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Can Taxes Mitigate Corporate Governance Inefficiencies?

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LOSING THE DIGITAL SHIRT OFF YOUR BACK: APPLYING THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT TO VIRTUAL PROPERTY BETTING

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ABSTRACT

In recent years, a myriad of websites have been established, which offer gambling to U.S.-based customers via the Internet, using virtual items existing only within the realms of online video games as currency. A relatively new development, this virtual property has been addressed by courts very little, leaving many questions about how the law of the U.S. would and should treat it for purposes including but not limited to gambling. Because virtual property shares many characteristics with tangible property, it is likely to be found to share many of the same legal aspects as the latter, which would permit the Justice Department to attack it as it has other forms of gambling throughout the years.

One form of regulation which the U.S. government might use to regulate this virtual property gambling is the Unlawful Internet Gambling Enforcement Act (UIGEA). In 2011, the U.S. government used the provisions of the UIGEA to shut down major websites offering online poker and other forms of gambling within the U.S., targeting the payment processors handling funds from American customers. If the Justice Department finds that virtual property is analogous to tangible property, it would likely approach regulation of this market in a similar manner as it did in 2011. This Note argues that because virtual property gambling is a multibillion-dollar business and should be seen as property in its own right, regulation via the UIGEA, or other sources is inevitable.

* The Author is a JD Candidate at William & Mary Law School. He wishes to thank: his family for their endless patience and support throughout his education; the Law School faculty for their advice and insights throughout the process of writing this Note; and the staff of the *William & Mary Business Law Review* for their tireless efforts in editing and preparing this Note for publication.

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INTRODUCTION

On April 15, 2011, the U.S. Justice Department shook the poker world when, acting under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), it unveiled indictments and filed civil lawsuits against the owners and operators of the three largest Internet poker companies operating in the country, alleging that their companies continued to accept payments and financial transactions from American citizens after the passage of the Act.¹ Since this date, known colloquially in the poker community as “Black Friday,” online poker activity in the United States has remained considerably reduced, as very few providers are willing to continually risk accepting financial transactions from American customers.²

Five years later, while traditional online gambling in the United States remains limited, a new form of betting has become widespread, centered around competitive video games, or eSports.³ Unlike online poker rooms and casinos, however, these eSports wagers are not being placed with a “real money” balance, but rather with virtual property—in this case, digital items created by game developers that only exist within the framework of the games themselves.⁴ While these items do not have any fixed

¹ Martin Harris, *Black Friday: Reliving Pokers Darkest Day Five Years Later*, POKERNEWS (Apr. 12, 2016), <https://pokernews.com/news/2016/04/black-friday-five-years-later-24506.htm> [<https://perma.cc/X94J-KAHQ>]. The three companies specifically named were PokerStars, Full Tilt Poker, and Absolute Poker. *Id.*; see also U.S. ATTY S.D.N.Y., MANHATTAN U.S. ATTORNEY CHARGES PRINCIPALS OF THREE LARGEST INTERNET POKER COMPANIES WITH BANK FRAUD, ILLEGAL GAMBLING OFFENSES AND LAUNDERING BILLIONS IN ILLEGAL GAMBLING PROCEEDS (2011), <https://www.justice.gov/archive/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf> [<https://perma.cc/Q94M-GCSG>]; First Amended Complaint, U.S. v. PokerStars, 11 Civ. 2564 (S.D.N.Y. 2011), http://online.wsj.com/public/resources/documents/FullTiltAmendSuit_Sept20_2011.pdf [<https://perma.cc/M38X-2JK3>].

² Harris, *supra* note 1.

³ eSports is defined as “a form of sports where the primary aspects of the sport are facilitated by electronic systems ...” Juho Hamari & Max Sjöblom, *What is eSports and why do people watch it?*, 27 INTERNET RES. 211, 211 (2017).

⁴ Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), http://www.espn.com/espn/feature/story/_id/18510975/how-counter-strike-turned-teenager-com-pulsive-gambler [<https://perma.cc/T65W-E6PZ>].

value, the rarest are highly sought after, and command significant real money value; for example, in 2013, one item from the game Dota 2 sold for \$38,000.⁵ Further, until recently,⁶ betting with these items was a multibillion-dollar industry.⁷ On a single website in 2015, bettors from around the world placed over \$1 million in wagers on at least fourteen separate Counter-Strike: Global Offensive (CS:GO) matches.⁸ According to the BBC, the total video game betting market may be worth up to £4 billion;⁹ in dollars, approximately \$5 billion was wagered in virtual items in 2016.¹⁰

Given the amount of money at stake, as well as the current unregulated state of virtual property, it seems likely that the U.S. government will be interested in stepping in and closing these betting markets to American citizens.¹¹ One potential avenue

⁵ Wesley Yin-Poole, *Someone bought a Dota 2 courier for \$38,000*, EUROGAMER (June 11, 2013), <http://www.eurogamer.net/articles/2013-11-06-someone-bought-a-dota-2-courier-for-USD38-000> [<https://perma.cc/D9MB-4XR8>]. Further, according to Yin-Poole, another piece of virtual property sold in 2010 for a staggering \$635,000. *Id.*

⁶ In 2016, Valve, the publisher of Counter-Strike: Global Offensive (CS:GO) and Dota 2, sent cease-and-desist letters to many of the largest websites offering gambling with items from those two games. Assael, *supra* note 4.

⁷ CS:GO gambling alone saw \$5 billion in virtual item wagering in 2016, despite the cease-and-desist letters. *Id.*

⁸ CS:GO is a team-based first-person shooter video game, in which the players form two teams that compete against each other (terrorists and counterterrorists). Stephen Totilo, *An Hour with Counter-Strike: GO*, KOTAKU (Aug. 25, 2011), <http://www.kotaku.com/5834542/an-hour-with-counter-strike-go> [<https://perma.cc/Y348-6C37>]. In its most common gameplay format, the terrorists attempt to plant a bomb on a specific site within an in-game world, and the counterterrorists attempt to stop them from doing so. *Id.* If the bomb is planted and explodes, the terrorists win, and if it is planted but is defused, the counterterrorists win. Either team may also win a round if it eliminates all the players on the other team prior to the bomb being planted. *Id.*; see also HwanZike, *Top 100 CSGL matches by total \$value bet*, REDDIT (Sep. 12, 2015), https://www.reddit.com/r/csgobetting/comments/3knxy2/top_100_csgl_matches_by_total_value_bet/ [<https://perma.cc/W5KP-NXAG>].

⁹ Rory Cellan-Jones, *YouTube Nepenthez charged over video game gambling site*, BBC (Sept. 16, 2016), <http://www.bbc.com/news/technology-37385555> [<https://perma.cc/PX87-7BHP>].

¹⁰ Assael, *supra* note 4.

¹¹ Bryce Blum (esportslaw), *I'm Bryce Blum, an attorney with a full-time practice in esports law (including CS:GO), AMA!*, REDDIT (Feb. 3, 2016), https://www.reddit.com/r/GlobalOffensive/comments/440u1w/im_bryce_blum_an_atorney_with_a_fulltime/czmi2r8 [<https://perma.cc/R9NH-BK6J>] (Regulation is

would be an attempt to apply the UIGEA to virtual property, and thus shut down any and all providers of virtual property betting in a single “Black Friday”-esque stroke.¹² This Note will examine the legal framework surrounding virtual property and gambling, and argue that it is likely that the federal government will indeed wish to step in and regulate virtual property gambling, with the UIGEA being the government’s most likely tool for doing so. Part I will provide an overview of virtual property and the limited legal analysis of it thus far.¹³ Part II will examine the framework of the UIGEA and its previous applications by the Justice Department, including its application toward online poker.¹⁴ Part III will discuss whether the UIGEA’s text permits its application toward virtual property.¹⁵ Finally, Part IV will discuss the policy concerns inherent in an application of the UIGEA to virtual property, and examine alternative forms of regulation that may be preferable instead.¹⁶

I. WHAT IS VIRTUAL PROPERTY?

In general, property is often referred to as a “bundle of sticks,” or rights attached to a given piece of property; of these “sticks,” the most common ones are: “(1) the right to transfer; (2) the right to exclude; (3) the right to use; and (4) the right to destroy.”¹⁷ While this is fairly intuitive when dealing with tangible goods, it can be somewhat more difficult to comprehend in virtual realms.¹⁸ It is for this reason that there have been very few reported cases specifically dealing with virtual property in video games and

“inevitable, though predicting when would be total guesswork.”). Also, note that other governments have already begun applying their own gambling laws to virtual item betting. See, e.g., Joe Donnelly, *First prosecutions made in relation to videogame betting in the UK*, PC GAMER (Sept. 16, 2016), <http://www.pcgamer.com/first-prosecutions-made-in-relation-to-videogame-betting-in-the-uk/> [<https://perma.cc/GY6E-3GT7>].

¹² Harris, *supra* note 1.

¹³ See *infra* Part I.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.

¹⁷ Justin M. Ackerman, Note, *An Online Gamer’s Manifesto: Recognizing Virtual Property Rights by Replacing End User Licensing Agreements in Virtual Worlds*, 6 PHX. L. REV. 137, 143 (2012).

¹⁸ *Id.*

related issues,¹⁹ despite the large digital economy that has developed in recent years.²⁰

Given this lack of treatment by U.S. courts, it may be helpful to view video game virtual property through similar analogues. One of these is Internet domain names, which, in contrast, have seen substantial litigation since the Internet boom in the 1990s.²¹ Like digital items in a video game, domain names only exist electronically;²² the “owner” of a domain name is the party who gets to decide to which space on the Internet (more commonly known as a website) the domain name points.²³ In one landmark domain name case, *Kremen v. Cohen*, the Ninth Circuit developed a three-part test to determine whether a property right existed in the domain name in question: “[f]irst, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.”²⁴ The court determined that the domain name met all three of these prongs, and thus the plaintiff indeed had an intangible property right in it.²⁵

Applying this three-part test, virtual items in many video games and other virtual worlds would qualify as property, similar to domain names. First, virtual items are precisely defined because each individual item is given a unique identification code by the programmers who create it.²⁶ Second, because each item

¹⁹ One of these few cases is *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007), in which a customer of the game “Second Life” sued the game’s publisher after it revoked in-game property he had purchased; ultimately, the case settled out-of-court, with no legal resolution of the property issues. Benjamin Duranske, *Bragg v. Linden Lab—Confidential Settlement Reached; ‘Marc Woebegone’ Back in Second Life*, VIRTUALLY BLIND (Oct. 4, 2007), <http://www.virtuallyblind.com/2007/10/04/bragg-linden-lab-settlement/> [<https://perma.cc/6Y4S-AV8G>].

²⁰ See *supra* text accompanying notes 5–9.

²¹ *Domain Name Case Law*, HARV. L. SCH., <https://cyber.harvard.edu/property00/domain/CaseLaw.html> [<https://perma.cc/SE6V-6ELW>].

²² Ackerman, *supra* note 17, at 145.

²³ *Id.*

²⁴ *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (citing *G.S. Rasmussen & Assoc. v. Kalitta Flying Serv.*, 958 F.2d 896, 903 (9th Cir. 1992)).

²⁵ *Id.*

²⁶ Steam—the platform owned by Valve, and on which Dota 2 and CS:GO, among many other games, run, for example—utilizes tradeable in-game items

has this unique identification code, it can only be in the control of a single account holder, and others cannot take it against this account holder's wishes, meaning that it is exclusive.²⁷ Finally, one could presume that this account holder, by virtue of the fact that it is in her account, will be able to claim exclusivity over the item. Thus, it would seem that video game items would qualify as property under the test put forth in *Kremen*.

Though the above test seems straightforward, there is a major complication. According to the End User License Agreement (EULA) or Terms of Service (TOS) found in nearly every piece of software today, in many cases any in-game property is either impliedly or explicitly deemed not to be owned by a player, and is instead controlled to at least some degree by the game's publisher.²⁸ These agreements range in severity from reserving limited control over items with the publisher, to explicitly stating that users retain no ownership stake in in-game items whatsoever.²⁹ This would seem to conflict with the exclusivity prongs of the test cited in *Kremen*, as in even the most lenient of these

that must provide a persistent 64-bit identification code for each item. AlexanderCzR, *Understanding Item ID's*, REDDIT (June 9, 2015), https://www.reddit.com/r/SteamBot/comments/394o9d/understanding_item_ids/ [<https://perma.cc/BYJ6-N7FC>]. For more information on how this identification code is created, see *id*.

²⁷ See *id*.

²⁸ Ackerman, *supra* note 17, at 162–63.

²⁹ See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (Second Life's publisher exercised its control over in-game property to revoke a plot of digital land "owned" by the plaintiff); *Steam Subscriber Agreement*, VALVE, INC. (Jan. 1, 2016), http://store.steampowered.com/subscriber_agreement/ [<https://perma.cc/ERU3-88VG>] ("All title, ownership rights and intellectual property rights in and to the Content and Services and any and all copies thereof, are owned by Valve and/or its or its affiliates' licensors."); Blizzard's EULA provides in pertinent part:

Blizzard is the owner or licensee of all right, title, and interest in and to the Battle.net Client, Battle.net, the Games, Accounts, and all of the features and components thereof The following components of Battle.net and/or the Games, are owned or licensed by Blizzard ... 4. Items: Virtual goods, currency, potions, wearable items, pets, mounts, etc.

Battle.net® End User License Agreement, BLIZZARD ENT. (Feb. 28, 2015), <http://us.blizzard.com/en-us/company/legal/eula.html> [<https://perma.cc/J2JS-QNQH>].

agreements the publisher obtains at least some right of ownership over any virtual items in the game.³⁰

For users, this is, of course, problematic. In many cases, users will have obtained virtual property through the investment of either in-game time and labor or real money purchases.³¹ Additionally, in nearly all virtual worlds utilizing virtual property, lucrative markets have sprung up, either sanctioned by the publishers or not, permitting sales of these goods.³² Despite the disclaimers in EULAs and other agreements, publishers rarely invoke their rights to control property held by users.³³ Practically speaking, therefore, game publishers have given users the expectation of property rights in virtual items that can be bought, sold, and otherwise transferred as with tangible property.³⁴ There is a clear conflict between users' contracted rights in the respective software usage agreements and what is implicitly permitted by publishers.³⁵

While, as mentioned previously, there is no case law as of yet directly addressing the issue, there is some amount of academic scholarship surrounding these ownership conflicts and how they ought to be treated by courts.³⁶ While some argue that the current state of EULAs and other agreements is likely to remain in place,³⁷ other scholars have made arguments against EULAs including but not limited to substantial unconscionability, an unreasonable restraint on goods, a lack of business necessity for such harsh terms, and the distribution of property falling outside of players' expectations.³⁸ Others have suggested that public policy concerns

³⁰ *Kremen*, 337 F.3d at 1030; see *supra* note 29 and accompanying text.

³¹ Ackerman, *supra* note 17, at 187.

³² *Id.* at 178.

³³ See, e.g., *Statistics*, VACBANNED (Nov. 5, 2016), <http://www.vacbanned.com/view/statistics> [<https://perma.cc/3BFZ-V6TD>]. Of the over 179 million Steam accounts currently in existence, only 1.8 percent have been "banned," or excluded from playing or otherwise interacting with certain games or property the account owners have purchased. *Id.*

³⁴ Ackerman, *supra* note 17, at 178.

³⁵ *Id.*

³⁶ See, e.g., *id.*; Andrea Vanina Arias, Note, *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 EMORY L.J. 1301, 1303–04, 1308–09 (2008); see generally Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649 (2006); Allen Chein, Note, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059 (2006).

³⁷ Chein, *supra* note 36, at 1090.

³⁸ Arias, *supra* note 36, at 1332.

will require legislative regulation over both EULAs and virtual property in general.³⁹ However, until there is either a common law ruling or statute enacted regarding the subject, the state of virtual property will remain legally in limbo for both game publishers and users.⁴⁰

II. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

One possible way the U.S. government might approach regulation of virtual property, particularly when it comes to gambling, is through the UIGEA. Enacted in 2006, the UIGEA is the most recent evolution of the Wire Act of 1961,⁴¹ which Congress originally enacted to combat betting connected with organized crime.⁴² The UIGEA prohibits any “person engaged in the business of betting or wagering” from “knowingly” accepting: (1) “credit” (including funds extended from credit cards); (2) “electronic fund[s] transfer[s]”; (3) “any check[s], draft[s], or similar instrument[s]”; or (4) “the proceeds of any other form of financial transaction,” as jointly prescribed by the Federal Reserve.⁴³ Though this seems fairly straightforward, certain aspects of the statute deserve closer inspection, especially in light of a potential application to virtual property and virtual property gambling markets.

In the Findings, attached to the law, Congress noted that, in the United States, “Internet gambling is a growing cause of debt collection problems,” and “traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”⁴⁴ Though some feel that these stated purposes for the UIGEA are perfectly legitimate and reasonable,⁴⁵ others have claimed that conservative lawmakers’

³⁹ *Id.*

⁴⁰ *Id.* at 1332–33, 1337–38.

⁴¹ 18 U.S.C. § 1084 (2012).

⁴² James Romoser, Note, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 526 (2013).

⁴³ 31 U.S.C. § 5363 (2006).

⁴⁴ *Id.* § 5361(a)(3)–(4).

⁴⁵ Michael A. Tselnik, Note, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1668 (2007).

moral disdain for gambling fueled its passage.⁴⁶ Nonetheless, these intended applications of the law have continued to shape its real-world uses since its passage.⁴⁷

Beyond discussion of the possible legislation of morality inherent in the UIGEA, there are also concerns with its ambiguous construction.⁴⁸ Importantly, the UIGEA does not explicitly prohibit an individual from gambling on the Internet.⁴⁹ It instead attacks the revenue stream for the gambling markets and providers by making it illegal for banks and institutions engaged in the gambling business to knowingly accept funds electronically to be used for an illegal bet or wager.⁵⁰ It defines “bet or wager” as: (a) “the staking or risking of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance”; (b) lottery-type games in “which opportunity to win is predominantly subject to chance”; (c) unlawful sports gambling as defined in 28 U.S.C. § 3702; or (d) “any instruction or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account” for the purpose of betting.⁵¹

With these key terms defined, the UIGEA can be further broken down into five elements: (1) a bet or wager must be placed; (2) on the Internet; (3) that is knowingly accepted; (4) in a jurisdiction where external laws (state or federal) make such a bet illegal; and (5) that exemptions for certain intrastate and tribal gambling operations (including state lotteries and Indian casinos) are not met.⁵² Note that this largely requires other laws already on the books to be broken in order for the UIGEA to apply.⁵³

According to federal prosecutors, major online poker companies in 2011 satisfied these elements as required by law.⁵⁴ The

⁴⁶ Romoser, *supra* note 42, at 520.

⁴⁷ *Id.* at 520–21.

⁴⁸ *Id.* at 536.

⁴⁹ Andrew M. Nevill, Note, *Folded Industry? Black Friday’s Effect on the Future of Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL’Y 203, 210 (2013).

⁵⁰ *Id.*

⁵¹ 31 U.S.C. § 5362(1)(A)–(D) (2006).

⁵² Thomas A. Flynn, Note, *The Ace in the Hole: Why the Unlawful Internet Gambling Enforcement Act Did Not Categorically Ban Online Poker in the United States*, 5 GEO. MASON J. INT’L COM. L. 75, 84 (2013).

⁵³ Romoser, *supra* note 42, at 531.

⁵⁴ Harris, *supra* note 1.

three largest providers of Internet poker in the United States, along with key individuals in their organizations, were charged with a multitude of criminal activities, including bank fraud, conspiracy, violating the UIGEA, money laundering, and operating an illegal gambling business.⁵⁵ Regarding the UIGEA charges, the illegal betting element was met under 18 U.S.C. § 1955 (the “Illegal Gambling Business Act”) and 18 U.S.C. § 371 (conspiracy to commit offense or defraud in the United States).⁵⁶ In the end, the three major poker sites under indictment reached settlements with the U.S. government wherein, among other things, they agreed to leave the United States market and would not return “until it is legal to do so under U.S. law.”⁵⁷

III. THE APPLICATION OF THE UIGEA TO VIRTUAL PROPERTY BETTING

When considering whether UIGEA would apply to current virtual property betting markets, there are several aspects to consider: (a) whether virtual property, like tangible property, has real value; (b) the types of gambling done with virtual items; and (c) the various parties involved in these betting markets to whom the UIGEA could be applied. This section will examine these questions in-depth.

A. *Does Virtual Property Have Real Value to Satisfy the UIGEA?*

The first element to qualify an action for enforcement under the UIGEA is that a bet or wager must be placed.⁵⁸ Key to the definition of “bet or wager” within the UIGEA is that “something

⁵⁵ Flynn, *supra* note 52, at 88; *see also* U.S. ATT’Y S.D.N.Y. PRESS RELEASE, *supra* note 1.

⁵⁶ Flynn, *supra* note 52, at 94.

⁵⁷ *Id.* at 92. As a result, there are currently only a handful of online poker websites available nationally to United States customers, which suffer from both a lack of player base and uncertainty regarding any funds deposited into the system. *Id.* at 79. However, three states—Nevada, Delaware, and New Jersey—currently offer intrastate online poker clients, which can only be accessed and used within the individual states. The Associated Press, *Online gaming called ‘new frontier’ for states*, LAS VEGAS REV. J., Oct. 22, 2013, <https://www.reviewjournal.com/business/online-gaming-called-new-frontier-for-states/> [<https://perma.cc/ST6Z-J5ZW>].

⁵⁸ Flynn, *supra* note 52, at 84.

of value” must be staked or wagered as part of the bet.⁵⁹ As previously discussed, there is a great deal of debate over whether in-game items truly have value: on one hand, the EULAs for virtually all games state that in-game items are not owned by the player; by not giving users ownership over their own items, publishers are essentially stating that these items have no practical real-world value since there is no explicit license given in most agreements to sell or otherwise transfer the publisher’s property.⁶⁰ This would suggest that this element of the UIGEA is unsatisfied, and thus the law would not apply to virtual property—indeed, two district courts have ruled separately that virtual currency has no real value when it comes to gambling, largely because the Terms of Use for each game in question state that the currency in question has no value.⁶¹

On the other hand, however, many publishers have either tacitly allowed or explicitly created marketplaces or other systems by which users are able to exchange real money for in-game items.⁶² In some cases, these only serve to confuse the issue further. One such example is the Steam Marketplace, a place within the Steam client, which allows users to buy and sell items from at least forty different games with a “wallet” of funds deposited into the Steam system and tied to each individual user account.⁶³ Though one must utilize real money in order to deposit

⁵⁹ 31 U.S.C. § 5362 (2006).

⁶⁰ Ackerman, *supra* note 17, at 163.

⁶¹ *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at *4 (W.D. Wash. 2015) (ruling that because the Terms of Use state that users have no property interest in any virtual item; virtual items may not be transferred, sold, or purchased; and virtual items have no monetary value; any user doing so is attempting to sue Defendant for their own breach of contract); *Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457, 465 (D. Md. 2015) (ruling that, once Plaintiff had purchased virtual currency, she had swapped something of value for “something of whimsy” which had no value). Note that both of these cases involved virtual currency purchased directly from the publisher, and declared to be strictly for usage within the specific software, unlike Steam items, which have a built-in framework for trading and other types of transactions between users. See Assael, *supra* note 4.

⁶² See, e.g., Ackerman, *supra* note 17, at 157; Arias, *supra* note 36, at 1302.

⁶³ *Community Market*, VALVE, INC., <http://www.steamcommunity.com/market/> [<https://perma.cc/8H38-QD2F>]; see also *Community Market FAQ*, VALVE, INC., https://support.steampowered.com/kb_article.php?ref=6088-UDXM-7214 [<https://perma.cc/2WT2-B7FT>].

these funds, once the user transfers them to the Steam system, they are no longer the user's property according to the EULA.⁶⁴ Additionally, any items traded, purchased, or sold in the Steam Marketplace are license rights, in which there is no ownership interest, and Valve does not recognize any trades or sales made outside of Steam.⁶⁵ With that said, however, it seems likely that, because in-game Steam items are convertible to real money through any process, even a circuitous one, they indeed have "value."⁶⁶

The contractual validity of this EULA aside, Valve continues to muddy the waters further within Steam. Despite its staunch stance that Steam funds have no real monetary value, the IRS requires Valve to file a Form 1099 (used to report miscellaneous income) for any U.S.-based users who meet a certain threshold of virtual market transactions per year based on these sales.⁶⁷ In other words, regardless of what Valve may believe or publicly state regarding the real-world monetary value of any items and funds currently within the Steam trading community,⁶⁸ the United States government, at least, already feels that these items do in fact have value and should be viewed through that lens.

Without any case law or other statutory guidance, this real value requirement in the UIGEA remains undecided, but there are strong arguments to be made in favor of virtual property having real value.⁶⁹ There is the practical consideration that in-game items are often traded for real money, whether through a publisher-sanctioned marketplace or through a "black market" of

⁶⁴ According to the text of the agreement, once funds have been added to the Steam Wallet, they are "non-refundable and non-transferable. Steam Wallet funds do not constitute a personal property right, have no value outside Steam and ... have no cash value and are not exchangeable for cash." *Steam Subscriber Agreement*, *supra* note 29.

⁶⁵ *Id.*

⁶⁶ Anita Ramasastry, *Could Second Life Be In Serious Trouble? The Risk of Real-Life Legal Consequences for Hosting Virtual Gambling*, FINDLAW (Apr. 11, 2007), <http://supreme.findlaw.com/legal-commentary/could-second-life-be-in-serious-trouble-the-risk-of-real-life-legal-consequences-for-hosting-virtual-gambling.html> [<https://perma.cc/8L5E-MQ5Y>] (discussing whether the in-game currency in Second Life, the "Linden Dollar," would be subject to UIGEA scrutiny).

⁶⁷ *Community Market FAQ*, *supra* note 63.

⁶⁸ *Steam Subscriber Agreement*, *supra* note 29.

⁶⁹ See Kurt Hunt, *This Land Is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141, 158–59 (2007).

sorts.⁷⁰ This, coupled with the fact that the IRS considers said items to have value to the point where they are taxable, suggests that virtual property should be considered “something of value,” thus satisfying the definition in the UIGEA.⁷¹

B. Does the Type of Gambling Generally Done With Virtual Items Satisfy the Requirements Set Forth in the UIGEA?

Along with the value requirement embedded within the definitions of the UIGEA, the Act also defines the types of bets or gambling within its scope.⁷² This wording leads to a range of possible activities the UIGEA covers, including obvious examples like lotteries,⁷³ roulette, and other casino-like games of chance.⁷⁴ Although online poker, via the Black Friday indictments, was the most prominent application of the UIGEA to this point, there have been judicial affirmations of its applicability to some of these other forms of gambling as well.⁷⁵

Beyond the traditional games of chance, the UIGEA would likely also extend to betting on professional eSports matches as well.⁷⁶ The First Circuit has ruled that bets on traditional sporting events qualify under the Act.⁷⁷ Although eSports, as a fairly new

⁷⁰ See, e.g., Ackerman, *supra* note 17, at 157; Arias, *supra* note 36, at 1302.

⁷¹ See I.R.S. Notice 2014-21, 2014-16 IRB 938.

⁷² Flynn, *supra* note 52, at 86. “[S]taking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.” See 31 U.S.C. § 5362(1)(B) (2012) (“[lottery-type games in] which opportunity to win is predominantly subject to chance”).

⁷³ *Id.* § 5362(1)(B) (“The term ‘bet or wager’ ... includes the purchase of a chance or opportunity to win a lottery”)

⁷⁴ *Id.* § 5362(1)(A) (“The term ‘bet or wager’ ... means the staking or risking by any person of something of value upon the outcome of ... a game subject to chance”); see D. A. Norris, Annotation, *What are games of chance, games of skill, and mixed games of chance and skill*, 135 A.L.R. 104 (1941).

⁷⁵ See, e.g., *California v. Iipay Nation of Santa Ysabel*, No. 14cv2724, 2014 WL 12526720, at *8 (S.D. Cal. 2014) (determining that bingo, as well as poker, would qualify as a violation of UIGEA).

⁷⁶ § 5362(1)(A) (“The term ‘bet or wager’ ... means the staking or risking by any person of something of value upon the outcome of ... a sporting event”)

⁷⁷ *United States v. Lyons*, 740 F.3d 702, 729 (1st Cir. 2014) (Defendant was taking bets on sporting events via the Internet; the court ruled that these bets qualified as “unlawful gambling” under UIGEA).

industry, has had very little attention in the form of academic studies to this point, at least some contemporary commentators argue that it fits within the traditional boundaries of a sport,⁷⁸ thus permitting regulation under the UIGEA per the First Circuit.⁷⁹ Additionally, even if one does not consider eSports to qualify as sporting events as specifically named in section 5362(1)(A), they would still likely qualify under this subsection, due to the fact that any competitive eSports match is “a contest of others.”⁸⁰

Virtual property gambling has encompassed all of the above types of betting, and others as well. *Second Life* players hosted virtual slot machines, poker, and blackjack in 2007.⁸¹ Currently, using CS:GO property alone, one can make bets on eSports and traditional sports, or play games of chance, including virtual slots, dice games, coin flips, and roulette spins.⁸² Because it seems likely that wagers made with virtual property satisfy the value requirement of UIGEA, and wagers on these types of games satisfy the definitions of gambling under the Act, it is therefore likely that the types of gambling typically done using virtual property would qualify to be regulated under the UIGEA.

C. If the U.S. Government Decided to Invoke the UIGEA Against Virtual Property Gambling, Which Parties Would Be Liable Under the Act?

If the U.S. government does target Internet providers of virtual property gambling with the UIGEA, there are two primary types of parties which might be liable under the provisions of the Act: game publishers and third-party gambling providers.⁸³ As discussed previously, UIGEA applications target the revenue stream for Internet gambling providers by making it illegal to receive payments connected to these bets.⁸⁴ Because the creators

⁷⁸ See, e.g., Hamari, *supra* note 3 (eSports is defined as “a form of sports where the primary aspects of the sport are facilitated by electronic systems.”) (emphasis added).

⁷⁹ See *Lyons*, 740 F.3d at 729 (noting that it is illegal to transmit or receive a sports bet in interstate commerce).

⁸⁰ § 5362(1)(A).

⁸¹ See Ramasastry, *supra* note 66.

⁸² See Assael, *supra* note 4.

⁸³ See Ramasastry, *supra* note 66.

⁸⁴ According to the Congressional Research Service, “[t]he Unlawful Internet Gambling Enforcement Act (UIGEA) seeks to cut off the flow of revenue to

of any virtual property are the ones initially releasing said property into the wider marketplace in exchange for an initial payment, if not ongoing control over the virtual items or currency within their virtual worlds, they would likely fall squarely within the crosshairs of the Justice Department as it attempts to wield UIGEA provisions.⁸⁵ If, as in *Second Life*, third parties are actually using the game world itself to host casino games and other forms of betting, it is likely that the answer is yes.⁸⁶ The UIGEA holds liable “a financial transaction provider, or any interactive computer service or telecommunications service” with knowledge and control of bets and which owns, controls, operates, manages, supervises, or directs any Internet website at which gambling takes place.⁸⁷ This appears to be fairly straightforward; for those games in which transactions and other monetary (via currency or other forms of valuable property) interactions take place, the publishers would likely face an uphill battle to show a lack of liability.

For those publishers that do not directly host their own in-world currency, unlike *Second Life*, there is an additional layer of abstraction. As Valve, developer and publisher of CS:GO, is responsible for a considerable gambling economy stemming from its games, it will serve as a useful case study for this subsection.⁸⁸

In order to purchase items from Valve, including keys or other items, a user must first deposit real money into their Steam account, which converts that money to Steam credit and is non-refundable back into real money.⁸⁹ Valve currently accepts deposits via PayPal, an electronic money transferring service, and credit cards.⁹⁰ The UIGEA prohibits persons engaged in the business of betting or wagering from knowingly accepting, in connection with unlawful Internet gambling: “credit, or the proceeds of credit ... (including credit extended through the use of a credit

unlawful Internet gambling business. It outlaws receipt of checks, credit card charges, electronic funds transfers, and the like by such businesses.” Flynn, *supra* note 52, at 82.

⁸⁵ See, e.g., *infra* text accompanying notes 94–99 (discussing the process of obtaining virtual items in CS:GO).

⁸⁶ See Ramasastry, *supra* note 66.

⁸⁷ 31 U.S.C. § 5367 (2006).

⁸⁸ CS:GO item gambling alone accounted for an estimated \$5 billion in wagers in 2016. Assael, *supra* note 4.

⁸⁹ *Id.*

⁹⁰ *Community Market FAQ*, *supra* note 63.

card)” and “an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service”⁹¹ These provisions certainly cover both credit card payments and PayPal transfers, and it is likely that any gambling involving virtual property on Valve’s platform qualifies as unlawful.⁹² However, there are two further elements of this statute to satisfy before Valve is clearly liable.

The first additional element that must be met is the “knowingly” requirement embedded in this section.⁹³ Valve is certainly aware that not an insignificant portion of its customers are using their in-game items for gambling; in 2016, it sent more than forty cease-and-desist letters to websites taking bets and wagers using CS:GO items.⁹⁴ Some Steam users, however, presumably never use any of their Steam Wallet funds to purchase virtual property; and of those users who do possess certain in-game items, some never use their items to gamble.⁹⁵ Unlike the Internet poker companies targeted on Black Friday or the defendant in *Lyons*, Valve might have a plausible argument that it has never *knowingly* accepted any deposit to be used for illegal gambling.⁹⁶ Valve receives many deposits each day and has no way of knowing which will be used to purchase virtual property to be wagered, and which will simply be used to purchase games or other things within the Steam system.

Unfortunately, the lack of judicial precedent on the matter limits any forecast regarding this argument.⁹⁷ One potential

⁹¹ 31 U.S.C. § 5363(1)–(2) (2012).

⁹² See Lawrence Trautman, *E-Commerce, Cyber, and Electronic Payment System Risks: Lessons from PayPal*, 16 U.C. DAVIS BUS. L.J. 261, 280–81 (2016).

⁹³ § 5363.

⁹⁴ Assael, *supra* note 4.

⁹⁵ For example, Valve has sold 21 million copies of CS:GO, and while more than three million people wagered virtual items in 2015, that obviously leaves many purchasers of the game who did not gamble. See Joshua Brustein & Eben Novy-Williams, *Virtual Weapons Are Turning Teen Gamers Into Serious Gamblers*, BLOOMBERG (Apr. 20, 2016), <https://www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling/> [<https://perma.cc/9TX5-W9YX>]

⁹⁶ See Harris, *supra* note 1 (including the indictment against the three providers); see also *United States v. Lyons*, 740 F.3d 702, 714 (1st Cir. 2014).

⁹⁷ See *supra* text accompanying notes 19–20.

analogy might be found in money laundering, in which the law states that the government need not “show that funds withdrawn from the defendant’s account could not possibly have come from any source other than the unlawful activity.”⁹⁸ In other words, if an individual or institution is knowingly receiving funds from both legitimate and illegitimate sources, all funds are tainted.⁹⁹ Similarly, a court faced with a complaint against Valve under the UIGEA might conclude that all deposits are tainted because Valve is knowingly receiving both legitimate and illegitimate deposits, and separating out the individual sources of each is immaterial and defeats the purpose of the UIGEA.¹⁰⁰

The remaining additional element in the UIGEA is the requirement that a defendant must be “engaged in the business of betting or wagering”¹⁰¹ Valve has argued that it neither runs nor endorses any of the gambling surrounding Steam items;¹⁰² because of this, they are not “engaged” in the gambling industry.¹⁰³ There are two major avenues, however, where this argument might fail, one of which applies to game publishers generally and one specifically to Valve.

First, a primary concern for any company offering virtual property in some way is that investigators or regulatory agencies will determine that the company’s policies are inexorably tied up in gambling operation making use of the items it offers, and thus it is indeed “engaged in the business of betting or wagering”¹⁰⁴ The argument specifically against Valve revolves around “cases,” the primary method of obtaining in-game items in CS:GO.¹⁰⁵ Players obtain these cases, which are essentially virtual item

⁹⁸ *United States v. Johnson*, 971 F.2d 562, 570 (10th Cir. 1999).

⁹⁹ *Id.* The court explains that, once commingled, legitimate and illegitimate funds are indistinguishable, which would defeat the entire purpose of money-laundering statutes. *Id.*

¹⁰⁰ *Id.*; see also Assael, *supra* note 4.

¹⁰¹ 31 U.S.C. § 5363 (2012).

¹⁰² *In-Game Item Trading Update*, VALVE, INC. (July 13, 2016), <http://store.steampowered.com/news/22883/> [<https://perma.cc/3PYC-G8VL>]. Valve backed this assertion by sending the many cease-and-desist notices to gambling sites in 2016. Assael, *supra* note 4.

¹⁰³ *In-Game Item Trading Update*, *supra* note 102.

¹⁰⁴ § 5363.

¹⁰⁵ Assael, *supra* note 4.

containers, through the ordinary course of playing the game.¹⁰⁶ Any player willing to purchase a \$2.49 “key” from Valve can “open” the case, which triggers a randomized wheel that selects a virtual item for the player to keep.¹⁰⁷ These items range in value on the Steam Market and other marketplaces from a few cents to thousands of dollars.¹⁰⁸ Unlike a traditional bet, the user is guaranteed to receive an item in exchange for their \$2.49; however, it is far more likely than not that the item she receives is “worth” considerably less than her investment.¹⁰⁹

It is possible that courts would consider this to be a form of gambling. Under the UIGEA, activities considered to be bets or wagers include those which stake or risk “something of value upon the outcome of ... a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”¹¹⁰ The key question is whether a case opening qualifies as one of these events. Case openings, which in some ways simulate a virtual slot machine, are subject to chance and randomness;¹¹¹ however, unlike, say, a traditional slot machine, a spin of which is fully randomized and often results in no prize,¹¹² a user opening a case is guaranteed to receive an in-game item from their investment.¹¹³

While the statutory language within the UIGEA is vague regarding which “certain outcomes” qualify,¹¹⁴ there is some case law which may help evaluate case openings with more focus.¹¹⁵ Consumers may purchase packs of trading cards, which are guaranteed to include a set number of cards within them.¹¹⁶ These packs have a chance to include “insert” or “chase” cards, which are rarer and more desirable to card collectors, and thus more

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 31 U.S.C. § 5362(1)(A) (2012).

¹¹¹ Assael, *supra* note 4.

¹¹² Norris, *supra* note 74.

¹¹³ Assael, *supra* note 4.

¹¹⁴ § 5362(1)(A).

¹¹⁵ *See* Chaset v. Fleer/Skybox Intern., LP, 300 F.3d 1083, 1087 (9th Cir. 2002); *see also* Price v. Pinnacle Brands, Inc., 138 F.3d 602, 604 (5th Cir. 1998).

¹¹⁶ *See, e.g., Price*, 138 F.3d at 604.

valuable on the secondary market.¹¹⁷ The Ninth Circuit held in *Chaset v. Fleer/Skybox Intern., LP* that opening a pack and not receiving a “insert” card is not a cognizable injury, as consumers receive value in the form of a certain number of cards, which may or may not include an “insert” card, in exchange for what they paid as a purchase price.¹¹⁸ However, the court did not rule on whether the act of opening a pack was indeed a form of gambling, instead simply deciding that even if the defendants’ activities did constitute illegal gambling, it was immaterial to the final holding.¹¹⁹ The Fifth Circuit has found similarly as well.¹²⁰

The trading card cases were the forerunners to *McLeod v. Valve Corp.*, in which the Western District of Washington similarly dismissed plaintiffs’ claims, with heavy reliance upon the holdings from the trading card analogues.¹²¹ *McLeod* is relevant in this discussion because the court recognized that virtual items are analogous to tangible property in the form of trading cards, and that by betting with their virtual items, plaintiffs had “an opportunity to win and received a benefit of their bargain,” analogous to *Chaset*.¹²² Thus, the argument in that case that consumers receive exactly what they pay for would likely transfer to case openings as well—that is, for their \$2.49, CS:GO players receive a single item, which has the chance to be something of high scarcity and rarity.¹²³ This suggests that courts feel as though consumers receive something of value in every outcome when they open a pack or a case, which would likely defeat the UIGEA’s “certain outcome” language if Valve was ever challenged

¹¹⁷ See, e.g., *Chaset*, 300 F.3d at 1086.

¹¹⁸ *Id.* at 1087.

¹¹⁹ *Id.* at 1087–88.

¹²⁰ See, e.g., *Price*, 138 F.3d at 607–08. Note, however, that both *Chaset* and *Price* were not cases brought under UIGEA; rather, they were claims against the trading card distributors under anti-racketeering statutes. Both cases were dismissed due to plaintiffs’ lack of standing under these statutes.

¹²¹ See *McLeod v. Valve Corp.*, No. C16-1227-JCC, 2016 WL 5792695, at *4 (W.D. Wash. Oct. 4, 2016). Like *Chaset* and *Price*, this is not a UIGEA case; rather, plaintiffs attempted to sue under anti-racketeering law. Note that *McLeod* has no direct relevance to case openings, which are not referred to once throughout the decision. *Id.* at *1–5.

¹²² *Id.* at *4.

¹²³ Assael, *supra* note 4.

on this issue specifically in court, suggesting that Valve (or other publishers who in the future implement a similar system into their own games) would not be liable under the UIGEA for these sorts of virtual item sales and distributions.¹²⁴

While it is uncertain whether game publishers, such as Valve, would be liable under the UIGEA, the other major parties the U.S. government might target would be the companies specifically taking advantage of the existence of virtual items and actually hosting and providing gambling services with the items as currency.¹²⁵ Once again, the system Valve has built into Steam serves as a useful case study. Steam operates using an access system which allows third parties to engage with and utilize the platform.¹²⁶ This approach gives Valve a great deal of flexibility and openness to innovation from Steam users; on the other hand, it also allows third parties to take advantage of Steam's infrastructure, including item inventories and trading, to engage in a variety of different activities, including gambling.¹²⁷ For these entities, the analysis is less convoluted than that of Valve; they are in the business of betting or wagering, in connection with unlawful gambling on the Internet, and are knowingly accepting payments for that purpose.¹²⁸

One possible defense for item gambling websites is that the UIGEA does not specifically discuss virtual items as a prohibited form of payment.¹²⁹ However, the government could use several arguments to get around this defense. First, as mentioned previously, section 5363(2) of the UIGEA prohibits electronic fund transfers.¹³⁰ An electronic fund transfer is defined as "any transfer of funds ... which is initiated through an electronic terminal ... or

¹²⁴ 31 U.S.C. § 5362(1)(A) (2006).

¹²⁵ *Id.* § 5362(10)(A); Assael, *supra* note 4.

¹²⁶ Assael, *supra* note 4. This system is called an "application programming interface" (API). Anyone may obtain access to Steam's API system, so long as they possess a Steam account, fill out a form, and agree to the API terms of use. *Steam Web API Documentation*, VALVE, INC., <https://steamcommunity.com/dev> [<https://perma.cc/A6W7-JD4W>].

¹²⁷ Assael, *supra* note 4.

¹²⁸ *See* 31 U.S.C. § 5363 (2006).

¹²⁹ *Id.*

¹³⁰ *Id.* § 5363(2).

computer ... so as to order, instruct, or authorize a financial institution to debit or credit an account.”¹³¹ Any transaction involving Steam items is necessarily initiated electronically, as there are no real items involved; however, it is very unlikely that a court would decide that a gambling website qualifies as a financial institution.¹³²

Should this subsection of the UIGEA fail, the government may instead invoke section 5363(4), which permits the Board of Governors of the Federal Reserve to issue regulations defining additional types of transactions that qualify under the UIGEA.¹³³ This subsection also applies to financial institutions, but provides considerable leeway to the Federal Reserve to decide on how a financial institution is involved in order to invoke the Act.¹³⁴ This is not a sure thing, however, with the current construction of the UIGEA; unlike, for example, the complaints against the online poker companies, there are no payment processors or financial institutions involved for any gambling website dealing strictly in virtual items.¹³⁵

Virtual item gambling currently exists in a legal gray area.¹³⁶ While the UIGEA is not the only statute regulating gambling in the United States,¹³⁷ it has been applied recently and effectively against gambling establishments existing strictly on the Internet, most notably the poker sites on Black Friday.¹³⁸ Though both game publishers and gambling providers would have defenses against Department of Justice prosecutors relying upon

¹³¹ 15 U.S.C. § 1693a(7) (2012).

¹³² A financial institution is defined as a private or public organization that acts “as a channel between savers and borrowers of funds.” *Financial Institution*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/financial-institution.html> [<https://perma.cc/989H-YYPV>].

¹³³ 31 U.S.C. § 5363(4) (2006).

¹³⁴ *Id.* “In other words, even if a form of funds does not fit in the first three categories, the Federal Reserve could issue a regulation to deem its system to fall within the fourth, catch-all category.” Ramasastry, *supra* note 66.

¹³⁵ See First Amended Complaint at 4, *U.S. v. PokerStars II* Civ. 2564 (S.D.N.Y. 2011), http://online.wsj.com/public/resources/documents/FullTiltAmendSuit_Sept20_2011.pdf [<https://perma.cc/M38X-2JK3>] (alleging that the defendants deceived U.S. banks and financial institutions with the aid of “highly compensated third party payment processors.”)

¹³⁶ Chris Grove, *Understanding Skin Gambling*, NARUS ADVISORS 5 (2016), <http://www.esportsbettingreport.com/wp-content/uploads/2016/07/A-Guide-To-Skin-Gambling.pdf> [<https://perma.cc/5W9Q-JPUB>].

¹³⁷ *Id.*

¹³⁸ Harris, *supra* note 1.

the UIGEA, they may very well be found liable both civilly and criminally under the Act.¹³⁹

IV. PUBLIC POLICY AND THE UIGEA

Like any governmental regulation of a consumer activity, the potential application of the UIGEA to virtual item betting has inherent concerns.¹⁴⁰ This Part will first discuss the sound public policy reasons to pursue regulation of virtual property, via the UIGEA or otherwise, then conclude by discussing the way the Act might be implemented, as well as other options aside from the UIGEA.

A. Arguments in Favor of Federal Regulation of Virtual Property

The UIGEA was originally enacted under the pretext of addressing increasing gambling debt, especially debt accrued via Internet gambling, which was not well-regulated at the time of the Act's passage.¹⁴¹ Although virtual item gambling is not seen in the same way as more mainstream gambling games, it nonetheless is just as effective as more traditional betting in getting people addicted and in debt.¹⁴² Even worse, because much of this virtual property being wagered comes from video games, many of those afflicted are under-aged.¹⁴³ It seems logical, in a country where casino gambling is heavily regulated,¹⁴⁴ that the easy

¹³⁹ 31 U.S.C. § 5365 (2006).

¹⁴⁰ Tselnik, *supra* note 45, at 1627, 1632.

¹⁴¹ 31 U.S.C. § 5361(3)–(4) (2006).

¹⁴² Assael, *supra* note 4 (explaining that virtual items “are a highly effective tool for hooking those predisposed for addiction”).

¹⁴³ Though many gamers in general are adults, of the 155 million Americans who played video games in 2015, twenty-six percent are under the age of eighteen. *Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS'N (2015), <http://www.theesa.com/wp-content/uploads/2015/04/ESA-Essential-Facts-2015.pdf> [<https://perma.cc/EC2J-2655>]. Assael, *supra* note 4 (“Kids are ‘becoming gambling addicts at [thirteen] ...’”).

¹⁴⁴ Most states have enacted some sort of minimum gambling age statute, and many of those without one do not have casinos available within their borders. *Complete Guide to USA Casino Gambling*, CASINO.ORG, 2017, <https://www.casino.org/us/guide/> [<https://perma.cc/3AMD-G2W8>].

availability of virtual property betting for children and others would be problematic.¹⁴⁵

Underage gambling is understandably a major concern for watchdogs and others in eSports.¹⁴⁶ However, other concerns around eSports gambling have plagued the industry as well, as the amount of money at stake has increased.¹⁴⁷ One of the most notable examples of this occurred in 2015 in the iBUYPOWER scandal, in which arguably the best American CS:GO team “threw,” or intentionally lost, a professional match against a team they should have handily defeated.¹⁴⁸ By placing virtual item bets upon themselves to lose on both their own and a multitude of other Steam accounts, the players received nearly \$7,000 in virtual items for the loss, and others in the know prior to the loss profited even more.¹⁴⁹ After the scandal came to light, Valve banned all of the players complicit in the match-fix, as well as others strongly linked to it, from professional play in Valve-sponsored events indefinitely, citing the impact that events like match-fixing have “on the health and stability of [the] sport.”¹⁵⁰ Events like this are made possible in part by the unregulated nature of virtual property; unlike traditional, brick-and-mortar

¹⁴⁵ Assael, *supra* note 4.

¹⁴⁶ *Id.* (“These kids, man, they look up to you. They think if their idols can make \$13,000 in five minutes, they can too. But we all know that’s not true Let these kids go to school, man.”)

¹⁴⁷ See, e.g., Annabelle Fischer, *Gambit fines AdreN, mou, Dosia for TWC incident*, THE SCORE ESPORTS (Sept. 27, 2016), <https://www.thescoreesports.com/csgo/news/10578-gambit-fines-adren-mou-dosia-for-twc-incident> [<https://perma.cc/GS4S-DRXD>] (an example of teams in professional matches utilizing “ringers,” other more skilled players from other teams); Aurangzeb Durrani, *Match-fixing comes to the world of e-sports*, TECHCRUNCH (Apr. 23, 2016), <https://www.techcrunch.com/2016/04/23/match-fixing-comes-to-the-world-of-e-sports/> [<https://perma.cc/2R85-T7AJ>] (discussing match-fixing among professional eSports players in several major games, including CS:GO and Dota 2).

¹⁴⁸ Richard Lewis, *New evidence points to match-fixing at highest level of American Counter-Strike*, DOT ESPORTS (Jan. 16, 2015, 10:03 PM), <https://www.dotesports.com/counter-strike/match-fixing-counter-strike-ibuypower-netcode-guides-1256> [<https://perma.cc/VY4S-FCLV>].

¹⁴⁹ Philippa Warr, *Valve Bans Players Caught in CS:GO Match-fixing*, ROCKPAPERSHOTGUN (Jan. 27, 2015, 2:00 PM), <https://www.rockpapershotgun.com/2015/01/27/counter-strike-global-offensive-match-fixing/> [<https://perma.cc/JW5C-NQ2Y>].

¹⁵⁰ Lewis, *supra* note 148.

casinos which are heavily regulated,¹⁵¹ the lack of oversight in virtual property and eSports betting continues to make scandals like match fixing more possible than in other betting markets.¹⁵²

It is, of course, possible for the government to criminalize outright online gambling, with or without virtual property; as the poker example shows, however, even with very limited legal options available, American citizens will seek out those sites which still remain available to them.¹⁵³ It is better for those who do wish to partake in gambling that the government does regulate providers, as it is safer if the government is able to establish a market and regulate it to prevent fraudulent or illegitimate parties from preying on American gamblers.¹⁵⁴ Further, regulations allowing virtual item gambling would likely attract more established, legitimate providers into the American market, as the looming risk of the UIGEA or other criminal statutes would no longer exist.¹⁵⁵ It is even possible that publishers like Valve would themselves get involved in the potentially lucrative market, taking intermediaries out of the equation and streamlining the marketplace for all involved.¹⁵⁶

While gambling is the primary concern of this Note, there are other concerns stemming from the general lack of regulation on virtual property as well (though these concerns are admittedly not addressable via UIGEA implementation). Since many virtual items are sold via black market transactions—that is, outside any marketplace officially sanctioned by game publishers—buyers are susceptible to scams and other pitfalls along the way.¹⁵⁷ There is also the potential for outright theft, for which a victim would have no recourse without recognizance of the inherent value in virtual property.¹⁵⁸ If the goal is fairness and protection for consumers of

¹⁵¹ See, e.g., *Gaming Statutes & Regulations*, NEV. GAMING COMM'N, <http://www.gaming.nv.gov/index.aspx?page=51> [<https://perma.cc/753S-FKAY>] (listing the many regulations of the Nevada Gaming Commission and Nevada Gaming Control Board).

¹⁵² Brustein & Novy-Williams, *supra* note 95.

¹⁵³ Nevill, *supra* note 49, at 225.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 229.

¹⁵⁷ Chein, *supra* note 36, at 1068–69.

¹⁵⁸ Arias, *supra* note 36, at 1308.

software which features virtual property, it would seem that there is some necessity to reimagine how the public and the courts in the United States view said property.

Beyond these practical concerns, there would be other benefits to regulation of virtual property as well. First and foremost is the potential taxation revenue should virtual property be recognized as having real value.¹⁵⁹ Given the estimated \$5 billion in gambling revenue in 2016 from CS:GO items alone, the potential windfall to both state and federal revenue services would not be insignificant.¹⁶⁰ Additionally, many virtual item gambling websites are located outside of U.S. jurisdiction.¹⁶¹ Should the UIGEA be implemented on virtual property gambling sites in a similar way to its implementation against poker websites, it can be argued that it is a “protectionist statute geared to harbor United States currency from being expatriated offshore.”¹⁶² As discussed in Part III of this Note, the IRS already recognizes income derived from sales of virtual items within Steam’s community marketplace.¹⁶³ It would seem to be a narrow conceptual leap to require Valve and other publishers utilizing virtual property in their software to track more carefully virtual item transactions; practically speaking, however, this might not be feasible, given the sheer number of transactions taking place on a regular basis.¹⁶⁴

¹⁵⁹ Ackerman, *supra* note 17, at 185–86.

¹⁶⁰ Assael, *supra* note 4.

¹⁶¹ *Id.* (discussing sites “opening in tax havens like Antigua or in untraceable locations in Russia or China”).

¹⁶² Tselnik, *supra* note 45, at 1632.

¹⁶³ See *supra* Part III; *Community Market FAQ*, *supra* note 63.

¹⁶⁴ At one point in late 2013/early 2014, there were two million Steam transactions taking place per day. Jenna Pitcher, *Steam Holiday Sale saw 2M daily community market transactions, 2M Snow Globe card trades*, POLYGON (Jan. 15, 2014, 11:18 PM), <http://www.polygon.com/2014/1/15/5313958/steam-holiday-sale-saw-2m-daily-community-market-transactions-2m-snow> [<https://perma.cc/VXA4-7W88>]. Since that time, the number of Steam users has doubled—from seven million to over fourteen million in January 2017—suggesting that considerably more transactions would be taking place now. *Number of peak concurrent Steam users from November 2012 to July 2017 (in millions)*, STATISTA (last visited Nov. 13, 2017), <https://www.statista.com/statistics/308330/number-stream-users/> [<https://perma.cc/MDR9-K7DW>].

B. Alternatives to the UIGEA

As demonstrated by this Note, the current gray area in which virtual property and virtual item gambling reside is not likely to last.¹⁶⁵ There are a number of good reasons, both substantive and policy, for government regulation of these markets.¹⁶⁶ While the UIGEA is likely to be a successful method of doing so, there are a number of regulatory schemes to which the government may look in order to accomplish its goals.¹⁶⁷

First, there are several anti-gambling statutes currently enacted, besides the UIGEA, to which regulators could turn in order to crack down on virtual property gambling.¹⁶⁸ One of these is the Wire Act, which criminalizes the transmission of wagering information.¹⁶⁹ Rather than targeting the payment providers as the UIGEA does,¹⁷⁰ the Wire Act targets those “engaged in the business of betting or wagering” electronically, originally via telephone but now construed to include the Internet as well.¹⁷¹ The major downside of the Wire Act is that courts have found that its statutory language refers only to wagers made on sports.¹⁷² Other statutes have similar limitations; the Travel Act, for example, is not enforceable upon new forms of gambling unless they have been specifically enumerated.¹⁷³ Ultimately, of the existing anti-gambling statutes, the UIGEA is the newest, and likely the best-equipped to handle the unique issues that virtual property presents.¹⁷⁴

Other possible solutions are more regulatory in nature, similar to what has been proposed for online poker. One suggestion follows the fact that most states that currently allow gambling have their own state Gaming Commission or a similar office that

¹⁶⁵ Grove, *supra* note 136, at 5.

¹⁶⁶ Chein, *supra* note 36, at 1068; Nevill, *supra* note 49, at 222–24.

¹⁶⁷ Tselnik, *supra* note 45, at 1626.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Nevill, *supra* note 49, at 210.

¹⁷¹ Tselnik, *supra* note 45, at 1626 (quoting 18 U.S.C. § 1084(a) (2000)).

¹⁷² *Id.* at 1627 (referencing *In re Mastercard Int'l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002)).

¹⁷³ *Id.* at 1627–28 (quoting 18 U.S.C. § 1952(a) (2000)).

¹⁷⁴ See *supra* text accompanying notes 140–41.

regulates all gambling within the state—a nationwide version of this equipped specifically to handle and license online gambling, including virtual item gambling, would be quite useful for the purposes of oversight.¹⁷⁵ The inclusion of virtual property currency would pose a complication, but as discussed previously, it is similar enough to tangible property that doing so should be feasible.¹⁷⁶

Poker suggests a different solution as well. Currently, three states have legalized intrastate online poker networks.¹⁷⁷ If the federal government were unwilling to step in and regulate virtual item gambling on a nationwide basis, states may do so on their own, as befits the culture and moral views of each individual population.¹⁷⁸ The downside of this approach is that, like in poker, these sites would only be available to those residing within the state itself, and the pool of bettors would be considerably diminished.¹⁷⁹ Still, for those residing in states which would agree to legalize these forms of gambling, it would undoubtedly be better than nothing.¹⁸⁰

The final potential regulatory scheme would be a nationwide legislative one. Several states have enacted laws recognizing new forms of currencies, such as Bitcoin and other cryptocurrencies;¹⁸¹ similarly, if Congress were to simply legislate a legal understanding of virtual property, many of the issues at question in this Note would be cleared up. Even simply recognizing that users have property rights in the virtual items they obtain and possess would allow software users to enjoy the full legal protections of existing property laws and regulations,¹⁸² and allow the IRS or other agencies to treat virtual property just like any other form of property for the purposes of regulation and taxation.¹⁸³ This approach would seem preferable, due to its ability

¹⁷⁵ Nevill, *supra* note 49, at 227.

¹⁷⁶ *See supra* text accompanying note 69.

¹⁷⁷ Flynn, *supra* note 52.

¹⁷⁸ Tselnik, *supra* note 45, at 1637–38.

¹⁷⁹ Flynn, *supra* note 52, at 78.

¹⁸⁰ Tselnik, *supra* note 45, at 1637–38.

¹⁸¹ *See, e.g.*, N.H. REV. STAT. ANN. § 399-G:25 (2016) (establishing a commission to study cryptocurrencies); CAL. PENAL CODE § 320.6 (West 2016) (prohibiting the sale of raffle tickets in exchange for Bitcoin or any other cryptocurrency).

¹⁸² Ackerman, *supra* note 17, at 183.

¹⁸³ *Id.* at 186.

to settle a multitude of issues; still, care would have to go into crafting any such legislation, and given the moral disdain many lawmakers seem to have toward gambling,¹⁸⁴ this approach does not seem likely to bear fruit in the current political climate.

CONCLUSION

As virtual worlds in video games and other software continue to be developed and released to consumers, so too will virtual property within those worlds. Currently, there is very little regulation of virtual property in the United States, which has led to various legally suspect uses of these in-game items. The proliferation of websites and other parties offering gambling services is perhaps the most notable of these; in the current deregulated system, there is nothing stopping individuals from creating their own system for taking wagers without any regard to whom their customers are. This, however, cannot last—if companies such as Valve do not take steps to self-regulate the virtual property under their control, it is likely that the U.S. government will instead step in, and do so sooner rather than later. The UIGEA is one possible method by which it might do so, and is one that would likely be successful. Nevertheless, it is not so much a matter of if, so much as it is a matter of when and how.

¹⁸⁴ Tselnik, *supra* note 45, at 1620.