

December 12, 2007

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Department of the Treasury
Office of Critical Infrastructure
Protection and Compliance Policy
Room 1327
Main Treasury Building
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 really do appreciate the opportunity to comment on the proposed rule concerning the Unlawful Internet Gambling Enforcement Act. Unlike many others I have a completely different perspective on the matter. I agree that most forms of gambling are not only a losing proposition therefore stupid, I also agree that too often in this country where there is stupidity there is crime and our government should be involved. I do not seek to abolish the implementation of the UIGEA because I want my favorite form of gambling protected as the Horse Racing and the Dog Racing people do. I have no interest in sports betting nor casino gaming.

I am a poker player. I grew up playing bridge, backgammon, Monopoly, and other games that challenged me. I can spot a house edge or a protected interest a mile away. The only game I've ever played in a Casino was blackjack, which other than craps has the lowest house advantage that I know of in casino gaming involving any skill. Poker without a small part of the wagers going to pay the dealer and the house for running the game (rake) is a game of skill between the other players. Anyone who has played more than a few hands of poker will tell you that there is very little luck involved in the longer term. To be bold; poker played well the cards don't matter much at all. As far as my comments herein are concerned I submit them in regards to the specific areas of generally considered gambling but more specifically are considered by various States games of skill.

To better explain my positions perhaps you will indulge me a little as I share a little of my personal background as may help better help the Agencies in your up coming deliberation process as you attempt to create a final rule from the law Congress wrote.

First of all, I have sat in the meeting rooms you currently occupy as you laugh about some of the comments submitted. I was a Federal employee. I do not mention this to try to raise the stature of my comments, but merely to point out I do not envy the task ahead.

When the proposed rule was published, late, I immediately felt I knew, or at least understood how Valerie Abend¹ must have felt. I have often joked, that I once missed a meeting and was honored with getting “published” in the Federal Registry.

I have been to all the meetings including the scolding meeting with OMB that politely inform the group that you can not use any rational approach in attempting to implement the directions and tasks given you by Congress. The time a number of you must have spent arguing with the government’s lawyers why this or that approach just was against the rules. Anyone reading the proposed rule can almost laugh at the true meaning of the words in the document. I do not mean to make light of your serious work, but on some level you must admit Congress served you up a nightmare with this task.

You make it clear in the proposed rule you fully understand not only the intent of Congress but most of the cross currents of desires and concerns wrapped up in this piece of, well, legislation. Gambling laws are written and control of the matter is a state level issue, but Congress tells you they want you to find a way to make sure any left over illegal internet gambling is stopped. I’ve read the National Gambling Impact Study (NGIS), as a parent I whole heartedly agree with its assumptions; for some part of the population gambling is a serious harm.

The members of the Commission worked very hard over two years given “a very broad and difficult task – to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States.”² The Commission should be highly commended on the work done in identifying the serious problems facing policy makers involved in gambling. However when they strayed into the area of suggesting policy making their recommendation are both very outdated and shortsighted.

Without a doubt everyone, gamblers and non-gamblers alike, should be concerned with the social and economic impacts of gambling on our and all societies. The Commission correctly identified the fact that gambling laws almost without exception are properly under the jurisdiction of State laws; they even included over 1,000 pages of all the State laws of the fifty States in their report.³ Never the less concerning Internet Gaming they suggested Congress adopt, through the creation of broad new sweeping Federal powers, steps to enact an almost immediate prohibition. Perhaps we have all become inured to the gee wiz solutions to previously impossible tasks, as the power and easy solutions developed with computers and software almost daily, that we forget what life was like a decade ago.

¹ Deputy Assistant Secretary Critical Infrastructure Protection and Compliance Policy U.S. Department of the Treasury

² James, Kay C. National Gambling Impact Study Commission Report, Executive Summary, 1999 pg 1

³ National Gambling Impact Study Commission Report, GAMBLING STATUTES DATABASE, <http://govinfo.library.unt.edu/ngisc/reports/statutes.html>

Like the Honorable Catherine L. Hanaway⁴, I am a parent, I know we both share a parents desire to do all we can to protect our children from as many of life's evils as possible. In a cosmic irony that even Kierkegaard would find worthy, my entry to politics, was on (or over, depending of who tells the tale) Catherine's knee. It is something of a testament to the size of the world and politics that we now find ourselves advocating two diametrically opposed solutions to the same problem.

Perhaps it is significant that this month is the 75th anniversary of the repeal of the 22nd Amendment (December 5th), as the parallels of the social and economic impacts on society and the ultimate failure of public policy between alcohol and gambling are striking. In general terms a problem was identified by members of society and eventually Congress passed a solution. Over the 13 years between the 18th and 22nd Amendments, history shows us Congress' initial solution actually created more problems than it solved.

As with gambling like alcohol every fair person wants to insure minors and those prone to addiction have their access to such dangers severely limited if not totally blocked. Parents and some advocates like Thomas E. McClusky⁵ may value the protection gained regardless of the cost to others. Contrary to Mr. McClusky's sworn testimony⁶ the UIGEA is not "a well- thought-out measure", any more than the 18th Amendment was proven to be in practice.

Perhaps this is the place to mention that I write in part to represent a some what unique portion of the population who are affected by this proposed rule. I am what is called a recreational poker player. I do not operate nor have any interest in any poker site, nor any affiliated business. I do not even derive any portion of my income from playing poker. By some estimates I am part of something approaching 95% of all players who play for the enjoyment of the game. I have never had a penny at risk. I do have a modest "online poker bankroll", in reality an unnumbered, unregulated, un-tax-reported, off-shore virtual bank account. Given that I am a "small time winner" I will be proud to report the income to the IRS this year. Given the current regulatory structure I shudder to imagine how many billions of reportable income is not freely reported and remains uncollected. Some estimates place the amount of money gambled online as high as a 1/3 of a Trillion dollars annually.

As a Federal Appointee I have participated in preparation for Congressional hearings both in the House and the Senate. Unlike Mr. McClusky I never did find them fun⁷, but I do play poker for fun with out all of the societal ills he imagines are prevalent to poker players and their families. Poker players are not the criminals and degenerates the

⁴ United States Attorney Eastern District of Missouri United State Department of Justice (Lucy's mother)

⁵ Vice President of Government Affairs Family Research Council

⁶ PREPARED TESTIMONY OF THOMAS E. McCLUSKY before the HOUSE JUDICIARY COMMITTEE November 14, 2007

⁷ Q&A TESTIMONY OF THOMAS E. McCLUSKY before the HOUSE JUDICIARY COMMITTEE November 14, 2007 in response to the Honorable Representative Steve Cohen

Family Research Council might fear. I was very comfortable taking my 12 year old daughter to a reception on Capital Hill in October of this year. She was, as was I and House Judiciary Chairman the Hon. John Conyers, Jr. very impressed with poker professional Annie Duke. Rep. Conyers was so impressed that he asked Mrs. Duke to testify at the November hearings of the full Judiciary Committee.⁸ Personally I hold dear the 20 minutes or so that my daughter and I spent talking to Chris “Jesus” Ferguson.⁹ While Chris suggested that perhaps he had spent too much time in school, while talking about poker to my daughter and I, he made it clear that even, perhaps especially in poker, as in life a good education is critical to any measure of success.

So I will not engage in any debate on the prevalence of problem gamblers by citing various studies on the subject, as such a debate dissolves into methodology and tests of static validity, that even Chris Ferguson with his PhD would find maddening. I do suggest that the history of Prohibition shows that such a policy forces limited governmental resources to fighting the new crime and not a dime goes to actually helping those who the law was designed to protect, minors and problem gamblers.

The net result of Congress’ action with the UIGEA is to force online gaming further offshore with less protection for Americans than even a year ago. In addition Congress has passed what is in effect a new tax collected by e-wallets and alternative money transfer systems. Implementation of any further restrictions on money transfers will only increase the cost to recreation players like me, and hasten the development of newer and more unregulated forms of stored money as well as ever more untraceable monetary transfers.

As evidenced by Michael Colopy’s testimony in part: “The Internet has brought an acceleration of technological remedies that are far more effective today than they were at the start of the last Congress: state-of-the-art online verification illustrates this pattern.¹⁰” The 18th Amendment brought bath tub gin and criminals with Tommy guns fighting for market share in the streets, not exactly the solution to excessive drinking Congress sought in December 18, 1917. Today we do not have machine gun battles in our streets, nor people dying from bath tub gin, but the effects for the recreational player in a virtual sense are exactly the same; there is no Nevada type gaming commission to prevent cheating nor is there any recourse for Americans who have their poker account frozen or outright stolen by an unscrupulous site operator closing up their virtual poker room overnight.

Having worked in the District in a Federal capacity I long ago learned to not expect logic and reason to have any meaning in the mechanics of governance. Never the less, I feel it is clear that the UIGEA takes the Agencies 180 degrees from the direction it should go in

⁸ Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers, 2007 <http://judiciary.house.gov/oversight.aspx?ID=396>

⁹ <http://www.chrisferguson.com/bio>

¹⁰ Colopy, Michael, ARISTOTLE Inc., Effective Age and ID Verification Online Before the House Committee on the Judiciary, <http://judiciary.house.gov/OversightTestimony.aspx?ID=1210>

any attempt to really address the Congressional intent in addressing the concerns of the National Gambling Impact Study. Many other countries from the U.K.¹¹, New Zealand¹², to South Africa, have shown that sensible regulation not only solves the problems identified by the NGIS, but also provides a new revenue stream to address the funding needs for the minority of any population prone to addiction to most any pleasurable activity. New Zealand has perhaps the best governmental agency for realistically addressing problem gamblers through their Ministry of Health¹³.

The Agencies as mandated by Congress have fulfilled their responsibility to attempt to develop rules for the Executive Branch to follow the direction of the Legislative Branch. Given the amount of money involved and the complexity of the various state laws it is almost certain that any rules will be modified by the Judicial Branch. Having completely read the problems outlined in the proposed rule alone, I would suggest that the Agencies refer the legislation back to Congress for “a well- thought-out measure” of a sensible regulatory policy solution.

Given that in poker terms the odds of that happening might be like drawing to an inside straight I will address a number of areas of the proposed rule where the Agencies sought comment. Where ever another has made a similar point I will not further waste the Agencies time but simply reference their comment. The Agencies requested comment on over 20 points, the most interesting to me is where the Agencies did not request comment but themselves pointed out the difficulties (read absurdity) of implementation of the law.

“The proposed rule requires participants in designated payment systems to establish policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit transactions in connection with unlawful Internet gambling.¹⁴”

Has to coexist with: “The proposed rule does not specify which gambling activities or transactions are legal or illegal because the Act itself defers to underlying State and Federal gambling laws in that regard and determinations under those laws may depend on the facts of specific activities or transactions (such as the location of the parties).¹⁵”

I’ll admit that I understand that logic and reason have no place in governmental rule making, but how can you expect a bank to block or prevent a transaction that they are not sure is unlawful Internet gaming?

¹¹ U.K. Gambling Commission, <http://www.gamblingcommission.gov.uk/Client/index.asp>

¹² New Zealand Gambling Commission, <http://www.gamblingcommission.govt.nz/gcwebsite.nsf>

¹³ New Zealand Ministry of Health Problem Gambling portal, <http://www.moh.govt.nz/problemgambling>

¹⁴ **Federal Register** / Vol. 72, No. 192 / Thursday, October 4, 2007 / Proposed Rules, 56680

¹⁵ *Ibid*, page 56681

As clearly explained by M. Brandon Meadows for Compass Bank¹⁶, without a clear definition of what is or is not a “restricted transaction” how can anyone reasonably develop procedures “reasonably designed” to block such undefined transactions?

Ron Guss and John Dobra writing for Sovereign Bank¹⁷ advocate the creation and maintenance of a list of “unlawful Internet gambling businesses”. Further: “We believe that a list of such businesses should be developed and maintained by the U.S. Government and made available to financial institutions. Financial institutions should participate in the identification process by reporting suspected unlawful Internet gambling businesses to the U.S. Government through Suspicious Activity Reports (SARs). A financial institution would then block a business transaction involving a listed unlawful Internet gambling business, similar to the process currently used for OFAC.¹⁸”

Not only is it clear from the Agencies own comments that, “the burden on ODFIs in developing the necessary systems to obtain the information and determine whether to reject or block a transaction would likely be substantial.”¹⁹ Moreover my bank may discover that my favorite poker site has made a suspicious transaction because someone realizes that there is gambling involved because they advertise on ESPN or NBC during “Poker After Dark”. Identified as a suspicious business they would according to the proposed rule not only attempt to block any transaction of mine, regardless of the fact that my transactions in the State of Virginia are completely legal. Even if I lived in one of less than 10 states who have an expressed law against online gaming, where I am when the wager is made determines its legality or illegality. Would the same bank block my transfer of money to a Las Vegas Casino in preparation for an upcoming vacation simply because it is illegal to participate in Casino games in Virginia?

“The Agencies expect that the most efficient way for participants to implement the due diligence procedures in the proposed rule would be to incorporate them into existing account opening due diligence procedures (such as those required of depository institutions under Federal banking agencies’ anti-money laundering compliance program requirements)”²⁰

The Agencies seem to suggest that as a US citizen that my name might be placed on a list of criminals without evidence of a crime? I am not a constitutional lawyer, but even my 12 year old learned in her Civics class that just is not right! No only would I then have an account closed, which any bank can do for business reasons, but likely be unable to open an account anywhere.

¹⁶ Proposed rule comments dated December 6th, 2007

¹⁷ Proposed rule comments dated November 29, 2007

¹⁸ Ibid

¹⁹ **Federal Register** / Vol. 72, No. 192 / Thursday, October 4, 2007 / Proposed Rules, 56686

²⁰ Ibid page 56688

Ron Guss and John Dobra writing for Sovereign Bank do suggest as do others that any list is a uniquely governmental activity. “We believe a professionally trained official of an agency of the U.S. Government would be better able than an employee of a financial institution to determine if a business conducting a gambling-related function is an unlawful Internet gambling business. The accuracy of data developed through a federal investigation with federal investigatory powers would surpass any information developed by a bank employee.”²¹

Having once been involved in an Agency attempt to collect information specifically requested by Congress, I have some small idea of the problems the Agencies face in even getting an OMB number for any forms. I believe that the problems discussed in the proposed rule are only a small portion of the problems any Agency would have in creating and maintaining any “restricted list”, as stated in part:

“Any government agency compiling and providing public access to such a list would need to ensure that the particular business was, in fact, engaged in activities deemed to be unlawful Internet gambling under the Act. This would require significant investigation and legal analysis. Such analysis could be complicated by the fact that the legality of a particular Internet gambling transaction might change depending on the location of the gambler at the time the transaction was initiated, and the location where the bet or wager was received. In addition, a business that engages in unlawful Internet gambling might also engage in lawful activities that are not prohibited by the Act. The government would need to provide an appropriate and reasonable process to avoid inflicting unjustified harm to lawful businesses by incorrectly including them on the list without adequate review. The high standards needed to establish and maintain such a list likely would make compiling such a list time-consuming and perhaps under-inclusive. To the extent that Internet gambling businesses can change the names they use to receive payments with relative ease and speed, such a list may be outdated quickly.”²²

Then there is the matter of cost.

“The Treasury also examined the potential benefits of the establishment by the U.S. Government of a list of entities that it determines are engaged in the business of “unlawful Internet gambling.” While the Treasury understands that interest exists in such a list, we have tentatively concluded that the benefits of the list as an effective tool for use by regulated entities to identify and block or otherwise

²¹ Proposed rule comments dated November 29, 2007 page 2.

²² **Federal Register** / Vol. 72, No. 192 / Thursday, October 4, 2007 / Proposed Rules, 56690-56691

prevent or prohibit unlawful Internet gambling transactions is uncertain relative to the likely costs involved in creating such a list.”²³

Including the cost of legal analysis; “Establishing a list of unlawful Internet gambling businesses would be a time consuming process given the fact finding and legal analysis that would be required.”²⁴

So it seems clear with out further footnoting other authorities like the Chamber of Commerce or the Center for Regulatory Effectiveness both organizations’ comments you already have that there is no way for the government to create nor maintain a “restricted list”, I find it the highest form of double speak for the Agencies to suggest that the private sector should or could maintain such a list even if it was at a lower price.

Suggesting that the Banking Industry because of the safe harbor provision would somehow be a better guard of my civil rights in determining the legality or illegality of any financial transaction I make even using a one sized fits all over blocking better safe than sorry approach is not my opinion of good government not proper public policy.

Indeed I am appalled that as part of the justification for this law the Agencies cite: “Congress determined that Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.”²⁵ More has been lost in the last five years due to the actions of the Banking Industry in promoting and profiting from the Real Estate bubble through sub-prime mortgage products, than could be lost in a lifetime of problem gambling even over the Internet, the “crack cocaine of gambling.” At worst a problem gamblers effects are limited to those closest to him, he doesn’t have the power to wipe out value in almost everyone’s largest single lifetime investment their home.

I have not yet had a chance to read any comments submitted by the American Banker’s Association, but I see very little good governmental policy in protecting the banks from any individuals. They as a whole have shown little regard for your average American. In reality they have quietly created at least a generation of share cropper slaves reminiscent of the bondage outlawed long ago from the Civil War and the abolishment of company towns.

Perhaps the Agencies can find some magic solution to address all of the concerns from individuals as well as those in the Banking and Money Transaction businesses; that does not cause further harm. As someone who spent a decade in the Financial Services Industry I can not think of a single one.

In addition to potential legal action further clogging up the courts for decades to come, the Agencies also face pressure from the rest of the world. We may have movement from the WTO on Friday December 14th, 2007, that will render a complete rewrite of not only

²³ **Federal Register** / Vol. 72, No. 192 / Thursday, October 4, 2007 / Proposed Rules, 56692

²⁴ **Federal Register** / Vol. 72, No. 192 / Thursday, October 4, 2007 / Proposed Rules, 56692

²⁵ Ibid page 56691

the UIGEA law but render this rule making process moot. But given the current environment I imagine that action at best being at least as costly to the average citizen as the sub-prime fiasco.

Given that there are plenty of other ways to protect against the problems identified by the NGIS as evidenced by the experience of other nations, there seems little need enact a prohibition with its track record of failure as policy. I as a recreational poker player would much prefer my government's efforts followed the model of New Zealand. There New Zealanders enjoy a safe and regulated game with out worry of creating harm to others. The government collects enough revenue to not only regulate the activity but provide additional funds to the Ministry of Health. Now that sounds like a "well-thought-out measure"²⁶ and perhaps good government.

So, to little old me your course seems clear. How you manage to put all of the problems into their proper language to show Congress that you did the best you could and completely fulfilled your mandate, I do not have a clue. What is governmentese for do over?

In closing, I wish you what almost every gambler wishes for; good luck!

As a poker player I know those who rely on luck are fish (losers).

I am,

Joseph E. McNeill

²⁶ PREPARED TESTIMONY OF THOMAS E. McCLUSKY before the HOUSE JUDICIARY COMMITTEE November 14, 2007