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January 22, 2016

*By Electronic Mail*

Attorney General Maura Healey  
The Commonwealth of Massachusetts  
One Ashburton Place  
Boston, MA 02108

Re: Proposed Regulations for Daily Fantasy Sports Operations in MA

Dear Attorney General Healey:

We write on behalf of FanDuel, Inc. (“FanDuel”) to provide comments to the Daily Fantasy Sports Proposed Regulations your office published at 940 C.M.R. 34 (“Proposed Regulations”).

FanDuel has been an innovative leader in offering exciting and compelling fantasy sports competitions on a daily or weekly basis since 2009. Having operated in the daily fantasy space longer than any other DFS operator, FanDuel has a wealth of experience with the topics addressed in the Proposed Regulations.

As an initial matter, FanDuel shares the goals of your office and seeks to maintain a safe, fair, and regulated environment for consumers to enjoy playing in FanDuel’s fantasy contests. FanDuel also appreciates the opportunity to submit its comments in advance of the issuance of final regulations. These comments, while supportive, are designed to provide constructive feedback regarding the Proposed Regulations based on FanDuel’s experience building and operating its platform, and the history of customer feedback FanDuel has received as its business has continued to evolve. FanDuel’s comments focus on areas where a proposed regulation may not best serve its identified objective, or where it presents significant operational and implementation challenges. FanDuel hopes that your office will find these comments helpful in improving the proposed regulatory framework and achieving the shared consumer protection goals in a manner that benefits fantasy sports players without unduly burdening the growth of the still burgeoning Daily Fantasy Sports industry.

FanDuel’s comments are divided into two sections: (1) comments that apply to the entirety of the regulatory effort and; (2) comments that are designed make particular provisions more effective, more logical, and/or more likely to achieve the intended result.

## **General Comments that Apply to Multiple Regulations**

### **Application of Proposed Regulations to Massachusetts Residents**

FanDuel believes that the majority of the Proposed Regulations should apply based on a user's physical location in Massachusetts, rather than residency in Massachusetts. As a practical matter, reliance on residency complicates compliance and creates inconsistencies that could be mitigated by the alternate approach. By contrast, reliance on physical location creates clearly defined parameters that can be effectively implemented by an operator's systems, maintains consistency throughout the user base, and upholds principles of state sovereignty.

FanDuel currently uses a geo-block on deposit and contest-entry to prevent users in prohibited jurisdictions from depositing funds or entering paid contests. Operationally, this approach is effective and relatively straight-forward to implement. It allows FanDuel to serve different content and games based on the IP address or GPS location of the player at the time the player seeks to enter a contest. FanDuel can use this existing capability to build additional rule sets to enforce a number of aspects of the Proposed Regulations.

Reliance on physical location is also consistent with state sovereignty and jurisdiction, as state laws generally apply to people physically located within their borders, and not to people located outside state lines. Accordingly, FanDuel believes that Massachusetts should apply the majority of its Proposed Regulations to consumers physically located in Massachusetts when they attempt to play, rather than creating rules that follow Massachusetts residents wherever they may be located.

Additionally, reliance on residency alone would lead to inconsistent – and potentially unintended – applications of the Proposed Regulations to temporary residents. For example, college students whose permanent residence is outside of Massachusetts may still be able to play when physically located within the Commonwealth while their Massachusetts' resident housemates or dorm mates cannot. Conversely, Massachusetts residents who take temporary jobs outside the Commonwealth would be covered by the Proposed Regulations even when their local co-workers would have no such restrictions. These examples suggest potentially inconsistent and inappropriate application of Massachusetts law if based on residency and not location.

FanDuel strongly believes that the optimal application of the Massachusetts Proposed Regulations can be achieved by changing the definition of DFS Consumer to read as follows: "Any individual person physically located within the physical boundaries of the Commonwealth of Massachusetts." Certain other provisions, like protection of funds/escheat in 34.05, should still apply to users based on their Massachusetts residency, but those few provisions can be specifically identified as a subset of the general rule.

### **Minors Defined as Under 21**

The Proposed Regulations should define a Minor as an individual under 18 years of age instead of 21, as this approach would be most consistent with current Massachusetts law as well

as the laws of other states. The proposed approach would create a different age of majority for fantasy sports than other Massachusetts laws. For example, M.G.L. ch. 4 § 7 defines “age of majority” as 18 years of age, “adult” as a person who has attained the age of 18, “full age” as 18 and “minor” as a person under 18 years old. Similarly, the prohibitions on lottery purchases and pari-mutuel wagering also only apply to those under 18. *See* M.G.L. ch. 10 § 29 and M.G.L. ch.128A § 10. There is no rational basis that would support applying a different age requirement to daily fantasy sports as compared to season-long cash fantasy games, or to race-track wagering at Suffolk Downs.

Defining “Minors” as under 21 makes some of the other compliance obligations awkward and untenable (e.g., parental controls) when the individuals involved are legally adults. DFSOs should not be overriding the desires of adults based on their parents’ wishes when they are above the age of majority.

### **Highly-Experienced Player Definition**

The Proposed Regulations offer a framework whereby certain players will be designated as Beginners and others as Highly-Experienced Players (“HEPs”). FanDuel understands the purpose of these designations is to surface the experience level of the HEPs, giving their opponents the tools to decide whether to enter into a contest with them. Additionally, the Proposed Regulations require DFSOs to offer contests that are limited to less experienced players so they have an opportunity to compete against other beginners as they learn the game. FanDuel understands the purported goal of these designations but suggests that the definition of HEPs be modified.

Under the Proposed Regulations, HEP status is based on both a user’s volume of play (his or her experience), as well as an evolving measure of success in contests. Extending the definition of HEP beyond volume (i.e., number of contests entered) into success rates creates significant implementation and operational challenges, and also creates potentially confusing treatment of customers that does not appear to advance the underlying objective of the HEP designation. These challenges can be significantly mitigated, however, by basing the definition only on the number of contests entered – such as 500 or 1,000 – rather than on other criteria.

First, basing the HEP designation solely on volume of play allows for a clearly defined standard for DFSOs to adhere to: any user who has played over the requisite number of contests will be clearly designated as an HEP. Second, calculating winning percentage, as included in the current proposed definition, is difficult as that percentage will change as the player continues to play. Depending on the number of contests entered, a player might be considered an HEP at one time and then fall below the threshold at a later time, even while a contest is pending. This variance reflects the operational difficulties of calculating and maintaining these percentages as well as the potential for confusion among players. Additionally, the term “prevailed” is not entirely clear and could be interpreted several ways depending on the contest. For example, does this mean that the player won more than he spent to enter the contest or won within a certain percentile of the contest (e.g., in a multiplier)? Finally, basing a HEP designation on winning three contests of over \$1000, as the third criterion suggests, creates the inconsistent situation where a HEP may also be a Beginner. Accordingly, identifying an HEP solely based on volume

of play removes operational challenges and supports consistency under the Proposed Regulations.

Additionally, there has been a suggestion among the other public comments that an HEP should be maintained across platforms. This approach would negatively implicate the privacy of consumers by requiring DFSOs to share the actual identities of their HEPs – in order to capture the players who may use different usernames on each platform – thereby forcing them to conduct that analysis and obtain consent to sharing that information. DFSOs should not to be required to share personal information about their users in this way. Moreover, given the differences in types of contests run by DFSOs, a HEP on one site may essentially be starting from scratch in an unfamiliar game or contest on a different site.

### **Standard of Care**

While DFSOs will make every effort to comply with these regulations, it is foreseeable that certain players will find a way to circumvent a DFSOs commercially reasonable controls. As long as the DFSO is taking reasonable efforts to implement the regulations, however, it would be reasonable to build in some provisions that would provide assurances that there is no “gotcha” type enforcement. One proposed solution would be to add “knowingly” to certain regulations to avoid creating strict liability. Accordingly, your office should consider modifying the following sections to insert the word “knowingly” as indicated:

- 34.04(1) – “No DFSO will **knowingly** allow a Minor to participate...”
- 34.06(1) – “DFOSs will not **knowingly** allow a DFS player to establish more than one account.”
- 34.06(3) – “No DFSO will **knowingly** allow DFS player to use a proxy server”
- 34.12(3) – “No DFSO will **knowingly** allow a professional or amateur athlete...to enter DFS contests in the sport in which they participate.”

### **Comments About Specific Regulations**

#### **Definition of DFSO – 34.03**

The current definitions of DFSO and Enterprise can be read together to suggest that the Proposed Regulations apply to those businesses who share common ownership with DFSO but who offer products and services that are not intended to be covered by the regulations. By removing the term “Enterprise” from the Proposed Regulations and replacing the term in the definition of DFSO with “entity,” this potential issue can be resolved.

Alternatively, FanDuel suggests you consider creating a term called “Covered Contests,” that capture the types of contests for which the regulations are designed to apply. Certain regulations could then be limited to such Covered Contests, so that other types of contests (such as contests that do not offer prizes or charge entry fees) are outside the scope of the regulations, regardless of whether they are conducted by a subsidiary that might be in the same Enterprise as a DFSO.

### **Simultaneous log-ins – 34.05(2)**

The Proposed Regulations require DFSOs to “not allow” simultaneous log-ins for a single account, presumably on the theory that this precaution would prevent players from using a proxy to enter contests. This restriction seems over-inclusive, and potentially interferes with users’ legitimate use and full enjoyment of fantasy sports platforms. Indeed, the objective of preventing proxy play can be addressed without a bar on simultaneous log-ins. FanDuel already monitors its accounts for evidence of proxy use. Although well intentioned, the way this Proposed Regulation is currently framed may interfere with a sports fan’s full second-screen experience, where they can log in from mobile while watching a sporting event even though they never logged out on their home computer. To address both concerns, FanDuel proposes addressing the real issue – the potential for use of proxies – by changing to the Proposed Regulation so that it requires DFSOs to “**use commercially reasonable measures** to prevent any DFS player from acting as a proxy on behalf of another person or entity in entering DFS Contests” rather than preventing simultaneous log-ins.

### **Advertising Content – 34.07**

FanDuel appreciates the goal of these provisions to avoid advertisements that would uniquely appeal to Minor players. However, the way the proposed regulation is currently written it would preclude inclusion of some professional athletes in ads, as they may be under 21. In addition, its restrictions could apply to national advertisements that are lawful in every other jurisdiction but are seen by Massachusetts residents. This creates potential First Amendment and Dormant Commerce Clause Issues. The simplest way to solve for these issues is to limit the proposed regulation to those advertisements specifically targeted to Massachusetts residents. Further, the term “depict” should be changed to “feature” so it does not include Minors who are seen in the background but not centrally featured in the advertisement (e.g., a baby sitting on his father’s lap while watching football), or Minors in a crowd shot at a sporting event.

### **Promotional Offers – 34.09(2)**

This provision requires that all terms of promotional offers are disclosed at the time such offers are advertised. In certain contexts, such as billboards or certain Internet displays, it is unrealistic to include the full terms of the offers. Qualifying the requirement to specify that “material” or “key” terms should be included at the time of the offer would be more workable. Additionally, consistent with the Proposed Regulations, all terms will be disclosed before the DFS Consumer provides anything of value in exchange for the offer.

### **Scripts – 34.12(8)**

The presence or use of scripts on DFSO sites has received attention due to certain media reports highlighting the potential abuse of scripts in a way that might allow them to unfairly impact gameplay by automating otherwise manual processes. However, the approach taken in the Proposed Regulations to ban any use of scripts is both overly broad and unworkable. As a threshold matter, not all scripts have the potential to negatively impact other players’ experience. For example, a player might want to create a script that gathers retrospective information about

his own performance or contest entries. Collection of this information only enhances his enjoyment of the experience and does not interfere with others' gameplay. Furthermore, scripts cannot always be detected or blocked before they are used. Often, scripts are detected through historical review of log files.

Moreover, FanDuel already maintains a policy regarding use of scripts that specifically prohibits automating certain activities such as editing of lineups and takes efforts to identify use of unauthorized scripts and terminate their use. *See, e.g.,* <https://newsroom.fanduel.com/2015/10/08/scripting-policy/>. To address some of the concerns raised regarding script use, FanDuel may offer certain additional functionality through its platform, and in some cases that functionality may rely on a "script" or plug-in that may be covered by the proposed regulations. Ensuring that all players have access to the same tools, and that tools that provide a competitive advantage are prohibited best achieves the objective of promoting an equal playing field for all players.

FanDuel suggests that the existing regulation be modified to prohibit unauthorized scripts by substituting the following language:

Prohibition of Unauthorized Scripts: DFSOs shall require that all authorized scripts be made available to all DFS Players through app stores, or other means through which that DFSO's Consumers can readily obtain the scripts. DFSOs shall publish clear rules on what types of scripts may be authorized, and shall prohibit the use of any scripting activities that provide a competitive gameplay advantage. DFS Consumers who have been found to have used Unauthorized Scripts shall be suspended or terminated.

#### **Limits on Consumer Deposit – 34.10(6)**

The Proposed Regulations impose a \$1,000 limit per calendar month that a player can deposit unless the DFSO promulgates and implements standards by which a player can establish his or her financial viability to support raising that limit. Imposing this limit requires DFSOs to act essentially as credit reporting agencies in order to evaluate whether to permit players to make a deposit exceeding the threshold in a way that no other merchant in Massachusetts is required to do. Retail stores in Massachusetts have no similar obligation to verify a consumer's ability to pay before selling even higher-priced items such as designer clothes, furniture, or even motorcycles or cars. This application to DFSOs only cannot be justified. And unlike the credit card companies, DFSOs are poorly suited to make this assessment of financial capability, and should neither be collecting nor storing personal financial information in order to justify a decision. For all of these reasons, this provision is inappropriate here and should be removed from the Proposed Regulations.

#### **Third Party Requests for Self- Exclusion – 34.10(5)**

This provision creates a significant burden on DFSOs to act as judges to determine whether third party requests for exclusion of a DFS player are legitimate requests made on behalf of problem gamers, or are being made by unauthorized parties (e.g., a losing player fraudulently attempting to recoup his losses or a disgruntled former partner). Not only does this provision

require DFSOs to collect and verify sensitive personal and financial information about both their players and other third parties to make these determinations of validity, but it also requires them to store that same sensitive information in order to justify the decision to exclude a player. As a policy matter regarding data security, DFSOs do not want to receive, handle, or retain this information. Additionally, in the event of a dispute over the validity of an exclusion or the relationship of a family member, DFSOs are not operationally equipped to arbitrate the merits of each claim. A better process would appoint a reputable third party entity to evaluate the merits of the exclusion request and then provide all DFSOs periodically with names of individuals who should be placed on the exclusion list. This same type of third-party solution was independently recommended to your office during the public hearing on the Proposed Regulations by the National Council on Problem Gaming.

### **Restrictions on Number of Entries by Contest – 34.12(11)**

DFSOs often offer a wide variety of contests including head-to-head contests, multipliers (where players finishing in a certain percentile win) and tournaments. Many of these contests are already restricted to single entries. The Proposed Regulations place limitations on the number of entries per contest that a player may enter based on contest size, which restricts opportunities for engagement and an important source of revenue for DFSOs. Players enjoy the opportunity to enter many different contests, even where those contests may have low entry fees and smaller prizes. An alternate way of framing this limitation is to allow DFSOs to offer a limited number of clearly labeled contests with unrestricted entries. For example, DFSOs could offer a certain fixed number or a baseline percentage of contests that restrict the number of entries the participants can enter in those specific contests. Alternatively, caps could only apply to beginner contests or other contests under a certain financial threshold.

### **No Game Play – 34.12(1)**

There should be some exception to this regulation for test accounts used by DFSO employees or contractors, provided they are clearly labelled (such as with “DFSOTest,”) to ensure the games are working as expected and to test the consumer experience. FanDuel suggests the following addition to capture this exception: “DFSO employees may enter contests for testing purposes using clearly identified test accounts. Such accounts may be used solely to work on and improve the consumer experience and are not eligible to win any prizes.”

### **Adequate Time for Implementation**

FanDuel’s implementation of the Proposed Regulations is well underway and FanDuel expects to be in compliance with many of the regulations as soon as they are finalized. However, certain engineering changes cannot be designed and implemented until FanDuel can be certain about the final regulations and some solutions may depend on the acceptance of some of the changes proposed in this letter. As a result, FanDuel requests that all DFSOs be given adequate time following the issuance of the final regulations to achieve full compliance.

FanDuel appreciates the Massachusetts Attorney General's constructive and thoughtful approach to the DFS industry, and will take seriously its compliance with the regulatory framework ultimately issued by your office. Thank you for the consideration of FanDuel's comments regarding the Proposed Regulations. Please do not hesitate to contact me if you have questions about FanDuel's comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. J. Zwillinger', with a long, sweeping flourish extending to the right.

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