



NEVADA PARI-MUTUEL ASSOCIATION

185 East Reno Avenue, Suite B-8B
Las Vegas, Nevada 89119
Tel (702) 387-2021
Fax (702) 387-5459

November 29, 2007

VIA EMAIL

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

Re: **Response to Proposed UIGEA Regulations — Docket No. R-1298**

Dear Ms. Johnson:

Thank you for the opportunity to present comments on the above referenced proposal. I am the Executive Director of the Nevada Pari-mutuel Association ("NPMA") and am writing in response to the proposed rules to implement applicable provisions of the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").

The NPMA is a Nevada non-profit corporation comprised of 81 race books licensed to conduct pari-mutuel wagering in the state of Nevada. The NPMA was formed in 1989 for the purpose of encouraging the development of pari-mutuel wagering. As such, the NPMA believes that the proposed regulations to the UIGEA may have a profound negative impact on its legal industry for the reasons set forth in this letter.

Under UIGEA, two agencies, the Board of Governors of the Federal Reserve System and your Department (collectively the "Agencies"), had the responsibility to propose rules (in consultation with the Department of Justice) to implement applicable provisions of UIGEA. Specifically, these regulations were intended to provide guidance to the payment systems used by credit card companies, banks, payment networks including electronic fund transfers, stored value or money transmitting services, EFT terminal operators, and money transfer businesses (hereinafter, the "financial transaction providers" or "FTPs") to: (a) identify and code restricted transactions and (b) block the restricted transactions.

Restricted transactions are those transactions where a gambling business accepts funds directly or indirectly from a player in connection with *unlawful Internet gambling*. UIGEA defines "unlawful Internet gambling" as "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or state law in the state in which the bet or wager is initiated, received, or otherwise made."

UIGEA, however, specifically excludes interstate horse racing from the term unlawful Internet gambling:

In general, the term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

31 U.S.C. § 5362(10)(D).

Let me explain the Interstate Horse Racing Act (IHRA). In passing the IHRA, Congress wanted to promote the stability of horse racing and off-track betting (OTB) in the United States.¹ Congress envisioned an *interstate* pari-mutuel scheme to ensure that states with legalized horse race wagering "cooperate[d] with one another in the acceptance of legal interstate wagering."² The IHRA now governs the relationship between the OTB operators, licensed Internet and interactive television horse race betting services, the tracks, the horse owners and trainers and the state racing commissions concerning wagers placed in one state on the outcome of races being held in another state.³ All other aspects of horse racing, such as licensing and policing, are left to the discretion of the various state racing or gaming commissions.

A major provision of the IHRA requires the OTB operator to effectively negotiate a fee for conducting interstate wagering with each track on which it accepts wagers. The horse racing interests have always believed that the Act along with Section 1084(b) of the Federal Wire Act ("Wire Act") implied that interstate off-track wagering is legal under federal law. This would include interstate pari-mutuel poolings and account wagering by telephone or other means.

Notwithstanding the foregoing, the United States Department of Justice ("DOJ") took the position that interstate pari-mutuel off-track wagering violated the Wire Act, 18 U.S.C. § 1084 (1961).⁴ This dispute came to a head at a Congressional Committee hearing in 1999 when the Congress was debating an earlier version of the Internet Gambling Prohibition Act. At that hearing, the DOJ representative stated that he thought that account wagering was unlawful. Understandably, this position generated various concerned responses from horsemen's groups, especially since the Department of Justice had never previously "used the Wire Act to prosecute any state licensed and regulated entities for conducting interstate simulcasting, commingling of pools or account wagering."⁵ Moreover, court decisions supported the position of the horsemen's groups. For example, the Ninth Circuit has held that the criminal provisions of section 1084 are not applicable to the activity of licensed pari-mutuel wagering where it is lawful under

¹ 15 U.S.C. § 3001(3)(b) (2001).

² 15 U.S.C. § 3001(2) (2001).

³ See 15 U.S.C. §§ 3001—07 (2000)

⁴ Acting Assistant Attorney General Jon P. Jennings, Letter to from the Department of Justice to Senator Patrick Leahy regarding S. 692, The Internet Gambling Prohibition Act of 1999 (visited June 13, 2001) <<http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm>>; See also Internet Prohibition Act of 1999: Hearings on H.R. 3125 Before the Subcomm. on Telecomm., Trade and Consumer Protection of the House Commerce Comm. 106th Cong. 34 (2000) (testimony of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

⁵ Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 106th Cong. 59 (2000) (statement by Stephen Walters, Chairman, Oregon Racing Commission; See also Internet Prohibition Act of 1999: Hearings on H.R. 3125 Before the Subcomm. on Telecomm., Trade and Consumer Protection of the House Commerce Comm. 106th Cong. 43 (2000) (testimony of Anne Poulson, President of the Virginia Thoroughbred Association).

state law.⁶ In accord, other federal courts have recognized that the “legislature drafted the exception in §1084(b) specifically to accommodate the desire of some states to legalize off-track betting.”

As a direct result of that controversy, however, the horse racing interests solicited the help of Kentucky Senator Mitch McConnell to clarify the legality of interstate account wagering. The solution was to seek clarification through an amendment to the Interstate Horse Racing Act of 1978. The amendment was passed in 2000 and codified that pari-mutuel wagering may be placed, via telephone or other electronic media (including the Internet), and accepted by an off-track betting system *where such wagers are lawful in each state involved*. The new definition of “inter-state off-track wager” is as follows:

“[I]nterstate off-track wager” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.

During Congressional debate, Representative Harold Rogers (R-KY), then Chairman of the Appropriation Subcommittee on Commerce, Justice, and State, assured the IHRA amendment was specifically intended to “clarif[y] that the Interstate Horse Racing Act permits the continued merging of any wagering pools and wagering activities conducted between individuals and state-licensed and regulated off-track betting systems, whether such wagers are conducted in person, via telephone, or other electronic media.” An electronic media communication would undoubtedly include the Internet.

Not only was the intent of UIGEA not to require that FTPs block lawful interstate horse race wagers, but it was designed to assure that FTPs specifically process transactions excluded from the UIGEA’s definition of “unlawful Internet gambling,” such as qualifying intrastate transactions, intra-tribal transactions, or *interstate horseracing transactions*. UIGEA specifically mandated that the **Agencies 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**.

31 U.S.C. § 5364(b)(4) (emphasis added).

⁶ U.S. v. Donaway, 447 F.2d 940, 944 (9th Cir. 1971) (Court reversed defendant’s conviction under the Wire Act, holding that the Act was not applicable to defendant whose betting at licensed pari-mutuel betting enterprises was legal under state law).

⁷ Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass’n., Inc., 802 F. Supp 662, 670 (R.I.D. 1992)(Holding that the Interstate Horseracing Act was intended to have purely civil consequences and race track operator could not use law designed to deter organized crime to attack activity subject to only civil repercussions); aff’d by 989 F.2d 1266 (1st Cir. R.I. 1993); cert. denied 510 U.S. 1024, 114 S. Ct. 634 (1993).

⁸ See 15 U.S.C. §§ 3001-3007 (2000).

⁹ See 15 U.S.C. § 3002 (2000).

The Agencies have not met this mandate because the proposed regulations fail to establish procedures to ensure that legal gambling transactions are not blocked, believing that "UIGEA does not provide the Agencies with the authority to require designated payment systems or participants in these systems to process any gambling transactions, including those excluded from the UIGEA's definition of unlawful gambling if a system or participant decides for business reasons not to process such transactions."

The primary reason that the FTPs would decide not to process transactions for lawful horse racing wagering would be solely because of the uncertainty as to propriety of doing so under UIGEA. Any other reason would be inconsistent with the economic best interests of the FTPs that earn processing fees from such transactions. The failure to follow the Congressional mandate has significant ramifications for interstate pari-mutuel account wagering. NPMA believes this may lead to the blocking of all lawful pari-mutuel account wagering as most financial institutions want no part of the expense associated with this undertaking and lack the necessary knowledge to conduct such investigation into the legality of different online activities. Therefore, their natural inclination is to not engage in any reasoned analysis to distinguish between lawful activities like that represented by the horse racing industry but to assume that all gambling transactions are restricted and to improperly code and prohibit all horse race wagers. For instance, as the commentary in the proposed regulations already notes: "payment system operators have indicated that, for business reasons, they have decided to avoid processing any gambling transactions, even if lawful...." This is the likely proclivity not only for unlawful gambling transactions but lawful transactions as well.

In combination, these shortcomings result in the FTPs having no reason to continue processing lawful transactions and will result in subsequent blocking of legal interstate pari-mutuel account wagering. Therefore, instead of fulfilling the Congressional mandate to ensure that any transactions in connection with interstate horse race wagering are not blocked or otherwise prevented or prohibited by the proscribed regulations, the proposed regulations may condemn interstate pari-mutuel account wagering to complete elimination.

CONCLUSION AND PROPOSED ACTION

The Agencies must revisit the express UIGEA mandate requiring the Agencies to "ensure that transactions in connection" with lawful Interstate horse racing are protected from being blocked by the affirmative regulations as opposed to being the potential victim of the proposed regulations. Specifically, the regulations should have a provision that instructs the financial institutions that transactions for Interstate horse race wagering by states or state licensed entities are excluded from restricted transactions, should not be coded as restricted transactions and should not be blocked.

Sincerely,



Patty Jones
Executive Director