagering of a stake of monetary value in the expectation of a prize of monetary value, subject to a future and uncertain occurrence related to a sports competition. In particular:

- a. “Illegal sports betting” means any sports betting activity whose type or operator is not allowed under the applicable law of the jurisdiction where the consumer is located.
- b. “Irregular sports betting” means any sports betting activity inconsistent with usual or anticipated patterns of the market in question or related to betting on a sports competition whose course has unusual characteristics.
- c. “Suspicious sports betting” means any sports betting activity which, according to reliable and consistent evidence, appears to be linked to a manipulation of the sports competition on which it is offered.¹¹

While betting is a major contributor to sport through sponsorship and public support, problems occur when betting leads to the manipulation of competitions.

¹¹ Article 3.5, Council of Europe Convention on the Manipulation of Sports Competitions.

As a result of technological advances and particularly the emergence and growth of the online gambling market, sports betting opportunities have increased dramatically, both in terms of the number of sport events and the number of betting markets available. This diversification of the sports betting offer has caused considerable concern amongst various stakeholders. It is often argued that some of these new betting options pose inherent threats to the integrity of sports events. Today, it is possible to:

- Bet on numerous actions: such as the half-time score, number of corners, number of red cards etc.
- Bet during a competition: live or in-play betting accounts for over 60 % of the betting market.

While 20 years ago sports betting was a recreational activity, today, sports betting is used by “professionals” including traders and criminals for money laundering. Athletes and officials in certain sports are already and will further become targets of criminals in order to manipulate a competition for betting purposes. Sports betting, and notably illegal online betting websites, has dramatically increased in recent years and is used as a mechanism for profit for organised crime.

4.1 Sports Betting Markets

The opportunities for sports betting exist in various forms including online, in shops etc. Each country has its own laws in relation to how sports betting is regulated and can be generally classified into:

- Prohibition (where sports betting is prohibited).
- Monopoly (where one betting operator has an exclusive right on all sports betting).
- Licences (where licences are issued by a betting regulator).

Sports Betting Regulatory Frameworks

1) Prohibition

Examples:

- USA
(except some states)
- India
- Russia (online)

2) Monopoly

Examples:

- China
- Hungary
- Switzerland

3) Licences

Examples:

- Belgium
- Italy
- Malta
- Russia (offline)
- UK

Distinction between licensed and unlicensed or non-regulated betting operators

A licensed or registered operator does not necessarily mean that the operator is legal in other jurisdictions.

1) Licensed Betting Operator	2) Unlicensed Betting Operators	3) Non-registered Betting Operators
Operate with an authorisation in the jurisdiction of the consumer = LEGAL (approx. 200 operators)	ILLEGAL e.g. website registered in a country but not as a betting website	ILLEGAL e.g. street betting in China, US, or illegal shops in Italy
Operate without an explicit authorisation in one or many jurisdictions = MAY NOT BE LEGAL (approx. 1 000 operators)		

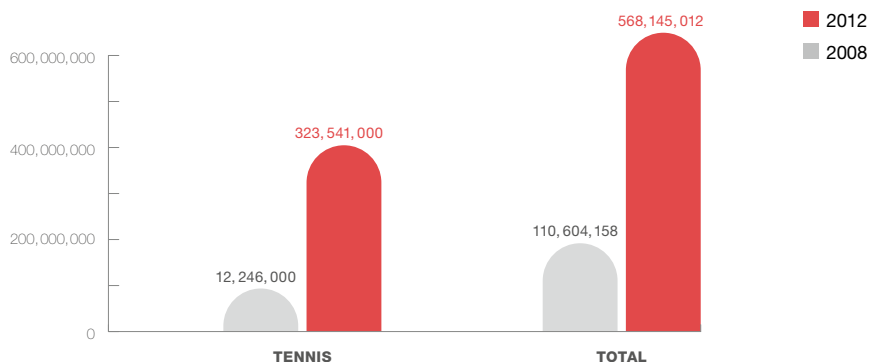
4.2 Size of the sports betting market

While it is difficult to estimate precisely the size of the sports betting market globally, the amounts bet on the legal market is in the \$billions annually. What is unknown, however, is the size of the unregulated/unlicensed/non-registered sports betting market, frequently referred to as the ‘illegal’ market. Often such betting is conducted on websites that appear for a short period prior to disappearing, or in a ‘black’ or underground market where cash changes hands meaning traceability is extremely difficult.

4.3 Size of Betting on the Olympic Games

While it is prohibited for athletes and their entourage to bet on any events during the Olympic Games, punters from around the world bet millions of dollars on the various competitions.

London Summer Olympic Games 2012 Comparison of Betting Turnover
Comparison of Turnover 2008–2012 by Betfair tennis and total (US\$)



London Summer Olympic Games 2012 Sports Betting Volumes

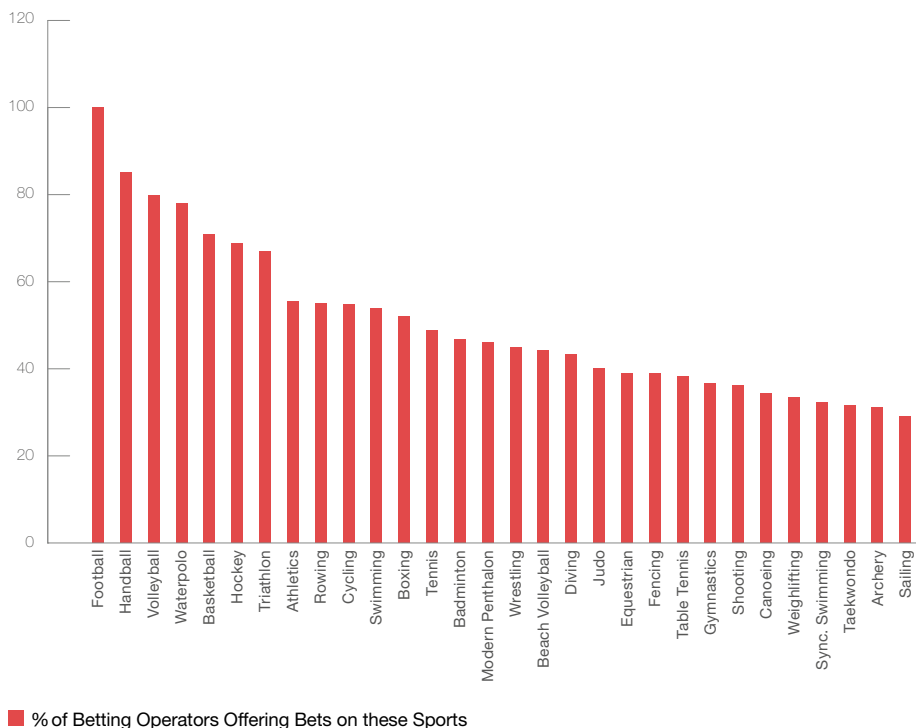
The following table illustrates the turnover at just one legal betting exchange, Betfair, the world's largest online betting exchange company, on a sample of events during the London Summer Olympic Games 2012.

Rank with regards to volumes bet	Sport, Event	Amount bet (US\$)
1	Tennis, Men's semi-final, Federer-Del Potro	30,856,095
5	Athletics, Men's 100m final	8,697,887
7	Football, Men's final, Mexico-Brazil	7,232,926
11	Basketball, Men's final, USA-Spain	3,484,248
12	Volleyball, Men's final, Russia-Brasil	3,000,821
15	Football, Women's final, USA-Japan	2,090,757
...	Average	398,947
Least	Wrestling, Women's freestyle 48 kg	161

London Summer Olympic Games 2012 Betting Offers

This table shows how many operators offered bets on a particular sport, i.e. 85 % of all betting operators monitored offered bets on Handball.

% of Betting Operators Offering Bets on a particular sport

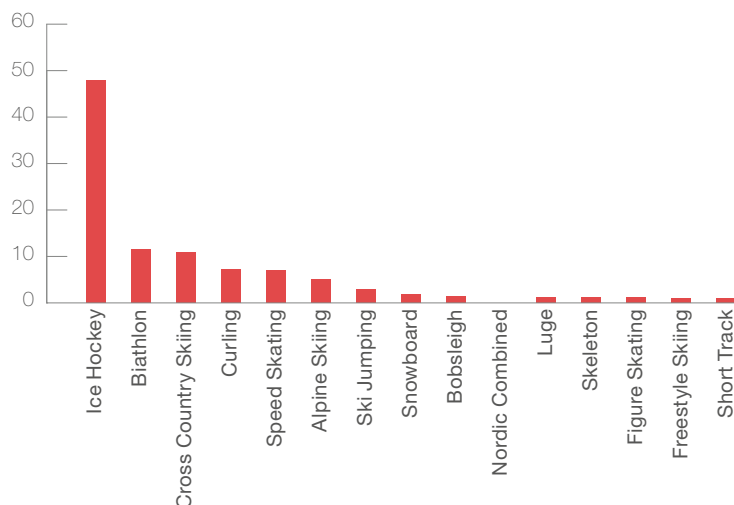


Sochi Winter Olympic Games 2014 Sports Betting Volumes

The following table illustrates the percentage of bets that were placed on different sports during the Sochi Winter Olympic Games 2014, i.e. 48.3% of all bets were placed on Ice Hockey. Outside of the Olympic Games period, there is limited betting that takes place on winter Olympic sports. Compared to the average World Cup event of the sport in question, betting on the Sochi Winter Olympic Games 2014 was larger by an approximate:

- Five times on Alpine Skiing;
- Four times on Biathlon;
- Seven times on Cross Country Skiing;
- Sixteen times on Ski Jumping;
- One and a half times on Ice Hockey.

% of bets placed on different sports during the Sochi Winter Olympic Games 2014



4.4 Types of Bets

There are two main types of sports betting:

Fixed-Odds betting

Whereby the bettor knows in advance how much they can win if their bet is correct. This type of betting accounts for approximately 90 % of the Gross Gaming Revenue (GGR)¹² of the legal sports betting market. Fixed odds betting is calculated by $\text{Winning} = \text{Stake} \times \text{Odds}$. The main countries are: United Kingdom, Hong Kong, Greece, Australia and Italy.

Pari-Mutuel Betting

Whereby the stakes are distributed equally among the winners and accounts for approximately 10 % of the Gross Gaming Revenue of the legal sports betting market. This type of betting is predominantly used in horseracing and in a limited number of countries including Japan, China, Spain, and Scandinavian countries.

However, in recent years, other variations of betting have emerged:

Betting exchanges

Whereby two people bet against each other on the internet with one playing the role of bookmaker and proposing a bet with fixed odds; the other player plays the role of punter and places a bet. The online betting operator who facilitates the exchange (e.g. Betfair, Matchbook) is paid according to the winner's earnings.

¹² Gross Gaming Revenue = total amount of money bet (Turnover) – Winnings = $\text{Turnover} \times (1 - \text{payout ratio})$.
The Payout Ratio = Winnings / Turnover.

Further types of betting include:

Asian Handicap

Gives one of the teams (by default the underdog) a virtual head start in terms of the number of goals in order to make the contest theoretically equal. The bet is settled by adding the handicap to the outcome of the match. This type of betting removes the option of a draw i.e. x in the 1 × 2 market.

Live-betting

Provides the possibility of betting in real-time during the course of a competition (also known as in-play betting or in-the-run betting). An estimated 60 % of bets placed on the legal market are live bets.

Spot or side bets

Betting on a specific aspect of a game, unrelated to the final result e.g. which player will score first, whether a penalty will be taken by a team etc.

Spread betting

Whereby the bet is placed on whether the outcome will be above or below the spread, e.g. the number of goals in a competition with pay-out based on the accuracy of the bet rather than a simple win or lose outcome. As the competition progresses and the goals increase, the prices change.

4.5 Types of Odds

Betting odds are presented globally in three different ways:¹³

Fractional Odds (or Traditional or British)

Used mainly in the UK and in international horse racing. It tells you the amount of profit relative to your stake if you win your bets, e.g. if you bet £ 10 at odds of 3/1, you receive £30 profit if you win, plus your £ 10 stake.

Decimal Odds (or European)

Common around the world but especially in Europe. They convey the total amount you will receive if you win, including the return of your stake, e.g. if you bet \$ 10 at odds of 3.75, you will receive \$37.50 in total if you win.

Moneyline Odds (or American)

Used by most US bookmakers, moneyline odds are based on a straight single bet (on a single outcome, without a points spread). If the moneyline is positive, the amount quoted is the amount you would win on a \$ 100 bet. If it is negative, the amount quoted is what you would need to bet to win \$ 100.

4.6 Betting Related Factors and Risks for Sport

A profitable competition manipulation presupposes that large bets can be placed without being detected. Criminal organisations therefore seek to exploit betting markets with high liquidity, where large profits can be made with low risks of being detected. For these reasons, some types of bets such as side bets are of limited interest to the fixers due to their relatively low liquidity.¹⁴

¹³ See also: www.oddsconverter.co.uk

¹⁴ See Asser Institute, Centre for European and International Law, January 2015, The Odds Of Match Fixing: Facts & Figures On The Integrity Risk Of Certain Sports Bets, available at: www.asser.nl/media/2422/the-odds-of-matchfixing-report2015.pdf

Betting Related Risks (1/2)

Betting Related Risks	Risk Assessment–Why is it a Risk?
Unregulated betting market	<ul style="list-style-type: none"> – Underground economy that reduces potential income for States and subsequently sports. – Increases chance of link between organised crime and sports. – Distrust in sport when a link between irregular betting market and sport becomes apparent. <p>Regulating bookmaking varies from strong to weak. Strong regulation may include:</p> <ul style="list-style-type: none"> – blocking of illegal sites, blocking of payments to those sites; – ban on advertising by companies that are not regulated in the region; – severe administrative and criminal sanctions against operators convicted of illegal betting or illegal advertising; – police action against illegal operators; – co-operation with financial institutions.
Anonymous betting with no betting limits	<ul style="list-style-type: none"> – Certain types of bookmaking where bets are collected and passed through a hierarchical structure (e.g. in Asia) allow bets to be placed anonymously with no betting limits. – Professional fixers predominantly place their bets with such bookmakers rather than with regulated bookmakers who restrict the stakes and disclose client details to law enforcement. – Minimising this risk may be undertaken by seeking to regulate operators to remove the possibility of making anonymous bets with no betting limits.

Betting Related Risks (2/2)

Betting Related Risks	Risk Assessment–Why is it a Risk?
Betting on certain types of competitions	<p>Competitions particularly vulnerable to manipulation include:</p> <ul style="list-style-type: none"> – competitions where little is at stake in sporting terms (e.g. friendly matches) and competitions in lower leagues; – amateur competitions or competitions involving minors where the players may be more vulnerable to approaches.¹⁵ <p>Many bookmakers do not offer such bets. Minimising this risk may be undertaken by raising the awareness of sports betting operators that the offering of such bets may potentially hurt sport.</p>
Betting on the final outcome of a competition, in particular, the winning margin	<p>Almost all suspicious betting activity is detected in the most popular sports betting markets:¹⁶</p> <ul style="list-style-type: none"> – Match Odds market (e.g. the traditional 1 × 2 betting formula in football); – Totals market; – Asian Handicap market: with a 50/50 chance of winning, there is an opportunity to launder money by betting on both sides. <p>In a recent study, 91 % of all suspicious betting patterns were detected in Asian Handicap betting.¹⁷</p> <p>In order to maximise profit, corruptors may attempt to ensure the manipulation of a competition that is based on a particular team losing or winning by a predefined (minimum) margin of goals. Many bookmakers limit stakes on such bets.</p>
Inside Information	<p>Corruptors may attempt to obtain ‘inside information’ from an athlete/ official as this information may subsequently be used in determining the success of a bet. The giving of inside information is prohibited by the Olympic Movement Code on the Prevention of the Manipulation of Competitions (art. 2.4).</p>

¹⁵ See Table: Non-Betting Related Factors and the Risks they Pose for Sport.

¹⁶ Ibid, Asser Institute, 2015, p. 33.

¹⁷ Ibid, Asser Institute, 2015, p. 30.

Betting Related Risks	Risk Assessment–Why is it a Risk?
Live Betting	<p>Although there is limited evidence to support the claim that live bets pose a specific or greater manipulation risk compared with pre-match betting,¹⁸ the following risk factors have been identified:</p> <ul style="list-style-type: none"> – Provides opportunities for spot-fixing as it is not necessary to lose a game; – Fixers can take advantage of the higher betting limits and variations in the odds to maximise profits; – Detection of suspicious betting patterns is more difficult compared with pre-match betting. <p>There is a particular risk of players/referees manipulating for their own benefit independently of any intervention from a criminal organisation.</p>
Side or spot bets	Apparently simple, non-dangerous plays that have no significant impact on the final result of the competition may be favourable to the fixers. ¹⁹
High rates of return e.g. close to 100 %	Greater interest for organised crime to launder money.
Sports betting havens	Attract crime and therefore require strong regulation.
Gambling related problems and addictions	Athletes and officials may be more vulnerable to approaches to manipulate a competition in order to pay off gambling debts. Early detection and treatment is required.

¹⁸ See Asser Institute, 2015, p. 32. See also, UK Gaming Commission, October 2011, “Betting integrity issues paper: inside information and fair and open betting”, para. 3.40, available at: www.gamblingcommission.gov.uk/PDF/Betting%20integrity%20issues%20paper%20-%20inside%20information%20and%20fair%20and%20open%20betting%20-%20October%202011.pdf

¹⁹ See CAS 2011/A/2364 Salman Butt v International Cricket Council, relating to spot-fixing in cricket, where the odds of the exact sequence of events was estimated to be 512,000 to 1, available at: www.tas-cas.org/fileadmin/user_upload/Award2023642020FINAL.pdf. However, the claim that side bets pose significant match fixing risks lacks empirical support; ibid, Asser Institute, 2015, p. 33.

4.7 Gathering and Exchanging Intelligence

4.7.1 Types of betting monitoring

Sports betting is monitored by various types of systems including the following:

- Betting Monitoring/Fraud Detection Companies e.g. Early Warning System (EWS), SportRadar, Sport Integrity Monitor (SportIM);
- Betting Industry Monitoring e.g. Betting Operators systems, Global Lottery Monitoring System (GLMS), European Sports Security Association (ESSA).

4.7.2 Intelligence and Information Exchange Mechanisms

Information related to competition manipulation may come from a variety of sources including:

- Betting monitoring reports that are based on the monitoring of activities on the betting market;
- Referrals, reports or inquiries from other jurisdictions including from law enforcement, other sports organisations, the IOC, media, etc;
- Physical surveillance at competition venues for suspicious behaviour;
- Sports betting information exchange systems that traditionally consist of Memorandums of Understanding between the sports organisation and betting operators e.g. IOC Integrity Betting Intelligence System (IBIS) (see next page);
- Hotlines or other reporting mechanisms.

Centralisation of the collection of information and subsequent analysis and exchange with the appropriate authorities is vital for the protection of the integrity of sport.

All sports organisations are recommended to establish a mechanism for confidential reporting of suspicious approaches or activities related to competition manipulation. The IOC has established the IOC Integrity and Compliance Hotline available at: www.olympic.org/integrityhotline both for reporting on competition manipulation and other integrity matters.

4.8 The IOC's Integrity Betting Intelligence System (IBIS)

IBIS²⁰ was created in 2013 as an intelligence sharing IT platform to collate alerts and information through its established links with Single Points of Contact (SPOCs) from all 35 International Sports Federations on the Olympic Programme and major sports betting entities—private and public operators, operators associations and regulating bodies. IBIS ensures the monitoring of all the main international competitions of all Olympic sports, one non-Olympic sport²¹ and the Olympic Games. The aims of IBIS are:

- To safeguard sports from any negative influence connected to sports betting;
- To support International Sports Federations (IFs) and organisers of multisport events in the fight for clean athletes and clean competitions, by providing them with alerts and intelligence via a centralised mechanism for the exchange of information;
- To create a framework for transparency, confidentiality and trust between all stakeholders.

IBIS is a system of reciprocal responsibilities:

- Regulators and operators undertake to pass on all alerts and relevant information on potential manipulation connected to sports betting on the events chosen run by each IF;
- The IOC undertakes to aggregate and analyse the information received before passing it on to the IFs concerned;
- During the Olympic Games, the IOC is responsible for the application of rules and sanctions;
- In between editions of the Olympic Games, the IFs are responsible for deciding, pursuant to their own rules and regulations, how to deal with the information: investigation, analysis of the sporting aspect of the competition concerned and the application or non-application of measures and/or sanctions;

²⁰ For further information, see here: www.olympic.org/Documents/Reference_documents_Factsheets/Integrity_Betting_Intelligence_System_IBIS.pdf

²¹ Fédération Internationale d'Automobile (FIA).

- The IFs undertake to convey the results of their analysis and any action taken to the IOC, who may then pass the information on to the relevant stakeholders at the origin of the alert;
- In the event that an IF suspects one of its events has been jeopardised, the IF may ask IBIS for any information on the betting market.
Contact: integrityprotection@olympic.org

4.9 Betting Monitoring Reports for the Purpose of Preventing or Detecting Competition Manipulation

Access to Betting Monitoring Reports by the sports movement requires cooperation between the sports organisation and betting operators or betting regulators. Such cooperation may be in the form of a formal collaboration or through such entities as the IOC's Integrity Betting Intelligence System (IBIS).

Betting Monitoring Reports:

- Can provide a detailed analysis of what happened in the betting market relating to a specific competition/match that triggered an 'alert' by the Monitoring System. An alert may be triggered by factors such as abnormal volumes of bets placed against the favorite or abnormal volumes of money placed. Such alerts may trigger bookmakers to either partially or completely remove the betting offer on the match in question – either pre-match or live;²²
- May be used to support/corroborate suspicions of competition manipulation;
- May be used as evidence in sports disciplinary or criminal cases;
- Employees from the monitoring systems may contribute as expert witnesses.

²² Ibid, Asser Institute, 2015, p. 28.

The detection of betting irregularities prior to or during a competition may trigger the necessity for provisional measures to enhance the security, monitoring, observation and reporting of the match. This may involve measures such as informing the players and referees and other officials that suspicious betting activities have been detected, ensuring players and officials are aware of the opportunities to report that they have been approached (e.g. through a reporting mechanism such as a hotline). In serious circumstances, the sports organisation may consider the reassignment of referees or the provisional suspension of a player or official. Each sport should have a system in place to replace referees and other officials at late notice should it become known that a referee or official may be involved in a manipulation during an upcoming competition.

A betting related alert or Betting Monitoring Report may trigger the necessity to begin a Fact-Finding Inquiry by the sports organisation or an investigation by law enforcement.²³ The following steps should be considered by a sports organisation before beginning any inquiry:

- Whether suspicious betting was found by other betting operators;
- Whether the Betting Monitoring Report refers to suspicious betting on a specific event and whether that specific event appears to be potentially manipulated on the field of play (e.g. unexplainable behaviour on the field of play);
- Whether information can be obtained regarding the person who placed the bets (the sports organisation may have jurisdiction over that individual and such betting may be against the sports regulations even if manipulation has yet to be proven).

²³ See further, INTERPOL-IOC, 2016, *Handbook on Conducting Fact-Finding Inquiries into Breaches of Sports Integrity*.

2

Applicable Sports Regulations

To ensure that sport is protected from breaches to its integrity and that the autonomy of sport is preserved, all sports organisations require regulations that clearly detail violations, disciplinary procedures and repercussions for transgressions of those regulations.

The Olympic Movement Code on the Prevention of the Manipulation of Competitions²⁴ was approved by the IOC Executive Board in December 2015.²⁵ The Code aims to harmonise sports rules in relation to competition manipulation based on minimum standards; to harmonise definitions in line with the Council of Europe Convention on the Manipulation of Sports Competitions; and to establish minimum violations and minimum standards for disciplinary procedures in order to enable mutual recognition of sanctions. Any sports organisation bound by the Olympic Charter should respect the Code including the IOC, all International Federations, National Olympic Committees and their respective members at the Continental, Regional and National level and IOC recognised organisations.

²⁴ Available at: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/olympic_movement_code_on_the_prevention_of_the_manipulation_of_competitions-2015-en.pdf. For an Explanatory Note related to the Code see: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/explanatory_note_on_code_on_the_prevention_of_the_manipulation_of_competitions_-_eng.pdf

²⁵ See: www.olympic.org/news/ioc-publishes-unprecedented-olympic-movement-code-for-preventing-competition-manipulation/247646

Model Rules have been developed to assist sports organisations in implementing the Code, either by incorporating the Code by reference, implementing regulations consistent with the Code, or implementing regulations more stringent than the Code.²⁶ The Code will be applied for the first time during the Rio Summer Olympic Games 2016.

1 Olympic Movement Code on the Prevention of the Manipulation of Competitions

Preamble

- a. Acknowledging the danger to sports integrity from the manipulation of sports competitions, all sports organisations, in particular the International Olympic Committee (IOC), all International Federations, National Olympic Committees and their respective members at the Continental, Regional and National level and IOC recognised organisations (hereinafter, 'sports Organisations'), restate their commitment to safeguarding the integrity of sport, including the protection of clean athletes and competitions as stated in Olympic Agenda 2020.
- b. Due to the complex nature of this threat, Sports Organisations recognise that they cannot tackle this threat alone, and hence cooperation with public authorities, in particular law enforcement and sports betting entities, is crucial.
- c. The purpose of this Code is to provide all Sports Organisations and their members with harmonised regulations to protect all competitions from the risk of manipulation. This Code establishes regulations that are in compliance with the Council of Europe Convention on the Manipulation of Sports Competitions,²⁷ in particular Article 7. This does not prevent Sports Organisations from having more stringent regulations in place.

²⁶ Model Rules to Assist Sports Organisations in Implementing the Olympic Movement Code on the Prevention of the Manipulation of Competitions, available at: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/model_rules_om_code_on_the_prevention_of_the_manipulation_of_competitions.pdf

²⁷ The Council of Europe Convention on the Manipulation of Sports Competitions is open for signatories from non-European states.

- d. In the framework of its jurisdiction as determined by Rule 2.8 of the Olympic Charter, the IOC establishes the present Olympic Movement Code on the Prevention of the Manipulation of Competitions, hereinafter the Code.
- e. Sports Organisations bound by the Olympic Charter and the IOC Code of Ethics declare their commitment to support the integrity of sport and fight against the manipulation of competitions by adhering to the standards set out in this Code and by requiring their members to do likewise. Sports Organisations are committed to take all appropriate steps within their powers to incorporate this Code by reference, or to implement regulations consistent with or more stringent than this Code.

Article 1 – Definitions²⁸

- 1.1** “Benefit” means the direct or indirect receipt or provision of money or the equivalent such as, but not limited to, bribes, gains, gifts and other advantages including, without limitation, winnings and/or potential winnings as a result of a wager; the foregoing shall not include official prize money, appearance fees or payments to be made under sponsorship or other contracts.
- 1.2** “Competition” means any sports competition, tournament, match or event, organised in accordance with the rules of a Sports Organisation or its affiliated organisations, or, where appropriate, in accordance with the rules of any other competent sports organisation.
- 1.3** “Inside Information” means information relating to any competition that a person possesses by virtue of his or her position in relation to a sport or competition, excluding any information already published or common knowledge, easily accessible to interested members of the public or disclosed in accordance with the rules and regulations governing the relevant Competition.
- 1.4** “Participant” means any natural or legal person belonging to one of the following categories:
- a. “Athlete” means any person or group of persons, participating in sports competitions;
 - b. “Athlete support personnel” means any coach, trainer, manager, agent, team staff, team official, medical or paramedical personnel working with or treating athletes participating in or preparing for sports competitions, and all other persons working with the athletes;

²⁸ When definitions are provided by the Council of Europe Convention on the Manipulation of Sports Competitions, such definitions are used in this Code to minimise the risk of misinterpretation.

- c. “Official” means any person who is the owner of, a shareholder in, an executive or a staff member of the entities which organise and/or promote sports competitions, as well as referees, jury members and any other accredited or engaged persons. The term also covers the executives and staff of the sports organisation, or where appropriate, other competent sports organisation or club that recognises the competition.

1.5 “Sports Betting, Bet or Betting” means any wager of a stake of monetary value in the expectation of a prize of monetary value, subject to a future and uncertain occurrence related to a sports competition.

Article 2 – Violations

The following conduct as defined in this Article constitutes a violation of this Code:

2.1 Betting

Betting in relation either:

- a. to a Competition in which the Participant is directly participating; or
- b. to the Participant’s sport; or
- c. to any event of a multisport Competition in which he/she is a participant.

2.2 Manipulation of sports competitions

An intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the sports competition with a view to obtaining an undue Benefit for oneself or for others.

2.3 Corrupt conduct

Providing, requesting, receiving, seeking, or accepting a Benefit related to the manipulation of a competition or any other form of corruption.

2.4 Inside information

1. Using Inside Information for the purposes of Betting, any form of manipulation of sports competitions or any other corrupt purposes whether by the Participant or via another person and/or entity.
2. Disclosing Inside Information to any person and/or entity, with or without Benefit, where the Participant knew or should have known that such disclosure might lead to the information being used for the purposes of Betting, any form of manipulation of competitions or any other corrupt purposes.
3. Giving and/or receiving a Benefit for the provision of Inside Information regardless of whether any Inside Information is actually provided.

2.5 Failure to report

1. Failing to report to the Sports Organisation concerned or a relevant disclosure/reporting mechanism or authority, at the first available opportunity, full details of any approaches or invitations received by the Participant to engage in conduct or incidents that could amount to a violation of this Code.
2. Failing to report to the Sports Organisation concerned or a relevant disclosure/reporting mechanism or authority, at the first available opportunity, full details of any incident, fact or matter that comes to the attention of the Participant (or of which they ought to have been reasonably aware) including approaches or invitations that have been received by another Participant to engage in conduct that could amount to a violation of this Code.

2.6 Failure to cooperate

1. Failing to cooperate with any investigation carried out by the Sports Organisation in relation to a possible breach of this Code, including, without limitation, failing to provide accurately, completely and without undue delay any information and/or documentation and/or access or assistance requested by the competent Sports Organisation as part of such investigation.
2. Obstructing or delaying any investigation that may be carried out by the Sports Organisation in relation to a possible violation of this Code, including without limitation concealing, tampering with or destroying any documentation or other information that may be relevant to the investigation.

2.7 Application of Articles 2.1 to 2.6

1. For the determination of whether a violation has been committed, the following are not relevant:
 - a. Whether or not the Participant is participating in the Competition concerned;
 - b. Whether or not the outcome of the Competition on which the Bet was made or intended to be made;
 - c. Whether or not any Benefit or other consideration was actually given or received;
 - d. The nature or outcome of the Bet;
 - e. Whether or not the Participant's effort or performance in the Competition concerned were (or could be expected to be) affected by the acts or omission in question;
 - f. Whether or not the result of the Competition concerned was (or could be expected to be) affected by the acts or omission in question;
 - g. Whether or not the manipulation included a violation of a technical rule of the respective Sports Organisation
 - h. Whether or not the competition was attended by the competent national or international representative of the Sports Organisation.

2. Any form of aid, abetment or attempt by a Participant that could culminate in a violation of this Code shall be treated as if a violation had been committed, whether or not such an act in fact resulted in a violation and/or whether that violation was committed deliberately or negligently.

Article 3 – Disciplinary Procedures

The contents of this Article are minimum standards which must be respected by all Sports Organisations.

3.1 Investigations

1. The Participant who is alleged to have committed a violation of this Code must be informed of the alleged violations that have been committed, details of the alleged acts and/or omissions, and the range of possible sanctions.
2. Upon request by the competent Sports Organisation, the concerned Participant must provide any information which the Organisation considers may be relevant to investigate the alleged violation, including records relating to the alleged violation (such as betting account numbers and information, itemised telephone bills, bank statements, internet service records, computers, hard drives and other electronic information storage devices), and/or a statement setting out the relevant facts and circumstances around the alleged violation.

3.2 Rights of the concerned person

In all procedures linked to violations of the present Code, the following rights must be respected:

1. The right to be informed of the charges; and
2. The right to a fair, timely and impartial hearing either by appearing personally in front of the competent Sports Organisation and/or submitting a defence in writing; and
3. The right to be accompanied and/or represented.

3.3 Burden and standard of proof

The Sports Organisation shall have the burden of establishing that a violation has been committed. The standard of proof in all matters under this Code shall be the balance of probabilities, a standard that implies that on the preponderance of the evidence it is more likely than not that a breach of this Code has occurred.

3.4 Confidentiality

The principle of confidentiality must be strictly respected by the Sports Organisation during all the procedure; information should only be exchanged with entities on a need to know basis. Confidentiality must also be strictly respected by any person concerned by the procedure until there is public disclosure of the case.

3.5 Anonymity of the person making a report

Anonymous reporting must be facilitated.

3.6 Appeals

1. The Sports Organisation shall have an appropriate appeal framework within their organisation or recourse to an external arbitration mechanism (such as a court of arbitration).
2. The general procedure of the appeal framework shall include provisions such as, but not limited to, the time limit for filing an appeal and the notification procedure for the appeal.

Article 4 – Provisional Measures

4.1 The Sports Organisation may impose provisional measures, including a provisional suspension, on the participant where there is a particular risk to the reputation of the sport, while ensuring respect for Articles 3.1 to 3.4 of this Code.

4.2 Where a provisional measure is imposed, this shall be taken into consideration in the determination of any sanction which may ultimately be imposed.

Article 5 – Sanctions

- 5.1** Where it is determined that a violation has been committed, the competent Sports Organisation shall impose an appropriate sanction upon the Participant from the range of permissible sanctions, which may range from a minimum of a warning to a maximum of life ban.
- 5.2** When determining the appropriate sanctions applicable, the Sports Organisation shall take into consideration all aggravating and mitigating circumstances and shall detail the effect of such circumstances on the final sanction in the written decision.
- 5.3** Substantial assistance provided by a Participant that results in the discovery or establishment of an offence by another Participant may reduce any sanction applied under this Code.

Article 6 – Mutual recognition

- 6.1** Subject to the right of appeal, any decision in compliance with this Code by a Sporting Organisations must be recognised and respected by all other Sporting Organisations.
- 6.2** All Sporting Organisations must recognise and respect the decision(s) made by any other sporting body or court of competent jurisdiction which is not a Sporting Organisation as defined under this Code.

Article 7 – Implementation

- 7.1** Pursuant to Rule 1.4 of the Olympic Charter, all Sports Organisations bound by the Olympic Charter agree to respect this Code.²⁹
- 7.2** These Sports Organisations are responsible for the implementation of the present Code within their own jurisdiction, including educational measures.
- 7.3** Any amendment to this Code must be approved by the IOC Executive Board following an appropriate consultation process and all Sports Organisations will be informed.³⁰

²⁹ This Code was approved by the IOC Executive Board on 8 December 2015.

³⁰ For all information concerning this Code, contact IOC Ethics and Compliance.

2 Jurisdiction

The global nature of sport and competition manipulation and the potential of the breach of the regulations being also a criminal matter presents a challenge in terms of areas of responsibilities, jurisdiction and coordinated fact-finding/disciplinary and criminal proceedings. Usually, the sports regulations applied to a competition are that of the federation or organisation responsible for the competition. In general terms, the jurisdiction rests with the place where the crime or breach takes place. However, competition manipulation generally involves athletes competing internationally, money flowing across borders, online websites and organised crime.

Certain principles of jurisdiction should therefore be considered when determining which sports organisation has jurisdiction including:

- whether the athlete or official competes internationally and which regulations are to apply (e.g. those of the international and/or national federation, games organising committee etc.). During the Olympic Games period, the IOC Regulations apply for wrongdoing committed during the Olympic Games period. However, once the Games are over, the regulations of the International Sports Federation or National Federation or National Olympic Committee apply which may mean an additional sanction is applied;
- whether the sports organisation has stipulated in their regulations that they remain competent to sanction players and officials who breached the regulations at the time they were officially affiliated with the sports organisation, even if they have since transferred to another jurisdiction. In most international federation's rules, specific regulations outline the requirements of mutual recognition by national federations of sanctions imposed by the international federation.

3 Coordination and cooperation between sports disciplinary and criminal investigatory proceedings

In a number of jurisdictions, competition manipulation may be considered a criminal offence either as an offence in itself or under the crimes of corruption, fraud, bribery, organised crime, money-laundering etc. (see further below under Legislation). For that reason, a sports disciplinary proceeding and criminal investigation may be happening simultaneously.

Traditionally, the principle of sports autonomy has meant that the world of sports and law enforcement have seldom cooperated. However, sport cannot deal alone with the criminal threat posed by competition manipulation and requires police support, particularly with regards to obtaining the evidence in order to sanction an individual under their jurisdiction.

Coordination between a sports fact-finding inquiry and a criminal investigation is in the interest of both law enforcement agencies and sports organisations in order to protect sport's integrity, given the significant positive impact and role of sport within society. It is also in their mutual interest to facilitate law enforcement investigations into the criminal networks behind competition manipulation to prevent further cases. As such, it is important that both the law enforcement investigation and the fact-finding inquiry by sport are coordinated to ensure that neither is negatively impacted by the activity of the other. Recognition of the distinctions between the two proceedings assists in ensuring cooperation, continued respect for the autonomy of sport and the independence of the police.

Factors that influence the level of coordination between sport and law enforcement may include:

- Potential links to organised crime networks;
- Scale of the allegations;
- Necessity of covert investigation;
- Reputational risk and potential impact of inaction;
- Long investigation process.

Coordination of this type requires a partnership approach between sports organisations and law enforcement agencies to work together to tackle competition manipulation. Both entities are in a position to contribute significantly to each other's core aims, provided that there is mutual recognition and respect. Some of the challenges to information-sharing and collaboration may include:

- Not having regulations that enable the conducting of an inquiry;
- Not having regulations that enable information/cooperation to be demanded;
- Identifying the relevant partners;
- Managing and sharing information with partners;
- Time frame for obtaining information;
- Differences in data protection issues across jurisdictions and organisations.

Distinctions between Sports Disciplinary Proceedings and Criminal Proceedings (1/3)

Sports Disciplinary Proceedings

Criminal Proceedings

Proceedings may be complementary yet decisions may differ.

Both proceedings require fair and efficient justice, carried out promptly, proportionately and in a transparent manner.

International vs. National Level

Disciplinary proceedings may be conducted at an international level by an international sports federation or multi-sport event organiser e.g. the Olympic Games or nationally by a national sports federation or organisation e.g. national championships.

Crime is always considered nationally, i.e. according to the national law. Due to the fact that competition manipulation is frequently conducted across borders, international collaboration in relation to the investigation will be required.

Definition of misconduct

Disciplinary misconduct by an athlete may not be a criminal offence. Some rules and laws will be similar and some not, e.g. the passing on of inside information is against sports rules³¹ but generally not against the law. Participating in competition manipulation may be against both the regulations and the law.

Criminal misconduct by an athlete is a disciplinary offence (in general). The focus of a criminal investigation will most often be broader than a sports disciplinary case as the primary focus should be targeting the criminals organising the manipulation and pursuing criminal networks and financial transactions.

Time and Resources

Although thorough Fact-Finding Inquiries are time and resource intensive, sports disciplinary proceedings are generally more time efficient due to the lower standard of proof required (see next page).

Criminal investigations are generally very time-consuming and resource intensive, particularly when they are transnational in nature.

³¹ See Art. 2.4 of the Olympic Movement Code on the Prevention of the Manipulation of Competitions.

Distinctions between Sports Disciplinary Proceedings and Criminal Proceedings (2/3)

Jurisdiction

Sports disciplinary law can only be applied if there is a legal relationship between the subject and the sports organisation e.g. members, persons involved in the sports organisation etc. The organisation of competition manipulation by someone outside the sports family may be against the law, but this person may not be subject to any action by the disciplinary system.

'Nulla poena sine lege' (no penalty without law) prohibits the enforcement of sanctions not explicitly provided for in texts. As such, it can be seen that there are some parts of manipulation that are wholly within sport's jurisdiction, some parts that are wholly within the law enforcement agency's jurisdiction and some parts that may be mutually of interest to both law enforcement and a fact-finding inquiry.

Sports Fact-Finding Inquiry vs. Police Investigation

Each sports organisation should establish Fact-Finding Procedures for the management of allegations or suspicions of competition manipulation including the identification of a fact-finder appointed to initiate and to undertake an inquiry on behalf of the sports organisation.³² Such an individual would have the role of:

- Conducting fact-finding inquiries into suspicions or allegations of competition manipulation;
- Establishing the facts of the said allegation or suspicion;
- Reporting the findings to a disciplinary panel.

Investigations of a breach may be conducted in conjunction with relevant competent national or international authorities (including criminal, administrative, professional and/or judicial authorities).

The sports organisation may decide to pause its own investigation pending the outcome of investigations conducted by other competent authorities.

It is recommended that Fact-Finders liaise with police to prevent the disruption of criminal investigations, while ensuring that a disciplinary proceeding is maintained.

Police Investigative Procedures should determine the procedures for investigating competition manipulation recognising that such cases are frequently complex investigations into financial fraud, money laundering, organised crime etc.

Each national police force should identify an individual or team of 'sports investigators' who will be trained to conduct such investigations.

Given that most competition manipulation cases are multi-jurisdictional, it is recommended that relevant and appropriate information is shared with the INTERPOL Match-Fixing Task Force in order to enhance greater understanding of modus operandi etc.

Police may be willing to 'second' an investigator to the sports body in order to assist in the fact-finding inquiry. This may be of particular use for those sports who do not have the capacity to investigate competition manipulation.

³² See further, the INTERPOL-IOC, 2016, Handbook on Conducting Fact-Finding Inquiries into Breaches of Sports Integrity that outlines detailed roles and responsibilities of the Fact-Finders.

Aims

A Fact-Finding Inquiry by a sports organisation aims to establish if evidence exists that a breach of the regulations has occurred.

A criminal investigation aims to establish if evidence exists that a national criminal law has been broken, where there is a realistic prospect of conviction and public interest requires a prosecution.

Evidence

All evidence may be admissible including any useful, relevant evidence and facts that have been established by any reliable means, such as betting account numbers and information, itemised telephone bills, bank statements, internet service records, computers, hard drives and other electronic information storage devices so long as they are obtained within certain parameters (e.g. respect of human dignity and safety, natural justice).

A Betting Monitoring Report can and should be used as evidence in disciplinary proceedings and monitoring system employees may be involved as expert witnesses.

Special investigative techniques may be used to obtain evidence so long as they are in accordance with national law and procedures, respect human rights and the general principle of proportionality e.g. seizing of material, electronic and covert surveillance, cameras, monitoring of bank accounts, controlled deliveries, monitoring of bank accounts and other financial investigations, fictitious business operations etc.

However, certain evidence may be non-admissible in court with protocols required to determine the parameters of admissibility.

Exchange of Information

Protocols for the Exchange of Information between sport and law enforcement should be established either formally or informally (see next page for an Example of a Protocol). Where there is a suspicion that a criminal act has taken place, or there is a perceived risk to the safety of someone as a result of a fact-finding inquiry, the sports organisation should report to the relevant national law enforcement agency. It is good practice to identify in advance the responsible agency and a single point of contact within that agency so that a cooperative, coordinated working relationship can be established.

Distinctions between Sports Disciplinary Proceedings and Criminal Proceedings (3/3)

Burden of proof

Burden of proof: should be on the sports organisation rather than the accused to prove that a violation has occurred. But some circumstances may presume there is an offence unless the accused disproves it.

Will depend on the national law.

Standard of Proof

Standard of Proof: Balance of Probabilities, a standard that implies that on the preponderance of the evidence it is more likely than not that a breach of the regulations has occurred.³³

Beyond reasonable doubt is the standard mostly used in criminal law. It is quite possible that insufficient evidence exists to prove, beyond reasonable doubt, that a criminal law was broken, particularly where the law being applied was not specifically written to target sports corruption. However, there may be sufficient evidence to allow the disciplinary body to make a determination on the balance of probabilities that a breach of the regulations occurred.

Provisional measures

Provisional measures may be necessary to preserve the reputation of a sport.

Depending on national law, an interim order may be imposed, which can be either a temporary restraining order or a temporary directive order.

Sanctions vs. Sentences

Sanctions may include a warning, fine, suspension, ban or other order. Often the sports sanction may be a more effective punishment and may act as a strong deterrent against misbehaviour.

Sentences may include a fine, community order, prison or other order.

³³ Art. 3.3 Olympic Movement Code on the Prevention of the Manipulation of Competitions.

Example of a Protocol for the Appropriate Handling of Competition Manipulation Cases by a National Sports Organisation and National Law Enforcement

<p>Sport and Police</p>	<ul style="list-style-type: none"> - Establishment of a protocol between a national sports organisation and national law enforcement that: <ul style="list-style-type: none"> · states the roles and responsibilities of sport and police in dealing with matters under concurrent jurisdiction; · determines the factors that may trigger a sports disciplinary inquiry or criminal investigation; · encourages trust and collaboration between sport and police; · facilitates prompt resolution of all cases in a consistent way; · clarifies the exchange of information between sport and police.
<p>Sports Organisation</p>	<ul style="list-style-type: none"> - Identification of integrity officer/SPOC within the sports organisation who will receive suspicious alerts from IBIS, Betting Monitoring Systems, National Platform and/or other sources; - Determine if the risk of manipulation is such that preemptive steps are to be taken and collaborate with disciplinary body in determining such steps (e.g. provisional suspension); - Determine if information may be relevant to police and if so, send information to the national police; - Commence Fact-Finding Inquiry (this may be a different individual than the organisation's SPOC). If evidence may assist the criminal procedure, consent from witnesses should be obtained at the beginning of the process in order to send witness statements and other evidence to police.
<p>National Police</p>	<ul style="list-style-type: none"> - Identification of responsible individual/s within national law enforcement with the following responsibilities: <ul style="list-style-type: none"> · Determine if information received potentially breaches law and warrants the opening of a Criminal Procedure; · Determine if information may be of interest to other national police and transfer the information either directly to the national police or through the INTERPOL National Central Bureaus (NCBs) to the INTERPOL Match-fixing Task Force; · Consult with the sports organisation to determine if it is sufficient that the matter is dealt with by the relevant sports organisation and not by police; - If there is to be a criminal investigation, consult with the sports organisation to determine whether and to what extent the sports organisation should suspend its own inquiry, if at all. Any decision to suspend a sports inquiry should be regularly reviewed in light of the progress of the criminal investigation; - Commence Criminal Investigation. If evidence may assist the sports disciplinary procedure, consent from witnesses should be obtained at the beginning of the process in order to send witness statements and other evidence to the sports organisation.
<p>INTERPOL or regional law enforcement organisations</p>	<ul style="list-style-type: none"> - During or following the investigation, information and evidence received by the sports organisation or law enforcement may be determined relevant to other jurisdictions and should be subsequently sent through the INTERPOL NCBs to the INTERPOL Match-Fixing Task Force or regional law enforcement body; - If a Regional Law Enforcement body received the information, it should determine if it falls within its mandate (e.g. if Europol receives the information, it can only act if a minimum of 2 Europol member states are concerned); - Analyses the information received to assess if touches other crime issues (e.g. money laundering); - Sends compiled Intelligence Package to concerned Member States INTERPOL NCBs.

3

Applicable State Legislation

Sports organisations need to appreciate that they, generally:

- Do not have jurisdiction over non-participants (i.e. organised crime);
- Have inadequate powers to obtain evidence;
- Have a lack of powers to enable the protection of whistle-blowers;³⁴
- Have a lack of expertise and resources to investigate competition manipulation which may link to complex investigations into corruption, fraud, bribery, organised crime, money-laundering, etc.

Therefore, it is useful to understand the international and national legislative frameworks that may provide a framework to support your organisation in its efforts to prevent competition manipulation.

³⁴ Ibid, UNODC-IOC Report, July 2013, p. 16.

1 International instruments

1.1 United Nations Convention against Corruption

The only international, legally binding instrument for tackling corruption is the United Nations Convention against Corruption (UNCAC).³⁵ It has 178 states parties (as of March 2016). Countries are required to establish criminal and other offences to cover a wide range of acts of corruption including domestic and foreign bribery, embezzlement, trading in influence and money laundering. In November 2015, the Conference of the States Parties to UNCAC adopted the following resolution:

*“Recognizes the importance of protecting integrity in sports by promoting good governance in sports and mitigating the risk of corruption that sports face globally, requests the Secretariat to continue, in cooperation with relevant international organizations, partners and donors, to develop studies, training materials, guides and tools for Governments and sports organizations to enable them to further strengthen measures in this area, and acknowledges the work that has already been done by the United Nations Office on Drugs and Crime in this regard, in particular the development of studies and guides with the International Olympic Committee.”*³⁶

1.2 United Nations Convention against Transnational Organised Crime

The United Nations Convention against Transnational Organised Crime (UNTOC)³⁷ aims to promote cross-border cooperation in tackling organised crime and has 185 parties (as of March 2016). In Article 2(a) of the Convention, an ‘organised criminal group’ is defined as:

- A group of three or more persons that was not randomly formed.
- Existing for a period of time.

³⁵ Available at: www.unodc.org/unodc/en/treaties/CAC/index.html

³⁶ www.unodc.org/documents/treaties/UNCAC/COSP/session6/DraftResolutions/V1507740e.pdf

- Acting in concert with the aim of committing at least one crime punishable by at least four years' incarceration.
- In order to obtain, directly or indirectly, a financial or other material benefit.

1.3 Council of Europe Convention on the Manipulation of Sports Competitions

The Council of Europe Convention on the Manipulation of Sports Competitions³⁷ opened for signature on the 18 September 2014 in Magglingen, Switzerland (CETS 215). The Convention aims to prevent, detect and punish the manipulation of sports competitions and is open for signature and ratification by European and non-European States.

Article 14 of the Convention calls for the creation of a national platform addressing the manipulation of sports competitions, which shall:

- Serve as an information hub, collecting and disseminating information that is relevant to the fight against manipulation of sports competitions to the relevant organisations and authorities.*
- Co-ordinate the fight against the manipulation of sports competitions.*
- Receive, centralise and analyse information on irregular and suspicious bets placed on sports competitions taking place on the territory of the Party and, where appropriate, issue alerts.*
- Transmit information on possible infringements of laws or sports regulations referred to in this Convention to public authorities or to sports organisations and / or sports betting operators.*
- Co-operate with all organisations and relevant authorities.*

³⁷ Available at: www.unodc.org/unodc/en/treaties/CTOC/index.html

³⁸ Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cd d7e>

A number of countries have subsequently created National Platforms including Norway, the first country to have ratified the Convention. The Norwegian Gaming and Foundation Authority is responsible for establishing and running the national platform with the Ministry of Culture providing the annual funding. The Platform which commenced activities in 2016 serves as an information center, collecting, analysing and disseminating information as well as making risk assessments to facilitate targeted preventive measures by sport, betting operators and public authorities in Norway.

Particular articles within the Convention of relevance for sports organisations include the following:

Article 7 – Sports organisations and competition organisers

- 1 Each Party shall encourage sports organisations and competition organisers to adopt and implement rules to combat the manipulation of sports competitions as well as principles of good governance, related, inter alia to:*
 - a. Prevention of conflicts of interest, including:*
 - Prohibiting competition stakeholders from betting on sports competitions in which they are involved.*
 - Prohibiting the misuse or dissemination of inside information.*
 - b. Compliance by sports organisations and their affiliated members with all their contractual or other obligations.*
 - c. The requirement for competition stakeholders to report immediately any suspicious activity, incident, incentive or approach which could be considered an infringement of the rules against the manipulation of sports competitions.*
- 2 Each Party shall encourage sports organisations to adopt and implement the appropriate measures in order to ensure:*
 - a. Enhanced and effective monitoring of the course of sports competitions exposed to the risks of manipulation;*
 - b. Arrangements to report without delay instances of suspicious activity linked to the manipulation of sports competitions to the relevant public authorities or national platform;*

- c. Effective mechanisms to facilitate the disclosure of any information concerning potential or actual cases of manipulation of sports competitions, including adequate protection for whistle blowers;*
- d. Awareness among competition stakeholders including young athletes of the risk of manipulation of sports competitions and the efforts to combat it, through education, training and the dissemination of information;*
- e. The appointment of relevant officials for a sports competition, in particular judges and referees, at the latest possible stage.*

3 *Each Party shall encourage its sports organisations, and through them the international sports organisations to apply specific, effective, proportionate and dissuasive disciplinary sanctions and measures to infringements of their internal rules against the manipulation of sports competitions, in particular those referred to in paragraph 1 of this article, as well as to ensure mutual recognition and enforcement of sanctions imposed by other sports organisations, notably in other countries.*

4 *Disciplinary liability established by sports organisations shall not exclude any criminal, civil or administrative liability.*

2 European Instruments

2.1 European Union

The Lisbon Treaty or the Treaty on the Functioning of the European Union (TFEU) was signed by 27 EU Member States on 13 December 2007 and provides in Article 165:

The Union shall contribute to the promotion of European sporting issues, while taking account of the specificity of sports. Union acts shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

This article effectively enables the EU to tackle competition manipulation as a core activity of its competence in the sports field.

2.2 European Council Framework Decisions

Council Framework Decision 2003/568/JHA³⁹ on combating corruption in the private sector of 22 July 2003 aims to criminalise both active and passive bribery and establishes detailed rules on the liability of legal persons and deterrent sanctions. Under this law, Member States are required to penalise certain acts which are intentionally carried out in the framework of business activities. Another relevant instrument is the Council Framework Decision intending to fight organised crime 2008/841/JHA of 2008⁴⁰ and Directive 2005/60/EC⁴¹ of the European Parliament and Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, which was established 26 October 2005.

3 National Legislation

“A large number of substantial loopholes in the offences established in the legislation of many countries seriously hamper the efforts of law enforcement agencies and judicial authorities to combat match-fixing at the national, and even more so, at the international level.”⁴²

In recent years, numerous countries have made competition manipulation a separate criminal offence rather than relying on existing general provisions incriminating fraud, bribery, cheating, corruption or deception. Separate offences have been created either within the

³⁹ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AI33308>

⁴⁰ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0841>

⁴¹ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF>

⁴² *ibid*, UNODC-IOC Report, July 2013, p. 14.

general criminal codes or acts e.g. in Australia, Bulgaria, France, New Zealand, Spain and Ukraine, or within the country's law on sports or gambling e.g. in Argentina, Brasil, China, Italy, Greece, Korea, Malta, Poland, Portugal, Russia, Switzerland and the UK.

The IOC, in collaboration with the UN Office on Drugs and Crime (UNODC) is currently developing Model Criminal Law Provisions on the Prevention of the Manipulation of Sports Competitions for all member states that have yet to have adopted specific legislation.

4 Data Protection Laws

National data protection laws may be cited in order not to exchange relevant information or intelligence in relation to competition manipulation, and will determine the capacity to access key evidence such as telephone and betting records. However, as stated in article 43 of UNCAC:

*States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.*⁴³

In essence, data protection laws aim to safeguard our privacy yet they should not be used to protect 'persons of interest' from being investigated in a competition manipulation case. Nor should they be used to hinder countries or sports exchanging information, particularly when it is in the public's interest to collect and deal with such data.

⁴³ See also UNCAC art. 48.1.(a) "To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities."

4

Prevention, Capacity Building and Training

1 Integrity Officer/Unit

All sports organisations are encouraged to appoint an Integrity Officer (Single Point of Contact) or Unit with the following roles and responsibilities:

- To ensure regulations are in line with the Olympic Movement Code on the Prevention of the Manipulation of Competitions;
- To coordinate intelligence in relation to competition manipulation and to convey alerts through the National Platform at the national level or the IOC Integrity Betting Intelligence System (IBIS) at the international level;
- To ensure ‘fact-finders’ are appointed and trained to be able to undertake fact-finding inquiries into competition manipulation;
- To ensure the development and implementation of a strategy to prevent competition manipulation including, for example, educational programmes designed to assist those involved in sport and sports organisations to recognise, resist and report suspicions of competition manipulation.

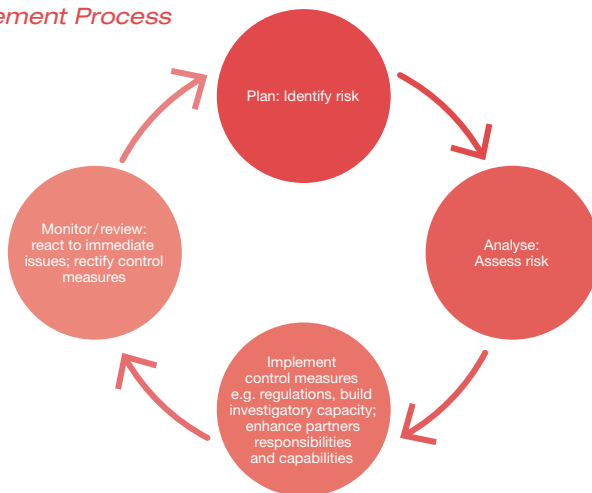
2 Risk Assessments for Sport

Risk assessments are used to identify areas of vulnerability and to design counter measures to minimise the risks. It is recommended that risk assessments are undertaken regularly, at least annually and also for specific high profile events in respect of the threat to your sport from competition manipulation. Risk assessments are also vital when dealing with an allegation of competition manipulation.

By undertaking a risk assessment for your sport, you are assessing the possibility that the outcome of a game or competition, or particular aspects of that game or competition, will be manipulated for betting purposes and financial advantage.

In order to manage risk, the risk management process should be identified in advance: What could potentially happen? What can be done to prevent it happening? If it cannot be prevented, then preparation should be made in anticipation of such eventualities. The following model can be of use in managing risk.

Risk Management Process



A Risk Assessment may take into account a number of factors including identifying and assessing the risks related to the:

- Vulnerability of the sport to manipulation for betting purposes: this assessment may include whether particular competitions are offered on the betting market.
- Vulnerability to manipulation for sporting purposes: this assessment may include whether the competition is ‘high-risk’ for sporting manipulation such as being at the end of the season in which one team has no vested interest in winning or losing as they have already qualified yet their opponents require points and a result to qualify for the next round.
- Affiliation to a betting monitoring system: All Olympic sports federations are affiliated to the IOC’s Integrity Betting Intelligence System. This enables the exchange of information related to suspicious activities within the system. All national federation SPOCs are encouraged to establish contact with their international federation SPOC to ensure exchange of information in relation to matters within the national jurisdiction as well as case/s, judicial actions or other intelligence on a regular basis.
- Fragility of sports organisations that may mean that risky decisions are made such as accepting money from uncertain origins; integrating into the management individuals who use the sport to engage in dubious activities not paying wages or late payment of wages leading to a greater risk that athletes and officials would be tempted to manipulate.

The implementation of control measures may include the following:

- Establishment of a designated Integrity Officer or Unit;
- Regulations that are in compliance with the Olympic Movement Code on the Prevention of the Manipulation of Competitions;
- An educational programme on integrity risks that reaches all levels of your organisation from grassroots to the elite level and harnesses the use of former athletes and officials to assist in the delivery of the educational programme.

3 Media Strategy

The establishment of a media strategy in relation to competition manipulation will enable your sports organisation to tackle any crisis in advance and to deal with the media's request for information. Frequently, allegations of manipulation are revealed by the media meaning that any media strategy should outline the sports organisation's role, response, actions and stance regarding allegations of competition manipulation. Any media strategy should be drafted with your organisation's media/communication department to ensure smooth planning, coordination and constant communication between the SPOC and management. This will ensure that the sports organisation can control the information and highlight the proactive nature of the sports organisation in dealing with competition manipulation.

Experience has shown that it is never an advantage for an inquiry/investigation to release information to the media prior to its conclusion. For this reason, a media strategy should be in place before an inquiry commences. This strategy should identify who will speak to the media in any given situation and identify the risks of disclosing information that may compromise the integrity of the inquiry or any criminal investigation that may ensue.

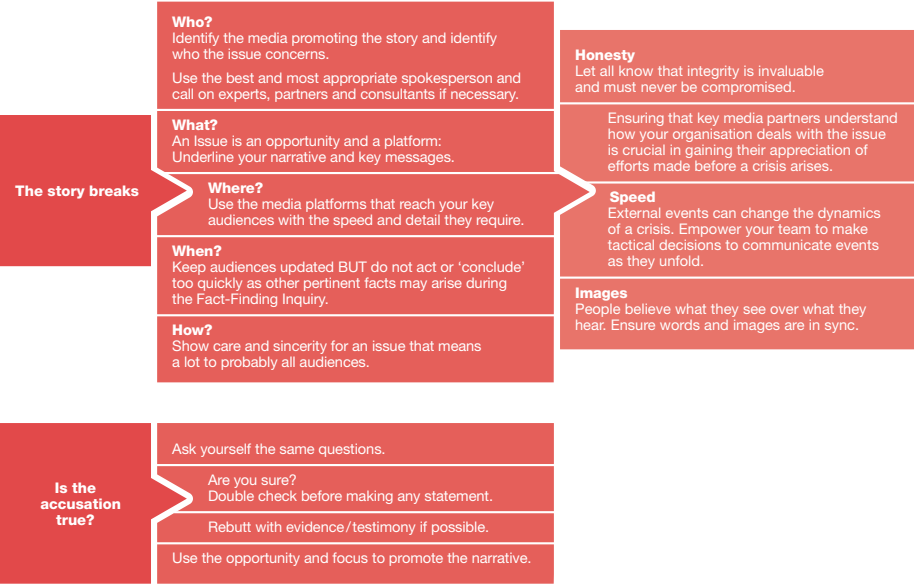
If an Integrity in Sport National Platform exists in your country, then ideally a media strategy is determined that all stakeholders within the Platform agree with. This will enable harmonised messaging with regards to how all stakeholders are dealing with the issue.

Any media strategy should take into consideration the following points:

- Manage your contacts with the media by proactively establishing a relationship with respected media in order to regularly brief them about integrity measures that your organisation is taking;
- Determine how to deal with the media when a fact-finding inquiry related to the manipulation of sports competition has been opened, or when rumours of a manipulation have been made public;
- Determine how to set up a crisis management procedure when a criminal procedure related to the manipulation of a sports competition has been launched, or when rumours related to a possible manipulation have been made public;
- Ensure that any media strategy or incident management procedure that is put in place is respected during any incident.

Crisis Communication

The following decision tree outlines the principle considerations to be made before deciding on a particular path following the breaking of a story.



In order to move on from the story or issue, ensure that you evaluate how you dealt with the story to see what could be done better next time. Willingness to evolve and to express publicly what will be done differently in the future will be appreciated by your audience. Ensure your Crisis Communication strategy is kept regularly updated.

4 Developing a Prevention Strategy

A holistic prevention strategy is recommended in relation to dealing with competition manipulation. Such a strategy requires:

- Strong regulatory framework (e.g. implementation of the Olympic Movement Code on the Prevention of the Manipulation of Competitions, provisions in athletes contracts and competition participatory forms related to respect of the rules e.g. Olympic Games Conditions of Participation Form);
- Effective educational programmes;
- Monitoring and information exchange mechanisms, reporting mechanisms, investigatory (fact-finding) capacity.

5 Educational Programmes

All sports organisations, nationally and internationally, are encouraged to develop and implement awareness raising and educational programmes related to combating competition manipulation. Given the numbers of athletes and officials that require training, a cascading of programmes is recommended through Train the Trainer programmes, e-learning complemented by Workshops, and potential synergies with other programmes such as those on doping. It is essential that the messages are unambiguous, consistent and clear. Generally the training programmes need to explain what competition manipulation is, how it works, how it can affect the individual, how you may be approached, the consequences of becoming involved in any way and a requirement to report, and to whom. The most common summary of this is to 'Recognise, Resist and Report'. There are a range of training programmes already in existence within various sports which may prove useful starting points.

6 INTERPOL-IOC Capacity Building and Training

INTERPOL and the IOC adopt a holistic approach to the protection of the integrity of sport as this is essential for both the prevention and investigation of competition manipulation nationally and internationally. INTERPOL and the IOC works in partnership with national and international stakeholders in law enforcement, government, sports governing bodies and betting operators and regulators to implement the strategy through the conduct and dissemination of analytical research to identify trends, modus operandi, legal requirements, good practice and other relevant information, as well as capacity building and training. The IOC and INTERPOL jointly conduct the following Capacity Building and Training:

6.1 Integrity in Sport Multi-Stakeholder Workshops

Aim: To develop knowledge and understanding of the global threat from competition manipulation and irregular/illegal betting; to identify current good practice and ways to prevent competition manipulation and corruption in sport; to encourage global, regional and national bodies with a role to play in promoting integrity in sport to work together more effectively in partnership, regularly sharing information and to take action to prevent competition manipulation.

Format: 1 day Workshop, approx. 80 people.

Example: Lima, Peru, 16 October 2015.

6.2 Integrity in Sport National Partnership Development Meetings (PDMs)

Aim: To bring together high level representatives from the Government, Betting Regulators and Operators, police, public prosecutors and the National Olympic Committees/National Federations in order to assist in the development of a coordinated national approach that protects the integrity of sport and enables the national, regional and international cooperation required for the prevention and investigation of competition manipulation. This includes identification of the legislative/regulatory status and elaboration of an appropriate framework for collaboration, education and exchange of information between all stakeholders.

Format: 1 day Meeting, approx. 20 people.

Example: Oslo, Norway, 16 June 2015.

6.3 Integrity in Sport Train the Trainers Workshops

Aim: To train sports coaches and educators to be able to deliver an Integrity in Sport Training Session for athletes and officials in order to multiply knowledge and understanding about the threat of competition manipulation within a particular sport or country and by providing training materials that reflect the latest trends and modus operandi of criminals.

Format: 1 day, approx. 40 people.

Example: Winnipeg, Canada, 11 November 2015.

6.4 Integrity in Sport Fact-Finders and Law Enforcement Investigators Trainings

Sport Fact-Finders Aim:

To prepare and train persons within a sports organisation tasked with conducting a Fact-Finding Inquiry in relation to a suspicion or allegation of competition manipulation to compile an inquiry file report and submit the results in accordance with the sports disciplinary procedure. Basic investigatory requirements such as interview skills, file reports etc. are developed. To establish the parameters for exchange of information between sport and police.

Format: 3 days, max. 12 fact-finders.

Example: Arnhem, Netherlands, 16-18 September, 2015.

Law Enforcement Sport Investigators Aim:

To train law enforcement officials and prosecutors to investigate competition manipulation with a specific focus on transnational investigations, evidence evaluation and coordination with sports organisations. To establish the parameters for exchange of information between sport and police.

Format: 2 day, max. 12 police investigators.

Example: Singapore, 27-28 August, 2015.

7 INTERPOL Major Event Support Team (IMEST)

An INTERPOL Major Event Support Team (IMEST) is deployed to assist member countries in the preparation, coordination and implementation of security arrangements for major sporting events.

IMEST team members assist the national and foreign liaison officers of participating countries in making the most efficient use of INTERPOL's full array of databases. They facilitate real-time exchange of messages and vital police data among all member countries. This data includes fingerprints, photos, wanted person notices, and data relating to stolen and lost travel documents and stolen motor vehicles.

An IMEST can be tailored to a member country's needs prior to and during an event and brings all of INTERPOL services to focus on the upcoming event. The global police communications network, known as I-24/7, can be enhanced and used for immediate outreach to the worldwide law enforcement community, should the need arise.

8 INTERPOL Match-fixing Task Force

The INTERPOL Match-Fixing Task Force is composed of a specialist network of police investigators from 74 Member countries (as of September 2015). It enables member countries to better exchange information, intelligence and experience and to develop cross-border strategies against international competition manipulation.

The Task-Force is supported by INTERPOL's Anti-Corruption and Financial Crimes Sub-directorate, benefiting from its experience on anti-corruption, notably its Global Focal Point Initiative on Anti-Corruption and Asset Recovery.

9 IOC strategy and TOOLS

The IOC philosophy of protecting clean athletes and sports integrity was reaffirmed in December 2014 upon the adoption of Olympic Agenda 2020,⁴⁴ the IOC's strategic roadmap for the future of the Olympic Movement. Under the IOC Ethics and Compliance Office, key initiatives related to preventing competition manipulation and related corruption have been developed and implemented in order to:

- a. Improve governance through sport regulations and state legislation;
- b. Raise awareness, build capacity and undertake training;
- c. Ensure information exchange, investigation and prosecution capacities.

The strategy is global and holistic in order to cascade rules, education, capacity building and the sharing of information from the international level to local club level.

⁴⁴ See further here: www.olympic.org/olympic-agenda-2020

IOC Integrity Initiatives Overview



9.1 Improve governance through sport regulations and state legislation

The IOC encourages and supports the development of sporting regulations that protect the integrity of sport, prevent competition manipulation and empower effective regulatory enforcement, particularly as a risk prevention measure in the organisation of sporting competitions. In December 2015, the IOC Executive Board approved the Olympic Movement Code on the Prevention of the Manipulation of Competitions (see Chapter 2: Applicable Sports Regulations). The IOC took the lead on preparing such a Code following the International Forum for Sports Integrity in April 2015 during which the Olympic Movement was called upon to develop global standards regarding the manipulation of competitions and related corruption in compliance with the Council of Europe Convention on the Manipulation of Sports Competitions (see Chapter 3: Applicable State Legislation). It also coincided with the IOC's renewed commitment to protect clean athletes and the integrity of sport as outlined in Olympic Agenda 2020.

In 2015, the IOC and the UN Office on Drugs and Crime (UNODC) commenced a joint study that will be released in 2016 to research over 50 countries legislative frameworks in dealing with competition manipulation, to determine best practices and subsequently develop Model Criminal Law Provisions to fight the Manipulation of Competitions. This Study follows on from the UNODC-IOC Study "Criminalization approaches to combat match-fixing and illegal/irregular betting: a global perspective"⁴⁵ that compiled criminal law provisions on match-fixing and illegal betting from existing legislation in UNODC Member States and identified discrepancies and similarities in legislative approaches.

Since 2006, the IOC Code of Ethics⁴⁶ has forbidden all participants at the Olympic Games from betting on Olympic events. For each edition of the Olympic Games, and also for the Youth Olympic Games, specific rules are published.⁴⁷

⁴⁵ Ibid, UNODC-IOC, July 2013.

⁴⁶ Available at: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/2016_ioc_code_of_ethics-book-en.pdf

⁴⁷ The Rio de Janeiro Summer Olympic Games 2016 Rules, available here: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/rio2016_rules_on_the_prevention_of_manipulation-en.pdf

9.2 Raise awareness, build capacity and undertake training

- The IOC organises regularly the International Forum for Sports Integrity (IFSI) as a global forum for governments, international organisations, betting operators and the sports movement.
- With the support of INTERPOL, the IOC builds capacity, trains and assists sports organisations, national law enforcement and other stakeholders through workshops and tailored training material to effectively respond to integrity threats.
- An Integrity e-learning programme for Olympic athletes and officials is presently being developed and will be launched in 2016.
- The IOC promotes and continues to develop stakeholder-appropriate risk prevention tools including:
 - PlayFair Integrity Booth for use during Olympic Games, Youth Olympic Games and other multi-sports events, which includes a workshop, game⁴⁸ and quiz.⁴⁹
 - PlayFair Code of Conduct “Protect your sport” available in 10 languages.⁵⁰

⁴⁸ Available at: <http://assets.olympic.org/playfair/>

⁴⁹ Available at: <http://assets.olympic.org/quizbetting/>

⁵⁰ See further: www.olympic.org/ethics-commission?tab=betting#education

PlayFair Code of Conduct “Protect your sport” available in 10 languages.



9.3 Ensure information exchange and investigative capacities

- The IOC’s Integrity Betting Intelligence System (IBIS) enables information exchange between law enforcement, sports organisations and betting operators/regulators (see above Chapter 1, 4.8).⁵¹
- The IOC, in partnership with INTERPOL, is developing fact-finding and investigative processes and capacities within and across sports to enable sports to conduct disciplinary proceedings and for law enforcement authorities to conduct criminal proceedings in relation to competition manipulation;
- A framework for reporting of integrity breaches has been established following the creation of the IOC’s Integrity and Compliance Hotline, available at: www.olympic.org/integrityhotline. The Hotline can be used to:
 - Report suspicious approaches or activities related to competition manipulation or;
 - Infringements of the IOC Code of Ethics or other matters including financial misconduct or other legal, regulatory and ethical breaches over which the IOC has jurisdiction.

⁵¹ For further information, see here: www.olympic.org/Documents/Reference_documents_Factsheets/Integrity_Betting_Intelligence_System_IBIS.pdf

5

Case Studies

This section aims to provide sports organisations with examples of competition manipulation within various sports:

Badminton

When: London Summer Olympic Games 2012

What: Women's double's competition. All four pairs were accused of deliberately attempting to lose group games in an attempt to manipulate the draw for the knockout stage.

Sanction: Disqualification from the Olympic Games for “not using one's best efforts to win”.

Baseball

When: 1919

What: Black Sox Scandal. 1919 Baseball World Series, the Chicago White Sox were bought out and allowed the Cincinnati Reds the opportunity to win the finals. The White Sox subsequently became the ‘Black Sox’. It has been suggested that low wages and the reserve clause was partly responsible for players involvement in the Black Sox scandal. The reserve clause meant complete control over players' salaries.

Sanction: Eight players banned from playing professional baseball for life.

Basketball

- When:** 2005-2007 NBA seasons.
- Who:** Tim Donaghy, former US National Basketball Association (NBA) referee.
- What:** Investigation by the Federal Bureau of Investigation (FBI) found that Tim Donaghy bet on games that he officiated in order to control the point spread in those games. It was also found he had a gambling problem and disclosed inside information to individuals who placed the bets.
- Sanction:** Pleaded guilty to conspiracy to engage in wire fraud and transmitting betting information through interstate commerce. Sentenced to 15 months in US federal prison, fined \$500,000. Banned and disowned by the NBA and fellow referees.

Football

- When:** 2003-2004
- Who:** German second division referee Robert Hoyzer
- What:** Robert Hoyzer confessed to fixing and betting on matches in the 2nd Bundesliga, the German Football Federation (DFB) Pokal (German Cup) and the third division Regionalliga. It was found he acted on behalf of three Croatian brothers (Ante, Milan and Filip Sapina) who paid him to fix matches as part of a €2 million match-fixing scandal.
- Sanctions:** Hoyzer banned for life from football and received a 29 month prison sentence. He was released in July 2008 after serving half of his sentence and sued for €1.8 million. In an out-of-court settlement Hoyzer agreed to pay the DFB a monthly sum of €700 for 15 years as damages to the DFB as well as to a club knocked out of the domestic cup competition because of his match-fixing. Referee Dominik Marks was banned for life and received an 18-month sentence for his involvement. Ante Sapina convicted of fraud and sentenced to 35 months prison for fixing or attempting to fix games. His brothers, Milan and Filip were given suspended sentences.

Handball

When: May 2012

Who: Montpellier Handball team, France

What: Eight players bet on their own team losing at half time. French betting operator Française des Jeux noticed irregular betting patterns on the game when the game attracted bets of €103,000 for a sport that usually attracts just a few thousands euros. They immediately stopped accepting bets and alerted the authorities. Suspicions were raised as players did not bet themselves but members of their entourage did.

Sanctions: 6 game ban by French Handball league. 16 people, including seven players, were indicted, none were given jail time. French player, Nikola Karabatic found guilty and fined €10,000. Other players were fined between €1,500 and 30,000 euros. Players will pay compensation to La Française des jeux.

Sailing

When: 2012 IOC Ethics Commission decision

Who: Peter O'Leary, Irish sailor

What: Peter O'Leary placed two bets worth a total of €300 on British pair Iain Percy and Andrew Simpson to win in the same Star class event at odds of 12-1, the same event that he was competing in at the Beijing Olympics in 2008. He won €3,600.

Sanction: IOC Ethics Commission issued a warning to the athlete.⁵²

⁵² IOC Ethics Commission decision, available at: www.olympic.org/Documents/Commissions_PDFfiles/Ethics/2012-11-26-final-decision--P-OLeary-Eng.pdf

Tennis

- Who:** Daniel Koellerer, Austrian, former professional tennis player
- When:** October 2009 and July 2010.
- What:** David Koellerer used his personal website to facilitate betting on matches, was found guilty of “soliciting or facilitating a player not to use his or her best efforts in an event” and “soliciting, offering or providing money, benefit or consideration to any other covered person with the intention of negatively influencing a player’s best efforts in any event”.
- Sanction:** Tennis Integrity Unit (TIU) issued a life ban from tennis in May 2011 and fined him \$100,000 for betting-related corruption.⁵³ After appeal to CAS, the permanent suspension was upheld but the fine was withdrawn as he had not benefited financially from any of the charges for which he had been found liable.

⁵³ www.tennisintegrityunit.com/downloads/20110531155213-tiu-statement-re-daniel-koellerer-31-may-2011.pdf

S 17-D ADDABBO Same as [A 6113-C](#) Pretlow
ON FILE: 06/14/19 Racing, Pari-Mutuel Wagering and
Breeding Law
TITLE....Relates to the regulation of sports betting and
mobile sports wagering
01/09/19 REFERRED TO RACING, GAMING AND
WAGERING
05/02/19 AMEND AND RECOMMIT TO RACING,
GAMING AND WAGERING
05/02/19 PRINT NUMBER 17A
05/13/19 REPORTED AND COMMITTED TO
FINANCE
06/05/19 AMEND AND RECOMMIT TO FINANCE
06/05/19 PRINT NUMBER 17B
06/11/19 AMEND AND RECOMMIT TO FINANCE
06/11/19 PRINT NUMBER 17C
06/14/19 AMEND AND RECOMMIT TO FINANCE
06/14/19 PRINT NUMBER 17D
06/17/19 COMMITTEE DISCHARGED AND
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06/17/19 ORDERED TO THIRD READING
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06/17/19 PASSED SENATE
06/17/19 DELIVERED TO ASSEMBLY
06/17/19 referred to codes

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ADDABBO
Racing, Pari-Mutuel Wagering and Breeding
Law
TITLE....Relates to the regulation of sports
betting and mobile sports wagering
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wagering
05/02/19print number 6113a
05/29/19reported referred to codes
06/06/19amend and recommit to codes
06/06/19print number 6113b
06/17/19amend and recommit to codes
06/17/19print number 6113c

STATE OF NEW YORK

17--D

2019-2020 Regular Sessions

IN SENATE

(Prefiled)

January 9, 2019

Introduced by Sens. ADDABBO, CARLUCCI, FUNKE, RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and **Wagering** -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the racing, pari-mutuel **wagering** and breeding law, in relation to regulation of **sports** betting

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Section 1367 of the racing, pari-mutuel **wagering** and breed-
- 2 ing law, as added by chapter 174 of the laws of 2013, is amended to read
- 3 as follows:
- 4 § 1367. **Sports wagering.** 1. As used in this section:
- 5 (a) "Affiliate" means any off-track betting corporation, franchised
- 6 corporation, or race track licensed pursuant to this chapter, an opera-
- 7 tor of video lottery gaming at Aqueduct licensed pursuant to section
- 8 sixteen hundred seventeen-a of the tax law, which has an affiliate
- 9 agreement with a casino pursuant to section thirteen hundred sixty-sev-
- 10 en-a of this title. Any professional **sports** stadium or arena may serve
- 11 as an affiliate;
- 12 (b) "Agent" means an entity that is party to a contract with a casino
- 13 authorized to operate a **sports** pool and is approved by the commission to
- 14 operate a **sports** pool on behalf of such casino;
- 15 (c) "Authorized **sports** bettor" means an individual who is physically
- 16 present in this state when placing a **sports** wager, who is not a prohib-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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S. 17--D

2

1 ited sports bettor, that participates in sports wagering offered by a
2 casino. All sports wagers placed in accordance with this section are
3 considered placed or otherwise made when received by the operator at the
4 licensed gaming facility, regardless of the authorized sports bettor's
5 physical location at the time the sports wager is initiated. The inter-
6 mediate routing of electronic data in connection with mobile sports
7 wagering shall not determine the location or locations in which a wager
8 is initiated, received or otherwise made;

9 (d) "Brand" means the name and logo on the interface of a mobile
10 application or internet website accessed via a mobile device or computer
11 which authorized sports bettors use to access a sports betting platform;

12 (e) "Casino" means a licensed gaming facility at which gambling is
13 conducted pursuant to the provisions of this article;

14 ~~[(b)]~~ (f) "Commission" means the commission established pursuant to
15 section one hundred two of this chapter;

16 ~~[(e)]~~ (g) "Collegiate sport or athletic event" means a sport or
17 athletic event offered or sponsored by or played in connection with a
18 public or private institution that offers educational services beyond
19 the secondary level;

20 ~~[(d)]~~ (h) "Covered persons" includes: athletes; players; umpires;
21 referees; officials; personnel associated with players, clubs, teams,
22 leagues, and athletic associations; medical professionals, including
23 athletic trainers who provide services to athletes and players; and the
24 family members and associates of these persons where required to serve
25 the purposes of this title;

26 (i) "Exchange wagering" means a form of wagering in which an author-
27 ized sports bettor, on the one hand, and one or more authorized sports
28 bettors, a casino or an agent or an operator, on the other hand place
29 identically opposing sports wagers on an exchange operated by a casino
30 or an agent or an operator;

31 (j) "Global risk management" means the direction, management, consul-
32 tation and/or instruction for purposes of managing risks associated with
33 sports wagering conducted pursuant to this section and includes the
34 setting and adjustment of betting lines, point spreads, or odds and
35 whether to place layoff bets as permitted by this section;

36 (k) "High school sport or athletic event" means a sport or athletic
37 event offered or sponsored by or played in connection with a public or
38 private institution that offers education services at the secondary
39 level;

40 (l) "Horse racing event" means any sport or athletic event conducted
41 in New York state subject to the provisions of articles two, three,
42 four, five, six, nine, ten and eleven of this chapter, or any sport or
43 athletic event conducted outside of New York state, which if conducted
44 in New York state would be subject to the provisions of this chapter;

45 (m) "In-play sports wager" means a sports wager placed on a sports
46 event after the sports event has begun and before it ends;

47 (n) "Layoff bet" means a sports wager placed by a casino sports pool
48 with another casino sports pool;

49 (o) "Minor" means any person under the age of twenty-one years;

50 (p) "Mobile sports wagering platform" or "platform" means the combina-
51 tion of hardware, software, and data networks used to manage, adminis-
52 ter, or control sports wagering and any associated wagers accessible by
53 any electronic means including mobile applications and internet websites
54 accessed via a mobile device or computer;

55 (q) "Official league data" means statistics, results, outcomes, and
56 other data relating to a sporting event that have been obtained from the

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1 relevant sports governing body or an entity expressly authorized by the
2 sports governing body to provide such information to casinos;

3 (r) "Operator" means a casino which has elected to operate a sports
4 pool (or agent of such casino) or an Indian Tribe (or an agent of such
5 Indian Tribe) that has entered into a tribal-state gaming compact in
6 accordance with the Indian Gaming Regulatory Act 25 U.S.C. 2710, that is
7 in effect and has been ratified by the state and has entered into a
8 sports wagering agreement pursuant to section thirteen hundred sixty-
9 seven-a of this title;

10 (s) "Persons who present sporting contests" includes sports governing
11 bodies and associations, their members and affiliates, and other persons
12 who present sporting contests to the public;

13 ~~[(e)]~~ (t) "Professional sport or athletic event" means an event at
14 which two or more persons participate in sports or athletic events and
15 receive compensation in excess of actual expenses for their partic-
16 ipation in such event;

17 (u) "Prohibited conduct" means any statement, action, and other commu-
18 nication intended to influence, manipulate, or control a betting outcome
19 of a sporting contest or of any individual occurrence or performance in
20 a sporting contest in exchange for financial gain or to avoid financial
21 or physical harm. "Prohibited conduct" includes statements, actions, and
22 communications made to a covered person by a third party, such as a
23 family member or through social media;

24 (v) "Professional sports stadium or arena" means a stadium, ballpark,
25 or arena that is the permanent home of a professional sports team play-
26 ing at the highest professional level in its sport and has a seating
27 capacity for such contests exceeding fifteen thousand seats;

28 ~~[(e)]~~ (w) "Prohibited sports bettor" means:

29 (i) any officer or employee of the commission;

30 (ii) any principal or key employee of a casino or operator, except as
31 may be permitted by the commission for good cause shown;

32 (iii) any casino gaming or non-gaming employee at the casino that
33 employs such person and at any operator that has an agreement with that
34 casino;

35 (iv) any contractor, subcontractor, or consultant, or officer or
36 employee of a contractor, subcontractor, or consultant, of a casino if
37 such person is directly involved in the operation or observation of
38 sports wagering, or the processing of sports wagering claims or
39 payments;

40 (v) Any person subject to a contract with the commission if such
41 contract contains a provision prohibiting such person from participating
42 in sports wagering;

43 (vi) Any spouse, child, brother, sister or parent residing as a member
44 of the same household in the principal place of abode of any of the
45 foregoing persons at the same casino where the foregoing person is
46 prohibited from participating in sports wagering;

47 (vii) any individual with access to non-public confidential informa-
48 tion about sports wagering;

49 (viii) any amateur or professional athlete if the sports wager is
50 based on any sport or athletic event overseen by the athlete's sports
51 governing body;

52 (ix) any sports agent, owner or employee of a team, player and umpire
53 union personnel, and employee referee, coach or official of a sports
54 governing body, if the sports wager is based on any sport or athletic
55 event overseen by the individual's sports governing body;

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1 (x) any individual placing a wager as an agent or proxy for an other-
2 wise prohibited sports bettor; or
3 (xi) any minor;
4 (x) "Prohibited sports event" means any collegiate sport or athletic
5 event that takes place in New York or a sport or athletic event in which
6 any New York college team participates regardless of where the event
7 takes place, or high school sport or athletic event;
8 ~~(g)~~ (y) "Registered sports governing body" means a sports governing
9 body that is headquartered in the United States and who has registered
10 with the commission to receive royalty fee revenue in such form as the
11 commission may require;
12 (z) "Sports event" means any professional sport or athletic event and
13 any collegiate sport or athletic event, except a prohibited sports event
14 or a horse racing event;
15 ~~(h)~~ (aa) "Sports governing body" means the organization that
16 prescribes final rules and enforces codes of conduct with respect to a
17 sporting event and participants therein;
18 (bb) "Sports pool" means the business of accepting wagers on any
19 sports event by any system or method of wagering; ~~and~~
20 ~~(i)~~ (cc) "Sports wager" means cash or cash equivalent that is paid by
21 an authorized sports bettor to a casino to participate in sports wager-
22 ing offered by such casino;
23 (dd) "Sports wagering" means wagering on sporting events or any
24 portion thereof, or on the individual performance statistics of athletes
25 participating in a sporting event, or combination of sporting events, by
26 any system or method of wagering, including, but not limited to, in-per-
27 son communication and electronic communication through internet websites
28 accessed via a mobile device or computer and mobile device applications.
29 Any wager through electronic communication shall be deemed to take place
30 at the physical location of the server or other equipment used by an
31 operator to accept mobile sports wagering, regardless of the authorized
32 sports bettor's physical location within the state at the time the wager
33 is initiated. The term "sports wagering" shall include, but is not
34 limited to, single-game bets, teaser bets, parlays, over-under bets,
35 money line, pools, exchange wagering, in-game wagering, in-play bets,
36 proposition bets and straight bets;
37 (ee) "Sports wagering gross revenue" means: (i) the amount equal to
38 the total of all sports wagers not attributable to prohibited sports
39 events that an operator collects from all players, less the total of all
40 sums not attributable to prohibited sports events paid out as winnings
41 to all sports bettors, however, that the total of all sums paid out as
42 winnings to sports bettors shall not include the cash equivalent value
43 of any merchandise or thing of value awarded as a prize, or (ii) in the
44 case of exchange wagering pursuant to this section, the commission on
45 winning sports wagers by authorized sports bettors retained by the oper-
46 ator. The issuance to or wagering by authorized sports bettors at a
47 casino of any promotional gaming credit shall not be taxable for the
48 purposes of determining sports wagering gross revenue;
49 (ff) "Sports wagering lounge" means an area wherein a sports pool is
50 operated;
51 (gg) "Tier one sports wager" means a sports wager that is determined
52 solely by the final score or final outcome of the sports event;
53 (hh) "Tier two sports wager" means an in-play sports wager that is not
54 a tier one sports wager;
55 (ii) "Tier three sports wager" means a sports wager that is neither a
56 tier one nor a tier two sports wager; and

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1 (jj) "Indian Tribe" means an Indian Tribe (or an agent of such tribe)
2 that has entered into a tribal-state gaming compact in accordance with
3 the Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 to 1168,
4 inclusive, and 25 U.S.C. Sec. 2701 et seq.) which has been ratified by
5 the state.

6 ~~2. [No gaming facility may conduct sports wagering until such time as~~
7 ~~there has been a change in federal law authorizing such or upon a ruling~~
8 ~~of a court of competent jurisdiction that such activity is lawful.~~

9 ~~3.]~~ (a) In addition to authorized gaming activities, a [~~licensed~~
10 ~~gaming facility~~] casino may [~~when authorized by subdivision two of this~~
11 ~~section~~] operate a sports pool upon the approval of the commission and
12 in accordance with the provisions of this section and applicable regu-
13 lations promulgated pursuant to this article. The commission shall hear
14 and decide promptly and in reasonable order all applications for a
15 license to operate a sports pool, shall have the general responsibility
16 for the implementation of this section and shall have all other duties
17 specified in this section with regard to the operation of a sports pool.
18 The license to operate a sports pool shall be in addition to any other
19 license required to be issued to operate a [~~gaming facility~~] casino. No
20 license to operate a sports pool shall be issued by the commission to
21 any entity unless it has established its financial stability, integrity
22 and responsibility and its good character, honesty and integrity.

23 No later than five years after the date of the issuance of a license
24 and every five years thereafter or within such lesser periods as the
25 commission may direct, a licensee shall submit to the commission such
26 documentation or information as the commission may by regulation
27 require, to demonstrate to the satisfaction of the executive director of
28 the commission that the licensee continues to meet the requirements of
29 the law and regulations.

30 (b) As a condition of licensure the commission shall require that each
31 agent authorized to conduct sports wagering pay a one-time fee of twelve
32 million dollars. Such fee shall be paid within thirty days of gaming
33 commission approval prior to license issuance and deposited into the
34 commercial gaming revenue fund established pursuant to section thirteen
35 hundred fifty-two of this article.

36 (c) A sports pool shall be operated in a sports wagering lounge
37 located at a casino. The lounge shall conform to all requirements
38 concerning square footage, design, equipment, security measures and
39 related matters which the commission shall by regulation prescribe.

40 ~~[-e-]~~ (d) The operator of a sports pool shall establish or display the
41 odds at which wagers may be placed on sports events.

42 ~~[-d-]~~ (e) An operator shall accept wagers on sports events only from
43 persons physically present in the sports wagering lounge, or through
44 mobile sports wagering offered pursuant to section thirteen hundred
45 sixty-seven-a of this title. A person placing a wager shall be at least
46 twenty-one years of age.

47 ~~[-e-]~~ (f) An operator may also accept layoff bets as long as the
48 authorized sports pool places such wagers with another authorized sports
49 pool or pools in accordance with regulations of the commission. A sports
50 pool that places a layoff bet shall inform the sports pool accepting the
51 wager that the wager is being placed by a sports pool and shall disclose
52 its identity.

53 (g) An operator may utilize global risk management pursuant to the
54 approval of the commission.

55 (h) An operator shall not admit into the sports wagering lounge, or
56 accept wagers from, any person whose name appears on the exclusion list.

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1 ~~[(#)]~~ (i) The holder of a license to operate a sports pool may
 2 contract with ~~[an-entity]~~ an agent to conduct any or all aspects of that
 3 operation, or the operation of mobile sports wagering offered pursuant
 4 to section thirteen hundred sixty-seven-a of this title, including but
 5 not limited to brand, marketing and customer service, in accordance with
 6 the regulations of the commission. ~~[That-entity]~~ Each agent shall obtain
 7 a license as a casino vendor enterprise prior to the execution of any
 8 such contract, and such license shall be issued pursuant to the
 9 provisions of section one thousand three hundred twenty-seven of this
 10 article and in accordance with the regulations promulgated by the
 11 commission.

12 ~~[(#)]~~ (j) If any provision of this article or its application to any
 13 person or circumstance is held invalid, the invalidity shall not affect
 14 other provisions or applications of this article which can be given
 15 effect without the invalid provision or application, and to this end the
 16 provisions of this article are severable.

17 ~~[4-]~~ 3. (a) All persons employed directly in wagering-related activ-
 18 ities conducted within a sports wagering lounge shall be licensed as a
 19 casino key employee or registered as a gaming employee, as determined by
 20 the commission. All other employees who are working in the sports wager-
 21 ing lounge may be required to be registered, if appropriate, in accord-
 22 ance with regulations of the commission.

23 (b) Each operator of a sports pool shall designate one or more casino
 24 key employees who shall be responsible for the operation of the sports
 25 pool. At least one such casino key employee shall be on the premises
 26 whenever sports wagering is conducted.

27 ~~[5-]~~ 4. Except as otherwise provided by this article, the commission
 28 shall have the authority to regulate sports pools and the conduct of
 29 sports wagering under this article to the same extent that the commis-
 30 sion regulates other gaming. No casino shall be authorized to operate a
 31 sports pool unless it has produced information, documentation, and
 32 assurances concerning its financial background and resources, including
 33 cash reserves, that are sufficient to demonstrate that it has the finan-
 34 cial stability, integrity, and responsibility to operate a sports pool.
 35 In developing rules and regulations applicable to sports wagering, the
 36 commission shall examine the regulations implemented in other states
 37 where sports wagering is conducted and shall, as far as practicable,
 38 adopt a similar regulatory framework. The commission shall promulgate
 39 regulations necessary to carry out the provisions of this section,
 40 including, but not limited to, regulations governing the:

41 (a) amount of cash reserves to be maintained by operators to cover
 42 winning wagers;

43 (b) acceptance of wagers on a series of sports events;

44 (c) maximum wagers which may be accepted by an operator from any one
 45 patron on any one sports event;

46 (d) type of wagering tickets which may be used;

47 (e) method of issuing tickets;

48 (f) method of accounting to be used by operators;

49 (g) types of records which shall be kept;

50 (h) use of credit and checks by ~~[patrons]~~ authorized sports bettors;

51 (i) the process by which a casino may place a layoff bet;

52 (j) the use of global risk management;

53 (k) type of system for wagering; and

54 ~~[(j)]~~ (l) protections for a person placing a wager.

55 ~~[6-]~~ 5. Each operator shall adopt comprehensive house rules governing
 56 sports wagering transactions with its ~~[patrons]~~ authorized sports

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1 bettors. The rules shall specify the amounts to be paid on winning
2 wagers and the effect of schedule changes. The house rules, together
3 with any other information the commission deems appropriate, shall be
4 conspicuously displayed in the sports wagering lounge and included in
5 the terms and conditions of the account wagering system, and copies
6 shall be made readily available to ~~[patrons]~~ authorized sports bettors.

7 6. (a) Each casino that offers sports wagering shall annually submit a
8 report to the commission no later than the twenty-eighth of February of
9 each year, which shall include the following information:

10 (i) the total amount of sports wagers received from authorized sports
11 bettors;

12 (ii) the total amount of prizes awarded to authorized sports bettors;

13 (iii) the total amount of sports wagering gross revenue received by
14 the casino;

15 (iv) the total amount contributed in sports betting royalty revenue
16 pursuant to subdivision eight of this section;

17 (v) the total amount of wagers received on each sports governing
18 body's sporting events;

19 (vi) the number of accounts held by authorized sports bettors;

20 (vii) the total number of new accounts established in the preceding
21 year, as well as the total number of accounts permanently closed in the
22 preceding year;

23 (viii) the total number of authorized sports bettors that requested to
24 exclude themselves from sports wagering; and

25 (ix) any additional information that the commission deems necessary to
26 carry out the provisions of this article.

27 (b) Upon the submission of such annual report, to such extent that the
28 commission deems it to be in the public interest, the commission shall
29 be authorized to conduct a financial audit of any casino, at any time,
30 to ensure compliance with this article.

31 (c) The commission shall annually publish a report based on the aggre-
32 gate information provided by all casinos pursuant to paragraph (a) of
33 this subdivision, which shall be published on the commission's website
34 no later than one hundred eighty days after the deadline for the
35 submission of individual reports as specified in such paragraph (a).

36 7. (a) Within thirty days of the end of each calendar quarter, a cas-
37 ino offering sports wagering shall remit to the commission a sports
38 wagering royalty fee of one-fifth (.20) of one percent of the amount
39 wagered on sports events conducted by registered sports governing
40 bodies. The fee shall be remitted on a form as the commission may
41 require, on which the casino shall identify the percentage of wagering
42 during the reporting period attributable to each registered sport
43 governing body's sports events.

44 (b) No later than the thirtieth of April of each year, a registered
45 sports governing body may submit a claim for disbursement of the royalty
46 fee funds remitted by casinos in the previous calendar year on their
47 respective sports events. Within thirty days of submitting its claim
48 for disbursement, the registered sports governing body shall meet with
49 the commission to provide the commission with evidence of policies,
50 procedures and training programs it has implemented to protect the
51 integrity of its sports events.

52 (c) Within thirty days of its meeting with the registered sports
53 governing body, the commission shall approve a timely claim for
54 disbursement.

55 (d) (i) Persons who present sporting contests shall have authority to
56 remove spectators and others from any facility for violation any appli-

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1 cable codes of conduct, and to deny persons access to all facilities
2 they control, to revoke season tickets or comparable licenses, and to
3 share information about such persons with others who present sporting
4 contests and with the appropriate jurisdictions' law enforcement author-
5 ities.

6 (ii) Persons who present sporting contests shall provide notice to the
7 general public and those who attend sporting contests or visit their
8 facilities of any applicable codes of conduct and the potential penal-
9 ties for violating such codes.

10 8. For the privilege of conducting sports wagering in the state, casin-
11 os shall pay a tax equivalent to eight and one-half percent of their
12 sports wagering gross revenue, excluding sports wagering gross revenue
13 attributed to mobile sports wagering offered pursuant to section thir-
14 teen hundred sixty-seven-a of this title. Casinos shall pay a tax equiv-
15 alent of twelve percent of their sports wagering gross revenue attri-
16 buted to mobile sports wagering offered pursuant to section thirteen
17 hundred sixty-seven-a of this title.

18 9. The commission shall pay into the commercial gaming revenue fund
19 established pursuant to section ninety-seven-nnnn of the state finance
20 law eighty-five percent of the state tax imposed by this section; any
21 interest and penalties imposed by the commission relating to those
22 taxes; all penalties levied and collected by the commission; and the
23 appropriate funds, cash or prizes forfeited from sports wagering. The
24 commission shall pay into the commercial gaming fund five percent of the
25 state tax imposed by this section to be distributed for problem gambling
26 education and treatment purposes pursuant to paragraph a of subdivision
27 four of section ninety-seven-nnnn of the state finance law. The commis-
28 sion shall pay into the commercial gaming fund five percent of the state
29 tax imposed by this section to be distributed for the cost of regulation
30 pursuant to paragraph c of subdivision four of section ninety-seven-nnnn
31 of the state finance law. The commission shall pay into the commercial
32 gaming fund five percent of the state tax imposed by this section to be
33 distributed in the same formula as market origin credits pursuant to
34 section one hundred fifteen-b of this chapter. The commission shall
35 require at least monthly deposits by the casino of any payments pursuant
36 to subdivision eight of this section, at such times, under such condi-
37 tions, and in such depositories as shall be prescribed by the state
38 comptroller. The deposits shall be deposited to the credit of the state
39 commercial gaming revenue fund. The commission shall require a monthly
40 report and reconciliation statement to be filed with it on or before the
41 tenth day of each month, with respect to gross revenues and deposits
42 received and made, respectively, during the preceding month.

43 10. The commission may perform audits of the books and records of a
44 casino, at such times and intervals as it deems appropriate, for the
45 purpose of determining the sufficiency of tax payments. If a return
46 required with regard to obligations imposed is not filed, or if a return
47 when filed or is determined by the commission to be incorrect or insuf-
48 ficient with or without an audit, the amount of tax due shall be deter-
49 mined by the commission. Notice of such determination shall be given to
50 the casino liable for the payment of the tax. Such determination shall
51 finally and irrevocably fix the tax unless the casino against whom it is
52 assessed, within thirty days after receiving notice of such determi-
53 nation, shall apply to the commission for a hearing in accordance with
54 the regulations of the commission.

55 11. Nothing in this section shall apply to interactive fantasy sports
56 offered pursuant to article fourteen of this chapter. Nothing in this

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1 section authorizes any entity that conducts interactive fantasy sports
2 offered pursuant to article fourteen of this chapter to conduct sports
3 wagering unless it separately qualifies for, and obtains, authorization
4 pursuant to this section.

5 12. A casino that is also licensed under article three of this chap-
6 ter, and must maintain racing pursuant to paragraph (b) of subdivision
7 one of section thirteen hundred fifty-five of this article, shall be
8 allowed to offer pari-mutuel wagering on horse racing events in accord-
9 ance with their license under article three of this chapter. Notwith-
10 standing subparagraph (ii) of paragraph c of subdivision two of section
11 one thousand eight of this chapter, a casino located in the city of
12 Schenectady shall be allowed to offer pari-mutuel wagering on horse
13 racing events, provided such wagering is conducted by the regional off-
14 track betting corporation in such region as the casino is located. Any
15 other casino shall be allowed to offer pari-mutuel wagering on horse
16 racing events, provided such wagering is conducted by the regional off-
17 track betting corporation in such region as the casino is located. Any
18 physical location where pari-mutuel wagering on horse racing events is
19 offered by a casino and conducted by a regional off-track betting corpo-
20 ration in accordance with this subdivision shall be deemed to be a
21 branch location of the regional off-track betting corporation in accord-
22 ance with section one thousand eight of this chapter. Mobile sports
23 betting kiosks located on the premises of affiliates in accordance with
24 paragraph (d) of subdivision five of section thirteen hundred sixty-sev-
25 en-a of this title shall not be allowed to offer pari-mutuel wagering on
26 horse racing events.

27 13. A sports governing body may notify the commission that it desires
28 to restrict, limit, or exclude wagering on its sporting events by
29 providing notice in the form and manner as the commission may require.
30 Upon receiving such notice, the commission shall review the request in
31 good faith, seek input from the casinos on such a request, and if the
32 commission deems it appropriate, promulgate regulations to restrict such
33 sports wagering. If the commission denies a request, the sports govern-
34 ing body shall be afforded notice and the right to be heard and offer
35 proof in opposition to such determination in accordance with the regu-
36 lations of the commission. Offering or taking wagers contrary to
37 restrictions promulgated by the commission is a violation of this
38 section. In the event that the request is in relation to an emergency
39 situation, the executive director of the commission may temporarily
40 prohibit the specific wager in question until the commission has the
41 opportunity to issue temporary regulations addressing the issue.

42 14. (a) The commission shall designate the division of the state
43 police to have primary responsibility for conducting, or assisting the
44 commission in conducting, investigations into abnormal betting activity,
45 match fixing, and other conduct that corrupts a betting outcome of a
46 sporting event or events for purposes of financial gain.

47 (b) Casinos shall maintain records of sports wagering operations in
48 accordance with regulations promulgated by the commission. These regu-
49 lations shall, at a minimum, require a casino to adopt procedures to
50 obtain personally identifiable information from any individual who plac-
51 es any single wager in an amount of ten thousand dollars or greater.

52 (c) The commission shall cooperate with a sports governing body and
53 casinos to ensure the timely, efficient, and accurate sharing of infor-
54 mation.

55 (d) The commission and casinos shall cooperate with investigations
56 conducted by sports governing bodies or law enforcement agencies,

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1 including but not limited to providing or facilitating the provision of
2 account-level betting information and audio or video files relating to
3 persons placing wagers; provided, however, that the casino be required
4 to share any personally identifiable information of an authorized sports
5 bettor with a sports governing body only pursuant to an order to do so
6 by the commission or a law enforcement agency or court of competent
7 jurisdiction.

8 (e) Casinos shall promptly report to the commission any information
9 relating to:

10 (i) criminal or disciplinary proceedings commenced against the casino
11 in connection with its operations;

12 (ii) abnormal betting activity or patterns that may indicate a concern
13 with the integrity of a sporting event or events;

14 (iii) any potential breach of the relevant sports governing body's
15 internal rules and codes of conduct pertaining to sports wagering, as
16 they have been provided by the sports governing body to the casino;

17 (iv) any other conduct that corrupts a betting outcome of a sporting
18 event or events for purposes of financial gain, including match fixing;
19 and

20 (v) suspicious or illegal wagering activities, including use of funds
21 derived from illegal activity, wagers to conceal or launder funds
22 derived from illegal activity, using agents to place wagers, using
23 confidential non-public information, and using false identification.

24 The commission shall also promptly report information relating to
25 conduct described in subparagraphs (ii), (iii) and (iv) of this para-
26 graph to the relevant sports governing body.

27 (f) Casinos shall maintain the confidentiality of information provided
28 by a sports governing body to the casino, unless disclosure is required
29 by this section, the commission, other law, or court order.

30 (g) The commission, by regulation, may authorize and promulgate any
31 rules necessary to implement agreements with other states, or authorized
32 agencies thereof to enable the sharing of information to facilitate
33 integrity monitoring and the conduct of investigations into abnormal
34 betting activity, match fixing, and other conduct that corrupts a
35 betting outcome of a sporting event or events for purposes of financial
36 gain.

37 (h) The commission shall study the potential for the creation of an
38 interstate database of all sports wagering information for the purpose
39 of integrity monitoring, and shall create a final report regarding all
40 findings and recommendations to be delivered upon completion of all
41 objectives described herein, but in no event later than March first, two
42 thousand twenty, to the governor, the speaker of the assembly and the
43 temporary president of the senate.

44 (i) The commission shall investigate all reasonable allegations of
45 prohibited conduct and refer any allegations it deems credible to the
46 appropriate law enforcement entity.

47 (j) The commission shall establish a hotline or other method of commu-
48 nication that allows any person to confidentially report information
49 about prohibited conduct to the commission. The identity of any person
50 reporting prohibited conduct to the commission shall remain confidential
51 unless that person authorizes disclosure of his or her identity or until
52 such time as the allegation of prohibited conduct is referred to law
53 enforcement.

54 15. (a) Casinos shall use whatever data source they deem appropriate
55 for determining the result of sports wagering involving tier one sports
56 wagers.

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1 (b) Casinos shall only use official league data in all sports wagering
2 involving tier two sports wagers, if the relevant sports governing body
3 possesses a feed of official league data, and makes such feed available
4 for purchase by the casinos on commercially reasonable terms as deter-
5 mined by the commission.

6 (c) A sports governing body may notify the commission that it desires
7 to require casinos to use official league data in sports wagering
8 involving specific tier three sports wagers by providing notice in the
9 form and manner as the commission may require. Upon receiving such
10 notice, the commission shall review the request, seek input from the
11 casinos on such a request, and if the commission deems it appropriate,
12 promulgate regulations to require casinos to use official league data on
13 sports wagering involving such tier three sports wagers if the relevant
14 sports governing body possesses a feed of official league data, and
15 makes such feed available for purchase by the casinos on commercially
16 reasonable terms as determined by the commission.

17 (d) When determining whether or not a supplier of official league data
18 is offering commercially reasonable terms, the commission shall consider
19 the amount charged by the supplier of official league data to gaming
20 operators in other jurisdictions. This information shall be provided to
21 the commission by the supplier of official league data upon request of
22 the commission. Any entity providing data to a casino for the purpose of
23 tier two sports wagers shall obtain a license as a casino vendor enter-
24 prise and such license shall be issued pursuant to the provisions of
25 section thirteen hundred twenty-seven of this article and in accordance
26 with the regulations promulgated by the commission.

27 (e) No casino shall enter into an agreement with a sports governing
28 body or an entity expressly authorized to distribute official league
29 data to be the exclusive recipient of their official league data.

30 (f) The commission shall promulgate regulations to allow an authorized
31 sports bettor to file a complaint alleging an underpayment or non-pay-
32 ment of a winning sports wager. Any such regulations shall provide that
33 the commission utilize the statistics, results, outcomes, and other data
34 relating to a sporting event that have been obtained from the relevant
35 sports governing body in determining the validity of such claim.

36 16. A casino shall not permit sports wagering by anyone they know, or
37 should have known, to be a prohibited sports bettor.

38 17. Sports wagering conducted pursuant to the provisions of this
39 section is hereby authorized.

40 18. The commission shall promulgate rules that require an operator to
41 implement responsible gaming programs that include comprehensive employ-
42 ee trainings on responding to circumstances in which individuals present
43 signs of a gambling addiction and requirements for casinos and operators
44 under section thirteen hundred sixty-seven-a of this title to assess,
45 prevent, and address problem gaming by users under the age of thirty.
46 The commission shall establish a hotline or other method of communi-
47 cation that will allow any person to confidentially report information
48 about prohibited conduct to the commission. The commission shall promul-
49 gate rules governing the investigation and resolution of a charge of any
50 person purported to have engaged in prohibited conduct.

51 19. The conduct of sports wagering in violation of this section is
52 prohibited.

53 20. (a) In addition to any criminal penalties provided for under arti-
54 cle two hundred twenty-five of the penal law, any person, firm, corpo-
55 ration, association, agent, or employee, who is not authorized to offer
56 sports wagering under this section or section thirteen hundred sixty-

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seven-a of this title, and who knowingly offers or attempts to offer sports wagering or mobile sports wagering in New York shall be liable for a civil penalty of not more than one hundred thousand dollars for each violation, not to exceed five million dollars for violations arising out of the same transaction or occurrence, which shall accrue to the state and may be recovered in a civil action brought by the commission.

(b) Any person, firm, corporation, association, agent, or employee who knowingly violates any procedure implemented under this section, or section thirteen hundred sixty-seven-a of this title, shall be liable for a civil penalty of not more than five thousand dollars for each violation, not to exceed fifty thousand dollars for violations arising out of the same transaction or occurrence, which shall accrue to the state and may be recovered in a civil action brought by the commission.

§ 2. The racing, pari-mutuel wagering and breeding law is amended by adding a new section 1367-a to read as follows:

§ 1367-a. Mobile sports wagering. 1. (a) Except as provided in this subdivision, the terms in this section shall have the same meanings as such terms are defined in subdivision one of section thirteen hundred sixty-seven of this title.

(b) "Operator" for purposes of this section, means a casino which has elected to offer a mobile sports wagering platform, an Indian Tribe (or agent of such Indian Tribe) that has entered into a tribal-state gaming compact in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. 2710, that is in effect and has been ratified by the state and has entered into a sports wagering agreement to operate with the commission pursuant to this section, or the agent of such licensed gaming facility or such Indian Tribe.

2. (a) No casino shall administer, manage, or otherwise make available a mobile sports wagering platform to persons located in New York state unless registered with the commission pursuant to this section. A casino may use one mobile sports wagering platform and brand provided that such platform and brand has been reviewed and approved by the commission. A casino may contract with an independent operator to provide its mobile sports wagering platform. The independent operator may display its brand on the platform in addition to the casino's brand.

(b) Registrations issued by the commission shall remain in effect for five years. The commission shall establish a process for renewal.

(c) The commission shall publish a list of all operators and casinos registered to offer mobile sports wagering in New York state pursuant to this section on the commission's website for public use.

3. In the event that a casino contracts with an operator to provide its mobile sports wagering platform and brand, such operator shall obtain a license as a casino vendor enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of section thirteen hundred twenty-seven of this article and in accordance with the regulations promulgated by the commission.

3-a. (a) As a condition of registration as an operator, each casino shall agree, upon request of an Indian Tribe that has not entered into an agreement for mobile sports wagering with another casino, to provide a site for a mobile sports wagering server and related equipment for the Indian Tribe as directed by the commission, at no cost to the Indian Tribe except the direct and actual cost of hosting the server or other equipment used by the Indian Tribe as determined by the commission.

(b) As a condition of registration as an operator in New York state, an Indian Tribe shall enter into an agreement with the commission with respect to mobile sports wagering:

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1 (i) To follow the requirements imposed on casinos and operators under
2 this section and section thirteen hundred sixty-seven of this title with
3 respect to the Indian Tribe's mobile sports wagering; to adhere to the
4 regulations promulgated by the commission pursuant to this section with
5 respect to mobile sports wagering, and to submit to the commission's
6 enforcement of this section and section thirteen hundred sixty-seven of
7 this title and regulations promulgated thereunder with respect to mobile
8 sports wagering, including by waiving tribal sovereign immunity for the
9 sole and limited purpose of such enforcement. Nothing herein shall be
10 construed as requiring an Indian Tribe's agreement to adhere to the
11 requirements of section thirteen hundred sixty-seven of this title for
12 gaming conducted on tribal lands as a condition of offering mobile
13 sports wagering under this section;

14 (ii) To waive the Indian Tribe's exclusive geographic right to offer
15 and conduct mobile sports wagering, but not otherwise;

16 (iii) To remit payment to the state equal to tax on sports wagering
17 revenue imposed under section thirteen hundred sixty-seven of this title
18 with respect to mobile sports wagering;

19 (iv) Not to offer or to conduct mobile gaming other than mobile sports
20 wagering pursuant to this section unless such mobile gaming is otherwise
21 authorized by state or federal law; and

22 (v) To locate the server or other equipment used by the Indian Tribe
23 or its agent to accept mobile sports wagering at a casino as defined in
24 paragraph (d) of subdivision one of section thirteen hundred sixty-seven
25 of this title that has applied for and is eligible to register as an
26 operator of mobile sports wagering pursuant to this section and to pay
27 the actual cost of hosting the server or other equipment as determined
28 by the commission.

29 (c) All agreements entered into casinos and Indian Tribes with respect
30 to hosting mobile sports wagering platforms for an Indian Tribe:

31 (i) Must be approved by the commission prior to taking effect and
32 before registration of the casino or Indian Tribe as an operator under
33 this section;

34 (ii) Must provide that the Indian Tribe may, at its sole discretion,
35 terminate the agreement and all commitments, undertakings and waivers
36 made by the Indian Tribe thereunder, except that the Indian Tribe's
37 waiver of its exclusive geographic right to offer and conduct mobile
38 sports wagering shall survive the termination of the agreement;

39 (iii) Shall be limited in applicability solely to the Indian Tribe's
40 operation of mobile sports betting and shall not extend to any other
41 operation or activity of the Indian Tribe; and

42 (iv) Shall not create any rights or privileges to any third party who
43 is not a party to the agreement, except that the commission shall have
44 the power to enforce the agreement including by revoking or suspending
45 the registration of a party that fails to comply with its obligations
46 under the agreement.

47 (d) No mobile sports wagering may be conducted within an Indian
48 Tribe's exclusive geographic area unless the Indian Tribe with exclusive
49 geographic right to that area is registered as an operator under this
50 section. Operators shall use geo-location and geo-fencing technology to
51 ensure that mobile sports wagering is not available to persons who are
52 physically located in an Indian Tribe's exclusive geographic area,
53 unless the Indian Tribe with exclusive geographic right to that area is
54 registered as an operator under this section.

55 3-b.(a) The commission shall promulgate regulations to implement the
56 provisions of this section, including:

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1 (i) the development of the initial form of the application for regis-
2 tration;
3 (ii) responsible protections with regard to compulsive play safeguards
4 for fair play;
5 (iii) requiring that operators adopt controls to prevent minors from
6 creating accounts and placing wagers;
7 (iv) requiring that operators adopt controls to maintain the efficien-
8 cy of self-exclusion limits; and
9 (v) requiring that operators utilize commercially reasonable techno-
10 logical means of verifying account holders' identities.
11 (b) The commission shall prescribe the initial form of the application
12 for registration, for operators, which shall require, but not be limited
13 to:
14 (i) the full name and principal address of the operator;
15 (ii) if a corporation, the name of the state in which incorporated and
16 the full names and addresses of any partner, officer, director, share-
17 holder holding ten percent or more equity, and ultimate equitable
18 owners;
19 (iii) if a business entity other than a corporation, the full names
20 and addresses of the principals, partners, shareholders holding five
21 percent or more equity, and ultimate equitable owners;
22 (iv) whether such corporation or entity files information and reports
23 with the United States Securities and Exchange Commission as required by
24 section thirteen of the Securities Exchange Act of 1934, 15 U.S.C. §§
25 78a-78kk; or whether the securities of the corporation or entity are
26 regularly traded on an established securities market in the United
27 States;
28 (v) the type and estimated number of contests to be conducted annual-
29 ly; and
30 (vi) a statement of the assets and liabilities of the operator.
31 (c) The commission may require the full names and addresses of the
32 officers and directors of any creditor of the operator, and of those
33 stockholders who hold more than ten percent of the stock of the credi-
34 tor.
35 (d) Upon receipt of an application for registration for each individ-
36 ual listed on such application as an officer or director, the commission
37 shall submit to the division of criminal justice services a set of fing-
38 erprints, and the division of criminal justice services processing fee
39 imposed pursuant to subdivision eight-a of section eight hundred thir-
40 ty-seven of the executive law and any fee imposed by the federal bureau
41 of investigation. Upon receipt of the fingerprints, the division of
42 criminal justice services shall promptly forward a set of the individ-
43 ual's fingerprints to the federal bureau of investigation for the
44 purpose of a nationwide criminal history record check to determine
45 whether such individual has been convicted of a criminal offense in any
46 state other than New York or in a federal jurisdiction. The division of
47 criminal justice services shall promptly provide the requested criminal
48 history information to the commission. For the purposes of this section,
49 the term "criminal history information" shall mean a record of all
50 convictions of crimes and any pending criminal charges maintained on an
51 individual by the division of criminal justice services and the federal
52 bureau of investigation. All such criminal history information sent to
53 the commission pursuant to this subdivision shall be confidential and
54 shall not be published or in any way disclosed to persons other than the
55 commission, unless otherwise authorized by law.

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1 (e) Upon receipt of criminal history information pursuant to paragraph
2 (d) of this subdivision, the commission shall make a determination to
3 approve or deny an application for registration; provided, however, that
4 before making a determination on such application, the commission shall
5 provide the subject of the record with a copy of such criminal history
6 information and a copy of article twenty-three-A of the correction law
7 and inform such prospective applicant seeking to be credentialed of his
8 or her right to seek correction of any incorrect information contained
9 in such criminal history information pursuant to the regulations and
10 procedures established by the division of criminal justice services.
11 The commission shall deny any application for registration, or suspend,
12 refuse to renew, or revoke any existing registration issued pursuant to
13 this article, upon the finding that the operator or registrant, or any
14 partner, officer, director, or shareholder:

15 (i) has knowingly made a false statement of material fact or has
16 deliberately failed to disclose any information required by the commis-
17 sion;

18 (ii) has had a gaming registration or license denied, suspended, or
19 revoked in any other state or country for just cause;

20 (iii) has legally defaulted in the payment of any obligation or debt
21 due to any state or political subdivision; or

22 (iv) has at any time knowingly failed to comply with any requirement
23 outlined in this section, any other provision of this article, any regu-
24 lations promulgated by the commission or any additional requirements of
25 the commission.

26 (f) All determinations to approve or deny an application pursuant to
27 this article shall be performed in a manner consistent with subdivision
28 sixteen of section two hundred ninety-six of the executive law and arti-
29 cle twenty-three-A of the correction law. When the commission denies an
30 application, the operator shall be afforded notice and the right to be
31 heard and offer proof in opposition to such determination in accordance
32 with the regulations of the commission.

33 4. (a) As a condition of registration in New York state, each operator
34 shall implement the following measures:

35 (i) limit each authorized sports bettor to one active and continuously
36 used account on their platform, and prevent anyone they know, or should
37 have known to be a prohibited sports bettor from maintaining accounts or
38 participating in any sports wagering offered by such operator;

39 (ii) adopt appropriate safeguards to ensure, to a reasonable degree of
40 certainty, that authorized sports bettors are physically located within
41 the state when engaging in mobile sports betting;

42 (iii) prohibit minors from participating in any sports wagering, which
43 includes:

44 (1) if an operator becomes or is made aware that a minor has created
45 an account, or accessed the account of another, such operator shall
46 promptly, within no more than two business days, refund any deposit
47 received from the minor, whether or not the minor has engaged in or
48 attempted to engage in sports wagering; provided, however, that any
49 refund may be offset by any prizes already awarded;

50 (2) each operator shall provide parental control procedures to allow
51 parents or guardians to exclude minors from access to any sports wager-
52 ing or platform. Such procedures shall include a toll-free number to
53 call for help in establishing such parental controls; and

54 (3) each operator shall take appropriate steps to confirm that an
55 individual opening an account is not a minor;

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(iv) when referencing the chances or likelihood of winning in advertisements or upon placement of a sports wager, make clear and conspicuous statements that are not inaccurate or misleading concerning the chances of winning and the number of winners;

(v) enable authorized sports bettors to exclude themselves from sports wagering and take reasonable steps to prevent such bettors from engaging in sports wagering from which they have excluded themselves;

(vi) permit any authorized sports bettor to permanently close an account registered to such bettor, on any and all platforms supported by such operator, at any time and for any reason;

(vii) offer introductory procedures for authorized sports bettors, that shall be prominently displayed on the main page of such operator platform, that explain sports wagering;

(viii) implement measures to protect the privacy and online security of authorized sports bettors and their accounts;

(ix) offer all authorized sports bettors access to his or her account history and account details;

(x) ensure authorized sports bettors' funds are protected upon deposit and segregated from the operating funds of such operator and otherwise protected from corporate insolvency, financial risk, or criminal or civil actions against such operator;

(xi) list on each website, in a prominent place, information concerning assistance for compulsive play in New York state, including a toll-free number directing callers to reputable resources containing further information, which shall be free of charge;

(xii) ensure no sports wagering shall be based on a prohibited sports event;

(xiii) permit account holders to establish self-exclusion gaming limits on a daily, weekly, and monthly basis that enable the account holder to identify the maximum amount of money an account holder may deposit during such period of time;

(xiv) when an account holder's lifetime deposits exceed two thousand five hundred dollars, the operator shall prevent any wagering until the patron immediately acknowledges, and acknowledges each year thereafter, that the account holder has met the deposit threshold and may elect to establish responsible gaming limits or close the account, and the account holder has received disclosures from the operator concerning problem gambling resources;

(xv) maintain a publicly accessible internet page dedicated to responsible play, a link to which must appear on the operator's website and in any mobile application or electronic platform on which a bettor may place wagers. The responsible play page shall include: a statement of the operator's policy and commitment to responsible gaming; information regarding, or links to information regarding, the risks associated with gambling and the potential signs of problem gaming; the availability of self-imposed responsible gaming limits; a link to a problem gaming webpage maintained by the office of alcohol and substance abuse services; and such other information or statements as the commission may require by rule; and

(xvi) submit annually a problem gaming plan to the commission that includes: the objectives of and timetables for implementing the plan; identification of the persons responsible for implementing and maintaining the plan; procedures for identifying users with suspected or known problem gaming behavior; procedures for providing information to users concerning problem gaming identification and resources; procedures to

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1 prevent gaming by minors and self-excluded persons; and such other prob-
2 lem gaming information as the commission may require by rule.

3 (b) Operators shall not directly or indirectly operate, promote, or
4 advertise any platform or sports wagering to persons located in New York
5 state unless registered pursuant to this article.

6 (c) Operators shall not offer any sports wagering based on any prohib-
7 ited sports event.

8 (d) Operators shall not permit sports wagering by anyone they know, or
9 should have known, to be a prohibited sports bettor.

10 (e) Advertisements for contests and prizes offered by an operator
11 shall not target prohibited sports bettors, minors, or self-excluded
12 persons.

13 (f) Operators shall prohibit the use of third-party scripts or script-
14 ing programs for any exchange wagering contest and ensure that measures
15 are in place to deter, detect and, to the extent reasonably possible,
16 prevent cheating, including collusion, and the use of cheating devices,
17 including use of software programs that submit exchange wagering sports
18 wagers unless otherwise approved by the commission.

19 (g) Operators shall develop and prominently display procedures on the
20 main page of such operator's platform for the filing of a complaint by
21 an authorized sports bettor against such operator. An initial response
22 shall be given by such operator to such bettor filing the complaint
23 within forty-eight hours. A complete response shall be given by such
24 operator to such bettor filing the complaint within ten business days.
25 An authorized sports bettor may file a complaint alleging a violation of
26 the provisions of this article with the commission.

27 (h) Operators shall maintain records of all accounts belonging to
28 authorized sports bettors and retain such records of all transactions in
29 such accounts for the preceding five years.

30 (i) The server or other equipment which is used by an operator to
31 accept mobile sports wagering shall be located in the licensed gaming
32 facility in accordance with regulations promulgated by the commission.

33 (j) All mobile sports wagering initiated in this state shall be deemed
34 to take place at the licensed gaming facility where the server or other
35 equipment used by an operator to accept mobile sports wagering is
36 located, regardless of the authorized sports bettor's physical location
37 within this state.

38 (k) All mobile sports wagering shall be conducted in compliance with
39 this section and section thirteen hundred sixty-seven of this title.

40 (l) Permit an Indian Tribe pursuant to paragraph (a) of subdivision
41 three-a of this section to place at the licensed gaming facility the
42 server or other equipment by which the Indian Tribe may accept mobile
43 sports wagering, and to make commercially reasonable accommodations as
44 may be necessary to place and operate the Indian Tribe's server or other
45 equipment.

46 5. (a) Subject to regulations promulgated by the commission, casinos
47 may enter into agreements with operators or affiliates to allow for
48 authorized bettors to sign up to create and fund accounts on mobile
49 sports wagering platforms offered by the casino.

50 (b) Authorized sports bettors may sign up to create their account on a
51 mobile sports wagering platform in person at a casino, or an affiliate,
52 or through an operators internet website accessed via a mobile device or
53 computer, or mobile device applications.

54 (c) Authorized sports bettors may deposit and withdraw funds in their
55 account on a mobile sports wagering platform in person at a casino, or

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1 an affiliate, electronically recognized payment methods, or via any
2 other means approved by the commission.

3 (d) In accordance with regulations promulgated by the commission,
4 casinos may enter into agreements with affiliates to locate self-service
5 mobile sports betting kiosks, which are owned, operated and maintained
6 by the casino, and connected via the internet to the casino, upon the
7 premises of the affiliate. Authorized sports bettors may place account
8 wagers, and place and redeem non-account cash wagers, at such kiosks.

9 (e) All agreements entered into between casinos and affiliates in
10 relation to the provisions of this section shall be approved by the
11 commission prior to taking effect and shall include a plan for the time-
12 ly payment of liabilities due to the affiliate under the agreement;
13 provided, however, that the commission shall not approve any such agree-
14 ment between a casino and a racetrack licensed pursuant to this chapter
15 or an operator of video lottery gaming at Aqueduct licensed pursuant to
16 section one thousand six hundred seventeen-a of the tax law, until
17 twelve months after the effective date of this paragraph; and provided,
18 further, that the commission shall not approve any such agreement
19 between a casino and a professional sports stadium or arena, until twen-
20 ty months after the effective date of this paragraph.

21 6. The commission shall annually cause a report to be prepared and
22 distributed to the governor and the legislature on the impact of mobile
23 sports wagering on problem gamblers in New York. The report shall
24 include an assessment of problem gaming among persons under the age of
25 thirty. The report shall be prepared by a non-governmental organization
26 or entity with expertise in serving the needs of persons with gambling
27 addictions. The report shall be prepared and distributed under the
28 supervision of and in coordination with the commission. The costs asso-
29 ciated with the preparation and distribution of the report shall be
30 borne by operators and the commission shall be authorized to assess a
31 fee against operators for these purposes. The commission shall also
32 report periodically to the governor and the legislature on the effec-
33 tiveness of the statutory and regulatory controls in place to ensure the
34 integrity of mobile sports wagering operations.

35 § 3. Section 104 of the racing, pari-mutuel wagering and breeding law
36 is amended by adding a new subdivision 24 to read as follows:

37 24. To regulate sports wagering in New York state.

38 § 4. Severability clause. If any provision of this act or application
39 thereof shall for any reason be adjudged by any court of competent
40 jurisdiction to be invalid, such judgment shall not affect, impair, or
41 invalidate the remainder of the act, but shall be confined in its opera-
42 tion to the provision thereof directly involved in the controversy in
43 which the judgment shall have been rendered.

44 § 5. This act shall take effect immediately.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S17D

SPONSOR: ADDABBO

TITLE OF BILL: An act to amend the racing, pari-mutuel wagering and breeding law, in relation to regulation of sports betting

PURPOSE:

To update the existing provisions of law which allow the four upstate casino gaming resorts to conduct sports betting in the event of a change in the federal law which currently prohibits it.

SUMMARY OF PROVISIONS:

Section 1: Amends section 1367 of the Racing, Pari-Mutuel Wagering and Breeding Law as follows:

- * Expands and clarifies definitions;
- * Prohibits sports betting on high school athletic events;
- * Provides a listing of the individuals who are prohibited from participating in sports betting;
- * Clarifies that mobile sports wagers are made and take place upon acceptance at the location of the server, regardless of the physical location of the individual placing a wager;
- * Clarifies the ability of casinos to place layoff bets and the authority of the Gaming Commission to regulate how they are placed;
- * Requires registration and reporting of mobile sports wagering licenses.
- * Requires license fee of \$12 million for each agent authorized to conduct mobile sports wagering.
- * Requires the casinos to pay a royalty fee of .n of handle to the state for sports governing bodies;
- * Requires the casinos to pay a state tax of 8.52, of gross sports wagering revenue, not including mobile sports wagering revenue, which will be subject to a 12,5 tax on gross revenue from mobile sports wagers;
- * Clarifies that interactive fantasy sports are not included in the provisions regulating sports betting conducted by casinos;

- * Provides the ability for sports governing bodies to petition the Gaming Commission to restrict certain wagers on sports events;
- * Requires sports body governing authorities to have procedures with respect to the protection of players;
- * Requires the Gaming Commission to promulgate rules mandating that operators implement responsible gaming programs, including programs to address potential problem gambling for individuals under the age of thirty;
- * Provides a structure for investigations and data sharing between the casinos, Gaming Commission and sports governing bodies;
- * provides authority for Gaming Commission to enter into agreements with other states to share information for integrity monitoring purposes;
- * Provides Gaming Commission to implement grievance procedure regulations for sports bettors who allege a casino has not properly paid their bet;
- * Provides the ability for sports governing bodies to require the use of official league data for certain wagers on sports events; and
- * provides for a civil penalty for violations of this section.

Section 2: Amends the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new section 1367-a which authorizes and regulates mobile sports wagering as follows:

- * Requires a casino offering a mobile sports betting platform to register with the Gaming Commission;
- * Requires any outside vendor offering a mobile sports betting platform for a casino to be licensed as a casino vendor enterprise;
- * Requires any sports bettor to be located in the State of New York when placing a sports wager;
- * Requires mobile sports betting platform operators to conform to a series of safeguards similar to those required of interactive fantasy sports operators;
- * Authorizes sports bettors to sign up for their mobile sports betting account in person at a casino or online;
- * Requires that the Gaming Commission promulgate regulations with respect to compulsive play safeguards for fair play;
- * Requires certain minimum information to be included in an initial form of application for registration;
- * Requires the server used by a mobile sports wagering operator to be located in the casino;
- * Clarifies that mobile sports wagers are made and take place upon acceptance at the location of the server, regardless of the physical location of the individual placing a wager;
- * Allows Native American Nations to voluntarily opt-in to participate in

mobile sports wagering, with such opt-in subject to a limited waiver of sovereign immunity solely with respect to mobile sports wagering. Such mobile sports wagering revenues will be subject to New York State taxation at the same rate as the State's licensed casinos. Native American Nations can still conduct sports wagering for individuals physically present at a Native American casino, if such Native American Nation does not opt-in to a mobile sports wagering platform;

* Allows affiliates to enter into agreements with casinos to host mobile sports wagering kiosks at their affiliate facilities.

Section 3: Clarifies the authority of the Gaming Commission to regulate sports wagering.

Section 4: Severability clause.

Section 5: Effective date.

JUSTIFICATION:

As part of the 2013 Upstate New York Gaming Economic Development Act, the four upstate casino gaming resorts were granted the ability to conduct sports betting should there be a change in federal law prohibiting sports betting outside of certain states. On May 14, 2018 the United States Supreme Court ruled the Professional and Amateur Sports Protection act unconstitutional in *Murphy v. National Collegiate Athletic Association* which resulted in the federal prohibition being overturned. In preparation for such a situation, the Senate Committee on Racing, Gaming and Wagering held a hearing in January on the topic of sports betting which has led to the introduction of this legislation to address a number of outstanding issues that are not addressed by the current statute.

LEGISLATIVE HISTORY:

2018: S. 7900-C - Senate Rules Committee,

FISCAL IMPLICATIONS:

Between 810 million and \$30 million annually to New York State for education based upon conservative market estimates. New York State could receive a one-time increase in State revenue of \$48 million in licensing fees from operators.

EFFECTIVE DATE:

This act shall take effect on the same date and in the same manner as section 1387 of the racing, pari-mutuel wagering and breeding law pursuant to subdivision (c) of section 52 of chapter 174 of the laws of 2013.

LIEBM...

History

Folders

Favorites

Notifications

Sign out

All content

adv: fantasy /3 sports

NY, All Fed.

Advanced

White v. Cuomo

Supreme Court, Albany County, New York. • October 26, 2018 • 62 Misc.3d 877 • 87 N.Y.S.3d 805 • 2018 N.Y. Slip Op. 28355 (Approx. 29 ...

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Attorneys and Law Firms

Opinion

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Brief It

62 Misc.3d 877

Supreme Court, Albany County, New York.

**Jennifer WHITE, Katherine
West, Charlotte Wellins and
Anne Remington, Plaintiffs,
v.**

**Hon. Andrew CUOMO, as
Governor of the State of New
York, and the New York State
Gaming Commission,
Defendants.**

5861-16

Decided October 26, 2018

Synopsis

Background: New York residents with gambling disorders and their relatives brought action against New York Governor and New York State Gaming Commission, seeking declaration that interactive **fantasy sports** contests with

the legislature, the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate, and any finding of unconstitutionality in such context would be beyond the scope of the judicial review authority. N.Y. Const. art. 1, § 9; N.Y. Penal Law § 225.00 et. seq.

West Codenotes

Held Unconstitutional

N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412.

Attorneys and Law Firms

****808** O'Connell and Aronowitz, (Cornelius D. Murray, Esq. of Counsel), 54 State Street, Albany, New York 12207, Attorneys for Plaintiffs

Hon. Barbara D. Underwood, New York State Attorney General, (Richard Lombardo, Asst. Attorney General, of Counsel), The Capitol, Albany, New York 12224-0341, Attorneys for Defendants

Opinion

Gerald W. Connolly, J.

***878** Plaintiffs, citizen-taxpayers of the State of New York who either have gambling disorders or are relatives of individuals who have such disorders,

have brought the within action requesting a declaratory judgment that Chapter 237 of the Laws of 2016 of the State of New York, which authorizes interactive **fantasy sports** contests with monetary prizes (hereinafter “IFS”), is unconstitutional as in violation of the anti-gambling provision at Article 1, § 9 of the state constitution. Plaintiffs further request a permanent injunction enjoining the State and its agencies and officials from implementing such chapter. By Decision and Order of August 31, 2017, the Court denied the defendants' motion to dismiss the complaint. Subsequently, the parties agreed to waiver of discovery and a timetable for submission of motions for summary ^{¶879} judgment. The parties have now fully submitted upon both the motion of plaintiffs and the cross-motion of the defendants.

^{¶**809} Article 1, Section 9 of the State Constitution provides, in pertinent part:

1 ... except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in

aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Chapter 237 states certain Legislative findings:

1. The legislature hereby finds and declares that: (a) Interactive **fantasy sports** are not games of chance because they consist of **fantasy** or simulation **sports** games or contests in which the **fantasy** or simulation **sports** teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization;

(b) Interactive **fantasy sports** contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any **fantasy sports** contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' ⁸⁸⁰ roster choices.

2. Based on the findings in subdivision one of this section, the legislature declares that interactive **fantasy sports** do not constitute gambling in New York state as defined in article two hundred twenty-five of the penal law. (RPMWBL § 1400) ¹ . In other pertinent part, Chapter 237 affirmatively states that “[i]nteractive **fantasy sports** contests registered and conducted pursuant to the provisions of this chapter are hereby authorized.”

(RPMWBL § 1411).

Stipulated Facts

Upon the within submissions, the parties have stipulated and agreed to the following enumerated facts:

(1) Online interactive **fantasy sports** providers offer their subscribers season-long, weekly, and daily online interactive **fantasy sports** contests.

(2) Participants in such contests select fantasy teams of real-world athletes and compete against other contestants based on a scoring system that awards points based on the individual athlete's performances^{¶810} in actual sporting events that are held after contests are closed and no more participants may enter the contest. Participants in **fantasy sports** contests may use, among other things, their sports knowledge and statistical expertise to determine how athletes individually, and their fantasy teams overall, are likely to perform in such sporting events. Participants cannot control how the athletes on their **fantasy sports** teams will perform in such sporting events.

(3) The winnings paid to successful online interactive **fantasy sports** contestants come from the entry fees paid by all contestants. The online interactive **fantasy sports** providers derive their revenue by retaining a portion of such entry fees.

^{¶881} (4) On August 3, 2016, Governor Cuomo signed into law Chapter 237 of the Laws of 2016, which amends the Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter, "RPMWBL") by adding a new Article 14.

(5) Chapter 237 of the Laws of 2016 authorizes interactive **fantasy sports** contests that are registered and conducted pursuant to the law (RPMWBL § 1411) and prohibits unregistered interactive **fantasy sports** contests (RPMWBL § 1412).

(6) Chapter 237 of the Laws of 2016 defines an “interactive **fantasy sports** contest” as “a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events.” (RPMWBL § 1401(8)).

(7) Chapter 237 of the Laws of 2016 provides for the registration of interactive **fantasy sports** providers (RPMWBL § 1402), required safeguards and minimum standards as a condition of such registration (RPMWBL § 1404), annual reporting by registered interactive **fantasy sports** providers (RPMWBL § 1406), taxation of registered interactive **fantasy sports** providers (RPMWBL § 1407), and the assessment of regulatory costs upon registered interactive **fantasy sports** providers (RPMWBL § 1408).

(8) The total tax revenue that the State of New York received in 2016 from the operation of interactive **fantasy sports** conducted pursuant to Chapter 237 of the Laws of 2016 was \$2,338,607.00.

(9) To become registered, the interactive **fantasy sports** provider must implement measures that “ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated

statistical results of the performance of individuals in sports events.” (RPMWBL § 1404(1)(o)).

^{*882} (10) Chapter 237 of the Laws of 2016 requires registered interactive **fantasy sports** providers to design games requiring the identification of highly experienced players and limiting the number of entries a contestant may submit for any single contest. (RPMWBL § 1404(1)(g) and (2)).

(11) Chapter 237 of the Laws of 2016 requires registered interactive **fantasy sports** providers to enable contestants to “self-exclude” themselves from contests and provide information regarding assistance for compulsive players. (RPMWBL § 1404(1)(d) and (m)).

Plaintiffs' Contentions

Plaintiffs argue that the plain meaning of the term “gambling” in the Constitution includes IFS and that the existence of a material degree of skill in IFS competition does not exclude IFS from the definition of gambling, as such competitions indisputably contemplate a material degree of chance. Plaintiffs reference the IFS scoring system, wherein points are awarded ^{**811} based upon contingent future events (performances of the selected “fantasy” players).

Plaintiffs assert that the legislative mandate in the constitutional provision is solely to pass laws to *prevent* gambling offenses and not to carve out exceptions to the provision. Plaintiffs argue that if the Legislature had the

right to arbitrarily define gambling [via statute], the Constitutional prohibition would be a nullity. Plaintiffs assert that all prior exceptions to such prohibition, including for pari-mutuel wagering on horse racing, certain lotteries and casinos, have been authorized solely by constitutional amendment.

Plaintiffs point to anti-gambling laws, specifically now-superseded Penal Law § 351 passed shortly after the 1894 amendment expanding the scope of the constitutional prohibition, which specifically criminalized bets, wagers and pools on the results of contests of skill, speed, power or endurance, as evidence of the use and meaning of the word “gambling” in the constitutional provision. Plaintiffs argue that such an contemporaneous interpretation by the Legislature of a Constitutional provision is entitled to great deference, citing to, *inter alia*, *New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 258, 386 N.Y.S.2d 646, 353 N.E.2d 558 (1976) (hereinafter *Steingut*). Plaintiffs argue that the Legislature cannot now, by legislation, define “gambling” to the contrary of its common and ordinary meaning.

Plaintiffs also argue that Chapter 237 of the Laws of 2016, by its terms, appears to accept that IFS is gambling, as it requires § 883 operators to both enable contestants to exclude themselves from contests and to prominently list information on their websites concerning assistance for compulsive

play. Plaintiffs note that § 225.00 of the Penal Law defines, for criminal prosecution purposes, a “contest of chance” as one that depends, to a “material degree”, upon an “element of chance”, and defines “gambling” as occurring when a person “stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence...”. Plaintiffs enumerate multiple well-known historical amateur and professional sporting results to demonstrate the impossibility, IFS player skill notwithstanding, of any conclusively correct prediction of such results.

Plaintiffs cite to cases interpreting Article XI, § 1 of the Constitution, including *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661 (1995) for the proposition that, while the Legislature is entitled to deference in carrying out a constitutional mandate, the Courts must first define the meaning of that mandate.

Plaintiffs also cite to a prior Opinion of the Attorney General: “[t]o summarize, we find that sports betting is not permissible under Article 1, § 9 of the New York State Constitution. The specific Constitutional bans against bookmaking and pool-selling, as well as a general ban against ‘any other form of

gambling' not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports-betting program.” (1984 NY Op. Att’y Gen. 1, 41, 1984 NY AG LEXIS 94). Plaintiffs also proffer the position taken by the Attorney General in a Memorandum of Law in cases filed against IFS providers DraftKings, Inc. and FanDuel, Inc. in 2015: “[t]he Key Factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament ^{¶812} may rise to the top based on their skill, but the game is still gambling. So is DFS.” (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, pg. 12).

^{¶884} Plaintiffs further argue that, should the Court apply a presumption of constitutionality in this review of the duly-enacted statute, the presumption has been rebutted as Chapter 237, *inter alia*, makes daily **fantasy sports** legal only when the operator is registered in accordance with the provisions of RPMWBL § 1402. Plaintiffs argue that, as the same activity as that allowed under Chapter 237 would be illegal if the participant were not registered, and as the activity would, by definition, involve the same level of skill and chance as legal IFS, which would be distinguished solely by its compliance with other provisions of Chapter 237, the premise

that one activity is gambling while the same is not due to factors not related to the definition of gambling renders such distinction, and Chapter 237, irrational.²

Defendants' contentions

Defendants assert that Chapter 237 carried out the Legislature's constitutional mandate to devise appropriate gambling laws (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 2), arguing that such mandate necessarily authorizes the Legislature to define what is not gambling. Defendants assert that the Constitution does not require a particular statutory definition of gambling and that there is sufficient basis in the record to find that the Legislature made a rational policy choice in determining that IFS is not gambling.³

Defendants set forth in detail the record before the Legislature at the time of the discussion of Chapter 237, and argue that such record demonstrates that “plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice” (Memorandum of Law, p. 2). In sum, while not denying that IFS contests carry a material degree of chance, defendants argue that such showing is insufficient, in light of the evidence of skill in IFS demonstrated to the Legislature, to overcome the presumption that the statute declaring such ⁸⁸⁵ contests games of skill and accordingly not gambling was

constitutional. In support of such argument, defendants note certain submissions to the Legislature of (i) statistics demonstrating the results of the activities of Fanduel, Inc. and Draftkings, Inc., two of the largest on-line interactive **fantasy sports** providers ⁴, showing, *inter alia*, that actual users are likely to defeat computer-generated randomly selected teams and (ii) studies showing that there is a high winning percentage of the most successful IFS participants.

Defendants cite to case law which they argue demonstrates that, when an activity could reasonably be considered to be gambling ^{**813} or not, there is latitude for the Legislature to declare whether such activity should be prohibited (see *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-171, 71 N.E. 753 [1904] [hereinafter *Ellison*]) ⁵. They argue that, given the disparity between legal definitions of the word “gambling” (referencing statutory analysis), that where, as here, the activity within does not constitute pure chance, such as roulette, the Legislature may rationally determine that the activity does not constitute gambling as used in the Constitutional prohibition. The defendants concede solely that a game of “pure chance” is prohibited by the Constitutional provision. Defendants cite to alleged Court interpretation of the Penal law prior to 1965 (a period of approximately 70 years from the enactment of the constitutional provision) wherein they argue that

gambling referred only to activities where chance, not skill, was the “dominating element” (*see Id.*).

Defendants cite to cases demonstrating deference in the interpretation of the Article 1, § 9 (*see, Saratoga County Chamber of Commerce v. Pataki*, 293 A.D.2d 20, 26, 740 N.Y.S.2d 733 [3d Dept. 2002], *affirmed in part and modified in part*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *Dalton v. Pataki*, 11 A.D.3d 62, 65, 780 N.Y.S.2d 47 [3d Dept. 2004], *affirmed in part and modified in part*, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005] [hereinafter *Dalton*]). Defendants further cite to *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 46 N.E. 302 (1897) (hereinafter *Sturgis*) for the proposition that a highly deferential standard of review had been applied to a constitutional challenge to the sufficiency of a statute creating criminal penalties for horse racing. Defendants also assert that the Court should disregard the earlier statements of the Attorney General with regard to IFS constituting gambling as such statements were made prior to the Legislative determinations herein. Further, defendants cite to the determinations of a number of other state legislatures that IFS does not constitute gambling, though neither party has identified a case in which a Court has directly addressed the issue of whether IFS constitutes gambling for purposes of the New York (or any other state's) constitution.

Summary Judgment Standard

1 2 3 To obtain summary judgment, a movant must establish his or her position “ ‘sufficiently to warrant the court as a matter of law in directing judgment’ ” in his or her favor (*Friends of Fur Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298 [1979], quoting CPLR § 3212 [b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues of fact from the case (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]).

****814 Discussion**

4 5 6 7 8 “Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable

doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional” (

Overstock.com, Inc. v. New York State Dept. of Taxation & Fin., 20 N.Y.3d 586, 624, 965 N.Y.S.2d 61, 987 N.E.2d 621 [2013], citing *LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490 [2002]; see also, *Dalton v. Pataki*, 5 N.Y.3d 243, 255, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005]. “A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid” (*Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 787 N.E.2d 624 (2003)) (internal citations and quotations [887 omitted]). It is axiomatic, however, that “... it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them...” (*Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 925, 769 N.Y.S.2d 106, 801 N.E.2d 326 [2005]).

⁹ Based upon the stipulated facts and submissions before the Court, IFS involves, to a material degree, an element of chance, as the participants win or lose based on the actual statistical performance of groups of selected athletes in future events not

under the contestants [players] control or influence. "It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence" (*Ellison, supra* at 169, 71 N.E. 753). In *People ex rel. Lawrence v. Fallon*, 4 A.D. 82, 84-85, 39 N.Y.S. 865 [1st Dept. 1896], *aff'd*, 152 N.Y. 12, 46 N.E. 296 [1897], the First Department stated as follows:

There certainly is a wide distinction between the wager of money upon the result of any game and the purchase of shares in a lottery. To a certain extent it may be said that what is called chance enters into the result of any game, even the game of chess, and that nothing which is the result of a contest or competition is decided without some other element entering into it than the mere skill of the persons who take part in the contest. Everybody recognizes that in a baseball game or a game of football, or in running or walking matches, the result depends not alone upon the skill and strength and agility of the competitors, but upon numerous

incidents which may or may not occur and whose occurrence depends upon something which nobody can predict and which so far as human knowledge is concerned have no reason for existing. This is a chance pure and simple, but yet the result of those games cannot in any just sense be said to be a lottery. The distinction we apprehend to be that in a lottery no other element is intended to enter into the distribution than pure chance, while in the result of other contests which are forbidden under the act against betting or gaming other elements enter, and the element of chance, although necessarily taken into consideration, may be, and is, eliminated to a very considerable extent by the skill, careful preparation and foresight of the^{*888} competitors.

To the extent that the legislative findings stated at RPMWBL § 1400(1)(a) and^{*815} (b), which serve as the basis for the statutory determination that IFS does not constitute gambling as defined in Penal Law § 225.00, can be read as inconsistent with the proposition that IFS involves a material degree of chance, the stipulated facts and the language of

the statute (RPMWBL § 1401(8)) applied in light of the standard referenced above are sufficient to overcome any presumption or deference to be accorded such legislative finding. Neither the finding that IFS are not games of chance or the finding that IFS does not constitute wagers on future contingent events addresses the fact that points are scored (and cash pieces won or entry fees lost) based upon performances of selected athletes in events held after “contests are closed”. No research, investigation, skill or judgment of the IFS participant can effect such future athletic performances.

In IFS, the scoring of the participants is directly related to the performance of their selected players⁶ as compared to the performance of the selected players of other participants. IFS participants have no control whatsoever of the performance of the selected players, though the experience, research and related skill involved in selecting an IFS team can sharply impact an IFS participant's chances of prevailing. IFS only allows participants to score points based on the performance of individual players, which occur after the participant have selected their team, that is, in future events. As such, the first legislative finding proffered, that is, the rationale for why “IFS is not a game of chance”, does not lead to the conclusion that there is not, to a material degree, an element of chance to IFS competition.

By the same token, the rationale for the second conclusion also does not provide a logical basis for the conclusion. The findings state that “IFS are not wagers on future events not under the contestants control or influence”, and then references the facts that IFS relies upon agglomerated ⁸⁸⁹ performances of individuals in team events rather than individual or team performances. Such rationale does not support the broad statement; the fact that IFS is scored based on *agglomerated* individual performances in future events not under the contestants' control or influence does not negate the fact that the wagers are placed on performances in future events not under the contestants' control or influence.

Based upon the submissions of the defense however, including the legislative findings and the (legislatively received) statistical analysis of Draftkings, Inc. and Fanduel, Inc. results demonstrating the likelihood of success of a small percentage of players as well as the performance of players against randomized computer models, it is equally clear that there is a significant element of skill in IFS competition. In light of the deference to be accorded the Legislature in the exercise of its responsibilities, the Court will, for purposes of the within discussion, accept the proposition that the chance versus skill assessment of IFS weighs on the skill side; that is, that IFS participation and success is

predominated by skill rather than chance (see RPMWBL § 1400 (1)(a)).

Legislative Authority

10 11 The constitutional provision, as relevant herein, contains two clauses:

first, a proscription on the authorization or allowance [¶]*816 of any gambling within the State, and second, a mandate that the Legislature pass appropriate laws to prevent such offenses. The latter clause “...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution.” (*Sturgis, supra* at 11, 46 N.E. 302). Such provision mandates that the Legislature, in the exercise its discretion, pass laws to *prevent* offenses to the provision. Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute. In *Sturgis* the Court held that “[i]t is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses.” (*Id.* at 10, 46 N.E. 302). The defense argues that the second clause effectively grants the Legislature authority to statutorily define the term “gambling” in the negative.

12 Despite such mandate, the plain language of the first referenced clause of the constitutional provision does not [¶]*890 require absolute deference to the

statute, as the mandate does not give the Legislature unlimited authority to define what is “not” gambling for purposes of such provision. Such interpretation would render the constitutional prohibitions on “...authoriz[ing] or allow[ing]...” “...pool-selling, bookmaking or any other kind of gambling” meaningless, as the entire field would then be effectively governed by statute, rather than the constitutional provision (see *Dalton v. Pataki*, 11 A.D.3d 62, 90, 780 N.Y.S.2d 47 [3d Dept. 2004], *affirmed in part and modified in part*, *Dalton v. Pataki*, 5 N.Y.3d 243, 264, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005])⁷. As set forth above, the Defendants to some degree accept this point, admitting that a statute authorizing an activity governed purely by chance (e.g. roulette) would be unconstitutional.

¹³ Plaintiffs argue that IFS is gambling, and it is axiomatic that the Legislature cannot pass a law that violates a constitutional proscription. The constitutionality of the enactment authorizing and regulating IFS turns upon the scope of the prohibition as used in the Constitution, and whether plaintiffs have demonstrated beyond a reasonable doubt, in the context of the presumption of constitutionality, that IFS, a game determined by a dominant degree of skill and a material degree of chance, fits the constitutional definitions of the prohibited activities. The Court finds that plaintiffs have made such demonstration.

¹⁴ ¹⁵ ¹⁶ ¹⁷ “Words of ordinary import receive their understood meaning, technical terms are construed in their special sense. Especially is the plain import of the language to be given its effect in the construction of constitutional provisions, for the words are deemed to have been used most solemnly and deliberately; and ^{**817} where the intent of the constitutional provision is manifest from the words used and leads to no absurd conclusion, there is no occasion for interpretation, and the meaning which the words import should be accepted without conjecture” (McKinney's Cons. Laws of ⁸⁹¹ New York, Statutes, § 94 [internal citations omitted]). “When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers... as indicated by the language employed and approved by the People” (*Matter of King v. Cuomo*, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 613 N.E.2d 950 [1993] [citations omitted]).

¹⁸ In determining the import of the phrase “...pool-selling, book-making, or any other kind of gambling...”, the Court finds that such phrase incorporates sports gambling, and such gambling is generally precluded by such constitutional prohibition. Such finding comports with Formal Opinion No. 84-F1 of the Office of the New York State Attorney General, which legally and historically analyzed the constitutional prohibition under circumstances not dissimilar to those herein; that is, in

assessing proposed legislation which would affirmatively create, and authorize the State Division of the Lottery to conduct, a game in which parlay bets would be placed on the outcome of pro sports events (see 1984 NY Op. Att'y Gen. 1). After discussing the 1894 Amendment to the then-existing constitutional provision (which previously banned solely lotteries) to add prohibitions upon “pool-selling, book-making or any other kind of gambling...”, such opinion specifically referenced the amendment to the constitutional provision thus: “this distinct statutory ban on sports wagering [referencing the 1877 Penal Code] was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today” (*Id.* at 11). In light of the legal and constitutional history cited by the Attorney General in the 1984 opinion, particularly *Reilly v. Gray*, 77 Hun. 202 (1894), it is clear that the added language regarding “poolselling, bookmaking and any other kind of gambling” generally encompassed sports gambling.

¹⁹ ²⁰ Further, the virtually contemporaneous enactment of then-Penal Law § 351, creating criminal penalties for, *inter alia*, sports gambling, compels the conclusion that sports gambling cannot be authorized absent a constitutional amendment, as the contemporaneous interpretation of a constitutional provision by the Legislature is to be accorded great

deference, and “...may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of the instrument propounded.” (*Steingut, supra* at 258, 386 N.Y.S.2d 646, 353 N.E.2d 558 [1976] [internal quotations and citations omitted]). This seems particularly applicable ^{*892} where, as both here and in *Steingut*, the contemporaneous Legislature was exercising the authority granted by the constitutional provision.

In *Sturgis*, the Court referenced (now superceded) Penal Law § 351 which clearly encompassed sports gambling and provided that “...any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill speed or power of endurance, of man or beast... or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever...is guilty of a felony...” stating that “[t]his examination of the statute discloses that the legislature has passed laws, the obvious purpose of which is to prevent the offenses mentioned in section nine of article one of the constitution” (*Sturgis, supra* at 7, 46 N.E. 302).

Having concluded that the prohibition generally bans the authorization of sports gambling, the Court next turns to the position of the plaintiffs that the prohibition ^{**818} does not apply to a law authorizing a practice which includes any degree of skill. As stated above, in assessing such issue, the Court

will presume the accuracy of the [Court-interpreted] legislative conclusion that success in IFS is predominantly determined by the skill of the participant.

Initially, the Court cannot agree with the citations of the defendants to *Ellison*, 179 N.Y. 164, 71 N.E. 753 (1904), for the proposition that it has been held that the constitutional prohibition does not apply to a law authorizing a practice where the outcome is dependent upon a degree of skill (see Defendants' MOL in Support of Cross-Motion of Summary Judgment, pg. 13, fn. 8; Defendants' MOL in Reply, p.3). The discussion in *Ellison* was addressed to then-Penal Law § 327, and does not address the meaning of the constitutional provision. Moreover, as discussed below, the statute reviewed by the Court of Appeals in *Ellison* was not the sports gambling statute enacted immediately after the constitutional amendment, but the lottery statute.

The discussion in *Ellison* was with regard to the element of chance in then Penal Law §§ 323 and 327 creating penalties for operation of a *lottery*, and accordingly focused upon whether the allegedly illegal conduct, which created a system not governed exclusively by chance, fit such definition. There, the Court found that a contest for the guessing of the number of cigars sold violated the anti-lottery statutes, though involving elements of both chance and judgment, because chance was the

dominant element. The Court did not opine on whether such ^{*893} conduct fit the constitutional definition of the separate constitutional terms “pool-selling, book-making or any other gambling”. Such determination on what constituted a lottery for purposes of the Penal Law, in the opinion of the Court, carries no precedential value herein.

Separate from *Ellison*, the Court cannot agree with the defendants' contention that only legislative authorization of games constituting pure chance (e.g., lotteries or roulette) is barred by the prohibition. It is clear that the drafters of the 1894 prohibition intended to bar contests based on future contingent events. Former Penal Law § 351, in addition to enacting criminal penalties specific to “...the *result* of any trial or contest of skill, speed or power of endurance...”, also encompassed “...the result of any lot, chance, casualty, unknown or *contingent event whatsoever*” (emphasis added) (*Sturgis, supra* at 7-8, 46 N.E. 302). The caution in *Steingut, supra*, that special consideration be given to relatively contemporaneous acts of the Legislature in constitutional interpretation leads to the conclusion that the actions further described in Penal Law § 351 were within the contemplation of the drafters of the constitutional prohibition.

Further evidence that the prohibition is meant to be read more broadly than the interpretation urged by the defendants

is found in the plain language of the prohibition. Initially, the provision bans laws authorizing lotteries, which, as discussed in *Ellison* in detail at both the Appellate Division and Court of Appeals decisions, were arguably seen at the time as games of pure chance (see *Ellison*, 179 N.Y. 164, 71 N.E. 753 [1904] *rev'g*, 93 A.D. 292, 87 N.Y.S. 776 [1st Dept. 1904]). If the intent of the Article 1, § 9 drafters were to simply bar “pure chance” gambling, they could have done so, instead of going on, via the amendment of 1894, to bar pool-selling, book-making and other gambling.

²¹ ²² Additionally, the provision does not simply bar the authorization of gambling, it bars the authorization of “...lottery or the sale of lottery tickets, pool-selling, book-making, or *any other kind of gambling*” (emphasis added). Applying ⁸¹⁹ the rule of construction that words used in constitutional provisions should be given their ordinary meaning and not be deemed superfluous, the “any other kind” proscription calls for an expansive, not a limited, interpretation of the term “gambling”. This is particularly so where the preceding language enumerates differing descriptions of gambling activities, including bookmaking, which is defined in our current Penal Law at § 225.00 (9) as “...advancing gambling activity by unlawfully ⁸⁹⁴ accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events”. The

commentaries to such statute note that it codified "...the views set forth by the Court of Appeals" defining bookmaking prior to the imposition of the statutory definition (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 225.00 at 356). It is axiomatic that sporting events are included within such "future contingent events" (*see generally, People v. Abelson*, 309 N.Y. 643, 132 N.E.2d 884 [1956]; 1984 Op. Att'y. Gen. 1). It is also beyond dispute that those amending the Constitution had a clear view at the time of the differences between "pure chance" activities (e.g., lotteries, roulette) and those involving bets on sporting events (*see People ex rel. Collins v. McLaughlin*, 128 A.D. 599, 113 N.Y.S. 188 [1st Dept. 1908] [discussing evolution of anti-gambling statutes in the State]).

While the Court is mindful of the doctrine of *ejusdem generis*, the use of "Book-making" and "Pool-selling" in the preceding language to the broad ban on "any other" form of gambling strongly implies that placing bets on performances in IFS, which practice is recognized as entailing substantial skill, falls within such prescription (*see Philbrick v. Florio Co-op*, 137 A.D. 613, 616, 122 N.Y.S. 341 [1st Dept. 1910], *aff'd*, 200 N.Y. 526, 93 N.E. 1123 [1910]) and at least one contemporary Appellate Court discussed such prohibition in similar fashion:

It must be remembered that the evil which the people aimed at in passing that constitutional amendment was the sale of lottery tickets, the establishment of lotteries and pool-selling and bookmaking, which had been conducted so generally and under such circumstances as to become a grave public evil. Other forms of gambling, to be sure, are mentioned—not particularly, because the people deemed it unnecessary to put a constitutional prohibition upon other forms of gambling, for the Legislature had already by stringent laws taken steps to do that—but because, as is evident from the debates in the convention, it was intended that no opening should be left by which anybody who desired to pursue the business of bookmaking or poolselling in some other way than had been pursued before, could be able to do so, and thereby evade the constitutional prohibition.

(⁸⁹⁵ *People ex. rel. Sturgis v. Fallon*, 4 A.D. 76, 79, 39 N.Y.S. 860 [1st Dept. 1896],

aff'd, 152 N.Y. 1, 46 N.E. 302 [1897]).

Further, the Court of Appeals has previously referenced the prohibition in a fashion strongly implying that it was meant to be broad in application:

“[f]rom an absolute constitutional prohibition on gambling in New York of any kind, expressly including ‘book-making’, which has stood almost 80 years in the New York Constitution (art. I, § 9), a specific exception was carved out in 1939.” (emphasis added) (*Finger Lakes Racing Ass’n v. N.Y. State Off-Track Pari-Mutuel Betting Comm’n*, 30 N.Y.2d 207, 216, 331 N.Y.S.2d 625, 282 N.E.2d 592 [1972]).

Finally, while the parties have not identified a Court determination defining “gambling” for the purposes of the constitutional provision, in *dicta* in *Dalton*, the **§ 820** Third Department, discussing the definition of the word “lottery” in article 1, § 9, referenced gambling as “defined by the three elements of consideration, chance and prize” and makes no reference to the inclusion of an element of skill as negating the application of the other three elements (*Dalton v. Pataki*, 11 A.D.3d 62, 90, 780 N.Y.S.2d 47 [3d Dept. 2004]). Such holding cites to, *inter alia*, the modern New York Penal law definitions of “Gambling” and “Contest of Chance”. Such definition was adopted again, (in *dicta*) by the Court of Appeals in their decision affirming in part and modifying in part the Third Department's decision (see *Dalton v.*

Pataki, 5 N.Y.3d 243, 264, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005]). Such definition comports with the modern Penal Law provisions passed in fulfillment of the constitutional mandate, and is, at a minimum, evidence of the commonly understood meaning of the term “gambling”.

²³ Defendants argue that “[b]ecause Article I, § 9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling, the only currently valid definition of the term “gambling” in Article 1 § 9 is found in Penal Law § 225.00 (2)” (see Defendants’ MOL at pg. 13, fn. 7).⁸ It appears undisputed that, aside from the IFS exception specified in Chapter 237, IFS falls within the Penal Law definition of gambling. As discussed below, the Legislature has the authority to address and exclude certain acts, including IFS, from the ambit of the Penal Law. Such discretionary exclusion, however, does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the constitution is not so fungible.

⁸⁹⁶ The defendants also discuss the differences between IFS and real sports competitions, including the key elements differentiating the two, those being that the points are scored based on aggregated individual (rather than team) performances and that the IFS participants select their own “team”. Neither of these facts effects the

conclusion that the performances of the individuals are future events over which the IFS participants have no control.

There is little, if any, identified difference between complex gambling practices (*e.g.*, poker, horse handicapping and complex betting on sports events including point spreads, over/under bets, and parleys) and IFS. Each of these actions involve a significant amount of “skill”, including the ability to assess multiple options of play and, using talent, information gained by experience and dedicated research, to maximize one's chances of winning, whether against the “house” or against a group of opponents. As discussed above however, this skill/chance dichotomy was by no means unknown to those who enacted the relevant constitutional provision, and the provision made no reference to even a dominant degree of “skill” as negating the definitions of pool selling, bookmaking and any other gambling.

24 | 25 The broad constitutional prohibition cannot be allowed to contemplate a parsing of the degree of skill involved in a practice which encompasses a material degree of chance based upon the outcome of a future contingent event or events (the separate performances of a group of selected athletes). The proposed exclusion from such ban of games with a degree, or even a dominant degree, of skill, if intended ⁸²¹ by the provision drafters, would have been clearly stated;

instead, the language was made broad enough to encompass every eventuality wherein gambling was conducted on future contingent events.

²⁶ ²⁷ Based on all of the above, the Court finds and holds that the Constitutional prohibition upon authorization or allowance of pool-selling, bookmaking or any other kind of gambling encompasses IFS, including in circumstances where the Legislature has determined that ultimate success in an activity premised upon the performance of selected athletes in future contests is predominantly determined by the skill of the individual selecting the athletes. The intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now of the meaning of the prohibition and of the particular words “bookmaking” and ⁸⁹⁷ “gambling”, and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests all lead to such conclusion. Moreover, as referenced above, to countenance such redefining of the term would effectively eviscerate the constitutional prohibition (see *Dalton v. Pataki*, 11 A.D.3d 62, 780 N.Y.S.2d 47 [3d Dept. 2004], *affirmed in part and modified in part*, *Dalton v. Pataki*, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005]). As such, the plaintiffs have demonstrated beyond a reasonable doubt, that, to the extent Chapter 237 authorizes and purports to regulate IFS registered and conducted pursuant to

the provisions of such Chapter, it is unconstitutional.

Penal Law Provision

²⁸ ²⁹ In addition to the provisions authorizing, regulating and taxing IFS, Chapter 237 also affirmatively declares, within the context of the RPMWBL, that IFS does not constitute gambling in New York as defined in Penal Law Article 225. As discussed in detail above, the legislative findings upon which such declaration is based do not factually support such declaration, and, to the extent it is not clear from the discussion above, IFS does fit the statutory definition of gambling set forth in Article 225.

As further stated above, it is facially clear that, pursuant to Article 1, § 9, the authority to pass appropriate laws to prevent offenses against the provisions of such section rests in the Legislature. Such clause “...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution.” (*Sturgis, supra* at 11, 46 N.E. 302). Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute (*Id.* at 10, 46 N.E. 302: “It is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses”).

³⁰ In *Sturgis*, the Court declined to invalidate a statute of which “[t]he most that can be said is, ...its effect was to reduce the then existing penalty or punishment for that particular offense” (*Id.* at 10, 46 N.E. 302), citing to the clear mandate of legislative authority in the constitutional section. The Court went on to hold, with reference to such statute, that “[i]t being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this Court to condemn it as invalid or unconstitutional because, in our opinion, some more effective or appropriate law might have been devised and enacted” (*Id.* at 11, 46 N.E. 302). Further, “[c]ourts do not sit in review of the discretion of ^{*898} the legislature, or determine upon ^{**822} the expediency, wisdom or propriety of legislative action in matters within the power of the legislature.” (*Id.*).

The statute herein, as regards the Penal law, expressly declares that IFS does not constitute gambling for the purposes of such statutory definition. The Court has found that IFS is gambling for the purposes of the constitutional provision, and, further, that the stated rationale for the finding that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion. Nevertheless, in light of the specific discretion afforded the Legislature in the constitutional provision, that is, to enact laws to prevent such offenses, the Court cannot find that the provision ostensibly excluding IFS from the ambit of the

Penal Law definition of gambling is unconstitutional. (see 1984 NY Op. Att'y Gen. 1, 22-23 [stating, “[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State.” (*Id.* at 41)]).

³¹ The Legislature, in the exercise of its authority and discretion, has enacted an anti-gambling statute (Penal Law Article 225). It has apparently seen fit to exclude from such statute IFS. It is not within the authority of this Court to usurp the Legislature's authority in fashioning such statute. As argued by the defendants, such authority has previously been exercised by the Legislature in excluding “Players” from the scope of the anti-gambling Penal Law provisions (see Penal Law § 225.00(3)). As the enactment of statutes to prevent gambling offenses lies within the clear responsibility of the legislature, the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate, and any finding of unconstitutionality in such context would be beyond the scope of the judicial review authority (see *McKinney's Cons. Laws of New York, Statutes*, § 73).

Accordingly, the Court finds and holds that plaintiffs have failed to meet their burden herein with regard to the provision of Chapter 237, now codified at RPMWBL § 1400 (2), which purports to except IFS from the anti-gambling

provisions of the Penal Law; moreover, the defendants have met their burden with regard to such provisions, and the plaintiffs have failed to meet their burden in opposition.

***899** Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that Plaintiff's motion for Summary Judgment is granted herein (and Defendant's cross-motion denied) as follows: that Chapter 237 of the Laws of the State of New York, to the extent that it authorizes and regulates IFS within the State of New York, is found null and void as in violation of Article I, § 9 of the New York State Constitution; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant's cross-motion for summary judgment granting dismissal of the within action is granted herein (and plaintiff's motion denied) as follows: Chapter 237 of the Laws of the State of New York, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, is not in violation of Article I, § 9 of the New York State Constitution.

This shall constitute the Decision, Order and Judgment of the Court. This original

Decision, Order and Judgment is being returned to the attorney for the plaintiffs. The below referenced original papers are being transferred to the Albany County ^{**823} Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.

All Citations

62 Misc.3d 877, 87 N.Y.S.3d 805, 2018 N.Y. Slip Op. 28355

Footnotes

- 1 Penal Law § 225(2) defines “Gambling” as follows: “A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome”. A “Contest of Chance” is defined at Penal Law § 225.00(1): “... any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”
- 2 Plaintiffs finally argue that the Legislative Record evidence submitted by the defendants in support of their position that the finding that IFS is not “gambling” is insufficient to constitute a rational basis for such finding.

Plaintiffs argue that significant portions of such evidence were generated by interested parties, those being the organizations (or their hirees) directly impacted by the proposed legislation.

- 3 Defendants cite, at page 5 of their reply brief, to certain statutory provisions regarding horse racing for the proposition that the Legislature can make a rational determination that horse handicapping contests do not constitute gambling, though they cite to no case law applying the within constitutional provision to such statutes.
- 4 Fanduel, Inc. and Draftkings, Inc. offer their subscribers weekly and daily online **fantasy sports** formats (see Defendants' Memo of Law in Opposition, pgs 4-5).
- 5 Defendants cite further to the exercise of the Legislature's latitude inherent in the choices made at Penal Law Art. 225 and Racing Law § 906.
- 6 The parties have not presented to the Court specific evidence with regard to the "scoring" of IFS competitions involving football players. Though the ability to create a system to award points based on individual offensive performances (e.g., yards gained, touchdowns scored, completed passes) is apparent, the ability to create such a system based on individual defensive performances, rather than team effort, is significantly less so.
- 7 The Appellate Division in *Dalton* discussed the application of the lottery exception amendment to the constitutional ban on gambling in the context of a very general definition of lotteries advanced by defendants which was consistent with all gambling. There the Court held that "[s]uch a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional ban on gambling"

(*Dalton*, 11 A.D.3d 62, 90, 780 N.Y.S.2d 47, affirmed in part and modified in part, *Dalton v. Pataki*, 5 N.Y.3d 243, 264, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005]; see also, 1984 Op. Atty. Gen. *supra* at 41 which provides that “[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State.”).

- 8 Such argument, however, is inconsistent with the position of the defendants that the Legislature, in defining “contest of chance”, did so more expansively than required by the constitutional provision.

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