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Via Overnight Delivery

R. Douglas Sherman
Chief Counsel
Attention: Regulation # 125-212 Public Comment
Pennsylvania Gaming Control Board
P.O. Box 69060
Harrisburg, PA 17106-9060

Re: FanDuel Public Comments on Fantasy Contest Temporary Regulations

Dear Mr. Sherman:

On behalf of FanDuel, Inc. (“FanDuel”), we write in response to the issuance of the draft Fantasy Contest Temporary Regulations (the “Draft Regulations”) proposed by the Pennsylvania Gaming Control Board (the “Board”), pursuant to 4 Pa. Cons. Stat. §301, *et seq.* (the “Fantasy Sports Statute”). We appreciate the Board’s efforts to develop these regulations and that operators have been afforded this opportunity to provide comments on the Draft Regulations. Based on our lengthy experience as an operator in the fantasy sports industry and collaborator with regulators of fantasy sports contests in several other states in the development of their regulations, we want to offer constructive feedback on ways in which the Draft Regulations can be revised to improve their clarity and effectiveness as well as consistency with other state regulations. In particular, we seek to identify potentially unintended operational consequences and implementation hurdles that the Draft Regulations would create as currently drafted and offer some possible solutions.

I. PREFACE

While we provide comments on specific provisions below, we also have a few global observations regarding the Draft Regulations. First, we wish to underscore that the Draft Regulations are being introduced after many states have passed statutes largely similar to the Pennsylvania Fantasy Sports Statute, and several states have issued detailed regulations addressing the same topics in the Draft Regulations. Many operators, including FanDuel, have sought and obtained licenses in such other states and have implemented numerous policies and practices to comply with applicable licensing requirements, and third party auditors have developed testing and auditing to measure compliance with those requirements. Indeed, FanDuel is currently licensed to offer fantasy sports contests in Missouri, Indiana, Tennessee, Virginia,



New Hampshire, and Colorado, has been issued a temporary permit in New York, and has applications pending in several other jurisdictions. Largely, those policies and practices should be consistent with and/or can be harmonized with the rules and regulations the Board ultimately issues.

Certain provisions of the Draft Regulations, however, impose significant burdens on operators that go well beyond the licensing and regulatory requirements already in place in numerous states, as well as the Pennsylvania statute. We believe that the objective and/or concerns that prompted these provisions can be addressed through less onerous, but equally effective, means. For example, the requirement that operators maintain an office within the Commonwealth is unique among the states and fails to recognize the reality that the fantasy sports industry is conducted almost entirely in the digital realm. At the same time, the Board's concerns can be served in a less burdensome way by mandating that operators keep a registered agent in the Commonwealth, authorized to receive service of process and requests for information from the Board, and compelled to provide such information upon such request.

In addition, certain provisions require individuals and entities connected to the operator to submit an overwhelming amount of information. Although we recognize that the Board is entitled to obtain information regarding the individuals and entities that are capable of exerting control over operators, as currently drafted, these provisions potentially impact dozens of entities and individuals who, while they may own a small stake in an operator, cannot exert control over its operations. The intended goals of these provisions can be accomplished by limiting them to entities and individuals with larger ownership stakes in the operator and individuals with operational control, consistent with the approach adopted in most other states.

Finally, in some places, the Draft Regulations introduce new or more expansive requirements that exceed the language or scope of the statute itself. We have outlined below the provisions which exceed the scope of the Fantasy Sports Statute, which should be narrowed to reflect what the statute requires.

In the sections that follow, we set forth our comments on specific provisions in the Draft Regulations that are most important to FanDuel. We have organized our comments in the following manner:

- Section II outlines the provisions for which we request modification in order for the regulations to operate as intended and for consistency with the fantasy sports industry and the regulations in other states;
- Section III outlines the provisions that impose an excessive burden, stifle the industry, or cause unforeseen expenses;

- Section IV outlines areas where the regulations can be improved through small changes; and
- Section V outlines requests for clarification on sections that are unclear or notes on minor errata.

II. PROVISIONS FOR WHICH MODIFICATION IS REQUIRED IN ORDER FOR THE REGULATIONS TO OPERATE AS INTENDED AND FOR CONSISTENCY WITH THE FANTASY SPORTS INDUSTRY AND THE REGULATIONS IN OTHER STATES

Localization in Pennsylvania

The proposed regulations contain a potentially unique burden as compared to other states regulating fantasy sports by requiring operators to “maintain an office or place of business within the Commonwealth” § 1205.4(i). This requirement, if read to mean an actual, physical office must be opened in the Commonwealth, is burdensome, and more importantly, unnecessary. The fantasy sports industry operates nationwide through online platforms, and operators do not maintain offices in every state in which they offer contests. Moreover, operators in this industry rely heavily on digital technology to maintain records in electronic data warehouses. Accordingly, a physical office in Pennsylvania would not make those digital records more accessible to the Board. Moreover, the goal of records accessibility for legitimate records requests is already provided for in the requirement that operators “cooperate with the Board, the Bureau, the Department and law enforcement authorities performing any function or duties related to monitoring, investigating or enforcing provisions of the Act or regulations relating to fantasy contest related activities.” §1205.4(e).

If the Pennsylvania office requirement seeks to ensure that operators have an acknowledged site for service of process and other documents or requests issued by the Board as well as a location where the Board can review such information, such goals can be accomplished through much less burdensome means. The Board could require operators maintain a registered agent for service of process and document requests from the Board within the Commonwealth and notify the PGCB of any changes to that agent. Thus, Section 1205.4 (i) should be revised as follows:¹

Each licensed operator shall maintain an office, ~~or~~ place of business, or registered agent for service of process within the Commonwealth, and shall file with the Board the address and contact information for a person or representative in the Commonwealth authorized to receive service of process, documents and requests issued by the Board. If the Board makes a request for information or delivers

¹ Proposed additions to the Draft Regulations are underlined and proposed deletions are struck through.



documents or a notice to that address, it shall constitute receipt of those documents or requests by the licensed operator or applicant. If the Board shall require access to such requested information or documents, the information and document shall be made available to the Board at the Pennsylvania office, place of business, or registered agent address, or at the offices of the Board ~~If the Board shall require access to the database for the licensed operator, this information shall be kept, and be made available to the Board, at the Pennsylvania office address.~~

These changes will ensure that the Board can serve process and other requests on an operator’s agent in the Commonwealth and facilitates the Board’s legitimate inspection of any pertinent operator records without unreasonably burdening operators.

Contests limited to Pennsylvania residents

Fantasy sports are played online and involve users from all over the country competing against one another. However, Section 1205.2(b)(2) provides that “no participant outside of the Commonwealth may participate in a fantasy contest under this part”. As written, such a provision could potentially be read to imply that Pennsylvania participants would not be able to engage in fantasy contests against users from other states and vice versa. If so read, this provision would plainly contravene the intention of both the statute and the PGCB as expressed elsewhere. The statute defines “participant” as “an individual who participates in a fantasy sports content, whether the individual is located in this Commonwealth *or in another jurisdiction.*” §302 (emphasis added). Consistent with that definition, the PGCB’s Fantasy Contests FAQ explains to the public that a participant does not have to be in Pennsylvania to play, but only “in a state where fantasy contests are legal.” https://gamingcontrolboard.pa.gov/files/legislation/fantasy_FAQ.pdf.

Aside from the obvious burden such a reading would impose on both participants and providers, such a restriction would not benefit or protect Pennsylvania participants a manner consistent with the intention of the Fantasy Sports Statute or the spirit of online fantasy sports contests across the country. Accordingly, we ask that the Board clarify, consistent with the statute, that “participants” include individuals located both in the Commonwealth and in other states.

Self-exclusion

FanDuel understands that self-exclusion is an important part of regulating fantasy contests, and the company is committed to maintaining responsible self-exclusion policies and practices. The regulations, however, create a self-exclusion regime that is incompatible with other states that regulate fantasy sports and impose specific restrictions which are counter-



productive to encouraging individuals to self-exclude when appropriate.

Until now, operators have been required to maintain platform-specific tools that allow participants to self-exclude, rather than a form. Platform-specific self-exclusion is readily accessible to the user through the operator's site and limits the amount of personal information a participant must divulge to self-exclude, which assuages potential privacy concerns and removes potential barriers for utilizing such tools. FanDuel's tools also allow a participant to self-exclude for a range of time periods, including three, six, or nine months, which are less than the full year required under the Draft Regulations.

The Draft Regulations would fundamentally change the way operators manage self-exclusion. First, the regulations require self-exclusion periods be specified in years only, with a one-year minimum. §1209.2(b)(2). This one-year minimum conflicts with the Fantasy Sports Statute, which provides that self-exclusion period should be "determined by the participant." § 325(6). Further, a full year exclusion may discourage participants from self-exclusion altogether, as many users view a short-term exclusion as a valuable tool in assisting them with managing their play on an ongoing basis.

Second, individuals must report themselves for self-exclusion to the Board on a form provided by the Board and must provide personal information directly to the Board that is not required by other states, such as phone number and driver's license information. § 1209.2(b)(2). The Draft Regulations also require the user to fill out a stand-alone form rather than easily selecting the self-exclusion period of his/her choice. The self-exclusion tools currently available on FanDuel (platform-specific, variable time periods) make it easy for individuals to self-exclude and maintains the privacy of such individuals. While a participant is logged into his/her account, he/she can access the Responsible Play page through a link that is accessible at all times, where the participant can then access the self-exclusion tools. Further, because of the verification procedures required under the Statute, FanDuel already has the participant's name, date of birth and address. There is no need for a stand-alone form to capture such information. These regulations should be amended to conform to current industry practice, which has been developed and tailored over time to best achieve the underlying goals of responsible play protections for users of fantasy sports platforms, and approved by fantasy sports regulators in other jurisdictions. Operators should be required to provide self-exclusion options to their users and should maintain policies and practices that encourage and enforce self-exclusion.

III. PROVISIONS THAT MAY IMPOSE AN EXCESSIVE BURDEN, STIFLE THE INDUSTRY OR CAUSE UNFORSEEN EXPENSES

Certain application requirements are onerous and inconsistent with those of other states

The Draft Regulations establish certain application requirements that are particularly burdensome, both in terms of the scope and intrusiveness of the information required and the monetary costs of complying with these requirements. These application requirements do little to advance the interests of the Board in regulating the fantasy sports industry. Accordingly, the regulations should be amended to narrow or, where appropriate, eliminate these requirements.

The regulations require an enormous amount of information from each “principal” and “key employee.” For each such person, an operator must submit, among other things, a separate license application—including a \$2,500 application fee, a Multi-Jurisdictional Personal History Disclosure Form requiring submission of detailed (e.g., date of birth of spouse’s parents), and in some instances, highly sensitive financial information going back many years, a Principal/Key Employee Form, job description, fingerprints, and consent to background check. §§ 1202.4; 1202.5. Each “principal” that is an entity must similarly submit a \$2,500 application fee, a Principal Entity Form requiring the compilation of extensive operational, financial, and shareholder information spanning an extended period of time, and various releases and certifications from its Chief Executive Officer.

These additional application requirements for “principals” and “key employees” are unreasonably broad primarily due to the broad manner in which those terms are defined. *See* §§ 1201.2 and 1202.4. The definition of “principals” should be narrowed such that only directors, officers, and persons holding a controlling interest in the operator qualify as “principals.” Such a change would entitle the Board to require applications from persons who truly have the ability to direct or control the operator, but would exclude persons who are simple shareholders. At the very least, the regulations should exempt shareholders who hold small fractions of ownership. Finally, the volume and breadth of information sought by the individual and entity application forms goes far beyond what other states that regulate fantasy sports have required to conduct background checks—including numerous instances of detailed historical and financial information that is burdensome to prepare and often highly sensitive. These forms should be pared back to take account of these concerns, particularly given PGCB’s ability to request more detailed information in appropriate circumstances where necessary to the review process for a particular person (rather than on a blanket basis). These changes together would greatly reduce the burdens associated with the application process while still requiring the individuals and entities with the most authority over the operator or ability to put funds at risk to submit sufficient info to the Board to enable it to exercise its oversight role.

Highly burdensome requirements regarding internal operations

The Draft Regulations also require operators to submit to the Board any change to their system of internal controls and such changes can only be implemented after approval by the Board or after 30 days with no objection. This barrier is highly burdensome, particularly for minor technical changes to online platforms that may need to be implemented quickly. Refining the requirement so that it applies only to changes to internal controls that implicate the conditions and restrictions of licensure set forth in the Statute (§§325-326) and are significant in nature would be less burdensome and still serve the Board’s interest in overseeing any changes of consequence.

IV. ISSUES THAT COULD BE IMPROVED THROUGH SMALL CHANGES

In § 1205.2(b)(5), operators must suspend for 15 days the account of any non-beginner participant who attempts to enter a beginner contest and bar that account from further participation in beginner contests. The statute only requires operators to take such action for actual entries in beginner contests. *See* § 325(4.1)(III). The same is true of § 1205.2(b)(6), regulating the attempts of highly experienced players to enter contests for which they are ineligible. *See* § 325(4.2). We think that these restrictions should mirror the Fantasy Sports Statute and require the imposition of suspension and barring future entries for successful entries by such participants in these types of contests, as unsuccessful attempted entries are already by definition enforced effectively by the operator’s system alone (and may in some cases represent inadvertent action by the user, in which case a mandatory suspension could be an unfair result).

In § 1205.2(b)(7), operators must require a participant to identify any professional sports they currently engage in, and restrict them from contests for that sport. FanDuel has implemented a robust policy aimed at preventing athletes, coaches and other team management, team support personnel (e.g. without limitation, team physicians) and team owners from participating in any FanDuel contests in the sport or sports with which they are associated. Aside from prohibiting such individuals in our Terms of Service, FanDuel also screens such individuals from play based on information it receives from professional sports leagues, publicly available lists of athletes and other sources of information. Such measures are more effective than a request for identification upon account creation, which can be easily circumvented by the user (and for the overwhelming majority of users merely extends the registration process). The regulations should be amended to require the disclosure and implementation of an exclusion policy, such as the one implemented by FanDuel, which must be approved by the Board.

In §1205.4(h), operators must report to the Bureau any “suspicious transactions” within “two business days of learning of the event.” In many cases, however, the process of investigating a potentially suspicious transaction takes more than two days from when an operator first becomes aware of it—given the need to analyze account activity, obtain additional information from the user where appropriate, and determine whether there is reason to believe

the transaction “involves funds derived from illegal activity,” “is part of a plan to violate or evade a law or regulation,” or “has no apparent lawful purpose.” § 302. Accordingly, requiring operators to report on such transactions just two business days after “learning of the event,” read literally, would be unduly burdensome and result in needless waste of resources and over-reporting. Instead, the reporting requirement should not be triggered until the operator has reached an internal conclusion that a suspicious transaction, as defined in the statute, has taken place.

In § 1205.5(a)(13), operators must not knowingly permit a principal, employee, or relative to participate in any fantasy contest involving prize/award. This provides no allowance for employee play in private contests or test accounts. This oversight is likely due to drafting inconsistency in statute. Section 325 prohibits employee entry into contests offered to the “general public,” but Section 326, on which this regulatory provision is based, fails to include that limitation. Tracking the language in Section 325 accomplishes the goals of the Fantasy Sports Statute without unnecessarily prohibiting private contests for employees, which are not available to the general public. The regulation should also be amended to exclude test accounts from the prohibition. Test accounts, which can be clearly identified as such and excluded from any possibility of winning a contest, are important tools that allow operators to diagnose potential problems and bugs in their platforms, and do not result in the actual receipt of prizes or awards by employees performing such diagnostic tests or otherwise negatively impact users participating in those contests.

In § 1208.1(a), a fantasy sports website must conspicuously post specific language regarding problem gaming, including on account registration and login pages. The statute requires that operators “conspicuously post compulsive and problem play notices at fantasy contest registration points and provide the toll-free telephone number to participants,” as approved by the Board. § 325(8). The regulation should mirror the Fantasy Sports Statute.

In § 1205.4(g), operators must submit to the Board on quarterly basis a record of all participant complaints and description of how each complaint was resolved. This is unduly burdensome because “complaints” cannot easily be isolated from the larger universe of customer support interactions, and thus compliance would require either extensive manual review or over-submission of irrelevant support communications. We suggest changing this regulation to require operators to maintain records of any complaints and make those records available to the Board upon request, so that when information is provided it can be more effectively identified based on the particular circumstances of the request.



V. REQUESTS FOR CLARIFICATION AND NOTES ON MINOR ERRATA

In § 1201.2, the definition of “Beginner” (a participant who has entered fewer than 51 contests offered by a single licensed operator **or** who does not meet the definition of a highly-experienced player) is confusing since it could be read to mean that there are no intermediate players. The “or” should be changed to “and.”

In § 1202.5(e), no “key employee” may perform duties for which a key employee license is required prior to receiving temporary or permanent credential. The exemption for existing fantasy operators (§ 1203.3) appears to supersede that prohibition, but interaction is ambiguous and needs to be clarified.

In § 1207.1(b), direct marketing to a person on the self-exclusion list is prohibited. The provision should be qualified to prohibit operators from “knowingly directly market” to such individuals. This addition would bring the provision in line with § 1205.5(a)(9) and § 326(a)(7) of Fantasy Sports Statute.

We appreciate your time and consideration of our comments and would be happy to discuss at your convenience.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Cory Fox', written over a light blue horizontal line.

Cory Fox
Counsel, Policy and Government Affairs