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Sports Betting Advertising and the Need for Further Regulation in the United States

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I. Introduction

As the 2021-22 football season was approached, I came across an ad from the Barstool Sportsbook which said by signing up with their promo code and making a first deposit, I could “Unlock a \$100 free bet on the 2021/22 NFL Championship future wager of [my] choice.” That sentence was enough to entice me to sign up and deposit with Barstool, and I was fortunate enough to win the promotional bet with the Rams winning the Super Bowl. As the clock ticked down to zero I was thrilled, but I remained cautious because I had frequently heard that promotions like these are often not quite as they seem. The Terms and Conditions of the offer said “Sportsbook bonus cash awarded subject to all Sportsbook Play Through Requirements,” and being a casual bettor I did not understand what that meant. It took discussions with multiple Barstool representatives, along with personal research, before I realized that there was a significant burden I had to meet to receive my winnings. The confusion of this experience led me to wonder to what extent sports betting ads are regulated in the United States.

Sports betting did not become widely legal in the United States until 2018, when the decision in *Murphy v. NCAA*¹ repealed the Professional and Amateur Sports Protection Act (PASPA), which prohibited states from sponsoring, operating, advertising, or promoting wagering schemes for professional and amateur sports.² The rapid growth of the industry has been matched only by the growth of advertising - which has raised serious concerns about the scope and effect of those ads.

¹*Murphy v. NCAA*, 138 S. Ct. 1461 (U.S. 2018)

² 28 USCS § 3702

In June 2018, the first month after PASPA was repealed, sports bettors wagered \$310 million.³ Fast forward to October 2021, and that monthly total was \$7 billion.⁴ The amount wagered in 2021 is up 165% from 2020, with a total handle of \$57.22 billion, which brought a revenue of \$4.29 billion.⁵ Looking to the future, with the way states are embracing gambling and the rise in popularity of mobile sports betting, Goldman Sachs projects that annual revenue for online sports betting could reach \$39 billion by 2033.⁶

Sportsbook operators are pouring these funds into advertising.⁷ Some of these companies are even operating at a loss at the moment because they see such a need to pour as much as possible into advertising in the early years.⁸ Over the last year the amount spent on television ads by online gambling companies has increased from \$292 million in 2020, to \$725 million in 2021.⁹ Four operators accounted for 93% of that television ad spending in 2021.¹⁰ As more states legalize sports betting and more operators fight for their market share, those numbers will likely increase. This year's Super Bowl illustrates how much these companies are willing to spend on advertising. It was the first year gambling companies were allowed to purchase Super Bowl ads, and they spent \$7 million per 30 second commercial during the Big Game.¹¹

³ Timothy L. O'Brien and Elaine He, *The Sports Gambling Gold Rush Is Absolutely Off the Charts*, Bloomberg, (December 16, 2021) <https://www.bloomberg.com/graphics/2021-opinion-online-sports-betting-future-of-american-gambling/>

⁴ *Id.*

⁵ Will Yackowitz, *U.S. Gambling Revenue Hit Record \$53 Billion in 2021*, Forbes (February 15, 2022) <https://www.forbes.com/sites/willyakowicz/2022/02/15/us-gambling-revenue-hit-record-53-billion-in-2021/?sh=5cdf707c7f50>

⁶ Bloomberg, *supra*

⁷ Avi Salzman, *New Data Show Enormous Growth Rate in Gambling Ads*, Barron's, (Feb. 10, 2022) <https://www.barrons.com/articles/new-data-show-enormous-growth-rate-in-gambling-ads-51644513956>

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Hayes Brown, *The Losing Bet Behind the Super Bowl's Worst Commercials*, MSNBC, (February 13, 2022) <https://www.msnbc.com/opinion/msnbc-opinion/super-bowl-2022-crypto-sports-betting-ads-are-gamble-n1288997>

The 2022 Super Bowl was not the only massive new advertising opportunity to come about for these gambling companies over the last year. The 2021-22 NFL season was the first season where sports betting advertisements were allowed to be run during games, and they were featured prominently all season long.¹² This comes despite long-term NFL opposition to sports betting in the preceding years due to their concerns that allowing sports betting would “negatively impact [the league’s] long-term relationship with [their] fans, and negatively impact the perception of [football] across the country.”¹³ Today, the NFL has sponsorship deals with seven sportsbooks,¹⁴ and the value of the three largest deals was just under \$1 billion combined over a five-year period.¹⁵ CEO of Roundhill Investments Will Hershey has called this pivot by the league a “cultural shift,” and says the industry is getting to a point “where [making deals with gambling companies] is no longer taboo.”¹⁶

This Comment will explain how ads are regulated generally and in the sports betting industry, explore the dangers that can result, investigate other approaches in similar industries at home and abroad, and propose a path forward with new forms of regulation. Part II provides a background of how ads are regulated in general in the United States. Part III explains what is unique about sports betting ads, and then how they are currently regulated in the United States. Part IV explores the dangers of gambling and sports betting in particular, and looks into which groups of people in our country are most vulnerable. Part V provides potential solutions to better

¹² Jim Sergent, *Six charts show sports betting's digital explosion with NFL season about to kick off*, USA Today, (Sept. 9, 2021) <https://www.usatoday.com/in-depth/graphics/2021/09/09/online-sports-gambling-good-bet-industry-continue-winning-ways/5686836001/>

¹³ David W. Chen, *The N.F.L.'s About-Face on Sports Gambling*, NY Times, (Feb. 10, 2022) <https://www.nytimes.com/2022/02/10/sports/nfl-bets-gambling.html>

¹⁴ *Id.*

¹⁵ Jabari Young, *Tech, gambling and alcohol helped the NFL earn almost \$2 billion in sponsorships this season*, CNBC, (Jan. 26, 2022) <https://www.cnbc.com/2022/01/26/tech-gambling-alcohol-helped-nfl-earn-almost-2-billion-in-sponsorships.html>

¹⁶ USA Today, *supra*

regulate sports betting advertising in the US, by looking at how it is regulated in other countries, and also how tobacco advertising is regulated in the US.

II. General Advertising Regulation in the United States

A. First Amendment Framework

In the United States, advertising is regulated at the federal level, at the state and local level, and also by self-regulatory organizations.¹⁷ Although speech is protected by the First Amendment, which states that “Congress shall make no law... abridging the freedom of Speech,”¹⁸ it was not until the 1970s that commercial speech, such as advertising, became viewed as part of this protection.¹⁹ In Bigelow v. Virginia in 1975, the Supreme Court held that “the existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.”²⁰ The following year, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Supreme Court concluded explicitly that commercial speech, even a communication such as advertising, is protected by the First Amendment, although commercial speech is entitled to less protection than noncommercial speech and can be regulated if false or misleading.²¹ Taken together, these decisions require that commercial speech be given First Amendment protection, but allow for regulation to ensure that commercial speech is not false or misleading.

Over the next 10 years, Supreme Court decisions continued to establish the line between the protection and regulation of “commercial speech.” In its 1980 decision in Central Hudson Gas

¹⁷ AdConsul.org, *General provisions on regulation of advertisement activities in the US* (2022) <http://adconsul.org/en/articles/6#:~:text=Advertising%20in%20the%20United%20States.by%20means%20of%20self%2Dregulation.&text=Federal%20authorities%20adopt%20federal%20laws,control%20advertising%20industry%20as%20whole>

¹⁸ USCS Const. Amend. 1

¹⁹ David Schultz, *The First Amendment Encyclopedia: Commercial Speech*, MTSU.edu (2020) <https://www.mtsu.edu/first-amendment/article/900/commercial-speech>

²⁰ *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975)

²¹ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)

& Electric Corp. v. Public Service Commission of New York, the Supreme Court established a four part test for whether regulation of commercial speech is constitutional.²² First, it must concern lawful activity and be considered speech.²³ Second, there must be a substantial governmental interest in regulating it.²⁴ Third, the regulation must advance that interest.²⁵ Finally, the regulation must not be more extensive than is necessary to serve that interest.²⁶ In Zauderer v. Office of Disciplinary Counsel in 1985, the Supreme Court further ruled that states may situationally compel certain commercial speech without violating the advertiser’s First Amendment rights.²⁷ Specifically the court held that a state may require an advertiser to disclose certain information “as long as the disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”²⁸

B. Federal Regulation

Federal Regulation of advertising is overseen by the Federal Trade Commission (FTC), which is the major regulatory body²⁹ that has the power to protect consumers from deceptive and unfair acts or practices.³⁰ Today, the FTC generally requires that claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based.³¹ Ads are considered deceptive if they are likely to mislead consumers and affect their behavior, and unfair if the injury caused is substantial and not reasonably avoidable.³² Any use of endorsements and testimonials in

²² *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566(1980)

²³ *Id.* at 565

²⁴ *Id.* at 565

²⁵ *Id.* at 566

²⁶ *Id.* at 566

²⁷ *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 645 (1985)

²⁸ *Id.* at 645

²⁹ AdConsul, *supra*

³⁰ 63 P.L. 203, 38 Stat. 717, 63 Cong. Ch. 311

³¹ FTC.gov, *Advertising and Marketing Basics* (2022) <https://www.ftc.gov/business-guidance/advertising-marketing>

³² JUSTIA, *supra*

advertising, must reflect honest opinions and experiences of the endorser, based on their actual use of the endorsed product.³³ For these endorsements, and for any other ads demonstrating how a product works, the ad must show how the product works under normal use by consumers.³⁴ When it comes to age considerations with advertising, the FTC enforces the Children’s Online Privacy Protection Act (COPPA), which requires websites to post privacy policies, provide parents with notice of the information they collect, and get verifiable consent from a parent or guardian before collecting personal information from children 13 and under.³⁵ Advertisements offering refunds and saying things like “money-back guarantee” must clearly provide the terms of the offer to the consumer, and meet those terms.³⁶

When advertisements do not comply with FTC rules, the advertiser may be punished through the form of cease and desist orders, injunctions by federal district courts, civil penalties of up to \$11,000, and damages to consumers in civil lawsuits.³⁷ However, the FTC typically only enters the picture in cases that affect substantial public interests.³⁸ Individual disputes are typically resolved in court with the involvement of state or local consumer protection agencies, or private groups like the Better Business Bureau.³⁹ Though these individual disputes can also be brought in Federal Court, by charging deceptive advertising under the Lanham Act.⁴⁰ For a violation under Section 43(a) of the Lanham Act, a consumer must prove that the advertiser made a false advertisement that actually and materially deceived consumers, that the advertiser caused the false

³³ 16 CFR 255.0

³⁴ JUSTIA, *supra*

³⁵ FTC.gov, *Children's Online Privacy Protection Rule: Not Just for Kids' Sites* (2022) <https://www.ftc.gov/business-guidance/resources/childrens-online-privacy-protection-rule-not-just-kids-sites>

³⁶ JUSTIA, *supra*

³⁷ JUSTIA, *supra*

³⁸ AdConsul, *supra*

³⁹ *Id.*

⁴⁰ JUSTIA, *supra*

advertisement to enter interstate commerce, and that the consumer was or is likely to be injured as a result.⁴¹

The Federal Communications Commission (FCC) is another federal body that regulates advertising, particularly television and radio broadcast advertising, and does so by resolving consumer claims about content and timing of ads, and establishing rules for political programming and junk fax advertisements.⁴² Violations of FCC regulation can result in the revocation of broadcast licenses, fines, the issuance of warnings, and litigation.⁴³ The FCC generally only involves themselves in disputes that involve obscene, indecent, or profane advertising.⁴⁴ The FDA plays a similar role in overseeing drug advertising, and several other government bodies are given authority to oversee advertising in other areas.⁴⁵

C. State and Local Regulation

State, county, and city legislators also regulate advertising, adopting regulations that ban unfair, deceptive, or fraudulent ads, and where necessary, expand federal protections.⁴⁶ For example, the New Jersey Administrative Code specifies types of advertising that shall be deemed to be misleading or deceptive for financial institutions including: “the advertisement of ‘immediate approval’ of a loan application or ‘immediate closing’ of a loan, or words to that effect.”⁴⁷ The New Jersey Administrative Code also has a rule that applies specifically to their NJ Transit system, banning not only false, deceptive, or misleading ads, but also ads that are controversial, promote tobacco use, or promote or oppose a political party.⁴⁸ To remedy a violation of state or local

⁴¹ 15 U.S.C. § 1125(a)

⁴² AdConsul, supra

⁴³ 47 USCS § 402

⁴⁴ AdConsul, supra

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ N.J. Admin. Code § 3:2-1.4(b)(1)

⁴⁸ N.J. Admin. Code § 16:86-1.2

regulations a consumer may file a complaint with the state, city, or county’s Attorney General, or with its Department of Consumer Affairs.⁴⁹ The Department of Consumer Affairs in a given state, county, or city issues licenses allowing businesses to run under their advertising standards, and violators of these standards are typically issued fines.⁵⁰

D. Self-regulatory Organizations

There are five non-governmental organizations that unite to form the National Advertising and Review Council (NARC) to foster truth and accuracy in national advertising through voluntary self-regulation.⁵¹ The first of these five is the Better Business Bureau (BBB) which is an organization that sets standards for ethical business behavior for the over 400,000 businesses that it has accredited, one of these standards being a Code of Advertising.⁵² The other four organizations make up what is called the “4As,” also known as the American Association of Advertising Agencies, which helps direct more than 85% of total U.S. advertising spend, and was founded to promote, advance, and defend the interests of their member agencies, employees, and the advertising and marketing industries overall.⁵³ The 4As organization collaborates with federal, state and local governments to achieve social and civic goals, to oppose unwise or unfair legislation and regulation, and to be the principal source of information and advice about advertising.⁵⁴

NARC sets the policies for the National Advertising Division (NAD) and the Children’s Advertising Review Unit (CARU), both under the BBB umbrella.⁵⁵ The National Advertising Review Board (NARB), which acts as the appellate body for the U.S. system of advertising

⁴⁹ AdConsul, *supra*

⁵⁰ *Id.*

⁵¹ AdConsul

⁵² BBB.org, *About Us* (2022) <https://www.bbb.org/all/about-bbb>

⁵³ AAAA.org, *Our Mission* (2022) <https://www.aaaa.org/about-the-4as/>

⁵⁴ AdConsul, *supra*

⁵⁵ Bbbprograms.org, *National Advertising Review Board* (2022) <https://bbbprograms.org/programs/all-programs/national-advertising-review-board>

industry self-regulation, holds panels hearing appeals of NAD and CARU decisions.⁵⁶ After decisions, the violator is given ten days to make a good faith effort to bring their advertising into compliance, and if they do not, the case will be referred to a government agency, likely the FTC.⁵⁷ This system of self-regulation is a flexible alternative to self-regulation, and serves as a more effective, quick, low-cost and private means to settle a dispute rather than litigation.⁵⁸

III. Sports Betting Advertising in the United States

A. *How Sports Betting Ads Work*

New York legalized sports betting in January 2022.⁵⁹ One month later, New York Attorney General Letitia James issued a press release urging bettors to be aware of deceptive online sports betting advertisements.⁶⁰ She gave tips to consumers to protect themselves and warned them to “read the fine print on bonuses and other promotions,” because offers of things like a “risk-free bet” or a “\$100 deposit match” might contain unclear and deceptive requirements.⁶¹

The most notable of these requirements is called the “wagering requirement.” The simplest way to explain a wagering requirement is that it is the amount you need to bet in order to withdraw the money you were rewarded.⁶² For example, Barstool Sportsbook offers a “\$1,000 risk free bet”

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ AdConsul, *supra*

⁵⁹ Alex Sherman, *You can now legally bet on sports from your phone in New York, just in time for the NFL regular-season finale*, CNBC (Jan. 8, 2022) <https://www.cnbc.com/2022/01/08/mobile-sports-betting-goes-live-in-new-york.html>

⁶⁰ Letitia James, *CONSUMER ALERT: Attorney General James Warns New Yorkers of Deceptive Online Sports Betting Companies Ahead of Super Bowl*, Letitia James NY Attorney General (Feb. 10, 2022)

⁶¹ *Id.*

⁶² Mike Epifani, *What Are Wagering Requirements*, Bonus.com, (Nov. 4, 2021) <https://www.bonus.com/what-are-wagering-requirements/#:~:text=That%20means%20you%20have%20to,can%20withdraw%20all%20your%20funds.&text=If%20it%20were%20%241%20for,a%20wagering%20requirement%20above%201x>

to anyone who signs up with a new account and makes an initial deposit.⁶³ If the bet wins you keep the money without any wagering requirements.⁶⁴ If it loses, you are given back the amount you bet, not in cash, but in bonus funds that are subject to a 1x wagering requirement, meaning the funds cannot be withdrawn until you spend the equivalent of that amount on new bets.⁶⁵ So if you bet \$1,000 and lose, the bonus funds cannot be converted into real cash that can be withdrawn until you spend \$1,000 on new wagers.⁶⁶ This is one of the more generous wagering requirements, as at different sportsbooks the requirements can range anywhere from 1x up to 5x, meaning in the \$1,000 free bet example a bettor would have to wager \$5,000 before they can access the \$1,000 bonus funds.⁶⁷ This offer might entice bettors to wager \$1,000 because they see it as risk-free, but they may not then have the financial flexibility to bet enough to satisfy the wagering requirement. In addition, sportsbooks have minimum odds and time limit restrictions.⁶⁸ A bettor may think that they can satisfy the wagering requirement by betting a large amount on extremely heavy favorites to chip away at that large sum, but the odds are often restricted, as they are capped at -200 on the aforementioned Barstool offer.⁶⁹ As for the time limits, most introductory offers expire between seven and 90 days, and if the wagering requirement is not met by then, the remaining bonus will be revoked by the sportsbook.⁷⁰

The wagering requirements, along with the time and odds restrictions, are commonly included in sportsbook promotions, and are part of what separates sports betting ads from ads in

⁶³ Ted Dahlstrom, *Barstool Sportsbook: Promo Codes & Review 2022*, USBETS, (Dec. 10, 2021) <https://www.usbets.com/barstool-sportsbook/>

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ BONUS.com, *supra*

⁶⁸ *Id.*

⁶⁹ US BETS, *supra*

⁷⁰ BONUS, *supra*

other industries. The fact that operators hide these requirements in the terms and conditions shows the inherent goal of sportsbooks putting out these ads, to capitalize on the ignorance of customers who see the ad and think they are stealing money. The two below photos show an example of a “Risk-Free Bet” offer from FanDuel Sportsbook, and then the additional terms that go along with it. This promotion is subject to a time limit that is not set out in the main ad, but rather hidden in the terms and conditions.



11. Restrictions on Withdrawal

The Promotion Bonus is not transferable and cannot be substituted except in the Sponsor’s sole discretion. The Promotion Bonus is non-withdrawable, but any winnings therefrom are immediately withdrawable. **Any unused portion of the Promotion Bonus will be automatically withdrawn from your FanDuel Account fourteen (14) days after being credited to your FanDuel Account.** You may withdraw your deposited funds without penalty at any time.

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⁷¹ FanDuel Sportsbook, *New FanDuel Sportsbook Users are eligible for a Risk-Free bet up to \$1000. Place your first bet to receive your bonus!*, 2022
<https://promos.sportsbook.fanduel.com/promotion?promoCode=RF1000AS&hideFooter=true&hideHeader=true>

In addition to the primary advertising methods of online promotions and television ads, sportsbook operators continue to invest in several other advertising methods. The BIAA projects that \$150 million will be spent on local radio advertising in 2022,⁷² and some of the nation’s top sportsbooks have formed long-term partnerships with large radio companies, like IHeartMedia partnering with DraftKings.⁷³ Sports betting operators are also entering deals to become the “exclusive betting partner” of media companies, in which the sportsbook pays for partial ownership, as well as an abundance of exclusive advertising.⁷⁴ Some operators, like DraftKings, are even signing these exclusivity deals with multiple different companies.⁷⁵

Sportsbooks are also partnering with celebrities and superstar athletes, having them star in their commercials to broaden their appeal.⁷⁶ Jamie Foxx has starred in numerous commercials for BetMGM, FanDuel has produced ads starring golfer Jordan Spieth, and WynnBet’s ads feature Shaquille O’Neal and Ben Affleck.⁷⁷ Some sports betting companies are even starting to create their own gambling related content, hiring sports personalities to head this.⁷⁸ Caesars, for example, has hired former ESPN content stars in Trey Wingo and Kenny Mayne to create content for them, hoping it would build social following and brand awareness.⁷⁹ Penn National bought sports media company Barstool, then created a sportsbook under the same name, allowing their content creators

⁷² INSIDE RADIO

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Howard Stutz, *Competitive sports betting market leads operators to find new messaging channels* (Oct. 11, 2021) <https://thenevadaindependent.com/article/competitive-sports-betting-market-leads-operators-to-find-new-messaging-channels>

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

to organically relate to their audience through sports betting, which drives traffic to the sportsbook.⁸⁰

Direct advertising is a less common form, but is used to target advertisements to a specific individual.⁸¹ Direct advertising can come in the form of emails, text messages, or phone calls, and enables gambling operators to target individual gamblers with tailored forms of marketing.⁸² The content in these direct ads usually involves things like bonus offers, boosted odds, and fixed percentages of losses back.⁸³ A Norwegian study found that those who showed riskier tendencies and higher vulnerability were exposed to direct marketing at a much higher rate.⁸⁴ This suggests that sportsbooks are identifying and targeting populations vulnerable to problem gambling and gambling addiction for their direct advertising.

This is potentially problematic because when we gamble, dopamine is released in our brain whether we win or lose, and this makes it harder for bettors to stop.⁸⁵ Offering free bets and other similar promotions is a means of luring bettors into placing multiple wagers, increasing the amount of dopamine released.⁸⁶ Once those free bets run out, bettors won't want to stop.⁸⁷ In addition, by saturating the market with these promotions and using well-known personalities to endorse them, sports betting becomes normalized and destigmatized.⁸⁸ An Australian study surveyed 50 men who

⁸⁰ *Id.*

⁸¹ Andre Syvertsen and Eilin K. Erevik and Daniel Hanss and Rune A. Mentzoni and Stale Palleson, *Relationships Between Exposure to Different Gambling Advertising Types, Advertising Impact and Problem Gambling*, *Journal of Gambling Studies* (May 20, 2021)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Jack O'Donnell, *The Ugly Truth Behind All Those Fun Gambling Ads*, POLITICO, (Feb. 13, 2022) <https://www.politico.com/news/magazine/2022/02/13/ugly-truth-behind-fun-gambling-ads-00008380>

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Emily G. Deans and Samantha L. Thomas and Jeffrey Devernsky and Mike Daube, *The influence of marketing on the sports betting attitudes and consumption behaviours of young men: implications for harm reduction and prevention strategies*, *Harm Reduction Journal*, (2017)

said the marketing they were seeing was mostly in non-gambling environments like social media, public transport, during regular television programming, and others.⁸⁹ The men said this became so common that they started to become desensitized to it.⁹⁰ The strategy is a long-term one, but it appears to be working.

The main advertising strategy at play right now in the industry, however, is a short-term one. As more and more states continue to legalize sports betting, all of the companies who want to operate there are competing for a share of the market.⁹¹ The strategy is to spend as much as possible on advertising in a state right after it legalizes, regardless of the financial hit to the company.⁹² For example, DraftKings is expected to lose \$2.45 per share in 2022 with so many new states legalizing.⁹³ However, since they are in such a better spot financially than most other operators, they can afford to take the hit now while they focus on acquiring market share.⁹⁴ Ultimately, when there are no longer any new states legalizing, DraftKings will have such a large share of the market in all of these states that they will more than make up for the loss they took on initial advertising spending.⁹⁵

B. How Sports Bettings Ads are Regulated

In 1976 when New Jersey first legalized casino gambling, casinos could advertise their hotels, food, and entertainment, but were forbidden from advertising casino games themselves.⁹⁶

Regulators felt if they left advertising in the hands of the operators, the industry would prey on the

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Avi Salzman, *New Data Show Enormous Growth Rate in Gambling Ads*, Barron's (Feb. 10, 2022) <https://www.barrons.com/articles/new-data-show-enormous-growth-rate-in-gambling-ads-51644513956>

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ POLITICO, *supra*

young and other vulnerable populations with unrealistic claims and glorification of gambling.⁹⁷ Over time as gaming expanded, the restrictions were relaxed, but the Division of Gaming Enforcement still required advance approval of every promotion.⁹⁸ When it comes to sports betting, however, there are no such approval requirements, and the advertising regulation is quite minimal in most states.⁹⁹

Now, sports betting advertising is of course advertising, so it is governed by state and federal advertising regulations. While there are no specific federal regulations directed solely at sports betting ads, there is a Responsible Marketing Code that must be adhered to by all members of the American Gaming Association (AGA).¹⁰⁰ Similar to the way NARC sets advertising standards and includes most of the major businesses in the U.S. under its umbrella, all of the major sports betting companies are members of the AGA and subject to its Responsible Marketing Code.¹⁰¹ This Code requires members to respect the legal age for sports wagering by reasonably making sure messages: don't appeal primarily to those under it, don't encourage underage people to participate, aren't placed in spots mostly seen by underage people, don't appear on products tailored to underage populations, and don't appear in college/university settings.¹⁰² It also requires that members support responsible gaming by not promoting irresponsible or excessive participation, not guaranteeing success, having messages with good taste, and including responsible gaming messaging and a toll-free helpline where practical.¹⁰³ Lastly, it requires that

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ American Gaming Association, Responsible Marketing Code for Sports Wagering (September 14, 2020) <https://www.americangaming.org/responsible-marketing-code-for-sports-wagering/>

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

these rules apply to all digital and media website content as well.¹⁰⁴ Similar to the NARB, the AGA’s Code Compliance Review Board (CCRB) reviews violation complaints from any person or entity and votes on whether it violates the Code, but the violating company can choose to remain anonymous and is only “expected to promptly withdraw or revise the advertising.”¹⁰⁵

Absent specific federal regulations regarding gambling ads, all regulation is left to the states. One regulation that all states share is the requirement that all sports betting marketing materials must feature a toll-free gambling helpline.¹⁰⁶ For example, in Indiana its statute requires all sports wagering marketing materials to display a message that states “If you or someone you know has a gambling problem and wants help, call 1-800-9-WITH-IT.”¹⁰⁷ Some states have little to no regulation outside of this restriction, while others go much further in restricting their sports betting advertising. For all states that have legalized sports betting, there are three categories that break down how strict their advertising regulations are: laissez-faire states, moderate states, and strict states.

The laissez-faire states are states that either don’t regulate beyond the requirement to feature the toll-free gambling hotline on ads, or if they do they go no further than establishing a broad standard of “decency.” New Jersey, for example, is one of the states whose one and only rule for sports betting advertising is to include the toll-free gambling hotline in all ads.¹⁰⁸ Nevada and Iowa are two states that go slightly further in requiring advertisers to meet a broad standard for the manner in which advertising must be conducted. This standard shared by both states

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Jennifer Shatley, MS and Kasra Ghaharian, MS and Bo Bernhard, Ph.D. and Alan Feldman and Becky Harris, LL.M, *The Marketing Moment: Sports, Wagering, and Advertising in the United States*, UNLV (April 15, 2021)

¹⁰⁷ 68 IAC 27-7-17

¹⁰⁸ N.J. Stat. § 5:12A-13

that sports betting companies are “prohibited from failing to conduct ads in accordance with decency, dignity, good taste, and honesty.”¹⁰⁹ Several states share this low standard, which seems broad enough for companies to easily find their way around. However, taking such a hands off approach can be good for business, and can attract more customers and operators in the state. This explains why the states taking this “laissez-faire” approach seem to be the states most eager to integrate sports betting into their state. Using New Jersey, Nevada, and Iowa as examples, they were three of the first states to legalize sports betting, all having done so by May 2019,¹¹⁰ New Jersey was the state that pushed for PASPA to get repealed, and Nevada is the state that has had legal sports betting the longest. These laissez-faire states are also demonstrating commitment to the cause, as New Jersey and Nevada have the highest sports betting revenue of any states,¹¹¹ and Iowa allows 18 different sportsbooks to operate in their state.

The states that fall into the moderate level of regulation have state-specific regulations that go beyond the low threshold of the laissez-faire states, but do not have as strict of limitations as some other states. Indiana and Pennsylvania are two examples of states in this category.¹¹²¹¹³ In addition to the required display message, Indiana also requires their ads to include a clearly-presented responsible gaming logo, a link to Indianagamblinghelp.com, and a clear statement of the operators commitment to responsible gaming that includes a link to their self-exclusion program.¹¹⁴ Beyond what must be displayed, Indiana also requires ads to state that patrons must be 21+, and prohibits implying greater chances of winning based on the operator used or the

¹⁰⁹ 491 IAC 13.2

¹¹⁰ Christopher Feery, *Iowa Sports Betting*, Legal Sports Report (April 21, 2022) <https://www.legalsportsreport.com/iowa/>

¹¹¹ Legal Sports Report, *US Sports Betting Revenue and Handle*, (April 25, 2022) <https://www.legalsportsreport.com/sports-betting/revenue/>

¹¹² 58 Pa. Code 501a.7

¹¹³ 68 IAC 27-13-1

¹¹⁴ *Id.*

amount wagered.¹¹⁵ All of these are direct policies taken straight from the AGA Code. Pennsylvania includes font restrictions in their regulations, preventing fonts that obscure limiting factors, and requiring minimum font sizes for the toll-free gambling hotline message.¹¹⁶

Strict states have implemented unique restrictions that create a much higher burden for sports betting companies to have to comply with in their advertising. Illinois is one of those states, as they put a greater focus on exposure to those below 21.¹¹⁷ Their statute requires, beyond the normal requirements, that sports betting ads: not contain images, symbols, celebrity or entertainer endorsements, or language designed to appeal specifically to those under 21; not feature anyone under 21, or anyone who even appears to be under 21; not be published or displayed in media/social media outlets that appeal primarily to individuals under 21; and not be placed before an audience presumed to be a majority under 21.¹¹⁸ Washington D.C. is another strict state, and some of its unique requirements include: not encouraging players to “chase losses” or re-invest their winnings, not suggesting that betting is a means of solving financial problems, and giving a balanced message in regards to winning and losing.¹¹⁹ Tennessee includes restrictions similar to those in D.C., but adds that “advertisements shall not be placed with such intensity and frequency that they represent saturation of that medium or become excessive.”¹²⁰ Tennessee is also one of the only states to include an approval process for sports wagering advertising, requiring ads to be submitted to the regulatory agency in advance for approval prior to publication.¹²¹ What ties states in the strict category together is that they have avoided embracing sports betting in their state despite legalizing

¹¹⁵ 68 IAC 27-7-17

¹¹⁶ 58 Pa. Code 501a.7

¹¹⁷ Ill. Admin. Code tit. 11, § 1900.340 (2021).

¹¹⁸ *Id.*

¹¹⁹ 30 DCMR § 2131

¹²⁰ Tenn. Code Ann. §4-51-318.

¹²¹ *Id.*

it. Washington D.C., for example, is the most unique betting state in the country, as they only have one unrestricted sportsbook operating in their state, as all the others are constrained to operating only within the direct vicinity of their physical location.¹²² Tennessee is also uniquely restricted by the fact that they only operate online, and have no physical sportsbooks, nor plans to create any.¹²³ Illinois showed hesitancy to fully embrace sports betting as well, demonstrated by them requiring in-person registration for all betting apps in the state over the first 2 years after they legalized, which limited sign-up numbers because people didn't want to travel, especially when they just planned to bet online.¹²⁴

IV. Why Sports Betting Advertising Needs to be Regulated Differently

Gambling addiction has become a growing concern in the United States and the lack of strict regulation of sports betting ads has allowed the problem to persist.

The National Council on Problem Gambling estimates that 2 million Americans¹²⁵ have a severe addiction to gambling, but most experts agree that the number is most likely much larger.¹²⁶ Gambling addiction is much harder to identify than other addictions because unlike alcohol or drug addiction there are no physical side effects, so outsiders, or even the addict themselves, may not recognize the addiction until after bad things like divorce, bankruptcy, or suicide happen.¹²⁷ A study of brain function during gambling showed that problem gamblers show significantly higher levels of excitement when dopamine is released in their brain compared to others.¹²⁸ So while there

¹²² Legal Sports Report, *DC Sports Betting*, (April 21, 2022) <https://www.legalsportsreport.com/dc/>

¹²³ Legal Sports Report, *Tennessee Sports Betting*, (April 19, 2022)

<https://www.legalsportsreport.com/tn/>

¹²⁴ Bart Shirley, *Illinois Sports Betting*, (April 21, 2022) <https://www.legalsportsreport.com/illinois/>

¹²⁵ NCPG, *Help & Treatment* (2022) <https://www.ncpgambling.org/help-treatment/faq/#:~:text=2%20million%20U.S.%20adults%20>

¹²⁶ POLITICO, *supra*

¹²⁷ *Id.*

¹²⁸ The Conversation, *Gambling: What happens in the brain when we get hooked - and how to regain control*, The Indian Express, (Feb. 26, 2022)

are physical indications of gambling addiction, they are not visible on the outside, so vulnerable people are getting addicted without anyone knowing.¹²⁹ With the rapid increase of accessibility to gambling, these numbers are only going to increase and at a rate that cannot be monitored.¹³⁰

Studies say that more than \$6 billion is lost each year as a result of gambling addiction.¹³¹ With such a large sum of money at stake, gambling addiction affects more than just the individual, it affects families and communities as well.¹³² As for side effects in the community, gambling addiction leads to increased rates of unemployment, bankruptcy, potentially the collapse of a business, increased alcohol and drug abuse, among many others.¹³³ Financial struggles will always cause family issues, but gambling addiction can lead to other family issues like stress from loved ones, emotional neglect of children, and a higher vulnerability to addiction for children.¹³⁴ Obviously the effects on the individual can be catastrophic as well, with many suffering from job loss, depression, criminal behavior, self-harm,¹³⁵ and 17% of problem gamblers attempting suicide.¹³⁶

Back in 2018, when sports betting had just been legalized, the National Council on Problem Gambling (NCPG) did a national survey to measure the extent of gambling in the United States prior to the rapid expansion of sports betting.¹³⁷ The study found that young adults are at higher

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Skywoodrecovery.com, Negative Effects of Gambling Addiction (2022)
<https://skywoodrecovery.com/gambling-addiction/negative-effects-of-gambling-addiction/>

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ University of Maryland School of Medicine, Suicide and Gambling Addiction (September 24, 2018)
<https://www.mdproblemgambling.com/suicide-and-gambling-addiction/#:~:text=In%20addition%2C%20a%20person%20struggling,1%20in%205%20people%20struggling.>

¹³⁷ NCPG, National Survey on Gambling Attitudes and Gambling Experiences, (2019)

risk for problem gambling.¹³⁸ Sports bettors also appear to be more at risk than other bettors, and the more often someone bets the more likely they were to show risky tendencies.¹³⁹ The study also found that an alarming number of gamblers don't know how gambling works, with around 16% believing it is a good way to make money, they will win more than they lose, and that their odds to win increase after they lose.¹⁴⁰ The study showed that people also misunderstand gambling addictions, with more than half of those surveyed thinking it is a sign of moral weakness or lack of willpower, and slightly less believing it can be genetics.¹⁴¹

Sports betting advertisements have been shown to exacerbate the issue for problem gamblers. A psychophysiological study was done in January 2020 on sports betting advertising by recording eye-tracking and tonic electrodermal activity of participants as they watched sports betting ads, and then afterwards asking the participants how likely they would be to take up the offer presented.¹⁴² The results showed that while most viewers looked at the ads, it wasn't likely to entice the average viewer to want to gamble unless there was something particularly arousing in the ad.¹⁴³ However, for those who were already at high risk of gambling problems, the results showed that the ads were worsening the problem.¹⁴⁴ An Australian study that analyzed the impact of sports betting promotions during televised sports broadcasts among different severities of problem gamblers yielded similar results.¹⁴⁵ The study found that those who went into watching

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Lisa Lole and Alex M.T. Russell and En Li and Hannah Thorne and Nancy Greer and Nerilee Hing, *Interest in inducements: A psychophysiological study on sports betting advertising*, *International Journal of Psychophysiology*, (Jan. 2020)

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Hing, N., Russell, A.M.T., Lamont, M., & Vitartas, P. Bet anywhere, anytime: An analysis of Internet sports bettors' responses to gambling promotions during sports broadcasts by problem gambling severity. *Journal of Gambling Studies*, (2017)

the game with positive attitudes toward these gambling ads and sports betting itself, were much more likely to show higher “Problem Gambling Severity Index (PGSI)” scores. It also found that the PGSI scores were much higher for young male Internet sports bettors, and for those who were watching sports more often, because there were so many ads being shown during the games.¹⁴⁶

Eric Webber, a Senior Clinician at the Caron Treatment Center for addiction rehabilitation, has said that limits must be put on advertising sports betting, just as they are for other vices, because gambling addiction is an addiction just the same.¹⁴⁷ As he says, the reason addictive vices like tobacco have strict advertising regulations is because there is a compelling health need to do so.¹⁴⁸ But gambling is a public health threat as well, and the advertising policies should reflect that.¹⁴⁹

V. Potential Solutions

A. *Taking Inspiration from Sports Betting Advertising Regulation in Other Countries*

U.S. consumers are consistently subject to a blitz of sports betting advertisements with little governmental response. Other countries, however, are taking proactive steps to protect consumers. Canada, for example, legalized sports betting in August 2021¹⁵⁰ and has kept a close eye on the development of sports betting in the United States. After seeing the marketing blitz in New York after legalization, the Chief Executive Officer of Canada’s Responsible Gaming Council said that Canada’s advertising regulations for sports betting will be “much more

¹⁴⁶ *Id.*

¹⁴⁷ Eric Webber and Howard Gensler, *Should we ban sports betting ads during games?* Pro/Con, Philadelphia Inquirer (Jan. 20, 2022) <https://www.inquirer.com/opinion/commentary/sports-gambling-advertising-during-games-addiction-20220120.html>

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Ted Dahlstrom, *Canada Sports Betting - Legality, Launch Dates, And FAQ*, SportsHandle.com (Feb. 25, 2022) <https://sportshandle.com/canada/#:~:text=As%20we%20have%20previously%20discussed,bets%20throug%20the%20provincial%20lotteries.>

stringent.”¹⁵¹ One restriction being implemented is that bonuses and other inducements will only be allowed to be offered after the operator is given consent by the player, and will not be permitted on their widespread promotions.¹⁵² Canada will also restrict the use of celebrities in these ads, to focus on a responsible gambling message.”¹⁵³

Australia has also taken a more restrictive approach to sports betting advertising. Fans of the Australian Rugby League (AFL) were frustrated with the volume of gambling ads so they voiced these concerns to the league, and as a result, nine clubs across the AFL, as well as Australia’s basketball and cricket leagues, have created a cohort committed to “challenge the idea that betting is a normal part of sport.”¹⁵⁴¹⁵⁵ These clubs are pledging to refuse money from betting agencies, remove ads from ground signage and big screens, and remove sponsorship from all club apparel.¹⁵⁶ Australia also bans gambling ads on live television until after 8:30 pm.¹⁵⁷

Britain also serves as an example of a middle ground for changes that can be made without adopting complete advertising bans. Britain’s Advertising Standards Authority (ASA) has imposed a “whistle-to-whistle” ban on sports betting ads that appear during television broadcasts of games in the U.K.¹⁵⁸ Having these time or event specific ad bans is a common feature in European countries, and Britain’s Industry Group for Responsible Gambling (IGRG) promotes

¹⁵¹ Steve McAllister, With more sports betting ads expected in Ontario, all eyes will be on how they’re regulated, Toronto Star (Feb. 18, 2022) <https://www.thestar.com/sports/sports-betting/2022/02/18/with-more-sports-betting-ads-expected-in-ontario-all-eyes-will-be-on-how-theyre-regulated.html>

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Jon Pierik, “Stop promoting gambling:” Betting ads a burning issue in AFL fan survey, Brisbane Times (Feb. 20, 2022) <https://www.brisbanetimes.com.au/sport/afl/stop-promoting-gambling-betting-ads-a-burning-issue-in-afl-fan-survey-20220214-p59w5h.html>

¹⁵⁵ Emma Kemp, *NRL Clubs move to distance themselves from gambling industry*, The Guardian (Mar. 2, 2022) <https://www.theguardian.com/sport/2022/mar/03/nrl-clubs-move-to-distance-themselves-from-gambling-industry>

¹⁵⁶ *Id.*

¹⁵⁷ Brisbane Times, *supra*

¹⁵⁸ Ayumi Cavis, *Sports Betting Industry Ponders if Relentless Advertising Is Overkill for Viewers, Fans*, NewsWeek (Dec. 3, 2021) <https://www.newsweek.com/sports-betting-industry-ponders-if-relentless-advertising-overkill-viewers-fans-1656043>

another similar rule with a voluntary ban on advertising sign-up offers (free bets and free money) before 9 p.m..¹⁵⁹ The IGRG is a voluntary membership organization, similar to the AGA, that sets standards in areas not covered by Britain's Advertising Codes.¹⁶⁰ Many of the standards, and rules under the Advertising Codes, are similar to the ones that exist in different states in the US, but take them a step further. For example: social media ads must be targeted at those over 25 unless there is concrete proof they can precisely be targeted at those over 18, only age-verified accounts can view sports betting ads on Youtube, and 20% of the ad for shop window ads needs to be dedicated to responsible gaming messages.¹⁶¹ The Advertising Codes are designed to encourage social responsibility, prevent financial, social, or emotional harm, and to avoid exposure to children or other vulnerable populations.¹⁶² To achieve this, ads may not feature people in them if they are or appear to be under 25 (as opposed to 18 in the U.S.), cannot be targeted to audiences that are projected to be 25% or more under 18 (as opposed to 50% in the U.S.), and the “significant conditions” in free bets and bonuses must always be “prominently displayed” in an offer to ensure terms and conditions are clear.¹⁶³

Throughout Europe there is no consensus on how to regulate gambling advertising, and it is really done differently in each country. Some countries, like Switzerland and France, are even less strict than the United States with the only restriction on their advertising being advertising to minors.¹⁶⁴ Ireland takes a much different approach, where there is no specialized legislation, and gambling ads are regulated by the general regulations of consumer protection and advertising

¹⁵⁹ John Woodhouse, *Gambling Advertising: how is it regulated?*, House of Commons Library (2022)

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Tatyana Klymenko, *Regulation of Gambling Advertising in Europe*, Law & Trust International (2021) <https://lawstrust.com/en/autor/klymenko/regulation-gambling-advertising-europe>

services standards.¹⁶⁵ In Germany, gambling advertising on television or the Internet is banned unless the Federal Republic of Germany grants specific permission, but the advertising of sports betting before or during live television broadcasts of games is completely banned.¹⁶⁶ Spain legally permits advertising,¹⁶⁷ but bans stadium name and player jersey ads, and also limits television gambling ads to appearing only between the hours of 1a.m. and 5a.m.¹⁶⁸ Italy is a much stricter example, where gambling products and services are prohibited from being advertised on television, the Internet, or the radio.¹⁶⁹ Exceptions to the ban in Italy include things like the website's domain name, information from legal operators indicating where their gambling services are offered, and casual marketing without displaying names, trademarks, or logos.¹⁷⁰

The United States should adopt many of these common sense regulations, particularly the ones limiting the time periods that these ads can be shown. Limiting ads to only being shown between 1 a.m. and 5 a.m. would be too extreme to implement in the U.S. because it would prevent almost the entire target audience from seeing the ads, a large majority of whom are not a part of a vulnerable population. The “whistle-to-whistle” ban, would be a more reasonable restriction because it will allow time for the ads to be seen, but it will also decrease the amount of irresponsible live bets placed by problem gamblers who see ads during games, and allow viewers to stop directly associating watching sports with the need to bet. The limits other countries have put on offering sign-up offers should also be adopted by the U.S.. Banning sign-up offers before 9 p.m. would be an effective way of keeping the lure of the ads away from the vulnerable youth population. Requiring “player consent” for these types of offers will protect the other vulnerable population in

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ NewsWeek, *supra*

¹⁶⁹ Law & Trust International, *supra*

¹⁷⁰ *Id.*

this country, allowing an extra warning sign for problem gamblers to consider whether they should be partaking in sports betting.

Britain also provides a very useful model when it comes to regulating what appears on the ad, and how it appears. First of all, requiring “significant conditions” to be prominently displayed is certainly something that needs to be added in future regulation in the US. This prevents sportsbooks from being able to bury these important rules in the middle of the terms and conditions. Britain also requires that responsible gaming messages like the toll-free hotline must take up at least 20% of the advertisement. This should be brought to the US as a regulation because currently the required 1-800-Gambler hotline messages are written in impossibly small font at the bottom of ads like in the below picture. Requiring the message to take up at least 20% of the ad will alleviate any concern that consumers won’t be able to see it even if they’re looking for it.



There are a few other ways ads are regulated in other countries that should be adopted as regulations in the U.S.. Canada using celebrities to advertise Responsible Gaming messages as opposed to sign-up offers would be extremely helpful in decreasing the “normalization” of sports betting. This would be complicated to implement because companies would be unlikely to pay

expensive celebrities for not very lucrative ads, but maybe even requiring a Responsible Gaming message to be included in the same sign-up offer promo would prevent this problem. Britain has several interesting regulations when it comes to age restrictions that could be effective in the United States. Increasing the age for social media ads and actors in ads from 18 and over to 25 and over, and only showing ads to audiences of no more than 25% under 18 as opposed to 50%, just further ensures we are protecting the vulnerable population of young people. Lastly, Spain bans ads on player jerseys and for stadium names, and while this isn't a huge issue in the U.S. there is nothing preventing it from becoming one. Banning these types of ads would be another great way to prevent sports and sports betting from becoming an inseparable pairing.

B. Taking Inspiration from Advertising Regulation in the Tobacco Industry

In the 1960s and earlier, cigarette smoking was much more common than it is today, and much more freely advertised. It was not until the Public Health Cigarette Smoking Act of 1969 was passed in 1970, that the health concerns arose enough for advertising bans to be put in place.¹⁷¹ This statute made it “unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission (FCC),” basically prohibiting cigarette advertising on television and radio.¹⁷² The next big step came in 1998, when the Attorney Generals of all but 4 US states and territories signed the Tobacco Master Settlement Agreement (MSA) with all of the largest tobacco companies in the country.¹⁷³ In order to reduce smoking in the United States, especially in children, this act prohibited targeting youth in advertising, banned the use of cartoons in advertising; prohibited merchandise from being sold by

¹⁷¹ 91 P.L. 222, 84 Stat. 87

¹⁷² *Id.*

¹⁷³ National Association of Attorneys General, The Master Settlement Agreement (2022) <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/>

tobacco companies; banned payments to promote tobacco products in media, such as movies, television shows, theater, music, and video games; banned outdoor, billboard, and public transportation advertising; and prohibited sponsorship of events with a significant youth audience or team sports.¹⁷⁴

The biggest development in regulation of tobacco product advertising came in June 2009 when the Family Smoking Prevention and Tobacco Control Act was signed into law, giving the FDA the authority to regulate the manufacture, distribution, and most importantly the marketing of tobacco products.¹⁷⁵ Once this authority was granted, the FDA added many new strict regulations on how tobacco products could be advertised. Manufacturers and distributors of tobacco products are prohibited from marketing any item (other than tobacco products) or service using their brand name, logo, selling message, colors, or any other form of product identification identical or similar to their tobacco products.¹⁷⁶ The statute also prohibited the tobacco industry from sponsoring any athletic, musical, artistic or other social or cultural event, or any team or entry in said event, using the aforementioned forms of product identification.¹⁷⁷ The FDA also implemented a new required warning statement, “WARNING: This product contains nicotine. Nicotine is an addictive chemical,” and instructed that the statement must appear in the upper portion of the advertisement, occupy at least 20% of the ad’s area, meet the font requirements, contrast with all other material on the advertisement, and be centered and have a rectangular border.¹⁷⁸

¹⁷⁴ *Id.*

¹⁷⁵ FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT, 111 P.L. 31, 123 Stat. 1776

¹⁷⁶ 21 CFR§ 1140.34(a)

¹⁷⁷ 21 CFR§ 1140.34(c)

¹⁷⁸ *Id.*

Gambling is is an addictive vice just like tobacco,¹⁷⁹ and therefore gambling advertisements should be regulated with similar restrictions. The fact that tobacco and gambling are both public health threats suggests that there should be a federal body overseeing the marketing of sports betting just like the FDA does for tobacco advertising, whether it is a newly created regulatory body for that purpose or an existing one.

The Tobacco Master Settlement Agreement provides guidance for how sports betting ads can be regulated. A starting point can be time and place limits on advertisements. For example, outright banning outdoor and billboard advertising might be excessive, but limiting the size of these and how many can be placed across the state is a good place to start. Prohibiting brand names and logos from being used in media like movies, television, and music would be reasonable as well because it is not very common anyway, and would just help to further the objective of preventing the normalization of sports betting in consumer's minds. Prohibiting cartoons in advertising is something that is not directly applicable to sports betting ads because it is not something that typically happens, however, it can be used as inspiration to limit other types of depictions in sports betting ads. For example, some advertisements show the actor in their commercial surrounded by money, or clearly living a wealthy, lavish lifestyle, and this is something that should be prohibited as it gives a false perception to consumers of their chances at life-changing wealth.

The FDA's regulations on tobacco ads also provide another useful guide to improving sports betting ad regulation, particularly when it comes to their requirements for warning labels. In addition to increasing the portion of the ad that the responsible gaming hotline message takes up, the required warnings should be made much stricter, and sports betting operators should be

¹⁷⁹ Philadelphia Inquirer, *supra*

required to warn customers that the product can be addictive. They should also follow the requirements that make the warning stick out more. Not only should the toll-free gambling hotline and warning be bigger, but it should also strongly contrast with the rest of the ad, be centered, have a distinct border, and have a unique font. This will drastically improve the rate at which consumers see the warning, and will give problem gamblers a chance to think before they bet recklessly.

C. Other Potential Solutions

As much as inspiration needs to be drawn from outside sources, there are plenty of regulations that already exist in different states that could and should be widely adopted in legal states. Regulations that restrict what advertisements can imply, particularly prohibiting implications like greater chances of winning with their sportsbook, solving financial issues, and that it is a good idea to “chase losses,”¹⁸⁰ should be adopted in all states.

Another potential solution is that operators should be required to have a one to one advertising “match” such that for every typical promotion sports betting companies put out, they must also put out an ad solely dedicated to responsible gaming. This allows companies to put out an unlimited number of ads, but they must match these ads with an equal number of responsible gaming messages. This would force companies to strategize how they want to allocate their resources, and simultaneously increase the number of responsible gaming messages in circulation.

Lastly, in addition to adding stricter regulations, states should clarify how the words “deceptive” and “misleading,” are to be interpreted. An example was given earlier with how the NJ Administrative Code applied those terms to the advertising of loan applications, and each state should be doing the same for how those terms apply in sports betting.¹⁸¹ For New Jersey loan application ads, the Administrative Code specified that terms like “immediate approval” and

¹⁸⁰ 30 DCMR § 2131

¹⁸¹ N.J. Admin. Code § 3:2-1.4(b)(1)

“immediate closing” would be considered deceptive and misleading. States should do the same thing for sports betting ads by specifying that terms like “risk-free bet” or “deposit match,” among others, will be considered deceptive and misleading.

D. How These Solutions Can be Implemented

In order to implement these suggestions, the federal government should empower a federal agency to specifically regulate sports betting advertising. While this power could be granted to an existing federal body, a new federal agency would likely need to be created specifically for this role. As it did in 1974 in creating the FTC, Congress need only pass an enabling act to create the agency, and then the President would sign it into law.¹⁸² This agency could then implement all of the regulations that have been discussed, though they may come more in the form of broad guidelines at the federal level, like those in the FTC.

If this were not to happen, the next best approach would be for the AGA to adopt much stricter requirements, in line with all of the regulations discussed above. Many states currently take direct inspiration in their regulations from the AGA, but the current AGA requirements are so broad that they don’t pressure the states to be strict on advertising. If the AGA can become much clearer in what they require, along with making those requirements much stricter, it will encourage the states to follow suit.

The last approach is simply to push for statutory reform in the states. This is something that should be done regardless of whether either of the first two approaches come to fruition, because either way the states will have the power to decide how strict they want to regulate. States in the laissez-faire category need to follow the lead of the stricter states, and that may not mean all states have to regulate with the same level of severity. But in order to address the serious dangers

¹⁸² FTC, *Our History* (2022) <https://www.ftc.gov/about-ftc/history>

that sports betting ads can cause with how they are presently regulated, many states are going to have to reform their regulations to a significant degree.

VI. Conclusion

Sports betting is a new industry in this country, and it is growing at such a rapid pace that it is difficult to analyze what is working and what is not. But the industry is also a dangerous one so it is crucial that the best effort is made to identify the issues and proceed with as much caution as possible, in order to protect those most vulnerable to the addiction it can cause.

Advertising is a particularly concerning aspect of the growing sports betting industry, because it directly encourages consumers to participate in an activity that may not be safe for them to partake in. It is also something that is difficult to track, so problem gambling and addiction can be rising as a result of unregulated advertising without anybody noticing or knowing why. Thankfully, there are sources that can be used as a guiding light both in this country and abroad. Countries across the world have had legal sports betting for many years and have regulated it in different ways. Tobacco advertising has also been a prominent issue in this country for decades, and shares many similarities to sports betting. Whether it is the addition of federal regulation of sports betting advertising, or statutory reform in the states, sports betting ads must be regulated to a much stricter degree than they currently are, to protect the people of this country.