

Gambling and the Law®: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed

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The Unlawful Internet Gambling Enforcement act of 2006 was rammed through Congress by the Republican leadership in the final minutes before the election period recess. According to Sen. Frank. R. Lautenberg (D-NJ), no one on the Senate-House Conference Committee had even seen the final language of the bill. The Act is title VIII of a completely unrelated bill, the Safe Port Act, HR 4954, dealing with port security. It can be found on pages 213-244 of the Conference Report: <http://www.saveonlinegaming.com/hr49543.pdf>. It is based on the Leach and Goodlatte bills, HR 4411 and HR 4777, but there are some important differences.

The following is a detailed analysis of the Act. The section numbers that follow refer to new sections that have been added to Title 30 of the U.S. Code:

§5361. The Act begins with Congress's findings and purpose. These include a recommendation from the discredited National Gambling Impact Study Commission, whose chair was the right-wing, Republican incompetent, Kay Coles James. Findings include the doubtful assertion that Internet gambling is a growing problem for banks and credit card companies. It correctly states that "new mechanisms for enforcing gambling laws on the Internet are necessary," especially cross-border betting.

The Act contains a standard clause that it does not change any other law or Indian compact. It repeats this many times, to make sure that no one can use the Act as a defense to another crime, or to expand existing gambling.

Most importantly, the Department of Justice is arguing before the World Trade Organization, in the dispute between the U.S. and Antigua, that all interstate gambling is illegal under the Wire Act. The DOJ insisted that any Internet prohibition passed by Congress not expressly authorize Internet betting on Horseracing. The DOJ believes this will allow it to continue to argue that the Interstate Horseracing Act does not do exactly what it says it does, legalize interstate horseracing.

§5362 Definitions.

Bet or wager includes risking something of value on the outcome of a contest, sports event or "game subject to chance." The Act otherwise allows contestants to risk money on themselves. The "game subject to chance" restriction is designed to eliminate Internet poker.

The Act then confuses the issue of skill by stating that betting includes purchasing an "opportunity" to win a lottery, which must be predominantly subject to chance. Someone will figure out a way to create an opportunity to win, where the opportunity is subject to

some chance. But the Act expressly prohibits lotteries based on sports events.

Betting includes instructions or information. This eliminates the argument overseas operators used that the money was already in a foreign country, so no bet took place in the U.S.

The Act exempts activities that we all know are gambling, but are by statute, declared not to be gambling. These include securities and commodities, including futures, that are traded on U.S. exchanges. Boilerrooms and bucketshops, selling foreign securities are gambling. Insurance is not.

Free games are not gambling. But there is a special provision that allows sites to offer points or credits to players only if these are redeemable only for more games. Operators of free games, where players can win valuable prizes, will have to stop giving points for wins that can be redeemed for cash. Free bingo, on the other hand, can still give small cash prizes paid out of the advertising budget.

Fantasy leagues are legal, but subject to detailed restrictions. A fantasy team cannot be "based on the current membership of an actual team." What they mean is a fantasy team cannot be composed merely of the players of a real team. There is no limit on the cost of entering, but prizes must be announced in advance, and not based on the fees paid by participants. Statistics must be derived from more than one play, more than one player, and more than one real-world event.

Being in the "business of betting or wagering" still does not include mere players. It also expressly does not include financial institutions involved in money transfers.

"*Designated payment system*" is a new term. It could have been labeled simply "target," as in "you are the target of a criminal investigation." It covers any system used by anyone involved in money transfers, that the federal government determines could be used by illegal gambling. The procedure will be that the Secretary of the Treasury, Board of Governors of the Federal Reserve System and Attorney General will meet and create regulations and orders targeting certain money transfer systems.

"*Financial transaction provider*" is a very broad definition covering everyone who participates in transferring money for illegal Internet gambling. This expressly includes an "operator of a terminal at which an electric fund transfer may be initiated," and international payment networks. This covers third party providers, like Neteller.

"*Interactive computer service*" includes Internet service providers.

"*Restricted transaction*" means any transmittal of money involved with unlawful Internet gambling.

"*Unlawful Internet gambling*" is defined as betting, receiving or transmitting a bet that is illegal under federal, state or tribal law. The Act says to ignore the intermediary computers and look to the place where the bet is made or received.

This does not completely solve the problem of Internet poker, or even Internet casinos. The Act does not expand the reach of the Wire Act, the main federal statute the DOJ uses against Internet gambling. Although the DOJ has taken the position that the Wire Act covers all forms of gambling, courts have ruled that it is limited to bets on sports events and races. State anti-gambling statutes have similar weaknesses, including the presumption that they do not apply if part of the activity takes place overseas. This new statute requires that the Internet gambling be "unlawful." But it would often be difficult to find a federal, state or tribal law that clearly made a specific Internet bet illegal.

Nevada and other states are expressly permitted to authorize 100% intrastate gambling systems. Congress required that state law and regulations include blocking access to minors and persons outside the state.

Tribes were given the same rights, with the same restrictions. Two tribes can set up an Internet gaming system, if it is authorized by the Indian Gaming Regulatory Act. This means that tribes can operate bingo games linking bingo halls on reservations. They can also link progressive slot machines, if their tribal-state compacts allow. But they cannot operate Internet lotteries and other games open to the general public.

It is interesting that Congress decreed that states can decide for themselves if they want to have at-home betting on horseracing, but not on dog racing. Congress also decreed that tribes can operate games that link reservations, even across state lines, but not the states themselves: state lotteries are not exempt.

Congress had a little problem with the term “*financial institution*.” To force casinos to report large cash transaction, federal law was changed to define “financial institution” as including large gambling businesses. Congress had to undo that definition, so that in this Act casinos go back to being casinos. Since no other federal laws were changed, casinos will still have to file Financial Transaction Reports and other forms.

The other definitions are standard or are described above.

§5363. “No person engaged in the business of betting or wagering may knowingly accept” any money transfers in any way from a person participating in unlawful Internet gambling. This includes credit cards, electronic fund transfers, and even paper checks. But it is limited to Internet gambling businesses, not mere players. It also would not cover payment processors, except under of a theory of aiding and abetting.

§5364. Federal regulators have 270 days from the date this bill is signed into law to come up with regulations to identify and block money transactions to gambling sites. At this writing, President Bush had not yet signed this bill, but he will. So the regs will go into effect by the beginning of July 2007.

The regs will require everyone connected with a “designated payment system” to I.D. and block all restricted transactions. So all payment processors are supposed to have systems in place to prevent money from going to operators of illegal Internet gambling. The first step will undoubtedly be to take the credit card merchant code 7995 and expand it to all money transfers. Visa created the 7995 classification in 2001 to avoid having its credit cards used for online gambling. The federal government will order banks and all others involved with electronic money transfers to cease sending funds to any Internet operator who has a 7995 credit card merchant code. Any financial institution that follows the regs cannot be sued, even if it wrongfully blocks a legitimate transaction.

The Act allows the federal regulators to exempt transactions where it would be impractical to require identifying and blocking. This obviously applies to paper checks. Banks have no way now of reading who the payee is on paper checks and cannot be expected to go into that business. Banks tried to defeat this bill, not because they cared about patrons’ privacy, but because they knew that it would cost them billions of dollars to set up systems to read paper checks.

The great unknown is how far into the Internet commerce stream federal regulators are willing to go. The Act requires institutions like the Bank of America and Neteller to I.D. and block transactions to unlawful gambling sites, whatever they are. But, while the Bank of America will comply, Neteller might not, because it is not subject to U.S. regulations. Will federal regulators then prohibit U.S. banks from sending funds to Neteller? And would they then prohibit U.S. banks from sending funds to an overseas bank, which forwards the money to Neteller?

For financial institutions within the U.S., the Act provides that exclusive regulatory enforcement rests with their federal regulators, like the Federal Reserve Board. The Federal Trade Commission is supposed to enforce regulations on everyone else. It is extremely doubtful whether the F.T.C. will ever try to do anything about the Netellers of the world, who are beyond regular U.S. regulatory control.

§5365. Since there is no way to regulate overseas payment processors, the Act allows the U.S. and state attorneys general to bring civil actions in federal court. The courts have the power to issue temporary restraining orders, preliminary and permanent injunctions, to prevent restricted transactions. The only problem with this enormous power is that it is, again, practically useless against payment processors who are entirely overseas.

It is difficult to serve a company with the papers necessary to start a lawsuit, a summons and complaint or petition, if the company has no offices or officers in the U.S. Even if the papers for such a lawsuit can be served, there is normally no requirement that foreign countries enforce these types of orders. Other countries are particularly reluctant to enforce a T.R.O. (temporary restraining order), often ignored, because they are issued without a full trial and can be modified anytime by the trial judge. Neteller operates out of the Isle of Man. I do not know of any treaty or other law which would require the Isle of Man to enforce even a permanent injunction against one of its licensed operators.

The Act provides for limited civil remedies against “interactive computer services.” An Internet service provider can be ordered to remove sites and block hyperlinks to sites that are transmitting money to unlawful gambling sites. ISPs are under no obligation to monitor whether its patrons are sending funds to payment processors or even directly to gambling sites. But once it receives notice from an U.S. Attorney or state Attorney General, the ISP can be forced to appear at a hearing to be ordered to sever its links.

But the statute has an interesting requirement: The site must “reside on a computer server that such service controls or operates.” This would limit the reach of this statute to payment processors, affiliates and search engines that are housed on that particular ISP. The same problem of going after foreign operators and payment processors affects this section. Foreign ISPs are difficult to serve and not necessarily subject to federal court injunctions.

The greatest danger here would seem to be with affiliates. Any American operator can be easily grabbed. This includes sites that don’t directly take bets, but do refer visitors to gaming sites. If the affiliate is paid for those referrals by receiving a share of the money wagered or lost, it would not be difficult to charge the affiliate with violating this law, under the theory of aiding and abetting. Being a knowing accomplice and sharing of the proceeds of a crime make the aider and abettor guilty of the crime itself. The federal government could also charge the affiliate with conspiracy to violate this new Act.

The other danger lies with search engines. Although California-based Google does not take paid ads, punching in “sports bet” brings up many links to real-money sites. This new Act expressly allows a federal court to order the removal of “a hypertext link to an online site” that is violating the prohibition on money transfers. But what prosecutor would want to be ridiculed internationally for trying to prevent Google from showing links?

The Act gives ISPs a little more security by declaring that they cannot be convicted of violating the Wire Act, unless, of course, the ISP is operating its own illegal gambling site.

This section of the Act ends with a limitation, that frankly, makes no sense. It says that, after all the talk of getting court orders to prevent restricted transactions, “no provision of this subchapter shall be construed as authorizing” anyone “to institute proceedings to prevent or restrain a restricted transaction against any financial transaction provider, to the extent that the person is acting as a financial transaction provider.” This could be a typo, since the bill was rushed though without an opportunity to even be read. Or perhaps it means that banks can be ordered to not transfer money to gambling sites, but only if they know about it. It is indecipherable.

§5366. Criminal penalties: Up to five years in prison, and a fine. And barred from being involved in gambling.

§5367. The Act naturally makes ISPs and financial institutions liable if they actually operate illegal gambling sites themselves.

Lastly, the Act requests, but does not require, the executive branch to try and get other countries to help enforce this new law and “encourage cooperation by foreign governments: in identifying whether Internet gambling is being used for crime. The Secretary of the Treasury is told to issue a report to Congress each year “on any deliberations between the United States and other countries on issues relating to Internet gambling.” That report will go unread.