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## 1. Summary

Internet gambling is generally viewed to be illegal under the gambling laws of most of the fifty states. In addition, the U.S. Department of Justice (“DOJ”) has taken the position that various federal statutes such as the Wire Act prohibit internet gambling activities. The DOJ has interpreted those statutes as applicable not only to those who are providing gambling sites, but also to those who support the gambling activity.

## 2. Existing Federal Law

As stated in a June 11, 2003 letter to the National Association of Broadcasters (attached as Exhibit A), the DOJ has taken the position that:

Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony. Additionally, pursuant to Title 18, United States Code, Section 2, any person or entity who aids or abets in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes. . . . Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.

This letter was directed to broadcasters, but its strong language has a broad reach. Each of the DOJ’s statutory references is addressed below.

Section 1084 of Title 18 of the United States Code is commonly known as the “Wire Act” or the “Wire Wager Act.” This statute is the most commonly cited in connection with Internet gambling. It prohibits the knowing use of wire communications (i) for transmission in interstate or foreign commerce of bets or information assisting in the placing of bets, (ii) in order to obtain money or credit as a result of bets, or (iii) for information to assist in the placing of bets, on any sporting event or contest. 18 U.S.C. § 1084(a). Although it has been held that this statute only applies to sports booking, *In Re Mastercard Int’l Inc. Internet Gambling Litigation*, 313 F.3d 257, 262 (5th Cir. 2002), the DOJ and other authorities have adopted a broader interpretation. See Letter of June 11, 2003 to National Association of Broadcasters (discussed above); Letter of August 23, 2002 to Nevada Gaming Control Board (“As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the internet, including casino-style gambling.”).

Commonly known as the “Travel Act,” § 1952 of Title 18 of the United States Code prohibits the travel or use of mail or any facility in interstate or foreign commerce with the intent to “distribute the proceeds of any unlawful activity,” or to “otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” 18 U.S.C. § 1952(a). “Unlawful activities” expressly include “any business enterprise involving gambling.” 18 U.S.C. § 1952(b). Unlike the Wire Act, there is no doubt that the Travel Act applies to gambling activity beyond sports betting. Also, the Travel

Act specifically extends to one who intends to facilitate illegal gambling activities, separate and apart from the primary gambling operator.

Section 1955 of Title 18 of the United States Code prohibits the operation of an “illegal gambling business.” As used in the statute, an “illegal gambling business” is a business that is operated by five or more persons, violates state or other national law,<sup>1</sup> and either has been in operation for more than thirty days or has gross revenue of \$2,000 or more on any single day. 18 U.S.C. § 1955(b)(1).

Finally, under § 2 of Title 18 of the United States Code, one who “aids, abets, counsels, commands, induces or procures” the commission of a crime is punishable as if that person had committed the crime. 18 U.S.C. § 2(a). Caselaw has provided some leniency beyond the express language of the statute – in the Fifth Circuit, an “aider and abetter” under the statute must have “(1) associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed.” *U.S. v. Stone*, 960 F.2d 426, 433 (5th Cir. 1992).

Nor is it necessarily helpful that gambling activity may be lawful in the country where a particular gambling operator is located, if a person in the United States can access and use the gambling site. The DOJ has consistently taken the position that gambling activity occurs both in the location of the bettor and in the location of the gambling operation. *See, e.g.*, Letter of August 23, 2002 to Nevada Gaming Control Board; *see also United States v. \$734,578.82 in United States Currency, et al.*, 286 F.3d 641, 657 (3rd Cir. 2002) (“Claimants are therefore actually arguing that the laws of England insulate them from forfeiture based upon their conduct in New Jersey. We reject that argument.”).

The Unlawful Internet Gambling Enforcement Act (the “UIGEA”), 31 U.S.C. §§ 5361 – 5367 (attached as Exhibit B), was signed into law by President Bush on October 13, 2006. The Act is Title VIII of an unrelated bill, The SAFE Port Act, Pub. L. 109-347. Just as the DOJ’s June 2003 letter to the National Association of Broadcasters was directed to curtailing advertising of online gambling, the UIGEA was primarily directed to curtailing payment systems for online gambling. While the UIGEA signaled Congressional support for the DOJ’s position, the statute has been criticized as lacking clarity. Notably, the UIGEA specifically addresses fantasy sports games, which are not considered to be gambling under the UIGEA as long as the following conditions are met:

- (1) fantasy teams may not mirror the current membership of an actual team;
- (2) prizes must be established and announced to participants in advance of the game;
- (3) prize amounts may not be determined by the number of participants or amount of entry fees;
- (4) the winning outcome must reflect the relative knowledge or skill of its participants; and

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<sup>1</sup> This statute does not have much independent significance because it is expressly predicated on other gambling laws.

- (5) the winning outcome must be determined predominantly by the accumulated statistics of the individual athletes in multiple real-world games.

31 U.S.C. § 5362(1)(E)(viii). However, the impact of this definition is somewhat limited, in that the UIGEA does not preempt any other federal law or state law that may be construed as prohibiting a particular fantasy sports operation.<sup>2</sup> See 31 U.S.C. § 5361(b) (providing that the UIGEA does not alter, limit, or extend, any federal, state, or tribal law that prohibits, permits or regulates gambling).

### 3. Texas Law

Gambling is generally illegal in Texas.<sup>3</sup> See TEX. PENAL CODE ch. 47 (gambling offenses); *id.* § 71.02(a)(2) (organized criminal activity involving gambling). The gambling “promotion” statute requires “intentional or knowing” behavior and does not appear to extend to advertising except perhaps with respect to unlawful lotteries. *Id.* § 47.03 (unlawful to intentionally or knowingly “for gain, promote[] any lottery”; other categories of unlawful promotion involve direct participation in betting processes). There is a prohibition against communicating gambling information (*i.e.*, information concerning bets or betting odds), but again the scienter requirement is high – a person must act “knowingly” and with the “intent to further gambling.” *Id.* § 47.05. Finally, to the extent that a computer server could be considered a “gambling device” or “gambling paraphernalia” under the Texas statutes, it would only be unlawful to own/possess the server if the owner/possessor (i) intends to further gambling with the server, (ii) knows the server is designed for gambling, or (iii) knows the server is designed as a subassembly or essential part of a device designed for gambling. *Id.* § 47.06(a), (c).

### 4. United Kingdom Law<sup>4</sup>

The recently enacted Gambling Act 2005 took effect on September 1, 2007. This Act, administered by the Department for Culture, Media, and Sport, created a new Gambling Commission (an independent, “non-departmental public body”), charged with developing and implementing a licensing scheme and codes of practice. The Act’s primary objectives are to

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<sup>2</sup> Gambling typically consists of consideration, chance, and a prize. The applicable state and federal laws vary considerably as to each of these factors. The federal Wire Act, 18 U.S.C. § 1084, specifically applies to sports betting and does not provide any exemptions or clarifications as to consideration, chance, or prizes. The federal Professional and Amateur Sports Protection Act (the “PASPA”), 28 U.S.C. §§ 3701 – 3704, – designed to prevent states (other than Nevada) from enacting laws legalizing sports betting – prohibits the enactment of state law or the operation and advertising pursuant to state law of any “betting, gambling, or wagering scheme based, directly or indirectly ... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.” 28 U.S.C. § 3702. Notably, this federal statute could operate to render illegal any fantasy sports betting that is *legal* according to state law, but the federal statute would not apply to any fantasy sports betting that is simply not authorized or addressed by state law. For example, Montana expressly permits fantasy sports betting subject to certain limitations, MONT. CODE §§ 23-5-802, 23-5-805, and it is arguable that a fantasy sports operator could be said to have violated the federal PASPA by participating in a sports betting operation expressly authorized by Montana state law.

<sup>3</sup> Notably, under Texas law, a “thing of value” sufficient to constitute a wager is broadly defined to include “any benefit” (other than the immediate right to replay a game). TEX. PENAL CODE § 47.01(9).

<sup>4</sup> The underlying authorities for much of the discussion in this section are official British government websites, principally the Gambling Act 2005 available at <http://www.opsi.gov.uk/acts/acts2005/20050019.htm> and the Gambling Commission site located at <http://www.gamblingcommission.gov.uk>.

disassociate gambling and crime, to ensure fairness and openness in gaming, and to protect children and other vulnerable persons. The Gambling Act is comprehensive and, to the extent possible, technology-neutral. Issues such as advertising, bingo, lotteries, and software are specifically addressed by the Act and/or the related codes of practice promulgated by the Gambling Commission.

“Remote gambling” is defined under the Act as “gambling in which persons participate by the use of remote communication, including the internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication.” Generally speaking, a remote gambling operator (or intermediary, or software provider) who has any part of its operation in the U.K. must get a license. As before, if the entire operation (i.e., all of the servers associated with the operation) is outside of the U.K., then no license is required, even to accept bets from persons in the U.K.

As provided on the Gambling Commission website (<http://www.gamblingcommission.gov.uk/Client/detail.asp?ContentId=113>), there are ten different types of gambling licenses currently available<sup>5</sup>:

1.	Operating a casino (casino operating licence)	Casinos
2.	Providing facilities for playing bingo (bingo operating licence)	Bingo
3.	Providing facilities for betting other than pool betting (a general betting operating licence)	General Betting
4.	Providing facilities for pool betting (pool betting operating licence)	Pool Betting
5.	Acting as a betting intermediary (betting intermediary operating licence)	Betting intermediaries
6.	Making gaming machines available for use in an adult gaming centre (gaming machine general operating licence)	Adult Gaming Centres
7.	Making gaming machines available for use in a family entertainment centre (gaming machine general operating licence)	Family Entertainment Centres
8.	Manufacturing, supplying, installing, adapting, maintaining or repairing a gaming machine (gaming machine technical operating licence)	Gaming machines technical licence types
9.	Manufacturing, supplying, installing or adapting gambling software; (gambling software operating licence)	Gambling software licence types
10.	Promoting a lottery (lottery operating licence)	Lottery operating licence types

Although still in its infancy, the implementation of the U.K. approach to online gambling as set forth in the Gambling Act 2005 will be of significant interest should the U.S. ever decide to adopt a regulated approach to the industry.

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<sup>5</sup> There are remote-specific licenses within each of the casinos, bingo, general betting, pool betting, betting intermediary, and lottery categories.