



The Interactive Media Entertainment & Gaming Association

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December 12, 2007

Ms. Jennifer J. Johnson,
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Department of the Treasury,
Office of Critical Infrastructure Protection and
Compliance Policy
Room 1327
Main Treasury Building
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Federal Reserve Docket Number R-1298; Treasury Docket Number: Treas-DO-2007-0015

Dear Agency Officials:

The Interactive Media Entertainment & Gaming Association (iMEGA) is a trade association representing entities and individuals invested in the continued growth of the Internet and of the interactive media. We view the Internet as an indispensable engine for economic prosperity and social justice. Furthermore, we adhere to the proposition that the inalienable rights that each of us holds under the Constitution to freedom of speech, association, and private conduct should not—and cannot—be diluted in any way simply because an individual chooses to exercise these rights while employing the emerging medium of the Internet. These “Digital Civil Rights” do, in our view, serve as the cornerstone for sustaining freedom and building wealth in a globalized economy.

Accordingly, we must lodge the strongest possible objections to both the principles and details of the regulations proposed by your respective Agencies pursuant to the Unlawful Internet Gaming Enforcement Act (UIGEA). These regulations would, if implemented (and do, even in proposed form), exert a harshly chilling effect on innovation surrounding the Internet. What is more, by imposing unprecedented burdens on the intricate system of financial transactions and

payment system instrumentalities--which has up until now been universally recognized as being inherently content-neutral--these proposed regulations run the grave risk of sharply stifling the growth of electronic commerce.

iMEGA recognizes that immense political and ideological pressures were brought to bear upon your respective Agencies during the process of drafting regulations intended to enforce a statutory enactment that is as deeply flawed and wholly-misdirected as is the UIGEA. We are, nonetheless, profoundly troubled by the Agencies' refusal to define just what an "unlawful gambling transaction" is and to, instead, delegate this determination to be made on an *ad hoc* basis by an entity or person having a "customer relationship" with an Internet gaming concern.

Given the harsh civil and criminal sanctions facing any market participant falling afoul of these proposed rules, the natural course of action for a financial intermediary--particularly a smaller entity without a corporate legal department or sophisticated outside counsel to guide it--will be to deem every transaction submitted by an Internet gaming concern to be an "unlawful" one. Thus, as a direct and proximate consequence, the proposed regulations will have accomplished by *de facto* means a blanket prohibition on Internet gaming for which no political consensus exists-or has ever existed--in the Congress. Far worse, however, is the deep chill that such action places upon technological innovation and the principles of financial transparency.

Moreover, it is from just such innovation that have emerged--in the form of electronic filtering and financial vectoring--the tools necessary to ameliorate the social ills ostensibly serving to motivate the proponents of the UIGEA. It is, indeed, ironic, then, that the very groups that the UIGEA was purportedly intended to protect--such as children and individuals with addictive disorders--may well end up being made worse off by its implementation.

We, therefore, offer the following comments and request that your Agencies reconsider these proposed regulations in an attempt to salvage what is undoubtedly a wholly-untenable circumstance. More importantly, we implore the Congress to embark on a bipartisan effort to come to terms with the emerging principles of "Digital Civil Rights" and to enact legislation just as overarching and as transcendent as was the 1964 Civil Rights Act that will guaranty these rights for all Americans here in the Twenty-First Century.

Sincerely,

THE INTERACTIVE MEDIA ENTERTAINMENT & GAMING ASSOCIATION ¹

Edward James Leyden

Edward J. Leyden,
President

¹ Please note that iMEGA is the lead plaintiff in *iMEGA v. Gonzales, et al.*, 3:07-cv-02625-MLC-TJB, in the United States District Court for the District of New Jersey, which challenges, among other things, the constitutionality of the Unlawful Internet Gaming Enforcement Act and thus the validity of any regulations promulgated thereunder.

1. THE REGULATIONS WERE NOT PROMULGATED
WITHIN THE TWO HUNDRED SEVENTY (270) DAY
PERIOD REQUIRED BY STATUTE AND CONTAIN NO
EXTENSION OR RATIONALE FOR LATE PROMULGATION
IN VIOLATION OF THE A.P.A.

With all due respect to the agencies' rulemaking duties in this complex field, the regulations fail to enunciate a reason for failing to meet the clear requirement of the UIGEA to promulgate the rules. The UIGEA mandated promulgation of the rules within two hundred seventy (270) days of the effective date of the UIGEA.² 31 U.S.C. § 5364. Where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, the late promulgation should also be evaluated by the nature and extent of the interests prejudiced by delay.³

The interests represented by iMEGA have been severely damaged, with an international economic engine brought to its knees, by the delays in this matter. The proposed six (6) month delayed effectiveness of the rules following final adoption after the payment system industry adopts self policing regulations will deal a fatal blow to industries which may, in fact, be specifically exempt from the UIGEA's ambit.

For example, a sample stock quotation on September 5, 2007 from Reuters [<http://www.reuters.com>] on the Internet for PartyGaming, Ltd., a British Internet Gambling company, shows the impact that the UIGEA has had on the industry. **See Table One.** The value clearly

² 31 U.S.C. § 5364.

³ *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77-78 (D.C.Cir.1984).

tumbled from a high of approximately \$2.25 per share in early October 2006, on the eve of adoption of the UIGEA, to a present low of \$0.59 per share. Clearly, the value of its shares are directly related to the proscription of use of payment system instruments which would allow it to function. Most likely this real world demonstration of direct economic loss will continue across the Internet Gambling industry as well as related industries, including payment instrument systems which generate income on each transaction.

This incidental effect is a direct result of the lack of promulgated regulations, as well as the chilling effect of the UIGEA on the Internet Gambling industry. The proposed regulations' intentional regulatory intent not to establish clear guidelines for legal transactions appears to iMEGA to violate the UIGEA's express requirement to actually define transactions which are legal under the UIGEA.⁴ This is because the proposed regulations do not address the statutory requirement to prevent "overblocking" which is set forth in the regulations themselves.⁵ This point is more fully developed below in Points 2 and 3. However, here, iMEGA submits that it could detail innumerable instances where merely the existence of restrictions without the mandated exceptions for legal transactions has chilled the payment instrument system providers, whether ACH, ODFI, ADFI or card

⁴ 31 U.S.C. § 5364(B)(4).

⁵ Proposed regulations, § 5 and footnote 14.

TABLE ONE

Partygaming Plc PYGMF.PK (OTC)

Sector: Industry: [View PYGMF.PK on other exchanges](#)

Sector: Industry: [View PYGMF.PK on other exchanges](#)

As of 11:00 PM EST

\$.57 USD

Price Change

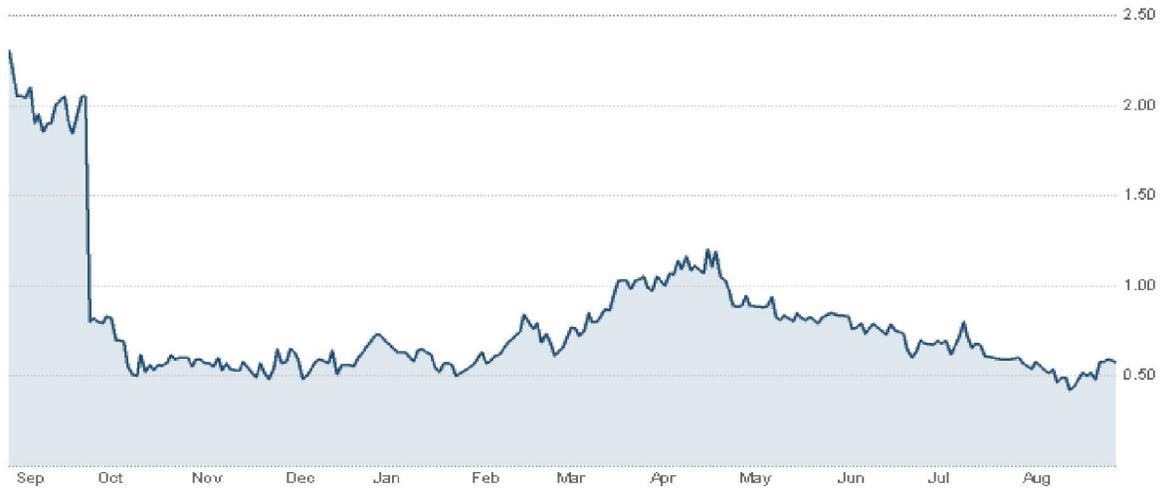
0.00

Percent Change

0.00%

[Independent Research](#) [Broker Research](#)

Today 5 Day 10 Day 1 Month 6 Month 1 Year 3 Year 5 Year



system, into refusing to accept transactions because there are no guidelines for exempting "legal" transactions yet.⁶

For instance, Giro Bank, one of two (2) online gambling friendly banks in Curacao, has received a letter from its corresponding bank in the United States advising that Giro Bank must either stop doing gaming business or lose the corresponding relationship. VIP.com and PinnacleSports.com are two (2) major Internet Gambling operations doing business from Curacao. PinnacleSports.com has stopped taking bets completely from US customers and has not been able to pay all its agents and/or affiliates residing in the States. VIP.com has stopped accepting new customers from both the US and Canada.⁷

Further, the United States recently subpoenaed information from financial institutions such as HSBC, Credit Suisse and Deutsche Bank, which underwrote initial public offerings of offshore Internet Casinos.⁸ That article also reported the cessation of acceptance of Internet bets from the United States by BetonSports.com, a sports wagering company, "crippling its business." However, domestic gross operating profits, the most widely accepted measure of profitability in the gambling

⁶ Bunnam, Srephichet, *Pirates of the Caribbean; Offshore Gambling Sites Cursed by the Unlawful Internet Gambling Enforcement Act*, 30 Hastings Comm. & Ent. L.J. 139, 165-169 (Fall 2007).

⁷ Costigan, Christopher; *Online Gambling Friendly Bank in Curacao Warned*, Gambling911.com, March 28, 2007.

⁸ New York Times On-Line, *Gambling Subpoenas on Wall Street*, January 22, 2007.

industry, were five percent (5%) percent higher on average among all licensed gambling casinos on revenues of nearly \$1.4 billion, up from \$1.3 billion in 2005.⁹

Just these few examples out of many clearly establish that there has been a chilling effect on legal, authorized Internet Gambling transactions as the various financial industries involved in this regulatory scheme try to react to the legislation. The UIGEA does not impose a total prohibitory ban on activity as was seen in the days of Prohibition, or more currently in the prohibition of the use or sale of marijuana even as the tide of public opinion turns more and more to the legalization of marijuana for medical purposes only.¹⁰ Here, the activities of iMEGA's members and affiliates was, is, and remains legal under the exemptions provided for in both statutory and regulatory schemes. However, the failure to promulgate regulations in a timely fashion without leave or justification continues to damage the Internet Gambling sector of the regulated industry.

⁹The Associated Press, April 4, 2007.

¹⁰ *Raich v. Gonzales*, --- F.3d ----, 2007 WL 754759 (Ninth Cir. 2007), 07 Cal. Daily Op. Serv. 2698

**2. THE PROPOSED REGULATIONS FAIL TO ADDRESS THE
LEGALITY OF USING PAYMENT SYSTEM INSTRUMENTS FOR
INTERNET GAMBLING WAGERS UNDER CASE LAW DECISIONS.**

iMEGA objects to the regulations' scope and approach as defined by the joint promulgating agencies. The regulations, in their definitional section, make several assumptions which are incorrect under present law. The agency notes that "[t]he Department of Justice has consistently taken the position that the interstate transmission of bets and wagers, including bets and wagers on horse races, violates Federal law." § II(A) at page 6. Such may be true, but the Fifth Circuit Court of Appeals has determined that interstate transmission of bets and wagers, for purposes of Internet gambling, by the use of payment instrument systems does not violate the Wire Act, 18 U.S.C. § 1804, *et seq.*¹¹ This inconsistency, which iMEGA recognizes is forced upon the regulating agency by the inconsistencies of the legislation itself, was not addressed in the legislation because the UIGEA does not amend the Wire Act and did not change any language to include or exclude the use of payment system instruments for Internet Gambling which was in fact validated in *In Re MasterCard* under the Wire Act itself.¹² In fact, the proposed regulations note that:

¹¹ *In Re MasterCard Litigation*, 313 F.3d 257 (Fifth Cir. 2002). The Fifth Circuit Court of Appeals decision was not appealed to the United States Supreme Court.

¹² The only statutory enactments which are deemed to be amended and/or incorporated by reference in the UIGEA do not amend or incorporate Wire Act standards or prohibitions.

The Act focuses on payment transactions and relies on prohibitions on gambling contained in other statutes under the jurisdiction of other agencies. Further, application of some of the terms used in the Act may depend significantly on the facts of specific transactions and could vary according to the location of the particular parties to the transaction or based on other factors unique to an individual transaction.

§ II.A. at 56682. Not only is this position incorrect under *In Re MasterCard's* holding that payment system instruments themselves do not violate gambling laws, this position shows that the proposed regulations avoid the very statutory duty they are required to fulfill: to define legal and illegal transactions. The supposed difficulty in identifying legal and illegal transactions noted in the regulations belies the point that such identification procedures are required by law. iMEGA therefore requests the joint promulgating agencies reconsider the regulations due to this singular failure to address the critical factor of legality of the transaction and the recognition that rules cannot be fashioned to fit every one of the billions of transactions which occur in Internet Gambling.

This designed, deliberate omission of the regulations is reflected elsewhere in the regulations. "The Agencies are

The only statutory provisions which are incorporated into the UIGEA are exempted definitions in the Securities Exchange Act of 1934, 15 U.S.C.A. § 78bb(a), 78c(a)(10) and(47); the Commodity Exchange Act, 7 U.S.C.A. § 1 and 16(e); the Communications Act of 1934, 47 U.S.C.A. § 230(f); the Interstate Horseracing Act of 1978, 15 U.S.C.A. § 3001 et seq.; the Gambling Devices Transportation Act, 15 U.S.C.A. § 1171 et seq.; the Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 et seq.; the Truth in Lending Act, 15 U.S.C.A. § 1602; the Electronic Fund Transfer Act, 15 U.S.C.A. § 1693a; and the Federal Deposit Insurance Act, 12 U.S.C.A. § 1813(c);the Federal Credit Union Act, 12 U.S.C.A. § 1752. 31 U.S.C. § 5362 (1-11).

proposing to exempt all participants in the ACH systems, check collection systems, and wire transfer systems, except for the participant that possesses the customer relationship with the Internet gambling business.”¹³ Thus, the regulations avoid the obligation to identify illegal and legal transactions by focusing on the nature of the financial transaction rather than the statutory mandate to concentrate on transactions which are illegal on a state by state basis.

For instance, in designing exceptions to the proposed regulations for participants in the payment instrument system, the proposed regulations cover participants who have, amongst the industry itself, developed identifying “merchant codes” which identify the nature of the business of the payee and whether the transfer was initiated on the Internet. *Id.* Thus, these participants can identify whether the recipient or payee of the transaction is an Internet Gambling business and whether the transaction was made, in whole or part, on the Internet.

However, the “merchant code” does not identify whether the transaction is illegal in the jurisdiction where the Automated Clearing House (referred to in the proposed regulations and hereinafter as the “ACH”), the originating depository financial institution (referred to in the proposed regulations and hereinafter as the “ODFI”) or the receiving depository financial

¹³Regulations, SII.A. at 55585.

institution (referred to in the proposed regulations and hereinafter as the "RDFI") are located. Nor does it identify whether the transaction is legal or illegal in the location of the payee, transmitting financial agent or payor.

Further, the approach of the proposed regulations to exempt all participants in the ACH systems, check collection systems and wire transfer systems, based upon whether that participant has a customer relationship with an Internet Gambling business, does not define whether that business relationship is legal or illegal. Again, by failing to provide a regulatory scheme whereby the required statutory identification of a legally conducted gambling transaction is able to be made, the identification of the nature of the business will automatically criminalize and/or prevent legitimate Internet Gambling transactions, leaving the third party financial institution to make its own improper or inappropriate decisions because they have no guidance. The sole criteria for this exemption is a lack of direct "personal" contact with an Internet Gambling business. Yet such systems may originate, transmit or receive transactions with a merchant code identifying the transaction's origin or destination, or may in fact process such a transaction for payment at another destination. Further, transactions may ultimately be received by the gambler's RDFI without ever being identified as a gambling transaction, much less an Internet

Gambling transaction, be it the posting of winnings or the debit of losses. This lack of direct involvement in a transaction was the basis for the court to determine that all payment system instruments for purposes of Internet Gambling in *In Re MasterCard Litigation*, 313 F.3d 257 (Fifth Cir. 2002) were legal transactions under federal laws, after reviewing a number of state-based postulations which were also rejected.

Gamblers can purchase the credits through online transactions or by authorizing a purchase via a telephone call. Gamblers also can purchase the credits via personal check or money order using the mails.¹⁴

Therefore the designation of a system which identifies transactions by merchant code has a two-fold defect:

- (1) it does not identify the legality of the transaction where it was initiated or consummated; and,
- (2) it does not identify the payee as operating in a legal or illegal manner where it is located.

In this light, Congress recognized the primacy of the issue of legality in the regulatory scheme of the UIGEA. When considering the UIGEA for passage in its current form, Congress clearly held as a primary policy consideration that:

- (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; and

¹⁴ *Id.* at 260, footnote 2.

(2) the Federal government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.¹⁵

The Federal courts continue to recognize the "content neutral" nature of payment system instruments in Internet transactions since *In Re MasterCard*. The Federal Ninth Circuit Court of Appeals recently held that a payment instrument system does not violate State or Federal copyright law.¹⁶ In that case, Perfect 10 argued that Visa, MasterCard and financial institutions which issued their own credit cards aided and abetted copyright laws by processing payments after being notified that Perfect 10 alleged copyright infringement against companies for which the payment instruments processed payments. The payment system instrument companies did not materially contribute to the infringement because they had no direct connection to that infringement, nor were the payment systems used to locate the infringing images. The court dismissed the case because the services provided by the credit card companies did not aid in the commission of the offenses under Federal or State law.¹⁷

¹⁵ 109th Congress, 2d Session, House of Representatives, Rept. 109-412, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006, Part 2, May 26, 2006, Part 4.

¹⁶ *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788 (9th Cir. 2007).

¹⁷ *Id.* at 794. "We evaluate Perfect 10's claims with an awareness that credit cards serve as the primary engine of electronic commerce and that Congress has determined it to be the "policy of the United States-(1) to promote the continued development of the

Thus the regulating agencies in this matter should draw the regulations in accordance with the status of the law, which clearly militates against the thrust of these regulations. The regulations in their present form do not craft the correct exemptions and/or inclusions under the UIGEA, because they concentrate on an assumed degree of separation between ACH, ODFI and RDFI which may or may not exist in fact and which varies from payment system to payment system. Moreover, the proposed regulations deliberately do not provide for the prevention of "overblocking" by failing to consider the legality of the transaction in any and all jurisdictions - a requirement imposed by the UIGEA itself.¹⁸

The UIGEA, 31 U.S.C. § 5264 provides that:

In prescribing regulations under subsection (a), the Secretary and the Board of Governors of the Federal Reserve System shall--

- (4) ensure that transactions in connection with any activity excluded from the definition of unlawful internet gambling in subparagraph (B), (C), or (D)(i) of section 5362(10) are not blocked or otherwise prevented or prohibited by the prescribed regulations.

The proposed regulations presume that the nature of a transaction cannot be identified, particularly if no merchant

Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §§ 230(b)(1), (2).

¹⁸ See footnote 4.

code accompanies the transaction. This is absolutely and unequivocally false. The transaction can be identified at its origination in the Internet Gambling casino based on the URL of the Internet Gambling Casino. In fact, the General Accounting Office of the United States Government conducted a survey of Internet Gambling in 2002 for the Congress to use in consideration of regulation of Internet Gambling!¹⁹ The express intent of the regulations as promulgated by the agencies in this matter is to deliberately not address this significant requirement of legality. Therefore, iMEGA submits, the regulations need to be reviewed, revised and reissued correctly.

¹⁹ United States General Accounting Office, *Internet Gambling: An Overview of the Issues*, GAO 03-89, December 2002. The report is appended as Appendix II.

3. THE PROPOSED REGULATIONS DO NOT PROVIDE
FOR FILTERING OF PERMISSIBLE OR IMPERMISSIBLE
TRANSACTIONS AT THE POINT SOURCE OF THE
GAMBLING TRANSACTION, THE INTERNET CASINO OR
THE INDIVIDUAL GAMBLER, WHICH IS THE MOST
LOGICAL POINT FOR EVALUATION OF THE
LEGALITY OF THE TRANSACTION.

The advent of the Internet presents a new and unique challenge for regulators. Unlike traditional casinos, Internet gambling sites cannot be shut down by merely chaining the doors. . . . In fact, unlike gaming of the past, Internet gambling does not even need to be hosted in the state or the country where the player logs in. The fact that Internet gambling knows no boundaries adds an additional layer of complexity that distinguishes it from its predecessors.²⁰

Schwartz, Joel Michael, *The Internet Gambling Fallacy Craps Out*, 14 *Berkeley Technology Law Journal* 1021, 1032-1037 (footnote deleted) (1999). This basic fact which pervades the use of the Internet for virtually any activity in the year 2007 has not escaped the Industry's attention. In the context of regulation of Internet transactions, the preferred method of regulation of content based activities is not external regulation - it is self regulation through filtering. The Government Accounting Office prepared a study for Congress during consideration of Internet Gambling regulation under the *Leach-LaFalce Internet Gambling Enforcement Act*, H.R. 556-2002 in 2002. That report advised Congress that the major credit card companies, payment aggregators and banks already had in place filtering or coding

²⁰ Schwartz, Joel Michael, *The Internet Gambling Fallacy Craps Out*, 14 *Berkeley Technology Law Journal* 1021, 1032-1037 (footnote deleted) (1999).

to regulate Internet Gambling related transactions.²¹ The GAO also reported on the emergence of new technology and approaches to self-regulation.²² Further, law enforcement sources reported little concern with issues of money laundering and fraud.²³ The United States Supreme Court sustained issuance of a preliminary injunction against enforcement of the criminal penalties of the Child Online Protection Act, 47 U.S.C. § 231, *et seq.*, because its prohibitions did not constitute the least restrictive means to prevent child pornography in light of the availability of filtering programs which exist and can be used to prevent access.²⁴

The Internet Gambling industry took pains to develop its own standards over six (6) years ago when similar legislation to the UIGEA was proposed. The Internet Industry Association, www.iiia.net.au, an Australian Trade Association, published its *Internet Industry-Interactive Gambling Industry Code: A Code for Industry Co-Regulation in the Area of Internet Gambling Content Pursuant to the Requirements of the Interactive Gambling Act of 2001* in December 2001. Even then, the proposed self-regulating code contained *Schedule 1-Scheduled Filters* § (5), which listed

²¹ Report to Congressional Requestors, *Internet Gambling: An Overview of the Issues*, GAO-03-89 (December 2002), 20-27.

²² *Id.* at 33-34.

²³ *Id.* at 34-38.

²⁴ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S.Ct. 2783 (2004).

fifteen (15) readily available commercial filters.²⁵ As a noted authority, William S. Mossberg, noted recently in the Wall Street Journal:

[f]or years, add-on programs have attempted to give parents some control over what children can do on the computer. Some of these have been OK, but many have had weaknesses that were exploited by kids, who are typically technically savvier than adults. Many parents, however, don't realize that the latest versions of the two main computer-operating systems, Microsoft's Windows Vista and Apple's Mac OS X Tiger, have parental controls built right in.²⁶

The proposed regulations do not take into account the ability of the end user or any other participant in the activity stream of Internet Gambling to effectively and efficiently use filtering to identify transactions which are prohibited or which are legal. The proposed regulations admit that many exceptions have to be carved into the transaction stream in order not to reach activities which have nothing to do with Internet Gambling because, as discussed in Point 2, above, they have nothing to do with gambling; they are content neutral transactions and they have already been approved as such by several Federal Circuit Courts of Appeal.

Further, the regulations do not provide who is to arbitrate whether a transaction is exempt, not because it is transmitted

²⁵ See appendix 1, attached.

²⁶ Mossberg, Walter S., *You Have Weapons In Your Computer To Monitor Your Kids*, The Wall Street Journal, June 14, 2007.

from or to an ACH, RDFI or ODFI, but because, simply put, it is legal.

The treatment among the federal government and various states of gambling in its many forms, including lotteries, pari-mutuel horse racing, games of chance, casinos, Indian casinos, sports betting, and other forms of gambling is uneven. The following Table Two ²⁷ summarizes State laws, as of 2005, regarding "gambling" and Internet gambling in its simplest forms. In Table Two, the authors defined the following categories, summarized according to each state's laws.

Dominant Factor Test Applied: where the elements of skill predominate over the elements of chance in determining outcome, then the "chance" element is lacking and the game involved does not violate that state's anti-gambling law. This question considers whether the state applies this "dominant factor," or predominance, test.

Social Gambling Allowed: whether playing for money in a purely social context is allowed, or at least probably legally overlooked. A "social context" usually means that no player or other person, like a bookie or the host of the game, makes or earns anything other than as, and on an equal footing with, a mere player in the contest or game.

Misdemeanor vs. Felony: grading is not consistent in all states. Some states distinguish on the basis of the place of possible incarceration. Most states draw the distinction based on the term of the possible sentence, with a punishment of one year or less being a misdemeanor and a longer possible sentence defining a felony. The latter approach is used in compiling the chart.

²⁷ Drawn from www.gambling-law-us.com/State-Law-Summary, cited in Methenitis, Mark, *Internet Gambling Regulation Present and Future: Technology Outpaces Legislation as the MMORPG Problem Emerges*, ___ Texas Tech University School of Law ___, December 2005; see also Schwartz, Joel Michael, *The Internet Gambling Fallacy Craps Out*, 14 *Berkeley Technology Law Journal* 1021, 1032-1037 (1999).

Simple vs. Aggravated: The distinction between "simple" and "aggravated" gambling is also one that varies from state to state. The approach used in compiling the chart is generally based on the presence of professional gambling, which involves those who make money on the contest or game other than as, and on an equal footing with, a mere player.

Express Internet Prohibition: The response to this question goes to whether a state has adopted a specific law criminalizing the offering and/or playing of gambling games offered over the Internet. The fact that a state has not passed a specific law does not make participation in or offering of gambling over the Internet legal under the laws of that state.

TABLE TWO - STATE BY STATE GAMBLING SUMMARY

State	Dominant Factor Test Applied	Social Gambling Allowed	Penalty for Simple Gambling	Penalty for Aggravated Gambling	Express Internet Prohibition
Alabama	Yes	Yes	Misdemeanor	Misdemeanor	No
Alaska	Yes	Yes	Misdemeanor	Felony	No
Arizona	No	Yes	Misdemeanor	Felony	No
Arkansas	No	No	Petty	Misdemeanor	No
California	Effectively, Yes	Yes	Misdemeanor	Misdemeanor	No
Colorado	Yes	Yes	Petty	Misdemeanor	No
Connecticut	Yes	Yes	Misdemeanor	Misdemeanor	No
Delaware	Questionable	Yes	Misdemeanor	Misdemeanor	No
Dist. of Columbia	Yes	Probably	Felony	Felony	No
Florida	No	\$10 Limit (1)	Misdemeanor	Misdemeanor	No
Georgia	Yes	No	Misdemeanor	Felony	No
Hawaii	Yes	Yes	Misdemeanor	Felony	No
Idaho	Yes	No	Misdemeanor	Misdemeanor	No
Illinois	No	No	Misdemeanor	Misdemeanor	Yes
Indiana	Yes	No	Misdemeanor	Felony	Yes
Iowa	No	No(2)	Misdemeanor	Misdemeanor	No
Kansas	Yes	No	Misdemeanor	Felony	No
Kentucky	Yes	Yes	Misdemeanor	Felony	No
Louisiana	No	Yes	Misdemeanor	Felony	Yes
Maine	Yes	Yes	Misdemeanor	Felony	No
Maryland	No	No	Misdemeanor	Felony	No
Massachusetts	Yes	Unclear	Misdemeanor	Misdemeanor	No
Michigan	Yes	No (3)	Misdemeanor	Misdemeanor	No (4)
Minnesota	Yes	Yes	Misdemeanor	Misdemeanor	No
Mississippi	Yes	No	Misdemeanor	Misdemeanor	No
Missouri	Yes	No	Misdemeanor (5)	Felony	No

Montana	Questionable	Yes	Misdemeanor	Misdemeanor	Yes
Nebraska	Yes	No	Misdemeanor	Misdemeanor	No
Nevada	Yes	Yes	Misdemeanor	Felony	Yes
New Hampshire	Yes	No	Misdemeanor	Felony	No
New Jersey	Yes	Yes	disorderly	Crime	No (6)
New Mexico	Yes	Yes	Misdemeanor	Felony	No
New York	Yes	Yes	Misdemeanor	Felony	No
North Carolina	Yes	No	Misdemeanor	Misdemeanor	No
North Dakota	Yes	Yes (7)	Misdemeanor	Felony	No
Ohio	Yes	Yes	Misdemeanor	Felony	No
Oklahoma	Yes	No	Misdemeanor	Felony	No
Oregon	Yes	Yes	Misdemeanor	Felony	Yes
Pennsylvania	Yes	Unclear	Misdemeanor	Misdemeanor	No
Rhode Island	Yes	No	Misdemeanor	Felony	No
South Carolina	Yes	Yes	Misdemeanor	Misdemeanor	No
South Dakota	Yes	No	Misdemeanor	Misdemeanor	Yes (8)
Tennessee	Questionable	No	Misdemeanor	Felony	No
Texas	Yes	Yes	Misdemeanor	Misdemeanor	No
Utah	Yes	No	Misdemeanor	Felony	No
Vermont	Questionable	Fine Only	Misdemeanor	Misdemeanor	No
Virginia	Yes	Yes	Misdemeanor	Felony	No
Washington	Yes	Yes	Misdemeanor	Felony	Yes (9)
West Virginia	Yes	No	Misdemeanor	Misdemeanor	No
Wisconsin	Yes	No	Misdemeanor	Felony	Yes
Wyoming	Yes	Yes	Misdemeanor	Felony	No

Footnotes:

(1) Florida authorized licensed card rooms to offer poker limits of \$2 per bet, with a limit of 3 raises per betting round, effective July 1, 2003.

(2) Iowa permits social gambling, but only to the extent that a player may win or lose no more than \$50 or other consideration equivalent thereto in all games and activities at any one time during any period of twenty-four consecutive hours or over that entire period. See Iowa Code 99B.12(1)(g)

(3) Michigan has exceptions for Senior citizens homes and state fairs.
(4) In 1999 Michigan adopted SB 562 which made it specifically unlawful to use the Internet to violate certain provisions of Michigan's anti-gambling laws (Mich. Compiled Statutes 750.301 through 750.306 and 750.311.) In 2000 Michigan adopted Public Act 185 which repealed the references to those anti-gambling sections. Thus, Michigan is not a state that has in effect a specific prohibition against using the Internet to make, offer or accept bets over the Internet.
(5) Missouri's felony penalty applies only to a "professional gambler" as defined.
(6) New Jersey Senate Bill 1013 seeks to clarify definition of illegal gambling to address Internet gambling; void credit card debt incurred through illegal gambling; authorize only the State to recover illegal gambling losses and to outlaw online gambling. Also introduced in previous legislative session as S2376. As of July 4, 2005, S1013 had not been reported out of the New Jersey Senate Wagering, Tourism & Historic Preservation Committee, and the bill failed.
(7) North Dakota has a limitation of \$25 per individual hand, game or event. Betting over \$25 is an infraction and it becomes a misdemeanor when the amount exceeds \$500.
(8) South Dakota's prohibition applies to those in the "gambling business."
(9) Prohibition becomes effective June 7, 2006.

In New Jersey, for instance, unlicensed gambling in most forms is illegal, even though the State permits casino gambling in licensed casinos in Atlantic City. However, state law²⁸ exempts a "player" from such prohibitions when that player "engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity." This statutory exemption also exists in Missouri as set forth in Missouri,²⁹ exempting a player's personal gambling winnings from gambling prohibitions.

²⁸ N.J.S.A. 2C:37-1(c).

²⁹ § 572.010-8.

Further, in New Jersey it is legal to accept or send Internet or wire transfers of funds for purposes of casino gambling. *N.J.A.C. 19:45-1.24A* provides that a casino can accept a wire transfer or electronic fund transfer from or on behalf of a patron to establish a cash deposit for gambling, to redeem a counter or pay a counter. *N.J.A.C. 19:45-1.24A(a)(3)* specifically authorizes a patron's gambling deposit or payment by computer. Nothing in the regulations refers to the origin of the deposit. Therefore, the proposed regulations would invalidate the wire transfer to a valid licensed casino in a state permitting casino gambling, if the person transmitting the funds for a proposed vacation junket to Atlantic City were from a state prohibiting any form of gambling! Thus, the proposed regulations, by seeking to avoid the morass of how to define and limit transactions based on their state-by-state legality, have actually excised the criteria by which legal transactions could be exempted as required by the statutory scheme. Congress was aware of the inconsistent landscape of the legality of Internet Gambling and gambling in general from state to state with the presentation of the General Accounting Office's survey ³⁰ which is annexed as Appendix II.

Simply put, filtering is more effective, judicially recognized by the United States Supreme Court, and even

³⁰ See Footnote 21 and Appendix II.

recognized as a most effective means of regulation of the Internet Gambling Industry by experts in the area as early as 1998 in a study of possible enforcement modes for proposed Internet Gambling regulations.³¹

Most tellingly, in the review of regulations which affect First Amendment protected rights in a technological setting, regulations which delegated the decision whether a transaction was prohibited or not, adopted by the Federal Communications Commission for cable operators, were found to be in conflict with the statutory mandate and were invalidated.³² The regulations set forth requirements for cable television operator content based on origination point, local access and content. The court was scathing at one point in addressing the Commission's action:

The Commission, in its requirement that cable operators exercise prior restraint of obscenity in access cablecasting, attempts to transfer to cable operators the very censorship power statutorily forbidden to the Commission in § 326 of the Act. The Commission's "belief" that cable operators would be free of legal liability because they were only following orders seems ill-founded when the orders are to do what it cannot do.

The aplomb with which the Commission is willing to forcefully expose cable operators to criminal and civil

³¹ Lessani, Andrea S., *How Much Are You Willing to Bet That the Internet Prohibition Act of 1997 Is Not the Most Effective Way to Tackle the Problems of On-Line Gambling?*, The UCLA Online Institute for Cyberspace Law and Policy, May 1998, pages 6-7.

³² *Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, (8th Cir. 1978), *aff'd F. C. C. v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435 (1979).

suits, with all of the uncertainties and serious liberty and financial risks involved in defending them, particularly in these years of America's litigious binge, raises serious questions, about the rationality of the access rules, about the lack of evidence showing a public interest so strong as to warrant them, and about the due process interests affected; all of which would require the closest judicial scrutiny if the access rules of the Commission were to be otherwise held within its jurisdiction.

Id. at 1059. The cable operators were positioned precisely as are the payment instrument system providers in the Internet Gambling industry - they merely provided the means to facilitate transmission of programming. The court's comments in *Midwest Video Corp., supra*, are highly appropriate and relevant to the matter at hand.

Thus, with all due respect to the joint proposing agencies in this regulatory scheme, the proposed regulations clearly avoid the singularly most important part of the mandatory regulatory scheme - the identification of exempt, legal and illegal transactions. The regulations take a track which is opposite to the nature of the industry and of the Internet itself, avoiding the practical system of filtering known URL's in favor of a complex system of exempt and non-exempt transactions without providing any means of identifying those transactions. Further, the proposed regulations would provide for an additional set of regulations to be adopted by the regulated industry, the payment instrument systems themselves,

which would thus permit the regulated industry to define crimes and liability which it would not obviously wish to incur but which the agencies would then have to enforce, thus further chilling the Internet Gambling industry's rights.

For all of these reasons the regulations should be withdrawn and the issue should be revisited. The regulations are unworkable and stand against established precedent involving payment instrument systems. They lack a cohesive program for fair and equal regulation, favoring those institutions without any direct connection with exemptions and placing an excessive burden of regulation and reporting on other institutions to define whether each of billions of transactions are legal or not.

APPENDIX I

**- INTERNET INDUSTRY -
INTERACTIVE GAMBLING
INDUSTRY CODE**

**A CODE FOR INDUSTRY CO-REGULATION
IN THE AREA OF INTERNET GAMBLING CONTENT
PURSUANT TO THE REQUIREMENTS OF THE
*INTERACTIVE GAMBLING ACT 2001***

December 2001



Internet Industry Association
www.iaa.net.au

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1. Preamble

- 1.1 The Internet Industry Association (IIA) recognises that Parliament intends, with the passage of the *Interactive Gambling Act 2001* (IGA), to limit access by Australians to some types of gambling sites on the Internet.
- 1.2 The IIA further recognises that the law requires Internet service providers (ISPs) to assist, within the capacity of available technologies, in providing a means to prevent access by users to certain Internet content.
- 1.3 In relation to the prevention of access to prohibited Internet gambling content, supervision by responsible adults remains the effective means of protection, particularly in the case of Internet use by children. In addition, the IIA endorses end-user empowerment, including education and the provision of information, and content filtering as methods to support and enhance supervision of Internet activity.
- 1.4 The IGA imposes obligations on ISPs, Interactive Gambling Service Providers, Publishers, Datacasters and Broadcasters for acts or omissions in relation to Internet Gambling Content in certain circumstances. Persons who fail to comply with some obligations may be guilty of an offence against the IGA.
- 1.5 The IIA has developed this Code in accordance with the expressed intention of Parliament primarily to assist IIA members to comply with the IGA.

2. Objectives

- 2.1 The aims of this Code include:
 - (a) to establish confidence in and encourage the use of the Internet;
 - (b) to provide a mechanism for ISPs to meet their legal obligations in dealing with designated Internet gambling matters; and
 - (c) to promote positive user relations with the Internet industry.
- 2.2 In compliance with sub-section 37(2) of the IGA, this industry Code deals with the following designated Internet gambling matters:
 - (a) the formulation of a designated notification scheme (set out in Clause 5.1 of this code); and
 - (b) procedures to be followed by ISPs in dealing with Internet content notified under paragraph 24(1)(b) or section 26 of the IGA (set out in Clause 5.2 of this code).

3. Terminology and Interpretation

- 3.1 In this Code:

“ABA”	means the Australian Broadcasting Authority.
“IGA”	means the <i>Interactive Gambling Act 2001</i> .
“Scheduled Filter”	means one of the products or services listed in Schedule 1 of this Code.

“Code”	means this Code of Practice, including Schedule 1.
“Content”	means all forms of information and, without limitation, includes text, pictures, animation, video and sound recording, separately or combined, may include software and includes a “Content Service” within the meaning of the <i>Telecommunications Act, 1997</i> .
“Content Provider”	<p>means a person who, in the course of business, makes available the content of a Web Site or database on the Internet and includes:</p> <ul style="list-style-type: none"> • advertisers • information providers • “content service providers” within the meaning of the <i>Telecommunications Act, 1997</i>, <p>but not a person acting in its capacity as an ISP or Internet Content Host, or a person who simply provides an automated general-purpose search engine, cache, catalogue or directory service or similar automated service</p>
“filter”	means to restrict or deny access to a Web Page or other Internet content.
“Internet”	means the public network of computer networks known by that name which enables the transmission of information between users or between users and a place on the network.
“IIA”	means the Internet Industry Association (ACN 071 075 575).
“ISP”	stands for Internet Service Provider and means those persons so defined by the <i>Broadcasting Services Act, 1992</i> (as amended).
“person”	includes partnerships, bodies corporate and the Crown.
“Prohibited Internet Gambling Content”	means that content so defined by the <i>Interactive Gambling Act 2001</i> .
“Software”	means computer software.
“Suppliers”	means persons who develop, import, sell or distribute Scheduled Filters, but excludes ISPs who merely provide filters for use in compliance with Clause 5.2 of this Code and do not determine the content or operation of Scheduled Filters.

“User” means a user of the Internet who is resident within Australia.

3.2 In this Code, where examples are provided of the manner in which a Code provision may be satisfied, those examples should not be read as limiting the manner in which the provision may be satisfied.

3.3 For the purposes of registration and replacement of this Code, Schedule 1 forms part of the Code. Scheduled Filters are included on the basis of having met the criteria set out in the schedule.

4. APPLICATION OF THIS CODE

This Code has been developed by the IIA to reflect the approach of its members in satisfying the requirements set out in section 36(1) of the *Interactive Gambling Act 2001* (IGA). The IIA will work to ensure that its members comply with this code. The Australian Broadcasting Authority may direct an ISP to comply with this code if it is satisfied that the ISP has contravened the IGA.

5 ISP OBLIGATIONS IN RELATION TO ACCESS TO CONTENT HOSTED OUTSIDE AUSTRALIA

5.1 Designated notification scheme

For the purposes of this Code and pursuant to the requirements of paragraph 24(1)(b) and section 26 of the Act, a designated notification scheme comprises:

- (a) direct notification, whether by means of email or otherwise, by the ABA to the Suppliers of Scheduled Filters of information by which the relevant Prohibited Internet Gambling Content can be identified; and
- (b) notification by email by the ABA to ISPs on a regular basis of Prohibited Internet Gambling Content.

5.2 ISP Procedures in Relation to Access to Content Hosted Outside Australia

ISPs must follow the procedure in either paragraph (a) or (b) below with respect to content notified under the Designated Notification Scheme set out in clause 5.1.

- (a) ISPs who provide Internet access to subscribers within Australia will, as soon as reasonably practicable for each person who subscribes to an ISP's Internet carriage service, provide for use, at a charge determined by the ISP, a Scheduled Filter.

For the purposes of this paragraph, provision for use includes the provision of a Scheduled Filter as part of:

- an online registration process, and in the case of user installable filters, links to effect download activation and instructions for use;
- a disk based registration process; or
- a notification containing, in the case of user installable filters, links to effect download activation and instructions for use.

(b) In the case of commercial subscribers, the ISP will, as soon as practicable, provide for use, at a charge and on terms determined by the ISP, such other facility or arrangement that takes account of the subscriber's network requirements and is likely to provide a reasonably effective means of preventing access to Prohibited Internet Gambling Content. In this clause, provision for use includes:

- providing appropriate software, including any of the Scheduled Filters; or
- facilitating access to consultancy services with respect to firewalls or other appropriate technology.

5.3 Consistent with sub-section 24(1) and section 27 of the IGA, the ABA will not issue standard access prevention notices or special access prevention notices to ISPs while the designated notification scheme contained in clause 5.1 of this Code is in effect.

5.4 Designated alternative access prevention arrangements

5.5 The arrangements set out in the following paragraphs 5.6 (a), (b) and (c) constitute designated alternative access prevention arrangements for the purposes of sub-section 37(3) of the Act.

5.6 Clause 5.2 of this Code shall have no application in respect of the supply of Internet carriage services by an ISP where an end user is subject to an arrangement that the IIA is satisfied is likely is to provide a reasonably effective means of preventing access to Prohibited Internet Gambling Content; for example:

- (a) a commercial subscriber who has advised their ISP that they have in place a form of content filtering or control, whether by means of firewall technology or otherwise;
- (b) a school, educational or other institutional subscriber similarly protected; or
- (c) any other subscriber who has advised their ISP that he or she already has installed a Scheduled Filter.

5.7 This Code was registered by the ABA on 13 December 2001 and will come into effect for implementation on that date. It will be formally reviewed within 18 months of the date of implementation.

SCHEDULE 1: SCHEDULED FILTERS

1. The filtering products and services in this Schedule may be modified from time to time in the following manner:
 - (a) if the IIA believes a product or service should be added to or removed from the list, IIA will in consult with the ABA; and
 - (b) if the ABA agrees with IIA the product or service will be added to or removed from the list. Where the ABA does not agree that a product of service be added it will provide a statement of reasons for so doing within a reasonable time.
2. For the purposes of replacement of the industry code, the ABA regards any addition or removal of a filter product or service to this Schedule as differing only in minor respects from the original code. Consequently, the IIA need not follow paragraphs 38(1)(e) and (f) of the IGA when making any such changes.
3. The inclusion of a filtering product or service in this Schedule is subject to the IIA being satisfied of the following criteria:
 - (a) ease of installation (where applicable);
 - (b) ease of use;
 - (c) configurability;
 - (d) availability of support; and
 - (e) the presence of management systems within commercial filter Suppliers to ensure that ABA updates are actioned and undertakings by those Suppliers to include all notifications made by the ABA under the IGA.
4. A Supplier who asks the IIA to include an Internet filter product or service in this Schedule, or who requests at any time that an Internet filter product or service remain in this Schedule, must supply the following information:
 - (a) the contact point to which the ABA should send notifications about content;
 - (b) the minimum information to be contained in notifications from the ABA to enable the Supplier to give effect to notifications by updating their Internet filter product or service;
 - (c) an outline of the process involved in updating the Internet filter product or service;
 - (d) the expected maximum time it will take to give effect to the notification;
 - (e) the means by which an end-user of the Internet filter product or service may obtain and implement a version updated as a result of the notification; and
 - (f) the steps to be taken by the manufacturer or their agent to preserve the confidentiality of information contained in notifications they receive from the ABA.
5. The following filter products and services are currently recognised for use under this Code:

- AOL Parental Control
- Arlington Custom Browser
- Cyber Patrol
- Cyber Sentinel
- CyberSitter
- EyeGuard
- Internet Sheriff
- Igear
- InterScan WebManager N2H2
- NetNanny
- Norton Internet Security Family Edition
- Smart Filter
- Too C.O.O.L
- XStop
- Xstop R2000

