

SPORTS BETTING BLITZ: ADVERTISING INUNDATION IN THE U.S.  
MARKET POST-PASPA AND STEPS OPERATORS CAN TAKE TO AVOID  
FURTHER REGULATION AND LEGISLATION

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I. INTRODUCTION

Legalized sports betting in the United States is still in its infancy following the 2018 Supreme Court decision in *NCAA v. Murphy* repealing the Professional and Amateur Sports Protection Act (PASPA). The market is experiencing rapid growth with a handful of states passing legislation each year to bring sports betting into their backyards. Currently, thirty-six states and the District of Columbia have legalized sports betting.<sup>1</sup> The economic prospects are enticing to states and operators alike. However, the rush to acquire customers in new markets—and the marketing strategy deployed in the process—raise questions as to whether the industry is equipped with a sufficient responsible gaming framework. This note explores the risks associated with persistent advertising by sportsbook operators and discusses what steps the industry can take to ensure the long-term success of the U.S. market.

Section I focuses on the rise and fall of PASPA, and the 2015 advertising war between FanDuel and DraftKings which took place before the Supreme Court issued its opinion in *Murphy*. Section II highlights on the regulatory framework of the U.S. market today as well as three separate European jurisdictions in an effort to determine common problems and solutions post-legalization. Section III discusses public concerns related to the frequency and breadth of advertising efforts by operators, including threats of direct oversight by regulators and increases in problem gambling. Section IV addresses efforts that the industry has made thus far to shift the focus toward responsible gaming

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<sup>1</sup> At the time of publication, five of the thirty-six states that have legalized sports betting are not yet live: Nebraska, Ohio, Florida, Massachusetts, and Maine. California has a ballot measure which went to a vote in the November primary of 2022. See *Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS'N (Sept. 1, 2022), <https://www.americangaming.org/research/state-gaming-map/> (last accessed Nov. 30, 2022).

to achieve a balance between customer acquisition, education, and responsible betting in the United States.

## II. THE SUPREME COURT'S DECISION IN *MURPHY* OPENS THE FLOODGATES TO ONLINE SPORTS BETTING ADVERTISEMENTS

In February of 1991, PASPA was first introduced in the U.S. Senate by Senator Dennis DeConcini.<sup>2</sup> The proposed bill closely followed a scandal involving Pete Rose, who admitted to placing bets on games involving the Cincinnati Reds, a team he both played for and managed.<sup>3</sup> Rose agreed to a lifetime ban from the Major League Baseball,<sup>4</sup> and his actions prompted the federal government to enact legislation that would effectively bring the sports betting industry to its knees for the next three decades.

With Rose's actions fresh on their minds, various Senate and House committees came together to discuss the growing problem of sports betting.<sup>5</sup> Former NBA player and U.S. Senator Bill Bradley began a crusade to get the bill enacted into law.<sup>6</sup> Ultimately, PASPA passed in the Senate with "overwhelming support."<sup>7</sup> The Senate explained that the purpose of PASPA was to "prohibit sports gambling conducted by, or authorized under the law of, any State . . . to maintain the integrity of our national pastime."<sup>8</sup> At the time of its proposal, major U.S. sports leagues voiced their support for PASPA, also citing game integrity as their primary concern.<sup>9</sup> In 1976, Pete Rozelle, the NFL Commissioner who reigned for nearly thirty years, stated "[l]egalized gambling on sporting events [is] destructive to the sports themselves and in the long run injurious to the public."<sup>10</sup> Roger Goodell, the current NFL Commissioner, echoed this sentiment in 2012 when he stated gambling was the "number one" threat to sports.<sup>11</sup>

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<sup>2</sup> Daniel Boswell, *The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting*, 28 U. MIA. BUS. L. REV. 115, 117 (2019).

<sup>3</sup> Nicolas T. Corbett, *Changing the Game: How the United States Can Look to the European Union to Create Effective Sports Betting Legislation in a Post-PASPA World*, 105 IOWA L. REV. 2273, 2278–79 (2020).

<sup>4</sup> *Id.* at 2279.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Boswell, *supra* note 2, at 117. *See also* S. REP. NO. 102-248, at 4 (1991).

<sup>9</sup> *See* Erik Gibbs, *Pro Sports Leagues Continue Focus on Integrity as Sports Gambling Takes Hold*, GAMBLINGNEWS (June 10, 2021), <https://www.gamblingnews.com/news/pro-sports-leagues-continue-focus-on-integrity-as-sports-gambling-takes-hold/>.

<sup>10</sup> Kurt Streecher, *The Rising Human Cost of Sports Betting*, N.Y. TIMES: SPORTS (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/sports/football/super-bowl-sports-betting.html>.

<sup>11</sup> ALBERT CHEN, BILLION DOLLAR FANTASY: THE HIGH-STAKES GAME BETWEEN FANDUEL & DRAFTKINGS THAT UPENDED SPORTS IN AMERICA 241 (2019).

Just a year and a half after PASPA's proposal, the House of Representatives endorsed and approved the bill with as much enthusiasm as the Senate.<sup>12</sup> In 1992, President George H.W. Bush signed PASPA into law<sup>13</sup> and as a result, states were mostly banned from operating, licensing, and authorizing "betting, gambling, or wagering" on competitive sports.<sup>14</sup> Nevertheless, the support for PASPA was not unwavering, and sports leagues began to soften their tone in the decades that followed.<sup>15</sup> The reason? The law's rigidity left few opportunities for consumers to place legal sports bets, which fueled the expansion of the underground market.<sup>16</sup>

The battle to dismantle PASPA began in 2011 when a majority of New Jersey citizens approved a referendum to bring sports betting to the state.<sup>17</sup> PASPA originally created a carveout for New Jersey to take part in sports wagering, but the legislature ultimately failed to act on the exemption before the deadline expired.<sup>18</sup> The National Collegiate Athletic Association (NCAA) sued New Jersey, seeking to stop the state from implementing sports betting.<sup>19</sup> The NCAA won its case in the district court.<sup>20</sup> Following this defeat, New Jersey fast-tracked another bill to capitalize on a loophole which *seemingly* allowed the state to legalize sports betting so long as the state itself did not attempt to regulate it.<sup>21</sup> Once again, New Jersey became embroiled in a battle with the NCAA and other major sports leagues about PASPA's legitimacy.<sup>22</sup> Even so, New Jersey's efforts were thwarted once more in 2012 by the district court and the Third Circuit in *Murphy v. NCAA*.<sup>23</sup>

In 2017, the Supreme Court granted certiorari and shortly after, reversed the Third Circuit's decision, holding that PASPA was unconstitutional and violated the anti-commandeering doctrine.<sup>24</sup> The Court had the option to leave part of PASPA in place—the section which made it illegal for private companies to advertise or promote sports betting—but chose not to.<sup>25</sup> The Court reasoned that if it upheld these provisions, "federal law would forbid the advertising of an

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<sup>12</sup> Boswell, *supra* note 2, at 117.

<sup>13</sup> *Id.*

<sup>14</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1470 (2018).

<sup>15</sup> CHEN, *supra* note 11, at 241.

<sup>16</sup> *See* Gibbs, *supra* note 9.

<sup>17</sup> Corbett, *supra* note 3, at 2281.

<sup>18</sup> Bill Grinstead, *Supreme Court Strikes Down PASPA, Opening the Sports Betting Floodgates*, NJ ONLINE GAMBLING (May 14, 2018), <https://www.njonlinegambling.com/supreme-court-strikes-down-paspa/>.

<sup>19</sup> *Murphy*, 138 S. Ct. at 1470.

<sup>20</sup> Corbett, *supra* note 3, at 2281.

<sup>21</sup> *Id.*

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Murphy*, 138 S. Ct. at 1478.

<sup>25</sup> *Id.* at 1484.

activity that is legal under both federal and state law.”<sup>26</sup> Referencing Congress’s past restriction of tobacco advertising, the Court clarified that even when Congress heavily regulated advertising in a particular industry, the practice of marketing was seldom “banned.”<sup>27</sup> After addressing the severability of the law’s advertising provision, the Court reiterated that “Congress can regulate sports gambling directly,” but if it chose not to, the states were free to regulate it themselves.<sup>28</sup>

And the states did just that. The Court’s 7-2 decision to overturn PASPA was a victory for the State of New Jersey, but betting could not proceed without a regulatory framework in place.<sup>29</sup> Other states including Pennsylvania, West Virginia, and Mississippi passed bills in anticipation of the Supreme Court’s decision and were among the first jurisdictions to benefit from the Court’s holding.<sup>30</sup> In 2019 alone, more than twenty states filed bills, looking to cash in on the American pastime.<sup>31</sup> Since then, thirty-six states have legalized sports betting, many with online and mobile betting options.<sup>32</sup>

The public attitude toward sports betting has shifted dramatically since PASPA was first enacted and subsequently overturned.<sup>33</sup> Americans have “begun envisioning a world in which legal, state-sanctioned wagers become a central part of the American sports landscape.”<sup>34</sup> The idea of Americans spending billions of dollars a year placing illegal bets and “siphoning tax revenues” from the economy is no more, and instead states, operators, and consumers are looking to benefit from the now-legal sports betting market.<sup>35</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1484–85.

<sup>29</sup> *See id.*

<sup>30</sup> Winkofsky, et al., *The Murphy Decision: Professional and Amateur Sports Protection Act Found Unconstitutional*, GREENBERG TRAURIG: ALERT (May 22, 2018), <https://www.gtlaw.com/en/insights/2018/5/professional-and-amateur-sports-protection-act-found-unconstitutional>.

<sup>31</sup> *See* Darren Rovel, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Mar. 28, 2022), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>32</sup> At the time of publication, Ohio, Massachusetts, Maine, Kansas, and Nebraska have all legalized sports betting but are not live. *Id.*; Owen Poindexter, *Sports Betting Companies Spending Billions on U.S. Market*, FRONT OFFICE SPORTS (Dec. 27, 2021), <https://frontofficesports.com/sports-betting-companies-spending-billions-on-u-s-market/>. The District of Columbia also has legal sports betting and utilizes a district-wide app run by the D.C. Lottery. *See* Rovel, *supra* note 31.

<sup>33</sup> Corbett, *supra* note 3, at 2283.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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A. What do Zombies, Kardashians, and Fantasy Football Ads Have in Common?

Years before the Supreme Court struck down PASPA, two companies were already waging a war, scrambling to acquire customers on the daily fantasy sports (DFS) front.<sup>36</sup> In DFS, participants' fantasy teams compete based on the statistics of actual professional players or teams.<sup>37</sup> By 2015, the Fantasy Sports Trade Association estimated that nearly fifty-seven million people were participating in fantasy sports and spending an annual average of \$465 per person.<sup>38</sup>

DFS was in a unique position under U.S. federal law. Unlike sports wagering, which was subject to PASPA, DFS was afforded a carveout by the Uniform Internet Gambling Enforcement Act (UIGEA).<sup>39</sup> UIGEA, by targeting financial institutions and payment systems, made it a crime to gamble with unlicensed operators over the Internet.<sup>40</sup> The Act exempted fantasy sports so long as the following three requirements were met:

- (1) the value of prizes is not dependent on the number of players;
- (2) the outcome is determined by fantasy-player skill and knowledge and is based on statistical results of real-world athletes; and
- (3) the outcome cannot be determined by the score of the game or based solely on one individual player's performance.<sup>41</sup>

The exemption, which was put in place prior to the emergence of DFS providers like FanDuel and DraftKings, was intended to protect the legality of season-long fantasy contests.<sup>42</sup> In theory, PASPA could have prohibited fantasy sports, but the games were never challenged under the law.<sup>43</sup> Thus, the war waged on and so did the advertisements.

In 2014, DraftKings and FanDuel ran a total of 8,743 and 14,017 network and cable ads respectively.<sup>44</sup> In 2015, the two companies spent an

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<sup>36</sup> CHEN, *supra* note 11, at 30.

<sup>37</sup> Johnathan Griffin, *The Legality of Fantasy Sports*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 2015), <https://www.ncsl.org/research/civil-and-criminal-justice/the-legality-of-fantasy-sports.aspx>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *UIGEA Explained*, BETTINGUSA.COM, <https://www.bettingusa.com/laws/uigea/> (last visited Nov. 18, 2022).

<sup>41</sup> *Id.*

<sup>42</sup> Griffin, *supra* note 37.

<sup>43</sup> *UIGEA Explained*, *supra* note 40.

<sup>44</sup> Tom Kludt, *DraftKings and FanDuel Ads Seems to Be Everywhere on TV Because They Are*, CNN BUS. (Oct. 8, 2015, 5:23 PM),

estimated \$500 million on advertising campaigns, leading to increased brand recognition and a large influx of new customers.<sup>45</sup> During a single week, DraftKings was the biggest television advertiser in America, outspending both AT&T and Geico.<sup>46</sup> Sports leagues who had previously wanted nothing to do with fantasy sports were suddenly striking deals with FanDuel and DraftKings. The NFL, which had long been one of the most resistant leagues toward gambling, now had twelve teams that were partnered with one of the two companies.<sup>47</sup> Prominent team owners and athletes began holding equity stakes in the DFS market.<sup>48</sup>

By the fall of 2015, the oversaturation of advertising had begun to “spell trouble.”<sup>49</sup> FanDuel’s numbers in early fall indicated that while 10% of the customer base loved the ads, the other 90% grew tired of the “brain-assaulting repetitiveness” of the commercials on their television screens.<sup>50</sup> During a broadcast of *The Daily Show*, Trevor Noah remarked, “[t]hese days, it feels like you can’t turn on the television without seeing one of these things: a zombie, a Kardashian, or a fantasy football ad.”<sup>51</sup> Within the DFS community, concerns grew as to whether the “escalating advertising” would draw unwanted attention from legislators and the casino industry.<sup>52</sup>

Aside from the general wear and tear on consumers caused by their marketing efforts, the two companies were soon presented with unique problems that prompted them to reel back their spending.<sup>53</sup> FanDuel and DraftKings were in a regulatory warzone, fighting off allegations that their operations were illegal.<sup>54</sup> The Nevada Attorney General’s Office had already shut out both operators from the state, a blow that both surprised and rocked the two companies.<sup>55</sup> New York Attorney General Eric Schneiderman also cracked down on DFS by shutting down DraftKings and FanDuel’s operations in the state,

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<https://money.cnn.com/2015/10/08/media/fanduel-draftkings-commercials/index.html>.

<sup>45</sup> Alexandra Berzon, *Fantasy-Sports Sites Curtail Ad Spending*, WALL ST. J. (Aug. 1, 2016, 8:00 AM), <https://www.wsj.com/articles/fantasy-sports-rivals-slice-ad-spending-1470052800>.

<sup>46</sup> CHEN, *supra* note 11, at 125.

<sup>47</sup> *Id.* at 130.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 121.

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

<sup>51</sup> *The Daily Show with Trevor Noah*, *Fantasy Sports: Getting Played by the Game*, COMEDY CENT. (Oct. 15, 2015), <https://www.cc.com/video/iw35t1/the-daily-show-with-trevor-noah-fantasy-sports-getting-played-by-the-game>.

<sup>52</sup> CHEN, *supra* note 11, at 79.

<sup>53</sup> Berzon, *supra* note 45.

<sup>54</sup> *Id.*

<sup>55</sup> CHEN, *supra* note 11, at 116.

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wiping out nearly 10% of the DraftKings customer base in one fell swoop.<sup>56</sup> The two companies were turning their attention away from advertising and customer acquisition, and instead putting their money toward “hefty legal and lobbying bills.”<sup>57</sup> Commercials that used to air every ninety seconds were suddenly nonexistent, and the companies that once had a relentless presence in American homes “had become ghosts.”<sup>58</sup>

### III. REGULATORY APPROACHES: A COMPARISON BETWEEN THE UNITED STATES AND EUROPE

#### A. The United States: Fifty Markets in One

When the Supreme Court struck down PASPA, it was careful to leave the door open for the federal government to step in and regulate sports betting if need be. Shortly after the Court published its decision, Senator Orrin Hatch of Utah announced his intent to propose federal legislation to regulate the market.<sup>59</sup> Senator Chuck Schumer of New York similarly authored a memo outlining his proposals for federal oversight.<sup>60</sup> Given the current U.S. sports betting landscape, it is clear that the Senators’ proposals never gained traction. Since *Murphy*, states have been scrambling to enact legislation to legalize sports betting.<sup>61</sup> While PASPA no longer reigns supreme, a handful of federal laws remain in place which both online and retail sportsbooks are required to comply with.

At the federal level, the Bank Secrecy Act (BSA) and UIGEA govern casinos and financial institutions and provide guidance regarding acceptable payment forms for wagers. Under the BSA, sportsbooks are required to implement costly anti-money laundering (AML) and know your customer (KYC) compliance programs to detect suspicious transactions by customers.<sup>62</sup> Kenneth Blanco, Director of the Financial Crimes Enforcement Network (FinCEN), reminded sports betting companies shortly after *Murphy* that they are “subject to the same regulatory expectations and scrutiny regardless of whether

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<sup>56</sup> *Id.*; The New York Court of Appeals issued an opinion related to the legality of DFS on March 22, 2022. The court declared that DFS is a predominately skill-based competition and does not fall within the purview of the State Constitution’s prohibition on gambling. *See White v. Cuomo*, 192 N.E.3d 300 (2022).

<sup>57</sup> Berzon, *supra* note 45.

<sup>58</sup> CHEN, *supra* note 11, at 121.

<sup>59</sup> Boswell, *supra* note 2, at 130.

<sup>60</sup> *Id.* at 130–31.

<sup>61</sup> *Where is Online Sports Betting Legal in the USA?*, WORLD SPORTS NETWORK, <https://www.wsn.com/sports-betting-usa/> (last visited Nov. 18, 2022).

<sup>62</sup> *KYC (Know Your Customer) Guide for Responsible Gambling*, WORLD SPORTS NETWORK, <https://www.wsn.com/know-your-customer/> (last visited Nov. 18, 2022).

their services are offered on site or through digital channels.”<sup>63</sup> The Interstate Wire Act is (technically) still on the federal books<sup>64</sup> and prohibits the use of wire communications to transmit sports wagers across state lines.<sup>65</sup> The law’s applicability to modern sportsbooks continues to hang in the balance without the Supreme Court’s direct input on the matter.<sup>66</sup>

In addition to the aforementioned federal laws, sportsbooks and mobile betting operators face further regulation at the state level, most of which are far from uniform. Every jurisdiction with legal sports wagering requires operators who offer retail or online betting to be licensed by their state gaming authority.<sup>67</sup> The same holds true for key suppliers<sup>68</sup> although different jurisdictions require varying levels of licensing for these suppliers—some with full licensing requirements and others with less strenuous options.<sup>69</sup> For reference, Illinois, one of the top three sports betting markets in the U.S.,<sup>70</sup> does not distinguish between different levels of suppliers.<sup>71</sup> In contrast, Nevada requires different licenses for suppliers, manufacturers, information providers, and even shareholders benefitting from the state’s gaming revenue.<sup>72</sup>

As for the number of licenses up for grabs, some states are stingier than others. Some employ wide-open markets with more than a dozen operators

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<sup>63</sup> Pete Foye, et al., *Sports Betting and AML—Don’t Gamble on Compliance*, PWC (Sept. 2019), <https://www.pwc.com/us/en/industries/financial-services/library/pdf/pwc-sports-betting-and-aml.pdf>.

<sup>64</sup> *Sports Betting Laws in the United States*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/us-sports-betting-laws/> (last visited Nov. 18, 2022).

<sup>65</sup> Corbett, *supra* note 3, at 2278.

<sup>66</sup> The Indian Gaming Regulatory Act (IGRA), not discussed here, continues to govern gaming conduct on tribal land and establishes the National Indian Gaming Commission and the applicable regulatory structure for tribal gaming in the United States. Additionally, International Gaming Technology (IGT) recently prevailed in a suit against the Department of Justice (DOJ). There, the Court issued a declaratory judgment, concluding the Wire Act does not apply to online poker. *See* Connor Richards, *IGT Prevails in DOJ Lawsuit; Wire Act Doesn’t Apply to Online Poker*, POKERNEWS (Sept. 20, 2022), <https://www.pokernews.com/news/2022/09/igt-prevails-in-doj-lawsuit-wire-act-doesn-t-apply-to-online-42110.htm>.

<sup>67</sup> Scott Scherer & Melissa Thevenot, *The Common Denominators of U.S. Sports Betting Regulation and Those States Swimming Against the Tide*, NEV. GAMING L. Sept. 2020, at A42–43.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Chet Fussman, *Illinois Sports Betting Apps: Online Sports Betting in IL*, MIA. HERALD (Sept. 20, 2022, 12:17 PM), <https://miamiherald.com/betting/article257663278.html>.

<sup>71</sup> Scherer & Thevenot, *supra* note 67, at 42.

<sup>72</sup> *Id.* at 42–43.



available to their residents,<sup>73</sup> while others restrict wagering to tribal casinos.<sup>74</sup> The District of Columbia and Oregon maintain unique monopoly-esque approaches, with Oregon specifically utilizing a state-operated mobile betting app recently acquired by a familiar name in the game: DraftKings.<sup>75</sup> Meanwhile, Wyoming has been relatively slow compared to other states in allowing new operators in post-legalization.<sup>76</sup> In short, complying with the entirety of the U.S. sports betting market is no easy undertaking.

Beyond the costs and logistical challenges associated with jurisdictional compliance, the clientele in each state also varies dramatically, and so too, the marketing approach taken by sportsbook operators. The Federal Trade Commission (FTC) and Federal Communications Commission (FCC) are the primary regulatory bodies in charge of advertising at the national level.<sup>77</sup> However, neither has implemented advertising standards for sports betting despite doing so with other so-called vices like tobacco and alcohol products.<sup>78</sup> Instead, individual states have stepped in to limit *how* companies can market their services and to *whom*.<sup>79</sup>

#### B. The European Way: Varying Approaches to Sports Betting Regulation

The European Union (EU) mirrors the U.S. sports betting market in many ways. Ultimately, the EU struggled with the emergence of online sports betting and concluded that online gambling services were not subject to any specific regulations at the EU level.<sup>80</sup> Similar to the Supreme Court's decision in *Murphy*, which delegated authority to states to regulate gambling within their borders, the EU took the stance that "gambling is better dealt with at the national level," leaving each country to regulate their own gambling, as opposed to continental regulation.<sup>81</sup> This left the EU and European Economic Area (EEA) member states free to regulate (or restrict) gambling as they saw fit.<sup>82</sup> The

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<sup>73</sup> See *Where It's Legal*, BETTOR SAFE, <https://bettorsafe.org/> (last visited Nov. 18, 2022) (diagraming states that offer safe and secure online betting).

<sup>74</sup> See Thomas Reynolds, *Legal Sports Betting States: Where You Can Bet Online, Mobile & In-Person*, NJ.COM, <https://www.nj.com/betting/online-sports-betting/> (last visited Nov. 18, 2022).

<sup>75</sup> *Oregon Sports Betting*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/oregon/> (May 19, 2022).

<sup>76</sup> *Wyoming Sports Betting*, LEGAL SPORTS REP. (Oct. 3, 2022), <https://www.legalsportsreport.com/wyoming/>.

<sup>77</sup> Corbett, *supra* note 3, at 2297.

<sup>78</sup> Michael Applebaum, *The U.S. Sports Betting Race Is On—and Many Marketers Want a Piece of the Action*, AD AGE (Jan. 14, 2021), <https://adage.com/article/marketing-news-strategy/us-sports-betting-race-and-many-marketers-want-piece-action/2305551>.

<sup>79</sup> *Id.*

<sup>80</sup> Corbett, *supra* note 3, at 2285.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

decision to not directly oversee gambling led to an intricate regulatory framework (advertising complexities included) among the member states.

1. *Italy's Approach: The All-out Ban*

Italy utilizes a multi-licensing approach to regulate gambling with one central regulator, the Agenzia delle Dogane e dei Monopoli (ADM), issuing licenses to sportsbooks hoping to operate in Italy.<sup>83</sup> The ADM, in the previous tender, set up 120 licenses, each costing €200,000.<sup>84</sup> Since then, the Italian government has urged the ADM to cut back on the number of operators, calling instead for a new tender of forty licenses at the steep price of €2.5 million.<sup>85</sup> Additional gambling reform to retail operations is in the works, but the Government's efforts have been delayed following recent concessions to licensees due to the impact of the COVID-19 pandemic.<sup>86</sup>

In terms of marketing, Italy takes a highly conservative approach. In 2019, the government fully banned commercial gambling advertising via television, radio, and the Internet.<sup>87</sup> The ban also affected sponsorships, affiliate marketing, and product placement.<sup>88</sup> This provoked outrage from gambling operators with sponsorship contracts in place, especially those with more lucrative agreements in place with sports teams like Italy's Serie A club, AS Roma.<sup>89</sup> Many people argued the regulation would only serve to benefit unlicensed operators, some of which appeared at the top of search engine results following the ban's implementation in early 2019.<sup>90</sup> Germany, which takes a more liberal approach to gaming regulation, criticized blanket bans on advertising as "counterproductive."<sup>91</sup> The German Sports Betting Association

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<sup>83</sup> *Italy's Customs and Monopolies Agency (ADM) Extends Current Sports Betting Licenses Until October*, GAMING LICENSING (July 14, 2021), <https://www.gaminglicensing.com/news/italys-customs-and-monopolies-agency-adm-extends-current-sports-betting-licenses-until-october/>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Court Extends Italian Online Gaming Licences Until December 2022*, FOCUS GAMING NEWS (Nov. 4, 2021), <https://focusgn.com/court-extends-italian-online-gaming-licences-until-december-2022>.

<sup>87</sup> See Erik Gibbs, *Gambling Advertising in Italy Officially Dead*, CALVIN AYRE (Aug. 10, 2018), <https://calvinayre.com/2018/08/10/business/gambling-advertising-italy-officially-dead/>; Ted Orme-Claye, *FIGC: Italian Ad Ban 'Bringing Sports Sector to Its Knees'*, INSIDER SPORT (Aug. 2, 2021), <https://insidersport.com/2021/08/02/figc-italian-ad-ban-bringing-sports-sector-to-its-knees/>.

<sup>88</sup> Orme-Claye, *supra* note 87.

<sup>89</sup> *Id.*

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

<sup>91</sup> Jerome Garcia, *German Sports Betting Association Rejects Plans for Gambling Advertising Ban*, GAMBLING NEWS (Nov. 25, 2021),

(Deutscher Sportwettenverband) echoed this sentiment, stating that the measures would function as an “economic stimulus package for black market providers,” especially in light of the extensive licensing procedure operators are required to undergo prior to marketing their services to consumers.<sup>92</sup> These concerns went largely unaddressed, and the ban was eventually implemented.<sup>93</sup> This forced licensed operators to set their sights on other markets with less stringent regulations and greater opportunities for customer acquisition.<sup>94</sup> Additionally, the ban left plenty of room for the proliferation of unlicensed operators and problem gambling.<sup>95</sup>

A recent industry research report conducted by PwC appears to confirm that these concerns were well-founded.<sup>96</sup> Black market betting now accounts for almost 25% of the total handles wagered in Italy.<sup>97</sup> The Director of Legal and Regulatory Affairs at the European Gaming and Betting Association (EGBA) noted that unlicensed betting was already on the rise in 2021, despite the ad ban only going into effect two years prior.<sup>98</sup> A representative for the EGBA warned that Italy needed to balance regulations with the demands of the market, further stating that “[a]n advertising ban is not the way to ensure an attractive market exists, on the contrary it is very harmful as it does not allow the consumer to be informed of who the regulated operators are.”<sup>99</sup> While proponents of the ban hoped it would reduce the number of gambling ads consumers were exposed to, the result appears to be a more dangerous landscape where unlicensed operators, uninsured bets, and encouragement of excessive betting now lurk in the shadows.

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<https://www.gamblingnews.com/news/german-sports-betting-association-rejects-plans-for-gambling-advertising-ban/>.

<sup>92</sup> *Id.*

<sup>93</sup> See sources cited *supra* note 88.

<sup>94</sup> Gibbs, *supra* note 88.

<sup>95</sup> Orme-Claye, *supra* note 88.

<sup>96</sup> This report by PwC has been criticized by the UK Gambling Commission’s Chief Executive for being exaggerated. He alleges the research failed to differentiate between real consumers and automated systems (i.e., bots) placing bets on unlicensed sites. Proponents of stricter gambling regulations allege that the research was prompted by licensed operators and the BGC, who are resistant to their demands for a blanket advertising ban, a talking point addressed more in the upcoming paragraphs regarding the UK’s current gaming regulations. See generally Ted Orme-Claye, *Gambling Commission Criticizes Black Market Claims*, SBCNEWS (Jan. 18, 2021), <https://sbcnews.co.uk/social-responsibility/2021/01/18/gambling-commission-criticises-black-market-claims/>.

<sup>97</sup> Erik Gibbs, *Betting and Gaming Council Report Shows European Black Market Gaming on the Rise*, CASINO.ORG (Mar. 31, 2022), <https://www.casino.org/news/betting-and-gaming-council-report-shows-european-black-market-gaming-on-the-rise/>.

<sup>98</sup> *Id.*

<sup>99</sup> Robin Harrison, *Rolling with the Punches: Italian Online Sector Survives a Tough Year*, IGAMING BUSINESS (May 12, 2021), <https://igamingbusiness.com/rolling-with-the-punches-italian-online-sector-survives-a-tough-year/>.

The Italian government's decision to implement a 0.5% "turnover tax" on sports betting during the COVID-19 pandemic further complicated the problem and enticed consumers to wager on more favorable payouts that existed in the untaxed, illegal market.<sup>100</sup>

## 2. *Norway's Approach: The Monopoly*

The sports betting landscape in Norway, an EEA member state, is vastly different from the U.S. and most other European markets. The revenue from sports betting, lotteries, and casino games goes to an unlikely recipient—Norwegian sports infrastructure.<sup>101</sup> The country employs a "grassroots share" option, allowing bettors to allocate 7% of their wagers to the sports team, cultural organization or local group of their choice.<sup>102</sup> In 2021, the Norwegian Government doled out nearly \$360 million to sports initiatives within the country, including youth sports programs, national squads, and Olympic training centers.<sup>103</sup>

Three pieces of legislation govern gambling in Norway: the Gaming Scheme Act of 1992, the Totalisator Act of 1927, and the Lottery Act of 1995.<sup>104</sup> All online and in-person bets go through one of two licensees, Norsk Tipping or Norsk Rikstoto,<sup>105</sup> both of which are state-owned and the only *legal* operators available to Norwegians.<sup>106</sup> Norsk Rikstoto holds exclusive rights over horseracing games, while Norsk Tipping has exclusive control over, well, everything else.<sup>107</sup> Both operators are tightly regulated by the Norwegian Parliament and Gaming Authority, who collectively employ one of the most aggressive gaming regulatory schemes in the world.<sup>108</sup> In an effort to curb the risks of problem gambling, the Norwegian Parliament put safeguards in place which cap customer losses per month at \$2,000 for sports betting and \$500 for casino games.<sup>109</sup> Restrictions on stakes and affordability checks are also

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

<sup>101</sup> Ben Cohen, *The Country Where Betting on Sports Is Patriotic*, WALL ST. J. (Feb. 11, 2022), <https://www.wsj.com/articles/winter-olympics-norway-sports-betting-11644574343>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Amie Eliassen, *Gaming in Norway: Overview*, THOMSON REUTERS: U.K. PRAC. L. (Sept. 1, 2020), <https://uk.practicallaw.thomsonreuters.com> (choose "Resources"; then click "Global Guides" from the "Multimedia and Publications" column; click "Gaming"; scroll over to "Country Q&A tab"; then click "Norway").

<sup>105</sup> Although Norsk Tipping has exclusive rights to operate lotteries, Norway created a carveout for humanitarian and charitable organizations serving a "socially beneficial purpose" to apply for a license to conduct a lottery so long as all profits are distributed to charities or humanitarian relief. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Cohen, *supra* note 101.

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

employed.<sup>110</sup> Norsk Tipping's head of gaming operations claims that Norway "[tries] to [regulate] in a really, really responsible way" that also benefits the local community.<sup>111</sup>

Norway also bans all advertising by unlicensed operators, meaning only the two state-run operators are allowed to advertise to Norwegian residents.<sup>112</sup> Even so, a number of offshore operators exploited a loophole in the law which allowed them to advertise to Norwegian consumers via television and the Internet for years.<sup>113</sup> Unsurprisingly, the government eventually took notice.<sup>114</sup> In 2020, Norway addressed the problem by amending legislation to authorize the Norwegian Media Authority (Medietilsynet) to order domestic broadcasters and Internet providers to take down promotional advertisements from unlicensed operators.<sup>115</sup> The Minister of Culture and Gender Equality hopes that the new means of reducing offshore betting advertising will reduce the number of potential problem gamblers.<sup>116</sup>

While this all sounds great, one may wonder how well these measures have been doing thus far. The short answer... apparently not well. Norway's problem gambling rate has doubled in the last seven years and is more than four times higher than countries like Spain or the U.K., both of whom follow a multi-licensing approach.<sup>117</sup> With only one operator available to them, Norwegian bettors frequently turn to unlicensed international websites that offer more choices and better payouts when placing their bets.<sup>118</sup> A recent estimate shows that nearly 66% of Norway's online gross gaming revenue (GGR) is going to unlicensed, offshore operators.<sup>119</sup> This means that the country has lost control of more than half of its online gambling market, costing Norway nearly 2 billion Kroner per year in tax revenue.<sup>120</sup>

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<sup>110</sup> *New Research Reveals Shocking Size of Black Market Gambling Across Europe*, BGC: NEWS UPDATE (Feb. 18, 2022), <https://bettingandgamingcouncil.com/news/new-research-reveals>.

<sup>111</sup> Cohen, *supra* note 101.

<sup>112</sup> See Eliassen, *supra* note 104.

<sup>113</sup> *Norwegian Parliament Passes Gambling Advertising Amendment*, IGAMING BUS.: LEGAL & COMPLIANCE (May 20, 2020), <https://igamingbusiness.com/norwegian-parliament-passes-gambling-advertising-amendment/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Maarten Haijer, *Norway: The Fallacy of One of Europe's Last Online Gambling Monopolies*, EUR. GAMING & BETTING ASS'N (Apr. 22, 2021), <https://www.egba.eu/news-post/norway-the-fallacy-of-one-of-europes-last-online-gambling-monopolies/>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

Norway justifies its longstanding state-run monopoly on the premise that the government is better situated than private companies to protect consumers from the risks associated with gambling.<sup>121</sup> Yet, the country has seemingly done the opposite by operating an unattractive and highly regulated monopoly. The regulations the Norwegian Parliament put in place—stake limits, loss limits, and consumer protection measures—only stand to protect the 34% of consumers who are betting legally.<sup>122</sup> The remaining 66% are now betting in an unregulated black market that their government has little to no control over.<sup>123</sup>

Neighboring Nordic countries like Denmark and Sweden abandoned the monopoly model and implemented multi-licensing regimes similar to that of the U.K. and Italy.<sup>124</sup> As a result, both have seen a significant reduction in the number of bettors using offshore sites.<sup>125</sup> Both countries now benefit from an increase in tax revenue, and their efforts have brought more consumers back into protected markets, which is key to properly monitoring and addressing risks of problem gambling.<sup>126</sup>

### 3. *The United Kingdom's Approach: The Ones to Watch*

Like Italy, the U.K. employs a multi-licensing approach to regulate gambling, but without a comprehensive social responsibility plan in place, the country faced its fair share of problems in the gaming space over the years.<sup>127</sup> Following the implementation of the 2005 Gambling Act, licensed operators were given free rein to advertise on all media platforms.<sup>128</sup> The number of ads has risen substantially since the Gambling Act passed, as has spending by operators to keep up with their customer acquisition goals.<sup>129</sup> In 2016, the Department for Digital, Culture, Media, and Sport (DCMS) launched a review of the connection between increased advertisements and problem gambling rates. DCMS ultimately found that problem gambling rates had largely remained stable since Parliament passed the Gambling Act.<sup>130</sup>

Around this time, commercialization of the sports industry continued, with more than ninety minutes of gambling advertisements airing during the 2018 World Cup.<sup>131</sup> Sports leagues cashed in, striking a number of sponsorship

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Haijer, *supra* note 117.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> UK Gambling Commission, GAMBLING.COM, <https://www.gambling.com/licenses/united-kingdom> (last visited Nov. 18, 2022).

<sup>128</sup> JOHN WOODHOUSE, HOUSE OF COMMONS LIBRARY, GAMBLING ADVERTISING: HOW IS IT REGULATED? 6 (2021).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Richard Conway, *Gambling Firms Agree 'Whistle-to-Whistle' Television Sport Advertising Ban*, BBC (Dec. 6, 2018), <https://www.bbc.com/sport/46453954>.

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deals with betting companies and broadcasters alike. The Premier League recently renewed its preexisting £5 billion deal with companies such as SkySports, BT Sports, and Amazon to stream roughly 200 games per season through 2025.<sup>132</sup> In addition to television deals, the leagues have substantial jersey sponsorships in place with gambling operators.<sup>133</sup> While the television deal remains intact, the jersey deals are now in jeopardy.<sup>134</sup> In 2018, nearly 60% of clubs in England's top-two soccer divisions donned the logo of companies like Bet365 on their jerseys.<sup>135</sup> In the 2021 season, deals with nine Premier League teams were valued at nearly \$80 million.<sup>136</sup>

The public opinion toward gambling advertisements remains predominantly negative, with some groups calling for an all-out ban similar to that which Italy employs.<sup>137</sup> In a House of Commons debate, proponents of the ban argued that vulnerable people were being “bombarded with gambling advertisements,” pointing to data showing that gambling ads accounted for nearly 70% of the time during the “match of the day.”<sup>138</sup> The complaints about the advertising inundation prompted the Government to review the Gambling Act in December 2020.<sup>139</sup> A House of Lords committee report urged the Government to review the connection between problem gambling and the marketing spend by various companies.<sup>140</sup> The committee opined that gambling operators should no longer be permitted to advertise on jerseys or any other items within players' kits.<sup>141</sup> The Government's review could also prompt changes to in-stadium and broadcast advertisements, putting the advertising efforts which have bombarded U.K. citizens for years at risk.<sup>142</sup>

The concerns surrounding misplaced ads and problem gambling were not just noticed by Parliament, but also by gambling operators. To avoid direct regulatory oversight on their advertising, operators instead opted to self-

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<sup>132</sup> *Premier League Clubs Agree to Three-Year Renewal of UK TV Rights*, ATHLETIC (May 13, 2021, 1:23 AM), <https://theathletic.com/news/premier-league-tv-rights-deal/nzHhPDZGYa8u/>.

<sup>133</sup> Eben Novy-Williams & Lev Akabas, *A UK Ban on Gambling Jersey Ads Could Threaten \$80 Million of Deals*, SPORTICO (Sept. 24, 2021, 12:01 AM), <https://www.sportico.com/business/sponsorship/2021/uk-ban-gambling-jersey-ads-1234640607/>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> WOODHOUSE, *supra* note 128, at 8.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (The UK Government's review has been delayed and is slated to be released in May of 2022).

<sup>140</sup> *Id.*

<sup>141</sup> SELECT COMM. ON THE SOC. AND ECON. IMPACT OF THE GAMBLING INDUS., *GAMBLING HARM—TIME FOR ACTION*, 2019-20, HL 79, ¶517 (UK).

<sup>142</sup> Novy-Williams & Akabas, *supra* note 133.

regulate.<sup>143</sup> In 2018, the largest gambling operators, weary of political pressure to reduce the number of ads, opted to adopt an industry-wide ban during live sports broadcasts.<sup>144</sup> Companies such as Paddy Power, Ladbrokes, and Bet365 collectively ensured no ads would be broadcast during the matches, a decision that was felt most in soccer.<sup>145</sup>

Although the whistle-to-whistle ban was a relief to viewers, several operators spoke out against increased regulation and the increased risk of driving bettors to unregulated markets.<sup>146</sup> Established in 2019, the Betting and Gaming Council (BGC) offers to voluntary participants both guidance in adhering to higher standards of advertising and other safe gambling tools aimed at curbing risks of problem gambling.<sup>147</sup> The BGC denounces the prohibitionist approach noting, “[i]t’s vital we don’t do anything that drives people to the unsafe, unregulated black market online, which has none of the protections or safer gambling interventions [we] see with licensed operators.”<sup>148</sup> This concern echoes the sentiment operators voiced years earlier in Italy.

Aside from the whistle-to-whistle ban, BGC members must ensure compliance with several other requirements. Under the BGC’s most recent Socially Responsible Advertising Code, the BGC expanded beyond television ad spending and began cracking down on social media and affiliate ads.<sup>149</sup> Now, these ads “must be targeted at consumers aged 25 and over unless the website can prove its adverts can be precisely targeted at over 18s.”<sup>150</sup> Additionally, this revised Code encourages the use of tools such as cooling off periods on gaming machines, deposit limits, and massive investment increases in programs aimed at research, education, and treatment for problem gamblers.<sup>151</sup> Though these tools help increase safer betting for those in the regulated market, the black market is still a worry for citizens, operators, and the BGC alike. The aforementioned PwC study reported an increase in the number of U.K. bettors utilizing unlicensed sites, seemingly validating their concerns.<sup>152</sup>

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<sup>143</sup> Conway, *supra* note 131.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Ted Menmuir, *BGC: Industry Will Maintain Its Safer Gambling Duties as Problem Rates Fall*, SBC NEWS (Oct. 26, 2021), <https://sbcnews.co.uk/europe/uk/2021/10/26/bgc-industry-will-maintain-its-safer-gambling-duties-as-problem-rates-fall/>.

<sup>147</sup> The BGC is an industry body offering guidance to voluntary gaming providers and is similar to the U.S. American Gaming Association discussed later. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *New Rules to Stop Under-18s Seeing Betting Ads*, BETTING AND GAMING COUNCIL (Aug. 27, 2020), <https://bettingandgamingcouncil.com/news/responsible-advertising/>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> PRICEWATERHOUSECOOPERS, REVIEW OF UNLICENSED ONLINE GAMBLING IN THE U.K. 35 (2021).



Still, the BGC attributes the steep decrease in problem gambling rates—as reported in the U.K. Gambling Commission’s most recent 2021 report—to its efforts. A “nationally representative sample” of roughly 4,000 participants were interviewed via telephone.<sup>153</sup> The results demonstrated a dramatic decline in the overall problem gambling rates—from 0.6% in 2020 to 0.3% in 2021.<sup>154</sup> For those in the sixteen to twenty-four age group, problem gambling rates dropped from 0.8% to 0.4%.<sup>155</sup> The largest decrease in problem gambling rates came from those aged twenty-five to thirty-two.<sup>156</sup> While its efforts have not been definitively connected to these large drops, the BGC remains assured that the safer gambling tools it helps provide are influencing the public for the better.<sup>157</sup> Though the future of stricter regulatory oversight remains uncertain, the efforts of operators to self-regulate appear to be striking a healthy balance between operators’ financial motivations and consumers’ concerns about the impact of gambling.

#### IV. THE CHALLENGES ACCOMPANYING LEGALIZED SPORTS BETTING IN THE U.S.

Sports betting in the United States has become ubiquitous—predictions about which state is slated to join the market next occur before the dust has fully settled on the last big launch. The demand is undoubtedly there, with Americans wagering almost \$35 billion in sports bets in 2020, a number that was nothing to scoff at, especially in the midst of a global pandemic.<sup>158</sup> In 2021, that number increased to a record-shattering \$57.22 billion, up 165% from the previous year.<sup>159</sup> Each time a state passes legislation to legalize sports gambling or issues additional licenses in its jurisdiction, top operators battle to acquire new customers.<sup>160</sup> With dozens of sportsbooks offering essentially the same service, high-cost marketing campaigns are a necessary (and expensive) prerequisite to gain market share.<sup>161</sup>

But with expansion comes growing pains, and the U.S., like its European counterparts, is beginning to experience its fair share. This section focuses on

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<sup>153</sup> Menmuir, *supra* note 146.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Applebaum, *supra* note 78.

<sup>159</sup> Will Yakowicz, *U.S. Gambling Revenue Hit Record \$53 Billion in 2021*, FORBES (Feb. 15, 2022, 2:58 PM), <https://www.forbes.com/sites/willyakowicz/2022/02/15/us-gambling-revenue-hit-record-53-billion-in-2021/?sh=537cfb5d7f50>.

<sup>160</sup> Applebaum, *supra* note 78.

<sup>161</sup> *Id.*

three challenges specifically related to advertising.<sup>162</sup> First, due to the lack of federal oversight, state regulations aimed at sports betting advertising typically contain barebones requirements for operators to abide by, which leaves the frequency, marketing message, and breadth of advertising entirely up to the operators. Second, with a multitude of sports marketing mediums in their arsenal, operators risk inundating consumers with advertising during their pursuit of customer acquisition—a problem that legislators have been quick to take notice of. Finally, market growth and the increase in ad spending raise questions as to whether the industry is properly addressing the risks associated with problem gambling.

A. States Scramble to Create a Framework for Sports Gambling but Leave Much to the Imagination with Their Advertising Regulations

With no federal guidance on how to market sports betting, states have stepped in to provide baseline requirements. Unlike other highly complex federal and state laws governing gaming in the United States, advertising laws are relatively straightforward (proponents of further regulation would argue too much so). Most of these laws cover three main categories: target audience, content-based restrictions, and responsible gaming.<sup>163</sup>

Concerning target audience, most state gaming authorities give explicit guidance for specific groups such as minors and self-excluded players.<sup>164</sup> Some states go a step further and prohibit operators from advertising in venues where most of the patrons are under the legal gambling age.<sup>165</sup> For content-based restrictions, states like Nevada and New Jersey adopted regulations pertaining to

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<sup>162</sup> Game integrity and match fixing are notable concerns, both within, and outside of the gaming community. The most recent scandal involves Calvin Ridley, a wide receiver for the NFL's Atlanta Falcons, who placed \$1,500 worth of bets on three separate parlays in November of 2021—all of which included bets for the Falcons to win. Ridley has since been suspended from the NFL until *at least* the conclusion of the 2022 season. The NFL cited game integrity as a basis for the suspension. Although game integrity and match fixing are highly notable concerns in the U.S. legalized sports betting market post-PASPA, it is beyond the scope of this paper's focus and will not be addressed in full here. *See Falcons' Calvin Ridley Suspended Through at Least the 2022 Season for Betting on NFL Games in 2021 Season*, NFL COMM'NS, <https://nflcommunications.com/Pages/FALCONS%E2%80%99-CALVIN-RIDLEY-SUSPENDED-THROUGH-AT-LEAST-THE-2022-SEASON-FOR-BETTING-ON-NFL-GAMES--IN-2021-SEASON.aspx#:~:text=%22There%20is%20nothing%20more%20fundamental,else%20employed%20in%20the%20league> (last viewed Nov. 18, 2022).

<sup>163</sup> Jennifer Shatley et al., *The Marketing Moment: Sports, Wagering, and Advertising in the United States*, U. NEV. LAS VEGAS: INT'L GAMING INST. 11 (2021).

<sup>164</sup> *Id.*

<sup>165</sup> TENN. COMP. R. & REGS. 15.1.1(L)(2) (2020).

obscene or offensive depictions in advertising.<sup>166</sup> They also prohibit advertising that is “false or materially misleading,” mimicking the FTC’s baseline requirements.<sup>167</sup> To help educate consumers on problem gambling, states typically require responsible gambling messages, such as information about state-run problem gambling help lines, to be included in sports betting ads.<sup>168</sup> Beyond these vague regulations, operators have no direction as to *how much* marketing is *too much*, and it remains unclear how far sports betting operators should take their advertising efforts.<sup>169</sup>

In an effort to bridge this gap, the American Gaming Association (AGA) published the Responsible Marketing Code for Sports Wagering (“Code”) to set the industry standard for operators looking to market their products to growing customer bases.<sup>170</sup> The AGA suggests that operators provide consumers the option of unsubscribing or opting out of marketing conducted via text messaging and email.<sup>171</sup> Similar to the approach already taken by many states, the AGA recommends prohibiting marketing to those below the legal gambling age.<sup>172</sup> Encouragingly, the AGA goes even further than most states by recommending that advertisements should only be placed in “broadcast, cable, radio, print, or digital communications” where at least 71.6% of the audience is “reasonably expected” to be of the legal gambling age.<sup>173</sup> The standards also prevent operators from aiming their advertising at college students, stating that no advertising materials should be circulated on university campuses, nor advertised through university-owned news assets like school newspapers.<sup>174</sup> The Code offers guidance on how companies should conduct their social media presence, suggesting operator accounts should remind patrons of the legal gambling age and enforce age-verification on their sites before allowing patrons to access content.<sup>175</sup> To further limit risk of underage access, the AGA provides a list of websites for parental control software managers, along with numerous other guidelines.<sup>176</sup>

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<sup>166</sup> N.J. ADMIN. CODE § 13:69C-14.1(e)(1) (2020); NEV. GAMING COMM. § 5.011(1)(d) (2019).

<sup>167</sup> NEV. GAMING COMM. § 5.011(1)(d) (2019); N.J. ADMIN. CODE § 13:69C-14.2(d).

<sup>168</sup> N.J. ADMIN. CODE § 13:69C-14.2(d).

<sup>169</sup> *American Gaming Association Establishes Best Practices for Advertising Sports Wagering*, SPORTTECHIE (June 4, 2019), <https://www.sporttechie.com/american-gaming-association-advertising-sports-wagering/>.

<sup>170</sup> AM. GAMING ASS’N, RESPONSIBLE MARKETING CODE FOR SPORTS WAGERING 2 n.2 (2022).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> AM. GAMING ASS’N, *supra* note 170.

<sup>176</sup> *Id.*

Despite all of the aforementioned guidance, it is important to note that operators are not required to adhere to the Code. Instead, they may *voluntarily* pledge their commitment to the body's strict standards, which go above and beyond what most state gaming enforcement bodies currently require by law.<sup>177</sup> The AGA, however, lacks an enforcement body to hold members to their promises, and its ability to generate change among non-member operators is ostensibly non-existent.<sup>178</sup> Given its lack of enforcement abilities, the AGA is in a similar position to the BGC in the U.K., as they both rely entirely on the voluntary willingness of operators to further complicate their already-intricate regulatory obligations.

B. Advertising from All Angels: The Impact of Expansive Sports Marketing Vehicles on Consumers

For years, casino marketing in the U.S. was “largely unnecessary.”<sup>179</sup> However, with the emergence of dozens of online sportsbooks toting near-identical services to in-person casinos, this is no longer the case. For athletes, teams, and stadiums, the opportunities for brand partnerships are seemingly endless.<sup>180</sup> The once prestigious Wheaties Box feature has now been replaced by major ambassador deals between sportsbooks and top athletes such as Shaquille O’Neal and the NHL’s Connor McDavid.<sup>181</sup>

Sports leagues have also cashed in on opportunities within the new market. The NFL alone lists three conglomerates—FanDuel, DraftKings, and Caesars—as official league sportsbooks.<sup>182</sup> Individual team sponsorships add another layer to sports marketing opportunities, with teams taking sponsorships from sportsbooks and unveiling shiny (and heavily branded) in-stadium lounges.<sup>183</sup> For example, the NFL’s Philadelphia Eagles struck a deal with DraftKings to offer patrons a premium in-stadium lounge at Lincoln Financial Field. DraftKings was also granted branding rights across Eagles-affiliated properties.<sup>184</sup> The Eagles negotiated a similar contract with FOX Bet, which gave

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<sup>177</sup> *Infra* note 197.

<sup>178</sup> *Id.*

<sup>179</sup> Shatley et al., *supra* note 163, at 10.

<sup>180</sup> *Id.* at 7.

<sup>181</sup> See generally Eben Novy-Williams, *NHL MVP Connor McDavid Signs BetMGM Deal in U.S. Sportsbook First*, SPORTICO (March 4, 2022, 1:30 PM), <https://www.sportico.com/business/sports-betting/2022/connor-mcdavid-betmgm-1234667161/>; Christopher Palmeri, *NBA’s Shaquille O’Neal Joins WynnBet as Pitchman and Adviser*, BLOOMBERG: BUS. (Aug. 9, 2021, 5:45 AM), <https://www.bloomberg.com/news/articles/2021-08-09/nba-s-shaquille-o-neal-joins-wynnbet-as-pitchman-and-adviser>.

<sup>182</sup> Caesars Sportsbook and the NFL signed a three-year agreement in 2019 worth a reported \$30 million. *US Sports Betting & Gambling Partnerships*, PLAYUSA, <https://www.playusa.com/sponsorships/> (last visited Nov. 18, 2022).

<sup>183</sup> Shatley et al., *supra* note 164, at 7.

<sup>184</sup> *US Sports Betting & Gambling Partnerships*, *supra* note 185.

FOX Bet the same advertising rights as DraftKings and established a branded, on-site lounge within the Eagles stadium.<sup>185</sup> Unibet joined in, striking an agreement to become an official sportsbook and casino partner of the team.<sup>186</sup> In this one stadium alone, patrons are seeing advertisements from three separate sportsbooks.

Traditional marketing mediums are not entirely dead in the water either. Ad spending through traditional mediums such as television and radio continues to grow, with nearly \$1.2 billion spent on sportsbooks' customer acquisition efforts in 2021.<sup>187</sup> That number is expected to grow to \$2.1 billion in 2022 as more states and leagues jump on board.<sup>188</sup> Consumers' and companies' appetites for personalization, coupled with the greater development of the sports betting industry, have produced data-driven customer acquisition methods for sportsbooks to use in a fiercely competitive industry.

The ads that suddenly disappeared from the airwaves during the DFS war between DraftKings and FanDuel have suddenly reappeared, as have the complaints. While companies rush to capture new customers in state markets, it is important to analyze the risks that the advertising inundation may have on consumers. There is also the risk to operators of unwanted legislative oversight if they push too hard.

#### 1. *New Jersey Warns Operators of Direct-Oversight*

Post-Murphy, New Jersey initially took an aggressive approach to regulating sports wagering promotional materials—painstakingly sifting through the terms of every sportsbook advertisement that came across the state gaming authority's desk.<sup>189</sup> Tennessee still does so to help regulate operator's advertising.<sup>190</sup> Since then, New Jersey's Division of Gaming Enforcement (DGE) has relaxed its approach due to the vast number of operators and advertising in the market.<sup>191</sup> After hearing complaints from residents about an influx of gambling ads, DGE Director David Rebeck warned operators that his

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Owen Poindexter, *Sports Betting Companies Spending Billions on U.S. Market*, FRONT OFFICE SPORTS (Dec. 27, 2021), <https://frontofficesports.com/sports-betting-companies-spending-billions-on-u-s-market/>.

<sup>188</sup> *Id.*

<sup>189</sup> Brad Allen, *Top NJ Regulator Drops Stern Warning on Sportsbook Advertising Blitz*, LEGAL SPORTS REP. (Sept. 14, 2021), <https://www.legalsportsreport.com/56886/nj-dge-director-regulate-sportsbook-advertising/>.

<sup>190</sup> TENN. COMP. R. & REGS. § 15.1 (2020).

<sup>191</sup> John Brennan, *NJ Regulator Lays Down the Law with Sports Betting Operators About Their Advertising*, NJ ONLINE GAMBLING (Sept. 15, 2021), <https://www.njonlinegambling.com/nj-regulator-warning-advertising-sports-betting-operators/>.

team would revert back to the practice of blocking promotions until the state preapproved them if advertising standards did not improve.<sup>192</sup>

Similar to most states' regulations, New Jersey's advertising regulations offer no guidance concerning the frequency of promotional materials, which prompted the DGE Director to reconsider employing direct oversight in an effort to respond to the population's expectations on advertising.<sup>193</sup> He made it clear that "[i]f the industry does not control itself, the government will step in and certainly create standards that [these companies] may not want."<sup>194</sup>

## 2. *Colorado Considers Legislation to Curb the Carpet Bombing*

In Colorado, the buzz surrounding sports betting has caused a similar surplus of advertising.<sup>195</sup> Before the 2021 NFL season kicked off, sportsbook ad spending figures were expected to surpass \$1 billion during the season, and Colorado residents took notice.<sup>196</sup> The Democratic Speaker of the Colorado House of Representatives, Alec Garnet, said that he never could have anticipated the flood of advertisements when he pushed to legalize sports betting in Colorado.<sup>197</sup> Speaker Garnet added, "I thought the market . . . would start to regulate itself. It clearly hasn't . . . Coloradans deserve some relief."<sup>198</sup> That relief may come in the form of legislation to curb sportsbooks' continued customer acquisition efforts.<sup>199</sup> During the 2022 legislative session, Speaker Garnet worked on a reform bill to regulate the problem and maintained he wanted it complete prior to the end of the session.<sup>200</sup> If Colorado chooses to pursue it, the potential legislation may resemble agreements between U.K. operators to reel

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<sup>192</sup> *Id.*

<sup>193</sup> *Cf.* N.J. ADMIN. CODE § 13:69C-14.1 (2020) (listing advertising rules that do not include information about frequency of promotional materials).

<sup>194</sup> *The Do's & Do Not's of Advertising and iGaming*, GEOCOMPLY & IDEVELOPMENT AND ECON. ASS'N (Sept. 13, 2021), <https://www.geocomply.com/resources/webinar/the-dos-do-nots-of-advertising-and-igaming/?formSubmitted=true>.

<sup>195</sup> *See id.*

<sup>196</sup> Next 9NEWS, *Even the Politician Who Helped Bring Sports Betting to Colorado Thinks There Are a Lot of Sports Bet*, YOUTUBE (Feb. 14, 2022), <https://youtu.be/Xelruf12ZKM>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Anthony Elio, *Colorado May Restrict Sports Betting Ads*, LINEUPS (Sept. 23, 2021, 1:24 PM), <https://www.lineups.com/betting/colorado-may-restrict-sports-betting-ads/>.

<sup>200</sup> Next 9NEWS, *supra* note 199. For an update on this bill, *see* Dan Holmes, *Colorado Passes Law That Limits Deductions by Sports Betting Operators*, COLO. SHARP (May 24, 2022), <https://www.coloradosharp.com/colorado-passes-law-to-limit-deductions-by-sports-betting-operators/>.

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back their campaigns following complaints of mass-burnout by the British public.<sup>201</sup>

### C. PROBLEM GAMBLING CONCERNS

With increased gaming legalization comes the inevitable stream of gambling addiction stories, making problem gambling a frequent point of contention for legislators with opposing positions on sports wagering.<sup>202</sup> The persistent advertising efforts discussed above appear to be exacerbating these concerns.<sup>203</sup> While state regulators have the ability to fine sportsbooks for activating the accounts of people on self-exclusion lists (as well as for other similar infractions) many believe the industry “lacks adequate guardrails” to protect problem gamblers.<sup>204</sup>

Allegations against DraftKings in December of 2020 added more fuel to this fire.<sup>205</sup> A former DraftKings employee recounted the story of a New Jersey man who had reached his monthly deposit limits.<sup>206</sup> The employee alleged that the customer, in an effort to keep gambling, made a request for an increase on his limit to the DraftKings employee in charge of monitoring player accounts.<sup>207</sup> After finding that the player had transferred “large, untraceable cash deposits” into his bank accounts and twice previously reported that he had a gambling problem, the former employee claimed she reported the account to her superior, who agreed to suspend the account.<sup>208</sup> However, the decision to do so was purportedly overturned the following day, and a temporary increase of the player’s deposit limit was granted.<sup>209</sup> The DGE and multiple DraftKings representatives declined to comment on the allegations, but a DraftKings executive reiterated that the company had a number of checkpoints in place to ensure that cases of problem gambling are properly addressed.<sup>210</sup> Lawsuits filed

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<sup>201</sup> Elio, *supra* note 199.

<sup>202</sup> Zack Jones, *Gambling Addiction Concerns Unaddressed as Sports Betting Expansion Continues*, FORBES (Jan. 12, 2022, 7:29 AM), <https://www.forbes.com/sites/zackjones/2022/01/12/gambling-addiction-concerns-unaddressed-as-sports-betting-expansion-continues/?sh=321f4d1683fd>.

<sup>203</sup> *Id.*

<sup>204</sup> Rich Schapiro, *Sports Betting Skyrocketed in Pandemic. Experts Warn of a ‘Ticking Time Bomb’*, NBC NEWS (May 15, 2021, 3:00 AM), <https://www.nbcnews.com/news/us-news/sports-betting-skyrocketed-pandemic-experts-warn-ticking-time-bomb-n1266518>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Schapiro, *supra* note 204.

in 2015 against DraftKings which alleged similar violations of problem gambling safeguards resulted in settlements in early 2021.<sup>211</sup>

Operators have access to a large amount of data on players in order to track spending and notice suspicious or addictive behavior.<sup>212</sup> During Arizona's sports betting debut weekend, Arizona Diamondbacks CEO Derrick Hall confirmed the usefulness of the data, noting, "[Gambling has] been taking place anyways. Those that want to gamble, they've found ways to gamble. Now we can collect the data, control the data . . . watch it, have safeguards for responsible gaming, and we can collect revenue for the state, too."<sup>213</sup> FanDuel, DraftKings, and other operators allow players to set deposit and spending limits in an effort to curb problem gambling.<sup>214</sup> Self-exclusion lists add another layer of protection, albeit only for bettors who are cognizant of their addiction and prepared to address it.<sup>215</sup>

Despite the influx of revenue from sports betting, non-profit organizations that provide problem gambling treatment programs remain "chronically underfunded."<sup>216</sup> At roughly \$1.46 per resident,<sup>217</sup> Delaware is one of the leading states in terms of per capita funding for gambling treatment services.<sup>218</sup> Despite this, the state failed to allocate additional funding to these programs following the legalization of sports betting.<sup>219</sup> Delaware is far from the only offender among the states that have legalized sports betting, as increases in funding for problem gambling programs have been meager or nonexistent across the board.<sup>220</sup>

Nevada, frequently referenced as the "gold standard" in the gaming space, doesn't even make it on the podium when it comes to problem gambling funding. As of 2021, Nevada ranks second in the U.S. for gambling revenue per resident, yet it lags in allocating funds to problem gambling treatment, ranking

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<sup>211</sup> See Conor Mulheir, *DraftKings to Pay Over \$7m in Site Credit in Lawsuit Settlement*, IGAMING BUS. (Mar. 4, 2021), <https://igamingbusiness.com/legal-compliance/legal/draftkings-to-pay-over-7m-in-site-credit-in-lawsuit-settlement/>; Max Jaeger, *DraftKings Settles Claims by Gamblers' Spouses in MDL*, LAW360 (Jan. 20, 2022, 6:03 PM), <https://www.law360.com/articles/1457213/draftkings-settles-claims-by-gamblers-spouses-in-mdl>.

<sup>212</sup> See Claire Cornelius & Nick Zeller-Singh, *Pick'em: Sport Gambling in Arizona Underway and Options Are Plentiful*, CRONKITE NEWS: ARIZ. PBS (Sept. 9, 2021), <https://cronkitenews.azpbs.org/2021/09/09/pickem-sport-gambling-in-arizona-underway-and-options-are-plentiful/>.

<sup>213</sup> *Id.*

<sup>214</sup> Schapiro, *supra* note 204.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Brian Pempus, *Each State Different on Combating Problem Sports Gambling Under New Laws*, USBETS (Sept. 24, 2019), <https://www.usbets.com/state-sports-betting-problem-responsible-gaming-funding/>.



just thirteenth in the nation.<sup>221</sup> Nevada allocated \$0.47 per person to problem gambling despite nearly 6% of residents reporting that they have a gambling problem.<sup>222</sup> Residents, legislators, and problem gambling professionals attempted to correct the disparity. In 2019, an effort to replace the preexisting quarterly tax of \$2 per slot machine began.<sup>223</sup> Retired Judge Cheryl Moss, who advocated for the establishment of the nation's only Gambling Treatment Diversion Court,<sup>224</sup> recently discussed how operators responded to this tax by removing slot machines from their casino floors.<sup>225</sup> She reflected on the casino operators' move noting, "[w]e actually lost money on that deal."<sup>226</sup> With the emerging popularity of mobile betting in Nevada, advocates proposed that 0.6% of gross gaming tax revenue be allocated to problem gambling; however, this proposed bill never made it out of committee.<sup>227</sup>

Problem gambling has been at the forefront of the conversation both before and after the legalization of sports betting, especially with the growth of mobile and online sportsbooks. In many states, consumers now have the ability to place bets without ever leaving their homes. Still, research on the correlation between problem gambling, increased advertising, and mobile betting options is scant.

## V. DON'T KILL THE GOLDEN GOOSE: FEASIBLE SOLUTIONS TO SUSTAIN THE MARKET

### A. More Regulation Does Not Necessarily Mean More Effective Regulation

With the rapid legalization of sports betting in the U.S., the attention of operators is hyper-focused on acquiring customers in up-and-coming markets. To do so, operators have employed persistent advertising efforts, prompting discussions about whether stricter advertising requirements at the federal and

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<sup>221</sup> *Problem Gambling Information-2021*, PROJECT WORTH NV, [https://dpbh.nv.gov/uploadedFiles/dpbh.nv.gov/content/Programs/ProblemGambling/ACPG/Problem%20Gambling%20Information%20-%202021\(1\).pdf](https://dpbh.nv.gov/uploadedFiles/dpbh.nv.gov/content/Programs/ProblemGambling/ACPG/Problem%20Gambling%20Information%20-%202021(1).pdf) (last visited Nov. 18, 2022).

<sup>222</sup> Dana Gentry, '*Gut-Wrenching*' Cuts to a Problem Gambling Program That Was Never Flush, NEV. CURRENT (Feb. 9, 2021, 6:17 AM), <https://www.nevadacurrent.com/2021/02/09/gut-wrenching-cuts-to-a-problem-gambling-program-that-was-never-flush/>.

<sup>223</sup> *Id.*

<sup>224</sup> Gary Rotstein, *Retired Clark County Judge Is on a Mission to Spread Gambling Court Concept to Other States*, USBETS (Mar. 10, 2021), <https://www.usbets.com/judge-spreading-gambling-court-concept/>.

<sup>225</sup> Zoom Interview with Cheryl Moss, Retired Judge, Nevada District Court and Gambling Treatment Diversion Court (Feb. 21, 2022).

<sup>226</sup> *Id.*

<sup>227</sup> Gentry, *supra* note 222.

state levels are necessary.<sup>228</sup> This includes Speaker Garnet's proposed reform in Colorado. These concerns are not new. They merely reiterate the concerns expressed in the U.S. during the DFS war of 2015, as well as those voiced in Italy and the U.K. following the EU's decision to reduce gambling oversight. While it is important to be cognizant of the breadth and impact of advertising in the post-PASPA sports betting landscape, it is equally important to recognize that *more* regulation does not always equate to *more effective* regulation.

Sports betting operators are already navigating their way through a minefield of federal, state, and tribal laws. Licensing requirements, the BSA, IGRA, and a fragmented patchwork of state regulations combine to create the complex regulatory framework that the gaming industry must comply with. Calling for a blanket advertising ban or rigid federal oversight from agencies like the FTC and FCC is an easy position to take. However, the reality is that operators are in the best position to address and prevent further strife among consumers and legislators. That is not to say operators are off the hook; for the "sake of long term sustainability of the market," the industry needs to operate with a strong social responsibility framework in place.<sup>229</sup>

#### B. Using Targeted Advertising to Prevent Consumer Fatigue

There are benefits to advertising to customers besides merely acquiring customers. Specifically, advertising plays a crucial role in driving players away from the black market and back into consumer-protected markets with problem-gambling resources available to bettors who need them.<sup>230</sup> At the same time, a balance needs to be struck between promoting the new market and overstimulating consumers. During a webinar hosted by iDEA Growth and GeoComply, CEO of Catena Media, Michael Daly, remarked "[o]perators have to learn how to not kill the golden goose . . . self-regulation by operators is possible."<sup>231</sup> CEO and Founder of GeoComply, Anna Sainsbury, agreed, saying "[t]here's a balance . . . we really need to focus on both what the operators need which is monitoring some sort of considerate cost-per-acquisition that enables them to operate within the market but also ensure that we're educating players [about legal betting]."<sup>232</sup>

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<sup>228</sup> See Corbett, *supra* note 3, at 2298; see also Marc Edelman, *New York Online Sports Betting Needs Stronger Advertising Regulations*, FORBES (Feb. 11, 2022), <https://www.forbes.com/sites/marcedelman/2022/02/11/new-york-online-sports-betting-needs-stronger-advertising-regulations/?sh=22ef98f965bf> (calling for the New York State Gaming Commission to prohibit leagues from displaying ads on their landing page and for federal oversight similar to tobacco and alcohol regulation).

<sup>229</sup> See iGaming NEXT, *Martin Lycka: Discussing the Future of the US Market*, YOUTUBE (Mar. 3, 2022), <https://youtu.be/Fcnvpz7JjYw>.

<sup>230</sup> See BETTOR SAFE, *supra* note 73.

<sup>231</sup> GEOCOMPLY, *supra* note 194.

<sup>232</sup> *Id.*

FanDuel’s Chief Marketing Officer, Mike Raffensperger, recently discussed the problems associated with sportsbook advertising in the U.S.<sup>233</sup> He noted that “[e]ach state is a market unto itself, and there isn’t just regulatory complexity but marketing complexity.”<sup>234</sup> The differences in tastes and preferences between different states’ residents force operators to rethink promotional materials and redistribute assets and resources into markets that will be most profitable for them.<sup>235</sup> But each time a state legalizes sports betting licensed operators flock to the new market in a race to acquire customers, often doing so with copious amounts of ads.

Caesars Sportsbook appears to be attempting to get ahead of this. After shilling out nearly \$1 billion in marketing costs, Caesars was able to gain a considerable share of the market.<sup>236</sup> This was particularly true in New York, where Caesars claimed the top share of the state’s debut monthly handle.<sup>237</sup> Months later, the company announced that after exceeding its targets, the sportsbook would be taking its foot off the gas.<sup>238</sup> The sportsbook quickly recognized that their high-cost spending on promotional deposit matches, ad campaigns, etc., was not a sustainable long-term plan for its profit-loss ratio.<sup>239</sup> Perhaps other companies experiencing the same issues with respect to their balance sheets will follow in Caesars’ footsteps. Operators can efficiently allocate their money by focusing on targeted marketing, while also giving consumers a well-deserved break from the ever-present ads.

### C. The Role of Responsible Gaming

By shifting the focus away from customer acquisition and allowing the market to stabilize itself, operators, leagues, regulators, and legislators can direct their attention to establishing a comprehensive approach to responsible gaming. The sports betting market is one with many key players. To avoid the problems that occurred in the U.S. back in 2015, as well as those their European counterparts were forced to address, collaboration from all sides of the industry is necessary—and possible.

#### 1. *The Operators’ Role*

The most obvious key player in the successful implementation of a responsible gaming culture are the operators themselves. Operators are in a unique position to serve as the first line of defense against problem gambling and

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<sup>233</sup> Applebaum, *supra* note 78.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Matt Rybaltowski, *Caesars Sportsbook Ready to Curtail Ad Spending Despite Hot Start in New York*, SPORTSHANDLE (Feb. 23, 2022), <https://sportshandle.com/caesars-shelving-ad-campaign/>.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

advertising fatigue. Companies like DraftKings, FanDuel, BetMGM, and Caesars have data on bettor spending, income, and wagering habits that legislators and leagues do not readily have at their disposal. If they used this data in a way that went beyond suspicious-transaction monitoring and self-exclusion lists, sportsbooks could mitigate harm and better protect vulnerable bettors.<sup>240</sup>

Entain, a non-profit dedicated to responsible gambling, partnered with BetMGM to launch a “first-of-its-kind” app, Gamble Responsibly America.<sup>241</sup> Entain’s Senior Vice President for American Regulatory Affairs and Responsible Gambling, Martin Lycka, remarked that the app’s goal was simply, “to educate users on safe gambling habits and provide the necessary tools and resources to allow users to access help and support instantly.”<sup>242</sup> The app features discussions on important topics such as disordered gambling and behavioral markers, as well as self-assessment tools and gambling diaries.

DraftKings has come a long way from its DFS ads in 2015, which were infamous for taglines like, “TURN \$20 INTO \$2 MILLION, \$10 MILLION GUARANTEED.”<sup>243</sup> The sportsbook has since partnered with the Cambridge Health Alliance’s Division on Addiction (an affiliate of the Harvard Medical School) to create a “systems-based approach to employee training” for recognizing and assisting with responsible gaming.<sup>244</sup> The company also committed to a multi-year allocation of funding to state problem gaming councils, usable at the councils’ discretion, to help critically underfunded non-profits offering treatment services to residents.<sup>245</sup>

Reflecting on the 2021 U.S. sports betting market, Matt Brown of Legal Sports Report summed up the recent efforts of operators by stating, “[l]essons clearly were learned to the positive side from 2015, it does not absolve anybody from what needs to probably be a stronger focus on responsible gambling moving into 2022 . . . It’s still important that we are publicly and broadly acknowledging

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<sup>240</sup> Richard Janvrin, *Entain U.S. Launches Second Edition of Responsible Gambling App*, GAMBLING.COM (Mar. 4, 2022), <https://www.gambling.com/us/news/entain-us-launches-second-edition-of-responsible-gambling-app-3076300>; Shatley, et al, *supra* note 164 at 10.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Patrick Tholey, *DraftKings NFL \$10M Millionaire Maker*, 247SPORTS (Aug. 21, 2015), <https://247sports.com/Article/DraftKings-NFL-10M-Millionaire-Maker-38873369/>.

<sup>244</sup> *DraftKings Announces \$1 Million+ Responsible Gaming Initiative Providing Multi-Year Financial Commitments to State Problem Gambling Councils*, GLOBENEWSWIRE (Jan. 20, 2022, 7:30 AM), <https://www.globenewswire.com/news-release/2022/01/20/2370054/0/en/DraftKings-Announces-1-Million-Responsible-Gaming-Initiative-Providing-Multi-Year-Financial-Commitments-to-State-Problem-Gambling-Councils.html>.

<sup>245</sup> *Id.*

it.”<sup>246</sup> Operators are clearly aware of legislators’ threats of regulation and have started trending toward self-regulation in a way that some European operators did not—at least until they had no choice.

## 2. *The Leagues’ Roles*

The leagues who once fervently resisted the legalization of sports betting now play a vital role in assuring its longevity. Major sports leagues profit from sports betting in many forms, and stadium marketing rights and league partnerships are just the tip of the iceberg. The NHL’s Washington Capitals are set to don a Caesars Sportsbook logo on their jerseys at the commencement of the 2022-2023 season, making them the first team to take advantage of the NHL’s approved plan for teams to pursue jersey sponsorships.<sup>247</sup> Given all of these opportunities, leagues have a stake in ensuring the money keeps flowing.

In recent years, leagues jumped on board with responsible gaming initiatives, taking a hands-on role in providing resources to curb problem gambling and promote safer betting. In 2021, the NFL committed \$6.2 million to the National Council on Problem Gambling (NCPG) in an effort to further develop responsible gaming safeguards by educating consumers on the dangers of over-betting.<sup>248</sup> The NHL similarly partnered with the AGA to promote responsible gaming with their “Have A Game Plan” initiative, which aims to educate consumers about the importance of betting responsibly through the use of co-branded marketing and desktop and mobile applications.<sup>249</sup> Leagues should continue to get on board with responsible gaming initiatives, especially if they intend to cash in on marketing deals that expose fans to advertising at every turn. By partnering with groups like the AGA and the NCPC, the leagues’ commitment to responsible gaming will become increasingly apparent to both consumers and legislators, shifting the conversation away from the need for rigid oversight.

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<sup>246</sup> LSR Sports Betting & News Podcast, *Ep. 130: A Look Back at Sports Betting in 2021*, LEGAL SPORTS REP., at 44:29 (Jan. 5, 2022), <https://www.legalsportsreport.com/podcast/>.

<sup>247</sup> Sam Carp, *Washington Capitals Claim NHL First with Caesars Jersey Patch Deal*, SPORTS PRO MEDIA (Sept. 27, 2021), <https://www.sportspromedia.com/news/washington-capitals-caesars-sportsbook-jersey-patch-sponsorship/>. This approved plan is in addition to the NHL’s previous approval for helmet sponsorships with sportsbooks.

<sup>248</sup> Devin O’Connor, *NFL Commits \$6.2M to Responsible Gaming, as Sports Betting Continues Expansion*, CASINO.ORG (Oct. 20, 2021), <https://www.casino.org/news/nfl-commits-6m-to-responsible-gaming-program/>.

<sup>249</sup> NHL Pub. Rel., *NHL Partners with AGA to Promote Responsible Sports Betting*, NHL: NEWS (Oct. 23, 2020), <https://www.nhl.com/news/nhl-partners-with-aga-to-promote-responsible-sports-betting/c-319508316>.

## VI. CONCLUSION

The U.S. market, while still relatively new, seems to have learned from Europe's mistakes and the 2015 DFS war. While progress is being made, operators and the leagues are not out of the woods just yet. So, who exactly is in the best position to ensure the long-term success of this new and exciting market? The answer does not lie with the federal government, nor the individual state legislatures, although the states should remain mindful of the varying concerns when proposing new legislation. Instead, the bulk of the responsibility lies with the operators, who are best equipped to address public concerns before they spiral out of control. To assist them with this responsibility, sportsbooks should collaborate with their regulators, be mindful of their partnerships with leagues, and employ responsible gaming-focused companies and public health officials. This approach helps ensure that companies do not become solely focused on reeling in customers. Instead, by striking a balance between profitability and responsibility, the industry can avoid stringent regulation by publicly acknowledging and subsequently addressing the dark side of this American pastime.