

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

May 9, 2016

To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “Daily Fantasy Sports: Issues and Perspectives”

On Wednesday, May 11, 2016, at 10:15 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing titled “Daily Fantasy Sports: Issues and Perspectives.”

I. BACKGROUND

Users of fantasy sports can create virtual teams of real-life professional athletes selected from the league’s full roster, which compete against other virtual teams.¹ The fantasy team’s success is based on the statistical performances of the individual players over the course of a season.² Daily fantasy sports (DFS) are a subset of traditional fantasy sports, in which users

¹ *An Uncertain Line Between Fantasy Sports, Gambling*, Boston Globe (Aug. 2, 2015) (online at www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html).

² *The NFL’s Hypocritical Stance on Fantasy Football and Gambling*, Vox (Aug. 25, 2015) (online at www.vox.com/2015/8/25/9201183/fantasy-football-gambling-nfl).

rebuild teams and compete daily or weekly.³ Players pay an entry fee to participate in most DFS contests, in which they compete with other players to earn a share of the prize pool.⁴

DFS generated an estimated \$3.7 billion in entry fees in 2015, and the market is projected to grow up to 41 percent annually.⁵ DraftKings and FanDuel alone account for 95 percent of the North American market.⁶ The industry-backed Fantasy Sports Trade Association (FSTA) reports that 56.8 million people spent an average of \$465 each on DFS sites in 2015.⁷ DFS are most popular among players who are male, educated, and under the age of 40.⁸

DFS have the potential to positively affect a number of industries beyond DFS companies and professional sports organizations, including broadcast television, sports journalism, and sports marketing.⁹ For example, FanDuel users consumed 40 percent more sports content across all media when they started playing DFS.¹⁰

II. LEGAL LANDSCAPE

A. Federal Level

³ *A Primer on Daily Fantasy Football Sites*, New York Times (Oct. 6, 2015) (online at www.nytimes.com/2015/10/07/sports/football/a-primer-on-daily-fantasy-football-sites.html); *FanDuel, How It Works* (online at www.fanduel.com/how-it-works) (accessed Mar. 21, 2016); *DraftKings, How to Play* (online at www.draftkings.com/help/how-to-play) (accessed Mar. 21, 2016).

⁴ *Id.*

⁵ *Yahoo Will Enter Daily Fantasy Sports Market*, New York Times (July 8, 2015) (online at www.nytimes.com/2015/07/09/technology/yahoo-will-enter-daily-fantasy-sports-market.html); *Daily Fantasy Sports Metrics For 2015: NBA, MLB Made In-Roads on NFL in Entry Fees*, Legal Sports Report (Jan. 22, 2016) (online at www.legalsportsreport.com/7487/dfs-industry-money-in-2015/).

⁶ *Daily Fantasy-Sports Operators Await Reality Check*, Wall Street Journal (Sept. 9, 2015) (online at www.wsj.com/articles/daily-fantasy-sports-operators-await-reality-check-1441835630).

⁷ Fantasy Sports Trade Association, *Industry Demographics* (online at fsta.org/research/industry-demographics) (accessed Mar. 21, 2016).

⁸ *Id.*

⁹ *Leagues See Real Benefits in Daily Fantasy Sports*, USA Today (Jan. 1, 2015) (online at www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279); *An Ad Blitz for Fantasy Sports Games, but Some See Plain Old Gambling*, New York Times (Sept. 16, 2015) (online at www.nytimes.com/2015/09/17/sports/football/draftkings-fanduel-fantasy-sports-games.html?rref=collection%2Fnewseventcollection%2Fsports-betting-daily-fantasy-games-fanduel-draftkings).

¹⁰ *Id.*

The Professional and Amateur Sports Protection Act of 1992 (PASPA) prohibits sports betting nationally, except in four states in which sports betting was legal prior to passage of the Act.¹¹ Online sports betting and online gambling are also prohibited under Federal law.¹² Under the Interstate Wire Act of 1961, interstate sports betting is prohibited through the use of “wire communications facilities,” including telephones and the Internet, except for betting transactions between states in which such activity is legal.¹³ Online gambling of other kinds, including Internet poker, is prohibited under the Unlawful Internet Gambling Enforcement Act (UIGEA).¹⁴

Despite being illegal in most states, traditional sports betting remains widespread and functions almost exclusively through organized crime.¹⁵ Of the estimated \$400 billion spent annually in the U.S. on sports betting, 99 percent is illegal.¹⁶

Daily fantasy sports operators rely on a provision of UIGEA that has become known as the fantasy sports “carve-out.”¹⁷ Under the carve-out, fantasy sports games that meet the following three criteria are exempt from the prohibitions in UIGEA: (1) the value of prizes are not determined by the number of participants or the amount of fees paid by participants, (2) winning outcomes must be based on skill, not chance, and (3) outcomes must not be based on the score or statistics of an individual athlete in a single event.¹⁸

DFS operators may also be exposed to federal criminal liability under the Illegal Gambling Business Act (IGBA) if they violate state gambling laws.¹⁹ The U.S. Attorney’s Office in the Middle District of Florida is reportedly investigating possible IGBA violations by DFS companies.²⁰ The U.S. Department of Justice and the Federal Bureau of Investigation have

¹¹ 28 U.S.C. § 3701-3704

¹² 31 U.S.C. § 5361-5367; 18 U.S.C. § 1084.

¹³ 18 U.S.C. § 1084.

¹⁴ 31 U.S.C. § 5362.

¹⁵ *Legalization of Sports Betting Would Be Huge Revenue Producer for Leagues, Expert Says*, Forbes (Sept. 19, 2014) (online at www.forbes.com/sites/davidlariviere/2014/09/19/legalization-of-sports-betting-would-be-huge-revenue-producer-for-leagues-expert-says/#335d989d7510).

¹⁶ *Id.*

¹⁷ *What's Next for the Daily Fantasy Industry?*, ESPN (Oct. 16, 2015) (online at espn.go.com/chalk/story/_/id/13901061/chalk-next-draftkings-fanduel-daily-fantasy-industry).

¹⁸ See note 14.

¹⁹ 18 U.S.C. § 1955.

²⁰ *Attorney: Federal Grand Jury in Tampa Investigating Fantasy Sports Operators*, Tampa Bay Times (Oct. 10, 2015) (online at www.tampabay.com/news/courts/criminal/attorney-florida-grand-jury-investigating-fantasy-sports-operators/2249225).

also begun investigating whether business practices used by DFS operators comply with federal law.²¹

B. State Level

Questions regarding the legality of DFS are currently being resolved on a state-by-state basis. Whether DFS is legal in a state has been generally dependent on the particular state's laws on gaming. In all states, gambling involves people wagering money on the outcome of a game or contest involving chance, with the winner receiving a prize.²² The degree of chance required varies among the states.²³ In most states, a game is gambling if chance is the predominant factor.²⁴ Some states prohibit all games that involve any degree of chance at all.²⁵ And in other states, a game is gambling if the degree of chance is a material element of the game.²⁶

Regulators in Kansas, Maryland, Massachusetts, and Rhode Island have stated that existing state law does not forbid DFS.²⁷ Virginia, Indiana, Tennessee, and Mississippi have passed laws explicitly legalizing DFS.²⁸

In contrast, regulators in some states, including Georgia, Hawaii, Illinois, New York, Texas, and Vermont have said that DFS are a form of illegal gambling under existing state law.²⁹ In Arizona, Iowa, Louisiana, Montana, and Washington, daily fantasy sports have long been considered banned.³⁰ In October 2015, Nevada regulators classified DFS as gambling and

²¹ *FBI, Justice Department Investigating Daily Fantasy Sports Business Model*, Wall Street Journal (Oct. 15, 2015) (online at www.wsj.com/articles/fbi-justice-department-investigating-daily-fantasy-sports-business-model-1444865627).

²² *Fantasy Sports vs. Illegal Gambling: Where's the Line?*, CNBC (Apr. 6, 2015) (online at www.cnbc.com/2015/04/06/fantasy-sports-vs-illegal-gambling-wheres-the-line-commentary.html).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Daily Fantasy Sports State-By-State Tracker*, ABC News (Apr. 12, 2016) (online at abcnews.go.com/Sports/daily-fantasy-sports-state-state-tracker/story?id=38332096).

²⁸ *Id.*; *Lightning Strikes Twice for Fantasy Sports in One Day: Mississippi Passes Bill*, Legal Sports Report (Apr. 19, 2016) (online at www.legalsportsreport.com/9606/mississippi-legislature-passes-dfs-bill/). Mississippi's governor has not yet signed the bill into law.

²⁹ *Fantasy Sports Games Make a Play for Legitimacy*, Washington Post (Mar. 18, 2016) (online at www.washingtonpost.com/local/virginia-politics/fantasy-sports-games-make-a-play-for-legitimacy/2016/03/17/0b56f244-e6df-11e5-b0fd-073d5930a7b7_story.html).

³⁰ *Id.*

ordered DFS sites to cease operation in the state until they obtained a state gambling license.³¹ Legislation to legalize DFS has been introduced or is being considered in 26 states.³²

Tribal gaming operators have opposed bills allowing DFS in Arizona, California, and Oklahoma, arguing that forbidding other forms of online gaming while expressly allowing DFS would unfairly disadvantage tribes.³³

III. INDUSTRY INVESTMENT IN DFS

Professional sports leagues have embraced DFS as a means to increase revenues and fan engagement.³⁴ The National Basketball Association (NBA), Major League Baseball (MLB), the National Hockey League (NHL), and Major League Soccer (MLS) have each heavily invested in DFS through the purchase of ownership interests or sponsorship agreements.³⁵

In addition to league investments, teams across professional sports have formed partnerships with daily fantasy sports operators. Eleven NHL teams, 25 NBA teams, and 27 of 30 MLB teams are sponsored by daily fantasy sports operators.³⁶ Although the National Football League (NFL) has not formally partnered with any daily fantasy sports operators, 28 NFL teams plus the NFL Players Association have formalized sponsorship deals with daily fantasy sports operators.³⁷

³¹ *Nevada Says It Will Treat Daily Fantasy Sports Sites as Gambling*, New York Times (Oct. 15, 2015) (online at www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html).

³² See note 27.

³³ *Powerful Casino Tribes Raise Concerns with California Fantasy Sports Bill*, Sacramento Bee (Feb. 10, 2016) (online at www.sacbee.com/news/politics-government/capitol-alert/article59647811.html); *Tribal Gaming Interests Waking up on Fantasy Sports: Oklahoma Coalition Quashes Bill*, Legal Sports Report (Mar. 21, 2016) (online at www.legalsportsreport.com/9116/tribes-and-fantasy-sports).

³⁴ *Frontline: The Fantasy Sports Gamble*, PBS (Feb. 9, 2016).

³⁵ See note 1; *NBA Signs Four-Year Deal With FanDuel That Includes Equity Stake In Fantasy Company*, Sports Business Daily (Nov. 12, 2014) (online at www.sportsbusinessdaily.com/Daily/Issues/2014/11/12/Marketing-and-Sponsorship/NBA-FanDuel.aspx); *DraftKings and Major League Baseball Extend Exclusive Partnership*, Forbes (Apr. 2, 2015) (online at www.forbes.com/sites/darrenheitner/2015/04/02/draftkings-and-major-league-baseball-extend-exclusive-partnership/); *The Side of Gronk You Don't See: One-on-One with the Party-Hardy Patriots Star*, Esquire (Aug. 17, 2015) (online at www.esquire.com/sports/a37211/rob-gronkowski-interview-draftkings-shoot/).

³⁶ *DFS Partnership/Sponsorship Tracker*, Legal Sports Report (online at www.legalsportsreport.com/dfs-sponsorship-tracker/) (accessed May 6, 2016).

³⁷ *Id.*

IV. WITNESSES

Steve Brubaker

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Kurt Eggert

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