

Client Alert

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U.S. Federal Government Reverses its Stance on Online Gaming

The online gaming industry received a welcome message from the U.S. federal government, when the U.S. Department of Justice (“DOJ”) reversed its interpretation of the Interstate Wire Act of 1961, that the DOJ previously held to prohibit all forms of online wagering, including online poker and casino services. In a legal opinion released December 23, the DOJ concluded “that the Wire Act prohibits only the transmission of communications *related to bets or wagers on sporting events or contests.*” The DOJ opinion is available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

Background

The DOJ opinion marks a seminal shift for the Justice Department, which has long relied on the law in asserting that all forms of online wagering are illegal in the United States. The Wire Act has been used by the U.S. federal government in scores of prosecutions targeting online gaming-services providers and their officers and shareholders. The Wire Act was also the impetus for the Unlawful Internet Gambling Enforcement Act (UIGEA), a law adopted by Congress in 2006, requiring U.S. banks and other financial institutions to implement procedures to detect and interdict credit card payments and other financial transactions relating to online gaming services.

The controversy over the Wire Act stems from language in the Act that explicitly prohibits use of interstate communications channels to place bets on sporting events, but which contains somewhat ambiguous language that the DOJ has broadly interpreted to bar other forms of online wagering.

DOJ Opinion Letter

The Justice Department’s Office of Legal Counsel issued the opinion to settle questions raised in 2009 by state officials in New York and Illinois planning to sell lottery tickets online. The state officials were concerned that these lottery ticket sales, even though restricted to residents of their own states, might fall afoul of the Wire Act because they may involve Internet transmissions across state lines.

The DOJ took the opportunity to reverse its interpretation of several key Wire Act provisions and, in a 13-page legal opinion written by Assistant Attorney General Virginia Seitz, states that in effect, whether the lottery ticket sale transactions crossed state lines or not was irrelevant, because these operations would not involve sports wagers, and the federal Wire Act would therefore not apply. In relevant part the opinion states:

The [initial] conclusion that the New York and Illinois lottery proposals may be unlawful rests on the premise that the Wire Act prohibits interstate wire transmissions of gambling-related communications that do not involve “any sporting event or contest.”...We conclude that [this] premise is incorrect and that the Wire Act prohibits only the transmission of communications related to bets or wagers on sporting events or contests....

The legislative history of subsection 1084(a) [of the Wire Act] supports our reading of the text...

In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce....

Given that the Wire Act does not reach interstate transmissions of wire communications that do not relate to a “sporting event or contest,” and that the state-run lotteries proposed by New York and Illinois do not involve sporting events or contests, we conclude that the Wire Act does not prohibit the lotteries described in these proposals.

Interplay with UIGEA

Since the DOJ has now taken the position that such intrastate online gambling is not barred by the Wire Act, the opinion did not analyze the impact of the more recent Unlawful Internet Gambling Enforcement Act, or the interaction (and possible conflict) between the two Acts. However, the UIGEA by its terms applies to financial transactions relating to gaming activities that are prohibited under other U.S. federal or state laws, rather than itself proscribing specific forms of online gaming services.

Effect on Intrastate Gaming Initiatives

For the past several years, efforts have been underway in several U.S. states to license operators of intrastate online gaming services (i.e., services such as online poker that are offered solely to residents of the state). These efforts are designed to avoid the assumed federal prohibitions on online gaming under the Wire Act, by avoiding interstate communications and financial settlements. A change in the federal view of the legality of online gaming could give these state licensing efforts a critical boost, and may eventually also allow licensed intrastate services to serve as a launch-pad for interstate services.

Notable recent state initiatives include the following:

- Just one day before release of the DOJ's opinion, the Nevada Gaming Control Board approved a comprehensive regulatory framework for operation of interstate online poker and other wagering services in Nevada. The Nevada regulations appear to explicitly contemplate these regulations serving as a basis for launch of interstate gaming services once the legality of such services under federal law is established.
- California has multiple bills up for debate in the coming legislative session that could legalize and license intrastate online poker, and possibly other online games as well. The services would be operated under the auspices of one or more of the Native American tribes in California.
- Iowa and Florida have both considered bills that would legalize intrastate online poker.
- Washington, D.C. and New Jersey both passed online intrastate gambling bills this year, only to have implementation delayed, in the case of D.C., or vetoed altogether, in the case of New Jersey.

With various states suffering from budget deficits and looking for new sources of tax revenue, many more states will likely consider legislation that would legalize and/or license various forms of online intrastate gambling. The DOJ's new stance will only help by removing an important legal barrier to implementation.

Prospects for Federal Legislation

While the federal government could step in at any time and provide a national framework to regulate online gambling, or could revise the Wire Act to limit or prohibit interstate online gaming, neither prospect appears likely in the near future. There has historically been little consensus in Congress on the issue of regulating interstate wagering and, in the current highly divided Congress, the prospects for substantive legislative change seem remote. Even in 2006, when Congress was less polarized than it is today, the proponents of the UIGEA were able to secure its passage only through a legislative maneuver that attached the bill to another popular piece of legislation, unbeknownst to many of the members of Congress who voted in favor of the bill.

For the time being, it appears that intrastate online gaming has the opening it needs to take root in the United States on a state-by-state basis.

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