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MEMORANDUM

TO: SENATOR BILL COLEY

FROM: PETER M. THOMAS, SECTION CHIEF – CHARITABLE LAW
MATTHEW GREEN, SENIOR ASSISTANT ATTORNEY GENERAL – CHARITABLE LAW

Cc: SHERYL MAXFIELD, CHIEF COUNSEL

DATE: JUNE 30, 2016

RE: DAILY FANTASY SPORTS WEBSITES

I. Introduction

You have asked the Ohio Attorney General’s Office (the “Office”) to analyze the legality of daily fantasy sports (“DFS”) websites under current law. This memo will discuss legal issues surrounding the operation of DFS websites as they relate to Ohio gambling laws found in R.C. Chapter 2915. It is important to note that this Office does not have independent prosecutorial authority relating to violations of R.C. Chapter 2915. Authority to enforce violations of Ohio gambling laws is vested in County Prosecutors. Additionally, this review of legal issues is factually limited. The facts relied upon for the analysis in this memorandum are gleaned from publicly available information on fantasy sports websites, news articles, and related materials. This Office lacks authority to conduct a civil investigation into the legal issues presented. Accordingly, by issuing the present memorandum, the Office is not issuing a demand to cease and desist or currently threatening any type of enforcement action against a DFS website.

II. Relevant Background

A. DFS in General

Although there are others, the most popular and well-known DFS websites are those operated by FanDuel, Inc. (“FanDuel”) and DraftKings, Inc. (“DraftKings”). FanDuel and DraftKings brought awareness of DFS to the general public through an extensive television ad campaign in the fall of 2015.

The last ten to fifteen years have seen a tremendous growth in the popularity of fantasy sports in general. Whether of the traditional or DFS variety, fantasy sports involve individual “owners” who assemble simulated “teams” from the rosters or lineups of actual professional

sports franchises. In traditional fantasy sports leagues, player and roster performances are tracked over the majority of a season. By contrast, DFS websites allow individuals to engage in contests that last only a day or a very short period of time—such as one week of an NFL season. Another difference between traditional fantasy sports and DFS websites is that the most common methods of player/roster selection for the former are so-called “snake drafts” or “auction drafts,” while the latter utilize almost exclusively “salary-cap drafts.” DFS websites also differ from traditional fantasy sports in that the former allows individuals to enter DFS contests in which multiple participants compete against each other simultaneously. Finally, DFS websites require the payment of a fee and pay-out money to contest winners. By contrast, websites that host traditional fantasy sports leagues—such as those operated by ESPN or Yahoo!—typically do not accept entry fees from participants or pay-out cash prizes directly to winners (although exceptions may exist).

B. Types of Contests Offered By DFS Websites

For purposes of this Memorandum, it is important to recognize that DFS websites offer a variety of different contests with different payout structures. Access to the Draftkings “contest lobby” currently is open to individuals without an account.¹ The contest lobby can be reached by going to www.draftkings.com and clicking on the “Lobby” link. The contest lobby itself consists a number of tabs or webpages—which are labeled at the top under the following categories: (1) Featured; (2) MLB; (3) NBA; (4) SOC (soccer); (5) NHL; (6) PGA; (7) NAS (NASCAR); (8) MMA (mixed martial arts); and (9) NFL.² Clicking on a tab dedicated to a particular sport—for example, MLB—will open the webpage for all the current contests associated with that sport. On the left-hand side, there is a listing of the “Contest Types.”

One of the contest types is “Head to Head.” As its name implies, Head to Head contests involve only two people. The so-called “entry fee” for these contests can range from \$0 (i.e., free) up through \$10,600.

Head to Head contests have two key aspects. First, the contests are not “guaranteed”—i.e., they only occur if two people enter. Second, the prize consists of the total amount of entry fees, less a percentage retained by Draftkings. For example, in an “MLB \$20 Head to Head” contest, each participant must pay \$20 and the winner receives \$36. Doing the math, Draftkings retains 10% of the entry fees. Review indicates that Draftkings’ share of the entry fee decreases as the entry fee increases. For example, in an “MLB \$215 Head to Head” contest, the prize to the winner is \$400; Draftkings retains \$30, or 7.5%. In an “MLB \$5,300 Head to Head” contest, the prize to the winner is \$10,000; Draftkings retains \$600, or 6%.

¹ The FanDuel website is organized slightly differently, but functions the same way.

² The NFL link currently is not active—presumably because the NFL is in its offseason.

A second category of contest type is “50/50s & Double Ups.” 50/50 contests and Double Up contests facially resemble each other in a few ways. First, both types of contests are intended for a group of participants of 4 or larger. Second, both contests operate by dividing contestants into a group of winners who each receive the same prize and a group of losers. In other words, all contestants who finish above a certain threshold will win the same amount of money, while those below a certain threshold will not earn any money.

There are, however, important differences in 50/50 contests and Double Up contests. First, all 50/50 contests involve an even number of contestants (common variations are 4, 6, 8, 10, or 20 contestants). By contrast, Double Up contests can have either an even or an odd number of participants.

Most importantly, 50/50 contests and Double Up contests differ in their prize structure. 50/50 contests do *not* have guaranteed prize pools. For example, a 50/50 contest for 10 participants will not run if all the spots are not filled. The payout for 50/50 contests is also structured similar to the Head to Head contests discussed above in that Draftkings takes a percentage of the total pool. For example, in an “MLB \$10 50/50” contest with four entries, there will be two winners, each of whom will receive \$18; Draftkings retains \$4.

As its name implies, Double Ups allow the winners to literally double their money. In addition, most Double Up contests appear to have guaranteed prize pools. The wrinkle is that the prize pool is structured so that the contest does not need to be “filled” in order for Draftkings to make money. For example, in an “MLB \$3 Double Up [\$60 Guaranteed]” contest, the total number of possible entries is 23; the prize payouts are \$6 for each participant finishing in first through tenth place. Given this structure, Draftkings will lose money if there are 19 or fewer entries in the contest, Draftkings will essentially break-even if there are 20 entries, and Draftkings will make money if there are 21, 22, or 23 participants in the contest.

A third category of contests are under the “Tournaments/Leagues” tab. These contests are similar to the Double Up contests in that Tournament/League contests both: (1) have guaranteed prize pools; and (2) are structured so that Draftkings could lose money if a contest is not filled, but Draftkings will make money if a certain threshold of entries is reached. Tournaments/Leagues differ from Double Up contests, however, in that the former have a tiered prize structure, while in the latter all “winners” receive the same prize.

For example, an “MLB \$20K Moonshot [\$20,000 Guaranteed]” contest with a \$3 entry fee and 7,666 possible entries is one variation of the Tournament/League model. In this particular contest, there is a \$2,000 prize to first place, \$1,000 prize to second place, and decreasing prizes all the way until 921st through 1540th place (\$6.00 each); the total prizes are \$20,000. With a \$3 entry fee, the total amount that *could be* collected by Draftkings should all 7,666 entries be filled is \$22,998. Put somewhat differently, Draftkings will make money so

long as 6,667 of the total 7,666 entries are filled. It should also be noted that the Tournament/League model is extremely flexible and can be adapted by manipulating the number of entries, the guaranteed prize pool, and the entry fee.

The fourth and final category of contests is “Satellites & Qualifiers.” These contests function similar to how large poker tournaments, such as the World Series of Poker, operate: individuals can enter a contest with a limited number of contestants for a lesser entry fee. Those who “win” or qualify high enough in the qualifying or satellite contest in turn win prize money and/or a “ticket” (or free entry) into a subsequent contest that offers a significantly larger prize. An example of this type of contest is one of Draftkings “\$4M Fantasy Baseball World Championship Qualifier.” As these types of contests are not stand-alone events, but rather a number of interrelated contests, analyzing their financial structure is much more complicated. For this reason, the analysis in this memorandum does not address Satellite & Qualifier contests.

III. Law and Analysis

A. The Office’s Authority Over DFS Websites

As set forth in more detail below, the legality of DFS websites turns primarily on the application of R.C. 2915.02. Violations of R.C. 2915.02 are criminal offenses. *See*, R.C. 2915.02(K). As stated at the outset, this Office does not have independent authority to prosecute criminal offenses.

B. DFS websites are not “authorized” under the Unlawful Internet and Gambling Enforcement Act of 2006

One argument that has been advanced by the DFS industry is that DFS websites are legal pursuant to the Unlawful Internet and Gambling Enforcement Act of 2006 (UIGEA). If so, an argument could be made that UIGEA preempts Ohio law on this issue.

UIGEA essentially operates by making it unlawful for an entity engaged in gambling to accept any bet or wager through the internet or a non-in person transaction. *See* 31 U.S.C. § 5363. It is true that UIGEA excludes fantasy sports from the definition of “bet or wager.” 31 U.S.C. § 5363(1)(E)(ix). However, the statute specifically provides that UIGEA is in no way intended to “alter[], limit[], or extend[] any Federal or State law ... prohibiting, permitting, or regulating gambling within the United States.” 31 U.S.C. § 5361(b).

As one commentator summarized, the “exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA.” Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1201 (2007). Every attorney general’s office or court

to consider this issue has come to the same conclusion.³ We agree with these authorities. Thus, as a threshold matter, it is the Office's position that the legality of DFS websites in Ohio does not turn not on UIGEA.

C. Analysis of DFS websites under R.C. Chapter 2915.02

Although other theories as to the legality or illegality of DFS websites may exist, the primary issue under Ohio law appears to be whether DFS websites constitute illegal gambling under R.C. 2915.02. Violation of R.C. 2915.02 is a first degree misdemeanor for first-time offenders and a fifth degree felony for those with a prior conviction. *See* R.C. 2915.02(K). As set forth below, an argument could be made that at least some of the contests offered by DFS websites fall outside of R. C. Chapter 2915.02—the theory being that participants are paying an entry fee to participate in a contest of skill in which a prize is offered by a third-party. Arguments, however, could also be made that many of the contests offered through DFS websites constitute illegal bookmaking under R.C. 2915.02(A)(1). Similarly, an argument could be made that many of the contests run by DFS websites are pools conducted for profit, making them illegal schemes of chance under R.C. 2915.02(A)(2). Please be advised, however, that the following analysis is premised on limited facts. No formal investigation has been conducted, and precisely how games are funded, what becomes of player “entrance fees,” how payouts are calculated, and how collected funds are distributed and to whom are all unknown. Nothing in this memorandum should be construed as an official finding of the Office.

1. R.C. 2915.02(A)(1)—illegal bookmaking

R.C. 2915.02(A)(1) provides that no person shall “[e]ngage in bookmaking, or knowingly engage in conduct that facilitates bookmaking.” R.C. 2915.01(A) defines “bookmaking” as the “business of receiving or paying off bets.” In turn, R.C. 2915.01(B) defines “bets” as “the hazarding of anything of value upon the result of an event, undertaking, or contingency, but does not include a bona fide business risk.”

Applying this legal standard to the DFS websites, a very straightforward argument could be made that companies such as Draftkings and Fanduel are engaged in bookmaking: these are for-profit companies; their business model consists of receiving entry fees and paying-off contest winners; and the individual participants are hazarding something of value (i.e., money) upon the

³ The Nevada Attorney General's Office issued an informal opinion on October 16, 2015. The Illinois Attorney General issued what appears to be a formal opinion on December 23, 2015. On December 12, 2012, Justice Mendez with Supreme Court of New York, New York County, issued a decision and order granting injunctive relief in favor of New York Attorney General, Eric Schneiderman, and denying injunctive relief in favor of Draftkings. Copies of these items can be provided upon request.

result of an event, undertaking, or contingency over which they have no control (i.e., the performance of professional athletes). As set forth below, however, there are nuances to this argument.

a. Bookmaking versus awarding prizes to contest winners; bet versus entrance fee

As a general matter, the law distinguishes between a bet or wager versus paying an entry fee to participate in a contest of skill in which a prize is offered by a third-party. *See, e.g.*, 38 C.J.S. Gaming § 139 (noting that a “prize, purse, or premium offered to the successful player in a game or competition in a contest by persons other than such players or competitors is not a bet or wager, and does not constitute gambling if the contest is one of mental or physical skill”); *State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807, 810 (Ariz. 1986) (noting that “the payment of an entrance fee is not an illegal bet or wager in an otherwise legal competition for prizes to be awarded by a nonparticipant, at least where the entrance fees do not specifically make up the prize purse”).

The DFS industry almost certainly would argue that DFS websites fit into this category of lawful contests of skill. Such a position is not unreasonable on its face. In support of litigation already filed in other states, the DFS industry has provided expert affidavits generally attesting to the fact that success in DFS contests involves some measure of skill. Further, and as will be discussed in more detail below, many contests on the DFS websites have “guaranteed” prize pools that pay out regardless of the number of participants. Thus, DFS could be analogized to a variety of events that common sense indicates should be lawful. *See Am. Holiday Ass’n, Inc.*, 727 P.2d at 812 (“we are reluctant to adopt a statutory interpretation which would turn sponsors of golf, tennis or bridge tournaments, rodeos, livestock, poultry, and produce exhibitions, track meets, spelling bees, beauty contests, and the like into class 6 felons operating gambling games”); *Faircloth v. Cent. Florida Fair, Inc.*, 202 So.2d 608, 609 (Fla.App.1967) (“To adopt defendant’s construction we would have to find all contests of skill or ability in which there is an entry fee and prizes to be gambling. The list could be endless: golf tournaments, dog shows, beauty contests, automobile racing, musical competition, and essay contests, to name a few.”).⁴

⁴ On this issue, it is also important to note that the General Assembly has vested authority over “skill-based amusement machines” in the Ohio Casino Control Commission. *See* R.C. 3773.03(K). If in fact DFS are determined to be games of skill, this may implicate the authority of the Casino Control Commission. This memorandum does not opine on the Casino Control Commission’s jurisdiction and does not analyze any implications of R.C. Chapter 3772.

While a court could find the argument that DFS falls into the category of lawful contests of skill persuasive, we believe the analogy could break down for two reasons. First, a fundamental distinction can be drawn between the contests of skill noted above and DFS. Whether it is a golf tournament, a beauty pageant, or a spelling bee, the person paying the entry fee in these types of situations is *directly* participating in the underlying event. Even in a dog show or livestock competition, the person entering the contest has a direct connection to the event in that the entrant owns, has cared for, or trains the animal.

By contrast, DFS participants have no direct link to the professional athletes whose performances ultimately determine whether a DFS participant wins or loses money. Put somewhat differently, a DFS participant's relationship to the professional athletes he or she "drafts" or "signs" exists solely within the virtual world of the DFS website. In sum, while DFS may be a more sophisticated form of sports betting—in that the outcome is based on the statistics of individual participants rather than the outcome of the game itself—it appears to be betting under Ohio law nonetheless. *See Progress Vending, Inc. v. Dep't of Liquor Control*, 59 Ohio App. 2d 266, 276, 394 N.E.2d 324, 330 (10th Dist. Ct. App. 1978) ("[W]here others hazard something of value upon the outcome of a game in which they do not personally participate, the conduct is prohibited as betting, as defined by R.C. 2915.01(B)." (emphasis added)).

Second, while research has not uncovered any Ohio court that has addressed the issue, one of the requirements to be a lawful contest of skill is that the associated prize cannot be comprised of the entry fees paid by the participants themselves. *Am. Holiday Ass'n, Inc.*, 727 P.2d at 810 (noting that "the payment of an entrance fee is not an illegal bet or wager ... where the entrance fees do not specifically make up the prize purse"); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. Ct. App. 1961) (noting that an entrance fee does not convert the contest into a wager if "the entrance fee does not specifically make up the purse or premium contested for"); Fla. Op. Att'y Gen. 90-58 (July 27, 1990) (noting that the payment of an entry fee is not a bet or wager if the entry fee does not directly make up the prize). However, due to the limited facts available we are unable to determine precisely how DFS contests are funded and how the entrance fees or wagers are distributed.

As noted above, DFS websites offer a variety of contests with a variety of payout structures. For purposes of R.C. 2915.02(A), a distinction can be made between those contests with guaranteed prize pools—e.g., Double Up contests and Tournament/League contests—and those that do not—e.g., Head to Head contests and 50/50 contests. For the latter, nonguaranteed types of contests, it would appear as if the prize pools are comprised of the entry fees paid by the participants themselves. To use a poker analogy, the DFS website serves as the "house" and makes it money by taking a "rake" or percentage of the amount wagered by patrons.

Admittedly, the guaranteed prize pool contests do not fit as neatly into this paradigm. Because the prize pool is “guaranteed” by the DFS website, it could be argued that the entrance fees paid by participants do not specifically make up the prize pool.

However, a counter-argument possibly could be made: DFS websites are for-profit ventures; DFS websites are intended to make money through their operations—the contests are not being operated to serve some type of promotional function; even though the prizes are guaranteed, the contests are always structured in a way that, if they operate as intended, the DFS website will make a profit on most of the guaranteed contests that are offered—the exact amount being a function of how close to “full” each contest is. Put somewhat differently, if DFS websites are successful in predicting the demand for their product (i.e., entry spaces in contests), then they should be able to structure the number and type of guaranteed contests so that, on the whole, the entry fees paid by participants *are* making up the total prize pool—with enough left over for the DFS website to make a profit.

At this point, it should be reiterated that the preceding discussion is based on facts that are currently unknown. A thorough, quantitative analysis of the operation of a DFS website, including the financial results for the hundreds of different contests that a DFS website offers on a weekly basis, would be necessary to ascertain the actual profitability of these so-called guaranteed contests and the extent prizes come from the participants themselves.

b. “Bona fide” business risk

As noted above, R.C. 2915.01(B) excludes from the definition of bets a “bona fide business risk.” The DFS industry generally has taken the position that DFS involves skill and that at least some DFS participants are not much different than stock or commodity traders. Thus, it could be argued that participation in a DFS website is a bona fide business risk.

On this issue, we believe a critical distinction should be made between the general public and professional gamblers. News articles about the DFS industry indicate two clear trends. First, the vast majority of payouts from DFS websites are made to a very small percentage of participants. *See generally* J. Caspian Kang, “How the Daily Fantasy Sports Industry Turns Fans Into Suckers,” *The New York Times Magazine* (Jan. 6, 2016) (available at http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=1) (discussing the relationship between DFS and the online poker industry). For example, a study in *Sports Business Journal* published in July 2015 indicated that, for the time period studied, 91% of all DFS payouts were won by just 1.3% of participants. *See* Braig, Kevin P., “Daily Fantasy Sports Firestorm,” p. 14, *Ohio Lawyer* (Jan/Feb. 2016). The second trend is that the top-ranking DFS participants are those who “enter” an extremely large number of lineups per day. For example, a *Bloomberg Business* article from September 2015 found that the top 10 DFS participants in the study group entered 873 winning lineups per day,

the top 100 DFS participants in the study group entered 330 winning lineups per day, and the remaining 20,000 participants entered 13 winning lineups per day. *See id.*

For some individuals, therefore, participating in contests on DFS websites could be considered a profession, and the risk of loss of any particular entry could be considered a “bona fide business risk.” *See* R.C. 2915.01(B). For the vast majority of individuals, however, it would seem that entering a contest on a DFS website is a purely speculative endeavor undertaken for personal, rather than business, reasons. Thus, it would appear that the safe harbor for bona fide business risk would not apply to DFS websites.

2. R.C. 2915.02(A)(2)—pool conducted for profit

R.C. 2915.02(A)(2) prohibits any person from “[e]stablish[ing], promot[ing], or operat[ing] or knowingly engag[ing] in conduct that facilitates any game of chance conducted for profit or any scheme of chance.” (Emphasis added.) Specifically included in the definition of a scheme of chance is a “pool conducted for profit.” R.C. 2915.01(C). While that term is not defined in the Revised Code, R.C. 2915.01(XX) defines “pool not conducted for profit” as “a scheme in which a participant gives a valuable consideration for a chance to win a prize and the total amount of consideration wagered is distributed to a participant or participants.” (Emphasis added.)

As a threshold matter, the DFS industry has advanced the narrative in the media that DFS contests are legal because they predominantly involve skill rather than chance. The skill versus chance inquiry generally is relevant to whether an activity constitutes “games of chance.” *See* R.C. 2915.01(D) (defining “game of chance” as an activity in which “the outcome ... is determined largely by chance”). By its terms, however, R.C. 2915.02(A)(2) makes unlawful “any game of chance conducted for profit or any scheme of chance.” (Emphasis added.) Accordingly, even if DFS contests are not “games of chance,” such contests could still be “pools conducted for profit” and, as such, unlawful “schemes of chance.” As noted above, the skill versus chance inquiry is irrelevant to whether DFS contests are pools conducted for profit. Although the statutory scheme in Ohio is unique, this core conclusion—i.e., that the skill versus chance inquiry is ultimately irrelevant to the legality of DFS contests—is consistent with the approaches taken by the Nevada Attorney General’s Office, the Illinois Attorney General, and the New York Superior Court.

Turning back to the core issue—i.e., whether DFS websites operate pools conducted for profit—a distinction can be made yet again between guaranteed prize and nonguaranteed prize contests. In the latter category, a straightforward argument could be made that DFS websites are operating pools for profit: contests do not run unless full, the “pool” is created by the wagers placed by the participants, and the DFS website earns a flat percentage of the amount “wagered.” *See* R.C. 2915.01(XX).

The guaranteed prize pool contests present a slightly more complicated analysis. As discussed above with regard to R.C. 2915.02(A), it is technically possible for DFS websites to lose money in an individual contest. Again, however, these contests are structured in such a way so that they are profitable once a certain threshold of participants has been reached. Thus, in those situations—i.e., in which the DFS website takes in more in entry fees than has been paid out—it also could be argued that such contest was, in fact, a pool conducted for profit.

D. Consumer Protection Considerations

In addition to R.C. Chapter 2915, another potential issue is whether DFS websites are operating in violation of Ohio's Consumer Sales Practices Act (the "CSPA"). While we believe that the operation of DFS websites raises consumer protection concerns, this memorandum ultimately takes no position as to whether any particular company operating a DFS website is currently violating the CSPA.

When considering the CSPA, the threshold issue is whether the statute even applies. R.C. 1345.01(A) defines a "consumer transaction" as one involving "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household." Applying a fairly straightforward analysis, an argument could be made that DFS fits into the definition of a consumer transaction. Other provisions of the Revised Code, however, arguably indicate that the General Assembly intended for gambling-related matters to fall outside the scope of the CSPA. *See* R.C. 2915.061 (exempting "skill-based amusement machines" from the CSPA).

In the event the CSPA is found to apply to DFS, R.C. 1345.02(A) would prohibit any "unfair or deceptive act or practice in connection with" the operation of a DFS website. One of the side-effects of the explosion in the DFS industry in 2015 has been increased media scrutiny on some of the more questionable aspects of DFS websites. For example, in September 2015 a scandal ensued when it was discovered that an employee at DraftKings won \$350,000 in prizes on FanDuel, and may have done so by using information only available to him as a result of his employment with DraftKings. *See* Kang, cited in Section III.C.1.b, *supra*.

As also noted above, initial research indicates that a very small percentage of participants tend to win the vast majority of DFS profits. While skill may play a role, an additional reason for this variance may be that many high volume participants have traditionally utilized what are known as "scripts." Scripts are computer programs that interact with the DFS websites and allow script users to either enter contests or adjust lineups automatically. By utilizing a script, it is alleged that individuals have built-in advantages over non-script users—for example, changing hundreds of lineups in just a few minutes in response to late-breaking news of a key injury. The existence and use of scripts were not generally known until fairly recently, and as a practical matter scripts are available to only a limited number of participants. *See id.*

While the preceding indicates that there are legitimate concerns over how DFS websites operate, we currently express no opinion regarding whether such websites are in violation of the CSPA. First and foremost, determining whether an entity is engaged in a deceptive act or practice is an extremely fact-intensive inquiry, and it is beyond the scope of this memorandum to even attempt to make such a finding.

Second, and as you likely well-know, the legal and factual landscape surrounding DFS is evolving at an *extremely* rapid pace. On March 7, 2016, Virginia became the first state to pass legislation specifically legalizing and regulating DFS. See <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER>. Bills seeking to legalize and regulate DFS also have been introduced in over twenty states. See <http://www.legalsportsreport.com/dfs-bill-tracker/>. We have attached as Appendix A to this memo a breakdown of how the states are currently addressing DFS.

Almost assuredly, the DFS industry is not operating in the exact same manner today as it was twelve, or even six, months ago, and the next twelve months likely will see even more changes. Thus, while reporting in the popular media indicates past problems, it is unclear if those problems will persist or if litigation under the CSPA is the most appropriate vehicle to address those problems.

IV. Conclusion

For the foregoing reasons, our current analysis is that:

(1) DFS websites are not specifically authorized by UIGEA.

(2) It is unclear whether DFS websites, as currently operating, violate R.C. Chapter 2915. Due to this lack of clarity and the variety of laws DFS implicates, the General Assembly may want to address this issue.

(3) Based on news articles, it is possible that the operation of DFS websites raise legitimate consumer protection concerns. However, it is unclear whether this operation would be covered by the CSPA. DFS operators appear to concede that consumer protection concerns exist as legislation enacted in other states attempt to provide protections in this area.

Please be advised that the foregoing analysis does not constitute a formal or informal opinion of the Attorney General. Please also be advised that DFS websites potentially implicate numerous legal issues and this memorandum is limited only to the matters discussed herein.

APPENDIX A:

State-By-State Review of DFS as of June 20, 2016

The following states have passed laws authorizing and regulating DFS:

- Colorado
- Indiana
- Kansas
- Maryland
- Mississippi
- Missouri
- New York (awaiting governor's signature)
- Tennessee
- Virginia

The Attorney General for the following state has opined that DFS is permissible and/or will not be prosecuted under current law:

- Rhode Island

The Attorney General for the following State has issued regulations applicable to DFS:

- Massachusetts

No Attorney General opinion has been issued or litigation filed. DFS websites continue to operate in the following states:

- | | |
|---|--|
| ▪ Alaska | ▪ North Carolina |
| ▪ Arkansas | ▪ North Dakota |
| ▪ California- active legislation | ▪ Ohio |
| ▪ Connecticut - previously introduced legislation | ▪ Oklahoma- previously introduced legislation |
| ▪ Delaware | ▪ Oregon |
| ▪ Florida- previously introduced legislation | ▪ Pennsylvania- active legislation |
| ▪ Kentucky- active legislation | ▪ South Carolina- active legislation |
| ▪ Maine | ▪ South Dakota |
| ▪ Michigan- active legislation | ▪ Utah |
| ▪ Minnesota- previously introduced legislation | ▪ Vermont- previously introduced legislation |
| ▪ Nebraska- previously introduced legislation | ▪ Washington, DC |
| ▪ New Hampshire | ▪ West Virginia- previously introduced legislation |
| ▪ New Jersey- active legislation | ▪ Wisconsin- previously introduced legislation |
| ▪ New Mexico- previously introduced legislation | ▪ Wyoming- previously introduced legislation |

Regulators and/or the Attorney General for the following states have issued letters or opinions questioning the legality of DFS. Certain DFS websites are in current litigation and/ or negotiations regarding continued operation:

- Alabama- The Alabama Attorney General has opined that “paid DSF contests are in fact illegal gambling under Alabama law.” Letters sent to DFS companies instructed them to cease operation in the state no later than May 1, 2016.
- Georgia- The Georgia Attorney General’s office issued a letter, dated February 26, 2016, stating that “DFS games are not authorized under Georgia law.”
- Hawaii- The Hawaii Attorney General concluded in January 2016 that DFS contests constitute illegal gambling. A Honolulu prosecuting attorney instructed leading DFS providers to cease operating in the state.
- Idaho- The Idaho Attorney General has opined that DFS contests fall within Idaho’s definition of gambling. Leading DSF companies agreed to exit the state and not offer any cash-based contests to Idaho residents absent legislation or a favorable court decision.
- Illinois- In December 2015, the Illinois Attorney General concluded that pay-to-play DFS is illegal under state law. DraftKings and FanDuel filed suit. Litigation is ongoing, and both companies continue to operate in the state.
- New York- The New York legislature passed a bill authorizing DFS on June 18, 2016. DFS websites had ceased operating in New York, but anticipate resuming operations soon. Notwithstanding legalization, the New York attorney general has indicated that he intends to continue pursuing previously filed false advertising and consumer frauds claims related to prior activity by DFS websites.
- Texas- The Texas Attorney General has concluded that, “because the outcomes of games in daily fantasy sports leagues depend partially on chance, payment to participate is a bet.” Fanduel entered into a settlement agreement with the state whereby FanDuel agreed to stop accepting paid entries for its games. DraftKings filed a lawsuit against Texas Attorney General Ken Paxton on March 4, 2016 and continues to operate in the state.

Based on current statutes, DFS websites do not operate in the following states:

- Arizona
- Iowa
- Louisiana
- Montana
- Washington

The Attorney General for the following state has concluded that a license is required to offer DFS in the state:

- Nevada