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Social Gaming: Emerging Regulation (aka “Make Money and Avoid Jail”)

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Social Games Industry - Evolution

- In 2007, the social games phenomenon was introduced to the world through Facebook.
- In 2013, there were over 750 million people worldwide playing social games. Experts expect that number to double by 2015.



The Basics of Social Games

- Common characteristics of social games:
 - Played for entertainment;
 - Game play is typically (not always) very simple;
 - Played through social networks; and
 - Players may play at little to no cost.
- Many games are designed with **social interaction** and **competition** among players in mind.
- Popular games include Candy Crush, Farmville, The Sims, and Words with Friends.

Social Games – Business Models

Generally, there are **two business models** employed in the social games industry:

- Up-front cost for the game or application
 - Buy the application like Angry Birds
- Free game or application with in-game purchases available to enhance the entertainment experience
 - Farmville allows users to buy more land or tractors

Social Casino-Style Games

- Over the past 3-4 years, there has been an emergence of casino-style social games such as slots, poker, blackjack and roulette.
- Many companies have entered the social casino style games space in the last few years including Zynga, Electronic Arts, IGT and Caesars.



Social Casino-Style Games

- ◆ Major Point of Difference:
 - ◆ Cash or merchandise awarded?



Differences from gambling?

- ▶ In the US, gambling generally requires 3 elements:
 - ▶ **Consideration:** The payment of something is required to play the game
 - ▶ **Chance:** The outcome of the game turns on chance, not skill
 - ▶ **Prize:** Money, money's worth or something of real-world/tangible value is awarded based on game play
- ▶ Evaluation of these games requires assessment of those elements, which is not always simple or straightforward

Regulation of Social Gaming?

- ◆ Is it a “gateway” to real-money gaming?
- ◆ Do virtual prizes have value?
- ◆ What is the behavior we are trying to prevent (or what is the interest we are trying to protect)?
- ◆ Which games are “shams” and which are not?
- ◆ Should who offers the game matter?
 - ◆ Brand equity – which is leveraging which and does that matter?
- ◆ Should name of the game matter?
- ◆ Should profitability of social gaming matter?
- ◆ Okay to offer cash prizes?

Intersection of Social Games and Gambling

- ◆ Are there constitutional considerations (e.g., commercial speech)?
 - ◆ Supreme Court in 1976 considered law banning sale of low-alcohol (referred to as “non-intoxicating”) beer to minors
 - ◆ “Rational basis”
- ◆ Fairness issue
 - ◆ In the context of discrimination (gender or tribal-focused restrictions on sales) or economic protectionism (wine shipments), laws have failed rational basis (or heightened scrutiny) analysis

Electronic Sweepstakes

- ◆ Explosion of “internet cafes” that are viewed as shams/fronts for gambling
- ◆ Threat to expanding legal gambling industry
- ◆ State responses – examples:
 - ◆ Florida – prohibited slots include “systems or networks of devices”
 - ◆ Receive “anything of value,” including additional play (even if the system is “available for free play”)
 - ◆ North Carolina – “conduct[ing] a sweepstakes through the use of an entertaining display” is prohibited

Factors to Consider

- ◆ State legislation
 - ◆ Spillover effect from internet cafés
- ◆ Private-party/class litigation
 - ◆ “Statute of Anne”/qui-tam cases
- ◆ State enforcement action
 - ◆ Cease and desist or civil actions
- ◆ Criminal prosecution

Bottom-line ... Today!

- ◆ Social casino games where free play is the **primary** method of entry – *i.e.*, few ever pay to participate – and where no tangible prize is awarded possess strong arguments for legality
 - ◆ A few states raise particular sensitivities that need be considered.
- ◆ Social casino games that award cash or merchandise face a more difficult analysis and require very robust AMOE and careful state-by-state scrutiny
 - ◆ But still possess substantial legal defenses in most jurisdictions
- ◆ Risk of “sweepstakes café” effect

A Word About Fantasy Sports

- ◆ Raises distinct issues; different from social games because **payment is required**.
- ◆ Unlawful Internet Gambling Enforcement Act contains a safe harbor for certain types of fantasy sports, **but only for purposes of that statute**.
- ◆ Few state statutes specifically address fantasy sports either way
- ◆ Main issue is state gambling and bookmaking laws
- ◆ Shorter duration of contests and nature of prize raise some concern
- ◆ There has been some litigation against fantasy sports sites, so far all unsuccessful
- ◆ Prognosis?

Questions?

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