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Regulatory and Public Policy

December 12, 2007

Re: Docket R-2198

VIA: www.regulations.gov

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

Mr. Charles Klingman
Deputy Director
Department of the Treasury, Office of Critical Infrastructure Protection and
Compliance Policy
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220.

Dear Ms. Johnson and Mr. Klingman:

Bank of America N.A. (Bank of America or the Bank) appreciates the opportunity to submit comments to the proposed rule implementing the Unlawful Internet Gambling Enforcement Act of 2006 (the Act). As one of the world's largest financial institutions, providing a full range of banking, investing, asset management and other financial and risk management products and services, Bank of America has a strong interest in a workable means of implementing of this rule. In 2006, the Bank processed nine billion checks, operated the largest bank-owned ATM network with over 7,000 locations, and was the largest receiver of Automated Clearing House (ACH) transactions in the United States.¹ Additionally, the Bank has over 23 million active on-line banking users and is the largest issuer of credit cards in the United States.

At Bank of America we strive to provide our customers with innovative products and services that meet their financial needs. We also work with the government to root out bad actors and combat efforts to abuse the system, and we offer our comments with those perspectives in mind.

In general, we note that the proposed rule creates additional oversight responsibilities for financial services companies to undertake at a time when regulatory burdens have been shown to inhibit the competitiveness of U.S. financial institutions. If not implemented with care, the proposed rule could reduce the efficiency of the global payments system.

We believe that there can be improvements to the definitions and exemptions provisions of the proposed rule. Additionally, the proposed safe harbor needs to be improved to ensure that it covers instances of over blocking as well as instances where illicit transactions pass through the payments system despite efforts to intercept them. The government is in the best position to identify and publish a list of entities

¹ In 2006 Bank of America was the number one Receiving Depository Financial Institution (RDFI) and number two Originating Depository Financial Institution (ODFI) in the U.S. with a total of 4,365,125,476 in combined transactions.

that are engaged in illegal internet gambling so that financial institutions can effectively block payments to and from these entities.

I. Definition of Unlawful Internet Gambling and Other Terms Needed

A. The proposed rule does not define “unlawful internet gambling,” and by failing to do so, hinders the ability of financial institutions to comply with the rule. The Supplementary Information in the rule states that the scope of the gambling related terms should be resolved by reference to the underlying State and Federal gambling laws. This approach is not workable for the participants in the payments system, as it grants no certainty as to what is permitted and what is not. Without an unambiguous definition of what is unlawful, financial institutions will be forced to block legitimate transactions in order to avoid the possibility of permitting an illegal transaction. This will result in costly disputes between payment system operators and participants and their clients. Some payment system operators and participants may be forced to completely abandon all services to any business that is involved in gaming activities for fear that some transactions may be deemed to be illegal.

Recommendation. As with OFAC, the agencies should provide a list of entities with whom financial institutions are prohibited from doing business. Without this additional direction financial institutions will be forced to determine on their own which state or federal laws apply to a particular transaction, which is a complicated, fact-specific determination to each transaction.

B. The proposed rule requires a depository bank to set and follow certain procedures “if the depository bank becomes aware that the customer has deposited checks that are restricted transactions.” Depository banks cannot manually inspect each check moving through the payments system to determine the purpose of the check, but even if they could, the purpose of the payment can easily be obscured by entities seeking to engage in unlawful internet gambling. A depository bank is most likely to become aware of an illegal internet gambling transaction through notice from the government that the payee is an unlawful enterprise.

Recommendation. The rule should clarify that a depository bank “becomes aware” of a restricted transaction when the bank is notified by the government of an unlawful transaction or when the payee is placed on a government-generated list of unlawful enterprises that is provided to the depository bank.

C. Throughout the proposed rule, there are references to “blocking, preventing, and prohibiting” restricted transactions. It would be helpful for enterprises seeking to comply with the final rule to have a better understanding of what the agencies mean when they refer to blocking, preventing, and prohibiting and if there is any distinction among these terms.

Recommendation. The agencies should permit the card networks (e.g. VISA, MasterCard, American Express, and Discover) and ACH associations to define these terms through their operating rules, and act by rule only if the association rules are deemed insufficient.

D. The definition of “card system” in the proposed regulation uses the term “operator” when determining who authorizes transactions. The term “operator” would only apply in the American Express (AMEX) or Discover proprietary models, where the issuer, acquirer, and network are owned by the same entity. In the more traditional model (MasterCard, Visa, and now AMEX & Discover Licensees), where the issuer, acquirer, and networks are different entities, the issuer is responsible for the authorization and may not have any direct relationship to the acquiring institution.

Recommendation. The following definition of “card system” may be more appropriate: “(d) *Card system* means a system for authorizing, clearing and settling transactions in which credit cards, debit cards, pre-paid cards, or stored value products, are used to purchase goods or services or to obtain a cash advance. The card system generally relates to a card processing model in which the merchant acquirer, the card network, and the card issuer may be separate entities, but may include a card processing model in which one or more of the entities are the same.”

II. Designated Payment Systems

The list of designated payments systems in the proposed rule is appropriate; however, the description of Money Transmitting Businesses (MTBs) should be narrowed. Often financial institutions use third party agents to provide money transferring services for their online banking businesses. These agents should be excluded from the definition of an MTB. If these entities are not excluded from the definition of MTBs, the ability of customers to transfer funds electronically will be significantly slowed and financial institutions will have to construct systems to replace the services that these agents provided.

Recommendation. Since these companies, when acting as vendors to financial institutions, are not acting as MTBs, they must be permitted to avail themselves of the same exemptions as the institutions that they are serving in order to perform their duties without threat of liability.

III. Safe Harbor Should be Clarified and Exemptions Expanded

Safe Harbor

The proposed rule structures its safe harbor provision by including non-exclusive examples of policies and procedures that would be deemed to be reasonably designed to prevent or prohibit unlawful internet gambling transactions. Bank of America strongly endorses this effort, but urges the agencies to clarify this safe harbor so that banks can reasonably rely on it for protection from liability and regulatory risks. It is expected that under the proposed rule banks may inadvertently prohibit (over block) some legitimate transactions and could also approve some transactions that are supposed to be blocked. The agencies should grant safe harbors for both of these inadvertent errors so long as the institution has reasonable policies and procedures in place to comply with the rule. Without this explicit safe harbor, the payments system will be slowed and a larger number of transactions will be over blocked.

Recommendation. The agencies should be clear that banks that establish reasonable policies and procedures to block unlawful internet transaction will not be subject to liability if a legitimate transaction is blocked or if an improper transaction is approved. The safe harbor should make it clear that in order to qualify an institution does not have a duty to continuously monitor transactions for unlawful activity, but rather must establish reasonable policies and procedures and act when it “becomes aware of” the unlawful activity. Without this clarification, the “becomes aware of” standard leaves a financial institution in doubt of what, if any, action it would need to take in order to be covered by the safe harbor. Although the proposed rule states that it was not intended to change the legality of any gambling-related activity in the United States, if there is no such safe harbor, financial institutions will be at great risk of liability and may be forced to disengage from all gambling-related clients.

ACH and Wire Transfer

Bank of America supports the provisions in the proposed rule that grant exemptions if it is not “reasonably practical” to prevent or block a transaction. The agencies have properly exempted the

originating depository financial institutions (ODFIs) of an ACH credit transaction and receiving depository institutions (RDFIs) in an ACH debit transaction and the originator's bank for a wire transfer, all based on the fact that banks do not have control over these transactions. Further, Bank of America agrees that both the Federal Reserve and EPN should be exempted since these entities pass files through the system, but do not interrogate them. However, the proposal does not exempt the ODFI in an ACH debit transaction or the RDFI in an ACH credit transaction and the beneficiary's bank in a wire transfer. There is no effective tool to monitor this transactional activity. The proposed rule seeks to require an originator to submit a statement that the ACH debit transaction is not a restricted transaction. As with the transactions that the proposed rule exempts, such a statement by an ODFI in an ACH debit transaction is of limited value, because a customer may knowingly mischaracterize the nature of the transaction, or because the customer may be unaware whether a particular gambling transaction is restricted under the Act. Developing a system to obtain information and then decide whether to reject or block a transaction would be burdensome, it would slow the payments system and any associated benefits would likely be outweighed by the costs to institutions involved.

Recommendation. In order to preserve the efficient function of the ACH and wire transfer systems and to avoid unnecessary costs, the final rule should exempt all ACH ODFIs and RDFIs for ACH credits and ACH debits, as well as all wire transfer beneficiary banks..

Check Transactions

Bank of America agrees with the provisions in the proposed rule that exempt the clearinghouses, the paying bank, any collecting bank, and any returning bank involved in a check transaction from the requirements of the regulation. As pointed out in the Supplementary Information, banks in the collection process handle large volumes of checks daily and typically rely on data (usually found in the MICR line of the checks) to process them. These banks do not inspect the items individually and could not do so, without creating extensive delay in the system and exponentially increasing the collection risk to banks. The exemption for most of the participants in the check collection process is necessary to keep this process operational.

The proposed rule, however, does not exempt depository banks from coverage. Under the proposed rule, depository banks would be required to have policies and procedures reasonably designed to prevent or prohibit restricted transactions. Depository banks, like others in the check collection process, rely largely on the information in the MICR line to process checks on a daily basis. In 2006, Bank of America processed an average of 125 million deposits **per month**, containing 500 million checks. This considerable check volume prohibits the Bank from inspecting each deposited item manually. If checks were inspected manually, the payments system would be severely impeded, and depository banks would encounter the same obstacles that the agencies acknowledge would face paying banks: “. . . even if the payee information on checks is analyzed manually, it is very difficult for a paying bank to determine whether the check is related to a restricted transaction.”² While depository banks are required to have more knowledge about their own customers than other banks in the collection chain, it does not follow that a depository bank would have any more information about the *purpose* of a transaction relating to a *particular check*. This is doubly important because, as discussed above, the proposed rule fails to define what constitutes “unlawful internet gambling.”

It would take a great deal of information about the purpose of a transaction behind any particular check, as well as an extensive knowledge of state, federal and tribal law to be able to determine that any

² The Federal Reserve Board and the Department of Treasury, Notice of Proposed Rule Making, 31 CFR Part 132, (p. 16).

particular check relates to “unlawful internet gambling.” This is not information and knowledge that individuals processing checks at a depository bank are likely to have.

Recommendation. Depository banks should be exempted from this rule since they will not have the ability to identify the purpose of the check transaction with any greater certainty than other participants in a check transaction. Further, convenience checks and ACH payments made or issued in connection with credit card accounts should be subject to the same exemptions the proposed rules grant to paper checks and ACH vehicles. It is extremely difficult to distinguish convenience checks and ACH payments connected to credit card accounts from those that are not connected to such accounts.

IV. Processing Restricted Credit Card Transactions

The proposed rule requires all non-exempt participants in the designated payment systems to establish and implement policies and procedures to identify and block, or otherwise prevent or prohibit, restricted transactions. While the overall intent of this provision should be to mirror processes that exist in the major card networks today (Visa, MasterCard, American Express, Discover), the proposed language fails to distinguish between the separate and distinct roles that the various non-exempt participants play in being able to support identification and blocking.

The credit card payments system generally require participation from four different parties who each play a distinct role in preventing the processing of illegal internet gaming transactions:

- (1) the merchant - initiates and submits the transaction a certain way impacting the transaction indicators;
- (2) the acquiring bank - establishes transaction indicator requirements with merchants and provides authorization and settlement services among merchants;
- (3) the card network - establishes the policies and procedures for identification and blocking and first detects a transaction's coding; and
- (4) the card issuer - provides authorization for non-restricted transactions.

Each party plays a critical role in facilitating merchant transactions, but they do not all have the same ability to identify and block a restricted transaction. In order for an issuer to recognize a transaction as “restricted” prior to authorization it relies solely on merchant category code (MCC) and transaction indicators provided by the merchant. At the time they initiate a transaction, the issuer would have to examine both the MCC from a gambling merchant (MCC 7995) and a separate internet transaction indicator, the combination of which would reasonably indicate internet gambling. The MCC and the transaction identifier simply indicate that there is a gambling transaction over the internet, not whether that transaction is legal or illegal. For example, the following elements on the same transaction indicate internet gambling:

MasterCard:
 MCC 7995 [Gambling]
 Data Element 22, subfield 1, value = 80 [Internet Transaction Indicator]

Visa:
 MCC (Field 18) = 7995 [Gambling]
 Processing Code (Field 3) = 11 [Quasi-Cash/Online Gambling]
 POS Condition Code (Field 25) = 01, 08, 59 [E-commerce transaction]

Both MasterCard and Visa use the same MCC, but different transaction identifiers and neither addresses the question of legality. If the merchant does not properly process the transaction or the transaction does not require an authorization, the card network (or issuer) would have no ability to identify and block the transaction and could not reasonably be expected to do so. On the other hand, while acquirers monitor their merchants to ensure they comply with the transaction parameters established at the time the merchant's account was set up, they do not have the functionality to view transactions in real-time, and only see transactions AFTER an authorization has been received from an issuer. Reliance on the MCC is subject to the same limitations as check, ACH, and wire transactions in that a customer or a merchant can knowingly mischaracterize the true nature of the transaction, without the network or the issuer being aware of the mischaracterization.

The only party who is in a position to determine whether or not the transaction is restricted under federal, state, intratribal, intrastate betting, or intrastate horseracing laws is the merchant itself. While acquirers can establish policies and procedures to ensure terminals are programmed for the appropriate MCC, without a list designating companies that are known to engage in illegal internet gambling activities, none of the parties have the resources to know the many state laws, nor would they know where a transaction is "initiated, received or otherwise made" to determine whether it was unlawful. In addition, issuers, and card networks are not able to make determinations based on the information received (MCC or transaction indicators) and would also have no way of knowing if the merchant is engaging in a legal or an illegal transaction at its particular location. Reliance on MCC codes will not be sufficient as their assignment is controlled by the merchants or the card network. Issuing banks and other depository institutions have no ability to determine how particular codes will be assigned. Additionally, since these transactions are unlawful to begin with, it would be safe to assume that users would be willing, and easily able, to improperly process transactions to prevent identification of their true nature.

Recommendation. Bank of America recommends recognition of the distinct roles played by the actors in a card transaction and supports a process that would require the payment networks to serve as the primary entities responsible for both the policies and operational procedures and the identification and blocking of restricted transactions that would occur before being presented to an issuer. In addition, the networks should be urged to create a consistent and uniform standard so that the participating members are not placed in a position of evaluating differing policies and procedures to determine compliance. The agencies should review and approve such plans once they have been created and provide a strong safe harbor for participants who rely on them. The networks should not be permitted to charge association members or licensees for compliance with the agencies' regulations.

Today, when the Office of Foreign Assets Control (OFAC) prohibits transactions with a country, the card networks prohibit all transactions within these countries before transactions are received by the issuer. A similar structure for internet gambling would be the most effective and efficient way to prevent illegal internet gambling.

V. Policies and Procedures

Bank of America generally supports the suggested provisions set forth in this section with the following specific suggestions:

Merchant/Customer Due Diligence. Bank of America has specific policies in place to identify a merchant's business activity. Account opening applications allow a bank to obtain specific information about the merchant that indicate the nature of its business and types of transactions on which it wishes to accept card payments, wire transfers, or engage in ACH transactions. Bank of America currently takes a

risk-based approach to establish that a merchant does not itself perform, or have relationships with other merchants known to perform, gaming transaction via the Internet. In addition, applicants that indicate that they will be accepting payments over the Internet are subject to enhanced due diligence in the form of an investigation of their web site content including links contained on its web pages. However, requiring banks to continuously monitor and review the activities of their clients without the use of a specific list of enterprises engaged in unlawful internet gambling will not achieve the goals of this proposed rule. Entities that seek to engage in illegal activity will not identify that they are engaged in such activity.

Remedial Action. We propose that the banks be permitted to establish risk-based remedies depending on severity, volume and type of non-compliant action. We have provisions in our customer agreements that permit us to terminate the relationship for improper use of the account. All banks should be permitted to make risk-based decisions as to whether to terminate or not terminate a customer and should be considered compliant, as long as they are taking reasonable steps to block transactions. With regard to fines for improper activity, the card networks and other payments associations are the appropriate entities to be charged with the duty of imposing fines for improper activity by merchants.

Cross Border Transactions. The agencies should clarify the intent of this section of the rule. There is no information embedded in a cross border wire transfer, credit card transaction or ACH transfer that would let a bank know the purpose of a transaction and, given the complexity of the question of what is legal and illegal, it is impossible to judge whether such a transaction would be restricted or not. To block illegal cross border transactions, a bank would have to rely on: 1) information within the transaction if provided by the originator; or 2) a list of blocked organizations. The originator is unlikely to be helpful in this regard; The responsibility for policing cross border transactions is more complex than policing transactions occurring completely in the U.S. because it is difficult to identify merchants off-shore, and international jurisdictions often permit internet gambling transactions. Additionally, it is unclear what a U.S. bank would be expected to do if a transaction that was legal in the countries of the sender and recipient traveled through the U.S. prior to payment. To require a U.S. based bank to discover and then block this type of transaction would be unreasonable and place an extreme burden on the payments system. Finally, since it is not possible to determine the purpose of a wire transfer, the agencies should make it clear that intermediary banks are exempted.

List of Unlawful Internet Gambling Businesses. This section of the proposed rule lays out precisely why financial institutions cannot with any degree of certainty identify, block or even accurately monitor unlawful internet activity. This regulation was proposed based on research that indicated that most unlawful gambling businesses operate offshore and have no direct relationships with U.S. financial institutions. As such, the U.S. Government is best positioned to provide information on targeted entities operating illegal businesses and to work to prevent those conducting legitimate transactions from being unfairly penalized. The payments system does not have the capability to limit identification and blocking to only those entities meeting the restricted transaction definition without being provided company/entity names to monitor against. The agencies identify some practical concerns in upkeep and execution; however, they are not different than the concerns that the card, ACH, wire, and check system participants encounter in their obligations under the proposed rules. We believe that the resource time and cost is much greater for private enterprises than it would be for the government to provide such a list and could leverage the existing process the government has for the management of the OFAC list. Further, the government grants entities that are placed on the OFAC list some due process rights to contest their listing. No such rights exist when transactions or entities are blocked by financial institutions, even though the effect on the company can be extremely adverse. We therefore support the establishment and maintenance of a list by the government to be used by financial institutions in a similar manner as the OFAC list, coupled with a safe harbor for those that block transactions with the listed entities.

Cost/Benefit. The agencies will be placing a substantial burden on financial institutions and the payments system if they require banks to actively monitor accounts for unlawful internet gambling activity. Banks will be forced to redesign their account opening systems and maintenance systems as well as warehouse the responses received from customers. For Bank of America these additional changes could result in hundreds of millions of dollars in additional costs for limited, if any, benefit. Additionally, consumers could face payment processing delays or the blocking of legitimate transactions if banks are required to monitor all of these financial transactions. As mentioned above, inquiries from banks to entities seeking information regarding unlawful activities will not likely result in responses indicating such activity is occurring, so the burdens of this proposal greatly outweigh any potential benefits.

Timing of Implementation. Given the safe harbor for participants in the payments system based on reliance with written policies and procedures of the designated payment systems, we would encourage the agencies to consider aligning the mandatory compliance dates for at least 24 months after the card networks and check clearing associations establish their policies required under these rules. This will limit duplication of effort and help ensure that all systems are responding at the same time.

VI. Conclusion

Thank you for the opportunity to present Bank of America's views on these proposed rules. In order to prevent undue burdens on the payments system, it will be critical for the agencies to improve and clarify the definition of unlawful internet gambling and establish unequivocal safe harbors for both over blocking and under blocking. Further, in addition to the exempted participants cited in the rule, the ODFI for ACH debits and the RDFI for ACH credits, beneficiary banks for wire transfers, and depository banks for check transactions should all be exempted from these rules since efficient systems do not exist to monitor these transactions for unlawful internet gambling activity. Finally, MCCs for card transactions are not useful tools for issuers to identify illegal internet gambling transactions. We respectfully submit that the most effective method to halt illegal internet gambling would be for the government to establish a list of entities that engage in such activities and require financial institutions to use this list to block access to the payments system.

Respectfully Submitted,



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