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FEDERAL REGULATION OF DAILY FANTASY
SPORTS

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THE WINNING LINEUP: FRAMEWORK FOR FEDERAL REGULATION OF DAILY FANTASY SPORTS

Lars A. Peterson *

INTRODUCTION

From modest origins dating back to the 1960s, fantasy sports have grown and evolved into a multi-billion dollar¹ industry that the “founding fathers” of fantasy sports never imagined. The explosive growth of fantasy sports, which has inched closer and closer to online gambling, coupled with the large sums of money involved and consumer protection concerns, make it unsurprising that the government has sought to regulate the industry.

Daily Fantasy Sports (“DFS”) have received a variety of regulatory treatments from individual states, from outright bans to no regulation at all. At the federal level, DFS are largely unregulated. However, “fantasy sports” are mentioned as an exception under Title VIII of the SAFE Port Act (Unlawful Internet Gambling Enforcement Act of 2006) (“UIGEA”), as they do not constitute a “bet or wager.”² Until recently, new iterations of fantasy sports presumably fell within the “fantasy sports” exception in UIGEA. It is, however, questionable that the drafters of UIGEA ever contemplated the ramifications of what the fantasy sports industry would become when drafting this exception. In fact, UIGEA co-author, Jim Leech, confirmed these doubts.³ While DFS have been operating under the UIGEA

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¹ *The Lucrative and Growing Fantasy Football Industry*, SPORTS MANAGEMENT DEGREE HUB, <https://www.sportsmanagementdegreehub.com/fantasy-football-industry/> (last visited Feb. 24, 2018).

² Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362 (2018) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game . . .”).

³ Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal and Completely Unregulated*, THINKPROGRESS (May 7, 2015, 12:31 PM), <https://thinkprogress.org/the-hot-new-form-of-fantasy-sports-is-probably-addictive-potentially-illegal-and-completely->

exception at the federal level, states have taken it upon themselves to determine if and how to regulate DFS.

A number of states are still in limbo, trying to find the appropriate way to regulate this potentially lucrative industry,⁴ Pennsylvania is one of the latest states to enact legislation.⁵ Due care must be exercised in regulating DFS to strike the appropriate balance, between too much and too little regulation, to ensure the survival and growth of DFS companies. The appropriate balance should allow DFS companies to be a source of revenue while ensuring consumers are able to freely participate in DFS contests and are protected while they do so. The state-by-state approach has resulted in an inconsistent regulatory framework for DFS companies to follow, and has required those companies to lobby for the right to operate in various states under differing regulations.

The inconsistent patchwork of state regulations either prohibits access to DFS contests in states that deem such contests illegal, or subjects DFS to varying levels of regulation depending on which state an individual resides in. Furthermore, the inconsistent approaches taken by states put DFS operators in a position where they have to comply with many different consumer protection protocols while having to segregate their revenue on a state-by-state basis to comply with the different tax rates and licensing fees imposed by states that have chosen to regulate DFS. The slow-moving regulatory process has also impeded the ability of the DFS industry to grow, with some temporary regulations adopted by states prohibiting DFS operators from offering new sports or types of contests until the state settles on an approach.⁶ The state-by-state approach not only stymies the development of the actual product, but also hurts the industry's growth, with DFS operators spending millions of dollars

4c90c89db63b/ ("The assumption was that while unconstrained Internet gambling could change the nature of America's savings and investment patterns, fantasy sports would be a 'de minimus' footnote. No one ever conceived of it becoming a large scale activity or that it could transition into one-day contests.").

⁴ See Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/dfs-bill-tracker/> (last visited on Mar. 3, 2018).

⁵ Dustin Gouker, *Add Another Win for DraftKings, FanDuel: PA Becomes 17th State to Enact Daily Fantasy Sports Law*, LEGAL SPORTS REPORT (Oct. 30, 2017), <https://www.legalsportsreport.com/16329/pennsylvania-17th-state-to-legalize-daily-fantasy-sports/>; see 4 PA. CONS. STAT. § 301 *et seq.* (2017).

⁶ See Eric Ramsey, *New York Revisits Fantasy Sports Law a Year and a Half Later with Legislative Hearing*, LEGAL SPORTS REPORT (Jan. 10, 2018, 11:52 PST), <https://www.legalsportsreport.com/17670/ny-dfs-hearing/> ("Part of the proposed regulations block states from offering sports that they did not offer before Nov. 10, 2015. For FanDuel, that includes golf and soccer[.]").

fighting legal battles and lobbying for the legality of their businesses across the country.⁷ Perhaps the most concerning aspect of the state-by-state approach is that some states have not enacted any regulations, simply allowing DFS operators to police their own operations without any consumer protection measures in place.

DFS companies have agreed that it is time for a “formal, industrywide” regulatory approach,⁸ and federal regulation can provide that approach. This Note argues that a uniform federal regulatory framework is preferable to the state-by-state approach for regulating DFS to: (1) allow the industry to continue to grow without having to lobby for its legality; (2) generate revenue from the operation of DFS; and (3) ensure that the consumers are able to freely participate in DFS contests guarded by adequate consumer protection protocols. This Note proposes that Pennsylvania’s approach strikes the right balance and should serve as the basis for the federal regulatory framework, supplemented by a few provisions included in the approaches taken by other states including New York and Massachusetts.

Part I of this Note details the background and origin of fantasy sports along with their current state: DFS. Part II examines the regulatory approaches of a sample of states that have weighed in on DFS regulation. Part III focuses on Pennsylvania’s DFS legislation. Part IV explores the grounds for federal regulation of DFS. Finally, Part V proposes a framework for federal regulation of DFS, based largely on Pennsylvania’s recent legislation.

I. THE BACKGROUND OF FANTASY SPORTS AND THEIR CURRENT STATE

Fantasy sports are defined as, “any sports competition with imaginary teams which the participants own, manage, and coach and with the games based on

⁷ Curt Woodward, *Daily Fantasy Sports Business Gets a Dose of Reality*, BOSTON GLOBE (Jan. 6, 2017), <https://www.bostonglobe.com/business/2017/01/06/daily-fantasy-sports-business-gets-dose-reality/8ShpChIgaD2S8UKguJbdQP/story.html> (“DraftKings and FanDuel, which account for more than 90 percent of the market, diverted millions of dollars into legal and lobbying campaigns last year after state regulators questioned whether the companies’ cash-prize games amounted to illegal gambling.”).

⁸ Dustin Gouker, *FanDuel CEO Nigel Eccles: “Now is the Time” for Government Regulation of Daily Fantasy Sports*, LEGAL SPORTS REPORT (Oct. 29, 2015, 8:10 PST), https://www.legalsportsreport.com/5672/fanduel-ceo-government-regulation/#What_Eccles_wrote_to_FanDuel_users (“That said, it has become apparent to me that our industry has grown to a size where a more formal, industrywide approach is needed. To be clear, our industry needs strong, common sense, enforceable consumer protection requirements to ensure its continued growth and success. A number of smart, but tough proposals in various state legislatures have begun to emerge, which I believe can serve as the basis for the sensible regulation of the fantasy sports industry.”).

statistics generated by actual players or teams of a professional sport.”⁹ The conception of the first fantasy sports league is subject to debate, but most estimates trace the origin of fantasy sports to around 1960. One account credits Bill Gamson, a Harvard research associate, with constructing the first fantasy sports league in the 1960s.¹⁰ Gamson’s “baseball seminar” involved a group of friends each paying ten dollars, creating an imaginary budget to draft a team of players, and keeping score based on statistics throughout the baseball season.¹¹ Also in the 1960’s, a group of Oakland Raiders fans created a variant of a fantasy football league; this was followed by the creation of the first public fantasy football league by a sports bar in Oakland, California in 1969.¹²

The next big step in the evolution of fantasy sports was “Rotisserie League Baseball.”¹³ Daniel Okrent is credited as coming up with this idea in 1980 while meeting with a group of sports journalists at a restaurant called La Rotisserie Francaise.¹⁴ Interestingly enough, Okrent became familiar with the concept of a fantasy sports league through one of Gamson’s former students, Robert Sklar, who participated in Gamson’s “baseball seminar.”¹⁵ Okrent’s “Rotisserie League” mirrored many modern fantasy sports leagues in that team “owners” would draft a team of Major League Baseball players, and follow their statistics throughout an ongoing season, while compiling scores based on these statistics.¹⁶

While the early variations of fantasy sports leagues were generally confined to personal friends and acquaintances, the internet allowed fantasy sports participation

⁹ DICTIONARY.COM, <http://www.dictionary.com/browse/fantasy-sport> (last visited Feb. 24, 2018).

¹⁰ Geoffrey T. Hancock, *Globalizing Secured Transaction Law: Current Problems, New Directions March 13–14, 2008: Note: Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 323 (2009).

¹¹ Hancock, *supra* note 10, at 323.

¹² Nico Newman, *History of Fantasy Sports*, FANTASY-SPORT.NET (Apr. 4, 2017), <https://fantasy-sport.net/history-of-fantasy-sports/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 6 (2012).

¹⁶ Newman, *supra* note 12.

to grow exponentially.¹⁷ The internet enabled statistics to be compiled quickly and easily,¹⁸ and allowed people to connect with and enter leagues with people all over the country—and even the world—so long as they had a computer with connection to the internet. To put the growth of fantasy sports into numbers, it is estimated that as of 2017, 59.3 million people in the United States and Canada play some form of fantasy sports, compared to 500,000 in 1988.¹⁹ The current smartphone era has helped fantasy sports to become even more pervasive; it is estimated that 39% of fantasy sports players primarily use a mobile device, as opposed to only 25% in 2012.²⁰

The traditional fantasy sports leagues that developed over time were season-long, head-to-head leagues where a number of “owners” draft a roster of players to different positions from the given sport. These leagues are usually hosted by an internet entity such as ESPN, Yahoo, or CBS. The teams in these leagues score points based on the players’ performance, with the team that scores more points in that week’s head-to-head matchup winning. Eventually the seasons culminate in bracketed playoffs that crown one winner.

Today, fantasy sports have taken a new form in addition to the former norm of season-long leagues. The “new norm” of fantasy sports is DFS. The emergence and popularity of DFS was largely initiated by two of the biggest DFS companies: FanDuel and DraftKings, founded in 2009 and 2012 respectively.²¹ On a general level, DFS are not drastically different than their season-long fantasy league predecessors. As their names suggest, the chief difference between DFS and the season-long fantasy leagues is their duration: DFS generally last a maximum of a few days, while the other leagues last for the entire sporting season.²² Other differences include: (1) paying entry fees for each individual contest; (2) a participant can theoretically draft the exact same team as someone else; (3) teams are

¹⁷ See *Fantasy Sports Demographic Information*, FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.org/research/industry-demographics/> (last visited Feb. 24, 2018).

¹⁸ Will Leitch, *The Evolution of Fantasy Sports*, SPORTS ON EARTH (Aug. 31, 2015), <http://www.sportsonearth.com/article/146446906/evolution-fantasy-football-sports-draft>.

¹⁹ *Fantasy Sports Demographic Information*, *supra* note 17.

²⁰ *Id.*

²¹ *The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited Feb. 24, 2018).

²² *Playing Daily Fantasy Sports for Dummies and er. . . You!*, DAILY FANTASY SPORTS 101, <https://www.dailyfantasysports101.com/basics/> (last visited Feb. 24, 2018).

drafted independently via a salary cap; and (4) the participants are paid their winnings immediately.²³

To participate in DFS, an individual must create an account with a DFS provider, such as FanDuel or DraftKings, and deposit money into their account to be used for entry fees.²⁴ Subsequently, a participant can enter a contest by paying an entry fee and drafting a team of players through a predetermined salary cap where players each have a corresponding price tag based on how well they usually perform.²⁵ Similar to the season-long format, players generate points based on their statistical performance. DFS contests, which vary in format, typically denote the number of people who will win money in any given contest based on where their entry falls in terms of points scored compared to the other entries in the same contest.²⁶

Until 2015, DFS providers operated in relative obscurity, escaping regulation on both the federal and state level. In 2015, DFS companies made their presence known through massive and aggressive advertising campaigns at the start of the NFL season.²⁷ Until this time, DFS had been operating under the fantasy sports exception of UIGEA even though the drafters never contemplated such an expansive industry when this law was passed.²⁸ Operating in a largely unregulated manner, DFS companies helped the fantasy sports industry take in more money than the actual sports leagues they are based upon.²⁹ The legal landscape changed, and the dominoes in the regulatory battle began to fall in 2015, when a DraftKings employee accidentally leaked company data before the NFL's week three games, and

²³ *Id.*

²⁴ Roni Mathew, *The Legality of Daily Fantasy Sports is in Gamble in Some States: A Closer Look at New York and Delaware's Response to This New(ish) Trend*, 24 JEFFREY S. MOORAD SPORTS L.J. 275, 276 (2017).

²⁵ Mathew, *supra* note 24, at 276–77.

²⁶ *Id.* at 277.

²⁷ Lori W. Sieron, *Increasing Regulation of Daily Fantasy Sports Games*, LEXISNEXIS: LEXIS PRACTICE ADVISOR J. (Mar. 11, 2016), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2016/03/11/increasing-regulation-of-daily-fantasy-sports-games.aspx>.

²⁸ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362 (2012); *see supra* note 3.

²⁹ Andrew Powell-Morse, *The Unstoppable Rise of Fantasy Sports*, SEATSMART (Nov. 4, 2015), <https://perma.cc/Y5YL-HZVH>.

subsequently won \$350,000 on an entry hosted by their industry rival FanDuel.³⁰ This led to allegations of insider trading, but, more importantly, garnered the attention of lawmakers, leading them to examine whether DFS constitutes a form of illegal online gambling despite the exclusion of fantasy sports under UIGEA.³¹

The ensuing legislative and regulatory battle has been expansive and has affected nearly all fifty states because the regulation of DFS has taken a state-by-state approach in the absence of federal regulation. On their face, it would appear that DFS, and DFS in general, have taken the fantasy sports scene by storm and are almost bottomless money pits to be regulated, as evidenced by the large sums of money they take in through contest entry fees. Their actual revenue figures paint a different picture, with industry giants FanDuel and DraftKings operating at losses of millions of dollars each year.³² While operating at a loss is relatively normal for startup companies, and both of these DFS giants have both been around for fewer than ten years, it is somewhat concerning that these companies have not been able to turn a profit with the massive amount of money associated with fantasy sports. One contributing factor for their lack of profitability to date is the ongoing legal struggle with DFS legalization and regulation.³³ This struggle was evidenced by the failed merger attempt by DFS industry giants FanDuel and DraftKings this past year.³⁴ A primary motivating factor behind the proposed merger was the exorbitant amounts of money both companies were spending on legal and regulatory battles they were facing all over the United States.³⁵ With the two biggest companies in the industry

³⁰ Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

³¹ *Id.*

³² Dan Primack, *The DraftKings, FanDuel Financials*, AXIOS (June 20, 2017), <https://www.axios.com/the-draftkings-fanduel-financials-2444723508.html>.

³³ See Tony Romm, *FanDuel is weighing whether to drop its merger with DraftKings*, RECODE (July 11, 2017, 7:30 PM), <https://www.recode.net/2017/7/11/15955616/fanduel-draftkings-merger-ftc-nigel-eccles-daily-fantasy-sports>; Woodward, *supra* note 7 (“DraftKings and FanDuel, which account for more than 90 percent of the market, diverted millions of dollars into legal and lobbying campaigns last year after state regulators questioned whether the companies’ cash-prize games amounted to illegal gambling.”); Alexandra Berzon, *Fantasy Sports Industry Mounts Lobbying Blitz*, WALL ST. J. (Feb. 15, 2016), <https://www.wsj.com/articles/fantasy-sports-industry-mounts-lobbying-blitz-1455585446> (“The companies are spending between \$5 million and \$10 million on the lobbying effort this year.”).

³⁴ The Associated Press, *DraftKings and FanDuel Call Off Merger*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/sports/draftkings-and-fanduel-call-off-merger.html>.

³⁵ See Joe Drape, *DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/sports/draftkings-fanduel-merger-fantasy-sports>

feeling the financial squeeze of fighting legal battles, it would be prudent for the federal government to issue effective regulation of DFS so that the industry can continue to blossom while protecting consumers.

II. STATES THAT ALLOW AND REGULATE DFS

To formulate the best way for the federal government to regulate DFS, it is important to examine some of the varied approaches that states have taken in order to learn from their mistakes and successes. After all, states have the unique ability to serve as laboratories of democracy in our federal system.³⁶

A. *New York*

The regulatory approach taken by New York garnered a lot of attention after the battle between DFS operators and New York's Attorney General.³⁷ The battle ultimately ended with the New York legislature granting DFS companies the right to operate. Enacted in 2016 as a temporary regulation, the statute begins by explicitly declaring fantasy sports to be a game of skill³⁸ and doubles down on this declaration by noting that interactive fantasy sports contests do not constitute gambling.³⁹

On the consumer protection front, the New York statute: (1) mandates that participants are limited to having one account; (2) prohibits minors from participating in contests; (3) includes protocols for players to exclude themselves from playing; and (4) ensures that player funds are segregated from the operator funds.⁴⁰ Furthermore, the New York statute addresses advertising by: (1) requiring operators to make clear, conspicuous, and accurate statements that are not misleading

.html; Erin Griffith, *5 Things to Know About the Failed FanDuel-DraftKings Merger*, FORTUNE (July 14, 2017), <http://fortune.com/2017/07/14/5-things-to-know-about-the-failed-fanduel-draftkings-merger/> (“This deal was supposed to reduce the amount of resources the companies were spending on regulatory issues. The companies argued that, separately, they were doubling the resources spent on legal battles.”).

³⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³⁷ See Press Release, New York State Office of the Attorney General, A.G. Schneiderman Issues Cease-And-Desist Letters to FanDuel And DraftKings, Demanding That Companies Stop Accepting Illegal Wagers in New York State (Nov. 11, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-issues-cess-and-desist-letters-fanduel-and-draftkings-demanding>.

³⁸ See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400 (2016).

³⁹ *Id.* § 1402.

⁴⁰ *Id.* § 1404.

concerning the chances of winning and number of winners; (2) requiring that advertisements about winnings must not be misleading; and (3) prohibiting advertising from targeting prohibited participants, minors, and self-excluded individuals.⁴¹

New York imposes a state tax on DFS operators at a rate of 15% of their gross revenue generated within the state, in addition to another tax equal to one-half of 1%, not to exceed \$50,000.⁴² To reinforce this tax, the bill requires DFS operators to submit to audits whenever deemed necessary to ensure they are providing the appropriate tax payments.⁴³ These taxes raised over \$3 million in revenue for New York in 2017, which was less than expected, but still far from insignificant.⁴⁴

Perhaps the most significant drawback of New York's regulation is a provision that limits licensed DFS operators to offering only those contests that were offered prior to November 2015.⁴⁵ Such a provision impedes the growth of DFS by discouraging further innovation and evolution and highlights the deficiencies of the state-by-state approach. With such a provision, participants in DFS contests may not be able to fully enjoy the variety of contests offered by DFS operators depending on which state they live in. Furthermore, it limits the potential revenue that would be generated by the additional offerings.

The current state of New York's regulation is in flux. In January 2018, the New York Assembly held a hearing to revisit the temporary regulations they enacted in 2016.⁴⁶ There is no indication from preliminary reports whether progress was made in finalizing the temporary regulations.⁴⁷ Additionally, the temporary regulations have been challenged as unconstitutional in New York.⁴⁸ This further highlights the

⁴¹ *Id.* § 1402.

⁴² *Id.* § 1407.

⁴³ *Id.* § 1406.

⁴⁴ Ramsey, *supra* note 6.

⁴⁵ N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1402 (2016); see Matthew Hamilton, *Daily fantasy sports companies see room for growth in New York*, TIMESUNION (Jan. 10, 2018, 1:27 PM), <https://www.timesunion.com/news/article/Daily-fantasy-sports-companies-see-room-for-12487560.php>.

⁴⁶ See *supra* note 45.

⁴⁷ See *id.*

⁴⁸ See Complaint, Jennifer White v. Cuomo, Index No. 5861-16, <http://stoppredatorygambling.org/wp-content/uploads/2016/10/2016-NY-DFS-lawsuit.pdf> (arguing that the law violates the State Constitution's Bill of Rights because DFS constitutes illegal gambling).

need for a set of uniform regulations for DFS as the battle for legality and regulatory clarity continues even after states like New York began regulating DFS.

B. Nevada

Perhaps the most unique stance on DFS regulation is the approach taken by Nevada. Currently, Nevada is the only state to actively categorize DFS as gambling and still allow them to operate.⁴⁹ In a memorandum from the Gaming Control Board Chairman, A.G. Burnett, DFS was deemed to constitute gambling in the form of either sports pools or lotteries.⁵⁰ Because of their status as gambling, Nevada requires that DFS cannot be offered without the proper sports pool or lottery licensure,⁵¹ which might seem like a victory for DFS operators—except that almost all DFS companies pulled out of Nevada after the release of the memorandum.⁵²

C. Massachusetts

An alternate regulatory approach that merits examination is the approach taken by Massachusetts. This approach focuses in large part on consumer protection.⁵³ The Massachusetts regulation does not charge a licensing fee for operators and does not impose taxes on revenue.⁵⁴ The 2016 regulation is novel in many aspects, including that it: (1) requires participants to be twenty-one years of age or older; (2) distinguishes between “beginner” players and highly-experienced players; (3) requires specific contests catered to the beginner and experienced groups of players; (4) requires fair and truthful advertising; (5) prohibits DFS operator employees from playing in almost all instances; and (6) establishes consumer complaint procedures.⁵⁵

⁴⁹ Daniel Roberts, *DraftKings and FanDuel are no longer allowed in Nevada*, FORTUNE (Oct. 16, 2015), <http://fortune.com/2015/10/15/fantasy-sports-nevada/>.

⁵⁰ Memorandum from J. Brin Gibson, Bureau Chief of Gaming and Government Affairs & Ketan D. Bhirud, Head of Complex Litigation to A.G. Burnett, Chairman, Nevada Gaming Control Board, Terry Johnson, Member, Nevada Gaming Control Board & Shawn Reid, Member, Nevada Gaming Control Board (Oct. 16, 2015), <https://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>.

⁵¹ *Id.*

⁵² See *Daily Fantasy Sports Offerings in Nevada*, PLAYNEVADA, <https://www.playnevada.com/fantasy-sports/> (last visited Mar. 4, 2018).

⁵³ See 940 C.M.R. § 34.01.

⁵⁴ See *id.* §§ 34.00–34.18.

⁵⁵ See *id.* §§ 34.04–34.10.

On the consumer protection front, this regulation is extremely desirable as it combats some of the scandals that have troubled DFS companies recently, such as the insider trading issue mentioned earlier where an employee of one operator leaked data and subsequently won a large amount of money through a competitor's contest.⁵⁶ Additionally, the requirement does not remedy already filed lawsuits alleging that DFS operators FanDuel and DraftKings engage in deceptive advertising techniques, thus harming consumers.⁵⁷ Under Massachusetts regulations, advertisements mentioning large individual winnings must now also include a disclosure of the average net winnings of all players.⁵⁸ Furthermore, the requirement that operators offer beginner-only contests works to ensure that the contests are fair for those just starting out. Massachusetts also sets out guidelines establishing a limit to the number of entries a participant can submit to a given contest.⁵⁹

Unsurprisingly, DFS operators DraftKings and FanDuel have responded positively to these regulatory measures,⁶⁰ most likely because they offer a legal avenue for their operation in Massachusetts without any added licensing fees or exorbitant taxes. This, however, could be subject to change as Massachusetts is currently considering legislation that would update their approach on DFS and add measures such as a licensing fee and a tax on revenue.⁶¹ The only significant drawback to the Massachusetts regulations from the DFS operator point of view is that the regulation limits the amount of money that any given user can deposit to \$1,000.⁶² This limits the revenue DFS operators can generate, as well as the amount of revenue that could potentially be taxed. The regulation does, however, provide an

⁵⁶ Drape & Williams, *supra* note 30.

⁵⁷ See Reuters, *DraftKings, FanDuel Pay Up to Settle Accusations of Deceptive Practices*, FORTUNE (Sept. 7, 2017), <http://fortune.com/2017/09/07/draftkings-fanduel-settle-accusations-deceptive-practices/>.

⁵⁸ Press Release, The Massachusetts Attorney General's Office, AG Healey Proposes Strong Consumer Protection Regulations for Daily Fantasy Sports Operations in Massachusetts (Nov. 19, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-11-19-daily-fantasy-sports.html>.

⁵⁹ See 940 C.M.R. § 34.12.

⁶⁰ Daniel Roberts, *Massachusetts Will Restrict Daily Fantasy Sports to Ages 21 and Up*, FORTUNE (Nov. 20, 2015), <http://fortune.com/2015/11/20/healey-fantasy-sports-regulation/>.

⁶¹ Dustin Gouker, *Massachusetts Bill Would Study Online Sports Betting, Create New Fantasy Sports Law*, LEGAL SPORTS REPORT (Jan. 23, 2018, 12:35 PST), <https://www.legalsportsreport.com/17943/massachusetts-sports-betting-fantasy-sports/>.

⁶² 940 C.M.R. § 34.10.

exception, where a player can deposit more than \$1,000, if it has been verified that he or she can economically sustain the potential losses.⁶³

D. Virginia

Virginia's regulatory approach combines consumer protection provisions with licensing fees, in an attempt to generate revenue from DFS operations.⁶⁴ In 2016, Virginia enacted the "Fantasy Contests Act," which legalized DFS while declaring that DFS contests do not constitute gambling and are a game of skill.⁶⁵ To operate in Virginia, DFS companies have to pay a \$50,000 registration fee and submit to an annual audit and test for regulatory compliance.⁶⁶ While these fees may not generate much revenue, it is still more than what the Massachusetts' regulatory measures generate. Virginia's Department of Agriculture and Consumer Service is tasked with overseeing the industry under the Fantasy Contests Act.⁶⁷

The Fantasy Contests Act is not quite as stringent from a consumer protection standpoint compared to the Massachusetts regulation. The Fantasy Contests Act: (1) requires contestants to be eighteen years of age or older; (2) prohibits the sharing of confidential information; (3) prohibits operators, their employees, and relatives living in the same house as the operator from competing in cash contests offered by that operator; and (4) requires the segregation of player funds from operational funds, among other things.⁶⁸ The Act, however, does not limit the amount of money an individual can deposit in a given time period or regulate advertisements.⁶⁹ Furthermore, the Virginia legislation relies on potential problem gamers to police themselves by requiring DFS operators to allow individuals to restrict themselves from playing.⁷⁰

⁶³ See *id.*; Press Release, *supra* note 58.

⁶⁴ See VA. CODE ANN. §§ 59.1-556–59.1-570 (2016).

⁶⁵ See Nick Statt, *Virginia Becomes First State to Formally Legalize Daily Fantasy Sports*, THE VERGE (Mar. 7, 2016, 8:26 PM), <https://www.theverge.com/2016/3/7/11176006/virginia-daily-fantasy-sports-law-draftkings-fanduel>; VA. CODE ANN. § 59.1-556 (2016).

⁶⁶ Statt, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ VA. CODE ANN. § 59.1-557 (2016).

⁶⁹ See *id.* §§ 59.1-556–59.1-70.

⁷⁰ See *id.* § 59.1-557.

III. PENNSYLVANIA'S LEGISLATION

In late October 2017, Pennsylvania Governor Tom Wolf signed an expansive bill that covers, among other things, the regulation of DFS.⁷¹ The portion of this statute relating to DFS is novel in many respects, but the fact that Pennsylvania was only the seventeenth state to legalize DFS⁷² serves to highlight the fact that there are still many more state-by-state battles for DFS companies to fight to achieve national legalization.

The Pennsylvania statute's definition of a "Fantasy Contest" includes reference to the winnings reflecting the knowledge and skill of participants,⁷³ suggesting they view DFS as a game of skill. The full definition of a "fantasy contest" in this statute is generally in line with the UIGEA fantasy sports exception definition.⁷⁴ Interestingly, Pennsylvania's statute distinguishes between the regulated DFS contests and "Social Fantasy Contests," which reflect the more traditional form of fantasy sports that DFS has seemingly usurped.⁷⁵

Pennsylvania requires DFS operators to obtain a license to operate within the state,⁷⁶ charging a licensing fee of \$50,000, and requiring a \$10,000 license renewal every five years.⁷⁷ Furthermore, the Pennsylvania statute taxes the gross revenue at a rate of 15%, which is on par with states like New York and Delaware.⁷⁸

From a consumer protection standpoint, people under eighteen years of age are not allowed to create accounts and DFS operators are required to: (1) implement procedures to verify the age, location, and identity of any participant prior to their making of a deposit for a fantasy contest; and (2) implement procedures for responding to participant complaints.⁷⁹ Like the regulation in Massachusetts,

⁷¹ Brittany Lovette, *Governor Wolf Signs Gambling Expansion Bill into Law*, WNEP (Oct. 31, 2017), <http://wnep.com/2017/10/31/governor-wolf-signs-gambling-expansion-bill-into-law/>.

⁷² Gouker, *supra* note 5.

⁷³ 4 PA. CONS. STAT. § 302 (2017) ("All winning outcomes reflect the relative knowledge and skill of participants.").

⁷⁴ *See id.*; Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362 (2012).

⁷⁵ *Id.*

⁷⁶ 4 PA. CONS. STAT. § 323 (2017).

⁷⁷ *Id.* § 324.

⁷⁸ *Id.* § 331; Gouker, *supra* note 5.

⁷⁹ 4 PA. CONS. STAT. § 325 (2017).

Pennsylvania requires DFS operators to offer contests limited to “beginners.”⁸⁰ Similarly, it prohibits the operators’ employees from entering into contests and sharing confidential information to prevent insider trading.⁸¹ The Pennsylvania statute also provides for protocols to assist problem gamers,⁸² including allowing participants to restrict their own ability to enter contests, limit the amount of money they can deposit, and providing conspicuous “compulsive and problem play” notices at fantasy contest registration points.⁸³ Additionally, the statute includes a clause requiring DFS operators to segregate their operational funds from player funds and to undergo an annual audit.⁸⁴

Perhaps one of the most innovative protections afforded by the Pennsylvania legislation is the requirement that DFS operators contract with a “testing laboratory” to verify compliance with the regulations set forth as conditions for their operation.⁸⁵ To date, no other regulation includes such a requirement, but requiring DFS operators to actively test their compliance with the applicable regulations will: 1) hold DFS operators in check, 2) ensure the line between DFS (i.e. a game of skill) and regular gambling is never crossed, and 3) offer more protection for consumers.⁸⁶ One addition to Pennsylvania’s statute is a clause requiring operators to maintain an office or place of business within the state.⁸⁷ This requirement would be rather onerous if adopted by all of the states, but uniform federal regulation of DFS could render such a requirement moot and allow DFS operators to maintain their current principal places of business.

Prior to the statute officially taking effect, DFS operators FanDuel and DraftKings reacted positively to it. A joint statement from the operators proclaimed that the law will “ensure fantasy sports contests offered by any company are transparent and fair for customers.”⁸⁸ Pennsylvania’s legislation has proved

⁸⁰ *Id.*; 940 C.M.R. § 34.12.

⁸¹ 4 PA. CONS. STAT. § 325 (2017).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 4 PA. CONS. STAT. §§ 311, 325 (2017).

⁸⁵ *Id.* § 311.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Gouker, *supra* note 5.

workable and profitable for DFS operators, even in the offseasons for most of the major sports leagues (football, basketball, hockey, etc.).⁸⁹ DFS generated over \$150,000 in tax dollars in June, after generating nearly \$200,000 in May, showing that regulating DFS can be profitable even with many major sports entering the offseason.⁹⁰

IV. POTENTIAL FOR FEDERAL REGULATION

While the state-by-state regulation of DFS is an approach rooted in federalism, it has resulted in inconsistent regulation at a high cost for DFS companies fighting for their legality state-by-state. This Note's proposed solution is for Congress to step in and provide a uniform standard for the regulation of DFS.

DFS regulation at the federal level was addressed in 2016 when Congress considered whether federal DFS regulation would be desirable during a House Energy and Commerce Committee hearing about DFS; however, the hearing yielded little progress in answering the ultimate question.⁹¹ The hearing conceded that DFS is an issue that needs to be addressed, potentially at the federal level, with one representative going as far as to declare that the "patchwork of differing and contradictory state laws has the potential to negatively impact consumers, and harm further growth and innovation."⁹²

Traditionally, the states have exercised their authority to define gambling activities through their police powers.⁹³ However, Congress has the power to weigh

⁸⁹ See Adam Candee, *Round Two in Pennsylvania Daily Fantasy Sports Goes to DraftKings*, LEGAL SPORTS REPORT (July 19, 2018, 12:18 PST), <https://www.legalsportsreport.com/22166/draftkings-pennsylvania-daily-fantasy-sports/>.

⁹⁰ See *id.*; see also Adam Candee, *FanDuel Is Outpacing DraftKings In Fantasy Sports Revenue, At Least In Pennsylvania*, LEGAL SPORTS REPORT (June 20, 2018, 14:47 PST), <https://www.legalsportsreport.com/21403/fanduel-pennsylvania-dfs-revenue/>.

⁹¹ Evan Grossman, *No closer to answering if daily fantasy sports should be federally regulated*, N.Y. DAILY NEWS (May 11, 2016, 2:39 PM), <http://www.nydailynews.com/sports/no-answer-feds-regulate-daily-fantasy-sports-article-1.2633261> ("It is not clear if there will be further hearings on the subject of fantasy sports and gambling, but it was clear after Wednesday's hearing that there seems to be an appetite for the legalization of both.").

⁹² Andrew Taylor, *Does Congress Need to Regulate Fantasy Sports*, PBS: NEWS HOUR (May 11, 2016, 12:58 PM), <https://www.pbs.org/newshour/nation/does-congress-need-to-regulate-fantasy-sports>.

⁹³ See Neville Firdaus Dastoor, Comment, *The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance Against Participation in Fantasy Sports Leagues that Involve the Exchange of Money*, 6 VAND. J. ENT. L. & PRAC. 355, 356 (2004) (noting that

in on this matter through the Commerce Clause, which allows Congress to “regulate commerce among the several states.”⁹⁴ Per the Commerce Clause, Congress may regulate activities having a substantial relation to interstate commerce.⁹⁵ As a billion dollar industry active in many different states,⁹⁶ there is no doubt that DFS can be seen to have a substantial effect on interstate commerce. Thus, it can be regulated through the commerce clause.⁹⁷ Any regulation by Congress would become “the supreme Law of the Land”⁹⁸ and supersede the patchwork of inconsistent state regulations currently in place.

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (“PASPA”),⁹⁹ which prohibited the government from licensing or authorizing betting, gambling, or wagering schemes based directly or indirectly on professional sports, effectively outlawing sports betting at the federal and state level, with one exception.¹⁰⁰ PASPA permitted states to pass their own laws legalizing sports betting within one year of the passage of the Act, but only four states did so.¹⁰¹ PASPA was especially relevant to DFS regulation as DFS contests are being questioned primarily as games of chance similar to sports betting,¹⁰² construing DFS to be sports betting

“the state has the power, duty and legitimate interest in regulating gambling activities via its police powers because of the readily apparent public policy considerations”).

⁹⁴ U.S. CONST. art. I, § 8, cl. 3 (“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”); Erick S. Lee, *Play Ball: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper Competitive Leagues*, 29 LOY. L.A. ENT. L. REV. 53, 72 (2008) (“As gambling is traditionally seen as a vice affecting public welfare and health, it is commonly subjected to state control under traditional police powers rather than federal regulation.”).

⁹⁵ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

⁹⁶ See *The Lucrative and Growing Fantasy Football Industry*, SPORTS MANAGEMENT DEGREE HUB, <https://www.sportsmanagementdegreehub.com/fantasy-football-industry/> (last visited Feb. 24, 2018).

⁹⁷ See *Lopez*, 514 U.S. at 558–59; U.S. CONST. art. I, § 8, cl. 3.

⁹⁸ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘any thing in the constitution or laws of any State to the contrary notwithstanding.’”).

⁹⁹ See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012).

¹⁰⁰ See *id.*

¹⁰¹ PENNSYLVANIA GAMING CONTROL BOARD, FANTASY SPORTS REPORT 11 (2016).

¹⁰² Sieron, *supra* note 27.

based directly or indirectly on one or more competitive games or one or more performances of such athletes in such games.¹⁰³

However, the Supreme Court recently struck down PASPA as unconstitutional.¹⁰⁴ In striking down PASPA, the Court reasoned that “Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”¹⁰⁵ Additionally, the Court noted where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly without merely conscripting state governments as its agents.¹⁰⁶ Importantly, this language suggests that, while PASPA was struck down, Congress can still address sports betting, so long as it addresses it directly. The Court’s decision in *Murphy*, which allows states to decide for themselves whether to allow sports betting, will further complicate the diverse patchwork of state regulation. Some states might opt to regulate DFS as sports betting, subjecting it to traditional gambling licensures and tax rates, while others either keep their current regulations classifying DFS as a game of skill, or continue to prohibit DFS.

The federal regulatory approach proposed by this Note advocates for declaring DFS a game of skill—not gambling or sports betting—and regulating it separately from sports betting. It is imperative to regulate DFS as a game of skill because, while PASPA no longer expressly prohibits states from allowing sports betting, there are a number of other hurdles that would stand in the way of uniform federal regulation of DFS if it were considered sports betting. First, online *interstate* sports betting is still illegal in the United States because the Wire Act expressly proscribes this type of interstate betting.¹⁰⁷ Thus, a uniform federal regulation of DFS, if classified as sports betting, would require repealing the Wire Act. Furthermore, even if Congress hypothetically were to repeal the Wire Act, other federal legislation such as the

¹⁰³ PENNSYLVANIA GAMING CONTROL BOARD, *supra* note 101, at 12.

¹⁰⁴ *See* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

¹⁰⁵ *Id.* at 1477.

¹⁰⁶ *Id.*

¹⁰⁷ Wire Act of 1961, 18 U.S.C. § 1084(a) (2018) (“Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.”); *see also* A.G. Burnett & Rick Trachok, *States Need Realistic Expectations for Sports Betting*, LAW360 (May 24, 2018, 5:36 PM), <https://www.law360.com/articles/1047081/states-need-realistic-expectations-for-sports-betting>.

Travel Act and UIGEA still make interstate or internet sports betting a felony if bets are taken or received in a state that prohibits sports betting.¹⁰⁸ To avoid the arduous task of repealing or amending three other federal laws, the simple solution is to regulate DFS at a federal level as a game of skill, not gambling.

Generally, whether a game constitutes gambling boils down to three elements: “consideration, a result determined by chance rather than skill, and a reward.”¹⁰⁹ States are split on how to determine what constitutes “chance,” but the majority of states follow the predominance test which dictates that a game is considered gambling if “the chance predominates over the skill involved.”¹¹⁰ This test is satisfied by either the chance or skill aspect crossing the 50% benchmark (*i.e.*, 51% chance constitutes gambling).¹¹¹ For purposes of this Note, the predominance test would be applied to determine whether variants of DFS contests constitute a game of chance or skill.

The primary argument for why DFS is a game of skill is that it requires research to put together an entry that can win. Keeping in mind that the threshold is only 51% skill, the fact that participants have to conduct research about the players they select to their team and piece together the best possible lineup to comply with the fictional salary cap should easily cross the required threshold. A majority of DFS entrants spend ten to twenty hours per week conducting research to be applied to their entries.¹¹² Participants must consider: (1) how players have been performing; (2) their injury status; (3) what team they are playing that week; (4) how they typically perform against their opponent for that week; and (5) a strategy for selecting the best possible lineup given the fictional salary cap restraints imposed in

¹⁰⁸ Burnett & Trachok, *supra* note 107; see Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362 (2018); 18 U.S.C. § 1952 (2018).

¹⁰⁹ Commonwealth v. Two Elec. Poker Game Machs., 465 A.2d 973, 977 (Pa. 1983).

¹¹⁰ Erica Okerberg, *What’s in a Game? A Test Under Which We May Call a “VGT” a Gambling Game is Not So Sweet: Why Courts Should Not Apply the Material Element Test to VGTS*, 5 U. NEV. LAS VEGAS GAMING L.J. 27, 28 (2014).

¹¹¹ Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 391–92 (2009).

¹¹² See Adam Krejcik, *Daily Fantasy Sports Player Survey - 2015*, EILERS RESEARCH (July 14, 2015), <https://courier.bluematrix.com/Courier/EmailDocViewer.action?info=vNnixFYyhd4FCmyi2AiiGw5bKPLv9kYz%2BZwoDtUOHirWYkn0AQzNKxEiRrGphv6zdodk2GDWPv%2FX%0AC%2BhzuqMIBWLeF97PSR8CVyMr2Di1PopPVRmAbIdrG1Y9nnc0GOWiwihqCSj7NI6M9WmRaDJJk4Vfu%0AazRheD6QQR6vQsok1GU%3D%0A>.

DFS.¹¹³ FanDuel CEO Nigel Eccles noted that, based on statistical analysis, a highly-skilled player will beat a non-skilled player 90% of the time.¹¹⁴

Furthermore, one scholar has noted that DFS can be classified as a game of skill because participants have a degree of control over their “teams” that is absent from traditional gambling.¹¹⁵ He notes that the court in *Commonwealth v. Two Electric Poker Game Machines* held there is skill involved with poker, however having no control over the cards dealt in a poker game meant that chance played a predominant role.¹¹⁶ In DFS, a participant essentially has all of the control over the cards they are dealt, as they are able to select every player on their team. Following the logic from *Commonwealth v. Two Electric Poker Game Machines*, this would indicate that skill predominates in DFS contests.

These two arguments highlight how DFS can pass as a game of skill under the predominance test, enabling federal regulation to be enacted without having to repeal or amend the Wire Act, UIGEA, or the Travel Act. Congress would be free to constitutionally enact legislation, pursuant to their Commerce Clause power, to address DFS and supersede the inconsistent patchwork of state regulation.

V. PROPOSED FEDERAL REGULATORY FRAMEWORK

To ensure regulation is uniform, consumers are protected, and the state-by-state battle for legality ends, a regulatory framework for DFS should be implemented at the federal level with Pennsylvania’s bill providing the general framework. The key factors to be considered in devising this regulatory framework are: (1) the definition of “fantasy sports”; (2) whether they are a game of skill; (3) the appropriate licensing fee and tax rates on revenue; (4) consumer protection measures; and (5) the appropriate body to oversee the regulation.

¹¹³ See Erin Mack, *10 Things DFS Players Should Never, Ever Do*, BLEACHER REPORT, <http://bleacherreport.com/articles/2408489-10-things-dfs-players-should-never-ever-do> (last visited Feb. 25, 2018). The list includes: “don’t ignore outside data,” “don’t have tunnel vision” (in regard to consulting multiple sources for projecting how players will perform in a given week), and “don’t have the same strategy for all sports.”

¹¹⁴ See Darren Heitner, *Daily Fantasy Sports Games Defend Legality of Their Services*, FORBES: SPORTSMONEY (Mar. 13, 2013, 7:56 AM), <https://www.forbes.com/sites/darrenheitner/2013/03/13/daily-fantasy-sports-games-defend-legality-of-their-services/#2e01ac771bf4>.

¹¹⁵ Randolph Andrew Scott, *Updating Your Fantasy Lineups and the Federal Law: The Case for Federal Regulation of Daily Fantasy Sports*, 47 SETON HALL L. REV. 603, 639 (2017).

¹¹⁶ *Id.*; *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 977–78 (Pa. 1983).

While fantasy sports are mentioned as an exception in UIGEA, the act does not actually define fantasy sports, nor does it actively legalize them or declare they do not constitute gambling.¹¹⁷ Thus, the first step for establishing a federal regulatory framework would be to define fantasy sports and declare them to be a game of skill using the predominance test. The definition should initially be broad and general, like the definition provided in Section I of this Note.¹¹⁸ It should also include more specific distinctions like the definitions in the Pennsylvania bill indicating what constitutes a fantasy contest for DFS purposes and the definition of the traditional “social fantasy contests.”¹¹⁹ The language from the New York regulations denoting the contests as a game of skill, and not gambling,¹²⁰ should also be included in this definition to ensure that the federal regulation is not construed as sports betting or gambling. The definition should also include language noting that the predominance test is to be applied to future variants of DFS in considering their legality under the federal regulation.

Beyond the semantics of defining fantasy sports, the next consideration in drafting federal regulation of DFS is to determine the appropriate licensing fee and taxation on revenue. For this, Pennsylvania should serve as the model for the federal regulation. Pennsylvania’s 15% tax on revenue, \$50,000 licensing fee, and subsequent \$10,000 renewal fee¹²¹ will generate sufficient revenue without running DFS operators out of business. In terms of translating this to the federal level, the 15% tax on gross revenue can stay. This will make things easier on the companies as they would not have to segregate gross income on a state-by-state basis and could just do one simple calculation to determine the tax owed. States that have enacted DFS regulation may not be happy to lose a source of revenue; however, many states still have not enacted DFS regulation to generate revenue from it, so the outcry may not be severe if federal regulation is instituted sooner rather than later. Nonetheless, it would be possible to include a small revenue sharing provision of around 15% to

¹¹⁷ PENNSYLVANIA GAMING CONTROL BOARD, *supra* note 101, at 14 (2016).

¹¹⁸ *See supra* note 9.

¹¹⁹ *See* 4 PA. CONS. STAT. § 302 (2017).

¹²⁰ *See* N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400, 1402 (2016) (“Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization.”).

¹²¹ 4 PA. CONS. STAT. §§ 323–24, 331 (2017).

be distributed to the states in the event that they are unhappy with regulation being taken over at the federal level.

The licensing fee may be trickier if translated to the federal level. The federal regulation could charge a larger up-front licensing fee, and charge a lower fee for renewal every five years like the Pennsylvania regulation.¹²² This could mean a flat licensing fee of \$50,000 for every state along with a flat \$10,000 renewal fee, or some alternative that takes the market size of the given state into account for calculating both.¹²³

The federal regulatory scheme for consumer protection should be based on those outlined in the Pennsylvania legislation. Federal regulation should prohibit persons under eighteen from creating accounts and implement age-verification procedures to ensure that this protection is not easily side-stepped by minors who simply enter in a fake date of birth. Furthermore, it would be ideal for the federal regulation to mandate distinctions between beginner players and experienced players, while offering “beginner only” contests like the Pennsylvania legislation¹²⁴ to keep DFS “sharks” from preying on inexperienced beginners. Federal regulation should also include Pennsylvania’s requirement that DFS operators establish a maximum amount of entries per participant in each contest, and prohibit the use of scripts, which would help ensure one person does not win almost all of the money in a given contest.¹²⁵ Furthermore, including a provision requiring DFS operators to segregate player funds from their operational funds as seen in the Pennsylvania bill¹²⁶ will be essential to protect consumers and make sure their money is not simply stolen by DFS operators and to promote transparency.¹²⁷ Measures should also be taken to protect confidential participant information, and to safeguard data from insider trading abuse. While the regulatory framework this Note proposes is largely based

¹²² *See id.*

¹²³ For example, Pennsylvania being a larger market could account for \$50,000 in the equation, while a smaller market sized state could be valued lower at \$30,000 in calculating the licensing fee.

¹²⁴ *See* 4 PA. CONS. STAT. § 325 (2017).

¹²⁵ *See* David Purdum, *Are Computer Scripts Bad for Daily Fantasy Sports*, ESPN (July 15, 2015), http://www.espn.com/fantasy/baseball/story/_/id/13261582/are-computer-scripts-bad-daily-fantasy-sports.

¹²⁶ *Id.*

¹²⁷ *See* Dustin Gouker, *Why Fantasy Aces Wasn’t Caught, and How DraftKings, FanDuel and Others Segregate Player Funds*, LEGAL SPORTS REPORT (Feb. 2, 2017, 10:19 PST), <https://www.legalsportsreport.com/12919/segregation-of-dfs-player-funds/>.

on the Pennsylvania legislation, it would also be prudent for a federal regulatory scheme to include advertising regulations like those seen in the temporary New York regulation and the Massachusetts regulation.¹²⁸ These regulations are a little more stringent than Pennsylvania's¹²⁹ with regard to advertising and would provide consumers with maximum protection from deceptive advertising.

The federal regulation should also include Pennsylvania's protocols for problem gamers. Participants should be allowed to restrict their ability to enter contests, limit the amount of money they can deposit, and be provided with conspicuous problem gaming notices at contest registration points. Allowing players to manage the amount of their deposits, as opposed to the state imposing deposit limits,¹³⁰ is likely more desirable as it allows players to more freely participate in DFS with minimal regulatory oversight. To preserve the integrity of fantasy sports and the sports they are based on, the regulation should include provisions prohibiting the players from participating, and prohibiting DFS contests based on collegiate and high school sports, like in the Pennsylvania bill.¹³¹

All of these measures would be useless if compliance with them was not ensured. Compliance can be ensured by requiring DFS operators to submit to a testing laboratory to verify compliance, one of the more novel inclusions in the Pennsylvania bill.¹³² Federal regulation should thus require DFS companies submit to testing with a testing laboratory annually along with an annual audit.

The last step in a federal regulatory framework is to designate an agency to enforce these regulations. The appropriate regulatory agency at the federal level to enforce these regulations is the Federal Trade Commission (FTC), as it deals with consumer protection issues and polices unfair or deceptive acts or practices in or affecting commerce.¹³³ It may be beneficial to create a smaller "board" within the FTC that deals exclusively with fantasy sports. The board could be similar to the Pennsylvania Gaming Control Board that oversees the administration of

¹²⁸ See discussion *supra* Section II.

¹²⁹ See 4 PA. CONS. STAT. § 326 (2017).

¹³⁰ See *id.* § 325.

¹³¹ See *id.*; 940 C.M.R. § 34.10.

¹³² See 4 PA. CONS. STAT. § 311 (2017).

¹³³ See FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> (last visited Feb. 25, 2018); 15 U.S.C. § 45 (2012).

Pennsylvania's regulation.¹³⁴ While such a board would have a narrower focus than the Pennsylvania Gaming Control Board, since it would focus exclusively on fantasy sports regulation, the creation of such a board is warranted by the explosive growth of fantasy sports.¹³⁵

CONCLUSION

Ultimately, it is no surprise that the rapid growth of fantasy sports into the current DFS norm has led to new issues regarding gambling and consumer protection that were not present in traditional fantasy sports. These new issues, coupled with the large amount of money being poured into fantasy sports, creates an environment ripe for regulation. Unfortunately, the state-by-state approach has led to an inconsistent regulatory scheme and costly legal battles.

To end the inconsistent regulatory approaches and continued battles for legality, a uniform federal regulatory framework for DFS should be implemented through Congress' power to regulate commerce. Such a framework will provide one set of guidelines for DFS operators to follow while ensuring that the consumer participants are protected. Additionally, federal regulation will allow the government to receive additional revenue through licensing fees and taxes. In drafting a federal regulatory framework for DFS, the recent legislation in Pennsylvania can serve as a general guideline with provisions from other states supplementing in the few areas. The regulatory framework proposed by this Note will establish a regulatory environment which is reasonable to the DFS industry while providing protection and fairness to those who enjoy playing DFS, a win worth more than any DFS contest for all parties involved.

¹³⁴ See 4 PA. CONS. STAT. §§ 302, 311 (2017).

¹³⁵ See *Fantasy Sports Demographic Information*, *supra* note 17.

