Betting on Success: Can the Unlawful Internet Gambling Enforcement Act Help the United States Achieve Its Internet Gambling Policy Goals

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Betting on Success: Can the Unlawful Internet Gambling Enforcement Act Help the United States Achieve Its Internet Gambling Policy Goals?

by

JAMES N. BRENNER

I. Introduction ........................................... 110

II. Background ........................................... 112
    A. Internet Gambling Policy Concerns ................. 112
    B. Federal Anti-Gambling Statutes .................... 115
       1. The Wire Act ..................................... 115
       2. The Interstate Travel Act ......................... 116
       3. The Illegal Gambling Business Act ............... 117
    C. Prohibiting Internet Gambling May Conflict with the United States’ GATS Commitments ..................... 118
    D. Past Legislative Attempts to Prohibit Internet Gambling in the United States .................. 119

III. The Unlawful Internet Gambling Enforcement Act (“UIGEA”) .................. 121
    A. Prohibition on Internet Gambling Fund Transfers ........................................... 122
    B. Available Injunctive Relief Against Internet Service Providers ....................... 123
    C. New Regulatory Requirements for Financial Transaction Providers .................. 124

IV. Effectiveness of the UIGEA ........................................... 125
    A. Establishing Extraterritorial Jurisdiction ............ 125
    B. Personal Jurisdiction ................................ 126
    C. Subject Matter Jurisdiction ........................... 128
    D. Prohibiting Extraterritorial Transactions .................. 132
    E. No Punishment of Gamblers .......................... 133

V. Proposal ........................................... 134

VI. Conclusion ........................................... 136

* University of California, Hastings College of the Law, Juris Doctor Candidate, 2008. Mr. Brenner dedicates this note to his wife, Lara; without her patience, love, and support, this note would not have been possible. Also, Mr. Brenner offers his thanks to professor Marsha Cohen for her insight and instruction.
I. Introduction

Imagine a game of high stakes Texas hold 'em. In the final round of betting, only John and Bill remain. So far they've each committed $600 to the pot. Looking at the cards in his hand, John realizes that he has a King-high flush, the second highest possible hand the community cards will allow; the only hand that can beat his is an Ace-high flush. John opens by betting $300. Bill calls his bet and raises another $300. John believes that there is no way Bill could have the Ace-high flush, so he calls and raises another $300. Bill calls John's bet. When the cards are shown, John discovers Bill wasn't bluffing. Bill wins the hand with an Ace-high flush. John just lost $1500. While this scene may sound like it takes place in Las Vegas or Atlantic City, it does not. John is in his house in Des Moines and Bill is sipping his coffee in an Internet café in San Francisco. The two have been playing online in an Internet casino.

Currently, there are over 2,000 Internet casinos where users can bet on sporting events, purchase private lottery tickets, and play poker, bingo, and other traditional casino games. Over sixty foreign jurisdictions permit some form of Internet gambling, including Austria, Antigua, and the United Kingdom. Countries, such as Antigua, which once had a primarily agricultural economy, are now experiencing substantial economic growth due to the emergence of the Internet gambling industry. In 2005, revenues from Internet gambling were estimated to be $11.5 billion. Of the estimated 23 million people who contributed to these revenues, 8 million were from the United States.

Since the 1960s, the United States federal government has taken an active role in preventing the spread of gambling in the United States. Recently it voiced its concerns about the emergence of

3. Id.
4. American Gaming Association, supra note 1. This number is expected to double by 2010. Id.
5. Id.
Internet gambling. State and Federal Attorneys General felt that they were unable to adequately prevent offshore Internet casinos from doing business in the United States with current federal anti-gambling laws. Over the course of a decade, Congress attempted to prohibit Internet gambling. In the Fall of 2006, both the House and the Senate enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which attempted to address the Internet gambling concerns of the Attorneys General.

This note addresses the effectiveness of the UIGEA in achieving the United States policy goals on Internet gambling. This note does not discuss the wisdom of the United States policy on Internet gambling, nor the wisdom of the government's choice to prohibit, instead of regulate, Internet gambling to achieve its policy goals. Rather this note focuses on whether or not the UIGEA adequately addresses the United States policy concerns over offshore Internet casinos.

First, this note discusses federal laws, treaties, proposed legislation, and policy concerns which address Internet gambling. Second, this note discusses the language of the UIGEA. Third, this note analyzes the UIGEA and shows that, in general, it adequately prohibits even offshore Internet casinos from knowingly accepting bets or wagers from the United States. But, because the UIGEA does not prohibit gamblers from circumscribing the preventive measures put in place, it fails to address the main policy concerns behind a prohibition of Internet gambling. Finally, this note proposes governments in preventing organized crime, and not necessarily to protect gamblers or society from the possible ills of gambling. Anne Linder, First Amendment as Last Resort: The Internet Gambling Industry's Bid to Advertise in the United States, 50 ST. LOUIS U. L.J. 1289, 1308-09 (2005).


8. Id. at 5-9.


that this loophole can be alleviated by state or federal legislation that criminalizes the act of placing a bet over the Internet.

II. Background

A. Internet Gambling Policy Concerns

There are many arguments both for and against sweeping prohibitions on gambling. Many of the arguments in support of prohibiting gambling focus on gambling's societal implications, which include increased addictions, increased crime, and the impact on the poor. Those who wish to regulate (as opposed to prohibit) gambling regard gambling as a form of entertainment. They believe that American consumers should be able to spend their money in the fashion they find most useful. The proponents of gambling regulation further point out that the economic benefits that stem from the revenues of casinos (e.g., job opportunities and tax revenues) outweigh the societal costs associated with gambling.

In addition to these traditional debates, Internet casinos raise other concerns. Proponents of Internet gambling emphasize that people can now gamble from the comfort of their own homes and are no longer subject to the "traps" of traditional brick-and-mortar casinos. Critics of Internet gambling, however, note that the nature of the Internet makes it easier for children to gamble and increases the potential for money laundering. There are also concerns about the legitimacy of the casino's operators (i.e., the fairness of the games and the ability of users to redeem their winnings).

In 1999, the National Gambling Impact Study Commission ("NGISC") found that a prohibition on Internet gambling would be the best solution in preventing problematic use by minors and

12. Id. at 85.
13. Id.
14. Id. at 86-87.
15. Id. at 89.
16. Id. at 87.
18. Thompson, supra note 11, at 88-89.
pathological gamblers, as well as in curbing criminal activities. Such criminal activities included dishonest operators, hackers "cheating" or stealing other players' money, and organized crime using the Internet to launder money. The NGISC concluded that the federal government needed to take action to address the ambiguities, inconsistencies, and inabilities of the states to resolve the issue. It noted that current gambling laws are too ambiguous to cover Internet gambling or will soon be obsolete due to technological advances. Also the NGISC believed that ambiguities in the Indian Gaming Regulatory Act have led to inconsistent state court interpretations on whether tribes have the ability to offer Internet gambling to individuals outside their reservations.

The National Association of Attorneys General ("NAAG") requested to the NGISC that the federal government take action. While many states have taken action to stop Internet gambling within their own state, the impact of their action was limited. The federal government can only address the issues raised by Internet gambling, because too many Internet gambling operators are outside the jurisdictional reach of the United States. The NAAG believed that current federal anti-gambling legislation "falls short in several major areas, including the definition of what constitutes gambling, the need for the law to specifically cover more types of communication devices, and the ambiguity regarding the legality of receiving information on bets or wagers."

The NGISC found that even if the federal government did prohibit Internet gambling, there would be major obstacles in enforcing such a ban. One of these obstacles is the international nature of the Internet gambling business. In 1999, at least 25

19. NGISG Final Report, supra note 7, at 5-4 to -6. This report contains the NGISC's official findings and recommendations on gambling within the United States. One section of this report focuses solely on the impact of Internet gambling. Id. at 5-1.
20. Id. at 5-6 to -7.
21. Id.
22. Id. at 5-8 to -9.
23. Id. at 5-9.
24. Id. at 5-7 to -8.
25. Id. at 5-8.
26. Id.
27. Id. at 5-10.
28. Id.
countries permitted Internet gambling. The NGISC admitted that
without the support of these countries, it would be difficult to enforce
a United States prohibition on Internet gambling in these countries,
even if gamblers from the United States were to place bets or wagers
on their sites. Second, the NGISC noted that there are many
plausible actions both Internet casino users and operators might take
to remove themselves from the jurisdiction of the United States.
Finally, the NGISC recognized that prohibiting Internet gambling
might infringe on United States citizens’ First Amendment rights.
It noted that a ban on Internet gambling may raise the same First
Amendment issues as the attempts by Congress to regulate Internet
content in the 1990s. Yet the NGISC was quick to point out that
those attempts regulated content traditionally protected as free
speech, while a legislative prohibition on Internet gambling would
regulate an activity in which there is no protected First Amendment
right.

To conclude its report on Internet Gambling, the NGISC
recommended four actions. First, the NGISC recommended a
sweeping prohibition of Internet gambling without allowing “any new
exemptions or the expansion of existing federal exemptions to other
jurisdictions.” Second, the NGISC recommended a prohibition of
wire transfers to known Internet casinos or the banks that represent
them. This included making any credit card debts incurred while

29. Id. Since this report was issued in 1999, this number has more than doubled. See
Google Answers: Which International Jurisdictions Permit Online Gambling?, supra
note 2.
30. NGISC Final Report, supra note 7, at 5-12.
31. Id. at 5-10 to -12. For example, the user could log into an offshore Internet
Service Provider (ISP) and use an offshore bank account to give the appearance that he is
not gambling within the United States. Id. Furthermore, if access to the Internet casino’s
IP address is blocked, the casino can merely change to a different IP address without
changing its website address. Id. at 5-11.
32. Id.
33. Id. Examples of such acts are the Communications Decency Act (47 U.S.C. §§
223(a), (d)) (held to abridge free speech protected by the First Amendment in Reno v.
American Civil Liberties Union, 117 S. Ct. 2329 (1997)) and the Child Online Prevention
Act. Id. at 5-11 – 5-12.
34. NGISC Final Report, supra note 7, at 5-12. See also Ziskis v. Kowalski, 726 F.
Supp. 902, 911-12 (D. Conn. 1989) (“[T]here is no First Amendment right to conduct or
play... a game of chance.”).
35. NGISC Final Report, supra note 7, at 5-12.
36. Id.
37. Id.
BETTING ON SUCCESS

38. Id.
39. Id.
40. Id. at 5-12.
44. Mills, supra note 17, at 94.
45. NGISC Final Report, supra note 7, at 5-9.
46. The term “use” extends beyond the physical use of the wire facility by the defendant; rather, the facility just needs to be used at some point during the transaction. United States v. Sklaroff, 323 F. Supp. 296, 315 (D.C.Fla. 1971). See also United States v. Kelley, 254 F. Supp. 9, 15 (D.C.N.Y. 1966).
47. The term “wire communication facility” is defined as “any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.” 18 U.S.C. § 1081 (2000).
government to prosecute offshore sports betting agencies that were accepting bets from the United States. Even though the Wire Act has been liberally constructed, courts have had different views on whether the Wire Act is applicable to all forms of Internet gambling. The Wire Act is unclear about whether it applies only to bets or wagers made on sporting events or to all bets or wagers. Some courts have interpreted the Wire Act broadly and have included all forms of gambling under the statute. Other courts have interpreted the statute to only apply to sports betting. This ambiguity between the jurisdictions and the advent of wireless technology—whose use may not fall under the Wire Act—is what prompted the NAAG to conclude that the Wire Act is ultimately ineffective against Internet gambling.

2. The Interstate Travel Act

There is also an argument that the Interstate Travel Act can be used to prohibit Internet gambling. The Interstate Travel Act criminalizes travel or the use of “facilities in interstate or foreign commerce” with the performance of certain acts related to the execution of any “unlawful activity.” Furthermore, “any business enterprise involved in gambling” is considered an “unlawful activity” under the Interstate Travel Act. Courts have interpreted the Interstate Travel Act broadly, holding that the telephone and wire lines are considered a “transportation facility” under the statute.

50. NGISC Final Report, supra note 7, at 5-6.
51. Vacco, 714 N.Y.S.2d at 852.
54. The use of the facility does not need to be integral to the operation of the “unlawful activity”; it merely needs to facilitate the carrying on of the unlawful activity—making it “easy or less difficult” to execute. Interstate Travel Act, 18 U.S.C. § 1952(b) (2000).
55. Specifically, the Interstate Travel Act prohibits anyone to “(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) . . . facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” 18 U.S.C. § 1952(a) (2000).
56. Id.
57. Id. § 1952(b).
58. Id. See also United States v. McLeod, 493 F.2d 1186, 1189 (7th Cir. 1974).
These courts have reasoned that telephone lines can be used to send packets of information to a destination, thus using an interstate facility to carry on a gambling business. 59

It has been suggested that, since the infrastructure of the Internet is analogous to the infrastructure of telephone lines, the Interstate Travel Act is also applicable to bets made over the Internet. 60 Indeed, the statute was used in a New York state trial court to prosecute a Delaware-based corporation’s Antigua-licensed casino, which provided services to United States residents. 61 Despite its success in the past, the NAAG believes that this statute would be ineffective in prohibiting Internet gambling from entering the United States. 62

3. The Illegal Gambling Business Act

Although it has never successfully been used to prosecute an Internet casino, some scholars have argued that the IGBA could be successfully used to prosecute large-scale Internet casinos. 63 Under the IGBA, "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling’s business" shall be

62. NGISC Final Report, supra note 7, at 5-6. Although it seems fairly obvious that allowing gamblers to use the Internet to place a bet or wager makes facilitating the practice of the business “less difficult,” perhaps the NAAG’s concern is that in cases where the operation is owned and operated offshore, the court would be less willing to find criminal liability under the Travel Act. See United States v. Truesdale, 152 F.3d 443, 447-49 (5th Cir. 1998).
63. Gottfried, supra note 4, at ¶ 53.
64. An “illegal gambling business” is a “gambling business which (i) is a violation of [State law]; (ii) involves five or more persons . . . ; and (iii) has been . . . in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.” Illegal Gambling Business Act, 18 U.S.C. § 1955(b)(1) (2000). Very little proof is necessary to establish the existence of an “illegal gambling business.” First, the defendants only need to violate a state law, no matter how trivial, to fall under the IGBA. Mills, supra note 17, at 101. The defendants do not even need to be convicted of the violated statute. United States v. Murray, 928 F.2d 1242, 1245 (1st Cir. 1991). Second, at least five people who are “necessary and helpful” to the operation need to be involved at all times over the course of thirty days. United States v. DiMuro, 540 F.2d 503, 507 (1st Cir. 1977), cert. denied, 429 U.S. 1038 (1977). It is not even necessary that all of the five people participate in the actual gambling aspect of the business. Id. To meet the thirty-day requirement, the defendants do not need to accept bets or wagers everyday; they only need to have “a repeated pattern of gambling activity” over the course of thirty days.
“subject to criminal sanctions.”65 Courts have hinted, however, that to be liable under the IGBA, a portion of the gambling business must reside in the United States.66 Simply because the foreign gambling business is available to those inside the United States does not put it within the jurisdiction of the IGBA.67 Thus, it would be difficult, if not impossible, to prosecute an off-shore Internet casino under the IGBA when the casino’s operations are conducted completely off-shore.

C. Prohibiting Internet Gambling May Conflict with the United States’ GATS Commitments

As a member of the World Trade Organization (“WTO”), the United States is subject to the General Agreement on Trade in Services (“GATS”).68 GATS regulates trade services (e.g., airlines, telecommunications, etc.) among WTO members.69 Each member of GATS has a detailed schedule of market-access commitments that control which service markets the member will open to foreign competition, as well as the openness of each market.70 GATS provides for certain exemptions in which a member may ignore its commitments and enact laws that are in conflict (e.g., if the laws are “necessary to protect public morals or to maintain public order”).71 These exempted laws, however, may not arbitrarily or unjustifiably discriminate between members or be disguised restrictions on trade services.72 If a member country believes that another member has

66. See Truesdale, 152 F.3d at 448.
67. Id.
70. Id.
72. Id.
BETTING ON SUCCESS

violated its market access commitments under GATS, it may ask the WTO to settle the dispute.\textsuperscript{73}

In 2003, Antigua filed a claim to the WTO that the United States' attempts to prohibit Internet gambling violated the United States' market-access commitments under GATS.\textsuperscript{74} A WTO Appellate Panel concluded that the United States was under a specific commitment to permit foreign gambling and betting services in the United States.\textsuperscript{75} The Panel also concluded that three federal laws (the Wire Act, the Interstate Travel Act, and the IGBA) violated the United States' commitments under GATS.\textsuperscript{76} Despite this finding, the Panel found the laws were not discriminatory or restrictive and were necessary to "protect public morals and maintain public order" in the United States.\textsuperscript{77} Thus, the laws fell under one of GATS' commitment exemptions and did not have to comply with the United States' market-access commitments.\textsuperscript{78}

D. Past Legislative Attempts to Prohibit Internet Gambling in the United States

Over the past decade, Congress made numerous unsuccessful attempts to prohibit Internet gambling. Due to the inherent interstate nature of the Internet, the Dormant Commerce Clause demands that Congress be the only legislature with the power to control Internet gambling within the United States.\textsuperscript{79} Congress

\textsuperscript{73} Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, General Agreement on Trade in Services, Part V, Article XXIII, Dispute Settlement and Enforcement, Apr. 15, 1994, 33 I.L.M. 1125 (1994), \textit{available at} http://www.wto.org/English/docs_e/legal_e/26-gats/pdf.


\textsuperscript{75} \textit{Id.} at ¶ 213.

\textsuperscript{76} \textit{Id.} at ¶ 265. Antigua also claimed that several state laws violated the United States GATS commitment. \textit{Id.} at ¶ 134. The Appellate Panel, however, found that Antigua failed to establish a \textit{prima facie} case for the state laws and refused to rule on the issue. \textit{Id.} at ¶¶ 154-55. The WTO has yet to rule on to what extent States may prohibit gambling without violating the United States' obligations under GATS.

\textsuperscript{77} \textit{Id.} at ¶ 373(D)(iii)(c).

\textsuperscript{78} \textit{Id.} at ¶ 373(D)(iii)(c). \textit{See also} Jonathan Swartz, \textit{Click the Mouse and Bet the House: The United States' Internet Gambling Restrictions Before the World Trade Organization}, 2005 U. ILL. J.L. TECH & POL'Y 125, 135-38 (2005).

proposed two different approaches in attempting to prohibit Internet gambling.

The first approach focused on amending Title 18 of the United States Code to include a prohibition of Internet gambling. The earliest serious attempt, the Internet Gambling Prohibition Act of 1997 ("1997 IGPA") proposed to dramatically expand the scope of the Wire Act. The 1997 IGPA proposed to expand the definition of "bet or wager" to cover all forms of gambling and replace the term "wire communication" with "communication facility." Additionally the 1997 IGPA proposed to add an additional section to the Wire Act, which would prevent any person from making or receiving "a bet or wager, via the internet or any other interactive computer service" in the United States.

The Internet Gambling Prohibition Act of 1998 and the Internet Gambling Prohibition Act of 1999 forwent the idea of amending the original Wire Act, but instead proposed to add an additional section. This new section achieved the same result as the proposed additional section of the 1997 IGPA—it became unlawful to place, receive, or otherwise make a bet or wager via the Internet or any other interactive computer service or invite information assisting in the placing of a bet or wager with the intent to do such an act. Ultimately, none of the bills were enacted into law.
In the next two sessions, Congress tried a different approach to prohibit Internet gambling. Both attempts proposed to control financial transfers to and from Internet gambling cites. The Unlawful Internet Gambling Funding Prohibition Act of 2000 proposed to prohibit any person engaged in a gambling business from knowingly accepting in connection with the participation of another person in Internet gambling any "financial transaction involving a financial institution as payor or financial intermediary for another."\(^8\) Additionally, the Unlawful Internet Gambling Funding Prohibition Act of 2003 proposed to order federal regulators to restrict transactions to and from Internet casinos.\(^9\) Once again, both Houses of Congress were unable to enact the bills.\(^9\)

### III. The Unlawful Internet Gambling Enforcement Act

In the fall of 2006, Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA").\(^9\) The UIGEA created a new chapter in the Financial Codes, Title 31 of the United States Code.\(^9\) The UIGEA attempts to prevent Internet gambling in the United States through three different measures. First, the Act prohibits any Internet casino from accepting any bet or wager from a place where the bet or wager would violate a State or Federal law.\(^9\) Second, it requires all Internet Service Providers ("ISPs") to block access to any known Internet casinos.\(^9\) Third, the UIGEA requires that the Treasury Department adopt new financial regulations that

\(^9\) SAFE PORT Act, Pub. L. 109-347, Title VIII (codified as 31 U.S.C. §§ 5361, et seq.). President Bush signed the UIGEA into law on October 13, 2006. \(Id.\)
\(^9\) \(Id.\) § 5365(c)(1).
would prohibit all financial institutions in the United States from allowing money to be transferred to known Internet casinos.96

A. Prohibition on Internet Gambling Fund Transfers

The main thrust of the UIGEA falls under United States Code Title 31, section 5363:

"No person engaged in the business of betting or wagering97 may knowingly accept . . . a financial transaction involving a financial institution as a payor or financial intermediary" in connection with the participation of another person in unlawful Internet gambling.98

Specific forms of these restricted transactions include payments in any form of credit, check (or similar note), or electronic funds transfer.99 Thus, the Act controls the ability of Internet casino owners to legally receive payments for bets or wagers made by their users. However, the UIGEA does not prohibit gamblers from placing bets or wagers on the Internet.

There are a few unique exceptions worth noting. First, "bets and wagers" do not include the participation in any games that do not risk anything of value other than personal effort or points or credits provided by the sponsor of the game for free that can only be used for participation in the games offered by the sponsor.100 Second, fantasy sports contests based on certain conditions are not prohibited by the UIGEA.101 Third, the UIGEA explicitly excludes any activity allowed under the Interstate Horseracing Act of 1978.102 Finally, if the bet or wager is made exclusively within a single state, or if the bet or wager is made in accordance with state law and the state regulations require

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96. Id. § 5364.
97. "Bet or wager" is defined broadly as "a means of risking something of value upon the outcome of a contest of others, sporting event, or game of chance, upon an agreement . . . that the person or another person will receive something of value in the event of a certain outcome." Id. § 5362(1)(A). The statute carves out certain exceptions for items such as securities transactions, insurance contracts, and indemnity/guarantee agreements. Id. § 5362(1)(E).
98. "Unlawful Internet Gambling" means to "place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use . . . of the Internet where such bet or wager is unlawful under Federal or State law . . . in which the bet is initiated, received, or otherwise made." Id. § 5362(10)(A).
99. Id. § 5363.
100. Id. § 5362(1)(E)(viii).
101. Id.
102. Id. § 5362(10)(D). The Interstate Horseracing Act of 1978 can be found at 15 U.S.C. §§ 3001, et seq.
an age verification system, the bet and wager is excluded from the UIGEA. 103

The UIGEA provides for both civil and criminal penalties for violations of section 5363. The federal and state Attorneys General may institute civil proceedings in a federal district court to obtain injunctive relief against any person to restrain or prevent a particular restricted transaction. 104 The federal government may also bring proceedings against restricted transactions made on Indian land. 105 In a criminal suit, any person who violates section 5363 can be subject to fines under Title 18, imprisoned up to five years, or both. 106 The court may also enter a permanent injunction enjoining the person from making or assisting in restricted transactions. 107

B. Available Injunctive Relief Against Internet Service Providers

The UIGEA also allows Attorneys General to bring civil claims against ISPs 108 who permit violations of section 5363. 109 The relief available against ISPs, however, is limited. An injunction against an ISP under the UIGEA can only require the service to remove or disable access to Internet casinos or hyperlinks to Internet casinos that have been specifically identified as violators of section 5363. 110 Additionally, a court may not force an ISP to engage in a self-monitoring program. 111 However, an ISP removes itself from this limited liability if it has knowledge and control of “bets or wagers” and has either direct control, or is in an agency relationship with, an Internet casino. 112

104. Id. §§ 5365(b)(1),(2).
105. Id. § 5365(b)(3).
106. Id. § 5366(a).
107. Id. § 5366(b).
108. “[A]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f) (2000).
110. Id.
111. Id.
112. Id. § 5367.
C. New Regulatory Requirements for Financial Transaction Providers

The UIGEA also requires that the Secretary of the Treasury and the Board of Governors of the Federal Reserve System create a new regulatory system. This regulatory system will essentially require financial transaction providers to block, prohibit, or prevent restricted transactions. The law requires that this new regulatory scheme establish policies that: (1) deem what payment systems are regulated under this law; (2) allow the payment system to identify restricted transactions by means of codes in authorization messages; (3) block restricted transactions identified; and (4) identify policies and procedures that a financial transaction provider could use to identify and block, or prevent or prohibit, restricted transactions. Federal regulators and the Federal Trade Commission will control the enforcement of these policies.

The UIGEA does not explicitly mention what type of liability the financial transaction providers will be subject to if they do not follow the prescribed regulations. Presumably, the regulations will impose what penalties can be assessed if they are not followed. However, the UIGEA declares that financial transactions providers are not liable under the regulations imposed if they rely on and comply with the policies and procedures of a qualified designated payment system. Additionally, financial transaction providers are not liable to any person if they block, prevent, prohibit, or refuse to honor a restricted transaction. The UIGEA does make it clear, however, that financial transaction providers can only be liable under

113. Id. § 5364.
114. "[A] creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system." Id. § 5362(4).
115. Id. § 5364(a).
116. Any system used by a financial transaction provider that could be utilized in connection with, or to facilitate, a restricted transaction. Id. § 5362(3).
117. Id.
118. Id. § 5364(a)(1)(A).
119. Id. § 5364(a)(1)(B).
120. Id. § 5364(b).
121. Id. § 5364(e).
122. Id. § 5364(c).
123. Id. § 5364(d).
section 5363 if such providers have knowledge and control of bets and wagers and either has direct control, or is in an agency relationship with, a Internet gambling operation.\textsuperscript{124}

IV. Effectiveness of the UIGEA

The UIGEA clearly prohibits and obstructs the ability to operate an Internet casino within the jurisdiction of the United States. The law focuses on punishing the operators of Internet gambling sites, while forcing the middlemen (the ISPs and the financial institutions) to stop the site operators from communicating with, and receiving profits from, gamblers in the United States. Yet while the statute may facially achieve the government's objective of prohibiting the operation of Internet casinos within the United States, it falls short of being an effective solution to prohibit access to offshore Internet casinos. Because most of the offshore Internet casinos are companies that do not have offices, employees, or financial assets in the United States, federal prosecutors may have problems establishing extraterritorial jurisdiction over them.\textsuperscript{125} Also, the statute does not deter gamblers from finding ways to gamble on the Internet. Moreover, because the UIGEA does not deter gamblers from finding ways around the law, it falls short of one of its primary purposes: to prevent problematic gamblers from placing bets.

A. Establishing Extraterritorial Jurisdiction

While it is believed that Congress does have the power to extraterritorially regulate Internet gambling,\textsuperscript{126} the language of the UIGEA may not avail itself to extraterritorial jurisdiction against offshore Internet casinos. First, unless the offshore casino knows that United States gamblers are placing bets or wagers on their site, it may be close to impossible to establish personal jurisdiction. Second, due to the language of the UEGIA and the United States' commitments under GATS, the UEGIA may not have subject matter jurisdiction over offshore Internet casinos.

\textsuperscript{124} Id. \S 5367.

\textsuperscript{125} Prosecutors may have even more trouble actually enforcing a judgment. But that situation varies from case to case, depending on the extent the United States can gain control of the casino's assets once a judgment has been entered.

B. Personal Jurisdiction

To decide whether or not a foreign party has established personal jurisdiction in one of the states under the Due Process Clause of the Fourteenth Amendment, the courts have created a multi-step analysis. First, the claim must either arise from a “systematic and continuous” activity by the defendant within the United States or the claim must be “related to or arises out of the defendant’s contacts with the forum.” Second, the defendant must have “minimum contacts” within the state that purposefully avail itself of “the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” Finally, the court is concerned with whether the notions of “fair play and substantial justice” would be offended by exercising jurisdiction over the nonresident defendant. Factors considered by the court include whether the defendant “could reasonably anticipate being haled into court there,” “the burden on the defendant,” and “the forum State’s interest in adjudicating the dispute.” In international matters, courts may look at the burdens the defendant may experience litigating in a foreign legal system and the reasonableness of “stretching the long arm of personal jurisdiction over national borders.”

In Internet cases, courts have based personal jurisdiction on a “sliding scale” where the proper exercise of personal jurisdiction is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” At one end of the scale are defendants who are clearly doing business over the Internet. The court has personal jurisdiction over these

128. Id. at 414-16.
131. Id. at 316.
135. Zippo, 952 F. Supp. 2d at 1124 (citations omitted).
defendants. At the other end are purely passive websites where information is simply posted for any viewer. In this situation, the court cannot fairly exercise personal jurisdiction. There is a middle ground, however, where “a user can exchange information with the host computer.” “In these cases, the exercise of [personal] jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”

While personal jurisdiction is determined on a case-by-case basis, it is possible to establish personal jurisdiction for a claim against an offshore Internet casino. First, if the Internet casino accepts a wager from a gambler inside the United States, it clearly avails itself of the United States’ laws and establishes the necessary “minimum contacts.” Furthermore, if the offshore Internet casino knows that it was accepting wagers from gamblers inside the United States, it would be difficult for the casino operator to say that it could not anticipate being summoned into a United States court. Although it would be defending itself in a foreign legal system, it is well known in the Internet gambling community that the United States is cracking down on Internet gambling within its borders. Finally, under the Zippo standard, Internet gambling either falls into the “clearly doing business” or “middle ground” category. Yet even if Internet gambling falls into the “middle ground” category, the highly interactive and commercial nature of Internet casinos should allow the United States to exercise personal jurisdiction over them.

However, if the gambler “covered his path” and registered for the casino using an offshore bank account and fraudulent

136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. In past cases involving Internet gambling, courts have established minimum contacts through the presence of an online mailing list and a toll free number for customer inquiries. State v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 719, 720 (Minn. Ct. App. 1997). Minimum contacts have also been established when an Internet gambling site advertised over the Internet, required customers to enter into contracts, and sent prizes to customers through the mail. Thomson v. Handa-Lopez, Inc., 998 F. Supp. 738, 744 (W.D. Tex. 1998).
143. Gottfried, supra note 4, at ¶ 64.
information, it would be difficult to establish both minimum contacts and notions of “fair play and substantial justice.”\textsuperscript{144} First, it would be difficult to show that the casino extended itself to the “privilege of conducting activities” in the United States. If the gambler was gambling from an offshore ISP and transferring money to the casino using an offshore bank account, it could be difficult to prove that enough activity was actually being conducted in the United States to justify personal jurisdiction. Moreover, since the gambler is immune from prosecution and the casino was unaware he was from the United States, it may be difficult to show that the casino’s activities extended itself to jurisdiction within the United States at all. Finally, it would hardly be consistent with the notions of “fair play and substantial justice” if the court allowed an action against a defendant that did not know that a United States gambler was placing bets or wagers on his casino.\textsuperscript{145}

C. Subject Matter Jurisdiction

Even if the casino owners know they have users from the United States, the UIGEA may not allow the United States to have extraterritorial subject matter jurisdiction. To have extraterritorial subject matter jurisdiction, the statute must pass a two-part test. Under this test, courts must first determine whether there is a congressional intent to have extraterritorial jurisdiction,\textsuperscript{146} and second, whether the effect of the proscribed conduct on the United States justifies the exercise of its jurisdiction.\textsuperscript{147}

For the first part of the test, a court must determine whether Congress intended the statute to have extraterritorial jurisdiction.\textsuperscript{148} This intent can either be made explicitly\textsuperscript{149} or the court can impute an intention to Congress by looking at “the purpose of Congress as

\textsuperscript{144} Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\textsuperscript{145} Even if a court believed personal jurisdiction had been established in this situation, it would be near impossible to prosecute the defendant site since the statute requires that the defendant site have knowledge that the bet violated a federal or state law. The Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5363 (West Supp. 2007).
\textsuperscript{147} United States v. Alumninum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945).
\textsuperscript{148} See Vacco, 714 N.Y.S.2d at 851.
\textsuperscript{149} See id.
evinced by the description and nature of the crime.\textsuperscript{150} In \textit{Vacco}, the court held that the Wire Act contained significant congressional intent for extraterritorial enforcement.\textsuperscript{151} The court reasoned that because the statute explicitly prohibited “communication in interstate or foreign commerce,” Congress must have intended for courts to have extraterritorial subject matter jurisdiction.\textsuperscript{152}

While the UIGEA makes no explicit reference to its jurisdictional reach, like the Wire Act, it has been argued that the nature of Internet gambling should allow for extraterritorial subject matter jurisdiction.\textsuperscript{153} Because of the inherently international nature of the Internet, it is believed that Congress must intend for any Internet gambling regulation to apply extraterritorially, regardless of any explicit reference.\textsuperscript{154} To remove this implicit intention would render the statute virtually meaningless due to the ability to provide an illegal service on a website physically located outside of the United States.\textsuperscript{155} Indeed, the inherent “nature” of Internet gambling may be enough to show that Congress implicitly intended the statute to apply extraterritorially.

However, Congress might have implicitly waived extraterritorial jurisdiction within Pub.L. 109-347, Title VIII, section 803. Section 803(2) recommends that when dealing with foreign governments, the United States should “advance policies that promote the cooperation of foreign governments, through information sharing or other measures, in the enforcement of this Act . . . .”\textsuperscript{156} This statement could indicate that Congress did not intend for the statute to have extraterritorial jurisdiction; rather, the United States wished to encourage the foreign governments to take action to prevent Internet gambling from reaching the United States.

However, if Congress intended the statute to apply extraterritorially, it ultimately violates the United States’ obligations under GATS. The WTO has concluded that the United States’

\textsuperscript{150} United States v. Bowman, 260 U.S. 94, 97-98 (1922).
\textsuperscript{151} \textit{Vacco}, 714 N.Y.S.2d at 851.
\textsuperscript{152} \textit{Id}.
\textsuperscript{153} Goss, \textit{supra} note 126, at ¶ 41. \textit{See also} Gottfried, \textit{supra} note 4, at ¶ 55.
\textsuperscript{154} Goss, \textit{supra} note 126, at ¶ 42.
\textsuperscript{155} \textit{Id}.
schedule of commitments under GATS includes Internet gambling.\textsuperscript{157} If laws that are vague about Internet gambling are in violation of the United States’ GATS commitments, the UIGEA is in violation as well.\textsuperscript{158} The United States may be exempt from this violation, however, because, like the Wire Act, Interstate Travel Act, and Illegal Gambling Business Act, the UIGEA can be considered “necessary to protect public morals and maintain public order.”\textsuperscript{159} Yet the Department of Justice needs to be clear that it intends to enforce the UIGEA on both domestic and foreign offenders of the law so it will not remove itself from this exemption.

The second prong of the test to determine whether the statute will have extraterritorial subject matter jurisdiction examines the “effect of the proscribed conduct” on the United States.\textsuperscript{160} United States courts may exercise extraterritorial subject matter jurisdiction over proscribed conduct that results in a demonstrated, actual, or presumed effect in the United States.\textsuperscript{161} A number of reasons have been argued that to show that offshore Internet gambling has a sufficient effect on the United States to justify extraterritorial subject matter jurisdiction. The three main arguments are: (1) “Internet gambling has the potential to exacerbate social problems associated with gambling”; (2) “Internet gambling hurts traditional brick-and-mortar gaming businesses”; and (3) “Internet gambling has the potential to undermine the tax revenue base of the States.”\textsuperscript{162}

While Internet gambling does have the potential effect of exacerbating the social problems associated with gambling,\textsuperscript{163} it is doubtful that Internet gambling can potentially affect the traditional gaming business and undermine the United States tax revenue. First, gambling on the Internet is different from gambling in traditional casinos. People go to traditional casinos not just for gambling, but for the experience as well. If the only reason people went to cities like Las Vegas or Atlantic City was to gamble, shows costing upwards of

\textsuperscript{157} Appellate Body Report, \textit{supra} note 74, at ¶ 373(A)(ii).
\textsuperscript{158} See \textit{id.} (holding that the Wire Act, Interstate Travel Act, and Illegal Gambling Business Act constitute violations of Article XVI:2 of GATS).
\textsuperscript{159} See \textit{id.} at ¶ 373(D)(iii) (holding that the Wire Act, Interstate Travel Act, and Illegal Gambling Business Act fall under the Article XIV exemption.).
\textsuperscript{160} Goss, \textit{supra} note 126, at ¶ 44.
\textsuperscript{161} United States v. Alumninum Co. of Am., 148 F.2d 416, 443-44 (2nd. Cir. 1945).
\textsuperscript{162} Goss, \textit{supra} note 126, at ¶¶ 45-48. \textit{See also} Gottfried, \textit{supra} note 53, at ¶ 57.
\textsuperscript{163} See, \textit{supra} § II(A).
$137 per ticket, gourmet restaurants, and high-class nightclubs would not be successful or popular. Simply because Internet casinos are in the same line of business as traditional casinos does not mean that the effect on the casinos is substantial enough to warrant extraterritorial subject matter jurisdiction. Second, with the exception of Nevada and New Jersey, most of the tax revenue base from gambling within the United States comes from state lotteries, not from traditional forms of gambling. While state lotteries are a form of gambling, they are entirely different from Internet gambling. Most Internet casinos operate traditional casino games, not lottery-type games. Although state lotteries may be "a fund-raising device of real importance to [a] state," it is difficult to infer that Internet gamblers would be spending their money on state lotteries if they could not gamble on the Internet. At the end of the day, however, the potential societal effects caused by Internet gambling discussed earlier in this article are probably enough to warrant subject matter jurisdiction.

Internet casinos have argued that since the gambling occurs in their home country, where the gambling is legal, Internet gaming should not be subject to United States law. This argument has not succeeded in the past, however, when there is evidence of specific illegal transactions between a United States gambler and the Internet casino. Yet absent any specific evidence, courts have refused to permit jurisdiction over Internet casinos, even if the casino can be

167. Neal Lawrence, Gambling on a New Life, MIDWEST TODAY, Jan. 1995, http://www.midtod.com/highlights/gambling.phtml (last visited Oct. 1, 2007) ("Indian gaming represents only about 5% of all gambling in the United States . . . About 40% of gambling revenues come from state lotteries and the remaining 55% is dominated by commercial entities in Nevada and New Jersey.").
169. See supra § II(A).
171. See, e.g., id.
accessed freely by the jurisdiction.\footnote{See, e.g., United States v. Truesdale, 152 F.3d 443, 448 (5th Cir. 1998).} Thus the issue of jurisdiction may once again look to whether or not the Internet casino had put measures in place to prevent accepting bets from the United States and to what extent the gambler sought to circumvent those measures.

D. Prohibiting Extraterritorial Transactions

Second, the statute may not always prohibit extraterritorial transactions with gamblers in the United States.\footnote{It has already been established in Cohen that the Wire Act can be used to prosecute extraterritorial sports wagers over the Internet. United States v. Cohen, 260 F.3d 68 (2d. Cir. 2000). For the purposes of this article, any bets or wagers are considered outside the scope of the Wire Act.} These transactions would occur when a gambler in the United States has opened an offshore account and is using an offshore Internet casino. Since the UIGEA only applies to those in the “business of bets and wagers,” gamblers inside the United States are not violating the statute. Furthermore, if the United States gambler registers for the Internet casino using false information, it may be difficult to prove that the offshore casino owner knowingly accepted a bet or wager in connection with “unlawful Internet gambling”—violating the UIGEA.

Theoretically the UIGEA prevents these extraterritorial betters by requiring all ISPs the United States to block access to all recognized violators of section 5363, even those offshore.\footnote{Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5366(c)(1) (West Supp. 2007).} But there are many reasons why this method can never completely block gamblers inside the United States from engaging in Internet gambling. First, gamblers can log on to an ISP overseas.\footnote{While this theory may not apply to users using a “high-speed” line (e.g., DSL or cable), a person using a traditional phone line can dial into a foreign ISP where there is no Internet gambling prohibition. This situation raises many questions, outside the scope of this note, about the equitable power of the United States courts over a foreign entity. For }
unclear whether the subject matter of the law provides extraterritorial jurisdiction to offshore ISPs who unknowingly provide access to Internet casinos for United States gamblers. Second, and most notably, the ISPs are under no obligation, nor can they be ordered, to actively search for unlawful Internet casinos; they only have to block access to Internet casinos that have violated section 5364. Thus, if the government is unable to prosecute an offshore casino or has not identified the casino as a violator of the UIGEA, the ISP cannot be required to block access to the casino—allowing United States gamblers to continue to engage in extraterritorial bets or wagers.

E. No Punishment of Gamblers

Probably the largest problem with the UIGEA is that it fails to fully address the government’s policy reasons behind prohibiting Internet gambling: to prevent problematic use by minors and pathological gamblers, as well as curbing criminal activities. Most of these concerns revolve around the activities by the gambler and not the operator. The gambler is free from punishment under the UIGEA. The UIGEA only criminalizes the behavior of the operator.

This is not an uncommon occurrence with gambling laws. The Wire Act, Travel Act, and IGGB only criminalize the behavior of the operator, and ignore the gambler. When these statutes were enacted in the 1960s, a person had to be physically present to place a bet in a game of chance in most situations. Thus, if it was illegal to own and run a casino, there was no organized location where a person could legally go to gamble. While the Wire Act could imply that the government foresaw the use of communication technology to place bets, it could not have foreseen the extent it would be possible. The example, can a court order a foreign ISP to block access to section 5363 violators? Also, would the order only apply to those who access the ISP from the United States?

176. See supra § III(A)(ii).
178. NGISC Final Report, supra note 7, at 5-4 – 5-5.
179. See 18 U.S.C. §§ 1084, 1952, 1955 (2000). This may be because the statutes were created with the intention to help the Department of Justice to prosecute organized crime. Linder, supra note 6, at 1308-09.
180. In the 1960s, sports bets were the only types of wagers one could make over the phone. This may be why the Wire Act was written to only include “sports events or contests;” at the time, the expansion of the telecommunications industry was unforeseen. Wire Act, 18 U.S.C. § 1084 (2000).
Internet has created a vast communication network that people can anonymously connect to, browse, and search in the privacy of their own homes. The inherent nature of the Internet makes it difficult, if not impossible, to stop Internet gambling without prohibiting both ends of the transaction.

Admittedly, there are some benefits in prohibiting the operation of Internet casinos. Gamblers are now protected from being taken advantage of by the site owner. Also, the UIGEA makes it more difficult for a problematic gambler, minor, or criminal to obtain access to an Internet casino. At the end of the day, however, if a person in the United States wants to gamble on the Internet, they will find a way.

V. Proposal

In order to completely prohibit Internet gambling and deter gamblers from using Internet casinos, the government needs to criminalize the gambler's actions as well. Unless the government prohibits its citizens from gambling, there are no repercussions for them if they find a way to access an Internet casino. Since the UIGEA only prevents the use of the Internet to make bets or wagers that are unlawful under federal or state law, the UIGEA may assume that state legislatures will create laws that punish Internet gamblers. Indeed, some states already have blanket prohibitions against gambling or laws that explicitly prohibit gambling on a computer.

These laws escape the jurisdictional issues of the UIGEA. To violate the law, the user would have to place the bet physically within the state, availing him/herself of any laws of that jurisdiction. Thus establishing personal or subject matter jurisdiction would not be a problem.

It is arguable that such a prohibition could be a tariff on Internet gambling because it would be preventing United States citizens from purchasing gambling services from overseas Internet casinos, thus violating the Unites States' GATS commitment. But, a carefully written federal or state law can also escape this scrutiny as long as it was intended to protect the "public morals." As long as the law does not discriminate between foreign and domestic suppliers of

182. See, e.g., UTAH CODE ANN. § 76-10-1102(1) (West 1998).
183. See, e.g., LA. REV. STAT. ANN. § 14:90.3 (2004).
gambling—by also preventing United States citizens from purchasing gambling services from Internet casinos within the United States—it can fall within the GATS exemption clause. The law, however, may cause a problem under GATS if it permits certain types of Internet gambling, but prevents others (e.g., a law that permits state residents from purchasing state lottery tickets online, while prohibiting residents from using the Internet to buy any other type of lottery ticket). If the permitted gambling could be construed as discriminatory to foreign jurisdictions, the WTO may hold that the discriminatory effect is a tariff, which would remove the law from its exemption.  

Furthermore, courts need to be aware of the technological difficulties of ordering an ISP to block an unlawful Internet gambling site. The UIGEA only gives courts the power to order ISPs to block identified sites. Theoretically this can be achieved by ordering the ISP to block either access to the site’s server or the specific website address of the identified casino. Both methods, however, could prove to be ineffective or raise additional problems. If the ISP blocks access to the site’s server, and the server is shared with another non-offending site, it could be a violation of the non-offending site’s freedom of speech. Moreover it is not difficult for the offending site to change its server but retain its website address. Yet if the ISP only has to block the website address of the identified site, the owner can change its website, allowing it to continue its operation and still be accessible to users from the United States.

While neither method obtains perfect results, blocking web addresses may achieve the best results. By ordering United States ISPs to block an unlawful Internet casino’s website address, the Internet casino either has to change its website address or no longer accept wagers from the United States. The casino will be faced with a difficult decision: either no longer gain profits from the United States or lose all good will and brand name recognition and start a new website.

185. 31 U.S.C.A. §5365(c)(1).
186. See Gottfried, supra note 54, at ¶ 75.
187. Id.
188. Id.
VI. Conclusion

In its 1999 report on Internet gambling, the NGISC found that a prohibition of Internet gambling would be the best way for the United States to achieve its policy objectives. The NGISC recommended (1) a sweeping prohibition of Internet casinos; (2) prohibition of wire transfers to known Internet casinos, or the banks that represent them; (3) state legislation that prohibits the use of Internet casinos within the home or office; and (4) that the federal government encourage foreign governments not to harbor Internet gambling operators that serve the United States. The UIGEA only achieves two of these recommendations. It works in conjunction with existing federal laws to prohibit the operation of Internet casinos on United States soil. It also prevents offshore Internet casinos from accepting money transfers from the United States.

Without adopting the other two of the NGISC’s recommendations, however, the UIGEA is toothless. If the government truly wishes to protect its citizens from the dangers of gambling, it must give them a reason not to gamble. As of today, there are no repercussions for gamblers in the United States if they find a way to work around the UIGEA and access an Internet casino. Also the United States needs to actively work with foreign governments to help prevent offshore Internet casinos from accepting wagers from the United States. Without the cooperation of these governments, the United States may have more trouble in the WTO as it continues to pursue a policy that is contrary to its GATS commitments.

Full impact of the UIGEA on the Internet gambling industry is yet unknown. At the time this note was written, the Treasury Department has not announced the new financial regulations for the financial transaction providers. The strength of these regulations will determine how much responsibility financial transaction providers will have in blocking financial transfers to unlawful Internet casinos. Also the UIGEA still needs to be tested in the courtroom. Once courts determine the breadth of the UIGEA, the Internet gambling

189. NCISG Final Report, supra note 7, at 5-4 to 5-6.
190. ld. at 5-12.
191. In August of 2007, the author did a preliminary search on Google for “UIGEA workaround.” Within minutes, he found numerous suggestions on blogs and forums detailing how gamblers can access and place bets or wagers on Internet casinos who are in compliance with the UIGEA.
industry will know whether the United States successfully prohibited Internet gambling. Until then, the industry will have to sit back, try to relax, and see where the chips fall.