

# e-finance&payments law&policy

**FEATURED ARTICLE**  
**02/07**



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

# Unlawful Internet Gambling Enforcement Act: e-payments

The Unlawful Internet Gambling Enforcement Act, appended to the SAFE Port Act in October last year, is designed to identify and block payments between US residents and internet casinos. Linda J. Shorey, Holly K. Towle and Sean P. Mahoney, of K&L Gates, highlight the unintentional consequences that the UIGEA could have on the e-payments industry.

On 13 October 2006, the US President signed into law the 'SAFE Port Act'. Appended to the SAFE Port Act is the 'Unlawful Internet Gambling Enforcement Act of 2006' (the 'UIGEA'). One of the purposes of the UIGEA is to block transactions between US residents and internet casinos, effectively shutting down offshore internet casinos that depend upon US gamblers. The act targets persons engaged in the 'business of betting or wagering' - essentially, no person engaged in that business may knowingly accept proceeds for unlawful internet gambling, including credit card proceeds, electronic fund transfers, checks and so forth. Regulations to be promulgated under the UIGEA, if as broad as the statute allows, could impose a compliance burden upon many unsuspecting participants in the payments industry.

## Unlawful internet gambling

'Unlawful internet gambling' is defined 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'. The definition of 'bet or wager' is broad enough to include some ordinary

internet promotions because it is defined as risking something of value upon the outcome of a contest or game etc., including a lottery or prize. However, there are exclusions for several items, including games or contests in which nothing of value is wagered other than personal effort, or points or credits from the sponsor of a free game that are redeemable only for participation in sponsored games or contests. There is also an exclusion for fantasy or simulated sports, or 'educational' games or contests if several conditions are met (e.g., the nature and value of all prizes and awards must be known to participants in advance). In short, many companies need to be concerned about the UIGEA, either to ensure that their 'gaming' activities are not covered, or if they are covered, to comment on and/or comply with upcoming regulations.

## What the regulations are to address

The UIGEA requires the US Secretary of the Treasury ('Treasury') and the Board of Governors of the Federal Reserve System ('Federal Reserve') to promulgate regulations that will require action by financial institutions, payments systems and payment system participants. The regulators have until 9 July, 2007 to promulgate regulations to prevent or prohibit the acceptance of 'restricted transactions'.

The definition of 'restricted transaction' in the UIGEA is keyed to the types of payments which those engaged in the business of betting or wagering may not accept. The types of payments involved are far reaching:

- credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

- an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn or payable through any financial institutions; or
- the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

Under procedures required by Section 553 of the Administrative Procedure Act and past practice, the Treasury and the Federal Reserve will likely publish proposed regulations in the spring of 2007 to assure ample time for comment and response to comments. The only certainty with such proposed regulations will be controversy.

The regulations are to 'requir[e] each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions [i.e. the unlawful gambling transactions or transmittals of funds which may not be accepted] through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions'. The regulations are to include several examples of policies and procedures designed to identify, block and prevent or prohibit the acceptance of the restricted transactions including, but not limited to, procedures prohibiting

the acceptance of products or services of the payment system in connection with a restricted transaction. Such policies and procedures are to be designed not only to block restricted transactions (or the fruits of them), but also to ensure that legal intrastate, intertribal and horseracing transactions are not blocked.

The Treasury and the Federal Reserve, in consultation with the US Attorney General, are given authority to determine which payment systems are 'designated payment systems'. They will do this by regulation or order, as to any system utilized by a 'financial transaction provider' that they determine could be utilized in connection with, or to facilitate, a restricted transaction. A 'financial transaction provider' is not just a bank, but includes any creditor, credit card issuer, financial institution, EFT terminal operator, money transmitting business, payment networks (for credit, EFT and stored value transaction), money transmitter, or participants in such networks or a designated payment system. The question of who is a 'financial transaction provider' may prove to be particularly challenging for merchants and other service providers, because each of the italicized terms is defined to include, with variations, definitions under the US Truth in Lending Act and the Electronic Funds Transfer Act. Those acts contain some of the most complex and surprising (to some merchants) definitions in US law, and are currently being broadly interpreted or applied by regulators in other contexts.

In any event, conceivably, a 'designated payment system' could encompass such systems as credit/debit networks, wire transfer systems, automated clearing houses, internet payment systems,

**Recipients of checks and ACH transfers are not currently coded, so a new system would need to be created to allow efficient blocking of payments**

land-line and cellular telephones and so on, if the regulators view the system as utilized by a 'financial transaction provider' and determine that the system may facilitate a restricted transaction.

In addition, the regulators are given discretion to exempt transactions from the regulations if they find it would not be practical to identify and block, or otherwise prevent or prohibit the acceptance of certain transactions listed as restricted transactions. They must do this while, in a simultaneous balancing act, also 'ensuring' that unrestricted transactions (i.e. legal intrastate, intertribal and horseracing transactions) are not blocked. Embedded within the requirement not to block unrestricted transactions is a complex analysis (involving review of tribal compacts in some cases) of exactly which internet gambling transactions are not restricted under the UIGEA.

#### **Issues surrounding the regulations**

While the Treasury and Federal Reserve have not yet made public any indication of what proposed regulations would look like, we expect that much of the debate and focus will be on three key areas:

- designation or exemption of payment systems;
- exempt transactions; and
- examples of policies and procedures.

Perhaps the most intriguing aspect of the upcoming regulations will be which transactions will be exempted, and which payment systems will be subject to the requirement to adopt procedures to block illegal gambling transactions. Since credit card/debit card networks already block transactions with offshore casinos using the credit card merchant code '7995', it is unlikely that such transactions would be

exempted. Proposals to block checks and ACH transfers, however, create significant practical problems. Unlike recipients of funds from credit card and debit card transactions, recipients of checks and ACH transfers are not currently coded, so a new system would need to be created to allow efficient blocking of payments. Given this and the UIGEA's emphasis on reasonable practicality, it is possible that checks or certain ACH transfers could be exempted. However, doing so could present political issues, given that each is specifically identified in the UIGEA as a restricted transaction when used in connection with unlawful internet gambling.

If checks and ACH transfers were not exempted in whole or in part, procedures would have to be included in the regulations to block transactions with internet casinos and other covered entities. There are two obvious possibilities:

- use the '7995' code to identify the 'gambling' recipients of checks and ACH proceeds; or
- use a process similar to that used to block transfers to terrorists.

If the credit card merchant code '7995' were implemented for checks, ACH and wire transfers, all merchant accounts that could accept such payments would have to be coded. This would appear to be a monumental undertaking that could result in enormous expense to the payments industry and its participants, including merchants caught up in any failure of the regulations to ensure that unrestricted transactions are not impaired.

If such a procedure were adopted, financial transaction providers would have to ascertain the restricted transactions in which its customers participate. Account establishment and customer identification procedures might

become even more complicated than under current regulations. Obtaining information from existing commercial customers may be expensive and time consuming. As with other compliance-related technology that affects financial services, implementation costs will present a much greater burden to smaller institutions as opposed to very large ones that can spread costs over a larger asset base.

Also, a shortcoming in blocking checks and ACH or wire transfers through coding, is the possibility of a lack of international cooperation. All accounts involved in such transactions - including those in foreign jurisdictions - would have to be coded for the system to work. While the Treasury and the Federal Reserve could mandate coding for US financial institutions and other payment system participants, ordinarily they could not impose such restrictions on institutions and participants in offshore jurisdictions where internet gambling is legal. Recent laws have expanded powers of US regulators, however many confuse these concepts.

Another potential procedure for blocking transfers of proceeds by check or ACH transfers would be the use of existing anti-money laundering procedures. Currently, financial services providers are required to block all transactions involving 'specially designated nationals and blocked persons'. A list of prohibited transferees (the 'SDN List') is maintained by the US Office of Foreign Assets Control.

Theoretically, transfers to internet

casinos and the like could similarly be blocked by creating a 'betting or wagering' list akin to the SDN List. An SDN List-type approach would only work with respect to internet 'betting or wagering' companies identified by US law enforcement authorities - financial institutions and other participants could not be expected to keep track of such companies. Also, there is the statutory requirement to ensure that unrestricted transactions are not blocked: it is one thing to block all transfers of funds to a designated terrorist, but the world is not so all-or-nothing for companies that engage in the betting or wagering industry. Those companies are also the recipients of unrestricted checks and ACH transfers, so creating a system that can adequately distinguish a restricted transaction from a transaction that may not be restricted will be challenging, to say the least. However, the burden would be on the company to show it was not a restricted transaction and there are a vast array of issues, beyond the scope of this article, that arise as to the feasibility of a company in the business of betting and wagering raising that challenge, especially if the company accepts bets or wagers from US-based persons.

**Conclusion**

Because of the potential issues and possible burdens that could be created by adoption of regulations under the UIGEA, participants in the internet, e-commerce and e-payments industries should review proposed UIGEA regulations when they are issued. If the proposed

regulations place a particular burden on any affected industry participant, or if they sweep so broadly as to include companies intended to be excluded (such as interactive computer services or telecommunications services), comments to the regulations would be in order. Regulators are required to respond to comments on proposed regulations and, in the past, the Treasury and the Federal Reserve have accommodated informed comments made by those affected.

---

**Linda J. Shorey** Partner  
**Holly K. Towle** Partner  
**Sean P. Mahoney** Associate  
 Kirkpatrick & Lockhart Preston Gates  
 Ellis  
 linda.shorey@klgates.com  
 holly.towle@klgates.com  
 sean.mahoney@klgates.com

---

**SIGN UP FOR FREE E-LAW ALERTS**

E-Finance & Payments Law & Policy provides a free alert service. We send out updates on breaking news, forthcoming events and each month on the day of publication we send out the headlines and a precis of all of the articles in the issue.

To receive these free e-law alerts, register on [www.e-comlaw.com/updates.asp](http://www.e-comlaw.com/updates.asp) or email [dan.towse@e-comlaw.com](mailto:dan.towse@e-comlaw.com)



# cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

## e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.

ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.

**A twelve month subscription is £390 (overseas £410) for twelve issues and includes single user access to our online database.**

## e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.

Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.

**A twelve month subscription is £380 (overseas £400) for six issues and includes single user access to our online database.**

## data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.

DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently. Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.

**A twelve month subscription is £355 (public sector £255, overseas £375) for twelve issues and includes single user access to our online database.**

## world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.

Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.

Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

## world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.

Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction, domain names, ticketing and privacy are subjects that have featured in WSLR recently.

Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

- Please enrol me as a subscriber to **e-commerce law & policy** at £390 (overseas £410)
- Please enrol me as a subscriber to **e-commerce law reports** at £380 (overseas £400)
- Please enrol me as a subscriber to **data protection law & policy** at £355 (public sector £255, overseas £375)
- Please enrol me as a subscriber to **world online gambling law report** at £485 (overseas £505)
- Please enrol me as a subscriber to **world sports law report** at £485 (overseas £505)

**All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.**

Name

Job Title

Department  Company

Address

Address

City  State

Country  Postcode

Telephone  Fax

Email

**1** Please **invoice me**  Purchase order number

Signature  Date

**2** I enclose a **cheque** for the amount of

made payable to 'Cecile Park Publishing Limited'

**3** Please debit my **credit card**  VISA  MASTERCARD

Card No.  Expiry Date

Signature  Date

VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information. Please tick here if you would like to hear from other companies about products or services that may add value to your subscription.

priority order form

FAX +44 (0)20 7729 6093

CALL +44 (0)20 7012 1380

EMAIL [dan.towse@e-comlaw.com](mailto:dan.towse@e-comlaw.com)

ONLINE [www.e-comlaw.com](http://www.e-comlaw.com)

POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND