

IT'S TIME FOR WIZARDS TO GIVE UP THE ILLUSION AND SHOW THEIR CARDS: HOW WIZARDS OF THE COAST CIRCUMVENTS GAMING LAW TO MAKE MILLIONS.

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INTRODUCTION

Humans have been gambling for thousands of years. Scholars agree that there have been card-based games of chance in Ancient China as early as the 800AD.¹ In the United States, the federal government has been struggling to regulate gambling since the turn of the nineteenth century.² However, so long as there is regulation, there will be those who try to avoid it. This remains as true today as it was in the early days of the “turf clubs” in the 1940s. Historically, some turf clubs and bookies were able to survive, even thrive by avoiding government detection and thus regulation. As Philip K. Dick so eloquently put it, “[w]hom the g-ds notice they destroy. Be small... and you will escape the jealousy of the great.”³ This philosophy has proven very true for Wizards of the Coast (WOTC), who pioneered trading card games (TCGs) with the creation and development of Magic the Gathering (“magic”).⁴

Magic is the world’s most popular TCG reaching millions of players in more than 48 countries around the globe.⁵ True to its name, magic gathers flocks of fans and players in regional, national, and global tournaments throughout the year. The game itself includes mixed elements of strategy, skill, and chance. Amateur and professional magic players alike, compete in tournaments and leagues around the world for excitement, notoriety, and a variety of prizes.

¹ *The History of gambling*, GAMBLING.NET, (last visited. Jan. 1 2018), <http://www.gambling.net/history/>.

² See, David Schwartz, *Roll the Bones: The History of Gambling (Casino Edition)*, WINCHESTER BOOKS (2013).

³ PHILIP K. DICK, *THE MAN IN THE HIGH CASTLE* (Putnam, 1962).

⁴ <https://magic.wizards.com/en/content/history>, MAGIC.WIZARDS.COM, (last visited. Feb 23, 2018).

⁵ See, Wizards of the Coast LLC, *Country Breakdown*, (last visited Feb. 3, 2018) <https://magic.wizards.com/en/articles/archive/feature/country-breakdown-2000-01-01>.

Players train, practice, conduct research, and invest significant amounts of time and money to rise in the ranks and compete at the top levels. Nevertheless, the “highest ranking” players often lose to relative newcomers and it is extremely rare for any single player to consistently rank in the top eight—let alone win consecutive tournaments.⁶ Magic’s more chaotic features undoubtedly play a role in its appeal and mounting success. However, despite the elements of chance present in magic, WOTC has thus far managed to evade scrutiny from gaming commissions and remains self-regulating. Magic and other TCGs, escape gaming law and regulations by blurring the line between “games” and “gambling,” which results in companies like WOTC⁷ flying under the radar raising significant policy concerns for gaming regulators and communities.

PREAMBLE: “Everything gives way, and nothing stays.”⁸

Like everything in life, the world of gaming is constantly evolving and gaming regulators need to keep up. In the last two decades, the internet has been a major force in changing the landscape of international gaming law.⁹ In the words of Thomas Friedman (not Tila Tequila)¹⁰, “the world is flat.”¹¹ Due to globalization, companies and individuals have access to international

⁶ See PLAYER RANKINGS <http://www.mtgptresults.com/rankings/t8> (last visited Feb. 2, 2018). (Jon Finkel who is ranked number one among all currently active professional magic players with 80 points, has only won three pro tours and achieved top eight a total of 16 times over the last 22 years); See also, <http://www.mtgptresults.com>. (last visited Feb. 2, 2018). (In 2017, only 2 players ranked in the top eight at more than one pro tour. 26 players ranked in the top eight only one time. No player ranked in the top eight more than twice in 2017. No player has won back to back pro tour events, although in 2004, Nicolai Herzog won two pro tour events in that year).

⁷ Some other TCG companies that are similarly evading scrutiny are Konami (Yu-Gi-Oh!), Blizzard (Hearthstone), Sabretooth Games (Warhammer 40, 000), and many others.

⁸ Heraclitus, WIKIQUOTE.ORG, <https://en.wikiquote.org/wiki/Heraclitus> (last visited Jan. 4, 2018). See, πάντα χωρεῖ καὶ οὐδὲν μένει Heraclitus quoted by Plato in Cratylus, 402a.

⁹ See generally, Jess Hutton, *How the Internet Changed the Gaming Industry*, <https://www.highspeedinternet.com/resources/how-the-internet-changed-the-gaming-industry>. (Apr. 9, 2014).

¹⁰ See, Sage Lazzaro, *Tila Tequila Truly Believes the Earth is Flat and Won't Stop Yelling About it on Twitter*, OBSERVER.COM (last visited Jan. 10, 2018). <HTTP://OBSERVER.COM/2016/01/TILA-TEQUILA-TRULY-BELIEVES-THE-EARTH-IS-FLAT-AND-WONT-STOP-YELLING-ABOUT-IT-ON-TWITTER/>.

¹¹ See Thomas L. Friedman, *It's a Flat World, After All*, N.Y. TIMES (last visited Jan. 10, 2018), <http://www.nytimes.com/2005/04/03/magazine/its-a-flat-world-after-all.html>. Friedman explains that globalization

markets and are forced to operate on a level playing field that has little respect for borders. This is especially true for the gaming industry, which has been laboring intensely to keep up with online betting, eSports, and cryptocurrencies.¹² Part I of this note looks at how globalization affects the TCG industry and magic specifically.

The tournament structure of magic and the actual mechanics of gameplay will be explored in part II. The similarities between TCGs such as magic and games that *are* regulated by gaming authorities (like Texas Hold’Em) will be highlighted in part III. Part III will also look at how WOTC manages to evade a gaming classification, and why. Finally, part IV of this note will outline some potential strategies, such as creating a subclass or “carve-out” for TCGs, which will enable gaming regulators to accommodate TCGs without derailing the TCG industry.

I. PART I: Globalization of TCGs in the Modern Era

Individuals all over the globe now have access to the internet from their smartphones and can place bets right from the palms of their hands.¹³ TCGs and eSports are arguably becoming more prevalent in foreign countries than traditional sports and the viewership numbers, especially online viewers, is staggering.¹⁴ Furthermore, there is vast international appeal for

is leveling the playing field and that people are accessing the global market and communicating with increasing ease. He states that “America had better get ready for this,” implying that industries need to prepare for the inevitability that borders are disappearing. This has a significant impact on growth industries like online gambling and eSports.

¹² See Bradley Gerrard, *From Gaming to Gambling: the Rising Risk of eSports*, THE TELEGRAPH.CO.UK <https://www.telegraph.co.uk/business/2017/05/13/gaming-gambling-rising-risk-esports/> (May 13, 2017 3:42pm).

¹³ See generally, *Number of Mobile Phone Users Worldwide From 2013 to 2019 (in billions)*, STATISTA.COM <https://www.statista.com/statistics/274774/forecast-of-mobile-phone-users-worldwide/> (last visited Feb. 2, 2018). Statistics show that there are almost 5 billion mobile phone users globally; See also, *Betting Apps – The Future of Online Gambling*, SOCCERWIDOW.COM, <http://www.soccerwidow.com/football-gambling/betting-knowledge/betting-advice/betting-apps-future-online-gambling>. (last visited Feb. 2, 2018). (“More than 30% of worldwide gambling revenue is generated through mobile betting”); See also, *A Casino in Every Smartphone: Law Enforcement Implications*, H.R. No. 114-130, First Sess. (Wa. 2017).

¹⁴ See generally, *the Biggest Live ESports Events on the Planet*, BETOCLOCK.COM, <https://betoclock.com/biggest-esports-live-events>. (last visited Feb. 2 2018). These events reach online viewership of over twenty million in some cases; See also, David Greenwald, *Inside the World’s Biggest ‘Magic: The Gathering’ Tournament*, Rollingstone.Com <https://www.rollingstone.com/culture/features/inside-the-worlds-biggest-magic-the-gathering->

games like poker; evidenced by the growth and success of the World Series of Poker (WSOP).¹⁵ Due to the sensational growth of eSports and poker (in its many forms), gaming regulatory bodies already struggle to find universally acceptable methods of protecting communities from the dangers of gambling and to monitor, as well as tax, gambling appropriately.¹⁶ Adding to that challenge is the influx of non-traditional TCGs whose developers and promoters have cleverly circumvented gaming regulations while building momentum and amassing fans worldwide. If regulators “don’t face forward, [they] face the possibility of shock and damage.”¹⁷

In recent years, eSports has garnered international attention and appeal. A recent poll shows that, *League of Legends* (LOL), a popular videogame, boasts 5,219 tournament players and over 1,974 tournaments in which it awarded a combined total of over \$49 million dollars in cash prizes.¹⁸ This shocking amount of prize money is dwarfed by *Dota 2*, another videogame, which has awarded almost 133 million in cash prizes over the span of only 877 tournaments (averaging approximately \$150,000 per tournament). These eSports tournaments raise important questions when it comes to gambling and gambling regulations. Much like traditional sports, those questions center around whether tournaments are considered “games” or “gambling.” The latter involving both professional and amateur players alike, where elements of chance play a

tournament-20150603. (June 3, 2015). (More than 11 000 in attendance); *See also, Pro Tour Magic 2015 – Finals – Ivan Floch vs. Jackson Cunningham*, <https://www.youtube.com/watch?v=M8vq7GxCg2o> (Aug. 3, 2014). This video has over two million views on YouTube.

¹⁵ *See generally*, Donnie Peters and Chad Holloway, *History of the World Series of Poker, Part 2: Growth and Acquisition by Harrah’s*, POKERNEWS.COM (Oct. 30, 2013) <https://www.pokernews.com/news/2013/10/history-of-wsop-part-2-14875.htm>.

¹⁶ *See generally*, Sam Cooke, *Lack of Regulation in eSports Gambling remains a Burden*, TOTALLYGAMING.COM, <https://totallygaming.com/news/betting/lack-regulation-esports-gambling-remains-burden>. (March 15, 2017); *See also*, Josh Axelrad, *Online Gambling may be Too Powerful For Regulation*, THEGUARDIAN.COM, <https://www.theguardian.com/commentisfree/2011/apr/21/online-gambling-regulations>. (April 21, 2011); *See also* Xinjian Li, *Dangerous New Trend: Illegal Magic Gambling*, GOODGAMERY.COM, <https://goodgamery.com/2010/09/dangerous-new-trend-illegal-magic-gambling>. (Sept. 22, 2010).

¹⁷ *See*, Jason Lee, actor playing ‘Brodie’ in the motion picture *Mallrats*, <https://www.youtube.com/watch?v=k0eo1hLmbMk> (Oct. 20, 1995), at 0:36-0:50.

¹⁸ *E-Sports Earnings: Top Games Awarding Prize Money*, <https://www.esportsearnings.com/games> (last visited Jan 4. 2018).

substantial factor in determining the outcomes. For the most part, gambling regulators have not raised much concern about or regulated eSports. That is perhaps partially because, like traditional sports, eSports are generally considered contests of skill. Much like chess,¹⁹ eSports and popular video games like *Golden Tee*²⁰ are being classified as games of skill and avoiding gambling regulation in many of the same ways that WOTC avoids that stigma. Being a skill-based game, however, does not eliminate the potential for betting on the tournament or game outcomes, which is still chance-based.

Not unlike many eSports games, TCGs are amassing a huge global audience. Today, magic is the leading TCG in the world²¹ having held over 100 Pro Tour (PT) tournaments each awarding \$240, 000 in cash prizes²² and nearly 700 Grand Prix (GP) tournaments with more than sixty thousand players.²³ These tournaments are hosted worldwide in over 48 countries²⁴ and matches are streamed live on a variety of online platforms.²⁵ Like eSports, the global reach of TCGs, magic in particular, makes it possible for WOTC to market its product to a wide range of potential customers who have virtually unlimited access to view tournaments or compete

¹⁹ 1985 N.Y. Op. Att’y Gen. (inf.) 75 (1985). “Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players.”

²⁰ See Howard Fischer, *Arcade Gambling Tees Up*, AZDAILYSUN.COM (Mar. 15, 2002) http://azdailysun.com/arcade-gambling-tees-up/article_ef277360-ac33-5065-9993-e87147feae27.html (stating that the Senate Government Committee agreed to change the definition of illegal gambling to include only electronic games where luck is a factor).

²¹ See, Jon Ledford, *Best Trading Card Games*, ARCADESUSHI.COM (Aug. 22, 2013) <http://arcadesushi.com/best-trading-card-games>; See also, *Top Trading Card Games*, THEOPTENS.COM (last visited Feb. 3, 2018) <https://www.thetoptens.com/top-trading-card-games>.; See also *The Best Trading Card Games of All Time*, RANKER.COM (last visited Feb. 3, 2018) https://www.ranker.com/list/best-trading-card-game/colloquialism_and_the_like.; Kyle Hill, *the World’s Most Popular Card Game Just Took a Huge Risk...and it Paid Off*, NERDIST.COM (March 11, 2016) <https://nerdist.com/the-worlds-most-popular-card-game-just-took-a-huge-risk-and-it-paid-off/>.

²² https://en.wikipedia.org/wiki/Magic:_The_Gathering_Pro_Tour.

²³ https://en.wikipedia.org/wiki/List_of_Magic:_The_Gathering_Grand_Prix_events#List_of_Grand_Prix

²⁴ *Id.*

²⁵ See generally, Magic: The Gathering, TWITCH.TV, <https://www.twitch.tv/directory/game/Magic:%20The%20Gathering> (last visited Feb. 23, 2018).

themselves. A phenomenon that was hardly contemplated before the existence of the World Wide Web.

As with eSports, the crucial question is whether TCGs and the magic tournaments run by WOTC ought to be classified as gambling and regulated as such. In this regard, magic can be clearly distinguished from eSports because in magic (a game of cards),²⁶ random chance plays a much more substantial role in determining the outcome of matches.

II. PART II: Understanding Magic The Gathering: A Non-Traditional Classification of “Game”: Game Mechanics and Play

Developed in 1993 by Richard Garfield, magic has amassed over 12 million fans worldwide.²⁷ Casual players convene in kitchens, living rooms, basements, school lunchrooms, and local stores to trade cards and play against each other. Many of them will also attend tournaments at nearby game stores and compete for cash prizes or bundles of cards. Other players will attend qualifying tournaments that offer winners a chance to compete on a larger platform. Players of varying degrees of skill – ranging from professional players to casual “amateur” players – regularly attend tournaments, often competing in “Grand Prix” tournaments to earn a coveted ticket and get invited onto the “Pro Tour.”²⁸

Magic is a strategic fantasy-based TCG. Hundreds of gameplay variations exist for magic, but the standard game is comprised of a match, or series of matches, in which two players

²⁶ See *supra*, note 19. Just because there is an element of skill involved from the players, card games are not precluded from being classified as gambling.

²⁷ See, Yannick Lejacq, *At 20, ‘Magic: The Gathering’ Still Going Strong – and Not Just in Schoollunchrooms*, NBCNews.Com <https://www.nbcnews.com/technology/20-years-magic-gathering-still-going-strong-not-just-middle-8C11044163>. (Aug. 30, 2013); See also, Owen Duffy, *how Magic: The Gathering Became a Pop-Culture Hit – and Where it Goes Next*, THEGUARDIAN.COM. (July 10, 2015). This number, although impossible to verify, has allegedly grown to beyond 20 million in recent years.

²⁸ See, Wizards of the Coast LLC, *Magic: the Gathering Pro Tours*, MAGIC.WIZARDS.COM. (last visited Feb. 2, 2018). <https://magic.wizards.com/en/content/pro-tour-magic-event-types-events>.

face off against each other.²⁹ Each player creates a deck of cards following specific rules laid out by WOTC³⁰ and competes with his or her deck. Magic is a turn-based game beginning with both players drawing seven cards from their respective decks and rolling a die to determine – *randomly* – who goes first. Each player is allotted twenty life points and then they take turns playing cards intended to reduce the opponent’s life points to zero. WOTC has created more than 19,000 cards since magic’s inception – each with unique properties that can alter the course of a match.³¹ To construct a deck, players select cards and pair them together to create potentially devastating combinations; commonly referred to as *combos*. There is a tremendous amount of strategy involved in deciphering the best possible *combos* for a given tournament format³² and building an optimal deck to defeat a variety of potential opponents. In a typical tournament, each deck must contain a minimum of sixty cards and a sideboard of no more than fifteen cards.³³ In each sixty-plus card deck, a player can only include four of any individual card. Each player shuffles his or her own deck then hands it to the opponent to shuffle, ensuring randomization of the cards and fair play.³⁴ Card sorting– the practice of arranging one’s deck so that certain cards can be drawn in sequence or at a certain junction in the match – is strictly forbidden.³⁵

Once each player has drawn seven cards and the starting player has been determined, that player begins the first turn. Except for the first turn, turns begin with an *untap phase*, followed

²⁹ See generally, Wizards of the Coast LLC, *Magic: the Gathering Comprehensive Rules*, § 100 <https://blogs.magicjudges.org/rules/cr304>. (last updated Jan. 19, 2018).

³⁰ See generally, Wizards of the Coast LLC, *Magic: the Gathering Comprehensive Rules*, <https://blogs.magicjudges.org/rules/cr304>. (last updated Jan. 19, 2018).

³¹ See generally, *Magic: The Gathering/Statistics and Trivia*, MAGIC.GAMEPEDIA.COM, (last updated Jan. 12, 2015) https://mtg.gamepedia.com/Magic:_The_Gathering/statistics_and_trivia.

³² See generally, Wizards of the Coast LLC, *Magic: the Gathering Tournament Rules*, 26 (2014), http://www.wizards.com/contentresources/wizards/wpn/main/documents/magic_the_gathering_tournament_rules_pdf1.pdf. (Hereinafter “MTR”). There are a variety of different tournament formats and different tournaments place different limits, bans, and other restrictions on cards .

³³ *Id.*

³⁴ *Id.* at 10, 17-18.

³⁵ *Id.* at 17-18.

by an *upkeep phase*, and then a *draw phase* in which the acting player draws a single card from the top of the deck (also referred to as a player's library). During each phase either player can play *instant* cards or activate *instant* abilities.³⁶ The turn then follows with the *main phase* in which the acting player can play spells from his or her hand and again *instants* can be played or activated. During a player's *main phase*, that player may declare an attack, triggering an *attack phase* that creates yet another opportunity for either player to cast *instants* or use *instant* abilities. Finally, the player ends his turn with a *discard phase* giving one last opportunity for *instants* before the opponent's turn commences. This process continues until the match concludes in either a draw or one player winning by bringing the opponent's life points to zero. Alternatively, a player also loses the match if, during the *draw phase*, that player is unable to draw because there are no remaining cards in his or her library.

Much like the deck building process, during actual gameplay, the skill of a player will significantly influence the outcome of a match. Each player is limited by the number of cards in hand and has limited resources, called *mana*³⁷ with which to cast spells from his or her hand. In selecting which cards to play at any given time, players must consider: the cards in play on both sides, the remaining cards in their own hand, the cards they may draw next, and the cards that may be in the opponent's hand and library. Similar to traditional strategy games, like chess, players who can think several turns ahead and anticipate what options an opponent might have

³⁶ See generally, Wizards of the Coast LLC, *Magic: the Gathering Comprehensive Rules*, § 304 <https://blogs.magicjudges.org/rules/cr304>. (last updated Jan. 19, 2018). (Hereinafter "MCR"). *Instants*, like sorceries, are one-shot spell cards or abilities that are not put into play. They have their effect immediately once the mana cost is paid then are removed to the player's graveyard (discard pile). Unlike sorceries, which can only be played during the active player's main phase, *instants* can be used at any time.

³⁷ *Id.* at § 106. Typically, mana is produced by "land" cards which can be played one card per turn and are "tapped" (turned on their side) to indicate that the card has been used. Mana can also be produced by various spell cards and abilities. Once mana is produced the active player can use that amount of mana to cast other cards in his or her hand or activate abilities from the cards in play that require a "mana cost." Any lands that are tapped for mana remain tapped until the player's following "untap" phase at the beginning of the following turn. The standard order of play is: untap phase, upkeep phase, draw phase, main/attack phase, and discard phase.

based on that opponent's deck, will have a huge advantage in deciding which cards to play from their own hand and at what time. The most skilled players have a vast knowledge of the best *combos* that are being played in different decks in the tournament and which cards might be available to an opponent to thwart that player's own attempts. As in poker, skilled players will read their opponents and make educated guesses based on what they know of the potential cards their opponents may possess. However, unlike poker, the possibilities are not limited to a fifty-two-card deck, but rather a sixty-card deck comprised of a potentially much larger pool of options since there are over 19, 000 magic cards available.³⁸ The tremendous amount of skill in magic play notwithstanding, there are undeniable elements of randomization and chance involved as well. Despite holding an advantage based on skill, the best players, sometimes with the best decks, do not always win.³⁹

What could be the best deck against one opponent may be the worst matchup against a different opponent's deck. A good deck matchup could be offset by a poor initial draw that weighs heavily in favor an opponent even if that opponent has a weaker deck. With so many potential card combinations, the randomness of drawing cards, the interplay between different decks, and the varying skill of the players, there remains a substantial amount of luck involved in each match.

Throughout a match, each player's deck will interact with the opponent's deck. Players can "cast spells" that remove an opponent's card from play or alter the effects on a card. In a tournament structure, the interplay between decks becomes even more complex because each

³⁸ *Supra* note 27. In games like Texas Hold'Em, all players seated at the table are dealt cards from a communal deck of 52 cards whereas in magic each player has at minimum a 60-card deck that is was constructed out of thousands of different cards. In most cases, no two 60-card magic decks are the same.

³⁹ *See infra*, Penrod note 23.

player uses a deck that can vary greatly from an opponent's deck in a previous round, but no player can swap his or her own deck for a more favorable one once it has been entered into the tournament. When a player advances in a tournament and faces a new randomly selected opponent, that opponent's deck can be vastly different from the deck faced in the previous round. A player can only *adjust* his or her deck after the first match in a best-of-three series by substituting cards from his or her fifteen-card sideboard. Suppose Player A builds a deck that relies only on *creature spells*, which eat away at an opponent's life points by attacking with creatures, while Player B has a deck with no creatures at all. When Player A attempts to cast a creature spell, Player B may respond with a *counterspell* card if Player B has the available *mana* required to cast the *counterspell*. If, however, Player B has no *counterspell* or no available *mana*, Player B will have to rely on other creature removal spells hoping that one is drawn before the creature attacks. If Player B does not draw a creature removal spell in time, it could spell big trouble. Assuming Player B has adequately built a deck to combat creature spells, Player B could be at a significant disadvantage when facing a subsequent opponent who plays a creature-less deck because all of Player B's creature removal spells will be useless. The challenge then becomes building a deck that will be able to compete against a variety of different opponents who are playing different decks coupled with a significant amount of 'luck of the draw' due to the randomness of the shuffled libraries.

Another factor adding to the randomization is the selection of opponents. In regular tournament play, player matchups are selected at random and neither player is privy to their opponent's deck makeup prior to the selection.⁴⁰ The most skilled player could be paired against another highly skilled player or against the least skilled player in the tournament depending on

⁴⁰ Some players with a previous ranking will receive a "bye" in the first rounds of the swiss style matchups.

random chance. According to many of the most elite magic players, magic will always have a substantial element of chance.⁴¹ “There is variance to this game, the best players win 70% of the time, not 100% of the time... recognize that it is a numbers game.”⁴²

Magic The Gathering Betting History

In magic’s earlier days, players often competed for what they called *ante*.⁴³ Just like traditional betting card games such as poker, an ante was a stake put up by each player before receiving their playing hand.⁴⁴ In magic, the stake was a magic card, selected at random from each players’ library. “When playing for ante, each player puts one random card from his or her deck into the ante zone after determining which player goes first but before players draw any cards. Cards in the ante zone may be examined by any player at any time. At the end of the game, the winner becomes the owner of all the cards in the ante zone.”⁴⁵

Playing for ante is a direct contest between two players for a prize that sometimes has significant monetary value. Each magic card carries a different monetary value that is derived from a combination of factors including: the (1) rarity; (2) playability; and (3) power of the card. Together, these factors will govern a card’s worth in the market. Magic cards are sold in *booster packs* (standard booster packs have 8 or 15 cards varying in rarity)⁴⁶ and subsequently placed

⁴¹ Shaun Penrod, *187: How to Prepare Like a True Magic Professional with Jon Stern*, MTGPROTUTOR.COM Episode 187 (last visited Feb. 2, 2018) <http://www.mtgprotutor.com/?s=187> Time stamp: 24:30 – 25:15 “There is variance to this game, the best players win 70 % of the time... it is a numbers game”

⁴² *Id.*

⁴³ *See infra*, MCR note 19 at § 407.1.

⁴⁴ *See, Ante*, Oxford Living Dictionaries, OXFORDDICTIONARIES.COM, <https://en.oxforddictionaries.com/definition/ante>. (last visited Feb. 2, 2018).

⁴⁵ *See infra*, MCR note 19 at § 407.2.

⁴⁶ *See* David Lumb, *Can Legislation Fix Gaming’s Loot Box Problem? It’s Time to Decide the Difference Between Loot Boxes and Gambling, If There Is One*, ENGADGET.COM (Feb. 24, 2018) <https://www.engadget.com/2018/02/24/loot-boxes-gambling-legislation/>. There is substantial debate surrounding “loot boxes” in video games, which is extremely similar to the random chance involved in opening a booster pack of cards that may contain extremely valuable cards. magic booster packs are often awarded as prize tournaments, adding yet another layer to this debate.

back into the market individually by players and retailers who buy, sell, and trade them to create their desired decks. The structure of the game itself serves to drive players to purchase more cards and increase the sales of magic merchandise in general, but the quickly expanding tournament system WOTC has developed and promoted also serves as a primary advertising mechanism and generates substantial income for the company.⁴⁷

While playing for *ante* is not permitted in tournament play, that does not reduce the elements of chance that are so clearly prevalent in the actual gameplay itself. Even though the skill of an individual player will have an impact on the outcome of a match, so too will the randomized selection of opponents, the luck of the draw, the chance to play first, and the varying interplay of different decks.

III. PART III: How WOTC Escapes Notice: Regulations, Common Practices, and Lack of Oversight: Flying Under the Radar

In traditional sports, like American football, amateur and professional athletes are distinguished by their relative levels of skill and the notion that only professionals are paid to perform. The designation that the athletes are “professional” lends itself to the idea that there is a substantial amount of skill involved in an athlete’s performance. However, as far as eSports and TCGs are concerned, there is no amateur or college level training nor are there leagues that players complete in to attain the “professional” designation. In most cases, a player only needs to pay a fee to enter an eSports or magic tournament and have either a gaming console or, in magic, a deck of cards. Consequently, amateurs and professionals compete against each other regularly

⁴⁷ See generally, CML, *The Problem with Magic: The Gathering No One is Talking About*, DAILYDOT.COM, <https://www.dailydot.com/via/magic-the-gathering-esport>. (last updated May 5, 2016). Estimated magic revenue is \$300 million a year.

for the same prizes and accolades. In this way, WOTC and eSports leagues are distinguishable from traditional sports.

Under 28 U.S.C. § 3701, a professional sports organization is “a league or association... that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate.”⁴⁸ The key distinction here is that typically eSports and TCG players are not considered athletes. The Oxford English Dictionary defines an athlete as “[a] person who is proficient in sports and other forms of physical exercise.”⁴⁹ This is a significant distinction for WOTC because so long as magic players are not athletes, then pursuant to the statute, WOTC is not a professional sports league and therefore, not subject to sports gambling regulations. Since WOTC is not a sports league, the question that follows is whether the game (magic) itself is gambling.

To enter a magic tournament, players must pay an entrance fee just like many other tournaments including the WSOP. However, in *Humphrey v. Viacom*, the New Jersey District Court established that entry fees such as these are different from bets or wagers.⁵⁰ In *Humphrey*, the court held that because the player has no chance of winning back the entry fee and the entity offering the prize has no chance to win the promised award, the entry fee is not considered a wager.⁵¹ This is one way that WOTC avoids being labelled gambling because the entrance fees are not considered wagers. Players pay an entrance fee for the chance to compete in a tournament like any other. Golf tournaments, chess tournaments, and even eSports tournaments are usually not considered gambling, also in part, for this reason. Nevertheless, other tournaments like the

⁴⁸ 28 U.S.C.A. § 3701(3)(A)(B).

⁴⁹ *Athlete*, English Oxford Living Dictionaries, OXFORDDICTIONARIES.COM, <https://en.oxforddictionaries.com/definition/athlete>, (Last visited Feb. 23, 2018).

⁵⁰ *See*, *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 28, 359 (1961).

⁵¹ *See*, *Humphrey v. Viacom, Inc.*, No. 06 2768 DMC, 2007 WL 1797648, at *8 (D.N.J. June 20, 2007).

WSOP are considered gambling in most jurisdictions because the game itself is a “gambling game.” This is an area where courts have been less consistent, which explains why WOTC has taken considerable steps to distance magic from being perceived as gambling and to avoid such a classification.

Even though the “ante” provision still appears in the general magic rule book, playing for ante (and other betting practices) are strictly prohibited under the magic tournament rules.⁵² WOTC tournament rules forbid “[t]ournament participants, tournament officials, and spectators” from placing any “wager, ante, or bet on any portion (including the outcome) of a tournament, match, or game.”⁵³ To tournament participants, those rules carry significant influence. However, despite these efforts, when it comes to spectators and fans, WOTC is limited in its ability to enforce these rules. It may not be as widespread as eSports gambling, but there are already online websites, such as Pinnaclesports.com, that post a betting line on the magic Pro Tour and promote it on their online platform.⁵⁴ WOTC is not without remedies for people caught betting on games, but the remedies available are restricted to WOTC’s authority over its tournaments. Fans, spectators, and players can be banned from WOTC events and tournaments, but they cannot be sanctioned or fined outside of that – at least not by WOTC.

WOTC’s strict compliance with its anti-gambling policy often enforces a treatment of players that is as harsh as many punishments imposed on players found cheating during actual gameplay.⁵⁵ For pro players, disqualification from a major magic event can have significant

⁵² See *infra*, MCR note 19 at § 407.1.

⁵³ See *infra*, MTR note 15 at MTR § 5.3 *wagering*.

⁵⁴ See *generally*, SBO.NET, <https://www.sbo.net/esports/magic-the-gathering/> (last visited Feb. 23, 2018).

⁵⁵ See *generally*, Ben Bleiweiss, *Ben’s Ten: The 10 Most Memorable DQs of All Time!*, STARCITYGAMES.COM, http://www.starcitygames.com/magic/misc/20059_Bens_Ten_The_10_Most_Memorable_DQs_of_All_Time.html. (Sept. 14, 2010).

repercussions. The stain on that player's record and social stigma notwithstanding, such a punishment directly impairs that player's ability to earn money from the tournament and improve his or her ranking. An inability to rise in the ranks, in turn, affects future pro points, financial awards, and tournament outcomes. WOTC, at its sole discretion, has repeatedly punished players for conduct unrelated to tournament play.⁵⁶ WOTC's anti-gambling policy and severe response to violations of the policy reflect its deliberate attempts to separate magic from being viewed as gambling or condoning gambling. However, it also raises some serious concerns about the unchecked regulatory power wielded by WOTC.

Is Magic The Gathering Gambling?

WOTC's attempts to distance magic and its tournament play from being labelled gambling and the fact that magic tournament rules explicitly forbid gambling does not mean that playing in a magic tournament is not itself a gamble. Under N.R.S. 463.0152, a gambling game is defined as "any game played with cards, dice... or electronic device or machine for money, property, checks, credit or any representative of value."⁵⁷ The inquiry does not stop there. Courts must further determine whether a game is "gambling" by applying the dominant factor test. In most jurisdictions, that test turns on whether skill or chance is a substantial factor in the outcome of the game.⁵⁸

⁵⁶ See, Candice Greaux, *Wizards of the Coast Bans a Magic Player and Sets Off a Tizzy Among Gamers: An Up-and-Coming Player is Booted*, OBSERVER.COM <http://observer.com/2015/07/wizards-of-the-coast-bans-a-magic-the-gathering-player-and-sets-off-a-tizzy-among-gamers>. (July 14, 2015); See also, Zach Jesse, *In Light of Recent Discussion: a Post by Zach Jesse*, REDDIT.COM, https://www.reddit.com/r/magicTCG/comments/35q0yx/in_light_of_recent_discussion_a_post_by_zach_jesse. (last visited Feb. 2, 2018).

⁵⁷ N.R.S. 463.0152 (2017).

⁵⁸ See *Opinion Of The Justices*, 795 So. 2d 630, 643 (Ala. 2001) (holding that "a player's skill, no matter how good or bad, does not and cannot control the randomness inherent in the "deal" of the cards... ultimately the player's skill cannot determine the outcome, regardless of the degree of skill involved"); See also *Com. V. Dent*, 992 A.2d 190, 196 (PA, 2010) (holding that the randomness of the deal makes it possible for novices to defeat skilled players with a "simple run of luck." "No amount of skill can change a deuce into an ace").

The prizes in magic tournaments include significant cash awards, cards with monetary value, sponsored airfare to future events, and invitations to future events which can be sold for cash. These latter prizes unambiguously constitute representatives of value under the statute because they can be traded or sold at face value. Although magic, like Texas Hold’Em, involves a great deal of skill, “[t]he fact that skill is involved in a game is not determinative of the issue of whether chance plays a material role in its outcome, for purposes of determining whether the activity constitutes gambling.”⁵⁹ Elements of both chance and skill are undoubtedly at play in any magic format, whether tournament or recreational. Therefore, magic can only be classified as a mixed game of chance and skill. How jurisdictions treat mixed games of chance and skill does vary, but to determine whether a specific game constitutes gambling, nearly all states employ the dominant factor test.⁶⁰ According to the dominant factor test, if the elements of chance present are the “dominant factor” in determining the distribution of prizes, the game will be considered gambling.⁶¹ This test does not offer a bright-line rule, but rather, a spectrum with lotteries at one end and games of pure skill on the other.⁶² This test is particularly useful for games that include mixed elements of skill and chance, like most – if not all – card games. As with sports and arguably most eSports, there are significant elements of skill that determine the outcome of a match, but they are not devoid of chance either. Still, such games will typically pass the muster of the dominant factor test. Games like backgammon that rely a on the randomness of a dice roll, while still requiring significant amount of skill, will likely fall closer to the other end of the

⁵⁹ See, Francis L. Bailey and Kenneth J. Fishman, *Handling Misdemeanor Cases*, 2nd ed. § 17:2. (Clark Boardman Callaghan 2017); See also, *Boardwalk Regency Corp. v. Attorney General of State of N.J.*, 188 N.J. Super. 372, 457 (Law Div. 1982).

⁶⁰ See, Steven D. Levitt, et al. *Is Texas Hold’em a Game of Chance? A Legal and Economic Analysis*, 101 Geo. L.J. 581,588 (2013).

⁶¹ *Id.*

⁶² *Id.*

spectrum. Under this approach, “games in which skill is a significant, although not dominant, element would be ... forbidden[.]”⁶³

In the world of eSports, the creation and addition of *loot boxes* has become a very controversial topic. A *loot box* is a virtual container that appears in video games that can appear during game play when a player completes a specific game-related task, or at random.⁶⁴ Each *loot box* contains items (commonly referred to as *skins*) that can have a range of effects in the game.⁶⁵ Some *skins* have little to no effect other than perhaps a visual enhancement, while others can have significant game-altering potential.⁶⁶ One reason why there is so much debate surrounding *loot boxes* is that they introduce a substantial element of chance into what have been consistently considered skill-based games. Suppose you are playing in an LOL tournament and you are awarded a random *loot box* that contains a game-changing item. In such a circumstance, you could advance in the tournament solely due to your luck in receiving a *loot box* and the fact that the *loot box* contained such a valuable item. This could be severely detrimental to the video game industry if game developers and promoters are subsequently forced to be regulated as a gambling game.

The gaming industry has good reason to stamp out any loot box-gambling connection: Once states decide to regulate them as such, game studios will have to comply with each law and statute... This may be a big issue for titans of the industry like Activision-Blizzard, which has centralized loot boxes in many of its AAA games (*Call of Duty: WWII*, *Destiny 2*, *Overwatch*, *Hearthstone*) to drive up revenue. Smaller studios that can't afford legal counsel but include loot boxes could suffer more if they violate state laws, according to Marc Whipple, an intellectual-property lawyer who frequently advises video-game companies.⁶⁷

⁶³ See *supra*, Levitt note 34.

⁶⁴ See Brett Abarbanel, *Gambling vs. Gaming: A Commentary on the Role of Regulatory, Industry, and Community Stakeholders in the Loot Box Debate*, PAPERS.SSRN.COM (Feb. 25, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129811.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *supra*, Lumb, note 46.

Combined with the vast popularity of eSports, the advent of *loot boxes* also gives rise to the potential for these *skins* to retain a real market value. Online players can buy, sell, and trade these virtual items for currency in the real world. In some instances, the *loot boxes* themselves can be purchased. Imagine a player purchases a *loot box* for five dollars and that reveals a hidden item that can then be sold for thousands.⁶⁸ To avoid these dilemmas, many games, such as *Path of Exile* (POE), adopt a strict no-sale policy in spite of consumers who would like to purchase items in the game.⁶⁹ POE's insistence that players refrain from selling in-game items is analogous in many ways to WOTC's strict anti-gambling policy. In the same way that POE uses strict adherence to its no-sale policy, WOTC uses its anti-gambling policy to distance itself from the pitfalls of being associated with gambling; namely gambling regulations.

This debate over whether the addition of *loot boxes* is enough to tip the scales in favor of qualifying eSports as gambling does not only raise concern for game developers; there could also be significant implications for gambling regulators. Once that bell is rung, it cannot be un-rung and it could open the door forcing gambling regulators to expend a great amount of resources to oversee the plethora of popular eSports games and tournaments. Magic draft tournaments include a similar element of chance because players form their decks by opening a variety of *booster* packs and selecting the cards one at a time in sequence. If a *booster* pack contains only one valuable card, the randomly selected player who picks first will gain a significant advantage over the other players in the draft. However, in the popular WOTC *constructed* tournament formats, *booster* packs are only used as prizes and do not affect the actual gameplay. In *constructed*

⁶⁸ See generally Amalie Finlayson, *Online Gamer Killed for Selling Virtual Weapon*, SMH.COM.AU (Mar. 30, 2005, 2:05PM) <https://www.smh.com.au/news/World/Online-gamer-killed-for-selling-virtual-weapon/2005/03/30/1111862440188.html>).

⁶⁹ See *Path of Exile – Terms of Use and Privacy Policy*, PATHOFEXILE.COM (last visited Mar. 23, 2018) <https://www.pathofexile.com/legal/terms-of-use-and-privacy-policy> *Non-Transferable*, No. 19; see also Forum Index, PATHOFEXILE.COM (last visited Mar. 23, 2018) <https://www.pathofexile.com/forum/view-thread/1652754>.

tournaments, players form their decks and submit a deck list detailing each card in their respective decks with the tournament organizers when sign in. Although *booster* packs do add an element of gambling to some formats of magic, most WOTC-sanctioned tournaments are more akin to WSOP and other card tournaments.

The similarities between magic tournaments and WSOP are of great importance here. Most jurisdictions have classified Texas Hold’Em as gambling⁷⁰ and there are considerably more variables at work in magic than in Texas Hold’Em as well as most, if not all, other variations of poker games. As with poker, in a game of magic, “a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control.”⁷¹ In magic, there are even more instrumentalities beyond the players control due to the substantially larger collection of cards that comprise a player’s deck, the randomization of opponents, and randomly determined the order of play. Magic is further distinguishable from tournaments like the WSOP in that magic is only regulated by WOTC; and this is a problem.

Regulating Magic The Gathering

The regulation of magic is currently under the sole jurisdiction of WOTC, which means that WOTC is the only authority deciding acceptable player conduct. A subdivision of WOTC known as DCI, is the official sanctioning body for all magic events.⁷² DCI is responsible for player registration, certifying judges, and sanctioning events.⁷³ It is unclear whether regulations are created and enforced by DCI or WOTC directly, but what is clear is that there are no outside, uninterested regulators to offer oversight and ensure fair play by WOTC. This means that WOTC

⁷⁰ See, Com. V. Dent, 2010 PA Super 47, 22, 992 (2010).

⁷¹ *Id.*

⁷² See, *DCI (wizards of the Coast)*, WIKIPEDIA.ORG [https://en.wikipedia.org/wiki/DCI_\(Wizards_of_the_Coast\)](https://en.wikipedia.org/wiki/DCI_(Wizards_of_the_Coast)).

⁷³ *Id.*

has a free hand when devising rules that govern tournament play, judging, and all other regulations. Due to the rapid growth and the global reach of magic, WOTC's self-regulating practices raise some serious concerns with respect to the involvement of minors who compete for large cash prizes (often against adults) and challenges notions of integrity and fair play.

As a fantasy-based TCG, magic has a tremendous appeal with young players. Due to globalization, the increasing availability and access of the gambling industry to youths is naturally becoming a social concern.⁷⁴ Research suggests that “early initiation of gambling [is]... closely correlated with placing players at higher risk of developing problem gambling behaviour in the future.”⁷⁵ Not only is WOTC making gambling available to minors through *booster* pack sales and tournaments, but it is actually targeting youths with its marketing, the actual game design, and magic lore. Magic cards are not your typical numbered card with the addition of a club, diamond, heart, or spade symbol. Each magic card sports a unique illustration, explanatory text, and flavor text relating to the magic storyline.⁷⁶ WOTC also published a line of fantasy novels boasting more than 50 titles to further attract young players interested in the fantasy genre.⁷⁷ It is also not uncommon for WOTC to promote and encourage its young tournament players. On Father's Day, WOTC posted an article displaying father-son and father-daughter

⁷⁴ See Sally Gainsbury, *Gambling and gaming are converging: “Won't someone think of the children!”?*, THE BRIEF ADDICTION SCIENCE INFORMATION SOURCE, BASISONLINE.COM (Feb. 13, 2017), <http://www.basionline.org/2017/02/gambling-and-gaming-are-converging-wont-someone-think-of-the-children.html>; see generally Maggie E. Magoon, et al., *Juvenile Delinquency and Adolescent Gambling: Implications for the Juvenile Justice System*, 32 CRIM. JUST. & BEHAVIOR 690 (2005); see generally, Malgorzata Carran, *Minors and Gambling Regulation*, 4 EUR. J. RISK REG. 509 (2013); see generally Keith C. Miller, *Public Policy and the Inevitability of Internet Gambling*, 61 DRAKE L. REV. DISCOURSE 1 (2013).

⁷⁵ Malgorzata Carran, *Minors and Gambling Regulation*, 4 EUR. J. RISK REG. 509 (2013); see also Maggie E. Magoon, et al., *Juvenile Delinquency and Adolescent Gambling: Implications for the Juvenile Justice System*, 32 CRIM. JUST. & BEHAVIOR 690, 691 (2005).

⁷⁶ See *Magic: The Gathering*, WIKIPEDIA.ORG (last visited Mar. 23, 2018), https://en.wikipedia.org/wiki/Magic:_The_Gathering#Artwork,_Artwork,_Storyline.

⁷⁷ See *List of Magic: the Gathering Novels*, WIKIPEDIA.ORG (last visited Mar. 23, 2018), https://en.wikipedia.org/wiki/List_of_Magic:_The_Gathering_novels.

duos.⁷⁸ Even more recently, WOTC published another article promoting and congratulating 7-year-old Dana Fischer for being the youngest player to make it to the second day in a Grand Prix tournament.⁷⁹ Although the game itself shares many elements with other traditional board games that are typically played merely for recreational purposes, in magic tournament play, minors are often competing for very large cash prizes. In a recent Grand Prix event in Toronto, 15-year-old Alessandro Pogorzelsky finished in 6th place earning a cash prize of \$1, 345.61; not a bad take for a teenager to earn in a weekend.⁸⁰

Having minors compete against adults carries with it some other safety concerns that WOTC is perhaps not equip to handle.⁸¹ WOTC has come under fire from fans and players because of its policies regarding hiring practices that do not require background checks for staff and judges who will be unsupervised while overseeing matches between children and adults throughout tournaments.⁸² This highlights another potential problem for unregulated events that encourage minors to play in what is typically an adult's world.

Without outside regulation, magic players struggle to maintain a regulated and level playing field where they can expect "fair play." In a casual game of chess, or magic, the consequences to a player when her opponent cheats are somewhat contained. However, with

⁷⁸ *Celebrating Father's Day the GP Way*, MAGIC.WIZARDS.COM, <https://magic.wizards.com/en/events/coverage/gplv17/grand-prix-vegas-weekend-highlights-2017-06-18>, (last visited Feb. 23, 2018).

⁷⁹ *Dana Fischer Comes to Europe*, MAGIC.WIZARDS.COM, <https://magic.wizards.com/en/events/coverage/gplyo18/gplyo18-day-1-highlights-2018-02-17>, (last visited Feb. 23, 2018).

⁸⁰ *Recent Tournament Finishes for Alessandro Pogorzelsky*, MAGICGOLDFISH.COM, <https://www.mtggoldfish.com/player/Alessandro%20Pogorzelsky>, (last visited Feb. 23, 2018).

⁸¹ *See, A Statement Regarding Recent Community Concerns*, MAGIC.WIZARDS.COM, <https://magic.wizards.com/en/articles/archive/statement-regarding-recent-community-concerns-2014-10-24>, (last visited Feb. 23, 2018). WOTC releases a statement which suggests that they are relying on the community of players to spot instances of cheating and bring it to the attention of WOTC.

⁸² *Magic: The Pedophile Conspiracy*, NICHEGAMER.COM, <http://nichegamer.com/2018/01/08/magic-pedophile-conspiracy/>, (Jan. 8, 2018 at 10:07am); *see also, Magic: Sex Crimes Lies and Elaine Chase*, NICHEGAMER.COM, <http://nichegamer.com/2018/01/11/111961/>, (Jan. 11, 2018 at 8:13pm).

thousands of dollars, pro points, Pro Tour invitations, and other prizes on the line, the implications of cheating can be far more severe. Because WOTC is self-regulating, in situations like these, players have very little recourse. The common practice for WOTC in dealing with cheaters is to disqualify the offender from the tournament, suspend the offending player for a limited time, and in some severe situations ban that player indefinitely from magic tournament play. However, if the infractions are only discovered at a later date, those remedies offer very little consolation to the other players who have been adversely affected by the offender. If, on the other hand, magic was regulated by a gaming commission, the legal repercussions for an offense during tournament play would have much more significance and would serve as a stronger deterrent when saddled with potential criminal liability. This aspect of regulation would reinforce the integrity of the game and encourage fair play.

How Gaming Regulations Could Hurt WOTC

Given the staggering growth of magic in popularity over the last decade, WOTC's current self-regulating practices will inevitably give rise to significant public policy concerns. Also, as is the case with eSports, gambling regulators are perhaps reluctant to open the door to regulating TCGs because of exponential growth. TCGs are yet another new and scarcely understood category of games. Gambling regulators lack the expertise to properly oversee tournaments and tournament officials. They would inevitably be forced to spend significant time and resources in order to understand and regulate TCGs if they are classified as gambling. If magic is classified as gambling, subjecting WOTC to gaming regulations could severely impact the gameplay and WOTC's bottom line in terms of sales; likely hamstringing their growth and profits.

Under the current tournament structure, gaming regulations would impair small businesses who rely on magic the most. Small magic retailers would suffer tremendously if they

could not host sanctioned tournaments at their shops sans gaming license, which are notoriously hard to obtain. If these retail stores cannot operate their grassroots tournaments legally, WOTC would likely see a dramatic decline in players and card purchases. Furthermore, if the history of gambling is any indicator, this would also lead to a spike in illegal tournaments that are not sanctioned even by WOTC. It is possible that many of those players would migrate to online play, however, relying on online versions of magic, retail sales generated from the physical stores would inevitably drop. Furthermore, if retailers cannot host magic tournaments at their stores, they may be less inclined to carry magic products since they will have fewer opportunities to sell to players and their customers will have fewer incentives to make last-minute purchases to alter a deck before a tournament begins.

Imposing gambling related age restrictions on the stores and tournament venues would also pose a substantial threat to WOTC. Since a large percentage of magic's demographic is teenagers and minors who cannot gamble legally, gaming regulations would prevent even casual tournaments from admitting minors. WOTC use magic tournaments as a method of promoting new card releases and implanting their new cards into the marketplace. However, if minors cannot attend these tournaments, they will not be exposed to one of WOTC's primary methods of advertising. Moreover, if magic is considered gambling, it is conceivable that WOTC would be fined for advertising to minors or otherwise encouraging minors to purchase cards. The social stigma that many communities place on gambling would also discourage parents from allowing their children to play and even dissuade adults from playing if they associate magic with a form of gambling.

To cover the expenses of regulating magic, regulatory bodies would need to levy taxes and license fees on both the organizers and the competitors who win prizes. Although the total

amount of prize money awarded by WOTC is significant, for players finishing outside the top eight, the individual award can be quite modest. If a portion of that award is taken away as a gaming tax it would become a further deterrent for players. Organizers would also be less inclined to host tournaments if faced with debilitating licensing fees and other compliance costs.

WOTC has invested substantially in its tournament structure and online community to promote and market the magic brand. If magic is held to the same standards as traditional card games like poker, that are marketed towards adults, WOTC will suffer considerable losses that would likely derail its entire business. If gaming commissions swallow up non-traditional TCGs like magic into the pre-existing framework, companies like WOTC will be hard-pressed to survive. Classifying magic as gambling and forcing WOTC to comply with typical gaming regulations is also likely to dismantle the magic tournament structure and discourage the innovation of thousands of other TCGs in the marketplace. It is clear why WOTC works hard to avoid being labelled a “gambling game,” however, as a mixed game of chance and skill wherein individuals compete using cards and dice for a cash award, magic tournament play should indeed be classified as such. Moreover, due to the exponential popularization of magic, allowing WOTC to maintain the status quo and have complete discretion on how to monitor and regulate magic tournaments, is no longer a viable option. While the goal of regulation should never be to halt commerce or limit individual freedoms, gambling regulations are necessary to protect the public from the very real harms such as gambling addiction and game fixing.⁸³ The dangers of allowing TCG game developers to operate tournaments without regulation or oversight would have equally, if not more, harmful consequences both on local and international communities.

⁸³ See, Stephen H. Unger, *The Hazards of Gambling*, CS.COLUMBIA.EDU, <http://www1.cs.columbia.edu/~unger/articles/gambling.html>. (May 21, 2013).

Because the extreme solutions on either end are not workable, TCGs require a middle ground; which could potentially be achieved with a TCG carve-out.

IV. PART IV: 3-Prong Proposed Regulation Strategy: The TCG Carve-Out

If TCGs remained hidden in the shadows without gaining so much popularity, regulation would be near impossible. The injuries and dangers would still exist, but they may not have ever risen to such a level where they merit the necessary allocation of resources needed to govern them. However, now that TCGs have reached this level of commonality, they plainly must be regulated. Considering the size of the magic community, the magic online platforms, and the expansive global reach of TCGs generally, a special gaming classification or “carve-out” is clearly merited.

TCGs can easily be distinguished from traditional card games like poker based on some key characteristics such as the subject matter of the games, the demographics of the players, and who the games are marketed towards. However, those differences alone may not be enough to clearly identify TCGs as separate from traditional card games. It would be far too easy for a gaming establishment to change the standard images on their cards to cartoons and market to children; thus meeting the requirements of a carve-out. Regulators will need to examine the elements of TCGs to establish which games can be classified as a TCGs and how to ensure that TCGs remain distinguishable from more typical casino games. Some other ways to distinguish TCGs for the carve-out could be based on the prize money awarded for tournaments and the recreational aspects of the games. For example, if a TCG reaches a certain threshold of prize money, it will no longer satisfy the requirements of the carve-out and be treated as a “gambling game” with the same licensing and taxation requirements as other gambling games. Similarly, if the TCG is being played in a tournament with only a small number of players, it could be

considered primarily a “recreational” game and stay within the classifications of the carve-out. This carve-out could potentially be applicable to poker games as well if that game is, for example, a small tournament among friends for minimal prize money. Whether gaming commissions choose to include other games like poker into the carve-out, which could also encourage growth in that marketplace, is something that could be decided on a case-by-case or jurisdictional basis.

1st Prong: Licencing and Taxation

Once a game is categorized as a TCG, it will be subject to certain exemptions from standard gaming regulatory practices, but still be limited by stricter operational practices than these games currently face. Licensing should be required only by the game developers and tournament operators, not the venues who might otherwise require a gaming license to host gambling events and should be easily obtained with minimal requirements in contrast to typical gaming licenses. For example, a retail hobby store that plans on hosting a local tournament will need to obtain a license from the local gaming commission, but that license should not require the store owner to jump through the regular hoops and background checks required for a standard gaming license. Any game developer or tournament organizer seeking a TCG gaming license, who has legally obtained rights to a specific game or permission from the rights holder to host a tournament, should be issued a license for a reasonable fee determined by the overseeing body in that jurisdiction. That license will grant the licensee the right to operate tournaments for a specific TCG alone. Taxation on prizes and admission fees for tournaments shall be limited to the pre-existing governmental standard taxation on income and sales rather than gaming taxes. Licenses should be renewable after a pre-determined duration for a

reasonable fee. Again, the purpose here is to regulate, rather than hamper, the licensees. The second prong of this proposed framework deals with limitations on the tournaments themselves.

2nd Prong: Restrictions: Age, Awards, and Distinguishing Professionals from Amateurs

To maintain classification as a TCG, licensees shall comply with certain age restrictions and limitations on prize payouts. Licensees shall also separate amateur and professional tournaments with separate rules for each. By separating the amateurs from the professionals, TCGs will be able to minimize the exploitation of minors without being forced to close operations altogether. Qualifications for pro tournaments should include age restrictions preventing minors from competing against adult veterans. This age restriction must comply with the age restrictions on gambling in the hosting region. For example, if the tournament is hosted in Nevada where the age restriction for gambling is twenty-one, the pro tournament should only offer admission to players who are aged twenty-one and above. Similarly, prizes and payouts for tournaments must be capped. The amount of the cap should ultimately be determined by the regulatory commission. If a monetary payout is too high, the TCG will no longer meet the requirements of the carve-out and will instead be subject to the same gaming regulations and taxations as other pre-existing gaming regulations. This carve-out would also facilitate TCG tournaments in states that do not legalize gambling. To illustrate, suppose a store within a state that does not permit gambling wishes to run a magic tournament. A license to run TCG tournaments could still be permitted under the carve-out exception to the no-gambling regulations provided that the proper age restrictions are followed and the prize payouts are within the permitted payout maximum. However, if the payouts are above the allotted limit, that store will be in violation of the local gaming statutes and subject to fines or penalties that the state would normally impose on illegal gaming establishments. The carve-out would essentially allow

the licensee to operate under a less restrictive framework, but non-compliance removes that privilege. Prizes for amateur tournaments should be scaled accordingly and severely limited in monetary awards. The enduring danger here is that non-monetary prizes, such as booster packs, limited edition cards, and airfare⁸⁴ can easily be converted to monetary gains. Nevertheless, those transactions can be monitored separately by collaboration between the regulatory bodies and the operators. Towards that end, licensees will be required to submit a report to local commissions of all awards from an event and prizes deemed too large can be addressed by gaming commissions on a case-by-case basis.

3rd Prong: Online Tournaments and Events

Finally, the third prong of this framework deals specifically with online tournaments and events. While online TCG events must meet the same minimum requirements put forward in the second prong, to operate an online event, licensees will have to comply with additional screening requirements. Players in online events shall be subject to registration whereby licensees issue player numbers that are subsequently registered with a regulatory commission in the jurisdiction where the licensee is located. This will allow TCG organizers and regulators to monitor age restrictions as well as prize payouts. Additionally, online events will require licensees to request a special provision on their license subject to an additional license fee borne by the licensee. This extra fee will compensate regulatory bodies for the additional expenses required to maintain and review player registrations. Licensees should be expected to report the status of their registered

⁸⁴ See generally, Wizards of the Coast LLC, *Pro Tours*, MAGIC.WIZARDS.COM. <https://magic.wizards.com/en/content/pro-tour-magic-event-types-events>. (last visited Feb. 2, 2018); See also, Wizards of the Coast LLC, *Pro Tour Players Club Guidelines and Procedures*, <https://magic.wizards.com/en/content/pro-players-club>. MAGIC.WIZARDS.COM. (last visited Feb. 2, 2018). Prizes vary depending on the tournament. Winners receive cash prizes as well as “pro points.” When a player wins enough pro points they gain status in the magic pro players club which entitles them to invitations and airfare to other events. There are also “side events” at every tournament where players compete for packs of cards and other prizes that can be converted to cash.

players with their local gaming commission quarterly. To maintain standing under this proposed TCG carve-out, licensees will have to comply with these limitations, violations of which will result in penalties imposed at the discretion of the gaming commissions or other designated regulatory body.

Under this framework, TCGs will avoid the stigma of gambling despite still being monitored by qualified third parties. TCGs will not be considered gambling by the public under the traditional views of what gambling is, but the public interests will still be protected by a governing body. Although a carve-out will somewhat open the door forcing gambling regulators to allocate some extra resources, that door will only be opened a crack. Regulators will not need to oversee every aspect of the tournaments and officiating to the same extreme extent as with other gambling games and the expenses will be mitigated by licensing fees. Despite the low cost of licensing, the sheer number of events and hosts will bring in substantial revenue typical in any economy of scale. Game designers will not be discouraged from developing new games for fear of costly compliance to strict gambling regulations and players will not be turned away from the games they've grown to love.

Considering the rapid growth of magic, and TCGs in general, it would be irresponsible for regulators not to address the growing public policy concerns. Even if certain jurisdictions may not conclude that magic is a form of gambling, it is undeniable that many of the dangerous elements of gambling are also present in magic tournaments. Conversely, the harsh restrictions that typical gaming regulations would impose on WOTC could potentially ruin magic altogether. Naturally, as a successful business enterprise, WOTC is primarily motivated by a need to expand its market share and increase profit so it is quite apparent why WOTC would seek to shield itself from being classified as "gambling." WOTC cannot be expected to place the same importance on

public safety as other disinterested parties would or to have the expertise to control the potential harms that coincide with globalization. Allowing WOTC, who are severely under qualified to regulate gambling or protect their players from the dangers present in these tournaments, to continue self-regulating would be an unforgiveable disservice to the public. The answer here is to find a middle ground that serves the public interest in such a way that would not be prohibitive to companies like WOTC who want to promote a TCG through increasingly popular tournament formats. Since most jurisdictions would agree that magic tournaments constitute gambling, or at minimum that magic tournaments share many of the same dangers as gambling games, a gaming carve-out catered specifically to TCGs is a logical solution. WOTC has held up its illusion for long enough, now it is past time that regulators deal with the cards in play.