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A COMPARISON OF AND COMMENTS ON THE LOTTERY-RELEVANT PROVISIONS IN THE “KING” AND “BARTON” INTERNET GAMBLING BILLS

by Mark Hichar¹, Partner, Chair of the Gaming Law
Practice Group, Hinckley Allen Law Firm

The chart at right compares certain lottery-relevant provisions of the “Internet Gambling Regulation, Enforcement, and Consumer Protection Act of 2013” (H2282) introduced June 6, 2013 by Representative Peter King (R-NY) and the “Internet Poker Freedom Act of 2013” (H2666) introduced July 11, 2013 by Representative Joe Barton (the “New Barton Bill”). Under each Bill, states would be included automatically in the federal scheme unless they affirmatively “opted out” within a specified time. However, state lotteries in states that “opted out” would still be subject to the restrictions on their internet game offerings described below.

Neither bill is considered likely to pass. The King Bill is a particular long shot, because it would authorize all types of internet gambling (other than sports gambling). Thus, it would offend those who – while they might begrudgingly accept poker because of its popular acceptance and dependence on player skill – view games of pure chance (e.g., roulette and slot machines) as particularly pernicious. While the New Barton Bill is limited to poker, considers Native American interests and is friendlier to state lotteries than prior bills, it still restricts state gambling and sets up a federal licensing infrastructure. In addition, the New Barton Bill is unlikely to satisfy conservatives who would allow poker only in exchange for more robust restrictions and enforcement with respect to other internet gambling, because the Bill does little to prohibit internet gambling other than unlicensed internet poker. It may be, however, that the repeated introduction of federal gaming bills and the frequent Congressional committee hearings on internet gambling have created a fictional reality regarding state-regulated internet gambling that has given rise to an artificial imperative for federal legislation.

As those in the lottery industry know, not much has changed since the DoJ’s December 2011 opinion narrowing the scope of the Wire Act. Only the Illinois and Georgia Lotteries actually have daily lottery games online, and the Delaware Lottery is expected to go online with poker this fall. Nevada and New Jersey have authorized the licensing of private online gaming operators, but only Nevada has gone “live.” While several other states are considering online gaming, those few moving forward are doing so cautiously and deliberately. Regardless, the rhetorical hyperbole used by legislators pushing federal legislation of internet gambling (particularly when

it would benefit their own states) often goes unchallenged. For example, at the July 17, 2013 hearing on internet gambling, Senator Dean Heller (R-NV) told the Senate Subcommittee on Consumer Protection the following:

With one decision, the Department of Justice effectively rendered all laws that we have on our books – the very laws this body has passed – useless to regulate and stop Internet gambling.

Patchwork state and tribal regulations have sparked a regulatory race to the bottom, ...

Due to the regulatory uncertainty created by the 2011 DoJ decision, the Internet has effectively turned it into the “wild west” for online gaming.

These statements are simply wrong. Among other laws, the Unlawful Internet Gambling Enforcement Act (the “UIGEA”) was unaffected by the DoJ’s decision, laws restricting interstate lottery communications laws still have teeth, and the Wire Act still effectively bans Internet sports gambling. As to the regulatory “race to the bottom,” that statement must have come as a surprise to regulators in Senator Heller’s own State of Nevada. Nothing suggests new gaming regulation is any less rigorous than pre-existing “bricks and mortar” casino regulation. And finally, as to the internet having become the “wild west” for online gaming, we have yet to hear a single “Yee-Haw!” from the states. To the contrary, those states that are moving forward are doing so carefully and deliberately.

Given this steady drumbeat for federal legislation, however, states must remain ever vigilant if they wish to preserve their right to decide for themselves what gambling should be permitted within their boundaries. ♦

	THE KING BILL	THE NEW BARTON BILL
LICENSED ACTIVITIES	All types of gambling other than sports betting (with the exception of pari-mutuel wagering on racing events as permitted by law).	Only poker, and then only when played by two or more people playing against each other and not against the “house.”
INTERNET GAMES THAT MAY BE OFFERED BY STATE LOTTERIES	<p>Without a federal license, state lotteries could offer only the following internet games (subject to the grandfather clause described below): Games (i) not related to sporting events; (ii) in which chance predominates, and (iii) offered exclusively on an intrastate basis. Limiting lotteries to games of chance would preclude poker if poker were held to be a game of skill under federal law. (Last year, the District Court for the Eastern District of New York held that poker is a game of skill under the federal Illegal Gambling Business Act. (U.S. v. DiCristina, 886 F.Supp. 164 (E.D.N.Y. 2012). However, that decision was reversed on August 6, 2013, by the United States Court of Appeals for the Second Circuit. Docket No. 12-3720)</p> <p>Because lotteries would be limited to intrastate games, a multi-state internet lottery game – unless implemented in the same manner as PowerBall and Megamillions – would not be possible without a federal license. Obtaining interstate compacts would be academic, since interstate lottery games would be unlawful absent a license. (Currently, multistate games are operated as individual lottery games of each participating lottery. Each state lottery keeps all the profits of sales made in its state. A detailed description of how Powerball is operated is at http://www.powerball.com/pb_faq.asp.)</p> <p>The King Bill would not restrict internet gambling authorized, licensed, and regulated by a state or Indian tribe as of the day prior to enactment of the Bill (although it may restrict expansion or other changes to such internet games).</p>	<p>The New Barton Bill expressly authorizes state lotteries to offer (without a federal license) internet games (i) in which chance predominates, and (ii) offered exclusively on an intrastate basis. Poker would be precluded, since poker is defined in the Bill as a game in which skill predominates. Sports gambling is not expressly prohibited, but would be prohibited under other federal laws.</p> <p>Unlike prior bills, however, the New Barton Bill does not contain a broad prohibition on internet gaming. The Bill would prohibit the operation of an “internet poker facility” without a license, but that term is limited in scope to “internet poker.” Thus, unlike the King Bill, lotteries would remain free to enter into interstate compacts and to operate multi-state internet lottery games pursuant thereto.</p> <p>The New Barton Bill would not supersede or affect the interpretation of any state or tribal law that was in effect before the enactment of the Bill. Thus, pre-existing state laws authorizing internet gambling would not be preempted by the New Barton Bill. Moreover, the New Barton Bill expressly states that it would not affect the rights or obligations of state or tribal lotteries under other applicable federal, state, or tribal laws.</p>
ELIGIBILITY FOR LICENSING	It would be difficult for state lotteries to get licensed under the King Bill. Among the licensing requirements, applicants would have to show that they have or will acquire adequate business competence and experience in the operation of casino or internet gambling facilities. However, unlike prior bills, there is no requirement that the applicant control or operate a casino or race track, or be a casino machine manufacturer.	State lotteries would likely be unable to obtain licenses under the New Barton Bill. To be eligible for a license, applicants would have to (i) own or control (or be owned or controlled by) a company that operates a casino or qualified card room, or (ii) have manufactured and supplied slot machines to casinos with at least 500 slot machines. Because “casino gaming” expressly excludes lotteries of states or of federally recognized Indian tribes, even lotteries that operate or control casinos likely would not be eligible for licensing.
EFFECT ON WIRE ACT	The Bill amends the Wire Act so that it is not limited to wagering on sporting events, as was determined by the Department of Justice (“DoJ”) in its December 2011 opinion. This would make unlawful internet wagers accepted by unlicensed state lotteries that were (a) from out-of-state players regardless of the game, and (b) on games of skill, even if from in-state players to in-state data centers.	The Bill does not amend the Wire Act and leaves intact the DoJ’s December 2011 opinion.

Mark Hichar is a Partner with the law firm Hinckley Allen and Snyder, LLP and the Chair of the firm’s Gaming Law Practice Group. Mark’s clients include casinos, suppliers of gaming systems and services (for both “bricks and mortar” and online gaming), and investors in and lenders to gaming businesses. Mark is a frequent writer and speaker on developments in Gaming Law and related regulatory actions, and has authored several articles on developments in the laws relating to online gaming. See <http://www.hinckleyallen.com/mark-hichar/>