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The U.S. Department of Justice has still not made a declarative statement regarding the rights of states to implement Internet gaming. Late last year, the New York Lottery met with lawyers at the DOJ. Following is the reasoning for why the NY Lottery is confident that the DOJ will not object to its Internet gaming agendas. (Bill Murray presented on this topic at the SMART-Tech conference in NYC in March. You can view this presentation at www.PublicGaming.org.)

Public Gaming: *It seems like there are two main ideas that drive your approach to Internet gaming. One, gaming and gambling is a state's right issue. In every respect it has always been up to the states to determine policy regarding gaming and gambling and that's why it should be up to states to determine policy on Internet gaming. Second, regarding the transmission of electronic data, as long as the points of origin and termination begin and end within the borders of state, there is no violation of the laws requiring states to not engage in inter-state gambling.*

Bill Murray: Yes, that's our position. We think our position actually became clearer after the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA). Prior to that, there was a general understanding of the balance between federal and state power that allowed states to determine gambling regulatory policy. In 2005, in a letter sent to the Illinois Lottery, the DOJ said that Internet lottery play would violate federal law. That called into question the traditional balance of power over who had the right to decide gambling policy, the federal government or the states. Then in 2006, the U.S. Congress enacted the Unlawful Internet Gambling Enforcement Act. The Act covers unlawful internet gaming but specifically excludes state lotteries from its coverage because U.S. state lotteries are not unlawful. We feel that the Act describes and allows what the New York Lottery and other lotteries were doing in 2005 in the form of subscription programs in which we offer a lottery subscription over the Internet. Our subscription programs comply with all of our New York state laws. We have safeguards that are quite effective at verifying that the customer is physically located in the state of New York; and that the

customer is at least 18 years of age, the legal age for playing lottery in New York. Congress included language in the Act to provide that as long as data transmissions originate in the state and end in the state, that shouldn't be considered a violation of any federal law against unlawful Internet gambling, regardless of where that data may have travelled in the process. We pointed this out to the DOJ. The UIGEA also is clearly defined only as an Enforcement Act that is not intended to alter existing law. We pointed out that the UIGEA effectively clarified what had been an implicit understanding regarding the balance of power between the federal and state governments. We think that the UIGEA makes the intention of Congress very clear in this matter, and that is that states have the right to allow their lotteries to sell lottery products and games over the internet. The DOJ lawyers that the New York Lottery talked to last year did not dispute our position. As it happens, the lawyers that we talked to in 2009 are not the same ones who were with DOJ in 2005 when they suggested that state Internet lottery programs might be illegal. A main difference is that the lawyers in 2009 had the benefit of reviewing the intent of Congress as expressed in the UIGEA. So while the traditional approach to regulatory policy was called into question back in 2005, we feel that it's been brought back into balance.

The lawyers at DOJ agreed with you that selling subscriptions and selling lottery tickets over the Internet is not in violation of federal law in general, or the Wire Act in particular?

B. Murray: To be absolutely precise, they acknowledged that they understood

our legal reasoning, they acknowledged that they understood how we came to that conclusion, and they acknowledged that we are specifically asking them for their opinion and whether they disagreed with our conclusions. We asked that they please communicate whatever opinion or disagreement they might have with our position. We would like to have a letter from the U.S. DOJ affirming their agreement with the position that states have the right to decide how their lottery can sell its products, but we did not get that.

Do you remember the old Book-of-the-Month Club negative option? You are told that if you do not explicitly request that you not be sent the book-of-the-month selection, then you will be sent that selection even though you didn't proactively order it. Your lack of objection to being sent the book-of-the-month selection in effect defaults to being an order for that B-O-M selection. Similarly, we have done everything we possibly can to communicate with the U.S. DOJ about what we are doing, the legal reasoning and basis for proceeding with internet gaming, and inviting the DOJ to give us feedback on these issues and to comment on all we have communicated about our position on these issues. We have made our actions crystal clear and indicated that if the DOJ has an objection, please say so now or we will take that as agreement that our reasoning is in fact not objectionable. Since the DOJ has not objected or given us any indication that they will object to our business methods, we are proceeding on the basis that the DOJ will not have a problem with our internet gaming agenda.

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Is there any track record or precedence of how that plays out in real life? If the DOJ were to decide six months from now that they wanted to backtrack and object to the way the NY Lottery sells internet subscriptions or sue the Lottery to force you to change your policy in some way, to what extent would the paper trail you've created augment your ability to defend your actions? Is the paper trail, the record of full disclosure and transparency and beseeching the DOJ to clarify their position on internet gaming, is all that legally relevant if the DOJ turns around and sues the NY Lottery?

B. Murray: Good question because yes, it is relevant. The process through which we came to the conclusions that states have the right to determine regulatory policy relating to their own state lottery, the process through which we exhausted all manner and methods of communication with the DOJ to discuss any concerns they may have with our actions, the fact that the DOJ has been asked repeatedly for a reasoned opinion on this issue and our actions, the fact that we told the DOJ explicitly that we will take their lack of objection as an implicit agreement with our position...yes, these facts are all quite relevant to an understanding of our actions and to a recognition that if there was a logical, reasonable basis for objecting to our position on these issues, then the DOJ could have and should have objected at an earlier date. The parties reviewing a case like this would most definitely be interested in the events and circumstances that led up to the controversy.

You ask about precedent for the negative assumption theory, the notion that the lack of objection can be interpreted as agreement. First, let's clarify that I am not saying that lack of objection must be interpreted as agreement, only that it is a relevant factor when considered in context with everything else that has happened. We don't pretend that lack of objection is binding. But precedent is very relevant. Consider the fact that state lotteries have been operating under a form of negative option for over 40 years. The Wire Act that the DOJ brought up in 2005 has been in effect for more than 40 years, dating back to before the beginning of the modern state lottery. The 1961 Wire Act was clearly aimed at sports betting and illegal bookmakers using telephones to send and receive information about sports bets. In our 2009 meeting with DOJ, the New York Lottery showed the DOJ lawyers a map describ-

ing the networks carrying electronic data for U.S. state lotteries. This map shows how the purchase of a lottery ticket at a retail store sets off a chain of events that includes the electronic transmission of data from retailers to various data processing centers located all around the country. The simple act of purchasing a lottery ticket in a retail store, just as it has been done for decades, results in electronic data leaving the boundaries of the state before it returns to the termination point back within the boundaries of the state. Millions upon millions of electronic transactions travel all over the country in the process of operating a state lottery. The processing of gaming transactions already involves sending electronic transmissions across state borders. It is legal, though, because the transmission begins and ends within the borders of the state. The same thing applies to Internet gaming.

The Federal Justice Department has not objected to the manner in which states have operated their state lotteries for the past 40+ years and I can't imagine that they would object now. So why would they object to internet transactions that both originate and terminate in the same state? That would make no sense. Notice, too, that the legal basis for the legitimacy of the way lotteries have been doing business over the past 40+ years uses that negative option reasoning. It never occurred to anyone when, in the course of building out this business, that routing lottery transactions electronically through a server hub based in a city outside of the borders of the state would violate the 1961 Wire Act. Can you imagine the U.S. DOJ challenging the states' rights to do business that way now? Of course not. First, it is not a reasonable interpretation to think that the 1961 Wire Act was intended to prohibit state lotteries from operating that way. Second, if the DOJ wanted to object, they could have and should have done it a long time ago. We contend that the same reasoning on both counts applies equally to internet gaming. The transaction is intra-state as long as the points of origin and termination of the electronic transmission are both within the borders of the state. The fact that the transmission may have travelled outside of the state in the process does not constitute an inter-state transaction or violate federal laws against inter-state gaming.

Why doesn't the DOJ come right out and affirm that?

B. Murray: The mission of the DOJ is to implement and enforce the law as it is legislated by Congress. It would appear to us that the DOJ does not now disagree with our position on these matters but that back in 2005 DOJ was not entirely clear on the intention of Congress. That is where our position is strengthened even more. Clearly, Congress never intended and would not now intend to make the kind of interstate electronic communications used by state lotteries illegal. The 200 year history of the accommodation between the federal government and the state governments has been that states decide on the gambling policies and the federal government will enact only laws that support and complement the state laws. The federal government has never made laws that interfere with the rights of states to determine their own gambling policy. In the early 1970's, shortly after the beginning of the modern state lottery era, U.S. Attorney General William Saxbe asked that the states, the Department of Justice, and Congress work together to define more clearly the interplay between state and federal lottery laws. It was clear at that time that there would have to be revisions to the federal anti-lottery law that had been in effect since the 1880's, but nobody at that point even looked at the Wire Act. Instead, Congress adopted the necessary exceptions to the federal anti-lottery law to make it clear that a state could, without violating federal law, use interstate commerce to send and receive information and materials needed to operate a lottery inside the borders of the state where the lottery was authorized by state law. It was not until 2005, when the DOJ put forth that novel interpretation of the Wire Act, that it occurred to anyone that intra-state electronic transmissions might be classified as interstate because they leave and then re-enter the state in the virtual world while making their way to their final destination. Fortunately, Congress corrected that misconception with the Unlawful Internet Gaming Enforcement Act, stating that they are referring only to unlawful Internet gaming and that does not include gaming implemented by state lotteries.

Theoretically, does this mean that states could implement internet poker?

B. Murray: I think that's right, as long as it's allowed by state law. And I think that's what Congress meant by including those

provisions in the Unlawful Internet Gambling Enforcement Act of 2006.

The e-wallet system, which you have not implemented yet, will be sort of a small step forward in the sense of the player putting funds on deposit in a similar way as a subscription, only they don't predetermine their purchases but instead play games and purchase lottery products at whatever time they want, with more flexibility over changing the dollar amount of the purchases?

B. Murray: Right. It would not be dedicated to a particular game. Whatever games the Lottery makes available on the menu for play with e-wallet deposits can be played. The players can choose from that menu while sitting at their computer or using their handheld iPhone, iPad, Blackberry, or whatever other form of walking computers.

What is the next step?

B. Murray: The Full Service Lottery System contract the New York Lottery awarded to GTECH last year includes a requirement that GTECH take over the operation of the subscription program, which New York has always operated in-house. Additionally, they will build out a website that enables New York Lottery players to access and play other lottery games. We didn't spell out in the RFP exactly how it is all going to work. E-wallet right now seems like the most promising idea. But we still haven't settled on that. The Lottery and GTECH have been focused on getting all the new terminals installed in 17,000 locations and replacing the central system. That's the priority now and will not be completed until August of this year. As we near the end of that process, we'll begin the dialogue with GTECH about how to move forward with an internet gaming agenda.

What does NY state law allow with respect to internet gaming?

B. Murray: The jackpot games like Mega Millions, Powerball, Lotto, Sweet Million, Take 5 and the other traditional drawing games do not have restrictive language in the statute, and we think under current law can be offered over the internet.

It would be easy enough to design instant lottery games for internet play. The game is designed before the ticket is printed. Once you have a game design, you can execute it without printed tickets as long as you have the appropriate security safeguards. But New York law requires preprinted tickets. So the law needs to be clarified or modified to allow

for internet instant games.

Current state law is not clear on some of the other games, like the Quick Draw keno game. Like all other states, the New York legislature is presently dealing with the fiscal crisis. There are proposals in front of the state legislature right now that would clear the way for more internet lottery play.

How about new types of games, perhaps games that would appeal to the video-gaming generation? Not skill games, but perhaps creating a more stimulating playing experience.

B. Murray: We have the law that allows for Aqueduct and the other race tracks to implement video lottery. The law is clear that the New York legislature intended to allow video lottery gaming only at the racetracks. So we probably can't create a similar playing experience over the internet.

The other problem is that video lottery games, like all casino games, are designed with payout structures that are much higher than lottery. They're designed to pay out 90% or more to enable players to play them over and over again. Any lottery game that does not qualify as a video lottery game defaults into the lower prize payout structure that will not likely appeal to the video-lottery player.

Some U.S. lottery directors and state legislators are concerned that they would be sued by the DOJ if they implemented internet gaming.

B. Murray: I understand the concern but I think the risk is minimal. The federal government rarely seeks a legal conflict with a state government. And I have detailed everything we have done to minimize that possibility. The New York Lottery has communicated to the DOJ that we don't think this is something that belongs in court, we think we're right on the law, we think you can recognize that and agree with it, and if you don't think we're right, then please tell us and explain to us why you think we're not right. That would enable us to decide whether it's such a serious objection that we should both go to Congress and ask Congress to change the federal laws to make them more clear, as Congress did back in 1975 after U.S. Attorney General Saxbe brought up the issue; and as Congress did in 2006 when legislating in the area of internet gaming. The DOJ has the authority to prosecute what DOJ thinks are crimes. That would require them to get an indictment from a Grand Jury which would force them to articulate their position, at which

point we will be able to prove that we're right and they're wrong. A friend and colleague suggested to me at your NYC conference that we initiate legal action and sue the DOJ for a declaratory judgment. But why should we do that? We know we are right. We think the DOJ knows that we are right and that's why they haven't objected to anything we have done and that's why I do not think they will object in the future. Based on all that has transpired, I'm convinced that the DOJ implicitly agrees with our position that intra-state internet gaming that is legal under state law is not prohibited by federal law.

Won't states need a form of UIGEA to force foreign corporations to comply with state gaming laws and regulations? Why shouldn't the UIGEA be thought of as strictly an Enforcement Act intended to support state law?

B. Murray: I think that is the way that UIGEA was intended by Congress to be interpreted and implemented. That is the division of labor that has traditionally existed between the states and the federal government. The U.S. Constitution clearly intends that states should have a large measure of sovereignty and flexibility in the formation of public policy. And gaming policy has always been determined at the state level. In those areas that are beyond the power of individual states to effectively control, the federal government and the law enforcement faculties of the federal government should be brought to bear. That's exactly what the role of the federal government is intended to be. That role would include many aspects of foreign affairs, foreign commerce, helping states to enforce the laws of the land against foreign corporations, and helping states to enforce their own gaming laws. Ironically, towards the end of our discussion last December with the DOJ, we actually asked them to enforce the Wire Act in the way we think it was intended. Sports betting is prohibited by both New York State and the federal government so please ramp up your efforts to enforce the Wire Act. Likewise, please implement the UIGEA and force all operators of internet gaming to comply with New York state law. That's where we think federal efforts should be directed, and we strongly encourage DOJ to use the power of the federal government in the traditional way to back up and support the gambling policies adopted by state governments. ♦