



Capitol Hill Update - *Internet Gaming Legislation*

By Jeffrey R. Rodefer, Vice President of Legal Affairs, Assistant General Counsel & Corporate Compliance Officer, Boyd Gaming Corporation

Since 1995 when online gaming first appeared as mostly “free play” websites¹, Internet gambling has grown at a pace that many probably never envisioned. Global Internet gaming revenues for 2008 are projected to exceed \$20 billion.² Can Congress legislate online gambling or even ban it with any real mechanism to enforce such a ban?

The discussion regarding the legality of Internet gaming finds its genesis in the Wire Act of 1961, 18 U.S.C. § 1084. The Wire Act was a product of United States Attorney General's Robert F. Kennedy's program in 1961 to target organized crime and racketeering, along with the Travel Act (18 U.S.C. § 1952) and the Interstate Transportation of Wagering Paraphernalia Act (18 U.S.C. § 1953).³ As one would imagine, much debate has taken place over a statute that was enacted nearly 50 years ago to address organized crime's foothold in bookmaking operations and its applicability today with the emergence of the worldwide web and the ease by which anyone can access information from his or

her personal computer, laptop or handheld device. This debate is further set against a backdrop of the Tenth Amendment in which gaming has historically been left to the states to regulate.⁴ As some have observed, the Internet is inherently a creature of interstate commerce and should be the sole domain of Congress to govern.⁵ Since 1997, Congress has tried several times to legislate in this area, including Congressman Cliff Stevens' (R-FL) introduction in 2001 of the “Jurisdictional Certainty Over Digital Commerce Act,” which would have completely preempted any states' rights regarding online commerce, including gaming.⁶

Essentially, the Wire Act prohibits someone engaged in the business of betting or wagering from using a wire communication to transmit across statelines bets or information to assist in placing a bet on any sporting event or contest that would entitle the recipient to receive money or credit as a result of the bet or wager.⁷ The Department of Justice under both the Clinton and Bush administrations has taken the position that this act prohibits all forms of gambling over the Internet.⁸ This view is not necessarily held by the federal courts, most notably the Fifth Circuit Court of Appeals, who in 2002 affirmed the lower court and held in *In re MasterCard Int'l, et al.* that the plain language of the Wire Act was

limited to gambling on a sporting event or related contest.⁹

After several attempts to pass specific legislation to amend the Wire Act and prohibit all forms of online gambling, in 2006 Senator Jon Kyl (R-AZ), along with Senate Majority Leader Bill Frist (R-TN) secured the enactment of the first legislation to address Internet gaming, the Unlawful Internet Gambling Enforcement Act (UIGE Act).¹⁰ This Act, which was attached to the Safe Port Act of 2006 in the closing hours of the 109th Congress, attacks the funding sources for online gambling by making it illegal for banks and other financial institutions to collect on debt that is extended by credit, credit cards, electronic funds transfers, checks, drafts or similar instruments.¹¹

The UIGE Act does not resolve the dispute between the Department of Justice and Fifth Circuit regarding the applicability of the Wire Act to all forms of gambling. Moreover, the legislation does not define the legal and illegal forms of online gaming. The enactment merely targets the traditional funding sources for Internet gaming.

In passing the UIGE Act, Congress¹² found that:

- (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.
- (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.

In furtherance of this new law, Congress provided that within 270 days of the bill's enactment (October 13, 2006) the Federal Reserve, with assistance from the United States Attorney General, shall promulgate regulations to identify and block the prohibited payment methods.¹³ On October 1, 2007, the United States Department of the Treasury and the Board of Governors of the Federal Reserve released a joint



proposed rule to implement the UIGE Act.¹⁴ As proposed, the rule would require financial firms in this country who designate payment systems to have “policies and procedures that are reasonably designed to prevent payments being made to gambling businesses in connection with unlawful Internet gambling.”¹⁵ The Federal Reserve Board and the Treasury Department received hundreds of comments on the proposed rule by the submission deadline of December 12, 2007.¹⁶ Many of the comments, especially from the financial industry, raised deep concerns about Congress' failure to clarify what constitutes

2007, Congressman Frank introduced the Internet Gambling Regulation and Enforcement Act of 2007.²⁰ The bill, which has 48 co-sponsors including Congresswoman Shelley Berkley (D-NV), would empower the Director of the Financial Crimes Enforcement Network (FinCEN) within the United States Department of Treasury to license operators of Internet gambling sites. On June 7, 2007, Congressman Robert Wexler (D-FL) introduced the Skill Game Protection Act,²¹ which has 21 co-sponsors including Congresswoman Berkley, attempts to amend to the Wire Act by clarifying that online games that are



unlawful internet gaming activity in The UIGE Act and the unrealistic burden the proposed rule would place on the financial community to police unlawful gaming activity.¹⁷

On April 10, 2008, Congressman Barney Frank (D-MA) introduced the Payments System Protection Act before the House Committee on Financial Services.¹⁸ The bill would have prohibited the adoption of any regulation to implement The UIGE Act. On June 25, 2008, the Financial Services Committee defeated the bill in a tie vote.¹⁹

Since The UIGE's passage, five separate bills have been introduced in Congress to address online gambling. On April 26,

predominantly determined by a player's skill, such as poker, chess, bridge and mahjong, among others, are not prohibited. On the same day, Congressman Jim McDermott (D-WA) introduced the Internet Gambling Regulation and Tax Enforcement Act of 2007,²² which he also introduced again in following session of the 110th Congress.²³ The bills seek to amend the 1986 Internal Revenue Code by ensuring that the collection of taxes on regulated Internet gambling activities. According to a tax revenue analysis performed by PricewaterhouseCoopers, taxation of a regulated online gaming industry would generate between \$8.7

billion and \$42.8 billion in federal revenues over the next ten years.²⁴

On May 3, 2007, Congresswoman Berkley introduced the Internet Gambling Study Act.²⁵ This bill, which has 72 co-sponsors including Congressmen Dean Heller (R-NV) and Jon C. Porter (R-NV), would require the National Research Council of the National Academy of Sciences to conduct a comprehensive study concerning online gaming, as well as the existing legal mechanisms for governing this activity. The study would also examine the impact of the UIGEA on Internet gaming in the United States.

Although Nevada passed Assembly Bill 466 in 2001 that empowered the Nevada Gaming Commission, with assistance from the State Gaming Control Board, to adopt regulations governing the licensing of interactive operations, no such regulations have been adopted.²⁶ However, before such regulations could be promulgated the Commission was instructed by the Legislature to determine, among other things, if such gaming was legal.²⁷ In 2002, the United States Department of Justice advised Nevada, in writing, that its interpretation of applicable federal laws would prohibit all forms of gambling over the Internet, not just wagering on sporting events. Nevada, as well as seven other jurisdictions, expressly prohibits online gaming. **NGL**

¹ Bo J. Bernhard, Ph.D, Anthony F. Lucas, Ph.D, Elena Shampaner, Ph.D (candidate), *Internet Gambling in Nevada*, 6 (International Gaming Institute, University of Nevada-Las Vegas, April 2007).

²See Christiansen Capitol Advisors, LLC (www.cca-i.com).

³Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 Gaming L. Rev. 393, 396 (October 2002).

⁴*Id.* at 394.

⁵*Id.*

⁶*Id.* at 414.

⁷*Id.* at 397-398.

⁸American Gaming Association, *Factsheet*:

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(www.americangaming.org/industry/factsheets/issues_detail).

⁹132 F. Supp.2d 468,472 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).

¹⁰H.R. 4954, § 801, 109th Cong., 2nd Sess. (2006), Pub. L. No. 109-347.

¹¹*Id.* at sec. 5363.

¹²*Id.* at sec. 5361.

¹³*Id.* at sec. 5364.

¹⁴72 Fed. Reg. 56,680 (Oct. 4, 2007) (proposed Oct. 1, 2007); *see also*

(www.federalreserve.gov/newsevents/press/bcreg/20071001a.htm).

¹⁵*Id.*

¹⁶*Id.*

¹⁷Key Congressional Committee Reaches Stalemate on New Regulations to Enforce Internet Gambling Ban, PR Newswire, June 25, 2008.

¹⁸H.R. 5767, 110th Cong. 2nd Sess. (2008).

¹⁹*See n. 17, supra.*

²⁰H.R. 2046, 110th Cong., 1st Sess. (2007).

²¹H.R. 2610, 110th Cong., 1st Sess. (2007).

²²H.R. 2607, 110th Cong., 1st Sess. (2007).

²³H.R. 5523, 110th Cong., 2nd Sess. (2008).

²⁴*See n. 17, supra.*

²⁵H.R. 2140, 110th Cong., 1st Sess. (2007).

²⁶Act of June 14, 2001, ch. 593, 2001 Nev. Stat. 3075 (codified at NRS 463.750, *et seq.*).

²⁷NRS 463.750(2)(a).

