The Unlawful Internet Gambling Enforcement Act of 2006
Is Not a Green Light for Intrastate Internet Gambling

By Mark Hichar, Esq., Partner, Edwards, Angell, Palmer & Dodge, LLP

Introduction to the Unlawful Internet Gambling Enforcement Act of 2006

On October 13, 2006, President Bush signed legislation including the Unlawful Internet Gambling Enforcement Act of 2006 (the "2006 Law"). The 2006 Law contains language substantially similar to that in House Bill 4411 introduced by Rep. Jim Leach (R-IA) and that was part of the Internet gambling legislation that passed the House in July, 2006 – i.e., the "Internet Gambling Prohibition and Enforcement Act." The other part of that July legislation – i.e., the portion introduced by Rep. Bob Goodlatte (R-VA) and known as the "Goodlatte Bill" (H.R. 4777) – was not part of the 2006 Law.

The 2006 Law prohibits persons "engaged in the business of betting or wagering," from knowingly accepting credit (including credit extended through credit cards), electronic fund transfers, checks and certain other forms of payment in connection with the participation of another person in "Unlawful Internet Gambling." "Unlawful Internet Gambling" is defined generally as the placing, receiving or other knowing transmission of a bet or wager via the Internet, where such bet or wager is unlawful under any applicable federal or state law in the state (or tribal land) in which the bet or wager is initiated or received.[1] Wagers initiated and received within a single state are expressly excluded from "Unlawful Internet Gambling," provided the wagers are expressly authorized by and placed in accordance with applicable state law, and the state's laws or regulations include age and location verification requirements designed to block access to minors and persons located out of the state, as well as data security measures designed to prevent unauthorized access by such persons.[2] In this regard, [t]he 2006 Law provides that "the intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received or otherwise made." (2006 Law, new section §5362(10)(E) of U.S.C. title 31) Thus, under the New Law, the "intrastate" nature of state-authorized Internet gambling will not be destroyed if the electronic messages containing bets or wagers are routed out of the state, as long as they are initiated and received within the state.

Pursuant to the 2006 Law, within two-hundred seventy days of its enactment, regulations shall be promulgated requiring "designated payment systems" and all participants therein (e.g., payment processors) to identify and block credit, electronic and other payment transactions to businesses conducting Unlawful Internet Gambling. Financial transaction providers shall be considered to be in compliance with the regulations if they rely on and comply with the policies and procedures of the designated payment system of which they are member participants.[3]

Civil actions may be commenced against interactive computer service providers to cause them to remove or disable access to online sites violating the 2006 Law. However, such actions are limited to seeking such removal or disabling (unless such interactive computer service providers do not qualify for the exemption from liability under the 2006 Law set forth in footnote 3). The 2006 Law does not impose an obligation on interactive computer service providers to monitor their services or to search for violations of the 2006 Law.

The 2006 Law also makes available certain civil remedies to restrain actual or threatened restricted transactions, and these are available to state attorneys general as well as to the United States Department of Justice (the "DOJ").

The DOJ Maintains that Existing Federal Law Prohibits Intrastate Internet Gambling, Unless the Electronic Wagering Data Remains in the State, and the 2006 Law does not Modify Existing Federal or State Gambling Laws

Unlike the Bill that passed the House in July, the 2006 Law does not clarify or otherwise amend the Wire Act, except only to provide that interactive

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1 *"Bet or wager" is broadly defined and includes risking anything of value upon the outcome of sporting events and games subject to chance, and also includes "the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance)." (2006 Law, new section §5362(1) of U.S.C. title 31) It does not include, however, participation in fantasy sports leagues if conducted in accordance with the specific requirements of the 2006 Law.*

2 *A similar exclusion is provided for wagers within the land of a single Indian tribe or between the Indian lands of two or more Indian tribes to the extent authorized by the Indian Gaming Regulatory Act. (25 U.S.C. 2701 et seq.)*

3 *By definition, financial transaction providers, providers of interactive computer services and providers of telecommunications services are not in the "business of betting or wagering." However, notwithstanding this exclusion, a financial transaction provider, interactive computer service or telecommunications service may be liable under the 2006 Law if it:*

(A) "has actual knowledge and control of bets and wagers," AND

(B) (1) operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received or otherwise made; OR

(2) owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which unlawful best or wagers may be placed, received, or otherwise made.

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computer services that do not violate the 2006 Law shall not be liable under the Wire Act provision pertaining to common carriers (18 U.S.C. 1084(d)) (unless they are not exempt from liability under the 2006 Law as set forth in footnote 3). Indeed, the 2006 Law expressly states that it shall not "be construed as altering, limiting, or extending any Federal or State Law or Tribal-State compact prohibiting, permitting or regulating gambling within the United States." (2006 Law, new section §5361(b) of U.S.C. title 31)

This is of particular concern with respect to any intrastate Internet wagering that states may wish to expressly authorize in accordance with the provisions of the 2006 Law. While it may be possible to implement such intrastate Internet wagering without violating the 2006 Law, unless the electronic messages containing wagers and information assisting in the placing of wagers remain within the state at all times, such intrastate Internet wagering will violate existing federal laws, as those laws are interpreted by the DOJ.

While a discussion of existing federal laws is beyond the scope of this article, it is sufficient for these purposes to note that the DOJ takes the position that existing federal law prohibits intrastate wagering if the electronic messages containing the wagers are routed out of the state. Testifying on April 5, 2006 with respect to the Goodlatte Bill, Bruce G. Ohr, Chief of the DOJ's Organized Crime and Racketeering Section (Criminal Division), voiced the DOJ's objection to a proposed amendment to the Wire Act contained in the Goodlatte Bill that would have permitted intrastate wagering over the Internet.[4] He stated:

[The Goodlatte Bill] also permits "intrastate" wagering over the Internet without examining the actual routing of the transmission to determine if the wagering is "intrastate" versus "interstate." Under current law, the actual routing of the transmission is of great importance in deciding if the transmission is in interstate commerce. The Department is concerned that these two proposals would weaken existing law.

Two years earlier, the DOJ expressed even more clearly that (in its view) the routing of electronic wagering messages out of state violates federal law even if they were initiated and received in the same state and were legal in that state. By letter dated January 2, 2004, from United States Attorney David M. Nissman to Judge Eileen R. Petersen, Chair of the U.S. Virgin Islands Casino Control Commission, U.S. Attorney Nissman maintained that it would violate U.S. Federal law if the U.S. Virgin Islands were to permit Internet gambling. He stated:

As you know, the Department of Justice believes that federal law prohibits all forms of Internet gambling, including casino-style gambling, occurring within a state, commonwealth, territory, or possession of the United States and the Criminal Division [of the DOJ] has asked me to send you this letter. While several federal statutes are applicable to Internet gambling, the principal statutes are Sections 1084 and 1952, of Title 18, United States Code[5]…[W]e believe that the acceptance of wagers by gambling businesses located in the Virgin Islands from individuals located either outside of the Virgin Islands or within the Virgin Islands (but where the transmission is routed outside of the Virgin Islands) would itself violate federal law…

As mentioned, the Bill that passed the House in July, 2006 contained provisions amending the Wire Act. Indeed, had it become law, it would have excepted from the prohibitions of the Wire Act wagers initiated and received within a single state, provided the wagers were expressly authorized by and placed in accordance with applicable state law, and the state's laws or regulations included age and location verification requirements designed to block access to minors and persons located out of the state, as well as data security measures designed to prevent unauthorized access by such persons. In other words, it would have created an exception for intrastate wagering under the Wire Act substantially the same as the exception contained in the 2006 Law – which exception applies only to the 2006 Law. In addition, the Bill that passed the House in July, 2006 would have made irrelevant under the Wire Act the intermediate routing of bets or wagers or information assisting in the placing of bets or wagers.

However, the above-described amendments to the Wire Act were not made part of the 2006 Law, and by the express terms of the 2006 Law, the Wire Act and other federal laws pertaining to Internet gambling remain unaffected by the 2006 Law. Accordingly, the Wire Act and such other federal laws will continue to apply to Internet gambling just as they did prior to the enactment of the 2006 Law, and there is no reason to believe that the DOJ has or will change its interpretation of the Wire Act or such other federal laws.

Conclusion

In conclusion, while the acceptance by a state-authorized Internet gambling business of credit card payments, electronic fund transfers, checks and other payments in connection with intrastate wagers made in accordance with state law (and compliant with the location and age verification requirements of the 2006 Law) will not violate the 2006 Law, the DOJ may, and likely will, continue to assert that such intrastate Internet gambling is unlawful under other, pre-existing federal laws, unless the electronic data containing wagers or information assisting in placing wagers is routed so as to never leave the state. This is because existing federal and state laws are not limited or otherwise amended by the 2006 Law and, therefore, existing interpretations of (and ambiguities in) those laws will remain intact. Thus, the DOJ's interpretation of pre-existing federal laws likely will remain unchanged, and the DOJ will thus continue to assert that existing federal laws prohibit intrastate Internet gambling where the electronic messages containing wagers and/or information assisting in wagering are routed outside the state. ♣

NOTE ABOUT THE AUTHOR: Mark Hichar has been a partner at Edwards, Angell, Palmer & Dodge since 2000, and leads the firm's Gaming Practice Group. Mr. Hichar represents GTECH Corporation in various gaming and general corporate matters, and advises GTECH on legislative developments. Between 1990 and 2000, Mr. Hichar was employed as an attorney by GTECH Corporation, serving in progressively senior capacities and eventually as Assistant General Counsel.

4 *At the time, the Goodlatte Bill did not contain language that would have made irrelevant the intermediate routing of electronic data containing bets or wagers or information assisting in the placing of bets or wagers.*

5 *I.e., the Wire Act and the Travel Act, respectively.*