

**INSIDER TRADING:  
ATHLETICS & SPORTS BETTING**  
*Locked Up v. Regulated Lock Down*

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INTRODUCTION

Many Americans experienced a surreal moment after learning that the maven of hospitality and home décor was trading in her apron and chic gardening attire for prison stripes. Martha Stewart's career appeared to be in a downward spiral when the United States (U.S.) Government decides to bring inside trading charges against Martha Stewart. Nevertheless, the notion of the government imprisoning an 'American Darling' is an ordinary reality in today's society.

On December 27, 2001, Martha Stewart's downfall begins when she sells 4,000 shares of her stock to a biopharmaceutical company called ImClone, Inc.<sup>1</sup> Days later, the Food and Drug Administration (FDA) decides not to approve one of ImClone's essential products.<sup>2</sup> The announcement tanks ImClone's stock.<sup>3</sup> Stewart's stock sale saves her more than forty-five thousand dollars in losses.<sup>4</sup>

The suspicious timing of Stewart's sale leads to an investigation where the Securities and Exchange Commission (SEC) discovers Stewart's decision is motivated by an unlawful tip from a broker with Merrill Lynch.<sup>5</sup> Due to insider knowledge surrounding ImClone's CEO, and the selling of his stock, Stewart

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<sup>1</sup> See Wayne M. Carlin & Barry W. Rachkover, SEC Charges Martha Stewart, Broker Peter Bacanovic with Illegal Insider Trading, U.S. Sec. & Exch. Comm'n (June 4, 2003), <https://www.sec.gov/news/press/2003-69.htm>.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

receives advisement to exercise the same discretion.<sup>6</sup> The SEC's Director of Enforcement investigating Stewart's case states:

“It is fundamentally unfair for someone to have an edge on the market just because she has a stockbroker willing to break the rules and give her a foul tip. It is worse still when the individual engaging in insider trading is the Chairman and CEO of a public company.”<sup>7</sup>

Insider trading scandals like Martha Stewart's are prevalent in the stock market and involve multiple players, even members of Congress.<sup>8</sup> The SEC regulates insider trading to maintain a fair marketplace due to such scandals.<sup>9</sup> The SEC defines insider trading as buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, based on material, non-public information about the security.<sup>10</sup> Under this definition, any person with access to non-public information that uses knowledge to buy or sell stocks engages in illegal insider trading.

Many parallels can be drawn between insider trading in the stock market and placing bets within the sports marketplace. Following the Supreme Court case *Murphy v. NCAA*,<sup>11</sup> many states are beginning to legalize sports betting.<sup>12</sup> The primary goal of legalized sports betting is maintaining fairness.<sup>13</sup> Without enacting regulations addressing integrity concerns, it appears Congress cannot protect consumers and the sports world from issues arising from insider information being utilized in sports betting.

The fundamental goal of the legal note is to advance the premise that the SEC's concepts governing the free market can also help regulate insider trading within the sports market. Part I

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<sup>6</sup> See Carlin & Rachkover, *supra* note 1.

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

<sup>8</sup> See Alexander Kurov & Marketa Wolfe, What's insider trading and why it's a big problem, *The Conversation* (Feb. 18, 2022, 8:07 AM), <https://theconversation.com/whats-insider-trading-and-why-its-a-big-problem-176940>.

<sup>9</sup> *Id.*

<sup>10</sup> See Akhilesh Ganti, Insider Trading, *Investopedia* (Mar. 7, 2022), <https://www.investopedia.com/terms/i/insidertrading.asp>.

<sup>11</sup> See 138 S. Ct. 1461, 1478 (2018).

<sup>12</sup> See Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

<sup>13</sup> See Michael Sutyak, The Technical Challenges That Come After Sports Betting is Legalized, *SportTechie* (Mar. 5, 2021), <https://www.sporttechie.com/sports-betting-gambling-challenges-once-legalized>.

discusses the impact of the decision in *Murphy*,<sup>14</sup> which directly leads to an increasing trend in the legalization of sports betting. Part II links the effect of the *Murphy*<sup>15</sup> decision and the possible rise of integrity-related issues within the sports betting industry. Part III introduces a proposal to create an SEC-like body for sports betting. Lastly, Part IV concludes by detailing the importance of having a federal regulatory body while suggesting a solution to industry integrity problems.

Rather than allowing states to regulate sports betting, Congress's power needs to extend to regulating sports betting to ensure fairness, uniformity, and profitability.

### I. THE PROBLEM

In *Murphy v. NCAA*,<sup>16</sup> the reviewing Court deliberates over the language surrounding the Professional and Amateur Sports Protection Act (PASPA).<sup>17</sup> The Court rules the Act unconstitutional because it violates the anti-commandeering doctrine.<sup>18</sup> The fundamental basics of PASPA make it unlawful for a state or its subdivisions to sponsor, operate, advertise, promote, license, or authorize by law a lottery, sweepstakes, or another betting, gambling, or wagering scheme based on a competitive sporting event.<sup>19</sup> The Supreme Court concludes that PASPA violates the constitution because it unequivocally dictates what a state legislature may and may not do and puts state legislatures under the direct control of Congress.<sup>20</sup>

Ultimately, the Court's decision in *Murphy* removes the federal ban on sports betting and returns the ability to regulate sports betting to the States.<sup>21</sup> PASPA's supporters argue that sports gambling may corrupt and damage professional and amateur sports reputations.<sup>22</sup> Nonetheless, the *Murphy* Court's decision

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

<sup>15</sup> *Id.*

<sup>16</sup> See generally *Murphy*, 138 S. Ct. at 1461-78.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Professional and Amateur Sports Protection Act of 1992, 28 U.S.C.A. § 3701 (1992), invalidated by *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>20</sup> *Murphy*, 138 S. Ct. at 1478.

<sup>21</sup> See generally *Murphy*, 138 S. Ct. at 1461-78.

<sup>22</sup> *Id.* at 1470.

significantly shifts sports gambling laws, and more states continue to legalize sports betting.<sup>23</sup>

Since the decision in *Murphy*, more than twenty states have legalized sports betting or introduced a bill that would legalize sports betting.<sup>24</sup> The legalization of sports betting generates millions in new tax revenue, and the trend will likely continue across the country.<sup>25</sup> However, legalization is also creating a growing concern over potential corruption.<sup>26</sup> One of the biggest fears of legalizing sports betting centers around referees, team employees, or athletes manipulating games to gain betting profits.<sup>27</sup> Congress has yet to address the issue entirely, but there are several instances where people are challenging the integrity of sports.<sup>28</sup>

For example, many challengers point to the acts of conspiracy by NBA referee Tim Donaghy when he tries to manipulate the game's spread he officiates.<sup>29</sup> Bettors did not care whether or not he was fixing the games because the bettors financially benefitted from Donaghy's acts.<sup>30</sup> Other intrigued bettors quickly discover Donaghy's impropriety and begin following his bets while protecting their competitive edge by keeping the information private.<sup>31</sup>

In 2018, a nationally renowned sports oddsmaker advised his clients not to play Cleveland Cavaliers due to inside information about LeBron's injury to make things more complicated about the

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<sup>23</sup> See generally Ryan Rodenberg, United States of sports betting: An updated map of where every state stands, ESPN (Apr. 7, 2021), [https://www.espn.com/chalk/story/\\_id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization).

<sup>24</sup> *Id.*

<sup>25</sup> See Jackson Brainerd, The Early Bets Are In: Is Sports Betting Paying Off?, Nat'l Conf. of State Legis. (Mar. 1, 2021), <https://www.ncsl.org/research/fiscal-policy/the-early-bets-are-in-is-sports-betting-paying-off.aspx>.

<sup>26</sup> See Will Leitch, Sports Gambling Is a Disaster Waiting to Happen, The Atlantic (Sept. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/micro-betting-could-destroy-sports/620188/>.

<sup>27</sup> See Leitch, *supra* note 26.

<sup>28</sup> See Christopher B. Cash, "Insider betting" and LeBron James' right hand, Norton Rose Fulbright (Apr. 24, 2019), <https://www.nortonrosefulbright.com/en/inside-sports-law/blog/2019/04/insider-betting-and-lebron-james-right-hand>.

<sup>29</sup> See Scott Eden, From the archives: How former ref Tim Donaghy conspired to fix NBA games, ESPN (July 9, 2020), [https://www.espn.com/nba/story/\\_id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games](https://www.espn.com/nba/story/_id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games).

<sup>30</sup> See *id.*

<sup>31</sup> See Eden, *supra* note 29.

integrity of sports betting.<sup>32</sup> However, insider information like LeBron's injury can be decisive for oddsmakers.<sup>33</sup> The insider information is linked to an occasion when LeBron James punched a blackboard out of frustration resulting in a broken hand after losing Game 1 of the NBA Finals; yet, the injury was not known to the public.<sup>34</sup> James wears a soft cast whenever absent in public or the media view<sup>35</sup> and plays through the injury; however, the team loses the next three games.<sup>36</sup> The injury only becomes public knowledge after the NBA Finals.<sup>37</sup>

More intricate integrity issues are arising surrounding gambling, sports betting, and technology.<sup>38</sup> For example, motion-tracking systems and wearable sensors are currently available to monitor games and athletes at a granular level.<sup>39</sup> The systems provide a broader understanding of a team's and player's physical health while providing greater data analysis to predict player

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<sup>32</sup> See Andrew Mentock, *Insider Trading Laws Are Coming...To Sports Betting*, OZY (Feb. 16, 2019), <https://www.ozy.com/the-new-and-the-next/insider-trading-laws-are-coming-to-sports-betting/92055/> ("After losing in Game 1 of the 2018 NBA Finals, an emotional LeBron James smashed a whiteboard in the Cleveland Cavaliers locker room, breaking his right hand. His play faltered in the subsequent three games that the Golden State Warriors also won for a clean sweep. Yet, the injury wasn't made public until after the finals were over. That kind of information can prove decisive for oddsmakers like Tom Stryker, a nationally renowned sports handicapper who compares his profession to a stockbroker's. "I would've never come up with that pick or advised my clients to play Cleveland knowing he was hurt," he recalls. If known only to a select few, it's also the kind of inside dope that's now coming under scrutiny stock markets are usually subjected to.").

<sup>33</sup> See *id.*

<sup>34</sup> See Scott Davis, *LeBron James played through the Finals with a severe hand injury that occurred after he punched a blackboard after the Cavs' devastating Game 1 loss*, Bus. Insider (June 19, 2018, 8:18 AM), <https://www.businessinsider.com/lebron-james-hand-injury-finals-2018-6>.

<sup>35</sup> See Davis, *supra* note 34.

<sup>36</sup> See *id.*; see also Tom Whitters, *Golden Still: Warriors sweep Cavs for second straight title*, Associated Press (June 9, 2018), <https://apnews.com/article/north-america-ap-top-news-cleveland-ca-state-wire-cleveland-cavaliers-4fc37ec3f09849a3b3f37361972f64df>.

<sup>37</sup> See Davis, *supra* note 34.

<sup>38</sup> See Leitch, *supra* note 26.

<sup>39</sup> See Jacob Gershman, *The Brave New World of Betting on Athlete's Data*, Wall St. J. (Mar. 10, 2020, 10:02 AM), <https://www.wsj.com/articles/the-brave-new-world-of-betting-on-athletes-data-11583848891> ("Major League Baseball pitchers wear a compression sleeve on their throwing arms that collects biomechanical data to measure elbow stress. Baseball players also wear wristbands that capture their sleep cycles, heart rates and temperatures, as do football players.").

performance.<sup>40</sup> Players and sportsbook companies are raising questions about the legality of selling the data derived from these sensors; and whether this type of information will raise issues about placing bets based on non-public information.<sup>41</sup>

### *A. What Research Reveals*

Research says that spending large amounts of money on sports leads to more corruption.<sup>42</sup> Behavioral finance studies show sports gambling and stock investing are linked activities, with gamblers who profit from football betting investing more heavily in lottery-like stocks.<sup>43</sup> When comparing the regulations for stockbrokers, it seems clear that the non-public information presented in the above scenarios is of the exact illegal nature of the stock market.

Despite several states prohibiting confidential information to place bets, as of November 2020, federal financial regulations are absent of penalties, making it unlawful for a person to place or accept sports bets using material, non-public information.<sup>44</sup> Seemingly, sports betting and insider trading mirror the same issues of leveling the playing field; nonetheless, conflicting interests will only increase with the absence of regulation.<sup>45</sup>

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<sup>40</sup> See Wearable Tech in Live Sports Betting, aptantech (Feb. 19, 2021), <https://aptantech.com/2021/02/19/wearable-tech-in-live-sports-betting/> (“At its core, wearable tech in the major leagues is designed to collect data that can be used to analyze a player’s performance, whether they’re prone or nearing injury, and how they should move on the court, rink, diamond, and gridiron. Beyond aiding individual player analysis, wearable tech can also identify patterns of how a team as a whole is moving.”).

<sup>41</sup> See Gershman, *supra* note 39 (“[T]he questions of who owns the data, who has access to it, and the government’s role in regulating it are largely unanswered. Sportsbooks, the physical and online gambling operations that accept wagers and collect commissions, are jockeying with professional leagues and players for control of the information. Many in the industry predict confrontations over issues ranging from property rights to privacy and antitrust enforcement. Some legal experts say some level of federal oversight of the industry is inevitable.”).

<sup>42</sup> See Eden, *supra* note 25 (statement of Wladimir Andreff) (“All economic analyses conclude that the more money there is inflowing to sport, the greater the sports corruption.”).

<sup>43</sup> Larry Swedroe, *The Relationship between Sports Betting and Investing*, Advisor Perspectives (Nov. 2, 2020), <https://www.advisorperspectives.com/articles/2020/11/02/the-relationship-between-sports-betting-and-investing>.

<sup>44</sup> See Mentock, *supra* note 32.

<sup>45</sup> See Gershman, *supra* note 39.

## II. THE PROPOSAL

Since the legalization of sports betting in many states, wager amounts are dramatically increasing.<sup>46</sup> Historically, all forms of gambling are regulated at the State level.<sup>47</sup> However, sports wagering often involves individuals across numerous States, affecting interstate commerce and other forms of gaming.<sup>48</sup>

To protect the integrity of sports betting and the sports market, Congress seemingly must pass legislation to regulate bets within states and across state lines. While each State may decide whether to permit sports wagering and how to regulate sports wagering, there is an essential role of Congress to set standards for sports wagering.<sup>49</sup> Concepts similar to the SEC need infusion into the sports world in order to regulate insider trading within the sports market.

### *A. Overview The Securities and Exchange Commission*

The parallels between the stock market and sports gambling warrant a micro-scaled overview of how the SEC operates and maintains a free and open marketplace. The Securities and Exchange Act of 1934 created the SEC to protect investors, maintain orderly and efficient markets, and facilitate capital formation.<sup>50</sup> The Act's two primary objectives include: 1) requiring investors to receive financial and other significant information concerning the securities offered for public sale; and 2) prohibiting deceit, misrepresentations, and other fraud in the sale of securities.<sup>51</sup>

The Act prohibits fraudulent activities surrounding the offering, purchasing, or selling of securities. In addition, the Act's provisions serve as the basis for many types of disciplinary actions,

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<sup>46</sup> See Ryan Prete, Investors wager on US sports betting as legalization spreads, PitchBook (May 3, 2021), <https://pitchbook.com/news/articles/investors-wager-on-us-sports-betting-legalization>.

<sup>47</sup> US Gambling Laws, Online U.S. Casinos, <https://www.onlineunitedstatescasinos.com/states/> (last visited Apr. 1, 2022).

<sup>48</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

<sup>49</sup> Id.

<sup>50</sup> See What We Do, Sec. & Exch. Comm'n (Dec. 18, 2020), <https://www.sec.gov/about/what-we-do>.

<sup>51</sup> Id.

including actions against fraudulent insider trading.<sup>52</sup> In conjunction with the SEC's efforts, each State enforces its own 'blue sky' laws that apply only to the buying and selling of securities within state lines.<sup>53</sup>

### *B. What is Insider Trading?*

The SEC defines insider trading as buying or selling a security in breach of a fiduciary duty or other relationship of trust and confidence based on material, non-public information about the security.<sup>54</sup> Material, non-public information is defined as information not legally available to the public, which can impact an investor's decision to buy or sell a security.<sup>55</sup> Any tipping of material non-public information may result in illegal insider trading.<sup>56</sup>

Any person can engage in insider trading; the SEC's rules cover any person who receives a tip.<sup>57</sup> The triggering factor for insider trading is for the insider to pass information, the receiver of the information to act upon it, and then the selling or buying of the stock before the information becomes available to the general public.<sup>58</sup> A friend who receives a tip may have the same duty as the insider who shares the information.<sup>59</sup> The SEC vigorously pursues such insider trading cases to ensure that the capital market is a level playing field where no one is at an unfair advantage.<sup>60</sup>

### *C. How Does the SEC Track Insider Trading?*

Historically, insider trading is challenging to prove, but the SEC now utilizes resources and data tools to develop tracking methods that collect evidence for possible violations of securities

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<sup>52</sup> *Id.*

<sup>53</sup> See State Securities Regulators, U.S. Sec. & Exch. Comm'n, <https://www.sec.gov/answers/statesecre.htm> (last modified Jan. 11, 2005).

<sup>54</sup> See Ganti, *supra* note 10.

<sup>55</sup> *Id.*

<sup>56</sup> See Insider Trading Policy, U.S. Sec. & Exch. Comm'n (Nov. 11, 2015), [https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture\\_8k-ex9904.htm](https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture_8k-ex9904.htm).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Elvis Picardo, How The SEC Tracks Insider Trading, Investopedia (Oct. 22, 2021), <https://www.investopedia.com/articles/investing/021815/how-sec-tracks-insider-trading.asp>.



laws.<sup>61</sup> Typically, the types of insider trading that capture the headlines are large dollar amounts that involve high-profile celebrities like Martha Stewart.<sup>62</sup> The SEC ensures the detection of minor violations is not overlooked with enhanced capabilities and methods.<sup>63</sup> Insider trading cases are not the same and are primarily rooted in circumstantial evidence.<sup>64</sup>

The SEC uses market surveillance activities, informants, and advanced data analytics systems to monitor and prevent irregular activity and identify insider trading.<sup>65</sup> The SEC monitors market activities with a security-based approach.<sup>66</sup> The traditional security-based approach uses data analytics systems to discover irregular or unordinary trades.<sup>67</sup>

Most insider trading cases catch the SEC's attention when there are individuals with intentions of making as much money as possible through huge bets.<sup>68</sup> If investors make an astronomical profit from an investment, their behaviors are considered suspicious.<sup>69</sup> Technological breakthroughs increase the speed and efficiency of detecting insider trading cases.<sup>70</sup> However, the system only detects suspicious activity after the completion of a security transaction.<sup>71</sup>

To combat some of the SEC's insider trading setbacks, The SEC is consistently making strides to enhance detection and investigation capabilities, enabling the organization to become more proactive in identifying potential insider trading issues.<sup>72</sup> The SEC is refining how they identify insider trading and suspicious activities by using advanced data analytics and specialized units.<sup>73</sup>

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<sup>61</sup> See Picardo, *supra* note 60.

<sup>62</sup> *Id.*

<sup>63</sup> See Todd Ehret, SEC's advanced data analytics helps detect even the smallest illicit market activity, Reuters (June 30, 2017, 12:11 PM), <https://www.reuters.com/article/bc-finreg-data-analytics/secs-advanced-data-analytics-helps-detect-even-the-smallest-illicit-market-activity-idUSKBN19L28C>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Ehert, *supra* note 63.

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

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Ehret, *supra* note 63.

<sup>73</sup> *Id.*

The specialized units study how traders use information when making their trading decisions and develop ways to detect how information flows from trader to trader.<sup>74</sup> Through a ‘trade-based’ approach, SEC officials examine blue sheet data to find patterns in individual and institutional traders to reveal suspicious activity.<sup>75</sup>

After patterns reveal suspicious activity trading, the SEC uses the information to determine correlative relationships among traders to identify potential sources of material information.<sup>76</sup> The approach allows the SEC to deduce potential sources of material non-public information.<sup>77</sup> Informants and whistleblowers may report insider trading through tips and complaints to the SEC. Once the SEC collects a sufficient amount of facts about the violation, the SEC launches a full private investigation.<sup>78</sup> Insider trading penalties can surpass three times the profit gained from trading.<sup>79</sup>

Since the SEC does not exist in the sports betting industry, the federal government needs to pass legislation creating a governing body to monitor fraud, odd betting patterns, sporting insider activity, and suspicious behavior within the sports industry.

### III. THE CONTENTIOUS DEBATES WITHIN SPORTS BETTING

#### A. *Congress & The Creation of a Regulatory Body*

Some states are beginning to implement legislation regulating insider trading.<sup>80</sup> Indiana, Massachusetts, New York, Tennessee, Indiana, and others are using similar language to prohibit or prevent the use of confidential or non-public information when placing a bet on a state-approved athletic competition in legislation.<sup>81</sup> With the cultivation of state legislation, creating a regulatory body seemingly will help centralize and uniform

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<sup>74</sup> See Ehret, *supra* note 63.

<sup>75</sup> *Id.*

<sup>76</sup> See Ehret, *supra* note 63.

<sup>77</sup> *Id.*

<sup>78</sup> See Andrew Sebastian, *How Insider Trading is Prevented in Corporations*, Investopedia (Nov. 13, 2020), <https://www.investopedia.com/articles/investing/092616/how-insider-trading-prevented-corporations.asp>.

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

<sup>80</sup> See Mentock, *supra* note 32.

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

regulations at the federal level. The uniformity leads to a pathway of consistency across state lines and ensures a leveled playing field among all bettors, where no one has an unfair advantage.

### *B. The Current Sports Betting Market*

#### 1. The System of Placing Bets

Sports betting is high-tech at the most basic level and allows a bettor to place bets directly on their computer or smartphone. One must fully comprehend how sports betting operates to understand the rising issue of insider trading within the sports betting world. For starters, a bettor needs to clearly understand the sports betting laws of their State. Some states allow in-person and mobile wagering, while others only allow in-person betting or have yet to pass any legislation devoted to sports betting.<sup>82</sup>

At a more detailed level, a bettor making a well-informed betting decision will first look at betting lines released by oddsmakers/linemakers in sportsbooks and decide whether to bet on the point spread, the money line, or the over/underline.<sup>83</sup> When an oddsmaker releases its betting line, it decides which teams should be the favorite or the underdog.<sup>84</sup> The most common way to place a bet on a favorite or an underdog is to use the point spread or the money lines.<sup>85</sup>

The other common type of sports betting is money lines, which requires a bettor to wager on which team they believe will win the game or match.<sup>86</sup> Like point spreads, money lines use plus and minus symbols for the betting lines.<sup>87</sup> Instead of showing the spread, the symbols denote the odds, or how much one needs to bet

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<sup>82</sup> Rodenberg, *supra* note 19.

<sup>83</sup> See Randy Ray, *How Sports Betting Works A Guide to Betting, Gambling Sites* (July 27, 2017, 12:00 AM), <https://www.gamblingsites.com/blog/how-sports-betting-works-35875/>.

<sup>84</sup> See *How to Bet on Sports for Beginners: 12 Tips to Know*, *Action* (Apr. 7, 2022, 4: 21 AM), <https://www.actionnetwork.com/how-to-bet-on-sports/general/sports-betting-for-beginners-10-things-to-know>.

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

<sup>86</sup> See Ray, *supra* note 83.

<sup>87</sup> See *id.*

to win money.<sup>88</sup> Because the system expects underdogs to lose, there is more of a reward to bet on them.<sup>89</sup>

## 2. How Oddsmakers Create Betting Lines

The phrase “Vegas is always right” proves to be pretty accurate. Before technology advancements, oddsmakers made decisions for point spreads and money lines using statistical analysis and gut feelings.<sup>90</sup> Over the years, with advances in technology and statistical data, oddsmakers rely less on their gut feelings and more on sophisticated algorithms and data analysis methods.<sup>91</sup>

As sports betting increases, bettors are no longer competing as much against the house; instead, they are participating in a global marketplace with billions of dollars flowing through various books daily.<sup>92</sup> Like stock market brokers’ fees, sportsbooks make money through the payment of ‘vigs’ from bettors placing bets.<sup>93</sup> When a sportsbook accepts the same number of bets on each side of a bet, it locks in a profit.<sup>94</sup> Thus, a linemaker’s primary concern is not with the game’s actual results but with mitigating risk and making a profit.

### *B. The Parallel: The SEC & The Future of Sports Betting*

#### 1. “Material Nonpublic” Information in Sports Betting?

Insider trading laws prohibit individuals from buying or selling stocks on the stock market using this type of material, non-

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<sup>88</sup> See *id.*

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

<sup>90</sup> See Aaron Gray, *How Do Bookmakers Generate Sports Odds?*, Sports Betting Dime (Nov. 12, 2020), <https://www.sportsbettingdime.com/guides/betting-101/how-bookmakers-generate-odds/>.

<sup>91</sup> See Chris Vasile, *Who Sets the Odds for Sports Betting?*, DocSports (Apr. 8, 2019), <https://www.docsports.com/how-to-what-is-does/who-sets-odds-sports-betting517.html>.

<sup>92</sup> See *Stock Market vs. Sports Betting: How Investing and Gambling Differ*, Sports Betting Dime (Aug. 6, 2020), <https://www.sportsbettingdime.com/guides/finance/how-investing-and-gambling-differ/>.

<sup>93</sup> See *Stock Market vs. Sports Betting*, *supra* note 92.

<sup>94</sup> *Id.*

public information.<sup>95</sup> Integrity concerns arise when individuals discover non-public information.<sup>96</sup> Applying SEC laws to sports betting will seemingly help regulate material, non-public information.

In 2015, the two major fantasy companies, DraftKings and FanDuel, started to face insider trading allegations after discovering that employees were placing bets using material information unknown to the public.<sup>97</sup> An employee of the fantasy sports betting company, DraftKings, admits to leaking insider information about which players have a higher usage in the millionaire-maker contest lineups.<sup>98</sup> By getting this information before the games, the employee's betting decisions help him to win \$350,000 through a rival fantasy sports betting company FanDuel.<sup>99</sup>

The single greatest threat to the fantasy sports industry is the misuse of insider information.<sup>100</sup> It seems that if sports betting is not federally regulated, employees may continue to misuse information. Without regulations, seemingly speculations about the integrity of the sports betting industry will appear due to the lack of strict internal controls or auditing processes. The federal government must transition into the sports betting industry by establishing a regulatory body similar to the SEC.

## 2. Advancements in Technology and Growing Concerns

Technology innovations, monitoring games, players' biometric data, and access to insider information are more readily available.<sup>101</sup> Sports gambling is colliding with technology that

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<sup>95</sup> See U.S. Sec. & Exch. Comm'n, *The Laws That Govern the Securities Industry*, Investor.gov, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> (last visited Mar. 30, 2022).

<sup>96</sup> See Code of Ethics and Business Conduct, Discover Fin. Servs., <https://www.discover.com/company/our-company/corporate-governance/code-of-ethics/> (last visited Dec. 13, 2021).

<sup>97</sup> See Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. Times (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

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

<sup>99</sup> Drape & Williams, *supra* note 97.

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

<sup>101</sup> See Gershman, *supra* note 39.

enables real-time tracking of biometric data.<sup>102</sup> The future of sports betting seems to include an increase in ‘in-game wagers’ that use biometrics data.<sup>103</sup> However, biometric data and its impact on sports betting are yet to be seen.

### 3. How SEC Tools Can Help To Regulate Sports Betting

Regulatory mechanisms are necessary to ensure integrity within the sports betting marketplace. Sports betting is a popular investment opportunity for individuals, and without regulation, consumers are susceptible to misleading and predatory marketing tactics.<sup>104</sup> Several states are beginning to introduce sports betting regulations to punish bettors from placing bets using insider information in response to such threats.<sup>105</sup>

Historically, gambling is regulated at the state level, but sports betting affects interstate commerce more than other forms of gambling generally contained within the establishment’s walls.<sup>106</sup> Sports gambling is more similar to the securities market than any other gambling form due to its various interstate activities and potential as an investment opportunity.<sup>107</sup> Sports and securities insiders seem to believe there may be more quality control with regulation at the federal level because the States may not have the bandwidth to regulate sports betting. Seemingly, Congress needs to set sports wagering standards that mirror securities regulations to enable the federal government to target unlawful actors in the growing legal sports market.

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

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

<sup>104</sup> See generally Jeff Bell, *Not Just A Game: Online Sports Betting And The Rise of Corrosive Technology*, *Forbes* (Feb. 25, 2021), <https://www.forbes.com/sites/forbestechcolumnist/2021/02/25/not-just-a-game-online-sports-betting-and-the-rise-of-corrosive-technology/?sh=411e6c2670ec>.

<sup>105</sup> See Mentock, *supra* note 32.

<sup>106</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

<sup>107</sup> See generally Michelle Minton, *Legalizing Sports Betting in the United States*, *Comp. Enter. Inst.* (Mar. 14, 2018), <https://cei.org/studies/legalizing-sports-betting-in-the-united-states/>.

*A. The Sports Wagering Market Integrity Act of 2018*

The federal government can regulate sports betting by setting regulations, directing a federal agency to administer the law, and enforcing rules across and within state lines. In 2018, Congress noticed the need for federal regulation and introduced the Sports Wagering Market Integrity Act of 2018.<sup>108</sup> The bill's intent centered around federally regulating sports gambling and maintaining a distinct federal interest in the integrity and character of professional and amateur sporting contests.<sup>109</sup>

The bill potentially would help to protect the sports betting market's integrity by making it unlawful for a person to place a wager using material, non-public information. The bill states, in part:

“It shall be unlawful for any person, directly or indirectly, to place or accept, attempt to place or accept, or conspire with any other person to place or accept through any scheme in commerce as sports wager if the person is in possession of material, non-public information relating to the sports wager or the market for the sports wager; and knows or recklessly disregards, that the material, non-public information has been obtained wrongfully; or the placement or acceptance would constitute a wrongful use of the material, non-public information.”<sup>110</sup>

Any person violating the above paragraph shall face fines under this title and imprisonment for not more than five years or both.<sup>111</sup>

The language is nearly identical to the SEC's governing insider trading. Congress needs to advocate and re-introduce this bill because it provides federal oversight to the expanding legal sports betting market. While insider trading is difficult to prove, the bill or similar legislation will make it easier to maintain a level playing field.

Another significant caveat of the proposed bill is that it requires the creation of the National Sports Wagering

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<sup>108</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

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

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Clearinghouse to regulate sports betting.<sup>112</sup> The proposed bill expresses that the National Sports Wagering Clearinghouse shall (1) operate the official national resource center and information clearinghouse for sports wagering integrity; and (2) coordinate public and private programs along with other resources relating to sports wagering integrity and responsible betting while addressing gambling disorder.<sup>113</sup> The bill also purports that the National Sports Wagering Clearinghouse will receive reporting from sports wagering operators, anonymized sports wagering data, and suspicious transaction reports and then share this data among sports wagering operators, state regulators, sports organizations, and federal and state law enforcement.<sup>114</sup>

Congress's vision for the National Sports Wagering Clearinghouse (Clearinghouse) is to have similar roles to the SEC and wants the Clearinghouse's powers to investigate and enforce punishments against bad actors. In addition, the Clearinghouse would also require mandatory sharing of information to a central hub about unusual bets or line movement.<sup>115</sup> If the Clearinghouse recovers anything unusual concerning betting behavior within the data, it must file a transaction report.<sup>116</sup>

Other intentions for the Clearinghouse include having a similar SEC disclosure system, which requires corporations to register securities and encourages individuals to report suspicious activity.<sup>117</sup> The disclosure system's similarities will allow sports booking and betting sites to connect across state lines to a central organization that can alert regulators in multiple states.<sup>118</sup> All stakeholders will work together, allowing for a more regulated interstate sports betting market.

Although there is uncertainty about Congress's future support of the bill,<sup>119</sup> several professional sports leagues and the NCAA support the bill.<sup>120</sup> An NFL Executive Vice President states that

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<sup>112</sup> See *id.*

<sup>113</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

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

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

<sup>116</sup> See *id.*

<sup>117</sup> *Id.*

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

<sup>119</sup> Wayne Perry, APNewsBreak: Feds eye move to regulate legal sports betting, AP News (Dec. 19, 2018), <https://apnews.com/article/a3e2b43f3931436e8156f54471ad5fc3>.

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



without continued federal guidance and oversight, sports leagues and state governments alone will be unable to fully protect the integrity of sports contests and guard against the harms associated with sports betting.<sup>121</sup> Major League Baseball also supports the bill and notes that legalized sports betting is rapidly spreading across the country, creating a clear need for consistent, nationwide integrity standards in the sports world, a world that millions of Americans love.<sup>122</sup>

#### IV. CONCLUSION AND RECOMMENDATION

Whether the National Sports Betting Clearinghouse or some other entity, any creation of a sports betting regulatory body should use SEC's concepts to create a tracking system that monitors and identifies suspicious sports betting activities. There is an urgent need for the federal government to create legislation to better monitor fraud, betting patterns, insider activity, and suspicious behavior within the sports industry. Similar to the SEC, the sports wagering market needs a federal entity to compile sports betting information across state lines.

With federal oversight, more bettors will show more willingness to participate in sports betting due to the feeling of fairness among betting entities. In addition, the federal government needs regulations resembling SEC's existing processes and laws as a model to allow for timely and effective sharing of information about abnormalities, insider activity, or suspicious data. Therefore, leading to a growing trend within legalized sports betting of fairness across all jurisdictions and states. With the SEC already having advanced data analytics, a sports regulatory body can use these systems to identify potential insider betting activities and identify, analyze, and develop correlative relationships from both familiar potential material sources and non-public information.

There are many parallels between insider trading in the stock market and the sports betting industry. Both involve a consumer attempting to profit off of some future event. With an increasing push to legalize sports betting nationally, maintaining a level

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

<sup>122</sup> See Perry, *supra* note 119.

playing field in the marketplace is imperative. Without regulations addressing game integrity concerns, it seems Congress cannot protect sports gambling consumers from insider information utilized in online and mobile sports betting. Ultimately, consumer confidence is the ultimate key and resource to developing a robust regulatory infrastructure around the future of sports betting.