

The Post-Unlawful Internet Gambling Enforcement Act Online-Gaming Surge?

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IN THE VERY MONTH that the Unlawful Internet Gambling Enforcement Act was signed into law by President Bush,¹ a Web security company reported a 40 percent increase in U.S.-based traffic to gambling-related Web pages. "Given the recent . . . legislation, we had anticipated a drop in visits to gambling sites" in October 2006, said Dan Nadir, vice president of product strategy at ScanSafe, a Web security service company in San Mateo, Calif., that helps companies reduce online security risk. Despite the passage of the new law, "we actually saw an increase in Web requests from the U.S. for online gambling sites," said Nadir, whose company filters about 6 billion Web requests a month.

That increase doesn't necessarily mean that hordes of online gamblers were jumping online to play. "We saw two spikes, one right after the legislation was passed," Nadir explained. "It appears that most people were just checking to see if they could still access their accounts, if their money was still there," he said. The second spike was attributable to the World Series, Nadir said. Because the users are at work, the level of traffic to gambling sites isn't as high as it would be at other times when users can Web surf or gamble online for hours. "You're at work, you make a quick bet, and you're done," Nadir said.

Online gamblers themselves apparently don't need to worry all that much about the

new law. "I don't think this is going to deter, necessarily, the actual practice of Internet gamblers," said John Farmer Jr., a partner in the Newark, N.J. office of Kirkpatrick & Lochhart Nicholson Graham and a former N.J. Attorney General. "The law itself is focused on enforcement," explained Louis Archambault, a senior associate at Pathman Lewis in Miami who plays poker online. "The law does not focus on what is or is not currently illegal as far as online gambling," Archambault said.

Despite the passage of the new law, companies themselves weren't exactly rushing to block employee access to online gambling sites. "If a company wanted to block gambling sites, they could," Nadir said. While the degree of blocking in the United States tends to be higher than elsewhere in the world, "so far we haven't seen an increase in the number of [U.S.] companies blocking access" to gambling sites, Nadir said.

Overseas gaming sites aren't necessarily withdrawing from the U.S. market either. Admittedly, "a lot of the sites turned tail immediately and ran either selling their sites for sometimes as little as a dollar or setting their sites on Europe," observed Susan Tellem, president and CEO of Tellem Worldwide, Inc. in an interview conducted via e-mail. Last October, Sportingbet sold its U.S. operations to Jazette Enterprises for a buck.² But others are maintaining their U.S. business. "My original

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¹ Pub. L.N. 109-347 (to be codified at 31 U.S.C. §§ 5361-5367).

² Bennett Liebman, *Extraditing Peter Dicks*, 11 GAMING L. REV. 18, 18 (2007).

gaming client Bodog has taken the 'screw you approach,' which the founder is known for, and is chugging along as always and maybe even better since so many sites have stopped taking U.S. bets," Tellem continued. "Some sites like fulltilt.com supposedly had increased 600 percent with U.S. players," Tellem said.

Indeed, in the minds of some, the new federal law won't so much shut down the online gambling market as open it up to shadier operations. "It will deter the entry into the [U.S.] market of legitimate companies," Farmer said. "A number of legitimate folks, such as those publicly traded in the UK, are pulling out of the United States," observed Linda Shorey, partner in the Harrisburg, Pennsylvania office of Kirkpatrick & Lochhart Nicholson Graham. "It does leave [the U.S. market] open to the folks who are not as legitimate," she said.

"The real danger of the law is that it is not going to diminish the activity of Internet gambling," Farmer said. "The analogy to Prohibition becomes stronger by the day. It's creating an opening for organized crime. You are not going to stop consumption by driving the player out," he said. Players will keep playing. Legitimate sites might withdraw from the market, thus creating an opportunity for more nefarious elements to move into it.

"You have the top-tier level of people in the industry who have a lot of assets, who have a lot at stake, and who are generally publicly held companies who try to keep a clean record. They've generally taken the view that you need to cease and desist," explained Patrick Egan, a partner at Fox Rothschild in Philadelphia. "Then you have the next tier down, the people who are more loosey-goosey privately held entities. A number of them are taking the view that poker isn't included [in the new law] because the definition of gambling and gaming is different depending on where you reside and who you talk to," he said.

"There are those that take the view that poker is not gambling, it's gaming, and that gaming is not illegal under this act," Egan said. "I believe in the long run they'll be like the people who prescribe drugs over the Internet without the doctor seeing somebody. They'll be there saying there's no regulation saying you can't do this, there's no law saying you can't

do this, but they're staring down the barrel of two years of investigation, tons of legal fees, and maybe going to jail—but in the meantime they're making a whole lot of money. There are sites that are going to stay open," he continued.

"But the top-end people with the large publicly held companies who can't afford that type of behavior are getting out" of the United States, Egan explained. "There's plenty of money to be made elsewhere," he said.

In reality, it's the financial sector that needs to pay attention to the new law, in particular the regulations that are to be drafted by the federal government within 270 days of its signing by President Bush.³

The new law "is trying to create a bottleneck to prevent receipt of payments by these gambling sites and will require a rulemaking by the Treasury Department and the Federal Reserve on what payment services must do to identify and block payments to Internet gambling sites," said James Halpert, a partner in the Washington, D.C. office of DLA Piper US and co-chair of the firm's communications, e-commerce, and privacy practice. "But that is left very fuzzy, and it will be up to the Treasury Department and the Federal Reserve to decide what are feasible requirements," he continued. "As [the new] legislation was moving through Congress, the strong independent banks objected strongly to these mandates," Halpert recalled. "Likely they and others will be filing comments to argue that identification and blocking requirements" will be burdensome, he said.

"The new statute is squarely aimed particularly at the financial processors," said Alan Sutin, partner in the New York City office of Greenberg Traurig and chair of its global technology, media, and telecommunications practice group. The new law continues "the strategy, that because it's difficult to reach some of the Internet gambling operators, of attacking the choke point for the industry," especially since a number of financial processors have operations in the United States and are more easily accessible to law enforcement, Sutin said.

³ I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 *Gaming L. Rev.* 597, 599 (2006).

"The industry has got to be ready and focused and be in a position to lobby not only the agencies involved but put pressure on Congressional folks," Shorey said. "The regulators are probably going to be as conservative as possible and encompass as much as possible," she said. "But they're not allowed to prohibit legal transactions," Shorey noted.

One big unknown is what the big offshore electronic cash processors will do. "Any with assets or operations in the U.S. are likely to take this seriously. Less clear at this point is what the foreign ones will do," Sutin said. Shortly after the new law passed, Neteller, which is traded on the London Stock Exchange, announced that it would "comply with the Act and its related regulations as if it were subject to the Act's jurisdiction."⁴ Neteller, while assessing additional action, also noted that, "In the interim, US-resident customers are able to use the NETELLER service as normal. The funds of US-resident customers are held in trust accounts and will be available for withdrawal, on demand. The ability to withdraw funds will exist regardless of the customer's location or ability to transfer to any site."⁵

Undoubtedly, the regulated community will seek to carve out exceptions to the new statute. "There is some argument that if a state law

doesn't specifically prohibit Internet gambling, and there are only seven states that currently do, then the UIGEA would not prohibit receipt of payments" from citizens of the other 43 states, Halpert said. "That's an untested argument," he continued. "It's not clear how receptive courts will be to that. That will probably be a defense that is going to be raised in prosecutions that may be a product of this" new law, Halpert said.

"People assume that [the UIGEA is] going to ban payment services from handling payments to Internet gambling sites," Halpert said. Increasingly, he observed, overseas outfits are taking over all aspects of the payments chain and of these gambling sites, he explained. "Then we'll see the U.S. capillaries through which the U.S. payments flow to overseas payment sites become the focus of regulation and efforts to cut off funds."

Will that effort be successful? "The Internet proves time and time again it is extraordinarily difficult to prevent communication," Halpert said. And perhaps online gambling as well.

⁴ Press Release, Neteller, Update on US Position (Oct. 19, 2006), <<http://about.neteller.com/neteller/upload/Press%20releaseupdate19oct06Final.pdf>>.

⁵ *Id.*

Editor's Note: As this issue was going to print, Neteller, following the arrest of two of its founders, announced on January 18 that it would no longer process gambling-related transactions from the U.S. market.