Order Code RS22418
Updated July 31, 2006

CRS Report for Congress
Received through the CRS Web

Internet Gambling: Two Approaches in the 109th Congress

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Summary

On July 11, 2006, the House passed an amended version of H.R. 4411 that incorporated two different approach to address the problems posed by illegal internet gambling. H.R. 4777 (Representative Goodlatte) as introduced clarified and reenforced the basic federal criminal prohibitions in the Wire Act. H.R. 4411 (Representative Leach) as introduced sought to cut off the revenue flow to offshore internet gambling operations. H.R. 4777 included an authorization of an additional $10 million in appropriations for investigation and prosecution of violations. H.R. 4411 sought to enlist financial institutions in efforts to identify and block payments to internet gambling enterprises. H.R. 4777 rewrote the Wire Act. H.R. 4411 left it essentially untouched. The House-passed version of H.R. 4411 embodies the principal features of both bills. A third proposal (H.R. 5474, Representative Porter) that calls for the creation of study commission has also been introduced.

For a more detailed description of legislative activities in prior Congresses, see CRS Report RS21487, *Internet Gambling: A Sketch of Legislative Proposals in the 108th and 109th Congresses*, by Charles Doyle and Kenneth R. Thomas.

Background. Americans wager more than $4 to $6 billion a year on online, internet gambling.[1] Opponents of internet gambling contend that because it is largely unregulated it fails to block access by children, affords tempting opportunities for organized crime and money launderers, and lacks any effective safeguards against fraud; they also characterize it as particularly addictive and point out that it frustrates state gambling laws and regulations.[2] The National Gambling Commission recommended that the explosion of illegal Internet gambling be confined and that related financial

[1] Richtel, *Wall St. Bets on Gambling on the Web*, NEW YORK TIMES A11 (Dec. 25, 2005).

[2] *Proposals to Regulate Illegal Internet Gambling: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 1st sess. (2003)(*Senate Hearings)*; *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong., 1st sess. (2003)*(House Hearings)*.

transactions be outlawed.[3] Most internet gambling operations are already proscribed by federal law but as yet to little avail.[4] The two most commonly cited obstacles to more effective enforcement are (1) the fact that most internet gambling enterprises operate overseas beyond the effective reach of U.S. authorities;[5] and (2) questions of whether the Wire Act, perhaps the most effective federal anti-gambling statute, can be used against any form of gambling other than sports betting.[6] The task of removing these obstacles has been complicated by the legalization of various forms of gambling in different jurisdictions, by the use of electronic communications and other technological advances in connection with off track betting and other forms of gambling that are legal in some states and illegal in others, by the suggestion that the countenance of such use while prohibiting offshore internet gambling may be contrary to our World Trade Organization (WTO) obligations,[7] and by the shadow of the First Amendment.[8] Congress has weighed the possibility of amending related federal law for several years. The proposals often begin and end with the Wire Act, 18 U.S.C. 1084.

The Wire Act in pertinent part declares that:

> 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).

Anyone who aids or abets the commission of any federal crime, including violations of the Wire Act, is subject to the same penalties as the person who commits the violation

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[3] National Gambling Impact Study Commission, *Final Report*, at 5-12 (1999).

[4] *See generally*, CRS Report 97-619, *Internet Gambling: Overview of Federal Criminal Law*, by Charles Doyle.

[5] *House Hearings*, at 9 (testimony of Dep.Ass't Att'y Gen. John G. Malcolm).

[6] The Wire Act has been used to prosecute online gambling involving sports gambling, *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), but has rarely been used to prosecute any form of gambling other than sports gambling, *but see*, *United States v. Smith*, 390 F.2d 420 (4th Cir. 1968). Moreover, in a civil suit the Fifth Circuit rejected a contention that credit card companies had aided and abetted a violation of the Wire Act when they honored internet gambling charges, since the plaintiff had failed to allege that the charges involved sports gambling, *In re Mastercard International*, 313 F.3d 257, 262-63 (5th Cir. 2002).

[7] *See*, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 861 (2005).

[8] 18 U.S.C. 1304 prohibits FCC regulated radio stations from broadcasting certain gambling information. The Supreme Court upheld the application of section 1304 against a North Carolina station that broadcasted information concerning the Virginia state lottery, because lotteries were unlawful under North Carolina law, *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429-31 (1993). Six years later, it held that the First Amendment would not allow the application of section 1304 to advertisements for a local casino by a station located in Louisiana where such gambling was lawful, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 195-96 (1999).

directly, 18 U.S.C. 2.[9] The Department of Justice has reportedly called upon the specter of an aiding and abetting prosecution to discourage legitimate businesses from providing certain services to offshore internet gambling operations.[10]

H.R. 4411 (House passed). H.R. 4411, as passed by the House,[11] incorporates the amended features of H.R. 4777 and the H.R. 4411 as approved by the House Financial Services and Judiciary Committees.[12] It recasts the Wire Act and vests bank regulators (Treasury and the Federal Reserve) with the authority to stem the revenue flow to illicit gambling business.

More specifically, in terms largely reminiscent of H.R. 4777 as introduced, it amends the Wire Act to:

- prohibit those in the gambling business from using a communication facility to transmit a bet or information to facilitate placing a bet or a communication entitling the recipient to money or credit as a consequence of a bet or wager – when the transmission occurs (a) in interstate commerce, (b) within U.S. special maritime or territorial jurisdiction, or (c) into or out of the U.S., proposed 18 U.S.C. 1084(a)(1);

- prohibit those in the gambling business from accepting cash, check, credit or other form of payment in connection with such transmissions, proposed 18 U.S.C. 1084(a)(2);

- punish offenders with imprisonment for not more than 5 years (the Wire Act now carries a maximum term of 2 years) and/or a fine of not more than $250,000 ($500,000 for organizations), proposed 18 U.S.C. 1084(a);

- clarify the Wire Act language that suggests it applies only to sports gambling, proposed 18 U.S.C. 1084(a),(b), and that limits its application to wire communications, proposed 18 U.S.C. 1081(5);

- carries forward and expands an existing Wire Act provision so as to permit federal, state, local or tribal law enforcement officials to request communications carriers to discontinue service to subscribers who transmit gambling information in violation of the amended Wire Act's provisions, proposed 18 U.S.C. 1084(f);

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[9] "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

[10] Smith, *Interbet, It's Illegal, But Online Gambling Mushrooms Anyway*, ROCKY MOUNTAIN NEWS 1B (Jan. 30, 2006)("the Sporting News earlier this month agreed to pay a $4.2 million fine and launch a $3 million public-service campaign to settle federal charges it had run illegal online gambling advertising"); Timmons & Pfanner, *Online Gambling Shares Climb 11% in Debut Day*, NEW YORK TIMES C6 (June 28, 2005)("Many United States credit card issuers, under government pressure, also block payments to online gambling sites").

[11] 152 *Cong.Rec.* H5008 (daily ed. July 11, 2006); the text of H.R. 4411 as passed by the House appears in 152 *Cong.Rec.* H4980-983 (daily ed. July 11, 2006).

[12] H.Rept. 109-412, pt.1 and pt.2 (2006).

- authorize federal, state, local, or tribal authorities to seek judicial restraining orders to prevent payments or communications in violation of the Act, proposed 18 U.S.C. 1085;

- disclaim any intent to supersede state or tribal gambling prohibitions or those of the Professional and Amateur Sports Protection Act (28 U.S.C. 3701 et seq.), proposed 18 U.S.C. 1084(d), (e);

- exempt from the prohibitions of the Wire Act:
+ securities transactions, proposed 18 U.S.C. 1081(6)(D)(i);
+ commodities transactions, proposed 18 U.S.C. 1081(6)(D)(ii), (iv);
+ over-the-counter derivative instruments, proposed 18 U.S.C. 1081(6)(D)(iii);
+ indemnity or guarantee contracts, proposed 18 U.S.C. 1081(6)(D)(v);
+ insurance contracts, proposed 18 U.S.C. 1081(6)(D)(vi);
+ bank transactions (transactions with insured depository institutions), proposed 18 U.S.C. (6)(D)(vii);
+ games or contests in which the participants to do not risk anything but their efforts, proposed 18 U.S.C. 1081(6)(D)(viii);
+ certain sports fantasy contests, 18 U.S.C. 1081(6)(D)(ix);
+ supplying non-soliciting/facilitating, educational or news reporting information on lawful gambling, proposed 18 U.S.C. 1081(13)(A), 1084(b)(1), 1084(c)(1);
+ advertising lawful gambling where it is lawful, proposed 18 U.S.C. 1081(13)(B);
+ transmitting gambling information to and from places where it is lawful, proposed 18 U.S.C. 1084(b);
+ transmitting bets or gambling information within a state where it is lawful, regulated, and subject to location and age verification provisions, proposed 18 U.S.C. 1984(c);
+ transmission of bets or gambling information relating to the Indian Gaming Regulatory Act in states where it is lawful, regulated, and subject to location and age verification provisions, proposed 18 U.S.C. 1984(c);
+ conduct permitted by the Interstate Horse Racing Act (15 U.S.C. 3001 et seq.), proposed 18 U.S.C. 1084(f);

It also authorizes additional appropriations of $10 million for each four fiscal years between FY2007 and FY2010 for investigation and prosecution of Wire Act violations; and contains provisions designed leave where it stands the legal status of gambling under the Interstate Horseracing Act (15 U.S.C. 3001 et seq.), secs. 105, 106 of the bill.

The remainder of House passed H.R. 4411 is devoted to the regulatory and diplomatic proposals found in H.R. 4411 as approved by the Judiciary and Financial Services Committee.

It instructs the Treasury Secretary and Federal Reserve Board in consultation with the Attorney General to promulgate regulations directing banks and other members of the payment system to adopt policies and practices to enable to them identify and prevent restricted gambling related transactions, proposed 31 U.S.C. 5363.

Moreover, it asks that the Treasury Secretary report annually on international internet gambling deliberations and that the executive branch encourage Financial Action Task Force on Money Laundering (FATF) and other multinational groups to examine the extent to which internet gambling provides a vehicle for money laundering, corruption or other crimes.

Presumably since H.R. 4777 contribution of the revised H.R. 4411 already provides criminal and civil enforcement mechanisms in proposed 18 U.S.C. 1084, 1085 that apply to the use of financial services to facilitate illegal gambling, similar provisions originally contained in H.R. 4411 were replicated in the House passed version.

In the past, proposals comparable to those portions of H.R. 4411 originating in H.R. 4777 have engender criticism from some that it goes too far and from others that it does not go far enough.[13] While the Department of Justice generally endorsed the H.R. 4777 approach, several of the original features of H.R. 4777 gave it pause. Some, like those involving the Interstate Horseracing Act, appear to have been amended;[14] others, like those involving the coverage of poker[15] and availability of judicial relief against internet service providers,[16] appear not have been.

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[13] *Senate Hearings*, at 9 (testimony of Connecticut Att'y Gen. Richard Blumenthal)("I believe this law should be clear, broad, unassailable, without any exceptions, even for State-sanctioned gambling. If we have exceptions, they will swallow the rule"); *House Hearings*, at 14 (testimony of former Indiana Att'y Gen. Jeffrey A. Modisett)("I don't believe the choice . . . is whether or not there will be internet gambling in the U.S. There will be. The question is what sort of Internet gambling there will be... [T]here is the potential for a tightly regulated industry, overseen by Americans of integrity, bolstered by laws and regulations that provide substantial protections for minors and problem gamblers, remove the potential for money laundering, and provide economic benefit and tax revenue in the U.S."); H.Rept. 108-51, at 72 (2003) (Dissenting Views)("Additionally, the bill does not make it illegal for an individual to place an Internet bet. ...As such, the bill leaves out the most effective enforcement mechanism – targeting individual bettors").

[14] H.R. 4411 has been very carefully drafted to maintain the status quo regarding horseracing, preserving the ability of the Executive Branch and the horseracing industry to litigate the proper interpretation of these two statutes. The test of the bill is clear: 'this Act does not change which [activities] relating to horseracing may or may not be allowed under federal law.' To the degree this act provides new definitional standards, it bolsters rather than diminishes the Justice Department's latitude," 152 *Cong.Rec.* H4985 (daily ed. July 11, 2006)(remarks of Rep. Leach).

[15] *H.R. 4777, The "Internet Gambling Prohibition Act": Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006)(statement of Bruce G. Ohr, Chief of the Organized Crime and Racketeering Section, Criminal Division, U.S. Justice Department)("since the definition of the term 'bet or wage' requires that the activity be 'predominately subject to chance,' we are concerned whether this definition is sufficient to cover card games, such as poker"), available on July 7, 2006 at [http://judiciary.house.gov/media/pdfs/ohr040506.pdf]. But see, 38 AMERICAN JURISPRUDENCE 2D §4 ("the test of whether a game is one of chance or one of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game").

[16] *Id.* ("The Justice Department believes that Rule 65 of the Federal Rules of Civil Procedure should be the sole standard used by courts in considering whether to grant injunctive relief and what form this relief should take. . . .That provision leaves it to the discretion of the district court judge to determine on a case-by-case basis what form the relief should take. Proposed subsection [1085(d)], however, limits the relief that can be granted against an Internet service provider. The Department believes that the judge who has reviewed the specific evidence in the case should have the authority, as he or she currently does under rule 65, to fashion the appropriate remedy or relief").

H.R. 5474. H.R. 5474, introduced by Mr. Porter, proposes the creation of a bipartisan, nine member, Congressional commission to study the proper response to the growth of Internet gambling. The Commission would have 18 months within which to submit its final report to the Congress and the President.

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