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Differences between the Frank and Menendez Internet Gambling Bills May Make the Menendez Bill More Likely to Pass

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Bills introduced on May 6, 2009 by Representatives Barney Frank (D-MA) and Jim McDermott (D-WA) (collectively, the "Frank Bill"), and a Bill introduced on August 6, 2009 by Senator Robert Menendez (D-NJ) (the "Menendez Bill"), would authorize, but regulate and tax, certain forms of interstate and cross-border Internet wagering. Although similar in many respects, differences between the bills make it likely that a final bill—if there is one—will look more like the Menendez Bill.

The Frank Bill would authorize licensed Internet gambling facilities to accept interstate and cross-border wagers from persons located in those U.S. states that had not chosen to "opt out" of its provisions. Only wagers on sporting events would be excluded, although regulations issued under the bill could further limit the authorized wagering as could individual states and tribes that limited (rather than banned altogether) authorized wagering in their lands pursuant to the "opt out" procedure. The Menendez Bill, on the other hand, would authorize Internet wagering only on games "in which success is predominately determined by the skill of the players, including poker, chess, bridge, mahjong and backgammon." Moreover, it would permit wagering on poker only if the poker game was of a type "in which players compete against each other and not against the person operating the game..." Like the Frank Bill, states could "opt out" of the scheme, thereby leaving in place any existing state-law restrictions. By limiting its scope to poker and other skill games, the Menendez Bill may stimulate strong support among groups that have been formed to lobby for laws authorizing Internet gambling on poker.

Each bill attempts to keep professional and amateur sports leagues on the sidelines of the debate by specifically excluding from the authorized activities wagering on sporting events that would violate the Professional and Amateur Sports Protection Act. The Menendez Bill, however, conspicuously reaches out for support to the horseracing industry—historically a politically powerful group. For example, the Menendez Bill would exempt from its licensing provisions website operators that accept interstate off-track wagers as defined in the Interstate Horseracing Act (the "IHA") and also would confirm that the Wire Wager Act does not apply to wagers permitted under the IHA—thereby explicitly rejecting the contrary position asserted by the U.S. Department of Justice ("DOJ"). These provisions will likely engender support for the Menendez Bill from the horseracing industry.

In addition, the tax provisions of the Menendez Bill appear crafted to engender support from states that expect to have large populations taking advantage of newly-authorized Internet gambling. While the Frank Bill would obligate licensees to pay the federal government a license fee equal to 2% of all funds deposited by customers into their wagering accounts, it is silent as to state taxation. By contrast, the Menendez Bill would require licensees to pay a state/tribal fee as well as a federal fee, each equal to 5% of the amounts deposited by customers into their wagering accounts. The state/tribal fee would be divided among participating states and tribes pro rata according to the customer deposits attributable to persons located within their jurisdictions. Participating states and tribes would be prohibited from separately taxing customer deposits or wagers, or licensee income relating to such customer deposits or wagers (unless the licensee maintained a permanent physical presence in the jurisdiction).

Thus, the Menendez Bill would establish a more comprehensive scheme for collection and disbursement of state (as well as federal) taxes related

to the authorized wagering activity. States "opting in" with large populations of Internet gamblers relative to other states would receive larger shares of the state/tribal fee and would benefit from the federal government's established structure for collection and disbursement of this fee. Such states should strongly support the Menendez Bill. States "opting out" or with small numbers of Internet gamblers relative to other states, can be expected to be less supportive of the bill.

Still further, the Menendez Bill, unlike the Frank Bill, would amend the Unlawful Gambling Enforcement Act of 2006 (the "UIGEA") by requiring the creation of a list of website operators involved in illegal activity, including the operators' known website addresses, owners, operators, financial agents and account numbers. Such a list was requested by financial transaction providers in their comments to the draft UIGEA regulations so that they could learn which website operators were known to be operating unlawfully. Under the Menendez Bill, a financial transaction provider would be deemed to have actual knowledge that a website operator was operating unlawfully to the extent such operator was identified on the list.

Finally, the Menendez Bill would authorize the following appropriations in each of five years to increase knowledge and awareness with respect to problem gambling, and to further problem gambling research and treatment:

- \$200,000 per year to increase problem gambling knowledge and awareness;
- \$4 million per year for a national program of research of problem gambling; and
- \$10 million per year for grants to states, local governments and non-profit agencies to help them provide problem gambling education, prevention and treatment services.

In sum, the Menendez Bill is more detailed, and certain of its differences from the Frank Bill appear calculated to engender support for its passage. Each bill, however, would obligate states to "opt out" in order to prohibit the Internet gambling authorized, and this will likely offend states' rights advocates. (They likely would prefer an "opt in" approach.) At present, it is not known whether either bill will move forward in its respective chamber, nor is it known what the Obama administration's position is in regard to either bill or to Internet gambling generally. (The Attorney General's position is not so opaque, however. During his confirmation hearings in January 2009, then Attorney General-nominee Eric Holder promised Senator Jon Kyl (R-AZ) that "under [Holder's] leadership the Department of Justice would continue to aggressively enforce the law against the forms of Internet gambling that DOJ considers illegal," and that he would "oppose efforts to modify or to stop [the UIGEA] regulations, and...continue to be vigilant in enforcing those regulations to shut off the flow of cash from...illegal [Internet gambling] activity") In any event, the wagering activity contemplated under either bill is very unlikely to be lawful until late 2010, at the earliest. This is because each bill provides that its substantive wagering provisions do not become effective until 90 days after final regulations are issued, and each bill provides a 180-day period for the issuance of such regulations. It likely will take at least 180 days for regulations to issue, with the effect that the wagering provisions will not become effective until at least 270 days after enactment of the legislation.

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