

House Gaming Oversight Committee
Public Hearing: House Bill 1598
October 30, 2019

Good morning Chairman Marshall, Chairman Conklin and members of the Committee, I am Kevin O'Toole and I serve as the Executive Director for the Gaming Control Board ("Board").

As you know, the Board serves as the primary regulatory agency for several forms of licensed gaming in the Commonwealth which now includes slot machines, table games, sports wagering and on-line gambling products. In addition, the Board has oversight of fantasy sports contests which are conducted online and VGT truck stop gaming which utilize slot machine-like devices with random number generators, mandated payback percentages and connections to the Central Control Computer System, which is maintained by the Department of Revenue. For the most part, activities regulated by the Board constitute legalized gambling which by definition are games predominated by chance and not skill.

Games of skill do not currently fit within the definition of "gambling" and therefore generally fall outside of the Board's regulatory oversight duties if not explicitly provided for in statute and if not performed by a casino or related licensed on-line operator.

This distinction between games of chance and games of skill form a crucial line of demarcation between activities that constitute gambling, or not. This distinction stems from the Supreme Court's decisions relative to what is, and is not, gambling. The Supreme Court established the "predominate factor test" to determine if an activity is gambling because gambling is not a defined term under the Crimes Code.

Essentially, the "predominate factor test" measures the degree of chance and skill that determines the outcome of a particular game. If the outcome of a game in question is 51% or greater chance, then the activity is gambling. Correspondingly, if the outcome is based 51% or more on skill, it is not gambling. And in Pennsylvania, if gambling has not been authorized, such as casino gaming, the lottery, small games of chance, etc., then the activity is illegal under Title 18 §5513.

When it comes to games of skill and the Board's experience, Act 42 of 2017 inserted amendatory language to the Gaming Act to add the definition of "skill slot machine" and "hybrid slot machine" which can be placed in a licensed casino. Some would suggest that the General Assembly's inclusion of these terms in the Gaming Act

makes the provision of skill or hybrid slot machines by any entity other than a slot machine licensee, illegal. Others suggest that the insertion of that language in the Gaming Act simply provides further gaming opportunities for a casino to provide to patrons and does not alter the legality of the machines if they do not qualify as “gambling” under Pennsylvania law. To date, this issue has not been subject to a precedential Court ruling, so it remains an issue in need of clarification either by a precedential court opinion or the General Assembly.

Meanwhile, we all have seen the proliferation of so-called skill-based games throughout the Commonwealth and hear anecdotally of the impact on legalized casino gambling, the lack of player protections, and the unregulated tax-free environment in which they operate. To this end, House Bill 1598 seeks to impose some degree of regulation in terms of where the skill games can be operated, the level of oversight to be imposed, and a taxing structure to place those games on a somewhat more level playing field with the tax burden placed on slot machines and VGT’s.

I would like to offer a few comments on House Bill 1598 prefaced by the following: generally, the Board has taken the view that it is the purview of the General Assembly to establish policy. We offer

guidance on what we feel is the best way by which to effectively regulate and leave the decision as to whether or not to expand our oversight to the will of the General Assembly and the Governor. Should the Commonwealth provide for the regulation of “skill games”, and accordingly provide for a role of the Board in the regulation of these games, then the Board would work to implement our duties.

First, the Board supports the removal of the Bureau of Investigations and Enforcement (“BIE”) from the tavern gaming background investigation as indicated in Sections 902 and 903.

Second, House Bill 1598 places the Board and the BIE in the position of backgrounding and licensing distributors and manufacturers of skill games under the Local Option Small Games of Chance Act. This creates a funding issue as the Board is currently funded through payments by the casino industry and the VGT industry. House Bill 1598 provides an insufficient funding mechanism to support the background and licensing functions required under the legislation.

Moreover, it would be inherently unfair to require the Board to cover the costs with funds from the other casino and VGT regulated entities which, in some cases, have invested well over a half billion

dollars in the Commonwealth and which may be detrimentally affected by the expansion of skill-based games. Should the General Assembly decide that the Board needs to be involved in the regulation of games of skill, a funding mechanism needs to be established.

Third, House Bill 1598 provides for annual renewals for distributors and manufacturers. If the Board is to be involved, the Board would ask that this be changed to 5-year renewals. Annual renewals drive up the regulatory cost to license holders as well as to the Board due to the need for additional staff to provide the investigatory and oversight licensing functions. This burden can be mitigated by the change to 5-year renewals as we apply to other license holders. In addition, should the renewal period be changed to five years, then the Board would request that distributors and manufacturers have a duty to provide an update to the Board when there has been a material change to the information previously provided or to the business ownership structures or circumstances.

Finally, establishing standards for skill-based games as provided for in this Bill can be somewhat illusory. Games of chance contain a random number generator and mandatory payouts to protect the consumer -- those elements are absent in a game of skill. The

outcome of games of skill are predicated on the ability, or lack of ability, of the player with no predictability, no mandatory payout and no ability to test for fairness to the patron. This is a concern from a player protection standpoint and a fundamental concern about the current proliferation of skill-based machines throughout the Commonwealth.

Thank you for inviting me to testify and I would be happy to answer any questions that you may have.