



## Frank Fahrenkopf

President and Chief Executive Officer,  
American Gaming Association (AGA)

**PGRI Introduction:** Frank Fahrenkopf is the national advocate for the commercial casino industry and is responsible for positioning the association to address regulatory, political and educational issues affecting the industry. A lawyer by profession, Fahrenkopf gained national prominence during the 1980s when he served as chairman of the Republican Party for six of President Ronald Reagan's eight years in the White House (1983 to 1989). Prior to becoming the AGA's first chief executive on June 1, 1995, Fahrenkopf chaired the International Trade Practice Group, represented clients before Nevada gaming regulatory authorities, served as the first chairman of the American Bar Association (ABA) Committee on Gaming Law and was a founding trustee and president of the International Association of Gaming Attorneys, a worldwide organization of government gaming regulators and private attorneys acting on behalf of licensed gaming enterprises.

**Paul Jason, Public Gaming:** *What are some of the implications of the memorandum from the U.S. Department of Justice regarding the Federal Wire Act from your point of view?*

**Frank Fahrenkopf:** This opinion creates as much confusion as it does to clarify the issues in the internet gaming debate. First, we all need to realize that this is an opinion of the Department of Justice. This is not the law of the land as set down in a Supreme Court decision or in any other court decisions. And this opinion goes counter to four Departments of Justice that considered this matter prior. And it does not mean that the Department of Justice that comes after the Obama Department of Justice couldn't change positions on this issue. So it's very important to realize precisely what it is and what it isn't.

But it does make two things clear. First, the Wire Act only prohibits the transmission of communications relative to bets and wagers on sporting events or contests. And as you and I have discussed before, Paul, it's always been my position that that's all the Wire Act was ever intended to cover and that the Fifth Circuit MasterCard case had the correct reading of the Wire Act by con-

firming as much. Secondly, this U.S. DoJ opinion makes clear that intra-state sales of lottery tickets online are legal so long as the lottery games do not involve sports wagering, even though the digital signal may cross state lines in order to be completed.

Now here is what the U.S. DoJ opinion does not make clear and where it gets confusing. Are lotteries and/or states now authorized to implement intra-state online poker, slots, and other casino type games? My answer to that is probably yes, that states can now take legislative action to authorize internet gaming on an intra-state basis, except for sports-betting. That is a fundamental recognition of the Tenth Amendment right of each state to decide whether or not they want to have gambling. If they want to have it, the states need to decide and legislate the types of gambling they choose to authorize, and how it's going to be regulated, taxed, et cetera. There arises another important question. Can two or more states that legalize online gambling link their lotteries or other state approved online gaming together? Can states form agreements to collaborate on the implementation of the internet games? Such collaborations would constitute interstate commerce, so are states allowed to do

that? This is an important question because internet poker in particular depends upon a level of scale and liquidity that many states would not be able to achieve on their own. We know that states can negotiate interstate compacts. However, Congress does have the power to disapprove them. Historically, over the last couple of hundred years, there have been many, many state compacts that have been approved. Some multi-state compacts have been ignored, Congress just didn't take action to approve or disapprove. And in some cases Congress did not approve the compact. Congress does have the power under Article 1, Section 10 of the Constitution to approve or disprove of state compacts. Then there is also the question of whether a state can enter into a compact with an offshore jurisdiction, like Alderney or the UK.

*And the reason that is relevant is that these offshore i-poker operators would offer an instant pool of players and liquidity. So, do states have the right to enter into international compacts?*

**F. Fahrenkopf:** Exactly. Multi-jurisdictional compacts like this result in inter-state or even inter-national commerce. The U.S.

DoJ opinion does not address these questions. I think that congressional approval would probably be needed for some of these.

Another confusing point: How does this ruling impact the pari-mutuel industry? Also as we've discussed before, online wagering is going on now in this country and has been for some time in the pari-mutuel industry. Now we have to ask, is horseracing a 'sports activity'? I think it is if you read the entire opinion by the Justice Department. In fact, they use the reference to horseracing and bookies and so forth as the justification of why the Wire Act was passed in the first place. Now, it's the position of the pari-mutuel industry that the Interstate Horseracing Act exempts them from the Wire Act. The Justice Department has never accepted that interpretation. It has taken the position that they're in violation of the Wire Act, but they've never prosecuted anybody. This U.S. DoJ opinion is quiet on that. It doesn't clarify it one bit.

*And what about Native American gaming?*

**F. Farhenkopf:** The U.S. DoJ is quiet on that as well. If New York, for example, amends its statutes to allow for online poker, does that give the Indian tribes in New York the right to offer online poker? And would online poker or other casino type games fall within the Indian Gaming Regulatory Act? I'm not sure I know the answer. If it does, would those tribes have to renegotiate their compacts with those states if they want to get involved in this? Can the tribes say, well, look, we're not going to just stick with tribal gaming, we'll establish a commercial operation and pay taxes and be subject to state regulation. Can they do that? And are the tribes limited to taking online bets from people who are on the reservation? Or could they take a bet from players physically located outside of sovereign land but within the borders of the contiguous state? And if so, are Tribes subject to state taxes and regulations?

*Let's circle back to offshore operators. How does the ruling affect them?*

**F. Farhenkopf:** First, it's clear that UIGEA is still going to apply if sports betting is involved. It also will probably apply if the operator was not licensed in the state where they were taking bets. If the state law however is silent or if the offshore company gets licensed in the state, then UIGEA probably would not apply.

Where are we going to be if states all over the country implement different regulatory and taxation structures, whether through the use of their lotteries or land-based casinos or some other system? And what about Native American tribes and the pari-mutuel industry? We need to have minimum standards for consumer protection, for underage gamblers and for those who can't gamble responsibly. It seems to me that a patchwork quilt of regulations all over the country is not the best system. I believe that there should be a federal legislation that gives states the rights to continue to have control over regulation and taxation. We just need a national framework that establishes some minimum standards for consumer protection, underage gambling, responsible gaming, and also strengthens UIGEA and clarifies it so that law enforcement and financial institutions know clearly what they can and cannot do. Remember, we are all served well by having an effective UIGEA to enforce the laws against illegal offshore operators. The best estimates are there are 2000 illegal i-gaming websites. In the i-poker space, they will probably be marketing themselves as having more

...continued on page 41



Lottery terminals  
with a sense of family.

Tailor-made solutions  
for maximum cost efficiency?  
Only in the best families!

The KeWin multimedia, KeWin micro and KeWin check maintain the family tradition of fitting exactly into the individual terminal mix in line with the lottery ticket volume of the sales outlet. As a result of outstanding flexibility, efficiency and availability, the KEBA terminal family ensures that tailor-made solutions are also the most cost-efficient.



**KEBA**<sup>®</sup>

Automation by innovation.

## Ireland - Turnover and GGY (€ m) 2011e-2012f

	Sports Betting		Horse Racing		EGM*	Lottery		Others (Bingo)		Total
	Handle	GGY	Handle	GGY	GGY	Sales	GGY	GGY		
2011 Est.	633	87	3029	407	116	782	357	61	18	987
2012 Frct.	671	93	2877	387	111	798	365	55	16	971
Var. %	6.0	6.0	-5.0	-5.0	-5.0	2.0	2.0	-10.0	-10.0	-1.6

\*Electronic Gaming Machines  
Source: GBGC

Ireland, as a country that required a bailout, implemented one of the most punitive austerity measures in the Eurozone. The measures adopted in the last two years have wiped off 8.5% take home household income. Other measures to take effect in the coming year will cost an average Irish household an additional €1,800.

GBGC estimates the Irish gambling market to decrease by 4.5% in 2011. The fall of gambling revenue will not spare any segment, but horserace wagering and land based bingo, with a GGY decline of -7% and -5% respectively, will take the brunt of the decline.

2012 will be another year with declining revenue for operators working in the Irish market; however, the rate of decline will slow. GBGC forecasts the Irish gambling market to decrease by 1.6% in 2012 compared to 2011, with lottery sales and sports betting bucking the downward trend and producing growth of 2% and 6% respectively.

### Summary

2012 will be a tough year for gambling operators not only in the jurisdictions analysed, but in the whole of the European Union. Next year could be the year that the Eurozone crisis stabilises, but it could just as easily deteriorate, which would trigger further austerity measures that would cut even more into household income and consumer confidence that would require adjustments to our forecasts.

In the coming year policy-makers will undoubtedly shape the gambling market by the fiscal and regulatory decisions that will directly affect the gambling industry, and indirectly through the income of customers. However, operators, be it land based or online, will unquestionably improve their chances by adapting their strategies for the incoming tough environment by attracting new customers with clever marketing strategies and innovative products, and more importantly, not losing the acquired ones.

GBGC also estimates that the gambling industry will undergo through significant consolidation and the privatisation process of state controlled gambling operators will enter a crucial phase. ♦

### Information about Global Betting and Gaming Consultants

#### Contact details:

Warwick Bartlett, CEO, GBGC  
Contact: warwick@gbgc.com  
Tel: 07624 483 921  
www.gbgc.com

*GBGC has established itself as the most credible specialist international gambling consultancy in the world. The company has work with or supplied information to over 400 clients the majority of whom are 'blue chip'. In addition to its consultancy GBGC has produced six reviews of the global gambling market that have been widely acknowledged to be the best available both in terms of both their detail and accuracy. The latest Global Gambling Report was published in April 2011 and extends to over 1,500 pages, covering more than 250 individual markets on every continent.*

Frank Fahrenkopf ...continued from page 27

players and more liquidity to appeal to U.S. players. That is why it's still necessary to consider federal legislation to establish some minimum standards that will strengthen and clarify the effectiveness of UIGEA tools to enforce the laws.

*I can see that states will always need the agency of the federal government to assist in the enforcement of state laws, especially as it applies to foreign operators. I agree that a UIGEA is a very serviceable tool to accomplish that and so therefore the federal application of UIGEA is needed. But why do we need the federal government to do anything other than assist in the implementation of state laws? State laws vary in the other areas of gambling, like casino gambling. Why do we need to have a federal government overlay on top of states?*

**F. Fahrenkopf:** Because brick and mortar gambling establishments, pari-mutuels and state lotteries are all operated within the physical boundaries of the state. There is no inter-state component to the operation of a casino. Where the activity is strictly intra-state, the federal government has no interest. But when you have a situation where a state might want to do something inter-state, as would likely be pursued with i-gaming, then I think it's important to have some minimum standards.

*Would you agree that the role of the federal government should be contained. For instance, the federal government should not be involved in the determination of licensing. The states are perfectly capable of deciding the terms and conditions for all licensing within the borders of their state.*

**F. Fahrenkopf:** Agreed. I am not recommending that the federal government should actually do the licensing. I do envision that there are issues that require the involvement of the federal government. There is the question of Native American tribes, for instance. The sovereign rights of Tribes will likely conflict with the rule of state laws and that will require federal involvement to sort those issues out, and to possibly be involved in licensing procedures. But whenever and wherever possible, I would propose that the federal governing body of the Department of Commerce or Treasury would delegate the licensing, regulatory, and taxing authorities to the states and that those functions would not be performed at the federal level. States will almost certainly need to enter into inter-state compacts to collaborate on certain kinds of internet gaming initiatives. That will require the approval of the federal government. These are practical matters that do not need to be seen as impeding on states' rights. And as regards to taxation, the only federal taxation should be the income tax applied to the winnings. That, of course, is to be expected because the federal government taxes all income, including lottery and casino winnings.

I believe in the Tenth Amendment rights of states to control intra-state activity. And that applies to gambling. There are, though, some fundamentally inter-state aspects to internet gaming. It is these inter-state issues that clearly require a federal government presence and involvement. ♦