

ALERTS

New Indiana Law Legalizes Daily Fantasy Sports

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Effective July 1, 2016, Senate Enrolled Act No. 339 made the daily fantasy sports (DFS) industry legal in Indiana. The law provides that paid fantasy sports gaming is exempt from the state's gambling laws. This may attract more DFS companies (game operators) to Indiana. However, as a new law that creates a unique market, it presents barriers for game operators to enter the industry.

Background on Daily Fantasy Sports and the Controversy

Daily fantasy sports is an outgrowth of fantasy sports. Unlike fantasy sports, and as the name suggests, DFS occurs over shorter periods of time, increasing the frequency of contests. Participants can potentially draft a new team every day and face different opponents across several sports. Each virtual owner pays an entry fee, most of which goes into a pot that is later distributed to the winners of each contest.

Across the nation, the burgeoning DFS industry has faced turmoil concerning whether it is a game of skill or chance. This is a critical distinction because depending on the characterization, federal and state gambling laws could apply and regulate the DFS industry. After Hawaii Attorney General Douglas Chin issued cease-and-desist orders to DFS providers, many of them left the state. Texas Attorney General Ken Paxton wrote a decision claiming that "because the outcomes of games in daily fantasy sports leagues depend partially on chance . . . such activities are a bet." On the other hand, Kansas, Tennessee, Colorado and Missouri preempted this issue and passed legislation or regulations declaring DFS as a game of skill, exempting it from their state's gambling laws. Indiana did the same.

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Senate Enrolled Act 339 legalizes DFS in Indiana and explicitly rejects the notion that it is a game of chance. Specifically, the law states that "[a]ll winning outcomes reflect the relative knowledge and *skill* of the game participants." Ind. Code 4-33-24-9(2) (emphasis added).

The Indiana statute creates a Paid Fantasy Sports Division of the Indiana Gaming Commission responsible for investigating and enforcing the new laws, including taking disciplinary action against those game operators who violate the law. The division will decide which game operators may transact business in Indiana and requires an initial \$50,000 fee from such operators that the division can increase to no higher than \$75,000. For each subsequent year in operation, game operators will submit a \$5,000 annual fee. The renewal of this license is contingent on the operator's compliance with the statute.

The DFS law places restrictions on the types of individuals who may

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participate. Generally, these restrictions are guided by the objective of fair competition. For instance, the law restricts those involved in actual professional sports, including but not limited to, athletes and officials; however, this restriction only applies to contests determined in whole or in part on the performance of that specific athlete who is attempting to participate, his or her actual team, or the accumulated statistical results of the sporting event in which the individual is a player, official or other participant. The law also prohibits all advertising in publications directed to juveniles or at sports contests specifically for school children.

Barriers to Entry

The initial \$50,000 fee may prohibit several smaller DFS game operators from entering the market. The DFS law currently provides that the division may increase the initial fee to accommodate “direct and indirect” operational expenses. A material increase would constitute a substantial barrier to the industry.

Furthermore, the law entrusts the division with extensive powers to penalize game operators. The division may “take any reasonable or appropriate action to enforce [the DFS law.]” If the division interprets this broadly and disciplines otherwise benign actors, it could also discourage game operators from entering the market.

Importantly, the DFS law urges a study or statutory committee to review and research further regulation of the industry and taxation issues. If these matters are assigned to a study committee, that committee must issue a final report by Nov. 1, 2016. Hopefully, that committee will recognize these barriers.

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