Order Code RS22418
Updated October 2, 2006

CRS Report for Congress
Received through the CRS Web

Internet Gambling: Two Approaches in the 109th Congress

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Summary

On September 30, 2006, Congress passed and sent to the President the SAFE Port Act (H.R. 4954) that includes an Internet gambling title added in conference. The title prohibits gambling businesses from accepting checks, credit cards, electronic transfers and the like in connection with illegal Internet gambling In doing so, it tracks the language of H.R. 4411 as reported by the Financial Services Committee, but does not contain the amendments to the Wire Act or most of the other provisions folded into H.R. 4411 from H.R. 4777 prior to House passage in July. The title exempts intrastate and intratribal Internet gambling operations that feature age and location verification requirements imposed as a matter of law. It also leaves in place questions as to the extent to which the Interstate Horseracing Act curtails the reach of other federal laws.

The title calls for regulations under which various financial entities will block credit card, check, and similar transactions relating to illegal Internet gambling. It authorizes the federal and state authorities to sue to prevent or restrain violations of its provisions, although it limits the relief available against Internet service providers both under the title and under the Wire Act unless they are directly involved with an unlawful Internet gambling website. It is generally understood that like H.R. 4411 and H.R. 4777, the SAFE Port Act provisions do not apply to individual bettors. Still pending is a proposal, H.R. 5474, to establish a Congressional commission to study the proper response to the threat of Internet gambling.

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;

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

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 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 World Trade Organization (WTO) obligations of the United States,[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

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[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)*.

[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).

> 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 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. 4777, introduced by Representative Goodlatte, sought to amend the Wire Act to make it clear that the Act was not limited to sports gambling and that it applied to Internet gambling. H.R. 4411, introduced by Representative Leach, sought to ban gambling businesses from accepting checks, credit cards, electronic fund transfers and the like in connection with Internet gambling. After the bills were reported out of the House Financial Services and the House Judiciary Committees,[11] the House merged the two and passed them as H.R. 4411.[12] Although Internet gambling legislation had been introduced in the Senate in earlier Congresses, none had been introduced in the 109th Congress until the SAFE Port Act was reported out of conference. Title VIII of the SAFE Port Act (H.R. 4954) as reported out of conference,[13] passed by both Houses, and sent to the President,[14] addresses illegal Internet gambling.

Title VIII of the SAFE Port Act. H.R. 4954, as enacted, contains an unlawful Internet gambling enforcement title that in large measure draws upon the language of H.R. 4411 as reported by the House Financial Services Committee.[15] It does not contain the extensive amendments to the Wire Act found in H.R. 4777 and added to H.R. 4411 prior to its passage by the House. More specifically, Title VIII:

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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] H.Rept. 109-412, pt.1 and pt.2 (2006); H.Rept. 109-552 (2006).

[12] 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).

[13] H.Rept. 109-711 (2006), reprinted at 152 *Cong.Rec.* H8540 (daily ed. Sept. 29, 2006).

[14] 152 *Cong.Rec.* S10817, H8037-38 (daily ed. Sept. 29, 2006).

[15] The text of Title VIII is reprinted at 152 *Cong.Rec.* H8558 (daily ed. Sept. 29, 2006).

- prohibits those in the gambling business from accepting cash, check, credit or other form of payment in connection with unlawful Internet gambling, 31 U.S.C. 5363

- punishes violators by imprisonment for not more than 5 years; and or a fine of not more than $250,000 (not more than $500,000 for organizations), 31 U.S.C. 5366

- defines "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome" and includes
  + lottery participation;
  + gambling on athletic events; and
  + information relating financing a gambling account;

but does not include:
  + securities transactions;
  + commodities transactions;
  + over-the-counter derivative instruments;
  + indemnity or guarantee contracts;
  + insurance contracts;
  + bank transactions (transactions with insured depository institutions);
  + games or contests in which the participants to do not risk anything but their efforts;
  + certain sports fantasy contests, 31 U.S.C. 5362(1)

- defines "unlawful Internet gambling" to mean "to place, receive, or otherwise knowingly transmit a bet or wager by many means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any application federal of state law in the state or tribal lands in which the bet or wager is initiated, received, or otherwise made" but does not include:
  + intrastate gambling, authorized under state law that features age and location verification requirements, that does not violate certain other federal gambling laws;
  + intratribal gambling, authorized under law or compact that features age and location verification requirements, that does not violate certain other federal gambling laws, 31 U.S.C. 5362(10)

- directs the Secretary of the Treasury and Federal Reserve Board of Governors, in consultation with the Attorney General to promulgate regulations within 9 months requiring various financial entities to block unlawful Internet gambling financial transactions, affords entitles immunity from civil liability for compliance, and subjects them to regulatory enforcement, 31 U.S.C. 5364

-authorizes federal and state attorneys general to sue in federal district court for injunctive relief to prevent or restrain prohibited transactions; limits the relief available against Internet service providers to blocking access and removing links within their service, and provides that relief may not include imposition of monitoring responsibilities; and absolves Internet service providers from the Wire Act's denial of service requirements, except to the extent that they operate an unlawful Internet gambling website, 31 U.S.C. 5365

- makes it clear that financial entities and Internet service providers may be civilly and criminally liable if they have knowledge and control of bets and wagers and operate an illegal Internet gambling site, 31 U.S.C. 5367

- asks that the Treasury Secretary report annually on international Internet gambling deliberations with which the United States is involved and expresses the view that the

executive branch should encourage the Financial Action Task Force on Money Laundering (FATF) and other foreign entities to examine the extent to which Internet gambling provides a vehicle for money laundering, corruption or other crimes.

H.R. 4411 (House passed). H.R. 4411, as passed by the House,[16] incorporated the amended features of H.R. 4777 and the H.R. 4411 as approved by the House Financial Services and Judiciary Committees.[17] Using many of the definitions and exemptions ultimately used in the SAFE Port Act, H.R. 4411 would have reformulated the Wire Act to make it clear that the Wire Act's proscriptions apply to the Internet and to more than sports gambling. The bill would also have increased the maximum term of imprisonment for violation of the Wire Act from 2 to 5 years. Among other changes proposed in H.R. 4411 which the conferees dropped when they added Title VIII to the SAFE Port Act was an authorization of $40 million in appropriations spread over four years for enforcement of the Wire Act.

H.R. 5474. H.R. 5474, introduced by Representative 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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[16] 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).

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