



THE NEW REID-KYL BILL WOULD SEVERELY LIMIT STATE LOTTERY INTERNET GAME CHOICES

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Senate Majority Leader Harry Reid (D – NV) and Senate Minority Whip Jon Kyl (R – AZ) have completed work on an Internet poker regulation bill¹ that may be the most hostile federal Internet gambling bill U.S. state lotteries have yet seen. A summary of the bill has been leaked, and it sets forth their vision for the regulation of Internet gambling in the United States. That vision would put U.S. lotteries on the sidelines.

The summary of the “Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2012” (the “2012 Act”) indicates that the law, if enacted, would “[undo] the impact of the recent Justice Department Office of Legal Counsel (OLC) opinion that the Wire Act only covers sports betting.” (Unless otherwise indicated, quotes are from the summary.) Presumably, this means it would amend the Wire Act of 1961² to make it applicable to all wagering, except for betting on horse racing pursuant to the Interstate Horseracing Act of Act of 1978³ and Internet gambling permitted under the 2012 Act. According to the summary, “all Internet gambling, whether interstate or intrastate, would be prohibited, except offtrack horse-race wagering under the Interstate Horseracing Act of 1978 and licensed poker,” and presumably except also for the small variety of games that could be offered by state lotteries pursuant to the 2012 Act.

If the 2012 Act were enacted, the games state lotteries could offer via the Internet would be limited to those for which tangible tickets also were available via traditional distribution channels, provided further that (i) the games did not “mimic” other Internet games, and (ii) winners in the games were determined no more frequently than daily. While the bill circulated by Senator Reid’s office in December 2010 (the “2010 Act”) would have allowed lotteries to conduct on the Internet all games of chance (presumably poker would have been considered a game of skill), the summary of the 2012 Act states as follows (emphasis added):

The bill imposes strict limitations on online⁴ lotteries, while respecting the right of states and tribes to sell lottery tickets online and otherwise to retain regulatory authority over their lottery activities. As noted, states and tribes will only be able to sell “tangible” tickets online, in games where winners are determined not more frequently than daily. The games themselves cannot be played online and cannot mimic online games. (emphasis added)

While it is not clear exactly what is meant by “[t]he games themselves cannot be played online and cannot mimic online games,” it is clear that interactive online lottery games – e.g., games that players actually play online, including games in which winners are pre-determined and players “reveal” whether they have won or lost by playing an interactive game – would be prohibited. It is also clear that state lotteries could not sell via the Internet games such as 5-minute keno (or any keno game in which a winner was selected more frequently than daily). Slot-machine style games are clearly prohibited. Lotteries would be limited to selling on the Internet only tickets to games that are offered also in a tangible ticket format.

In sum, the utility of the Internet would be denied to state lotteries. They could use the Internet as a sales channel only – like Amazon currently uses the Internet to sell books. The player could buy a ticket online – and presumably the ticket could be delivered electronically – but the player would have to wait for a later drawing to find out whether she had won. No player interactivity with

1) Letter dated September 11, 2012, from Sen. Reid to Sen. Dean Heller (D-NV). “Senator Kyl and I completed this bill [described by Sen. Reid as “a bill that would prohibit internet gambling while legalizing and regulating online poker”] earlier this year.” 2) 18 U.S.C. §1084. 3) 15 U.S.C. §3001 et seq. 4) In the summary of the 2012 Act, “online” presumably means “on the Internet.” 5) Yucca Mountain was the site approximately 80 miles from Las Vegas where it was contemplated that nuclear waste would be stored (and indeed such storage was approved by Congress in 2002), until in 2010 the project was defunded, in large part due to the efforts of Sen. Reid. 6) Letter from Sen. Reid to Sen. Heller described in footnote 2. 7) 31 U.S.C. §5361 et seq. 8) “Federal Online Poker Bill Facing Resistance,” PokerNewsReport dated September 26, 2012, at <http://www.pokernewsreport.com/federal-online-poker-bill-facing-resistance-10590> (last accessed October 10, 2012). 9) “Poker Players Alliance Reacts to Summary of Text of Reid-Kyl Internet Gambling Bill,” PokerNews dated September 21, 2012, at <http://www.pokernews.com/news/2012/09/poker-players-alliance-reacts-summary-text-reid-kyl-bill-13461.htm> (last accessed October 10, 2012). 10) “Kyl Insists Internet Poker Push Still Alive,” Gambling Compliance, dated September 20, 2012. 11) Id. 12) Id.

the game would be permitted.

In addition, the 2012 Act is skewed in favor of Nevada. (As Senator Reid has written: “Legalizing and regulating online poker may be the most important issue facing Nevada since Yucca Mountain.¹ This bill means jobs for Nevada.”²) The 2012 Act would direct the Commerce Department to designate “qualified bodies,” which would act, along with a newly formed federal “Office of Online Poker Oversight,” or “OOPO,” as regulators – i.e., licensing bodies – of online poker operators. These licensing bodies would be qualified state agencies or tribal regulatory bodies. At least three “benchmark” licensing bodies would be designated to serve as initial regulators along with the OOPO. The benchmark licensing bodies so designated would have to “have reputations as regulatory and enforcement leaders in the gaming industry, must adhere to a strict regulatory regime, and must have sufficient staff, experience, and resources to regulate this new activity.” Given Senator Reid’s statement that the 2012 Act “means jobs for Nevada,” I expect that the Nevada Gaming Control Board would be among the three regulators designated as “benchmark” licensing bodies. Indeed, it could be the only regulator so designated, as it is the only regulator currently issuing licenses for online poker.

Moreover, a significant portion of the tax revenue would go to the state in which the licensing body is located. Under the 2012 Act, operators would pay a monthly online poker activity fee equal to 16% of eligible online poker receipts. Of this 16% fee, 14% would be payable to the states or tribes, and 2% would be payable to the federal government. The 14% of eligible online poker receipts payable to states and Indian tribes would be allocated as follows: 70% of the state and tribal portion of the online poker activity fee would be allocated based on the location of the players from whom the operator’s online poker receipts were generated. The remaining 30% would be paid to the state or tribe in which the operator’s licensing body was located. Thus, if the operator received its license from the Nevada Gaming Control Board, that 30% portion would be paid to Nevada – the state in which the operator was located would receive less than 10% of the poker activity fee (i.e., $14\% \times 70\% = 9.8\%$).

Still further, existing large casino operators would be explicitly favored under the 2012 Act. For the first two years after the 2012 Act was enacted, only “regulated operators (or affiliates of operators) of licensed land-based gambling facilities of a certain size and type (including commercial gaming operators, tracks and tribal operators) or manufacturers of certain types of regulated gaming devices” would be eligible to be licensed. Accordingly, state lotteries would be excluded from licensing unless they operated a casino or race track of the required size. Persons that were involved in offering Internet gambling to U.S. residents after the enactment of the Unlawful Internet Gambling Enforcement Act of 2006 (the “UI-GEA”)¹ could not be licensed for five years after enactment of the 2012 Act, unless they could demonstrate to a court by a preponderance of the evidence that no state or federal laws were violated. After the expiration of such five-year period, any such persons could be licensed if they passed a required suitability review.

The 2012 Act has managed to draw opposition from Indian tribes and strong concern from the Poker Players Alliance. Indian tribes oppose the 2012 Act because they may not “opt in” to the federal scheme (i.e., players on their lands may not participate) unless the states in which their lands are located have also “opted in” (i.e., chosen to participate in the federal regulatory regime).² The Poker Players Alliance is unhappy with the 2012 Act as it would subject to forfeiture all property – including player winnings – involved in or traceable to gambling in violation of the 2012 Act.³ Usually property is subject to forfeiture only if it is involved in the commission of a crime. (It is not clear whether the 2012 Act would make

criminal a player’s gambling on an illegal site.)

Otherwise, it appears that the 2012 Act is similar in many respects to the 2010 Act (which was never introduced). Like the 2010 Act, the 2012 Act would create an office under the U.S. Department of Commerce (called the “Office of Online Poker Oversight,” or “OOPO,” in the 2012 Act) that would oversee state and tribal regulatory bodies, and like the 2010 Act, the 2012 Act would allow poker play only by persons physically located in states or on tribal lands that had opted in to the federal regulatory regime. The 2012 Act would establish “a voluntary election procedure by which states and tribes [could] choose to participate. A state or tribe [could] opt out simply by doing nothing. To opt in, a state [would have to] elect to participate by a simple majority vote of each chamber of the state’s legislature.” (Under the 2010 Act, states that already permitted commercial poker – i.e., 15 specifically-named states – were deemed to have “opted-in” unless they “opted-out” within a stated period of time, and Internet poker play within states that did not permit commercial poker – i.e., were NOT on the list of 15 – would have been permitted only if the state “opted-in.”)

Like the 2010 Act, the 2012 Act would provide additional tools to assist law enforcement to prevent illegal Internet gambling. Among the additional enforcement tools it would create would be a list of licensed online poker enterprises. Financial transaction providers would be allowed to process U.S. transactions only for online poker enterprises on that list. Also, as mentioned, to deter U.S. players from patronizing illegal Internet gambling sites, the 2012 Act would expressly make subject to forfeiture any property (including winnings) involved in or traceable to a gambling transaction in violation of the 2012 Act. All operator proceeds from any such unlawful Internet gambling activity would similarly be subject to forfeiture. Finally, the 2012 Act would include enforcement mechanisms against “Internet poker cafes” – locations created principally for the purpose of accessing Internet gambling – and it would contain a mechanism to create barriers to future expansion into other forms of Internet gambling.

The anti-lottery aspects of the 2012 Act are quite startling in that they are so openly hostile to state lotteries. Unlike the bill (H.R. 2236) introduced this session by Representative Joe Barton (R-TX), in the 2012 Act, no attempt appears to have been made to camouflage the adverse effects of the act on state lotteries; and unlike the 2010 Act, which would have permitted lotteries to sell via the Internet all games of chance, the 2012 Act would severely restrict the games that lotteries could offer online, thereby greatly diminishing the usefulness and profitability of that sales channel.

Despite some political wrangling between Senators Reid and Kyl in September relating to the race for Nevada’s other Senate seat, Senator Kyl has stated that the push to enact the 2012 Act continues. He stated: “It is very important that we clarify the law as it relates to the Wire Act and Internet gambling, and the sooner the better because there are states that are already acting to fill that void.”¹ Senator Kyl stated that Congress must act as quickly as possible.² “So for my purposes,” Senator Kyl stated, “I hope that the little political dust up here will subside once the election is over, and we can get back to trying to get [the 2012 Act] passed.”³

Accordingly, states should expect a renewed effort in Washington to pass a federal Internet poker bill, and if states expect to retain the right to choose for themselves what types of gaming shall be permitted within their borders, they should remain vigilant and strong in opposition to the 2012 Bill. ♦

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