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## Daily Fantasy Sports and the Clash of Internet Gambling Regulation

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# DAILY FANTASY SPORTS AND THE CLASH OF INTERNET GAMBLING REGULATION

## I. INTRODUCTION

It is Week 7 of the NFL season on a crisp Sunday in October of 2015. The leaves are beginning to fall outside as you race home from your early morning workout to check your fantasy football team before the start of the early afternoon games. You log onto ESPN.com and after making sure that everyone on your roster is playing you turn on your TV to watch the slate of games. This week is particularly important as you hope to beat one of your good friends and take control of first place. Of the many fantasy leagues you and your friends have belonged to over the years, this league is the one you care about most because it has endured the longest. Even though all your friends are all older and now have jobs in the working world, the league still retains the same \$20 fee per year from when the league originated. As you begin to cheer on your players, consecutive advertisements play on TV touting a quick way to win millions of dollars in cash prizes. Common, everyday people are seen, celebrating wildly, with massive checks totaling in the hundreds of thousands or millions of dollars. These advertisements must be for the state lottery or for a poker tournament at a casino, right? Not quite, instead the advertisements are from the online Daily Fantasy Sports Websites, DraftKings and FanDuel. DraftKings and FanDuel are currently the two largest Daily Fantasy Sports (DFS) websites.<sup>1</sup> DFS websites operate in a similar fashion to traditional fantasy sports on websites such as Yahoo and ESPN.<sup>2</sup> The catch, however, is that instead of being bound to a league for an entire season, as you

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<sup>1</sup> See Anthony Crupi, *Fantasy Sports Sites DraftKings, FanDuel September Spend Tops \$100 Million*, ADVERTISINGAGE Sept. 30, 2015, <http://adage.com/article/media/draftkings-fanduel-spe/300658>. (Both [FanDuel and DraftKings] control upwards of 95% of the daily fantasy sports market.)

<sup>2</sup> *Id.*

are for traditional fantasy sports, daily fantasy allows the player the freedom to only commit for a single day.<sup>3</sup> DFS websites provide games including head-to-head, and guaranteed prize pool contests.<sup>4</sup> DFS, in Major League Baseball (MLB), for example, allows a competitor to enter a new league each day, during the MLB season, if the player so chooses, as opposed to grinding out an entire season in just one league.<sup>5</sup> DFS are a relatively recent phenomenon, having only been created around 2009, and the industry at the time pushed the limits of what constitutes illegal online gambling.

The Professional and Amateur Sports Protection Act Unlawful Internet Gambling Enforcement Act of 2006, discussed in greater detail below, will provide the background for how the daily fantasy sports industry molded into the form that it is in today. This section will also provide information on the current situation of states, such as New York, Nevada and Massachusetts, and their efforts to explicitly pass or bar DFS in their respective jurisdictions.

Section III focuses on potential federal legislation regarding daily fantasy sports and its likelihood of becoming law in Congress. Individual states will be analyzed as to why they would or would not support federal legislation regulating daily

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<sup>3</sup> *\$500,000 DraftKings 1-Day Fantasy Baseball Could Make You Rich Overnight*, SPORTSGRID, July 18, 2013, <http://www.sportsgrid.com/uncategorized/500000-draftkings-1-day-fantasy-baseball-contest-could-make-you-rich-overnight>. (“Daily fantasy baseball is similar to regular fantasy baseball, except you draft a new team every time you want to play.” DraftKings assigns a salary to each player participating in that night’s games and allows you to draft the best possible team under the salary cap.”)

<sup>4</sup> Josh Shepardson, *Types of Games*, DAILY FANTASY CAFÉ, last updated Sept. 7, 2015, available at <https://perma.cc/397K-K4UE>. (In head to head matchups, two players wager an agreed buy-in and face off directly against each other. Guaranteed prize pool games can have thousands of participants, all whom wager a set buy-in with locked in predetermined prizes sometimes totaling \$1 million)

<sup>5</sup> *Id.*

fantasy sports. Additionally, a timeline will be created for when possible daily fantasy sports legislation will be drawn up and who will benefit the most from it.

Section IV analyzes the potential positive and negative implications resulting from the proposed legislation. There will also be reasoning and analysis for why there should be federal regulation of daily fantasy sports as opposed to leaving the decision up to each of the individual states. It will be argued that uniformity of laws, through federal legislation, will make the daily fantasy sports industry more profitable, by removing exorbitant legal and lobbying fees, and help the government provide greater protections for players.

## II. BACKGROUND

### A. *What is Online Gambling?*

Merriam Webster's Dictionary describes gambling as, "to play a game in which you can win or lose money or possessions."<sup>6</sup> The word online, in Webster's dictionary, is stated to be "connected to a computer, a computer network, or the Internet."<sup>7</sup> Online gambling can take place on a regular computer, over the internet, as opposed to gambling at an actual casino. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which is the current controlling United State federal law on illegal gambling, does not delineate a uniform definition of gambling due to variations of the definition among the states and federal branch.<sup>8</sup>

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<sup>6</sup> *gambling*, MERRIAM-WEBSTER, (last visited Feb. 6, 2017) <https://www.merriam-webster.com/dictionary/gamble>.

<sup>7</sup> *online*, MERRIAM-WEBSTER, (last visited Feb. 6, 2017), <https://www.merriam-webster.com/dictionary/online>.

<sup>8</sup> See Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5326 (2006). ("Variations among federal and state laws and interpretations preclude a uniform definition of "unlawful Internet gambling." UIGEA, in its current form, allows states, federal agencies and financial institutions to determine on their own what constitutes "unlawful Internet gambling").

*B. Regulation of Sports Gambling and PASPA*

In response to the expansion of sports betting in the United States, in the late 1980's and early 1990's, The Professional and Amateur Sports Protection Act (PASPA) was signed into law, by President George H.W. Bush on October 6, 1992.<sup>9</sup> Sponsored by Senator Bill Bradley, of New Jersey, the bill strived to stop the proliferation of sports betting in the U.S by preventing states from legalizing sports betting.<sup>10</sup> Prior to 1989, non-Native American land casinos had only been legalized in New Jersey and Nevada, but between 1989 and 1992, casinos were legalized in seven additional states.<sup>11</sup> New Jersey and Nevada, at the time, sought to protect their sports betting industries, and successfully advocated for a carve-out exemption to the law.<sup>12</sup> PASPA, despite being passed nearly twenty-five years ago, still affects the DFS industry.<sup>13</sup> DFS contests must be offered as "legitimate games of skill" in order to escape the provisions of PASPA.<sup>14</sup> If DFS are to be considered sports betting and not a legitimate game of skill, then DFS would fall under the provisions of PASPA, which would effectively prevent the authorization and regulation of DFS.<sup>15</sup> PASPA, in its current form, is a major roadblock that could prevent future regulation of DFS both on the state and federal

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<sup>9</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-04 (1992).

<sup>10</sup> *Professional and Amateur Sports Protection Act – PASPA*, ONLINE GAMBLING SITES, 2016, <http://www.onlinegamblingsites.com/law/paspa>.

<sup>11</sup> *Id.* (The seven states that allowed casinos prior to PASPA include Illinois, Iowa, South Dakota, Colorado, Mississippi, Louisiana and Missouri.)

<sup>12</sup> *Id.* (PASPA's carve-out, allowed New Jersey and Nevada to continue to operate sports betting in their jurisdictions, while preventing nearly all other states from legalizing sports betting).

<sup>13</sup> *Id.* ("The bigger issue with PASPA in regard to DFS might be as more and more states consider regulation of the industry via legislation. It is very possible that PASPA, which is being used to block authorization and regulation of sports betting via the courts, could be applied to any attempts to regulate DFS").

<sup>14</sup> *Id.* (The daily fantasy sports industry itself is not mentioned in PASPA, but PASPA covers anything considered illegal gambling.)

<sup>15</sup> *Id.*

level.<sup>16</sup> If a state, such as Nevada, were to declare DFS to be a form of gambling, then the state may use PASPA to prevent or ban the DFS industry from establishing itself in that particular jurisdiction.<sup>17</sup> Consequently, PASPA is the main law used by opponents of DFS to stop the industry's spread throughout the United States.<sup>18</sup>

### C. Growth and Decline of Online Gambling in the 2000's

In September 2001, PokerStars, the largest online poker cardroom in the world was launched.<sup>19</sup> Rival online poker sites, including PartyPoker and Full Tilt Poker, also began to spring up from 2001-2005, and the industry began to accumulate record traffic and profits.<sup>20</sup> These online venues would profit generally

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<sup>16</sup> *Professional and Amateur Sports Protection Act – PASPA*, ONLINE GAMBLING SITES, 2016, <http://www.onlinegamblingsites.com/law/paspa>. (Some analysts, such as Jim Murren, Chairman of MGM and of the American Gaming Association, believe that regulating daily fantasy sports is not permitted by PASPA)

<sup>17</sup> *Id.* (Nevada is a leading state in opposition to the legalization of daily fantasy sports.); see also Joe Drape, *Nevada Says it Will Treat Daily Fantasy Sports as Gambling*, NEW YORK TIMES, Oct. 15, 2015, [https://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html?\\_r=0](https://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html?_r=0). (“The Nevada Gaming Commission concluded that daily fantasy is gambling and needs to be licensed here [Nevada], per David Gzesh, a lawyer specializing in gambling and sports law. “It should give other states pause because if it’s perceived as sports gambling here, no other state can offer it when it violates federal law””).

<sup>18</sup> Joe Drape, *Nevada Says it Will Treat Daily Fantasy Sports as Gambling*, NEW YORK TIMES, Oct. 15, 2015. (In August 2015, federal appeals court judges held in a 2-to-1 decision that New Jersey’s efforts to allow casinos and racetracks to take bets violated the federal Professional and Amateur Sports Protection Act, or PASPA).

<sup>19</sup> [pokerscout.com](http://pokerscout.com).

<sup>20</sup> Newsweek Staff, *Going All in for Online Poker*, NEWSWEEK, Aug. 14, 2005, <http://www.newsweek.com/going-all-online-poker-117991>. (The online poker industry grew from \$82.7 million in 2001 to \$2.4 billion by 2005).

from a process called the rake<sup>21</sup>, which is also used by daily fantasy sports websites.<sup>22</sup> Additionally, online poker players would compete directly against each other instead of the poker website itself.<sup>23</sup> Online poker players, before its ban in the United States, would pay their fees online through designated payment systems.<sup>24</sup> As internet access in the early to mid 2000's began to grow rapidly, so did internet poker.<sup>25</sup>

With the staggering success of the online poker industry, U.S. lawmakers, through much lobbying, passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).<sup>26</sup> UIGEA did not target the websites directly, but instead targeted the payment methods used to transfer money on the poker sites.<sup>27</sup> PartyGaming, after the passage of UIGEA, saw its publicly traded stock drop dramatically in just 24 hours.<sup>28</sup> Online poker websites

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<sup>21</sup> <http://www.poker-king.com/dictionary/rake/>. (The rake is a fee paid to the house (Poker Website) for hosting the poker game and is capped at a maximum fee on the online poker websites.)

<sup>22</sup> Newsweek Staff, *Going All in for Online Poker*, NEWSWEEK, Aug. 14, 2005, <http://www.newsweek.com/going-all-online-poker-117991>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (Designated payment systems include credit card, electronic check, wire transfer or other electronic money services).

<sup>25</sup> *Id.* (By June 2005, the world's largest online poker provider, PartyGaming, which ran the website PartyPoker.com, went public on the London Stock Exchange and was valued at \$8.46 billion.)

<sup>26</sup> *Unlawful Internet Gambling Enforcement Act of 2006*, ONLINE GAMBLING SITES, 2016, <http://www.onlinegamblingsites.com/law/uigea>. (UIGEA, which was introduced originally as the Internet Gambling Prohibition and Gambling Enforcement Act, by Rep. Jim Leach of Iowa, passed nearly unanimously through Congress on September 30, 2006).

<sup>27</sup> *Id.* (Credit Card companies, that were publicly traded, would not allow U.S. players to use their cards to make wagers or collect winnings on online poker sites).

<sup>28</sup> Fiona Walsh, *PartyGaming drops out FTSE 100*, THE GUARDIAN, Oct. 9, 2006, 03:53 EDT, <https://www.theguardian.com/business/2006/oct/09/ftse.stockmarkets>. (In the London Stock Exchange (FTSE) PartyGaming lost its coveted place in the FTSE 100 in just one week after the passage of the UIGEA. "The FTSE 100 is an elite club of Britain's 100 biggest companies." Just one week after the

offering exchanges of money were forced to block U.S. players from competing except under a few exceptions.<sup>29</sup> The UIGEA effectively crippled the online poker industry.<sup>30</sup> As of 2016, players in the United States can still access hundreds of poker websites, but are prohibited from transferring any funds.<sup>31</sup> U.S. banks and credit card companies, as of October 2016, continue to prohibit the use of their cards on poker websites.<sup>32</sup>

i. Unlawful Internet Gambling Enforcement Act of 2006

The Unlawful Internet Gambling Enforcement Act of 2006 was signed into law October 13, 2006,<sup>33</sup> and was initially controversial as the Act was attached to the Security and Accountability for Every Port Act of 2006 (SAFE Port Act)<sup>34</sup>. An anti-terrorism bill, the SAFE Port Act was meant to protect American ports from potential terrorist attacks.<sup>35</sup> Many federal lawmakers, however, were unaware that the UIGEA would be included within the SAFE Port Act.<sup>36</sup> The swiftness of which the

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passage of the UIGEA, PartyGaming was relegated to the FTSE 250 index due to losing \$2 billion English Pounds in that single week).

<sup>29</sup> *Unlawful Internet Gambling Enforcement Act of 2006*, ONLINE GAMBLING SITES, 2016. (Online poker sites could still operate by setting up free poker games with the transfer of funds being forbidden in these lobbies).

<sup>30</sup> Fiona Walsh, *PartyGaming drops out FTSE 100*, THE GUARDIAN, Oct. 9, 2006, 03:53 EDT. (More than \$4 billion English Pounds was wiped from the stock market value of internet gambling in just one week after the passage of UIGEA. The loss in stock value was due to a fundamental uncertainty over the industry's ability to continue trading in certain markets).

<sup>31</sup> *Unlawful Internet Gambling Enforcement Act of 2006*, ONLINE GAMBLING SITES, 2016.

<sup>32</sup> *Id.*

<sup>33</sup> Prohibition on Funding of Unlawful Internet Gambling, 31 U.S.C §§ 5361-67 (2012).

<sup>34</sup> Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

<sup>35</sup> *Id.*

<sup>36</sup> See Steve Beauregard, *How Is DraftKings Legal? And What States Don't Allow It?*, GAMBOOL!, last updated Sept. 8, 2016, [Published by Via Sapientiae, 2019](http://gamboool.com/how-</a></p>
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Act was passed and lack of debate regarding the matter has contributed to the overall difficulty in determining the exact legislative intent with regard to DFS.<sup>37</sup> Regardless, passed in order to combat the rise in gambling addictions among Americans in the late 1990's and early 2000's, the UIGEA, "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the internet and that is unlawful under any federal or state law."<sup>38</sup> This UIGEA banned the transfer of funds between players associated with online gambling such as online poker.<sup>39</sup> Additionally, the Act, to determine if the transaction falls within the jurisdiction of the United States, says to look to the place where the bet is made or received.<sup>40</sup> Thus, any bet that is made within the territorial integrity of the United States falls under the Act and players are barred from making wagers

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is-draftkings-legal-and-what-states-dont-allow-it, *supra* note 30 (categorizing the UIGEA as a provision that was "snuck into a terrorism-related port bill at the last minute"); *see also* Nathaniel J. Ehrman, Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sport 22 *SPORTS LAW J.* 79, 93 (2015), *supra* note 29, at 93 (pointing out the UIGEA was "forced through Congress in the remaining minutes before an election recess"); Hayden Bird, *Daily Fantasy Sports Was Created by Bizarre Government Legislation*, BOSTINNO, Oct. 20, 2015, <http://bostinno.streetwise.co/2015/10/20/explaining-why-daily-fantasy-sports-are-legal-uigea-safe-port-act-of-2006-vote-count>, *supra* note 32 (Legislators did not read the necessary provisions of the UIGEA before they passed the Act because it was added at the 11<sup>th</sup> hour and buried in the SAFE Port Act); I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, CALVINAYRE, Oct. 18, 2015, <http://calvinayre.com/2015/10/18/business/are-daily-fantasy-sports-legal>, *supra* note 29 ("Admittedly, the UIGEA was rammed through without any hearings or even proof-reading, so it is sometimes difficult to know what Congress intended.").

<sup>37</sup> *Id.*

<sup>38</sup> *supra* 31 U.S.C. §§ 5361-67 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> Chuck Humphrey, *Internet Gambling Funding Ban*, GAMBLING-LAW-US, Oct. 13, 2006, <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm>.

through designated payment systems.<sup>41</sup> It also does not matter if the wagering is done through an intermediary computer or network where there would be a third party with an IP address outside the United States administering the wagers except for minor exceptions.<sup>42</sup> If the wager is made physically within the United States an individual or party can face penalties for violating the UIGEA.<sup>43</sup>

UIGEA defines a bet or wager to include risking something of value in a contest, sports event, “or a game subject to chance.”<sup>44</sup> “Games of skill” were not banned under UIGEA, and thus fantasy sports, such as fantasy baseball and football, were explicitly exempted from the Act.<sup>45</sup> The UIGEA specifically contains a “carve out” for fantasy sports.<sup>46</sup> This carve out prevents fantasy sports games from being considered illegal gambling if the following criteria are acted accordingly: (1) prizes and awards are established and made known to participants before the game, and the prizes' value does not depend on "the number of participants or the amount of any fees paid by those participants"; (2) "all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting or other events"; and (3) winning outcomes are not based "on the score . . . or any performance . . . of any single real-world team or . . . an individual athlete in any single real-world

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (Excluded from the coverage of “unlawful internet gambling” are waypoints along the World Wide Web that are only incidental to the places where the electronic transmission of the bet or wager is initiated and finally received).

<sup>43</sup> *Id.* (Online bets made solely within a single state under an enabling statute passed by that state (No such laws exist at this time) and online bets made solely on or among Indian tribal lands under enabling laws adopted by the affected tribes and approved by the National Indian Gaming Commission (No such laws have been adopted or approved at this time)).

<sup>44</sup> *Supra* 31 U.S.C. §§5361-67.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

sporting or other event."<sup>47</sup> Legal and industry experts have heavily debated whether or not daily fantasy sports is indeed covered within the provisions of the UIGEA.<sup>48</sup> Representative Shelley Berkley of Nevada, perhaps sensing a possible loophole in the UIGEA, tried unsuccessfully to expand the UIGEA to also include games of skill.<sup>49</sup> DFS had not yet come into existence and would

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<sup>47</sup> *Id.*

<sup>48</sup> 31 U.S.C. § 5362(1)(E)(ix)(I)-(III) (2012). Daily Fantasy Sports satisfies the first prong of the UIGEA because all of the prizes are established in advance of the contest. Justin Fielkow, *From Fantasy to Reality: The Evolution and Legality of Fantasy Sports*, SPORTS ESQUIRES, May 18, 2015, [http://thesportsesquires.com/from-fantasy-to-reality-the-evolution-and-legality-of-fantasy-sports/#\\_edn12](http://thesportsesquires.com/from-fantasy-to-reality-the-evolution-and-legality-of-fantasy-sports/#_edn12). (Likewise, daily fantasy sports satisfy the third prong because contestants do not select an entire team or even a single athlete to compete in the contests; rather, contestants are presented with a "list of players, positions and their respective cost" and must fill their roster spots accordingly); *See also* Michael Nelson, *How to Make a Killer Daily Fantasy Sports Football Roster on DraftKings and FanDuel*, VENTURE BEAT, Sept. 10, 2015, 1:33 PM, <http://venturebeat.com/2015/09/10/how-to-make-a-killer-daily-fantasy-sports-football-roster-on-draftkings-and-fanduel>. (However, daily fantasy sports may fall short of the second prong, which requires winning outcomes be reflective of participants' relative skill and knowledge). 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, 38 (2012) (indicating daily fantasy games may not fulfill the second prong because their limited duration may increase the element of luck in these contests); *see also* Rose, *supra* note 36 (challenging UIGEA's applicability to daily fantasy sports because some "skill elements of the season-long fantasy leagues are missing" and events such as weather or injury are more likely to occur and ultimately determine which team wins). *But see* Legal, *supra* note 36 (contending daily fantasy sports contests have been "ruled a game of skill"). The Third Circuit recently upheld the constitutionality of the UIGEA and held it is not unconstitutionally vague. *Interactive Media Ent. & Gaming Ass'n v. Att'y Gen. of the U.S.*, 580 F.3d 113, 116 (3d Cir. 2009) (holding UIGEA "cannot be deemed impermissibly vague in all its applications" even though it "does not itself outlaw any gambling activity but rather incorporates other Federal or State law related to gambling").

<sup>49</sup> *Unlawful Internet Gambling Enforcement Act of 2006*. (As a result of the unsuccessful attempt to expand the UIGEA, fantasy sports, which at the time consisted only of season-long leagues, was exempted from the UIGEA and in its

not appear on the inter-webs until about three years after the passage of UIGEA.<sup>50</sup> Former Congressman Jim Leach, who authored the UIGEA, has gone on record stating that the idea the law would protect daily fantasy was unintentional; however, Congress has not made any effort to revisit the law to make any changes.<sup>51</sup>

#### D. Growth of Daily Fantasy Sports

Daily fantasy sports (DFS) are a subset of traditional season-long fantasy sports contests for sports such as baseball, basketball, hockey and football.<sup>52</sup> Users compete against others, from anywhere DFS is legal, by creating a team of players, from a specific league, while remaining under a set salary cap.<sup>53</sup> DFS involves daily or sometimes weekly leagues, while traditional fantasy sports take place over an entire season.<sup>54</sup> DFS relies on players craving the excitement of essentially having playoffs every day of the season, as opposed to traditional leagues where the playoffs only take place after what is generally a very long season.<sup>55</sup> Another difference between DFS and traditional leagues are the players you compete against.<sup>56</sup>

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form at the time, though not expressly written into the Act, was considered to be a game of skill.)

<sup>50</sup> Mark Osborne, maxim.com, *How to Become a Millionaire Playing Fantasy Sports*, MAXIM, July 1, 2015, <http://www.maxim.com/entertainment/how-become-millionaire-playing-fantasy-sports>

<sup>51</sup> *Id.*

<sup>52</sup> *\$500,000 DraftKings 1-Day Fantasy Baseball Could Make You Rich Overnight*, SPORTSGRID, July 18, 2013, <http://www.sportsgrid.com/uncategorized/500000-draftkings-1-day-fantasy-baseball-contest-could-make-you-rich-overnight>.

<sup>53</sup> *Id.* (Players earn points based on the statistical performance of athletes. The player who has the team with most points will win the matchup or pool).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Darren Heitner, *The Hyper Growth Of Daily Fantasy Sports Is Going To Change Our Culture And Our Laws*, FORBES Sep. 16, 2015,

In DFS contests, players can generally decide what type of matchup they would like to enter.<sup>57</sup> Each DFS pool has an entry fee that can range anywhere from a few to hundreds of dollars.<sup>58</sup> From these entry fees, the site operator, such as FanDuel or DraftKings, makes money in the same way as online poker profited by appropriating 10%-15% of the wagers.<sup>59</sup> FanDuel and DraftKings primarily operate by receiving rake fees.<sup>60</sup> Large contests, such as DraftKings Millionaire Maker tournament, will have a \$1 million set cash prize in exchange for a \$20 entry fee.<sup>61</sup> In September, 2016, Al Zeidenfeld beat out more than 277,000 entries to win the \$1 million cash prize.<sup>62</sup> Zeidenfeld, who is known as the “Tim Duncan of DFS,” has stated that he’ll generally put down \$2,000-\$10,000 per night of DFS contests.<sup>63</sup> Zeidenfeld played professional poker for seven years before transitioning to DFS, and he states that he approaches DFS as an investor.<sup>64</sup> Experienced players, such as Zeidenfeld, generally win

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<https://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#1e8e8a505aca>. (In daily fantasy sports a player will generally compete

against another individual whom they do not know, while traditional fantasy leagues are typically created amongst friends, co-workers or family members.)

<sup>57</sup> [draftkings.com](http://draftkings.com). (The most popular type of matchups, in DFS, are head to head where players can enter a 1 vs. 1 matchup with another player, and tournaments where players declare entry into a small, medium or large pool and only the top scoring players make money).

<sup>58</sup> *Id.*

<sup>59</sup> Mark Osborne, *How to Become a Millionaire Playing Fantasy Sports*, MAXIM, July 1, 2015, <http://www.maxim.com/entertainment/how-become-millionaire-playing-fantasy-sports>.

<sup>60</sup> *Id.* (The greater the number of players that join DFS websites, the more money that DFS operators, such as FanDuel and DraftKings, will receive through the rake).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

big on DFS; however, he has no qualms about what DFS entails.<sup>65</sup> In head-to-head leagues one player will always win and another will lose unless there is a tie.<sup>66</sup> However, in large pools, such as the 2015 PGA Championship Millionaire Maker tournament, only the very top percentage of players make any money at all.<sup>67</sup> Additionally, only the top 7,000 places were able to double their money from \$20 to \$40.<sup>68</sup> This payout structure has been subject to much criticism and led to lawsuits against FanDuel and DraftKings.<sup>69</sup>

On July 21, 2009, Nigel Eccles created FanDuel, which is currently the largest Daily Fantasy Sports company in the industry.<sup>70</sup> Eccles, when creating FanDuel, believed that this type of gaming would be immune from federal scrutiny.<sup>71</sup> Based in New York City, FanDuel considers itself to be a company that

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<sup>65</sup> Mark Osborne, *How to Become a Millionaire Playing Fantasy Sports*, MAXIM, July 1, 2015. (Referring to other players losing money in DFS, according to Zeidenfeld, “If I’m making \$1.25 on every dollar I put in, someone is making \$0.75”).

<sup>66</sup> draftkings.com (In head-to-head matchups a player, without considering other variables such as skill and resources, has a 50% chance of winning).

<sup>67</sup> Derek Farnsworth (Notorious), *Understanding the Payout Structure of Large Events*, ROTOGRINDERS, 2015, <https://rotogrinders.com/lessons/understanding-the-payout-structure-of-large-events-775341>. (In the 2015 PGA Championship Millionaire Maker tournament only the top 45,840 players out of the approximately 188,900 entries or 24.2% of entries made any money).

<sup>68</sup> *Id.* (For a player to double their money, in the 2015 PGA Championship Millionaire Maker tournament, they would have to finish in the top 3.7% of the pool).

<sup>69</sup> *Id.* The payment structure has been the subject of many of the false advertising claims against FanDuel and DraftKings as only a small percentage of the pool will come out with a profit.

<sup>70</sup> See Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches In Internet Gaming Loophole*, THE WASHINGTON POST, March 27, 2015, <https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole>.

<sup>71</sup> *Id.* (After careful reading of the UIGEA, Eccles realized that daily fantasy sports leagues would not be covered by the UIGEA).

provides free or paid daily games of skill.<sup>72</sup> With the rapidly expanding industry reaching new markets, Boston-based DraftKings was launched in February 2012.<sup>73</sup> DraftKings is currently the second largest daily fantasy sports provider and has repeatedly engaged with FanDuel in advertising battles and efforts to legalize daily fantasy sports.<sup>74</sup>

Many of the major sports leagues such as Major League Baseball (MLB) and the National Football League (NFL) have come to embrace DFS.<sup>75</sup> In April 2013, MLB became the first U.S. Professional Sports organization to invest in DFS.<sup>76</sup> This event opened the floodgates and in November 2014, DraftKings entered into a multi-year sponsorship deal with the National Hockey League (NHL).<sup>77</sup> DFS truly exploded in value beginning in April 2015, when the NFL decided to allow DFS providers to sign sponsorship deals with its franchises.<sup>78</sup> Since April 2015, nearly all NFL franchises have partnered with either FanDuel or DraftKings.<sup>79</sup> DraftKings scored a 3-year sponsorship deal with

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<sup>72</sup> *Id.* (These “games of skill” involve the selection of players from rosters of major league sports teams to earn the most points in a given pool of players).

<sup>73</sup> Scott Kirsner, *Two local companies, StarStreet and DraftKings, prepare to launch new fantasy sports sites*, BOSTON.COM, Feb. 27, 2012, [http://archive.boston.com/business/technology/innoeco/2012/02/two\\_local\\_companies\\_starstreet.html](http://archive.boston.com/business/technology/innoeco/2012/02/two_local_companies_starstreet.html)

<sup>74</sup> See article cited *supra* note 1. (In Quarter 3, of 2015, DraftKings and FanDuel spent approximately \$150 million in advertising costs).

<sup>75</sup> See article cited *supra* note 70.

<sup>76</sup> *Id.* (Major League Baseball purchased a small stake in the company, although it did so without making the deal public).

<sup>77</sup> *NHL Signs Two-Year Deal with DraftKings As Rise of Daily Fantasy Games Continues*, SPORTS BUSINESS DAILY, Nov. 10, 2014, <http://www.sportsbusinessdaily.com/Daily/Issues/2014/11/10/Marketing-and-Sponsorship/DraftKings.aspx>.

<sup>78</sup> Brent Schrottenboer, *FanDuel Signs Deals With 15 NFL Teams, Escalating Daily Fantasy Integration*, USA TODAY, April 21, 2015, <https://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961>.

<sup>79</sup> *Id.* (FanDuel partnered with the Washington Redskins, Cincinnati Bengals, Cleveland Browns, Tampa Bay Buccaneers, San Diego Chargers, Indianapolis

ESPN in June 2015.<sup>80</sup> The rise of DFS put immense pressure on traditional fantasy league providers, such as Yahoo!.<sup>81</sup>

With a rapidly increasing player base and profits, both DraftKings and FanDuel launched an unprecedented television advertising blitz in 2015.<sup>82</sup> In September 2015, alone, FanDuel and DraftKings spent over \$107 million in television advertising.<sup>83</sup> In total, approximately \$750 million in advertising and marketing was spent in 2015 by the two companies.<sup>84</sup> In comparison, Dr. Pepper Snapple Group, Inc., the owner of soft drinks Dr. Pepper and Snapple, annually spends about \$475 million in advertising.<sup>85</sup> Using the Wall Drug Marketing Strategy, nearly every sporting

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Colts, Philadelphia Eagles, Jacksonville Jaguars, New York Jets, Detroit Lions, Green Bay Packers, St. Louis Rams, Baltimore Ravens, Houston Texans and Chicago Bears.)

<sup>80</sup> *Id.* (The sponsorship deal between DraftKings and ESPN was valued at \$250 million).

<sup>81</sup> Vinu Goel and Joe Drape, *Yahoo Will Enter Daily Fantasy Sports Market*, NEW YORK TIMES, July 8, 2015, [https://www.nytimes.com/2015/07/09/technology/yahoo-will-enter-daily-fantasy-sports-market.html?\\_r=0](https://www.nytimes.com/2015/07/09/technology/yahoo-will-enter-daily-fantasy-sports-market.html?_r=0). (To compete with DFS operators, such as DraftKings and FanDuel, Yahoo! was forced to begin to offer DFS competitions on its website in order to compete).

<sup>82</sup> Dustin Gouker, *DraftKings' TV Blitz: One Commercial Every 1.5 Minutes; \$82 Million Spent in '15*, LEGAL SPORTS REPORT, (September 2, 2015), <http://www.legalsportsreport.com/3483/draftkings-tv-commercial-blitz/>

<sup>83</sup> Myles Udland, Business Insider, *Fantasy sports companies spend so much on commercials they're moving the needle on TV ad spending*, (October 6, 2015) <http://www.businessinsider.com/draftkings-fanduel-daily-fantasy-sports-advertising-2015-10>.

<sup>84</sup> *Id.* (FanDuel and DraftKings' commercials advertised huge payouts for competitors, and showed every day looking people celebrating millions of dollars in winnings).

<sup>85</sup> *A Look At Coca-Cola's Advertising Expenses (KO, PEP)*, INVESTOPEDIA, Aug. 13, 2015, <http://www.investopedia.com/articles/markets/081315/look-cocacolas-advertising-expenses.asp>. (Dr. Pepper Snapple Group, Inc. spent \$473 million, in advertising, in 2014, \$486 million in 2013, and \$481 million in 2012. Soft drink industry leader, The Coca-Cola Company spent \$3.499 billion, in advertising, in 2014, \$3.266 billion in 2013, and \$3.342 billion in 2012).



event was blanketed by Draftkings and FanDuel commercials.<sup>86</sup> Wall Drug, a store located in Wall, South Dakota put up billboards for hundreds of miles advertising free water to attract customers.<sup>87</sup> Due to Wall Drug's blanket advertising, potential customers were all made aware of the store and visited as a result.<sup>88</sup> FanDuel and DraftKings, in a manner similar to the Wall Drug strategy, sought to drown the public in a torrent of advertisements that would ensure that many would act and join one or both of the websites. The advertising blitz worked for both companies as the player base and profits continued to greatly expand.<sup>89</sup> While both companies' advertising was successful in attracting new players it was also successful in attracting the unwanted attention of regulators.<sup>90</sup> New York, the home of FanDuel, has been a critical player in the issue of DFS.<sup>91</sup> In August 2015, a class action lawsuit was filed

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<sup>86</sup> Greg Miliates, *How Free Ice Water Turned into a \$10M/Year Business (And What it Means for You)*, PROBLOGGER, Oct. 5, 2012, <https://prologger.com/how-free-ice-water-turned-into-a-10myear-business-and-what-it-means-for-you>. (Ted Husted, who owned a store called Wall Drug, put up hundreds of signs and billboards across hundreds of miles in North and South Dakota advertising free water at his establishment. Husted also gave out free bumper stickers that patrons would place on their cars, which generated more advertising potential for the store. By inundating the surrounding area with hundreds of signs every passerby on the highway had no choice but to see the advertisements and thus be alerted to the existence of the store. This inundation of information drove people to utilize the services provided by the store. As of 2012, Husted's store, in peak season, can receive 20,000 customers a day).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Joe Drape, *Fantasy Sports Companies Near Settlement With New York State*, NEW YORK TIMES, Oct. 23, 2016, [https://www.nytimes.com/2016/10/24/sports/draftkings-fanduel-daily-fantasy-near-settlement-with-new-york-state.html?\\_r=0](https://www.nytimes.com/2016/10/24/sports/draftkings-fanduel-daily-fantasy-near-settlement-with-new-york-state.html?_r=0).

<sup>91</sup> *Id.* (New York Attorney General Eric Schneiderman has led several investigations into DFS and FanDuel is based in New York City).

against DraftKings.<sup>92</sup> The matter was not settled until October 25, 2016, when FanDuel and DraftKings agreed to a \$12 million settlement with New York Attorney General Eric Schneiderman.<sup>93</sup> DraftKings' CEO Jason Robins and FanDuel CEO Nigel Eccles both signed the settlement agreement from the Attorney General's Office and were both forced to admit that they deliberately misled its customers.<sup>94</sup> This deliberate misleading was evidenced by FanDuel and DraftKings' lack of disclosure regarding player winnings, marketing promotions and expected performances.<sup>95</sup> Additionally, Schneiderman's office stated that FanDuel identified and targeted users with a propensity for gambling and addiction and did not provide proper protection for these users.<sup>96</sup> Schneiderman, who has been a leading force against DFS operators, has taken issue with the lack of consumer protections for new players on DFS websites in the past.<sup>97</sup> Some players on FanDuel and DraftKings have advanced algorithms or other programs that gives them an advantage when picking players for their fantasy teams.<sup>98</sup> According to McKinsey & Company, a

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<sup>92</sup> *Id.* (The lawsuit against DraftKings, initiated by New York Attorney General Eric Schneiderman, alleged that the company engaged in false advertising, fraud, racketeering and negligence).

<sup>93</sup> Dustin Gouker, *DraftKings, FanDuel Pay \$6 Million Each to Settle New York Daily Fantasy Sports Case*, LEGAL SPORTS REPORT, Oct. 25, 2016, <http://www.legalsportsreport.com/11901/draftkings-fanduel-pay-6-million-in-new-york-case>.

<sup>94</sup> *Id.* (According to the Attorney General's office the settlement agreement, signed by DraftKings CEO Jason Robins and FanDuel CEO Nigel Eccles, "impose the highest New York Penalty awards for deceptive advertising in recent memory." Schneiderman and his office stated that each site "misled customers on key aspects of its games).

<sup>95</sup> *Id.* (Far fewer players than advertised, by operators FanDuel and DraftKings, actually made a profit while playing DFS).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Joe Solosky, *Will The Use of Algorithms Create A Fatal Tipping Point for Daily Fantasy Sports?*, SPORT TECHIE, Sept. 22, 2015, <http://www.sporttechie.com/2015/09/22/fantasysports/will-use-algorithms-create-fatal-tipping-point-daily-fantasy-sports/>.

consulting firm in New York, 91% of DFS winnings are won by just 1.3% of players.<sup>99</sup> The common DFS player does not have access to advanced coding or algorithms when making their picks and instead must rely on their own experience, intellect and luck.<sup>100</sup> Many advanced algorithms, through advanced statistical analysis will pinpoint the perfect player to choose for DFS based on their value, matchup and the weather.<sup>101</sup> Some websites, such as spreadsheetsports.com, offer easily accessible algorithms for players if they are willing to pay a monthly or seasonal fee.<sup>102</sup> Having the ability to better predict results undoubtedly creates “advanced players,” who can also use these algorithms to pinpoint weaker players on FanDuel and DraftKings.<sup>103</sup> Advanced players could use an algorithm to pair themselves up in head-to-head matchups with new or lesser-performing players.<sup>104</sup> Less advanced players would nearly always end up losing money on FanDuel or DraftKings, while advanced players sometimes racked up millions of dollars in winnings.<sup>105</sup>

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<sup>99</sup> Kate Barlowe, *Daily Fantasy Sports Merger Expedites Push for Sports Betting Legalization, AGA Says*, Nov. 21, 2016,

<https://www.casino.org/news/daily-fantasy-sports-merger-expedites-push-sports-betting-legalization-aga-says>. (McKinsey & Company found that highly skilled pros won the vast majority of winnings in DFS contests.)

<sup>100</sup> See article cited *supra* note 98 (Algorithms, are a process or set of rules to be followed in calculations or other problem-solving operations by a computer).

<sup>101</sup> *Id.*

<sup>102</sup> Bryan Povlinski, *Pricing, SPREAD SHEET SPORTS*, Last visited Feb. 5, 2017, <https://www.spreadsheetsports.com/projection-tools/pricing>. (For algorithm access to all DFS websites, Spread Sheet Sports charges \$59.99 per NFL and MLB season and \$49.99 per NBA season. Additionally, monthly subscriptions are available for all three sports for \$19.99 per month. Once purchased, Spread Sheet Sports offers customizable projection spreadsheets tools, baseline projections, historical projection tracking and optimal daily rosters).

<sup>103</sup> Joe Solosky, *Will The Use of Algorithms Create A Fatal Tipping Point for Daily Fantasy Sports?*, SPORTS TECHIE, Sept. 22, 2015.

<sup>104</sup> *Id.* (By advanced players entering themselves in sometimes hundreds or thousands of matchups daily against new players, the result would be that only a slim number of players actually won money).

<sup>105</sup> *Id.*

During Schneiderman's investigation into DFS's false advertising it was also revealed that FanDuel and DraftKings had explicitly stated to investors and advanced players that the late 2015 advertising blitz was to garner new players for the websites in order to benefit the advanced players.<sup>106</sup> New players, according to FanDuel and DraftKings, would provide more earnings for the advanced players and ensure a constant stream of revenue for investors.<sup>107</sup> These revelations ultimately, led to the \$12 million settlement against FanDuel and DraftKings.<sup>108</sup> Schneiderman found that even though DFS was being marketed as a game where anyone could win, very few non-advanced players actually did.<sup>109</sup>

Trouble continued for the daily fantasy industry when it was revealed on October 5, 2015, that DraftKings employees used "insider information" to win hundreds of thousands of dollars on FanDuel.<sup>110</sup> New York Attorney General Eric Schneiderman, immediately opened an investigation, in addition to his earlier investigation of deceptive advertising by FanDuel and DraftKings, to determine if insider information was being used.<sup>111</sup> By October 14, 2015, the FBI launched an investigation into DraftKings employees to determine if insider information had been shared,

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<sup>106</sup> Dustin Gouker, *DraftKings, FanDuel Pay \$6 Million Each to Settle New York Daily Fantasy Sports Case*, LEGAL SPORTS REPORT, Oct. 25, 2016, <http://www.legalsportsreport.com/11901/draftkings-fanduel-pay-6-million-in-new-york-case>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (91 percent of DFS winnings are won by just 1.3 percent of players).

<sup>110</sup> Joe Drape and Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, NEW YORK TIMES, Oct. 5, 2015, <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

<sup>111</sup> Dustin Gouker, *DraftKings, FanDuel Pay \$6 Million Each to Settle New York Daily Fantasy Sports Case*, LEGAL SPORTS REPORT, Oct. 25, 2016, <http://www.legalsportsreport.com/11901/draftkings-fanduel-pay-6-million-in-new-york-case>.

and unfairly advantaged those employees.<sup>112</sup> On October 15, 2015, in reaction to the reports of possession of insider information, the Nevada Gaming Control Board declared DFS to be gambling in the form of wagering and not “a game of skill.”<sup>113</sup> FanDuel and DraftKings are finalizing terms to merge into one company.<sup>114</sup> Due to the two companies dominating the vast majority of the market share the merger may be blocked by regulators such as the Federal Trade Commission (FTC).<sup>115</sup>

According to Jeff Infrac, a prominent gaming attorney, the companies [FanDuel and DraftKings] will likely have to answer questions about whether consumers would have to pay higher prices or would receive a higher quality product.<sup>116</sup> Infrac added that there are enormous benefits to the two companies merging.<sup>117</sup> Through the merger DraftKings and FanDuel, who have been forced to spend tens of millions of dollars in legal fees and lobbying costs, would also be better able to pool their resources together to handle these expenses.<sup>118</sup>

### *E. Individual State’s Reactions to Daily Fantasy Sports*

After FanDuel and DraftKings’ advertising blitz in

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<sup>112</sup> Joe Drape and Jacqueline Williams, *Fantasy Sports Said to Attract F.B.I. Scrutiny*, NEW YORK TIMES, Oct. 14, 2015, [http://www.nytimes.com/2015/10/15/sports/draftkings-fanduel-fbi-investigation.html?\\_r=0](http://www.nytimes.com/2015/10/15/sports/draftkings-fanduel-fbi-investigation.html?_r=0).

<sup>113</sup> Joe Drape, *Nevada Says it Will Treat Daily Fantasy Sports as Gambling*, NEW YORK TIMES, Oct. 15, 2015.

<sup>114</sup> Maya Kosoff, *The World’s Biggest Fantasy-Sports Web Sites Are Reportedly Merging*, VANITY FAIR, Nov. 1, 2016, <http://www.vanityfair.com/news/2016/11/the-worlds-biggest-fantasy-sports-web-sites-are-reportedly-merging>. (Were the companies to merge, they would control 90-95% of the DFS industry.)

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (Arguments in favor of the merger would be pooled liquidity, higher prize pools and greater consumer protection.)

<sup>118</sup> *Id.*

September 2015, many states began to look into the legality of DFS.<sup>119</sup> New York, under the direction of Attorney General Eric Schneiderman, and Nevada have been the states most critical of DFS.<sup>120</sup> Schneiderman has launched several investigations into FanDuel and DraftKings' activities and Nevada has sought to protect their casino industry through by declaring DFS to be gambling in the form of wagering and not as a game of skill.<sup>121</sup> In order for FanDuel or DraftKings to operate in Nevada they must apply for a gaming license, which would designate DFS to be a form of gambling.<sup>122</sup> FanDuel and DraftKings have pulled operations out of Nevada because they do not want to concede DFS is a form of gambling.<sup>123</sup>

On December 23, 2015, Illinois Attorney General Lisa Madigan ruled that DFS were a form of unlawful gambling under state law.<sup>124</sup> Just one month later on January 17, 2016, Texas Attorney General Ken Paxton issued a non-binding advisory opinion that DFS is a form of prohibited gambling if the house (DFS Website) takes a cut.<sup>125</sup> Paxton added, "because the outcomes of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate

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<sup>119</sup> Dustin Gouker, *DraftKings, FanDuel Pay \$6 Million Each to Settle New York Daily Fantasy Sports Case*, LEGAL SPORTS REPORT, Oct. 25, 2016, <http://www.legalsportsreport.com/11901/draftkings-fanduel-pay-6-million-in-new-york-case>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Joe Drape, *Nevada Says it Will Treat Daily Fantasy Sports as Gambling*, NEW YORK TIMES, Oct. 15, 2015.

<sup>123</sup> *Id.*

<sup>124</sup> Lisa Madigan, Office of the Attorney General, *File No. 15-006; SPORTS AND GAMING: Daily Fantasy Sports Contests as Gambling* (December 23, 2015).

<sup>125</sup> Joe Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, NEW YORK TIMES, Jan. 19, 2016, [http://www.nytimes.com/2016/01/20/sports/texas-attorney-general-deems-daily-fantasy-sports-illegal.html?\\_r=0](http://www.nytimes.com/2016/01/20/sports/texas-attorney-general-deems-daily-fantasy-sports-illegal.html?_r=0).

in such activities is a bet.”<sup>126</sup> FanDuel has left Texas entirely, while DraftKings has remained.<sup>127</sup> Losing Texas as a possible place of business deprives the DFS industry of over two million potential fantasy sports players located within the state.<sup>128</sup> Currently, DFS is explicitly allowed in twelve states including Massachusetts and New York, which are the corporate headquarters of DraftKings and FanDuel respectively.<sup>129</sup>

Massachusetts Attorney General Maura Healey commented, “I think anybody looking at this [DFS] acknowledges it’s a form of gambling.”<sup>130</sup> Soon after Healey’s comments, Massachusetts passed a comprehensive regulations bill on DFS, which included the banning of players under 21 years of age, requiring sites to offer beginner only games and disallowing any fantasy contests for college or high school sports.<sup>131</sup>

New York, despite being a battleground for litigation and lawsuits against FanDuel and DraftKings, has legislation explicitly permitting DFS in the state.<sup>132</sup> The legislation, in exchange for the explicit legalization DFS, provides for oversight from state regulators, new consumer protections and greater funding for

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<sup>126</sup> See Nick Statt, *Texas Attorney General Says Daily Fantasy Sports Are 'Prohibited Gambling'*, VERGE, Jan. 19, 2016, <http://www.theverge.com/2016/1/19/10791654/daily-fantasy-sports-texas-attorney-general-draftkings-fanduel>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (“There are more than 2 million fantasy sports players in Texas, according to the Fantasy Sports Trade Association.”)

<sup>129</sup> Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN, Aug. 27, 2016. [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

<sup>130</sup> *Id.* (Healey later added, “just because it’s gambling doesn’t make it illegal”).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*; Dustin Gouker, *Daily Fantasy Sports Is Back In Business In New York: Gov Cuomo Signs Bill*, LEGAL SPORTS REPORT, Aug. 3, 2016, <http://www.legalsportsreport.com/10890/ny-enacts-dfs-law>. (The New York DFS statute allows DraftKings, FanDuel and all other sites that had pulled out of the state to return to operation in New York).

education according to New York Governor Andrew Cuomo.<sup>133</sup> Many of the ten remaining states that have explicitly legalized DFS also require licensing fees, audits and the banning of any contests involving high school or college sports.<sup>134</sup>

The deviations in policy towards DFS between the states led to the first Congressional Hearing on daily fantasy sports on May 11, 2016.<sup>135</sup> Federal lawmakers during the hearing hinted at possible future regulations for the DFS industry.<sup>136</sup>

The current lack of a uniform federal law specifically regarding DFS has led to a massive lobbying and legal costs for FanDuel and DraftKings.<sup>137</sup> Each individual state has become a battleground for FanDuel and DraftKings, and to ensure consumer access to their product, the companies have been forced to spend enormous sums of money.<sup>138</sup> FanDuel and DraftKings have employed upwards of 78 individual lobbyists to put pressure on states to legalize DFS.<sup>139</sup> Most lobbying is done to ensure that DFS remain a game of skill, in exchange for greater consumer protection, such as age requirements and measures to protect

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<sup>133</sup> Dustin Gouker, *Daily Fantasy Sports Is Back In Business In New York: Gov Cuomo Signs Bill*, LEGAL SPORTS REPORT, Aug. 3, 2016. (Governor Cuomo's office estimated that the DFS law would result in \$4 million in revenue for the state).

<sup>134</sup> Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN, Aug. 27, 2016. (Colorado, Indiana, Kansas, Maryland, Mississippi, Missouri, Rhode Island, Tennessee, West Virginia and Virginia are the remaining ten states that have explicitly legalized daily fantasy sports.)

<sup>135</sup> Dustin Gouker, *After Hearing, Don't Expect Congress To Get Involved With Daily Fantasy Sports*, LEGAL SPORTS REPORT, May 11, 2016, <http://www.legalsportsreport.com/9985/congress-and-action-on-daily-fantasy-sports>.

<sup>136</sup> *Id.*

<sup>137</sup> Alexandra Berzon, *Fantasy Sports Industry Mounts Lobbying Blitz*, WALL STREET JOURNAL, Feb. 15, 2016, <http://www.wsj.com/articles/fantasy-sports-industry-mounts-lobbying-blitz-1455585446>.

<sup>138</sup> *Id.* (Together the companies are aiming to spending between \$5 million and \$10 million on lobbying just in 2016.)

<sup>139</sup> *Id.*



player's funds.<sup>140</sup>

### III.      POTENTIAL PROPOSED LEGISLATION

#### *A. Who Will Handle the Regulation of the Daily Fantasy Sports Industry?*

Under the Federal Trade Commission's "Section 5 authority," this agency is arguably in the best position to provide federal oversight to the DFS industry.<sup>141</sup> Section 5 of the FTC allows the federal agency to defend against deceptive conduct and behavior.<sup>142</sup> Correspondence between FTC Chairwoman, Edith Ramirez, and New Jersey Representative Frank Pallone and New Jersey Senator Robert Menendez, suggested that the FTC had the ability to regulate DFS.<sup>143</sup> It is imperative that a strong regulatory

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<sup>140</sup> *Id.*

<sup>141</sup> 15 U.S.C. § 45(a)(2) (2012). (The FTC's authority under Section 5 declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.")

<sup>142</sup> See David McCabe, *NJ Dems Want FTC to Regulate Daily Fantasy Sports*, HILL (Nov. 10, 2015, 7:14 PM), <http://thehill.com/policy/technology/259754-nj-dems-say-ftc-in-best-position-to-regulate-daily-fantasy-sports> (reporting Edith Ramirez, the current chairwoman of the Federal Trade Commission, told Sen. Menendez and Rep. Pallone "that the commission was able to investigate the industry under its authority to police deceptive behavior"). See generally 15 U.S.C. § 45 (describing the authority of the FTC to prohibit unfair or deceptive trade practices).

<sup>143</sup> See Travis Waldron, *New Jersey Congressman Wants Review of Daily Fantasy Sports*, HUFFINGTON POST (Sept. 14, 2015, 5:48 PM), [http://www.huffingtonpost.com/entry/congress-pallone-daily-fantasy-sports-hearings\\_55f734b5e4b00e2cd5e7a03b](http://www.huffingtonpost.com/entry/congress-pallone-daily-fantasy-sports-hearings_55f734b5e4b00e2cd5e7a03b) (relaying the efforts by Frank Pallone to have the Energy and Commerce Committee review daily fantasy sports); see also Jonathan Salant, *Feds Should Set Rules for Fantasy Sports, N.J. Lawmakers Say*, NJ.COM (Oct. 6, 2015, 7:04 PM), [http://www.nj.com/politics/index.ssf/2015/10/njs\\_menendez\\_and\\_pallone\\_seek\\_us\\_probe\\_of\\_fantasy.html](http://www.nj.com/politics/index.ssf/2015/10/njs_menendez_and_pallone_seek_us_probe_of_fantasy.html) ("U.S. Sen. Robert Menendez (D-N.J.) and U.S. Rep. Frank Pallone Jr. (D-6th Dist.) asked FTC Chairwoman Edith Ramirez

agency oversees DFS to ensure protections for players, prevent corruption and to punish breaching parties.

*B. Potential Regulation in Response to the FanDuel and DraftKings Merger*

The main proponent for DFS regulation is likely to be Representative Frank Pallone (D-NJ).<sup>144</sup> Representative Pallone requested a Congressional hearing on the matter and believes that DFS's reliance on "game of skill" is unconvincing.<sup>145</sup> Additionally, Representative Pallone is a major proponent of legalized sports gambling as the casino industry in his home state of New Jersey serves to profit directly from sports betting.<sup>146</sup> Furthermore, Representative Pallone is interested in DFS being considered to be sports betting/gambling so that the industry will receive the same scrutiny, oversight and consumer protection currently faced by the sports gambling industry.<sup>147</sup>

Regulation of DFS by the U.S. Congress will be premised on the protection of consumers participating in the industry.<sup>148</sup> In

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whether the commission could regulate daily fantasy sports, and if so, to begin establishing rules for their operation.”).

<sup>144</sup> Daily Fantasy Sports: Issues and Perspectives: *Before the H. Subcomm. on Commerce, Mfg. and Trade*, 114th Cong. (2016), (“The biggest thing for me is that I would like us to legalize sports betting”).

<sup>145</sup> *Id.* (statement of Representative Frank Pallone (D-NJ), “while quietly applying for and receiving gambling licenses in the United Kingdom, DFS operators continue to argue to interested states in the U.S. that – unlike sports betting – DFS is not gambling”).

<sup>146</sup> *Id.* (statement of Representative Frank Pallone (D-NJ), “How can the professional sports leagues oppose sports betting at casinos and race tracks but support and prosper from the betting that is taking place every day in daily fantasy sports?”).

<sup>147</sup> *Id.* (Representative Pallone’s interest is in making sure that DFS is not unfairly taking advantage of the lack of regulation in the DFS industry, compared to that of sports gambling).

<sup>148</sup> Daily Fantasy Sports: Issues and Perspectives: *Before the H. Subcomm. on Commerce, Mfg. and Trade*, 114th Cong. (2016), (statement of Representative Frank Pallone (D-NJ), “It is crucial that consumers know what they are

the aftermath of the insider information controversy in October, 2015, fairness and transparency in the industry will also be a major focus of federal regulation.<sup>149</sup> Representative Michael Burgess (R-TX), the chairman of the subcommittee for the Congressional hearing, stated that consumer protection is the main issue for discussion.<sup>150</sup> Consumer protection has been the rallying call for both states explicitly legalizing DFS and for states that have banned DFS.<sup>151</sup> Federal and State lawmakers, with regard to DFS, are ultimately looking to provide protections for players and to ensure that DFS providers are not taking advantage of new players.<sup>152</sup>

The proposed merger between FanDuel and DraftKings will expand the need for greater regulation of the DFS industry as generally a merger of the top two companies in any industry category will receive intense scrutiny under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (hereinafter, HSR Act).<sup>153</sup>

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purchasing when the sign up for daily fantasy sports and that they understand the risks of losing money in the process.”); The Free Dictionary, *Consumer Protection*, (Last visited Feb. 5, 2017), <http://legal-dictionary.thefreedictionary.com/consumer+protection>, (Consumer protection laws are federal and state statutes governing sales and credit practices involving consumer goods. Such statutes prohibit and regulate deceptive or unconscionable advertising and sales practices, product quality, credit financing and reporting, debt collection, leases and other aspects of consumer transactions).

<sup>149</sup> Daily Fantasy Sports: Issues and Perspectives: *Before the H. Subcomm. on Commerce, Mfg. and Trade*, 114th Cong. (2016), (Representative Frank Pallone (D-NJ) stated, at the May 11, 2016, legislative hearing, that his goal is not to stop people from playing, but how to bring fairness and transparency to the industry as the potential harm to consumers is real).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (According to Representative Frank Pallone (D-NJ), “DFS is currently operating in a murky legal framework... that is mostly unregulated... 90% of payouts are won by just 1% of winners”).

<sup>153</sup> See Marc Edelman, *Proposed FanDuel And DraftKings Merger Makes an Interesting Test Case For Trump Antitrust Policy* (Nov. 16, 2016, 5:54 PM) <http://www.forbes.com/sites/marcedelman/2016/11/16/proposed-fanduel-and->

Federal government action is imminent any time a merger occurs, and the merged companies control an overwhelming share of the market.<sup>154</sup> Together, FanDuel and DraftKings control approximately 90-95% of the DFS industry, which would easily attract the attention of regulators due to a possible monopoly.<sup>155</sup> Monopolies overwhelm competitors through price control and erection of barriers to prevent future competition that only a big market company could compete with.<sup>156</sup> There is no codified percentage, that automatically triggers federal government review of a merger.<sup>157</sup> Several Federal Appeals Courts have differed on the required dominant market share that is necessary for there to exist a monopoly, but have generally agreed that a company controlling over 80% of the market does constitute a monopoly.<sup>158</sup>

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draftkings-merger-will-be-interesting-test-case-for-trump-antitrust-policy/#5ad1c2c5c6c1. (“For example, in August 2010, the Federal Trade Commission and Department of Justice issued new Horizontal Merger Guidelines that state the agencies’ intent is to challenge any mergers that serve to substantially ... lessen competition, or ... tend to create a monopoly.”)

<sup>154</sup> *Id.* (The federal government, particularly regulatory agencies, are more likely to act when competitor entry into a particular industry is substantially impeded. Impediments include high licensing fees.)

<sup>155</sup> Maya Kosoff, Vanity Fair, *The World’s Biggest Fantasy-Sports Web Sites Are Reportedly Merging.*

<sup>156</sup> Gans, Joshua; King, Stephen; Stonecash, Robin; Mankiw, N. Gregory (2003). *Principles of Economics.* Thomson Learning.

<sup>157</sup> The United States Department of Justice, *Competition And Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 2*, (Updated Jun. 25, 2015), [https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N\\_22\\_](https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N_22_), (Judge Hand stated, in *United States v. Aluminum Co. of America*, that a market share of ninety percent “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.” The Supreme Court has endorsed Judge Hand’s approach in *American Tobacco Co. v. United States*).

<sup>158</sup> *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam) (The Fifth Circuit observed that “monopolization is rarely found when the defendant’s share of the relevant market is below 70%); *Compare*, *Colorado Interstate Gas Company v. Natural Gas Pipeline Company of America*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (The Tenth Circuit noted

An antitrust review of FanDuel and DraftKings will take place, likely in 2017, to determine if the proposed merger violates U.S. law.<sup>159</sup> Under the HSR Act parties cannot complete mergers until they have made proper filings with the U.S. Federal Trade Commission and Department of Justice.<sup>160</sup> Knowing that they face a large legal hurdle, FanDuel CEO Nigel Eccles has stated that the merger will benefit the consumer, which is a critical test for federal regulators.<sup>161</sup> Smaller competitors, such as Jeremy Levine, founder and CEO of DRAFT, have expressed support for the merger due to the mounting legal fees and the realization that if

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that to establish “monopoly power, lower courts generally require a minimum market share of between 70% and 80%); *Compare*, United States v. Dentsply Int’l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) (The Third Circuit stated that a “share significantly larger than 55% has been required to establish prima facie market power” and held that a market share between seventy-five percent and eighty percent of sales is “more than adequate to establish a prima facie case of power”).

<sup>159</sup> See Curt Woodward, Boston Globe, *Rivals DraftKings, FanDuel Ink Merger Deal* (Nov. 18, 2016).

<https://www.bostonglobe.com/business/2016/11/18/fantasy-sports-rivals-draftkings-fanduel-ink-merger-deal/PEfrAdm9mqxA5gBHLxzuvL/story.html> (The proposed merger of DraftKings and FanDuel is likely to be finalized in early 2017, which will then set forward an antitrust review).

<sup>160</sup> Fenton, Kathryn; McDonald Bruce. “DOJ Brings “Gun Jumping” Enforcement Action and Requires Disgorgement.”

<https://www.transactionadvisors.com/insights/doj-brings-gun-jumping-enforcement-action-and-requires-disgorgement> (Once proper filings are made the FTC and DOJ will determine whether the merger will adversely affect U.S. commerce. Until the merger is approved the merging companies cannot take any steps to integrate operations or for the acquiring party to obtain operation control of the acquired party.)

<sup>161</sup> David Purdum, ESPN, *Daily fantasy powerhouses DraftKings, FanDuel agree to merge*, (Nov. 18, 2016), [http://www.espn.com/chalk/story/\\_/id/18078056/daily-fantasy-powerhouses-draftkings-fanduel-agree-merge](http://www.espn.com/chalk/story/_/id/18078056/daily-fantasy-powerhouses-draftkings-fanduel-agree-merge) (Overall competition in the [Daily fantasy sports] marketplace will be increased by offering a greater variety of options that appeal to new users).

FanDuel and DraftKings fail so will the smaller DFS companies<sup>162</sup> Smaller DFS providers, including Levine, want FanDuel and DraftKings to do well so that the companies or their merged entity can expand the industry and bring new players to the smaller DFS providers.<sup>163</sup>

### C. Proposal to Repeal PASPA

The proposed merger between FanDuel and DraftKings has expedited calls for a repeal of PASPA and the creation of new legislation to govern sports betting by the American Gaming Association (AGA).<sup>164</sup> AGA Senior VP of Public Affairs Sara Rayme, stated, “We’re building on the momentum created by DFS to remove the federal ban on sports betting.”<sup>165</sup> DFS currently walks a fine line between online gambling, which is prohibited under the UIGEA, and PASPA, which prohibits sports betting.<sup>166</sup> Repealing PASPA would clear the way for DFS to be considered sports betting and pave a path for federal regulation of the DFS industry.<sup>167</sup> A repeal of PASPA would allow the DFS industry to rebrand itself as legalized sports betting and keep the industry from having to continue to face the online gambling charges that

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<sup>162</sup> *Id.* (“Prior to the tumult of the past year, FanDuel and DraftKings were well on their way to becoming multibillion-dollar pillar business in sports,” according to, founder and CEO of DRAFT, Jeremy Levine).

<sup>163</sup> *Id.* (“There still will be massive business built in this space, but it won’t be FanDuel or DraftKings individually. Due to the merger, the opportunity is now there for the few companies that were able to survive and strengthen in the past year” according to, founder and CEO of DRAFT, Jeremy Levine).

<sup>164</sup> Kate Barlowe, *Daily Fantasy Sports Merger Expedites Push for Sports Betting Legalization, AGA Says*, (“The American Gaming Association (AGA) is a Washington-DC based lobbying firm that believes regulated sports betting would provide safeguards for consumers who are already participating through offshore networks.”)

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (To have the ability to pass any federal legislation involving DFS, PASPA must first be repealed).

<sup>167</sup> *Id.*

are currently bogging down FanDuel and DraftKings.<sup>168</sup> The election of former casino owner Donald Trump, as President of the United States in 2016, will make a repeal of PAPSAs more likely, due to Trump's greater familiarity with illegal sports betting.<sup>169</sup> Republicans controlling both Houses of Congress are also more likely to repeal PASPA, compared to Democrats, largely in part to the argument that states should have the ability to govern their own affairs.<sup>170</sup>

*D. Major Players Involved in DFS Federal Legislation and  
Timeline for Potential Regulation*

Representative Frank Pallone, who has a dual interest in legalizing sports gambling in New Jersey and protecting consumers, will likely lead the charge in legalizing DFS.<sup>171</sup> The Congressman will seek a concession from the DFS industry that they permanently designate themselves as sports betting and not as a game of skill.<sup>172</sup> This designation will allow Rep. Pallone to push forward a bill repealing PASPA and legalizing sports gambling which is in the interest of him and DFS operators.<sup>173</sup> Protecting consumers will also be a major term of new legislation and any regulation affecting DFS.<sup>174</sup> Any proposed legislation will contain provisions that require top players to be listed on a

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (“As President-elect Donald Trump has acknowledged, illegal sports betting is a thriving industry,” according to AGA President Geoff Freeman”)

<sup>170</sup> *Id.* (“The 24-year-old federal ban, which is breathing life into a \$150 billion illegal sports betting market, threaten the integrity of games, and presents fundamental questions about state sovereignty to define their own laws,” according to AGA President Geoff Freeman.)

<sup>171</sup> Daily Fantasy Sports: Issues and Perspectives: *Before the H. Subcomm. on Commerce, Mfg. and Trade*, 114th Cong. (2016).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (The prevention of deceptive advertising and sales practices is the main focus to protect consumers).

leaderboard.<sup>175</sup> This leaderboard will give other consumers a reasonable opportunity to block and avoid having to face these players.<sup>176</sup>

A federal law regulating DFS will likely resemble that of the Fantasy Contests Act, a Virginia law geared towards DFS or the state of Tennessee's DFS law.<sup>177</sup> Under the Virginia system, the state delegated oversight of DFS operators to the Department of Agriculture and Consumer Services.<sup>178</sup> The law mandates that all DFS providers implement age verification policies and that funds from DFS players be "segregated from a company's operating funds."<sup>179</sup> Additionally, all DFS providers, whether big or small, must pay a \$50,000 licensing fee, to conduct business in

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<sup>175</sup> *Id.* (Listing top participants will allow new players to better track which players they should avoid in head to head matchups).

<sup>176</sup> *Id.* (The blocking option will allow players to avoid having to be put into head to head matchups with specified top players. By blocking another player, that blocked player will no longer be able to enter into head to head matchups against the blocking player. This will prevent skilled players from constantly entering and feasting on new players).

<sup>177</sup> Fantasy Contests Act, 2016 Va. Acts (to be codified at Va. Code Ann. §§ 59.1-556 to - 570); See Dustin Gouker, *Tennessee Governor Signs Daily Fantasy Sports Bill; Third State to Enact DFS Law*, Legal Sports Rep. (Apr. 28, 2016, 09:18 PDT), <http://www.legalsportsreport.com/9774/tennessee-governor-signs-daily-fantasy-sports-bill-law-third-state-regulate-dfs> (recognizing on Wednesday, April 27, 2016 Tennessee became "the third state to regulate the daily fantasy sports industry"). See generally *Bill History*, Tenn. Gen. Assembly,

<http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2105>

<sup>178</sup> Dustin Gouker, *Virginia Governor Signs Fantasy Sports Bill; VA First State to Pass DFS Regulation*, Legal Sports Rep. (Mar. 7, 2016, 15:13 PDT), <http://www.legalsportsreport.com/8873/virginia-governor-signs-dfs-bill> (explaining how Virginia's Department of Agriculture and Consumer Services is "tasked with overseeing the [daily fantasy sports] industry"). The Virginia law also gives the Department of Agriculture and Consumer Services the power to investigate and enforce violations of the act.

<sup>179</sup> See Dustin Gouker, *Fantasy Sports Industry 'Deeply Concerned' with \$50K Fee in Virginia Law*, Legal Sports Rep. (Mar. 8, 2018, 8:04 PDT), <http://www.legalsportsreport.com/8915/fsta-pushes-back-on-dfs-fees>.



Virginia.<sup>180</sup> The \$50,000 flat licensing fee has raised concerns from small DFS providers that they will not be able to afford the fee and will be put out of business.<sup>181</sup> Compared to Virginia, Tennessee's legislation deviates regarding the cost of licensing fees.<sup>182</sup> Instead of assessing a single flat licensing fee of \$50,000, Tennessee's legislation, "charges a 6% tax on revenue generated Tennessee's residents."<sup>183</sup> By charging a percentage tax on revenue, as opposed to a single flat fee, Tennessee's model is more favorable towards smaller-scale daily fantasy sports operators.<sup>184</sup> Virginia and Tennessee's plans for licensing fees resemble flat taxes.<sup>185</sup> A progressive tax on licensing fees<sup>186</sup> has not been implemented in any state considering legalizing DFS.<sup>187</sup> Implementing a progressive tax on licensing fees would likely provide a greater opportunity for smaller DFS operators to grow relative to larger providers, such as FanDuel and DraftKings, due to the lower tax rate on licensing fees compared to their larger

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<sup>180</sup> *Id.* (Virginia's \$50,000 licensing fee will more than likely serve to hurt smaller daily fantasy sports companies, with only a "handful" of such companies being able to afford the fee).

<sup>181</sup> *Id.* (The Fantasy Sports Trade Association, which has been pushing for sensible daily fantasy sports legislation, is now desperately trying to stop "the momentum behind higher fees.")

<sup>182</sup> See Dustin Gouker, *Tennessee Governor Signs Daily Fantasy Sports Bill; Third State to Enact DFS Law*.

<sup>183</sup> Gouker, *supra* note 154. (The equation for calculating the amount of revenue generated by Tennessee residents is "entry fees minus prizes awarded equals revenue.")

<sup>184</sup> *Id.* ("Tennessee has the chance to be much more friendly in terms of allowing smaller operators into the state.")

<sup>185</sup> Kelly Phillips Erb, Forbes, *Our Current Tax v. The Flat Tax v. The Fair Tax: What's The Difference?* (Aug. 7, 2015, 10:16 AM)

<http://www.forbes.com/sites/kellyphillipserb/2015/08/07/our-current-tax-v-the-flat-tax-v-the-fair-tax-whats-the-difference/#3a9908e21fa6> (A flat tax is a consistent tax rate applied to all brackets and everyone would pay the same tax rate regardless of income.)

<sup>186</sup> *Id.* ("A Progressive tax is exactly what it sounds like: the rate of tax increases as income increases." This tax system is currently used by the United States.)

<sup>187</sup> Ryan Rodenberg, ESPN, *Daily Fantasy Sports State-by-State Tracker*.

competitors.<sup>188</sup> However, there are also several drawbacks to implementing a progressive tax rate.<sup>189</sup> Also problematic is that the Republican-controlled Congress has advocated for simplifying the tax code in a manner similar to that of a flat tax.<sup>190</sup> Thus, Republicans will be hesitant to add a progressive tax structure to federal licensing fees for DFS.<sup>191</sup>

Individual states, such as Virginia and Tennessee, will not take too kindly if the federal government swoops in and takes away all revenue that the states would have previously collected from their own state regulations. To avoid this scenario, any federal legislation must contain a revenue sharing provision with individual states. A percentage of all money that the federal government takes in from DFS operators, in this case 20%, shall be set aside to be allocated by the federal government to individual states. Having the federal government allocate the money, instead of DFS operators, will ensure that there is proper oversight and prevent DFS operators from receiving higher operating costs to comply with the measure.

Currently, when an individual creates an account for

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<sup>188</sup> Kelly Phillips Erb, Forbes, *Our Current Tax v. The Flat Tax v. The Fair Tax: What's The Difference?* (A progressive tax raises revenue by taxing those who can most afford to pay. "Offering tax breaks for those at the bottom should, in theory, give those taxpayers the opportunity to increase their wealth and work their way out of poverty").

<sup>189</sup> *Id.* (Progressive taxes treat people differently and the top 1% of taxpayers, who in this case would be FanDuel and DraftKings, would consistently pay far more of their earnings in taxes. Another drawback is that progressive taxes are also considered to be more complicated than other forms of tax, meaning more effort and oversight will needed to create and maintain a progressive form).

<sup>190</sup> Clark Mindock, *ibtimes.com, Fox GOP Debate: What Is A Flat Tax? Cruz, Paul, Carson And Santorum Support The One Size Fits All Approach*, (Nov. 10, 2015, 3:55 PM), <http://www.ibtimes.com/fox-gop-debate-what-flat-tax-cruz-paul-carson-santorum-support-one-size-fits-all-2178227>, (Republican Senators and 2016 Presidential candidates, Rand Paul and Ted Cruz, have called for a national flat tax. Fellow 2016 candidates Ben Carson and Rick Santorum also supported a national flat tax.)

<sup>191</sup> *Id.*

DraftKings they must provide the website the name of state from which they are operating from and their social security number.<sup>192</sup> FanDuel does not currently ask for the state in which a player is located.<sup>193</sup> All DFS providers, as part of their licensing agreements with the federal government, will be required to ask for the state in which the player is competing from. Additionally each individual player must enter a debit or credit card into the provider's website in order to compete on that forum. The entering of state and credit/debit card information will allow the FTC to monitor where each transaction is taking place and determine which jurisdiction that will receive revenue. Revenue should be split based on the proportional representation of players in each individual state on each DFS website.

Requiring stringent state ID requirements will allow for an accurate accounting of the number of players competing in each state. Additionally, the stringent requirements will prevent any state from creating fake profiles to boost the number of players competing in their state. Each person competing in a state will only count as one individual even if they are competing on multiple DFS websites. The other option for determining state revenue sharing would be to base it off of the total amount of revenue generated by DFS providers in each state. This option, despite appearing more simple, would incentivize individual states to advocate that its citizens compete in DFS. It would be very dangerous for states to have an incentive to advocate that its citizens bet money on a website. State governments should not be encouraging its citizens to partake in any form of online gambling and revenue sharing based on the total number of players will better protect the public than a sharing system based on revenue generated.

Federal regulation regarding DFS, despite its rapid growth, will likely not be a high priority in President Donald Trump's

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<sup>192</sup> <https://www.draftkings.com/>; (Last visited Feb. 6, 2017).

<sup>193</sup> <https://www.fanduel.com/p/join>. (Last visited Feb. 6, 2017).

administration.<sup>194</sup> Despite President Trump's signaling of support for legalized sports gambling he is not likely to directly address the issue unless forced to.<sup>195</sup> Perhaps the man representing the biggest hurdle to federal legislation regarding DFS is Billionaire Republican donor Sheldon Adelson.<sup>196</sup> Adelson, who founded the Las Vegas Sands Corporation, is the owner of the Venetian and The Palazzo hotels in Las Vegas.<sup>197</sup> In the past, Adelson has voraciously fought against Internet based gambling.<sup>198</sup> In 2015, Adelson publicly backed a bill introduced in the US House of Representatives that sought to overturn any state legislation that

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<sup>194</sup> See Amita Kelly and Barbara Sprunt, *Here Is What Donald Trump Wants To Do In His First 100 Days*, (Nov. 9, 2016)

<http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> (President Donald Trump's major goals include immigration reform, the forced removal of two million criminal illegal immigrants, building a wall on the United States' southern border with Mexico, improving infrastructure, term limits, lobbying bans, renegotiation of trade deals, appointing a replacement to the Supreme Court to replace the deceased Antonin Scalia, establishing tariffs, and repealing the Affordable Care Act).

<sup>195</sup> Kate Barlowe, *Daily Fantasy Sports Merger Expedites Push for Sports Betting Legalization, AGA Says*, (The proposed merger of FanDuel and DraftKings will trigger regulatory scrutiny and is likely the upcoming event that can force Donald Trump's involvement in DFS).

<sup>196</sup> Nathan Vardi, *forbes.com, Sheldon Adelson Says He Is 'Willing to Spend Whatever It Takes' To Stop Online Gambling*, (Nov. 22, 2013, 9:08 AM) <http://www.forbes.com/sites/nathanvardi/2013/11/22/sheldon-adelson-says-he-is-willing-to-spend-whatever-it-takes-to-stop-online-gambling/#fd9e4f34c637> (Adelson has hired an army of lawyers and lobbyists to outlaw online gambling due to his view that "internet gambling will hurt young and economically vulnerable Americans, including those who will view it as a potential way to get out from under a mountain of student debt." For Adelson, the issue is a moral one according to his statements).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (Adelson, in addition to viewing the outlaw of online gambling as a moral issue, believes that online gambling will have a devastating impact on the U.S. casino industry, which he is a part of, and thousands of jobs will be lost. Adelson, additionally, believes that online gambling would hurt his revenue as a casino owner.)

legalizes online gambling.<sup>199</sup> Adelson, through Super PACs, donated \$25 million to Donald Trump, which made him the largest individual political donor in the 2016 Election Cycle.<sup>200</sup> With so much political influence and spending power along with his donations to President Donald Trump, Adelson, as he has done with other politicians in the past, may be able to exert enough influence on Trump to force the President away from any legalization of online gambling and sports betting.<sup>201</sup>

Another group that is likely to play a role in blocking the legalization of DFS, by the federal government or states such as Texas, are anti-gambling and Christian groups.<sup>202</sup> The Christian Life Commission of the Baptist General Convention of Texas, is

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<sup>199</sup> Christina Wilkie, The Huffington Post, *Adelson-Backed Online Gambling Bill Splits GOP At Hearing*, (Mar. 26, 2015, 9:26 PM ET), [http://www.huffingtonpost.com/2015/03/26/adelson-gambling-ban\\_n\\_6951990.html](http://www.huffingtonpost.com/2015/03/26/adelson-gambling-ban_n_6951990.html).

<sup>200</sup> Peter Stone, theguardian.com, *Sheldon Adelson to Give \$25m boost to Trump Super Pac*, (Sept. 23, 2016, 13:56 EDT), <https://www.theguardian.com/us-news/2016/sep/23/sheldon-adelson-trump-super-pac-donation-25-million> (Adelson gave the \$25 million to Future45, a Super PAC, which brought his total estimated political donations to \$65 million in the 2016 Election Cycle); Gregory J. Krieg, abcnews.com, *What Is a Super PAC? A Short History*, (Aug. 9, 2012), <http://abcnews.go.com/Politics/OTUS/super-pac-short-history/story?id=16960267> (Super PACs can raise an unlimited amount of money to support a candidate or campaign but are barred from coordinating political activities with any candidate or campaign. Donors can also remain anonymous).

<sup>201</sup> Kenneth P. Vogel, Politico, *Christie apologizes for 'occupied territories.'* (Mar. 29, 2014, 11:55 EDT) (Updated Mar. 31, 2014, 9:47 AM EDT), <http://www.politico.com/story/2014/03/chris-christie-occupied-territories-apology-105169>, (New Jersey Governor, Chris Christie, after giving a speech on Middle East politics and Israel, apologized to Sheldon Adelson, a pro-Israel donor, for referring to the West Bank as the “occupied territories.” Adelson has rejected the use of the term “occupied territories,” when referring to the West Bank).

<sup>202</sup> Gromer Jeffers Jr, Dallas Morning News, *Luck or Skill? Daily fantasy sports like DraftKings splitting conservative Texas lawmakers*, (Feb. 21, 2017), <http://www.dallasnews.com/news/texas-legislature/2017/02/21/luck-skill-daily-fantasy-sports-like-draftkings-splitting-conservative-texas-lawmakers>.

one such religious group that has advocated against the legalization of DFS due to held religious beliefs and a concern for addiction among players.<sup>203</sup> Robert Kohler, a lobbyist for the group, vehemently opposes gambling and believes that the “game of skill” argument is merely there to sneak DFS through.<sup>204</sup> Kohler agrees with Texas Attorney General Ken Paxton’s decision to designate DFS as a form of gambling, and has stated that the Christian Life Commission will not support the legalization of DFS regardless of what is actually proposed.<sup>205</sup>

In summary, a proposed DFS statute would likely include federal regulation and oversight conducted by the Federal Trade Commission, the repeal of PASPA, licensing fees resembling that of a flat tax and protections for players. All terms will be conditioned on the acceptance of FTC approval of the merger of DraftKings and FanDuel. Article 5 of the FTC gives the regulatory agency the ability to effectively police the agency by ensuring that players are indeed protected and handing down penalties for non-compliance with its regulations. Due to federal regulations, all conflicts involving DFS will be uniformly channeled through the FTC as opposed to individual states. Every state, barring a carve-out, will follow the same uniform standards as every other state. Player protections will follow the lead of Massachusetts by implementing a minimum age requirement of 21 years old, mandating player leaderboards be made available to all players and giving users the ability to block other players. Additionally, players must be explicitly made aware, by the DFS

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<sup>203</sup> *Id.* (Robert Kohler, a lobbyist for the Christian Life Commission of the Baptist General Convention of Texas, said he doubts the [Texas] Legislature or the governor [Greg Abbott] would see the issue as anything but an expansion of gambling).

<sup>204</sup> *Id.* (“Attorney General Paxton got it right,” Kohler said. “Folks on both sides will agree there’s an element of chance. At the end of the day, trying to sneak this thing in as a skill is a bad way to sell this policy).”

<sup>205</sup> *Id.* (Kohler said that in order to let fantasy sports companies operate in Texas, there should be a constitutional amendment to allow it and even then, the Christian Life Commission would still oppose the measure).

operator, of their ability to use these protections.

The most likely proponent of a federal bill, Rep. Frank Pallone, will require that PASPA be repealed as part of the bill or else no federal statute will come to fruition. Pallone and Rep. Frank A LoBiondo of New Jersey introduced a Bill in the house on February 1, 2017, that aims to legalize sports betting nationwide.<sup>206</sup> On March 2, 2017, the proposed bill was referred to the subcommittee on Crime, Terrorism, Homeland Security, and Investigations by the House Judiciary.<sup>207</sup> DFS, via the new statute, will be re-designated as “legal sports betting” due to the removal of PASPA and legalization of sports betting nationwide. While the exact pay structure has not yet been released, the proposed statute should follow the Tennessee model requiring that all DFS operators pay a 6% licensing fee to the federal government on all profits generated. No progressive-type tax will be implemented in the statute. Finally, all current and future cases in state courts involving DFS must be transferred to federal jurisdiction to be adjudicated by the FTC once the bill is passed.

#### *E. Carve-Outs for Individual States and Indian Lands*

As was done in prior regulatory efforts including PASPA and UIGEA, a new federal statute will almost certainly include carve-outs for several states and Native American lands.<sup>208</sup> All

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<sup>206</sup> Sports Gaming Opportunity Act of 2017, H.R. 783, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/783/text>, (This bill amends the federal judicial code to exempt a lottery, sweepstakes, or other betting, gambling, or wagering scheme authorized by a state by a statute enacted on or after January 1, 2017, and in effect not later than January 1, 2021, from the prohibition against a governmental entity, or a person acting pursuant to the law or compact of a governmental entity, sponsoring, operating, advertising, or promoting sports gambling).

<sup>207</sup> *Id.*

<sup>208</sup> Onlinegamblingsites.com, *All About PASPA And How It Impacts US Online Gambling Sites*, (PASPA contained a carve-out for the states of Nevada, Oregon, Delaware, New Jersey and Montana, while UIGEA specifically exempted fantasy sports from its provisions).

gambling-related activities undertaken on Native American lands is currently overseen by the National Indian Gaming Commission (NIGC).<sup>209</sup> The Indian Gaming Regulatory Act, passed in 1988, protected gambling on Native American lands and gave Individual states no jurisdiction over casinos on recognized Indian lands even if the territory in question fell within the state's boundaries.<sup>210</sup> Currently, Indian casinos are the only gambling establishments recognized by the federal government. A federal statute must allow the already existing framework of the NIGC to remain intact and allow the agency to continue to govern Native American lands. This would mean that Indian casinos, despite the enactment of a federal statute, would not be able to automatically legalize DFS in their casinos. NIGC's mission is to act in the best interests of the Indian gambling and any decisions that might impact Indian casinos should first receive approval from the regulatory agency. Indian casinos, under the jurisdiction of NIGC, will be given a carve-out exemption to legalizing DFS on its lands and casinos. Any Indian casino wishing to operate a legalized DFS website or sportsbook must first get approval from the NIGC. Native American lands and casinos are a delicate subject that involves differing interests than those currently faced by individual states. The agency best equipped to handle the challenges of Indian casinos is the NIGC and the agency should continue to maintain control over all of its casinos regarding DFS.

#### IV. ANALYSIS

##### *A. Profitability for the Daily Fantasy Sports Industry*

Ultimately, the primary goal of the DFS industry, including DraftKings and FanDuel, is to generate the maximum amount of

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<sup>209</sup> Indian Gaming Regulatory Act, 25 USC 2701 § 2 (1988).  
<https://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg2467.pdf>.

<sup>210</sup> *Id.*



profits possible.<sup>211</sup> Federal regulation of the DFS industry, barring any carve outs, will create legal uniformity in every jurisdiction in the United States. The major titans of the DFS industry, DraftKings and FanDuel, have spent an exorbitant number of dollars in legal and lobbying fees in their efforts to legalize the industry on a state by state basis.<sup>212</sup> Currently, the DFS industry must lobby and expend legal fees in each state it hopes to operate in, which means attorneys and lobbyists must be paid in every jurisdiction. These costs have made the DFS industry expend resources that could have been otherwise spent on advertising or negotiating new partnership deals. With all jurisdictions sharing in legal uniformity, DFS providers will no longer have to spend such resources. Instead of having a fifty-state strategy, DFS providers and lobbyists can instead focus their efforts on one singular target in Washington D.C.

Through regulation, the DFS industry will instantly become more profitable as the costs previously allocated towards lobbying and legal fees may instead be disbursed for marketing, partnership deals and investing in new technology to make the player's experience even more enjoyable. Additionally, the legal fog that has prevented or led to the rescission of partnership deals with major sports entities will be lifted. The removal of this fog will allow businesses to pursue partnerships without the fear of consequences due to an uncertain legal future. Uniformity, created by a federal law, will streamline the contract process for businesses and the DFS industry. Confidence of businesses involved in the DFS sector will increase with the knowledge that the DFS industry has been recognized by the federal government as a legitimate and reputable entity. Companies and investors generally advocate for consistency, but the legal limbo and financial volatility of DFS has made recent investment into the

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<sup>211</sup> Dustin Gouker, legalsportsreport.com, *DraftKings' TV Blitz: One Commercial Every 1.5 Minutes; \$82 Million Spent in '15*.

<sup>212</sup> Alexandra Berzon, The Wall Street Journal, *Fantasy Sports Industry Mounts Lobbying Blitz*.

industry very unstable. A federal statute and regulation of DFS would remove the volatility of DFS from state-to-state and create uniform guidelines that would increase the stability of the industry. Investment and partnership deals from that consistency would soon follow as DFS was valued as a multi-billion-dollar industry before it ran into its legal troubles.<sup>213</sup>

Smaller companies in the DFS industry will also benefit from a federal statute and regulation. Similar to why many small DFS providers support the proposed merger between DraftKings and FanDuel, regulation would increase the profits of the two largest DFS providers, which would then trickle down to the smaller providers.<sup>214</sup> The increase in marketing, advertising, and partnerships due to the freeing up of funds previously spent on legal fees, will attract more players to compete in DFS. The additional number of competitors has the potential to trickle down to the smaller providers and provide them with a greater player base. The small DFS providers are completely dependent on the success of DraftKings' and FanDuel's lobbying and legal battles meaning that the lack of federal legislation serves them no benefit. The smallest DFS providers must navigate the same legal landmines as the largest providers, but without the backing of partnership agreements and millions in raised capital. The lessening of legal barriers for small DFS providers gives them greater potential to expand into new, previously unavailable markets, such as Texas, and increase their own player base.<sup>215</sup>

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<sup>213</sup> David Purdum, ESPN, *Daily fantasy powerhouses DraftKings, FanDuel agree to merge*.

<sup>214</sup> Tejvan Pettinger, *Trickle down economics*, (Dec. 9, 2014), <http://www.economicshelp.org/blog/174/economics/trickle-down-economics/>, ("Trickle down economics is a term used to describe the belief that if high income earners gain an increase in salary, then everyone in the economy will benefit as their increased income and wealth will filter through to all sections in society").

<sup>215</sup> See Nick Statt, Texas Attorney General Says Daily Fantasy Sports Are "Prohibited Gambling," ("There are more than 2 million fantasy sports players in Texas, according to the Fantasy Sports Trade Association.")

While the large players would also expand into these markets to compete against small DFS providers, the alternative of state-by-state legislation only drives down the potential success of the small providers. Success for small DFS providers is nearly impossible to achieve when too many barriers exist to impede their growth. Additionally, the lessening of barriers for smaller DFS providers may allow a smaller provider a clearer path to potentially challenging DraftKings and FanDuel as the dominant players in the industry.<sup>216</sup>

### B. Public Perception of Daily Fantasy Sports

Due to the advertising blitz of Autumn 2015, the DFS took a major public relation hit for its non-stop advertising during sporting events.<sup>217</sup> While not all reaction was negative, the inundation of advertisements led many people to sour towards the marketing campaign as a whole.<sup>218</sup> While the Wall Drug-style advertising campaign increased the number of players who visited DFS websites, the negativity surrounding the industry will likely

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<sup>216</sup> Tejvan Pettinger, *Trickle down economics*, (“If high income earners see an increase in disposable income, they will increase their spending and this created additional demand in the economy. This higher level of aggregate demand creates jobs and higher wages for all workers. Alternatively, increased profits for firms may be reinvested into expanding output. This again leads to higher growth, wages and incomes for all”).

<sup>217</sup> Jordan Valinsky, *digiday.com, Everybody hated those DraftKings and FanDuel commercials, data shows*, (Sep. 14, 2015), <http://digiday.com/brands/everybody-hated-draftkings-fanduel-commercials-data-shows/>, (According to data from Brandwatch, conversations online about FanDuel and DraftKings’ commercials was overwhelmingly negative. Data shows that 76 percent of FanDuel commercials were received negatively, while DraftKings was just as hated with 75% of mentions tracking negatively”).

<sup>218</sup> *Id.* (“Negative mentions don’t generally concern themselves with the quality of the ads, or the messages within them, but just seeing them repeatedly,” said Brandwatch analyst Kellan Terry, adding that people simply felt “inundated.” The negative opinions of the marketing campaign deviated from the public perception of DraftKings and FanDuel, themselves, whom scored 81% and 54% in positivity respectively.).

remain in the years to come even if federal legislation goes through. New York Attorney General Eric Schneiderman's investigations, and later settlements, regarding insider trading and false advertising in the DFS industry will likely keep many potential new players away from initially participating. Large scale advertising campaigns will also not help the image of DFS. Legalization of DFS, however, would assure people, including investors, that the industry has been recognized and is therefore legitimate. Recognition of its legality by the federal government will greatly improve the perception of DFS' legitimacy in the eyes of potential players. It will not happen immediately, but perception of the DFS industry will eventually become more positive. Slowly garnered positivity will also mean that the DFS industry likely will not see an immediate explosion of new players right away from markets that already allow DFS. States where DFS is not currently allowed in, such as Texas and Nevada, will see huge increases in the number of players joining DFS, however, most states will only see a slow gradual climb in players competing on DFS websites.

### *C. Reactions from the Four Major Sports and Media Networks*

The repeal of PASPA will initially be met with approval among most the four major sports in the U.S. as gambling has become more accepted since the passage of the law in 1992.<sup>219</sup> PASPA has been a contentious issue for the Commissioners of the NFL, NBA, MLB and NHL and its repeal will have ramifications on all four leagues.<sup>220</sup> Designating DFS as a legal form of

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<sup>219</sup> Onlinegamblingsites.com, *Professional and Amateur Sports Protection Act – PASPA*, (NBA Commissioner Adam Silver, in a New York Times op-ed, stated “Times have changed since PASPA was enacted. Gambling has increasingly become a popular and accepted form of entertainment in the United States. Most states offer lotteries. Over half of them have legal casinos. Three have approved some form of Internet Gambling, with others poised to follow.)

<sup>220</sup> *Id.*

gambling will result in the repeal of PASPA. NBA Commissioner Adam Silver and MLB Commissioner Rob Manfred have favored the legalization of sports betting.<sup>221</sup> NFL Commissioner Roger Goodell, meanwhile, is in favor of DFS, but does not support universal legal internet and sports gambling.<sup>222</sup> NHL Commissioner Gary Bettman is in favor of DFS but has been non-committal in supporting legalized sports betting.<sup>223</sup> The more time that passes between the repeal of PASPA and the present day, the greater the acceptance will be for legal internet and sports gambling within the four major sports. An increase in the potential for licensing deals and the vast profits that will accompany them will gradually push the NFL and NHL towards supporting legal internet and sports gambling, alongside DFS. During the 2014 fiscal year, NFL teams shared more than \$7.2 billion in league revenue.<sup>224</sup> According to the American Gaming

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<sup>221</sup> *Id.* (“Major League Baseball, and Commissioner Rob Manfred, seemed to be inching towards wanting to see legalized sports betting”).

<sup>222</sup> Dustin Gouker, Legal Sports Report, *What the NFL, NBA And MLB Have To Say About Daily Fantasy Sports And Sports Betting*, (Nov. 4, 2015, 8:21 PST), <http://www.legalsportsreport.com/5798/nfl-nba-mlb-on-dfs-and-sports-betting/>, (“Daily fantasy is considered a game of skill. There’s no league sponsorship agreement or investment in those companies. Clubs may accept traditional advertising within their controlled media properties, including TV, radio, digital, print and stadium signage, provided no club or league marks are included in such advertisements. The daily fantasy marketplace is in its infancy and we continue to follow developments.” Regarding sports betting, Goodell stated. “We are not in favor of legalizing sports gambling. We think that is a mistake for sports. The integrity of our game is the most important thing and we want to make sure that our game is above any sort of influence and we do not want to participate in that).

<sup>223</sup> *Id.* (Bettman has stated, “the issue of legalized sports betting needs a lot more discussion before any decisions about government legalization and regulation can be made”).

<sup>224</sup> David Purdum, ESPN, *Research show U.S. could dominate global legalized sports betting market*, (Sep. 9, 2015), [http://www.espn.com/chalk/story/\\_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market](http://www.espn.com/chalk/story/_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market), (ESPN sports business

Association, an estimated \$95 billion was spent on NFL and college football in 2014, with less than four percent of that money being wagered legally.<sup>225</sup> A repeal of PASPA will legalize these estimated wagers and open the door to greater revenue for the four major sports. Each of the four leagues and their commissioners will accept the newly recognized online and sports gambling law, without much fanfare as billions in potential revenue will be too hard to pass up. All four leagues will no doubt produce partnership and licensing agreements with gambling operators that will allow them access to a portion of the profits associated with the industry.

The express legalization of DFS will lead to an increase in licensing deals between the DFS operators, the four major sports, and media companies. Removing the legal barriers currently in place will ease the fears of potential investors, including TV networks. This will allow these entities to invest unabated in DFS and prevent what occurred in 2015. In 2015, at the height of FanDuel and DraftKings' advertising binge, companies including The Walt Disney Company pulled out of certain aspects of their deal with DraftKings due to fears of financially associating itself with possible gambling activities.<sup>226</sup> With the express legalization of DFS nationwide, potential investment companies will have a stable framework to operate from. Companies will be able to more confidently invest in the industry as the amount of legal uncertainty, regarding the DFS industry, will be reduced to near

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reporter Darren Rovell estimates the NFL's total annual revenue to be more than \$12 billion).

<sup>225</sup> *Id.*

<sup>226</sup> Kurt Wagner, Peter Kafka, *DraftKings Won't Raise \$250 Million From Disney, but Will Still Get Ad Deal*, (Jun. 23, 2015, 9:08 PM PDT), <https://web.archive.org/web/20151010011822/http://recode.net:80/2015/06/23/draftkings-wont-raise-250-million-from-disney-but-will-still-get-espn-ad-deal/>, (DraftKings maintained the exclusive rights to advertise fantasy sports on Disney's ESPN properties starting in 2016, however, the previously agreed upon investment/money raising deal, between the two companies, was stricken due to Disney not wanting to be associated with gambling activities).

zero. The Disney scenario, barring any agreements made in bad faith, will likely not repeat itself with the federal regulation of DFS as investors will have complete legal information to knowledgably make their business decisions. This increased knowledge will quicken the pace of investment agreements into the industry as vetting the industry will be far less time-consuming and cost draining compared to pre-federal legislation. Individual companies value consistency in the market and the newly created consistency of the DFS industry will be a magnet for investors.

#### *D. Effect on the Casino Industry*

Nevada and Las Vegas' most influential casino magnate, Sheldon Adelson, opposes the legalization of DFS. However, his stated reasons do not suggest that he is worried about increased competition.<sup>227</sup> Adelson views his opposition to DFS as a moral one as opposed to a business-related reason.<sup>228</sup> Many casino owners and gaming companies, including Rush Street Gaming CEO George Carlin, would welcome a broader legalization of DFS as they do not fear the industry as a competitor.<sup>229</sup> Carlin's main

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<sup>227</sup> Daniel Roberts, Yahoo.com, *Exclusive: Why Sheldon Adelson is against daily fantasy sports*, (Sept. 9, 2016) <http://finance.yahoo.com/news/exclusive-why-sheldon-adelson-is-against-daily-fantasy-sports-144543169.html> (Adelson, in an interview, stated that he believes DFS exploits poor people and that the accessibility to DFS through cellphones makes the game dangerous for young kids. Explaining further, Adelson stated, "This is a moral issue").

<sup>228</sup> *Id.*

<sup>229</sup> Danny Ecker, Crain's Chicago Business, *Is there a state jackpot in daily fantasy sports?* (Jan. 16, 2016) <http://www.chicagobusiness.com/article/20160116/ISSUE01/301169993/is-there-a-state-jackpot-in-daily-fantasy-sports>, ("Rush Street Gaming CEO Greg Carlin, who runs Rivers Casino in Des Plaines, doesn't fear competition from daily fantasy betting. Instead, he sees it as a step toward broader legalization of sports betting—something he would love to offer at the state's most lucrative riverboat casino. "If they legalize daily fantasy sports in Illinois, they should legalize Internet gaming," he says. Carlin says he's unsure whether he would want to incorporate daily fantasy into his casino's offering if it were allowed.

worry is that with no regulation DFS maintains an unfair advantage over casinos and other gaming entities who are regulated and pay taxes.<sup>230</sup> Federal regulation of DFS, via the proposed legislation, would solve Carlin's problem by putting casinos and DFS on a level playing field. Both casinos and DFS will be taxed, regulated and subject to the same or similar rules. With casinos and DFS subject to the same, or similar, rules the casino industry will likely not be too worried about losing business to DFS.

Casino and gaming operators, at least publicly, do not seem to be worried about losing business to DFS. However, there is potential business that could be lost if casinos do not themselves add DFS to their facilities. Once casinos do realize that they will lose some business they will respond by launching their own DFS websites. The average age of players participating in fantasy sports is 38.6 years old and is composed consists of a 66 to 34 male to female ratio.<sup>231</sup> Comparatively, the average age of visitors to casinos is 46 years old with a negligible difference in the male to female ratio.<sup>232</sup> Players choosing DFS and casinos tend to be more educated than the general population and have similar annual earnings.<sup>233</sup> Additionally, the average household income for

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For now, he's imploring lawmakers to level the playing field with companies like FanDuel and DraftKings. Daily fantasy "is untaxed, unlicensed, unregulated gambling," he says. "They should be subject to the same rules and regulations and taxes that we're subject to").

<sup>230</sup> *Id.*

<sup>231</sup> Fantasy Sports Trade Association, <http://fsta.org/research/industry-demographics/>, (51% of fantasy sports players have a household income of over \$75,000 and 66% of players have a college degree or more).

<sup>232</sup> Online Casinos Elite Blog, <https://www.onlinecasinoselite.org/post/the-modern-day-gambler>, (Per the American Gaming Association, a 2012 opinion poll showed 29% of all males in the United States has visited a casino in the last year while 26% of female respondents visited a casino in that same time frame. According to a 2006 Harrah's report, the average household income of casino visitors is just over \$56,000 per year or about \$8,000 per year high than the median household income for that year).

<sup>233</sup> *Id.*; Fantasy Sports Trade Association.



fantasy sports and casino players are relatively similar.<sup>234</sup> These numbers suggest that there is a shared player base between DFS and casinos. With the full legalization of DFS, casinos will see a small decrease to the number of traditional bets, specifically in sports booking. Casinos, however, will have the full ability to respond to a potential loss in bettors by setting up their own DFS operations, whether online or at their own facilities. The legalization of DFS will force casinos to ratchet up their own operations to compete. This will result in the creation of several well-funded, casino-run, DFS operating sites. The addition of these well-funded casino websites will increase competition in the DFS sector and slightly whittle away at DraftKings and FanDuel's current domination of the industry.

*E. Impact on Individual States*

A major argument against federal legislation of DFS is that this kind of regulation would take the matter out of the hands of the states. Many states have already acted on DFS and will argue that federal government action is not needed. If many of the fifty states have or are currently looking into legislation for DFS, then why should the federal government interfere with this process? Some states, including Texas which has banned DFS providers from operating in its jurisdiction, will likely not take too kindly to having their state government decision overruled by the federal government. The government in Texas may argue that the federal legislation does not benefit its citizens the same way that state measures would. Put simply, Texas knows what Texans like best. Despite the valid objections from proponents of states' rights, regarding DFS, federal legislation will be more effective than

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<sup>234</sup> Dollar Times, <http://www.dollartimes.com/inflation/dollars.php>, (When adjusted for annual inflation of 1.86% between 2006 and 2016, \$56,000 in buying power amounts to \$67,303.86. The average household income of casino players is differentiated by approximately \$7,696.14 compared to fantasy sports players).

negotiating individual state laws.

Were Congress to pass a federal statute legalizing DFS, all current state laws would immediately be trumped by the new federal law. Under precedent set in *McCulloch v. Maryland*, federal laws have supremacy over state laws, meaning that individual states will have no ability to interfere with the federal government's ability to enforce a statute pertaining to DFS.<sup>235</sup> All states will be forced to follow the federal government statute and barring any carve-out, will effectively lose the ability to independently regulate DFS. The states that will be most opposed to losing the ability to regulate DFS themselves will be the states that currently ban DFS.<sup>236</sup> This opposition will be softened somewhat in big states, such as Texas, due to the profits taken in from the state revenue sharing program. However in smaller states such as Idaho, where DFS operators ceased operation following a deal with the state Attorney General, the reaction will not be as positive since their potential player base is much less than Texas.<sup>237</sup> According to the United States Census, Idaho, as of July 1, 2016, was estimated to have 1,683,140 citizens, compared to Texas, which had an estimated population of 27,862,596.<sup>238</sup> The revenue that Idaho is likely to receive will be insignificant compared to that of Texas. Idaho, barring any carve-out, will lose the ability to regulate DFS in its state and will receive little in return. Despite the inconvenience for small states, the laws must remain uniform with only a few allowable carve-outs for special circumstances such as for Native American lands. Uniformity of laws will help the most players receive important protections,

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<sup>235</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>236</sup> [legalsportsreport.com](http://www.legalsportsreport.com), *What Are The States Where You Can Play Daily Fantasy Sports?*, <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/>, (The States of Washington, Idaho, Iowa, Montana, Hawaii, Alabama, Louisiana, Delaware, Nevada, Arizona contain no DFS operators, while Texas, Missouri, Indiana, Florida, Virginia, New York and Vermont only contain limited DFS operators due to regulation or by agreement).

<sup>237</sup> *Id.*

<sup>238</sup> <http://www.census.gov/data/tables/2016/demo/popest/nation-total.html>.

establish greater oversight, and will help make the industry more profitable.

It is necessary to create a uniform framework that is both easier to understand than the current state of DFS legislation, and also guarantee greater protections to players in each state. Having a uniform framework will protect citizens in states such as Texas and Idaho, where DFS is not currently legal. As seen after the demise of online poker in 2006, players will not simply give up and disappear, but rather will find a new source to feed their gambling habits. State laws banning DFS in their jurisdiction only push players to pursue DFS and gambling on the black market.<sup>239</sup> It is imperative to keep players on legitimate websites where they can receive the maximum protections available including information security, ability to block predatory players, and regulatory oversight.

#### *F. National Indian Gaming Commission*

The proposed carve-out for Indian casinos and lands will allow the National Indian Gaming Commission to continue to regulate all DFS related matters. DraftKings and FanDuel have not made any discernible efforts in the past to target Native American populations for players or lobby Indian casino owners in the past and will likely not do so in the future. There is little potential for DraftKings and FanDuel regarding Native Americans and NIGC, and the two companies will likely not advertise on Native American lands or try to interfere with the carve-out in order to reach more players. The NIGC, with its special carve-out, will continue to function in a manner similar to what it has in the past regarding gambling and DFS and make decisions in the best interest of Native American tribes.

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<sup>239</sup> David Purdum, ESPN, *Research show U.S. could dominate global legalized sports betting market*, (Despite the ban on sports betting in the United States, with the exception of a few carve-outs, there was over \$90 billion spent illegally on the NFL and College Football in the so-called black market in 2014).

### *G. Increased Protections for Daily Fantasy Sports Players*

The primary aim of supporters who advocate for federal regulation of DFS is to increase consumer protection for all players.<sup>240</sup> Legislation for DFS will prevent new players to DFS from being taken advantage of by experienced players with access to advanced statistics.<sup>241</sup> Legislation will require DFS providers, both big and small, to allow players to block others. Additionally, all registered players must be given notice of the blocking feature and agree to the terms by clicking a check box before they first compete. Players with advanced data in the past have used advanced algorithms at their disposal to pair themselves in matchups against new players or low skilled players.<sup>242</sup> Giving notice to players of their ability to block predatory and highly skilled users will prevent new players from being taken advantage and increase their own chances of winning. In the long run, the increase in earnings by a greater number of players will in turn draw in more players to compete in DFS. More players are likely to be attracted to compete if their odds of winning are increased. Detailed statistics of opposing players, including their rank, must be available to each adversarial player so that those adversaries can better decide whether to block that user. The blocking feature will prevent advanced players from constantly feeding off low-

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<sup>240</sup> Daily Fantasy Sports: Issues and Perspectives: *Before the H. Subcomm. on Commerce, Mfg. and Trade*, 114th Cong. (2016), (statement of Representative Frank Pallone (D-NJ), “It is crucial that consumers know what they are purchasing when the sign up for daily fantasy sports and that they understand the risks of losing money in the process.”).

<sup>241</sup> David Purdum, ESPN, *Research show U.S. could dominate global legalized sports betting market*.

<sup>242</sup> Jay Caspian King, *How Daily Fantasy Sports Industry Turns Fans Into Suckers*, (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html>, (High-volume gamblers, often aided by computer scripts and optimization software that allow players to submit hundreds or even thousands of lineups at a time reportedly take advantage of new players”).

skilled players in head-to-head matchups.

*H. Shutting Down Daily Fantasy Sports Will Only Cause  
Players to go Elsewhere to Gamble*

If Daily Fantasy Sports are banned in a manner like that of online poker then it will only cause players to move to another form of gambling as opposed to eradicating the problem completely.<sup>243</sup> As seen with the demise of online poker, the players involved in the industry had to go somewhere and many gravitated towards DFS.<sup>244</sup> Players who make a living off of various forms of gambling or DFS will simply look for another source to feed their career or obsession.<sup>245</sup> The same players who use advanced algorithms and software in DFS also used them on online poker websites.<sup>246</sup> Requiring DFS providers to even out these advantages and provide greater protections to their players will be vastly more effective in protecting consumers than by simply banning the industry and thereby forcing advanced players to move into different games.<sup>247</sup> Advanced players cannot be fully removed from online gambling and it is in the federal government's interest to provide a home for these players, under strict regulation, as opposed to banning the industry and causing

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<sup>243</sup> Evan Grossman, Rolling Stone, "*Will Daily Fantasy End Up Like Online Poker? You Bet,*" (Oct. 29, 2015)

<http://www.rollingstone.com/sports/features/will-daily-fantasy-end-up-like-online-poker-you-bet-20151029> (After charges, on April 15, 2011, alleged that poker sites had violated the Unlawful Internet Gambling Enforcement Act of 2006, the online poker industry evaporated overnight in the United States. "The day left thousands of online gamblers scratching their heads and looking for new places to play and make a quick buck.")

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* ("Online poker experienced a rash of cheating software that allowed players to see the hidden cards of other players, giving them a major advantage")

<sup>247</sup> *Id.*

another industry to quickly take in the former players.<sup>248</sup>

### *I. Effects of Having no Federal Legislation*

If federal legislation does not pass through Congress or get signed into law by the President of the United States, then the DFS industry will continue to operate in a near exact state to what it has been since Autumn 2015. DraftKings and FanDuel, regardless of whether their merger takes place, will continue to fight a running battle in each individual state to legalize DFS. The perpetual legal battles in roughly twenty-five states in the U.S. will not end overnight and will persist for several more years.<sup>249</sup> Illinois and Georgia will likely be the next two major battlegrounds for DFS operators.<sup>250</sup> Each state has a large population with many potential players and DraftKings and FanDuel will not be want to lose such valuable states for their business.<sup>251</sup>

The lobbying costs in both Georgia and Illinois will be high considering the headwinds that DFS operators are facing against the negative Attorney General opinions in each state. Additionally, the legal fees from litigating in the two states will be detrimental to the profitability of DraftKings and FanDuel, as both

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<sup>248</sup> *Id.* ("Bankroll management is a big thing," he [Teddy McDermott, whose true name has been withheld due to a pending lawsuit] says. "I think a lot of people who don't have a poker background struggle with that. Just knowing how to manage and not going above my means in any particular buy-ins. And then there's game selection. You don't sit down at an online poker table of really good players. In DFS, you don't join a heads-up game against really good players if you can help it.")

<sup>249</sup> [legalsportsreport.com](http://legalsportsreport.com), *What Are The States Where You Can Play Daily Fantasy Sports?*

<sup>250</sup> *Id.* (Illinois Attorney General Lisa Madigan has opined that DFS is illegal gambling in the state of Illinois, but no action has yet been taken by the Illinois State Legislature. In Georgia, the state Attorney General also issued a negative opinion on DFS, but nearly all DFS operators maintain a presence in the state.)

<sup>251</sup> <http://www.census.gov/data/tables/2016/demo/popest/nation-total.html>. (Illinois has an estimated population of 12,801,539 as of July 1<sup>st</sup>, 2016, while Georgia's population is estimated at 10,310,371).

will be the targets of any legal action that arises. Both companies have already taken the step to pool their resources together to confront the lobbying and legal costs. Even if the merger is not approved by the federal government, the two companies will likely work closely in tandem to achieve the desired result of DFS legalization. DraftKings and FanDuel, while not always seeing completely eye-to-eye, will have a common enemy in State Legislatures wanting to ban DFS. This common enemy will keep the two companies aligned with each other. If federal legislation is passed to legalize DFS and the merger was denied by the FTC, then the two companies would likely resume hostility towards each other. Until then, the companies will find it in their best interests to share legal and lobbying fees.

Individual state opinions on DFS will continue to trickle in every couple of months and keep the industry in the media. Without uniform laws, however, the industry will continue to be unprofitable until each state case is settled, which will likely take at least five years. That five-year period will likely wipe out all but the largest DFS operators, as only the largest providers, DraftKings and FanDuel, will be able to lobby successfully enough to stay in each state. Several states have legalized DFS in their state, but have only authorized a certain number of DFS operators to conduct business in the jurisdiction.<sup>252</sup> Small DFS providers will face stiff headwinds, no matter where legislation emerges, due to their reliance on individual state decisions. Individual state decisions, especially those modeled similarly to Virginia's DFS law, has caused many small DFS operators to have to pick and choose which states they decide to operate in.<sup>253</sup> With

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<sup>252</sup> [legalsportsreport.com](http://legalsportsreport.com), *What Are The States Where You Can Play Daily Fantasy Sports?* (The State of New York, through legislation, has legalized DFS, but only a select number of DFS operators have been approved to conduct business in the state).

<sup>253</sup> [legalsportsreport.com](http://legalsportsreport.com), *What Are The States Where You Can Play Daily Fantasy Sports?*, (Virginia has passed legislation that allows any DFS operator to conduct business in the state, but the licensing fees have been too much for many smaller DFS operators to afford).

a single federal law, small DFS operators would still have to pay a licensing fee or tax but the law's uniformity will prevent these operators from having to undergo the process of registering in each state. Registering state by state is a costly endeavor which requires hiring an attorney in each state, and expending other resources that these operators do not have. Smaller DFS providers, without any federal legislation, will likely go out of business in the next few years, and only large providers, such as FanDuel, DraftKings, Yahoo! and potentially large casinos, being able to succeed.

*J. Scenario of Banning DFS From All Jurisdictions*

A complete ban of DFS through federal legislation, in a manner similar to that of online poker and gambling, would likely lead to a similar outcome of players simply finding a new game to quench their thirst. The outlaw of online poker, through the UIGEA, closed the door on one issue, but simultaneously created another in the form of DFS. Many former online poker players now play DFS and those players will no doubt find another form of online gambling to compete in the event of a federal ban on DFS. DraftKings and FanDuel would be forced to move all of their operations overseas, particularly to Great Britain, and all smaller U.S. based operators would be immediately wiped out. A federal prohibition would cause the industry to quickly die out in the U.S., similar to online poker. In all likelihood, a black market for DFS would also emerge to handle the demand of players who would still like to compete in DFS despite the ban. States that have already designated DFS as illegal within their boundaries will no doubt welcome the federal prohibition, while states that had previously legalized DFS will not put up too much of a fight because the industry is relatively small and a low priority in many states. The loudest protests would come from commissioners and owners within the four major sports, many of whom have invested in DFS. A scenario where DFS is banned nationwide will likely not come to fruition but a ban would not be unprecedented as seen



with the UIGEA.

## V. CONCLUSION

Federal regulation of Daily Fantasy Sports must be enacted. A federal statute will increase protection for all players involved in DFS and will help make the DFS industry more profitable. A federal statute, that regulates but does not ban DFS, will keep players from moving on and engaging in other alternative means to feed their gambling habits. Regulation will also revisit complicated U.S. internet laws, such as UIGEA, and allow for a more streamlined process for negotiating internet regulation. To pave the way for federal regulation of DFS, the Professional and Amateur Sports Protection Act of 1992 (PASPA) must be repealed. The repeal of PASPA will allow DFS operators to classify themselves as legalized sports betting, which will absolve operators from having to defend their product as illegal gambling. Additionally, a federal statute will prevent DFS operators from having hemorrhage legal and lobbying fees in all fifty states. DFS players will receive greater protection, ranging from blocking predatory or advanced players, greater transparency from the industry, and have the added benefit of federal oversight via the FTC. Pursuant to the legislation, the federal government will also tax DFS operators at a percentage of their total revenue taken in through rakes.

There will be several high-profile opponents of federal regulation, including billionaire Sheldon Adelson, and Attorney Generals Ken Paxton of Texas, Lisa Madigan of Illinois and Adam Laxalt of Nevada. Adelson's opposition will likely prove to be most problematic as he donated the most money to Donald Trump in the 2016 Election and has been steadfast in his opposition to legalized DFS. The state of Nevada, of which Adelson is a resident, will be the individual state that produces the greatest resistance to legalizing DFS. Nevada, with its vital casino industry, could serve to lose money from the legalization of DFS as some players may forsake the opportunity to travel to Las Vegas

and instead gamble online.

The proposed merger between FanDuel and DraftKings will no doubt trigger federal scrutiny, due to its monopolistic nature, as the two companies control 90-95% of the DFS industry. Ultimately, the merger will likely be denied as it would represent a barrier to competition. President Trump will not make federal regulation of DFS a top priority,<sup>254</sup> and ultimately it is Congress that must take the initiative to enact DFS regulation.

Daily fantasy sports have become an integral part of the internet-based fantasy sports industry. While money is certainly a motivating factor for players, the majority of players are simply looking to have a good time. So long as there is federal oversight to make sure that the DFS operators are putting together a fair product, with full disclosure, there is little reason to ban players from utilizing internet-based daily fantasy sports. Banning transactions in online poker has not prevented players from simply moving to a different gambling-like activity. Instead of creating another online poker-type situation, legislators should instead focus on regulating the DFS industry, protecting players and allowing the industry to produce the best product it can.

*Joshua Shancer\**

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<sup>254</sup> See Amita Kelly and Barbara Sprunt, *Here Is What Donald Trump Wants To Do In His First 100 Days*.

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