

Although New MasterCard Rules Require Blocking of All Online Wager Purchases, A Transaction Coding Change May Provide a Way Out.

By Mark Hichar



As was widely reported in late November, 2009, compliance by financial institutions and other payment network participants with the regulations issued under the Unlawful Internet Gambling Enforcement Act (“UIGEA”) was delayed six months, from December 1, 2009, to June 1, 2010. Those regulations are in furtherance of the UIGEA requirement that payment systems, and all participants therein, identify and block “restricted transactions” – which, generally, are transactions involv-

ing credit or debit cards, electronic funds transfers, checks and other payments in connection with an individual’s “unlawful Internet gambling” – in general, placing a wager via the Internet, where such wager is unlawful under any applicable federal or state law where the wager is placed or received. The regulations fulfill the law’s requirement that covered payment processors and financial institutions establish policies and procedures “reasonably designed” to (a) permit identification of restricted transactions by means of transaction codes or by other means, and (b) block those transactions.

Online magazines and blogs have been abuzz in February and March, 2010, declaring that, with increasing frequency, MasterCard card issuers have been denying Internet gambling payment transactions relating to Internet gambling in the United States. Some have reported that Visa is following suit. Both card companies have denied doing this, however, saying that their policies in respect of Internet gambling have not changed. Whether or not a crackdown is underway, it is clear, at least in the case of MasterCard, that its rules in regard to Internet gambling have changed. (Visa appears not to have changed its rules applicable to transactions originating in the U.S., at least since November 15, 2008.)

The MasterCard Rules, which are applicable to participating financial institutions and payment processors, and the “Maestro [Payment Network] Global Rules” (applicable to entities using the Maestro payment network), were in fact changed and those changes reflected in new versions of those Rules issued November 6, 2009 and November 11, 2009, respectively. The changes to the prior versions of those rules (which are easily identifiable) suggest that MasterCard, anticipating the effective date of the UIGEA regulations (which was to be December

1, 2009, until that date was extended as aforesaid), initially decided to require card issuers to block all Internet gambling transactions, whether or not unlawful.

By way of background, recall that the UIGEA regulations provide a safe harbor for certain policies and procedures of card system operators, transaction acquirers, third-party processors and card issuers. Their policies and procedures for card system participants will be deemed to be “reasonably designed” to identify and block restricted transactions, if they provide for either:

(a) due diligence procedures in establishing new commercial customer accounts and, if the participant has actual knowledge that an existing commercial customer engages in an Internet gambling business, procedures to confirm that the business is lawful; or

(b) Implementation of a code system, such as transaction codes and merchant/business category codes, that are required to accompany the authorization request for a transaction;

and in any event, in regard to card system operators, transaction acquirers and third-party processors, they include steps to be taken when the participant has actual knowledge that a merchant has received restricted transactions through the card system – e.g., denying the merchant access to the card system and/or closing the merchant’s account. However, to the extent the participants do not deal directly with the commercial customers (e.g., Internet gaming business operators), the only safe harbor available will be the one described in (b), namely implementation of a code system to identify and enable blocking of transactions. The UIGEA law and regulations exempt these participants from all liability for blocking transactions that were not restricted – i.e., were lawful and thus not related to unlawful Internet gambling – provided that such participant (a) relied on the policies and procedures of a payment system or (b) reasonably believed the blocked transactions to be restricted.

The MasterCard Rules and Maestro Global Rules contain identical language stating that “with respect to any Internet gambling transaction involving a U.S. region cardholder, the issuer of the card must either employ a method of systemic transaction blocking or decline all such transaction authorization requests on an individual basis.” This suggests that MasterCard card issuers must block all Internet wager purchases involving U.S.-based cardholders – individually, or via a method of systemic transaction blocking – whether or not the transactions are unlawful. This strict interpretation is supported by the definition of “Internet gambling transaction,” which places no relevance on whether a transaction is unlawful or not. The Rules state: “An Internet gambling transaction is any transaction that the acquirer has identified in the authorization request message as both (a) a gambling transaction, by the use of MCC 7995..., and (b) an e-commerce transaction, by the use of a value of 6 (electronic commerce transaction)...” In practice, this will cover all Internet wager purchases, whether or not unlawful, because:

(1) “gambling transaction” is defined as “[a]ny transaction, other than an ATM transaction or PIN-based in-branch terminal transaction [i.e., a transaction at an attended terminal at the premises of a member bank], involving the placing of a wager, the purchase of a lottery ticket, in-flight commerce gaming, or the purchase of chips or other value usable for gambling in conjunction with gambling activities provided by wagering or betting establishments such as casinos, race tracks, jai alai frontons, card parlors, airline, and the like;” and

(2) “[a]cquirers must identify all gambling transactions with MCC 7995 so that [card] issuers are fully aware of the nature of these transactions;” and

...continued on page 29

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(3) Acquirers must also properly identify all e-commerce transactions as such.

Thus, all Internet wager purchases must be identified by use of the MCC 7995 code (for gambling) and 6 (for e-commerce transaction) and, whether or not a particular wager purchase is unlawful, if it involves a U.S.-based cardholder, the MasterCard Rules and Maestro Global Rules call for it to be blocked or declined. Those Internet wagering transactions that are generally recognized as lawful – for example, deposits into advance deposit wagering accounts for Internet betting on horse races where lawful under the applicable state laws – would be subject to such denial. Moreover, as stated above, MasterCard card issuers would not face liability for denying legitimate Internet wager purchases. Since they would be relying on the rules of the Maestro payment network, the UIGEA would exempt them from liability.

It appears likely, however, that this situation will be temporary. As noted by the U.S. Treasury and Federal Reserve in its overview to the final UIGEA regulations, some commenters to the draft rules had suggested that the card system examples of reasonably designed policies and procedures “should include a provision by which credit card companies would create a particular merchant category code that would be limited to those types of Internet gambling that are specifically excluded from the definition of the term ‘unlawful Internet gambling’ – intrastate transactions, intratribal transactions, and any activity that may be allowed under the Interstate Horseracing Act.” While the federal agencies declined

to do so, leaving that decision up to the card system operators and their participants, those commentators apparently have continued their efforts. Although it could not be confirmed as of this writing, it is expected by industry watchers that MasterCard will implement this year new transaction codes for transactions that are not “unlawful Internet gambling transactions” – transactions such as deposits into advance deposit wagering accounts for wagering on horse races and intrastate lottery purchases (in each case, where lawful). Presumably, in order for transactions to qualify for such “unrestricted code,” some sort of pre-qualification would be required to establish that such transactions were lawful.

Thus, although an increasing number of MasterCard card issuers now may be denying Internet wagering purchases, a further change to the MasterCard and Maestro Global Rules would provide relief from the blocking mandate that MasterCard has established. What Professor I. Nelson Rose stated when commenting on the draft UIGEA regulations bears repeating: “U.S. licensed parimutuel outlets that do Advanced Deposit Wagering should lobby for their own special code with Visa, MasterCard, American Express, etc., so that banks will know that this is a legal form of online gaming...[and] there should be additional codes created for other forms of [legal] gambling...” Short of repealing or amending the UIGEA, a change in the transaction codes seems to be a good way to address this “over-blocking” problem. ♦

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