



United States Department of Justice Issues Opinion on the Implications of the Federal Wire Act to Online Gaming:

Now What?

By Jeffrey R. Rodefer

Through the Clinton and Bush administrations, the United States Department of Justice (DOJ) had consistently interpreted 18 U.S.C. §1084, more commonly known as the Federal Wire Act, as a prohibition to the interstate transmission of bets or information assisting in the placing of bets or wagers on all forms of gambling that used a wire communication facility, such as a telephone, telegraph or the Internet.¹ This prohibition applied to bets originating in and terminating in the same state even if any portion of the transaction crossed state lines during its processing.²

Since 1995, when online gaming first appeared as predominantly free play websites,³ the debate has steadily grown regarding the accuracy of this position⁴ that was even questioned by a federal district court in 2001.⁵ Nevertheless, the DOJ did not waver in its view. In 2002 the Nevada State Gaming Control Board and Nevada Gaming Commission inquired whether interactive gaming was legal as mandated by the Nevada Legislature with the passage of Assembly Bill 466 in 2001 (the first legislation to authorize interactive gaming regulations).⁶ The DOJ responded by reiterating its longstanding position.⁷



This all changed on December 23, 2011 with the release of the opinion authored by the DOJ's Office of Legal Counsel. In response to requests from the states of Illinois and New York regarding the legality of proposals to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults, the DOJ's Criminal Division sought an opinion from the Office of Legal Counsel, which concluded "that interstate transmissions of wire communications that do not relate to a 'sporting event or contest,' 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act."⁸ The opinion further concluded that the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)⁹ appears to permit the out-of-state routing of data associated with wholly in-state transactions and, as such, the Wire Act could not be so narrowly construed to support the

DOJ's view that this activity was also prohibited.¹⁰ Interestingly, the DOJ's opinion did not address a myriad of issues regarding online gaming that still remains unanswered, including the following as noted by the American Gaming Association:¹¹

- May states offer intrastate online poker and other traditional casino games? Presumably, yes if the online wagering does not involve a sporting event or contest and is limited solely as an in-state offering authorized under appropriate state legislation, such as Assembly Bill 258 (2011) in Nevada.¹²
- May states that have authorized online gaming or, more specifically, online poker enter into negotiated interstate compacts to increase their liquidity or pool of players similar to Powerball for lotteries?¹³
- The DOJ strongly opposed the 2000 Amendment to the Interstate Horseracing Act of 1978 that expanded the definition of "interstate off-track wager" to permit pari-mutuel wagers transmitted between states by way of telephone or other electronic media as being a civil provision that did not control, amend or repeal existing criminal statutes, such as 18 U.S.C. § 1084 (Wire Act), 1952 (Travel Act) or 1955 (Illegal Gambling Business Act).¹⁴ The recent opinion does not address the ramifications of the Wire Act to the horseracing industry.
- What effect, if any, would this have on tribal gaming?



- What is the interplay between UIGEA and the Wire Act to offshore operators?
- Is there recourse available to individuals previously convicted under the Wire Act for non-sports related wagering operations?

Obviously, the DOJ's opinion is not law and is subject to further change. Absent further clarification from the DOJ or a case and controversy arising that gives the United States Supreme Court the opportunity to make law in this area, it appears that many of these issues will remain unresolved until Congress finally adopts enabling legislation that establishes some consistency in state regulation to ensure clarity for law enforcement and players alike.

Jeff Rodefer is the Vice President of Legal Affairs, Assistant General Counsel and Corporate Compliance Officer for Boyd Gaming Corporation (NYSE: BYD). He has been the Chairman of the Gaming Law Section since 2000.

¹ Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, Office of Legal Affairs, to Harry Reid, U.S. Senate Majority Leader (Dec. 23, 2011); see also, Adrian Goss, Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States Anti-Gambling Laws, 7 Rich. J.L. & Tech. 32 (Spring 2001)

² Memorandum for Lanny A. Breuer, Assistant Attorney General, U.S. Department of Justice, Criminal Division, from Virginia A. Seitz, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel (Sept. 20, 2011), at 2.

³ Bo J. Bernhard, PhD, Anthony F. Lucas, PhD, Elena Shampaner, PhD (candidate), Internet Gambling in Nevada, 6 (International Gaming Institute, University of Nevada, Las Vegas, April 2007).

⁴ Jeffrey R. Rodefer, Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466, 6 Gaming L. Rev. 393, 397-401 (Oct. 2002).

⁵ In re MasterCard Int'l, Inc., 132 F. Supp. 2d 468, 480 (E.D. La. 2001) (a plain reading of the Wire Act limits its scope to sporting events or contests); aff'd, 313 F.3d 257 (5th Cir. 2002).

⁶ See Act of June 14, 2001, ch. 593, § 3, 2001 Nev. Stat. 3075.

⁷ Letter from Michael Chertoff, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to Dennis K. Neilander, Chairman, Nevada Gaming Control Board (August 23, 2002).

⁸ See Memorandum, supra note 2.

⁹ 31 U.S.C. § 5362(10)(B) and (E).

¹⁰ See Memorandum, supra note 2.

¹¹ Frank J. Fahrenkopf, Jr., President and CEO, American Gaming Association, Federal Online Gambling Legislation Needed Now More Than Ever, Global Gaming Business, (Feb. 1, 2012).

¹² See Act of June 10, 2011, ch. 302, 2011 Nev. Stat. 1668-1672.

¹³ 18 U.S.C. § 1301.

¹⁴ See Rodefer, supra note 4, 397-403.

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