

# THE COMMONWEALTH OF MASSACHUSETTS



## *White Paper on Sports Betting*

MASSACHUSETTS GAMING COMMISSION

Paul Connelly, Director of Licensing  
Justin Stempeck, Associate Counsel

February 28, 2018

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## **INTRODUCTION**

The goal of this white paper is to provide a roadmap for those seeking to learn about the current landscape of the sports betting discussion in the country and its possibilities in Massachusetts. While the basics of the Supreme Court argument are summarized in passing, this is not a detailed legal analysis of the arguments put forth in that forum. Instead, this paper examines the facts concerning illegal and legal sports betting in the United States and the various policy approaches to a regulated sports betting market in the Commonwealth. The possible fall of the federal ban on sports betting provides an opportunity coinciding with the rise of a nascent casino industry in Massachusetts. Recognizing that the first step in any decision is proper education on the subject, the Massachusetts Gaming Commission respectfully submits this white paper to the Legislature to aid in this endeavor.

### **I. What factors are important to the Commonwealth for consideration in a discussion of Sports Betting?**

#### **A. Historical Perspective**

The gaming landscape in Massachusetts has changed drastically over the past seven years. Where previously the Commonwealth was known primarily for its horse racing and the success of its state lottery, since the passage of the 2011 Expanded Gaming Act (M.G.L. c. 23K), Massachusetts has been at the forefront of discussions concerning the future of gaming, both with respect to the impressive brick and mortar casino facilities being currently constructed as well as with respect to advances in online gaming, daily fantasy sports (DFS) and sports betting. These discussions have included thoughtful consideration of new gaming questions as well as the careful and responsible implementation of the Expanded Gaming Act.

The Expanded Gaming Act was crafted as a job creation and economic stimulus bill to take advantage of the untapped gaming market in Massachusetts. That consumer market had

long filled the coffers of neighboring states that provided legal gaming opportunities. The Gaming Act sought to create jobs, spur investment and development in the Commonwealth and retain local gaming dollars that had previously been spent in other states. In order to achieve these lofty goals, the Act provided for the licensing of three resort casinos in three separate areas of the state. The Act also permitted the construction and operation of a slots-only casino. Currently, MGM Resorts holds the Region B license and is nearing completion of the construction of a casino complex in Springfield which is slated to open in September 2018. Wynn Resorts holds the Region A license and is deep into construction of a facility set to open in June 2019. Plainridge Park Casino, the state's sole slot parlor opened in June 2015.

Recently, during the pendency of The Special Commission to conduct a comprehensive study relative to the regulation of online gaming, fantasy sports gaming and daily fantasy sports, that group heard testimony from representatives from the three casino licensees with respect to a number of cutting-edge issues, including sports betting. All three licensees favored the introduction of a sports betting product at their facilities. While there was no in-depth discussion of the details of how sports betting would be presented by the licensees, it is clear that the opportunity to add a sportsbook to their locations would not be overlooked.

The Expanded Gaming Act also placed the existing Racing Commission under the jurisdiction of the newly created Massachusetts Gaming Commission (MGC), placing oversight of Thoroughbred and Standardbred racing within the authority of the MGC. As horse racing has a long and storied history in the Commonwealth, it also provides a concrete example of a type of legal sports betting that has prevailed for decades. Further, many are unaware of the fact that the horse racing industry in Massachusetts introduced a form of online betting through advance

deposit wagering (ADW) back in 2001.<sup>1</sup> ADW allows a bettor to prefund an account and then place bets from that account on local and national horse races through telephone calls or the websites of numerous ADW providers, including Hollywood Races, XpressBet, TVG, Twinspires and NYRAbets. Notably, each of these ADW providers have corresponding mobile applications that any bettor can use on a smartphone, thus providing mobile, legal horse betting to any citizen of the Commonwealth.

### **B. What is the Potential Sports Betting Market Size?**

One of the inherent difficulties with estimating the potential legal sports betting market size is the uncertainty that comes with any estimate of the illegal market size. Further complicating the matter has been the fact that most of the figures advanced in public reports are based on a national estimate of total betting handle and not revenue. Understanding the difference between the handle and revenue is critical for realistic expectations of sports betting revenue. The “handle” in sports betting refers to the total amount wagered, which is not the amount that would typically be taxed. Sports book operators typically clear roughly 5% of handle as gross gaming revenue. “Gross gaming revenue,” (GGR) is the amount wagered minus the winnings returned to players (before paying taxes and operating costs). For example, a handle of \$50 million would result in only \$2.5 million in GGR. So while there may be an extremely large handle for illegal sports betting, the taxable GGR is a much smaller percentage of that figure.<sup>2</sup>

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<sup>1</sup> As used in this section, "account wagering" shall mean a form of pari-mutuel wagering in which an individual may deposit money to an account established through an agreement with a person licensed to conduct a running horse, harness horse or dog racing meeting and use the account balance to make and pay for wagers by the holder of the account which wagers may be made in person, by direct telephone call or by communication through other electronic media by the holder of the account to the licensee. G.L. c. 128A, § 5C.

<sup>2</sup> For example, in Nevada, the gross gaming revenue is taxed at 6.75%, thus using the scenario posed; the tax would only return \$168,750.00 on \$2.5 million in revenue.

Many estimates of the size of the illegal sports betting market in the United States have significantly exceeded \$100 billion annually, with the American Gaming Association estimating a \$150 billion annual market size and a recent study by H2 Gambling Capital estimating a \$192 billion annual market size.<sup>3</sup> In contrast, a September report by the firm of Eilers & Krejci Gaming estimates a black market size at a more conservative \$50-\$60 billion. Regardless of the exact figure it is safe to assume that the illegal sports betting market is in the tens of billions of dollars, if not over \$100 billion.

Although relatively little research has been conducted on state specific market size, the American Gaming Association did retain Oxford Economics to examine the economic impact of sports betting in May 2017.<sup>4</sup> Oxford conducted numerous analyses of national and state data to estimate the tax revenue to various states based on a number of different scenarios. These scenarios examined three GGR tax rates: a “low” tax rate of 6.75%, a “base” tax rate of 10% and a “high” tax rate of 15%. The study also looked at three different models concerning the availability of sports betting: a **limited availability model** (sportsbooks only available at casinos, no online/mobile), a **moderate availability model** (casino sportsbooks and retail locations, no online/mobile) and a **convenient availability model** (casino sportsbooks, retail locations and online/mobile). Analyzing each availability model with the three prospective tax rates returned the following possible tax revenues<sup>5</sup> for Massachusetts:

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<sup>3</sup> See “Illegal sports wagering reaches \$196bn or 97% of US market, according to H2”

<http://www.igamingbusiness.com/news/illegal-sports-wagering-reaches-196bn-or-97-us-market-according-h2-0>

<sup>4</sup> <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf>

<sup>5</sup> These revenues are derived from the various scenarios posed by the Oxford study.

REVENUE	LOW TAX OF 6.75% GGR	BASE TAX OF 10% GGR	HIGH TAX OF 15% GGR
Limited availability Revenue	\$8.6 million	\$11.9 million	\$15.2 million
Moderate availability Revenue	\$19.5 million	\$27.2 million	\$34.7 million
Convenient availability Revenue	\$31.9 million	\$45.2 million	\$61.3 million

To date this is the only Massachusetts specific market research we have discovered. While it necessarily can only provide an estimate based on the nine scenarios, the study shows the revenue generating potential of various versions of legal sports betting.

### C. The Evolving Nature of Sports Betting

Given that opportunities for legal sports betting in the United States are currently limited, many are unaware of the advances in the field that have modernized the product in both the legal and the illegal contexts. Sports betting’s increasing popularity is reflected in the record setting handle of over \$500 million a month reported by the Nevada Gaming Commission for September, October and November of 2017. While bettors in Nevada can still physically place a bet at a sportsbook much of the business has now turned to placing bets online or via smartphone applications, the first of which was approved in 2010. As of 2018, there are eight different sports betting apps available in Nevada. These apps generate 25-50% of the entire sports betting handle for the state.<sup>6</sup> Sportsbooks offer a variety of different types of traditional bets (point spread, money line, parlay, etc.) but the fastest growing area of betting is “in play bets.” “In play bets” allow a bettor to place a wager on a game that is already in progress.

While regulated sports betting in Nevada enjoys resurgent interest, sophisticated online illegal sports betting is easily available. A simple Google search for “online sportsbook” returns

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<sup>6</sup> <https://www.legalsportsreport.com/nevada/>

numerous providers that offer online betting options to U.S. customers regardless of the legal status of sports betting in one's state. Many of these operators also provide mobile apps that integrate seamlessly with the sportsbook to allow for bettors to place bets wherever they have access to their smartphone. These black market operators may appear legitimate at first glance, but they are unlicensed and unregulated. As a result, a disgruntled customer has limited recourse in the event of any complaint and no guarantee of any consumer protections for their money once it is sent to the operator.

Beyond the easy access to sports betting for anyone with an internet connection or a smartphone, there has been a significant advancement from the typical local bookie to the development of a "pay per head" model of sports betting. A "pay per head" sportsbook provides a software as a service type product where bookies receive access to a custom sports betting website where they can direct their customers. A "pay per head" has all of the accessories to rival online sports books including a betting menu, 24/7 player access, a wide variety of betting types including in-play bets, player profiles, live agents to take bets over the phone, technical support and a full slate of varied sports on which to bet. The service further allows the bookie to modify player profiles to set limits or cut off betting, both of which are integral where a bettor is allowed to make bets on credit. A sophisticated bookie can even change the lines on a particular game to balance out risk exposure. Using "pay per head" software, the bookie pays a weekly service fee to the software operator based on the number of players he brings in, generally the more players he brings in, the lower the average cost per player per week. While the software does all of the calculations for wins and losses, the bookie still collects losses and pays out winnings. The "pay per head" model offers the advantages of both worlds, combining the local



relationships that support a small sportsbook with the sophistication and technology of a polished online operation.

Just as the betting operations have become more sophisticated, bettors themselves have embraced technology, particularly in the age of cryptocurrency.<sup>7</sup> With the popularity of bitcoin and other similar currencies, entrepreneurs began offering sportsbooks that accepted such anonymous tender without requiring any details of ownership. Many of the sites that host such operations do not even require users to provide an email address thus raising very real concerns about a host of consumer protection issues including player fund protection, fairness of contests, access to funds, as well as money laundering.

#### **D. How are Other States Approaching Sports Betting?**

There is no uniform approach emerging as other states grapple with the legalization of sports betting. There was extensive legislative activity in many states in 2017. That pace has only continued into the beginning of 2018, as reflected in the 2018 legislation filed to date and shown in this chart:

STATE	BILL	DESCRIPTION
California	ACA 18	Allows the legalization of sports betting if PASPA is overturned.
Illinois	H4214, S2478, S 3125, H 5186	Legalizes sports betting unless at existing gaming facilities unless prohibited by federal law
Indiana	S405, H1325	Legalizes sports betting unless at existing gaming facilities unless prohibited by federal law
Iowa	H592	Legalizes sports betting for existing licensees if PASPA is overturned.
Kansas	H2533	Legalizes sports betting solely at racetrack gaming

<sup>7</sup> “Cryptocurrency is a digital asset designed to work as a medium of exchange that uses cryptography to secure its transactions, to control the creation of additional units, and to verify the transfer of assets. Cryptocurrencies are a form of digital currencies, alternative currencies and virtual currencies. Cryptocurrencies use decentralized control as opposed to centralized electronic money and central banking systems. The decentralized control of each cryptocurrency works through a blockchain, which is a public transaction database, functioning as a distributed ledger.” <https://en.wikipedia.org/wiki/Cryptocurrency>

		facilities.
Kentucky	BR155	Legalizes sports betting under the Kentucky Racing Commission
Maryland	S856, HB1346	Legalizes and regulates sports betting via referendum
Michigan	H4060, H4261, H4926	The first bill legalizes sports betting via a referendum. The second allows for parlay wagering. The final bill legalizes online sports betting (as long as consistent with federal law), casino games and poker.
Mississippi	H1113, H1154	The first bill legalizes sports betting on the physical premise of licensees. The second bill studies tax rates for sports betting.
Missouri	H2320, H2406, S 1005, H 2535, S 767	These bills provide differing approaches to legalizing and regulating sports betting .
New York	S1282, A5438	The bills legalize sports betting at racetracks and simulcast venues. New York has already legalized sports betting at its commercial casinos in the event that PASPA is overturned.
Oklahoma	H3375, S1175	These bills legalize sports betting.
Rhode Island	S2045	Subject to a change in federal law this bill legalizes sports betting at casinos.
South Carolina	H3102	This bill legalizes sports betting.
West Virginia	H2751, S106, S415, H4396	These bills legalize sports betting if PASPA is overturned.

As demonstrated above, proposed legislation varies in detail and complexity from state to state. The basic common thread is the march of many states from around the country towards the legalization of sports betting.

**II. What are the possible legal outcomes of the pending Supreme Court Decision and what would their effects be in Massachusetts?**

**A. The Professional and Amateur Sports Protection Act and Christie v. NCAA, et al.**

In order to place the current discussion over the future of sports betting in context, it is important to understand both the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 (1992), as well as New Jersey’s challenge to the statute. PASPA basically serves as a prohibition against any state action that would make sports betting legal (except for certain

grandfathered states, including Nevada). The most relevant and oft-discussed section of PASPA states:

It shall be unlawful for-

- (1) A governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). These so-called PASPA ‘verbs:’ “sponsor, operate, advertise, promote, license or authorize by or law or compact” have been much discussed as their exact limits are murky.

The current fight over PASPA began in November 2011, when the voters of New Jersey approved a referendum which granted the state legislature the authority to amend the New Jersey Constitution to allow sports wagering. Subsequently in January 2012, the legislature passed a bill allowing the state to issue licenses to the state’s casinos and racetracks to permit gambling on sporting events. The bill was then signed into law. Before any regulations were promulgated, the NCAA, NBA, NFL, NHL and MLB filed an action in the United States District Court for the District of New Jersey to prevent the state from implementing the law asserting that it violated PASPA. The District Court found in favor of the leagues in February 2013. The state then appealed to the United State Court of Appeals for the Third Circuit to challenge the District Court’s decision. In a two-to-one decision, the Third Circuit affirmed the District Court’s decision against New Jersey.

Approximately a year later, New Jersey filed a motion with the District Court asking for clarification that the state was not required to criminalize sports betting and thus could eliminate laws on sports betting without technically violating PASPA. In October of 2014, New Jersey decriminalized sports betting at licensed racetracks and casinos. The leagues filed suit again and New Jersey lost. In March 2015, New Jersey appealed to the Fourth Circuit Court of Appeals and a three judge panel upheld the lower court ruling in a 2-1 decision. New Jersey then requested a full or “en banc” hearing by the Appeals Court. After the request was granted, the full court ruled against New Jersey in a 9-3 ruling. New Jersey then appealed the decision to the Supreme Court, which heard the case in December 2017. The primary question posed by New Jersey to the Supreme Court was whether PASPA “commandeers” states and requires them to maintain state-law bans on sports betting, thus violating the 10<sup>th</sup> Amendment.

#### **B. Possible Supreme Court Outcomes and Potential Impact in Massachusetts**

Since oral argument in December, legal experts have scrutinized the briefs and the questions posed by the Justices to speculate as to which way the Court is leaning. The general consensus from legal scholars and those that have been following New Jersey’s path to the Supreme Court is that New Jersey has a slight edge in obtaining a favorable verdict. Despite this opinion, there is no clear answer as to what such a favorable ruling would look like.

The various routes the Supreme Court could take fall into the following broad categories (these are not the only possibilities, simply the ones most widely considered):

##### **(1) The Court fully upholds PASPA**

Although it is possible that the Supreme Court would uphold PASPA in its entirety, it seems unlikely given that the Court chose to hear the case and extensively questioned counsel during legal argument with respect to the commandeering issue at the heart of the case. The

Supreme Court could have simply denied the writ of certiorari if it was going to leave PASPA unchanged. The Supreme Court receives 7,000 to 8,000 writs of certiorari each year and only hears approximately 80 oral arguments (roughly 1%). Thus, the decision to hear this case in that context cannot be overlooked. If PASPA is entirely upheld by the Supreme Court, there would be no effect on Massachusetts; sports betting is currently illegal and would continue to be illegal under state and federal law.

## **(2) The Court Issues a Narrow Ruling Authorizing New Jersey's Sports Betting**

Alternatively, the Court could issue a narrow ruling that would grant New Jersey the right to offer sports betting but only in the context of the “partial repeal” of its existing laws, while maintaining the legality of PASPA as a whole. As noted above, New Jersey's current dispute with the leagues came when it decriminalized sports betting at licensed racetracks and casinos. Thus, arguably New Jersey did not take any affirmative actions to “sponsor, operate, advertise, promote, license, or authorize” sports betting in contravention of PASPA. The Court could agree with New Jersey's argument in this respect.

A decision on these grounds would create some practical difficulties for New Jersey because although it would technically have legal sports betting at licensed racetracks and casinos, there would be no state rules or regulations to govern its operation. In the event that the state attempts to impose such regulations, New Jersey could once again run into a conflict with PASPA and whether its actions constitute “authorization” of sports betting. It could seem counterintuitive to approve of New Jersey's actions to allow sports betting in an unregulated form but curtail its ability to ensure that the industry was well managed and provided consumer protections. In reaching such a ruling, the Supreme Court could point out these dangers in an

effort to spur Congress to revisit PASPA to address these deficiencies in light of a changed gaming landscape.

In the event that such a narrow ruling is reached, the ruling would provide a roadmap for other states to follow. Such a ruling could lead to a number of states eliminating laws criminalizing sports betting at their licensed casinos, racinos and racetracks. The potential for other states to avoid PASPA prohibitions on sports betting by eliminating their own laws addressing the subject strongly suggests that the Supreme Court will do more than simply approve of New Jersey's approach.

Under this type of a ruling Massachusetts could follow the New Jersey approach and repeal prohibition on sports betting limited solely to licensed casinos / racetracks. However, it would run into the same problems with ensuring the integrity of the practice if actual regulation would simply lead to another PASPA violation.

### **(3)The Court Fully Strikes Down PASPA.**

Alternatively, the Supreme Court could fully strike down PASPA, thus allowing states to address the issue of sports betting themselves. Many states would still need to address state constitutional bans or other state law prohibitions if they are interested in sports betting. However, states would no longer have to be concerned with their actions stepping into the vague penumbra of the PASPA 'verbs' mentioned above. A number of states have already prepared for this possible outcome and have enacted legislation that legalizes sports betting in the event that PASPA is overturned. These states currently include: Connecticut, Delaware, New York, New Jersey, Pennsylvania and Mississippi. Of course, many other states have pending legislation seeking to do the same thing, as referenced in section E above.

In the event that PASPA is overturned by the Supreme Court and Massachusetts is interested in legalizing sports betting in the Commonwealth, a number of state laws could be modified to address the topic. One efficient way to accomplish that goal would be to decriminalize sports betting under certain circumstances, such as when conducted with a state approved sportsbook operator. Additionally, Massachusetts would need to determine if regulation of the industry would be addressed specifically via statute or by regulation, as well as who should regulate the field. There has not been a consistent approach taken by other states that have addressed this issue. Some have crafted dense, detailed bills and others proposed broad legislative language that empowers an administrative agency with the ability to regulate the granular details. An additional option under this scenario would be the “omnibus approach” previously referenced in the MGC’s White Paper on Daily Fantasy Sports. Under that approach a regulatory body would be provided the authority to address the broad subject of online gaming (including sports betting) and thus could quickly react to an industry where change is constant. Settling on a Massachusetts approach is important where both neighboring Rhode Island and Connecticut have either proposed or passed legislation that would legalize sports betting in their respective states if PASPA falls.

### **C. If PASPA Falls, are There Other Legal Obstacles?**

Even in a scenario where PASPA is eliminated, prospective sports book operators would still need to understand the potential application of another federal law, the Federal Wire Act 18 U.S.C. §1081. The Wire Act states in relevant part:

**Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or**

**wagers**, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. §1084(a) (emphasis added).

The Wire Act, which was signed into law in 1961, was originally crafted and used to fight organized crime and illegal betting rings. Recently, due to some confusion as to the reach of the Wire Act, the Department of Justice was formally asked for a clarifying opinion and produced one in 2011. In that opinion, the Department of Justice's Office of Legal Counsel (OLC) stated that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside the reach of the Wire Act."<sup>8</sup> While this likely was a positive development for those seeking to offer other forms of online gaming, this clarification made clear that the main focus of the Wire Act is on sports betting.

Given the Wire Act's clear focus on sports betting, the question then becomes what practical effect would it have on a legalized sports environment in the Commonwealth? By the language cited above, the Wire Act prohibits the (1) interstate transmission of bets; (2) interstate transmission of a "wire communication which entitles the recipient to receive money or credit as a result of bets or wagers;" or (3) interstate transmission of "information assisting in the placing of bets or wagers." Importantly, some of these prohibitions are easier to understand than others. For example, under the Wire Act, Massachusetts sportsbook operators could accept bets only from those within Massachusetts in an effort to ensure that there is no "interstate" action. Similarly, a "wire communication which entitles the recipient to receive money or credit as a result of bets or wagers" strongly suggests that any payment processor associated with a legal sportsbook would need to be based in-state. The phrase "information assisting in the placing of

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<sup>8</sup> "Whether Proposals by Illinois and New York State to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act" United States Department of Justice. September 20, 2011. p. 1. Retrieved February 7, 2018.



bets or wagers,” is not as clear. Legal experts have questioned whether that phrase would prohibit professional sports leagues from transmitting sports data to legal sportsbooks or prohibit a national sportsbook operator from transmitting information on betting lines to other state based affiliates or subsidiaries. The Wire Act does contain an exemption that states:

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.

18 U.S.C. §1084(b)

In accordance with this exemption, the “transmission of information assisting in the placing of bets or wagers on a sporting event” from one state where sports betting is legal to another state where sports betting is legal would potentially be permitted as long as no bets are communicated between the states. Nonetheless, there is not yet an exact definition of “information assisting in the placing of bets or wagers.” Thus at its inception legalized sportsbooks will have to plan to only accept and process bets entirely within the Commonwealth.

### **III. Framework For Approach**

As the Legislature considers whether or not to legalize sports betting, its evaluation will be guided by certain policy objectives. The introduction of a new aspect of the emerging gaming industry in Massachusetts presents an opportunity to bring a significant amount of gaming activity and revenues out of the shadows and into the legal market. With that transition would come the opportunity to cultivate the associated economic benefits – including tax revenues – while providing consumers of sports betting with protections not afforded them by illegal

bookmakers. While certainly not an exhaustive list, we would posit that among those policy objectives under consideration by the Legislature could be:

- A desire to transition sports betting activity from the black market to legal, regulated markets
- A desire to capture tax revenues from legal sports betting activities
- A desire to expand economic opportunities to potential local providers of sports betting and related industries
- A desire to identify and mitigate any potential negative externalities associated with the introduction of sports betting, including efforts to promote responsible gaming

The Legislature's appetite for legalization and the particular perspective it takes on addressing the policy objectives under consideration will have significant impact on the nature and conduct of a potential sports betting landscape in Massachusetts. Here are some of the high-level considerations to frame some of the most important issues and serve as a starting point for further analysis.

#### **A. Minimizing the Black Market**

Because of the advanced nature of illegal online sportsbooks, the "pay per head" operations and bettors utilizing cryptocurrencies to anonymize their actions, any legal competitor will need to offer a competitive product to minimize the appeal of the black market. While some bettors may choose to move into a legal alternative simply because it is legal, fewer will do so if the legal product is less sophisticated than what is easily available on the black market. Reducing the black market has multiple advantages to a state government considering sports betting legalization as doing so will drive bettors to legal, taxable alternatives that are regulated and provide for consumer protections of the public, thus benefiting both the state as well as the

bettors themselves. Reducing the size of the black market also has the potential to reduce enforcement costs associated with investigating and prosecuting illegal sports betting. There are a number of important elements to consider as critical for competing with the black market if sports betting is ultimately legalized, they include:

- **Online availability:** internet based sports betting is already here as exemplified by the multiple off shore sportsbook websites that are easily available to anyone with an internet connection. A legal alternative to these sites must be as convenient and as accessible to challenge the pervasive black market.
- **Mobile availability:** Much as with online, if current black market bettors are accustomed to the ubiquity of a mobile app for their illegal product, any legal version will need to offer similar convenience or risk being ignored.
- **Similar offerings:** Legal sportsbooks will need to offer a similar slate of contests to bet on and types of bets to make, including in-game betting. Any constraints on the most popular types of bets or types of games will discourage adoption of the legal product.
- **Taxes and Fees<sup>9</sup>:** Understanding the economics of a sportsbook and the relatively small margins involved in their operation, taxes and fees should be carefully considered. The active black market operators pay no taxes and no regulatory costs. So they already enjoy an advantage over any legal operator that would only be compounded by a high tax rate on legal operators.

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<sup>9</sup> There has been extensive recent discussion and lobbying efforts by the NBA and MLB to include a 1% fee on handle payable to the leagues in any sports betting legislation. Importantly, a 1% fee on handle equates to roughly a 20% tax on gross gaming revenue, significantly higher than many state tax rates and nearly three times Nevada's existing sportsbook tax.

- **Security/Consumer Protection:** Any legal sports betting product should be prepared to demonstrate its security credentials as well as its consumer protection policies. These elements, when backed by law and regulation, would allow legal sports betting products to distinguish themselves from black market offerings. Such characteristics could be aggressively advertised and marketed as a means to persuade black market bettors to move into the legal market.
- **Responsible Gaming:** A legal market presents the opportunity to provide responsible gaming tools to allow participants to monitor and manage their betting activity.

These are just some of the most relevant elements that should be examined when determining the specifics of a legal market product. Once relevant stakeholders enter the conversation in earnest, there will likely be dozens of nuanced issues to further assess; however, the six broad categories above encapsulate the lion's share of discussions taking place in state legislatures throughout the country.

## **B. Implementation Considerations**

When considering the potential introduction of sports betting in Massachusetts and its attendant impacts, it is helpful to think through the following fundamental questions regarding how and where sports betting would be made available, and to what extent it would be allowed.

**Who** (i.e. which providers) should be allowed to participate in offering sports betting?

**Where** (i.e. through which access channels) should sports betting be allowed; brick & mortar, online, or both?

**What** types of bets and on which types of contests should sports betting be allowed?

**When**, and at what pace should sports betting be allowed; gradual rollout or all-at-once?

**How** should sports betting be taxed and regulated?

These questions, when contemplated within the framework of the overarching policy objectives bring to light many of the important issues regarding both the scope of a potential sports betting regime and the potential legalization strategies necessary for a thoughtful regulatory approach.

### **C. Implementation Considerations: WHO**

The question of who will be allowed to provide sports betting is in some sense a function of whether it is seen as an activity suitable for new (and perhaps market-disruptive) entrants, or an extension of an existing regulated market. The Legislature will need to consider how broadly it wants to extend the opportunity to offer sports betting amongst a field of potential providers that ranges from established interests to as-yet-unknown entrants. Any stakeholder vying to provide sports betting will, however, have an interest in limiting the number of entrants in the market, as demand for sports betting is strong, but not unlimited. Additionally, stakeholders will likely perceive first-mover advantages in a marketplace that could get crowded as other northeast states consider legalization, as well.

Some potential providers are already invested in the gaming landscape of the Commonwealth such as the three casino licensees, as well as racetracks and off-track-betting facilities. These stakeholders may seek to maintain exclusivity over expanded gaming in Massachusetts in the case of the former (given existing investments and expectations of the market they entered), and seek additional economic security in the case of the latter. If sports betting is legalized and authorized to be offered online, there are potential implications with the Mashpee Wampanoag tribe that would need to be considered (see chart below)<sup>10</sup>. Additionally, the Massachusetts Lottery will certainly want to understand what impact, if any, sports betting

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<sup>10</sup> The Aquinnah Wampanoag Tribe is restricted to Class II games (e.g. bingo) which would not include sports betting.

might have on lottery sales and activity, and could consider becoming a provider of sports betting products as is the case in Delaware. Finally, depending on the approach a potential legalization strategy might take, there may be opportunities for new entrants into the market, whether existing operators looking to expand (either in brick and mortar shops, or offering online products) or new startups attempting to introduce innovative ideas and products to the market.

The table below provides an overview of potential providers of sports betting along with some relevant considerations:

POTENTIAL PROVIDER	DESCRIPTION	CONSIDERATIONS
<b>Existing Gaming Licensees</b>	<ul style="list-style-type: none"> <li>- Plainridge Park Casino (Penn National Gaming)</li> <li>- MGM Springfield (MGM Resorts)</li> <li>- Wynn Boston Harbor (Wynn Resorts)</li> </ul>	<ul style="list-style-type: none"> <li>- Have already made significant investments (licensing fee, capital investments) in MA</li> <li>- Have proven track record in other jurisdictions with sports betting</li> <li>- Already licensed and found suitable in MA</li> <li>- Have already expressed interest in offering sports betting, if legal</li> </ul>
<b>Racetracks / OTB</b>	<ul style="list-style-type: none"> <li>- Plainridge Park</li> <li>- Suffolk Downs</li> <li>- Raynham Park</li> </ul>	<ul style="list-style-type: none"> <li>- Have experience with sports betting</li> <li>- Have experience with (online) Advanced Daily Wagering (ADW) services</li> <li>- Have economic need to support industry</li> </ul>
<b>Tribal Interests</b>	<ul style="list-style-type: none"> <li>- Mashpee Wampanoag Tribe</li> </ul>	<ul style="list-style-type: none"> <li>- Can offer internet sports betting if internet gaming is authorized under Commonwealth and Federal law (See: Tribal-State Compact Part 4.3.2)</li> </ul>
<b>Lottery</b>	<ul style="list-style-type: none"> <li>- Massachusetts Lottery</li> <li>- Lottery Retailers</li> </ul>	<ul style="list-style-type: none"> <li>- Have interest re: potential impact of sports betting on Lottery sales</li> <li>- Model of Lottery as a provider exists: Delaware</li> </ul>

		<p>offers limited sports betting through state Lottery</p> <ul style="list-style-type: none"> <li>- Availability could be restricted or extend to all Lottery retailers (akin to retail and kiosk model in UK and Quebec)</li> <li>- Adoption of sports betting as a product entails Lottery assuming increased risks</li> </ul>
<b>Brick &amp; Mortar (New Entrants)</b>	<ul style="list-style-type: none"> <li>- Existing sports betting operators not currently licensed in MA could enter market as stand-alone providers</li> </ul>	<ul style="list-style-type: none"> <li>- Existing sports books operating in US and Europe have extensive experience and are eager to enter a legal and regulated market in the US</li> </ul>
<b>Online Providers (New Entrants)</b>	<ul style="list-style-type: none"> <li>- Virtually all existing sports betting operators have online platforms</li> <li>- Existing fantasy sports operators could add products to include traditional sports betting</li> <li>- New entrants could enter the market, including “white box” providers offering standard sports betting platforms</li> </ul>	<ul style="list-style-type: none"> <li>- While commonly accepted as the primary driver of industry growth and transition to legal market, concerns by policymakers about online may encourage a “wait-and-see” approach</li> <li>- Provides a wealth of data available for Know your customer measures, spotting problem gaming trends and providing assistance</li> <li>- Customer usage data can be used to aggressively market and encourage betting activity (push notifications, customized offers)</li> <li>- Robust data to support enhanced integrity monitoring</li> </ul>

#### **D. Implementation Considerations: WHERE**

Where sports betting might be made available and through which modalities is an extension of who is allowed to provide it and is the primary driver of the accessibility of the product. For simplicity sake, one can consider two basic models: **brick and mortar** (where bets must be placed in person at an authorized provider), and **online** (where bets can be placed over the internet, using computers, tablets or smartphones). While complimentary and often offered together, there is an obvious tension between the two models. Unlike slots or table games, sports betting, as mentioned earlier, is a low-margin business (about 5%) and is viewed by brick and mortar casinos as a way to attract customers to spend on additional activities. In a February 2018 earnings call, Penn National Gaming's CEO Timothy Wilmott remarked "(W)e think the big advantage for us is the increased visitation that we'll see by having sportsbook operations at our regional properties where we can take advantage of that visitation with higher room rates, higher volumes of food and beverage revenues."<sup>11</sup> Most versions of online sports betting can be conducted without ever stepping foot in a casino, removing the opportunity to generate this additional spending. That being said, online sports betting comes in a variety of forms, from online betting allowed only within the physical bounds of a brick and mortar casino (supported by sophisticated geolocation technology), to online sports betting where customers must sign up at a land-based casino and bet through that casino's online presence, to completely independent sports betting platforms that can be set-up, wagered on and paid out entirely online.

Offering sports betting in brick and mortar casinos is the norm, however it co-exists with online betting in most jurisdictions where sports betting is legal. In most European countries, online sports betting is easily accessible, with accounts created and maintained entirely online and age and identity verification often performed by third party providers. In Nevada, all online

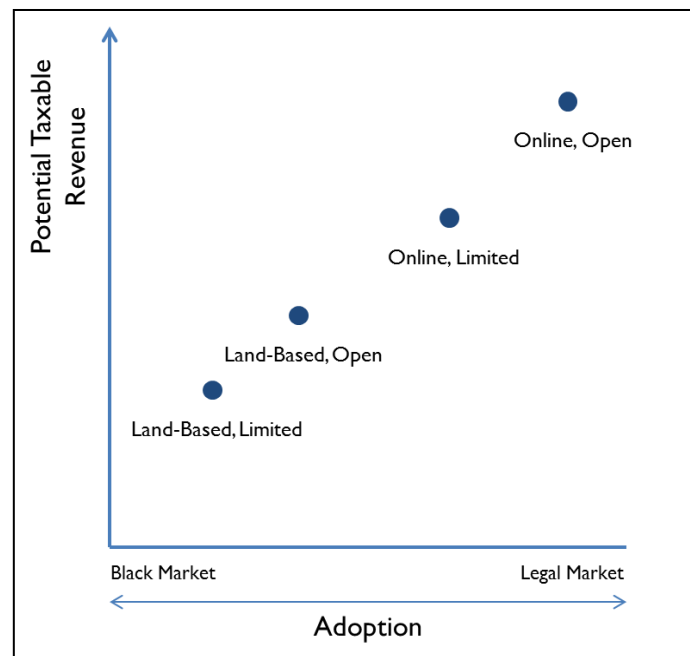
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<sup>11</sup> <https://www.legalsportsreport.com/18322/penn-national-ceo-sports-betting-future/>



sports betting accounts must be initiated at a land-based provider, with age and ID verification conducted in person. Additionally, sports bettors in Nevada generally have to return to the brick and mortar operator to add funds to, or receive payouts from, their accounts. In many European jurisdictions these activities can be performed online using credit or debit accounts.

Most analyses indicate that online sports betting – based on its convenience and ability to rapidly evolve to match consumer demand – is the most attractive and overall lucrative channel for offering sports betting, and the most effective way to transition bettors from existing black markets to the legal market<sup>12</sup>. In fact, online offerings are seen by many as essential to disrupting the existing relationships between sports bettors



**ONLINE / BRICK & MORTAR MARKET MODEL**

and illegal bookmakers.<sup>13</sup> Eilers & Krejci Gaming – an independent research firm – conducted an analysis of the sports betting market in their paper *Regulated Sports Betting: Defining the U.S. Opportunity* and assert, “Our model suggests that a market incorporating both land-based and online sports betting products could be worth over two times a market that is restricted to land-based sports betting alone.” This model is echoed by the Oxford Economics study previously cited in this paper which found that, “Considering the impacts across the availability

<sup>12</sup> Oxford Economics projects sports betting markets (as measured by handle) ranging from \$83 million to \$287 million based on limited (land-based only) to convenient (land-based and online) availability.

<sup>13</sup> (re: “Online/Brick & Mortar Market Model”) Additional factors influencing number of entrants into the market include: tax rate, licensing fees, other set-up costs. Adoption rate will also be affected by: quality and variety of products offered, ease of access

scenarios, the largest impacts are associated with the Convenient Availability Scenarios”<sup>14</sup> (which includes brick-and-mortar plus online sports betting). However, recognizing the cultural leap that online betting represents (notwithstanding existing Advanced Daily Wagering activity currently underway in horse racing), along with the fact that existing land-based casinos often work to protect the investments they made in jurisdictions where they operate, Eilers & Krejcik Gaming conclude, “But we are of the strong opinion that many – perhaps even most – states will choose to delay or forgo online.” While online sports betting offers the potential to provide rich, real-time user data that might be used to identify – and potentially mitigate – problematic gambling behavior, concerns abound about that same data being used to “reach out” and target consumers in sophisticated ways, which coupled with easy access to gambling platforms could stimulate problem gambling activity that otherwise would not occur.

#### **E. Implementation Considerations: WHAT**

In addition to where and how bettors can access sports betting, any legalized framework should consider what kinds of bets individuals are allowed to make and on which sports (or contests). Sports bets are traditionally placed on horse racing or other professional or collegiate sports (notwithstanding league or NCAA objections). However, increasingly eSports – multiplayer video game competitions – are attracting not only millions of viewers, but also significant betting activity. These contests present straightforward betting opportunities that fit within most Americans’ understanding of sports betting. Other, more exotic forms of betting include virtual sports, where the outcome of a computer generated event (such as a virtual soccer game) is determined by an algorithm, as well as a form of “futures” betting which where election and entertainment (e.g. reality show) outcomes are the contest on which wagers are made. Additionally, in-game betting where bettors place wagers on specific plays or events after a

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<sup>14</sup> Economic Impact of Sports Betting, Oxford Economics, p. 6

game or contest has already started, is increasingly popular. The range of available bets and contests present a varied set of products for customers to choose from, while each poses potential unique issues regarding the integrity of the underlying contests. Each of these types of bets are offered in various jurisdictions around the world and would need to be contemplated in any legalized sports betting schema.

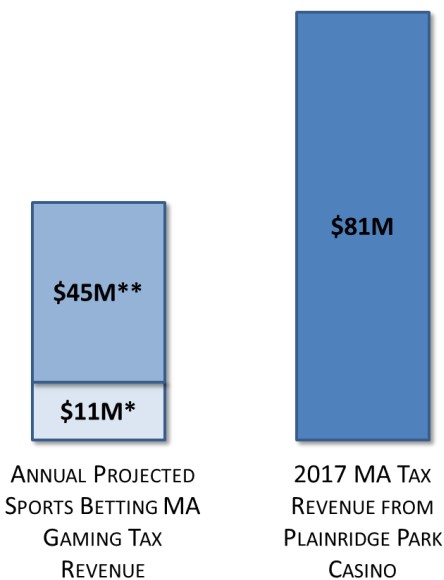
It goes without saying that the integrity of the underlying contests is of paramount importance in ensuring fair and viable sports betting. The organizations that offer the contests that are being bet on have a shared interest in ensuring the integrity of the games, as it goes to the core of why fans want to watch and bettors want to bet. Any doubt that games/contests are not totally spontaneous and not predetermined could be fatal to both the game/contest and the betting environment. The issue of integrity monitoring has been highlighted recently, as some professional sports leagues have argued that when states consider legalization efforts, that they mandate operators pay the leagues “integrity fees” to fund additional integrity monitoring. There are a number of public and very divergent viewpoints on the necessity, feasibility (and even equity) of such “integrity fees” to be paid to the leagues, that this white paper will not discuss. That being said, integrity fees (proposed as a percentage of handle instead of gross gaming revenue) must be considered within the context of the profitability of sports betting and the public policy desire to transition sports betting activity from the black market to the legal market. Simply stated, anything that reduces the limited profitability of sports betting (including taxation discussed later) will impact the odds and products that legal sports betting operators will offer. If the betting options are not attractive to bettors, there will be little incentive for bettors to leave the illegal market. Therefore, a careful impact analysis should be conducted when considering

the appropriate level of fees, taxes and other requirements that would have a direct impact on profitability.

**F. Implementation Considerations: WHEN**

As previously noted, anticipation of a New Jersey-friendly decision in the Christie case has inspired a number of states to make attempts to proactively legalize sports betting. Should the Commonwealth decide to join the move to introduce legalized sports betting, it will also need to consider at what pace to introduce it. Clearly, this will be impacted significantly by decisions on questions regarding which entities will be allowed to offer sports betting and whether there will be managed or open competition. This decision may differ slightly from the introduction of traditional casino gaming in Massachusetts in 2011, Sports betting may be largely seen as an extension of current casino gaming. The national implications of a potential PASPA repeal may spur a group of early adopters throughout the Northeast (a region that Eilers & Krejcik identified as potentially the most active region to adopt sports betting - in all its forms - in the country).

**G. Implementation Considerations: HOW (Taxation)**



\*\* Projection based on Online, Open scenario  
 \* Projection based on Land-Based, Open scenario  
 (Source: Oxford Economics Study)

Finally, one of the primary incentives for legalizing sports betting is to create a legal marketplace that is safer for bettors while also providing the Commonwealth the opportunity to collect tax revenues. Just as with the Commission’s White Paper on Daily Fantasy Sports, the issue of whether and how to impose taxes on sports betting is an issue solely for deliberation by the Legislature. We again note that the tax rates are high on casino gaming (i.e. slot and table games) where

the profit margins are high, and that typically sports betting is a lower margin (5%) endeavor. Also, while legalized sports betting presents an opportunity to capture significant, much needed tax revenue, it only represents a portion of the tax revenues that traditional casino gaming represents. By way of example, the Oxford Economics Study conducted for the American Gaming Association concludes that at a base tax rate of 10% of gross gaming revenue (Nevada, by contrast imposes a tax rate of 6.75% of gross gaming revenue) Massachusetts would stand to collect anywhere between \$11 million and \$45 million annually in tax revenue, depending on how widely available sports betting is allowed. In contrast, Plainridge Park Casino alone generated \$81 million in tax revenue (including the Horse Racing Development Fund) in 2017.

#### **H. Implementation Considerations: HOW (Regulation)**

When the Legislature considered allowing expanded casino gaming in Massachusetts with the introduction of M.G.L 23K, it established a strong and clear framework for the economic landscape in which casino gaming would compete, and how it would be regulated. If the Legislature considers expanding the legal gaming environment in Massachusetts to include sports betting, a basic question is whether to employ a similar approach and craft a statute that anticipates both the policy and regulatory issues that will need to be addressed. Who will be allowed to enter the market as sports betting providers; how and to what extent will they be licensed; will online sports betting be allowed and by whom; what types of bets (e.g. “in-play” betting) will they be allowed to offer and on which contests (e.g. eSports, virtual sports); how will players be protected and what role will responsible gaming occupy in this activity are all questions that could be answered by statute. Alternatively, a statute could address the questions that impact the strategic landscape of who, where, what, and how and leave the particulars of the implementation of these questions to an empowered regulatory body.

When the Commission wrote its White Paper on Daily Fantasy Sports, the very legality of Daily Fantasy Sports (DFS) was in question. Discussion of DFS (which is conducted exclusively online) spurred conversations regarding online gaming, in general, and how it could and should be addressed. The concept of online gaming is again central to the discussion of sports betting, as sports betting activity increasingly moves online. Unlike DFS at the time (the lines between DFS and sports betting are beginning to blur as the potential for legal sports betting becomes clearer), sports betting is very much a known entity that fits quite cleanly into our existing understanding of gambling activity. Its online aspect, however, is potentially transformative in terms of redefining a gambling landscape to include this whole new class of gaming. Should the Legislature decide to allow online sports betting it may be prudent to consider the concept of an “Omnibus Regulatory Approach” that the Commission introduced in the Fantasy Sports White Paper. The concept was to define overriding public policy objectives and regulatory principles in statute and to broadly empower a regulatory body to tackle the issues regulating online gaming activity. This approach was suggested recognizing that online gaming is unique in that it is quickly deployed, highly malleable and responsive to new consumer demands. The concern is that with online gaming the pace of innovation and technological change can quickly outpace even the most nimble and contemplative statute. It would be important, should online sports betting be allowed, to consider and protect against online sports betting becoming the “Trojan Horse” for other forms of online gaming. This could be articulated in statute by strong definitional language or delegated to a regulator to monitor and address using an omnibus approach with jurisdiction broad enough to evaluate online gaming activities, and determine whether they meet the definition of allowed gaming.

## **CONCLUSION**

This white paper is an attempt to provide some background, context and a high-level analytical framework should the Legislature consider legalizing sports betting, (which itself is a dependent on the outcome of the upcoming Supreme Court ruling in the Christie case). As noted, the decision in the Christie case alone may not determine the future of sports betting in Massachusetts, as there are still open questions as to the applicability of the WIRE act, and the potential of future legislation that may re-clarify the legality of sports betting. However, should Massachusetts have the opportunity to legalize sports betting, there are a number of questions at hand that will have broad impact, not only on who will benefit from sports betting as an operator, but also whether the overall gaming landscape in Massachusetts will be fundamentally transformed by the introduction of online gaming. The success of transitioning sports bettors from illegal to legal markets may depend substantially on how sports betting is made available as well as the quality of the sports betting products that are offered. Finally, a thoughtful taxation and regulatory approach can maximize the benefits to consumers through increased protections, maximize economic benefits to providers and downstream industries, and create a market that ultimately benefits all Commonwealth citizens by maximizing the potential tax revenues associated with sports betting.