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H.R. 1174: The Frank Bill Returns

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Background

On March 17, 2011, Rep. John Campbell (R-CA) introduced H.R. 1174—"Internet Gambling Regulation, Consumer Protection, and Enforcement Act." The bill is identical to H.R. 2267 (a bill introduced by Rep. Barney Frank (D-MA) in the prior congressional session), as it was amended and reported by the House Financial Services Committee on July 28, 2010.[1] Rep. Frank, along with Rep. Peter King (R-NY) and Rep. Ed Perlmutter (D-CO), are co-sponsors of H.R. 1174.

Section 2 of H.R. 1174 would add a new subchapter—Subchapter V—to Chapter 53 of Title 31 of the U.S. Code to follow Subchapter IV, which contains the Unlawful Internet Gambling Enforcement Act ("UIGEA").[2] The proposed subchapter provides a regulatory and licensing framework in which the Secretary of the Treasury will issue licenses to "operate an Internet gambling facility," a phrase defined to mean "the direction, management, supervision, or control of an Internet site through which bets or wagers are initiated, received or otherwise made, whether by telephone, Internet, satellite, or other wire or wireless communication." Proposed 31 U.S.C. §5382(7). If enacted, the bill, through Subchapter V, would provide an avenue through which online gambling operators can obtain licenses permitting them to provide many types of Internet gambling activities to persons in the United States.

Gambling, rightly or wrongly, continues to be associated with crime, as is reflected in State licensure schemes for land-based entities in "suitability" requirements. During the hearings related to Internet gambling in prior congressional sessions, many concerns were expressed, including ones associated with the financial industry, money laundering, terrorism, professional sports, jobs, gambling addiction, protection of minors, age and identity verification, tribal gaming, and states' rights.[3]

In addition, much attention has been focused on non-U.S. operators of Internet gambling that accept, or previously accepted, wagers from persons located in the U.S. and whether they should be permitted to obtain licensure. The U.S. Department of Justice considers the acceptance by these operators of bets or wagers from U.S.-based persons to violate U.S. law, regardless of the activity on which they are placed. In addition, some land-based gambling operators have opined that Internet gambling in general will cannibalize land-based customers or that experienced non-U.S. online gambling operators will be licensed, with both possibilities putting them out of business or causing them to downsize and lay off employees.

H.R. 1174 attempts to address many of these thorny issues. This paper examines the bill, looking specifically at the proposed provisions related to licensure requirements, safeguards to be employed, the regulatory system, State and tribal concerns, financial transactions, and other significant miscellaneous provisions. In covering these areas, a number of ambiguities, seeming inconsistencies, and impacts of the bill are noted.

Licensure

An applicant for licensure must submit: (1) its "criminal and credit history" and that of its senior executives, its directors, and any person "deemed to be in control of" it; (2) its financial statements; (3) documentation of its "corporate structure" and that of "all related businesses and affiliates;" (4) documentation of its "plan for complying" with regulatory requirements, including evidence of its "ability to (i) protect underage and problem gamblers, (ii) ensure games are being operated fairly; and (iii) comply with and address the concerns of law enforcement;" (5) certification that it "agrees to submit to United States jurisdiction" and laws; and (6) certification that it "has established a corporate entity or other separate business entity in the United States, a majority of whose officers are United States persons and, if there is a board of directors, that the board is majority-controlled by directors who are United States persons.[4]" Proposed 31 U.S.C. §5383(c).

To be eligible for licensure, an applicant, its associates, and any person in control of it, as well as "certain service providers,"[5] must undergo a background check and investigation and establish suitability "by clear and convincing evidence." Proposed 31 U.S.C. §5383(d)(1),(2). Suitability requires an applicant (and others subject to establishing suitability) to demonstrate that it:

- is of "good character, honesty, and integrity;"
- does not have "prior activities, reputation, habits, and associations" that (i) "pose a threat to the public interest or to effective regulation and control of the licensed activities or (ii) create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of the licensed activities or the carrying on of the business and financial arrangements incidental to such activities;"
- "is capable of and likely to conduct" its business as required by the proposed subchapter and any regulations prescribed under it;
- "has or guarantees acquisition of" the necessary competence to operate; and
- "has or will obtain sufficient funding" to conduct its operation from a "suitable source."

Proposed 31 U.S.C. §5383(d)(2).

An applicant for licensure (and anyone else required to establish suitability) "may not be determined to be suitable" if it:

- fails to supply required information or supplies untruthful/misleading information;
- has been convicted of a crime requiring more than one year's imprisonment;
- is delinquent in filing any applicable federal or state tax return or in paying any applicable tax;
- has, after the enactment of UIGEA in 2006, (i) "knowingly participated in, or should have known [it was] participating in, any illegal Internet gambling activity, including the taking of an illegal Internet wager, the payment of winnings on an illegal Internet wager, the promotion through advertising of any illegal Internet gambling website or service, or the collection of any payments to an entity operating an illegal Internet gambling website; or" (ii) "knowingly been owned, operated, managed, or employed by, or should have known [it was] owned, operated, managed, or employed by, any person who was knowingly participating in, or should have known [it was] participating in, any illegal Internet gambling activity, including the taking of an illegal Internet wager, the payment of winnings on an illegal Internet wager, the promotion through advertising of any illegal Internet gambling website or service, or the collection of any payments to an entity operating an illegal Internet gambling website;"
- has received or provided "any assistance, financial or otherwise," from or to "any person who," prior to the enactment of UIGEA, "knowingly accepted wagers from a person located in the United States in violation of Federal or State law;"
- has "purchased or otherwise obtained" an entity, the customer list of an entity, or "any part of the equipment or operations" of an entity "that has accepted a bet or wager from any individual in violations of United States law;"
- "is listed on a State gambling excluded persons list;"[6] or
- "fails to certify" that it (and its affiliates) "has through its entire history, (i) not committed an intentional felony violation of Federal or State gambling laws; and (ii) used diligence to prevent any United States person from placing a bet on an Internet site in violation of Federal or State gambling laws."

Proposed 31 U.S.C. §5383(d)(3).[7]

Safeguards

The bill, in proposed 31 U.S.C. §§5383 and 5384[8], provides that regulations are to be promulgated to require licensees to maintain mechanisms, or have a program, to ensure that certain safeguards are in place, specifically ones to ensure that:

- a bet or wager is not placed by anyone not of legal age;[9]
- a person "placing a bet or wager is physically located in a jurisdiction that permits Internet gambling at the time the bet or wager is placed," proposed 31 U.S.C. §5383(g)(2);[10]
- "all taxes relating to Internet gambling" are (1) collected from those engaged in gambling "at the time of any payment of any proceeds of Internet gambling" and (2) collected and disbursed from licensees, with adequate records maintained for later audit/verification, proposed 31 U.S.C. §5383(g)(3),(4);
- there are "appropriate safeguards to combat (1) fraud, money laundering, and terrorist finance"[11] and (2) "compulsive Internet gambling," proposed 31 U.S.C. §5383(g)(5),(6);
- there are "appropriate safeguards to protect the privacy and security of any person engaged in Internet gambling," proposed 31 U.S.C. §5383(g)(7);[12]
- any assessments on a licensee are paid to the Secretary, proposed 31 U.S.C. §5383(g)(8);
- each customer is who he or she claims to be, proposed 31 U.S.C. §5383(g)(7), §5384(b)(1)(A);
- certain "responsible gambling materials," as well as "any other materials that the Secretary or qualified State or tribal regulatory body may deem appropriate," are available to customers, proposed 31 U.S.C. §5384(b)(1)(E);
- certain "player-selectable responsible gambling options," as well as "other similar options that the Secretary or qualified State or tribal regulatory body may deem appropriate" are available to customers, proposed 31 U.S.C. §5384(b)(1)(F);
- "each customer, before making or placing any bet or wager," establishes "personal limits as a condition of play that apply across all betting sites," proposed 31 U.S.C. §5384(b)(1)(G); and
- other requirements the Secretary establishes by regulation or order are in place, proposed 31 U.S.C. §5383(g)(9).

Regulatory System

Ultimate authority to grant or revoke a license to operate an Internet gambling facility that accepts bets or wagers from persons located in the United States and to regulate licensees is given to the Secretary of the Treasury. The Secretary, however, is directed to delegate authority to "qualified State and tribal regulatory bodies," as described in the following three paragraphs.

The bill directs the Secretary to qualify State and tribal regulatory bodies "with expertise in regulating gambling" that seek qualification from the Secretary. Proposed 31 U.S.C. §5383(o). If a State or tribal regulatory body desires to be qualified, it is to "notify the Secretary of its willingness to review prospective applicants to certify whether [the applicants meet] the qualifications established under the subchapter" and provide whatever documentation the Secretary has determined is necessary to decide whether the "regulatory body is qualified to conduct such review and may be relied upon by the Secretary to make such certification." Proposed 31 U.S.C. §5383(o)(1). If qualified, the regulatory body

- may undertake suitability reviews;
- may impose an administrative fee/assessment on applicants it reviews to cover the expense of the review; and
- "shall process and assess each applicant fairly and equally based on objective criteria, regardless of any prior licensing of an applicant" by the regulatory body.

Proposed 31 U.S.C. §5383(o)(2). An applicant that obtains a certification of suitability from a qualified regulatory body can submit the certification, with the documentation that was submitted to obtain it, to the Secretary and it "shall be relied on by the Secretary as evidence" that the applicant has established suitability. Proposed 31 U.S.C. §5383(o)(3). The Secretary, however, "retains the authority to review, withhold, or revoke any license if the Secretary has reason to believe that any applicant or licensee does not meet the suitability requirements for licensing …, or any other requirements of a license." Proposed 31 U.S.C. §5383(o)(4). The Secretary may also, "at any time and for any reason," revoke a regulatory body's qualification. Proposed 31 U.S.C. §5383(o)(7).

In addition to suitability reviews, the bill directs the Secretary to "rely on any" qualified State and tribal regulatory body "for such other regulatory and enforcement activities" that the Secretary "finds to be useful and appropriate to carry out the purposes of this subchapter, including" three specifically identified activities[13]–

- "examine licensees who are licensed under a State or tribal program referred to in [proposed 31 U.S.C. §5383(o)(1)];"[14]
- "employ enforcement agents with sufficient training and experience to administer the requirements of this subchapter;" and
- "enforce any requirement of this subchapter that is within the jurisdiction of the qualified state or tribal authority through all appropriate means provided under this subchapter and other provisions of law."

Proposed 31 U.S.C. §5383(o)(5),(6).

The bill, in the proposed provision titled "General Powers of the Secretary," also gives the Secretary "authority" to "require licensees to"

- "maintain substantial facilities involved with the processing of bets or wagers from the United States within the United States;"
- have "a majority" of its employees (and those of its affiliated business entities) be residents or citizens of the United States;
- "maintain in the United States all facilities that are essential to the regulation of bets or wagers placed from the United States at a location that is accessible to the appropriate regulatory personnel at all times;" and
- "maintain all facilities within the United States for processing of bets or wagers made or placed from the United States."

Proposed 31 U.S.C. §5383(k)(1)(A)(ii-v). The bill recognizes a seemingly slim possibility that the second and third of the above points may be problematic from a global standpoint, as it provides that those requirements "shall cease to have effect if a tribunal of the World Trade Organization of final arbitration rules that the implementation of such clauses would violate the trade commitments of the United States under the World Trade Organization." Proposed 31 U.S.C. §5383(k)(1)(B). According to the author of the amendment, Rep. Sherman (D-CA), this provision protects against the possibility that the U.S. would change its mind about modifying its participation in the General Agreement on Trade Services so as to exclude the cross-border supply of gambling and betting services.

State and Tribal Concerns

Two decades ago, Internet gambling was virtually unknown. Gambling was a local activity. States authorized and regulated gambling under their inherent police power, with some addressing it in their State constitution. Since 1988, tribal gambling on Indian lands has been regulated pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701-2721. Under IGRA, Tribes are responsible for authorizing and regulating most forms of gambling that take place on Indian lands with the exception of "Class III gaming."[15] Tribes are permitted to conduct Class III gaming on tribal lands only pursuant to a compact with the State where the lands are located. With the advent of Internet gambling, States and Tribes have encountered new challenges. One of the common challenges has

been the position of the U.S. Department of Justice that all activities resulting in the placement of bets or wagers over the Internet implicate the Wire Act, 18 U.S.C. §1084. The bill recognizes that States and Tribes have concerns regarding Internet gambling and has attempted to accommodate some of these concerns. This paper looks at four of the attempts.

The first attempt to address State and tribal concerns is reflected in the provisions discussed above concerning the qualified State and tribal regulatory bodies.

The second attempt is the process provided in proposed 31 U.S.C. §§5387(a) and (b) by which States and Tribes can "opt-out" of the federal program. Once a State or Tribe has opted-out, a licensee may accept bets or wagers from individuals located in that State or Tribe only in the "nature and extent" of the limitation imposed by the opt-out. Proposed 31 U.S.C. §§5387(a)(1) and (b)(1). A State's limitation, however, does not apply to the acceptance of bets or wagers from individuals placing a bet or wager from tribal lands within that State and may not "be considered in making any determination with regard to the ability of an Indian tribe to offer any class of gambling activity" under IGRA. Proposed 31 U.S.C. §§5387(a)(1)(B),(C).

A State's initial opportunity to opt-out of the federal program requires a State's governor to make its limitation known, "in a manner which clearly identifies the nature and extent of such limitation, before the end of the period beginning on the date of the enactment of [the bill] and ending on the date on which such State's legislature has conducted one full general legislative session, where such session began after the date of the enactment of such Act." Proposed 31 U.S.C. §§5387(a)(1)(A). Thereafter, a State may choose to opt-out or change or repeal its limitation, but it will not begin until "the first January 1 that occurs after the end of the 60-day period beginning on the later of (A) the date the State's Governor notifies the Secretary of the State's decision or (B) the effective date of" the legislation that imposes, repeals, or changes a limitation. Proposed 31 U.S.C. §§5387(a)(2).

A Tribe's initial opportunity to opt-out of the federal program requires a Tribe's principal Chief, or other chief executive officer, to make its limitation known, "in a manner which clearly identifies the nature and extent of such limitation, before the end of the 90-day period beginning on the date of the enactment of [the bill]." Proposed 31 U.S.C. §5387(b)(1). Thereafter, a Tribe may choose to opt-out or change or repeal its limitation, but it will not begin until "the first January 1 that occurs after the end of the 60-day period beginning on the later of (A) the date the Tribe's principal Chief, or other chief executive officer, notifies the Secretary of the Tribe's decision or (B) the effective date of" the opt-out or change or repeal. Proposed 31 U.S.C. §5387(b)(2).

A third attempt, also found in the provisions of proposed 37 U.S.C. §5387, concerns the impact on tribal gaming of Tribes that choose to obtain federal licenses to conduct some form of Internet gambling. These provisions provide that tribal operations of Internet gambling pursuant to a federal license shall not (1) "impact an Indian tribe's status or category or class under its land-based activities," or (2) "require or impose any requirement on" a Tribe "to negotiate a new agreement, or renegotiate any existing agreement, limitation or other provision of a tribal-State compact, agreement, or other understanding with respect to gaming or revenue-sharing, with regard to any Internet bet or wager occurring pursuant to" its federal license. Proposed 31 U.S.C. §§5387(a)(1)(D),(E).

The fourth attempt is found in proposed 31 U.S.C. §5390, which provides (1) an exemption from the federal licensure and regulatory system for "Internet gambling conducted by any State or tribal lottery authority" when conducted in accordance with the exception to unlawful Internet gambling set forth in UIGEA, 31 U.S.C. §§5362(10)(B) and (C), "as clarified by section 5362(10)(E)," and (2) a clarification that such Internet gambling does not implicate the Wire Act, 18 U.S.C. §1084.

Financial Transactions

The bill attempts to address the concerns expressed at the hearings by segments of the financial industry about the burden imposed on them by the UIGEA regulations to determine what is "unlawful Internet gambling" and what entities are engaged in that activity. It does this in two ways.

First, in proposed 31 U.S.C. §5385, the bill provides: "No financial transaction provider shall be held liable for engaging in financial activities and transactions for or on behalf of a licensee or involving a licensee, including payment processing activities, unless such provider has knowledge that the specific financial activities or transactions are conducted in violation of this subchapter and with applicable Federal and State laws."

Second, in proposed 31 U.S.C. §5386, the bill directs the Director of the Financial Crimes Enforcement Network,[16] within 120 days after enactment of the bill, to provide the Secretary with a "list of unlawful Internet gambling enterprises" and to "regularly update such list." In turn, the Secretary is to provide the list to, among others, "all persons who are required to comply with the [UIGEA] regulations." Financial transaction providers are "deemed to have actual knowledge" that those on the list are engaged in unlawful Internet gambling. While the list addresses the concern of the financial industry, it is not a complete solution, as the list is not to be deemed the sole source of actual knowledge by financial transaction providers subject to the UIGEA regulations.

Interestingly, the term "unlawful Internet gambling enterprises" is defined to include only those conducting unlawful Internet gambling more than 10 days after the date of the enactment of the bill. This would appear to provide a window of opportunity for operators taking wagers from U.S. persons to stay off the list. However, given the unsuitability provisions of the bill, this would not appear to be a way for those non-U.S. operators (or suppliers who assist them) who currently accept bets or wagers from U.S.-based individuals to make themselves eligible for licensure.

Other Significant Miscellaneous Provisions

Among the provisions not discussed above are ones of significance that do not fit neatly into any of the above topics. Those provisions include:

- A prohibition on the acceptance by licensees of "Internet bets or wagers on sporting events, with the exception of pari-mutuel racing as permitted by law," proposed 31 U.S.C. §5388;
- A defense to prosecution or an enforcement action if the activity at issue was authorized and lawfully done under the proposed subchapter, see proposed 31 U.S.C. §5391;
- A statement that the Wire Act and UIGEA shall not apply to licensees operating in compliance with their licenses, see proposed 31 U.S.C. §5392; and
- A prohibition on the acceptance of "a bet or wager or payment for or settlement of a bet or wager that is transmitted or otherwise facilitated with a credit card," except that those "licensed to take bets or wagers in accordance with the Interstate Horseracing Act of 1978 [("IHA")]"[17] and those "involved in legal, land-based or State- or tribal-regulated intrastate gambling" are only prohibited from credit card use in connection with those activities conducted pursuant to a license authorized by the bill, proposed 31 U.S.C. §5389.

Conclusion

It is difficult to set the odds for H.R. 1174 becoming law. A number of legislators, special interest groups, and other parties are interested in the bill. Among these, some want federal licensure and regulation, some would rather see State licensure and regulation, and some would prefer that additional action be taken to prevent all Internet betting and wagering. The proponents of the various outcomes, however, are not united on the details. If the pro-federal licensure and regulation forces prevail and the bill becomes law, it would be a watershed moment in the history of gambling law in the United States. For the first time, those in the business of betting or wagering would be able to seek licensure to offer opportunities to bet or wager on activities like poker and casino games using the Internet (and, potentially, other wireless and mobile devices).

H.R. 1174, however, is complex legislation that, because it attempts to address the concerns of a myriad of stakeholders, is riddled with ambiguities and potential inconsistencies, a number of which are noted in this paper. If not remedied by amendment, they are areas that should be kept in mind, should the bill be enacted, for clarification through the development of regulations.

Endnotes

[1] The House Financial Services Committee's report (111-656), which includes the text of the Frank bill as amended by the Committee, is available through http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1%28hr656%29. A web cast of the markup is available here. http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1340.

[2] 31 U.S.C. §§5361-5367. 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 or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. §5362(10)(A). UIGEA mandated the promulgation of regulations that delineate "designated payment systems" and that require participants in such systems to: (1) identify any instruction from a U.S.-based bettor to convey money affiliated with the bettor's participation in "unlawful Internet gambling" to an entity in the business of betting or wagering or to make any other type of conveyance which is deemed to be a "restricted transaction" by the regulations; and (2) block or otherwise prevent the "restricted transaction." 31 U.S.C. §5364. The mandated regulations are codified at 12 C.F.R. §§233.1-233.7 (Federal Reserve System) and 31 C.F.R. §§132.1-132.7 (Department of Treasury). Should H.R. 1174 be enacted, one result would be that the Internet gambling activities covered by a federal license would be "lawful" and not subject to the financial transaction prohibitions of UIGEA.

[3] The two hearings held by the House Financial Services Committee are available at http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1117 (December 3, 2009) and http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1330 (July 21, 2010).

[4] The term "United States person" is not defined in the bill. It is, however, defined in other federal statutes. For example, in 22 U.S.C. §2370a(h) (a statute addressing expropriation of U.S. property), "United States person" is defined as "a United States citizen or corporation, partnership, or association at least 50 percent beneficially owned by United States citizens."

[5] A service provider required to meet the suitability requirements is a "person that knowingly (A) manages, administers, or controls bets or wagers that are initiated, received, or otherwise made within the United States, (B) otherwise manages or administers the games with which such bets or wagers are associated, or (C) develops, maintains or operates or distributes or makes available for downloading software, other system programs or hardware that create, operate, or otherwise affect the outcome of a game." Proposed 31 U.S.C. §5383(n)(1). This definition would appear to include any third parties engaged to provide services related to fraud detection, age and identity verification, payment processing, software development, or software programs, among others. The requirement that such service providers satisfy "suitability" requirements means they also will need to have or to establish a U.S. business entity with a majority of its officers and members of its board, if a corporation, being U.S. persons.

[6] The bill does not provide a definition for the phrase "State gambling excluded persons list." However, many States that license and regulate land-based gambling maintain a list of persons who are to be "excluded" from the gambling floor or from the premises of a licensee. See, e.g., list at http://www.pgcb.state.pa.us/?p=172, which lists persons excluded pursuant to 4 Pa.C.S. §1514. Nevada, in addition to a list of excluded persons, maintains a list of individuals who have been determined to be unsuitable and a list of the organizations controlled by individuals deemed to be unsuitable. See http://gaming.nv.gov/unsuitable.htm. As pointed out in the Regulatory System discussion, the bill requires that in determining suitability, the reviewer is to "process and assess each applicant fairly and equally based on objective criteria, regardless of any prior licensing of an applicant." Accordingly, it would seem that persons on Nevada's "List of Individuals Who Have Been Denied or Found Unsuitable" should not be considered to be "listed on a State gambling excluded persons list," although a reviewer should be able to take prior determinations of unsuitability, or suitability, into consideration as objective criteria.

[7] The "unsuitability" provisions concerning applicants that have accepted, or are still accepting, wagers from U.S.-based players appear to overlap to some extent, as well as being somewhat inconsistent and ambiguous. For example: One provision deems an applicant "unsuitable for licensing" if the applicant "fails to certify" that "throughout its entire history," it and "all affiliated business entities" have "not committed an intentional felony violation of Federal or State gambling laws." (Emphasis added.) Another provision deems unsuitable any applicant that on or after the enactment of UIGEA "knowingly participated in, or should have known they were participating in, any illegal gambling activity." (Emphasis added.) Is "an intentional felony violation" one that is "knowingly participated in"? While Rep. Bacchus (both in supporting Rep. Campbell's amendment adding the "knowingly" provision and in presenting the amendment with the "intentional" language) asserted that his amendment was tougher, from a statutory construction standpoint, it could well be the other way around. Arguably, a person "knowingly" participates in (or "should have known" about participation in) an illegal gambling activity if the person was aware (or should have been aware) that he or she was participating in an activity that was illegal. By contrast, a person arguably commits an "intentional felony violation" only if the person was not only aware of the participation and its illegality but also intended to violate the law. In other words, for one to "knowingly" participate in illegal activity, in this context, arguably requires a less culpable state of mind than it does for one to "intentionally" participate.

[8] Unlike proposed 31 U.S.C. §5383, proposed 31 U.S.C. §5384 provides that not only the Secretary, but also qualified State or tribal regulatory bodies, "shall prescribe regulations for the development of a Problem Gambling, Responsible Gambling, Consumer Safeguards, and Self-Exclusion Program." The same situation exists in subsections (b)(1)(E), (F), and (2)(E) of Section 5384, in that each subsection permits the Secretary and qualified regulatory bodies, if "deem[ed] appropriate," to require licensees to make available "other" materials and options. This seems to permit multiple regulatory bodies to impose requirements on licensees but does not indicate whether these requirements would be limited to specific licensees or would be generally applicable. While typically one State or tribal regulatory body would not apply regulations adopted by another such body without adopting them as its own, the bill does not appear to restrict the qualified regulatory bodies to applying only their own and federally-adopted regulations. And if a qualified regulatory body may not apply another such body's regulations, the regulatory scheme will likely not be uniform, and a major reason for a federal system seemingly lost.

[9] In the bill, one provision states that "legal age" is that "defined by the law of the State or tribal area" where the bettor is located when placing a bet or wager, while a second provision states that no one "under the legal age 21" may place a bet or wager. Compare proposed 31 U.S.C. §5383(g)(1) with proposed 31 U.S.C. §5384(b)(1)(B).

[10] Two other provisions also require location verification: one requires a program "to verify the State or tribal land in which the customer is located at the time the customer attempts to initiate a bet or wager," while another requires a program to ensure that no one located in a jurisdiction that has opted-out places a bet or wager "prohibited by [the] opt-out." Compare proposed 31 U.S.C. §5383(g)(2) with proposed 31 U.S.C. §5384(b)(1)(C) & (D). While there may be different reasons for needing to know the physical location of a person making a bet or wager, three separate and somewhat differently worded statutory provisions seem to introduce unnecessary obfuscation.

[11] Other provisions also impose requirements related to fraud and money laundering. With respect to fraud, one provision requires a program "to protect against fraud and to provide for dispute resolution relating to Internet gambling activity through programs to insure the integrity and fairness of the games," proposed 31 U.S.C. §5384(b)(1)(I), and another provision details requirements "to insure [sic] the integrity and fairness of the games,"

with a caveat providing the substitution of "equally effective options that the Secretary or qualified State or tribal regulatory officer or agency may determine to be appropriate." Proposed 31 U.S.C. §5384(b)(2). With respect to money laundering, a seemingly duplicative provision requires an applicant/licensee to have a program "to protect against money laundering relating to Internet gambling activities." Proposed 31 U.S.C. §5384(b)(1)(J).

[12] Another seemingly duplicative provision requires a program "to protect the privacy and security of any customer in connection with any lawful Internet gambling activity." Proposed 31 U.S.C. §5384(b)(1)(H).

[13] During the markup of the Frank bill, Rep. Campbell offered an amendment that was accepted. Rep. Campbell explained that this amendment, in part, addressed the concern that the licensure and regulatory scheme proposed by the bill would necessitate a new federal bureaucracy. Rep. Campbell stated that no new federal bureaucracy was needed because while the ultimate authority to issue licenses would rest with the federal government, his amendment would provide that State and tribal authorities, who already had the infrastructure necessary to carry out regulation and enforcement, would be used to regulate and enforce. What Rep. Campbell's amendment appears to do is require the Secretary to rely on the qualified State and tribal authorities to not only perform suitability certifications but also to conduct whatever "regulatory and enforcement activities" the Secretary concludes must be conducted. There is, however, no detail in the bill on how this would work. For example, if, as seems probable, there are two or more qualified State or tribal regulatory agencies, how will applicants be divided among them? Or, will an applicant be able to choose (or challenge) the regulator that will process its application? Or, will the Secretary be able to delegate specific regulatory and enforcement tasks to specific qualified regulatory bodies, such as tasking one qualified State regulatory body to inspect facilities of all licensees whose facilities are located in the State and tasking one tribal regulatory body to inspect the facilities of all licensees whose facilities are located on Indian lands? It seems likely these issues would be addressed during the regulatory process, if not addressed during the enactment process.

[14] It is not entirely clear who the "licensees who are licensed under a State or tribal program" would be, as the authority provided by the bill to issue licenses rests with the Secretary. The provision referred to – proposed 31 U.S.C. §5383(o)(1) – addresses the process by which a State or tribal regulatory authority is to seek and obtain approval as a regulatory body "qualified to conduct a review of prospective applicants" and one that "may be relied upon to certify whether any such applicant meets the qualifications established under this subchapter."

[15] Class III gaming is defined in IGRA "as all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. §2703(8). In very general terms, Class III gaming can be considered as games, including slots and card games (but not bingo), played with and for money against the house.

[16] The Financial Crimes Enforcement Network (often referred to as "FinCen") is part of the U.S. Department of the Treasury. It was established in 1990 "to provide a government-wide multisource financial intelligence and analysis network." In 1994, its responsibility "was broadened to include regulatory responsibilities for administering the Bank Secrecy Act." http://www.fincen.gov/about_fincen/wwd/.

[17] This exception could be interpreted as acknowledging that entities that offer advance deposit wagering on horseracing and do so in accordance with the IHA are conducting lawful Internet gambling. However, the U.S. Department of Justice has taken the position that the Wire Act is implicated by the acceptance of Internet wagers on horseraces (although it has also admitted to never having undertaken a criminal investigation or prosecution), and the bill does not, as it did for State and tribal operated lotteries, clarify that the Wire Act does not apply to interstate bets or wagers accepted by entities in compliance with the IHA.

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