

To,  
Ms. Anna Roy,  
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18.01.2021

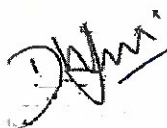
**Subject: Recommendations on the “Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India”**

Ma'am,

We are a full-service law firm headquartered in New Delhi and are actively advising several players in the online fantasy sports sector. Over the years we have spent considerable time on complex legal queries in this space. At the very outset, we would like to express our gratitude to Niti Aayog for recognising the need for clarity on the regulation of fantasy sports in India and undertaking to address the same. The Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India dated December 4, 2020 is a praiseworthy position paper which has sought to address the concerns of all key stakeholders. It is a great starting point for a regulatory framework to be put in place that will aid and assist the gaming industry as well as address concerns of the government.

As mentioned in your position paper, we have enclosed a set of high-level recommendations which will hopefully assist you in creating a policy framework that is balanced and a win-win for the government as well as other stakeholders in the online fantasy sports sector.

Sincerely,



For PSA  
Dhruv Suri  
Partner

## COMMENTS ON NITI AAYOG'S DRAFT GUIDELINES FOR REGULATION OF FANTASY SPORTS IN INDIA

### Introduction

The introduction of Guiding Principles for Online Fantasy Sports Platforms in India (“**Guiding Principles**”) by Niti Aayog have acted as a catalyst for the discussion on creating a more robust regulatory system for online fantasy sports platforms (“**OFSPs**”). Online fantasy sports in India have grown at a compounded annual growth rate of 212%. However, a large barrier for any business seeking to enter into this platform has been the multitude of laws governing the field of gaming.

While the Guiding Principles are a positive step and welcome by the industry, we believe there are certain aspects which once covered, will provide for a balanced policy for both, the government and industry. We have attempted to summarize them below:

#### 1. Insertion of an Object Clause

It is evident to most stakeholders that the concerns with respect to OFSPs go beyond simple classification of their games as being “games of skill” and not “games of chance”. The concerns also extend to providing a safe service to consumers and ensuring that their mental well-being is not affected as a result of these platforms. This concern is even more pertinent in light of the notice issued to Virat Kohli and Sourav Ganguly by the Madras High Court in a petition concerning suicide committed by 10 people who had suffered heavy losses on OFSPs.<sup>1</sup> The court has also expressed its concern on how youngsters are being attracted to play such online games where real prize money is involved.

Thus, the social and mental health risks of online fantasy sports need to be acknowledged at the level of policy formulation itself. These risks have already been acknowledged internationally, and will increase as OFSPs continue to increase their consumers at the rates estimated by KPMG in its report titled “The Business of Fantasy Sports”. The Council on Compulsive Gambling in the United States of America has called Daily Fantasy Sports an “alarming and disturbing trend.”<sup>2</sup> A 2017 study on over 1500 college students saw a correlation between fantasy sports participation and gambling problems. It also found that males who play fantasy sports for money and females who play fantasy sports (*for money or not*) were more likely to experience gambling-related problems.<sup>3</sup>

Thus, we recommend the following object clause to be inserted in the Guiding Principles:

*“For the purpose of consolidating the rights and obligations of Online Fantasy Sports Providers to provide ‘games of skill’ to the general public in a manner which is not harmful to their physical and mental wellbeing or against public policy.”*

#### 2. Provision of Specific Factors for OFSP Evaluation

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<sup>1</sup> Muthukumar v. Union of India, W.P (MD) No.15231 of 2020 Madras High Court (Madurai Bench), also at: <https://www.outlookindia.com/website/story/sports-news-online-gambling-virat-kohli-sourav-ganguly-get-high-court-notices-for-endorsing-fantasy-cricket-apps/363551> [accessed January 6, 2021]

<sup>2</sup> See: <https://carrierclinic.org/2019/08/09/the-real-life-dangers-of-daily-fantasy-sports/> [accessed January 14, 2021]

<sup>3</sup> See: <https://www.sciencedirect.com/science/article/abs/pii/S030646031400166X> [accessed January 14, 2021]

The second principle requires all OFSPs to be “skill predominant” and obtain approval if they wish to offer “pay-to-play” services. The approval must be obtained from an independent evaluation committee (“**Committee**”) constituted by the recognized self-regulatory organisation, that will undertake statistical and legal evaluation of such format to ascertain and confirm that it is skill-predominant.

This principle needs to be more specific with respect to **(i)** the manner of evaluation and direct the Committee to ensure that the game format is fair for all players and non-discriminatory, **(ii)** rules which are intuitive to understand and follow, transparent and easily available on the platform and other portals, and easy to play and improve on.

There is also a need to provide for a mechanism to ensure that the evaluation process is fair, transparent, and confidential to protect the intellectual property of the OFSP. The committee must comprise of individuals having legal and technical knowledge in the relevant field and must not contain persons affiliated with any other OFSP to ensure that the efforts of the OFSP are not frustrated by it losing its first mover advantage.

For the sake of clarity, the reporting and record keeping obligation of the OFSP operators should be incorporated as a separate principle.

<b>Current Provision</b>	<b>Proposed Amendment</b>
<p>2. All formats of fantasy sports contests offered by OFSPs should remain skill-predominant. In case an OFSP operator wishes to offer a pay-to-play variant of contest that varies from the fantasy sports format judicially determined to constitute a game of skill, it should first obtain approval from an independent evaluation committee, constituted by the recognized self-regulatory organisation, that will undertake statistical and legal evaluation of such format to ascertain and confirm that such format is skill-predominant in determining the winning outcome. Such independent evaluation committee shall have the power to set rules or recommend changes to formats that will be binding on OFSPs. OFSP operators will be required to keep statistical data to track player/user performance on their platforms and submit the same to the self-regulatory organisation periodically to demonstrate that the formats deployed by the operator are skill predominant.</p>	<p>2. All formats of fantasy sports contests offered by OFSPs should remain skill-predominant. In case an OFSP operator wishes to offer a pay-to-play variant of contest that varies from the fantasy sports format judicially determined to constitute a game of skill, it should first obtain approval from an independent evaluation committee, constituted by the recognized self-regulatory organisation, that will undertake statistical and legal evaluation of such format to ascertain and confirm that such format is skill-predominant in determining the winning outcome. Such independent evaluation committee shall have the power to set rules or recommend changes to formats that will be binding on OFSPs and ensure that the evaluation is done in a manner that ensures:</p> <ul style="list-style-type: none"> <li>○ Fair assessment in an unbiased, non-discriminatory manner.</li> <li>○ Transparency while conducting the assessment.</li> <li>○ Confidentiality of the OFSP operator and any information shared by it.</li> </ul> <p>3. OFSP operators will be required to keep statistical data to track player/user performance on their platforms and submit the same to the self-regulatory organisation</p>

	periodically to demonstrate that the formats deployed by the operator are skill predominant.
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### 3. Specifying Mandatory Disclosures to ensure the Protection of Minors and Patrons

The third principle relating to the protection of minors is vague and could provide an exploitable lacuna for OFSPs. It is important to protect minors from indulging in online sports betting and fantasy sports. The threat of online apps affecting the minds of children is already a concern for many government entities. The Delhi High Court has expressed concern over children allegedly committing suicide while playing the Blue Whale Challenge.<sup>4</sup>

These concerns have been addressed in proposed legislation in the United States. The proposed fantasy sports legislation in Nevada (“Nevada Legislation”) requires the OFSP to submit a written plan which demonstrates the manner in which the applicant will verify the identity and age of patrons who wish to participate in a paid fantasy game and place an absolute restriction on the advertising and marketing of the Fantasy Game in any publication which is exclusively aimed towards minors.<sup>5</sup>

Moreover, as mentioned earlier protection must be extended to all users. Since studies have highlighted the addictive nature of fantasy sports, OFSP operators should provide for methods of self-regulation for their patrons. The Nevada Legislation also required OFSP operators to provide a means where patrons can restrict or limit themselves from participating in paid fantasy games and provide for a means to protect the personal and financial information of the game participants. This is to ensure that users of OFSPs can self regulate and prevent themselves from getting overly addicted to the game.

Current Provision	Proposed Amendment
3. Pay-to-play formats of fantasy sports contests should not be offered by an OFSP operator to users who are less than 18 years old. All necessary safeguards to protect minors must be instituted.	4. Pay-to-play formats of fantasy sports contests should not be offered by an OFSP operator to users who are less than 18 years old. All necessary safeguards to protect minors must be instituted which shall include but not be limited to: <ul style="list-style-type: none"> <li>○ Disclosures by the OFSP operator relating to manner of verifying the identity and age of patron using the pay-to-play format.</li> <li>○ Restriction on advertising or promoting fantasy games on any platform aimed exclusively to individuals under 18 years of age.</li> </ul>

<sup>4</sup>See: <https://www.firstpost.com/india/blue-whale-challenge-delhi-hc-expresses-concern-over-app-causing-childrens-suicide-3940177.html> [accessed on January 14, 2021]

<sup>5</sup> NRS 463. Restriction of marketing and promotion of paid fantasy games

1. A game Operator may not advertise nor promote a paid fantasy game in any publication or medium that, in the judgment of the Commission, is aimed exclusively to individuals under 18 years of age
2. The Commission shall publish and make available to operators of fantasy games a list of publications and mediums it has judged to be aimed exclusively to individuals under 18 years of age. An operator of a fantasy game shall not be in violation of this section unless it places advertising or promotes a paid fantasy game in a listed publication or medium

	Additionally, OFSP operators may provide a means for participants using the pay-to-play format to restrict or limit themselves from participating in paid fantasy games which shall be disclosed at the time of evaluation.
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**4. Specifying criteria to be used while permitting infusions of elements of chance**

The fourth principle requires all fantasy sports contests to relate to and emulate a real world sports contest as closely as possible with no elements of chance which are not present in the real world contest. However, the committee has the power to waive this requirement.

The committee has been granted an absolute power without any guidelines or tests for when such power should be used. This can lead to the committee abusing its power or complaints being raised before courts that the committee has applied its powers in a biased or arbitrary manner.

The principle should frame certain guidelines to be followed in cases where the committee chooses to waive this requirement. The element of chance must not have an appreciable impact on the overall gameplay and ensure that the game can still be classified as a “game of skill”. The committee should also observe whether removal of the element of chance is possible in a manner which does not impede the overall gameplay or if the element of chance can be substituted for any real-world aspect.

Further, there should not be a presumption that merely because the fantasy sport does not emulate the real-world sport, it is a “game of chance”. For instance, if Dream11 requires a participant to make a team of 11 players, merely because another company requires the participant to make a team of 10 or 9 or 8 or 7 or 5 should not deem such company’s business model to qualify as a “game of chance”. Often variations from the real-world sport can increase the “skill” factor in a game. For instance, picking a team of 5 players instead of 11 could be considered a lot tougher in view of all the player data the participant has to evaluate.

<b>Current Provision</b>	<b>Proposed Amendment</b>
4. A fantasy sports contest should generally relate to and emulate an entire real world officially sanctioned sports contest as closely as possible and not infuse elements of chance that are not present in the real-world contest, provided that this requirement may be waived by the independent evaluation committee in cases it deems fit.	5. A fantasy sports contest should generally relate to and emulate an entire real world officially sanctioned sports contest as closely as possible and not infuse elements of chance that are not present in the real-world contest, provided that this requirement may be waived by the independent evaluation committee in cases it deems fit as long as: <ul style="list-style-type: none"> <li>○ It is not possible to remove the element of chance without significantly hampering the overall design and gameplay.</li> <li>○ No viable alternative is available from elements present in the real-world contest.</li> </ul>

**5. Fair and Transparent terms of participation for the users**

We appreciate that the Niti Aayog takes the interest of the user or the fantasy players into consideration and recommends for fair and transparent terms of participation in fantasy sports. This step is essential as the success of fantasy sports in India is highly dependent upon consumer participation and satisfaction. A fair and transparent mechanism will go a long way in showcasing increased confidence from consumers in fantasy sports and erase any fear they may have once had. Having said that, it is essential that there must be other checks and balances to ensure that this level playing field is maintained at all times.

The Guiding Principles in this aspect suggests a few measures but do not elaborate on other measures by which this fairness and transparency shall be maintained in the fantasy sport industry. In such a vacuum, it is recommended that the OFSPs should ensure that only one person through one single account participates at a point of time. There should be no limit on the number of registrations per household or organisation but registrations must not be made by agents or third parties. The OFSP may use valid IDs to ensure that only genuine players enter events especially in the pay-to-play format. This would help in eliminating various nefarious elements who participate in the same event through multiple accounts. Alternatively, the OFSP could consider limiting the number of entries a participant could have in any one tournament as a means to prevent a single participant from having mass entries to essentially stack the team against more novice participants.

Further, in order to assure the integrity of the game, the employees of an OFSP should be prohibited from playing fantasy sports on any online platform as they may have access to non-public information concerning players, teams or other information which could influence the outcome of a fantasy sports contest. On the consumer protection front, this regulation is extremely desirable as it combats some of the scandals that have troubled such OFSPs in some jurisdictions. For instance, in the US, there were allegations made against an employee of a popular OFSP called DraftKings. The employee was found to have accidentally released player-related data before the time scheduled for its release. The same week, it was found that the employee won \$350,000 playing daily fantasy sports on a competing site FanDuel.<sup>6</sup> After investigation, DraftKings found no improprieties but both, DraftKings and FanDuel, banned their employees, directors, promoters, members from competing in contests on their platform in the interest of fairness and integrity of the games.

Additionally, OFSP should include information for assistance of the players, make known the value of prizes and awards prior to the contest, explain how to participate in fantasy events, provide players with information on responsible play and compulsive behavior, designate highly experienced players on the platforms, offer games exclusively to just the beginners, maintain information on the winners of contests, bar computer scripts, computer generated algorithms and bots to pick teams in a fantasy sports contest. They should also not mislead participants on the chances of winning and number of winners, or target minors or self-excluded individuals with advertisements.

Further the self-regulatory organization could set up an internal committee that examines whether the OFSPs are in compliance with the applicable laws at all times. This will (a) hold the OFSP in check and ensure that their platforms are not used for illegal purposes, (b) ensure the line between a game of skill and gambling is never crossed by OFSPs, and (c) offer more protection to consumers from unscrupulous OFSPs.

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<sup>6</sup> Joe Drape & Jacqueline Williams, Scandal Erupts in Unregulated World of Fantasy Sports, N.Y. TIMES, <https://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-betrivals.html> [accessed on January 7, 2021]

## 6. Consumer grievance redressal mechanism

The Guiding Principles have taken a positive step by providing for a grievance redressal mechanism for the redressal of the complaints of the users. The basic structure behind the grievance redressal mechanism should be to provide a platform to the users to lodge their complaints related to the services provided by the OFSPs in a transparent and timely manner, voice their opinion and provide feedback on the services rendered by the OFSP. This would provide the self-regulatory organisation important feedback on the working of the various OFSPs in the country and take adequate steps accordingly. Some of the suggested measures that a grievance mechanism should follow are provided below:

- It should be easily accessible and well publicised
- It should be simple to understand and use by the users
- It should be cost-effective to users otherwise the whole purpose would be redundant
- It should be speedy, with established time limits for action
- It should keep the users informed of progress of their complaints and the steps taken
- It should be fair, comprehensive and impartial in its investigation
- It should maintain the confidentiality of the details shared by the complainant
- Strategies should be put in place to improve customer service on a continuous basis

### ○ Account and Security

Another issue of concern to OFSP is the security of player accounts and personal data. With the nature of personal data submitted by a player to establish an account along with bank or credit card information to facilitate fund transfers especially in pay to play format, account security is paramount. Given the wealth of user data that OFSP would process every day, it is critical that players have confidence that account information be secure, and protected. OFSP must have adequate safeguards in place to guard against unauthorized access to accounts as well as dispute mechanisms to resolve complaints. In addition, since the financial data is regarded as sensitive personal data accordingly, access, storage, use and other forms of dealing must be as per Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011. These Rules in essence will require OFSP to (i) obtain specific written consent, (ii) limit the purpose for which data is processed i.e., only for transactions and fund transfers etc. (iii) maintain confidentiality with limited access rights (iv) retain only for a duration as required for the purpose and (v) implement other reasonable measures to prevent breach.

### ○ Consumer rating system

As stated earlier the entire fantasy sports industry thrives on customer service satisfaction. Different OFSPs compete to provide a better gaming experience to their customers. This suggests that the introduction of a rating system could prove beneficial to users as it would provide them with information that would enable them to better protect their own interests as well as to improve the quality of service provided by the OFSP. It is therefore recommended that the self-regulatory body sets up a rating committee or itself assigns ratings for OFSP to assist users to make informed choices regarding the products' quality and safety of the services provided by OFSP.

The self-regulatory body may use parameters such as whether the OFSP follows the industry-adopted principles and Advertising and Standards Council of India (ASCI) guidelines for advertisement, security of the platform and security mechanism in place for users, compliance with applicable laws, fair and transparent terms of participation etc. In the event that an OFSP is found to have consistent low rating the self-regulatory body recommend changes that will be binding on OFSPs or impose fines for continuous low ratings.

This rating system could prove to be useful to the users as it would help them in making informed decisions and shield them from unscrupulous platforms and OFSPs.

## **7. Minimizing the Risks of User Addiction and Mental health**

The Guiding Principles should recognise the dangers to mental health and addiction associated with the fantasy sports especially in the pay to play model. It is essential for the self-regulatory body to find a balance between the interests of recreational fantasy sports participants and individuals who are susceptible to suffer from addiction. The OFSPs in order to prevent addiction amongst the players should allow the participants to restrict their ability to enter events, limit the amount of money they can deposit for an event or play within a month or any other specified period, and provide notices at event registration/ entry points. OFSP in pay to play model must carry a disclaimer at the event registration/entry point that *“the game involves an element of financial risk and may be addictive. Please play responsibly and at your own risk”* in a language that can be easily understood by the user. The self-regulatory body may even cap the amount of money that any OFSP may collect from any participant over the course of a defined period thereby allowing for these contests to operate as a form of social or entertainment gaming but not as a form of high-volume gambling activity

Furthermore, from a mental health’s perspective the OFSPs should allow the users to self-exclude and switch-off themselves from the platform by deleting/suspending their accounts and block advertisement and updates by OFSPs in their emails. The OFSPs may also study user behavior constantly and intervene when they think an individual is addicted as well as have a de-addiction helpline number for the users.

## **8. Legislative Action**

Despite a number of high courts<sup>7</sup> in India holding fantasy sports to be a game of skill involving a user’s exercise of knowledge and judgment, the OFSPs continue to be subject to various civil and criminal cases by state governments. This has been primarily due to the lack of proper guidelines on how to identify whether a game is predominantly a “game of skill” or a “game of chance.”

In such a landscape, it is essential that the central government steps in and utilizes its residuary legislative authority to provide broad guidelines on the factors and tests that should be employed to classify a game as predominantly “a game of skill.” These guidelines could also set out the regulatory prescriptions and the eligibility criteria for approving an OFSP engaged in offering fantasy sports. The guidelines would enable each state government to continue regulating gambling under its respective gambling laws as it does currently, with the center’s legislation complementing state statutes and giving effect to the exemption for “games of skill” present in the majority of state statutes. However till the structure of such guidelines is erected the self-regulatory authority should be allowed to come up with guidelines for state governments

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<sup>7</sup> Varun Gumber v. UT of Chandigarh & Ors 2017 SCC OnLine P&H 5372 ; Gurdeep Singh Sachar v. Union of India 2017 SCC OnLine Del 12272



to follow when evaluating whether the game offered by an OFSP is predominantly a “game of skill” or a “game of chance.” Such a step would ensure that those OFSPs which provide games where the skill of the user is predominant are granted safe harbor from all kinds of prosecution by each state.