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DOJ Reverses Course And Announces Favorable Internet Gambling Policy

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On December 23, 2011, the Office of Legal Counsel ("OLC") of the U.S. Department of Justice ("DOJ") revealed that the DOJ had wholly rejected its long-held interpretation of the 1961 Federal Wire Act, 18 U.S.C. § 1084 ("Wire Act") by concluding that the Wire Act prohibits only sports betting. Until then, the DOJ had consistently declared that the Wire Act barred both casino games and sports betting. The DOJ's significant policy shift increases the likelihood of legal Internet casino gambling in the U.S., although the DOJ policy does not actually legalize such Internet gambling.

The scope of the Wire Act has been subject to varying interpretations over the past dozen years. The uncertain legal status of Internet gambling in the U.S. has frustrated many U.S. casino gaming companies, which have not participated in the Internet gambling boom for fear of violating applicable law and losing their valuable casino regulatory licenses. These companies have watched as U.S. citizens spend an estimated $4 billion annually gambling online at Internet casinos located outside the U.S. The U.S. gaming industry has recently acknowledged what the casual player has been saying for years – namely, that regulation and not prohibition is needed.

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The prior DOJ position has also frustrated U.S. online gamblers, who play online poker and other games at Internet casinos run by offshore casino operators. First and foremost, some online gamblers are concerned that they may not be able to cash out their wagering accounts and will have less than ideal enforcement remedies in the event of any such difficulty. Similarly, some online gambling sites may not be subject to the stringent internal controls and regulatory rules that are prevalent in Las Vegas, Atlantic City and other U.S. jurisdictions that permit commercial casino gaming. Online gamblers have begrudgingly accepted such uncertainty and risk in exchange for the convenience and excitement of gambling online.

In the U.S., lawful brick-and-mortar casinos and sports betting operations are regulated by individual states through casino regulatory agencies, which enact laws to permit such activities. The new DOJ policy does not constitute federal regulation of Internet gambling, but it removes significant obstacles that have prevented state governments from implementing laws, rules and regulations to regulate Internet gambling and issue licenses to Internet gambling operators and their technology providers. The DOJ's policy shift will likely encourage individual state governments and/or the U.S. Congress to enact the necessary legislation to permit lawful Internet gambling in the U.S.

The DOJ Letters

The DOJ policy is summarized in letters sent by Assistant Attorney General Ronald Weich of the OLC to U.S. Senators Harry Reid and Jon Kyl on December 23, 2011 ("DOJ Letters"). The DOJ Letters are based on an OLC memorandum dated September 20, 2011, authored by Assistant Attorney General Virginia A. Seitz (the "OLC Memorandum"), which the DOJ did not publicly disclose until December 23, 2011. The DOJ Letters confirmed that the DOJ had historically interpreted the Wire Act to ban all forms of Internet gambling, including sports betting and traditional casino-type games like poker. The DOJ noted, however, that there appeared to be a conflict between the Wire Act and a different law relating to Internet gambling, the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). As more fully described below, the "unlawful Internet gaming" of the UIGEA does not include intra-state transactions that, among other things, are routed across state lines.

The DOJ Letters provide that, according to the OLC, "the Wire Act only applies to the transmission of bets or information assisting in the placing of bets or wagers relating to sporting events or contests." *See* DOJ Letter to Senator Harry Reid dated December 23, 2011, at 1. The OLC Memorandum, which is discussed below, explains the DOJ's reasoning and specifically addresses why and how the OLC rejected the prior DOJ interpretation of the Wire Act.

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The Wire Act

The Internet did not exist when the 1961 Federal Wire Act was enacted, but the Internet has led to increasing debate over its applicability to certain forms of gambling. If the Wire Act is read broadly to apply to all forms of gambling, then all Internet gambling is illegal in the U.S. However, if the Wire Act is interpreted narrowly to apply only to sports betting, then some forms of Internet gambling could be legal (subject, of course, to other U.S. laws). The Wire Act provides that

> [w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1084(a).

The DOJ Office Of Legal Counsel Memorandum

The OLC Memorandum specifically considered the issue of whether proposals by the states of New York and Illinois to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act. In connection with its analysis, the DOJ also addressed the particular concerns raised by Senators Reid and Kyl related to the Wire Act, i.e., whether it prohibits all gambling or just sports betting.

The OLC Memorandum discussed the following factual scenarios: New York's lottery proposal contemplated the printing of some virtual tickets that would be electronically delivered over the Internet to computers or mobile phones located inside the State of New York, as well as the routing of all transaction data from the customer's location in New York to the lottery's data centers in New York and Texas through networks controlled in Maryland and Nevada. Illinois' proposal involved the sale of lottery tickets to adults over the Internet, which could have included the routing of data across state lines over the Internet.

In analyzing the relevant issues, the OLC sought to distinguish its own analysis and conclusions from that of the DOJ's Criminal Division. As part of its research, the OLC sought the Criminal Division's interpretation of the Wire Act. The Criminal Division advised the OLC that

> "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." The [Criminal] Division also explains that "the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law's interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process." Taken together, these interpretations of the Wire Act, "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state. OLC Memorandum, at 2 (quoting Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, DOJ, from Lanny A. Brewer, Assistant Attorney General, Criminal Division, DOJ (July 12, 2010) (internal citations omitted).

The Criminal Division acknowledged to the OLC, however, that it had doubts about its long-held position. The Criminal Division noted that its own interpretation of the Wire Act seemed to conflict with another gambling law, the UIGEA, 31 U.S.C. §§ 5361-5367 (2006) (prohibiting any person engaged in the business of betting/wagering from accepting any credit or funds from another person in connection with the latter person's engaging in "unlawful Internet gambling"), which appears to allow intermediate out-of-state routing of electronic data related to lawful lottery transactions that otherwise occur in-state. OLC Memorandum, at 2. The OLC added that, under the UIGEA, "'unlawful Internet gambling' does not include bets 'initiated and received or otherwise made exclusively within a single State.'" *Id.* (*quoting* 31 U.S.C. § 5362(10)(B)).

The OLC's analysis was based, in large part, on its interpretation of the actual language of the Wire Act, which differed from that of the Criminal Division. Of particular interest, the OLC determined that Subsection 1084(a) contained two (2) broad clauses (as opposed to the Criminal Division, which had interpreted the same provision to have three (3) separate clauses), as follows:

- Clause 1 prohibits anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." *See* OLC Memorandum, at 4 (*quoting* 18 U.S.C. § 1084(a)).
- Clause 2 prohibits any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id.*

Regarding Clause 1, the OLC concluded that "sporting event or contest" modifies both instances of the phrase "bets or wagers," even though the contrary interpretation is plausible. *Id.* at 5. In reaching this conclusion, the OLC reasoned, in part, that the contrary interpretation would make absolutely no sense, stating that, "it is difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports, thereby effectively permitting covered persons to transmit information assisting in the placing of a large class of bets or wagers whose transmission was expressly forbidden by the clause's first part." *Id.* (citations omitted) (emphasis in original). Therefore, the OLC concluded that the Wire Act was intended to prohibit the use of wire communication facilities to transmit (a) bets or wagers on sporting events or contests, and (b) betting or wagering information on sporting events or contests.

Regarding Clause 2, the OLC stated that the references to "bets or wagers" refer to "bets or wagers on any sporting event or contest," as it concluded in regard to Clause 1. *Id.* at 7. While recognizing that the language could certainly

have been more clearly stated, the OLC found comfort in "the fact that the phrase 'in interstate and foreign commerce' is likewise omitted from the second clause, even though, in the OLC's opinion Congress likely intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications." *Id*. (citations omitted) (emphasis in original).

The OLC determined that limiting the Wire Act to sports-related betting is the better interpretation. Moreover, the OLC asserted that it is counter-intuitive for subsection 1084(a) to contain some prohibitions that apply solely to sports-related gambling and others to all gambling. To emphasize its argument, the OLC stated:

> We think it is unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications could receive money or credit as a result of those bets. We think it similarly unlikely that Congress would have intended to allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets. *Id*. at 8.

The OLC also engaged in a lengthy analysis of the legislative history of Section 1084(a) and concluded that Congress's overriding goal in the Wire Act was to stop the use of wire communications for sports-related betting. In addition, the OLC found support in the fact that Congress enacted a separate gambling statute, the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. §1953 *("Paraphernalia Act")* on the same day as Congress enacted the Wire Act. OLC relied on the fact that the Paraphernalia Act expressly regulated lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, to support its conclusion that Congress did not intend to reach non-sports wagering in the Wire Act. *Id*. at 11.

The OLC determined that it did not need to specifically answer the narrow question relating to lotteries – whether the federal gambling laws prohibit state lotteries from using the Internet to sell tickets to in-state adults where the transmission crosses state lines or is routed to an out-of-state transaction processor – because the OLC determined that, "the Wire Act only applies to sports-related gambling activities in interstate and foreign commerce" *Id*. at 12. Having determined that the state lotteries conducted by New York and Illinois do not relate to sporting events, the operation of such lotteries on the Internet would not violate the Wire Act.

Next Steps

A. State Legislation

For several years, certain U.S. states have sought to enact legislation to license operators of intrastate-only Internet gambling, despite the confusion over the legality of such activity. Many of these state bills have been specifically limited to online poker, due to a general perception that legislators and the public would be more receptive to online poker than a full roster of online casino-type games.

In fact, the State of Nevada on December 22, 2011 – one day before the DOJ publicly announced its policy change – approved its own comprehensive regulatory framework for conducting online poker solely within Nevada. Several other states have introduced, or are seeking to introduce, intra-state online gambling legislation, including the states of California, Florida, Iowa and New Jersey, as well as Washington DC. It is also conceivable that U.S. states could agree with each other to allow inter-state Internet gambling, much like states have done with horse racing and lotteries, such as Mega Millions and Lotto.

B. Federal Legislation

Federal regulation would provide a single, comprehensive mechanism for consistent licensing, operation and enforcement of U.S. Internet gambling laws. The American Gaming Association, which represents the U.S. commercial casino industry by addressing federal legislative and regulatory matters, supports federal legislation that would regulate online gambling. Such legislation could (1) assist law enforcement to shut down illegal Internet gambling operators; (2) prevent fraud and money laundering; (3) address problem gambling and underage gambling; (4) ensure players aren't cheated; and (5) provide consistency in laws applicable to all U.S. citizens who wish to gamble on the Internet. However, passage of such a federal body of laws, at least in the short term, seems unlikely because Congress has not in the past sought to expressly regulate brick-and-mortar casino gambling and it would seem difficult to enact federal Internet gambling legislation in an election year. Therefore, the more likely scenario is that certain states, such as Nevada, will step up to regulate intrastate Internet gambling.

C. The Courts

U.S. courts have considered the Wire Act's applicability to non-sports Internet gambling and have reached differing results. In 2002, the Fifth Circuit affirmed a lower court finding that the Wire Act only prohibits gambling on sporting events. *In re MasterCard Int'l Inc*., 313 F.3d 257 (5th Cir. 2002). The Fifth Circuit's decision is consistent with the new DOJ policy. In that case, the plaintiffs were gamblers who used their credit cards to open online gambling accounts with an Internet casino and proceeded to lose thousands of dollars playing Internet casino-type games. Plaintiffs commenced a class action lawsuit against their credit card companies and issuing banks, alleging that such banks had violated the Wire Act by processing the transactions, among other claims. The district court had held that the Wire Act applies only to gambling on sporting events or contests (and not on non-sports games) and that the plaintiffs had failed to allege that they engaged in Internet sports betting. The district court relied on the following three (3) factors:

1. the plain language of the Wire Act only prohibits gambling on a sporting event or contest;

2. the legislative history of the Wire Act demonstrates that the intent was to address "wagers or bets and layoffs on horse racing and other sporting events;" and

3. prior and then-ongoing legislation seeking to amend the Wire Act to expressly prohibit all forms of Internet gambling, which the district court reasoned supported its conclusion that the Wire Act was not so broad as to include casino-type gambling. *In re MasterCard*

Int'l Inc., 132 F.Supp.2d 468 (E.D.La. 2001).

In 2007, the district court of Utah disagreed, holding that the Wire Act prohibited all types of Internet games, not just those relating to sporting events or contests. *U.S. v. Lombardo*, 639 F.Supp.2d 1271, 1275 (D.Utah 2007). The court interpreted Section 1084(a) as having three (3) distinct prohibitory clauses, as follows:

> The statute proscribes using a wire communication facility (1) "for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers of any sporting event or contest"; or (2) "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers"; or (3) "for information assisting in the placing of bets or wagers." *Id*. at 1281.

The court concluded that the limiting phrase, "sporting event or contest," only applied to the first portion of the statute since that limiting language did not appear in the second or third prohibitory clauses. The court also reasoned that, "[s]ince both the first and the third prohibitions use the phrase "information assisting in the placing of bets or wagers," the third prohibition would be unnecessary unless it had a wider scope than the first prohibition's "sporting event or contest." In addition, the court determined that a reference in the Wire Act's legislative history to "like offenses" could be interpreted to refer to more than just sports betting. *Id*. at 1280-81.

Summary

The DOJ has completely changed its long-standing policy on Internet gambling. As a consequence, the prohibitions in the 1961 Federal Wire Act that the federal government previously determined to apply to companies engaged in the businesses of casino betting and sports betting will no longer apply to casino betting. This policy decision seems likely to incentivize U.S. states to enact legislation to regulate Internet gambling and license companies to provide online poker within state borders as a first step into legalized U.S. Internet gambling.