

Comments on Proposed Adoption of 940 CMR 34.00 (Daily Fantasy Sports Contest Operators)

These comments are filed on behalf of ESPN, Inc. (hereinafter referred to as “ESPN” or “the Company”) on proposed adoption of 940 CMR 34.00 (Daily Fantasy Sports Contest Operators (hereinafter “the Proposed Regulations”). ESPN is the leading multinational, multimedia sports entertainment company featuring a broad portfolio of multimedia sports assets, including television, radio, publishing, websites, and apps. In the fantasy sports space, ESPN is a leader in providing content aimed at fantasy sports enthusiasts, provides a free hosting platform for hundreds of thousands of private season long fantasy leagues, and provides a variety of free promotional games with prizes. Additionally, ESPN has offered paid season long fantasy leagues. ESPN does not own any assets that provide daily fantasy games.

These comments do not take a position on the Proposed Regulations in general or on the need for or advisability of the Proposed Regulations as a whole or any specific proposal therein. These comments propose a number of principles for regulation which we believe a prudent and effective regulatory regime should reflect.

Free Games Should Be Exempt From the New DFS Regulatory Regime

New regulatory regimes designed to address the daily fantasy sports (DFS) industry should not apply to free games, including free games that pay out cash prizes. Some of the Daily Fantasy Sports legislation that has been proposed in various states would apply the new regulatory regime to all fantasy games that involve cash prizes, even games that are free to the participants. These types of free games have been offered by many different entities for many years as promotional tools or for fan engagement. However, because no fee is being paid (*i.e.*, no consideration), they do not trigger the regulatory concerns that have been raised by some about the daily fantasy industry. Additionally, to the best of the Company’s knowledge, these types of free games have not generated consumer complaints or other policy concerns and they rightly have not been subject to specific regulation of the type in the Proposed Regulations for decades. Accordingly, new regulations aimed at the DFS industry should not apply to free games, including free games that offer a cash prize.

We appreciate that it is the apparent intent of the Attorney General’s Office in the Proposed Regulations to exempt free games given the exemption of entities that offer only free games in the definition of Daily Fantasy Sports Operator (“DFS Operator”) at 34.03. However, as drafted, we do not believe the Proposed Regulations achieves this result. The expansive definition of Daily Fantasy Sports Contest (“DFS Contest”) includes free games, and a variety of the regulatory rules apply to all DFS Contests operated by a DFS Operator. Accordingly, once an entity is treated as a DFS Operator, all of its fantasy contests, including free games, are covered by the regulatory regime. We therefore recommend a modification to the Proposed Regulations to define a subset of DFS Contests as “Covered DFS Contests,” excluding free games from the definition of Covered DFS Contests, and applying the regulatory regime only to Covered DFS Contests. Redline suggestions are attached to this submission.

Mere Hosting Platforms For Private Leagues Should Not Be Covered by the Regulatory Regime.

New regulatory regimes designed to address the DFS industry should not apply to the many sites, that have in many cases existed for decades, that host private leagues. Collectively, these sites provide services (e.g., by providing a drafting platform, compiling fantasy statistics, creating weekly matchups, running add/drops, , etc.) to tens of millions of fans typically playing in season-long “friends and family” leagues (*i.e.*, involving participants exclusively or primarily made up of small groups). The games are played for fun or with stakes or prizes decided solely by the participants. The service

providers play no role in and generally have no knowledge of the terms of participation agreed among the players and, to the extent such private terms involve the exchange of money, the service providers take no cut/"vig"/rake.

Over many years, to the best of Company's knowledge, these types of services have not raised policy concerns – perhaps at all, let alone the concerns currently driving legislative/regulatory efforts. Sweeping sites that merely offer services for friends and family leagues into the new legislative/regulatory regimes would affect literally millions of individuals who have been playing these games for decades, would not advance the policy concerns driving legislative/regulatory efforts, would raise implementation nightmares, and could create immense public opposition.

Again, we appreciate that it is the apparent intent of the Attorney General's Office in the Proposed Regulations to effectively exempt such hosting providers. This is accomplished in a number of ways, direct and indirect. The Proposed Regulations carefully ensure that individuals who act as commissioners of friends and family leagues are not themselves treated as DFSOs – (a) by limiting the definition to "enterprises" and (b) by setting a *de minimis* limit on the number of DFS games offered. Additionally, the proposed regulations provide a general exemption for certain season long games, which as a practical matter is another way the Proposed Regulations indirectly exempt mere hosting providers to most friends and family leagues. As for the free games exemption, though, unless the "Covered DFS Contest" concept suggested above is adopted, this season long game exemption evaporates once an entity is treated as a DFSO.

Finally, we suggest that you provide a definition of "entry fee" in 34.03 -- "cash or cash equivalent that is required to be paid by a DFS Consumer to a DFSO in order to participate in a DFS contest." This would further ensure that mere hosting platforms (which do not receive entry fees) are not accidentally treated as DFSOs.

Regulatory Regimes Should Avoid Creating A "Regulatory Cliff"

Regulatory regimes should avoid creating what we see as a "regulatory cliff" – a regime whereby activities of an entity that were previously deemed unworthy of regulation and in many cases wholly unrelated to paid fantasy sports contests, get swept into the regulatory regime once the entity is treated as a DFSO. This "regulatory cliff" is hard to justify from a policy perspective, would impose an undue regulatory burden on activities wholly unrelated to the DFS industry, and would create a significant anti-competitive regulatory hurdle against new market entrants. We assume that the regulatory cliff is unintentional, driven by initial drafting focused on entities that are exclusively providers of DFS games.

In numerous ways, the Proposed Regulations would create a, presumably unintentional, regulatory cliff. As noted above, once an entity becomes a DFSO, its heretofore exempt free games would be covered by the regulatory regime for paid games – e.g., DFSOs would have to take measures to prevent players from having more than one account, to verify true identities and addresses, to prevent the use of proxy servers, and to prevent simultaneous log-ins. Such regulations would impose an undue burden on free games, with no apparent regulatory benefit. Additionally, a number of provisions in the Proposed Regulations would appear to apply to all activities of an entity once deemed a DFSO, even activities wholly unrelated to the provision of paid fantasy sports. For example, under 34.07(2), once an entity is defined as a DFSO, it cannot run advertisements that depict college settings; under 34.08, entities deemed to be DFSOs may not run promotional events or advertise at college campuses or at college sporting events; under 34.14, DFSOs must retain all advertisements for at least four years. The Company has extensive activities relating to coverage of college sporting events wholly unrelated to the

fantasy space (free or paid); the Company has extensive advertising efforts wholly unrelated to the fantasy space (free or paid). To the extent these restrictions remain, they should be limited to activities relating to paid fantasy contests.

To address the regulatory cliff issue, we propose creating the Covered Fantasy Contests concept discussed above and adding a clarification that, with respect to the regulations in 34.04-34.15, a DFSO is a DFSO only with respect to its activities that cause it to be treated as a DFSO and such regulations apply: (1) only to DFS contests that are Covered DFS Contests and (2) only to the extent the activity covered by the regulations relates to the entity's status as a DFSO. Specific suggested clarifications to the Proposed Regulations to address this issue are included in the attached.

Conclusion

ESPN acknowledges that efforts to regulate the DFS space are novel and raise important policy questions and drafting challenges given the range of activity in the fantasy sports space. We appreciate the AG's approach of soliciting comment on the Proposed Regulations and are pleased to have had the opportunity to make this submission.