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January 2019

DOJ Reverses Wire Act Opinion as It Applies to Non-Sports Gambling

Understanding the Impact of the DOJ's Expansion of The Wire Act's Reach

On Jan. 14, 2019, the Department of Justice released a memorandum opinion reversing a 2011 opinion interpreting the federal Wire Act (18 U.S.C. § 1084(a)) (see memorandum opinion here). The 2011 opinion had carved out sports betting as the only type of gambling to be covered by the Wire Act. The new opinion instructs that the Wire Act is applicable to any form of gambling that uses a wire communication and crosses state lines. As drafted, this includes online gambling and online lotteries.

On Jan. 15, 2019, Deputy Attorney General (DAG) Rod Rosenstein delayed implementation of the new interpretation for 90 days to allow businesses that have relied on the 2011 opinion "time to bring their operations into compliance with federal law." Further, in contemplation of the new directive and to promote standardization of cases brought across the country, the DAG implemented a new review and approval process for prosecutions pursuant to the Wire Act (see DAG Rosenstein memorandum here).

In reliance on the 2011 opinion, multiple states including Pennsylvania, New Jersey, Delaware, and Nevada legalized online gambling, and several state lotteries began to sell their games online. Additionally, after the United States Supreme Court struck down the federal ban on sports gambling in May 2018 (*Murphy v. National Collegiate Athletic Association*, 584 U.S. ___ (2018)), online sports gambling began in many states. Thus, this new DOJ opinion raises many potential legal issues: How will this new opinion affect states' ability to raise money through their state lotteries? What will be the impact

on licensed commercial gaming? What about marketing that occurs across state lines for any type of gaming? Will this affect daily fantasy sports? Should banks and other payment processors be concerned about serving the gaming market?

The DOJ's re-interpretation of the Wire Act means DOJ may now criminally prosecute a gambling business for knowingly using "a wire communication facility" for the transmission "in interstate or foreign commerce" of:

1. "bets or wagers" or
2. "information assisting in the placing of bets or wagers on any sporting event or contest," or
3. "a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," or
4. "information assisting in the placing of bets or wagers"

DOJ determined that only the second Wire Act prohibition is limited to sports betting. The others – numbers 1, 3, and 4 – apply to betting of any type.

The Wire Act "safe harbors" (i.e., exemptions from the above prohibitions) are unaffected by the 2019 opinion. The safe harbor most relevant to gaming operators is the following: "Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of … information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." Because this "safe harbor" appears only to relate to sports betting, the transmission of information assisting in placing non-sports bets (e.g., instructions on how to place a bet) is now arguably illegal under the Wire Act, if transmitted by a gambling business in interstate commerce. This may apply even in instances where the non-sports betting is currently lawful in the state from which the information is sent and in the state in which the information is received.

The new opinion also concludes that the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) does not modify the Wire Act. More specifically, the Wire Act is not modified or amended by the UIGEA's intrastate exception to "unlawful internet gambling" or the UIGEA language providing that "[t]he intermediate routing of electronic data shall not determine the location or locations where a bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(E).

The UIGEA was already understood not to modify the Wire Act as a legal matter because of its express statement that it shall not be construed "as altering, limiting or extending any Federal or State law or Tribal compact … prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). However, many in the industry took comfort from the UIGEA, believing that it set forth the "spirit" of Congress regarding intrastate gaming and "intermediate routing." "Intermediate routing" is a term used for transmissions that travel between points in the same state but are routed intermediately out of the state. The new DOJ opinion makes clear that taking comfort from the UIGEA's intrastate wagering exception and/or "intermediate routing" language is unwarranted, and arguably raises the risk associated with "intermediate routing."

There are factors that give rise to the likelihood of litigation during the DAG's 90-day grace period in the form of plaintiffs seeking declaratory judgments that the 2019 DOJ opinion is wrong. In 2002, the U.S. Court of Appeals for the 5th Circuit held that the Wire Act applies only to sports betting (*In Re:*

Mastercard International Inc. Internet Gambling Litigation), and in 2014, the U.S. Court of Appeals for the 1st Circuit, citing *Mastercard*, stated in dicta that the Wire Act applied only to sports betting (*U.S. v. Lyons*).

We are following events closely and are happy to provide further detail regarding this significant policy shift and the resulting legal controversy.

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