

Unlawful Internet Gambling Enforcement Act and Its Implementing Regulations

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October 19, 2009

Congressional Research Service
7-5700
www.crs.gov
RS22749

CRS Report for Congress
Prepared for Members and Committees of Congress

c11173008

Summary

The Unlawful Internet Gambling Enforcement Act (UIGEA) seeks to cut off the flow of revenue to unlawful Internet gambling businesses. It outlaws receipt of checks, credit card charges, electronic funds transfers, and the like by such businesses. It also enlists the assistance of banks, credit card issuers and other payment system participants to help stem the flow. To that end, it authorizes the Treasury Department and the Federal Reserve System (the Agencies), in consultation with the Justice Department, to promulgate implementing regulations. Proposed regulations were announced with a comment period that ended on December 12, 2007, 72 *Fed. Reg.* 56680 (October 4, 2007). After taking into consideration the public comments on the proposed rule, the Agencies adopted a final rule implementing the provisions of the UIGEA, 73 *Fed. Reg.* 69382 (November 18, 2008); the rule is effective January 19, 2009, with a compliance date of December 1, 2009.

The final rule substantially resembles the proposed rule, with several modifications in response to public comments. It addresses the feasibility of identifying and interdicting the flow of illicit Internet gambling proceeds in five payment systems: card systems, money transmission systems, wire transfer systems, check collection systems, and the Automated Clearing House (ACH) system. It suggests that, except for financial institutions that deal directly with illegal Internet gambling operators, tracking the flow of revenue within the wire transfer, check collection, and ACH systems is not feasible at this point. It therefore exempts them from the regulations' requirements. It charges those with whom illegal Internet gambling operators may deal directly within those three systems, and participants in the card and money transmission systems, to adopt policies and procedures to enable them to identify the nature of their customers' business, to employ customer agreements barring tainted transactions, and to establish and maintain remedial steps to deal with tainted transactions when they are identified. The final rule provides non-exclusive examples of reasonably designed policies and procedures to prevent restricted transactions. The rule also explains why the Agencies rejected a check-list-of-unlawful-Internet-gambling-operators approach, asserting that such a list of businesses would not be practical, efficient, or effective in preventing unlawful Internet gambling. Rather, the Agencies argued that flexible, risk-based due diligence procedures conducted by participants in the payment systems, in establishing and maintaining commercial customer relationships, is the most effective method to prevent or prohibit the restricted transactions.

Several bills have been introduced in the 111th Congress related to Internet gambling. H.R. 2266 (Reasonable Prudence in Regulation Act) would delay the implementation of the UIGEA regulations by one year, establishing an effective date of December 1, 2010. H.R. 2267 (Internet Gambling Regulation, Consumer Protection, and Enforcement Act) would establish a federal licensing program, administered by the Treasury Department, under which Internet gambling companies may lawfully operate and accept bets or wagers from individuals located in the United States. H.R. 2268 (Internet Gambling Regulation and Tax Enforcement Act of 2009) would establish a licensing fee regime within the Internal Revenue Code for Internet gambling operators. S. 1597 (Internet Poker and Game of Skill Regulation, Consumer Protection, and Enforcement Act of 2009) would create a federal licensing program similar to that of H.R. 2267, except that the permitted Internet gambling operations would be limited to those that offer online games "in which success is predominantly determined by the skill of the players, including poker, chess, bridge, mah-jong, and backgammon."

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Background

Passage of the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006 as Title VIII of the SAFE Port Act[1] represented the culmination of legislative consideration that began with the recommendations of the National Gambling Commission.[2]

UIGEA prohibits gambling-related businesses from accepting checks, credit card charges, electronic transfers, and similar payments in connection with unlawful Internet gambling.[3] Anyone who violates this prohibition of UIGEA is subject to a criminal fine of up to $250,000 (or $500,000 if the defendant is an organization), imprisonment of up to five years, or both.[4] In addition, upon conviction of the defendant, the court may enter a permanent injunction enjoining the defendant from making bets or wagers "or sending, receiving, or inviting information assisting in the placing of bets or wagers."[5] The Attorney General of the United States or a state attorney general may bring civil proceedings to enjoin a transaction that is prohibited under UIGEA.[6]

As a consequence of UIGEA and Department of Justice enforcement efforts, NETeller, which reportedly processed more than $10 billion in gambling proceeds between U.S. customers and offshore Internet gambling business from 1999 to 2007, entered into a deferred prosecution agreement under which it agreed to discontinue U.S. operations, cooperate with investigators, and to pay the U.S. $136 million in sanctions and to return an additional $96 million to U.S. customers.[7] Several offshore Internet gambling companies have apparently sought similar agreements.[8] A number of large banking institutions, which underwrote the initial public offers for offshore Internet gambling companies on the London stock exchange, have been the targets of grand jury subpoenas as well.[9]

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[1] P.L. 109-347, 120 Stat. 1952 (31 U.S.C. 5361-5367) (2006).

[2] National Gambling Impact Study Commission, *Final Report* at 5-12 (1999). Earlier related CRS Reports include CRS Report RS22418, *Internet Gambling: Two Approaches in the 109th Congress*, from which some of this report is drawn, and CRS Report RS21487, *Internet Gambling: A Sketch of Legislative Proposals in the 108th and 109th Congresses*, which includes a more extensive discussion of the legislation's evolution.

[3] 31 U.S.C. § 5363. UIGEA's prohibition applies to anyone "engaged in the business of betting or wagering;" however, it expressly excludes from the definition of the term "business of betting or wagering" the services of a financial intermediary or Internet service provider that may be used in connection with the unlawful bet. 31 U.S.C. § 5362(2); *see* Interactive Media Entm't & Gaming Ass'n v. AG of the United States, 2009 U.S. App. LEXIS 19591, *2-3 n.1 (3d Cir. 2009).

[4] 31 U.S.C. § 5366(a).

[5] 31 U.S.C. § 5366(b).

[6] 31 U.S.C. § 5365.

[7] "Neteller to Pay Dollars 136m Gambling Penalty," *Financial Times USA* at 16 (July 19, 2007).

[8] *Id.*; "Sportingbet Cuts Deal," *Express on Sunday* at 7 (August 5, 2007) ("Sportingbet is now following the lead of rivals PartyGaming and 888 Holdings which started talks with the United States Attorney's Office ... in a bid to remove the threat of any criminal proceedings."); Eric Pfanner, "A New Chance for Online Gambling in the U.S.," *New York Times* (April 27, 2009) ("This month, PartyGaming agreed to a $105 million settlement with the U.S. attorney's office in New York, involving the period before 2006, when it acknowledged that its activities had been 'contrary to certain U.S. laws.' In turn, the U.S. authorities agreed not to prosecute the company, which is listed on the London Stock Exchange, or its executives.").

[9] Andrew Ross Sorkin and Stephanie Saul, "Gambling Subpoenas on Wall St," *New York Times,* at C1 (January 22, 2007).

UIGEA's definition of "unlawful Internet gambling" does not specific what gambling activity is illegal; rather; the statute relies on underlying federal or state gambling laws to make that determination:

> The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.[10]

However, this statutory definition expressly *exempts* lawful intrastate and intratribal Internet gambling operations that feature age and location verification requirements imposed as a matter of law.[11] UIGEA further defines the term "bet or wager" to mean "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."[12] The statutory definition includes lottery participation, gambling on athletic events, and information relating to financing a gambling account, but a "bet or wager" does *not* include the following:

- 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 do not risk anything but their efforts; or
- certain fantasy or simulation sports contests.[13]

UIGEA leaves in place questions as to the extent to which the Interstate Horseracing Act curtails the reach of other federal laws,[14] an issue that was at the center of World Trade Organization (WTO) litigation.[15] The statute instructs the Secretary of the Treasury and the Board of Governors

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[10] 31 U.S.C. § 5362(10)(A).

[11] 31 U.S.C. § 5362(10)(B), (C) (The state law or regulation, or tribal ordinance, resolution, or tribal-state compact, must include "age and location verification requirements reasonably designed to block access to minors and persons located" out of such state or out of the applicable tribal lands.).

[12] 31 U.S.C. § 5362(1)(A).

[13] 31 U.S.C. § 5362(1)(B)-(E).

[14] 31 U.S.C. § 5362(10)(D)(iii). The Justice Department and certain members of the horse racing industry disagree over the extent to which the Horseracing Act amends the coverage of the Wire Act that outlaws the interstate transmission by wire of certain information related to gambling. UIGEA denies that its provisions are intended to resolve the dispute.

[15] *See e.g.*, *Don't Bet on the United States's Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUMBIA BUSINESS LAW REVIEW 439. In the WTO dispute, Caribbean nation Antigua and Barbuda ("Antigua") argued that the United States discriminates against foreign Internet gambling operators while permitting domestic, online gambling on horse racing, in violation of U.S. market access commitments under the General Agreement on Trade in Services treaty. Antigua won its case before the WTO, and on December 21, 2007, a WTO arbitration report determined that Antigua had suffered $21 million in damages (continued...)

of the Federal Reserve, in consultation with the Attorney General, to issue implementing regulations within 270 days of passage.[16]

On September 1, 2009, a federal appeals court ruled that UIGEA is not unconstitutionally vague.[17] The Interactive Media Entertainment & Gaming Association had filed a lawsuit alleging that UIGEA was facially unconstitutional, and sought to enjoin the enforcement of the Act and its regulations. The U.S. Court of Appeals for the Third Circuit disagreed with Interactive's assertion that UIGEA was void for vagueness because of the lack of an "ascertainable and workable definition" of the statutory phrase "unlawful Internet gambling":

> The Supreme Court has explained that a statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 128 S. Ct. 1830, 1845, 170 L. Ed. 2d 650 (2008).... We reject Interactive's vagueness claim. The Act prohibits a gambling business from knowingly accepting certain financial instruments from an individual who places a bet over the Internet if such gambling is illegal at the location in which the business is located or from which the individual initiates the bet. 31 U.S.C. §§ 5362(10)(A), 5363. Thus, the Act clearly provides a person of ordinary intelligence with adequate notice of the conduct that it prohibits.[18]

The appellate court noted that UIGEA "itself does not make any gambling activity illegal," but rather, the definition of "unlawful Internet gambling" references federal and state laws related to gambling.[19] Therefore, the court suggested that "to the extent that [there is] a vagueness problem, it is not with the Act, but rather with the underlying state law."[20]

Regulations Implementing UIGEA

UIGEA calls for regulations that require "each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures" reasonably calculated to have that result, 31 U.S.C. 5364(a). On October 4, 2007, the Board of Governors of the Federal Reserve System and the Treasury Department (the Agencies) issued proposed regulations implementing UIGEA, 72 *Fed. Reg.* 56680. The proposal invited commentators to suggest alternatives and critiques before the close of the comment period on December 12, 2007. The proposal offered to exempt substantial activities in those payment systems in which tracking is not possible now and in which it may

(...continued)

annually. The WTO arbitrator ruled that Antigua may request authorization to suspend a maximum of $21 million annually in obligations owed to the United States under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. (In other words, Antigua could infringe the rights of U.S. holders of copyrights, trademarks, and patents, up to $21 million a year.) Decision by the Arbitrator, Recourse to Arbitration by the United States for Arbitration under Article 22.6 of the DSU, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/ARB (December 21, 2007). For more information on this case, *see* CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

[16] 31 U.S.C. § 5364.

[17] Interactive Media Entm't & Gaming Ass'n v. AG of the United States, 2009 U.S. App. LEXIS 19591 (3d Cir. 2009).

[18] *Id.* at *7.

[19] *Id.* at *11-12.

[20] *Id.* at *11.

ultimately not be feasible. It also noted that the two Agencies felt that they have no authority to compel payment system participants to serve lawful Internet gambling operators.[21] After taking into consideration the public comments on the proposed rule and consulting with the Department of Justice (as required by the UIGEA), the Agencies adopted a final rule implementing the provisions of the UIGEA, 73 *Fed. Reg.* 69382 (November 18, 2008); the rule is effective January 19, 2009, with a compliance date of December 1, 2009.

Designated Payment Systems & Due Diligence

The final rule identifies five relevant payment systems that could be used in connection with, or to facilitate, the "restricted transactions" used for Internet gambling: Automated Clearing House System (ACH), card systems, check collection systems, money transmitting business, and wire transfer systems, new 31 C.F.R. §132.3. The rule defines a "restricted transaction" to mean any transactions or transmittals involving any credit, funds, instrument, or proceeds that the UIGEA prohibits any person engaged in the business of betting or wagering from knowingly accepting, in connection with the participation of another person in unlawful Internet gambling, new 31 C.F.R. §132.2(y). However, the rule does *not* provide a more specific definition of the term "unlawful Internet gambling;" instead, it restates the UIGEA's definition.[22]

While the Agencies expect that card systems will find that using a merchant and transaction coding system is "the method of choice" to identify and block restricted transactions, the Agencies felt that the most efficient way for other designated payment systems to comply with the UIGEA is through "adequate due diligence by participants when opening accounts for commercial customers to reduce the risk that a commercial customer will introduce restricted transactions into the payment system in the first place," 73 *Fed. Reg.* 69394 (November 18, 2008).

The rule directs participants in the designated systems, unless exempted, to "establish and implement written policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions," new 31 C.F.R. §132.5(a), and then provides non-exclusive examples of reasonably compliant policies and procedures for each system, new 31 C.F.R. §132.6. Participants may comply by adopting the policies and procedures of their payments system or by adopting their own, new 31 C.F.R. §§132.5(b), 132.6(a). Participants that establish and implement procedures for due diligence of their commercial customer accounts or commercial customer relationships will be considered in compliance with the regulation if the procedures include the following steps, new 31 C.F.R. § 132.6(b):

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

[21] "Some 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." The Agencies do not believe UIGEA authorizes them to countermand such a decision, 72 *Fed. Reg.* 56688 (October 4, 2007).

[22] 31 C.F.R. § 132.2(bb).

2. Based on its due diligence, the participant makes a determination regarding the risk the commercial customer presents of engaging in an Internet gambling business. Such a determination may take one of the two courses set forth below:

    a. The participant determines that the commercial customer presents a minimal risk of engaging in an Internet gambling business (such as commercial customers that are directly supervised by a federal functional regulator,[23] or an agency, department, or division of the federal government or a state government), or

    b. The participant cannot determine that the commercial customer presents a minimal risk of engaging in an Internet gambling business, in which case it must obtain a certification from the commercial customer that it does not engage in an Internet gambling business. If the commercial customer does engage in an Internet gambling business, the participant must obtain: (1) documentation that provides evidence of the customer's legal authority to engage in the Internet gambling business and a written commitment by the commercial customer to notify the participant of any changes in its legal authority to engage in its Internet gambling business, and (2) a third-party certification that the commercial customer's systems for engaging in the Internet gambling business are reasonably designed to ensure that the commercial customer's Internet gambling business will remain within the licensed or otherwise lawful limits, including with respect to age and location verification.

3. The participant notifies all of its commercial customers that restricted transactions are prohibited from being processed through the account or relationship, "through a term in the commercial customer agreement, a simple notice sent to the customer, or through some other method, "73 *Fed. Reg.* 69393 (November 18, 2008).

Non-exclusive Examples of Compliant Policies and Procedures

Of the five payment systems, a "card system" as understood by the regulations is one that settles transactions involving credit card, debit card, pre-paid card, or stored value product and in which the cards "are issued or authorized by the operator of the system and used to purchase goods or services or to obtain a cash advance," new 31 C.F.R. §132.2(f). Merchant codes are a standard feature of the system which permits the system to identify particular types of businesses, 71 *Fed. Reg.* 56684 (October 4, 2007). There are no card system exemptions from the regulations' requirements. Examples of reasonably compliant policies and procedures feature due diligence and prophylactic procedural components. The standards involve screening merchants to determine the nature of their business, a clause prohibiting restricted transactions within the merchant agreement, as well as maintaining and monitoring a business coding system to identify and block restricted transactions, new 31 C.F.R. §132.6(d).

[23] The term "federal functional regulator" means—the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; (D) the Director of the Office of Thrift Supervision; (E) the National Credit Union Administration Board; and (F) the Securities and Exchange Commission. 15 U.S.C. § 6809.

"Money transmitting businesses" are entities such as Western Union and PayPal that are in the business of transmitting funds, 71 *Fed. Reg.* 56684 (October 4, 2007). They too are without exemption from the UIGEA implementing regulations. Examples of acceptable policies and procedures for money transmitting businesses feature procedures to identify the nature of a subscriber's business, subscriber agreements to avoid restricted transactions, procedures to check for suspicious payment patterns, and an outline of remedial actions (access denial, account termination)[24] to be taken when restricted transactions are found, new 31 C.F.R. §132.6(f).

The regulations contain exemptions in varying degrees for the other payment systems. In essence, because of the difficulties of identifying tainted transactions, they limit requirements to those who may deal directly with the unlawful Internet gambling businesses. In the case of "check collection systems," the coded information available to the system with respect to a particular check is limited information identifying the bank and account upon which the check is drawn, and the number and amount of the check, 72 *Fed. Reg*. 56687 (October 4, 2007). Information identifying the payee is not coded and a "requirement to analyze each check with respect to the payee would substantially ... reduce the efficiency of the check collection system," 72 *Fed. Reg*. 56687 (October 4, 2007). Consequently, the final rule exempts all participants in a particular check collection through a check collection system except for "the first U.S. institution to which a check is transferred, in this case the institution receiving the check deposit from the gambling business,"72 *Fed. Reg*. 56687 (October 4, 2007)—namely, the depositary bank, new 31 C.F.R. §132.4(b).

Banks in which a payee deposits a check are covered by the regulations as are banks which receive a check for collection from a foreign bank. The rule offers examples for both circumstances. In the case of a check received from a foreign bank, examples of a depositary bank's reasonably compliant policies and procedures are procedures to inform the foreign banking office after the depositary bank has actual knowledge[25] that the checks are restricted transactions (such actual knowledge being obtained through notification by a government entity such as law enforcement or a regulatory agency), new 31 C.F.R. §132.6(e)(2). In the purely domestic cases, examples of reasonably compliant policies and procedures would include (1) due diligence in establishing and maintaining customer relations sufficient to identify the nature of a customer's business, and to provide for a prohibition on tainted transactions in the customer agreement, and (2) remedial action (refuse to deposit a check; close an account) should a tainted transaction be unearthed, new 31 C.F.R. §132.6(e)(1).

"Wire transfer systems" come in two forms. One involves large volume transactions between banks; the second, customer-initiated transfers from one bank to another, 72 *Fed. Reg*. 56685 (October 4, 2007). Like the check collection systems, under current practices only the recipient bank is in a realistic position to determine the nature of the payee's business. The Agencies sought public comments on whether additional safeguards should be required of the initiating bank in such cases, 72 Fed. Reg. 56687 (October 4, 2007), but ultimately decided to exempt all but the bank receiving the transfer, new 31 C.F.R. §132.4(d).

[24] However, "[a]s the examples in the rule are non-exclusive, a system or participant may choose to include fines in its policies and procedures where appropriate." 73 *Fed. Reg*. 69393 (November 18, 2008).

[25] "Actual knowledge" is defined by the regulation to mean, with respect to a transaction or commercial customer, "when a particular fact with respect to that transaction or commercial customer is known by or brought to the attention of (1) an individual in the organization responsible for the organization's compliance function with respect to that transaction or commercial customer, or (2) an officer of the organization." 31 C.F.R. § 132.2(a).

Banks that receive a wire transfer (the beneficiary's bank) are covered by the regulations, and examples of reasonably compliant policies and practices resemble those provided for check collection system participants: know your customer, have a no-tainted transaction customer agreement clause, and have a remedial procedure (transfer denied; account closed) when tainted transactions surface, new 31 C.F.R. §132.6(g).

The "Automated Clearing House System" (ACH) is a system for settling batched electronic entries for financial institutions. The entries may be recurring credit transfers such as payroll direct deposit payments or recurring debit transfers such as mortgage payments, 72 *Fed. Reg*. 56683 (October 4, 2007). The entries may also include one time individual credit or debit transfers, *Id.* Banks periodically package credit and debit transfers and send them to a ACH system operator who sorts them out and assigns them to the banks in which the accounts to be credited or debited are found, *Id.* Participants are identified not according to whether they are transferring credits or debits but according which institution initiated the transfer, i.e. originating depository financial institutions (ODFI) and receiving depository financial institutions (RDFI), *Id.*

The final rule exempts all participants processing a particular transaction through an ACH system, except for the RFDI in an ACH credit transaction, the ODFI in an ACH debit transaction, and the receiving gateway operator that receives instructions for an ACH debit transaction directly from a foreign sender, new 31 C.F.R. §132.4(a). These entities are not exempt under the theory that in any tainted transaction they will be in the best position to assess the nature of the business of the beneficiary of the transfer and to identify and block transfers to unlawful Internet gambling operators, 72 *Fed. Reg*. 56686 (October 4, 2007). The ACH system operator, ODFIs in a credit transaction and RDFIs in a debit transaction are exempt from the regulations, however, *Id.*

The examples of ACH system reasonably compliant policies and procedures are comparable to those for check collection and wire transfer systems: in purely domestic cases, know your customer, have a no-tainted transaction customer agreement clause, have a remedial procedure (disallow origination of ACH debit transactions; account closed) when tainted transactions surface; in the case of receiving transfers from overseas, know your foreign gateway operator, have a no-tainted transaction agreement, have a remedial procedure (ACH services denied; termination of cross-border relationship) when tainted transactions surface, new 31 C.F.R. §132.6(c). The Agencies explained that U.S. participants processing *outbound* cross-border credit transactions (ACH credits and wire transfers) are exempted "because there are no reasonably practical steps that a U.S. participant could take to prevent their consumer customers from sending restricted transactions cross-border," 73 *Fed. Reg.* 69389 (November 18, 2008). The Agencies explained that there is insufficient information to allow U.S. participants to identify and block restricted transactions in cross-border ACH credit transactions and sending wire transfers abroad, *Id.*

Unlawful Internet Gambling Operators Watch List

In the proposed regulations, the Agencies had explained why they did not follow a list-of-unlawful-Internet-gamblers approach similar to that used to deny drug dealers and terrorists access to American financial services (such as those administered by the Office of Foreign Assets Control (OFAC)), 72 *Fed. Reg*. 56690 (October 4, 2007).

The OFAC system is a product of the International Economic Emergency Powers Act (IEEPA) which grants the President extraordinary powers to deal with foreign threats to the national security, foreign policy or economy of the United States.[26] The Presidents have exercised their powers under IEEPA to bar financial dealings with various identified drug dealers and terrorists among others.[27] OFAC maintains an online list of the dealers and terrorists subject to the freeze.[28] It might be thought that assembling a list of known unlawful Internet gambling operators and their fiscal accomplices might work just as well.

After considering the public comments on this issue, the Agencies concluded that maintaining such a list would be a time-consuming effort for which they lack the expertise, and they also questioned its effectiveness, 73 *Fed. Reg.* 69384 (November 18, 2008). The Agencies provided several reasons to support their position that the watch list would be inefficient and ineffective in preventing unlawful activity:

- Because the UIGEA does not precisely define what activities constitute unlawful Internet gambling, but rather refers to activities that are illegal under various federal or state gambling laws, creating such a list would require the Agencies to interpret those laws in a way that might "set up conflicts or confusion with interpretations by the entities that actually enforce those laws."
- The payment transactions may not necessarily be made payable to the business's listed name.
- The list might become quickly outdated to the extent that Internet gambling businesses could quickly change their payments information to evade the law.

Legislation in the 111th Congress

Several bills have been introduced in the 111th Congress that would liberalize federal online gambling laws.

Reasonable Prudence in Regulation Act

Introduced by Representative Frank, the Chairman of the House Financial Services Committee, the Reasonable Prudence in Regulation Act (H.R. 2266) would delay the date for compliance with the UIGEA regulations by one year, until December 1, 2010.

[26] 50 U.S.C. §§ 1701-1707.

[27] *See e.g.*, E.O. 12978, Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers, 60 *Fed. Reg.* 54579 (October 21, 1995); E.O. 13219, Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans, 66 *Fed. Reg.* 34777 (June 26, 2001).

[28] 31 C.F.R. ch.V, App.A (July 1, 2006), available on November 1, 2007 at http://www.treasury.gov/offices/enforcement/ofac/sdn/t11sdn.pdf.

Internet Gambling Regulation, Consumer Protection, and Enforcement Act

Another bill introduced by Representative Frank, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act (H.R. 2267), would establish a federal licensing regime under which Internet gambling operators may lawfully accept bets or wagers from individuals located in the United States. The Secretary of the Treasury would have full regulatory authority over the Internet gambling licensing program, including the power to approve, deny, renew, or revoke licenses to operate an Internet gambling facility. In addition, H.R. 2267 would establish specific minimum standards for Internet gambling licensees to satisfy, including the following:[29]

1. Establishing safeguards to verify that the customer placing a bet or wager is of legal age as defined by the law of the state or tribal area in which the individual is located at the time the bet or wager is placed.
2. Requiring mechanisms that verify that the customer placing a bet or wager is physically located in a jurisdiction that permits Internet gambling.
3. Ensuring the collection of all taxes relating to Internet gambling from customers and from any licensee.
4. Maintaining safeguards to combat fraud, money laundering, and the financing of terrorism.
5. Maintaining safeguards to protect the customer's privacy and security.
6. Establishing safeguards to combat compulsive Internet gambling.

Indian tribes and states may opt out of the Internet gambling regime if they provide notice to the Secretary of the Treasury before the end of the 90-day period after enactment of the Internet Gambling Regulation, Consumer Protection, and Enforcement Act.[30] Therefore, customers located within Indian tribes and states that elected to opt out would be prohibited from engaging in Internet gambling activities,[31] and licensees would be responsible for blocking access to those customers. Finally, the bill contains a clause that expressly states that H.R. 2267 does not provide any authorization for an Internet gambling facility to knowingly accept bets or wagers on sporting events in violation of federal law.[32]

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[29] H.R. 2267, § 2, adding new 31 U.S.C. § 5383(g).

[30] *Id.,* adding new 31 U.S.C. § 5386. Although the bill's Indian tribe opt-out provision requires Indian tribes' principal chief or other chief executive officer to inform the Secretary of the Treasury of the decision to opt out from allowing individuals in their jurisdiction to participate in Internet gambling, the bill's state opt-out provision requires the governor of a state to inform the "Director" of such opt-out. Yet the term "Director" is nowhere defined in the legislation. The reference to "Director" may well be an unintentional carry-over from Representative Frank's bill in the 110th Congress, H.R. 2046, which would have empowered the Director of the Financial Crimes Enforcement Network to oversee and operate the Internet gambling licensing program that would have been established under that bill.

[31] A state or tribe's decision to opt out does not necessarily mean that persons located within the state or tribal land are prohibited from all Internet gambling activities; rather, the state's governor or the tribal chief must clearly identify the "nature and extent" of the limitation on bets and wagers. *Id.*

[32] H.R. 2267, § 2, adding new 31 U.S.C. § 5387. Under existing federal law, it is unlawful for a governmental entity or a private person to sponsor, operate, advertise, promote, license, or authorize a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, with certain limited exceptions (parimutuel animal racing or jai-alai games). 28 U.S.C. § 3702. However, the UIGEA's definition of "bet or wager" explicitly does not include participation in any fantasy or (continued...)

Internet Gambling Regulation and Tax Enforcement Act of 2009

Representative McDermott introduced a related bill to Representative Frank's licensing legislation, the Internet Gambling Regulation and Tax Enforcement Act of 2009 (H.R. 2268). This bill would establish a licensing fee regime within the Internal Revenue Code for Internet gambling operators. In support of the legislation, Representative McDermott cited an April 2009 study conducted by the accounting firm PricewaterhouseCoopers that estimated that regulating Internet gambling could generate up to $48.6 billion (excluding online sports gambling) or $62.7 billion (including online sports gambling) in federal revenues over a 10-year period.[33] H.R. 2268 would require each licensee to pay a monthly Internet gambling license fee in an amount equal to 2% of all funds deposited by customers during that month.[34] In addition, customers would be required to pay income taxes on their Internet gambling winnings.[35]

Internet Poker and Game of Skill Regulation, Consumer Protection, and Enforcement Act of 2009

Senator Menendez introduced the Internet Poker and Game of Skill Regulation, Consumer Protection, and Enforcement Act of 2009 (S. 1597), which offers many of the same provisions as Representative Frank's licensing bill, but only allows the licensing of businesses that operate online games "in which success is predominantly determined by the skill of the players, including poker, chess, bridge, mah-jong, and backgammon";[36] the bill would not permit online betting or wagering with respect to games of chance. Similar to Representative Frank's bill, S. 1597 would allow states and tribes to opt out of the licensing regime. In addition (and unlike H.R. 2267), Senator Menendez's bill would require the Director of the Financial Crimes Enforcement Network, within 120 days after the bill's enactment, to submit to the Treasury Secretary a list of "unlawful Internet gambling enterprises" that identifies any person who has violated UIGEA more than 10 days after the date of the bill's enactment; such a list is to be posted on the Department of the Treasury website for public access and also distributed to "all persons who are required to comply with" the regulations promulgated by the Federal Reserve and the Treasury Department.[37] Finally, S. 1597 would impose an Internet gaming license fee similar to Representative McDermott's bill, but instead of 2%, Senator Menendez's bill would require a licensee to pay a monthly federal license fee equal to 5% of its Internet gaming deposited funds for the calendar month.[38] Unlike H.R. 2268, S. 1597 would require a licensee to also pay a monthly state or tribal government gaming license fee of 5% of the gaming operator's monthly deposits.[39] The state or tribal government gaming license fees received in the Treasury of the

(...continued)

simulation sports games, 31 U.S.C. § 5362(1)(E)(ix).

[33] Press Release, *Rep. McDermott Introduces Internet Gaming Tax Legislation Companion Bill to Rep. Frank's Legislation to License and Regulate Online Gaming,* May 6, 2009 (referring to PricewaterhouseCoopers, *Estimate of Federal Revenue Effect of Proposal to Regulate and Tax Online Gambling* (April 24, 2009), *available at* http://www.safeandsecureig.org/media/pwc09.pdf).

[34] H.R. 2268, § 2(a), adding new 26 U.S.C. § 4491(a).

[35] *Id.,* § 4(d), adding new 26 U.S.C. § 861(a)(9).

[36] S. 1597, § 102(a), adding new 31 U.S.C. § 5381(5).

[37] *Id.*, § 103(a), adding new 31 U.S.C. § 5368.

[38] *Id.*, § 202(a), adding new 26 U.S.C. § 4491(b)(1).

[39] *Id.*, § 202(a), adding new 26 U.S.C. § 4491(b)(2).

United States are to be appropriated to a new "State and Indian Tribal Government Gaming License Fee Trust Fund" that the bill would establish.[40] Out of this trust fund, the Treasury Secretary would be required to pay to each qualified state or tribal government an amount of the fees that are attributable to deposits made by persons located within the state or tribal government's jurisdiction.[41]

Legislation in the 110th Congress

In the 110th Congress, Representatives Frank and McDermott had introduced legislation similar to their bills in the 111th Congress. The 110th Congress also considered legislation, the Skill Game Protection Act (H.R. 2610), that would have removed from Wire Act[42] and UIGEA coverage games such as poker, which enthusiasts consider games of skill.[43] Finally, the Payments System Protection Act of 2008 (H.R. 6870), introduced by Representative Frank, would have prohibited the Agencies from proposing, prescribing, or implementing any regulation called for under the UIGEA, including the proposed regulations, except to the extent that such regulation pertains to unlawful Internet sports gambling. Furthermore, the bill would have required the Agencies to develop and implement regulations that include a definition of "unlawful Internet gambling" and require the Secretary of the Treasury to compile and maintain a list of unlawful Internet gambling businesses; however, such regulations would not have been effective if they "require any person to block or refuse to honor any transaction, or prohibit the acceptance of any product or service of such person, other than in connection with a business on the list maintained by the Secretary."

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[40] *Id.,* § 202(a), adding new 26 U.S.C. § 9511(a).

[41] *Id.*, § 202(a), adding new 26 U.S.C. § 9511(c).

[42] 18 U.S.C. § 1084 ("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.").

[43] Apparently with games like poker in mind, when defining the bets and wagers within its reach, UIGEA uses the phrase "a game subject to chance," when speaking of prohibited speculation upon contests, sporting events, and games, 31 U.S.C. § 5362(1)(A), rather than the phrase "opportunity to win is predominantly subject to chance," which it uses when speaking of prohibited speculation on lotteries, 31 U.S.C. § 5362(1)(B).