

**PLAYING THE ODDS:
THE FUTURE OF DAILY FANTASY SPORTS AND A POTENTIAL
ROLE FOR THE CONSUMER FINANCIAL PROTECTION BUREAU**

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Abstract

The Professional and Amateur Sports Protection Act of 1992 (PASPA) placed a stranglehold on the sports betting industry in the United States for over two decades. On May 14, 2018, the Supreme Court overruled PASPA in a 7-2 decision which held that the provisions of the law that prohibited state authorization and licensing of sports gambling schemes violated the Constitution's anti-commandeering rule. The Court declared the entire law unconstitutional by a 6-3 vote. The Court's decision proved to be a victory for state sovereignty and the sports gambling industry alike. Since the decision, several states have either passed or begun to consider their own sports gambling legislation.

Three years before the Supreme Court's ruling, however, one of the largest operators in a niche gambling market known as daily fantasy sports (DFS) came under harsh scrutiny after one of its employees won over \$350,000 in a DFS contest by allegedly using insider information. This led one state attorney general to issue a cease-and-desist order to a DFS operator's payment processing partner. This negative publicity was only worsened by further allegations in subsequent class action lawsuits alleging the same DFS operator and others like it had violated state laws prohibiting such gambling activity by accepting deposits from players living in anti-gambling jurisdictions. The aforementioned scandals have caused many to question whether the DFS industry can be trusted to police itself and, if it cannot, what state and federal authorities can do to protect consumers from potentially nefarious activity.

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As escolhas difíceis foram o que fez valer a pena.

This Note argues that the Consumer Financial Protection Bureau (CFPB) should play an oversight and regulatory role in the DFS industry not only because DFS operators and payment processors fall within the purview of the Consumer Financial Protection Act of 2010 (CFPA), but also because these entities pose serious risks to consumers when left unchecked. In the end, whether the CFPB will be utilized in such a way will depend on the Supreme Court ruling positively on the CFPB's constitutionality, and the Executive branch's willingness to act.

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I. Introduction

Members of Congress were quick to respond¹ to the Supreme Court's decision in *Murphy v. NCAA*, in which the nation's high court held the Professional and Amateur Sports Protection Act (PASPA) unconstitutional as a violation of the anti-commandeering principle of the Tenth Amendment.² Congress's prompt response was made possible, in part, by its advance preparations, including a House of Representatives hearing in the Subcommittee on Commerce, Manufacturing, and Trade.³ In December of 2018, Senators Orrin Hatch and Chuck Schumer introduced a bill which purported to recognize a "distinct Federal interest" in regulating sports wagering alongside state governments.⁴ Titled the "Sports Wagering Market Integrity Act of 2018" (SWMIA), the bill had bipartisan support.⁵ Notwithstanding its early backing, SWMIA was introduced in the waning days of Congress and has not been reintroduced. Since the retirement of Senator Hatch,

¹ Memorandum from Senate Democratic Leader Charles E. Schumer on Protecting the Games We Love after *Murphy v. NCAA*: A Federal Framework for Consumer Protection and Sports Integrity (Aug. 29, 2018), https://www.democrats.senate.gov/imo/media/doc/Consumer_Protection_Sports_Integrity_Framework.pdf [<https://perma.cc/AXC7-D55E>] (proposing the creation of a "strong national integrity standard for sports gambling" in light of the Court's decision).

² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) ("Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not.").

³ *Daily Fantasy Sports Issues and Perspectives: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the Comm. on Energy and Comm. of the H.R.*, 114th Cong. 1–2 (2016) (statement of Rep. Michael C. Burgess, Chairman, Subcomm. on Commerce, Mfg., and Trade).

⁴ See generally Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018) (carving out a Federal interest in sports gambling).

⁵ ESPN NEWS SERVICES, *U.S. Senators Charles Schumer, Orrin Hatch Introduce Federal Sports Gambling Bill*, ESPN (Dec. 19, 2018), https://www.espn.com/chalk/story/_/id/25573273/senators-chuck-schumer-orrin-hatch-introduce-federal-sports-gambling-bill [<https://perma.cc/HQ8S-KRAX>] (quoting the NCAA as "applaud[ing] the bipartisan support of Senators Hatch and Schumer in proposing the federal sports wagering legislation"); see also David Purdum & Ryan Rodenberg, *What you need to know about the new federal sports betting bill*, ESPN (Dec. 20, 2018), https://www.espn.com/chalk/story/_/id/25581529/what-need-know-sports-wagering-market-integrity-act-swmia-2018 [<https://perma.cc/5WLD-D58Z>] (providing an overview of the major components of SWMIA).

however, Senator Mitt Romney has taken his place and partnered with Senator Schumer to continue addressing federal sports betting.⁶ It remains unclear whether Senators Schumer and Romney will draft a new bill or re-introduce SWMIA.⁷

SWMIA reads as both an acknowledgment of the Court's decision, and Congress's firm stance on continuing to overseeing sports gambling and its growing national market.⁸ The text of the bill opens with the following stated purpose: "To acknowledge the rights of States with respect to sports wagering and to maintain a distinct Federal interest in the integrity and character of professional and amateur sporting contests, and for other purposes."⁹ The "distinct Federal interest"¹⁰ is rooted in sports wagering that occurs *between* states.¹¹ This is evident from the language in section 101, which makes it unlawful for "any person to knowingly accept a sports wager" except as provided in subsection (b).¹² Subsection (b) allows a "sports wagering operator" doing business in a state that has decided to permit sports wagering to accept a sports wager.¹³ Thus, Senators Hatch and Schumer found it appropriate for Congress to continue regulating sports

⁶ Brett Smiley, *Report: Romney To Carry Federal Sports Betting Bill Torch with New York's Schumer*, SPORTSHANDLE (Sept. 6, 2019), <https://sports-handle.com/romney-schumer-sports-betting-federal-bill-report/> [<https://perma.cc/3S96-S4E6>].

⁷ *Id.* ("It's not yet clear if Schumer will re-introduced the "placeholder" federal sports betting bill in the same or largely similar form, or if the senators will offer one with material changes in seeking to establish certain "minimum standards" for state to follow with respect to legal sports betting.").

⁸ *See generally* S. 3793, 115th Cong. (2018) (announcing a federal interest in interstate sports gambling).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at § 2(9) (stating that sports wagering "affects interstate commerce more than other forms of gaming").

¹² *Id.* at § 101(a). It is not important for the purposes of this work to discuss whether this section would even be enforceable in light of *Murphy*.

¹³ *Id.* at § 101(b); *see also id.* at § 3(19) (defining "sports wagering operator" to mean a licensed gaming facility that offers sports wagering and an interactive sports wagering platform).

wagering insofar as the activity implicated interstate commerce.¹⁴ This is consistent with *Murphy*.¹⁵

In order to enforce the “distinct Federal interest,” SWMIA empowers the Attorney General with the appropriate authority.¹⁶ Pursuant to SWMIA, if the Attorney General “believes” an individual “has violated, is violating, or will violate subsection (a),” the Attorney General “may bring a civil action in the appropriate district court.”¹⁷ A violator of subsection (a) would then be subject to a civil penalty of “not more than the greater of \$10,000 or three times the amount of the applicable sports wager.”¹⁸

Perhaps the most relevant part of SWMIA for the purposes of this Note is its establishment of a “State Sports Wagering Program.”¹⁹ The program would require a state interested in allowing sports betting to seek approval from the Attorney General by submitting “such information as the Attorney General may require.”²⁰ Such a requirement would likely not violate *Murphy* since both Justice Alito, writing for the majority, and Justice Ginsburg, writing for the dissent, agreed Congress may regulate sports gambling directly.²¹ The state would have to include in its submission a description of the sports wagering program it wishes to implement, a list of all state laws pertaining to sports gambling, and an “assurance” from the state’s own attorney general or chief legal officer that those laws “provide adequate authority to carry out the proposed program.”²² The Attorney General would then have the authority to approve the proposed program, which would

¹⁴ *Id.* at § 2(9) (acknowledging that sports wagering often involves individuals betting over state lines, implicating interstate commerce).

¹⁵ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

¹⁶ S. 3793 at § 102(a)–(b) (giving the Attorney General discretionary authority over admittance of state applications for sports wagering programs).

¹⁷ *Id.* at § 101(c)(1).

¹⁸ *Id.* at § 101(d)(1).

¹⁹ *Id.* at § 102.

²⁰ *Id.* at § 102(a)(1).

²¹ *See Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (“Congress can regulate sports gambling directly”); *see also id.* at 1489 (Ginsburg, J., dissenting) (“Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA.”).

²² S. 3793 at § 102(a)(2)(A)–(B).

be valid for a three-year period after which the state would have to re-apply.²³

Despite being over one hundred pages long, SWMIA fails to identify any single federal agency that would oversee sports wagering.²⁴ As part of the U.S. House of Representatives hearing in May of 2016, members of the subcommittee requested certain witnesses testify as to that issue.²⁵ One of the individuals testifying, Professor Ryan Rodenberg of Florida State University of Law, has proposed a few ways in which federal regulators, including the Commodity Futures Trading Commission (CFTC)²⁶ and the Federal Trade Commission (FTC),²⁷ can play a role in sports gambling oversight. This Note aims

²³ *Id.* at § 102(d) (“A State sports wagering program shall be valid for a fixed 3-year period beginning on the date on which the Attorney General approves the application of the applicable State under subsection (a) or (e).”).

²⁴ *Id.* at § 106(d)(1) (permitting a National Sports Wagering Clearinghouse to disclose sports wagering data and suspicious activity to a *state* regulatory entity without mention of a *federal* agency) (emphasis added). The term “National Sports Wagering Clearinghouse” is defined in SWMIA in section 3, paragraph 13 as “the entity designated by the Attorney General Under section 106(b).” Notwithstanding the vagueness in the term “entity,” if there were a federal regulatory agency whose mandate could be construed as to authorize it to regulate sports gambling, then it appears the Attorney General could simply direct that agency to do so. It is my understanding, however, that no regulatory entity currently has such explicit authority. In any case, any attempt by the Attorney General to appoint such an entity may be challenged by members of Congress.

²⁵ *Daily Fantasy Sports Issues and Perspectives: Hearing Before Subcomm. on Commerce, Mfg., and Trade of the Comm. on Energy and Comm. of the H.R.*, 114th Cong. 8–10 (2016) (statement of Peter Schoenke, President, Rotowire) (advocating for continued reliance on state regulatory bodies but acknowledging the potential role of the Federal Trade Commission in overseeing sports gambling); *see also id.* at 15–16 (statement of John M. McManus, Executive Vice President, General Counsel, and Secretary, MGM Resorts International) (expressing support for “[daily fantasy sports] to be run fairly with appropriate consumer protections and appropriate level of regulation . . .”).

²⁶ John T. Holden & Ryan M. Rodenberg, *Modern Day Bucket Shops? Fantasy Sports and Illegal Exchanges*, 6 TEX. A&M L. REV. 619, 646 (2019) (concluding the CFTC “likely could” bring charges against *certain* DFS operators) (emphasis added).

²⁷ Hearings on Competition and Consumer Protection in the 21st Century, Fed. Trade Comm’n (2019) (written statement of Professor Ryan M. Rodenberg)

to fill a gap in this nascent regulatory framework by investigating whether and to what extent the Consumer Financial Protection Bureau (CFPB) may help these other agencies in regulating online sports gambling.

This Note focuses on Daily Fantasy Sports (DFS)—an offshoot of traditional sports gambling played primarily online in which contestants select a player roster consisting of real-world athletes whose performance is measured through a pre-set algorithmic scoring system.²⁸ The DFS participant whose team of athletes collectively accumulates the most points wins the contest.²⁹ Sports gambling, especially online sports gambling, is an industry ripe for CFPB regulation.³⁰ The final determination for if and how the CFPB may get involved is whether the DFS qualifies as a “financial product or service” under the Consumer Financial Protection Act (CFPA) of 2010.³¹ If DFS qualifies as a “financial product or service,” the next question is how and to what extent consumers are affected by potential abuses in this industry. Finally, if there is a financial product or service being offered and consumers need protection, how can the CFPB, unilaterally or with the help of other federal agencies and state governments, protect those consumers?

https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0100-d-0010-163542.pdf [<https://perma.cc/HLR4-8GVC>] [hereinafter “Written Statement of Ryan M. Rodenberg”] (highlighting DFS operators’ use of consumer data and how the activity “raises a host of complex legal matters” that could fall within the jurisdiction of the Federal Trade Commission).

²⁸ Harold Stark, *What is Daily Fantasy Sports and Why is Everyone so Obsessed with It?*, FORBES (Dec. 9, 2017, 9:41 AM), <https://www.forbes.com/sites/haroldstark/2017/12/09/what-is-daily-fantasy-sports-and-why-is-everyone-so-obsessed-with-it/#219987e81be3> [<https://perma.cc/ZSR6-HSSB>] (explaining that each contest is limited to one sports, e.g. “fantasy football” or “fantasy baseball”).

²⁹ *Id.*

³⁰ The current administration does not look favorably upon the CFPB, and therefore likely will not utilize the agency in the way proposed in this Note. Nevertheless, so long as the CFPB is not dissolved, a future administration, if it elects to do so, could utilize the agency in overseeing the gaming industry to some degree. See Jonnelle Marte, *Trump Administration Calls the Structure of the Consumer Financial Protection Bureau Unconstitutional in Filing*, WASH. POST, Mar. 18, 2017, at A11 (referencing the DOJ’s opposition to the structure of the CFPB in the *PHH Corp.* case before the D.C. Circuit Court).

³¹ 12 U.S.C. § 5481(15) (2018) (defining the term “financial product or service”).

This Note argues that the CFPB can play a role, alongside other agencies, in overseeing online and interstate DFS gambling because DFS satisfies the statutory definition of a financial product or service under the CFPB. The proposed scheme in SWMIA in which the Attorney General serves as nothing more than a compliance check-point does not address the fast-moving consumer issues that arise in the sports wagering industry. If the “distinct Federal interest” in the integrity of sports is to mean anything, it must be accompanied by a clear and unmistakable show of force in the form of empowered regulatory bodies that can track betting in real-time and resolve consumer protection disputes in a timely manner.

Part II will discuss the history of gambling in the United States. Part III explores what sports gambling looks like today, and how the DFS industry operates. Part IV discusses the CFPB, its creation, and its purpose. Part V analyzes the DFS industry and whether it falls under the purview of the CFPB and, consequently, the CFPB. The note ends with a policy recommendation.

II. Historical Background: Gambling in the United States

Gambling in the United States has a long and storied history. A discussion on the current state of sports wagering necessitates a review of the past. Justice Alito said it best in *Murphy* when he asserted “Americans have never been of one mind about gambling.”³² The author of the Court’s recent decision concerning sports gambling then provided a brief history of the industry in the United States.³³ This section adds to that brief overlay and elaborates further upon the rich annals of American gambling.

English settlers may have brought their gambling habits to the colonies, but gambling was already an established practice among native people.³⁴ Though most early settlers generally rejected games of chance as sinful, others were not so pious.³⁵ The latter’s openness to

³² *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct 1461, 1468 (2018) (discussing the history of sports gambling in the United States).

³³ *Id.* at 1468–69 (referencing an 1897 New Jersey constitutional amendment banning all gambling).

³⁴ CHAFETZ, HENRY, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955* 7–8 (1960) (explaining that Native Americans believed their deities to be the very origin of gambling).

³⁵ *Id.* at 13 (contrasting the “God-fearing” migrants to the few “[f]ast-living, reckless cavaliers” who left England to gamble in the forests of Virginia).

games of chance was, in fact, more in line with England where gambling was not illegal at common law for much of the country's history.³⁶ Instead, the Crown regulated the practice for a variety of purposes.³⁷ It was only when gambling "ran the risk of a breach of the peace or public morals" that the court treated it as a public nuisance.³⁸ By 1710, however, Parliament believed the excesses of gambling were damaging the interests of the "landed aristocracy" and in turn amended an earlier 1664 statute and passed "[a]n Act for the better preventing of excessive and deceitful Gaming," otherwise known as the Statute of Anne.³⁹ By passing the Statute of Anne, Parliament intended to mitigate the negative side effects of gambling on English society as the practice had led to "large transfers of wealth" and ultimately "disrupted England's land-based society."⁴⁰

Among some of the earliest English settlers of the American continent, the Puritans approached gambling as anyone might expect them to: prohibition.⁴¹ Interestingly enough, the Puritan argument against gambling was not based on a belief that the practice was "evil per se or directly contrary to the teachings of God."⁴² Rather, the Puritans condemned gambling for the vice which it engendered in man—idleness.⁴³ This should be of no surprise—the Puritans were a staunchly religious people and the Massachusetts colony was nothing short of

³⁶ NAT'L INST. OF LAW ENF'T AND CRIMINAL JUSTICE, UNITED STATES DEP'T OF JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776–1976* i, xxiii (1977), <http://hdl.handle.net/2027/mdp.39015030532009> [<https://perma.cc/5GU2-QPG8>] [hereinafter NAT'L INST. OF LAW ENF'T AND CRIMINAL JUSTICE] (comparing English common law, which sought to reach a balance between gambling's potential benefits and harms, to early New England law, where gambling was strictly prohibited).

³⁷ *Id.* at xxiii (explaining that restricting gambling was done to promote "the arts of war," to temper the parts of the practice considered to be nuisances, and to raise revenue).

³⁸ *Id.* at 3 (citing H. STREET, *THE LAW OF GAMING* 14 (1937)).

³⁹ *Id.* at 15.

⁴⁰ *Id.*

⁴¹ NAT'L INST. OF LAW ENF'T AND CRIMINAL JUSTICE, *supra* note 36, at 41 (explaining how, even though the Bible did not strictly condemn gaming, the Massachusetts Bay Colony imposed a wholesale ban on all such games).

⁴² *Id.* at 40–41.

⁴³ *Id.* at 45 (referencing the Massachusetts Bay Colony's clergy and its efforts "to criminalize not gambling as such, but idleness").

America's first Bomont.⁴⁴ Puritan households were prohibited from possessing any items associated with gambling including "cards, dice, or gaming tables."⁴⁵ As an all-encompassing safety net, these early settlers even passed the idleness statute of 1633:

It is further ordered that noe pson howse houlder or othr, shall spend his time idely or unppfitably under paine of such punishment as the Court shall thinke meete to inflict.⁴⁶

Thirteen years after the idleness statute, Massachusetts passed the colonies' first law against gambling, borne out of the same desire to limit colonial shiftlessness.⁴⁷ Other colonies followed suit and passed similar laws outlawing a large swath of games.⁴⁸ Again, the opposition to gambling was not born out of a belief that gambling was immoral per se. Instead, idleness—the supposed byproduct of gambling and other activities of leisure—was a vice that threatened colonial existence, both on earth and in the afterlife.⁴⁹ Intolerance toward public gambling continued largely for the same reasons throughout the seventeenth and early eighteenth centuries.⁵⁰

Following the end of the American Revolution, eleven of the thirteen colonies adopted English common law and statutes into their

⁴⁴ See FOOTLOOSE (Phoenix Pictures 1984) (featuring a fictional teenager by the name of Ren McCormack who moves from Chicago, IL to the town of Bomont, Utah where, like in Puritan Massachusetts, activities like singing and dancing were banned for religious reasons).

⁴⁵ NAT'L INST. OF LAW ENF'T AND CRIMINAL JUSTICE, *supra* note 36, at 41 (listing types of games prohibited).

⁴⁶ *Id.*

⁴⁷ *Id.* at 42 ("Upon complaint of the disorders, by the use of the Games of Shuffle-board and Bowling, in and about houses of common entertainment, whereby much precious time is spent unprofitably, and much wast [sic] of wine and beer occasion; It is Order by this Court and the Authority thereof, That no Person shall henceforth, use the said Games of Shuffle-board, or blowing, or any other play or game, in, or about any such house . . .").

⁴⁸ *Id.* ("The unlawful games included all those forbidden under British statutes: bowling, tennis, cards, dice, and cockfighting.").

⁴⁹ *Id.* at 43 (attributing colonial opposition to idleness to several factors including "the harsh and unfamiliar American wilderness, the danger of hostile Indian attack, and the possibility of starvation or disease," making opposition to idleness a mortal and economic necessity).

⁵⁰ *Id.* at 49.

state constitutions and statutes.⁵¹ As time passed, American courts refined the borrowed legislation with practicality in mind.⁵² This functional approach to legislative interpretation was not free of Puritan influence, especially when it came to gambling law.⁵³ Post-revolution colonial jurists cited familiar anti-gambling policy rationales for their opposition to the activity—including idleness,⁵⁴ economic ruin,⁵⁵ and the negative effects gambling can have on commerce.⁵⁶ Gambling and the gambler did not reflect the image of the ideal American at the time: diligent, industrious, and a contributor to society.⁵⁷

Though public forms of gambling were frowned upon, private games of chance were permitted throughout several colonies,⁵⁸ with the exception of Maine.⁵⁹ This slowly began to change in the nineteenth century with the influx of different immigrant groups who held a more open approach to gambling.⁶⁰ Public, regulated lotteries, viewed by many as voluntary taxation, began to flourish under state

⁵¹ *Id.* at 59 (explaining how this was a decision made in the interest of providing “an orderly continuance of judicial processes disrupted by the Revolution between 1776 and 1784”).

⁵² *Id.* at 61 (quoting Roscoe Pound, *THE FORMATIVE ERA OF AMERICAN LAW* 97 (1938)) (“What [the courts] did was to determine what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became part of the law.”).

⁵³ *Id.* (“Instead, it was produced by judges who, many times, continued to reflect basically Puritan ideals and whose feelings toward gambling closely echoed those of their forebears.”).

⁵⁴ *Id.* at 62 (commenting that judges did not enforce gambling wagers, as was done under the English common law rule, and justified their conclusions using familiar Puritan language).

⁵⁵ *Id.* at 63 (highlighting how courts often expressed concern for the gambler and the fiscal condition of his household).

⁵⁶ *Id.* at 64 (“Finally, the money spent on gambling, it was argued, had a detrimental effect on commerce because it diverted large sums that would normally be spent on commercial products to a highly demoralizing form of entertainment.”).

⁵⁷ *Id.* at 69 (describing the popular attitude in the late-eighteenth century that the “only acceptable type of occupation was one in which the individual contributed a useful service to society through disciplined and honest work.”).

⁵⁸ *Id.* at 70 (referencing a post-Revolutionary Massachusetts gambling statute which only forbade “public gaming and gaming for something of value”).

⁵⁹ *Id.* at 71–72.

⁶⁰ *Id.* at 72.

licensing schemes.⁶¹ The state-run lotteries served as lucrative sources of revenue for public works projects and community reinvestment.⁶² Pushback against state lotteries began during the Jacksonian era and into the mid-1800s.⁶³ By 1860, some states, including Massachusetts, outlawed state lotteries.⁶⁴ Massachusetts courts went so far as to rule that the possession of lottery tickets from neighboring states would be a violation of Massachusetts law.⁶⁵

Until about the 1920s, gambling was banned throughout most of the country.⁶⁶ As new games and devices developed in the world of gambling, courts interpreted existing statutes more broadly and legislatures responded with additional laws.⁶⁷ The development of futures and commodity market speculation led many states to articulate a clear distinction between wagers and investment.⁶⁸

After the Great Depression, changes in demographics led to more accepting approaches to gambling law.⁶⁹ Even where states had anti-gambling laws, they also made exceptions that benefitted some important organizations.⁷⁰ In short order, due to an increase in “the demand for social services, including welfare, medical services, and state education,” states which had previously abandoned legalized gambling began reintroducing it.⁷¹ By the late 1960s, New Jersey’s Atlantic City was in decay as the east coast’s version of Sin City

⁶¹ *Id.* at 77–78.

⁶² *Id.* at 78.

⁶³ *Id.* at 81 (observing how American newspaper outlets outwardly condemned authorized lotteries).

⁶⁴ *Id.* at 87.

⁶⁵ NAT’L INST. OF LAW ENF’T AND CRIMINAL JUSTICE, *supra* note 36, at 87 (referencing *Commonwealth v. Dana*, 43 Mass. 329 (1841)).

⁶⁶ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S.Ct. 1461, 1469 (2018) (referencing both NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT, 2-1 (1999) and S. Durham & K. Hashimoto, THE HISTORY OF GAMBLING IN AMERICA 34–35 (2010)).

⁶⁷ *See generally* NAT’L INST. OF LAW ENF’T AND CRIMINAL JUSTICE, *supra* note 36, at 93–96 (characterizing newer “gambling schemes” like poolselling and “bookmaking on horseraces” as presenting “definitional problems” which forced courts to expand existing laws prohibiting gambling and the lottery).

⁶⁸ *Id.* at 98 (pointing to a Maine bucket shop law).

⁶⁹ *Id.* at 108 (connecting immigration patterns, urbanization, and industrialization to more lenient attitudes towards gambling).

⁷⁰ *Id.* at 109 (explaining how charitable and religious groups in some states were exempt from state gambling laws).

⁷¹ *Id.*

struggled with poverty.⁷² On the other side of the country the nation's true capital of gambling, Las Vegas, was flourishing economically despite being severely overwhelmed by organized crime.⁷³ Organized crime persisted in spite of federal government intervention and the formation of the Special Committee to Investigate Organized Crime in Interstate Commerce in 1950 and 1951.⁷⁴

By the 1990s, as Justice Alito explained in *Murphy*, the growth in the legalization of gambling gave rise to the practice's potential extension into the sports world (on an official basis).⁷⁵ This raised concerns about youth gambling addiction, irresponsible spending among those of more modest means, and the possible corruption of professional and collegiate sports.⁷⁶ These concerns led Congress to enact the Professional and Amateur Sports Protection Act of 1992 (PASPA).⁷⁷ PASPA made it unlawful for a governmental entity or a person to do any of the following:

sponsor, operate, advertise, promote, license or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.⁷⁸

⁷² See DAVID CLARY, GANGSTERS TO GOVERNORS: THE NEW BOSSES OF GAMBLING IN AMERICA 152 (2017) (explaining how the state lottery soon became “the most lucrative in the nation”).

⁷³ *Id.* at 94 (citing Nevada's “ineffectual oversight of gambling licenses” as the primary reason for the abundance of criminal activity).

⁷⁴ *Id.* at 103 (“Many in Washington believed that local law enforcement agencies were not capable of addressing a problem of such national importance.”).

⁷⁵ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1470 (2018) (“By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling, and this sparked federal efforts to stem the tide.”).

⁷⁶ *Id.* at 1484.

⁷⁷ Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (prohibiting all but a select few states from authorizing the legalization of sports gambling within their jurisdictions).

⁷⁸ *Id.* at § 3702(1)–(2).

PASPA did not make sports gambling a crime, but instead gave the Attorney General of the United States, professional sports organizations, and amateur sports organizations the power to bring civil actions in district court to enjoin enumerated violations of the statute.⁷⁹ At the time of PASPA's enactment, most states prohibited sports gambling.⁸⁰ Petitioners in *Murphy* argued that the anti-authorization provision of PASPA unconstitutionally required states to maintain their existing laws against sports gambling.⁸¹ Conversely, the United States in *Murphy* maintained that the provision did not prohibit a state from doing anything, but simply empowered "a defined group of entities, and endow[ed] them with the authority to conduct sports gambling operations."⁸² The Court ultimately agreed with the Petitioners.⁸³

Perhaps unsurprisingly, PASPA only engendered the vices it intended to stifle.⁸⁴ Despite PASPA, the sports gambling industry blossomed in the black market throughout the following three decades.⁸⁵ Today, only China rivals the United States in the size and scope of its illegal sports gambling markets.⁸⁶ Even where sports betting was legal in the United States, namely in the state of Nevada because of a

⁷⁹ *Id.* at § 3703 ("A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.")

⁸⁰ *See Murphy*, 138 S. Ct at 1474 (explaining how at the time of PASPA's enactment, "the great majority of states" did not allow sports gambling).

⁸¹ *Id.* at 1473 (pointing to Petitioner's brief where Petitioner argued that one of the accepted meanings of "authorize" is "permit").

⁸² *Id.*

⁸³ *Id.* at 1481 ("There is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rules does not allow.")

⁸⁴ DAVID FORREST & RICK PARRY, *THE KEY TO SPORTS INTEGRITY IN THE UNITED STATES: LEGALIZED, REGULATED SPORTS BETTING* 1, 3 (2016), <https://www.americangaming.org/sites/default/files/FINAL%20SPORTS%20INTEGRITY%20REPORT.pdf> [<https://perma.cc/3MM8-K72E>] ("The problems PASPA sought to address such as problem gambling and crimes associated with sports, such as match fixing and point shaving, can instead go unnoticed in an unregulated environment.")

⁸⁵ *Id.* at 2 (concluding that despite its illegality, sports gambling has continued to flourish among American consumers).

⁸⁶ *Id.* at 2–3.

PASPA exemption, the illegal market still “operate[d] with a volume that dwarf[ed] the legal market.”⁸⁷

The response after PASPA should not be to allow sports gambling to run rampant. On the other hand, PASPA showed why wholesale prohibitions do not work either.⁸⁸ Legalization combined with regulation could lead to a safer and more enjoyable sports gambling economy.⁸⁹ From preventing organized crime, to growing the tax base, to improving consumer protection, taking sports gambling out of the shadows and under the wing of a regulatory regime could carry many benefits.⁹⁰

III. What Sports Betting Looks Like Today

A. Daily Fantasy Sports

Interest in legalized sports wagering has been growing in the United States and was arguably at its peak just before *Murphy*.⁹¹ The intrigue has proven fruitful as several states have legalized gambling on sporting events.⁹² One popular way for consumers to join in on the craze is through DFS platforms like FanDuel and DraftKings.⁹³ In the fall of 2015, however, several DFS operators—most notably DraftKings—were caught in a scandal that strongly resembled insider

⁸⁷ *Id.* at 7–8.

⁸⁸ *Id.* at 2 (“Americans want to bet on sports and prohibition has largely failed as the restrictions are ignored.”).

⁸⁹ *Id.* at 11–12 (arguing for legalization and subsequent regulation as a proper way to control the scrupulous aspects of sports gambling).

⁹⁰ *See generally id.* (discussing these and other positives to introducing a regulatory regime to sports gambling).

⁹¹ David Purdum & Ryan Rodenberg, *Future of Sports Betting: the Marketplace*, ESPN (Oct. 24, 2016), https://www.espn.com/chalk/story/_/id/17892685/the-future-sports-betting-how-sports-betting-legalized-united-states-the-marketplace-look-like [<https://perma.cc/X8RZ-98DC>] (quoting NBA Commissioner Adam Silver who predicted the expansion of sports betting to be “inevitable”).

⁹² Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (last updated on Aug. 2, 2019), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [<https://perma.cc/XZ5T-B5W5>].

⁹³ Stark, *supra* note 28 (cataloging the development of DFS and the rise of FanDuel and DraftKings as leaders in the growing niche).

trading.⁹⁴ To understand the gravity of the DraftKings scandal, one must first understand how DFS works and the importance of information when it comes to success in this arena.

DFS contests are hosted by DFS operators, such as DraftKings.⁹⁵ The idea behind DFS is fairly simple, and does not stray too far from its origins in the Rotisserie League.⁹⁶ Invented by Daniel Okrent, the Rotisserie League consisted of individuals who selected a team of players from Major League Baseball and acted as the team's general manager.⁹⁷ This was a casual and innocent endeavor, often done amongst friends in a restaurant or sports bar.⁹⁸ Once a team was assembled, the league would calculate player performance using traditional statistics (e.g., HRs, RBIs, OBPs, etc.) over the course of a season.⁹⁹ At the end of the season, the individual whose team's cumulative statistical performance was best was crowned winner.¹⁰⁰

Modern DFS works in a similar fashion, but on the Internet.¹⁰¹ Players make a profile on the DFS operator platform, they select teams of real-world athletes, and place bets on whose team will perform best that day.¹⁰² Statisticians and casual fans alike can compete head-on

⁹⁴ Robert Klemko, *How Daily Fantasy Is Changing the Game*, SPORTS ILLUSTRATED (Oct. 8, 2015), <https://www.si.com/mmqb/2015/10/08/fanduel-draftkings-scandal-daily-fantasy-football-dfs> [<https://perma.cc/5RVS-UVK9>] (describing how 0.3% of FanDuel's prize money had gone to DraftKings employees who likely used insider information).

⁹⁵ Stark, *supra* note 28 (pointing to DraftKings and FanDuel as the two largest platforms in the market).

⁹⁶ Jonathan Crowl, *Thirty-Five Years Later, Fantasy Baseball's Creators Remember Thrilling Beginning*, THE POSTGAME (Apr. 19, 2015), <http://www.thepostgame.com/blog/fantasy-life/201503/rotisseries-fantasy-baseball-creators-remember-beginning> [<https://perma.cc/PFL3-S76L>] (recalling the founding of the fantasy baseball game in the 1980s referred to as the 'Rotisserie League,' named after the restaurant in which it was created).

⁹⁷ *Id.* (interviewing Daniel Okrent who distinguishes his invention from its modern version by calling it "real life" not "fantasy").

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Marc Edelman, *Navigating The Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 121 (2016) (marking 1994 and the use of the internet in fantasy sports as the turning point for the industry).

¹⁰² Stark, *supra* note 28.

through the world wide web almost instantaneously.¹⁰³ The addition of the internet, however, also led U.S. residents into more infamous parts of the sports betting industry, including online sportsbooks and poker rooms.¹⁰⁴ The U.S Department of Justice (DOJ) and other law enforcement institutions responded with investigations and crackdowns, leading to the enactment of the Unlawful Internet Gambling Enforcement Act (UIGEA).¹⁰⁵ However, only a year after the passing of UIGEA a new but familiar company was launched called Fantasy Day Sports Corp.—a company purporting to offer DFS contests.¹⁰⁶ Many were weary of the “perception of illegality” surrounding this new venture, but the ability of it and the more popular FanDuel to evade U.S. prosecution engendered confidence in the public.¹⁰⁷ By 2013, private equity companies were getting involved and investing millions in FanDuel alone.¹⁰⁸

DFS today is fast-paced and differs from other forms of sports wagering in that participants need not be invested for an entire season.¹⁰⁹ DFS contests come in various forms, but the three most popular are: (1) guaranteed prize pools (GPPs); (2) 50/50s; and (3) head-to-head games.¹¹⁰

Of the three, GPPs are the most popular.¹¹¹ In a GPP, the DFS operator notifies all potential participants of the size of the pool.¹¹²

¹⁰³ Edelman, *supra* note 101, at 121 (quoting Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 8 (2012)) (wherein Edelman describes the first Rotisserie League as a “cult following among statistically-oriented sports fans”).

¹⁰⁴ *Id.* at 121–122 (describing these games as “less socially acceptable”).

¹⁰⁵ *Id.* at 122. I discuss UIGEA later on in this note.

¹⁰⁶ *Id.* at 124.

¹⁰⁷ *Id.* at 125–26.

¹⁰⁸ *Id.* at 126 (including firms such as Comcast Ventures, Shamrock Holdings, NBC Sports, and KKR & Co., LLP).

¹⁰⁹ Holden & Rodenberg, *supra* note 26, at 621 (stating that some DFS contests may only last a single afternoon).

¹¹⁰ *Id.*

¹¹¹ Dustin Gouker, *Daily Fantasy Sports Basics—What Is a Guaranteed Prize Pool (GPP)*, DAILY FANTASY SPORTS CODES (Apr. 28, 2015, 9:32 PM), <https://dailyfantasysports.codes/basics/daily-fantasy-basics-what-is-a-guaranteed-prize-pool-gpp/> [<https://perma.cc/XL72-4M5A>] (“The most popular type of contest in today’s daily fantasy sports landscape are ones with a guaranteed prize pool.”).

¹¹² *Id.*

This number remains constant regardless of how many people participate.¹¹³ Importantly, when the number of participants does not cover the guaranteed prize, an overlay is formed.¹¹⁴ In DFS, an “overlay” is often referred to as “free money.”¹¹⁵ Contestants pay a “buy-in” or entry fee for the contest, and when the total buy-ins equal or exceed the guarantee, no overlay is formed.¹¹⁶ An overlay also indicates an under-filled contest, meaning there are fewer contestants than expected.¹¹⁷ This imbalance means the likelihood of winning a cash prize is greater.¹¹⁸ DFS operators offer GPPs to ensure compliance with some state laws which may require that the prize pool be known beforehand.¹¹⁹

The second most popular form of DFS is the 50/50 league.¹²⁰ These contests are also referred to as “double-ups” and have clear winners and losers.¹²¹ More specifically, a 50/50 contest will usually require players to finish in the top 50th percentile of the pool to win.¹²² However, the 50th percentile is not the universal standard—some contests require placing in the top 25th percentile.¹²³ Double-up games can host upwards of five hundred players.¹²⁴ A normal entry fee is around

¹¹³ *Id.* (explaining that one of the reasons for announcing the prize pool beforehand is because some state laws mandate such action).

¹¹⁴ *Id.* (“If the number of entrants in the contest doesn’t cover the amount of money guaranteed, then there is an overlay.”).

¹¹⁵ Daily Fantasy Sports Basics Staff, *Daily Fantasy Sports Basics—What Is an Overlay?*, DAILY FANTASY SPORTS CODES (Apr. 26, 2018, 8:35 PM), <https://dailyfantasysports.codes/basics/daily-fantasy-basics-what-is-an-overlay/> [<https://perma.cc/WBJ6-S2QS>] (“Quite simply, an overlay means there is free money being handed out by a site for a given contest.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Gouker, *supra* note 111 (explaining why GPPs tend to be the most popular).

¹¹⁹ *Id.*

¹²⁰ Holden & Rodenberg, *supra* note 26, at 621.

¹²¹ Daily Fantasy Sports Basics Staff, *DFS Cash Games: 50/50s and Head-to-Heads*, DAILY FANTASY SPORTS CODES (Mar. 25, 2018, 5:07 PM), <https://dailyfantasysports.codes/basics/dfs-cash-games-50-50s-and-head-to-heads/> [<https://perma.cc/9VSK-GRCC>].

¹²² *Id.*

¹²³ *Id.* (expanding on the iterations of 50/50 games).

¹²⁴ Tom Schriener, *DFS Strategy: The Basics to 50/50s*, FANTASYPROS (Feb. 3, 2017), <https://www.fantasypros.com/2017/02/dfs-strategy-the-basics-to-50-50s/> [<https://perma.cc/75EX-W6PR>] (explaining that the number of participants can range from 10 to 500).

five dollars.¹²⁵ The prize remains the same regardless of a contestant's placement in the top 50th percentile.¹²⁶ A key aspect to note with respect to 50/50s when compared to GPPs is the odds of winning.¹²⁷ While GPPs are more difficult and require players to "get more creative" with their strategies,¹²⁸ the payout is greater.¹²⁹

Finally, there are the head-to-head games.¹³⁰ Like 50/50s, head-to-head games create distinct winners and losers.¹³¹ The number of participating contestants most distinguishes head-to-head games from GPPs and 50/50s.¹³² Head-to-head games feature two players.¹³³ The contestant selects a line-up of athletes while remaining blind to their opponent's selection.¹³⁴

B. DFS Operators

DFS operators are the platforms that host DFS contests almost exclusively in a digital world.¹³⁵ When an individual wants to participate in a contest hosted by an operator like FanDuel or DraftKings, they must create a profile on the operator's website and make a deposit using either a credit card, debit card, or digital currency.¹³⁶ The deposits and fees deposited into DFS companies are generally handled by payment processing entities or payment processors, like Vantiv Enter-

¹²⁵ *Id.* (calculating a five-dollar entry fee to produce a nine-dollar return in a 100 player-contest).

¹²⁶ *Id.* ("It's about finishing in the money, not being #1 overall.").

¹²⁷ *Id.* (urging players to use the greater guarantee of winning in 50/50s to offset the higher chances of losing in GPPs).

¹²⁸ *Id.* (offering advice on the different strategies DFS players should take depending on the type of DFS contest they choose to enter).

¹²⁹ *Id.* (warning those considering participating in DFS that GPP tournaments offer the "biggest prizes, but the worst odds").

¹³⁰ See Holden & Rodenberg, *supra* note 26, at 621.

¹³¹ *Id.* (referring to head-to-head as a "one-on-one" contest where the "winner" walks away with a "pre-set amount of money").

¹³² *Id.* at 621, 640 (allowing only two participants as opposed to potentially hundreds as featured in other DFS formats).

¹³³ *Id.* at 621.

¹³⁴ *Id.* at 645.

¹³⁵ Stark, *supra* note 28.

¹³⁶ Leonardo Real, *Fantasy Sports or Money Laundering?*, ACAMS TODAY (Mar. 7, 2016), <https://www.acamstoday.org/fantasy-sports-or-money-laundering/> [<https://perma.cc/XF4E-6FWL>].

tainment Solutions (Vantiv).¹³⁷ Beginning in late 2015 and into 2016, however, a few of these processing companies, including Vantiv, grew leery of the DFS companies due to the uncertainty of their legal status.¹³⁸ Companies like Vantiv and PayPal are integral to DFS operations as they handle most player deposits and withdrawals.¹³⁹ However, DFS operators, such as FanDuel, also play a role in overseeing player deposits and withdrawals.¹⁴⁰

As the dust begins to settle after *Murphy*, both DFS operators and their integral payment processors will have to answer to both state and federal enforcement authorities and explain exactly how they handle player funds.¹⁴¹ Following unexpected probes into DFS business models, the DOJ and the Federal Bureau of Investigation (FBI) discovered that some of these operators were not being candid about how they managed player funds.¹⁴² These investigations were prompted by suspicions, which were ultimately confirmed, that DraftKings employees had been utilizing proprietary information to “prey on players in contests.”¹⁴³

After the DOJ and FBI completed their examinations, evidence of account mismanagement began to surface.¹⁴⁴ DFS operators

¹³⁷ Joe Drape, *Firm’s Withdrawal Shakes Fantasy Sports*, N.Y. TIMES, Jan. 30, 2016, at D1 (referencing Vantiv as it handled player funds for the two largest DFS operators, FanDuel and DraftKings).

¹³⁸ *Id.* (“[Vantiv] cited the unfavorable opinions that have been issued by state attorneys general in recent months.”).

¹³⁹ *Id.*

¹⁴⁰ FanDuel, TERMS OF USE, §§ 1, 4.5 (2018) (notifying contestants that “deposits and player winnings” are held in “separate, segregated bank account by a subsidiary of FanDuel, Inc.”).

¹⁴¹ See generally Chris Grove, *A Call For All Daily Fantasy Sports Operators To Transparency Regarding Player Funds*, LEGAL SPORTS REPORT (Oct. 15, 2015), <https://www.legalsportsreport.com/5105/dfs-player-funds/> [<https://perma.cc/8NYT-FZ5C>] (stressing how DFS operators will have to become more transparent in the future).

¹⁴² See Brad Reagan & Devlin Barrett, *Daily Fantasy Sports Face U.S. Probe*, WALL ST. J., Oct. 15, 2015, at B1 (referencing the “hundreds of millions of dollars flowing into” DFS from both venture capital companies and players as part of the reason for the probe).

¹⁴³ Joe Drape & Jacqueline Williams, *Fantasy Sports Said to Attract F.B.I. Scrutiny*, N.Y. TIMES, Oct. 14, 2015, at A1 (discussing a case in which a DraftKings employee leaked proprietary information before a contest and subsequently won \$350,000 from that same contest).

¹⁴⁴ See Dustin Gouker, *Why Fantasy Aces Wasn’t Caught, and How DraftKings, FanDuel and Others Segregate Player Funds*, LEGAL SPORTS

normally purport to segregate player fund accounts from operational accounts.¹⁴⁵ In most cases, operators and payment processing companies include “strict conditions” in their agreements which direct distinct separation between the two accounts.¹⁴⁶ However, due to a lack of oversight and accountability, players are often left in the dark about how their money is being handled.¹⁴⁷ In one extraordinary case, upon filing for chapter 7 bankruptcy, DFS operator Fantasy Aces was found to have squandered over \$1.3 million in player accounts.¹⁴⁸ Following this gross mismanagement, several state legislatures passed laws specifically targeting the way DFS operators oversee player accounts.¹⁴⁹

C. Payment Processors

A payment processor is a third party servicer who partners with a merchant, such as a DFS operator like FanDuel, to help that merchant receive debit or credit card payments from customers and their financial institutions.¹⁵⁰ The payment processor connects the merchant to a bank or financial institution that is a member of a “card network,” typically Visa or Mastercard.¹⁵¹ Payment processors manage the communication between the merchant and the bank through a payment gateway software.¹⁵² When the payment processor receives

REPORT (May 19, 2017, 2:54 PM), <https://www.legalsportsreport.com/12919/segregation-of-dfs-player-funds/> [<https://perma.cc/V344-3VYG>] (detailing revelations of a DFS operator having improperly combined player funds with operational funds).

¹⁴⁵ Grove, *supra* note 141.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Gouker, *supra* note 141.

¹⁴⁹ See, e.g., Dustin Gouker, *Massachusetts AG Healy Announces Final Daily Sports Regulations*, LEGAL SPORTS REPORT (Mar. 25, 2016, 11:41 PM), <https://www.legalsportsreport.com/9272/massachusetts-fantasy-sports-regulations/> [<https://perma.cc/5WWX-AHQA>] (discussing a Massachusetts regulation filed in 2016 intended to oversee the DFS industry).

¹⁵⁰ Stefan Cenus, *How Does the Payment Processing Industry Work? Understanding the Infrastructure and Process*, 2CHECKOUT (Nov. 22, 2018), <http://blog.avangate.com/how-does-the-payment-processing-industry-work/> [<https://perma.cc/KQR6-ZGWD>].

¹⁵¹ *Id.* (identifying Visa and MasterCard as examples of card networks. Other examples are Chase and American Express).

¹⁵² *Id.* (“A payment gateway is a software that facilitates the communication of transaction information.”).

transaction information from the merchant, that processor sends the information to the acquiring bank, which then either approves or declines the transaction based on customer information.¹⁵³ Put simply, payment processors function as intermediaries between DFS operators and their players, allowing the former to efficiently receive deposits from the latter.¹⁵⁴

Due to the legal uncertainty surrounding DFS (as discussed below in subsection D), payment processors view the industry as “high risk.”¹⁵⁵ One of the most utilized payment processing companies in the DFS industry was Vantiv.¹⁵⁶ In the wake of Vantiv’s decision to end its relationship with operators like FanDuel and DraftKings, other payment processors are expected to “fill the void.”¹⁵⁷ Meanwhile, credit card companies and banks are declining to accept transaction requests by DFS players even where online sports gambling is legal and regulated.¹⁵⁸

¹⁵³ *Id.*

¹⁵⁴ Chris Grove, *Major Payment Processing Partner Demands That Fantasy Sports Sites Exit New York*, LEGAL SPORTS REPORT (Nov. 11, 2015, 7:39 PM), <https://www.legalsportsreport.com/6130/payment-processors-tell-dfs-sites-exit-ny/> [<https://perma.cc/F2Z7-46K5>] (detailing how one popular DFS payment processor urged DFS operators to leave New York after a DraftKings employee had used “insider information” to profit handsomely from one of the operators’ contests).

¹⁵⁵ See generally Ellen Cunningham, *Credit Card Processing for Gambling and Fantasy Sports*, CARDFELLOW (May 14, 2019), <https://www.cardfellow.com/blog/credit-card-processing-for-gambling-fantasy-sports/> [<https://perma.cc/L35J-YRAD>] (stating that online gambling merchant accounts must verify that they will not be used in states where gambling is prohibited and that not all states consider DFS to be gambling while others do).

¹⁵⁶ Dustin Gouker, *Report: Vantiv Set to Stop Processing Payments for DraftKings, FanDuel*, LEGAL SPORTS REPORT (Jan. 29, 2016, 1:44 PM), <https://www.legalsportsreport.com/7748/vantiv-payments-to-draftkings-fanduel/> [<https://perma.cc/467K-BKUV>] (detailing how Vantiv’s decision to stop working with FanDuel and DraftKings after scandals in late 2015); see also Drape, *supra* note 135 at D1 (explaining how DFS operators do not handle players’ deposits and withdrawals and instead depend on processors like Vantiv for that service).

¹⁵⁷ See Gouker, *supra* note 156 (believing that PayPal would likely be the “only remaining option for users”).

¹⁵⁸ Martin Derbyshire, *What Are My Options? A Quick Guide To Making Deposits At NJ Sportsbook Apps*, NJGAMBLINGSITES (last updated on Oct. 10, 2019), <https://www.njgamblingsites.com/15071/nj-sportsbook-apps-deposit-ops/> [<https://perma.cc/U3MH-7YSH>] (explaining how credit card compa-

D. A Legal Conundrum

In 2016, the legal status of DFS and its operators was, as one former member of the National Indian Gaming Commission wrote, “uncertain.”¹⁵⁹ The Court’s decision in *Murphy* helped clarify the anti-commandeering issue, but in doing so also allowed for a regulatory melee.¹⁶⁰ As a result, approaches to regulation differ significantly depending on the jurisdiction.¹⁶¹ The uncertainty results from an inability of some to decide with confidence whether contests like DFS count as gambling.¹⁶² States remain split on the question.¹⁶³

1. State Law

Whether a contest is a game of skill or of chance is a fact-intensive inquiry.¹⁶⁴ Plaintiffs in most states can make a prima facie claim of illegal gambling by showing that the contest involves (1) consideration, (2) reward, and (3) chance.¹⁶⁵ A majority of courts have found consideration to be present in gambling *only* when a player has exchanged money or valuable property for a chance of winning.¹⁶⁶ A minority of courts do not distinguish consideration in gambling from

nies and banks refuse to engage in DFS and other online gambling transactions in the state of New Jersey).

¹⁵⁹ Elizabeth Lohah Homer, *The Dynamic Legal Environment of Daily Fantasy Sports*, 41 AM. INDIAN L. REV. 219, 219 (2016).

¹⁶⁰ See generally *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018). The very consequence of ruling on anti-commandeering grounds was to allow states to choose whether they would regulate. If anything, the Court’s decision *contributed* to the proliferation of regulation.

¹⁶¹ See Homer, *supra* note 159, at 225–229 (explaining differing approaches to sports wagering regulation in Nevada, New York, Connecticut, and Oklahoma).

¹⁶² *Id.* at 219 (“This ‘uncertainty’ stems from a simple question asked of all pay-to-play contests: Is the contest a game of skill or of chance?”).

¹⁶³ *Id.* at 219–220.

¹⁶⁴ See generally Edelman, *supra* note 101, at 130–35 (narrowing the pivotal issue down to whether a contest involves a requisite level of “skill” or “chance” to satisfy state law, and providing examples of the fact pattern as applied to different state court tests).

¹⁶⁵ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 26–27 (2012).

¹⁶⁶ *Id.* at 27.

consideration in contract law, finding consideration present where any “legal detriment, even non-monetary in value,” is exchanged for an opportunity to win.¹⁶⁷ Where a contested game does not require an entry fee, it is unlikely to violate gambling laws since no consideration is exchanged.¹⁶⁸ With respect to the element of reward, courts do require the prize to “be tangible in form,” even if it is of “small value.”¹⁶⁹ The final element for a prima facie claim of illegal gambling, chance, is the one which causes the most discord among courts.¹⁷⁰

Courts apply one of three tests to determine the ratio of chance to skill involved in any contest.¹⁷¹ These include the “predominant purpose test,”¹⁷² the “material element test,”¹⁷³ and the “any chance test.”¹⁷⁴ The first two tests—the predominant purpose and material element tests—are less restrictive and require more analytical prowess on the part of the court.¹⁷⁵

The predominant purpose test is the most widely used.¹⁷⁶ The general inquiry for the test is whether a contest involves more skill than chance.¹⁷⁷ Where a court finds that the outcome of the game depends on chance more than half the time, the contest itself is deemed a game of chance.¹⁷⁸ As a result of the fact-intensive nature of the predominant purpose test, whether a contest is a game of chance ulti-

¹⁶⁷ *Id.* (describing these courts’ application of the “true contract-law meaning of the word ‘consideration’ . . .”).

¹⁶⁸ *Id.* at 29 (referring to the “any chance test”).

¹⁶⁹ *Id.* at 28.

¹⁷⁰ *Id.*

¹⁷¹ See generally Edelman, *supra* note 101, at 130–35 (describing the “predominant purpose test,” the “any chance test,” and the “gambling instinct test”).

¹⁷² *Id.* at 130–34.

¹⁷³ *Id.* at 134–35.

¹⁷⁴ Edelman, *supra* note 165, at 29 (explaining that the “any chance test” finds an activity to be a game of chance if it “contains any chance that influences the outcome”).

¹⁷⁵ Edelman, *supra* note 101, at 134–35. Edelman mentions these other approaches briefly. For example, in states such as Arizona and Arkansas, courts have interpreted games like DFS to be games of chance so long as they involve “even a modicum of chance.” Edelman posits that in these states DFS and games like it would likely violate state gambling laws “as long as they include entry fees and prizes.”

¹⁷⁶ *Id.* at 130.

¹⁷⁷ *Id.*

¹⁷⁸ Edelman, *supra* note 165, at 28–29 (“The predominant purpose test, which is applied by most states, deems an activity to be one of chance where ‘greater than 50 percent’ of the result is derived from chance”).

mately depends on its “rules and structure” as determined by the operator.¹⁷⁹ In turn, some DFS games are riskier than others when viewed through this lens.¹⁸⁰

Fewer states use the material element test when deciding whether a game is one of skill or chance.¹⁸¹ Under the material element test, a court may still find a game to be one of chance even if a defendant can prove that skill is a controlling factor.¹⁸² This is because under the material element test, courts can and often do consider additional factors, including the expertise of the participants and other information that dilutes the “skill” factor.¹⁸³ Furthermore, where the element of consideration is given its traditional contract meaning, the material element test weighs heavily in favor of illegality.¹⁸⁴

2. *Federal Law*

At the federal level, there exists a number of laws which help regulate—largely indirectly—DFS operators.¹⁸⁵ When it comes to gambling generally, the state and federal governments had developed a cordial relationship prior to PASPA.¹⁸⁶ A collection of laws during the 1960s and 1970s reflect this partnership, including the Federal Wire Act, the Travel Act, the Wagering Paraphernalia Act, and the Illegal

¹⁷⁹ *Id.* at 29 (pointing to entry fees, whether a contest includes an “auto-pick” feature, and the overall drafting method of the DFS contest).

¹⁸⁰ *Id.* 29–30.

¹⁸¹ Edelman, *supra* note 101, at 134 (referencing Missouri and New York as some of the few states that apply this stricter test).

¹⁸² *Id.* at 134–135 (concluding that, because DFS contests usually include entry fees and prizes, they “would seem to violate state gambling laws”).

¹⁸³ *Id.* at 134.

¹⁸⁴ Edelman, *supra* note 165, at 31 (referring to states such as Delaware and Kansas where the true-contract meaning of consideration is applied and thus the gambling element of consideration can still be satisfied even without an entry fee “so long as the contest participant expends substantial time or effort that benefits the contest’s host in some way.”).

¹⁸⁵ Edelman, *supra* note 101, at 142–44 (discussing UIEGA and other federal laws).

¹⁸⁶ Keith C. Miller & Anthony N. Cabot, *Regulatory Models For Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 154 (2018) (referencing a time before PASPA when federal gambling laws were intended to “aid” state in their attempts to enforce their own gambling prohibitions).

Gambling Business Act.¹⁸⁷ These laws gave the states ample room to function within their own spheres of sovereignty with the federal government assuming a “supplementary role.”¹⁸⁸ Perhaps, the most important of these laws is the Unlawful Internet Gambling Enforcement Act.¹⁸⁹

i. Unlawful Internet Gambling
Enforcement Act

Congress made several findings when enacting the Unlawful Internet Gambling Enforcement Act (UIGEA).¹⁹⁰ Specifically, it found that internet gambling is “primarily funded through personal payment systems, credit cards, and wire transfer;”¹⁹¹ that a 1999 commission recommended legislation that would prohibit wire transfers to internet gambling sites or the banks representing those sites;¹⁹² that internet gambling creates a “growing cause of debt collection problems for insured depository institutions and the consumer credit industry;”¹⁹³ and that new ways of enforcing gambling laws were necessary because the traditional framework was “often inadequate.”¹⁹⁴

UIGEA prohibits a business from accepting a “bet or wager by any means” from someone located in a state where gambling is prohibited.¹⁹⁵ When referring to a “bet or wager,” the law defines the term as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sport event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”¹⁹⁶ The term also includes the “purchase of a chance

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (affirming the idea that the sovereigns would work in unison to limit gambling).

¹⁸⁹ 31 U.S.C. §§ 5361–5367 (2018).

¹⁹⁰ 31 U.S.C. § 5361 (2018).

¹⁹¹ 31 U.S.C. § 5361(a)(1) (2018).

¹⁹² 31 U.S.C. § 5361(a)(2) (2018).

¹⁹³ 31 U.S.C. § 5361(a)(3) (2018).

¹⁹⁴ 31 U.S.C. § 5361(a)(4) (2018) (declaring that “new mechanisms for enforcing gambling laws” are necessary for the internet).

¹⁹⁵ 31 U.S.C. § 5362(10)(A) (2018).

¹⁹⁶ 31 U.S.C. § 5362(1)(A) (2018).

or opportunity to win a lottery or other prize (which opportunity is predominantly subject to chance).¹⁹⁷

Interestingly, UIGEA includes a specific exemption for fantasy sports.¹⁹⁸ To qualify for the exemption, DFS teams cannot be exact replicas of real “amateur or professional sports” teams, and DFS operators must satisfy three conditions: (I) prizes cannot depend on the number of participants in the contest or the amount of fees paid, but instead must be known to the participants beforehand; (II) players have to use their “knowledge and skill” to guess the results of their selection based on events happening in the real sport; and (III) a winning outcome cannot be based on either (aa) “the score, point-spread, or any performance of any single real-world team or any combination of such teams;” or (bb) “solely on any single performance of an individual athlete in any single real-world sports or other event.”¹⁹⁹ Despite the apparent “fantasy exception,” not everyone is convinced that DFS are truly exempt from UIGEA’s purview.²⁰⁰

ii. The Federal Wire Act

The Transmission of Wagering Information Act, otherwise known as the Federal Wire Act, was signed into law in 1961 as an effort to combat organized crime.²⁰¹ The primary purpose of the statute is to prohibit interstate gambling:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wages or information assisting in the

¹⁹⁷ 31 U.S.C. § 5362(1)(B) (2018).

¹⁹⁸ See 31 U.S.C. § 5362(1)(E)(ix) (2018).

¹⁹⁹ 31 U.S.C. § 5362(1)(E)(ix)(I)–(III) (2018).

²⁰⁰ See Darren Heitner, *Congress Wisely Puts Legal Status of Fantasy Sports Under Review*, FORBES (Sept. 15, 2015, 8:05 AM), <https://www.forbes.com/sites/darrenheitner/2015/09/15/congress-wisely-puts-legal-status-of-fantasy-sports-under-review/#5fae3ce376e9> [<https://perma.cc/7LKQ-WVQA>] (pointing to the “vague and over broad language” of the exception to explain why many in the DFS industry remain unsure of how it might be applied to them).

²⁰¹ Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling 2* (CTR. FOR GAMING RES., OCCASIONAL PAPER SERIES NO. 29, 2014) https://digitalscholarship.unlv.edu/occ_papers/25 [<https://perma.cc/MW24-V7WD>].

placing of bets or wagers on any sporting event or contests, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years or both.²⁰²

In 2011, the Office of Legal Counsel for the DOJ issued an opinion stating the Wire Act only applied to sports gambling.²⁰³ Following the Supreme Court's PASPA decision, however, in late 2018 the DOJ reconsidered its previous interpretation.²⁰⁴ The DOJ, now in line with several federal courts and the Criminal Division, views the Wire Act as covering all forms of interstate gambling.²⁰⁵

iii. The Illegal Gambling Business Act

The Prohibition of Illegal Gambling Business Act (IGBA) was another late-20th century piece of legislation intended to combat the proliferation of organized crime.²⁰⁶ Not every gambling enterprise falls within the purview of IGBA.²⁰⁷ Three requirements must be satisfied before federal authorities can invoke IGBA: (1) there must be a violation of state law, meaning the gambling operation must also be illegal in the state in which it is functioning, (2) the operation must involve five or more people, and (3) the enterprise must be in continuous

²⁰² 18 U.S.C. § 1084(a) (2018).

²⁰³ See Sol FH, *The DOJ Jumps the Fence on Federal Wire Act*, CASINOREPORTS (Jan. 16, 2019), <https://www.onlinecasinoreports.com/articles/the-doj-jumps-the-fence-on-federal-wire-act.php> [<https://perma.cc/M3FA-XV4Z>].

²⁰⁴ Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. 1,1 (2018) (clarifying that the Act is to be interpreted to include gambling of any kind whether or not related to sports).

²⁰⁵ *Id.* at 4 (diverting from a 2011 O.L.C. opinion which contradicted the courts and the Criminal Division).

²⁰⁶ Brett Smiley, *Mailbag Mythbusting: The Illegal Gambling Businesses Act and Sports Betting*, SPORTSHANDLE (June 18, 2018), <https://sportshandle.com/mailbag-mythbusting-the-illegal-gambling-businesses-act-and-sports-betting/> [<https://perma.cc/C4MX-55KC>] (elaborating on the history of the Act and how it was passed as part of the Organized Crime Control Act).

²⁰⁷ *Id.* (comparing the IGBA to the RICO Act and clarifying that “[n]ot every gambling operation is within the scope of the IGBA.”).

operation for at least thirty days and gross in excess of \$2,000 on any given day.²⁰⁸

Some have noted how, in certain circumstances, IGBA goes beyond the Wire Act in terms of what conduct is covered.²⁰⁹ This is because IGBA applies regardless of whether there exists any wire technology.²¹⁰ On the other hand, because IGBA only targets “illegal gambling activities of major proportions”²¹¹ and ignores enterprises with less than \$2,000 in gross revenue,²¹² IGBA is also limited in its scope. Nevertheless, it could still prove useful in unique situations for both law enforcement officials and the CFPB.

iv. The Travel Act

The Travel Act, also known as the Hobbs Act, prevents interstate commerce involving illegal activity.²¹³ The relevant language states:

- (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
 - (1) distribute the proceeds of any unlawful activity; or
 - (2) commit any crime of violence to further any unlawful activity; or
 - (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, manage-

²⁰⁸ *Id.*; see also 18 U.S.C. § 1955(b)(1)(i)–(iii) (2018).

²⁰⁹ Edelman, *supra* note 165, at 35 (explaining that the Gambling Act prohibits certain gambling activities even if those activities lack wire technology).

²¹⁰ *Id.* (explaining that “wire communications” can include *both* telephonic and internet transactions).

²¹¹ *Id.* at 36 (quoting *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972)).

²¹² 18 U.S.C. § 1955(b)(1)(iii) (2018) (defining “illegal gambling business” as a gambling business which “has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”).

²¹³ 18 U.S.C. § 1952(b) (2018) (clarifying that “unlawful activity” includes “any business enterprise involving gambling, liquor on which the Federal excise has not been paid”); see also Edward S. Garlock, et. al, Comment, *Prosecution under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 66 J. CRIM. L. & CRIMINOLOGY 306, 306 (1975).

ment, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.²¹⁴

Congress passed the Travel Act with a vision that it would be applied more “extraterritorially.”²¹⁵ Based on the statutory language, DFS gambling may be susceptible to this law. More specifically, if (1) a DFS operator does business in a state where gambling is illegal, (2) a player from another states wins a prize on the operator’s platform, and (3) the operator sends the player his winnings using internet services, would that not constitute the use of a “facility in interstate or foreign commerce” (the internet) with an intent to distribute the proceeds of an unlawful activity (sports gambling being illegal in the state)?

v. The Wagering and Paraphernalia Act

Assuming DFS is considered a financial product, the Wagering and Paraphernalia Act could prove useful for CFPB regulation purposes. The pertinent language in the statute prevents:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce, any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b)

²¹⁴ 18 U.S.C. § 1952(a) (2018).

²¹⁵ John D. Andrie, Note, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 10 UNLV GAMING RES. & REV. J. 59, 67 (2005).

wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.²¹⁶

Unlike the Travel Act, which calls for intent to participate in an illegal business enterprise that is continuous or ongoing, the Wagering and Paraphernalia Act does not require such intent.²¹⁷ This distinction could make it easier for the DOJ in tandem with the CFPB to bring charges against violators. In the end, however, much of the of the CFPB's power in this arena will depend on a definitional issue. In particular, what constitutes a "record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing ..."?²¹⁸

IV. The Consumer Financial Protection Bureau

A. Founding, Purpose, and Enforcement Power

In its preamble, the CFPA makes clear its objective "to protect consumers from abusive financial services practices."²¹⁹ To help realize this goal, the CFPA created a new consumer protection agency called the CFPB.²²⁰ Wanting to meet expectations to construct an agency specialized in consumer issues, the CFPB's founders sought ample independence from congressional oversight and its politics.²²¹

The CFPB's objectives are clear: providing consumers with information to help them make responsible financial decisions,²²² protecting consumers from "unfair, deceptive, or abusive acts and practices" (UDAAP) and discrimination,²²³ removing outdated financial

²¹⁶ 18 U.S.C. § 1953(a) (2018).

²¹⁷ *United States v. Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990) (holding specific intent is not required to violate the statute).

²¹⁸ 18 U.S.C. § 1953(a) (2018).

²¹⁹ 12 U.S.C. § 5511(b)(2) (2018).

²²⁰ 12 U.S.C. § 5491(a) (2018) (establishing this new agency in the Federal Reserve System).

²²¹ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> (proposing the new agency reflect the independence of the U.S. Consumer Product Safety Commission (CPSC) whose mission is to protect Americans "from risks of injury and death from products used in the home, school, and recreation.").

²²² 12 U.S.C. § 5511(b)(1) (2018).

²²³ 12 U.S.C. § 5511(b)(2) (2018).

regulations,²²⁴ and enforcing federal financial laws in order to promote fair competition.²²⁵ The CFPB's authorities are three-fold. They include (1) a supervisory role, (2) an enforcement role, and (3) a rule-making role.²²⁶ The supervisory role encompasses the power to review the compliance systems of covered persons, conduct on-site examinations, and require the production of relevant reports.²²⁷ The CFPB enforces regulations by issuing cease and desist orders, imposing penalties, or reporting activity to another relevant agency.²²⁸ The CFPB also has authority to prescribe regulations to implement nineteen consumer laws²²⁹ that were already in force at the time it was created.²³⁰ To assist the CFPB in identifying potential UDAAPs, consumers may file complaints online.²³¹ Since its inception, the CFPB has dealt with more than one million complaints.²³²

The CFPA authorizes the Director of the CFPB to prescribe regulations, so long as those regulations are for the purpose of administering, enforcing, or implementing the provisions of federal consumer financial law.²³³ Prior to the adoption of a new rule, the CFPB

²²⁴ 12 U.S.C. § 5511(b)(3) (2018).

²²⁵ 12 U.S.C. § 5511(b)(4) (2018).

²²⁶ CHERYL R. COOPER & DAVID H. CARPENTER, CONG. RESEARCH SERV., INTRODUCTION TO FINANCIAL SERVICES: THE BUREAU OF CONSUMER FINANCIAL PROTECTION (CFPB) (2019) (“The CFPB’s authorities fall into three broad categories: *supervisory*, including the power to examine and impose reporting requirements on financial institutions; *enforcement* of various consumer protection laws, and regulations; and *rulemaking*.”).

²²⁷ Gregory J. Pulles, *The End of the Beginning: A Revolution in the World of Consumer Financial Products and Services*, 10 U. ST. T. J. L. & PUB. POL’Y 33, 37 (2015) (discussing extent of CFPB’s supervisory authority).

²²⁸ *Id.* (clarifying that any person, affiliate, or service provider covered by an enumerated Federal Consumer Financial Law must also comply with the CFPB’s regulations promulgated under those laws).

²²⁹ 12 U.S.C. § 5481(12) (2018).

²³⁰ COOPER & CARPENTER, *supra* note 226 (stating the aforementioned laws “largely predated” Dodd-Frank).

²³¹ CFPB, *Having a Problem with a Financial Product or Service?*, <https://www.consumerfinance.gov/complaint/> [https://perma.cc/6R96-45FF] (last visited July 24, 2019).

²³² *Id.* (“We’ve handled over 1 million complaints, helping consumers connect with financial companies to get direct responses about problems with mortgages, student loans, payday loans, debt collection, credit reports, and other financial products and services.”).

²³³ 12 U.S.C. § 5512(b)(1) (2018).

must consider the “potential benefits and costs to consumers”²³⁴ as well as the impact such proposed rules will have on consumers in rural areas along with other specified persons.²³⁵ Likewise, prior to adopting a rule, the CFPB must consult with the appropriate prudential regulator or other federal agency.²³⁶ If a prudential regulator objects to a proposed rule, the CFPB is obligated to produce a copy of the objection in the adopting release and an explanation as to why the CFPB did or did not accept the objection.²³⁷ A member of the Financial Stability Oversight Council (FSOC) may find success in stalling the implementation of such regulation if it can show that the proposed rule would threaten the “safety and soundness of the United States banking system.”²³⁸ Some argue that this veto by FSOC is the most effective limitation on the CFPB’s independence.²³⁹

B. Who Is Covered and What Is a Consumer Financial Product or Service?

The CFPB is charged with regulating “the offering and provision of consumer financial products or services under the Federal consumer financial laws.”²⁴⁰ There are ten enumerated categories of financial products and services²⁴¹ as well as a general catchall provision, which reads as follows:

such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title, if the Bureau finds that such financial product or service is—
(I) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law;
or

²³⁴ 12 U.S.C. § 5512(b)(2)(A)(i) (2018).

²³⁵ 12 U.S.C. § 5512(b)(2)(A)(ii) (2018); *see also* 12 U.S.C. § 5516(a) (2018).

²³⁶ 12 U.S.C. § 5512(b)(2)(B) (2018).

²³⁷ 12 U.S.C. § 5512(b)(2)(C) (2018).

²³⁸ 12 U.S.C. § 5513(a) (2018); *see also* 12 U.S.C. § 5513(b)(1) (2018).

²³⁹ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 78 (2010) (“The Council’s veto threat appears to be the greatest limit on the agency’s independence.”).

²⁴⁰ *See, e.g.*, 12 U.S.C. § 5481(5)(A) (2018) (directing the reader to a list of examples in paragraph (15) of the same section).

²⁴¹ *See* 12 U.S.C. § 5481(15) (2018).

(II) permissible for a bank to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.²⁴²

Thus, it would appear that many things, perhaps most financial products, could meet the definition laid out in the CFPA.²⁴³ The CFPA defines a “financial product or service” in several ways.²⁴⁴ Among the qualifying examples, there is one that may prove applicable to either DFS operators, DFS payment processors, or both. Under the CFPA, a “financial product or service” includes “engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instruments for use by or on behalf of a consumer.”²⁴⁵ Deposit-taking activities are also defined generously and include the “acceptance of deposits, maintenance of deposit accounts, or the provision of services related to the acceptance of deposits or the maintenance of deposit accounts.”²⁴⁶ The definition of deposit-taking activities also encompasses “the acceptance of funds, the provisions of other services related to the acceptance of funds, or the maintenance of member share accounts by a credit union.”²⁴⁷ Read separately, the first two sentences of the clause—the acceptance of funds and the provision of other services related thereto—would seem to apply to DFS operators.²⁴⁸

The CFPA also provides generous definitions to key terms, such as “consumer,”²⁴⁹ and “covered person,”²⁵⁰ which lend weight to the argument that DFS operators and payment processors fall within the law’s purview. Specifically, a consumer is simply an “individual or

²⁴² 12 U.S.C. § 5481(15)(A)(xi)(I)–(II) (2018) (giving the CFPB the broad power to define a financial product or service in certain circumstances).

²⁴³ See Pulles, *supra* note 227, at 36 (“Thus, unless one of the specific DFA exceptions garnered by the lobbyists applies, virtually everything offered by a bank or its holding company is either currently specifically covered, or is subject to the Bureau’s authority to cover the product or service under the catchall provision.”).

²⁴⁴ 12 U.S.C. § 5481(15) (2018).

²⁴⁵ 12 U.S.C. § 5481(15)(A)(iv) (2018).

²⁴⁶ 12 U.S.C. § 5481(8)(A) (2018).

²⁴⁷ 12 U.S.C. § 5481(8)(B) (2018).

²⁴⁸ *See id.*

²⁴⁹ 12 U.S.C. § 5481(4) (2018) (“The term ‘consumer’ means an individual or an agent, trustee, or representative acting on behalf of an individual.”).

²⁵⁰ 12 U.S.C. § 5481(6) (2018).

an agent, trustee, or representative acting on behalf of an individual.”²⁵¹ A covered person is any person that offers or provides a financial product or service, as well as any affiliate of that person, so long as the affiliate also acts as a “service provider to such person.”²⁵² If one concludes that DFS operators and payment processors are offering a “financial product or service” by maintaining, watching over, and transmitting player funds acquired from participating financial institutions, then they would seem to meet the definition of a “covered person.”²⁵³

V. *Is DFS a Financial Product or Service That Falls Within the CFPB’s Purview?*

A. *DFS Operators and Payment Processors Fall Within the CFPB’s Purview*

DFS operators and payment processors would appear to fall squarely within the purview of the CFPB.²⁵⁴ Operators like FanDuel and DraftKings at times function as the “custodians of funds.”²⁵⁵ This is most apparent when an operator holds player deposits in segregated accounts controlled by its subsidiary.²⁵⁶ Moreover, DFS payment processors surely “transmit” funds on behalf of DFS operators.²⁵⁷ In addition, the CFPB’s generous definition of “deposit-taking activities” would also appear to encompass the depositing that DFS players do when creating and using their accounts.²⁵⁸ Finally, the CFPB has taken

²⁵¹ 12 U.S.C. § 5481(4) (2018).

²⁵² 12 U.S.C. § 5481(6) (2018).

²⁵³ *See id.* (stating that a person who offers a financial product or service is a “covered person”).

²⁵⁴ *See supra* Part IV(B) (concluding that a DFS operator and payment processor is covered by the CFPB).

²⁵⁵ *See* 12 U.S.C. § 5481(15)(A)(iv) (2018).

²⁵⁶ *See* FanDuel, *supra* note 138, at § 4.5 (explaining how a FanDuel subsidiary controls player deposits in a “segregated bank account”).

²⁵⁷ 12 U.S.C. § 5481 (15)(A)(iv) (2018) (defining the term “financial product or service,” in part, as “transmitting or exchanging funds or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer”).

²⁵⁸ *See* Real, *supra* note 136 (explaining how players create their DFS accounts and deposit funds).

action against a payment processor before when it fined PayPal \$10 million for enrolling consumers in an online credit product in 2015.²⁵⁹

Despite what seems to be a straight-forward application of law to fact, the CFPB does include an important exception that could affect the CFPB's power over some DFS operators. The CFPB limits the CFPB's authority over certain merchants, retailers, and sellers of non-financial goods or services.²⁶⁰ The CFPB does not define "merchant, retailer, or seller,"²⁶¹ but assuming, for the sake of argument, a DFS operator is considered a "merchant, retailer, or seller" and does *not* perform a deposit-taking activity such as accepting, storing, or transmitting funds, but instead defers such activities to a third-party processor, then that operator would appear to fall within the exception because it is not providing a financial *service*.²⁶² It would be difficult to say the same of DFS payment processors like PayPal or Vantiv because the essence of their services is financial.²⁶³

The consequence of not having authority over DFS operators would be less direct oversight over arguably the most important party in the DFS industry.²⁶⁴ Nevertheless, because DFS operators need DFS payment processors to gain access to financial institutions, equipping the CFPB with regulatory oversight over the processors servicing the operators could still be effective.²⁶⁵

B. CFPB Enforcement Authority

In its capacity as a regulator, the CFPB can learn from state entities that have already started to police DFS operators and payment

²⁵⁹ See Kathryn Rubino, *What You Need To Know About The PayPal Settlement*, ABOVE THE LAW (May 20, 2015, 5:30 PM), <https://abovethelaw.com/2015/05/what-you-need-to-know-about-the-paypal-settlement/> [<https://perma.cc/SVL8-YLDC>] (explaining what led up to the CFPB filing a formal complaint against PayPal in Maryland District Court).

²⁶⁰ 12 U.S.C. § 5517(a)(1) (2018).

²⁶¹ 12 U.S.C. § 5481 (2018).

²⁶² 12 U.S.C. § 5517(a)(1) (2018) (exempting merchants, retailers, or sellers of nonfinancial goods or services).

²⁶³ See, e.g., PAYPAL, *Who We Are*, <https://www.paypal.com/us/webapps/mpp/about> (last visited Nov. 21, 2019) [<https://perma.cc/2ZVN-6A95>] ("PayPal creates better ways to manage and move money, and offers choice and flexibility when sending payments, paying or getting paid.").

²⁶⁴ See *supra* Part III(B) (discussing the important role of DFS operators).

²⁶⁵ See *supra* Part III(C) (explaining the importance of payment processors for DFS operators).

processors.²⁶⁶ For example, the Massachusetts Attorney General's office recently passed regulations limiting DFS operators in several areas, including imposing limitations on DFS accounts,²⁶⁷ requiring DFS player funds remain segregated from operational accounts,²⁶⁸ and enforcing a wholesale prohibition on games based on student sporting events.²⁶⁹ The Massachusetts regulation, like the CFPA, is intended to protect consumers "from unfair and deceptive acts and practices" that may arise while playing DFS.²⁷⁰

The CFPA endows the CFPB with specific powers to allow it to fulfill its mission to enforce consumer finance law.²⁷¹ Perhaps the most effective weapon the CFPB wields is its authority to prescribe rules obligating covered persons that offer financial products or services to comply with disclosure requirements.²⁷² With regards to DFS operators and payment processors, a mandatory disclosure regime might include rules forcing these entities to explain, in detail, how exactly they plan to manage player funds and player data. A disclosure regime does not necessarily have to be burdensome on DFS operators. For example, Massachusetts regulations merely require DFS operators to disclose potential tax liabilities to consumers.²⁷³ Ultimately, the goal of a federal disclosure regime should be the promotion of transparency in DFS so that consumers can remain aware of potential UDAAPs and make informed decisions with their money.

²⁶⁶ See generally 940 MASS. CODE REGS. § 34.00 (2018) (providing a regulatory scheme for DFS operators in Massachusetts).

²⁶⁷ *Id.* at § 34.06(1) (preventing DFS operators from allowing players to create more than one username or more than one account).

²⁶⁸ *Id.* at § 34.05(2)(a) (requiring DFS consumer accounts be held in trust for the DFS consumer or be maintained and controlled by a third party that is not the DFS operator and that is independent from the relevant DFS operator).

²⁶⁹ *Id.* at § 34.04 (imposing complete bar on minors participating in DFS contests and requiring the refunding of any deposits made by minors).

²⁷⁰ 940 MASS. CODE REGS. § 34.01(2018).

²⁷¹ See generally 12 U.S.C. §§ 5531–5536 (2018).

²⁷² 12 U.S.C. § 5532(a) (2018) (representing that the power is intended for the full, accurate, and effective disclosure to consumers "in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.").

²⁷³ 940 MASS. CODE REGS. § 34.14(2) (2018) (requiring disclosure of tax liabilities when the prize is in excess of \$600).

C. Forming a Regulatory Coalition

DFS operators and payment processors implicate many fields of law, and others have already begun recommending how and to what extent the federal government can ensure parity and fairness in this growing industry.²⁷⁴ In a written statement to the FTC this past January, Professor Rodenberg discussed the importance of data collection and analysis to DFS.²⁷⁵ Pointing to the uncertainty as to “the extent to which sports betting data are available,”²⁷⁶ Rodenberg asserted that the impact of such information raises questions of significant “competition and consumer protection issues” over which the FTC could assume oversight responsibilities.²⁷⁷ The CFTC is another agency Rodenberg thinks could play a significant role in curtailing the worst abuses of DFS operators.²⁷⁸ Adding the CFPB to a collection of federal agencies that will oversee interstate sports wagering would represent a proper allocation of responsibility to the appropriate authorities. Like the FTC and the CFTC, the CFPB is primarily concerned with ensuring fairness in consumer markets.²⁷⁹ Joining forces with these other agencies along with the DOJ, the CFPB could help ensure parity and safety in the sports betting market.

D. Risks of Non-Involvement

The risks of not closely regulating in this area are substantial. Technological advances since the passage and subsequent overruling of PASPA have created a society that is more sophisticated and inter-

²⁷⁴ See generally Holden & Rodenberg, *supra* note 26, at 621 (asserting that the DFS industry possibly violates several Commodity Futures Trading Commission regulations and should therefore be monitored by the regulatory body).

²⁷⁵ Written Statement from Ryan M. Rodenberg, *supra* note 27 (stressing the importance of data to DFS and the need for the FTC to take part in overseeing the industry’s use of this consumer information).

²⁷⁶ *Id.*

²⁷⁷ *Id.* (“Third, the extent to which sports betting data are available raises a host of complex legal matters that impact competition and consumer protection issues potentially within the FTC’s purview.”).

²⁷⁸ See Holden & Rodenberg, *supra* note 26, at 646 (concluding “the CFTC likely could bring charges against certain DFS operators arguing that their head-to-head contests represent event contracts”).

²⁷⁹ 12 U.S.C. § 5511(a) (2018) (explaining the purpose behind the formation of the CFPB).

connected on a global scale.²⁸⁰ The aforementioned criminal statutes and anti-gambling laws contemplate not only mitigating crimes but also protecting consumers who participate, knowingly or unknowingly, in these enterprises.²⁸¹ The CFPB, along with agencies like the DOJ and even perhaps the FBI, can combine their forces and expertise in this area in an attempt to combat nefarious activity and its effects.

Opponents of sports gambling argue that legalizing the practice will create gambling addicts, encourage irresponsible spending, and “corrupt professional and college sports.”²⁸² These skeptics should not be dismissed too swiftly. According to one recent study of fantasy sports, data exist to suggest that “most DFS players also gamble and they experience significantly higher rates of comorbid substance and mental health problems than the average gambler.”²⁸³ Moreover, some have identified young, unpaid college athletes as being the most vulnerable among potential DFS and sports betting victims.²⁸⁴ In one example, a collegiate coach claimed to have witnessed what he believed to be evidence of young sports fans caring more about “the point spread” than the actual sporting event before their eyes.²⁸⁵ Finally, there are legitimate concerns that, left unchecked, DFS operators could become epicenters for money laundering.²⁸⁶ Conversely, pro-

²⁸⁰ See H. Guyford Stever & Janet H. Muroyama, *Overview*, in GLOBALIZATION TECH.: INT’L PERSPECTIVES 1, 1 (H. Guyford & Janet H. Muroyama, eds., 1988) (“Sophisticated information technologies permit instantaneous communication among the far-flung operations of global enterprises.”).

²⁸¹ See *supra* Parts III(D) and IV (discussing criminal statutes and anti-gambling laws and consumer protection efforts, respectively).

²⁸² *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484 (citing Congressional findings when PASPA was originally enacted).

²⁸³ Lisa Nower, Kyle R. Caler, Dylan Pickering & Alex Blaszcynski, *Daily Fantasy Sports Players: Gambling, Addiction, and Mental Health Problems*, 34 J. GAMBL. STUD. 727, 735 (2018), [<https://doi.org/10.1007/s10899-018-9744-4>] (referencing higher rates of substance abuse and suicidality among young DFS players).

²⁸⁴ *60 Minutes: Will Legalized Sports Betting Curtail Corruption or Encourage It?* (CBS television broadcast March 24, 2019) (“There’s people that will do what they need to do to make a buck at the expense of an 18 or 19-year-old kid.”).

²⁸⁵ *Id.* (describing a University of Las Vegas basketball game wherein a player did not take a wide-open lay-up at the end of a game and, despite the team leading their opponent significantly, fans of the player’s squad booed because “UNLV would have covered the point spread”).

²⁸⁶ Ian McKendry, *Are Fantasy Sports Sites a Money Laundering Haven?*, AM. BANKER (Oct. 13, 2015) <https://www.americanbanker.com/news/are->

ponents point to the fact that sports gambling will likely lead to an increased growth in state revenues,²⁸⁷ and its legalization could create thousands of American jobs.²⁸⁸

In the end, most can agree that DFS is not going away.²⁸⁹ The good news is that legalization and appropriate regulation can help mitigate some of the problems that inevitably arise in sports betting.²⁹⁰ For example, regulators can impose “specific conditions” on betting operators, in this case DFS operators, to encourage transparency.²⁹¹ The CFPB, along with other relevant federal authorities, can play an important role in ensuring these more scrupulous aspects of DFS are controlled.

E. Executive and Judicial Willingness

Executive willingness is necessary to make this proposal effective. The statutory structure of the CFPB is intended, in part, to keep the agency independent and avoid industry “capture.”²⁹² However, it appears opponents of the CFPB may have identified a vulnerability. The Trump Administration began the process of exposing this weakness by appointing Mick Mulvaney, a staunch CFPB opponent and critic, to the position of acting Director.²⁹³ The Director of the

fantasy-sports-sites-a-money-laundering-haven (raising concerns about DFS operators engaging in money laundering schemes).

²⁸⁷ Elad De Piccioto, *Should Sports Betting Be Legal?*, THE PERSPECTIVE (2018), <https://www.theperspective.com/debates/sports/sports-betting-legal/> [<https://perma.cc/TSH7-4SHF>] (proposing states could raise nearly \$6 billion in annual revenue in four to five years).

²⁸⁸ *Id.* (referencing an estimated 125,000 to 152,000 jobs that could be created as a result of legalized sports betting).

²⁸⁹ Forrest & Parry, *supra* note 84, at 11 (“[I]f the demand for betting grows, the amount of betting will grow whether this takes place in a legal environment or in an underground economy.”).

²⁹⁰ *Id.* at 12 (arguing that bookmakers in the illegal market have no incentive to address addiction problems).

²⁹¹ *Id.* (pointing to types of conditions, such as minimum age requirements and the use of proper age verification technology).

²⁹² Barkow, *supra* note 239, at 17.

²⁹³ Tara Siegel Bernard, *Agency Picked A New Leader; So Did Trump*, N. Y. TIMES, Nov. 25, 2017, at A1 (quoting Mulvaney as once characterizing the Bureau as a “sad, sick joke.”); *see also* Evan Weinberger, *New Director Could Wield Budget Ax at Consumer Finance Watchdog*, BLOOMBERG LAW (Dec. 06, 2018), <https://www.bna.com/new-director-wield-n57982094553/>

CFPB retains sole authority to request funding from the Federal Reserve in order to finance CFPB activity.²⁹⁴ The statutory language imposes a duty on the Board of Governors to transfer whatever funding is requested²⁹⁵ so long as such request is deemed “reasonably necessary”²⁹⁶ by the Director and falls safely within the mandated cap of twelve percent.²⁹⁷ Recognizing the ambiguity in the Second Quarter of Fiscal Year 2018, then-Acting Director Mulvaney sent a letter to the Federal Reserve Chair Janet Yellen informing her that the CFPB would not be requesting any funding.²⁹⁸ This conservative approach in CFPB leadership is expected to continue with the appointment of new Director, Kathleen Kraninger.²⁹⁹

Even with an Executive branch intent on utilizing the CFPB to oversee the DFS industry, however, the Supreme Court must still decide whether the CFPB’s structure conforms with the Constitution.

[<https://perma.cc/D4PL-SLYQ>] (recounting fears that Kathleen Kraninger could cut the CFPB’s budget by 23% without input from Congress).

²⁹⁴ See 12 U.S.C. § 5497(a)(1) (2018) (clarifying that the necessary amount of funding needed for the Bureau shall be determined by the Director “to be reasonably necessary to carry out the authorities of the Bureau”); see also 12 U.S.C. § 5497 (e)(1)(A) (2018) (granting the Director the authority to determine that sums available to the CFPB are sufficient to carry out Bureau authority).

²⁹⁵ 12 U.S.C. § 5497(a)(1) (2018) (“[T]he Board of Governors shall transfer . . . the amount determined by the Director . . .”).

²⁹⁶ *Id.*

²⁹⁷ Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 112 (2013).

²⁹⁸ See Michael Grunwald, *Mulvaney Requests No Funding for Consumer Financial Protection Bureau*, POLITICO (Jan. 18, 2018, 9:00 AM), <https://www.politico.com/story/2018/01/18/mulvaney-funding-consumer-bureau-cordray-345495>) (stating that the agency was requesting \$0); Jim Puzanghera, *Mulvaney Requests Zero Funding for the Consumer Financial Protection Bureau*, L.A. TIMES (Jan. 18, 2018, 12:40 PM), <https://www.latimes.com/business/la-fi-cfpb-mulvaney-funding-20180118-story.html> (describing how Mulvaney plans to slash the Bureau’s reserve fund); Barbara S. Mishkin, *Mulvaney forgoes CFPB funding*, (Jan. 18, 2018), <https://www.consumerfinancemonitor.com/2018/01/18/mulvaney-forgoes-cfpb-funding/> [<https://perma.cc/63MT-PK7U>] (explaining that Mulvaney believes that Bureau’s current reserves to be sufficient to carry out its mission).

²⁹⁹ Renae Merle, *Pick for Consumer Agency Faces Fight*, WASH. POST, June 22, 2018, at A16 (stating that Democrats fear that Kraninger was brought in to oversee a curtailing of CFPB activities).

The opportunity to do so has arrived as a law firm out of the Ninth Circuit petitioned the Court to decide whether the single-director CFPB violates constitutional separation of powers³⁰⁰ and the Court subsequently accepted the petition.³⁰¹ Adding to the intrigue is the fact that the DOJ under the current administration will likely want the case to be heard and for the Court to rule against the CFPB.³⁰² One commentator has speculated that the Supreme Court may have to appoint an amicus curiae to defend the CFPB, lest the CFPB defends itself.³⁰³ Regardless, until the constitutional question is finally resolved, the CFPB will continue to face challenges to its legitimacy, which will make it difficult for the agency to regulate not only DFS, but any entity.

VI. Conclusion

The CFPB was created in the wake of a credit crisis.³⁰⁴ That crisis came about not as a result of sports wagering, but rather, as a consequence of a different type of gambling—specifically in the form

³⁰⁰ PETITION FOR WRIT OF CERTIORARI, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, https://www.supremecourt.gov/DocketPDF/19/19-7/104482/20190628140628272_18_PetitionForAWritOfCertiorari.pdf [<https://perma.cc/HJH3-PJTC>] (requesting the Court decide on whether the ruling from Ninth Circuit Court of Appeals that single-director structure of the Bureau is constitutional was correct).

³⁰¹ Amy Howe, *Justices to review constitutionality of CFPB structure*, SCOTUSBLOG (Oct. 18, 2019, 3:56 PM), <https://www.scotusblog.com/2019/10/justices-to-review-constitutionality-of-cfpb-structure> (discussing the Court's decision to accept the *Seila Law* petition).

³⁰² Alan S. Kaplinsky, *Seila Law Asks U.S. Supreme Court to Review Ninth Circuit Ruling that CFPB's structure is Constitutional*, NAT'L L. REV. (July 1, 2019), <https://www.natlawreview.com/article/seila-law-asks-us-supreme-court-to-review-ninth-circuit-ruling-cfpb-s-structure> (opining that, unlike past petitions which the DOJ opposed, *Seila Law's* petition for writ presents a stronger chance of success, causing the DOJ to not oppose it).

³⁰³ *Id.* (adding that the CFPB is statutorily permitted to represent itself before the Supreme Court).

³⁰⁴ See CONSUMER FINANCIAL PROTECTION BUREAU, *Creating the Consumer Bureau*, <https://www.consumerfinance.gov/about-us/the-bureau/creatingthe-bureau/> (last visited July 24, 2019) [<https://perma.cc/PE7S-4DBM>] (chronicling the inception of the CFPB as a response to the drying up of consumer credit and the defaulting of consumer loans).

of subprime mortgage-backed securities and consumer lending.³⁰⁵ Some might argue that the CFPB's expansion into sports wagering and DFS would constitute an abuse of federal power and go beyond the legislative intent of the CFPB. There is some merit to this argument. On the other hand, the CFPB is an agency assembled with individuals containing expertise in all matters affecting consumers and their interactions with the marketplace. Online sports wagering and DFS contests are becoming a significant part of that marketplace, and their ease of access through mobile devices means more consumers will be eager to participate. Illegal sports gambling proliferated in spite of PASPA.³⁰⁶ Now, as the country is becoming more adept to the Internet and sports apps like FanDuel and DraftKings, sports betting is, as Sen. Orrin Hatch pointed out, just a "click away."³⁰⁷ Given sports betting's historic tendency to function on credit systems, the CFPB should work with state regulators, compliance offices, and other federal agencies to protect the vulnerable and promote fair play within their respective jurisdictions, and throughout the nation.

³⁰⁵ Erin Coghlan, Lisa Mccorkell & Sara Hinkley, *What Really Caused the Great Recession?*, INST. FOR RES. ON LAB. & EMP. (Sept. 2018), <https://irle.berkeley.edu/files/2018/09/IRLE-What-Really-Caused-the-Great-Recession.pdf> [<https://perma.cc/4N5L-SDTF>] (pointing to "risky" mortgage-backed securities and collateralized debt obligations as the initial causes of the crisis).

³⁰⁶ Nicholaus Garcia, *Sen. Orrin Hatch Delivers Speech on Sports Betting in Congress, Will Introduce Bill Soon*, LEGAL SPORTS REPORT (Aug. 24, 2018, 9:13 AM), <https://www.legalsportsreport.com/23265/hatch-sports-betting-bill-in-congress/> [<https://perma.cc/4K77-3WER>] (quoting a senior vice president of public affairs for the American Gaming Association who said "Federal oversight of sports betting was an abject failure, succeeding only in enabling the growth of a massive illegal market").

³⁰⁷ Jordain Carney, *Hatch to introduce sports betting bill after Supreme Court decision*, THE HILL (May 14, 2018, 1:17 PM), <https://thehill.com/blogs/floor-action/senate/387594-gop-senator-to-introduce-sports-betting-bill-after-supreme-court> [<https://perma.cc/QPL5-GUJ7>].