Indian and Federal Gaming Law

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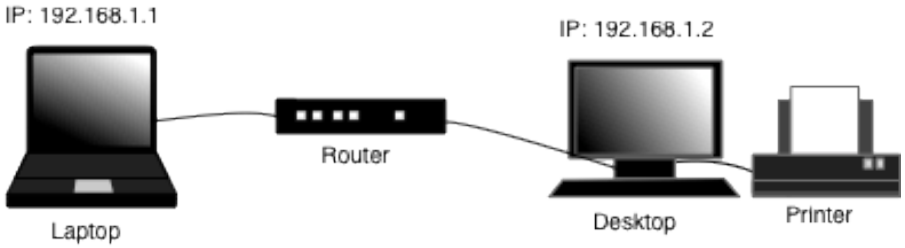
Internet Gambling

Internet Background Information

The internet is essentially a world wide connection of electronic devices using a common basic communications protocols. The common protocols that bind all network devices of the internet are the Transmission Control Protocol and Internet Protocol or collectively the TCP/IP protocol.

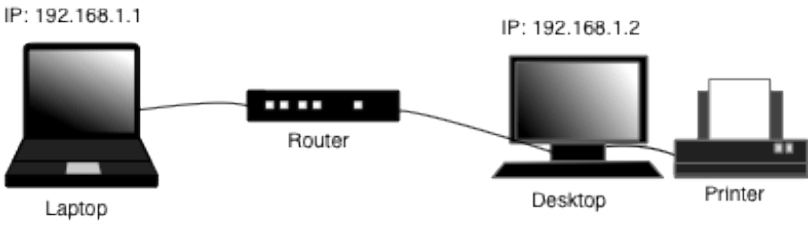
There are many attributes and components of the TCP/IP protocol, but this text will only address a few high level attributes of the protocol as background for understanding the internet and its relationship to law and gambling laws in particular. First, devices using the TCP/IP protocol are either assigned an IP address.[1] The IP address is attached to each instance of communication sent and received by a networked device. To route information between addresses, the internet uses a series of devices known as routers. Routers keep track of where devices are connected and route traffic from router to router to device to complete the communications circuit.

The following may illustrate the concepts presented above more clearly:



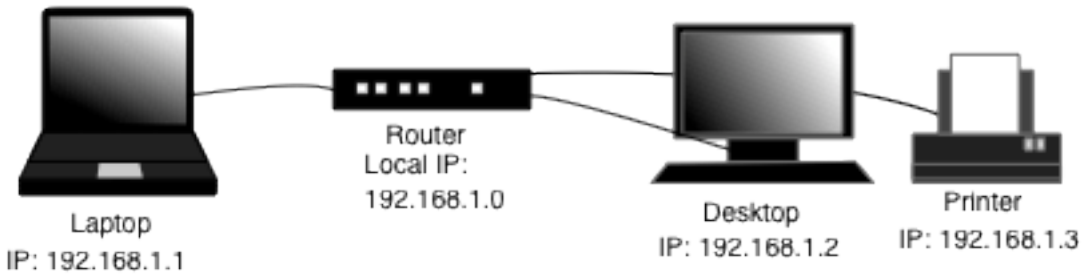
[1] To see the IP address of your computer when to a local network you can enter the following:
For windows machines, run the command line terminal program (**CMD**). When the command prompt is shown, type in **ipconfig**. This will cause the PC to list the IP addresses associated with the machine.
For Mac users, run the **Network Utility** application in the *Utility* Folder of the *Applications* Folder, your IP address will be presented on the *Info* tab.
To see your IP address as reported on the internet, search Google or type in the following address in your favorite browser: http://www.raynersoftware.com/my_ip.php?all_headers=TRUE

The illustration is of a small home network with a laptop, router, desktop and printer. This is a common home network setup where a person wants to share their desktop printer with their laptop computer. The router will issue IP addresses for the laptop and desktop, then control the flow of information between the two computers using their issued addresses.



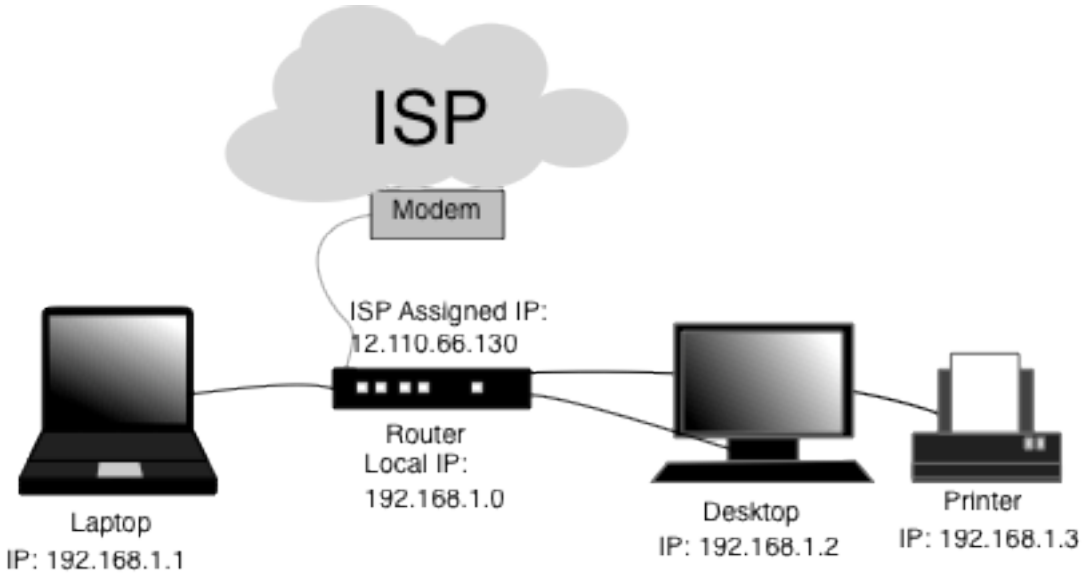
The basic model for creating network traffic is the client/server model. In the above example, the laptop will issue a request to the desktop to print a document. The router makes sure that the network traffic flows to the proper device. The devices will send a series of requests and responses to complete the transaction of printing from the laptop to the printer attached to the desktop computer.

Because the networking protocol is indifferent to the type of device connected to the network, it is possible to use a network connected printers rather than sharing a printer connected to a particular PC. Use of such a network printer would be represented by the following illustration:



The client/server model of network traffic continues as above. However, instead of the laptop making requests to the desktop, the request will go directly to the printer that is connected to the router.

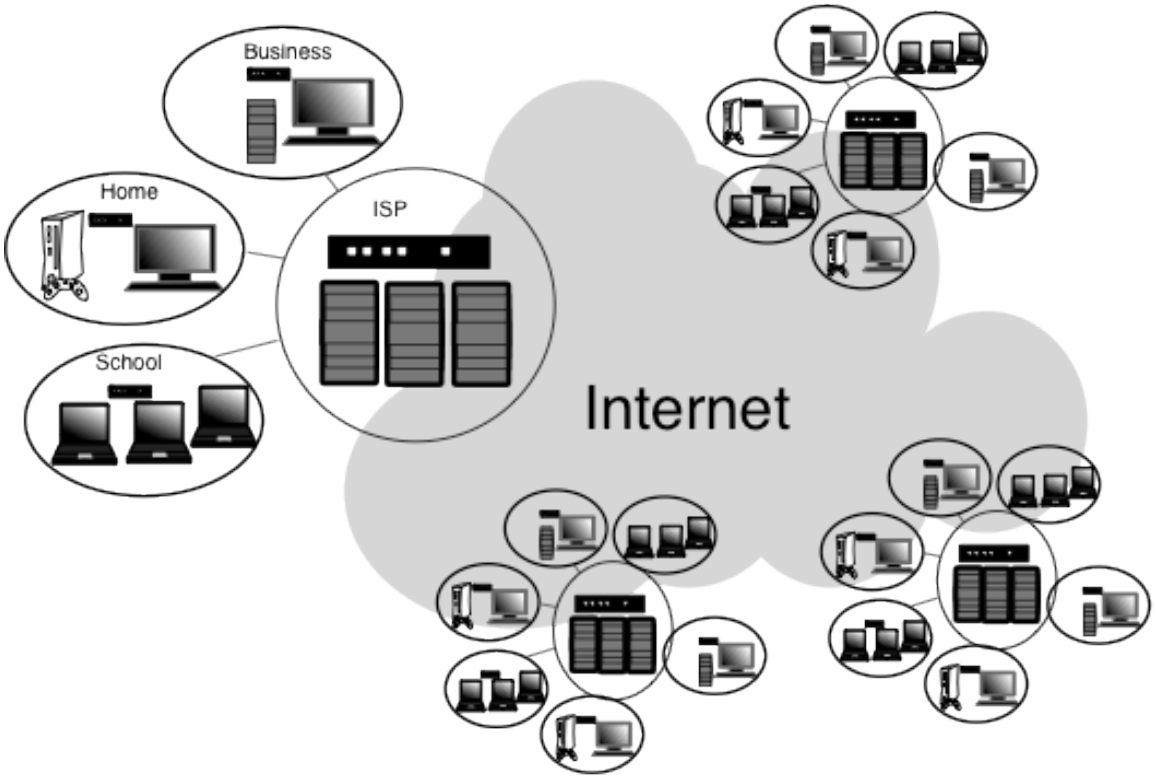
Though not illustrated above, the router itself has an IP address. If the home user decided to connect their home network to the internet, the model scales to accommodate. When connecting to the internet, the internet service provider (ISP) will provide the IP address for the router via a modem (Cable modem, telephone modem, DLS modem). The ISP will route network traffic between the modem and the internet, and the router will route network traffic on the local network. The following illustrates this next step in the scale of the network:



In the example illustration above, the router gets its own IP address from the ISP then translates IP addresses for traffic between the local network devices and the wider ISP network and internet.

While this example focused on a home network, the same principles apply to all internet networking. Devices get addresses and routers route traffic between addresses.

Networks are part of networks that are connected to other networks in which information is routed between devices, networks and routers.



The breadth of the internet continues to increase as new devices incorporate TCP/IP compatible networking protocols. In addition to traditional computing devices, many other devices such as home game consoles[2], cellular phones[3], home telephones[4], set top movie boxes[5] and televisions[6] are adding internet network connectivity. The rush

[2] The Sega Dreamcast, XBOX, XBOX 360, Nintendo Wii and Sony PS3 all incorporate the ability to connect to the internet and interact with internet devices.
[3] Many 2G and 3G phones such as the Apple iPhone, the T-Mobile G1, Windows Mobile 6 phones and newer Blackberry devices have the capability to connect to and interact with the internet.
[4] Voice over IP (VoIP) is becoming a common replacement for standard land line service. VoIP services, like those from Vonage, Time Warner, Comcast and Cox use internet protocols and the internet to transmit voice data and call data.
[5] In 2006, Apple introduced Apple TV to permit the purchase or rental of movies delivered through the internet. In 2008, Netflix introduced a set top movies on demand box that used internet connectivity to select and transit movies.
[6] In 2008, LG and Sony introduced televisions that incorporated internet connectivity for showing televisions programming data and streaming video from sites such as YouTube and Hulu.

to add more internet connected devices has also led to some bizarre result such as internet connected refrigerators and other appliances.

The Legal Tension

Because the internet as the interconnection of devices and networks using a common protocol or language, the internet is not itself bound by geographical constraints. It is really a collection of dispersed hardware, software and signals, rather than a physical object.

On the other hand, laws and regulations are specific to geographically bound areas. City of Las Vegas ordinances apply within the geographic boundaries of the city. Clark County ordinances apply within the geographic boundaries of the county. Nevada statutes and regulations apply within the geographic boundaries of the state. United States laws apply within the territory of the country.

This fundamental difference in landscape creates significant tension with regard to application of geographic based laws to activities that are not geographically bound.

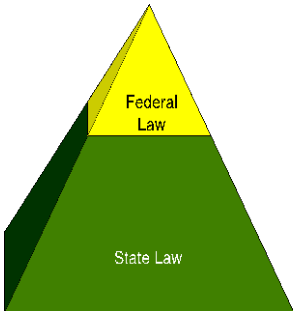
The Significance for Gaming

Most gaming laws were drafted at a time when physical presence was required to engage in gambling activities other than sports wagering. In the 1960s, when many federal gaming statutes were enacted, there was no way to remotely wager on poker, black jack, slots and other forms of gambling. In the 1960s, it would have been science fiction to believe that a person sitting in Minnesota could place a wager in a poker game with players sitting in California, Canada, Oklahoma, Vermont, and Florida on a table being run from the Kahnawake nation outside of Montreal, Canada.

In 2009, the occurrence described above seems perfectly plausible.

Federal & Online Gaming in The U.S.A.

The United States has a federalist system of government, where sovereignty is divided between the central federal government and the government of the states. With regard to gaming, most of the legal authority governing the regulation or prohibition of gaming activities resides with the states. However, the federal government has asserted concurrent jurisdiction over activities that occur, or can occur, across state and international boundaries.



Because state law is the primary law governing gaming activities, the legal landscape of regulated and prohibited gambling in the United States is complex. Most states have unique gambling laws and prohibitions and a body of disparate court opinions that further complicate the analysis of any gaming activity that can or does occur on a national basis. To complicate matters even further, American Indian tribes also have limited sovereignty over gaming activities that occur within Indian lands. Therefore, certain gaming activities that are prohibited within a state may still occur on Indian lands within a state based on tribal sovereignty.

Federal Laws

Federal laws regarding gaming are generally limited to the following subjects:

1. American Indian gaming
2. Sports wagering
3. Assisting states in enforcing criminal gambling prohibitions that occur in interstate or foreign commerce
4. Interstate horseracing
5. State lotteries
6. Funds transfers related to online wagering
7. The transportation of gaming equipment

In addition, other laws regarding financial transactions, money laundering, bank fraud and tax evasion are often used to prosecute gambling businesses that violate any of these laws.

For the purposes of the discussion at this meeting we will focus only on the primary federal laws that are the focus of recent U.S. Department of Justice ("DOJ") actions and opinions, namely, the Federal Wire Act, the Illegal Gambling Business Act and the Unlawful Internet Gambling Enforcement Act.

The Federal Wire Act

The Federal Wire Act is often the most cited U.S. law applicable to online gaming activities. The Federal Wire Act, along with several other laws, was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Federal Wire Act, codified as 18 U.S.C. §1084, generally prohibits the use of interstate electronic communications facilities for conducting certain forms of gambling. The core elements of the statute are provided as follows:

> ***18 U.S.C. §1084 Transmission of wagering information; penalties***
>
> *(a) 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 wagers or information assisting in the placing of bets or wagers on any sporting event or contest, 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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

...

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States

Application to Online Gaming

The Federal Wire Act has been used in the prosecution of several defendants related to online sports book activities. The most cited of these is the Jay Cohen case.[i] Jay Cohen was a founder and manager at World Sports Exchange ("WSX"). WSX was a licensed sports book in Antigua that was permitted under its Antigua license to take international online and telephone sports wagers.[ii] The Cohen opinion affirmed that the Federal Wire Act applied to online and internet wagering and that the long held

interpretation of a bet as occurring in both the jurisdiction of the location of the bettor and the bookmaker also applied to internet wagering.

Online Gambling

The Jay Cohen Case Court Opinion

Briefs and Other Related Documents

United States Court of Appeals,

Second Circuit.

UNITED STATES of America, Appellee,
v.
Jay COHEN, Defendant Appellant.
Docket No. 00-1574.

Argued: May 21, 2001.

Decided: July 31, 2001.

Defendant was convicted in the United States District Court for the Southern District of New York, Thomas P. Griesa, J., of conspiracy and substantive violations of statute prohibiting transmission of bets in interstate or foreign commerce, and he appealed. The Court of Appeals, Keenan, District Judge, sitting by designation, held that: (1) conspiracy conviction did not require proof of defendant's corrupt motive; (2) transmissions from customers did not fall within safe harbor for transmissions limited to mere information that assisted in placing of bets; and (3) rule of lenity did not require reversal of defendant's convictions.

Affirmed.

Joseph V. DeMarco, Assistant United States Attorney for Mary Jo White, United States Attorney for the Southern District of New York (Assistant United States Attorney George S. Canellos, New York, NY, on the brief), for Appellee.

Mark M. Baker, New York, N.Y. (Brafman & Ross, P.C., Benjamin Brafman, Jennifer Liang, and Melinda Sarafa on the brief) for Defendant- Appellant.

Before: LEVAL and PARKER, Circuit Judges, and KEENAN, [FN*] District Judge.

FN* The Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

KEENAN, District Judge:

BACKGROUND

In 1996, the Defendant, Jay Cohen ("Cohen") was young, bright, and enjoyed a lucrative position at Group One, a San Francisco firm that traded in options and derivatives. That was not all to last, for by 1996 the Internet revolution was in the speed lane. Inspired by the new technology and its potential, Cohen decided to pursue the dream of owning his own e-business. By year's end he had left his job at Group One, moved to the Caribbean island of Antigua, and

had become a bookmaker.

Cohen, as President, and his partners, all American citizens, dubbed their new venture the World Sports Exchange ("WSE"). WSE's sole business involved bookmaking on American sports events, and was purportedly patterned after New York's Off-Track Betting Corporation. [FN2] WSE targeted customers in the United States, advertising its business throughout America by radio, newspaper, and television. Its advertisements invited customers to bet with WSE either by toll-free telephone or by internet.

FN2. We note, however, that the Off-Track Betting Corporation's business is limited to taking bets on horseracing, not other sporting events.

WSE operated an "account-wagering" system. It required that its new customers first open an account with WSE and wire at least $300 into that account in Antigua. A customer seeking to bet would then contact WSE either by telephone or internet to request a particular bet. WSE would issue an immediate, automatic acceptance and confirmation of that bet, and would maintain the bet from that customer's account.

In one fifteen-month period, WSE collected approximately $5.3 million in funds wired from customers in the United States. In addition, WSE would typically retain a "vig" or commission of 10% on each bet. Cohen boasted that in its first year of operation, WSE had already attracted nearly 1,600 customers. By November 1998, WSE had received 60,000 phone calls from customers in the United States, including over 6,100 from New York.

In the course of an FBI investigation of offshore bookmakers, FBI agents in New York contacted WSE by telephone and internet numerous times between October 1997 and March 1998 to open accounts and place bets. Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offenses in violation of 18 U.S.C. § 1084 ("§ 1084"). That statute reads as follows:

> (a) 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 wagers or information assisting in the placing of bets or wagers on any sporting event or contest, 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.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

See § 1084(a)-(b). In the conspiracy count (Count One) and in five of the seven substantive counts (Counts Three through Six, and Eight), Cohen was charged with violating all three prohibitive clauses of § 1084(a) ((1) transmission in interstate or foreign commerce of bets or wagers, (2) transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, (3) information assisting in the placement of bets or wagers). In two counts, Counts Two and Seven, he was charged only with transmitting "information assisting in the placing of bets or wagers."

Cohen was convicted on all eight counts on February 28, 2000 after a ten-day jury trial before Judge Thomas P. Griesa. The jury found in special interrogatories that Cohen had violated all three prohibitive clauses of § 1084(a) with respect to the five counts in which those violations were charged. Judge Griesa sentenced Cohen on August 10, 2000 to a term of twenty- one months' imprisonment. He has remained on bail pending the outcome of this appeal.

DISCUSSION

On appeal, Cohen asks this Court to consider the following six issues: (1) whether the Government was required to prove a "corrupt motive" in connection with the conspiracy in this case; (2) whether the district court properly instructed the jury to disregard the safe-harbor provision contained in § 1084(b); (3) whether Cohen "knowingly" violated § 1084; (4) whether the rule of lenity requires a reversal of Cohen's convictions; (5) whether the district court constructively amended Cohen's indictment in giving its jury instructions; and (6) whether the district court abused its discretion by denying Cohen's request to depose a foreign witness. We will address those issues in that order.

I Corrupt Motive

Cohen appeals his conspiracy conviction on the grounds that the district court instructed the jury to disregard his alleged good-faith belief about the legality of his conduct. He argues that *People v. Powell,* 63 N.Y. 88 (1875), requires proof of a corrupt motive for any conspiracy to commit an offense that is *malum prohibitum,* rather than *malum in se.* We disagree, and we hold that whatever remains of *Powell* does not apply to this case.

In 1875, the New York Court of Appeals ruled in *Powell* that a conspiracy to commit an offense that was "innocent in itself" required evidence of a "corrupt" or "evil purpose." *Id.* at 92. The *Powell* defendants were commissioners of charities for Kings County and had been convicted of conspiring to violate state law by purchasing supplies without first advertising for proposals and awarding a contract to the lowest bidder. *Id.* at 89-90.

The *Powell* Court upheld an appellate court's reversal of the trial court, which had ruled that ignorance of the law was no defense to conspiracy. *Id.* at 89. In doing so, the Court concluded that a conspiracy offense, by nature, required some form of corrupt motive, even if its underlying substantive offense required only an intent to commit the prohibited act. *Id.* at 92. The Court stated that "[p]ersons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators [] because it turns out that the contemplated act was prohibited by statute." *Id.*

The *Powell* doctrine was echoed in federal cases from the first half of the last century, but many circuits have since, in effect, moved away from the doctrine. *Compare, e.g., Landen v. United States,* 299 F. 75 (6th Cir.1924) (applying *Powell* to drug wholesalers' conspiracy to sell intoxicating liquor for nonbeverage purposes without the necessary permit), *with United States v. Blair,* 54 F.3d 639 (10th Cir.1995) (involving, as does this case, offshore bookmaking in violation of § 1084); *United States v. Murray,* 928 F.2d 1242 (1st Cir.1991) (involving an illegal gambling business in violation of 18 U.S.C. § 1955); *United States v. Thomas,* 887 F.2d 1341 (9th Cir.1989) (involving trafficking in wildlife that the defendant should have known was taken in violation of state law).

Although this Court has long expressed its discontent with the *Powell* doctrine, we have done so in *dicta* in cases involving conspiracies to commit acts that were not "innocent in themselves." *See, e.g., United States v. Mack,* 112 F.2d 290, 292 (2d Cir.1940). In *Mack,* Judge Learned Hand criticized the *Powell* doctrine as "anomalous" and questioned "why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit." *Id.* He nevertheless found " 'corrupt motive' in abundance" in connection with the defendant's conspiracy to employ unregistered alien prostitutes. *Id.; see also United States v. Eisenberg,* 596 F.2d 522, 526 (2d Cir.1979) ("It being clearly established that requisite knowledge was proved for conviction of the substantive offense, it now follows that the same knowledge is enough as well to establish the conspiracy to commit the substantive offense."); *Hamburg- American Steam Packet Co. v. United States,* 250 F. 747, 759 (2d Cir.1918) ("[W]e are satisfied that as to the crime of conspiracy, ... it is not necessary to show that the defendants who are alleged to have conspired to do an act which is only malum prohibitum had knowledge of the unlawfulness of the act.")

The American Law Institute has expressly rejected *Powell* in its commentary to the Model Penal Code. *See* Model Penal Code § 5.03 note on subsec. 1 & cmt. 2(c)(iii) (1985). The Institute noted that the "melodramatic and sinister view of conspiracy" upon which *Powell* was premised is no longer valid. *Id.* at cmt. 2(c)(iii). It further observed that *Powell* now has "little resolving power in particular cases" and instead "serves mainly to divert attention from clear analysis of the *mens rea* requirements of conspiracy." *Id.*

In the Institute's view, the *Powell* doctrine was essentially "a judicial endeavor to import fair mens rea requirements into statutes creating regulatory offenses that do not rest on traditional concepts of personal fault and culpability." *See id.* The Institute itself disagreed with that policy, however, concluding that it was a function better left to the statutes themselves. *Id.*

In *United States v. Feola,* 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), the Supreme Court, in another context, rejected the notion that a federal conspiracy conviction required proof of *scienter.* We conclude that the *Powell* doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084.

II The Safe Harbor Provision

Cohen appeals the district court for instructing the jury to disregard the safe-harbor provision contained in § 1084(b). That subsection provides a safe harbor for transmissions that occur under both of the following two conditions: (1) betting is legal in both the place of origin and the destination of the transmission; and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves. *See* § 1084(b).

The district court ruled as a matter of law that the safe-harbor provision did not apply because neither of the two conditions existed in the case of WSE's transmissions. Cohen disputes that ruling and argues that both conditions did, in fact, exist. He argues that betting is not only legal in Antigua, it is also "legal" in New York for the purposes of § 1084. He also argues that all of WSE's transmissions were limited to mere information assisting in the placing of bets. We agree with the district court's rulings on both issues.

A. "Legal" Betting

There can be no dispute that betting is illegal in New York. New York has expressly prohibited betting in both its Constitution, *see* N.Y. Const. art. I, § 9 ("no ... bookmaking, or any other kind of gambling [with certain exceptions pertaining to lotteries and horseracing] shall hereafter be authorized or allowed within this state"), and its General Obligations Law, *see* N.Y. Gen. Oblig. L. § 5-401 ("[a]ll wagers, bets or stakes, made to depend on any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful"); *see also Cohen v. Iuzzini,* 25 A.D.2d 878, 270 N.Y.S.2d 278, 279 (1966) (ruling that the predecessor statute to N.Y. Gen. Oblig. L. § 5-401 (N.Y. Penal L. § 991) did not apply to bets executed at recognized pari-mutuel tracks). Nevertheless, Cohen argues that Congress intended for the safe-harbor provision in § 1084(b) to exclude only those transmissions sent to or from jurisdictions in which betting was a crime. Cohen concludes that because the placing of bets is not a crime in New York, it is "legal" for the purposes of § 1084(b).

By its plain terms, the safe-harbor provision requires that betting be "legal," *i.e.,* permitted by law, in both jurisdictions. *See* § 1084(b); *see also* Black's Law Dictionary 902 (7th ed. 1999); Webster's 3d New Int'l Dictionary 1290 (1993). The plain meaning of a statute "should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (alteration and internal quotation marks omitted). This is not the rare case.

Although, as Cohen notes, the First Circuit has stated that Congress "did not intend [for § 1084]

to criminalize acts that neither the affected states nor Congress itself deemed criminal in nature," it did not do so in the context of a § 1084 prosecution. *See Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n,* 989 F.2d 1266, 1273 (1st Cir.1993). Instead, that case involved a private bid for an injunction under RICO (18 U.S.C. § 1961 *et seq.)* and the Interstate Horseracing Act (15 U.S.C. § § 3001-07) ("IHA"). *Id.* at 1272-73. It does not stand for the proposition that § 1084 permits betting that is illegal as long as it is not criminal.

In *Sterling,* the defendant was an OTB office in Rhode Island that accepted bets on horse races from distant tracks and broadcasted the races. *Id.* at 1267. The office typically obtained the various consents required under the IHA, *i.e.,* from the host track, the host racing commission, and its own racing commission. *Id.* However, it would often neglect to secure the consent of the plaintiff, a live horse-racing track located within the statutory sixty-mile radius from the OTB office. *Id.* at 1268. The plaintiff sought an injunction against the OTB office under RICO, alleging that it was engaged in a pattern of racketeering activity by violating § 1084 through its noncompliance with the IHA. *Id.*

The *Sterling* court affirmed the district court's denial of the RICO injunction. *Id.* at 1273. It noted first that because the OTB office's business was legitimate under all applicable state laws, it fell under the safe-harbor provision in § 1084(b). *Id.* Furthermore, the court held that in enacting the IHA, Congress had only created a private right of action for damages on the part of certain parties; it did not intend for any Government enforcement of the IHA. *Id.* Consequently, the plaintiff could not use the IHA together with § 1084 to transform an otherwise legal OTB business into a criminal racketeering enterprise. *Id.*

Neither *Sterling* nor the legislative history behind § 1084 demonstrates that Congress intended for § 1084(b) to mean anything other than what it says. [FN3] Betting is illegal in New York, and thus the safe-harbor provision in § 1084(b) cannot not apply in Cohen's case as a matter of law. As a result, the district court was not in error when it instructed the jury to disregard that provision.

FN3. In support of his Congressional intent argument, Cohen offers two passages from the Congressional Reports, neither of which is persuasive. Together, the two passages evidence an intent to assist the states in enforcing gambling "offenses" and in suppressing "organized gambling activities" without preempting the states' own prosecutions of those offenses. *Compare* H.R. Rep. No. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N 2631, 2631, *with id.* at 2633. Those passages do not demonstrate an intent to exclude illegal yet non-criminal gambling activity from the statute's purview.

B. Transmission of a Bet, Per Se

Cohen appeals the district court's instructions to the jury regarding what constitutes a bet *per se.* Cohen argues that under WSE's account-wagering system, the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua. He argues that this fact was precluded by the district court's instructions. We find no error in those instructions.

Judge Griesa repeatedly charged the jury as follows:

> If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee or an internet mechanism located on the premises in the foreign country.

Jury instructions are not improper simply because they resemble the conduct alleged to have

occurred in a given case; nor were they improper in this case. It was the Government's burden in this case to prove that someone in New York signaled an offer to place a particular bet and that someone at WSE signaled an acceptance of that offer. The jury concluded that the Government had carried that burden.

Most of the cases that Cohen cites in support of the proposition that WSE did not transmit any bets involved problems pertaining either to proof of the acceptance of transmitted bets, *see United States v. Truesdale,* 152 F.3d 443 (5th Cir.1998), *McQuesten v. Steinmetz,* 73 N.H. 9, 58 A. 876 (1904), *Lescallett v. Commonwealth,* 89 Va. 878, 17 S.E. 546 (1893), or to proof of the locus of a betting business for taxation purposes, *see Saratoga Harness Racing, Inc. v. City of Saratoga Springs,* 55 A.D.2d 295, 390 N.Y.S.2d 240 (1976).

No such problems existed in this case. This case was never about taxation, and there can be no dispute regarding WSE's acceptance of customers' bet requests. For example, a March 18, 1998 conversation between Spencer Hanson, a WSE employee, and a New York-based undercover FBI agent occurred as follows:

> Agent: Can I place a bet right now?
> Hanson: You can place a bet right now.
> Agent: Alright, can you give me the line on the um Penn State/Georgia Tech game, it's the NIT [T]hird Round game tonight.
> Hanson: Its [sic] Georgia Tech minus 7 1/2 , total is 147.
> Agent: Georgia [T]ech minus 7 1/2 , umm I wanna take Georgia Tech. Can I take 'em for 50?
> Hanson: Sure.

WSE could only book the bets that its customers requested and authorized it to book. By making those requests and having them accepted, WSE's customers were placing bets. So long as the customers' accounts were in good standing, WSE accepted those bets as a matter of course.

Moreover, the issue is immaterial in light of the fact that betting is illegal in New York. Section 1084(a) prohibits the transmission of information assisting in the placing of bets as well as the transmission of bets themselves. This issue, therefore, pertains only to the applicability of § 1084(b)'s safe-harbor provision. As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here even if WSE had only ever transmitted betting information.

III Cohen's Mens Rea

Cohen appeals the district court's instruction to the jury regarding the requisite *mens rea* under § 1084. Section 1084 prohibits the "knowing" transmission of bets or information assisting in the placing of bets. *See* § 1084(a). The district court instructed the jurors that to convict, they needed only to find that Cohen "knew that the deeds described in the statute as being prohibited were being done," and that a misinterpretation of the law, like ignorance of the law, was no excuse.

Cohen argues that he lacked the requisite *mens rea* because (1) he did not "knowingly" transmit bets, and (2) he did not transmit information assisting in the placing of bets or wagers to or from a jurisdiction in which he "knew" betting was illegal. He contends that in giving its jury charge, the district court improperly instructed the jury to disregard that argument.

The district court was correct; it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute. *See Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998). Cohen's own interpretation regarding what constituted a bet was irrelevant to the issue of his *mens rea* under § 1084.

In any event, Cohen is culpable under § 1084(a) by admitting that he knowingly transmitted information assisting in the placing of bets. His beliefs regarding the legality of betting in New York are immaterial. The legality of betting in a relevant jurisdiction pertains only to § 1084(b)'s safe-harbor provision. As we have already discussed, that safe-harbor provision, as a matter of law, does not apply in this case.

IV Rule of Lenity

Cohen argues that the rule of lenity, a concept grounded in due process, requires a reversal of his convictions. According to Cohen, § 1084 is too unclear to provide fair warning of what conduct it prohibits. In particular, he contends that the statute does not provide fair warning with respect to (1) whether the phrase "bet or wager" includes account wagering, (2) whether "transmission" includes the receiving of information as well as the sending of it, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction in order to be considered "legal" in that jurisdiction. None of these contentions has any merit.

The rule of lenity applies where there exists a "grievous ambiguity" in a statute, *see Huddleston v. United States,* 415 U.S. 814, 831, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974), such that "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." *Reno v. Koray,* 515 U.S. 50, 65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (internal quotation marks and citation omitted). The rule exists to prevent courts from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier,* 520 U.S. 259, 266-67, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

We need not guess whether the provisions of § 1084 apply to Cohen's conduct because it is clear that they do. First, account-wagering is wagering nonetheless; a customer requests a particular bet with WSE by telephone or internet and WSE accepts that bet. WSE's requirement that its customers maintain fully-funded accounts does not obscure that fact.

Second, Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information. Cohen subsequently received such transmissions from customers, and, in turn, sent such transmissions back to those customers in various forms, including in the form of acceptances and confirmations. No matter what spin he puts on "transmission," his conduct violated the statute.

Third, it is clear to lawyer and layman alike that an act must be permitted by law in order for it to be legal. *See* Black's Law Dictionary 902 (7th ed. 1999); Webster's 3d New Int'l Dictionary 1290 (1993). It is also clear that betting is not permitted under New York law. *See* N.Y. Const. Art. I, § 9(1); N.Y. Gen. Oblig. L. § 5-401. Where a state's statute declares an act to be "unlawful," *see* N.Y. Gen. Oblig. L. § 5-401 ("all wagers ... shall be unlawful"), that act is not "legal," *see* § 1084(b). The safe-harbor provision is unambiguous, and is not applicable in Cohen's case.

V Aiding-and-Abetting Liability

Cohen contends that the district court constructively amended his indictment by instructing the jury on criminal aiding-and-abetting liability under 18 U.S.C. § 2(b) rather than under § 2(a) of that title. Cohen argues that as a result, the district court failed to instruct the jury that before convicting Cohen for aiding and abetting his subordinates' conduct, it must find that those subordinates were themselves guilty of crimes. Cohen also argues that he could not have been liable under § 2 for acts committed after his arrest. We find no error in either instance.

A constructive amendment can occur when jury instructions change an essential element of the charges in the indictment so as to "deprive a defendant of an opportunity to meet the prosecutor's case." *See United States v. Helmsley,* 941 F.2d 71, 90 (2d Cir.1991). (concluding that "the indictment and the jury charge ... comported with one another in all essential respects, and [the

defendant] had adequate notice of the conduct she was called upon to defend").

The district court indicated to the parties at the charging conference that it would only charge aiding-and-abetting liability under § 2(a). Section 2(a) requires proof that someone other than the defendant committed the underlying crime. *See United States v. Smith,* 198 F.3d 377, 383 (2d Cir.1999).

Instead, the district court charged the jury under § 2(b), which requires only that the defendant willfully cause another person to commit an act which would have been a crime had the defendant committed it himself. *See* 18 U.S.C. § 2(b); *United States v. Concepcion,* 983 F.2d 369, 383-84 (2d Cir.1992). Section 2(b), unlike § 2(a), does not require proof that someone else committed a crime.

Despite having charged § 2(b) rather than § 2(a), the district court did not amend Cohen's indictment. Cohen was charged in his indictment with violations of 18 U.S.C. § 2, *see* A15, and the district court gave the jury a proper instruction under that statute. Although there may have been some confusing colloquy between the district court and counsel prior to the jury charge, the charge was consistent with the indictment. There was no amendment.

Furthermore, Cohen could still have been liable for aiding and abetting the acts charged in Counts Seven and Eight of his indictment, even though those counts pertained to transmissions that occurred after his arrest. Cohen was a moving force behind WSE's entire operation, which continued to function after his arrest. Cohen retained his position as President of WSE while on bail after his arrest.

Although Cohen purportedly did not "deal with daily operations" at WSE after his arrest, he also made no effort to curtail those operations. In fact, he benefitted from them by receiving a salary, his travel expenses, and his legal fees from WSE. He clearly was still in a position to cause others, willfully, to commit acts that would have been crimes had he himself committed them. He could, therefore, have been found liable for aiding and abetting WSE's ongoing violation of § 1084.

VI Deposition of a Foreign Witness

Cohen argues that the district court should have granted his motion, pursuant to Fed.R.Crim.P. 15(a), to adjourn his trial for one week so that he could depose a witness in Antigua. The witness, an Antiguan government official, was unavailable for trial due to medical reasons. That testimony, however, was not material to Cohen's trial, and thus the district court did not abuse its discretion in denying the motion.

Under Rule 15(a), a trial court may, in its discretion, order the deposition of a witness for use at trial "[w]henever due to exceptional circumstances of the case it is in the interests of justice." Fed.R.Crim.P. 15(a). A movant must show that (1) the prospective witness is unavailable for trial, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice. *See United States v. Singleton,* 460 F.2d 1148, 1154 (2d Cir.1972).

Cohen states that the witness' testimony was material to two issues at his trial: (1) whether Cohen had a corrupt motive; and (2) whether Cohen believed that he was transmitting mere information assisting in the placing of bets rather than any bets themselves. Cohen states that the witness would have testified to the advice she gave him based upon her experience as an Antiguan official and upon her alleged conversations with U.S. Government officials.

As this Court has already discussed, neither of these two issues was relevant to the question of Cohen's guilt under § 1084. Cohen's purported motive was irrelevant to the issue of his conspiracy conviction, or to any other issue in his case. *See supra,* part I. His beliefs regarding the nature of WSE's transmissions were equally irrelevant in view of the fact that § 1084(b)'s safe

harbor was, as a matter of law, inapplicable to him. *See supra,* part II. Therefore, the district court was well within its discretion in denying the motion.

CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

Post Cohen Case

Does accepting wagers from U.S. residents violate U.S. law?

If accepting wagers from U.S. residents violates U.S. law, then can a U.S. resident or company do any of the following without violating U.S. law:

1. Act as an agent/affiliate to build the user base?
2. Run advertising for the online site?
3. Provide programming for the online site?
4. License trademarks to the online site for a % of the take?
5. Co-brand a site?

U.S. Involvement

What if a U.S. company has a foreign subsidiary operating an online site from jurisdictions where such activities are legal?

The above site is owned by BSkyB Group, PLC, which is owned by News Corporation, which is now a U.S. company.

Can this be done without violating U.S. law, and what is the key factor in this determination?

The Department of Justice Position

Testimony of

John G. Malcolm

Deputy Assistant Attorney General

Criminal Division

United States Department of Justice

Before the Committee on Banking, Housing, and Urban Affairs
United States Senates

Tuesday, March 18, 2003

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify before you today. The issue before this Committee is one of singular importance, and I commend the Committee for holding a hearing on this issue. I would also like to commend Senator Kyl, as well as Congressmen Goodlatte and Leach, for their tireless efforts and longstanding commitment to provide law enforcement with additional tools to combat Internet gambling. Today I am pleased to offer the views of the Department of Justice about Internet gambling, including the potential for gambling by minors and compulsive gambling, the potential for fraud and money laundering, the potential for the organized crime, the proliferation of advertising, and recent state actions. The Department of Justice generally supports the efforts of the drafters of these bills to enable law enforcement to cut off the transfer of funds to and from illegal Internet gambling businesses.

As you all know, the number of Internet gambling sites has increased substantially in recent years. While there were approximately 700 Internet

gambling sites in 1999, it is estimated that by 2003, there will be approximately 1,800 such sites generating around $4.2 billion. In addition to on-line casino-style gambling sites, there are also numerous off-shore sports books operating telephone betting services. These developments are of great concern to the United States Department of Justice, particularly because many of these operations are currently accepting bets from United States citizens, when we believe that it is illegal to do so.

The Internet and other emerging technologies, such as interactive television, have made possible types of gambling that were not feasible a few years ago. For example, a United States citizen can now, from his home at any hour of the day or night, participate in an interactive Internet poker game operated by a computer located in the Caribbean. Indeed, a tech-savvy gambler can route his bets through computers located in other countries throughout the world, thereby obscuring the fact that he is placing his bet from the United States or from some other country where it is illegal to do so.

Gambling by Minors

On-line gambling also makes it far more difficult to prevent minors from gambling. Gambling websites cannot look at their customers to assess their age and request photo identification as is possible in traditional physical casinos and Off-Track-Betting parlors. Currently, Internet gambling businesses have no reliable way of confirming that the gamblers are not minors who have gained access to a credit card and are gambling on their web site. Although some companies are developing software to try to detect whether a player is old enough to gamble or whether that player is from a legal jurisdiction, such software has not been perfected and would, of course, be subject to the same types of flaws and vulnerabilities that could be exploited by hackers.

Compulsive Gambling

Unlike on-site gambling, on-line gambling is readily available to all at all hours and it permits the user to

gamble, in many cases, anonymously. This presents a greater danger for compulsive gambling and can cause severe financial consequences for an unsuccessful player. As was recently pointed out by the American Psychiatric Society: "Internet gambling, unlike many other forms of gambling activity, is a solitary activity, which makes it even more dangerous; people can gamble uninterrupted and undetected for unlimited periods of time." Indeed, the problems associated with pathological and problem gamblers, a frighteningly-large percentage of which are young people, are well-established and can be measured in the ruined lives of both the gamblers themselves and their families.

Potential for Fraud

Although there are certainly legitimate companies who are either operating or who want to operate on-line casinos in an honest manner, the potential for fraud connected with casinos and bookmaking operations in the virtual world is far greater than in the physical realm. Start-up costs are relatively low and cheap servers and unsophisticated software are readily-available. On-line casinos and bookmaking establishments operate in many countries where effective regulation and law enforcement is minimal or non-existent. Like scam telemarketing operations, on-line gambling establishments appear and disappear with regularity, collecting from losers and not paying winners, and with little fear of being apprehended and prosecuted.

Through slight alterations of the software, unscrupulous gambling operations can manipulate the odds in their favor, make unauthorized credit card charges to the accounts of unsuspecting gamblers, or alter their own accounts to skim money. There is also a danger that hackers can manipulate the online games in their favor or can steal credit card or other information about other gamblers using the site.

Potential for Organized Crime

Additionally, the Department of Justice has a concern about the potential for the involvement of organized

crime in Internet gambling. Traditionally, gambling has been one of the staple activities in which organized crime has been involved. Indeed, many of the recent indictments brought against members of organized crime groups have included gambling charges. We have now seen evidence that organized crime is moving into Internet gambling.

Internet Gambling Violates Federal law

Most of these gambling businesses are operating offshore in foreign jurisdictions. If these businesses are accepting bets or wagers from customers located in the United States, then these businesses are violating federal laws, including Sections 1084, 1952, and 1955 of Title 18, United States Code. While the United States can bring indictments against these companies or the individuals operating these companies, the federal government may not be able to bring such individuals or companies to trial in the United States.

Money Laundering and Internet Gambling

Another major concern that the Department of Justice has about on-line gambling is that Internet gambling businesses provide criminals with an easy and excellent vehicle for money laundering, due in large part to the volume, speed, and international reach of Internet transaction and the offshore locations of most Internet gambling sites, as well as the fact that the industry itself is already cash-intensive.

It is a fact that money launderers have to go to financial institutions either to conceal their illegal funds or recycle those funds back into the economy for their use. Because criminals are aware that banks have been subjected to greater scrutiny and regulation, not surprisingly, they have turned to other non-bank financial institutions, such as casinos, to launder their money. On-line casinos are a particularly inviting target because, in addition to using the gambling that casinos offer as a way to hide or transfer money, casinos offer a broad array of financial services to their customers, such as providing credit accounts, fund transmittal services, check cashing services, and currency exchange services.

Individuals wanting to launder ill-gotten gains through an on-line casino can do so in a variety of ways. For example, a customer could establish an account with a casino using illegally-derived proceeds, conduct a minimal amount of betting or engage in offsetting bets

with an overseas confederate, and then request repayment from the casino, thereby providing a new "source" of the funds. If a gambler wants to transfer money to an inside source in the casino, who may be located in another country, he can just play until he loses the requisite amount. Similarly, if an insider wants to transfer money to the gambler, perhaps as payment for some illicit activity, he can rig the game so the bettor wins.

The anonymous nature of the Internet and the use of encryption makes it difficult to trace the transactions. The gambling business may also not maintain the transaction records, in which case tracing may be impossible. While regulators in the United States can visit physical casinos, observe their operations, and examine their books and records to ensure compliance with regulations, this is far more difficult, if not impossible, with virtual casinos.

Advertising for Internet Gambling

In addition to on-line gambling itself, the United States government is also concerned about the substance and scope of advertising for on-line gambling. Such advertisements are omnipresent on the Internet, in print ads, and over the radio. The United States Federal Trade Commission recently looked at this issue and found, not surprisingly, that advertisements for gambling over the Internet appear even on websites oriented towards children. The sheer volume of advertisements for offshore sports books and online casinos is troubling because it misleads the public in the United States to believe that such gambling is legal, when in fact, it is not. Indeed, as I am sure you all know, many of these advertisements affirmatively foster that erroneous belief.

Some states which outlaw the promotion of gambling have taken action to curtail these advertisements. For instance, in December 2001, the Colorado Attorney General and the Colorado Limited Gaming Control Commission sent notices to certain radio operators asking them to stop broadcasting advertisements for Internet casinos and sports bookmaking operations.

Similarly, in February 2002, the California Horse Racing Board and the California Broadcasters Association sent notices to every radio and television station in California to stop running advertisements for illegal off-shore wagering services.

Other Recent State Actions

In addition to the federal government, various state governments have also taken actions against on-line gambling. For instance, in New York State, where unauthorized gambling is illegal, the New York State Attorney General reached an agreement with Citibank to block credit card payments of on-line gambling transactions by its customers. The same Attorney General recently reached an agreement with PayPal, which agreed to stop processing payments from New York State customers to on-line gambling merchants.

Some companies have taken steps themselves against on-line gambling businesses. For instance, just last month, PayPal was acquired by E-Bay, the on-line auction service, which announced that it will phase out PayPal's on-line gambling business by the end of 2002. Both Discover and American Express have company policies that restrict the use of their credit cards for Internet gambling and prevent Internet gambling sites from being issued credit card merchant accounts.

Conclusion

On behalf of the Department of Justice, I want to thank you again for inviting me to testify today. We thank you for your support over the years and reaffirm our commitment to work with Congress to address the significant issue of Internet gambling. While we have some technical and other concerns about these bills, we support the sponsors' efforts to address gambling on the Internet. I will be happy to answer any questions that you might have.

Enforcement

The problem is as quoted from above "*Most of these gambling businesses are operating offshore in foreign jurisdictions. If these businesses are accepting bets or wagers from customers located in the United States, then these businesses are violating federal laws, including Sections 1084, 1952, and 1955 of Title 18, United States Code. While the United States can bring indictments against these companies or the individuals operating these companies, the federal government may not be able to bring such individuals or companies to trial in the United States.*"

Without the ability to enforce against the online sites, the DOJ has in part, turned its attention to those providing assistance to online sites. The following letter to the National Association of Broadcasters is an example of such efforts:

National Association of Broadcasters

U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

June 11, 2003

National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Re: Advertising for Internet Gambling and Offshore Sportsbook Operations

Dear Sir or Madam:

As you are no doubt aware, advertisements for Internet gambling and offshore sportsbook operations are ubiquitous on the Internet, in print ads, and over the radio and television. The sheer volume of advertisements for offshore sports books and online casinos is troubling because it misleads the public in the United States into believing that such gambling is legal, when in fact, it is not. Because of the possibility that some of your organization's members may be accepting money to place such advertisements, the Department of Justice, as a public service, would like you to be aware that the entities and individuals placing these advertisements may be violating various state and federal laws, and that, entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities.

With very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore. United States Attorneys' Offices in several districts have successfully prosecuted offshore sportsbookmaking and Internet gambling operations, and the Department of Justice will continue to pursue such cases.

Notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony. Additionally, pursuant to Title 18, United States Code, Section 2, any person or entity who aids or abets in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes. The Department of Justice is responsible for enforcing these statutes, and we reserve the right to prosecute violators of the law.

Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities. We'd appreciate it if you would forward this public service message to all of your member organizations which may be running such advertisements, so that they may consult with their counsel or take whatever other actions they deem appropriate.

Very truly yours,

John G. Malcolm

JOHN G. MALCOLM
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice

cc: Ms. Lori Sharpe-Day, Director, OIPL

Current Enforcement Regarding Media Outlets

[redacted] [redacted]

U.S. Department of Justice

United States Attorney
Eastern District of Missouri

CATHERINE L. HANAWAY
United States Attorney

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, 20th Floor
St. Louis, Missouri 63102

Office (314) 539-2200
Fax (314) 539-3887

SUBJECT TO SETTLEMENT NEGOTIATIONS

July 19, 2006

[redacted]

Re: Gambling Proceeds

Dear Mr. Goldstein:

This office previously notified you that it possesses information that, with respect to illegal online and telephonic gambling in the United States, [redacted] has: (a) been employed by or associated with enterprises engaged in, or the activities of which affect interstate or foreign commerce, and has conducted or participated, directly or indirectly, in the conduct of these enterprises' affairs through a pattern of racketeering activity; and (b) repeatedly violated Title 18, United States Code, Sections 2, 1084, 1952, and 1960, by aiding, abetting, inducing or procuring violations of federal law involving enterprises conducting such activities. Furthermore, our information indicates that [redacted] has collected $[redacted] for its services in facilitating this illegal commercial gambling.

The Government is preparing to take all appropriate steps to collect the proceeds received by [redacted] for promoting the illegal activities. However, in an effort to reach an amicable resolution prior to commencement of any legal action, we are prepared to discuss this matter with you. Please contact AUSA Michael K. Fagan (314) 539-6890 with my office by **September [redacted], 2006** to discuss this matter.

Thank you for your attention. We look forward to hearing from you.

Very truly yours,

Catherine L. Hanaway

CATHERINE L. HANAWAY
United States Attorney

encl.

Examples of Current Enforcement Against Foreign Nationals

The following links are to news stories regarding enforcement actions against foreign nationals and foreign companies:

Peter Dicks:
http://www.ft.com/cms/s/d27d424a-c93f-11dc-9807-000077b07658.html

http://www.timesonline.co.uk/article/0,,2095-2350224,00.html

David Carruthers:
http://www.forbes.com/business/feeds/afx/2006/07/17/afx2883564.html

Anurag Dikshit
http://www.usdoj.gov/usao/nys/pressreleases/December08/dikshitanuragpleapr.pdf

United States Attorney
Southern District of New York

FOR IMMEDIATE RELEASE
January 16, 2007

CONTACT: **U.S. ATTORNEY'S OFFICE**
YUSILL SCRIBNER,
REBEKAH CARMICHAEL
PUBLIC INFORMATION OFFICE
(212) 637-2600

FBI
NEIL DONOVAN, JAMES MARGOLIN
PUBLIC INFORMATION OFFICE
(212) 384-2715, 2720

U.S. CHARGES TWO FOUNDERS OF PAYMENT SERVICES COMPANY WITH LAUNDERING BILLIONS OF DOLLARS OF INTERNET GAMBLING PROCEEDS

MICHAEL J. GARCIA, the United States Attorney for the Southern District of New York, and MARK J. MERSHON, the Assistant Director-in-Charge of the New York Office of the Federal Bureau of Investigation ("FBI"), announced today that STEPHEN ERIC LAWRENCE and JOHN DAVID LEFEBVRE were arrested yesterday in connection with the creation and operation of an internet payment services company that facilitated the transfer of billions of dollars of illegal gambling proceeds from United States citizens to the owners of various internet gambling companies located overseas. According to the two criminal Complaints unsealed yesterday:

Neteller PLC ("Neteller"), formerly known as Neteller, Inc., is an internet payment services company that was founded by LAWRENCE and LEFEBVRE in 1999. Neteller is based in the Isle of Man and is publicly traded in the United Kingdom. Neteller began processing internet gambling transactions in approximately July 2000. Internet payment services companies, like Neteller, allow gambling companies to transfer money collected from United States customers to bank accounts outside the United States. According to Neteller's 2005 annual report, LAWRENCE and LEFEBVRE, through Neteller, provided payment services to more than 80% of worldwide gaming merchants.

Since founding Neteller, LAWRENCE and LEFEBVRE have held numerous senior management positions at the company. For instance, LAWRENCE served as Chief Executive Officer of Neteller until December 2002; as executive director of Neteller from 2001 to

August 31, 2003; and as Chairman of the Board of Directors of Neteller until May 11, 2006. LAWRENCE left the Board of Directors on October 13, 2006. LEFEBVRE served as President of Neteller from 2000 to 2002; and was a member of the Board of Directors until approximately December 2005.

Furthermore, LAWRENCE and LEFEBVRE have both held significant ownership interests in Neteller. As of December 31, 2004, LAWRENCE was the largest shareholder of Neteller, owning 21.94% of the outstanding shares of Neteller PLC. As of the same date, LEFEBVRE was the second-largest shareholder of Neteller PLC, owning 13.44% of the outstanding shares of the company.

At the time that the defendants took Neteller public, the company acknowledged in its offering documents that United States law prohibited persons from promoting certain forms of gambling, including internet gambling, and transmitting funds that are known to have been derived from criminal activity or are intended to promote criminal activity. The company's directors, including LAWRENCE and LEFEBVRE, also conceded that they were risking prosecution by the government of the United States under existing or future federal laws.

In 2005, Neteller processed over $7.3 billion in financial transactions. According to reports issued by Neteller, 95% of its revenue was derived from money transfers involving internet gambling companies. On September 11, 2006, the President and Chief Executive Officer of Neteller described the "online gaming market" as Neteller's "main market," and stated that, in the first half of 2006, Neteller processed $5.1 billion in financial transactions. As charged in the complaint, approximately 85% of Neteller's revenue during that period derived from individuals in North America, and 75% of its North American revenue was generated in the United States. Both the operation of an internet gambling operation and the transferring of the proceeds from these businesses overseas are illegal under United States law.

LAWRENCE and LEFEBVRE are both charged with conspiring to transfer funds with the intent to promote illegal gambling. If convicted, both defendants face a maximum sentence of 20 years' imprisonment.

LAWRENCE, 46, was arrested yesterday in the United States Virgin Islands and will be presented in federal court in St. Thomas by tomorrow. LEFEBVRE, 55, was arrested yesterday in Malibu, California and will be presented in Los Angeles federal court later today. LAWRENCE currently resides in Paradise Island, Bahamas. Both are Canadian citizens.

This prosecution is part of the United States Department of Justice's effort to combat unlawful internet gambling through, among other things, the implementation of the federal anti-money laundering statutes. Other recent examples of the Justice Department's efforts in this regard include the indictments of two offshore internet gambling companies - Worldwide Telesports, Inc., (indictment unsealed on May 17, 2006 in the United States District Court for the District of Columbia) and BetonSports, PLC, a publicly traded holding company that owns a number of Internet sportsbooks and casinos, and its founder, Gary Stephen Kaplan (indictment unsealed July 17, 2006 in the United States District Court for the Eastern District of Missouri). Additionally, in July 2003, one of Neteller's competitors, PayPal, and its parent eBay, entered into a civil settlement agreement with the United States Attorney's Office for the Eastern District of Missouri to settle allegations it aided in illegal offshore and on-line gambling activities. As part of the agreement, PayPal agreed to forfeit $10 million, representing proceeds derived by PayPal from the processing of illegal gambling transactions.

Mr. GARCIA praised the investigative efforts of the FBI and thanked the United States Custom & Border Patrol, United States Coast Guard, and Virgin Islands Police Department for their assistance in the investigation. Mr. GARCIA added that the investigation is continuing.

Mr. GARCIA stated, "Internet gambling has become a multibillion-dollar industry that derives a major portion of its revenues from United States citizens. STEPHEN ERIC LAWRENCE and JOHN DAVID LEFEBVRE knew when they took their company public that its activities, as well as those of the internet gambling companies it assisted, were illegal in the United States. Blatant violations of U.S. law are not a mere 'risk' to be disclosed to prospective investors. Criminal prosecutions related to online gambling will be pursued even in cases where assets and defendants are positioned outside of the United States."

FBI Assistant Director MERSHON stated: "Internet gambling is a multibillion-dollar industry. A significant portion of that is the illegal handling of Americans' bets with offshore gaming companies, which amounts to a colossal criminal enterprise masquerading as legitimate business. There is ample indication these defendants knew the American market for their services was illegal. The FBI is adamant about shutting off the flow of illegal cash."

Assistant United States Attorneys TIMOTHY J. TREANOR, CHRISTOPHER P. CONNIFF, and CHRISTINE MEDING are in charge of the prosecutions.

The charges contained in the Complaints are merely accusations, and the defendants are presumed innocent unless and until proven guilty.

07-012 ###

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-v- :

ANURAG DIKSHIT, :

Defendant. :
- - - - - - - - - - - - - - - - - x

INFORMATION
08 Cr.

COUNT ONE

The United States Attorney charges:

BACKGROUND

1. From in or about 1997 through in or about October 2006, PartyGaming PLC, a Gibraltar corporation, and its predecessor and affiliated corporate entities (collectively "PartyGaming"), operated an internet gambling business that offered casino and poker games, among other games of chance, to customers who wished to wager online. At all times relevant to this Information, a substantial majority of PartyGaming's online gambling customers, representing approximately 85 percent of PartyGaming's revenue in 2005, were located in the United States, including in the Southern District of New York

2. Between in or about 1998 and October 2006, ANURAG DIKSHIT, the defendant, developed a proprietary software platform for PartyGaming and directed PartyGaming's computer operations.

3. Beginning in or about 1999, and continuing up to and including October 2006, DIKSHIT was a principal shareholder of PartyGaming. At various times relevant to this Information, DIKSHIT served as a PartyGaming corporate officer and director.

THE OFFENSE

4. From in or about 1998, up through and including in or about October 2006, in the Southern District of New York and elsewhere, ANURAG DIKSHIT, the defendant, being engaged in the business of betting and wagering, unlawfully, willfully and knowingly used a wire communication facility for the transmission in interstate and foreign commerce of bets and wagers on any sporting event and contest, and a wire communication which entitled the recipient to receive money and credit as a result of bets and wagers, and for information assisting in the placing of bets and wagers.

(Title 18 United States Code, Sections 1084 and 2.)

FORFEITURE ALLEGATION

5. As the result of committing the gambling offense alleged in Count One of this Information, ANURAG DIKSHIT shall forfeit to the United States $300 million dollars in United States currency pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982 and 28 U.S.C. § 2461, constituting property, real and personal, involved in the gambling offense, and property, real and personal, that constitutes or is derived from proceeds traceable to the violation of 18 U.S.C. § 1084.

Substitute Asset Provision

a. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

Convicted Former Online Poker Billionaire Avoids Jail

Dec. 16 2010 - 5:53 pm

Anurag Dikshit, the former online poker billionaire, was sentenced on Thursday to one year of probation and no jail time in a hearing that highlighted the extreme confusion over how U.S. law applies to online poker.

Dikshit, 39, had traveled from his home in Gibraltar with a one-way ticket to New York to attend Thursday's sentencing hearing, where he faced a maximum of two years in prison. He pleaded guilty in 2008 to one count of violating the federal wire act and agreed to forfeit $300 million.

"I am persuaded that no jail time is appropriate here," said U.S. District Judge Jed Rakoff.

As part of his original plea deal, Dikshit agreed to cooperate in an ongoing investigation with federal prosecutors, who did not seek any jail time. "I came to believe there was a high probability it was in violation of U.S. laws," Dikshit said of his work at PartyGaming, the online poker company that he helped build, at the court hearing when he pleaded guilty in 2008.

Indeed, Dikshit, who is married with two children, had reached out to federal prosecutors in the U.S. to initiate the negotiations that resulted in his 2008 guilty plea. Dikshit's plea deal was originally seen as an important victory for the Department of Justice, which has long taken the position that facilitating for-money online poker in America violates U.S. law, making no distinction between sports betting—clearly illegal—and poker playing.

A few months after Dikshit pleaded guilty, his former company, PartyGaming, a Gibraltar company that was once the world's biggest online gaming company, struck a non-prosecution agreement with federal prosecutors in Manhattan, admitting that its U.S. operations for years had violated U.S. law. To some it seemed like the Justice Department had drawn a line in the sand against online poker and set a two-year time frame to go after industry players.

At Thursday's hearing Judge Rakoff challenged a government prosecutor wondering why there have been no other prosecutions, specifically mentioning Dikshit's fellow PartyGaming cofounders, Americans Ruth Parasol DeLeon and her husband Russell DeLeon. "Nobody else has been indicted," said Judge Rakoff. "It has been two years since this defendant began cooperating, what's going on?"

Assistant U.S. Attorney Arlo Devlin-Brown said that the investigation that involved Dikshit remains ongoing, pointing to sealed papers the government filed with the court. "There are challenges in this prosecution," said Devlin-Brown, adding that Dikshit had asked to settle the case at its very early stages. "It has been two years and there are reasons."

Indeed, even Mark Pomerantz, Dikshit's lawyer, said during the hearing that he and his colleagues had discussed the confusing circumstances surrounding the case "hundreds of times." In arguing for no jail time, Pomerantz highlighted Dikshit's $300 million payment and said Dikshit, who is a citizen of India with no ties to the U.S., had originally been told by some lawyers that it was unlikely he would be charged, and even if he was charged the chances of extradition were slim. "The acceptance of responsibility is extraordinary," said Pomerantz. "He wanted to square his accounts with the U.S."

It certainly would have been strange for Dikshit to wind up in jail even as other online poker entrepreneurs were not being prosecuted. Some of the most prominent are not even offshore, like the men widely believed to be behind Full Tilt Poker, the second-biggest company servicing U.S. play, poker champions Christopher Ferguson and Howard Lederer.

Dikshit's fellow PartyGaming cofounders, Ruth Parasol DeLeon and Russell DeLeon, who live in Europe, neither have settled with the feds nor have they been charged. Dikshit's plea bargain was seen as a betrayal by Ruth Parasol DeLeon in particular and the online poker community in general. Doyle Brunson, known as the Godfather of Poker and himself an online poker entrepreneur, blasted Dikshit two years ago, saying: "It looks like he would feel a sense of obligation to online poker, the industry that made him a rich man. Instead, he folded up like an accordion and pled guilty to breaking some kind of mystery law and is paying a 300 million dollar fine and possible 2-year jail term."

PokerStars, the biggest online poker company, has for years insisted that legal opinions it has received from several U.S. law firms state that the Isle of Man company is not breaking any U.S. law, including the wire act of 1961 that Dikshit pleaded guilty to violating. "It's PokerStars' position that both the plain language and the legislative intent of the Wire Act strictly limit its application to sports wagering," PokerStars has previously said. Federal prosecutors have not appeared eager to actually challenge this reasoning in court.

Instead, federal prosecutors and lawmakers have focused on cutting off online poker companies from the financial system by going after the outfits that process their financial transactions. A 2006 law that went into effect earlier this year was designed for this exact purpose by Congress. The law persuaded publicly-traded PartyGaming to exit the U.S. market, leaving its riches for PokerStars and Full Tilt Poker and causing its once high-flying stock to plummet.

FORBES estimated earlier this year that PokerStars' global annual revenue had hit $1.4 billion and Full Tilt's annual revenue was some $500 million. FORBES also estimated that 2.5 million Americans play poker online and bet $30 billion annually. H2 Gambling Capital estimated the U.S. generated $1.4 billion of online poker revenue for companies with U.S. services.

Recent efforts by Senate Majority Leader Harry Reid to ram online poker regulation through Congress by attaching it to legislation extending the Bush tax cuts appear to have failed, much to the disappointment of casino companies in Reid's home state of Nevada.

But whether online poker regulation ever comes to the U.S. is no longer a matter of concern to Dikshit, who refused to answer questions about his sentence. He has nothing to do anymore with PartyGaming and sold his remaining shares in PartyGaming over the last two years for some $450 million. These days Dikshit concentrates mostly on his charitable foundation, the Kusuma Trust, to which he has contributed some $75 million, according to its financial statements. With Thursday's sentencing, however, Dikshit's role in the online poker game may not have come to a close. One of the reasons Judge Rakoff insisted on probation was to ensure Dikshit's continued cooperation with the government, including in any potential future trial.

The 2011 DOJ Opinion

On December 23, 2011, the Department of Justice publicly released an opinion it finished on September 20, 2011. The release of the opinion was a bit of a surprise to the industry.

From the inception of the discussion of online gaming until the 2011 opinion was issued, the DOJ was consistent in asserting that the Federal Wire Act applied to both sporting events and, separately, contests. The 2011 opinion changed the official interpretation of the Federal Wire Act by the DOJ.

The following is a copy of the DOJ opinion:

WHETHER PROPOSALS BY ILLINOIS AND NEW YORK TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT

Interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.

Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them.

September 20, 2011

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

You have asked for our opinion regarding the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (July 12, 2010) ("Crim. Mem."); Memorandum for Jonathan Goldman Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (Oct. 8, 2010) ("Crim. Supp. Mem."). You have explained that, in the Criminal Division's view, the Wire Act, 18 U.S.C. § 1084 (2006), may prohibit States from conducting in-state lottery transactions via the Internet if the transmissions over the Internet during the transaction cross State lines, and may also limit States' abilities to transmit lottery data to out-of-state transaction processors. You further observe, however, that so interpreted, the Wire Act may conflict with the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367 (2006), because UIGEA appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state. In light of this apparent conflict, you have asked whether the Wire Act and UIGEA prohibit a state-run lottery from using the Internet to sell tickets to in-state adults where the transmission using the Internet crosses state lines, and whether these statutes prohibit a state lottery from transmitting lottery data associated with in-state ticket sales to an out-of-state transaction processor either during or after the purchasing process.

Having considered the Criminal Division's views, as well as letters from New York and Illinois to the Criminal Division that were attached to your opinion request,[1] we conclude that interstate transmissions of wire communications that do not relate to a "sporting event or contest," 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act. Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests,

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[1] *See* Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009) ("N.Y. Letter"); Letter for Eric H. Holder, Jr., Attorney General of the United States, from Pat Quinn, Governor, State of Illinois (Dec. 11, 2009) ("Ill. Letter"); Letter for Bruce Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, from John W. McCaffrey, General Counsel, Illinois Department of Revenue (Mar. 10, 2010); Department of Revenue and Illinois Lottery, State of Illinois Internet Lottery Pilot Program (Mar. 10, 2010) ("Ill. White Paper").

the Wire Act does not, in our view, prohibit them. Given this conclusion, we have not found it necessary to address the Wire Act's interaction with UIGEA, or to analyze UIGEA in any other respect.

I.

In December 2009, officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois sought the Criminal Division's views regarding their plans to use the Internet and out-of-state transaction processors to sell lottery tickets to adults within their states. *See* Crim. Mem. at 1; Ill. Letter; N.Y. Letter. According to its letter to the Criminal Division, New York is finalizing construction of a new computerized system that will control the sale of lottery tickets to in-state customers. Most of the tickets will be printed at retail locations and delivered to customers over the counter, but some will be "virtual tickets electronically delivered over the Internet to computers or mobile phones located inside the State of New York." N.Y. Letter at 1. New York also notes that all transaction data in the new system will be routed from the customer's location in New York to the lottery's data centers in New York and Texas through networks controlled in Maryland and Nevada. *Id.* Illinois, for its part, plans to implement a pilot program to sell lottery tickets to adults over the Internet, with sales restricted by geolocation technology to "transactions initiated and received or otherwise made exclusively within the State of Illinois." Ill. Letter at 2 (citation and internal quotation marks omitted). Illinois characterizes its program as "an intrastate lottery, despite the fact that packets of data may intermediately be routed across state lines over the Internet." Ill. White Paper at 12 (italics omitted). Both States argue in their submissions to the Criminal Division that the Wire Act is inapplicable because it does not cover communications related to non-sports wagering, and that their proposed lotteries are lawful under UIGEA. *Id.* at 11-12; N.Y. Letter at 3.

In the Criminal Division's view, both the New York and Illinois Internet lottery proposals may violate the Wire Act. Crim. Mem. at 3. The Criminal Division notes that "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." *Id.* at 3; *see also* Crim. Supp. Mem. at 1-2. The Division also explains that "the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law's interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process." Crim. Mem. at 3; *see also* Crim. Supp. Mem. at 2. Taken together, these interpretations of the Wire Act "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state. Crim. Supp. Mem. at 2.

The Criminal Division further notes, however, that reading the Wire Act in this manner creates tension with UIGEA, which appears to permit out-of-state routing of data associated with in-state lottery transactions. Crim. Mem. at 4-5. UIGEA prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter's participation in "unlawful Internet gambling." 31 U.S.C. § 5363; *see* Crim. Mem. at 3. Under UIGEA, "unlawful Internet gambling" means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet" in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A). Critically, however, UIGEA specifies that "unlawful Internet

gambling" does not include bets "initiated and received or otherwise made exclusively within a single State," *id.* § 5362(10)(B), and expressly provides that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made," *id.* § 5362(10)(E).

The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful. On the one hand, the Criminal Division believes that the New York and Illinois lottery plans violate the Wire Act because they will involve Internet transmissions that cross state lines or the transmission of lottery data to out-of-state transaction processors. Crim. Mem. at 4; Crim. Supp. Mem. at 2. On the other hand, the Division acknowledges that state-run intrastate lotteries are lawful and that UIGEA specifically provides that the kind of "intermediate routing" of lottery transaction data contemplated by New York and Illinois cannot in itself render a lottery transaction interstate. Crim. Supp. Mem. at 2; Crim. Mem. at 4-5. The Criminal Division further notes that the conclusion that the Wire Act prohibits state lotteries from making in-state sales over the Internet creates "a potential oddity of circumstances" in which "the use of interstate commerce," rather than simply supplying a jurisdictional hook for conduct that is already wrongful, would transform otherwise lawful activity—state-run in-state lottery transactions—into wrongful conduct under the Wire Act. Crim. Supp. Mem. at 2.[2]

In light of this tension, the Criminal Division asked this Office to provide an opinion addressing whether the Wire Act and UIGEA prohibit state-run lotteries from using the Internet to sell tickets to in-state adults (a) where the transmission over the Internet crosses state lines, or (b) where the lottery transmits lottery data across state lines to an out-of-state transaction processor. Crim. Mem. at 5; Crim. Supp. Mem. at 1.

II.

The Criminal Division's conclusion that the New York and Illinois lottery proposals may be unlawful rests on the premise that the Wire Act prohibits interstate wire transmissions of gambling-related communications that do not involve "any sporting event or contest." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 2. As noted above, both Illinois and New York dispute this premise, contending that the Wire Act prohibits only transmissions concerning sports-related wagering. *See* Ill. White Paper at 11-12; N.Y. Letter at 3; *see also In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."), *aff'd*, 313 F.3d 257 (5th Cir. 2002). The sparse case law on this issue is divided. *Compare, e.g., Mastercard*, 313 F.3d at 262-63 (holding that the Wire Act does not extend to non-sports wagering), *with United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007) (taking the opposite view), *and* Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3-12, at 4-6, *United States v. Kaplan*, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2008) (same).[3] We conclude that the Criminal

[2] State-run lotteries are exempt from many federal anti-gambling prohibitions. *See, e.g.*, 18 U.S.C. §§ 1307, 1953(b)(4) (2006).

[3] A New York court also found that subsection 1084(a) applied to gambling in the form of "virtual slots, blackjack, or roulette," but did so without analyzing the meaning of the "sporting event or contest" qualification. *See New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847, 851-52 (N.Y. Sup. Ct. 1999).

Division's premise is incorrect and that the Wire Act prohibits only the transmission of communications related to bets or wagers on sporting events or contests.

> The relevant portion of the Wire Act, subsection 1084(a), provides:
>
> 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 wagers or information assisting in the placing of bets or wagers on any sporting event or contest, 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.

18 U.S.C. § 1084(a) (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491 (1961)).[4]

This provision contains two broad clauses. The first bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." *Id.* The second bars any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id.*[5]

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[4] The Wire Act defines "wire communication facility" as "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." 18 U.S.C. § 1081 (2006).

[5] The Criminal Division reads this second clause of subsection 1084(a) as if it were two separate clauses: the first prohibiting the use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," and the second prohibiting the use of a wire communication facility "for information assisting in the placing of bets or wagers." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 1 n.1. We do not find this reading convincing. Under that reading, the latter clause would prohibit the "use[] [of] a wire communication facility . . . for information assisting in the placing of bets or wagers," but it is unclear what, if anything, "us[ing]" a wire communication facility "for information" would mean. This difficulty could be remedied by reading the phrase "the transmission of" into the statute. However, doing so would both add words to the text and make the last clause in subsection 1084(a)—prohibiting use of a wire facility "for [the transmission of] information assisting in the placing of bets or wagers"—overlap with the first part of subsection 1084(a), which prohibits using wire communications for "the transmission . . . of . . . information assisting in the placing of bets or wagers on any sporting event or contest." This redundancy counsels against the Criminal Division's reading. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (invoking "rule against superfluities"). We believe the second half of subsection 1084(a) is better read as a single prohibition barring "the transmission of a wire communication which entitles the recipient *to receive money or credit* [*either*] as a result of bets or wagers[] *or* for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a) (emphasis added). This reading avoids the illogic and redundancy of the first reading. It is also supported by the Wire Act's legislative history, which characterizes the second half of subsection 1084(a) as a provision that would prohibit "the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering," S. Rep. No. 87-588, at 2 (1961)—*not* as a set of two provisions that both would prohibit the transmission of wire communications entitling the recipients to receive money or credit as a result of bets or wagers *and* broadly bar the transmission of information assisting in the placing of bets or wagers. *See* H.R. Rep. No. 87-967, at 2 (1961) (subsection (a) "also prohibits the transmission of a wire communication which entitled the recipient to receive

Our question is whether the term "on any sporting event or contest" modifies each instance of "bets or wagers" in subsection 1084(a) or only the instance it directly follows. The second part of the first clause clearly prohibits a person who is engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit "information assisting in the placing of bets or wagers on any sporting event or contest" in interstate or foreign commerce. *Id.* § 1084(a). It is less clear that the "sporting event or contest" limitation also applies to the first part of the first clause, prohibiting the use of a wire communication facility to transmit "bets or wagers" in interstate or foreign commerce, or to the second clause, prohibiting 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." *Id.* For the reasons set forth below, we conclude that both provisions are limited to bets or wagers on or wagering communications related to sporting events or contests. We begin by discussing the first part of the first clause, and then turn to the second clause.

A.

In our view, it is more natural to treat the phrase "on any sporting event or contest" in subsection 1084(a)'s first clause as modifying both "the transmission in interstate or foreign commerce of bets or wagers" and "information assisting in the placing of bets or wagers," rather than as modifying the latter phrase alone. The text itself can be read either way—it does not, for example, contain a comma after the first reference to "bets or wagers," which would have rendered our proposed reading significantly less plausible. By the same token, the text does not contain commas after *each* reference to "bets or wagers," which would have rendered our proposed reading that much more certain. *See* 18 U.S.C. § 1084(a) ("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 wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . .").

Reading "on any sporting event or contest" to modify "the transmission . . . of bets or wagers" produces the more logical result. The text could be read to forbid the interstate or foreign transmission of bets and wagers of all kinds, including non-sports bets and wagers, while forbidding the transmission of information to assist only sports-related bets and wagers. But it is difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports, thereby effectively permitting covered persons to transmit information assisting in the placing of a large class of bets or wagers whose transmission was expressly forbidden by the clause's first part. *See id.*; *see also id.* § 1084(b) (providing exceptions for news reporting, and for transmissions of wagering information from one state where betting is legal to another state where betting is legal, both expressly relating to "sporting events or contests"). The more reasonable inference is that Congress intended the Wire Act's prohibitions to be parallel in scope, prohibiting the use of wire communication facilities to transmit both bets or wagers *and* betting or wagering information on sporting events or contests. Given that this interpretation is an equally plausible reading of the text and makes better sense of the statutory

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money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers"), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632.

scheme, we believe it is the better reading of the first clause. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent.").

The legislative history of subsection 1084(a) supports this conclusion. As originally proposed, subsection 1084(a) would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of *bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest* . . . ." S. 1656, 87th Cong. § 2 (1961) (as introduced) (emphasis added). The commas around the phrase "or information assisting in the placing of bets or wagers" make clear that the phrase "on any sporting event or contest" modifies both "bets or wagers" and "information assisting in the placing of bets or wagers."

In redrafting subsection 1084(a), the Senate Judiciary Committee altered the provision's first clause, changing the class of covered persons and removing the commas after both references to "wagers," and added a second clause prohibiting transmissions relating to "money or credit" (which we discuss below in section II.B). The Senate Judiciary Committee Report noted that the purpose of this amendment was to limit the subsection's reach to persons engaged in the gambling business, and to expand its reach to include "money or credit" communications:

> The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; and has further amended the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering which is designed to close another avenue utilized by gamblers for the conduct of their business.

S. Rep. No. 87-588, at 2 (1961). Nothing in the legislative history of this amendment suggests that, in deleting the commas around "or information assisting in the placing of bets or wagers" and adding subsection 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions from "bets or wagers . . . on any sporting event or contest" to *all* "bets or wagers," or to introduce a counterintuitive disparity between the scope of the statute's prohibition on the transmission of bets or wagers and the scope of its prohibition on the transmission of information assisting in the placing of bets or wagers. *See also* 107 Cong. Rec. 13,901 (1961) (Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, submitted for the record by Sen. Eastland, Chairman, S. Judiciary Comm.) (describing Senate Judiciary Committee's two major amendments to S. 1656 without mentioning an expansion of prohibited wagering to reach non-sports wagering); *cf. Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 55 (1961) ("Senate Judiciary Comm. Exec. Session") (statement of Byron R. White, Deputy Att'y Gen.) (the bill, as amended, "is aimed now at those who use the wire communication facility for the

transmission of bets or wagers in connection with a sporting event").[6] Given that such changes would have significantly altered the scope of the statute, we think this absence of comment in the legislative history is significant. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

B.

We likewise conclude that the phrase "on any sporting event or contest" modifies subsection 1084(a)'s second clause, which prohibits "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." 18 U.S.C. § 1084(a). The qualifying phrase "on any sporting event or contest" does not appear in this clause. But in our view, the references to "bets or wagers" in the second clause are best read as shorthand references to the "bets or wagers on any sporting event or contest" described in the first clause.

Although Congress could have made such an intent even clearer by writing "*such* bets or wagers" in the second clause, the text itself is consistent with our interpretation. And the interpretation gains support from the fact that the phrase "in interstate and foreign commerce" is likewise omitted from the second clause, even though Congress presumably intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications. *See* Crim. Mem. at 3 (to violate the Wire Act, the wire communication must "cross[] state lines"); *see also, e.g.*, H.R. Rep. No. 87-967, at 1-2 ("The purpose of the bill is to . . . aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information *in interstate and foreign commerce*.") (emphasis added), *reprinted in* 1961 U.S.C.C.A.N. at 2631. This omission suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.

Reading the entire subsection, including its second clause, as limited to sports-related betting also makes functional sense of the statute. *Cf. Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (construing the statute as a whole to avoid "the absurd results of a literal reading"). On this reading, all of subsection 1084(a)'s prohibitions serve the same end, forbidding wagering, information, and winnings transmissions of the same scope: No person may send a wire communication that places a bet on a sporting event or entitles the sender to

[6] The legislative history indicates that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General's program to fight organized crime and syndicated gambling. *See, e.g.*, S. Rep. No. 87-588, at 3 (noting that S. 1656 was introduced by the committee chairman on the recommendation of the Attorney General); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961) ("Senate Hearings") (statement of Robert F. Kennedy, Att'y Gen.) ("We have drafted this statute carefully to protect the freedom of the press."), *quoted in* S. Rep. No. 87-588, at 3; Senate Judiciary Comm. Exec. Session at 54-55 (statement of Byron R. White, Deputy Att'y Gen.) (describing amendments to S. 1656 negotiated by the Justice Department); *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 5 (1961) ("House Hearings") (statement of Rep. McCulloch) (referring to "the legislative proposals of the Kennedy administration").

receive money or credit as a result of a sports-related bet, and no person may send a wire communication that shares information assisting in the placing of a sports-related bet or entitles the sender to money or credit for sharing information that assisted in the placing of a sports-related bet.

Reading subsection 1084(a) to contain some prohibitions that apply solely to sports-related gambling activities and other prohibitions that apply to all gambling activities, in contrast, would create a counterintuitive patchwork of prohibitions. If the provision's second clause is read to apply to *all* bets or wagers, subsection 1084(a) as a whole would prohibit using a wire communication facility to place bets or to provide betting information only when sports wagering is involved, but would prohibit using a wire communication facility to transmit *any and all* money or credit communications involving wagering, whether sports-related or not. We think it is unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications would become entitled to receive money or credit as a result of those bets. We think it similarly unlikely that Congress would have intended to allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets.

The legislative history of subsection 1084(a) supports our reading of the text. *Cf. Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope.") (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)); *cf. Green*, 490 U.S. at 527 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [Federal] Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule"). To begin, when Congress revised the Wire Act during the legislative process to add the second clause, it indicated (as noted above) that its purpose in doing so was to "further amend[] the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering[,] which is designed to close another avenue utilized by gamblers for the conduct of their business." S. Rep. No. 87-588, at 2. There is no indication that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly than the underlying prohibitions on betting, wagering, and information communications, let alone any discussion of any rationale behind such a counterintuitive scheme. *Cf. Am. Trucking*, 531 U.S. at 468.

More broadly, the Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular. Congress was principally focused on off-track betting on horse races, but also expressed concern about other sports-related events or contests, such as baseball, basketball, football, and boxing. The House Judiciary Committee Report, for example, explains:

> Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins.

H.R. Rep. No. 87-967 at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2631-32 (reprinted report entitled "Sporting Events—Transmission of Bets, Wagers, and Related Information"); *see also* 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("This particular bill involves the transmission of wagers or bets and layoffs on horseracing and other sporting events."); House Hearings at 24-26 (statement of Robert F. Kennedy, Att'y Gen.) (describing horse racing bookmaking operations and the importance to the bookmaker of rapid inbound and outbound communications); House Hearings at 236-38 (statement of Frank D. O'Connor, District Attorney, Long Island City, N.Y.) (describing the operation of the Delaware Sports Service, a wire service that enables bookies and gambling syndicates to lay off horse race bets with other bookies, reduce odds on a horse, and even cheat by taking bets after a race has finished).

Legislative history from the Senate similarly suggests that Congress's motive in enacting the Wire Act was to combat sports-related betting. The Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, provided by Chairman Eastland during the Senate debate, describes the problem addressed by the legislation this way:

> Information essential to gambling must be readily and quickly available. Illegal bookmaking depends upon races at about 20 major racetracks throughout the country, only a few of which are in operation at any one time. Since the bookmaker needs many bets in order to operate a successful book, he needs replays, including money on each race. Bettors will bet on successive races only if they know quickly the results of the prior race and the bookmaker cannot accept bets without the knowledge of the results of each race. Thus, information so quickly received as to be almost simultaneous, prior to, during, and immediately after each race with regard to starting horse, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to both the illegal bookmaker and his customers.

107 Cong. Rec. 13,901 (1961); *see also* S. Rep. No. 87-588, at 4 (quoting Letter for Vice President, U.S. Senate, from Robert F. Kennedy, Att'y Gen. (Apr. 6, 1961)); Senate Hearings at 12 (statement of Robert F. Kennedy, Att'y Gen.) ("The people who will be affected [by S. 1656] are the bookmakers and the layoff men, who need incoming and outgoing wire communications in order to operate.").

Although Congress was most concerned about horse racing, testimony during the hearings also highlighted the increasing importance of rapid wire communications to "large-scale betting operations" involving other professional and amateur sporting events, such as baseball, basketball, football, and boxing. House Hearings at 25 (statement of Robert F. Kennedy, Att'y Gen.). The Attorney General testified, for instance, that recent disclosures revealed that gamblers had bribed college basketball players to shave points on games, and that up-to-the-minute information regarding "the latest 'line' on the contest," "late injuries to key players," and the like was critical to bookmakers. *Id.*; *accord* Senate Hearings at 6 (statement of Robert F. Kennedy, Att'y Gen.); *see also* House Hearings at 272 (statement of Nathan Skolnik, N.Y. Comm'n of Investigation) (bookmakers handling illegal baseball, basketball, football, hockey, and boxing wagering need wire communications to obtain "the line," to make layoff bets, and to receive race results); *id.* at 298-99 (statement of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.) (discussing baseball-sports ticker installations refused or removed by Western Union because of illegal use). This focus on sports-related betting makes sense, as the record before Congress indicated that sports bookmaking was the principal gambling activity for which crime syndicates were using wire communications at the time. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 Berkeley Tech. L.J. 529, 537 (2010); *see also* Senate Hearings at 277-78 (testimony of Herbert Miller, Assistant Attorney General, Criminal Division).[7]

Our conclusion that subsection 1084(a) is limited to sports betting finds additional support in the fact that, on the same day Congress enacted the Wire Act, it also passed another statute in which it expressly addressed types of gambling other than sports

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[7] As noted above, the Justice Department played a key role in drafting S. 1656, and it understood the bill to reach only the use of wire communications for sports-related wagering and communications. The colloquy between Mr. Miller and Senator Kefauver, chairman of a committee that held hearings to investigate organized crime and gambling in the 1950s, underscores that Congress was well aware of that understanding:

> SENATOR KEFAUVER. The bill [S. 1656] on page 2 seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?
>
> MR. MILLER. Primarily for this reason, Senator: The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest. Now, as a practical matter, your numbers game does not require the utilization of communications facilities.
>
> . . . .
>
> SENATOR KEFAUVER. I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.
>
> How about laying off bets by the use of telephones and laying off bets in bigtime gambling? Does that not happen sometimes?
>
> MR. MILLER. We can see that this statute will cover it. Oh, you mean gambling on other than a sporting event or contest?
>
> SENATOR KEFAUVER. Yes.
>
> MR. MILLER. This bill, of course, would not cover that because it is limited to sporting events or contests.

Senate Hearings at 277-78.

gambling, including gambling known as the "numbers racket," which involved lottery-style games. In addressing these forms of gambling, Congress used terms wholly different from those employed in the Wire Act. For example, the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953), specifically prohibits the interstate transportation of wagering paraphernalia, including materials used in lottery-style games such as numbers, policy, and bolita.[8] Subject to exemptions, the statute provides, in part:

> 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) 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.

18 U.S.C. § 1953(a) (2006). The legislative history indicates that the reference to "a numbers, policy, bolita, or similar game" under subpart (c) of this provision was intended to cover lotteries. *See* H.R. Rep. No. 87-968, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2634, 2635; *see also* House Hearings at 29-30 (1961) (statement of Robert F. Kennedy, Att'y Gen.) (highlighting the need for legislation prohibiting the interstate transportation of wagering paraphernalia to help suppress "lottery traffic" and to close loopholes created by judicial decisions).

Congress thus expressly distinguished these lottery games from "bookmaking" or "wagering pools with respect to a sporting event," and made explicit that the Interstate Transportation of Wagering Paraphernalia Act applied to all three forms of gambling. 18 U.S.C. § 1953(a).[9] Congress's decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act. *See Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) (construing one federal statute in light of another congressional enactment the same year).[10]

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[8] As Assistant Attorney General Herbert Miller explained, "numbers, policy, and bolita[] are similar types of lotteries wherein an individual purchases a ticket with a number." House Hearings at 350; *see generally* National Institute of Law Enforcement and Criminal Justice, United States Department of Justice, *The Development of the Law of Gambling: 1776-1976*, at 748-52 (1977) (describing the numbers game and lotteries).

[9] The Supreme Court later held that 18 U.S.C. § 1953 barred the interstate transportation of records, papers, and writings in connection with a sweepstake race operated by the state of New Hampshire. *United States v. Fabrizio*, 385 U.S. 263, 266-70 (1966). In 1975, Congress amended the statute to exempt "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law," Pub. L. No. 93-583, § 3, 88 Stat. 1916 (1975) (codified at 18 U.S.C. § 1953(b)(4)), and established a new provision, 18 U.S.C. § 1307, exempting state-conducted lotteries from statutory restrictions governing lotteries in 18 U.S.C. §§ 1301-1304, Pub. L. No. 93-583, § 1, 88 Stat. 1916 (1975). No similar exemption for state lotteries was added to the Wire Act.

[10] The legislative history of the Wire Act does contain numerous references to "gambling information." However, in context, this term is best read as a reference to the specific kinds of gambling information covered by the statute being discussed, not evidence of an independent intent to include other kinds of gambling information

In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.[11]

III.

What remains for resolution is only whether the lotteries proposed by New York and Illinois involve "sporting event[s] or contest[s]" within the meaning of the Wire Act. We conclude that they do not. The ordinary meaning of the phrase "sporting event or contest" does not encompass lotteries. As noted above, a statute enacted the same day as the Wire Act expressly distinguished sports betting from other forms of gambling, including lotteries. *See supra* pp. 10-11 (discussing § 1953(e)). Other federal statutes regulating lotteries make the same distinction. *See* 18 U.S.C. § 1307(d) (2006) ("'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.").[12] Nothing in the materials supplied by the

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within the scope of the statute—let alone an intent to include that other kind of information *only* with respect to money or credit communications. *See, e.g.*, H.R. Rep. No. 87-967, at 3 (citing the exemption in subsection 1084(b) for the transmission of "gambling information" from "a State where the placing of bets and wagers on a sporting event is legal, to a State where betting on that particular event is legal," even though subsection 1084(b) does not refer to "gambling information"), *reprinted in* 1961 U.S.C.C.A.N. at 2632; House Hearings at 353-54 (referring, in discussing H.R. 7039, 87th Cong. (1961), to "[o]ur purpose [being] to prohibit the interstate transmission of gambling information which is essential to the gambling fraternity," even though H.R. 7039 did not refer to "gambling information" but would have prohibited the transmission of wagers and wagering information only with respect to a "sporting event or contest").

We further note that the Wire Act itself uses the term "gambling information" in subsection 1084(d). *See* 18 U.S.C. § 1084(d) ("When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber . . . .") (emphasis added). We express no opinion about the scope of that term as it is used in that statutory provision.

[11] We also considered the possibility that, in the Wire Act's reference to "any sporting event or contest," 18 U.S.C. § 1084(a), the word "sporting" modifies only "event" and not "contest," such that the provision would bar the wire transmission of "wagers on any sporting event or [any] contest." This interpretation would give independent meaning to "event" and "contest," but it would also create redundancy of its own. If Congress had intended to cover *any* contest, it is unclear why it would have needed to mention sporting events separately. Moreover, as discussed above, the legislative history of the Wire Act makes clear that Congress was focused on preventing the use of wire communications for sports gambling in particular. And, legislative proposals from the 1950s in which the phrase "any sporting event or contest" originated further confirm that Congress intended to reach only "sporting contests." A key debate at that time concerned whether to regulate "any sporting event or contest" or "any horse or dog racing event or contest." *See, e.g.*, S. Rep. No. 81-1752, at 3, 22, 28 (1950) (explaining committee amendment to bill narrowing the definition of "gambling information" from covering "any sporting event or contest" to "any horse or dog racing event or contest"); *compare* S. 3358, 81st Cong. § 2(b) (1950) (as introduced), *with* S. 3358, 81st Cong. § 2(b) (1950) (as reported by the Interstate and Foreign Commerce Committee). If Congress had intended the Wire Act's predecessors to reach *any* "contest," however, the debate over which adjectival phrase to apply to "event" would have been meaningless.

[12] In addition, the Professional and Amateur Sports Protection Act ("PASPA") prohibits a governmental entity from sponsoring, operating, or authorizing by law "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or

Criminal Division suggests that the New York or Illinois lottery plans involve sports wagering, rather than garden-variety lotteries. Accordingly, we conclude that the proposed lotteries are not within the prohibitions of the Wire Act.

Given that the Wire Act does not reach interstate transmissions of wire communications that do not relate to a "sporting event or contest," and that the state-run lotteries proposed by New York and Illinois do not involve sporting events or contests, we conclude that the Wire Act does not prohibit the lotteries described in these proposals. In light of that conclusion, we need not consider how to reconcile the Wire Act with UIGEA, because the Wire Act does not apply in this situation. Accordingly, we express no view about the proper interpretation or scope of UIGEA.

/s/

VIRGINIA A. SEITZ
Assistant Attorney General

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professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702 (2006). While the statute grandfathers some established state gambling schemes, a new state lottery falling within the Act's prohibitions would not be exempt. *Id.* § 3704; *see, e.g.*, *OFC Comm Baseball v. Markell*, 579 F.3d 293, 300-04 (3d Cir. 2009) (PASPA preempted aspects of Delaware statute permitting wagering on athletic contests, which were not saved by any of the statutory exceptions).

The Unlawful Internet Gambling Enforcement Act

The most modern federal anti-gambling statute is the Unlawful Internet Gaming Enforcement Act (UIGEA). The UIGEA was passed after midnight on the day Congress adjourned for the last round of campaigning for the 2006 mid-term elections. Similar bills had been debated and vetted for years, but never had enough support to make it to a floor vote. In the fall of 2006, the intenet gambling prohibition and restriction legislation appeared headed for the same fate as similar bills as senator after senator refused to "attach" the bill to more important legislation.[7]

Just prior to adjourning to campaign for the fall 2006 elections, congress was rushing through legislation to complete the session. One of the bills in this final session was the "Security and Accountability For Every Port Act of 2006." According to news reports Senate Majority Leader Bill Frist, was able to get the UIGEA attached to the must-pass SAFE PORT at about 1:00 A.M. shortly before the end of the session that would be followed by election campaigning. This was a high priority "moral agenda" item for Senator Frist who was thought to be an early favorite for the 2008 republican presidential nomination.[8] There was no debate about the "anti-terrorism/homeland security" SAFE PORT act and it easily passed.

Despite the language in 31 USC 5361(b) the Department of Justice Opinion relied on the UIGEA to interpret the application of the Federal Wire Act. Review the statute and determine if the UIGEA should influence the interpretation of the Federal Wire Act.

31 U.S.C. §5361-5367 the Statute

31 U.S.C. 5361. Congressional findings and purpose

(a) Findings.--Congress finds the following:
(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.
(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.

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[7] HR 4411, the Internet Gambling Prohibition and Enforcement Act, a much more sweeping act passed the House of Representatives in the summer of 2006. It was deemed dead on arrival in the Senate when Senate Majority Leader Bill Frist announced that the legislative calendar was full for the remainder of 2006 and that there was insufficient support to accelerate addressing the bill in the Senate.

[8] It is interesting to note that at this time, there was significant fall out from the Jack Abramoff scandal, which in part disclosed that lobbyist Jack Abramoff helped kill prior online gaming prohibition bills. The UIGEA was promoted by its supporters a way for the Republican congress to distance itself from the Abramoff scandal leading up to the November 2006 elections.

(3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.

(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.

(b) Rule of construction.--No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

31 U.S.C. 5362. Definitions In this subchapter:

(1) Bet or wager.--The term "bet or wager"--

(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting 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;

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(C) includes any scheme of a type described in section 3702 of title 28;

(D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and

(E) does not include--

(i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act);

(ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;

(iii) any over-the-counter derivative instrument;

(iv) any other transaction that--

(I) is excluded or exempt from regulation under the Commodity Exchange Act; or

(II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

(v) any contract of indemnity or guarantee;

(vi) any contract for insurance;

(vii) any deposit or other transaction with an insured depository institution;

(viii) participation in any game or contest in which participants do not stake or risk anything of value other than--

(I) personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(II) points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants **and are** determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based--

(aa) on the score, point-spread, or any performance or performances 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 sporting or other event.

(2) Business of betting or wagering.--The term "business of betting or wagering" does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.

(3) Designated payment system.--The term "designated payment system" means any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction.

(4) Financial transaction provider.--The term "financial transaction provider" means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

(5) Internet.--The term "Internet" means the international computer network of interoperable packet switched data networks.

(6) Interactive computer service.--The term "interactive computer service" has the meaning given the term in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(7) Restricted transaction.--The term "restricted transaction" means any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient is prohibited from accepting under section 5363.

(8) Secretary.--The term "Secretary" means the Secretary of the Treasury.

(9) State.--The term "State" means any State of the United States, the District of Columbia, or any commonwealth, territory, or other possession of the United States.

(10) Unlawful internet gambling.--

(A) In general.--The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

(B) Intrastate transactions.--The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(iii) the bet or wager does not violate any provision of--

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(C) Intratribal transactions.--The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively--

(I) within the Indian lands of a single Indian tribe (as such terms are defined under the

Indian Gaming Regulatory Act); or

(II) between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of--

(I) the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(II) with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State compact includes--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(iv) the bet or wager does not violate any provision of--

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(D) Interstate horseracing.--

(i) In general.--The term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

(ii) Rule of construction regarding preemption.--Nothing in this subchapter may be construed to preempt any State law prohibiting gambling.

(iii) Sense of Congress.--It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.

(E) Intermediate routing.--The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.

(11) Other terms.--

(A) Credit; creditor; credit card; and card issuer.--The terms "credit", "creditor", "credit card", and "card issuer" have the meanings given the terms in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

(B) Electronic fund transfer.--The term "electronic fund transfer"--

(i) has the meaning given the term in section 903 of the Electronic Fund Transfer Act (15 U.S.C. 1693a), except that the term includes transfers that would otherwise be excluded under section 903(6)(E) of that Act; and

(ii) includes any fund transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.

(C) Financial institution.--The term "financial institution" has the meaning given the term in section 903 of the Electronic Fund Transfer Act, except that such term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received.

(D) Insured depository institution.--The term "insured depository institution"--

(i) has the meaning given the term in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); and

(ii) includes an insured credit union (as defined in section 101 of the Federal Credit Union Act).

(E) Money transmitting business and money transmitting service.--The terms "money

transmitting business" and "money transmitting service" have the meanings given the terms in section 5330(d) (determined without regard to any regulations prescribed by the Secretary thereunder).

31 U.S.C. 5363. Prohibition on acceptance of any financial instrument for unlawful internet gambling

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling--

(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

(4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. 5364. Policies and procedures to identify and prevent restricted transactions

(a) Regulations.--Before the end of the 270-day period beginning on the date of the enactment of this subchapter, the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations (which the Secretary and the Board jointly determine to be appropriate) requiring each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions in any of the following ways:

(1) The establishment of policies and procedures that--

(A) allow the payment system and any person involved in the payment system to identify restricted transactions by means of codes in authorization messages or by other means; and

(B) block restricted transactions identified as a result of the policies and procedures developed pursuant to subparagraph (A).

(2) The establishment of policies and procedures that prevent or prohibit the acceptance of the products or services of the payment system in connection with a restricted transaction.

(b) Requirements for policies and procedures.--In prescribing regulations under subsection (a), the Secretary and the Board of Governors of the Federal Reserve System shall--

(1) identify types of policies and procedures, including nonexclusive examples, which would be deemed, as applicable, to be reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of the products or services with respect to each type of restricted transaction;

(2) to the extent practical, permit any participant in a payment system to choose among alternative means of identifying and blocking, or otherwise preventing or prohibiting the acceptance of the products or services of the payment system or participant in connection with, restricted transactions;

(3) exempt certain restricted transactions or designated payment systems from any requirement imposed under such regulations, if the Secretary and the Board jointly find that it is not reasonably practical to identify and block, or otherwise prevent or prohibit the acceptance of, such transactions; and

(4) ensure that transactions in connection with any activity excluded from the definition of unlawful internet gambling in subparagraph (B), (C), or (D)(i) of section 5362(10) are not blocked or otherwise prevented or prohibited by the prescribed regulations.

(c) Compliance with payment system policies and procedures.--A financial transaction provider shall be considered to be in compliance with the regulations prescribed under subsection (a) if--

(1) such person relies on and complies with the policies and procedures of a designated

payment system of which it is a member or participant to--

(A) identify and block restricted transactions; or

(B) otherwise prevent or prohibit the acceptance of the products or services of the payment system, member, or participant in connection with restricted transactions; and

(2) such policies and procedures of the designated payment system comply with the requirements of regulations prescribed under subsection (a).

(d) No liability for blocking or refusing to honor restricted transactions.--A person that identifies and blocks a transaction, prevents or prohibits the acceptance of its products or services in connection with a transaction, or otherwise refuses to honor a transaction--

(1) that is a restricted transaction;

(2) that such person reasonably believes to be a restricted transaction; or

(3) as a designated payment system or a member of a designated payment system in reliance on the policies and procedures of the payment system, in an effort to comply with regulations prescribed under subsection (a), shall not be liable to any party for such action.

(e) Regulatory enforcement.--The requirements under this section shall be enforced exclusively by--

(1) the Federal functional regulators, with respect to the designated payment systems and financial transaction providers subject to the respective jurisdiction of such regulators under section 505(a) of the Gramm-Leach-Bliley Act and section 5g of the Commodities Exchange Act; and

(2) the Federal Trade Commission, with respect to designated payment systems and financial transaction providers not otherwise subject to the jurisdiction of any Federal functional regulators (including the Commission) as described in paragraph (1).

31 U.S.C. 5365. Civil remedies

(a) Jurisdiction.--In addition to any other remedy under current law, the district courts of the United States shall have original and exclusive jurisdiction to prevent and restrain restricted transactions by issuing appropriate orders in accordance with this section, regardless of whether a prosecution has been initiated under this subchapter.

(b) Proceedings.--

(1) Institution by Federal government.--

(A) In general.--The United States, acting through the Attorney General, may institute proceedings under this section to prevent or restrain a restricted transaction.

(B) Relief.--Upon application of the United States under this paragraph, the district court may enter a temporary restraining order, a preliminary injunction, or an injunction against any person to prevent or restrain a restricted transaction, in accordance with rule 65 of the Federal Rules of Civil Procedure.

(2) Institution by State attorney general.--

(A) In general.--The attorney general (or other appropriate State official) of a State in which a restricted transaction allegedly has been or will be initiated, received, or otherwise made may institute proceedings under this section to prevent or restrain the violation or threatened violation.

(B) Relief.--Upon application of the attorney general (or other appropriate State official) of an affected State under this paragraph, the district court may enter a temporary restraining order, a preliminary injunction, or an injunction against any person to prevent or restrain a restricted transaction, in accordance with rule 65 of the Federal Rules of Civil Procedure.

(3) Indian lands.--

(A) In general.--Notwithstanding paragraphs (1) and (2), for a restricted transaction that allegedly has been or will be initiated, received, or otherwise made on Indian lands (as that term is defined in section 4 of the Indian Gaming Regulatory Act)--

(i) the United States shall have the enforcement authority provided under paragraph (1); and

(ii) the enforcement authorities specified in an applicable Tribal-State Compact negotiated under section 11 of the Indian Gaming Regulatory Act (25 U.S.C. 2710) shall be carried out in accordance with that compact.

(B) Rule of construction.--No provision of this section shall be construed as altering, superseding, or otherwise affecting the application of the Indian Gaming Regulatory Act.

(c) Limitation relating to interactive computer services.--

(1) In general.--Relief granted under this section against an interactive computer service shall--

(A) be limited to the removal of, or disabling of access to, an online site violating section 5363, or a hypertext link to an online site violating such section, that resides on a computer server that such service controls or operates, except that the limitation in this subparagraph shall not apply if the service is subject to liability under this section under section 5367;

(B) be available only after notice to the interactive computer service and an opportunity for the service to appear are provided;

(C) not impose any obligation on an interactive computer service to monitor its service or to affirmatively seek facts indicating activity violating this subchapter;

(D) specify the interactive computer service to which it applies; and

(E) specifically identify the location of the online site or hypertext link to be removed or access to which is to be disabled.

(2) Coordination with other law.--An interactive computer service that does not violate this subchapter shall not be liable under section 1084(d) of title 18, except that the limitation in this paragraph shall not apply if an interactive computer service has actual knowledge and control of bets and wagers and--

(A) operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made or at which unlawful bets or wagers are offered to be placed, received, or otherwise made; or

(B) owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made.

(d) Limitation on injunctions against regulated persons.--Notwithstanding any other provision of this section, and subject to section 5367, no provision of this subchapter shall be construed as authorizing the Attorney General of the United States, or the attorney general (or other appropriate State official) of any State to institute proceedings to prevent or restrain a restricted transaction against any financial transaction provider, to the extent that the person is acting as a financial transaction provider.

31 U.S.C. 5366. Criminal penalties

(a) In general.--Any person who violates section 5363 shall be fined under title 18, imprisoned for not more than 5 years, or both.

(b) Permanent injunction.--Upon conviction of a person under this section, the court may enter a permanent injunction enjoining such person from placing, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers.

31 U.S.C. 5367. Circumventions prohibited

Notwithstanding section 5362(2), a financial transaction provider, or any interactive computer service or telecommunications service, may be liable under this subchapter if such person has actual knowledge and control of bets and wagers, and--

(1) operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made; or

(2) owns or controls, or is owned or controlled by, any person who operates, manages,

supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made.

UIGEA Regulations

Title 31: Money and Finance: Treasury

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PART 132—PROHIBITION ON FUNDING OF UNLAWFUL INTERNET GAMBLING

Section Contents

Authority: 31 U.S.C. 321 and 5364.

Source: 73 FR 69405, Nov. 18, 2008, unless otherwise noted.

§ 132.1 Authority, purpose, collection of information, and incorporation by reference.

(a) Authority. This part is issued jointly by the Board of Governors of the Federal Reserve System (Board) and the Secretary of the Department of the Treasury (Treasury) under section 802 of the Unlawful Internet Gambling Enforcement Act of 2006 (Act) (enacted as Title VIII of the Security and Accountability For Every Port Act of 2006, Pub. L. No. 109–347, 120 Stat. 1884, and codified at 31 U.S.C. 5361–5367). The Act states that none of its provisions shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States. See 31 U.S.C. 5361(b). In addition, the Act states that its provisions are not intended to change which activities related to horseracing may or may not be allowed under Federal law, are not intended to change the existing relationship between the Interstate Horseracing Act of 1978 (IHA) (15 U.S.C. 3001 et seq.) and other Federal statutes in effect on October 13, 2006, the date of the Act's enactment, and are not intended to resolve any existing disagreements over how to interpret the relationship between the IHA and other Federal statutes. See 31 U.S.C. 5362(10)(D)(iii). This part is intended to be consistent with these provisions.

(b) Purpose. The purpose of this part is to issue implementing regulations as required by the Act. The part sets out necessary definitions, designates payment systems subject to the requirements of this part, exempts certain participants in designated payment systems from certain requirements of this part, provides nonexclusive examples of policies and procedures reasonably designed to identify and block, or otherwise prevent and prohibit, restricted transactions, and sets out the Federal entities that have exclusive regulatory enforcement authority with respect to the designated payments systems and non-exempt participants therein.

(c) Collection of information. The Office of Management and Budget (OMB) has approved the collection of information requirements in this part for the Department of the Treasury and assigned OMB control number 1505–0204. The Board has approved the collection of information requirements in this part under the authority delegated to the Board by OMB, and assigned OMB control number 7100–0317.

(d) Incorporation by reference—relevant definitions from ACH rules. (1) This part incorporates by reference the relevant definitions of ACH terms as published in the “2008 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network” (the “ACH Rules”). The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the “2008 ACH Rules” are available from the National Automated Clearing House Association, Suite 100, 13450 Sunrise Valley Drive, Herndon, Virginia 20171, http://nacha.org , (703) 561–1100. Copies also are available for public inspection at the Department of Treasury Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, and the National Archives and Records Administration (NARA). Before visiting the Treasury library, you must call (202) 622–0990 for an appointment. For information on the availability of this material at NARA, call (202) 741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html 20002.

(2) Any amendment to definitions of the relevant ACH terms in the ACH Rules shall not apply to this part unless the Treasury and the Board jointly accept such amendment by publishing notice of acceptance of the amendment to this part in theFederal Register.An amendment to the definition of a relevant ACH term in the ACH Rules that is accepted by the Treasury and the Board shall apply to this part on the effective date of the rulemaking specified by the Treasury and the Board in the jointFederal Registernotice expressly accepting such amendment.

§ 132.2 Definitions.

The following definitions apply solely for purposes of this part:

(a) Actual knowledge with respect to a transaction or commercial customer means when a particular fact with respect to that transaction or commercial customer is known by or brought to the attention of:

(1) An individual in the organization responsible for the organization's compliance function with respect to that transaction or commercial customer; or

(2) An officer of the organization.

(b) Automated clearing house system or ACH system means a funds transfer system, primarily governed by the ACH Rules, which provides for the clearing and settlement of batched electronic entries for participating financial institutions. When referring to ACH systems, the terms in this regulation (such as “originating depository financial institution,” “operator,” “originating gateway operator,” “receiving depository financial institution,” “receiving gateway operator,” and “third-party sender”) are defined as those terms are defined in the ACH Rules.

(c) Bet or wager. (1) Means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting 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;

(2) Includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(3) Includes any scheme of a type described in 28 U.S.C. 3702;

(4) Includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering (which does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service); and

(5) Does not include—

(i) Any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that act (15 U.S.C. 78c(a)(10));

(ii) Any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(iii) Any over-the-counter derivative instrument;

(iv) Any other transaction that—

(A) Is excluded or exempt from regulation under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(B) Is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act (7 U.S.C. 16(e)) or section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(a));

(v) Any contract of indemnity or guarantee;

(vi) Any contract for insurance;

(vii) Any deposit or other transaction with an insured depository institution;

(viii) Participation in any game or contest in which participants do not stake or risk anything of value other than—

(A) Personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(B) Points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

(ix) Participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in 28 U.S.C. 3701) and that meets the following conditions:

(A) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(B) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(C) No winning outcome is based—

(1) On the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams, or

(2) Solely on any single performance of an individual athlete in any single real-world sporting or other event.

(d) Block means to reject a particular transaction before or during processing, but it does not require freezing or otherwise prohibiting subsequent transfers or transactions regarding the proceeds or account.

(e) Card issuer means any person who issues a credit card, debit card, pre-paid card, or stored value card, or the agent of such person with respect to such card.

(f) Card system means a system for authorizing, clearing and settling transactions in which credit cards, debit cards, pre-paid cards, or stored value cards (such cards being issued or authorized by the operator of the system), are used to purchase goods or services or to obtain a cash advance. The term includes systems both in which the merchant acquirer, card issuer, and system operator are separate entities and in which more than one of these roles are performed by the same entity.

(g) Check clearing house means an association of banks or other payors that regularly exchange checks for collection or return.

(h) Check collection system means an interbank system for collecting, presenting, returning, and settling for checks or intrabank system for settling for checks deposited in and drawn on the same bank. When referring to check collection systems, the terms in this regulation (such as “paying bank,” “collecting bank,” “depositary bank,” “returning bank,” and “check”) are defined as those terms are defined in 12 CFR 229.2. For purposes of this part, “check” also includes an electronic representation of a check that a bank agrees to handle as a check.

(i) Commercial customer means a person that is not a consumer and that contracts with a non-exempt participant in a designated payment system to receive, or otherwise accesses, payment transaction services through that non-exempt participant.

(j) Consumer means a natural person.

(k) Designated payment system means a system listed in §132.3.

(l) Electronic fund transfer has the same meaning given the term in section 903 of the Electronic Fund Transfer Act (15 U.S.C. 1693a), except that such term includes transfers that would otherwise be excluded under section 903(6)(E) of that act (15 U.S.C. 1693a(6)(E)), and includes any funds transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.

(m) Financial institutio n means a State or national bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds an account belonging to a consumer. The term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received.

(n) Financial transaction provider means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

(o) Foreign banking office means:

(1) Any non-U.S. office of a financial institution; and

(2) Any non-U.S. office of a foreign bank as described in 12 U.S.C. 3101(7).

(p) Interactive computer service means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(q) Internet means the international computer network of interoperable packet switched data networks.

(r) Internet gambling business means the business of placing, receiving or otherwise knowingly transmitting a bet or wager by any means which involves the use, at least in part, of the Internet, but does not include the performance of the customary activities of a financial transaction provider, or any interactive computer service or telecommunications service.

(s) Intrastate transaction means placing, receiving, or otherwise transmitting a bet or wager where—

(1) The bet or wager is initiated and received or otherwise made exclusively within a single State;

(2) The bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—

(i) Age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(ii) Appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(3) The bet or wager does not violate any provision of—

(i) The Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(ii) 28 U.S.C. chapter 178 (professional and amateur sports protection);

(iii) The Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(iv) The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(t) Intratribal transaction means placing, receiving or otherwise transmitting a bet or wager where—

(1) The bet or wager is initiated and received or otherwise made exclusively—

(i) Within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act (25 U.S.C. 2703)); or

(ii) Between the Indian lands of two or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.);

(2) The bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of—

(i) The applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(ii) With respect to class III gaming, the applicable Tribal-State compact;

(3) The applicable tribal ordinance or resolution or Tribal-State compact includes—

(i) Age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(ii) Appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(4) The bet or wager does not violate any provision of—

(i) The Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(ii) 28 U.S.C. chapter 178 (professional and amateur sports protection);

(iii) The Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(iv) The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(u) Money transmitting business has the meaning given the term in 31 U.S.C. 5330(d)(1) (determined without regard to any regulations prescribed by the Secretary of the Treasury thereunder).

(v) Operator of a designated payment system means an entity that provides centralized clearing and delivery services between participants in the designated payment system and maintains the operational framework for the system. In the case of an automated clearinghouse system, the term “operator” has the same meaning as provided in the ACH Rules.

(w) Participant in a designated payment system means an operator of a designated payment system, a financial transaction provider that is a member of, or has contracted for financial transaction services with, or is otherwise participating in, a designated payment system, or a third-party processor. This term does not include a customer of the financial transaction provider, unless the customer is also a financial transaction provider otherwise participating in the designated payment system on its own behalf.

(x) Reasoned legal opinion means a written expression of professional judgment by a State-licensed attorney that addresses the facts of a particular client's business and the legality of the client's provision of its services to relevant customers in the relevant jurisdictions under applicable federal and State law, and, in the case of intratribal transactions, applicable tribal ordinances, tribal resolutions, and Tribal-State compacts. A written legal opinion will not be considered “reasoned” if it does nothing more than recite the facts and express a conclusion.

(y) Restricted transaction means any of the following transactions or transmittals involving any credit, funds, instrument, or proceeds that the Act prohibits any person engaged in the business of betting or wagering (which does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service) from knowingly accepting, in connection with the participation of another person in unlawful Internet gambling—

(1) Credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) An electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; or

(3) Any check, draft, or similar instrument that is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution.

(z) State means any State of the United States, the District of Columbia, or any commonwealth, territory, or other possession of the United States, including the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.

(aa) Third-party processor means a service provider that—

(1) In the case of a debit transaction payment, such as an ACH debit entry or card system transaction, has a direct relationship with the commercial customer that is initiating the debit transfer transaction and acts as an intermediary between the commercial customer and the first depository institution to handle the transaction;

(2) In the case of a credit transaction payment, such as an ACH credit entry, has a direct relationship with the commercial customer that is to receive the proceeds of the credit transfer and acts as an intermediary between the commercial customer and the last depository institution to handle the transaction; and

(3) In the case of a cross-border ACH debit or check collection transaction, is the first service provider located within the United States to receive the ACH debit instructions or check for collection.

(bb) Unlawful Internet gambling means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made. The term does not include placing, receiving, or otherwise transmitting a bet or wager that is excluded from the definition of this term by the Act as an intrastate transaction or an intra-tribal transaction, and does not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq. ; see §132.1(a)). The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.

(cc) Wire transfer system means a system through which an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt, or on a day stated in the order, is transmitted by electronic or other means through the network, between banks, or on the books of a bank. When

referring to wire transfer systems, the terms in this regulation (such as “bank,” “originator's bank,” “beneficiary's bank,” and “intermediary bank”) are defined as those terms are defined in 12 CFR part 210, appendix B.

§ 132.3 Designated payment systems.

The following payment systems could be used by participants in connection with, or to facilitate, a restricted transaction:

(a) Automated clearing house systems;

(b) Card systems;

(c) Check collection systems;

(d) Money transmitting businesses solely to the extent they

(1) Engage in the transmission of funds, which does not include check cashing, currency exchange, or the issuance or redemption of money orders, travelers' checks, and other similar instruments; and

(2) Permit customers to initiate transmission of funds transactions remotely from a location other than a physical office of the money transmitting business; and

(e) Wire transfer systems.

§ 132.4 Exemptions.

(a) Automated clearing house systems. The participants processing a particular transaction through an automated clearing house system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that transaction, except for—

(1) The receiving depository financial institution and any third-party processor receiving the transaction on behalf of the receiver in an ACH credit transaction;

(2) The originating depository financial institution and any third-party processor initiating the transaction on behalf of the originator in an ACH debit transaction; and

(3) The receiving gateway operator and any third-party processor that receives instructions for an ACH debit transaction directly from a foreign sender (which could include a foreign banking office, a foreign third-party processor, or a foreign originating gateway operator).

(b) Check collection systems. The participants in a particular check collection through a check collection system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that check collection, except for the depositary bank.

(c) Money transmitting businesses. The participants in a money transmitting business are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions, except for the operator.

(d) Wire transfer systems. The participants in a particular wire transfer through a wire transfer system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that transaction, except for the beneficiary's bank.

§ 132.5 Policies and procedures required.

(a) All non-exempt participants in designated payment systems shall establish and implement written policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions.

(b) A non-exempt financial transaction provider participant in a designated payment system shall be considered to be in compliance with the requirements of paragraph (a) of this section if—

(1) It relies on and complies with the written policies and procedures of the designated payment system that are reasonably designed to—

(i) Identify and block restricted transactions; or

(ii) Otherwise prevent or prohibit the acceptance of the products or services of the designated payment system or participant in connection with restricted transactions; and

(2) Such policies and procedures of the designated payment system comply with the requirements of this part.

(c) For purposes of paragraph (b)(2) in this section, a participant in a designated payment system may rely on a written statement or notice by the operator of that designated payment system to its participants that states that the operator has designed or structured the system's policies and procedures for identifying and blocking or otherwise preventing or prohibiting restricted transactions to comply with the requirements of this part as conclusive evidence that the system's policies and procedures comply with the requirements of this part, unless the

participant is notified otherwise by its Federal functional regulator or, in the case of participants that are not directly supervised by a Federal functional regulator, the Federal Trade Commission.

(d) As provided in the Act, a person that identifies and blocks a transaction, prevents or prohibits the acceptance of its products or services in connection with a transaction, or otherwise refuses to honor a transaction, shall not be liable to any party for such action if—

(1) The transaction is a restricted transaction;

(2) Such person reasonably believes the transaction to be a restricted transaction; or

(3) The person is a participant in a designated payment system and blocks or otherwise prevents the transaction in reliance on the policies and procedures of the designated payment system in an effort to comply with this regulation.

(e) Nothing in this part requires or is intended to suggest that designated payment systems or participants therein must or should block or otherwise prevent or prohibit any transaction in connection with any activity that is excluded from the definition of “unlawful Internet gambling” in the Act as an intrastate transaction, an intratribal transaction, or a transaction in connection with any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.; see § 132.1(a)).

(f) Nothing in this part modifies any requirement imposed on a participant by other applicable law or regulation to file a suspicious activity report to the appropriate authorities.

(g) The requirement of this part to establish and implement written policies and procedures applies only to the U.S. offices of participants in designated payment systems.

§ 132.6 Non-exclusive examples of policies and procedures.

(a) In general. The examples of policies and procedures to identify and block or otherwise prevent or prohibit restricted transactions set out in this section are non-exclusive. In establishing and implementing written policies and procedures to identify and block or otherwise prevent or prohibit restricted transactions, a non-exempt participant in a designated payment system is permitted to design and implement policies and procedures tailored to its business that may be different than the examples provided in this section. In addition, non-exempt participants may use different policies and procedures with respect to different business lines or different parts of the organization.

(b) Due diligence. If a non-exempt participant in a designated payment system establishes and implements procedures for due diligence of its commercial customer accounts or commercial customer relationships in order to comply, in whole or in part, with the requirements of this regulation, those due diligence procedures will be deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if the procedures include the steps set out in paragraphs (b)(1), (b)(2), and (b)(3) of this section and subject to paragraph (b)(4) of this section.

(1) At the establishment of the account or relationship, the participant conducts due diligence of a commercial customer and its activities commensurate with the participant's judgment of the risk of restricted transactions presented by the customer's business.

(2) Based on its due diligence, the participant makes a determination regarding the risk the commercial customer presents of engaging in an Internet gambling business and follows either paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) The participant determines that the commercial customer presents a minimal risk of engaging in an Internet gambling business.

(ii) The participant cannot determine that the commercial customer presents a minimal risk of engaging in an Internet gambling business, in which case it obtains the documentation in either paragraph (b)(2)(ii)(A) or (b)(2)(ii)(B) of this section—

(A) Certification from the commercial customer that it does not engage in an Internet gambling business; or

(B) If the commercial customer does engage in an Internet gambling business, each of the following—

(1) Evidence of legal authority to engage in the Internet gambling business, such as—

(i) A copy of the commercial customer's license that expressly authorizes the customer to engage in the Internet gambling business issued by the appropriate State or Tribal authority or, if the commercial customer does not have such a license, a reasoned legal opinion that demonstrates that the commercial customer's Internet gambling business does not involve restricted transactions; and

(ii) A written commitment by the commercial customer to notify the participant of any changes in its legal authority to engage in its Internet gambling business.

(2) A third-party certification that the commercial customer's systems for engaging in the Internet gambling business are reasonably designed to ensure that the commercial customer's Internet gambling business will remain within the licensed or otherwise lawful limits, including with respect to age and location verification.

(3) The participant notifies all of its commercial customers, through provisions in the account or commercial customer relationship agreement or otherwise, that restricted transactions are prohibited from being processed through the account or relationship.

(4) With respect to the determination in paragraph (b)(2)(i) of this section, participants may deem the following commercial customers to present a minimal risk of engaging in an Internet gambling business—

(i) An entity that is directly supervised by a Federal functional regulator as set out in §132.7(a); or

(ii) An agency, department, or division of the Federal government or a State government.

(c) Automated clearing house system examples. (1) The policies and procedures of the originating depository financial institution and any third party processor in an ACH debit transaction, and the receiving depository financial institution and any third party processor in an ACH credit transaction, are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(i) Address methods to conduct due diligence in establishing a commercial customer account or relationship as set out in §132.6(b);

(ii) Address methods to conduct due diligence as set out in § 132.6(b)(2)(ii)(B) in the event that the participant has actual knowledge that an existing commercial customer of the participant engages in an Internet gambling business; and

(iii) Include procedures to be followed with respect to a commercial customer if the originating depository financial institution or third-party processor has actual knowledge that its commercial customer has originated restricted transactions as ACH debit transactions or if the receiving depository financial institution or third-party processor has actual knowledge that its commercial customer has received restricted transactions as ACH credit transactions, such as procedures that address—

(A) The circumstances under which the commercial customer should not be allowed to originate ACH debit transactions or receive ACH credit transactions; and

(B) The circumstances under which the account should be closed.

(2) The policies and procedures of a receiving gateway operator and third-party processor that receives instructions to originate an ACH debit transaction directly from a foreign sender are deemed to be reasonably designed to prevent or prohibit restricted transactions if they include procedures to be followed with respect to a foreign sender if the receiving gateway operator or third-party processor has actual knowledge, obtained through notification by a government entity, such as law enforcement or a regulatory agency, that such instructions included instructions for restricted transactions. Such procedures may address sending notification to the foreign sender, such as in the form of the notice contained in appendix A to this part.

(d) Card system examples. The policies and procedures of a card system operator, a merchant acquirer, third-party processor, or a card issuer, are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions, if the policies and procedures—

(1) Provide for either—

(i) Methods to conduct due diligence—

(A) In establishing a commercial customer account or relationship as set out in §132.6(b); and

(B) As set out in §132.6(b)(2)(ii)(B) in the event that the participant has actual knowledge that an existing commercial customer of the participant engages in an Internet gambling business; or

(ii) Implementation of a code system, such as transaction codes and merchant/business category codes, that are required to accompany the authorization request for a transaction, including—

(A) The operational functionality to enable the card system operator or the card issuer to reasonably identify and deny authorization for a transaction that the coding procedure indicates may be a restricted transaction; and

(B) Procedures for ongoing monitoring or testing by the card system operator to detect potential restricted transactions, including—

(1) Conducting testing to ascertain whether transaction authorization requests are coded correctly; and

(2) Monitoring and analyzing payment patterns to detect suspicious payment volumes from a merchant customer; and

(2) For the card system operator, merchant acquirer, or third-party processor, include procedures to be followed when the participant has actual knowledge that a merchant has received restricted transactions through the card system, such as—

(i) The circumstances under which the access to the card system for the merchant, merchant acquirer, or third-party processor should be denied; and

(ii) The circumstances under which the merchant account should be closed.

(e) Check collection system examples. (1) The policies and procedures of a depositary bank are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions, if they—

(i) Address methods for the depositary bank to conduct due diligence in establishing a commercial customer account or relationship as set out in §132.6(b);

(ii) Address methods for the depositary bank to conduct due diligence as set out in §132.6(b)(2)(ii)(B) in the event that the depositary bank has actual knowledge that an existing commercial customer engages in an Internet gambling business; and

(iii) Include procedures to be followed if the depositary bank has actual knowledge that a commercial customer of the depositary bank has deposited checks that are restricted transactions, such as procedures that address—

(A) The circumstances under which check collection services for the customer should be denied; and

(B) The circumstances under which the account should be closed.

(2) The policies and procedures of a depositary bank that receives checks for collection from a foreign banking office are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they include procedures to be followed by the depositary bank when it has actual knowledge, obtained through notification by a government entity, such as law enforcement or a regulatory agency, that a foreign banking office has sent checks to the depositary bank that are restricted transactions. Such procedures may address sending notification to the foreign banking office, such as in the form of the notice contained in the appendix to this part.

(f) Money transmitting business examples. The policies and procedures of an operator of a money transmitting business are deemed to be reasonably

designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(1) Address methods for the operator to conduct due diligence in establishing a commercial customer relationship as set out in §132.6(b);

(2) Address methods for the operator to conduct due diligence as set out in §132.6(b)(2)(ii)(B) in the event that the operator has actual knowledge that an existing commercial customer engages in an Internet gambling business;

(3) Include procedures regarding ongoing monitoring or testing by the operator to detect potential restricted transactions, such as monitoring and analyzing payment patterns to detect suspicious payment volumes to any recipient; and

(4) Include procedures when the operator has actual knowledge that a commercial customer of the operator has received restricted transactions through the money transmitting business, that address—

(i) The circumstances under which money transmitting services should be denied to that commercial customer; and

(ii) The circumstances under which the commercial customer account should be closed.

(g) Wire transfer system examples. The policies and procedures of the beneficiary's bank in a wire transfer are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(1) Address methods for the beneficiary's bank to conduct due diligence in establishing a commercial customer account as set out in §132.6(b);

(2) Address methods for the beneficiary's bank to conduct due diligence as set out in § 132.6(b)(2)(ii)(B) in the event that the beneficiary's bank has actual knowledge that an existing commercial customer of the bank engages in an Internet gambling business;

(3) Include procedures to be followed if the beneficiary's bank obtains actual knowledge that a commercial customer of the bank has received restricted transactions through the wire transfer system, such as procedures that address

(i) The circumstances under which the beneficiary bank should deny wire transfer services to the commercial customer; and

(ii) The circumstances under which the commercial customer account should be closed.

§ 132.7 Regulatory enforcement.

The requirements under this part are subject to the exclusive regulatory enforcement of—

(a) The Federal functional regulators, with respect to the designated payment systems and participants therein that are subject to the respective jurisdiction of such regulators under section 505(a) of the Gramm-Leach-Bliley Act (15 U.S.C. 6805(a)) and section 5g of the Commodity Exchange Act (7 U.S.C. 7b–2); and

(b) The Federal Trade Commission, with respect to designated payment systems and participants therein not otherwise subject to the jurisdiction of any Federal functional regulators (including the Commission) as described in paragraph (a) of this section.

Appendix A to Part 132mdash;Model Notice

[Date]

[Name of foreign sender or foreign banking office]

[Address]

Re: U.S. Unlawful Internet Gambling Enforcement Act Notice

Dear [Name of foreign counterparty]:

On [date], U.S. government officials informed us that your institution processed payments through our facilities for Internet gambling transactions restricted by U.S. law on [dates, recipients, and other relevant information if available].

We provide this notice to comply with U.S. Government regulations implementing the Unlawful Internet Gambling Enforcement Act of 2006 (Act), a U.S. federal law. Our policies and procedures established in accordance with those regulations provide that we will notify a foreign counterparty if we learn that the counterparty has processed payments through our facilities for Internet gambling transactions restricted by the Act. This notice ensures that you are aware that we have received information that your institution has processed payments for Internet gambling restricted by the Act.

The Act is codified in subchapter IV, chapter 53, title 31 of the U.S. Code (31 U.S.C. 5361 et seq.). Implementing regulations that duplicate one another can be found at part 233 of title 12 of the U.S. Code of Federal Regulations (12 CFR part 233) and part 132 of title 31 of the U.S. Code of Federal Regulations (31 CFR part 132).

UIGEA Statute Discussion Questions

What does the UIGEA prohibit?

Does the UIGEA make online casino wagering illegal?

Does the UIGEA make funding skill gaming illegal?

What are the parameters for acceptable online fantasy sports exempted from the Act?

580 F.3d 113
INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION INC, a not for profit corporation of the State of New Jersey, Appellant
v.
ATTORNEY GENERAL OF the UNITED STATES; Federal Trade Commission; Federal Reserve System.
No. 08-1981.
United States Court of Appeals, Third Circuit.
Argued July 7, 2009.

Filed: September 1, 2009.

Eric M. Bernstein (Argued) Eric M. Bernstein & Associates, Warren, NJ, Stephen

[580 F.3d 114]

A. Saltzburg (Argued) George Washington University, Washington, DC, for Appellant.

Nicholas J. Bagley (Argued) Jacqueline E. Coleman United States Department of Justice, Washington, DC, for Appellee.

Before: SLOVITER, AMBRO, and JORDAN Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Congress enacted the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5361 et seq. (the "Act"), because "traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C. § 5361(a)(4). Congress also found that "Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers." 31 U.S.C. § 5361(a)(1).

Appellant Interactive Media Entertainment & Gaming Association, Inc. ("Interactive"), is a New Jersey not-for-profit corporation that collects and disseminates information related to electronic and Internet-based gaming

and whose members are businesses that provide gaming services, including Internet gambling, to individuals located throughout the United States and the world. It raises a number of facial constitutional challenges to the Act. The District Court dismissed Interactive's claims, some on standing grounds and others on the merits. It appeals.

I.

The Act provides that "[n]o person engaged in the business of betting or wagering[1] may knowingly accept, in the connection with the participation of another person in unlawful Internet gambling," various forms of financial instruments (such as credit cards, electronic fund transfers and checks). 31 U.S.C. § 5363. The Act defines "unlawful Internet gambling" as "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).

Any person who violates § 5363 commits a crime punishable by fine and/or up to five years imprisonment. 31 U.S.C. § 5366(a). Moreover, upon conviction of that criminal offense, the defendant may be permanently enjoined from engaging in the making of bets or wagers. 31 U.S.C. § 5366(b). Finally, the Act also provides that federal and state authorities may bring civil proceedings to enjoin any transaction prohibited under the Act, 31 U.S.C. § 5365, and mandates that the Secretary of the Treasury and the Board of Governors of the Federal Reserve System enact regulations requiring certain financial institutions "to identify and block or otherwise prevent or prohibit" the transactions barred by § 5363. 31 U.S.C. § 5364(b)(1).[2]

Interactive filed a complaint alleging that the Act was facially unconstitutional [580 F.3d 115]and contrary to the United States' treaty obligations. It sought to enjoin the enforcement of the Act as well as the promulgation of regulations thereunder. After Interactive moved for a preliminary injunction, the District Court granted the Government's cross-motion to dismiss the complaint.

Interactive claimed the Act violated the First Amendment and the Government argued that Interactive lacked standing. The District Court rejected the Government's standing defense but, when it reached the

merits, it rejected Interactive's expressive association claim because the Act "does not have any adverse impact, much less a significant one, on the ability of the plaintiff and its members to express their views on Internet gambling." App. at 21. Indeed, the District Court noted that the conduct prohibited by the Act — the taking of another's money in connection with illegal gambling — does not involve any "communicative element" and "essentially facilitates another's criminal act." App. at 23.

Next, the District Court rejected Interactive's commercial speech claim because the Act "does not actually implicate First Amendment interests" given that the "acceptance of a financial transfer is not speech," and even if it were, the Act only applies where the transfer is related to illegal gambling. App. at 25.

The District Court also rejected Interactive's overbreadth and vagueness arguments. As to the First Amendment overbreadth argument, the Court concluded that the Act "does not implicate any form of protected expression, and thus there is no overbreadth problem." App. at 26. As to the due process vagueness claim, the Court rejected that argument because the Act's prohibitions "are not `in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application.'" App. at 26 (quoting Am. Civil Liberties Union v. Ashcroft, 322 F.3d 240, 268 (3d Cir.2003)).

The District Court also rejected Interactive's claim that the Act violates the privacy rights of individual gamblers betting online from their homes on the ground that Interactive lacked standing to assert claims on behalf of such gamblers. In the alternative, it rejected Interactive's privacy claim on the merits because the gamblers' conduct did not implicate any substantive due process rights.

The District Court also rejected Interactive's claims that the Act violates the United States' treaty obligations on standing grounds and, alternatively, on the merits. It rejected Interactive's claim that the Act violates the ex post facto clause because the Act is purely prospective. Finally, it rejected Interactive's Tenth Amendment claim because, as a private party, it lacked standing to pursue it.[3]

II.

Interactive raises two primary arguments on appeal. First, it contends

that the Act is void for vagueness because the statutory phrase "unlawful Internet gambling" lacks an "ascertainable and workable definition." Appellant's Br. at 25.[4]

[580 F.3d 116]

The Supreme Court has explained that a statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, ___ U.S. ___, 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008). Where, as here, a plaintiff raises a facial challenge to a statute on vagueness grounds, the plaintiff "must demonstrate that the law is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (emphasis added).

We reject Interactive's vagueness claim. The Act prohibits a gambling business from knowingly accepting certain financial instruments from an individual who places a bet over the Internet if such gambling is illegal at the location in which the business is located or from which the individual initiates the bet. 31 U.S.C. §§ 5362(10)(A), 5363. Thus, the Act clearly provides a person of ordinary intelligence with adequate notice of the conduct that it prohibits.

Further, the Act cannot be deemed impermissibly vague in all its applications. For example, several states prohibit all gambling activity (except non-commercial, social gambling not at issue here) by persons within the state and/or specifically ban Internet gambling. See, e.g., Haw. Rev.Stat. §§ 712-1220(4), 712-1223; Or. Rev.Stat. § 167.109. Thus, if a person in Hawaii places a bet over the Internet, a gambling business that knowingly accepts a financial instrument in connection with that bet would unambiguously be acting in violation of the Act. Similarly, a gambling business located in Oregon would violate the Act if it knowingly accepted a financial instrument in connection with Internet gambling prohibited by that state's law.

It is true, as Interactive notes, that the Act does not itself outlaw any gambling activity, but rather incorporates other Federal or State law related to gambling.[5] See 31 U.S.C. § 5362(10). However, "a statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions." United States v. Iverson, 162 F.3d

1015, 1021 (9th Cir.1998). Similarly, the fact that gambling may be prohibited in some states but permitted in others does not render the Act unconstitutionally vague. See United States v. Tripp, 782 F.2d 38, 42 (6th Cir.1986) (noting that a federal criminal statute may "incorporate[] state law for purposes of defining illegal conduct . . . even if the result is that conduct that is lawful under the federal statute in one state is unlawful in another").

Interactive also contends that it will often be difficult to determine the jurisdiction from which an individual gambler initiates a bet over the Internet, and consequently, whether the bet is unlawful. However, "[w]hat renders a statute vague [580 F.3d 117] is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[6] Williams, 128 S.Ct. at 1846; see also Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 915 (3d Cir.1990) ("Inability to satisfy a clear but demanding standard is different from inability in the first instance to determine what the standard is.").

Interactive also raises a hypothetical in which a gambler in a state that prohibits all gambling makes a bet over the Internet with a gambling business in a foreign jurisdiction that permits such activity. According to Interactive, if the law of the foreign jurisdiction provides that the bet is deemed to be placed and received in that jurisdiction, the Act becomes unconstitutionally vague because it is impossible to know where the bet was placed as a matter of law.

However, Interactive does not point to anything in the language of the Act to suggest that Congress meant anything other than the physical location of a bettor or gambling business in the definition of "unlawful Internet gambling." Further, to the extent that Interactive's hypothetical raises a vagueness problem, it is not with the Act, but rather with the underlying state law. It bears repeating that the Act itself does not make any gambling activity illegal. Whether the transaction in Interactive's hypothetical constitutes unlawful Internet gambling turns on how the law of the state from which the bettor initiates the bet would treat that bet, i.e., if it is illegal under that state's law, it constitutes "unlawful Internet gambling" under the Act.

In sum, we must reject Interactive's facial challenge to the Act. Simply put, a gambling business cannot knowingly accept the enumerated financial instruments in connection with a bet that is illegal under any Federal or State law applicable in the jurisdiction in which the bet is initiated or received. Thus, the Act "provide[s] a person of ordinary

intelligence fair notice of what is prohibited." Williams, 128 S.Ct. at 1845.

III.

Next, Interactive contends that the District Court erred in rejecting its claim that the Act violated a constitutional right of individuals to engage in gambling-related activity in the privacy of their homes. As noted above, the District Court held that Interactive lacked standing to assert the rights of third-party gamblers, and alternatively, that the claim failed on the merits.

"It is a well-established tenet of standing that a `litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 288 (3d Cir. 2002) (quoting Powers v. Ohio, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). However, this "prohibition is not [580 F.3d 118] invariable and our jurisprudence recognizes third-party standing under certain circumstances." Id. Indeed, the third-party standing doctrine is not rooted in the constitutional requirements for standing. Instead, "courts have imposed a set of prudential limitations on the exercise of federal jurisdiction over third-party claims." Id. at 287 (citing Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)).

"To successfully assert third-party standing: (1) the plaintiff must suffer injury; (2) the plaintiff and the third party must have a `close relationship'; and (3) the third party must face some obstacles that prevent it from pursuing its own claims." Nasir v. Morgan, 350 F.3d 366, 376 (3d Cir.2003).[7] The District Court concluded that Interactive could not satisfy either the second or third prongs of this test. We share the District Court's doubts regarding Interactive's standing to assert these claims, particularly because Interactive does not itself have any relationship with individual gamblers, but rather seeks to assert third-party standing based on its members' relationships with such gamblers. However, as noted above, the limitations on third-party standing are prudential requirements developed by the courts, not jurisdictional requirements imposed by Article III of the constitution. Accordingly, we need not decide whether Interactive has standing because, even assuming that it does, we agree with the District Court that Interactive's claim clearly fails on the merits.

In its effort to locate a constitutional privacy right to engage in Internet gambling from one's home, Interactive looks primarily to Lawrence v.

Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir.2008). Interactive's reliance on those cases is misplaced.

Both Lawrence and Earle involved state laws that barred certain forms of sexual conduct between consenting adults in the privacy of the home. Lawrence, 539 U.S. at 567, 123 S.Ct. 2472; Earle, 517 F.3d at 744. As the Supreme Court explained in Lawrence, such laws "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567, 123 S.Ct. 2472. Gambling, even in the home, simply does not involve any individual interests of the same constitutional magnitude. Accordingly, such conduct is not protected by any right to privacy under the constitution.[8] Cf. Am. Future Sys., Inc. v. Pennsylvania State Univ., 688 F.2d 907, 915-16 (3d Cir.1982) ("We are unwilling to extend the constitutional right of privacy to commercial transactions completely unrelated to fundamental personal rights. . . .").

[580 F.3d 119]

IV.

For the above-stated reasons, we will affirm the judgment of the District Court.

Notes:

1. The phrase "`business of betting or wagering' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 31 U.S.C. § 5362(2). Thus, the criminal prohibition contained in § 5363 of the Act applies only to gambling-related businesses, not any financial intermediary or Internet-service provider whose services are used in connection with an unlawful bet.

2. The Department of the Treasury and Board of Governors of the Federal Reserve have jointly adopted a final rule to implement this statutory mandate. Prohibition on Funding of Unlawful Internet Gambling, 73 Fed.Reg. 69382-01 (November 18, 2008). Those regulations are not at issue here.

3. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of a motion to dismiss for failure to state a claim. Sands v. McCormick, 502 F.3d 263, 267 (3d Cir.2007).

4. The government contends that Interactive waived its vagueness argument because it did not raise the issue before the District Court. Although Interactive did not include a separate count in its complaint raising its vagueness claim, its complaint did allege that the Act failed to give adequate notice of the conduct criminalized — the gravamen of a vagueness challenge. Moreover, the District Court deemed the issue to be before it and rejected Interactive's claim on the merits. The issue is properly before us.

5. Relatedly, Interactive notes that some of its members operate gambling websites from outside the United States and contends that the Act is ambiguous as to whether such members could face criminal sanctions under the Act if they engaged in financial transactions with a gambler who placed a bet from a state that prohibited such gambling. However, the Act unambiguously prohibits such transactions and we note that it "has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C.Cir.1984).

6. Interactive also contends the Act's requirement that certain financial institutions create procedures to block transactions prohibited by the Act encourages arbitrary and discriminatory enforcement of the Act. However, these financial institutions are only required to block transactions prohibited by § 5363, and as discussed above, we conclude that § 5363 provides adequate notice so as to avoid any vagueness problem. Moreover, we note that the duty of financial institutions to block or restrict transactions barred by the Act is not materially different from similar duties imposed on financial institutions under other federal law. See H.R.Rep. No. 109-412, pt. 1, at 11 (2006).

7. As the District Court correctly held, Interactive cannot assert standing for this claim based on principles of associational standing because it does not allege that individual gamblers, as opposed to gambling-related businesses, are among its members.

8. Before the District Court, Interactive primarily pursued a claim that the Act violated the First Amendment. Although Interactive stated at oral argument that it had not abandoned that claim, it only tangentially mentions this argument in its papers to this court. In any event, the Act only criminalizes the knowing acceptance of certain financial instruments in connection with unlawful gambling. Simply put, such conduct lacks any "communicative element" sufficient to bring it within the ambit of the First Amendment. United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The Illegal Gambling Business Act

The Illegal Gambling Business Act (the "IGBA") is a powerful statute that makes it a federal crime to engage in interstate gambling that violates the laws of any state in which the gambling occurs, provided the gambling business meets minimum size requirements. Much like the impetus for the Federal Wire Act, the purpose of the IGBA was to strike at the illegal endeavors of syndicated gambling.

The text of the essential element of the statute are set forth as follows:

> ***18 U.S.C. §1955. Prohibition of illegal gambling businesses***
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) 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.
>
> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or

> intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.
>
> (e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1986, as amended, any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

The Supreme Court has concluded that "conduct" can be "any degree of participation in an illegal gambling business except participation as a customer."[iii] Most circuits have adopted a simple test: a person "conducts" a gambling business if he or she performs any function that is "necessary or helpful in" the business.[iv] Under this analysis, virtually all, if not all, employees count toward the minimum requirement and are subject to liability. Perhaps the extreme limit of this test is illustrated by the Sixth Circuit case where the court held that a janitor that cleaned and straightened up a gambling room "conducted" the gambling operation.[v]

THE MERRELL OPINION

United States Court of Appeals,

Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Buster MERRELL, Defendant-Appellant.

No. 82-1182.

Argued Jan. 18, 1983.

Decided March 4, 1983.

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Robert E. DeMascio, J., of conducting an illegal gambling business, and he appealed. The Court of Appeals, Contie, Circuit Judge, held that: (1) actions of defendant, who acted as waiter and janitor in gambling house, aided gambling operation, and therefore his conviction was proper, and (2) persons who regularly aid gambling enterprises are subject to prosecution under statute for conducting an illegal gambling business, even though their conduct may not be strictly necessary to success of such businesses.

Affirmed.

Before, KENNEDY, CONTIE and WELLFORD, Circuit Judges.

CONTIE, Circuit Judge.

Buster Merrell appeals his conviction under 18 U.S.C. § 1955 for conducting an illegal gambling business. He was sentenced to two years probation. We affirm.

The facts are undisputed. Between May 11, 1979 and April 19, 1980, government agents undertook surveillance of 19733 Omira, Detroit, Michigan. The authorities suspected that illegal gambling was occurring on the premises. After photographing and videotaping activity transpiring outside the address, the agents legally planted a video camera and

microphone within the house and tapped two telephones. The videotape, which was the main prosecution evidence at trial, clearly indicated that an illegal dice game was being operated every Monday and Friday night during the time period in question.

On April 19, 1980, government agents raided the premises and arrested Merrell and others. Thirteen persons were charged with violating both 18 U.S.C. § 1955, conducting an illegal gambling business, and 18 U.S.C. § 371, conspiracy to commit the underlying substantive offense. Trial of all defendants commenced on December 14, 1981. Three days into the proceedings, eight defendants pleaded guilty. They were the lessor of the premises, the game operator, three dealers and three watchmen/doormen. The remaining five, including Merrell, waived their right to a jury trial.

The district court acquitted four of the defendants on both counts because they were mere bettors whose actions were not proscribed by section 1955. Although Merrell was acquitted of conspiracy, he was convicted of the substantive offense. The district court found that appellant performed several jobs which aided the gambling operation. For instance, Merrell regularly served coffee to bettors during gambling sessions. Immediately after these sessions, he usually stacked tables and chairs, swept the floors, cleaned ash trays and replaced the tables and chairs in preparation for future sessions. The sole issue raised on appeal is whether section 1955 makes criminal the waiters' and janitors' functions performed by the defendant. [Footnote 1. The record does not indicate whether Merrell was

compensated for his services. The point is insignificant because the government need not prove that appellant was paid in order to obtain a conviction. United States v. Rowland, 592 F.2d 327 (6th Cir.1979).]

The Supreme Court has stated that section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." Sanabria v. United States, 437 U.S. 54, 70 n. 26, 98 S.Ct. 2170, 2182, 57 L.Ed.2d 43 (1978). The courts of appeals have also recognized that only customers are outside the purview of the statute. See, e.g., United States v. Leon, 534 F.2d 667, 676 (6th Cir.1976); United States v. Reeder, 614 F.2d 1179, 1182 (8th Cir.1980). Section 1955 covers both "high level bosses and street level employees." 1970 U.S.Code Cong. & Ad.News 4007, 4029. Thus, this circuit has held that runners, telephone clerks, salesmen, dealers, doormen and watchmen "conduct" gambling businesses within the meaning of the statute. Leon, supra at 676. Since performing janitorial and service functions is not mere gambling, [*Foot Note 2 - The record reflects that in addition to his other activities, Merrell did gamble. The Sanabria exception to criminal liability only applies, however, to those whose sole role is that of bettor. Persons who wager and otherwise participate in the operation may be prosecuted because the contrary result would encourage a subterfuge, i.e., all participants could avoid liability by placing an occasional bet. See United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir.1981).]* the

question is whether Merrell's actions constitute "participation" in an illegal enterprise under the Sanabria test.

Merrell contends that his conduct does not amount to participation. He relies primarily on United States v. Boss, 671 F.2d 396 (10th Cir.1982), in which the tenth circuit held that waitresses whose sole function was to serve drinks both to dance hall patrons and to gamblers in an adjacent room were not subject to prosecution under section 1955. The Boss court reasoned that the statute only reached conduct strictly necessary to the operation of a gambling business. To extend the statute further allegedly might ensnare persons that Congress never intended. Since a gambling enterprise can operate without waitresses serving drinks to bettors, the waitresses were not conducting a gambling business within the meaning of the statute.

Merrell argues that under the Boss necessity test, runners, dealers, guards and the like may be prosecuted because such persons either are integral to the efficient operation of a gambling enterprise or provide security and protection. A gambling business could not long operate without them. Conversely, such an enterprise could easily function without the services of waiters or janitors. Merrell therefore asserts that the conviction should be reversed.

The major flaw in appellant's argument is that the strict necessity test has only been adopted by the Boss court. The prevailing rule is that one "conducts" a gambling business if that person performs any act, duty or

function which is necessary or helpful in operating the enterprise. See United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir.1981); United States v. Tucker, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981); United States v. Greco, 619 F.2d 635, 638 (7th Cir.1980); United States v. Reeder, 614 F.2d 1179, 1182 n. 2 (8th Cir.1980); United States v. Bennett, 563 F.2d 879, 882 n. 4 & 883 (8th Cir.1977). Merrell's actions clearly aided the gambling operation involved here. By serving coffee, appellant helped the bettors to continue wagering without interruption. See Tucker, supra at 1296; Bennett, supra at 883. By cleaning up and preparing the gambling area for future sessions, appellant helped to provide an attractive place for bettors to congregate in order to wager. In light of the authorities from the fifth, seventh and eighth circuits, we hold that persons who regularly aid gambling enterprises should be subject to prosecution under section 1955 even though their conduct may not be strictly necessary to the success of such businesses. [*Foot Note 3 - The fifth circuit stated in Tucker, supra that persons employed by gambling enterprises on a continuous basis, and whose duties require them directly to serve gamblers, are subject to prosecution under section 1955. Appellant's conduct fits that description.]* Since the Boss case ruled to the contrary, we decline to follow it.

Upholding the district court's judgment will not result in future convictions of persons that Congress never intended. The record clearly

> indicates that appellant regularly and consistently performed his duties. That fact distinguishes this case from the situation in which, for example, a mere bettor serves a drink or helps to clean up in an isolated instance. Secondly, and unlike the situation in Boss, Merrell regularly worked for an enterprise whose sole purpose was to promote illegal wagering. Consequently, appellant cannot reasonably claim that he unknowingly or unwittingly facilitated gambling.
>
> Since appellant knowingly and regularly aided the gambling business in question, the district court acted properly in convicting him. Accordingly, the judgment is AFFIRMED.

Application to Online Gaming

Recently, the three largest online gaming sites that took wagers from U.S. players, Poker Stars, Full Tilt and Absolute Poker were indicted for violating the IGBA in addition to violating other financial related crimes.[vi] The IGBA is the central gaming statute in the indictment. As part of the indictment, the DOJ has chosen to allege that Poker Stars, Full Tilt and Absolute Poker took poker wagers from New York players in violation of New York's state gambling prohibitions.

The matter is still pending and no court opinions have been issued at this time.

NEVADA

In 2001, the online gaming industry was accelerating at a rapid pace. Projections at the time estimated that the industry would be a four billion dollar a year industry by 2002 and would continue to grow into a twenty-four billion dollar a year industry by 2010.

Nevada has historically been a leader in well-regulated gaming, and the prospect of a large unregulated gaming market was a concern for the state. Many leading land based companies were concerned that fly-by-night online operators or unscrupulous online operators could negatively impact the reputation of gaming overall including the hard fought legitimacy won by regulated gaming over the past several decades. Many of these concerns with the new online market were related to the same concerns that Nevada had in implementing a strong regulatory and enforcement regime to address land-based gaming.

Additionally, there were competitive issue concerns. If someone could enter the gaming market with little capital, how would this impact the capital intensive business of land-based gaming. Intertwined with this is the state's interest in maximizing investment, employment and tourism to the state, while maintaining the reputation and economic viability of the industry in the state. The competitive issues were also closely tied to the consumer protection and industrial reputational issues, because a low barrier of entry, unregulated gaming business could attract suppliers of questionable character that may be tempted by quick revenue generation without regard for laws, general standards of

decency or the impact on the reputation of the industry or the interest of governments in balancing the economic benefits of gaming with the social risks through regulation.

In Nevada's 71st legislative session, the Nevada legislature responded to this challenge by passing amendments to Nevada's statutes to permit regulated and licensed interactive gaming in Nevada. The passage was the topic of substantial debate and discussion. The need to balance the competitive needs of the market, the needs of the state, the economic benefits of gaming in the state, the preservation and promotion of land based gaming, and the preservation of the reputation of gaming as a legitimate portion of the entertainment sector of the economy weighed heavy on the members of the legislature. The balance struck was that only operators with significant land based investment and a proven track record would be permitted to be online or interactive operators. This would ensure that operators would have more at risk that the online site or its operations, as such operators would be risking disciplinary action against their entire operations and potentially their gaming licenses overall if their interactive (online) operations were not in compliance with the letter and spirit of the laws and regulations under which they are subject. The measure was signed into law by Governor Kenny Guinn on June 14th, 2001.

The 2001 legislation was not limited to any particular games and the Nevada Gaming Commission (the "Commission") has broad authority to enact regulations, but not until the Commission first determined that :

1. Interactive gaming can be operated in compliance with all applicable laws.

2. Interactive gaming systems were secure, reliable and provided reasonable assurances that players were from lawful jurisdictions and of lawful age to play.
3. Such regulations are consistent with the public policy of the State and foster the success of gaming.

Hearings were held in 2001 and 2002, and the Nevada State Gaming Control Board (the "Board") and Commission investigated interactive gaming technologies, other laws, and regulations from other jurisdictions. These efforts came to an end when, after receiving a letter from the United States Department of Justice (the "DOJ"), the Commission determined that interstate or foreign interactive gaming was unlikely be able to be conducted in compliance with all applicable laws and, in particular, federal laws.

In the 2011 legislative session, Poker Stars proposed amending the Nevada interactive gaming statutes to, among other things, compel the Nevada State Gaming Control Board to draft and the Commission to adopt regulations for online poker. Additionally, A.B.258(2011) proposed to prohibit Nevada's gaming regulators from denying a license to anyone on the basis of their involvement in taking online wagers from U.S. residents prior to or while their application was pending. The bill also would provide anyone seeking an online poker license that was denied and believed they were denied on the basis of prior wagering activity a right of judicial review. These "minor" revisions had the potential to turn the regulatory system in Nevada on its head for an applicant like Poker Stars. Unfortunately for Poker Stars, their CEO was mentioned in an indictment during the 2011 session, the bill was revised substantially, and the end result was that:

1. The Board was compelled to draft and the Commission was compelled to adopt online poker regulations (note this did not prohibit regulations on other games); and,
2. The requirement that the Commission was required to determine that the activity could be conducted in compliance with all laws was removed.

Other bills created a new class of interactive gaming license for service providers. In 2001, there were only two classes of interactive gaming license, an operator's license and a manufacturer's license. This mirrored the land based world. In the intervening 10 years, interactive gaming matured, and specialists emerged in other jurisdictions that could be useful to Nevada operators, such as database providers, systems operators, hosting sites, affiliates, and security specialists to name a few.

The bill passed, and Chairman Lipparelli of the Board set out in earnest to comply with the law. He met the deadline to prepare regulations with one month to spare. Commission Chairman Bernhard took up the measure in December and the regulations were in place one month prior to the January 2012 deadline set by the Nevada Legislature. At the time, there were some commentators that were concerned that Nevada was too far ahead as its Senior Senator and the only written statements by the DOJ seemed to indicate that interactive gaming, even on an intrastate basis would be viewed by federal law enforcement agencies as violating the Federal Wire Act. However, on December 23, 2011, the DOJ released its opinion that the Federal Wire Act prohibitions only apply to sports wagering.

OPERATORS

The essential requirements for being eligible to file an interactive gaming operator's license application in Nevada are set forth in the table below:[9]

Counties > 700,000 people[10]	Counties > 45,000 but less than 700,000 people	Other counties
• A resort hotel that holds a nonrestricted gaming license. ○ A resort hotel is any building or group of buildings that is maintained as and held out to the public to be a hotel where sleeping accommodations are furnished to the transient public and that has: 1. More than 200 rooms available for sleeping accommodations; 2. At least one bar with permanent seating capacity for more than 30 patrons that serves alcoholic beverages sold by the drink for consumption on the premises; 3. At least one restaurant with permanent seating capacity for more than 60 patrons that is open to the public 24 hours each day and 7 days each week; and 4. A gaming area within the building or group of buildings.	• Holds a nonrestricted gaming license • Has more than 120 rooms available for sleeping accommodations • Has at least bar with permanent seating capacity for 20 patrons or more • Has at least one 24 hour restaurant that holds 60 or more patrons • Has a gaming area of at least 18,000 square feet with at least 1600 slot machines and 40 table games.	• Holds a nonrestricted gaming license that has been active for at least 5 years • Meets the definition of a Group 1 licensee pursuant to Commission regulations • Operates either more than 50 rooms for sleeping accommodations or 50 gaming devices.

[9] Affiliates of casino licensees that have held a non-restricted casino license for 5 years and meet the other criteria in the table may also be licensed as an interactive gaming operator. Affiliate is defined in terms of common control.

[10] AB 545 changed the thresholds to 700,000 and 45,000. This effectively places Clark County in a special top tier category and Washoe, Carson City, Lyon, Elko, Douglas, and possibly Nye Counties into a special mid-tier category.

Requirements for an iGaming License for A Clark County Nonrestricted Licensee

The only statutory requirement is that the applicant in Clark County is a non-restricted licensee operating a resort hotel. Pursuant to NRS 463.01865 , a resort hotel is any building or group of buildings that is maintained as and held out to the public to be a hotel where sleeping accommodations are furnished to the transient public and that has (i) at least 200 rooms available for sleeping accommodations, (2) has at least one bar with permanent seating capacity for more than 30 patrons that serves alcoholic beverages sold by the drink for consumption on the premises, (iii) has at least one restaurant with permanent seating capacity for more than 60 patrons that is open to the public 24 hours each day and 7 days each week; and (iv) a gaming area within the building(s).

Requirements for an iGaming License for A Small County Nonrestricted Licensee

The statute contemplates that non-restricted licensees, of sufficient size, in the smaller counties (those with a population under 45,000 people) may be qualified to apply for and hold an interactive gaming operator's license. At first glance, the initial requirements appear modest in only requiring the following: 1. The applicant establishment must have held a non-restricted gaming license to operate games for at least five years prior to applying; 2. The establishment is a Group 1 licensee; and, 3. The establishment has at least 50 gaming devices or sleeping rooms. However, pursuant to Gaming Regulation 6.010 5, the Group 1 licensing requirement is steep, and currently requires the applicant to have gross revenue of $6,165,000 in the 12 months preceding the end of June 30, 2014.

This is mitigated a bit because any licensee that was deemed a Group 1 Licensee in the past retains such designation even if the licensee doesn't meet current revenue thresholds for a Group 1 Licensee.

Agreements/Compacts

In the 2013 legislative session, the Nevada Legislature once again addressed the issue of interactive gaming. This time the Legislature authorized the Governor to engage in the process of entering into agreements with other jurisdictions to permit the cross border acceptance of wagers between jurisdictions. A bill was introduced, heard, debated and enacted all within 24 hours in a spirit of true non-partisan patriotic spirit. The speed at which the bill moved also created an opportunity for the students at UNLV William S. Boyd School of Law to introduce a bill that exempted gaming conducted pursuant to an interjurisdictional agreement from Nevada's criminal statutes against interstate gaming without a Nevada gaming license under NRS 465.

IN February, 2014, the first interjurisdictional agreement was signed between Nevada and Delaware. That agreement is as follows:

Multi-State Internet Gaming Agreement

(dated as of February 25, 2014)

WHEREAS, *as of the date of the execution of this Agreement by the Initial Member States, federal laws, including the Unlawful Internet Gambling Enforcement Act of 2006 and the Interstate Wire Act of 1961, leave to the States the ability to license and regulate certain Internet Gaming;*

WHEREAS, *the Member States have well-established legalized regimes regulating gaming in multiple forms, including casino gaming, lotteries and Internet Gaming, and the Member States control the regulation of gaming within their jurisdictions consistent with the highest standards of security, integrity and public accountability;*

WHEREAS, *the Member States believe that cooperation among them will serve the best interests of the Member States, their Patrons, and Licensees through an enhanced Patron experience contributing to the commerce of each Member State and optimizing the opportunity for revenues from Internet Gaming;*

WHEREAS, *the Initial Member States plan to pursue Internet Poker as the initial Internet Gaming offering under this Agreement, providing Patrons of Internet Poker within the Initial Member States the opportunity to compete against each other, while remaining subject to the laws and regulations of their respective Member States; and*

WHEREAS, *the Member States recognize the need to develop a regulatory infrastructure for Internet Gaming under a cooperative regime supported by each Member State, implementing best practices in Internet Gaming regulation.*

NOW, THEREFORE, the Member States, as parties to this Agreement and to attain these mutually beneficial objectives, do hereby agree as follows:

Article I: Title

This Agreement shall be referred to as the Multi-State Internet Gaming Agreement.

Article II: Purpose

The Member States are entering into this Agreement for the purpose of allowing Patrons of Internet Gaming within each Member State to avail themselves of an enhanced Internet Gaming experience that is offered through a common infrastructure utilizing the highest standards of regulatory practices in Internet Gaming in an effort to:

1. Expand access to certain Internet Gaming services by offering them to Patrons of Member States in a well-regulated, secure and publically accountable system designed to create a positive Patron experience (a) that limits access to minors, those with gambling problems, and others who should not be gaming; (b) that ensures such games

are conducted only in States where such activity is legal; and (c) that ensures such games are fair and conducted honestly;

2. Provide Internet Gaming services in a manner designed to maximize the net revenues to Member States, consonant with the dignity of each Member State and the general welfare of its citizens;

3. Improve the competitiveness of Internet Gaming Licensees; and

4. Enhance the Internet Gaming offerings of Member States by increasing liquidity, improving Patrons' experience, promoting convenience and adding to the variety of offerings for Patrons.

Article III: Definitions

"**Initial Member States**" means the State of Nevada and the State of Delaware.

"**Internet**" means the international computer network of interoperable packet switched data networks.

"**Internet Gaming**" means Internet Poker and Other Internet Gaming.

"**Internet Poker**" means a real money Poker game conducted over the Internet using virtual representations of cards and Poker chips.

"**Internet Poker State Revenue**" means revenue due to a Member State from Licensees offering Internet Poker to Patrons of such State, in connection with the operation of Internet Poker games under such license, whether that revenue is in the form of taxes, duties, levies, or any other form.

"**License**" means a license or permit issued by a Licensing Body of a Member State, allowing its recipient to offer Internet Gaming to Patrons.

"**Licensee**" means a person or entity that has been issued a License by one or more Member States.

"**Licensing Body**" means an entity authorized to grant Licenses pursuant to the applicable law of the respective Member State.

"**Licensing State**" means, with respect to a Licensee, a State which issued the License.

"**Member State**" or "**Member States**" means the States that are parties to this Agreement.

"**Member State Representative**" means a person lawfully designated by the chief executive of a Member State to serve as a member of the Multi-State Internet Gaming Board.

"**Multi-State Internet Gaming Association**" or "**Association**" means a limited liability company sited in Delaware and formed under the laws of the State of Delaware in accordance with Article VII of this Agreement.

"**Multi-State Internet Gaming Board**" or "**Board**" means the Board of Managers serving as the governing body of the Association in accordance with the terms of the Association's operating agreement, as amended from time to time.

"**Other Internet Gaming**" means non-Poker real money gaming offerings conducted by Licensees over the Internet in which the game is an Internet variation or compilation of slots or table games found in full service casinos using virtual representations of cards, slots, dice, chips, roulette wheels and similar items.

"**Other Internet Gaming State Revenue**" means revenue due to a Member State from Licensees offering Other Internet Gaming to Patrons of such State, in connection with the operation of Other Internet Gaming offerings under such license, whether that revenue is in the form of taxes, duties, levies, or any other form.

"**Poker**" means any peer-to-peer non-house banked card game commonly referred to as Poker, whether played as a cash game or in the form of a tournament, including any variations thereof approved by a Licensing Body.

"**Patron**" means any natural person physically present in a Member State and legally entitled, under the laws of that Member State, to engage in Internet Gaming.

"**Patron State**" means, with respect to a Patron, the State in which that natural person is physically present when participating in Internet Gaming.

"**State**" means any governmental unit of a national, state or local body exercising governmental functions, and includes without limitation national and sub-national governments, including their respective departments, agencies or instrumentalities and any departments thereof.

Article IV: Requirements to Join

1. The Initial Member States have entered into this Agreement as of the date first written above. Other States may join this Agreement by any means authorized by the laws of any such State, as long as such State agrees to act in accordance with the terms of this Agreement, and the execution of this Agreement by such State is recommended for approval by the requisite vote of at least two-thirds (2/3) of the Member State Representatives comprising the Multi-State Internet Gaming Board. Notwithstanding the Board's recommendation, however, no State shall be admitted as a Member State unless and until a Notice of Admission is signed by the chief executive of each Member State whose Member State Representative voted to recommend admission of such State.

2. No State shall be eligible to become a Member State unless the Board determines that such State's prospective Licensees, and the system of Internet Gaming offered thereby, meet the minimum standards set forth in Exhibit A of this Agreement, as the same may be amended from time to time by the Multi-State Internet Gaming Board. Each Initial Member State hereby confirms that the other Initial Member State meets such minimum standards. Except as otherwise provided in this Agreement, each Member State retains the authority granted to it by its Legislature or its equivalent governing body regarding licensing, technical standards, resolution of Patron disputes, requirements for bankrolls, enforcement, accounting, and maintenance of records regarding Internet Gaming.

3. Each Initial Member State represents that its applicable State law does not prohibit Licensees from allowing Patrons from other Member States to play Internet Poker against each other. Each Initial Member State further represents that its applicable State laws and regulations require each Patron to access Internet Gaming services exclusively through websites operated by Licensees in such Patron State. In the event additional Internet Gaming offerings are added in accordance with this Agreement, including but not limited to the additional Internet Gaming offerings set forth in Exhibit B, Member States offering such additional Internet Gaming shall ensure their applicable State law does not prohibit Licensees from allowing Patrons of other Member States to play such additional Internet Gaming offerings.

Article V: Operation of Internet Poker and Other Internet Gaming

1. A Licensee may pool the liquidity of its Internet Poker Patrons located in any Licensing State, subject to the laws and regulations of the applicable Licensing States, to allow its Patrons from those Licensing States to play Internet Poker against each other.

2. In the event that Other Internet Gaming offerings are added in accordance with this Agreement, including but not limited to the additional Internet Gaming offerings set forth in Exhibit B, then a Licensee may offer such Other Internet Gaming to its Patrons in any Licensing State which permits the same type of Other Internet Gaming, subject to the laws and regulations of the applicable Licensing State. A Licensee may allow its Patrons from different Licensing States which permit the same type of Other Internet Gaming to play with or against each other.

Article VI: Internet Gaming Revenue

1. Each Member State shall be entitled to receive the Internet Poker State Revenue generated from the provision of Internet Poker to Patrons of that Member State, regardless of the location of the Licensee that provided those services. Member States shall not be entitled to Internet Poker State Revenue generated from the provision of Internet Poker to Patrons of any other Member State, regardless of the location of the Licensee that provided those services.

2. Each Member State shall be entitled to determine the Internet Poker State Revenue structure (including rate and base of calculation) due as the result of the provision of Internet Poker to its Patrons. Each Member State shall communicate to other Member States the details of its Internet Poker State Revenue structure, and provide the other Member States with the necessary guidance and tools for assessment of the Internet Poker State Revenue due to it.

3. For the purpose of calculating the Internet Poker State Revenue due by the Licensee to each Member State, the following shall apply – (a) where Internet Poker State Revenue is calculated on the basis of commissions collected by a Licensee from participating players per round of play ("rake"), such commission shall be individually attributed to players who had placed wagers within that round of play on a pro rata basis reflecting each player's weighted contribution to the commission collected within that round of play; and (b) where Internet Poker State Revenue is calculated on the basis of tournament fees, such fees shall be attributed to each Patron State in accordance with the physical presence of each tournament entrant at the time of entry into said tournament.

4. Each Licensing State shall collect, on a monthly basis, all applicable Internet Poker State Revenue from its Licensees, and distribute to the Patron States their respective share of Internet Poker State Revenue in accordance with this Agreement. Member States may agree on administrative procedures among the Licensing States, including requiring the Licensees to conduct such collections and distributions themselves, in connection with the distribution of Internet Poker State Revenue. Member States may also agree on the payment to one another of reasonable administrative fees for performing such collections, distributions and administrative procedures.

5. Licensees providing Internet Poker under separate Licenses issued by different Licensing States shall report and remit the Internet Poker State Revenue due from them to the relevant authorities of each Licensing State with regard to the Internet Poker State Revenue generated under each respective License.

6. In the event Other Internet Gaming offerings are authorized under this Agreement, it is recognized that each Member State shall be entitled to receive the revenue generated by the Patron State from the provision of such Other Internet Gaming offerings, regardless of the location of the Licensee that provides such Other Internet Gaming offerings.

Article VII: Governance

1. The Initial Member States shall establish, and each Member State shall join, the Multi-State Internet Gaming Association to facilitate the implementation of Internet Poker and any Other Internet Gaming offerings authorized under this Agreement, and to oversee the operation by Member States of Multi-State Internet Gaming pursuant to the terms of this Agreement.

2. The Multi-State Internet Gaming Association shall be governed by the Multi-State Internet Gaming Board, which shall be comprised of the Member State Representatives of each Member State. The Initial Member States shall adopt the initial operating agreement of the Association which shall set forth the rules and procedures for the operation of the Board. The duties of the Board shall include approving modifications to the operating agreement; approving the addition of Other Internet Gaming offerings; recommending the admission of new Member States in accordance with Article IV of this Agreement; recommending the expulsion of Member States in accordance with Article XII of this Agreement; and such other duties as shall be required under this Agreement. In addition, the Board shall have such other duties as set forth in the operating agreement, which may but shall not be required to include the adoption of policies and procedures relating to hiring employees, assessing fees, and acquiring, owning and disposing of property.

3. The Board shall have a Chairperson and a Vice-Chairperson who shall be Member State Representatives. For the first four (4) calendar years during the term of this Agreement, for so long as they are parties to this Agreement, the Member State Representatives of the Initial Member States shall serve as Chairperson and Vice-Chairperson, respectively, on an alternating basis for terms of two (2) years each. Thereafter, the terms of the Chairperson and Vice-Chairperson shall be as set forth in the operating agreement.

Article VIII: Cooperation and Transparency

1. Member States shall take all reasonable steps to ensure cooperation among their respective law enforcement agencies. Each Member State shall have a designated law enforcement representative who is responsible for communications with the law enforcement representatives of the other Member States relating to matters arising under this Agreement.

2. No variation, derogation or waiver by a Member State from the requirements of this Agreement is permitted absent the consent of the Multi-State Internet Gaming Association.

3. No subordinate or side agreements relating to the provision of Internet Poker, or Other Internet Gaming offerings approved by the Multi-State Internet Gaming Association, are permitted among any subset of Member States. Notwithstanding the foregoing, any subset of Member States may enter into subordinate or side agreements with respect to sharing revenues and/or costs, including, but not limited to, sharing certain oversight functions and marketing efforts.

4. The Multi-State Internet Gaming Association shall establish protocols for Member States to keep each other Member State informed of the laws, rules and regulations governing Internet Gaming and Licensees of such Member States and any modifications to such laws, rules and regulations.

5. The Member States agree that this Agreement cannot contemplate all issues or areas of concern, whether they be of a regulatory or technical nature, and further agree to cooperate with one another, and through participation in the Association, in such a manner as to fulfill their own statutory and regulatory mandates while complying with this Agreement.

6. Licensees shall be required, upon demand, to provide the Licensing Body of any Licensing State with the data reasonably necessary to properly perform any audit deemed necessary by a Member State, and such data shall be provided by the Licensing Body to its counterpart in the relevant Patron State.

Article IX: Data Protection

Any data shared between Member States in regard to this Agreement, or sent, released or obtained pursuant to the procedures mandated within this Agreement shall be deemed privileged and confidential by and between the Member States subject to the respective right-to-know and open records statutes of the Member States; to that end, the Member States hereby agree to share data as required for implementation of this Agreement in accordance with the Member States' applicable privacy and data protection laws.

Article X: Dispute Resolution

1. Member States shall attempt to resolve any dispute between or among them in connection with this Agreement through good faith negotiations for a period of not less than forty-five (45) days between Member State Representatives.

2. If the dispute has not been resolved by negotiation as provided above, either party may commence mediation by providing the other party with written notice setting forth the subject of the dispute, claim or controversy and the relief requested. Except as otherwise set forth in this Article X, mediation procedures shall be determined by the Multi-State Internet Gaming Board.

3. The parties acknowledge that mediation proceedings are settlement negotiations, and that, to the extent allowed by applicable law, all offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties or their agents shall be confidential and inadmissible in any subsequent arbitration or other legal proceedings involving the parties; provided, that evidence which is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

4. The authority to resolve any dispute between a Patron of any Member State and a Licensee shall reside with the relevant authorities of the Patron State, in accordance with the laws and regulations of that State. The Member States will cooperate as necessary to allow such authorities to effectively resolve any such dispute.

5. The authority to resolve any dispute between or among Patrons who are Patrons of different Patron States shall reside with the relevant authorities of the Member State where the Licensee was operating the game in which the dispute arose. Any Patron may avail himself or herself of the patron dispute procedures available in the Member State from which the Patron played the game, and the other Member State will cooperate as necessary to allow such authorities to resolve any such dispute. Patron States may agree, on a case-by-case basis, to modify this primary rule under particular circumstances.

6. In the event that a dispute arising between Member States is not resolved according to the terms and procedures of dispute resolution enumerated in this article, a Member State may avail itself of any other remedies available under state law.

Article XI: Amendments to this Agreement

This Agreement may be amended pursuant to negotiations conducted by Member State Representatives. During such time as there exist only two Member States, an amendment to this Agreement may only be made if Member State Representatives from both such States have agreed in writing to any such amendment. If, at the time of any proposed amendment, there are more than two Member States party hereto, an amendment to this Agreement shall be effective only if at least two-thirds (2/3) of the Member State Representatives have agreed in writing to any such amendment.

Article XII: Withdrawal/Expulsion from this Agreement

1. Any Member State may withdraw from this Agreement by providing a written notice to each of the other Member States of an intent to withdraw at least sixty (60) days prior to the intended date of such withdrawal. Such notice shall be signed by the chief executive or the lawfully designated representative of the Member State (the "Withdrawal Notice"), and, unless the Withdrawal Notice specifically establishes a different date of withdrawal, such withdrawal shall come into effect on the sixty-first (61^{st}) day following the transmission of the Withdrawal Notice ("the Withdrawal Date").

2. A Member State's participation in this Agreement will be terminated with or without cause if such Member State's participation is recommended for termination on the affirmative vote of not less than seventy-five percent (75%) of the Member State Representatives comprising the Multi-State Internet Gaming Board; provided, that the Member State Representative of the Member State being considered for termination shall recuse himself or herself from such vote. Notwithstanding the Board's recommendation, however, the participation of a Member State shall not be terminated unless and until a Notice of Termination of Member State is signed by the chief executive of each Member State whose Member Representative voted to recommend termination of such Member State.

3. Withdrawal or termination from this Agreement under this Article XII, and any termination of the Agreement under Article XIII below, shall not absolve a Member State of any of its obligations under this Agreement with respect to the period terminating on the Withdrawal Date or Termination Date. The Withdrawal Notice and Notice of Termination of Member State must be given in strict compliance with Article XV below (Notifications), except that a Notice of Termination of Member State or a Notice of Termination of Agreement shall take effect immediately upon its execution by each chief executive required to sign such Notice.

Article XIII: Termination of this Agreement

This Agreement may only be terminated following a vote to recommend termination approved by the unanimous consent of the Multi-State Internet Gaming Board; provided, however, that the termination of this Agreement shall not occur unless and until a Notice of Termination of Agreement is signed by the chief executive of each Member State.

Article XIV: Severability

If any portion of this Agreement is found to violate any provision of applicable federal or State law, such provision shall be rendered inoperative and the remainder of this Agreement shall continue in force and effect.

Article XV: Notifications

All notices and notifications required pursuant to this Agreement shall be made in writing and delivered by certified mail, return receipt requested or by overnight courier requiring a signed receipt to each Member State Representative. Unless otherwise stated in this Agreement, all such notices and notifications shall take effect thirty-five (35) days after the above-described delivery. The Member State Representatives for the State of Nevada and the State of Delaware shall provide each other with the address for notices within seven (7) days after this Agreement is signed by such States. Thereafter, each Member State that executes this Agreement must provide all other Member States with the address for notices within seven (7) days after such execution. Such addresses may be changed by a Member State from time to time by delivery of a notice pursuant to this Article XV.

Article XVI: Effective Date

This Agreement shall take effect immediately upon its execution by the Initial Member States. With respect to any additional Member State that executes this Agreement, this Agreement shall take effect with respect to such Member State immediately upon execution by such additional Member State, along with the execution of the Notice of Admission in accordance with Article IV, § 1 hereunder.

Article XVII: Miscellaneous

1. Each Member State represents and warrants that the execution, delivery and performance of this Agreement by its representative has been duly authorized by all necessary State action, that this Agreement complies with applicable State laws, and that this Agreement shall be binding upon, and shall inure to the benefit of, such Member State.

2. This Agreement constitutes the entire understanding and agreement among the Member States hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written.

3. This Agreement may be executed and delivered by facsimile or electronic mail and in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of such shall together constitute one and the same instrument.

[Signatures Follow on Next Page]

IN WITNESS WHEREOF, the parties do hereby affix their respective signatures on the date first set forth above.

STATE OF DELAWARE	**STATE OF NEVADA**
_____ (Seal) By: Jack A. Markell Governor	_____ (Seal) By: Brian Sandoval Governor

Exhibit A

Minimum Standards

No State shall be recommended by the Board to become a Member State unless the Board determines that such State's prospective Licensees, and the system of Internet Gaming offered thereby, meet the following minimum standards:

1. Principles. Operators of Internet Gaming shall be issued licenses in accordance with procedures and processes that reflect Member States' commitment to the following principles:
   a. That such licensure must promote public confidence and trust in the online gaming industry;
   b. That online gaming operations must be conducted fairly, honestly, and competitively, in a well-regulated, secure and publically accountable system designed to create a positive Patron experience; and
   c. That online gaming must be conducted only in States where such activity is legal, pursuant to a system that limits access to minors, those with gambling problems and others who should not be gaming.
2. Licensees. Operators of Internet Gaming shall not be issued licenses unless the prospective Member State is satisfied that, pursuant to its rules, regulations and procedures, an applicant meets the following:
   a. Licensees shall be of good character, honesty and integrity, and shall not be persons or organizations whose prior activity or criminal records, reputation, habits, memberships or associations pose a threat to the public interest of or to the effective regulation and control of Internet Gaming;
   b. Licensees shall be adequately capitalized, with competence and experience to conduct online gaming activities; and
   c. Licensees shall not create or enhance the dangers of unsuitable, unfair or illegal practices, methods or activities in the conduct of online gaming or the business arrangements relating thereto.
3. Technical Capability. In determining an applicant's suitability for a License, prospective Member States must consider the applicant's demonstrated technical capability to ensure that no game is conducted unless the software, computer or other gaming equipment utilized by the applicant can reasonably:
   a. Verify the physical location of the Patron engaged in such game and exclude any Patron engaged in such game who is not located in the applicable Patron State(s) or whose geographic location cannot be determined;

b. Verify the identity and age of the Patron engaged in such game at the time of account registration, and exclude any Patron not meeting the minimum age requirements; or who is identified as having a gambling problem; or who otherwise should not be gaming;

c. Require Patrons to agree to the terms, conditions and rules applicable to such Internet Gaming and allow Patrons to log out, including procedures for automatically logging off persons from online games after a specified period of inactivity;

d. Maintain procedures for Patrons to deposit and withdraw funds in a secure Internet Gaming account, to suspend account activity for security reasons, and to terminate Patron accounts and dispose of proceeds in such accounts;

e. Allow Patrons to establish self-limitations on their wagering activity (e.g. deposit limitations, wagering limitations, time limits, loss limits);

f. Demonstrate controls for the recovery and backup of information, and secured electronic storage of Patron accounts and gaming information;

g. Prohibit self-excluded or involuntarily excluded persons from registering for an online account or participating in online gaming;

h. Prohibit the creation of accounts by prospective players whose identity and/or location cannot be reasonably verified, or who attempt to establish accounts in the name of any beneficiary, custodian, joint trust, corporation, partnership or other entity;

i. Prohibit accounts from being assigned or otherwise transferred;

j. Prohibit third parties from transferring funds into any Patron's account, and establish other anti-money laundering measures; and

k. Prohibit Patrons from accessing Internet Gaming except as permitted under the laws of the applicable Member State.

4. Advertisements to Assist Problem Gamblers. Licensees must agree to maintain on the websites where Internet Gaming is conducted an advertisement for and link to additional information for the treatment, education and assistance of compulsive gamblers.

Exhibit B

Internet Gaming Offerings

	Nevada	Delaware[1]
Poker	x	x
Baccarat		x
Big Six Wheel		x
Blackjack		x
Craps		x
Let It Ride		x
Pai Gow		x
Red Dog		x
Roulette		x
Sic Bo		x
Slots/Video Lottery		x
Wheel of Fortune		x

[1] The State of Delaware is authorized by law to offer a variety of table games and video lottery games including but not limited to those listed in this Exhibit B.

[i] *See U.S. v. Cohen*, 260 F.3d 68 (2nd. Cir 2001).
[ii] *See id.*
iii Sanabria v. United States, 437 U.S. 54 (1978).
iv See, e.g., United States v. Merrell, 701 F.2d 53, 55 (6th Cir. 1983) cert. denied, 463 U.S. 1230 (1983); United States v. Reeder, 614 F.2d 1179 (8th Cir. 1980).
v United States v. Merrell, 701 F.2d 53, 55 (6th Cir. 1983) cert. denied, 463 U.S. 1230 (1983).
[vi]