

Examining the Future of Online Gaming and Daily Fantasy Sports in Massachusetts

By Todd Grossman, Justin Stempeck and Carrie Torrisi



When the daily fantasy sports (“DFS”) fervor reached its initial crescendo, Massachusetts was at its center, due to the presence of DraftKings’ office in downtown Boston and a large, local population of fervent sports fans. What had previously been a niche hobby rose to prominence online and the advertising was unavoidable. Amidst the clamor of radio, television and online marketing were countless discussions about the legality of DFS, skill versus chance debates and questions about the adequacy of consumer protection.

Reacting quickly, the Massachusetts Attorney General’s Office promulgated first of their kind consumer protection regulations in November 2015. The Massachusetts Gaming Com-

mission (“MGC”) also investigated the issues, hosting a day-long seminar in December 2015 with representatives from the DFS industry, government regulators and subject matter experts.

Shortly thereafter, the MGC published a white paper examining DFS, discussing the broader difficulties faced by regulators addressing rapidly evolving new technology in the gaming space and advocating for an omnibus approach towards future regulation. The Massachusetts legislature addressed DFS in August 2016 by enacting a placeholder law, legalizing fantasy sports contests through 2018.

To many, that ended the conversation as the hobby was officially sanctioned by law and placed under the watchful eye of the Attorney General’s office. However, the Massachusetts Legislature continued the inquiry, creating a Joint Commission “to conduct a comprehensive study relative to the regulation of online gaming, fantasy sports gaming and daily fantasy sports.” What followed was a unique, nine-month inquiry into a number of industries at the forefront of gaming and technology.

Per its enacting legislation the goal of the Commission was to review:

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

deems relevant. The special commission shall not include in its review a comprehensive review of the state lottery or its ability to provide lottery products online or over the internet.¹

The commission was made up of nine members representing various interests, including the governor's office, the MGC, the Attorney General's office and both the state Senate and state House of Representatives. Their mandated schedule required that a report be submitted to the legislature by July 31, 2017. To that end, the Commission set an aggressive pace, covering a wide swath of gaming topics, including DFS, Esports, relationships with brick and mortar casinos, and problem gaming, all in a relatively short period of time.

Daily Fantasy Sports

In order to investigate the then current status of DFS, the Commission heard from various stakeholders including attorneys representing Draftkings/Fanduel, legal experts, law professors, the Attorney General's office, representatives from the MGC and representatives from the local casino licensees. Presenters updated the Commission on DFS's contributions to the local economy, the current state of legislation nationwide and the comprehensive state of consumer protection regulations in place in Massachusetts. Additionally, there was discussion concerning the universal applicability of many of those same consumer protections to other areas of online gaming, including Esports. Local casino licensees Penn National Gaming, Wynn Resorts, and MGM also addressed DFS, noting that they had no interest in the area but were interested in legalized sports betting and had varying levels of interest in online gaming. After hearing extensive testimony on DFS over a matter of months, the Commission synthesized its findings in a report. The primary conclusions on DFS were that the activity should remain legal (the current Massachusetts provisional law sunsets in 2018); however, it should fall under the broad definition

of online gaming crafted by the Commission and the activity should be regulated by the MGC. The Commission recommended that online gaming be defined as:

An activity, offered through the Internet or through other communications technology, that allows a person utilizing money or currency of any kind, to transmit electronic information to (1) risk something of value (2) on the outcome of an event (3) with an opportunity to win a prize.

The Commission opined that any workable definition of online gaming needed to be broad so that it would not have to be revisited with the introduction of each new online gaming product.

Esports

In addition to addressing the well-tread ground of DFS, the Commission heard testimony concerning Esports, including statistics regarding the size of the market, the number of players, the viewership, the prize pools and the day-to-day operations of an Esports team, including its business operations and streams of revenue. The Commission was also advised about the intersection of Esports with illegal gaming through betting on Esports competitions and skin² betting sites that resemble online casinos. In its report, the Commission explained the Esports phenomenon and its meteoric growth but did not detail any plan to address the known illegal gaming surrounding the activity. Instead the report advised targeting the non-gaming commercial opportunities associated with hosting Esports competitions at local convention centers and sports arenas.

Further, although the proposed definition of online gaming would on its face apply to Esports betting, the Commission specifically advised that all types of online gaming should be considered illegal unless permitted by statutory exception, thus making the state legislature the gatekeeper of any such activity. While only recommending that DFS be legal-

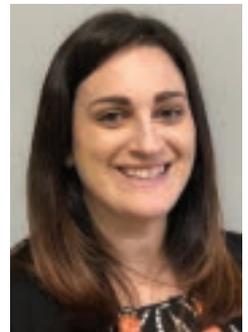
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ized under the new definition at the current time, the Commission noted that the door remained open to consider the legalization of other types of online gaming in the future.

Online Gaming

Much like with Esports, the Commission heard extensive facts and figures concerning the growing online gaming market. The Commission also heard directly from Massachusetts' three casino licensees concerning their positions on online gaming. Interestingly amongst the three licensees there were different perspectives: Penn National supported online gaming if it was limited to brick and mortar casinos and was taxed appropriately, Wynn had no interest in online gaming but did agree that participation

should be limited to casino licensees, and MGM was fully in support of online gaming. Notably MGM has experience offering online gaming in both Nevada and New Jersey while Penn National offers a broad slate of social gaming options nationally (social games prohibit a player from ever winning anything of value; however, real money can be spent to purchase credits to play the games themselves).

In its report to the Legislature in addition to summarizing the views of the local casino licensees, the Commission detailed the different approaches to the market employed by Nevada, New Jersey and Delaware as educational examples. Much as with Esports, the Commission did not advocate for the immediate legalization of online casino gaming, but noted that such activity would fall under its

proposed definition of “online gaming” and could ultimately be carved out from the broad category of illegal gaming in the Commonwealth. Given that two of the three Massachusetts casinos are still under construction, the Commission recommended a “wait and see” approach to online gaming, but noted that brick and mortar casinos should get some form of consideration.

The Commission further recommended that the daily governance of online gaming, when legalized, should be vested in the MGC in order to draft appropriate regulations, audit and monitor participants for compliance, approve and register/license companies and penalize non-cooperative entities. Through its analysis of the approaches of other jurisdictions as well as the Attorney General's DFS regulations, the Commission drafted a set of model recommended regulations that would equally apply to all online gaming and serve as a road map for best practices to be cemented in place by any supervisory agency. These recommended regulations included:

1. Clearly defined terms;
2. Legal gaming age set at 21;
3. Strong geolocation protections;
4. Strong suitability standards and operator licensing requirements overseen by a regulatory body;
5. Responsible gaming protections;
6. Transparency and fairness guarantees in gaming offerings;
7. Truth in advertising;
8. Sensitivity to any real or perceived conflicts of interest
9. Data/network security standards;
10. Fund processing / segregation / protections / anti-money laundering protections.

¹ The inability to discuss the lottery was a missed opportunity particularly given active efforts to introduce online lottery in Massachusetts, and given the potential overlapping nature of online lottery products and other online gaming products. Massachusetts' neighbor to the north, New Hampshire, recently legalized online lottery, thus raising the stakes for a response by the Commonwealth.

² A “skin” is a cosmetic enhancement on an in-game item that acquires real world value based on its rarity. Certain third-party websites allow players of the most popular Esports titles to essentially use skins as currency for online casino style games and cash out their winnings as real money.

The Commission did not specifically recommend any fees or taxes on online gaming; however, it suggested that the cost of regulation be borne by the online gaming industry, any fees/taxes be based on gross gaming revenue, regulation promote responsible gaming, and any fees/taxes not be so onerous as to suffocate an emerging industry.

Sports Betting

While several speakers that appeared before the Commission addressed the then pending Supreme Court case challenging the federal ban on sports betting, the Commission did not dedicate extensive time to discussing the matter. Similarly, the Commission's final report to the Legislature only briefly mentions the potentially huge black market for illegal online sports betting.

Sports betting would clearly fall under the definition of online gaming drafted by the Commission to the ex-

tent that definition is adopted. Much like Esports or online gaming, sports betting would require a separate carve out by the Legislature to be made legal. The Legislature has not yet filed any placeholder legislation to address sports betting in response to the recent Supreme Court decision invalidating the Professional and Amateur Sports Protection Act; however, there are two pending bills that would permanently legalize DFS, place it under regulation by the MGC and create a study committee to examine sports betting in greater detail before the 2019 legislative session.

Conclusion

The Joint Commission was unique in both the spectrum of viewpoints of its members as well as the breadth of topics it addressed during its relatively brief tenure. Although the Joint Commission stopped short of recommending a pure

omnibus approach to the regulation of online gaming, it took large strides in recognizing and drafting a broad definition of online gaming that would apply to existing products as well as future products sharing certain baseline characteristics. The Joint Commission further recognized the inevitability of the legalization of online gaming even if it continued to recommend that the Legislature be required to approve of each large category of online gaming before handing the matter over to the MGC. The Joint Commission's view of an ongoing collaborative discussion between the Legislature and the MGC addressing future online gaming products is a progressive recommendation that is often overlooked when bills are drafted and submitted. Such a nuanced conclusion, submitted to the entire Legislature, suggests a future of progressive policy making as Massachusetts embraces the gaming industry. ♣

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