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WHY RAWA IS UNNECESSARY, OVERREACHING AND MISGUIDED:

- ☛ Real-world evidence has demonstrated the effectiveness of geolocation technologies to prevent unlawful cross-border gambling and of safeguards to prevent underage gambling.
- ☛ Federal Laws already exist that prohibit Internet gambling that has not been made lawful by applicable state laws.

The March issue of this magazine analyzed the “Restoration of America’s Wire Act” (the “RAWA” or “H.R.707”)¹ and described the severe adverse effects it would have on U.S. lotteries were it to be enacted. Since then, the arguments for and against the bill have become crystallized.

The main arguments put forth by proponents of the RAWA appear to be these:

- Existing technology cannot prevent play of games in jurisdictions that have not authorized them, and, as stated by Lyle Beckwith, Vice President of Government Relations for the National Association of Convenience Stores, “there is no enforcement regime to try to make states” stop such out-of-state gambling;² and
- Existing technology cannot prevent play by minors, and state law enforcement is not capable of preventing such illegal wagering.

Reports on the Technology Indicate it is Indeed Effective

In New Jersey, after more than one year of experience conducting online poker and casino games, it is clear that the geolocation technology employed in that state is effective in preventing play from outside its boundaries. In his January 2, 2015 report on internet gambling in New Jersey, David Rebeck, that State’s Director of Gaming Enforcement, reported that the geolocation measures employed in New Jersey have “approximately a 98% success rate.”³ Note that the 2% “failure rate” does not

reflect persons being allowed to play from out-of-state. Rather, it reflects persons within New Jersey who were falsely flagged as not being within the State, and thus prevented from wagering—so-called “false negatives.”⁴ Thus, although some in-state residents remain frustrated by being inadvertently prevented from accessing New Jersey online gaming sites, the technology and processes have proven effective in preventing play from out-of-state.

Indeed, in testimony on the RAWA submitted to a subcommittee of the U.S. House Committee on the Judiciary (the “Pappas Testimony”), John Pappas, Executive Director of the Poker Players Alliance, stated:

- With major populations centers from other states on two borders (Pennsylvania and New York), New Jersey DGE [i.e., Division of Gaming Enforcement] employs some of the most sophisticated technologies to ensure compliance. Using satellite-based geo-positioning technology, the DGE verifies the location of Internet gamblers across New Jersey on digital maps and computer screens. Geo-positioning is so precise that it can distinguish between gamblers who are on the very edges of New Jersey’s boundaries and those just across the border in another state.⁵

In regard to age control, online gaming operators employ a number of technological and procedural safeguards to ensure that players are not only of legal gambling age, but also are who they claim to be.

1 Wire Act Fix 2015—While Identical to 2014, It Could be a Greater Threat to State Lotteries, by Mark Hichar and Ashley Taylor, Public Gaming Research International, March, 2015.

2 States’ Rights and Internet Gambling—Commentary, Special to Roll Call, May 7, 2015, by Lyle Beckwith, Vice President of Government Relations for the National Association of Convenience Stores. See <http://blogs.rollcall.com/beltway-insiders/states-rights-and-internet-gambling-commentary/?dcz> (last accessed May 15, 2015).

3 New Jersey Internet Gaming One Year Anniversary—Achievements to Date and

Goals for the Future, January 2, 2015 Letter Report by David Rebeck, Director, Division of Gaming Enforcement, New Jersey Office of the Attorney General, Department of Law and Public Safety (the “New Jersey Gaming Report”), p. 4.

4 See: <http://realmoney.durrrchallenge.com/nj-online-gaming-outlook/> and <http://www.newjerseycasinos.com/category/casino-news/cams-new-jersey-interview-201412180001/> (each last accessed May 12, 2015).

5 Testimony of John A. Pappas on behalf of the Poker Players Alliance, March 25, 2015, submitted to the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, Homeland Security & Investigations.

These verification measures include verifying the name, age and residence of players through third-party service providers who require players to provide numerous items of specific personal information and compare that information to information available online and in government data bases. If the provided information does not match such other previously recorded information for an individual, the individual's play is blocked pending resolution via additional measures. Accounts are password-protected as well.

In regard to the age control measures implemented in New Jersey, David Reback reported:

- The Division [of Gaming Enforcement] had to ensure that sufficient guidelines were applied for the "Know your customer" (KYC) process. This process ensures that patron identities are known and that the players are old enough to gamble in New Jersey. To date, this system has been working very well *with no evidence that underage individuals have been able to establish accounts.*⁶

Finally, Mr. Pappas testified as to the effectiveness of the age control measures employed in Delaware, Nevada and New Jersey. He stated:

- While the U.S. market is just under two years old, it is notable that in the three states that offer online poker and casino games [i.e., Delaware, Nevada and New Jersey], the states have not had a single reported incident of underage access. Even more impressive, however, is what we have learned from Europe's history

of regulation. In late 2011, the European Commission sought feedback on the effectiveness of its online age controls as part of its review of Internet gaming. A response was submitted by the Children's Charities' Coalition on Internet Safety. Their response stated:

- *"Since the online age verification laws came into force in the UK in September 2007, the children's organizations have not been made aware of a single instance where a child has beaten the system and got online to gamble. There have been instances where a child has "borrowed" a parent's credit or debit card and has been able to pass themselves off as the parent, but that raises different issues ... However, we are not aware of any instances where a child was able to lie about their age and get away with it in an online environment, as they used to do quite easily before the law was changed. By comparison it may not be so difficult to "PhotoShop" a fake ID to use in a real world setting."*⁷

Thus, the age control measures employed by Delaware, Nevada and New Jersey have proven effective at preventing online gambling by underage players. Claims that the technology is ineffective to prevent such underage gambling lack evidentiary support.

Enforceable State Laws Exist to Prevent Unlawful Out-of-State Play

The argument that the RAWA is necessary because there is no enforcement regime to stop unlawful out-of-state internet gaming and/or unlawful gaming

by minors is wrong.

Laws in states that have authorized internet gambling make clear that play outside state boundaries is unlawful (except where there is an agreement between states allowing play between or among residents of those states, such as the agreement between Delaware and Nevada relating to online poker⁸).

For example, in New Jersey, underage play is a crime⁹ and a parent or guardian who allows a minor to gamble via the internet can be held criminally liable.¹⁰ Further, a licensed operator may accept a wager only after verifying that the player is physically present in the State,¹¹ unless the New Jersey regulator determines that such wagering "is not inconsistent with federal law or the law of the jurisdiction, including any foreign nation, in which any such person is located, or such wagering is conducted pursuant to a reciprocal agreement to which this State is a party that is not inconsistent with federal law."¹² New Jersey law also expressly provides that the New Jersey Division of Gaming Enforcement ("DGE") is a law enforcement agency with enforcement powers.¹³ Similar laws exist in other states that allow intrastate online gambling,¹⁴ and laws in states that do not permit internet gambling criminalize the in-state sale of gambling products not made lawful under applicable state law.

States thus have the law enforcement capability to enforce underage and unlawful out-of-state gambling. *Even if they did not, however, robust federal laws exist today which federal law enforcement agents can use to prosecute gamblers and internet gaming*

6 New Jersey Igaming Report, p. 4 (emphasis added).

7 Pappas Testimony, p. 9, citing the European Commission Green paper on on-line gambling in the internal market 22, 2011, and Expansion of gambling does not lead to more problem gamblers, University at Buffalo Research Institute on Addictions, 2014.

8 See Nevada, Delaware Signing Online Poker Partnership, by Steve Tetreault and Howard Stutz, Las Vegas Review-Journal, February 25, 2014, at <http://www.reviewjournal.com/news/nevada-delaware-signing-online-poker-partnership> (last accessed May 12, 2015).

9 N.J.S.A. 5:12-119.

10 Id.

11 N.J.S.A. 5:12-95.23.

12 N.J.S.A. 5:12-95.31.

13 N.J.S.A. 5:12-77.

14 See, for example, 29 Del. C. § 4810(a) (making it a crime for underage persons to play internet wagering games); § 4810(c) (making it a crime for an operator to allow underage persons to play internet wagering games); § 4826 (requiring verification that players are physically located within the State, except that persons out-of-state may play if the Delaware Lottery determines that such play "is not inconsistent with federal law and the law of the jurisdiction in which the person is physically present, or if such games are conducted pursuant to an interstate compact to which the State is a party that is not inconsistent with federal law.") See also, NGC Reg. 5A.110 (requiring the operator to obtain proof that an individual is at least 21 years of age before registering such individual to engage in interactive gambling in Nevada, and requiring individuals to agree not to engage in interactive gaming from an out-of-state jurisdiction where such gambling is unlawful).

operators that violate online gaming laws. The RAWA is unnecessary in light of these existing federal laws.

Robust Federal Laws Exist to Prosecute Unlawful Out-of-State and Underage Internet Gaming

Existing federal laws prohibit online gambling that occurs via fraud (e.g., misrepresenting age or location information) and/or in violation of state law. For example, the federal Wire Fraud statute makes it a federal crime to obtain money or property, including intangible property (such as a virtual lottery ticket), by means of materially false and fraudulent statements transmitted by means of a wire communication in interstate commerce.¹⁵ Accordingly, a player from outside a lawful internet gaming jurisdiction who falsely claimed to be located within the jurisdiction in which such gaming was lawful in order to purchase a lottery ticket or play a wagering game,¹⁶ and who transmitted that false representation via the internet, would be subject to prosecution and conviction under this federal statute. One would similarly violate this statute if, regardless where located, one falsely claimed to be of lawful age to purchase a lottery ticket or play a wagering game, and transmitted such false representation via the internet (and

such transmission crossed state lines). In summary, federal law would apply and subject the fraudulent player to federal criminal prosecution.

In addition, the federal Bank Fraud statute makes it a crime to knowingly execute a scheme to defraud a financial institution or obtain any money or credit from such a financial institution, by means of false or fraudulent statements or promises.¹⁷ Thus, a person would violate the Bank Fraud statute if, in order to place an online wager (including the online purchase of a lottery game), he or she falsely claimed to be of legal age to do so or falsely claimed to be in a jurisdiction in which wagering on the applicable game was lawful, and, in either case, he or she executed the transaction using a credit card issued by a financial institution.¹⁸ Again, federal law would apply and subject the fraudulent player to federal criminal prosecution.

Still further, operators who knowingly accept wagers from players located outside the boundaries of the lawful playing jurisdiction would be subject to prosecution under at least three federal laws, the Unlawful Gambling Enforcement Act of 2006 (the "UIGEA"),¹⁹ the Travel Act²⁰ and the Illegal Gambling Business Act (the "IGBA").²¹

The UIGEA prohibits gambling businesses from knowingly accepting credit, electronic funds transfers, checks and other payment means in connection with "unlawful internet gambling," and requires payment networks and financial institutions to establish policies and procedures reasonably designed to identify and block the acceptance of unlawful internet gambling transactions. Although the UIGEA carves out from its provisions state regulated intrastate gambling (where applicable state laws or regulations include age and location verification requirements reasonably designed to block access to minors and persons located out of such state),²² this exception would not operate to make lawful the acceptance of wagers from persons located in jurisdictions which prohibited making the applicable wager. Such an unlawful wager would constitute "unlawful internet gambling" under the UIGEA.²³ Accordingly, a gaming system operator that knowingly accepted credit, electronic funds or other payment means in connection with such a wager would violate the UIGEA²⁴ and be subject to federal criminal prosecution.²⁵

The Travel Act prohibits the use of "the mail or any facility in interstate or foreign commerce, with intent to distribute the

15 18 U.S.C. § 1343, the federal Wire Fraud statute, provides, in part: "Whoever, having devised or intending to devise any scheme or artifice ... for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire ... communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

16 Licensed internet gaming websites, including lottery websites, usually, if not always, require players seeking to play a game or make a lottery purchase to certify that they are of legal age to play and physically located within the jurisdiction where play of such game, or purchase of such lottery ticket, is lawful.

17 18 U.S.C. § 1344 provides: "Whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."

18 See, for example, *United States v. Honarvar*, 477 F.3d 999 (8th Cir. 2007), in which the court affirmed convictions under 18 U.S.C. § 1344 of defendants who falsely inflated their incomes in order to obtain credit cards with larger credit limits.

19 31 U.S.C. § 5361 et seq.

20 18 U.S.C. § 1952.

21 18 U.S.C. § 1955.

22 31 U.S.C. § 5362(10)(B).

23 Subject to certain inapplicable exceptions (among them the exception for intrastate wagering), the UIGEA defines "unlawful Internet gambling" as "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362 (10).

24 See 31 U.S.C. § 5363.

25 So too would be any entity that "aided and abetted" the UIGEA violation. Under 18 U.S.C. § 2, "[t]o establish aiding and abetting liability, defendant must have: (1) associated with a criminal venture, (2) purposefully participated in the venture, and (3) sought by action to make the venture successful." (*U.S. v. Peters*, 283 F.3d 300, 308 (5th Cir. 2002); reh. den. 2002 U.S.App. LEXIS 6007 (5th Cir. 2002); cert. den. 536 U.S. 934 (2002))

26 18 U.S.C. § 1952(a).

27 18 U.S.C. 1952(b).

28 The Travel Act has been held to apply to internet gambling conducted in violation of state law. See *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 862 (N.Y. Sup. Ct. 1999).

29 18 U.S.C. § 1955(a).

30 18 U.S.C. § 1955(b)(1).

proceeds of any unlawful activity; or ... [to] otherwise promote, manage, establish [or] carry on ... any unlawful activity [or to facilitate any of the foregoing] ...”²⁶ The Travel Act definition of “unlawful activity” includes “any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or the United States ...”²⁷) Thus, the Travel Act would apply to gambling businesses—including online gambling businesses²⁸—operating in violation of a separate state or federal law.

The IGBA makes it a federal crime if one “conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business ...”²⁹ The IGBA defines “illegal gambling business” as “a gambling business which (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”³⁰ Thus, the IGBA would

apply to any reasonably-sized online gaming business operating in violation of state or local law.

Accordingly, it is not accurate to say that “there is no enforcement regime to try to make [states]” stop out-of-state gambling. Internet gambling by an individual located in a state which does not license internet gambling operators or conduct such internet gaming itself (e.g., via the state lottery) would be unlawful under the law of the state where the individual was located. A player who misrepresented his location (and/or his age) in order to be able to wager on internet games would likely violate the federal Wire Fraud law and, if he or she used a credit card issued by a financial institution, also the federal Bank Fraud law. Operators who knowingly accepted electronic payments in connection with such unlawful wagering transactions would violate the UIGEA, and likely also the Travel Act and the IGBA. Thus, such gambling activity would violate not only the law of state in which the individual was located, but also several federal laws. Such unlawful internet gambling activity

would therefore be subject to prosecution by federal law enforcement agents.

In summary, the main arguments put forth by proponents of the RAWA do not stand scrutiny. Technological and procedural measures designed to prevent underage play and play from jurisdictions in which such play is unlawful are proving to be effective in fulfilling those objectives. In addition, as shown above, underage play and wagering from jurisdictions in which such wagering is unlawful would violate not only applicable state law, but also several federal laws. As a result, federal law enforcement can be brought to bear to prosecute such unlawful conduct. The claim by RAWA proponents that the RAWA is necessary to make states stop unlawful out-of-state or underage internet gambling is false. ■

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huge. And the whole rest of Europe is being Uberified by the likes of tiny little Malta and Gibraltar.

Of course, this strategy only works if you can sell into the consumer markets where the consumers actually live, i.e. the more populous countries of the EU like Germany, France, and Italy. The problem is that while these i-gaming operators are licensed in Malta to operate this way, at least some of these Maltese operators are not licensed in the “consumption” countries to offer their i-gaming and lottery products. In that sense, they are operating illegally in the countries where the majority of consumers reside. Gibraltar has also adopted this Maltese model. Antigua and Barbuda have been trying for many years to adopt this model to sell i-gaming products into the U.S.

This is why it is so vital that there be an international cooperation to not only erect laws that protect the rights of all countries to regulate and tax the i-gaming industry, but to develop the tools and infrastructure to enforce their laws against those operators

based in “safe-havens” like Malta and Gibraltar.

The big threat is the likely convergence of “Uberification” tactics and creative new social-gaming models. Right now there are very important trade negotiations taking place between the EU and the U.S. They are trying to create a comprehensive trans-Atlantic trade and investment partnership that includes an e-commerce chapter. Social gaming may be included in that e-commerce section without adequate regard for the issues that relate to the regulation and taxation of gambling and lottery. Insofar as social-gaming is not considered to be gambling, and insofar as operators figure out ways to augment the social-gaming experience with a wagering component that falls outside of current definitions, or perhaps game concepts that appeal to the players’ desire to compete and win something of value, the result could be problematic for regulators, and devastating for the industries that depend on strict enforcement of regulations and tax obligations. ■