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**ONLINE GAMBLING**

The authors summarize the current state and federal frameworks governing online gaming and provide an update on recently introduced federal legislation. They conclude with compliance and best practices tips for companies operating in the online gaming space.

**U.S. Internet Gambling Laws: An Update**

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**O**n February 25, 2014, Delaware and Nevada entered into the country's first multistate online gambling compact, which will allow poker players in both states to wager against each other at the same virtual table. While the expansion of Internet gambling is mostly occurring at the state level, the federal framework governing online gambling is also a shifting landscape, as highlighted by the recent Congressional hearing on "The State of Online Gaming."

The Congressional hearing included testimony from gaming industry leaders, social advocates, and academics. Though the witnesses offered differing views on the merits (and perils) of expanding online gaming in the United States, both supporters and critics alike emphasized the need for a strong regulatory regime that would protect minors, minimize the incidence of gambling addiction, and ensure that all gaming is conducted fairly and lawfully.

Geoff Freeman, President and CEO of the American Gaming Association, observed that, in 2012, before any

American state had legalized online gaming, Americans gambled nearly \$3 billion at offshore casinos – almost 10% of the entire worldwide online gaming market. Freeman emphasized the need for a regulatory framework that would prevent illegal activity and ensure the integrity of games.

Another witness, Professor Kurt Eggert of the Chapman University Dale E. Fowler School of Law, stressed the importance of a robust consumer protection scheme, noting the increasing sophistication of automated poker bots – computer programs designed to play automatically against other players, some of which utilize sophisticated algorithms capable of beating the vast majority of casual players.

Andrew Abboud of the Las Vegas Sands Corporation (which operates brick-and-mortar casinos) urged the panel to reject any expansion of Internet gaming, citing "the potential for money laundering, terrorism financing, fraud and other criminal activity; underage betting; exploitation of those with gambling addictions, and the impact on jobs and economic growth." Many of the issues raised at the hearing are addressed in pending legislative proposals.

This article summarizes the current state and federal frameworks governing online gaming and provides an update on recently introduced federal legislation. We conclude by offering a few thoughts that companies might consider when operating in the online gaming space.

**Intrastate Gaming Laws**

Currently, only two states, Delaware and New Jersey, have legalized a full range of online casino gaming, such as electronic versions of blackjack, roulette, and slot machines, as well as online poker. Nevada, for its part, permits only online poker. The three states permit

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## Author Suggestions for Online Gambling Businesses

- Reexamine operations to ensure that you have established and maintain robust compliance and due diligence measures. Plans should include measures to ensure compliance with the laws of all jurisdictions in which you operate.
- Payment processors should test merchants' ongoing compliance with gaming policies. Refuse to set up accounts you suspect are being created for illegal purposes or at least ensure heightened oversight. Immediately terminate accounts that breach your procedures or controls.
- Take steps to help protect consumers prevent and manage gambling addiction.
- Develop methods to determine whether any players may be bots playing formulaically or according to automatic instructions.
- Use geolocation technology to minimize the risk of processing illegal transactions occurring beyond state boundaries.

wagering only by individuals physically located within their borders.

Online casino licenses in New Jersey are limited to existing traditional casino licensees, though licensees may use the brand name of their casino, of the online casino licensee, or other related trade names (18 ECLR 461, 3/6/13). For example, the Borgata Hotel Casino & Spa, whose online casino is operated by Bwin.Party Digital Entertainment, uses the domain names [www.borgatapoker.com](http://www.borgatapoker.com) and [www.borgatacasino.com](http://www.borgatacasino.com), as well as [www.NJ.partypoker.com](http://www.NJ.partypoker.com). Bally's, which is owned by Caesars Entertainment (owner of the Harrah's and World Series of Poker trademarks) and has its online casino operated by 888 Holdings, utilizes the domain names [www.HarrahsCasino.com](http://www.HarrahsCasino.com), [www.W-SOP.com](http://www.W-SOP.com), [us.888.com](http://us.888.com), [us.888poker.com](http://us.888poker.com), and [us.888casino.com](http://us.888casino.com).

Delaware similarly permits online gaming only at sites operated by its existing racetrack casinos: Dover Downs Hotel & Casino, Delaware Park, and Harrington Raceway and Casino.

Nevada, which permits casino gaming through the state, authorizes the issuance of online gaming licenses to resort hotels with non-restricted gaming licenses, although the only sites launched to date, Ultimate Poker, WSOP.com, and Real Gaming, are all owned by established casino operators with substantial holdings in the Las Vegas area (Station Casinos, Caesars Entertainment, and Michael Gaughan/South Point, respectively).

Several of the concerns raised at the congressional hearing, in particular those relating to consumer protection and problem gaming, are addressed in existing state regulatory frameworks. For example, Delaware's Internet gambling law is intended to offer casino gaming "in a well-regulated and secure system designed to create a positive customer experience that limits access to minors, those with gambling problems, and others

who should not be gaming." Del. Code Ann. tit. 29, § 4801(c)(1).

To that end, Delaware permits self-acknowledged problem gamblers to exclude themselves from gaming activity for periods of one year or more. *Id.* § 4834(a). Gaming operators are required to prevent self-excluded individuals from engaging in any gaming activity, remove such individuals from lists of those receiving any form of advertising and promotion, and are prohibited from providing such individuals with services such as casino credit, check cashing services, or complimentary benefits. *Id.* § 4834(c).

Moreover, each online gaming website must include "an advertisement for and link to additional information for services for the treatment, education and assistance of compulsive gamblers and their families." *Id.* § 4834(d). Delaware's Internet gambling law assigns responsibility for developing consumer protection rules and regulations to the Director of the Delaware State Lottery Office. *Id.* § 4826(c)(7).

New Jersey's Internet gaming law includes a similar requirement for the maintenance of self-exclusion lists by online casinos. N.J. Admin. Code § 13:69G-2.1, et seq. New Jersey's Internet gaming law is more specific in its warning requirements, however, mandating that a message stating "If you or someone you know has a gambling problem and wants help, call 1-800-Gambler" be displayed at the log-on screen and at the conclusion of each Internet gambling session. *Id.* § 13:69O-1.2(b). The same message must be included on a "patron protection page" accessible to patrons during all gaming sessions; such page must also include a direct link to the Council on Compulsive Gambling New Jersey, Inc., as well as at least one additional organization dedicated to helping individuals with gambling problems. *Id.* § 13:69O-1.2(l)(14).

Moreover, New Jersey requires its casinos to generate weekly reports "identifying potential problem gamblers, including those patrons who self-report," though the law does not specify actions that must be taken on the basis of these reports. *Id.* § 13:69O-1.9(k). In addition, New Jersey goes beyond the general consumer protection requirements imposed in Delaware and specifically bars the use of any automated computer software, including poker bots or similar mechanisms. *Id.* § 13:69O-1.2(l)(3)(v). New Jersey also requires all electronic systems to be designed to automatically detect potential cheating or collusive activity by players. *Id.* § 13:69O-1.5(h).

Nevada, unlike New Jersey and Delaware, permits online gaming operators to offer only poker. Notably, the Nevada statute itself contains very little detail as to the specifics of gaming operations, instead delegating much of the authority to the Nevada Gaming Commission. Nev. Rev. Stat. § 463.750; Nev. Gaming Comm'n Reg. 5A.

However, pre-existing Nevada law contains provisions regarding problem gambling, with a state-sponsored regime for problem gambling prevention, treatment, and research, which is funded by gaming license fees. Nev. Rev. Stat. § 458A.900. In addition, regulations promulgated by the Commission require all sites offering online gambling to include an active link to a "problem gambling website that is designed to offer information pertaining to responsible gaming." Nev. Gaming Comm'n Reg. 5A.150(6)(b).

The Nevada regulations, like the New Jersey framework, require sites to take steps to prevent player collusion, as part of the overall mandate to ensure that gaming is conducted “fairly and honestly.” *Id.* 5A.070(7).

## Current Federal Framework

While the state laws discussed above govern intrastate online gaming, the emergence of interstate gaming compacts (19 ECLR 306, 3/5/14) (and with them, the likelihood that gambling will be conducted across state lines) implicates federal law as well.

A number of federal laws apply to Internet gambling – most notably:

- the Wire Act, 18 U.S.C. § 1084;
- the Travel Act, 18 U.S.C. § 1952;
- the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955; and
- the Unlawful Internet Gambling Enforcement Act (UIGEA), 31 U.S.C. § 5361-5367.

Historically, the U.S. Department of Justice (DOJ) took the position that any company that offers Internet wagering to persons within the United States violates federal criminal law. However, the trend at the federal level is moving away from prosecuting Internet gambling per se and more toward prosecuting collateral illegal conduct, such as bank fraud, money laundering, and Ponzi schemes.

Although there is general momentum towards legalization and regulation of Internet gaming, potential liability under federal statutes such as the Travel Act and the IGBA remains to the extent that any transactions violate underlying state laws. Therefore, legitimate companies operating in the online gaming space typically will devote considerable effort to ensuring compliance with the laws of any state in which they seek to provide or facilitate intrastate gambling.

### The Wire Act.

The Wire Act prohibits any person “engaged in the business of betting or wagering” from “knowingly us[ing] a wire communication facility” for purposes of gambling. 18 U.S.C. § 1084(a). Until recently, DOJ took the position that the Wire Act applied to all forms of Internet gambling, and it initiated a number of high-profile investigations and prosecutions of companies and individuals engaged in non-sports (e.g., casino-style) wagering.

DOJ changed its position, however, when it announced in a September 2011 opinion that “the [Wire] Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.” Since then, New Jersey, Nevada, and Delaware have legalized intrastate online gambling, and legalization legislation has been introduced in several other states. Recently, *Forbes* reported that in New Jersey alone, online gaming generated \$8.3 million in the first five weeks after legalization.

### The Travel Act.

The Travel Act prohibits the use of any facility of interstate or international commerce – which has been interpreted to include telephone lines and the Internet – to “distribute the proceeds of any unlawful activity” or

to “promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” 18 U.S.C. § 1952(a). The Travel Act defines “unlawful activity” in relevant part as “any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.”

A recent case, *Ponte v. Chase Bank USA, N.A.*, No. 12-13901, 2013 WL 5818560 (E.D. Mich. Oct. 29, 2013), reiterates that liability under the Travel Act requires a showing of underlying unlawful activity. Thus, in the absence of underlying unlawful activity, gambling operators and payment processors would not face liability under the Travel Act.

### The Illegal Gambling Business Act (IGBA).

The IGBA punishes any person who “conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.” 18 U.S.C. § 1955(a). An “illegal gambling business,” for purposes of the statute, is defined as a gambling business that (i) is illegal under the law of the state in which it is conducted; (ii) has five or more managers, supervisors, or owners; and (iii) is in operation for more than 30 days or has gross revenue of \$2,000 in any single day. 18 U.S.C. § 1955(b)(1).

In August 2013, the U.S. Court of Appeals for the Second Circuit held that poker qualifies as “gambling” for purposes of the IGBA. *See United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013), *cert denied*, 2014 WL 684077 (Feb. 24, 2014). In *DiCristina*, the Second Circuit concluded that the IGBA does not independently define “gambling;” rather, the relevant inquiry is whether “the gambling business violates the law of the state in which the business is conducted.” *DiCristina*, 725 F.3d at 102.

This holding is in line with several other recent federal court decisions, which have highlighted the necessity of proving an underlying violation of state law in order to establish liability under the IGBA.

The federal government has prosecuted a number of payment processors under the IGBA, including the Internet payment services company Neteller, which led to the 2007 arrest of Neteller’s founders, the company’s eventual forfeiture of \$136 million, and its founders’ personal forfeiture of \$100 million.

### The Unlawful Internet Gambling Enforcement Act (UIGEA).

The UIGEA makes it unlawful for any person “engaged in the business of betting or wagering” to “knowingly accept, in connection with the participation of another person in unlawful Internet gambling,” credit, an electronic fund transfer, a check, or other forms of financial transactions. 31 U.S.C. § 5363.

The statute defines “unlawful Internet gambling” as gambling by means of the Internet that is unlawful under any federal or state law in the state where the bet is “initiated, received, or otherwise made.” 31 U.S.C. § 5362(10)(A). However, as courts have noted, liability under the UIGEA can be found only if a payment processor has actual knowledge and control of bets and wagers and owns or controls (or is owned or controlled by) a person who manages an illegal Internet gambling website.

## Federal Legislative Proposals

The federal framework governing online gaming may well evolve further in coming months, in light of potential legislative activity in both the House and the Senate.

The State of Online Gaming hearing focused primarily on H.R. 2666, the Internet Poker Freedom Act of 2013 (IPFA) (18 ECLR 3108, 12/18/13). The bipartisan bill, introduced on July 11, 2013 by Rep. Joe Barton (R-Tex) and co-sponsored by Rep. Robert E. Andrews (D-NJ), would establish a federal framework for legal, regulated online poker.

Specifically, the IPFA would require the Department of Commerce and the National Indian Gaming Commission to implement an interstate licensing program for Internet poker operations, run by “qualified regulatory authorities” at the state and tribal levels. Licensees would be prohibited from accepting bets or wagers for any activity other than Internet poker and from individuals residing in a state or Indian reservation with specific gambling prohibitions — that is, states and tribes could “opt out” of the federal program.

The IPFA also would provide some clarity to payment processors hoping to operate in the Internet gaming world. The IPFA seeks to amend the UIGEA to expand the safe harbor for financial transaction providers, including payment processors, by precluding liability for engaging in a transaction in connection with activity permitted by the IPFA or the Interstate Horseracing Act of 1978, unless the provider has actual knowledge that the activity or transaction was conducted in violation of federal or state law.

The IPFA also would preclude liability for blocking a transaction based on a good faith belief that the participants are acting in violation of federal law. Licensees would be prohibited from accepting deposits via credit card, a payment method currently utilized by many online casinos and poker rooms. Also, licensees would be required to ensure, to a reasonable degree of certainty: the exclusion of underage players and players located in jurisdictions that have prohibited such bets or wagers; the prevention of fraud, money laundering, and terrorist financing; the protection of the privacy and on-line security of players; and the collection or reporting of all relevant taxes.

Another bipartisan House bill, the Internet Gambling Regulation, Enforcement, and Consumer Protection Act of 2013 (H.R. 2282), was introduced on June 6, 2013 by Rep. Peter King (R-NY) and is co-sponsored by Rep. Michael Capuano (D-Mass) (18 ECLR 2016, 6/12/13). Unlike the IPFA, H.R. 2282 would permit a variety of types of non-sports-related online gambling, provided that players are located in states and Indian lands that have opted-in for participation in such gaming.

H.R. 2282 would establish an Internet gambling licensing and enforcement framework within the Department of the Treasury. Both the IPFA and H.R. 2282 would require the development of a responsible gaming and self-exclusion program, to be implemented by each licensee.

A third House bill, the Internet Gambling Regulation and Tax Enforcement Act of 2013 (H.R. 3491), would impose certain taxes on Internet gambling licensees.

Taking a different approach, Sen. Lindsey Graham (R-SC) and Rep. Jason Chaffetz (R-Utah) introduced the Restoration of America’s Wire Act (S. 2159, H.R. 4301) on March 26, 2014. The bipartisan bill would

amend the Wire Act to prohibit most forms of online gambling, reversing the DOJ’s 2011 opinion. Meanwhile, Sens. Harry Reid (D-Nev) and Dean Heller (R-Nev) are reportedly planning to introduce legislation that would ban most types of online gambling, with the exception of poker and interstate horse racing wagers.

## Some Observations

Congress is famously divided these days, and it remains to be seen whether any of the new federal online gambling legislation ultimately will be enacted. That said, the various proposals, if enacted, would result in a number of dramatic changes to an already complex legal landscape.

In the meantime, there are a number of things that businesses operating in the online gambling space can start doing now (if they aren’t doing them already). Businesses in the gaming space will want to scrub their compliance programs to ensure that they have in place adequate, state-of-the-art controls and are complying with state laws and avoiding the possibility of conducting or facilitating wagering activity in jurisdictions where Internet gambling is currently illegal. Some of the things that companies should consider include:

- Reexamining their operations to ensure that they have established and maintain robust compliance and due diligence measures, to minimize the risk of exposure to liability for facilitating illegal Internet gambling. Specifically, companies should implement detailed compliance plans, providing an account of the measures they will take to ensure that they act in accordance with the laws of the jurisdictions in which they operate. Payment processors should implement compliance procedures, either directly or through third party vendors, to test merchants’ ongoing compliance with gaming policies. If a payment processor suspects that a merchant may use its account for any unlawful purposes, the payment processor should either refuse to set up the account or ensure that it is monitored with a heightened level of oversight. If a merchant at any point breaches the payment processor’s procedures or controls, the payment processor should immediately terminate that merchant’s services.

- Taking steps to protect consumers, as recent legislation and Congressional hearing testimony have focused on issues such as preventing and managing gambling addiction and protecting consumers from bots (sophisticated software programs designed to play poker automatically against human players) and other unfair practices. As noted above, all three states that currently permit Internet poker within their borders require that operators establish mechanisms for detecting unfair practices, and New Jersey specifically mandates processes for the detection of poker bots. The technology behind bots is developing rapidly, to the point where some programs are reportedly able to defeat all but the most advanced poker players in the world. Even in the absence of a specific prohibition such as New Jersey’s, online casino operators would be well served to develop methodologies, including analysis of player activity, to determine whether any players appear to be playing formulaically or according to automatic instructions.

- Taking advantage of available technology, such as geolocation mechanisms, to minimize the risk of pro-

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cessing any illegal transactions that occur beyond state boundaries. Companies should monitor not only the location of individual players, but also the type of wagering taking place (especially in light of the variation in the types of gambling permitted in different jurisdictions).

The regulatory landscape governing online gaming is evolving quickly. Arnold & Porter will continue to monitor developments and plans to issue advisories to keep companies up to date. In the meantime, please reach out if you want to discuss any of these matters or how they might impact your business.