2008

Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling

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Recommended Citation
Jason A. Miller, Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling, 12 N.C. Banking Inst. 185 (2008).
Available at: http://scholarship.law.unc.edu/ncbi/vol12/iss1/9

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Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling

I. INTRODUCTION

Illegal gambling is under an intense attack, but not from the usual suspects—the FBI, state gambling enforcement agencies, or even local law enforcement. Rather, illegal gambling is under attack from legal gambling operations around the world. And the Internet has connected these operations, legal outside the United States, with U.S. citizens. Now, Congress has turned to an alternative method for breaking the gateway to these foreign organizations.

Like travel, movies, and the telephone, the Internet has drastically shifted the business paradigm for the gambling industry.¹ The Internet allows individual U.S. gamblers to interface directly from their own homes with publicly-owned and traded gambling organizations that operate legitimately in their home countries.² Since most Internet gambling organizations operate offshore, far from the reach of U.S. courts, most state and federal laws do not effectively prohibit Internet gambling.³ As a result, Internet gambling has grown tremendously in recent years.⁴ Because the government has not succeeded in curbing Internet gambling by targeting individual gamblers and foreign-based Internet gambling providers, it has now shifted its focus to restricting the supply line: funding.⁵

² See id. at 2-3 (statement of Hon. Sue W. Kelly, Chairwoman, Subcommittee on Oversight and Investigations of the House Committee on Financial Services).
⁵ See Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, §
In October 2006, Congress adopted the Unlawful Internet Gambling Enforcement Act (UIGEA), which seeks to hinder Internet gambling by deputizing financial institutions to identify and block transactions that they determine to be illegal Internet gambling transactions. As enforcers of the UIGEA, financial institutions will incur substantial costs in complying with the statutory requirements. Since the UIGEA will not be effective in curbing Internet gambling, this burden on financial institutions is unfair and unnecessary. Therefore, Congress should repeal the UIGEA and adopt new legislation that either specifically prohibits all forms of Internet gambling or legalizes and regulates the gambling industry.

Part II of this Note discusses the evolution of gambling in the United States, from discrete, underground operations to mainstream America. Part III examines the existing status of federal and state anti-gambling laws. Part IV analyzes the UIGEA and discusses its potential ineffectiveness in curbing Internet gambling. Part V examines alternative legislative approaches to address the benefits and social costs of Internet gambling.

II. INTERNET GAMBLING IN THE UNITED STATES

A. The Gambling Revolution

Over the past twenty-five years in the United States, legalized gambling has shifted from a "relatively rare phenomenon" into a commonplace activity undertaken by the masses. Nevertheless, there remains a strong moral opposition

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8. See infra Part IV.D.
9. See infra Part IV.E.
10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
13. See infra Part V.
14. NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT
that focuses on the perceived social costs of gambling, such as compulsive gambling, underage gambling, and destruction of the family. In 1961, the federal government acted on these moral concerns in passing the Federal Wire Act (Wire Act) as an extension of state anti-gambling laws. The Wire Act makes it illegal to use wire communications while “engaged in the business of gambling.” However, strong consumer demand for gambling, aided by the Internet, has undermined the original intentions of the Wire Act and fueled the gambling industry’s monstrous growth. Legal forms of gambling via the Internet, like horseracing and state lotteries, have also contributed to industry growth. According to a 1999 study funded by Congress, a staggering eighty-six percent of U.S. citizens had gambled in their lifetime and sixty-eight percent had gambled in the past year alone. To most U.S. citizens, gambling is no longer a morally forbidden act performed by a discrete minority of the population; it is a form of entertainment accepted by the masses.

B. Growth Statistics

Revenues from legal gambling grew approximately 1,600% between 1976 and 1997. Technological advances, particularly the Internet, and strong consumer demand have also led to exponential growth in legal gambling. Internet gambling has been around since 1995, but it really exploded in the late 1990s.
In 1999, Congress passed a law authorizing a national study aimed at producing empirical data on the gambling industry. The National Gambling Impact Study found that Internet gambling more than doubled between 1997 and 1998. In 1998, only about fifty Internet gambling websites were in existence. By 2002, roughly 1,800 sites could be found and the industry had generated over $10 billion in revenue. Since the National Gambling Impact Study, the Internet gambling industry has continued to grow at a torrid pace. In 2005, Internet gambling revenue was nearly $6 billion in the United States alone.

Christiansen Capital Advisors (CCA), a research consulting firm that provided data for the National Gambling Impact Study, estimates that nearly one-third of the twenty-three million people who gambled on the Internet in 2005 were from the United States. The most recent projections peg the Internet gambling industry at over $15 billion per year with U.S. customers providing a significant portion of this revenue.

III. LEGAL RESTRICTIONS ON INTERNET GAMBLING

A. Federal and State Restrictions

As evidenced by the precipitous growth, existing laws and traditional law enforcement efforts have not effectively controlled Internet gambling. Traditionally, gambling has been regulated at
the state level, with little or no federal interference. Some states, like Nevada, have legalized and regulate all forms of gambling. Most others, like New York, have banned some forms of gambling (sports betting) while allowing other forms (horseracing). There are only two states that have not legalized some form of gambling – Hawaii and Utah. Presently, eight states have explicitly banned Internet gambling and five other state attorneys general have issued opinions that Internet gambling is contrary to their state’s laws.

As interstate and foreign gambling grew, however, the U.S. government saw a need for intervention and passed laws to extend the reach of state anti-gambling laws. Most notably, the federal government passed the Wire Act, which makes it illegal to be “engaged in the business of betting or wagering [while] knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or information assisting in the placing of bets or wagers on any sporting event or contest.” The Wire Act provides a safe harbor, but only for bets that are both placed and received in jurisdictions where gambling is legal.

In Cohen v. United States, the Ninth Circuit noted that the purpose of the Wire Act is to “’curb the activities of the professional gambler,’” not the “’isolated acts of wagering by individuals not engaged in the business of wagering.’” In In re Mastercard Int’l, a federal district court held that the Wire Act covers sports betting only. The court explained that when one

38. Nat’l Gambling Impact Study Comm’n, supra note 14. “Hawaii and Utah have no legal gambling; pari-mutuel horse racing is legal in Tennessee, but no racetracks are currently operating there.” Id.
40. Kyl, supra note 24.
42. Id.; see also United States v. Cohen, 260 F.3d 68, 73 (2d. Cir. 2001) (holding that a bet placed in a jurisdiction where gambling is illegal violates the Wire Act even if gambling is legal in the jurisdiction where the bet is received).
43. Cohen v. United States, 378 F.2d 751 (9th Cir. 1967).
44. Id. at 757 n.8 (emphasis added).
46. Id. at 480.
Comparing the face of the Wire Act and [its legislative history] with the recently proposed legislation [attempting to amend the Wire Act to explicitly include all Internet gambling], it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to . . . sporting events or other contests.\footnote{Id. at 480-81.} As Cohen and In re Mastercard Int'l illustrate, courts have held that the Wire Act only regulates professional gamblers engaged in sports gambling, whether online or in the traditional form.\footnote{Id. at 480; Cohen, 378 F.2d at 757.}

Despite Cohen and In re Mastercard Int'l, the Department of Justice (DOJ) insists that the Wire Act can be extended to cover Internet gambling by non-professional gamblers.\footnote{American Gaming Association, supra note 4. "In 2002, the U.S. Department of Justice advised Nevada of its view that federal law currently prohibits gambling over the Internet, including casino-style gambling, halting the state's efforts to legalize, regulate and tax Internet gambling." Id.} The DOJ's position, in light of these judicial opinions, has generated significant controversy over whether the Act applies to all individuals who place wagers using the Internet.\footnote{KYL, supra note 24 (citing S. COMM. ON THE JUDICIARY, THE INTERNET GAMBLING PROHIBITION ACT, S. REP. NO. 106-21 (1999)).} The DOJ insists that the key problem lies in enforcement, not in interpreting the legality of Internet gambling.\footnote{American Gaming Association, supra note 4.} Foreign corporations have little or no need for a physical presence within U.S. borders.\footnote{KYL, supra note 24.} The Internet allows these organizations to attract customers, process wagers and provide communications, all without setting foot in the United States.\footnote{See Press Release, Office of the N.Y. State Attorney Gen., Spitzer Hails Establishment of New Banking Industry Standard (Feb. 11, 2003), http://www.oag.state.ny.us/press/2003/feb/feb11b_03.html.} With most Internet gambling operations located outside of the United States, it is difficult for law enforcement to obtain jurisdiction over these operations in order to effectively enforce the Wire Act.\footnote{See id.} The Internet is inherently borderless\footnote{Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).} and therefore individuals and organizations are able to do business without surrendering to the jurisdiction of U.S. courts. Additionally, the DOJ is fighting against technology. Offshore
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gambling organizations use this technology and the Internet to conceal transactions and their identities.\textsuperscript{56} This is a unique problem for governments and, in the case of Internet gambling, law enforcement has lagged behind the development of technology.\textsuperscript{57} To date, the federal laws and enforcement efforts have failed to prevent the continued growth of Internet gambling.\textsuperscript{58}

B. Restrictions by Financial Institutions

Despite the financial benefits that financial institutions enjoy as a result of Internet gambling,\textsuperscript{59} some of these organizations have succumbed to pressure from law enforcement agencies to eradicate this activity.\textsuperscript{60} Law enforcement advocates argue that Internet gambling poses unique threats, particularly to the financial community, that are not found in non-Internet gambling.\textsuperscript{61} According to Elliot Spitzer, New York Governor and former New York Attorney General, “[with] this insidious form of gambling [over the Internet], no physical or financial barrier insulates the gambler from the potential for significant financial losses.”\textsuperscript{62} In New York, several banks have joined Spitzer’s crusade to curb online gambling.\textsuperscript{63} In February 2003, ten banks entered voluntary agreements aimed at preventing their customers from using credit cards for Internet gambling.\textsuperscript{64} Spitzer’s alliance with the New York financial institutions produced an unlegislated win for law enforcement, challenging an Internet gambling industry that Spitzer claims “has enabled gamblers to wreak

\begin{footnotes}
\footnote{56. Id.}
\footnote{57. Id.}
\footnote{58. See supra Part II.}
\footnote{60. See Press Release, Office of the N.Y. State Attorney Gen., supra note 53.}
\footnote{61. See id.}
\footnote{62. Id.}
\footnote{63. Id.}
\footnote{64. Id. “The initiative began in June of 2002 when the Attorney General obtained Citibank’s agreement to block such transactions. The ten banks in this latest round of settlements cover a wide range of institutions. They include some of the country’s largest financial institutions, with millions of cardholders across the nation, as well as smaller, regional banks.” Id.}
\end{footnotes}
sudden financial devastation on themselves and their families."

The ten banks involved in this effort use traditional merchant codes to identify and block certain disfavored merchants and transactions. Each credit card transaction contains, in its electronic authorization file, a merchant-unique code and a transaction-unique code. These codes enable the authorizing institution to determine the nature of the transaction and who is requesting the transaction authorization. By identifying and blocking gambling transactions, the banks can prevent funds from being used for Internet gambling activities.

Spitzer claims that all forms of unauthorized gambling are illegal in New York. Assuming this is true, Spitzer and other law enforcement agents face many practical hurdles in policing this illegal Internet gambling. Since most Internet gambling operations are located outside of the United States, state and federal courts have no jurisdictional power. Thus, state law enforcement agents like Spitzer are without a forum to exercise their power over the Internet gambling industry. Due to this lack of jurisdictional power and the lack of anti-gambling laws that cover non-professional gamblers, law enforcement has shifted its focus to restricting the funds used to facilitate Internet gambling transactions.

The settlement between these ten banks and the state of New York exemplified the agenda shift by law enforcement. Following this Spitzer-brokered settlement, other credit card issuers, at the encouragement of Spitzer and others, decided to launch procedures for identifying and blocking Internet gambling transactions. These banking industry initiatives marked a
significant non-legislative attempt to curb Internet gambling. This trend of self-enforcement by financial institutions may have been the catalyst for a shift in focus with many federal legislators that led to the adoption of the UIGEA.

C. Limited Enforcement Efforts by the Department of Justice

Unable to effectively target individual gamblers under the Wire Act or to obtain jurisdictional access to most foreign Internet gambling organizations, federal law enforcement agents have begun pursuing other alternatives to slow down the gambling industry. In January of 2007, the DOJ subpoenaed four investment banks in an expanded investigation of Internet gambling. The subpoenas targeted the financial underwriters of several popular Internet gambling organizations overseas, including HSBC, Credit Suisse, Deutsche Bank and Dresdner Kleinwort.

The DOJ's decision to target underwriters and other legitimate investors could dramatically impact global financial institutions. With many legal, publicly-traded online gambling companies on the London Stock Exchange and other prominent exchanges, American investors and financial institutions may need to be more cautious with their investments. "The developments appeared to be part of an indirect but aggressive and far-reaching attack by U.S. prosecutors on the Internet gambling industry . . . . Unable to go directly after the casinos . . . they have sought to prosecute the operations' American partners, marketing arms and,
possibly now, investors.” There has been no indication as to where federal enforcers will draw the line in targeting indirect associates of Internet gambling operations that are legal in their home countries. This could set a scary precedent for investors. Investment firms may now have to interpret how U.S. laws will treat a corporation that exists entirely outside of the United States and whose operations are legal in its own country. Furthermore, if federal law enforcement decides to extend its efforts even further, shareholders of investment firms may need to be cautious of how the DOJ will interpret the firm’s investment decisions.

After all, the DOJ has shown that it intends to enforce the Wire Act against any individual that invests directly in Internet gambling organizations. On May 11, 2007, in a rare instance where the DOJ obtained jurisdictional access to the Internet gambling industry, federal agents indicted seven individuals and four off-shore Internet gambling companies on charges stemming from violations of the Wire Act. Those indicted were charged with facilitating credit card and Western Union transactions between U.S. citizens and websites involved in Internet gambling. Seemingly void of a comprehensive approach, the DOJ continues to target and harass the Internet gambling industry by sporadically enforcing the existing infrastructure of laws and creating alternative methods for its efforts.

82. Sorkin & Saul, supra note 77.
84. Id.
85. Id.
86. Legislative and Public Policy Advisory: Proposed Internet Gambling Regulation Would Require New Policies and Procedures for the U.S. Payments System, ELECTRONIC BANKING L. AND COM. REP. (ALSTON & BIRD), Nov. 2007, at 6, available at http://www.alston.com/files/Publication/f328344d-98a2-4668-a002-74cbe4b57fc3/Presentation/PublicationAttachment/5f828ec2-97b5-4087a34d-7ef06b7d39b5/2007%20Internet%20Gambling%20Advisory.pdf. “The Department of Justice (‘DOJ’) considers all Internet gambling to be illegal, but this position is at odds with the absence of enforcement activity by the DOJ against pari-mutuel betting operations that every day engage in transactions in the U.S. using most or all of the forms of payment mechanisms covered by the proposed regulation.” Id.
87. See Sorkin & Saul, supra note 77.
IV. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT (UIGEA)

A. Congress Passes the UIGEA

Despite broad consumer opposition to such restrictions, Congress continues to focus on prohibiting Internet gambling. In recent history, there has been a series of anti-gambling legislation that has made it through Congress, but none squarely addressed Internet gambling. In October 2006, President Bush signed into law the UIGEA, which is the first ever federal law that expressly attempts to restrict Internet gambling. It was buried in the unrelated Safe Port Act, which addressed concerns with Homeland Security and was virtually guaranteed to successfully pass through Congress.

The UIGEA attempts to restrict available funding for Internet gambling accounts rather than address the legality of

88. Online Gambling: Myths & Facts, Polls, http://www.onlinegamblingmythsandfacts.com/polls.htm (last visited Dec. 29, 2007). In March 2006, Zogby International conducted a poll of over 30,000 Americans. In the context of a possible government abolition of Internet gambling, seventy-eight percent were opposed to government restrictions on an individual’s privacy on the Internet from their own home. Id. Seventy-one percent did not feel that the government should stop adult gamblers from gambling with organizations that operate in a country where gambling is legal. Id.


90. See Travel Act, 18 U.S.C. § 1952 (2000) (prohibiting the use of travel or mail to “distribute the proceeds of any unlawful activity” or to “otherwise promote, manage, establish, carry on, or facilitate . . . the unlawful activity,” and defining gambling as an unlawful activity); Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2000) (prohibiting anyone other than a common carrier in the usual course of business from carrying or sending in interstate or foreign commerce any “device used . . . designed for use in [ ] bookmaking; or [ ] wagering pools with respect to a sporting event”—[excludes materials used in states where gambling is legal]); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2000) (prohibiting any governmental entity or any person from sponsoring, promoting, advertising, licensing, or authorizing by law any gambling activity based directly or indirectly on games involving amateur or professional athletes—did not become effective until 1993); Federal Aiding and Abetting Statute, 18 U.S.C. § 2 (2000) (allowing for those who aid or abet any crime against the U.S. to be punished as a principal).


92. Id.
Internet gambling. On the issue of the legality of Internet gambling, the UIGEA defers to the existing infrastructure of state and federal laws. The legislation focuses on the payment methods used to settle bets made through offshore Internet gambling sites. The UIGEA provides a series of administrative requirements and civil penalties for non-compliance.

For financial institutions, the most intrusive section of the UIGEA is section 5364 because it forces them to "adopt policies and procedures designed to block" the transfer of funds to and from organizations that are connected with Internet gambling. This section of the UIGEA directed the Secretary of the Treasury and the Board of Governors of the Federal Reserve System (the Agencies) to work with the U.S. Attorney General to develop regulations that identify and block restricted transactions.

Although the UIGEA required the Agencies to complete the regulations by June 2007, the Agencies did not produce the proposed rules until October 1, 2007. This delay led Senator Sam Brownback (R-Kan.) to question the intentions of the Treasury Department. Are they going to be committed to enforcing this law, Brownback asked, 'and putting the personnel in place that it needs [?]" Others have interpreted this delay as an outright display of the Treasury's skeptical view of the Act. "The regulations, long overdue, seem to say as much about an ambivalent regulatory attitude at the [Treasury] as they do about the merits of the law itself." The present state of the regulations reflects a desire to minimize the burden to the financial industry

93. Id.
94. Id.
95. American Gaming Association, supra note 4. "The bill does not update the [F]ederal Wire Act of 1961 to specifically apply to all forms of online gambling." Id.
101. Id.
103. Id.
rather than attack the Internet gambling industry. Even as such, the regulatory burden is dramatic when compared to the miniscule impact the UIGEA will have on Internet gambling.

B. Regulatory Approach to the UIGEA

The Agencies contemplated two distinct approaches in drafting the regulations required by the UIGEA. The first approach would require significant governmental involvement on a micro level. The Agencies would create a blacklist of merchants that are involved in illegal Internet gambling. They would also create a blacklist of transaction codes that represent illegal transactions. Financial institutions would then be required to validate each transaction against these lists and block those that match a code on either list.

The micro approach would require the Agencies to commit significant resources to investigating foreign companies and performing legal analysis to determine whether the company should be on the blocked list. Creating and monitoring a dynamic list of organizations worldwide that are linked to Internet gambling would be very costly for the Agencies. Also, Internet gambling companies can easily alter their identities to circumvent such a list. Due to the costs and limited benefits of the micro approach, the Agencies have preliminarily decided to adopt the second approach: a macro approach.

105. See infra Part IV.D.
107. See id.
108. See id.
109. See id.
110. See id.
111. See id.
113. See id.
114. Id. "[T]he benefits of the list as an effective tool for use by regulated entities to identify and block or otherwise prevent or prohibit unlawful Internet gambling transactions is uncertain relative to the likely costs involved in creating such a list." Id.
Under the macro approach, payment systems have been divided into five distinct categories: automated clearing house, card, check collection, money transmitting, and wire transfer. Each designated payment system will be required to adopt policies and procedures to identify and block illegal Internet gambling transactions. In an effort to lower compliance costs, the Agencies will not require financial institutions to create their own policies and procedures. Rather, financial institutions will be deemed to be in compliance with the UIGEA if they follow the payment system’s policies and procedures. Alternatively, financial institutions may create their own policies and procedures in compliance with the UIGEA if this alternative is more practical. The Agencies will require banks to use best efforts when reasonably practical to comply with the policies and procedures.

The Agencies have received comments from the industry and public regarding the proposed rules, and the final regulations will reflect this input. The regulations are scheduled to take effect six months after publication, which should occur sometime in 2008.

C. Specific Requirements of the Agencies’ Proposed Regulations

To understand the UIGEA’s fundamental shortcomings, it is important to understand exactly what is regulated by the statute. In general, the UIGEA requires that a participant in a designated payment system do one of two things to prevent “unlawful Internet gambling” transactions: (1) create its own policies and

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115. See id. at 56,693.
116. See id.
117. See id.
119. See id.
120. See id.
121. See id. at 56,682.
122. See id.
procedures or (2) comply with the policies and procedures established by the designated payment system of which it is a part. The Agencies’ proposed rule lists five “designated payment systems” that will be affected by the UIGEA: (1) automated clearing house systems (ACH), which are automated funds transfer systems that facilitate transactions between financial institutions; (2) card systems, which include credit cards, debit cards, pre-paid cards, and cards that store value, like Target gift cards; (3) check collection systems, which are interbank systems that facilitate transactions involving paper checks; (4) money transmitting businesses, including organizations that facilitate money transfers from person-to-person, business-to-business, or person-to-business; and (5) wire transfer systems, which operate similarly to the check system, except these systems electronically process the data on a paper check, like the account number and routing number, but do not require collection of the paper check itself.

Although all the designated payment systems are purportedly required to comply with the proposed regulations, some exemptions exist. In fact, the proposed regulations are written so that many financial systems are presumed to be exempt unless they meet certain criteria. This reflects the Agencies’ willingness to compromise with some of the grievances lodged by financial institutions. “The Agencies are proposing to exempt all participants in the ACH system, check collection system, and wire transfer system, except for the participant that possesses the customer relationship with the Internet gambling business . . . .”

126. See id.
127. See id.
128. See id. Examples of money transmitting businesses are Western Union and PayPal (online).
129. See id.
130. See id. at 56,685-88.
132. See id.
133. See id.
Although the exemption seems quite broad, financial institutions will still be required to exercise due diligence to ensure that commercial customers are not involved in Internet gambling, thus creating the requisite direct connection with an Internet gambling business as defined in the UIGEA.\textsuperscript{134} The regulations also require “exempt” participants to scrutinize cross-border transactions.\textsuperscript{135} Because many large institutions participate in cross-border transactions, there will be a regulatory burden on their part to use reasonable efforts to block restricted transactions.\textsuperscript{136}

The exemptions for these three payment systems exist because it is not possible for financial institutions to accurately identify and block certain restricted transactions given the way these systems currently function.\textsuperscript{137} For example, banks do not have an automated method for determining the nature of a transaction when a paper check is used.\textsuperscript{138} The systems could be revamped, but not without significant costs, and the Agencies are not willing to impose such a burden at this time.\textsuperscript{139} This reflects the Agencies’ view that the UIGEA’s potential impact on Internet gambling is not justified by the burden it could place on certain financial institutions.\textsuperscript{140}

Despite certain exemptions for the ACH system, check collection system, and wire transfer system, there are no exemptions for card systems and money transmitting businesses.\textsuperscript{141} Therefore, the compliance burden is even more significant. Participants in these systems will be required to identify and block restricted transactions based on their code identifiers.\textsuperscript{142} They will also be required to monitor and analyze patterns to determine whether customers are committing fraudulent activities to

\begin{itemize}
  \item [134.] See id. at 56,688-89.
  \item [135.] See id. at 56,683.
  \item [136.] See id.
  \item [138.] Legislative and Public Policy Advisory, supra note 86.
  \item [139.] See Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,685-86.
  \item [140.] See id.
  \item [141.] See id. at 56,685-90.
  \item [142.] See id.
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circumvent their procedures.\textsuperscript{143} The regulations impose knowledge-based requirements, but they also force the participants of these systems to take additional steps to ensure that their infrastructure is not being utilized.\textsuperscript{144} Even more troublesome is the fact that card systems and money transmitting systems cannot accurately identify and block restricted transactions.\textsuperscript{145} There are many work-arounds\textsuperscript{146} already employed by Internet gambling organizations and surely more will be developed to circumvent the proposed rules.\textsuperscript{147}

D. Impact on Financial Institutions

Although the Agencies met the mandate imposed by the UIGEA, they seem to have drafted regulations with the goal of minimizing the burden on financial institutions.\textsuperscript{148} This is favorable for financial institutions, but it undermines the fundamental goal of the UIGEA: hindering Internet gambling.\textsuperscript{149} Thus, the costs that these regulations impose on financial institutions are unnecessary.

Because the drafters of the UIGEA were unwilling to make a determination on the legality of Internet gambling,\textsuperscript{150} the Agencies were forced to draft ambiguous regulations that restrict "unlawful Internet gambling" with no determination of what constitutes "unlawful Internet gambling."\textsuperscript{151} Just like the drafters of the UIGEA, the Agencies have deferred to state and federal laws to determine which Internet gambling transactions are

\begin{itemize}
\item[143.] See id.
\item[144.] See id.
\item[145.] See infra Part IV.E.
\item[146.] A work-around is a plan or method to circumvent a problem (as in computer software) without eliminating it. Merriam-Webster Online, http://www.mw.com/dictionary/work-around (last visited Dec. 29, 2007).
\item[147.] See infra Part IV.E.
\item[149.] Id.
\end{itemize}
illegal.\(^\text{152}\) Ironically, the Agencies rejected the blacklist approach (the micro approach) because it would have unfairly required them “to formally interpret the various [f]ederal and [s]tate gambling laws in order to determine whether the activities of each business that appears to conduct some type of gambling-related function are unlawful under those statutes.”\(^\text{153}\) Yet, in adopting the macro approach, the Agencies are instead leaving financial institutions to determine what is lawful in the states in which they operate.\(^\text{154}\) If the Agencies are not suited to make this decision, then financial institutions are certainly no better positioned.\(^\text{155}\) Financial institutions that operate in multiple states will be subject to uncertainty, as each state’s laws may differ on the subject of gambling and there is no consensus on the reach of the federal laws.\(^\text{156}\) A bank that operates in all fifty states will have to analyze, interpret and monitor the anti-gambling laws of all fifty states.\(^\text{157}\) Furthermore, citizens of the same state could potentially be treated differently by their financial institutions based on interpretations of state law.\(^\text{158}\) Forcing financial institutions to absorb the ongoing costs of making these legal determinations is just one negative consequence of the ill-conceived UIGEA.\(^\text{159}\)

Another negative consequence of the UIGEA is that it forces financial institutions to become law enforcement agents. Some financial institutions, specifically those with a direct connection to foreign banks that serve the Internet gambling industry, will now be required to act as the enforcement mechanism in the U.S. government’s fight against Internet gambling.\(^\text{160}\) Other institutions will be required to implement procedures to reasonably protect against the use of their systems

\(^{152}\) Id.  
\(^{153}\) Id.  
\(^{154}\) Id.  
\(^{155}\) Id.  
\(^{156}\) Legislative and Public Policy Advisory, supra note 86.  
\(^{157}\) Id.  
\(^{158}\) Cf. id. ("[T]here continues to be ambiguity about the underlying definition of which transactions are legal and which are not, creating uncertainty for financial institutions required to identify and block unlawful transactions.").  
\(^{159}\) See infra Part IV.E.  
for Internet gambling transactions.\textsuperscript{161} Although the largest burden is placed on participants in the card system and wire transfer system, significant compliance burdens are also placed on participants in the other systems.\textsuperscript{162}

As could be reasonably expected, financial institutions are deeply troubled by the government’s decision to force them into this law enforcement role.\textsuperscript{163} They fear that the financial burden of complying with the UIGEA will drain them of “‘finite resources currently engaged in complying with anti-terrorism, anti-money laundering regulations and daily operation[s].’”\textsuperscript{164} Many experts are also concerned about the reach of this federal legislation and the impact it will have on the private relationship between banks and consumers.\textsuperscript{165} The concern is that if citizens perceive banks as law enforcement agents, citizens may be less likely to use the services of a particular bank or the banking industry in general.\textsuperscript{166} If citizens lose confidence in their private relationships with their banks, they may decide to terminate those relationships and retain their funds or seek other alternatives, possibly even foreign banks.\textsuperscript{167} Cumulatively, this type of movement could have a profound impact on the viability and profitability of financial institutions in the United States.\textsuperscript{168}

E. The UIGEA Will Not Be Effective

The most significant problem with the UIGEA is that it will not curb Internet gambling.\textsuperscript{169} This fact is already apparent to

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item Id.
\item Radley Balko, \textit{GOP Misses Mark on Internet Gambling Ban}, \textsc{foxnews.com}, Mar. 15, 2006, http://www.foxnews.com/story/0,2933,188048,00.html. “The privacy implications of such measures are disturbing enough. But there’s also something troubling about asking private companies to become de facto law enforcement agencies (a practice that started with aggressive money laundering laws).” Id.
\item Id.
\item Id.
\item Id.
\item See Mark, \textit{supra} note 163 (quoting Samuel Vallandingham, representing the
\end{enumerate}
\end{footnotesize}
many financial industry experts. "Ultimately, we [Independent Bankers of America] question whether the Internet gambling bills . . . will efficiently regulate the targeted behavior at a level which will justify the time and expense required by community banks." Experts on Internet gambling predict the UIGEA will be yet another futile government attempt to constrain this burgeoning industry. So, why will the UIGEA fail? With revenues of $15 billion and growing, Internet gambling companies have a strong incentive to find legal and illegal work-arounds to any attempted government regulations.

Third-party processors, or money transmitting businesses as they are called by the Agencies, serve as a financial link between individuals and e-commerce organizations. They process deposits from individuals using a credit card, check, or wire transfer and hold them in suspense until directed by the individual to send funds to an e-commerce merchant as payment for goods or services. By using a third-party processor, individuals can keep their financial information secure by only sharing it with trusted third-party processors rather than unknown online vendors. There are many third-party money processors worldwide, such as PayPal, which accept deposits from users through their domestic bank accounts for use on Internet purchases. Once the money is deposited with the third-party processor, it can be used to purchase goods and services from any site that accepts payments from the third-party processor, including Internet gambling sites.

Regardless of federal efforts to prohibit Internet gambling,
banks will continue to allow transactions with legitimate, third-party fund processors. The bank has no way of knowing whether the funds are used for buying shoes or placing a bet on the New York Giants. Although the UIGEA prohibits third-party processors (as "money transmitting businesses") from facilitating illegal Internet gambling transactions, many of these businesses are located in nations where gambling is legal. Once funds are in the third-party accounts, they can be used for any legal activity in that nation's jurisdiction, and U.S. financial institutions will have no way of knowing or controlling whether third-party processors allow customers to use those funds. Therefore, the UIGEA will have little or no impact on Internet gambling through off-shore third-party processors.

Moreover, bankers have testified that the UIGEA creates a significant incentive for fraud. If credit card processors start blocking gambling transactions, Internet gambling organizations will begin seeking work-arounds. An Internet gambling company could easily conceal its identity and the transaction's identity by intentionally altering the data that it sends to credit card processors. If gambling organizations alter their merchant codes, banks will not be able to accurately block Internet gambling transactions. In fact, a financial institution could unknowingly approve a gambling transaction thinking that the consumer purchased a sweater from an online clothing retailer. Even more

180. Id.
182. Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
183. You Won't Stop Internet Gambling Say Experts, CASINO PORTALEN, Oct. 25, 2006, http://www.casinoportalen.dk/news/externalnews.asp?curpage=7&id=1322. "In some cases, banks simply move the money to payment processors, known as e-wallets. Non-U.S. payment processors then transfer the money to the Internet gambling sites. The U.S. government has no authority over processors outside its jurisdiction that are operating legally." Id.
185. Id.
186. Id.
187. Id.
188. Id.
disconcerting is the fact that this mode of circumvention would distort the accuracy of the entire transaction authorization system.\textsuperscript{189} Thus, the UIGEA creates a strong incentive for organizations to commit fraud, and this fraud could have a broad range of negative implications for all five of the payment systems.\textsuperscript{190}

F. International Hurdles for the UIGEA

Although Internet gambling was once an activity reserved for small island countries in the Caribbean, it is now a legitimate business in many developed countries.\textsuperscript{191} Over fifty-five nations, including the United Kingdom, France, Australia and Germany, allow for publicly-owned Internet gambling corporations.\textsuperscript{192} In these nations, Internet gambling is legal, regulated, and an array of multinational financial institutions serve this legitimate industry.\textsuperscript{193} This fact creates two distinct issues. First, the UIGEA asks U.S. banks to sever its ties with these institutions, even though these institutions are complying with the laws and regulations of their home countries.\textsuperscript{194} This could have a significant impact on many industries unrelated to Internet gambling, most notably banking.\textsuperscript{195} Second, these legitimate foreign banks provide U.S. gamblers with a safe haven to deposit and withdraw their gambling funds.\textsuperscript{196} The

\textsuperscript{189} See id.
\textsuperscript{190} Internet Gambling Ban, supra note 184 (testimony by Michael L. Farmer).
\textsuperscript{191} Id.
\textsuperscript{192} Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
\textsuperscript{193} Id.
\textsuperscript{194} Legislative and Public Policy Advisory, supra note 86, at 4. "Domestic depository institutions may also have concerns about the proposed regulation's direction that they consider closing correspondent relationships with foreign banks that handle restricted transactions involving U.S. persons even when such transactions are lawful in the foreign jurisdiction where that bank is regulated." Id.
\textsuperscript{195} Cf. id. at 12. "The proposed regulation also risks creating significant tension between domestic and foreign financial institutions, as U.S. institutions must require their foreign counterparts to agree not to process transactions that may be legal in the foreign jurisdiction — and to terminate the relationship if the foreign bank does not comply." Id.
\textsuperscript{196} Id. "The most obvious way would be for a U.S. resident to open a foreign bank account in a jurisdiction where Internet gambling is legal. Such an account could be used for a variety of things, including Internet gambling, as would a normal banking account. At such time as the individual wanted to repatriate the funds, the individual could simply transfer all or part of the money to the U.S. Provided that
UIGEA cannot deter U.S. citizens from utilizing foreign banks to facilitate Internet gambling. With the worldwide growth of Internet gambling, the United States may soon be in a small minority of countries attempting to restrict it.

Ironically, a free-trade dispute between Antigua, a small Caribbean nation, and the United States before the World Trade Organization (WTO) may present a formidable obstacle to enforcing the UIGEA. In 2003, Antigua filed a complaint with the WTO alleging that U.S. federal and state laws constituted an illegal trade restriction that violated the 1994 General Agreement on Trade in Services (GATS) treaty, which regulates trade among members of the WTO. In April of 2005, the WTO ruled that U.S. Internet gambling restrictions were illegal because they ban offshore casino and sports gambling, but allow domestic gambling on horseracing, fantasy sports and lotteries. The United States appealed the WTO's decision, but in March of 2007 (after the UIGEA was passed), the WTO once again ruled against the United States. This time, the three judge panel specifically noted that the UIGEA violated free trade agreements under the GATS treaty.

Antigua has filed a compensatory claim that would impose $3.4 billion in trade sanctions against the United States. Australia, Canada, Costa Rica, India, Japan, Macao, and the twenty-seven nation European Union also filed compensation

the United States resident reported the bank account to appropriate U.S. authorities, there is no federal prohibition on an individual gambler having the account or using it for lawful purposes under the law of the jurisdiction where the account is located.”

197. Id.
198. See Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
199. See Brunker, supra note 172.
204. Id.
claims against the United States.\textsuperscript{206} Experts projected the sum of these claims to be in the $100 billion range.\textsuperscript{207} Because of the significant damage to many European gambling companies, this is the biggest case ever handled by the WTO.\textsuperscript{208} But this amount does not seem to faze U.S. officials.\textsuperscript{209}

The U.S. government has negotiated settlements with several of the aggrieved nations and initiated discussions with others.\textsuperscript{210} Australia has since dropped its claim and the United States settled with Japan for an undisclosed amount.\textsuperscript{211} The European Union settled its claim with the United States in exchange for new trade opportunities in sectors unrelated to Internet gambling.\textsuperscript{212} To avoid future claims, the United States has taken the unprecedented step of removing Internet gambling from its GATS treaty obligations.\textsuperscript{213} Under Article XXI of the GATS treaty, the United States has the right to retroactively modify its obligation under the GATS treaty and negotiate compensation agreements with countries negatively impacted by its decision.\textsuperscript{214} This approach disregards the grievances of many nations around the world and sets a terrible precedent for any nation that is unhappy with a WTO ruling.\textsuperscript{215} “It is almost incomprehensible that the United States would take such an action in the face of an

\begin{itemize}
\item \textsuperscript{206} Id.
\item \textsuperscript{209} See id. “The U.S. brushed off suggestions... that it may have to provide $100 billion in compensation to the European Union and other trading partners because of its restrictions on Internet gambling.” Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{213} Amy Tsui, Bill Legalizing Internet Gambling Could Be Solution to WTO Problem, Panelist Says, BANKING DAILY, Nov. 8, 2007.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} See id.
\end{itemize}
adverse dispute resolution ruling,” said Dr. Errol Cort, Antigua’s Minister for Finance and the Economy.\textsuperscript{216} James Jochum, an attorney and former Bush administration official said, “I am disappointed to see our country lead a degradation of the system [WTO]. The implications are so serious because of the precedent it sets.”\textsuperscript{217} Essentially, the United States, as a linchpin in the legitimacy of the GATS treaty and WTO, has undermined the credibility of the system by changing the rules when the treaty adversely impacts its interests.\textsuperscript{218} Many experts say this opens the door for other WTO members to disregard things like U.S. patent and trademark laws when WTO agreements are not in the best interest of that WTO member’s financial or political goals.\textsuperscript{219} The UIGEA will likely cost the United States billions of dollars in trade sanctions and compensation payments without significantly impacting Internet gambling.\textsuperscript{220} Therefore, Congress should comply with the WTO and repeal the UIGEA, rather than “revise” its commitments under the GATS treaty.\textsuperscript{221}

V. ALTERNATIVE APPROACHES TO INTERNET GAMBLING

The U.S. government is losing its battle against the growth of Internet gambling worldwide.\textsuperscript{222} Internet gambling continues to flourish, despite passage of the UIGEA, convictions of several off-shore organizations under the Wire Act, and non-legislative efforts by banks.\textsuperscript{223} Sebastian Sinclair, an expert on Internet gambling from CCA, equates the anti-gambling laws to the laws of the Prohibition Era.\textsuperscript{224} “Criminalizing drinking, a widely accepted

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Tsui, supra note 213.
\item \textsuperscript{221} Cf. U.S. Has More Time to Resolve WTO Internet Gambling Dispute, supra note 210 (citing the billions of dollars in trade sanctions and compensation claims that the U.S. will potentially pay and discussing alternative legislation that could alleviate this dilemma).
\item \textsuperscript{222} See supra notes 213-20 and accompanying text.
\item \textsuperscript{223} See NAT'L GAMBLING IMPACT STUDY COMM'N, supra note 14.
\item \textsuperscript{224} Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
\end{itemize}
\end{footnotesize}
behavior, created a vast market of thirsty consumers soon supplied by Al Capone and his unlettered but rapidly organizing associates. While it may have been a moral triumph, as public policy, Prohibition was a catastrophe.\textsuperscript{225} Anti-gambling laws, like the laws of the Prohibition Era, target a behavior that is widely undertaken by law-abiding citizens.\textsuperscript{226} These citizens may not think of NCAA basketball brackets or fantasy sports as forms of gambling, but at their core, these activities fit the mold.\textsuperscript{227} Just as Prohibition proved, the will of the people to undertake an often victimless activity is stronger than the government's ability to prevent it.\textsuperscript{228} In the same ways that Prohibition failed, anti-gambling laws will meet the same destiny.\textsuperscript{229} They will unfairly punish a small percentage of the participants at a high cost to the government, and they will not significantly impact the negative aspects of the regulated activity.\textsuperscript{230} So the question remains: what should the U.S. government do to address the gambling industry, and how will this decision impact the financial industry?

To answer this question and others, Representative Shelley Berkley (D-NV) proposed the Internet Gambling Study Act in May of 2007.\textsuperscript{231} This legislation "would provide for a study by the National Academy of Sciences to identify the proper response of the United States to the growth of Internet gambling."\textsuperscript{232} Currently, the bill has sixty-four co-sponsors.\textsuperscript{233}

In 2008, the Treasury and Federal Reserve are scheduled to publish final regulations for the financial industry implementing the UIGEA.\textsuperscript{234} These regulations will require financial institutions

\textsuperscript{225} Id.
\textsuperscript{226} Nat'l Gambling Impact Study Comm'n, supra note 14.
\textsuperscript{228} See Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} Internet Gambling Study Act, H.R. 2140, 110th Cong. (2007).
\textsuperscript{232} American Gaming Association, supra note 4.
\textsuperscript{234} Hansen, supra note 102. "It seems likely that actual implementation of the most influential unenforced law in American history will not happen until mid-2008
to undertake costly process changes to identify and block certain restricted transactions. Financial institutions will also incur the cost of monitoring the functionality of these processes. For fear of facing civil penalties and the associated legal costs, banks will be forced to assemble compliance teams, whose sole function is to ensure the proper functionality of the identification and blocking processes.

And then there is reporting. Presumably, the U.S. government will want to audit financial institutions to ensure compliance with the federal regulations and to gather statistics. Depending on the specific regulations promulgated, financial institutions could bear a significant administrative and financial burden in enforcing the UIGEA.

Ultimately, financial institutions will spend a tremendous amount of money designing, implementing, and complying with UIGEA regulations. But these efforts will not curb Internet gambling because of third-party processors, foreign Internet gambling organizations, fraud, and legitimate use of foreign financial institutions. With all of the existing and potential ways to bypass its goals, the UIGEA is not a viable option for curbing Internet gambling, particularly when considering the burden it places on financial institutions. Therefore, Congress should examine and implement alternative legislation that squarely addresses the problems created by Internet gambling.

A. Explicitly Make Internet Gambling Illegal for U.S. Citizens

Since existing federal laws do not explicitly make Internet gambling illegal for individuals and Congress appears to be

at the very earliest." *Id.*
235. *See supra* Part IV.D.
237. *See id.* at 56,689. The Agencies discuss the ongoing requirement of monitoring transactions and compliance systems. *Id.*
238. *See supra* Part IV.D.
239. *See supra* Part IV.E.
240. *See supra* Part IV.E.
241. *See infra* Part V.A-B.
242. *See supra* Part III. The existing federal laws do not explicitly make Internet
concerned about the social harms of gambling on individual citizens, the most obvious solution to curb Internet gambling would be for Congress to enact legislation that explicitly makes Internet gambling illegal for individuals. Although enforcement efforts could be difficult due to the nature of e-commerce, federal officials have developed methods for enforcing child pornography laws and other laws that ban illegal activities on the Internet. Putting the general public on notice that Internet gambling is illegal and also making a visible enforcement effort could have a dramatic impact on this issue. Similar to the traffic laws, a limited enforcement and the threat of penalties are sufficient to discourage many people from breaking the laws.

Under this approach, Congress could either repeal the UIGEA or leave it in place. If the UIGEA is repealed, the government, not financial institutions, would assume responsibility for enforcement of the anti-gambling laws. If the UIGEA remains, financial institutions would have a clear determination from Congress as to what constitutes illegal Internet gambling. As it stands, financial institutions are forced to make this determination on their own accord. Thus, whether the UIGEA is repealed or remains in effect, a law explicitly prohibiting all Internet gambling would permit financial institutions to focus more of their resources on their own business activities and cease spending their private funds on law enforcement and law enforcement.

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247. See id.
248. Email from Brian F. Frumkin, supra note 244. "Instead of relying on the banks to enforce an unenforceable requirement, it seems to us [Bank of America] that the first step should be to declare these types of transactions illegal." Id.
249. Id.
250. See supra Part IV.D.
In this way, a law explicitly prohibiting Internet gambling and amending or repealing the UIGEA would greatly reduce the impending burden that the UIGEA, in its present state, creates for financial institutions. Furthermore, express prohibition would likely be more effective in curbing Internet gambling than the UIGEA.

B. Legalize, License, and Regulate Internet Gambling

An alternative solution would be for Congress to legalize and regulate Internet gambling. This approach would "allow [Internet gambling organizations] to set up shop in the U.S., contribute to the U.S. economy, be regulated by U.S. markets, and be subject to U.S. courts." To this end, several legislators have proposed alternative solutions to address Internet gambling.

1. The Internet Gambling Regulation and Enforcement Act, Internet Gambling Regulation and Tax Enforcement Act, and Skill Game Protection Act

Congressman Barney Frank (D-MA), Chairman of the House Financial Services Committee, has proposed the Internet Gambling Regulation and Enforcement Act of 2007 to license, regulate, and tax Internet gambling. "It does not repeal the UIGEA, but seeks to create a regulatory structure around the existing laws dealing with gaming." Congressman Frank argues that citizens should have the freedom to make their own decisions whether or not to gamble. By licensing Internet gambling operations, the U.S. government could put processes in place to

251. Mark, supra note 163.
252. See infra Part IV.D.
253. Email from Brian F. Frumkin, supra note 244.
255. Balko, supra note 165.
258. Brown, supra note 254.
prevent underage and compulsive gambling.\footnote{Id.} Also, the government could bring these foreign organizations under the jurisdiction of U.S. laws while reaping the benefits of taxing this $15 billion industry.\footnote{Id.}

Rep. Jim McDermott (D-Wash) followed Congressman Frank by introducing the Internet Gambling Regulation and Tax Enforcement Act of 2007 (IGRTEA) to create a tax mechanism which would establish the licensing and enforcement infrastructure.\footnote{Internet Gambling Regulation and Tax Enforcement Act of 2007, H.R. 2607, 110th Cong. (2007); Bill to Tax Online Poker & Online Gambling Announced by Jim McDermott, POKERPAGES.COM, June 8, 2007, http://www.pokerpages.com/poker-news/news/bill-to-tax-online-poker--online-gambling-announced-by-jim-mcdermott--29763.htm.} Under the taxation bill, the U.S. Treasury would collect a 2% license fee on deposits, and the Internet gambling organizations would be required to withhold income taxes from winnings.\footnote{Id.} Rep. McDermott projects $6 billion to $25 billion in tax revenue for the government in the first five years.\footnote{Id.} Another bill, the Skill Game Protection Act,\footnote{Skill Protection Act, H.R. 2610, 110th Cong. (2007).} proposed by Congressman Robert Wexler (D-Florida) would explicitly exempt certain skill games like poker and bridge from the UIGEA and Wire Act.\footnote{See id.} These bills indicate a growing movement of legislators opposed to the UIGEA and who are considering legalization.\footnote{See supra Part IV.E-F.}

2. Internet Gambling Industry Solutions

With mounting global pressure, the adverse WTO rulings, and the impending failure of the UIGEA, legalization may be the most viable alternative for controlling the negative impacts of gambling.\footnote{See Internet Gambling Regulation and Enforcement Act, H.R. 2046, 110th Cong. (2007).} The Internet gambling industry has proposed a series of safety procedures aimed at reducing underage gambling and...
compulsive gambling.\textsuperscript{268}

To target underage gambling, industry experts advise using the existing infrastructure of government databases in combination with other controls.\textsuperscript{269} For example, Internet gambling sites could validate information from a customer’s credit card information against the Social Security Administration’s database to verify a customer’s age in real-time.\textsuperscript{270} The sites could also require driver’s license information to confirm that the customer is a valid user of the credit card and to provide another verification of the customer’s age.\textsuperscript{271} Age-verification technologies are already utilized in Europe, and there is empirical data to show that the use of these technologies has reduced underage gambling.\textsuperscript{272}

Also, technology is readily available that could mitigate concerns about compulsive gambling.\textsuperscript{273} According to the National Council on Problem Gambling, the nation’s premier compulsive gambling advocate, the Internet is capable of providing compulsive gambling programs that meet or exceed the standards currently in existence.\textsuperscript{274} Surprisingly, GamCare, a UK equivalent of the National Council on Problem Gambling, has found no increase in compulsive gambling as a result of increased access via the Internet.\textsuperscript{275} Technology currently in use is capable of monitoring gambling patterns by consumers and enforcing monetary limitations for a given period of time.\textsuperscript{276} This technology could be


\textsuperscript{269} Id.

\textsuperscript{270} Id.

\textsuperscript{271} Id.

\textsuperscript{272} Id. "‘There is clear evidence that steps taken by regulated Internet gambling operators to ensure the age and identification of every online gambler has gone a long way to minimize the threat of underage gambling in the U.K.,’ said Andrew Poole, managing director for GamCare Trade Services, a U.K. based organization owned by the charity GamCare, which is committed to addressing the social impacts of gambling.” Id.


\textsuperscript{274} Id.

\textsuperscript{275} Id.

\textsuperscript{276} Id.
used to identify and control extraordinary gambling activity based on a consumer's previous gambling history.\textsuperscript{277} The data could also be shared between Internet gambling organizations and with the U.S. government.\textsuperscript{278}

3. Impact of Legalization

Legalizing Internet gambling would have a huge impact on the financial industry.\textsuperscript{279} Bringing this fast-growing industry under the regulation of the U.S. government would allow institutions to profit from a sundry of transaction fees.\textsuperscript{280} Experts estimate that a credit card is used in 90\% of Internet gambling transactions.\textsuperscript{281} Internet gambling operations often incur as much as 7.5\% per transaction in charges and fees from the merchant acquirer,\textsuperscript{282} card network,\textsuperscript{283} and issuing bank.\textsuperscript{284} Conservatively assuming 7\% in fees and charges and a U.S. gambling market of $6 billion,\textsuperscript{285} financial institutions stand to gain about $420 million per year in revenues. Legalization would also mitigate the risk of customers defaulting on money owed and then suing to expunge the debt because it was accrued on an illegal activity, a risk that currently exists for financial institutions.\textsuperscript{286}

Legalization would also present serious financial benefits to

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} See Metropolitan Creditors v. Sadri, 19 Cal. Rptr. 2d 646, 653 (Cal. Ct. App. 1993). In Metropolitan Creditors, the California Court of Appeals upheld the trial court ruling that appellant creditor could not recover gambling debts that appellee had accumulated on his credit card while gambling legally in Nevada. Id. The court held that the enforcement of gambling debts incurred by appellee on his credit card was against the public policy of the state of California. Id.; see also Charles Brundage, Playing for Free? The Legality and Enforceability of On-Line Gambling Debts, 12 PACE INT'L REV. 153, 161-62 (2000).

\textsuperscript{280} Brundage, supra note 279, at 161-62.

\textsuperscript{281} Simpson, supra note 59.

\textsuperscript{282} Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,684 (proposed Oct. 1, 2007) (to be codified at 12 C.F.R. pt. 233). Merchant acquirers are organizations that sign up merchants to accept credit cards and then process their credit card transactions. Id.

\textsuperscript{283} Id. Card networks include Visa, Mastercard and others. Id.

\textsuperscript{284} Simpson, supra note 59. An issuing bank is the bank that guarantees the buyer's payment to the merchant. Id.

\textsuperscript{285} Brundage, supra note 279, at 161-62; see Cholodofsky, supra note 33.

\textsuperscript{286} Brundage, supra note 279, at 161-62.
the U.S. government and citizens via tax revenues.\footnote{287} The Internal Revenue Code already has a section in place to include gambling winnings in an individual's gross income.\footnote{288} Licensing and regulation would give the Internal Revenue Service a mechanism to collect taxes on gambling deposits, gambling withdrawals, or just net winnings.\footnote{289} In any scenario, with the U.S. gambling market currently at $6 billion and growing, there is an opportunity for significant tax revenue.

Legalization would produce a windfall for financial institutions and the U.S. government in taxes, but at what social cost? Anti-gambling advocates argue that these costs include youth gambling, an exacerbation of compulsive gambling, a gateway to other criminal activities, and a negative impact on sports.\footnote{290} However, these negative implications are speculative at best. A 2007 study by the Harvard Medical School’s Division on Addictions found that only 1\% of Internet gamblers exhibited excessive gambling patterns.\footnote{291} Regarding underage gambling, technology is available to control this problem in a more effective manner than pure prohibition.\footnote{292} In the end, the strongest remaining opposition to legalization is a purely moral one.\footnote{293} And as Prohibition proved, moral disdain by a small minority of individuals is not strong enough to control the overwhelming opinion of the masses.\footnote{294} If the masses prevail, there will be a tremendous windfall for financial institutions.\footnote{295} Anti-gambling advocates have presented valid concerns about the dangers of gambling.\footnote{296} But just like the Prohibition era, these dangers are most appropriately addressed through proactive regulation.\footnote{297}

\footnotetext{288}{\textit{Id.}}
\footnotetext{289}{\textit{Id.}}
\footnotetext{290}{\textit{KYL, supra note 24.}}
\footnotetext{291}{Richard A. LaBrie et al., \textit{Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior}, 23 \textit{J. OF GAMBLING STUD.} 1 (2007). This study tracked over 40,000 people who gambled on sports through the Internet. \textit{Id.}}
\footnotetext{292}{Press Release, Safe and Secure Internet Gambling Initiative, \textit{supra} note 268.}
\footnotetext{293}{\textit{See Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).}}
\footnotetext{294}{\textit{See id.}}
\footnotetext{295}{\textit{See supra Part V.B.3.}}
\footnotetext{296}{\textit{KYL, supra note 24.}}
\footnotetext{297}{\textit{Id.}}
Furthermore, there is a significant social cost to prohibiting Internet gambling. Many gambling advocates argue that prohibiting this activity is an unreasonable infringement on personal liberties. These advocates cite the often victimless nature of gambling. Freedom advocates might separate the question of whether gambling is morally acceptable from the question of whether the government should take affirmative action to legislate a moral position on the issue. Although this issue is not analyzed thoroughly in this Note, it bears mention as another viewpoint in the social cost discussion.

The UIGEA will not be effective in curbing Internet gambling and its related social evils. Legalization could better address these evils while providing financial benefits to the U.S. government, citizens, financial services and other related industries. Therefore, Congress should consider controlling Internet gambling by regulating it, rather than squandering government and private resources on fighting a losing battle.

VI. CONCLUSION

Gambling was a morally and socially unpopular activity for many decades in America and many states had laws in place to reflect these opinions. With the advent of the telephone and the growth of interstate gambling, the U.S. government asserted its role in this arena by passing the Wire Act to prohibit the use of phone and other wire communications by individuals “engaged in the business” of gambling. Then came the Internet, which circumvented the restrictions of the Wire Act. Like the telephone, the Internet drastically changed the gambling industry. The Internet allows individuals to instantly connect to

298. Brown, supra note 254.
299. Id.
301. See supra Part IV.D.
302. See supra Part V.B.2.
303. See supra Part IV.E.
304. See NAT'L GAMBLING IMPACT STUDY COMM'N, supra note 14.
306. See Gambling on the Internet, supra note 1 (testimony of Sebastian Sinclair).
307. Id.
casinos and sportsbooks around the world. Now, individuals no longer have to reach out to the underground network of illegal "bookies" to meet their gambling needs because the Internet allows gamblers to easily connect directly to a legitimate business in a place where gambling is legal.\textsuperscript{308}

The federal government, however, continues to seek control of the negative aspects of gambling.\textsuperscript{309} From bankruptcy to underage gambling to the destruction of traditional family life, gambling certainly can contribute to a number of negative behaviors.\textsuperscript{310} In consideration of these risks, the government has stepped up its fight against Internet gambling.\textsuperscript{311} However, instead of prohibiting the act of gambling itself, the government has chosen to focus on the funds needed to make a wager.\textsuperscript{312} As an unfortunate consequence, the financial industry has been saddled with the responsibility of taking on this fight, despite the obvious financial rewards this industry receives from Internet gambling.\textsuperscript{313} Under the UIGEA, financial institutions will be required to identify and block Internet gambling transactions that they determine are illegal.\textsuperscript{314} They will be required to alter their processes, hire staff, and incur significant expenses to prevent an activity that is widely undertaken and socially and morally accepted by a majority of Americans every year.\textsuperscript{315} And even more egregious, the expenses incurred by financial institutions are likely to result in little or no impact on a $15 billion industry that is growing rapidly worldwide.\textsuperscript{316}

When faced with oppressive governmental regulations, innovative businesses often search to find loopholes to maintain

\begin{itemize}
\item 308. See id.
\item 310. See Unlawful Internet Gambling Enforcement Act, §§ 801-03, 120 Stat. at 1952-62.
\item 311. See id. at § 802, 120 Stat. at 1958-59 (codified at 31 U.S.C.S. § 5364 (LexisNexis 2006)).
\item 312. See id.
\item 313. Simpson, supra note 59.
\item 314. § 802, 120 Stat. at 1958-59 (codified at 31 U.S.C.S. §§ 5361-67 (LexisNexis 2006)).
\item 315. Nat'l Gambling Impact Study Comm'n, supra note 14.
\item 316. See Cholodofsky, supra note 33.
\end{itemize}
their vitality. However, innovations are not needed for the Internet gambling industry to survive. There are already a plethora of techniques for circumventing the UIGEA. Unfortunately for the anti-gambling movement, though, it may be impossible to close the loopholes with government regulations, let alone regulations that do not make the underlying activity illegal. Thus, Congress should make a definitive decision on the legality of Internet gambling. Although either decision (complete legalization or complete prohibition) will be better than the current status quo, if Congress' goal is to control the evils of Internet gambling most effectively, Congress should legalize and regulate it. This is the best case scenario for the U.S. government, financial institutions, and, most importantly, the American people. Until Congress makes a definitive decision on the legality of Internet gambling, financial institutions will be burdened with the task of enforcing the UIGEA's unenforceable requirements. Since financial institutions do not have the ability, resources, or inclination to fight the government's losing battle, the UIGEA unfairly and unwisely shifts the burden of law enforcement to the U.S. financial industry. Therefore, Congress should take immediate action to repeal the UIGEA in favor of alternative legislation.

JASON A. MILLER

317. See supra Part IV.C.
318. See supra Part II.
319. See supra Part IV.E.
320. See id.
321. See supra Part V.B.2.
322. See id.
323. See supra Part IV.D.