



Draft Legislation Signals Potential Federal Oversight Over Nascent Sports Betting Industry

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Federal sports wagering legislation previewed by Sen. Orrin Hatch after the repeal of the Professional and Amateur Sports Protection Act (PASPA) by the U.S. Supreme Court has surfaced. On December 5, 2018, Sen. Hatch's office began circulating comprehensive proposed legislation on sports wagering. As many in the industry feared, the legislation imposes aggressive federal oversight of sports wagering. Specifically, it purports to require federal approval of state sports wagering programs before they can be implemented. In other words, states may not simply pass laws on sports betting; they must bring the proposed program to the Attorney General, who will determine whether it satisfies certain minimum standards. Even if the state obtains approval, it must be renewed by further application every three years. This framework appears to run afoul of states' rights.

Other highlights of the legislation include a requirement, in place through 2022, that sports betting operators use official data from sports leagues or their agents to determine the result of a sports wager. The legislation allows for internet sports betting by way of interstate sports wagering compacts entered into among states which have legalized sports betting and Indian tribes. The legislation acknowledges the existing federal excise tax of 0.25% of handle, which has been applied to states which had been grandfathered in to sports betting under PASPA and now applies to additional states that have legalized sports wagering, but such tax revenues will now be specifically earmarked in a fund for sports betting matters. The legislation also creates a "national sports wagering clearinghouse" to, *inter alia*, manage sports wagering data, disseminate information related to best practices to uphold the integrity of the industry, analyze sports wagering data to identify trends and irregularities, and provide technical assistance to involved parties. The legislation would amend and clarify the Federal Wire Act¹ to facilitate some sports betting across state lines.

Ironically, the very same concern that caused the Supreme Court to repeal PASPA appears to have reemerged in this new draft legislation. The primary basis of the challenge to PASPA in *Murphy v. National Collegiate Athletic Association*² was the anticommandeering doctrine, which reflects the founders' "decision to withhold from Congress the power to issue orders directly to the States."³ The Supreme Court held in that the anticommandeering principle could be violated both by prohibiting the repeal of laws and by affirmatively requiring states to take action.⁴ Since PASPA effectively prohibited New Jersey (and other states) from repealing laws banning sports wagering and/or enacting new laws to that effect, the law was unconstitutional.⁵ Sen. Hatch's draft legislation would give the Federal Government the power to tell states what to do with respect to sports betting. Especially for states that already have passed sports wagering legislation, the Attorney General's disapproval of any portion of a state's law could run afoul of the anticommandeering principle. Sen. Hatch was one of the drafters of PASPA and may be attempting to reinvigorate it with this legislation.

1 18 U.S.C. 1084.

2 *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461 (2018).

3 *Id.* at 1475.

4 *Id.* at 1481-82.

5 *Id.*



We expect this draft legislation to be hotly-debated, and likely to spur opposition from key players in the sports betting market. The consensus of the American Gaming Association (AGA) and many in the sports betting industry is that gaming has traditionally been regulated by the states and should not be subject to oversight by the Federal Government. The AGA also has opposed the federal excise tax, which hinders legal sports betting companies from competing with the black market. States that already have legalized sports wagering should be wary of the legislation, as it requires federal approval of existing state law. The sports leagues have spoken out against any regulation that would preclude them from negotiating a fee for the data they provide to companies that offer sports wagering. Several sports leagues have already contracted privately with gaming companies to form exclusive data-sharing partnerships. This legislation would render those agreements obsolete because sports leagues would be required by federal law to provide data to sports betting operators.

With Sen. Hatch's retirement approaching, it is possible that another senator will take up the mantle for this legislation in the next Congress. Our public policy team in Washington is closely following this issue and is available to provide insight and guidance.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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