

# INTERNET GAMBLING: RECENT DEVELOPMENTS AND STATE OF THE LAW

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Have you ever wondered whether internet gambling<sup>1</sup> is legal in the United States? The answer seems to depend on the source.<sup>2</sup> Such conflicting responses are not surprising given the state of the law. Federal and state laws from both before and after the conception of the Internet have created an unnavigable patchwork of regulation. And although the past few years have seen a new federal law in 2006, new agency regulations in 2009, and a host of controversial enforcement actions, the law remains frustratingly murky. In fact, the federal law enacted in 2006, the only one to target internet gambling, provides no definition of “unlawful internet gambling.”<sup>3</sup> The Treasury and Federal Reserve regulations promulgated under that law, likewise, fail to provide a definition or any helpful clarification.<sup>4</sup> Thus, the uncertainty of the law forces would-be bettors and companies to either play it safe or throw the dice.<sup>5</sup>

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1. The gaming industry uses the term “gaming” to refer to the industry and the term “gambling” to refer to the activity. AM. GAMING ASS’N, FACTSHEET: GAMING VS GAMBLING (1999), [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=9](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=9). Some commentators and practitioners reserve the former term for legalized activity and the latter for illegal activity. *See, e.g.*, CHUCK HUMPHREY, GAMBLING LAW US, <http://www.gambling-law-us.com> (last visited Feb. 24, 2010). This Note uses the terms interchangeably.

2. *Compare* Cheryl Wittenauer, *BetOnSports.com Founder Gets 4-Plus Years*, ASSOC. PRESS, Nov. 2, 2009, *available at* <http://abcnews.go.com/Technology/wireStory?id=8978727> (“Online gaming is illegal in the U.S.”) *with* Caryn Rousseau, *State Board Approves Online Horse Racing Bets*, ASSOC. PRESS, Oct. 13, 2009, *available at* <http://www.sj-r.com/breaking/x593082577/Illinois-moves-to-license-online-horse-racing-bets> (detailing Illinois’s legalization of internet gambling on horse racing).

3. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, tit. VIII, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)).

4. 12 C.F.R. pt. 233, 31 C.F.R. pt. 132 (2009). However, the agencies did acknowledge the difficulty in interpreting current law and thus refused to undertake that interpretation. *See* Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,384 (codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132) (concluding that defining “unlawful internet gambling” under current state and federal law “would not be practical” because “the underlying patchwork legal framework does not lend itself to a single regulatory definition”).

5. For example, gambling website operators located in the European Union, faced with the ambiguity of U.S. laws, took a chance by accepting bets originating in the United States; however, they were forced to withdraw from the U.S. market in 2006 when the

The stakes are high. Americans gambled away almost \$6 billion online in 2008.<sup>6</sup> Furthermore, by not legalizing and regulating internet gambling, the federal government may forego up to \$62.7 billion in taxes over the next decade.<sup>7</sup> Moreover, offshore operators of internet sports-gambling<sup>8</sup> sites unlucky enough to fall under Department of Justice scrutiny and U.S. jurisdiction are serving prison sentences and have forfeited millions of dollars.<sup>9</sup>

Yet no federal or state government in the United States regulates these sites, so bettors have no assurance of fair gaming.<sup>10</sup> If American bettors feel cheated, they have little chance of keeping lawsuits against foreign corporations in stateside courts.<sup>11</sup> And since the most reputable foreign companies have withdrawn from the U.S. market,<sup>12</sup> Americans must place their bets with less trustworthy sites.

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United States began intensifying enforcement actions against them. EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE ON U.S. INTERNET GAMBLING LAWS 77–78 (2009), *available at* <http://trade.ec.europa.eu/doclib/html/143405.htm> [hereinafter EC REPORT]. Some U.S.-based gambling websites, on the other hand, continue to operate with impunity. *Id.* at 40.

6. AM. GAMING ASS'N, FACTSHEET: INTERNET GAMBLING, [http://www.americangaming.org/Industry/factsheets/issues\\_detail.cfv?id=17](http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17) (last visited Feb. 24, 2010) [hereinafter INTERNET GAMBLING FACTSHEET] (stating that \$5.9 billion of the \$21 billion in gross revenues for internet gambling sites originated in the United States). In comparison, tribal and non-tribal brick-and-mortar casinos in the United States grossed a combined \$60.43 billion in 2007. *See* AM. GAMING ASS'N, FACTSHEET: GAMING REVENUE: CURRENT-YEAR DATA (2009), [http://www.americangaming.org/Industry/factsheets/statistics\\_detail.cfv?id=7](http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=7).

7. PRICEWATERHOUSECOOPERS, ESTIMATE OF FEDERAL REVENUE EFFECT OF PROPOSAL TO REGULATE AND TAX ONLINE GAMBLING: EXECUTIVE SUMMARY E-2 (2009), <http://www.safeandsecureig.org/media/pwctaxanalysis.pdf>.

8. This Note uses the term “internet sports-gambling” to mean wagering on sporting events via the Internet.

9. *See, e.g.*, Press Release, Department of Justice, BetOnSports Founder Sentenced on Federal Racketeering Charges—Agrees to the Forfeiture of Over \$43 Million (Nov. 2, 2009), *available at* <http://stlouis.fbi.gov/dojpressrel/pressrel09/sl110209.htm> [hereinafter DOJ Press Release] (announcing the sentencing of Gary Stephen Kaplan to over 4 years in prison). After a “worldwide search,” the FBI arrested Kaplan in the Dominican Republic with the help of Interpol and Dominican officials. Press Release, Department of Justice, Founder of BetonSports Arrested (March 30, 2007), *available at* [http://www.justice.gov/opa/pr/2007/March/07\\_crm\\_204.html](http://www.justice.gov/opa/pr/2007/March/07_crm_204.html). For more details, see *infra* Section I.A.5.

10. With the exception of internet gambling on horse racing, which states regulate. *See, e.g.*, Rousseau, *supra* note 2; *see also infra* Section I.B.

11. *See, e.g.*, Wong v. Partygaming Ltd., No. 1:06-CV-02376, 2008 WL 4449436, at \*1 (N.D. Ohio Sept. 30, 2008) (dismissing case under the doctrine of forum non conveniens).

12. *See* Transcript, PBS Newshour: President Bush Signs Law Banning Internet Gambling (Oct. 16, 2006) [hereinafter PBS Transcript], *available at* <http://www.pbs.org/>

Congress could take leadership by enacting a clear statutory scheme either to legalize, regulate, and tax internet gambling or to establish unequivocally which forms of internet gambling are prohibited. Alternatively, Congress could vest in states full authority to regulate internet gambling by explicitly delegating that power and delineating its bounds. Absent congressional leadership, courts will continue to wander through the legal thicket, and gaming advocates will continue to challenge state regulation.

Part I of this Note explores the current legal thicket created by federal gambling statutes. The ambiguity in federal law largely stems from the old Wire Act<sup>13</sup> and its interaction with subsequent legislation.<sup>14</sup> Part I advocates interpreting the Wire Act such that it does not prohibit all internet gambling. Part II provides an overview of state law and highlights two recent cases: the internet domain name seizures in Kentucky and a declaratory action brought by an amateur poker player in Washington.<sup>15</sup> Finally, Part III offers concluding thoughts.

## I. FEDERAL LAW

States have traditionally regulated gambling.<sup>16</sup> Their attitude has generally been tolerant, with state lotteries being the predominate manifestation.<sup>17</sup> Congress first enacted anti-gambling legislation at the turn of the Twentieth Century with two laws that prohibited the interstate transportation of lottery paraphernalia.<sup>18</sup> The next burst of federal legislation did not occur until the 1960s and 70s when Congress passed legislation to target organized crime,

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[newshour/bb/business/july-dec06/gambling\\_10-16.html](http://newshour/bb/business/july-dec06/gambling_10-16.html); EC REPORT, *supra* note 5, at 77–78.

13. Wire Act, Pub. L. No. 87-216, 75 Stat. 491 (1961) (codified at 18 U.S.C. § 1084 (2006)). The Wire Act prohibits the transmission of wagers on sporting events using a wire communication facility. *See infra* Section I.A.

14. *See* Amendment to the Interstate Horseracing Act, Pub. L. No. 106-553, tit. VI, 114 Stat. 2762A-108 (2000) (codified at 15 U.S.C. § 3002 (2006)); Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), Pub. L. No. 109-347, tit. VIII, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)); *infra* Section I.B (discussing Interstate Horseracing Act); *infra* Section I.C (discussing UIGEA).

15. *Rouso v. State*, 204 P.3d 243 (Wash. Ct. App. 2009), *review granted*, 217 P.3d 337 (Wash. 2009); *Interactive Media Ent. & Gaming Ass’n v. Wingate*, No. 2008-CA-2036, 2009 WL 142995 (Ky. Ct. App. Jan. 20, 2009).

16. Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 394 (2004).

17. *See* *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987).

18. *Id.*; *see also* *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903).

which had turned to illegal gambling as a source of revenue after the end of Prohibition left them without their original financial fount, the speakeasy.<sup>19</sup>

One of these old statutes, the Wire Act of 1961,<sup>20</sup> has become a major weapon against internet gambling,<sup>21</sup> but controversy has surrounded the interpretation of its scope. In addition, the legal landscape was complicated by the 2000 Amendment to the Interstate Horseracing Act of 1978 (IHA),<sup>22</sup> which may have provided a safe harbor for internet gambling on horse racing. Congress first took up the issue of internet gambling on a wider scale with the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA),<sup>23</sup> which mandated the Department of the Treasury and the Federal Reserve to promulgate regulations.<sup>24</sup> However, the government built these laws upon the shaky foundation of the Wire Act, and neither the UIGEA nor the agency regulations provided any real clarity to what types of gambling U.S. law actually prohibits.

#### A. THE WIRE ACT

Even though Congress enacted the Wire Act<sup>25</sup> before the conception of the Internet, most commentators agree that its language is sufficiently flexible

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19. See *King*, 834 F.2d at 112; Rodefer, *supra* note 16, at 397–407. Although Prohibition ended in 1933, the congressional hearings concerning organized crime that ultimately produced this wave of anti-gambling legislation did not occur until the 1950s and 60s. See *King*, 834 F.2d at 112.

20. Wire Act, Pub. L. No. 87-216, 75 Stat. 491 (1961) (codified at 18 U.S.C. § 1084 (2006)). See discussion *infra* at Section I.A.

21. Another statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)), is a potent weapon from this era still heavily used today. However, since prosecutions under RICO require defendants to have committed predicate acts in violation of other statutes, such as the Wire Act, see Rodefer, *supra* note 16, at 396, an analysis of RICO is unnecessary for the purposes of this Note.

22. Amendment to the Interstate Horseracing Act, Pub. L. No. 106-553, tit. VI, 114 Stat. 2762A-108 (2000) (codified at 15 U.S.C. § 3002 (2006)). See discussion *infra* at Section I.B.

23. Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), Pub. L. No. 109-347, tit. VIII, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)). See discussion *infra* at Section I.C.

24. 12 C.F.R. §§ 233.1–7, 31 C.F.R. §§ 233.1–7 (2009). See discussion *infra* at Section I.D. Note that the provisions located in Chapter 12 and Chapter 31 are identical: the Chapter 12 version is formally the Federal Reserve regulations, and the Chapter 31 version is formally the Treasury regulations.

25. The Wire Act is referred to alternatively as the Wire Wage Act and the Federal Wire Act.

to encompass internet gambling.<sup>26</sup> However, uncertainty surrounding its scope creates the first bramble bush in the legal thicket of internet gambling.

The debate centers on whether the Wire Act applies only to gambling on sporting events, such as betting on football games, or to all forms of gambling, including casino games, like poker and blackjack. Courts have ruled both ways. The Fifth Circuit takes the view that it applies only to gambling on sporting events;<sup>27</sup> the District of Utah (and, for that matter, the Department of Justice) takes the view that it applies to all forms of gambling.<sup>28</sup>

The consequences of this debate are significant. If the Wire Act applies to all forms of gambling, then all internet gambling, no matter the subject, is currently illegal<sup>29</sup> in the United States. If, on the other hand, the Wire Act only applies to gambling on sporting events, or if its original scope has been limited by subsequent legislation, then some internet gambling—for example, internet gambling on horse racing—could be legal.

1. *Language of the Wire Act*

Subsection (a) of the act provides the following:

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 . . .<sup>30</sup>

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26. See, e.g., Rodefer, *supra* note 16, at 396; cases cited *infra* note 32. But see U.S. GEN. ACCT. OFF., GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 12–13 (2002) [hereinafter GAO REPORT] (“Depending on how the phrase is interpreted, the act might not apply to Internet gambling in some instances . . .”).

27. *Thompson v. MasterCard Int’l Inc. (In re MasterCard Int’l Inc.)*, 313 F.3d 257, 262 (5th Cir. 2002).

28. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1278–82 (D. Utah 2007); EC REPORT, *supra* note 5, at 24.

29. Note, however, that the term “illegal” does not identify which party to the transaction is committing the crime. As discussed *infra* Section I.A.1, the Wire Act only targets those “engaged in the business of betting or wagering.” 18 U.S.C. § 1084(a) (2006). Thus, the gambling website and perhaps the professional gambler would be violating the Wire Act, but the casual gambler would not.

30. 18 U.S.C. § 1084(a).

As threshold elements, then, the Wire Act requires that one be “engaged in the business of betting or wagering,”<sup>31</sup> that he commit the acts “knowingly,” that he use a “wire communication facility,”<sup>32</sup> and that the transmission cross state or national boundaries. If the threshold elements are met, the Wire Act prohibits three types of transmissions: (1) transmissions of bets or wagers (or information assisting in the placement therein) on any “sporting event or contest;” (2) communications that entitle the recipient to receive money or credit as a result of “bets or wagers;” and (3) information assisting in the placing of “bets or wagers.” This Section will refer to these as the first, second, and third prohibitions of § 1084(a).

The phrase “sporting event or contest” limits the phrase “bets or wagers” in the first prohibition of § 1084(a); however, “sporting event or contest” does not appear in the second and third prohibitions. This textual ambiguity laid the groundwork for the debate.

2. *The Fifth Circuit Held That the Wire Act Only Applies to Sporting Events*

The Fifth Circuit has held that the Wire Act only prohibits gambling on sporting events.<sup>33</sup> The plaintiffs were gamblers who had used their credit cards to fund their wagering accounts at online (non-sports) gambling sites.<sup>34</sup> The class action suit against their credit card companies alleged, among other things, that the companies had violated the Wire Act by processing the transactions.<sup>35</sup>

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31. At least one court has interpreted this language to include anyone involved in the business, not just those “running the show.” *United States v. Corrar*, 512 F. Supp. 2d 1280, 1287 (rejecting defendant’s argument that being a middle man precludes prosecution under the Wire Act). The law, however, was never intended to be used against casual bettors. *See* 107 CONG. REC. H16, 533-38 (daily ed. Aug. 21, 1961) (statement of Rep. Cellar).

32. At least one defendant has argued that the Internet is not a “wire communication facility,” but the court did not agree. *Lombardo*, 639 F. Supp. 2d at 1289 (reasoning that the Wire Act “clearly contemplates any form of electronic transmission via wire”); *accord* *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (“Cohen established two forms of wire facilities, internet and telephone.”).

33. *Thompson v. MasterCard Int’l Inc. (In re MasterCard Int’l Inc.)*, 313 F.3d 257, 262 (5th Cir. 2002). Since the Eastern District of Louisiana opinion provides a full analysis and the Fifth Circuit opinion does not repeat that analysis, this Section cites to the district court opinion. *Compare id.* at 262 (“The district court concluded that the Wire Act concerns gambling on sporting events or contests . . . . We agree with the district court’s statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.”) *with In re MasterCard Int’l. Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).

34. *In re MasterCard*, 132 F. Supp. 2d at 473–74.

35. *Id.* at 472, 479.

The court used typical tools of statutory construction and concluded that the credit card companies had not violated the Wire Act because the Wire Act only applies to sporting events.<sup>36</sup> The court reasoned that “a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.”<sup>37</sup> The court also pointed to a statement made by the chairman of the House Judiciary Committee, Emmanuel Celler, while the bill was being considered: “[T]his particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events.”<sup>38</sup> In addition, the court took note of past and then-pending legislation that would have amended the Wire Act to prohibit all internet gambling—if the Wire Act extends beyond sporting events, the court reasoned, such amendments would have been unnecessary.<sup>39</sup>

3. *The District of Utah Held That the Wire Act Applies to All Gambling*

The District of Utah disagreed with the Fifth Circuit in a more recent case involving a criminal enterprise that provided transaction-processing services to illegal gambling websites.<sup>40</sup> The defendants challenged the sufficiency of the Wire Act allegations by arguing that the act only reaches wire communications concerning betting or wagering on sporting events or contests and does not include other games of chance like those used by online casinos.<sup>41</sup>

The court rejected the defendants’ argument and disagreed with the Fifth Circuit’s statutory construction.<sup>42</sup> The court found “conspicuous” the lack of the qualifier “sporting event or contest” in the second and third prohibitions of § 1084(a).<sup>43</sup> In addition, the court reasoned that if all three prohibitions reached only sporting events, then the third prohibition would be pure surplusage.<sup>44</sup> Since both the first and the third prohibitions use the phrase “information assisting in the placing of bets or wagers,” the third prohibition would be unnecessary unless it had a wider scope than the first prohibition’s “sporting event or contest.”<sup>45</sup> The court also noted legislative history in its

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36. *Id.* at 481.

37. *Id.*

38. *Id.* at 480–81 (quoting 107 CONG. REC. 16,533 (1961)).

39. *Id.* at 480.

40. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007). As an aside, it is interesting to note that Utah is the only state in the union that prohibits all forms of brick-and-mortar gambling. *See* sources cited *infra* note 132.

41. *Id.* at 1277–78.

42. *Id.* at 1282.

43. *Id.* at 1281.

44. *Id.*

45. *Id.*

favor. The committee report from the House Judiciary Committee stated that the bill's purpose was to assist states "in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses."<sup>46</sup> According to the court, "like offenses" contemplated a wider scope.<sup>47</sup>

The court also engaged in a whole act approach to statutory interpretation, but it found the evidence inconclusive because of inconsistent usage of "sporting event or contest." The exceptions listed in § 1084(d) of the act "require[] a common carrier, upon notice, to cease from operating any facility that is or will be used 'for the purpose of transmitting or receiving gambling information,' unqualified by any relation to a sporting event or contest."<sup>48</sup> However, "the exceptions in § 1084(b) refer to betting on sporting events or contests alone."<sup>49</sup> Thus, the inconsistent uses of "sporting event or contest" in other parts of § 1084 fail to clarify the interpretation of § 1084(a).

#### 4. *Analysis*

The District of Utah's reading of the statute is not without its own problems, though. As a consequence of not carrying over "sporting event or contest" to the second and third prohibitions of § 1084(a), all three prohibitions would apply to sporting events, but only the second and third would apply to other games of chance. The result would be irrational. For non-sporting events, transmitting the bets themselves would be legal under the first prohibition of § 1084(a), but transmitting information to assist those bets would be illegal under the second and third prohibitions. It seems unreasonable to impute this intent to Congress. In addition, the resulting structure of § 1084(a) would become highly suspect. Normally Congress starts with a broad or general term and then carves out specifics; under the District of Utah's reading, Congress has begun with a specific carve out and then followed it with two broader, more general prohibitions.

Furthermore, the legislative history is ambivalent, even more so than either court let on. The same committee report cited by the District of Utah lists the "immediate receipt of information as to results of a *horsrace*" and the dependency of "bookmakers . . . upon telephone service for the placing of

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46. *Id.* at 1280–81 (quoting H.R. REP. 87-967, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631) (emphasis in court's opinion).

47. *Id.*

48. *Id.* at 1281.

49. *Id.*

bets and for layoff betting on all *sporting events*” as examples of the evils the bill was to address.<sup>50</sup>

On the other hand, the committee report from the Senate Judiciary Committee, which drafted the language in question, implies a wider scope. It states that the bill’s purpose was “to amend ‘Chapter 50: Gambling,’ of title 18 . . . with respect to the transmission of bets, wagers, and related information to assist the several States in the enforcement of their laws pertaining to gambling.”<sup>51</sup> This language does not limit the bill’s purpose to betting on sporting events.

Other courts have noted that this statute was part of a larger crime bill that “does not stand alone, but appears as part of an independent federal policy aimed at those who would, in furtherance of *any* gambling activity, employ any means within direct federal control.”<sup>52</sup> Still, the only type of gambling activity for which crime syndicates were using wire communication facilities at that time was bookmaking.<sup>53</sup>

Overall, the Fifth Circuit’s construction is more convincing. Given the ambiguity at all levels of statutory construction—the text of § 1084(a), the text of the whole act, the legislative history, and the legislative intent—two facts should serve as tiebreakers. First, the District of Utah’s reading produces an absurd result. Second, the subsequent legislative history, although not normally a strong indicator of legislative intent, weighs in favor of the Fifth Circuit’s interpretation. Specifically, in the early 2000s Congress introduced a number of bills that would have broadened the Wire Act to encompass non-sports gambling.<sup>54</sup> In addition, the Amendment to the Interstate Horseracing Act<sup>55</sup> (“IHA amendment”) contemplates legalized internet gambling on horse racing.<sup>56</sup> Similarly, the Unlawful Internet Gambling Act of 2006<sup>57</sup> (UIGEA), by only outlawing “unlawful” internet

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50. H.R. REP. 87-967, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631 (emphasis added).

51. S. REP. 87-588, at 1–2 (1961).

52. *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968) (*dicta*) (emphasis added).

53. The only examples given on the record concern betting on sports and horseracing. *See, e.g.*, sources cited *supra* notes 38 and 50 and accompanying text.

54. *See In re MasterCard Int’l. Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).

55. Amendment to the Interstate Horseracing Act, Pub. L. No. 106-553, tit. VI, 114 Stat. 2762A-108 (2000) (codified at 15 U.S.C. § 3002 (2006)).

56. *See* GAO REPORT, *supra* note 26, at 42–44; EC REPORT, *supra* note 5, at 25–26; *see also infra* Section I.B.

57. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, tit. VIII, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)).

gambling and by providing a “safe harbor” for certain types of transactions, contemplates that some forms of internet gambling are legal.<sup>58</sup>

Furthermore, even if the Wire Act *originally* prohibited all forms of internet gambling, the IHA amendment can be seen as modifying that prohibition—Congress enacted the amendment after passing the Wire Act, and so where their provisions conflict, those of the IHA amendment should trump.<sup>59</sup> The UIGEA’s safe harbor provisions should then be interpreted as a congressional affirmation of this legislative modification.<sup>60</sup>

#### 5. *Recent Enforcement of the Wire Act*

The Department of Justice has maintained that the Wire Act applies to every form of gambling that involves wire transmissions in interstate or foreign commerce, not just gambling on sporting events.<sup>61</sup> The Department’s most recent conviction, though, did concern an internet sports-gambling site, BetOnSports.com.<sup>62</sup> Founder Gary Kaplan had based his business in Aruba, Antigua, and Costa Rica in the mid-90s.<sup>63</sup> The company accepted bets via telephone and Internet from wagering accounts registered to bettors in the United States.<sup>64</sup> In 2003, the company had almost one million registered customers and accepted over ten million sports bets in a cumulative gross amount in excess of \$1 billion.<sup>65</sup> By 2004, Kaplan had taken the company public on the London Alternative Investment Market.<sup>66</sup> Yet, in taking sports bets over the Internet, the company’s operations violated U.S. law. Thus, in November 2009, a U.S. court sentenced Kaplan to fifty-one months in

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58. See EC REPORT, *supra* note 5, at 31–32; cf. Mark Hichar, *The Wire Act Should Not Be Used to Prohibit Internet Gambling Under the UIGEA Intrastate Wagering Exception*, 13 GAMING L. REV. & ECON. 106, 113–14 (2009) (arguing that it would be against the purpose of the Wire Act to prohibit transmissions exempted by the UIGEA).

59. See *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007); see also EC REPORT, *supra* note 5, at 25, 52 (arguing that the language of the IHA amendment, the actions of the horse racing industry, and the lack of enforcement actions by the Department of Justice imply that internet gambling on horse racing is legal).

60. See EC REPORT, *supra* note 5, at 25 (“The [UIGEA] contained language that recognizes the ability of the horse racing industry to offer account wagering under the IHA of 1978 as amended . . . .”) (quoting Press Release, National Thoroughbred Racing Association, Congress Affirms Horse Racing’s Position in Internet Gaming; Legislation Passed by Both Houses Early This Morning, Sep. 30, 2006).

61. See Hichar, *supra* note 58, at 107–08, 111–12; EC REPORT, *supra* note 5, at 24.

62. DOJ Press Release, *supra* note 9.

63. *Id.*

64. See *id.*

65. *Id.*

66. *Id.* Going public personally netted Kaplan over \$100 million. *Id.*

prison after he pled guilty to charges of racketeering and violating the Wire Act.<sup>67</sup>

#### B. THE INTERSTATE HORSERACING ACT

In many ways, horse racing stands apart from other corners of the gaming industry.<sup>68</sup> Some states, for example, have separate regulatory bodies just for horse racing.<sup>69</sup> On a national level, horse racing has its own lobbying group distinct from the American Gaming Association.<sup>70</sup> And at a statutory level, internet gambling on horse racing is the only class of internet gambling that enjoys the privilege of being (sort of) recognized as legal under federal law.<sup>71</sup>

Off-track betting (OTB), in which a player can bet on a horse race from a remote location and view the race via broadcast, began before federal legislation in the field.<sup>72</sup> In 1978, however, Congress passed the Interstate Horseracing Act (IHA), which prohibits all OTB except that which complies with its provisions.<sup>73</sup> Mainly, the IHA requires that OTB corporations obtain the consent of state racing associations and racing commissions before accepting bets.<sup>74</sup>

Even before the IHA was passed, a gambler could walk into an OTB facility in New York, place his bet on a Kentucky horse race, and collect his

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67. *Id.*

68. Other subsets of gambling have also been given individual treatment by the law. For example, Congress has passed laws targeting sports gambling and lotteries. *See generally* Rodefer, *supra* note 16, at 396–411.

69. For example, the New Jersey Racing Commission is a division with rulemaking powers within the Department of Law and Public Safety, N.J. STAT. ANN. § 52:17B-95 (2009), separate from the Division of Gaming Enforcement, N.J. STAT. ANN. § 5:12-55 (2009), which is housed in the same department. Confusingly, there is also an independent agency called the Casino Control Commission. N.J. STAT. ANN. § 5:12-50 (2009).

70. The American Horse Council calls itself the “association that represents all segments of our nation’s diverse horse industry.” American Horse Council Homepage, <http://www.horsecouncil.org> (last visited Jan. 31, 2010); *see also* *The 25th Anniversary of the Passage of the Interstate Horseracing Act of 1978*, HORSEMEN’S J. (Winter 2003), available at <http://www.hbpa.org/HorsemensJournalDisplay.asp?section=3&key1=2391> (noting that, when the horse industry lobby showed up in Washington, D.C., the “Las Vegas and casino interests sure didn’t want to see us there”) (internal quotes omitted); National Thoroughbred Racing Association, [www.ntra.com](http://www.ntra.com) (last visited Jan. 31, 2010).

71. *Cf.* Rodefer, *supra* note 16, at 410.

72. *See* NYCOTB History, <http://www.nycotb.com/newnycotb/AboutUs/NYCOTBHistory/tabid/57/Default.aspx> (last visited Jan. 31, 2010) (detailing the history of the N.Y.C. Off-Track Betting Corporation, established in 1970).

73. Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 1181 (codified as amended at 15 U.S.C. §§ 3001–3007 (2006)).

74. 15 U.S.C. § 3004; *see also* GAO REPORT, *supra* note 26, at 42.

winnings from the New York OTB facility. In this situation, only the race information crosses state lines: which horses are racing, the odds, and which horses have won. Although the Wire Act generally prohibits such transmissions across state lines, it provides an exception that would have applied.<sup>75</sup> However, were the *wager* to cross state lines, the exception would not apply, and the wager would have violated the Wire Act.<sup>76</sup>

An open question, which became more relevant after the birth of the Internet, was whether the IHA had widened the Wire Act exception to include, at least in the context of horse racing, the interstate wagers themselves. In 1999, the Department of Justice clarified in a letter to Congress that, under its interpretation, the IHA did not sanction internet OTB if the wager crossed state lines—such wagers would still violate the Wire Act.<sup>77</sup>

Then, hidden amidst a mammoth appropriations bill in 2000,<sup>78</sup> Congress amended the definition of “off-track wager” in the IHA so that the amended provision now reads,

“[I]nterstate off-track wager” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State *and includes pari-mutuel*<sup>79</sup> [horserace] wagers, *where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.*<sup>80</sup>

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75. The exception is for “the transmission of information assisting in the placing of bets or wages . . . from a State . . . where betting on that sporting event or contest is legal into a State . . . in which such betting is legal.” 18 U.S.C. § 1084(b) (2006); *see also United States v. Bala*, 489 F.3d 334, 341–42 (8th Cir. 2007) (interpreting the exception).

76. Thus, if the gambler were to have phoned the Kentucky track from New York and placed a bet with the Kentucky track on the race, a violation of the Wire Act would have occurred. *See supra* Section I.A.

77. Letter from the Department of Justice to Senator Leahy regarding S. 692, The Internet Gambling Prohibition Act of 1999 (June 9, 1999), *available at* <http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm> (“The [IHA] does not allow for [the legal transmission and receipt of interstate horseracing bets or wagers], and if a parimutuel [horse racing] wagering business currently transmits or receives interstate bets or wagers . . . it is violating federal gambling laws.”).

78. *See* Amendment to the Interstate Horseracing Act, Pub. L. No. 106-553, tit. VI, 114 Stat. 2762A-108 (codified at 15 U.S.C. § 3002).

79. Gambling on horse racing falls under the heading of “pari-mutuel wagering,” which describes the method by which the winners are paid a portion from the pooled bets.

80. 15 U.S.C. § 3002(3) (italics indicate language added by the amendment).

By its plain language, therefore, the amendment legalized telephone and internet gambling on horse racing.<sup>81</sup>

The Executive Branch, however, has maintained that the amendment did not legalize internet gambling on horse racing. President Clinton issued a signing statement insisting that the Wire Act still prohibits it,<sup>82</sup> and the Department of Justice under President George W. Bush held the same position.<sup>83</sup> However, it is difficult to defend this assertion. The plain language of the IHA amendment disputes it. The IHA amendment came after the Wire Act; later-enacted statutes tend to trump earlier ones where they clearly contradict each other.<sup>84</sup> Moreover, the IHA amendment is specific to horse racing, whereas the Wire Act applies generally to all sporting events; specific statutes tend to trump general ones.<sup>85</sup> Finally, the legislative history of the IHA amendment supports the proposition that the legislative purpose of the amendment was to legalize internet pari-mutuel (horse race) wagering.<sup>86</sup> Although no federal court has addressed this proposition, many states have authorized internet pari-mutuel wagering for their residents,<sup>87</sup> and the Department of Justice has never prosecuted these internet sites.<sup>88</sup>

In summary, at the turn of the Twenty-first Century, the law of internet gambling was still murky. The Wire Act may have prohibited all internet betting (District of Utah interpretation), may have prohibited only internet sports gambling (including gambling on horse racing), or may have prohibited only internet sports gambling that was not sanctioned by the amended IHA. Meanwhile, both the number of internet gambling sites and the number of wagers originating in the United States were increasing.<sup>89</sup> It was into this environment that the first federal law enacted specifically to address internet gambling was born. Unfortunately, it did nothing to improve clarity.

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81. *See supra* note 59.

82. *See* Rodefer, *supra* note 16, at 410–11.

83. EC REPORT, *supra* note 5, at 24.

84. *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

85. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524–26 (1989).

86. *See* Rodefer, *supra* note 16, at 410–11.

87. *See, e.g., Prescott Carlson, Illinois Residents Can Now Play the Ponies from Home*, CHICAGOIST (Oct. 13, 2009), [http://chicagoist.com/2009/10/13/illinois\\_residents\\_can\\_now\\_play\\_the.php](http://chicagoist.com/2009/10/13/illinois_residents_can_now_play_the.php). Twinspires.com accepts bets from residents of 36 states. *See* Twinspires Account Registration Page, <http://www.twinspires.com/content/account/register> (click on the “State” pulldown menu).

88. EC REPORT, *supra* note 5, at 52.

89. *Id.* at 19–20.

C. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

Concerned after 9/11 that money from internet gambling sites was funding terrorist activities, Congress began to hold hearings in 2001 about how to reduce American participation in internet gambling.<sup>90</sup> The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was the result.<sup>91</sup>

The UIGEA is the first and only federal law to specifically address internet gambling. It provides new enforcement tools and imposes reporting and due diligence requirements on financial institutions to prevent unlawful internet gambling transactions from occurring.<sup>92</sup> However, the UIGEA does absolutely nothing to clarify exactly what type of internet gambling is unlawful.

The primary purpose of the statute was to “give U.S. law enforcement new, more effective tools for combating offshore Internet gambling sites that illegally extend their services to U.S. residents via the Internet.”<sup>93</sup> Unlike the Wire Act, the UIGEA does not purport to define the type of wagering it prohibits; instead, it looks to existing federal and state law in its definition of “unlawful Internet gambling”:

“[U]nlawful 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.<sup>94</sup>

Section 5364 contains the most relevant substantive provision. In it, the UIGEA directs the Secretary of the Treasury and the Board of Governors of the Federal Reserve System to prescribe regulations “requiring each designated payment system . . . to identify and block . . . restricted transactions.”<sup>95</sup> A designated payment system is defined as “any system utilized by a financial transaction provider that the Secretary [of Treasury] and the Board of Governors of the Federal Reserve System . . . jointly determine . . . *could be utilized* in connection with, or to facilitate, any restricted

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90. Report from House Committee on Financial Services, Unlawful Internet Enforcement Act of 2006 Report, 109 H. Rpt. 412 pt. 1, at 10 (April 6, 2006) [hereinafter H. Comm. Fin. Serv. UIGEA Rpt.].

91. *Id.*; Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, tit. VIII, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)).

92. *See* 31 U.S.C. §§ 5361–5367.

93. H. Comm. Fin. Serv. UIGEA Rpt., *supra* note 90, at 10.

94. 31 U.S.C. § 5362(10)(a).

95. *Id.* § 5364(a).

transaction.”<sup>96</sup> A restricted transaction, in turn, is defined as the knowing receipt of funds in connection with unlawful internet gambling by a person engaged in the business of betting or wagering.<sup>97</sup>

In other words, the UIGEA calls for regulations that mandate financial transaction providers to implement measures—with respect to certain payment systems that *could be used* in connection with Internet gambling—to *identify* such prohibited transactions and *block* them. The UIGEA does not target Joe the Gambler; instead, it targets the flow of funds to internet gambling operators.

The UIGEA is young and has yet to be enforced. Still, it has already withstood its first constitutional challenge.<sup>98</sup> And even before regulations were promulgated under the UIGEA, the very signing of the UIGEA had a chilling effect on European suppliers of internet gambling: the largest competitors in the internet gaming market stopped accepting new U.S.-based accounts.<sup>99</sup> This voluntary withdrawal from internet gaming companies may be the UIGEA’s only long-lasting accomplishment. As explained in the next Section, the regulations promulgated under the UIGEA added no clarity and gave it little bite.

#### D. REGULATIONS PROMULGATED UNDER THE UIGEA

The UIGEA gave joint rulemaking responsibility to the Department of the Treasury and the Federal Reserve System.<sup>100</sup> The proposed rules identified which payment systems were at risk of being used in unlawful internet gambling (“designated” payment systems) and subjected all participants in those payment systems to the regulations; however, they also exempted certain groups of participants from regulation.<sup>101</sup> The five

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96. *Id.* § 5362(3) (emphasis added).

97. *Id.* §§ 5362(7), 5363. Note that this language tracks that of the Wire Act. *See supra* Section I.A.1 and note 31.

98. *Interactive Media Ent. & Gaming Ass'n v. Gonzales*, No. 07-2625, 2008 WL 5586713 (D.N.J. Mar. 4, 2008), *aff'd sub nom.* *Interactive Media Ent. & Gaming Ass'n v. Att’y Gen.*, 580 F.3d 113 (3d Cir. 2009) (upholding constitutionality against First Amendment expressive association, commercial speech, and overbreadth arguments, as well as void-for-vagueness and privacy arguments).

99. *See* PBS Transcript, *supra* note 12; EC REPORT, *supra* note 5, at 79; ROBERT J. WILLIAMS & ROBERT T. WOOD, INTERNET GAMBLING: A COMPREHENSIVE REVIEW AND SYNTHESIS OF THE LITERATURE 10 (2007) (“approximately 25% of online gambling sites stopped taking bets from U.S. citizens immediately after the law took effect.”).

100. 31 U.S.C. §§ 5362(8), 5364(a).

101. *See* Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,683–85 (proposed Oct. 4, 2007) (to be codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

designated payment systems were automated clearing house (ACH) systems, card systems, check collection systems, money transmitting businesses, and wire transfer systems.<sup>102</sup> The regulations gave exemptions to all participants in ACH, check collection, and wire transfer systems except for one group of participants: those who possessed a customer relationship with the putative internet gambling business or who had direct contact with foreign payment service providers in cross-border transactions.<sup>103</sup> The rationale for the exemptions was that the non-exempted participants would bear the entire burden of regulation for each of those three payment systems.<sup>104</sup> The proposed rules called for due diligence in screening new customers, monitoring of patterns in card systems and money transmitting systems, and the possible development and use of more specialized merchant category and transaction codes for card systems.<sup>105</sup>

The agencies received comments from 225 members of the public, including customers, depository institutions, gambling-related entities, public advocacy groups, payment system operators, federal agencies, and members of Congress.<sup>106</sup> The Interactive Media Entertainment & Gaming Association (iMEGA), for example, worried about the “chilling effect on innovation surrounding the Internet” and the “unprecedented burdens on the intricate system of financial transaction.”<sup>107</sup> Whereas the financial processing systems in the past were content neutral, iMEGA worried that the “natural” reaction for a financial intermediary would be to deem every transaction from an internet gaming operator to be an unlawful one, even though the UIGEA contemplates that some of those transactions are not now (or will not be in the future) barred by law.<sup>108</sup>

Two members of the House Subcommittee on Commercial and Administrative Law were “deeply concerned” that the regulations did not provide any definition of “unlawful Internet gambling.”<sup>109</sup> The purpose of

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102. *Id.*

103. *Id.* at 56, 685–86.

104. *Id.*

105. *Id.* at 56, 688–89.

106. Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,383 (Nov. 18, 2008) (codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

107. Comment from Interactive Media Ent. & Gaming Ass’n on the Proposed Rules Implementing Prohibition of Funding of Unlawful Internet Gambling, at 1–2 (Dec. 12, 2007), *available at* [www.regulations.gov](http://www.regulations.gov) (keyword search TREAS-DO-2007-0015-0121.1).

108. *Id.*

109. Comment from Linda T. Sánchez & Christopher B. Cannon, Chair and Ranking Member of the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, at 1–2 (Dec. 12, 2007), *available at* [www.regulations.gov](http://www.regulations.gov) (keyword search TREAS-DO-2007-0015-0125.1).

rulemaking under the APA, they reasoned, is to let the regulated community know exactly with what they must comply under the statute.<sup>110</sup> As such, the House Subcommittee members proposed that the regulations examine on a state-by-state basis what sorts of transactions should be blocked.<sup>111</sup>

Bank of America (BOA) also wanted a definition of “unlawful Internet gambling” and, ideally, a government-produced black list of companies to block.<sup>112</sup> Giving substance to iMEGA’s concern, BOA opined that otherwise they would be forced to block legitimate transactions and engage in costly disputes with their customers.<sup>113</sup> Many depository institutions expressed similar concerns that the proposed regulation would be unduly burdensome and could adversely affect the competitiveness of the U.S. payments system.<sup>114</sup>

The final rules took effect January 19, 2009, but the rules did not require the regulated entities to comply until December 1, 2009.<sup>115</sup> Despite the request from members of Congress, the final rules still lacked a definition of “unlawful internet gambling” because the agencies determined that “a single, regulatory definition . . . would not be practical.”<sup>116</sup> In addition, the final rules did not provide for a black list, which the agencies determined would be neither efficient nor effective.<sup>117</sup> The agencies seemed particularly unwilling to “formally interpret” the underlying state and federal laws in order to determine what types of internet gambling were actually unlawful.<sup>118</sup>

The focus of the final rules is on a “flexible, risk-based due diligence” process that payment systems may use to gain compliance.<sup>119</sup> The rules mandate “[a]ll 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.”<sup>120</sup>

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110. *Id.* at 2.

111. *Id.*

112. Comment from Bank of America on the Proposed Rules Implementing Prohibition on Funding of Unlawful Internet Gambling, at 2 (Dec. 12, 2007), *available at* [www.regulations.gov](http://www.regulations.gov) (keyword search TREAS-DO-2007-0015-0128.1).

113. *Id.* at 2–3.

114. Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,383 (Nov. 18, 2008) (codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

115. *Id.* at 69,382.

116. *See id.* at 69,384.

117. *Id.*

118. *See id.*

119. *Id.*

120. 31 C.F.R. § 132.5(a) (2009).

The rules give a list of “non-exclusive examples” of how to comply with this mandate. One method for complying is to perform “due diligence” when establishing relationships with commercial customers.<sup>121</sup> In essence, if a participant determines that there is more than a minimal risk that a commercial customer is engaged in an internet gambling business (but does not know for sure), the participant can satisfy its legal obligations by requiring the customer to declare in writing that it is not engaged in an internet gambling business.<sup>122</sup> If the commercial customer is engaged in an internet gambling business, the participant must require that the customer present evidence of legal authority to engage in such business and a third-party certification that the customer has systems in place reasonably designed to ensure that it will remain within the law.<sup>123</sup> Finally, the participant must notify all commercial customers that restricted transactions are prohibited from being processed through the account.<sup>124</sup>

The rules provide another option for card systems: they may use the “[i]mplementation of a code system, such as transaction codes and merchant/business category codes, that are required to accompany the authorization request for a transaction.”<sup>125</sup>

Some commentators think that the regulations themselves will not change any behavior in the financial services industry.<sup>126</sup> The card systems already use a coding system, and the agencies noted that “[s]ome payment system operators have indicated that, for business reasons, they have decided to avoid processing any gambling transactions, even if lawful, because, among other things, they believe that these transactions are not sufficiently profitable to warrant the higher risk they believe these transactions pose.”<sup>127</sup> Furthermore, banks already conduct due diligence in opening new commercial accounts. All the regulations add is extra paperwork, which comes with a cost—an estimated \$88.5 billion in increased record-keeping costs imposed on the financial services industry.<sup>128</sup> This cost, coupled with concern over current economic conditions, prompted members of Congress

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121. *Id.* § 132.6(b).

122. *See id.* § 132.6(b).

123. *See id.*

124. *See id.*

125. *Id.* § 132.6(d).

126. *See, e.g.,* I. Nelson Rose, *The New Internet Gaming Regulations: Nothing Changes*, COMPATIBLE POKER, <http://www.compatiblepoker.com/final-uigea> (last visited Mar. 1, 2010).

127. Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,688 (proposed Oct. 4, 2007) (to be codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

128. Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,405 (Nov. 18, 2008) (codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

to request that the agencies postpone the December 1 deadline for one year;<sup>129</sup> on November 27, the agencies announced that they would postpone the deadline for six months to June 1, 2010.<sup>130</sup>

So, the regulations promulgated under the UIGEA impose new record-keeping requirements on the financial services industry but, again, *do not define unlawful internet gambling*. Thus, they do nothing to clarify the murky situation created by the Wire Act and the IHA.

The UIGEA contemplates that some types of internet gambling are not prohibited by federal law. If some gambling is not prohibited by federal law, then logically such gambling would be legal as long as it was not prohibited by state law. However, the structure of most (if not all) states' gambling laws requires an affirmative legalization for any type of gambling. Part II explores the topic of state laws.

## II. STATE LAW

In terms of brick-and-mortar gambling, the District of Columbia and forty-seven states allow lotteries, commercial casinos, or pari-mutuel gaming such as horse racing.<sup>131</sup> Of the remaining three states, Alaska allows only charitable gaming and social gambling (although there are Indian casinos within its borders), Hawaii only allows social gambling, and Utah does not allow gambling of any sort.<sup>132</sup> Despite the general acceptance of gambling across the United States, each state so heavily regulates gaming that “[v]irtually all States prohibit the operation of gambling businesses not expressly permitted by their respective constitutions or special legislation.”<sup>133</sup>

Although a number of states do explicitly allow internet horserace gambling,<sup>134</sup> only Nevada has attempted to legalize all internet gambling.<sup>135</sup> In 2001, the Nevada legislature passed a law that would allow for “interactive

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129. Letter from Rep. Barney Frank and Rep. Peter King to Timothy Geithner and Ben Bernanke (Oct. 1, 2009), *available at* [http://www.house.gov/apps/list/press/financialsvcs\\_dem/uigea\\_letter\\_copy.pdf](http://www.house.gov/apps/list/press/financialsvcs_dem/uigea_letter_copy.pdf).

130. Associated Press, *Treasury, Fed Delay Ban on Internet Gambling*, WASH. POST, Nov. 28, 2009, at A15; Prohibition of Funding of Unlawful Internet Gambling, 74 Fed. Reg. 62,687 (Dec. 1, 2009).

131. AMERICAN GAMING ASSOCIATION, FACTSHEET: STATES WITH GAMING, [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=15](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=15) (last visited Mar. 1, 2010).

132. *See id.*; CHUCK HUMPHREY, STATE GAMBLING LAW SUMMARY FOR ALL US STATES, <http://www.gambling-law-us.com/State-Law-Summary> (last visited Mar. 1, 2010).

133. H. Comm. Fin. Serv. UIGEA Rpt., *supra* note 90, at 11.

134. *See supra* Section I.B.

135. INTERNET GAMBLING FACT SHEET, *supra* note 6.

gaming,” including internet gaming, if it could determine that such gaming did not violate federal law.<sup>136</sup> However, the Department of Justice advised Nevada that it considered all interstate internet gambling, including casino-style gaming, illegal under the Wire Act.<sup>137</sup> Now, instead of allowing internet gambling, Nevada has become one of the few states to explicitly prohibit it.<sup>138</sup>

Given the depressed condition of most state economies, a number of state legislatures are looking to internet gambling as a possible source of tax revenues.<sup>139</sup> These lawmakers envision websites only accessible to internet connections located in the state.<sup>140</sup> Such legislation would not run afoul of the Wire Act, which only governs interstate and foreign wire transmissions,<sup>141</sup> nor would it fall within the definition of “unlawful Internet gambling” under the UIGEA because of a safe-harbor provision that carves out intrastate internet gaming, as long as minimum regulatory requirements are met.<sup>142</sup> A more difficult question is whether they would run afoul of the dormant Commerce Clause.<sup>143</sup>

136. *Id.*

137. *Id.* For a complete discussion of the Wire Act, see *supra* Section I.A.

138. *Id.*

139. *Id.* States considering legalizing internet gambling include Florida, Iowa, California, New Jersey, and Maine. See Safe and Secure Internet Gambling Initiative, News, <http://www.safeandsecureig.org/news/news.html> (last visited Mar. 2, 2010) (collecting news stories); *Florida Online Gambling Bill*, RECENTPOKER.COM, Mar. 2, 2010, <http://www.recentpoker.com/news/florida-gambling-bill-6324.html> (detailing a “legislative proposal [that] suggests a fully regulated system on online gambling in the state”); Jason Clayworth, *Legislators Consider Online Poker*, DES MOINES REGISTER, Feb. 27, 2010, at A1 (explaining bill that “would allow people to deposit between \$50 and \$500 into a special account at one of Iowa’s casinos. That account could then be used to play poker online”); Peter Hecht, *Legalizing Online Poker Debated in California Senate Hearing*, SACRAMENTO BEE, Feb. 10, 2010, at 3A; Juliet Fletcher & Michael Clark, *Bill Would Allow Atlantic City Casinos to Offer Internet Gambling*, PRESS OF ATLANTIC CITY, Jan. 17, 2010, [http://www.pressofatlanticcity.com/news/top\\_three/article\\_65acd3f0-03ea-11df-83a9-001cc4c03286.html](http://www.pressofatlanticcity.com/news/top_three/article_65acd3f0-03ea-11df-83a9-001cc4c03286.html); A.J. Maldonado, *Online Gambling Being Considered by Maine Lawmakers*, ONLINE CASINO ADVISORY, Jan. 12, 2010, <http://www.onlinecasinoadvisory.com/casino-news/online/online-gambling-may-come-to-maine-43561.htm>.

140. See, e.g., Clayworth, *supra* note 139 (“Technology has already been developed that can block out-of-state Web users from accessing pre-paid accounts and violating in-state gambling laws.”).

141. 18 U.S.C. § 1084(a) (2006) (specifying as a threshold element that the transmission be “in interstate or foreign commerce”).

142. 31 U.S.C. §§ 5362(10)(B)–(C) (2006); see also Hichar, *supra* note 58, at 111–14 (arguing that the Wire Act should not prohibit intrastate internet gambling even if the electronic transmission passes through another state).

143. The Commerce Clause vests in the federal government the power to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3. When Congress exercises this

A number of states have moved in the opposite direction. Eight states have passed laws that expressly ban internet gambling,<sup>144</sup> and the attorneys general of five additional states have issued opinions that internet gambling violates state law.<sup>145</sup> Washington's law is particularly harsh: internet gambling is a class C felony, the same as third-degree rape.<sup>146</sup>

Two states are currently engaged in high-profile court battles over their internet gambling laws and enforcement actions. In Kentucky, the state seized 141 internet domain names after an *ex parte* proceeding on the basis that the domain names constituted "gambling devices" subject to the trial

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power, preemption doctrine applies; however, when Congress is silent, its Commerce Clause power lies "dormant." See JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 221–22 (10th ed. 2006). This dormant Commerce Clause power, however, still prevents states from unduly interfering with interstate and foreign commerce. *Id.*

Two important questions ripe for analysis, but beyond the scope of this Note, are whether the dormant Commerce Clause prohibits states from directly regulating internet gambling because of the inevitable effects on interstate commerce and, what is more, whether it prohibits them from establishing in-state internet gambling that discriminates against out-of-state providers. See generally *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (a seminal case on state regulation of the Internet); *Pike v. Bruce Church*, 397 U.S. 137 (1970) (a seminal case establishing the Pike balancing test used to analyze most dormant Commerce Clause issues); Brian Carver, *State Efforts to Regulate the Internet*, Cyberlaw Cases (Aug. 31, 2009), <http://cyberlawcases.com/?p=58> (identifying judicial trends in state internet regulation cases); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001) (analyzing doctrine through a law and economics lens, attacking the decision in *Am. Libraries*, 969 F. Supp. 160, and arguing that states should be allowed to regulate the Internet in some circumstances); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998) (proposing a single framework for the seemingly disparate aspects of the doctrine).

144. EC Report, *supra* note 5, at 39 & n.75 (Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota and Washington). Interestingly, five of these states allow gambling in physical, non-Indian casinos. See American Gaming Association Factsheet: States with Commercial Casinos, [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=14](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=14) (last visited Mar. 1, 2010).

145. Internet Gambling Fact Sheet, *supra* note 6.

146. Compare WASH. REV. CODE ANN. § 9A.46.240 (West 2009) (internet gambling) with WASH. REV. CODE ANN. § 9A.44.060 (West 2009) (third-degree rape); see also Michael Hiltzik, *Calling America's Bluff on Internet Gambling*, L.A. TIMES (Oct. 19, 2009), at B1, available at <http://articles.latimes.com/2009/oct/19/business/fi-hiltzik19> ("State laws are wildly inconsistent and sometimes hypocritically excessive. 'Martians might have a difficult time understanding that if you play poker online for money in the state of Washington, you're committing a class C felony.'") (quoting Joseph M. Kelly). Class C felonies carry a maximum sentence of five years and a maximum fine of ten thousand dollars. WASH. REV. CODE ANN. § 9A.20.021 (West 2009).

court's in rem jurisdiction.<sup>147</sup> The internet sites had no contact with Kentucky other than use by Kentucky residents—the court made no findings that the domain names had been registered with in-state registrars, that the companies running the sites were located in Kentucky, or that the company's servers were located in Kentucky.<sup>148</sup> In a 2-1 decision, the Kentucky appellate court held that since a domain name did not fall within the state statute's definition of a "gambling device," the trial court did not have the necessary jurisdiction to seize the domain names.<sup>149</sup> The dissenting judge reasoned that the computers, "linked by the internet and compatible software," formed one computer system, any part of which could constitute a gambling device.<sup>150</sup>

The Kentucky Supreme Court heard oral arguments in October of 2009. If the Kentucky Supreme Court allows the seizure under the trial court's theory, then "Kentucky would be able to seize *any* domain name, from anywhere in the world, that pointed to a website that Kentucky deemed to violate a local law."<sup>151</sup> On the other hand, the Commonwealth's briefs have expressed the sense of frustration that arises from the difficulty of policing the Internet:

Petitioners' argument, distilled to its essence, is that the illegal gambling operations can continue to purposefully target Kentucky residents from offshore, systematically violate Kentucky law and reap profits from illegal gambling in Kentucky—while the courts of the Commonwealth are powerless to act.<sup>152</sup>

In Washington, after the legislature explicitly banned internet gambling by amending an old gambling statute, an amateur poker enthusiast challenged the ban in a declaratory action.<sup>153</sup> Plaintiff Rousso claimed that the law

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147. *Interactive Media Ent. & Gaming Ass'n v. Wingate*, No. 2008-CA-002036, 2009 WL 142995, at \*1 (Ky. Ct. App. Jan. 20, 2009).

148. *See id.* at \*1–7. In fact, the servers and companies were located off-shore. *See* Shari Geller, *Appeals Court Hears Argument on Kentucky Case*, POKERLISTINGS.COM, Dec. 13, 2008, <http://www.pokerlistings.com/appeals-court-hears-argument-on-kentucky-case-34096>. The registrars were located out of state. *See* Amicus Curiae Brief of the Electronic Frontier Foundation et al. in Support of the Writ Petition of Petitioners VicsBingo.com & Interactive Gaming Council at 13–14, *Interactive Media Ent. & Gaming Ass'n v. Wingate*, No. 2008-CA-2036, 2009 WL 142995 (Ky. Ct. App. Jan. 20, 2009) [hereinafter EFF Brief].

149. *Wingate*, 2009 WL 142995, at \*3.

150. *Id.* at \*6 (Caperton, J., dissenting).

151. EFF Brief, *supra* note 148, at 4; *see also Kentucky Domain Seizure Meeting Report*, DOMAINNEWS.COM, Oct. 7, 2008, <http://www.domainnews.com/en/kentucky-domain-seizure-meeting-report.html>.

152. Commonwealth's Response to Consolidated Petitions for Writ of Prohibition at 1, *Interactive Media Ent. & Gaming Ass'n v. Wingate*, No. 2008-CA-2036, 2009 WL 142995 (Ky. Ct. App. Jan. 20, 2009).

153. *Rousso v. State*, 204 P.3d 243, 244–45 (Wash. Ct. App. 2009).

violated the dormant Commerce Clause, which prohibits states from impermissibly interfering with interstate commerce.<sup>154</sup>

The state argued that a dormant Commerce Clause analysis was inapposite—instead, they argued, the court should apply a preemption analysis because there was already a federal law regulating internet gambling, the UIGEA.<sup>155</sup> The court, however, rejected this argument because the UIGEA did not contain the requisite “unambiguous statement” necessary for the court to consider the federal government’s dormant powers to have been “exercised.”<sup>156</sup> Thus, the court undertook a dormant Commerce Clause analysis and ultimately upheld the validity of the statute.<sup>157</sup> In doing so, the court rejected the notion, first posited in a federal district court case and based on a reading of dormant Commerce Clause doctrine,<sup>158</sup> that any state regulation of the Internet was per se unconstitutional.<sup>159</sup> Instead, the court undertook a balancing test and determined that the burdens the state regulation imposed on interstate commerce were not “clearly excessive” in relation to the state’s legitimate interest in regulating the “social ills” of gambling and the difficulty of doing so without directly regulating the Internet.<sup>160</sup> Rousso appealed, and the case is on the Washington Supreme Court’s docket for Spring 2010.<sup>161</sup>

### III. CONCLUSION

The Internet has added a new layer of complexity to gambling in the United States, and the patchwork of federal statutes, agency regulations, and state laws has produced a legal framework that is frustratingly ambiguous. Nevada attempted to legalize internet gambling only to be stymied by the Department of Justice, whose reading of the law was most likely incorrect. Some states are considering legalization of in-state internet gambling, the constitutionality of which has yet to be tested. Others, citing a desire to protect the morals and welfare of their citizens, have passed laws explicitly prohibiting internet gambling.

Congress’s only attempt at a targeted act, the UIGEA, added new enforcement mechanisms to old laws like the Wire Act but gave no clarity to

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154. *Id.*; see also *supra* note 143.

155. *Id.* at 246.

156. *Id.* at 248–49.

157. *Id.*

158. *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

159. See *Rousso*, 204 P.3d at 253 (citing *Goldsmith & Sykes*, *supra* note 143).

160. *Id.* at 250, 253.

161. *Rousso v. State*, 217 P.3d 337 (Wash. 2009) (granting petition for review).

federal gambling law as applied to the Internet. The administrative agencies to whom Congress delegated the administration of the statute—the very bodies charged with filling in the statute’s details—refused to indicate when internet gambling is “unlawful” and rejected the financial institutions’ pleas for a government-created black list of internet gambling companies. Thus, despite the added cost that will accompany the new paperwork requirements, the administrative regulations have little hope of actually curbing prohibited gambling activity.

Meanwhile, in part because of scanty and conflicting case law, the scope of the old Wire Act is still ambiguous. Although its interaction with the IHA remains untested and unclear, U.S.-based websites that process bets on horse racing continue to operate in apparent legality and now comprise a majority of the horse racing industry’s revenues.<sup>162</sup>

Interested parties on both sides of the internet gambling issue have clamored for reform. Those who would have the federal government ban all internet gambling are concerned about funding terrorism and crime syndicates, sacrificing minors and compulsive gamblers to an addictive vice that can be indulged in one’s pajamas, and destroying families with unmanageable gambling debt.<sup>163</sup> Those on the other side claim that even an outright federal prohibition would not stop people from gambling online.<sup>164</sup> Pointing to Europe’s legalized internet gambling, they insist that current technology can adequately protect the most vulnerable and at the same time give consumers the legal protections that can only be provided in a regulated environment.<sup>165</sup>

When the administrative agencies suspended the implementation of the UIGEA regulations, they cited a desire to give recent congressional activity a chance to develop.<sup>166</sup> Congress, though, mired in the healthcare overhaul and

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162. See EC REPORT, *supra* note 5, at 33.

163. See Editorial, *Don’t Fold on Internet Gambling Ban*, CHRISTIAN SCIENCE MONITOR, Mar. 25, 2008, at 8; JON KYL, CHAIRMAN OF U.S. SENATE REPUBLICAN POLICY COMMITTEE, ILLEGAL INTERNET GAMBLING: PROBLEMS AND SOLUTIONS 1 (2003); NAT’L GAMBLING IMPACT STUDY COMMISSION, FINAL REPORT 5–4 to 5–6, 5–12 (1999).

164. Safe and Secure Internet Gambling Initiative, Take Action!, <http://www.safeandsecureig.org/splash/IGact09.html> (last visited Mar. 2, 2010). This organization compares the prohibition on internet gambling to the Prohibition on alcohol. *Id.*

165. *Id.*

166. Prohibition on Funding of Unlawful Internet Gambling, 74 Fed. Reg. 62,687, 62,688 (Dec. 1, 2009) (extending compliance date). For example, Rep. Barney Frank has introduced a bill that would legalize, regulate, and tax internet gambling. Internet Gambling Regulation, Consumer Protection and Enforcement Act, H.R. 2267. The bill would allow states to opt out of legalization and prohibit internet wagers originating or terminating within their borders. *Id.*

the financial system reforms, already has a full plate. But as more states let their residents “bet the ponies” online, and as more entrepreneurial (or perhaps desperate) states propose bills to establish in-state casino-style internet gambling, the political mood could become more amenable to nationwide legalization. In the meantime, internet gaming proponents, led by the poker enthusiasts, have made their intentions quite clear: they are all in.<sup>167</sup>

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167. *See, e.g.*, Poker Players Alliance, Mission Statement, <http://theppa.org/about/mission/>; Bill Lambrecht, *Carnahan, Clay Push for Online Gambling*, ST. LOUIS POST-DISPATCH, at A1. The Poker Players Alliance has 1.2 million members, and proponents of online gambling have spent millions on lobbying Congress. Lambrecht, *supra*.