

**Ryan M. Rodenberg**  
**Response to Additional Question for the Record**  
**For the Hearing entitled “Daily Fantasy Sports: Issues and Perspectives”**  
**Before the Subcommittee on Commerce, Manufacturing, and Trade**  
**Of the Committee on Energy and Commerce**  
**House of Representatives, United States Congress, Washington, DC, USA**  
**May 11, 2016**

Chairman Burgess and other honorable members of the Subcommittee on Commerce, Manufacturing, and Trade, thank you for your June 6, 2016 letter providing me with the opportunity to respond to an additional question for the record after the hearing. Please find below my response to the following question posed by the Honorable Gregg Harper: *“What are the top three consumer protection issues you believe we should be on the lookout for during this discussion?”*

The top three consumer protection issues in connection with daily fantasy sports are: (i) corruption considerations involving the tethered real-world sporting events; (ii) integrity of the daily fantasy sports contests being offered; and (iii) preservation of customer funds held by daily fantasy sports operators.<sup>1</sup> Developing reasonable policies regarding these issues is an area where the interests of legislators, law enforcement, sports leagues, consumers, and reputable fantasy operators are shared.

**Real-World Sporting Events.** Unlike Broadway shows, musical concerts, professional wrestling, and other forms of live entertainment, the vast majority of sports fans desire sporting events to be comprised of unscripted athletic competition. Accordingly, it is important to ensure that such sporting events are not manipulated for (pecuniary) fantasy purposes. Likely for this reason, a number of sports organizations—all of which frequently cite “integrity of the game” considerations for a multitude of policy positions—ban or restrict athletes and related personnel from participating in cash-based daily fantasy sports.<sup>2</sup> Like spot-fixing

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<sup>1</sup> A number of experts have suggested potential regulatory policies and consumer protection considerations. See Albertson, I Won Millions in Daily Fantasy – And Even I Want Changes, *Wall Street Journal*, Oct. 6, 2015; Young, Fantasy Sports Regulation: An Inclusive Way Forward, *Legal Sports Report*, March 25, 2016; Zwillinger, et al, Regulating Daily Fantasy: Considerations for a Framework, *Law360*, May 18, 2016; Edelman, Regulating Fantasy Sports: A Practical Guide to State Gambling Laws and a Proposed Framework for Future State Legislation, *Indiana Law Journal*, forthcoming.

<sup>2</sup> Examples include bans by the National Collegiate Athletic Association, National Basketball Association, National Hockey League, and Major League Baseball. See Levinson, Daily Fantasy Sports Growth Pushes Leagues to Regulate Players, *Bloomberg*,

concerns in single event proposition sports betting, the real-world athletic performances fueling daily fantasy sports should be monitored. While the Sports Bribery Act attaches to several forms of game-fixing,<sup>3</sup> the statute has never been applied to daily fantasy sports.

**Fantasy Contests.** Results from daily fantasy contests could be influenced via the (mis-)use of non-public information.<sup>4</sup> This precise issue was the subject of headline-grabbing media coverage starting in October 2015, which resulted in consumer protection implications becoming a prominent focus. In addition to general consumer protection-related policies within the realm of the Federal Trade Commission, certain elements from the federal wire fraud statute,<sup>5</sup> securities laws,<sup>6</sup> and Commodity Futures Trading Commission regulations<sup>7</sup> may address some of the issues related to the role of non-public information in daily fantasy sports contests by analogy. Beyond inside information issues, related concerns under this broad consumer protection umbrella include: (i) the use of algorithms, scripts, and automated bots in contest entries; (ii) the number of entries permitted by any single individual or syndicate; (iii) the soundness of the fantasy contests' computer code; (iv) the accuracy of historical and real-time sports data that determine contest outcomes; (v) the use of forensic sports law analytics to test for fantasy contest irregularities; and (vi) the identification of problematic behavior among fantasy contestants consistent with addiction.<sup>8</sup>

**Customer Funds.** A small number of daily fantasy operators have had liquidity problems and been unable to return customer funds, pay out winnings, or meet certain contractual obligations.<sup>9</sup> Although infrequent, such problems represent an important consumer protection issue, as customer monies should

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April 1, 2015. Relatedly, the National Football League limits fantasy winnings of players, coaches, and executives to no more than \$250. See Florio, NFL Players Can Play Daily Fantasy, They Just Can't Win Much, *Pro Football Talk*, Sept. 29, 2015.

<sup>3</sup> 18 U.S.C. § 224.

<sup>4</sup> See Staff, Here's Where the Federal Investigations into Daily Fantasy Sports Might be Focused, *Legal Sports Report*, March 18, 2016. See also, Woodward, Federal Fantasy Sports Probe Could Drag on For Months, Lawyer Says, *Boston Globe*, April 8, 2016.

<sup>5</sup> 18 U.S.C. § 1343.

<sup>6</sup> See, e.g. Wang, Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping, 70 *University of Miami Law Review* 220-299 (2015).

<sup>7</sup> See, e.g. Verstein, Insider Trading in Commodities Markets, 102 *Virginia Law Review* 447-500 (2016).

<sup>8</sup> Many of these issues also apply to emerging consumer protection concerns in esports gaming. See, e.g. Green, Skin Gambling Site SCGO Diamonds: We Told Sponsored Player in Advance When He Would Win, *Esports Betting Report*, June 13, 2016.

<sup>9</sup> See Gouker, Daily Fantasy Sports Site FantasyHub Ceases Operations 'Temporarily' While Owning Players Money, *Legal Sports Report*, Feb. 19, 2016; Gouker, Say What? Daily Fantasy Sports Site Says DFS Illegal in Lawsuit, *Legal Sports Report*, June 3, 2016.

be held in segregated accounts and not commingled in general operating funds. Likewise, given the Unlawful Internet Gambling Enforcement Act (“UIGEA”) of 2006<sup>10</sup> and relevant state-level bookmaker/pooling laws, funds earmarked for payments to winners should seemingly be kept separate from entry fees and other monies in customer accounts. This potential issue derives from how customer entry fees are treated under operators’ internal accounting procedures.<sup>11</sup> Indeed, in a February 2016 court filing, a leading daily fantasy sports operator stated: “In fantasy sports as well, participants pay an entry fee to participate in a contest, and the entry fees generate the fund from which the successful contestants win prizes.”<sup>12</sup>

The three fantasy sports-related consumer protection issues highlighted here will continue to garner attention at both the federal and state level. However, as detailed in my full written statement and oral testimony, the ability of governments to address such issues is counterbalanced by the constraints found in the Professional and Amateur Sports Protection Act (“PASPA”), which makes it unlawful for certain state governments to “sponsor, operate, advertise, promote, license, or authorize...[a] betting, gambling, or wagering scheme based...on one or more competitive games in which amateur or professional athletes participate...or on one or more performances of such athletes in such games.”<sup>13</sup> Likewise, PASPA’s uneven and paradoxical grandfathering scheme among states may impact the ability to promulgate any consumer protection-leaning legislation for daily fantasy sports or other forms of sports gaming.

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<sup>10</sup> 31 U.S.C. § 5361 et seq.

<sup>11</sup> Potential issues pertaining to pooled funds attach to a variety of daily fantasy formats, including popular “50/50,” “double up,” and “head-to-head” contests. See Kang, How the Daily Fantasy Sports Industry Turns Fans into Suckers, *The New York Times Magazine*, Jan. 6, 2016. See also Schwartz, How the DraftKings-Boston Love Affair May Have Saved Daily Fantasy, *ESPN.com*, April 12, 2016. NBA commissioner Adam Silver recognized some of the general consumer protection concerns in this area and pinpointed the pooling issue: “People should know what percent of the pool of money is paid out in the same way you would at a track or at any other event where wagering is involved.” See Rovell, Commissioners Say Daily Fantasy Not Akin to Gambling, but Needs Regulation, *ESPN.com*, Oct. 27, 2015. Textured discussions of “betting pools” and “sports pools” vis-à-vis fantasy sports have been undertaken in a number of jurisdictions, including Massachusetts, Nevada, and North Dakota. See Massachusetts Gaming Commission, White Paper on Daily Fantasy Sports (Jan. 11, 2016); Nevada Attorney General Memorandum, Legality of Daily Fantasy Sports under Nevada Law (Oct. 16, 2015); and North Dakota Attorney General Letter Opinion 94-L-298 (Nov. 1, 1994). Relatedly, three Florida Attorney General Advisory Opinions analyzed the legality of pooled entry fees (in fantasy contests and otherwise) being used to pay out winnings. See AGO 90-58 (July 27, 1990), AGO 91-03 (Jan. 8, 1991), and AGO 94-72 (Aug. 23, 1994).

<sup>12</sup> Brief for Defendant-Appellant, *The People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York vs. FanDuel, Inc.*, New York Supreme Court Appellate Division—First Department, Feb. 22, 2016, page 20.

<sup>13</sup> 28 U.S.C. § 3702. PASPA’s prohibition also attaches to those acting pursuant to “law or compact of a governmental entity.”