



Four big issues facing the DFS industry in 2016

http://espn.go.com/chalk/story/_/id/14759843/daily-fantasy-payment-processors-leaving-big-issues-surrounding-industry

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During an optimistic Fantasy Sports Trade Association (FSTA) conference last month in Dallas, the recipe for the daily fantasy sports (DFS) industry's success in 2016 was made public.

"We are actively engaged with elected legislators and regulators across the country and in Washington to ensure that the millions of fantasy sports fans across the country can continue to play the games they love," DraftKings' Griffin Finan said in a widely reported statement earlier about lobbying efforts being made.

With a mix of state-level legislative and legal developments progressing on a weekly basis, Chalk explores four big issues surrounding the DFS industry in 2016.

Will the upcoming hearing in the New Jersey sports betting case affect DFS?

The next hearing in the New Jersey sports wagering case is set for Feb. 17. The litigation between the five major American sports leagues and New Jersey Gov. Chris Christie -- the NCAA, NBA, NFL, NHL and MLB first sued in August 2012 -- has briefly touched on fantasy issues.

"We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by [New Jersey's] Wagering Law," wrote a federal appellate court in a September 2013 ruling on the case.

Documents released in the New York DFS litigation shed further light on how fantasy operators differentiate themselves from traditional sports betting.

"The key to the distinction between fantasy sports and sports wagering, however, is that fantasy sports require the consistent and recognizable involvement of the contestants, almost to the point of immersion in the contest, to achieve success; such that the activity transforms from something outside their control to something within their control," wrote attorney Anthony Cabot in a March 22, 2013 letter to DraftKings executive Tim Dent.

Two lawyers writing to FanDuel CEO Nigel Eccles touched on the subject too.

"Unlike sports wagering, which was outlawed in part to protect the integrity of professional and amateur sports, fantasy sports contests do not create the risk of impairing the integrity of sporting events," wrote Marc J. Zwilling and Jacob A. Sommer in a Nov. 10, 2014 letter.

Recent filings in the litigation with the New York Attorney General made a consistent distinction as well.

"[F]antasy sports contestants are not mere observers betting on sporting events," wrote FanDuel attorney John S. Kiernan on Jan. 4, 2016. "They are contestants themselves in a separate bona fide contest, competing against each other."

"DraftKings fantasy contests are not tethered to the outcomes of real-world sporting events," wrote DraftKings lawyers in a Jan. 4, 2016 court filing.

While intervening co-defendants with Gov. Christie have argued the five sports league plaintiffs possess "unclean hands" as a result of their embrace of DFS, there is no indication that fantasy sports will be pivotal in the resolution of the long-running case.

A decision in the New Jersey sports betting case probably will be released in a few months.

Will other payment processors follow Citigroup and Vantiv?

The Unlawful Internet Gambling Enforcement Act of 2006 -- often referred to as UIGEA -- limits certain online activities by making it illegal to process gambling-related payments.

"Payment processors and payment gateways ... serve as a critical financial intermediary between players and DFS sites," [wrote industry expert Chris Grove](#) in a Nov. 11, 2015 LegalSportsReport article. "Without access to these processors and gateways, DFS sites would be effectively unable to operate."

With the legality of daily fantasy in flux in certain states, some payment processors sensitive to UIGEA may believe the risk isn't worth it, especially if DFS transactions are not a big percentage of their overall business.

Last week, Citigroup opted to [discontinue FanDuel and DraftKings payments in New York](#). Vantiv Entertainment Solutions, a large publicly traded payment processor, made waves late last month when the company became the first to announce that it would stop servicing New York-based fantasy transactions at the end of February. Vantiv and DraftKings are involved in litigation in Massachusetts, New York and Ohio.

"As you are aware, an increasing number of state attorneys general have determined that [DFS] constitutes illegal gambling," wrote Vantiv's Jonathan Ellman in a recent letter to DFS operators as [first reported by the New York Times](#). FanDuel issued a statement last week in the wake of Vantiv's decision.

"[T]here are many other payment processors available, as well as PayPal, and this decision will not impact their ability to play on FanDuel, withdraw funds, or have any other impact on the user experience," [wrote FanDuel](#). PayPal followed up with a statement of its own earlier this week, which likely reflects the feeling of many payment processors.

"We continue to review and consider ongoing developments in relation to Daily Fantasy Sports," a PayPal spokesperson said.

Will the federal government get involved with DFS?

The most prominent possibility for a federal role remains the specter of Congressional hearings. Recently released records indicate that DraftKings spent about \$80,000 on Congressional lobbying during the fourth quarter of 2015.

"When and if Congress wants to talk about fantasy sports, we welcome the opportunity," FSTA chairman Peter Schoenke said last month in a statement [first reported by USA Today](#).

One issue that could come up in any Congressional hearing is taxes.

A former Assistant U.S. Attorney has informed the Internal Revenue Service about possible tax implications stemming from daily fantasy.

"DFS businesses ... are clearly engaged in betting or wagering for purposes of the wagering excise tax," wrote Michael K. Fagan in an Aug. 22, 2015 letter sent to a half-dozen senior IRS employees and recently obtained by Chalk. As a federal prosecutor, Fagan successfully prosecuted a prominent offshore sports gambling website a decade ago.

"The excise tax component was an important part of the government's case [in 2006] given the law's broad scope," Fagan told Chalk in a phone interview.

"The federal excise tax for wagers is not well-known," said Marc Dunbar, a gaming lawyer at Jones Walker in Florida. "But the plain language of the Internal Revenue Code applies to wagers on a 'sports event' or 'contest,' including contests of skill such as spelling bees."

According to some, the skill versus chance distinction so important in state-level disputes may be irrelevant for federal excise tax purposes as set forth in IRS Form 730.

"The way the tax code is written, all wagers on sporting events and contests (including skill contests) are included," emailed Kate Lowenhar-Fisher, a gaming industry attorney at Dickinson Wright in Las Vegas. "The tax seems to apply to a category of activities that may be broader than 'gambling.'"

Experts were unaware if some or all of the daily fantasy companies are currently paying the excise tax. "I don't know for a fact whether they are paying the excise tax," said Fagan, who did not receive a response to his letter. "Given their marketing and public statements claiming not to be gambling, my educated guess is that they are not paying the excise tax."

Tax status for individual companies is confidential.

"The IRS declines to comment on this issue," Internal Revenue Service spokesman Bruce I. Friedland told Chalk last month after receiving a copy of Fagan's letter. In a follow-up email to Chalk last week, Friedland wrote that he had "no additional information" to provide.

Last week, the New York Times reported that agents from the IRS criminal investigation division "are examining how fantasy games affect problem gamblers."

Fagan's 11-page letter to the IRS also was sent to two members of Congress in September, including Republican U.S. Rep. Fred Upton. Congressman Upton has previously said a fantasy-related hearing is likely this year. Earlier this week, [The Hill reported](#) Upton as saying the potential hearing has yet to be set.

What happened to all of the private lawsuits about DFS?

Dozens of fantasy-related lawsuits were filed starting in October. Leading DFS operators were the target of the vast majority of the suits. A few complaints listed sports league investors, media companies, payment processors and individual fantasy contestants as defendants too. Various claims were put forth.

"Approximately 42 of these actions involve insider trading allegations, 36 involve illegal gambling allegations and eight involve bonus fraud allegations," wrote Panel on Multidistrict Litigation Chair Sarah S. Vance in a dense eight-page ruling released last week. "We conclude that the District of Massachusetts is the appropriate transferee district for this litigation."

The now-consolidated lawsuits in Boston have been renamed In re: Daily Fantasy Sports Litigation and assigned to U.S. District Court Judge George O'Toole. There is no immediate timetable for proceedings to begin.

One of the most unique private lawsuits was filed by NFL player Pierre Garcon against FanDuel. In the case, Garcon had alleged misuse of his name and likeness without consent. Garcon's lawsuit was recently settled out of court.