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Proposal: Prohibition on Funding of Unlawful Internet Gambling

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December 10, 2007 Jennifer J. Johnson Department of the Treasury Secretary Office of Critical Infrastructure Board of Governors of the Federal Protection and Compliance Policy Reserve System Room 1327 20th St. & Constitution Avenue, NW Main Treasury Building Washington, DC 20551 1500 Pennsylvania Ave., NW Washington, DC 20220 Re: FRB Docket No. R-1298; Treasury Docket No. DO-2007-0015; Prohibition on Funding of Unlawful Internet Gambling; 72 Federal Register 56680; October 4, 2007 Ladies and Gentlemen: I am writing to express my concerns over the regulations presently proposed under the Unlawful Internet Gambling Enforcement Act. As an overview, it appears to me that these proposed regulations will have far more effect at deterring legal internet gaming than at stopping unlawful internet gambling. They are therefore not in accord with congressional intent and in serious need of further work. Please note that I have distinguished the words "gaming" and "gambling" in the above paragraph. I have very little interest in gambling. Indeed, other than the occasional Las Vegas vacation, I have no interest in gambling at all. For the purposes of this letter I wholly accept the will of Congress as expressed in the UIGEA to hinder monetary transfers for unlawful internet gambling. But nowhere in the UIGEA is the will expressed that it is necessary or desirable to sacrifice America's internet gaming enthusiasts in order to more effectively deter America's internet gambling enthusiasts. Indeed, it would appear that the will of Congress was exactly the opposite. In calling for regulations to enforce the act, one requirement is to "ensure that transactions in connections with any activity excluded from the definition of unlawful internet gambling in subparagraphs (B), (C) or (D)(i) of section 5362(10) are not blocked or otherwise prevented or prohibited by the prescribed regulations." (page 233 of the legislation, lines 13-18). It is the refusal of the regulations as currently proposed to make any provision for such concern that disturbs me greatly and makes the regulations both a

mockery of congressional intent and an abrogation of executive responsibility. I have been an enthusiast of games of skill all my life. From Checkers to Chess, from Bridge to Poker, from computer games to complex military simulations, I have found the playing of competitive games of skill a satisfying and enriching endeavor. With the advent of the internet, I have found a world of opportunity for game playing, against people from all across the globe, while surrounded by my family in the comfort of my own home. The failure of the regulations to distinguish between lawful skill gaming and unlawful gambling now threatens to end this benign and perfectly legal intellectual pastime of mine. The card game of Poker is a good example of the issue. In researching the legality of playing online poker I discovered that the Federal Courts seem convinced that online poker does not violate the Federal Wire act (see, e.g., *In re MasterCard Int'l, et al.*, 132 F. Supp. 2d 468, (E.D. La. 2001), upheld on appeal by the Fifth Circuit – 2002 C05 518 (USCA5, 2002)). Thus the only way online poker could be illegal would be if it violates state law. The law in my state of New Hampshire defines “gambling” as risking anything of value “on a future contingent event not under one’s control or influence...” NH RSA 647:2, II, (d). Some unfamiliar with the game think this applies to poker because a player cannot influence the cards. The problem with that reasoning, though, is that **THE CARDS DO NOT ALWAYS OR ALONE DECIDE THE WINNER**. In poker, as those familiar know, its not the best hand that wins, its the best hand of those left at the end of the betting, and if only one is left at any time he or she wins regardless of the cards. So while the players may not influence what the next card is, the players certainly and undeniably influence (through betting, raising and folding) who is there at the end to see the cards, and whether the cards are seen at all. **POKER, THEREFORE, IS NOT GAMBLING UNDER NEW HAMPSHIRE LAW**. (See, also: Opinion of the Justices, 73 NH 625 (1906) (distinguishing, under old law, wagering amongst players in a contest, and wagering on the contests of others, finding only the latter to be “gambling”). On the other hand, betting on someone else’s sporting activity, a game of chance like roulette, or playing a slot machine, is certainly illegal under N.H. law, and those transactions should be blocked. I believe it is your responsibility to make this distinction clear to the financial institutions. Now, of course, other states have different definitions of gambling, (some other states specifically prohibit or allow poker, for example). Until the UIGEA we in New Hampshire could easily ignore the laws of other states, and rightly choose to only abide by our own. If the regulations are adopted as written, that will almost certainly cease. This is so because the UIGEA regulations as proposed fail to include any specific definition of what is and what is not “unlawful internet gambling.” At the same time the regulations have a specific exemption for financial institutions to prevent them from consequences for blocking legal internet gaming, and specify penalties for allowing unlawful internet gambling. In the regulations themselves, the writers note the extreme difficulty of defining “unlawful internet gambling” due to the open questions regarding state laws and the specific activity they may or may not cover. Obviously, if the regulation writers believe its too difficult to specifically define what is or is not “unlawful internet gambling” how can anyone reasonably expect the financial institutions to do it? In accord, The Center for Regulatory Effectiveness has recently issued an opinion indicating that such an endeavor is well nigh impossible for small to medium size financial institution and exceptionally costly for the larger ones. So what will the financial institutions do if the current law and regulations are not changed? Obviously they have every incentive to block ANY transaction that might even remotely be labeled “unlawful internet gambling” and that will almost certainly include blocking transactions to any of the skill

game internet sites that I and thousands of others enjoy playing legally on from the state of New Hampshire. I truly doubt any amount of writing, explaining and legal reasoning will convince any financial institution to leave their safe haven and venture into continuing to fund playing for residents of my state just because I, even as a New Hampshire lawyer, can present them with the proof that funding of play at Bridge sites, Chess sites, Wargaming sites, and, yes, Poker sites, does not violate any law. The inescapable conclusion is that the proposed regulations' failure to do the hard work and complete a substantive list of what is and what is not a prohibited transaction will defy the Congress' intent and lead directly to the stopping of thousands if not millions of lawful internet gaming transactions. All to the detriment of lawful individual players and legitimate businesses. This must not stand. Although time consuming and difficult, it is certainly not impossible to do with all 50 states what I have done with New Hampshire; namely determine what is lawful and what is not. This is the task Congress imposed, and this is the task ignored in the current proposed regulations. I ask you to rescind the proposed regulations and issue effective regulations which identify the illegal forms of gambling, game by game and state by state. Only in that way can the payment systems and participants implement the polices and procedures required by the Act without inadvertently and egregiously interfering with entirely legal activities. Patrick Fleming Portsmouth, NH