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# Memery Bank

## Internet Gambling in the US: Current Laws and Future Trends

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Peter Wilson surveys the current landscape of gambling laws in the US, as well as some possible changes on the horizon.

Despite the fact that the US continues to remain outside the mainstream of internet gambling, there is still a lot of activity on several fronts. There are three recognisable themes:

- Ongoing enforcement activity by US authorities;
- New law proposals at both Federal and State level; and
- Challenges to existing laws at both Federal and State level.

Everyone in the igaming sector is familiar with the aggressive attitude of the Department of Justice (“DOJ”) towards internet gambling. Regardless of the legal argument that the main Federal prohibition, the Wire Act 1961, only covers *“the placing of bets or wagers on any sporting event or contest”* the DOJ has always taken the view that all interstate gambling is illegal. Although arrests of foreign executives are far and few between, the consequences are almost always very serious.

One of the longest running cases against Bet on Sports founder, Gary Kaplan, came to some conclusion in November 2009 when he received a prison sentence of 51 months following a plea in August 2009 to Wire Act, conspiracy and racketeering offences. He will also forfeit around \$46.3m. The NASDAQ listed Canadian company Optimal settled with the DOJ for its historic involvement in igaming payment processing for some \$19.2m. Since Party Gaming settled for some \$105m and one of its founders, Anurag Dikshit, forfeited \$300m, one might wonder whether the DOJ sees the Federal Government making more money out of continuing to prohibit igaming than legalising it.

However, the US Joint Committee on Taxation reported in October that the introduction of an online gambling licensing scheme would reap in the order of \$42 billion for the Treasury over 10 years. Clearly, there is a better return from legalising and taxing igaming than continuing to (try) to ban it. This was the line taken by Barney Frank, the Chair of the House of Representatives Financial Services Committee, when he introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act (“the IG Act”) in May 2009, along with Congressman Jim McDermott’s Internet Gambling Regulation and Tax Enforcement Act of 2009 (“the IG Tax Act”). The IG Act is seen as having more chance of success than previous attempts to legalise online gambling as, amongst other things, it excludes betting on professional or amateur sports thereby aiming to placate



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the powerful sports league lobby. It also gives individual States a 90 day period in which to decide whether they want to opt out of the proposed Federal licensing scheme. The IG Tax Act will tax all funds deposited by customers during the preceding month in their online gambling account at the rate of 2% thereby raising easy revenue for the Federal Government without having to take more unpopular measures of increasing personal income or corporate taxes.

The IG Act provides that applicants' gaming licences will have to undergo background checks to establish that an applicant is *"a person whose prior activities, reputation, habits, and associations do not – (i) pose a threat to the public interest ....or (ii) create or enhance the dangers of unsuitable, unfair or illegal practices, methods, and activities in the conduct of the licensed activities ..."*

People who would be considered unsuitable for licensing include anyone who *"is delinquent in filing any applicable Federal or State tax returns or in the payment of any taxes, penalties, additions to tax, or interest owed to a State or the United States."*

Therefore, those companies that have taken bets from US residents in the past may find themselves deemed unsuitable due to their prior activities in breach of US law and/or their non payment of US taxes on those bets. It may be that the existing offline operators in the US have the best shot at obtaining the new licences should the IG Act or a similar scheme ever become law. Nevada casino operators might lack the expertise and know how required to succeed in the highly specialist world of internet gambling. That is partly why the recent deal between Harrah's Interactive and 888.com's B2B provider, Dragonfish, created so much interest in the industry. Perhaps it is a precursor of what is to come as US operators take an increasing interest and involvement in the European gaming market in preparation for the eventual reopening of the US gaming market.

It is still early days though and whilst the IG Act continues to gain support, there is a long way to go before anyone can really predict with anything near certainty if, and when, interstate gaming or sports betting will become regulated in the US (some existing interstate horse racing and second draws in lotteries are operated already).

In the meantime, at individual State level, there are ongoing proposals in California to licence intrastate poker. Following a study bill, one bill that was defeated and another that was withdrawn, supporters of the licensing of poker are still looking for a congressional sponsor and a way to engage the support of the powerful tribal gaming lobby. There may be a committee hearing on the issue in the early part of this year but there is no definite sign of a new law in the near future.

There were high hopes that Florida was moving towards the licensing of intrastate poker. That looks considerably less likely now following a study report published in late November 2009. The report weighed up the pros and cons of maintaining the status quo, adopting laws to expressly prohibit Internet poker, and introduces an intrastate licensing scheme. Regarding the latter, there is concern that any scheme might violate federal law, would increase regulatory costs, affect the state's gambling agree-

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ment with the Seminole Tribe and could increase problem gambling. There wasn't a great deal said on the positive side. Whilst it was recognized that it could improve player protection and raise tax, the report said only tentatively that a state poker licensing scheme "*could potentially increase state revenues, but currently there are no objective estimates of fiscal impact.*" It's hardly an endorsement of the financial benefits of licensing, which seems strange considering Florida has a huge budget deficit.

Perhaps the most promising development at State level was the new bill introduced last week by New Jersey Senator Raymond Lesniak, that would permit existing land based casinos licensed in New Jersey to offer internet gaming on an intra state basis. If it is signed by the new Governor, the Lesniak bill would amend the 1977 Casino Control Act to allow roulette, poker, baccarat, blackjack, slot machines and other existing casino games to be offered over the internet.

The casinos would be able to offer the new internet gaming only to residents of New Jersey and wagers would be deemed placed in Atlantic City. The bill would not affect existing Federal law that regulates inter state gambling such as the Wire Act or UIGEA.

Casinos that wish to offer their games online would have to apply for a internet wagering permit from the Casino Control Commission; which may establish a new Division of Internet Wagering. There would be an application fee of not less than \$200,000, an annual renewal of not less than \$100,000 and an additional annual payment of another \$100,000 to the State General Fund for use in prevent and treat compulsive gambling. The tax on gross internet wagering revenues would be 20%.

Only casinos that have land based licences in New Jersey could apply and they would have to go through a rigorous process involving submitting a detailed description of their systems of internal procedures, administrative and accounting controls for the internet wagering. Their servers would have to be located within Atlantic County and the software may have to be tested to ensure compliance with technical standards that would be set.

In essence, it's all familiar stuff for any operator in Western Europe that has applied for a licence in Britain, Malta or one of the white listed territories. That means the skills and experience of those who have been through the process could be very much in demand if this (or for that matter any other internet gambling bill in the US) makes it into law.

It remains to be seen whether the Lesniak bill will make it into law but if so it will obviously be a boost for the hard pressed Atlantic City casinos. They will be able to market their casino premises on the internet and offer New Jersey residents incentives to visit. They may also be allowed to enter into deals with race tracks to install terminals to allow them to play casino games remotely at the track.

Of course, there have also been moves at State level to ban igaming and the strangest case in the last year or so was the order of the Kentucky District Court obtained by Governor Steve Beshar in September 2008 to



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seize 141 domain names. Although the order was predictably overturned by the Appeals Court in January 2009, the issue is not quite dead as the Governor appealed to the Kentucky Supreme Court for recognition of the legality of the seizure. Opposing the appeal at a hearing in October 2009 was the Interactive Media Entertainment and Gaming Association (iMEGA), the Interactive Gaming Council and one of the bookmakers affected, Sportsbook.com. Publication of the judgement is pending, although it is hard to see how the Governor could succeed, so defective was the seizure order in the first place.

One development that is potentially uncomfortable for some is a motion issued by the Governor's attorneys to add more names to the original suit. It says, "... *the owners and operators of the gambling enterprises are located offshore in an attempt to avoid jurisdiction and take great pains to remain anonymous and to conceal their involvement in the enterprise ...the Commonwealth has learned the identity of certain entities and individuals involved in internet gambling operations, some of whom are US citizens.*" The motion is due to be heard on or shortly after 20 January 2010 and, whether it is successful or not, it is unlikely to breathe any new life into the Kentucky action as a whole.

iMEGA has been busy elsewhere challenging the restrictive anti-gambling laws. It has issued a civil suit in the New Jersey District Court to challenge the Professional and Amateur Sports Protection Act 1991 that prohibits State regulated or sponsored betting on amateur or professional sports (excluding sports betting that was already existing in the States of Nevada, Delaware, Montana and Oregon). Whilst the case is still at an early stage, there was a positive development on 2 November 2009 when the then Governor of New Jersey, Jon Corzine, succeeded in his application to be joined as a Plaintiff in the face of opposition by the Defendant, Eric Holder, the Attorney General.

iMEGA has had less success with its complaint that the Unlawful Internet Gambling Enforcement Act 2006 ("UIGEA") is unconstitutional and violates the rights of each State to determine its own laws on gambling. In September 2009 the Appeals Court in Philadelphia rejected iMEGA's arguments but helpfully restated the principle of State primacy in matters of gambling when Judge Dolores Sloviter said, "*Whether the transaction... constitutes unlawful Internet gambling turns on how the law of the state from which the bettor initiates the bet would treat that bet, i.e. if it is illegal under that state's law, it constitutes 'unlawful Internet gambling' under the Act.*"

Although UIGEA was passed in October 2006 by the Bush administration, it was only on 1 December 2009 that the regulations requiring financial transaction providers to identify and block transactions that they suspect are related to online gambling were due to take effect. Of course, UIGEA had its greatest impact immediately after it was passed when the larger banks and gambling sites effectively enforced its provisions themselves as they pulled out of the US market.

The regulations are problematic to enforce as, for a start, they fail to define what specifically constitutes an unlawful internet gambling transaction. There is also the problem of trying to distinguish between those

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internet transactions allowed by UIGEA (e.g. as permitted by the Interstate Horseracing Act) and those that are prohibited.

After hearing objections, the US Treasury once again postponed the regulations; this time until 1 June 2010. Banks and other financial institutions will still face huge compliance costs (possibly exceeding \$100m in the first year) as and when they do take effect.

To date, US residents have not ceased gambling with internet operators and a consequence of the regulations will probably be to drive even more igaming websites to operate “under the wire”. Of course there are some very reputable US facing operators but there are also many others that are not. Without adequate regulation in the US, its citizens may end up risking their money with sites with less transparency, accountability and regulation than ever before.

### About the Author

*Peter Wilson is a partner at Memery Crystal specialising in gambling and business investigations. His gambling practice has built up over 20 years expanding from advising UK land based businesses to an international igaming practice with clients in over a dozen jurisdictions. Peter is known for his comprehensive industry knowledge and sensible, practical advice. He has been recognised as a leading individual in the area of gaming law by both Chambers UK and The Legal 500.*

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