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ARE DAILY FANTASY SPORTS COMPANIES PLAYING THE ODDS AGAINST FUTURE REGULATIONS?

INTRODUCTION

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which prohibits transactions from banks or financial institutions to online gambling sites.¹ While the UIGEA bans online gambling of any kind, it contains a clear exception for “participation in any fantasy or simulation sports game or educational game or contest”² But, this exception only applies where certain conditions are met, including:

All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.³

Thus, the fantasy sports exception applies where the outcome of the fantasy sports contest rests on a participant’s skill, not chance.⁴ At the time UIGEA was passed, fantasy sports referred to the traditional season long fantasy leagues that have been a mainstay among friend groups and co-workers for years.⁵ However, the UIGEA’s fantasy sports exception created a loophole and ultimately allowed creative entrepreneurs to modify a time-tested platform to adhere to modern society’s “instant gratification” desires.⁶ The result of this modification of traditional fantasy sports is a new type of fantasy sports,

¹ *Why Fantasy Sports is Not Gambling: Understanding a Game of Skill*, FANTASY SPORTS TRADE ASS’N, <http://fsta.org/research/why-fantasy-sports-is-not-gambling/> (last visited Feb. 2, 2016).

² 31 U.S.C.A. § 5362 (1)(E)(ix) (2006).

³ 31 U.S.C.A. § 5362 (1)(E)(ix)(II) (2006).

⁴ See 31 U.S.C.A. § 5362 (1)(A) (2006) (defining a bet or wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or game subject to chance”).

⁵ Tony Romm, *Feeling Heat, Fantasy Sports Sites Launch Lobbying Blitz*, POLITICO, <http://www.politico.com/story/2015/10/fantasy-football-sports-gambling-lobbying-blitz-214814#ixzz30fwSLt4y> (last updated Oct. 14, 2015, 10:05 AM).

⁶ Darren Heitner, *An Abbreviated History of FanDuel and DraftKings*, FORBES (Sept. 20, 2015, 9:41 AM), <http://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/#3428222d127>; see also Mike Montgomery, *The FanDuel DraftKings Scandal Shows the Risk of Building Businesses in Legal Gray Zones*, FORBES (Oct. 18, 2015, 11:16 AM), <http://www.forbes.com/sites/mikemontgomery/2015/10/18/the-fanduel-draftkings-scandal-shows-the-risk-of-building-businesses-in-legal-gray-zones/#51f7a02e3b45>.

commonly referred to as daily fantasy sports (“DFS”). DFS was a nonexistent concept prior to the passage of the UIGEA.⁷ In DFS, a participant competes for prizes on a daily—or weekly—basis, allowing for greater opportunities to win. Recently, the media and politicians have heavily scrutinized popular DFS companies FanDuel and DraftKings, calling into question the legality of the companies’ operations.⁸ DFS companies maintain that their operations are protected by the UIGEA because DFS is a fantasy sports game based on skill rather than luck.⁹ Arguably, the loophole exemplifies a common problem in the sharing economy: innovation out-pacing regulation.¹⁰

This perspective seeks to explore possible regulatory and compliance measures that could help quell much of the controversy surrounding DFS. However, this piece will not examine the question of whether DFS constitutes gambling, but will instead operate under the assumption that DFS can continue to be protected under the exception in UIGEA if additional regulatory and compliance measures are instituted.

I. WHAT IS DAILY FANTASY SPORTS?

A basic understanding of how DFS works and the differences between DFS and traditional fantasy sports are the first steps in formulating potential regulation and compliance standards. The goal of all fantasy sports is to create a team that scores more fantasy points than the opposing participants.¹¹ A fantasy point is the scoring measurement utilized by both traditional fantasy sports and DFS, where point values correspond with particular plays.¹² In traditional fantasy sports, a participant chooses a league—that may consist of friends or random opponents—and drafts players at the beginning of a sport’s season in hopes of scoring more fantasy points than opposing participants.¹³ Usually, the draft involves all participants in the particular league, ensuring

⁷ Romm, *supra* note 5.

⁸ See, e.g., *Legislators Ask If Fantasy Betting is Skill or Chance?*, WALL ST. J., <http://www.wsj.com/articles/APda0bcb43d79646309131c45493edfc24> (last updated Dec. 16, 2015, 1:12 PM).

⁹ Montgomery, *supra* note 6.

¹⁰ *Id.*

¹¹ *Daily Fantasy Football 101*, DAILY FANTASY SPORTS 101, <http://www.dailyfantasysports101.com/football/> (last updated Feb. 29, 2016) [hereinafter *Daily Fantasy Football 101*].

¹² *Id.*

¹³ See, e.g., *Introduction*, ESPN, <http://games.espn.go.com/ffl/resources/help/content?name=introduction> (last visited Feb. 2, 2016).

that participants do not all pick the same players.¹⁴ The players the participant drafts will constitute his team for the duration of the season—with exceptions for trades and substituting alternates.¹⁵ At the end of the season, the participant with the most fantasy points wins the league and may collect the prizes agreed upon prior to the beginning of the season.¹⁶

DFS is essentially an evolved version of traditional fantasy sports tailored to our society's craving for "instant gratification."¹⁷ The most obvious difference between DFS and traditional fantasy sports is emphasized in their names. DFS begins and ends in the course of a day—with the exception of NFL games and golf tournaments, which last the entire weekend—while traditional fantasy sports span the length of a season.¹⁸ Perhaps the most enticing aspect of DFS is the chance to win money on a daily basis instead of waiting until the end of the season.¹⁹

In DFS, participants engage in an independent draft, allowing for the possibility of drafting an identical team to another participant.²⁰ Typically, DFS sites assign each player a "price tag."²¹ The DFS participant must then take into consideration the price of the player with respect to the player's perceived and anticipated impact on the game because, generally, the selection of players is subject to a pre-determined salary cap.²² For example, if a participant chooses to play in an NFL contest, the participant would draft nine players²³ that he believes would earn the most fantasy points.²⁴ After all of the games scheduled for that weekend have concluded, the participant's fantasy points will be tallied and compared to the totals of the other participants in the contest.²⁵ The type of contest he enters and the amount of the buy-in

¹⁴ See, e.g., *General Rules for Standard Leagues (Free & Prize Eligible)*, ESPN, <http://games.espn.go.com/ffl/resources/help/content?name=general-rules-standard> (last visited Feb. 2, 2016).

¹⁵ *Id.*

¹⁶ See *Introduction*, *supra* note 13.

¹⁷ Darren Heitner, *An Abbreviated History of FanDuel and DraftKings*, FORBES (Sept. 20, 2015, 9:41 AM) <http://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/#3428222d127>.

¹⁸ *Playing Daily Fantasy Sports For Dummies And erFalse You!*, DAILY FANTASY SPORTS 101, <http://www.dailyfantasysports101.com/basics/> (last visited Feb. 27, 2016, 9:41 AM).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See *Daily Fantasy Football 101*, *supra* note 11 (providing a chart comparing the rules of the two most popular DFS companies, FanDuel and DraftKings).

²⁴ *Id.*

²⁵ See *Daily Fantasy Football 101*, *supra* note 11.

determines the amount the participant can win.²⁶ The most appealing aspect of DFS is also the most controversial.

II. THE RISE OF DAILY FANTASY SPORTS

Although there are several DFS sites, the two largest and most widely discussed are FanDuel and DraftKings.²⁷ FanDuel was created in 2009, debuting in the South by Southwest Interactive Festival.²⁸ The founders of FanDuel sought to simplify the traditional fantasy sports game, describing FanDuel as “a new way to play fantasy—fan vs. fan in a test of sports knowledge and fantasy knowhow—where winners can taste victory on any given day. Not just once a year.”²⁹ FanDuel is now valued at over \$1 billion dollars³⁰ with investors including the National Basketball Association, Comcast Ventures and NBC Sports Ventures.³¹ DraftKings was founded in 2012 and acquired DFS competitor DraftStreet in 2014.³² As of December 2015, DraftKings has raised over \$626 million dollars³³, and counts Major League Baseball, Twenty-First Century Fox and the National Hockey League as investors.³⁴ Both companies gained traction from their high profile investors, and as of July 2015 appeared poised for IPOs.³⁵ But, the hype surrounding DFS was not all positive; in fact, the influx of attention brought to light some questions about the future of DFS.³⁶

²⁶ *See id.*

²⁷ Heitner, *supra* note 17.

²⁸ *About: The Birth of Daily Fantasy as We Know It*, FANDUEL, <https://www.fanduel.com/about>, (last visited Feb. 2, 2016).

²⁹ *Id.*

³⁰ Jeff Bercovici, *A \$1 Billion Valuation and Shutdowns in Two States: FanDuel's Very Eventful 2015*, INC., <http://www.inc.com/jeff-bercovici/2015-company-of-the-year-fanduel.html> (last visited Feb. 2, 2016).

³¹ Chris Grove, *Daily Fantasy Sports Investment & Acquisition Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-investment-and-acquisition-tracker/> (last updated Dec. 21, 2015).

³² Heitner, *supra* note 17.

³³ Grove, *supra* note 31.

³⁴ Lou Carlozo, *How the Fantasy Football Scandal Will Affect IPOs for DraftKings and FanDuel*, U.S. NEWS & WORLD REP., (Oct. 13, 2015, 10:17 AM) <http://money.usnews.com/money/personal-finance/mutual-funds/articles/2015/10/13/how-the-fantasy-football-scandal-will-affect-ipos-for-draftkings-and-fanduel>.

³⁵ Daren Heitner, *FanDuel Raises Another \$275 Million; Is an IPO Next?*, FORBES, (July 14, 2015, 7:40 AM) <http://www.forbes.com/sites/darrenheitner/2015/07/14/fanduel-raises-another-275-million-is-an-ipo-next/#1ac563583d1f>.

³⁶ Romm, *supra* note 5 (statement of N.J. Rep. Frank Pallone) (“Because of the advertising—millions of dollars have been spent—you’re starting to get a light shined on it, and you’re starting to see the problems occurring because of the lack of regulation.”).

III. THE CONTROVERSY

DFS companies are hardly unfamiliar with resistance to their existence. From the very beginning, DFS was prohibited from operating in Arizona, Louisiana, Iowa, Montana, and Washington.³⁷ High profile investors allowed DFS companies FanDuel and DraftKings to launch massive marketing deals and advertising campaigns,³⁸ catapulting DFS from the relatively unknown to a household name.³⁹ Nevertheless, with increased notoriety came increased scrutiny, entangling the fantasy sports industry in controversy. October 2015 saw an influx in negative press about DFS, specifically focusing on the legality of DFS. The inherently controversial nature of DFS was exacerbated after reports surfaced that an employee from DraftKings leaked data containing information about player lineups and—in the same week—won \$350,000 off a \$25 buy in.⁴⁰ In response to the data leak and employee participation in DFS, the New York Attorney General’s office announced that it was launching a probe into FanDuel and DraftKings, citing concern over “reports that employees may have misused inside data, ‘rais[ing] legal questions relating to the fairness, transparency, and security,’ of fantasy-sports companies.”⁴¹ The troubles for DFS did not end there. By mid- October, the Wall Street Journal broke a story that the Department of Justice and the FBI were beginning investigations into the legality of FanDuel and DraftKings.⁴² As of late

³⁷ *Id.*

³⁸ *See Id.* (“[T]he beginning of football season saw FanDuel and DraftKings spend a reported \$27 million on advertising—and promotions for FanDuel practically blanketed the Washington Redskins’ home opener in September.”).

³⁹ Heitner, *supra* note 17.

⁴⁰ Sarah E. Needleman, *Storm of Criticism Engulfs DraftKings, FanDuel*, WALL ST. J. (Oct. 6, 2015, 12:57 AM), <http://www.wsj.com/articles/storm-of-criticism-engulfs-draftkings-fanduel-1444107475>.

⁴¹ Sarah E. Needleman & Sharon Terlep, *Critics Raise Heat on Sports-Fantasy Sites DraftKings, FanDuel*, WALL ST. J., <http://www.wsj.com/articles/critics-raise-heat-on-sports-fantasy-sites-draftkings-fanduel-1444177829> (last updated Oct. 7, 2015, 10:32 AM).

⁴² Brad Reagan & Devlin Barrett, *FBI, Justice Department Investigating Daily Fantasy Sports Business Model*, WALL ST. J., <http://www.wsj.com/articles/fbi-justice-department-investigating-daily-fantasy-sports-business-model-1444865627> (last updated Oct. 15, 2015, 7:46 PM); *see also* Devlin Barrett, *Fantasy Sports Industry to Create Outside Control Board*, WALL ST. J., <http://www.wsj.com/articles/daily-fantasy-sports-industry-to-create-outside-control-board-1445972170?mg=id-wsj> (last updated Oct. 27, 2015, 7:48 PM) (“Federal Investigators are trying to determine whether the business model of daily fantasy violated federal law. The department is also probing whether company employees used insider knowledge of how customers place their bets to give their own bets an unfair edge”).

January, the number of lawsuits against DFS sites continues to climb, with estimates of over thirty lawsuits in ten different states.⁴³

DFS legal woes are a catalyst for a host of different problems. For example, FanDuel has gone through two different rounds of layoffs.⁴⁴ The most recent layoff occurred in early February, with the DFS company letting go “a group of developers in the Orlando office that were focused on R&D for ancillary games and applications that the company said it will not be investing in moving forward.”⁴⁵ In addition to the layoffs, the DFS industry was dealt another serious blow when payment processor, Vantiv, announced it would “suspend all processing for payment transactions related to daily fantasy sports in the United States and its territories on Feb. 29.”⁴⁶ Although an attorney for DraftKings denies that Vantiv will cease processing their payments, citing a court order mandating that Vantiv must carry out its contractual obligations,⁴⁷ the processor’s announcement nonetheless illustrates the growing doubt about the future of the industry.

IV. DAILY FANTASY SPORTS’ RESPONSE TO CRITICISM

A. *Calls for Regulation*

Amidst the controversy and scrutiny surrounding DFS, FanDuel CEO Nigel Eccles conceded that DFS companies need regulation in order to continue to evolve.⁴⁸ In a letter posted on FanDuel’s website in late October 2015, Eccles stated:

It has become apparent to me that our industry has grown to a size where a more formal, industry-wide approach is needed. To be clear,

⁴³ Maxine Bernstein, *Lawsuit Claims Fantasy Sports Websites FanDuel, DraftKings Violate Oregon Law*, THE OREGONIAN: OREGONLIVE, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/lawsuit_claims_fantasy_sports.html (last updated Jan. 26, 2016, 11:31 AM).

⁴⁴ Maury Brown, *More Layoffs Hit Daily Fantasy Sports Company, FanDuel*, FORBES (Feb. 10, 2016, 4:46 PM), <http://www.forbes.com/sites/maurybrown/2016/02/10/more-layoffs-hit-daily-fantasy-sports-company-fanduel/#50df9472463d>.

⁴⁵ *Id.*

⁴⁶ Joe Drape, *Payment Processor to Stop Working with Daily Fantasy*, N.Y. TIMES (Jan. 29, 2016) http://www.nytimes.com/2016/01/30/sports/draftkings-fanduel-vantiv-daily-fantasy.html?_r=1.

⁴⁷ *Id.*

⁴⁸ Joshua Brustein, *FanDuel CEO Asks for Regulation for Fantasy Sports, Illinois-Style*, BLOOMBERG BUS. (Oct. 29, 2015, 1:47AM), <http://www.bloomberg.com/news/articles/2015-10-29/fanduel-ceo-asks-for-regulation-for-fantasy-sports-illinois-style>.

our industry needs strong, common sense, enforceable consumer protection requirements to ensure its continued growth and success.⁴⁹

But even before the controversy and increased negative attention began to surround the DFS industry, FanDuel took precautionary measures, including increasing its lobbying efforts in specific states and consulting a former attorney general regarding concerns over its current business model.⁵⁰ In addition to DFS company executives calling for regulation of the industry, the Fantasy Sports Trade Association⁵¹ announced that it would form an oversight committee, to be known as Fantasy Sports Control Agency, to aid in the regulation of DFS sites.⁵² The Fantasy Sports Control Agency will be headed by former acting U.S. Secretary of Labor, Seth D. Harris.⁵³ The Fantasy Sports Control Agency hopes to establish, “a strict, transparent and effective system of self-regulation for the businesses that comprise the fantasy sports industry”.⁵⁴ The Fantasy Sports Trade Association confers the authority to the Fantasy Sports Control Agency to institute a system comprised of four different parts including: “Standards”, “Company Controls, Processes and Leadership”, “Auditing Policies and Procedures”, and “Enforcement”.⁵⁵ The creation of a separate agency to oversee and implement regulations for DFS emphasizes the pervasion of politics into the industry; therefore, it should

⁴⁹ *Id.*

⁵⁰ Romm, *supra* note 5.

⁵¹ See Doug Drotman, *Fantasy Sports Trade Association Appoints Former Acting U.S. Secretary of Labor Seth D. Harris to Spearhead Fantasy Sports Control Agency*, FANTASY SPORTS TRADE ASS'N (Oct. 27, 2015), <http://fsta.org/fantasy-sports-trade-association-appoints-former-acting-u-s-secretary-of-labor-seth-d-harris-to-spearhead-fantasy-sports-control-agency/> (explaining that the Fantasy Sports Trade Association was founded in 1998 and is “an international organization dedicated to the advancement of fantasy sports and in support of the hundreds of businesses and millions of fans that are engaged in fantasy sports”). The Fantasy Sports Trade Association has a “rotating 18-member Board of Directors comprised of industry veterans, pioneers and experts.”).

⁵² *Id.*; see also Alec Brzezinski, *DraftKings, FanDuel to be Regulated by New Oversight Agency*, SPORTINGNEWS (Oct. 27, 2015), <http://www.sportingnews.com/fantasy-nfl-news/4659418-draftkings-fanduel-scandal-lawsuits-dfs-controversy-regulation-sued-daily-fantasy-sports>.

⁵³ Drotman, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ *Id.* (Explaining that “Standards” will “Develop a system of standards for the fantasy sports industry founded on transparency, integrity, and ethical behavior”; “Company Controls, Processes and Leadership” means “Every FSTA member company will be expected to respond to the FSCA’s standards by establishing a system of controls and processes to ensure compliance. In addition, every member company will be expected to appoint a senior leader reporting to top executives and overseeing compliance efforts”; “Auditing Policies and Procedures” means an “implementation of a sound, regular auditing process to measure and report on company compliance”; and “Enforcement” means the “establishment of a system that provides incentives and public recognition for compliance with FSCA guidelines and penalties for failure to comply”.)

come as no surprise that DFS sites are ramping up their lobbying efforts, not only in key contested states, but also at the federal level.⁵⁶

B. Lobbying

Upon their inception, both FanDuel and DraftKings established a lobbying presence in states where law makes it impossible for them to operate.⁵⁷ With the help of the industry's trade group—the Fantasy Sports Trade Association—FanDuel and DraftKings, fought and will continue to fight proposed legislation that would limit their ability to operate under the current business model.⁵⁸ Due to the increased attention placed on DFS by politicians and consumers alike, DFS site FanDuel has increased its lobbying expenditures to include federal lobbying, emphasizing the heightened political influence on DFS.⁵⁹

V. REGULATORY CONSIDERATIONS

There are two options for the future of DFS companies: (1) they are viewed as gambling sites subject to gambling regulations which would ultimately force them to change their business model to fit the increased regulation; or (2) they are not viewed as gambling sites but are still subject to various compliance measures. Under either outcome, DFS companies will not continue to operate under the current business model. At the very least, there will be more stringent compliance procedures.

While the increased attention paid to DFS gave rise to a blitz of negative publicity, it nonetheless started the conversation about the future of DFS. Since DFS derived from a regulatory gray area, new regulation and compliance measures are inevitable.⁶⁰ DFS contests are subject to both federal and state gambling laws.⁶¹ Currently, DFS advocates maintain that the business platform is protected under UIGEA, satisfying compliance with federal gambling laws. Although this perspective has touched on federal investigations and lobbying, the analysis of regulatory considerations will be confined in its application to potential state laws.

⁵⁶ Romm, *supra* note 5.

⁵⁷ *Id.*

⁵⁸ Romm, *supra* note 5.

⁵⁹ *Id.*

⁶⁰ Montgomery, *supra* note 6.

⁶¹ Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 116, 129 (2016).

A. *Introduction to State Regulation*

DFS is a hotly contested issue in state legislatures across the country. This is due in part to the increased attention given to DFS and, more substantively, because the UIGEA does not prohibit states from adopting more specific regulations in order to tie up any loose ends the UIGEA has left undone.⁶² To date, twenty-four states have proposed legislation dealing directly with DFS.⁶³

In assessing potential regulations and legislation, it would be helpful to know that most states consider a contest to be illegal gambling “only if it can show that the given activity meets the state-specific definition for three factors: ‘consideration’, ‘reward’, and ‘chance’.”⁶⁴ DFS sites easily satisfy the definitions of “consideration” and “reward” through the entry fee and potential for prize money, respectively.⁶⁵ Where DFS starts to run into trouble is on the element of chance.⁶⁶ DFS sites FanDuel and DraftKings staunchly argue they are games of skill and not chance, even providing statistical data in support of their position at a recent hearing to fight an injunction in New York State.⁶⁷ Generally, in DFS, “the primary elements of skill are mathematical modeling and prognostication, and these elements of skill arise exclusively through the initial task of selecting players.”⁶⁸ In an effort to further break down the debate over DFS, this perspective will shift its focus to regulatory and compliance measures that can be taken by DFS to ensure that the element of skill—selecting players—remains as pure as possible.

B. *The Skill of Player Selection*

Much of the negative perception of DFS comes from its likeness to gambling.⁶⁹ Many of DFS problems are based on a declining reputation.⁷⁰ It

⁶² Ira Boudway & Joshua Brustein, *How Will the Government Change the Game for Daily Fantasy Sports*, BLOOMBERG BUS., <http://www.bloomberg.com/news/articles/2015-10-15/how-will-the-government-change-the-game-for-daily-fantasy-sports-> (last updated on Oct. 15, 2015, 9:00 PM).

⁶³ *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Feb. 14, 2016).

⁶⁴ Edelman, *supra* note 61, at 130.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Peter Hammon, *Analyzing FanDuel's Statistical Arguments on Skill vs. Chance at the New York Hearing*, LEGAL SPORTS REP. (Dec. 1, 2015, 2:13 PM), <http://www.legalsportsreport.com/6605/fanduels-skill-vs-chance-arguments/>.

⁶⁸ Edelman, *supra* note 61, at 130–31.

⁶⁹ Romm, *supra* note 5.

⁷⁰ See Boudway & Brustein, *supra* note 62.

follows then, that the opponents of DFS call into question DFS sites' - like FanDuel and DraftKings - ability to protect consumers from the negative aspects of gambling. The consumer protection argument was bolstered in October when news broke that a DraftKings employee leaked data regarding player lineups.⁷¹ The access to and release of data from the lineups has been likened to insider trading by the press.⁷² This analogy stems from the argument that if employees can access data "showing which players are the hottest players to own that weekend, the theory is that somebody could use that information to spot market inefficiencies and improve his or her chances of winning against the group."⁷³ Employee participation of this nature is directly linked to skill of picking players because of the data employees potentially have access to. Ignoring the possibility that allowing for the manipulation of data is in effect taking some of the element of chance out of the game, it could just as easily be argued that it increases chance and decreases skill for the average player as the—forgive the pun—deck would be stacked against them. This problem is easily eliminated by prohibiting DFS sites employees from participating in any contests, a measure both DraftKings and FanDuel took after news of the employee data leak were splashed across the headlines of every major news source.⁷⁴ But the pre-cautionary measures should not end with an employee ban.

The problem of employee involvement in DFS is deeper than mere participation. States like Illinois have proposed legislation that would allow DFS and not classify it as gambling but the allowance is contingent on a set of compliance measures, predictably including a few that deal with employee involvement.⁷⁵ In addition to prohibiting employees from participating in DFS, the proposed bill also prohibits employees "from sharing non-public information with third parties that could affect contests".⁷⁶ I believe these two compliance measures would help ease the general public's concerns about the

⁷¹ Needleman, *supra* note 40.

⁷² See Brett Schrottenboer, *DraftKings Pulls Advertising from ESPN Amid Questions of Insider Trading*, U.S.A. TODAY (Oct. 6, 2015, 6:02 PM), <http://www.usatoday.com/story/sports/2015/10/06/draftkings-pulls-advertising-espn-amid-questions-inside-trading/73476434/?wb48617274=C8D5126E>.

⁷³ *Id.*

⁷⁴ Darren Heitner, *DraftKings and FanDuel Ban Employees from Fantasy Sports Contests*, FORBES (Oct. 6, 2015, 7:59 AM), <http://www.forbes.com/sites/darrenheitner/2015/10/06/draftkings-and-fanduel-ban-employees-from-fantasy-sports-contests/#5bd90fe13f00>; see also *Statement to Our Users*, FANDUEL, <https://newsroom.fanduel.com/2015/10/07/statement-to-the-press/>.

⁷⁵ Brustein, *supra* note 48.

⁷⁶ *Id.*

fairness and help repair the struggling reputations of DFS sites DraftKings and FanDuel.

CONCLUSION

Whether DFS is classified as gambling, reform is both necessary and imminent. This reform should start with the root of the problem: employee participation in DFS. The potent nature of insider information in the context of DFS begs compliance and regulation starting with the companies and extending to states, and potentially, the federal government. While some DFS companies and states have taken steps to begin regulating this area,⁷⁷ more stringent requirements would help bolster the credibility of DFS.

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⁷⁷ Brustein, *supra* note 48.

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