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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

Attention: Treas-DO and Docket Number Treas-DO-2007-0015

And

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

Attention: Docket Number R-1298

Re: Notice of Joint Proposed Rulemaking - Prohibition on Funding of Unlawful Internet Gambling

Thank you for this opportunity to comment on the Proposed Rule implementing the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").¹ These comments are submitted on behalf of the Poker Players Alliance (the "Alliance"). The Alliance is a nonprofit membership organization comprised of poker players and enthusiasts from around the United States who have joined together to speak with one voice to promote the game, ensure its integrity, and, most importantly, to protect poker players' rights.

The Alliance and some of its members individually have filed, or will be filing, separate comments. The intent of this comment is to focus on the constitutionality of the above-referenced Proposed Rule, specifically with respect to the First Amendment's protection of commercial speech and prohibition against vague or overbroad regulations. This comment also discusses how the delegation to individual non-governmental financial institutions of decision-making authority violates procedural due process rights guaranteed by the Fifth Amendment.

¹ Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347 (2006).

Lost in much of the discussion on Internet gaming is the impact efforts to proscribe the activity have had on commercial speech protected by the First Amendment. The Justice Department's broad approach, in which it has concluded that all Internet gaming – and by extension, commercial speech related to such gaming – violates Federal law likely already amounts to an unconstitutional limitation on commercial speech. The Proposed Rule exacerbates the situation by failing to narrowly tailor the proscribing of financial transactions involving Internet gaming, and as such will catch in its net legitimate Internet gaming activities – and by extension, the commercial speech related to such gaming. The broad approach of the Justice Department and the Proposed Rule, when taken together, will chill commercial speech involving legal Internet gaming, thus infringing upon the right of individuals to hear messages about such legal activity.

The Proposed Rule, in implementing UIGEA, fails to define with any useful specificity what qualifies as “unlawful Internet gambling,” and, as such, could result in the restriction of legal advertising. It effectively delegates to private financial institutions the responsibility for determining what activities constitute “unlawful Internet gaming.” These financial institutions are not required, in making this determination, to be sensitive to, or even take into account, the impact their decisions could have on commercial speech. Indeed, in exercising this delegation, such institutions may have an incentive to construe broadly what qualifies as “unlawful Internet gambling,” and thus may quash legal activities and any accompanying truthful commercial speech.

The Proposed Rule's failure to define the term “unlawful internet gambling” also flies in the face of the Constitution's prohibition against vague or overbroad regulations. It is vague in that it does not give fair notice as to what activity is legal or illegal, and overbroad because it will effectively limit illegal and legal activity alike.

I. Constitutional Protections Provided To Commercial Speech

Typically, the threat to commercial speech freedoms arises when lawmakers or regulators restrict commercial speech promoting unpopular or controversial products. Yet, unpopular speech is precisely what the First Amendment was intended to protect. “Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.”² And this sentiment extends fully to commercial speech:

The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker

² *FCC v Pacific Foundation*, 438 U.S. 726, 745 (1978).

and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.³

Just as the case law provides clear protection of commercial speech, however unpopular, it also insists that any restriction on that speech not be overbroad, but be narrowly tailored. Vague and overbroad restrictions on commercial speech are invalid because, as such, the government cannot meet its burden of establishing that the restrictions are narrowly tailored and do not unduly infringe on free speech.

The Supreme Court first provided protection to commercial speech, *i.e.*, speech that does “no more than propose a commercial transaction,” in *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc.*⁴ Four years later, the Court issued the governing decision, *Central Hudson*, which established a four-part test to determine the constitutionality of governmental restrictions on commercial speech⁵. The *Central Hudson* test is as follows:

1. Does the commercial speech concern a lawful activity and is it non-misleading?
2. Is the asserted governmental interest in restricting the speech substantial?
3. If so, does the regulation, or regulatory approach, directly advance the governmental interest asserted?
4. If so, is the regulation, or regulatory approach, more extensive than is necessary to serve the government’s asserted interest?

If the first question is answered in the negative, the speech receives no protection under the First Amendment and the analysis ends. However, where the speech concerns lawful activity and is not misleading, the state bears the burden of establishing that the restriction. In this case, delegating to private financial institutions the responsibility of determining what constitutes “unlawful Internet gambling” transactions, and empowering those institutions to restrict such transactions, and by extension, any advertising which accompanies those transactions – satisfies the remaining three factors.⁶

³ *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); see *44 Liquormart Inc. v Rhode Island*, 517 U.S. 484 (1996).

⁴ *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁵ *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557 (1980).

⁶ See *Roderwood v City of Burlington*, 21 F. Supp. 2d 411, 421-22 (D. Vt. 1998) (“If ‘truthful and nonmisleading expression will be snared along with ... deceptive commercial speech, the State must satisfy the remainder of the

II. The Constitutionality of Current Restrictions on Commercial Speech for Certain Forms of Internet Gaming is in Question

Under the Interstate Wire Act of 1961 (the “Wire Act”), any person who aids and abets those taking bets proscribed by the statute could be subject to criminal penalties.⁷ The Justice Department has made the determination that all forms of Internet gaming, and by extension, advertisements promoting the activity, are subject to the Wire Act.

A 2003 letter from Deputy Assistant Attorney General for the Criminal Division John G. Malcolm to the National Association of Broadcasters, stated for all intents and purposes that those who run or publish advertisements for online gaming websites were violating the Wire Act.⁸ The Justice Department asserted this claim based on its analysis that all online gaming was illegal and, therefore, anyone who advertised for online gaming was also violating the law. Mr. Malcolm reiterated this claim during testimony before the Senate Committee on Banking, Housing, and Urban Development, in which he asserted that advertising for online gaming websites misleads consumers because they imply that online gaming was legal.⁹

The Department has undertaken enforcement actions consistent with such statements. In 2005, the Department seized \$3.2 million in advertisement money paid by ParadisePoker.com to advertise on the Discovery Channel.¹⁰ In January 2006, it was announced that the *Sporting News*, without admitting any liability, agreed to pay \$4.2 million to the United States in connection with the company's sale of advertising space to operators of offshore sports betting and casino-style gaming operations. The *Sporting News* also agreed to undertake a public service advertising campaign worth \$3 million to inform consumers that provision of such gambling services to residents of the United States violates federal and state laws. And it has been reported that the Justice Department has pressured major U.S. media outlets into pulling advertisements for online gaming, including, among others, Infinity Broadcasting, Clear Channel Communications, Google, Yahoo!, and Esquire Magazine.¹¹

Central Hudson test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.”)(quoting *Ederfield v Fare*, 507 U.S. 761, 768-69 (1993)).

⁷ 18 U.S.C. § 2 (2006).

⁸ Letter from John D. Malcolm, Deputy Assistant Attorney General, Criminal Division, to the National Association of Broadcasters, Re: Advertising for Internet Gambling and Offshore Sportsbooks Operations (June 11, 2003).

⁹ *Proposals to Regulate Illegal Internet Gambling Before the H. Comm. On Banking, Housing, and Urban Affairs*, 109th Cong. (2003) (Statement of John D. Malcolm, Deputy Assistant Attorney General, Criminal Division).

¹⁰ Matt Richtel, *U.S. Steps Up Push Against Online Casinos By Seizing Cash*, N.Y. TIMES, May 31, 2004, at C1.

¹¹ Matt Richtel, *Companies Aiding Internet Gambling Feel U.S. Pressure*, N.Y. TIMES, Mar. 15,

2004, at A1; Amy Yee, *Regulators Fight to Control Online Gaming*, FIN. TIMES, Aug. 20, 2005, at 7; Matt Richtel, *Web Engines Plan to End Online Ads For Gambling*, N.Y. TIMES, Apr. 5, 2004, at C1.

Despite these actions by the Justice Department, there is no uniform consensus on what constitutes unlawful Internet gaming under federal or state laws. In 2002, the Fifth Circuit in *In Re: MasterCard International Inc. Internet Gambling Litigation*, declared that the Federal Wire Act, the basis for the UIGEA's authority to prohibit financial institutions from transferring money to and from online gaming websites, does not apply to non-sportsbook online gaming.¹² The decision stands in contradiction to the Justice Department's letter (which, in fact, came after the ruling), seemingly creating two sets of federal rules for the country, those applying in the Fifth Circuit and those potentially applying elsewhere in the absence of a court decision.

The uncertainty surrounding the legality of Internet gaming is confirmed by the Proposed Rule. By the Treasury Department and Federal Reserve's own admission, the Proposed Rule does not clearly define "unlawful Internet gambling."¹³ In the introductory language to the Proposed Rule, it states:

"The proposed rule does not attempt to further define gambling-related terms because the Act itself does not specify which gambling activities are legal or illegal and the Act does not require the Agencies to do so. . . 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 . . . the Agencies' preliminary view is that issues regarding the scope of gambling-related terms should be resolved by reference to the underlying substantive State and Federal gambling laws and not by a general regulatory definition."¹⁴

That the government has an interest in restricting the speech related to clearly *illegal* Internet gaming is not at issue. However, the overly broad means by which the government is restricting such speech is Constitutionally suspect. The Justice Department's actions against advertisers of online gaming products, by failing to take into account either the *In Re: MasterCard* opinion or the uncertainty as to what constitutes "unlawful Internet gambling" as reflected in the Proposed Rule, violate the *Central Hudson* requirement that restrictions be no more extensive than is necessary to serve the government's asserted interest.

Indeed, while the Justice Department asserts its goal is to stop only those engaged in "illegal" gaming, there is reason to believe the Department has engaged in activity to pressure individual

¹² *In Re: MasterCard International Inc. Internet Gambling Litigation*, 313 F.3d 257 (5th Cir. 2002).

¹³ Prohibition on Funding Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,682, 56,697 (Proposed Oct. 4, 2007) (to be codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

¹⁴ Prohibition on Funding Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,682.

broadcasters and publishers to stop all online gaming advertisement, without regard to the decision of the Fifth Circuit and the ambiguity recognized in the Proposed Rule.¹⁵

The Justice Department's broad application of the Wire Act to advertising of all forms of legal or not conclusively illegal Internet gaming, then, is Constitutionally suspect when applied to advertising such Internet gaming. The failure of the Proposed Rule to clarify what constitutes "unlawful Internet gambling" exacerbates the Constitutional problem.

III. The Proposed Rule Violates the First Amendment's Protection of Commercial Speech

As discussed above, the Supreme Court has long held that commercial speech is a form of protected speech under the First Amendment. Commercial speech has been defined as expression related solely to the economic interest of the speaker and its audience.¹⁶ As such, lawful commercial speech usually takes the form of advertisements. Therefore, as commercial speech, these advertisements can only be regulated in a limited way in order to protect both the speaker and the audience, who also have a constitutional right to receive the message.¹⁷

A. The Proposed Rule Wrongly Limits Legal Commercial Speech

Under the test established in *Central Hudson*, the advertised activity must be legal for First Amendment protections to apply. Because certain forms of online gaming are legal, at least in certain jurisdictions, advertising for those online gaming websites is legal, and, therefore, protected by the First Amendment.

For example, as discussed above, the Fifth Circuit, in *In Re: MasterCard International Inc. Internet Gambling Litigation*, declared that the Federal Wire Act is limited to online gaming sites accepting bets on sporting events and contests, leaving as legal non-sportsbook websites, such as online poker to the extent the activity is legal under state law.¹⁸

Furthermore, there are online activities which do not violate the Wire Act by virtue of those activities being conducted on an intra-state basis (such as pari-mutuel race track betting in certain states), and which do not violate the Act by virtue of not constituting gambling (such as skill games including online chess tournaments).

¹⁵ *Casino City, Inc. v United States Department of Justice*, Civil Action No. 04-557-B-M3 (M.D. La. February 15, 2005).

¹⁶ *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

¹⁷ *Id.*

¹⁸ *In Re: MasterCard International Inc. Internet Gambling Litigation*, 313 F.3d 257 (5th Cir. 2002).

Commercial speech for these legal activities falls under the protection of the Constitution, as set forth in *Central Hudson*, and as such, any regulation of this speech must be narrowly tailored – which the Proposed Rule is not.

B. The Proposed Rule is Not Narrowly Tailored

In *Central Hudson*, the Court prohibited a regulation that was more extensive than was necessary to serve the government interest asserted. As such, the Court required that regulations be “narrowly tailored.” For a regulation to be narrowly tailored, it “may extend only as far as the interest it serves.”¹⁹ Moreover, “the State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”²⁰

Here, the state interest is regulating *illegal* online gaming activities, including advertisements for such activities. The Proposed Rule, by failing to define “unlawful Internet gambling,” will effectively restrict both illegal and *legal* activities, thereby regulating commercial speech related to both indiscriminately.

The Proposed Rule delegates to the financial institutions the responsibilities of determining which online gaming activities are illegal and which financial transactions to prohibit. The Justice Department’s demonstrated willingness to take actions against entities that support online gaming websites gives financial institutions an incentive to err on the side of barring any transaction which could conceivably be construed as illegal – even if the transaction is legal. Therefore, financial institutions could block all online gaming transactions, regardless of legality; a point made in the comments submitted by The Money Services Round Table.²¹ And because there is no recourse for online gaming websites, advertisers, or media outlets to challenge that determination, there is no incentive for financial institutions to be more precise in their decisions.

Once financial institutions block the transactions of a legal online gaming website, that site can be expected to terminate its use of commercial speech to promote its product. Furthermore, any media outlet (website, TV, radio, or print) that advertises that website could be chilled from carrying that site’s advertisements, fearing the financial institution’s determination could be shared by a Justice Department which has acted against those involved in the advertising of online gaming.

¹⁹ *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557, 565 (1980).

²⁰ *Id.*; see *First National Bank of Boston v Bellotti*, 435 U.S. 765, 794-795 (1978).

²¹ Comment by Howrey LLP on Behalf of The Money Services Round Tables (for Prohibition on Funding Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,682, 56,697 (Proposed Oct. 4, 2007) (to be codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132)), Docket No. Treas-DO-2007-0015-0052 (December 6, 2007).

This unintended consequence of the Proposed Rule is a direct result of the confusion caused by the failure to define the term “unlawful Internet gambling” and the delegation of that role to financial institutions. Given the above, it is clear that the result of the Proposed Rule will go beyond the overbroad application of the law resulting in the blocking of legal online gaming activities and their advertisement, to having an impact well beyond its intended goal. The intended goal is to regulate *illegal* activity. But the impact of the legislation and the Justice Department’s record of prosecuting and pressuring those engaged in online gaming activities will lead to the regulation of *legal* commercial speech as well.

IV. The Proposed Rule is Unconstitutionally Vague and Overbroad on Its Face

While not limited to First Amendment violations, it is a violation of the Due Process Clause for a law with criminal sanctions to be vague on its face. The Supreme Court has ruled that a law is void on its face if it is so vague that “persons of common intelligence must necessarily guess at its meaning and differ as to its application.”²² Furthermore, a regulation is considered unconstitutionally vague if it does not give fair notice of what action to avoid.²³

As discussed above, *Supra* at II, the Justice Department and Fifth Circuit already disagree as to what constitutes illegal online gaming. Knowing this dispute, Congress, in enacting UIGEA, failed to clarify what constitutes “unlawful Internet gaming,” effectively leaving this determination to the regulatory process. In the Proposed Rule, the Treasury Department and Federal Reserve are further delegating this key determination to individual financial institutions. Given the unclear status of the law – and the differing advice offered by different authorities – financial institutions and media outlets will be understandably confused as to how to implement this law.

Furthermore, a law is constitutionally overbroad on its face if it does not merely limit illegal activities, but also limits protected rights as well.²⁴ As discussed above, *Supra* at III(B), the Proposed Rule is impermissibly overbroad to the extent it predictably causes both legal and illegal Internet gaming, and by implication, advertising, to be blocked.

By failing to define the term, “unlawful Internet gaming,” financial institutions and media outlets are forced to make their own individual determinations as to what constitutes “unlawful Internet gaming.” This will effectively guarantee overbroad enforcement of the UIGEA as financial institutions and entities involved in the advertisement of online gaming activities can be counted upon to err on the side of over blocking transactions involving online gaming sites.

²² *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); see *United States v. Lanier*, 520 U.S. 259 (1997).

²³ *Id.*; see also *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

²⁴ *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

V. The Proposed Rule Violates the Due Process Rights of Media Outlets and Those Seeking to Advertise

The Fifth Amendment states that “No person shall... be deprived of life, liberty, or property without due process of the law... .”²⁵ Procedural due process requires that a person, whether they be natural or de jure (such as a company), not be deprived of a property interest without due process of the law, such as a hearing before a court or administrative agency. In particular, this right includes the right to judicial review of government action depriving an individual of their property interest.

Under the Proposed Rule, the decision whether an online activity constitutes “unlawful Internet gambling” is delegated from Congress to the Treasury Department and Federal Reserve, who, in turn, delegate this determination to individual financial institutions. If a financial institution determines that an online activity is illegal, then its services cannot be used to transfer money to and from the company engaged in that online activity.

However, under the Proposed Rule, there is no recourse available for an online gaming company (or an advertiser for that company) to challenge such a determination by financial institutions, thus infringing the due process rights of entities harmed by such a determination. Neither the Proposed Rule nor UIGEA provide for judicial review of these delegated decisions. The Proposed Rule does not even address what to do in the event two different financial institutions make differing decisions as to the legality of an online gaming website’s actions.

VI. Conclusion

The Proposed Rule poses a direct threat to commercial speech protected by the First Amendment. Furthermore, it violates constitutional protections against vague or overbroad laws or a denial of due process. The Treasury Department and Federal Reserve are respectfully urged to redraft the Proposed Rule to clarify precisely what constitutes “unlawful Internet gambling.” A more nuanced definition will provide the financial institutions the necessary guidance to block only those activities which are illegal while permitting transactions and advertisements related to legal online gaming websites.

In promulgating its Final Rule, the Treasury Department and Federal Reserve should consider, address, and give guidance with respect to the following questions:

²⁵ U.S. Const. amend. V.

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1. How will any court be able to determine if on-line gambling is lawful, if that determination has been delegated to any number of financial institutions in the various states? If no solution is offered, might a court declare the Proposed Rule unconstitutional because of the delegation of the authority to define criminal activity to private entities or because of vagueness?

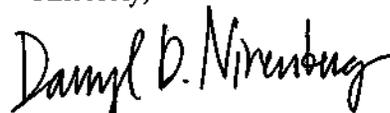
2. How will Treasury satisfy the "narrowly tailored" mandate of *Central Hudson* and avoid having the consequent direct and indirect restrictions on Internet gambling advertising not declared unconstitutional?

3. In light of the Fifth Circuit's ruling in *In Re: MasterCard International Inc. Internet Gambling Litigation* that the Wire Act applies only to online sports betting, and not to online games of skill and chance, will the Rule be different in the States within that Circuit?

4. What remedies will the Treasury Department enact to ensure that those entities engaged in lawful activities can continue to engage in those activities, and what recourse will be available to allow online gaming websites (and those that advertise for such websites) to challenge a designation by a financial institution that it is an entity engaged in unlawful Internet gambling?

Thank you again for providing me this opportunity to comment on the Proposed Rule on behalf of the Poker Players Alliance. Your consideration of the views stated herein is much appreciated.

Sincerely,



Darryl D. Nirenberg
Patton Boggs LLP