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## The Barton Bill Examined

by

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On June 24, 2011, Rep. Joe Barton (R-TX) introduced H.R. 2366—"Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011." At introduction, among the co-sponsors were the sponsor (Rep. John Campbell (R-CA)) and initial co-sponsors (Rep. Barney Frank (D-MA), Rep. Peter King (R-NY), and Rep. Ed Perlmutter (D-CO)) of H.R. 1174—"Internet Gambling Regulation, Consumer Protection, and Enforcement Act".<sup>1</sup> Unlike H.R. 1174 (the "Campbell bill"), which would provide for the licensure and regulation of many types of online wagering other than sports, H.R. 2366 (the "Barton bill") is limited to Internet poker. The Barton bill, like the Campbell bill, would also amend the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") to address areas of concern.

The Barton bill has two sections. Section 1 contains the title of the bill and a table of contents for the bill's contents. Section 2 contains the substance, i.e., the "meat," and has three components—"Findings," "Title I—"Prohibitions on Unlicensed Internet Gambling and Internet Poker Consumer Protection," and "Title II—Strengthening of Unlawful Internet Gambling Enforcement Act of 2006."<sup>2</sup> This paper examines the three components of Section 2.

## Findings

This component of the Barton bill contains seven Congressional findings, which:

- identify the problem—gambling websites "run by operators located in many different countries" that "have raised numerous policy, consumer protection, and enforcement concerns for Federal and State governments;"
- recognize the intent but failure of UIGEA to address problems associated with Internet gambling;
- acknowledge the "uncertainty about the laws of the United States governing Internet gambling and Internet poker, [but] not about laws governing Internet sports betting," the position of the federal Department of Justice ("DOJ") that all Internet gambling is illegal, "including activity that Congress intended to legalize under the Interstate Horseracing Act of 1978," and the inconsistency of certain court decisions with the DOJ position;
- point out the importance of more "tools to assist law enforcement in the prevention of unlawful Internet gaming activities," including the "[m]aintenance of a list of unlicensed Internet gambling enterprises and the owners, operators, and key personnel of such enterprises;"
- distinguish poker "from the class of games of chance traditionally defined as gambling;"
- see a "benefit [to players] from a program of Internet poker regulation which recognizes the interstate nature of the Internet, but nevertheless preserves the prerogatives of States" and would require licensees to
  - » "have effective means to prevent minors" from playing;
  - » "identify and help treat problem gamblers [and] ensure that games are fair;"

- » "allow players to self-exclude and limit losses;" and
- » "prevent money laundering;"
- establish a "new [U.S.] industry" that would "creat[e] thousands of jobs and substantial tax revenue for Federal and State governments."

## Title I—Prohibitions On Unlicensed Internet Gambling And Internet Poker Consumer Protection

Title I is the heart of the Barton bill with respect to the authorization and licensure of Internet poker. It begins with provisions that would make it "unlawful for a person to operate an Internet gambling facility without a license in good standing issue[d] to such person" under the bill and provides only for licenses to "operate an Internet poker facility." Proposed §§ 102(a)(1) and 104(a)(1). It ends with a provision that "[e]xcept as otherwise expressly provided in this title," pre-empts State and Tribal laws that "expressly relat[e] to the permitting, prohibiting, licensing, or regulating of Internet gambling facilities, including Internet poker facilities...except to the extent such State or Tribal laws are not inconsistent with this title." Proposed § 112(c)(1) of Title I. In other words, except where Title I says otherwise, if this bill is passed as drafted, neither a State nor a Tribe may allow or prohibit Internet gambling in a manner that is inconsistent with the bill.

Along these lines, a close reading of Title I reveals that a State law or Tribal ordinance that authorizes intrastate Internet gambling would apparently not be "inconsistent with" the Barton bill and, therefore, not preempted by the preemption provision to the extent that it applies in connection with Internet gambling licenses issued *before* the bill's enactment. It is not clear, however, whether such laws or ordinances would still be able to be applied *after* the bill's enactment to renew those licenses.

In this regard, proposed § 101(2)(B) adopts the definition of "bet or wager" that is in UIGEA, with exceptions. The exception for "certain intrastate transactions" provides:

(ii) Certain Intrastate Transactions—Placing, receiving, or otherwise transmitting a bet or wager –

(I) as described in subparagraph (B) of section 5362(10) of title 31, United States Code [i.e., of UIGEA], and clarified by subparagraph (E) of such section; and

(II) *authorized under a license that was issued by a regulatory body of a State or Indian Tribe on or before the date of the enactment of this Act.*

Proposed § 101(2)(B)(ii) (emphasis added). In turn, the bill's prohibition on unlicensed Internet gambling establishes that a person cannot operate an Internet gambling facility—defined as an Internet web site, or similar facility, "through which a bet or wager is initiated, received, or otherwise made," proposed § 101(8)—without a license issued under Title I.

Synthesizing the "intrastate transaction" exception and the prohibition on unlicensed gambling with the preemption provision suggests that the drafters'

<sup>1</sup> For a detailed description of H.R. 1174, see [H.R. 1174: The Frank Bill Returns](#).

<sup>2</sup> The Unlawful Internet Gambling Enforcement Act ("UIGEA") is codified at 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 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 the Barton bill be enacted, one result would be that Internet poker, offered by a Title I licensee in compliance with its license, would be "lawful" and not subject to the financial transaction prohibitions of UIGEA.

intent may be to “grandfather” any State and Tribal Internet gambling licenses that are issued before the advent of federal regulation. By necessity, therefore, their intent is likewise to keep State and Tribal laws alive to the extent they govern the grandfathered licenses (and the licensees that hold them), but perhaps *not* to the extent they apply to licenses issued after the bill’s enactment. Notably, because the “intrastate transaction” exception is not, on its face, limited to poker, it appears that the grandfathered licenses would include not only those that pertain to wagering on poker, but also those that pertain to wagering on other types of activities.

Separately, Title I sets forth a framework for the licensure and regulation of Internet poker. Licenses would be issued to qualified applicants to “operate an Internet poker facility,” which is defined to mean “to conduct, direct, manage, own, supervise, or control an Internet poker facility.” Proposed §101(14). “Internet poker” is defined as “a poker game, hand, tournament or other contest of poker offered through the use of an Internet poker facility.” Proposed §101(9). “Poker” is defined as “any of several card games in which players compete against each other, and not the person or entity hosting the game (sometimes called ‘the house’), and that over any significant interval, the outcome of a poker game is predominantly determined by the skill of the participants.” Proposed §101(15). An “Internet poker facility” is defined as “a type of Internet gambling facility that provides bets or wagers only with respect to a game, hand, tournament, or other contest of poker.” Proposed §101(10). “Internet gambling facility” is defined as “an Internet Web site, or similar communications facility in which transmissions may cross State boundaries, through which a bet or wager is initiated, received, or otherwise made, whether transmitted by telephone, Internet, satellite, or other wire or wireless communication facility, service or medium.” Proposed §101(8).

The Secretary of Commerce<sup>3</sup> is given oversight of the licensure and regulatory system. To carry out the Secretary’s functions under Title I, the Secretary is to establish, within the federal Department of Commerce, an Office of Internet Poker Oversight. Proposed §103(b).

## I. Qualified State Agencies

The Barton bill envisions that State and Tribal regulatory authorities meeting certain conditions would be responsible for the licensure and regulation required by the bill. Proposed §103 addresses the attributes the authorities would need to have to be qualified to undertake licensure and enforcement and also addresses the Secretary’s oversight role.

Proposed §103(a) gives the Secretary the authority to designate and monitor the “qualified State agencies” that are to be responsible for the licensure and regulation of Internet poker facilities. The term “qualified State agency” is defined in §101(16) to mean:

- (A) a State agency or regulatory body of an Indian Tribe that has been designated as a qualified body under paragraph (1) or (3) of section 105(a); or
- (B) the Office of Internet Poker Oversight established under section 106(a) and designated under paragraph (2) of section 105(a).

This definition is ambiguous. The cross-references to §§105(a) and 106(a) are inconsistent with the language of those sections, which pertain to disciplinary action concerning licensees and the establishment of regulations related to problem gambling, respectively. As noted above, the Office of Internet Poker Oversight is established in §103(b), which does not designate it as a qualified State agency. However, the overall tenor of the bill leads

to a conclusion that the qualified State and Tribal regulatory authorities would do the licensing and enforcement and that the Secretary would likely delegate oversight responsibility to the Office of Internet Poker Oversight.

### A. What Is Needed to Be a State Qualifying Agency?

Section 103(c) addresses the “designation of qualified State agencies” and contains four paragraphs. Without reference to the definition of “qualified State agency,” the first paragraph of §103(c) might lead one to believe that tribal regulatory bodies could not be considered for qualification. It requires the Secretary to “qualify any State agency that is designated to the Secretary by a State that wishes to participate ... if the Secretary determines that such agency meets the minimum standards ... .” It contains no reference to how the Secretary is to know that the regulatory body of an Indian Tribe should be considered for designation as a qualified State agency.

The second paragraph of §103(c) requires the Secretary to “prescribe minimum standards for qualifying a State agency.” A careful reading reveals that, contrary to what is suggested by the first paragraph, the Secretary will be reviewing both State agencies and Tribal regulatory bodies for qualification. The paragraph sets forth seven minimum standards that must be considered, one of which refers specifically to the authority provided to the entity seeking qualification by the applicable Indian Tribe:

- a staff of sufficient size “to ensure a sufficient number of enforcement agents with experience in gaming regulatory enforcement areas” and qualification to have “the sophistication and resources necessary to evaluate issues unique to the Internet environment;”
- “history of demonstrated regulatory enforcement and oversight commensurate with the responsibilities imposed” by Title I;
- “experience and willingness to work with Federal authorities, including the Financial Crimes Enforcement Network;”
- a policy on “conflicts of interest to ensure [the agency or body is] not controlled, directly or indirectly, by persons that have any significant ownership interest in entities regulated” by Title I;
- “capacity [for] and experience ... in conducting rigorous suitability reviews;”
- “the enforcement and regulatory authorit[y] ... under law of the applicable State or Indian tribe, including investigative authority, authority to impose requirements on licensees, and authority to impose civil or other penalties;” and
- anything “the Secretary considers relevant to the ability of an agency to serve as an effective qualified State agency.”

The minimum requirements would likely limit the State and Tribal authorities to those with a well-established reputation and significant investigatory experience. Also important would be what the State and Tribal authorities seeking qualification are permitted to do under their authorizing legislation.

The third paragraph of §103(c) addresses the Secretary’s power to withdraw a designation of qualified State agency one year after final regulations under Title I have been issued, if the Secretary determines the designated agency is not in compliance with the minimum standards or any other requirement of Title I.

The fourth paragraph of §103(c) sets forth the impact of the withdrawal of qualification on those licensed by the agency.

<sup>3</sup> The Campbell bill would assign oversight responsibility to the Secretary of the Treasury.

## B. The Secretary's Oversight Role

Section 103(d) would provide the Secretary with the power to investigate qualified State agencies and take action on the Secretary's own initiative or upon "credible information provided by other persons, including licensees or law enforcement officials," that an agency is "deficient or substantially less rigorous than other qualified State agencies in the discharge of its responsibilities under this title."

Section 103(e) requires the Secretary to "conduct meaningful consultation with Indian tribes regarding all aspects of [Title I] which affect Indian tribes."

## II. State and Tribal Limitations

### A. Limitations and Impact on Licensees

Proposed § 104(a)(3) addresses limitations that States and Tribes would be permitted to impose in connection with Internet poker and the impact of those limitations. Subparagraphs (A) and (D) would restrict licensees from accepting "a bet or wager from a person" located in the jurisdiction of a State or Tribe, if the State or Tribe has "inform[ed] the Secretary of such limitation, in a manner which clearly identifies the nature and extent of such limitation." Subparagraphs (B) and (E) would permit a State or Tribe to "establish[], repeal, or amend[]" a limitation and provide that such would take effect "beginning on the day that occurs after the end of the 60-day period beginning on the later of" (i) the date of written notification to the Secretary or (ii) "the effective date of such establishment, repeal, or amendment." Subparagraph (F) requires the Secretary to notify licensees and applicants for licenses of the identity of the States and Tribes that have notified the Secretary of the imposition of a limitation at least 30 days in advance of the effective date of the limitation and to take "effective measures" to ensure that licensees comply "with any limitation or prohibition."<sup>4</sup> It also provides that a violation of a State or Tribal limitation is a violation of Title I and enforceable under proposed § 105.

### B. Impact of State Limitations on Tribal Jurisdictions within a State

Subparagraph (C) of proposed § 104(a)(3) provides that any State limitation "shall not apply to acceptance by a licensee of bets or wagers from persons located within the tribal lands" of a Tribe that "(i) has itself opted out pursuant to subsection (b) (in which case the tribal opt-out exercise under such subsection shall apply); or (ii) would be entitled pursuant to other applicable law to permit such bets or wagers to be initiated and received within its territory without use of the Internet." This provision, as a result of use of the term "opt-out" and reference to subsection (b), is somewhat ambiguous. "Opt-out" is a term used often in the Campbell bill with respect to limitations that States or Tribes might impose, but in the Barton bill, it is not used anywhere other than subparagraph (C). Subsection (b) of section 104 does not concern State or Tribal limitations; it addresses what is to be included in an application for a license to operate an Internet poker facility.

The ambiguity of subparagraph (C), however, may simply be an oversight on the part of the drafters. The text of subparagraph (C)(i) and (ii) is identical to the text of paragraph (B)(i) and (ii) of proposed 31 U.S.C. § 5387(a) in the Campbell bill.

<sup>4</sup> It appears that a State or Tribal "limitation" could be a complete prohibition or something less with respect to the acceptance of bets or wagers from persons in its jurisdiction. Examples of the latter might be a limit on the amount of bets or wagers that can be accepted from one person in a particular time frame, a limit on the maximum size of a bet or wager, or a limit on the time that a person can play poker in a day. In other words, a State or Tribe might be able to dictate consumer protection requirements in addition to those the Barton bill or regulations promulgated under it by the Secretary would require.

## III. Eligibility for Licensure

### A. Those Initially Eligible for Licensure

Proposed § 104(f)(1) identifies four categories of applicants that would appear eligible to obtain the initial licenses:

- entities/persons that own or control a casino gaming facility,
- entities/persons that own or control a qualified race track,
- entities/persons that own or control a qualified card room, and
- entities that for 5 years prior to applying for a license had a Tribal or State license permitting them to manufacture and supply casino gaming facilities with not fewer than 500 slot machines or qualified mobile gaming systems.

A "casino gaming facility" is "a facility that provides casino gaming on a riverboat, at a race track, or in another facility that hosts 500 or more gaming devices in 1 physical location pursuant to" a license issued by a State or Tribal "gaming regulatory authority." Proposed § 101(4). A "qualified race track" is "a race track or other pari-mutuel wagering facility that" is "licensed by a regulatory authority of a State or [Tribe] to accept pari-mutuel wagers on horse races" and "has (i) at least 500 gaming devices at 1 physical location or (ii) processed at least \$200,000,000 or more in gross wagering on horse racing during any 3 of the 5 years preceding" the bill's enactment. Proposed § 101(19). A "qualified card room" is "a facility that has been licensed by a State or [Tribe] to provide at least 250 tables in 1 physical facility for bets or wagers on poker." Proposed § 101(17). A "qualified mobile gaming system" is "a system for the conduct of casino gaming through communications devices or gaming devices operated at a casino gaming facility by the use of communication technology that allows a person to transmit wirelessly information to a computer to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes, or other similar information and which is licensed for operation at a casino gaming facility by a State or [Tribe]." Proposed § 101(18).

These categories appear to encompass only persons or entities that, at a minimum, would have, on the date the Barton bill is enacted, a license from a State or Tribal gaming regulatory authority. It does not include State lotteries or Tribes that are not currently operating casinos.

### B. Those Potentially Eligible Later

Proposed § 104(f)(3) would permit the Secretary, beginning two years after the first license is issued, to allow the issuance of licenses to other applicants "if the Secretary determines" that doing so "will not significantly increase the risk" that the additional requirements for licensure in proposed § 104(d) "will not be satisfied."

## IV. Licenses and Certificates of Suitability

### A. Applications

Proposed § 104(b) addresses licensure applications. Applicants who want "to operate an Internet poker facility" are directed to submit their application "to the qualified State agency of the State where the servers for such Internet facility are located." Proposed § 104(b)(1). This appears to mean that

licensees would only be able to locate their servers within the boundaries of the jurisdiction of a qualified State agency, limiting the benefits, such as new jobs, associated with such facilities, to those States and Tribes whose regulatory bodies obtain qualification.

Qualified State agencies are allowed to establish the time and manner of submission, as well as the form of the application, they consider appropriate, so long as the following information is required from an applicant:

- Complete financial information;
- Documentation of the organization of it and that of all related businesses and affiliates;
- Criminal and financial history of (i) itself, (ii) its senior executives and directors, (iii) anyone in control of it, and (iv) other persons the qualified State agency considers appropriate;
- Information necessary for suitability determination;
- Other qualified State agencies to which the applicant has submitted applications and the status of those applications;
- Detailed description of plan for compliance with requirements of and regulations promulgated pursuant to Title I; and
- Certification that applicant agrees to be subject to (i) jurisdiction of U.S. federal courts and the courts of the State or Tribe of the qualified State agency to which applicant applies and (ii) all applicable provisions of U.S. law.

Proposed § 104(b)(1). The qualified State agencies are required to report the identity of all applicants and the disposition of all applications to the Secretary immediately upon disposition or at intervals the Secretary may prescribe, with as much information and documentation as the Secretary requires. Proposed § 104(b)(2).

### ***B. Suitability—Required for Licensees, Significant Vendors, and Other Vendors***

To be eligible for licensure, an applicant would first be required to obtain a “certificate of suitability” from the qualified State agency considering its application. In addition, an applicant’s eligibility for licensure requires that certificates of suitability be obtained by (i) “any person deemed to be in control of the applicant,” (ii) “all significant vendors of the applicant,” and (iii) “any other person” the qualified State agency determines to have “significant influence on the applicant.” Proposed § 104(c)(1). The qualified State agency may also require certificates of suitability to be obtained by certain “other vendors,” which includes those falling within descriptions in proposed § 104(c)(5)(A) and those the qualified State agency determines, with respect to the service being provided, pose a “substantial risk” of circumventing the suitability requirement for significant vendors. Proposed § 104(c)(5)(B). The following two paragraphs describe those that would fall into the significant and other vendor categories.

A “significant vendor” is a vendor that does the following for a licensee:

- “manages, administers or controls” (i) “bets or wagers that are initiated, received, or otherwise made in the United States” and (ii) “the games with which such bets or wagers are associated;”
- “develops, maintains, or operates the software or other system programs or hardware on which the games or the bets or wagers are managed, administered, or controlled;”

- “provides the trademarks, trade names, service marks, or similar intellectual property under which a licensee identifies its Internet poker facility to its customers in the United States;”
- “provides information on individuals in the United States that made bets or wagers with an Internet gaming facility not licensed under this title via a database or customer list;” or<sup>5</sup>
- “provides any products, services, or assets [] and is paid a percentage of gaming revenue or Internet poker commission fees [] (not including fees to financial institutions and payment providers for facilitating a deposit by a customer).”

Proposed § 101(22).

The “other vendors” described in proposed § 104(c)(5)(A) are those that would –

- “direct, provide or solicit customers to or for the licensee’s Internet poker facility, or materially assist in any of those tasks, in return for a commission or other fee;”
- “hold themselves out to the public as offering bets or wagers on [the] licensee’s behalf;” or
- “offer bets or wagers under their own names or brands but using and relying on licensee’s Internet poker facilities.”

Before issuing a certificate of suitability, a qualified State agency is required to conduct a background check and investigation and determine if the person seeking the certificate:

- is of “good character, honesty, and integrity;”
- is someone “whose prior activities, criminal record, if any, reputation, habits, and associations do not [i] pose a threat to the public interest or to effective regulation and control of Internet poker facilities; or [ii] create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of Internet poker facilities or the carrying on of the business and financial arrangements incidental to such facilities;”
- “is capable of and likely to conduct the activities for which” the license or certificate is sought “in accordance with the provisions of this title, any regulations prescribed under the title, and all other applicable laws;”
- if an applicant, “has or guarantees acquisition of adequate business competence and experience” needed to operate an Internet poker facility;
- if an applicant, “has or will obtain sufficient funding” to conduct its operation from a “suitable source;” and
- “has disclosed to the qualified State agency all known affiliations or relationships, whether direct or indirect.”

Proposed § 104(c)(1) and (2). An applicant or person seeking a certificate of suitability “may not be determined to be suitable ... if the applicant or such person”–

- fails to supply the required information or supplies untruthful/misleading information;
- “has been convicted of an offense” requiring more than one year’s imprisonment;

<sup>5</sup> Under this description, it appears that anyone selling a customer list obtained from non-U.S. Internet gaming operators that accept, or have accepted, wagers from U.S.-based persons would be a significant vendor.

- is delinquent in the payment of any applicable tax;
- “has not certified in writing” submission “to personal jurisdiction in the United States;” or
- “fails to comply with such other standard as the applicable qualified State agency considers appropriate.”

Proposed § 104(c)(2)(B). In conducting a suitability analysis, “a qualified State agency shall consider whether” the applicant or person “operated an Internet gambling facility before the enactment of this Act and the scope of such person’s activities with respect to such operation.” Proposed § 104(c)(2)(C).

If a significant vendor has already obtained a certificate of suitability from a qualified State agency, another qualified State agency “may, but need not, accept” that certificate “as evidence of the suitability of the significant vendor.” Proposed § 104(c)(2)(4)(D).

### **C. Other Licensure Requirements—Consumer Protection, Money Laundering, Terrorist Financing, Compulsive Gambling**

In addition to obtaining a certificate of suitability, applicants and licensees would be required to show the qualified State agency that they “maintain[] appropriate safeguards and mechanisms, in accordance with standards established by the qualified State agency,” and have safeguards and mechanisms that –

- “ensure” those placing a bet or wagers are (i) “not less than 21 years of age,” and (ii) “physically located in a jurisdiction that has not prohibited bets or wagers at the time the bet or wager is placed;”
- “ensure ... all taxes relating to” (i) “Internet poker from persons engaged in [placing] bets or wagers ... are collected or reported, as required by law,” when winnings from the bets or wagers are paid and (ii) “the operation of an Internet poker facility from any licensee are collected and disbursed as required by law and that adequate records to enable later audit or verification are maintained;”
- “prevent ... fraud, money laundering, and terrorist financing;”
- “ensure ... compliance with the requirements of [proposed] section 106,” related to compulsive gambling;
- “protect ... the privacy and online security of” those “engaged in bets or wagers;”
- “ensure that” the section 104(e)(1) fees for administrative expenses are paid;
- “ensure ... that Internet poker games are fair and honest,” and “prevent ... cheating, including collusion, and use of cheating devices, including use of software programs (sometimes referred to as ‘bots’) that make bets or wagers according to algorithms;” and
- address any other areas that “the qualified State agency may establish.”

Proposed § 104(d).

The final bullet point implies that licensees may face additional, and differing, requirements, depending on the qualified State agency from which licensure is sought.

Two of the bullet points refer to other proposed provisions—§§ 104(e) and 106. Proposed § 104(e) provides that all fees incurred by the qualified State agencies and the Secretary for administering Title 1 are to be assessed against and paid by applicants, licensees, or significant vendors as appropriate. Proposed § 106(a) requires each qualified State agency, before it issues a license pursuant to Title 1, to “establish requirements for the development of a Compulsive Gaming, Responsible Gaming, and Self-Exclusion Program that each [of its] licensees ... shall implement as a condition of licensure.” At a minimum, the program must –

- provide, “each time a player signs in to make a bet” for understandable “informational materials” about responsible gaming, including how the self-exclusion list works;
- provide, upon request of any player, “informational materials about responsible gaming;”
- “make continuously available individualized responsible gaming options,” including the ability “to self-limit [] access to the issuance of credit, check cashing, or direct mail marketing by the licensee;”
- “ensure ... that persons on the list of self-excluded ... are prevented from initiating any bets or wagers within the scope of [Title 1];” and
- “ensure that the information required under this subsection is clearly and prominently made available ... in each language in which services of the Internet poker facility of the licensee are offered.”

Proposed § 106(b).

### **D. Location of Equipment**

Licensees would be required to maintain their “remote gaming equipment” in the U.S. during the term of the license. A qualified State agency may require applicants, if it determines that doing so will “advance the regulatory interests of” Title 1, to obtain a license to locate its “remote gaming equipment” with in its jurisdiction.<sup>6</sup> Proposed § 104(g). “Remote gaming equipment” is the equipment “principally used by or on behalf of an operator of an Internet poker facility, including any significant vendor to such operator, to”–

- “(i) register a person’s participation in Internet poker and to store information relating thereto;”
- “(ii) present to persons who are participating or who may participate in Internet poker the game that is to be played;”
- “(iii) determine all or part of, or the effect of, a result relevant to a game, hand, tournament, or other contest of Internet poker and to store information relating thereto;”
- “(iv) accept payment of any winnings in respect of Internet poker;” or
- “(v) authorize payment of any winnings in respect of Internet poker.”

<sup>6</sup> As noted above, proposed § 104(b)(1) requires applicants to apply for licensure with “the qualified State agency where servers for such Internet facility are located.” “Servers” is not defined in the Barton bill. “Remote gaming equipment” would appear to include more than “servers.” It is defined as “electronic or other equipment principally used by or on behalf of an operator of an Internet poker facility, including any significant vendor to such operator, to” (i) register and store player information; (ii) present to” players “the game that is to be played; (iii) determine results and store related information; (iv) accept payment [] from player[s]; or (v) authorize payment of any winnings ... .” Proposed § 101(20)(A). Specifically excepted from the definition are “(i) [e]quipment used for business continuity, back-up, excess capacity, or other secondary use[;] (ii) [a] computer” used by a player “unless the computer is provided by or on behalf of the person [] conducting or providing the facilities for the game[; and] (iii) [e]quipment operated in the ordinary course of providing banking, telecommunications, or payment processing services.” Proposed § 101(20)(B).

Proposed § 101(20)(A). Excepted from the definition is –

- “(i) Equipment used for business continuity, back-up, excess capacity, or other secondary use.”
- “(ii) A computer which is used by a person to participate in Internet poker unless the computer is provided by or on behalf of the person who is conducting or providing the facilities for the game.”
- “(iii) Equipment operated in the ordinary course of providing banking, telecommunications, or payment processing services.”
- “(iv) Such other equipment that provides ancillary services as the Secretary considers appropriate.”

Proposed § 101(20)(B).

### ***E. Secretary’s Authority with Respect to Licenses and Suitability Determinations***

The Secretary would retain ultimate authority with respect to the decision to grant licensure and determine suitability. Proposed § 104(f)(4) provides that the Secretary “may suspend or revoke” any certificate of suitability or license “if the Secretary has reason to believe” the licensee “does not meet the suitability requirements,” but “may not overturn a decision by a qualified State agency to deny or to terminate a license” or a certificate of suitability. When a qualifying State agency denies, terminates, or revokes a license or certificate of suitability and within 12 months a different qualified State agency grants a license or certificate, the Secretary is to review the license or certificate and decide whether the license or certificate should be suspended or revoked. Proposed § 104(f)(5).

### ***F. What Constitutes Internet Poker?***

As noted above, “Internet poker” is defined in the Barton bill as “a poker game, hand, tournament, or other contest of poker offered through the use of an Internet poker facility.” Proposed § 101(9). Whether a specific game, hand, tournament, or other contest would fall within this definition is left initially to the qualified State agency that issued the applicable license. Proposed § 104(j)(1)(A). Review by the Secretary of a decision of a qualified State agency to reject a specific game, hand, tournament, or other contest would be available, and until the Secretary issues a decision, a licensee could continue to offer the game, hand, tournament, or other contest. Proposed § 104(j)(1)(B). The licensee or qualified State agency would be able to appeal the Secretary’s decision to the U.S. District Court for the District of Columbia, which could “set aside the Secretary’s determination” if it was “(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or (ii) without observance of procedure required by law.” Proposed § 104(j)(C).

### ***V. Disciplinary Action***

The qualifying State agency or the Secretary would be able to take disciplinary action—including license suspension or revocation—if a licensee fails to comply with Title I, any regulation issued pursuant to Title I, or any applicable provision of State or Tribal law. Proposed §§ 105(a)(1), (2), and (4). A licensee could appeal the result of a disciplinary action (1) by a qualified State agency in accordance with the law of the jurisdiction of the qualified State agency and (2) by the Secretary by filing an appeal with

the U.S. District Court for the District of Columbia, which can “set aside the Secretary’s determination” if it was “(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or (ii) without observance of procedure required by law.” Proposed § 105(a)(5). While an appeal is pending, the court handling the challenge would be allowed to permit the licensee to continue operating, if the licensee “has a reasonable likelihood of success on the merits” and “offering bets and wagers while the appeal is pending will not threaten the public interest.” Proposed § 105(a)(6).

When a license is revoked, the licensee would be required, within 30 days, to return all customer funds and escrow in a U.S.-located financial institution any funds it is unable to return because of a “change in customer address, bank details, or similar difficulty ... for safekeeping and orderly disposition by the Secretary.” Proposed § 105(a)(7).<sup>7</sup>

In general, for violations of Title I, the qualifying State agency or the Secretary may assess “a civil penalty of not more than the greater of (i) the amount involved in the violation ... , (ii) \$250,000 for an individual and \$750,000 for a corporation, or (iii) such other amount as provided under applicable State or tribal law of the qualified State agency.” Proposed §§ 105(b)(1)(A) & (B).

### ***VI. Failure to Obtain License***

Buried in proposed § 105(b)(1)(D) is authority for the Secretary, “[n]otwithstanding any other provision of law,” to impose a civil penalty on a person that has failed but is required to obtain a license under Title I. The penalty is to be “not more than the greater of (i) the amount of bets or wagers taken by the person from” U.S.-based players or (ii) \$1 million “per day that the person accepts bets or wagers from” U.S.-based players “during the period that a license was needed but not held by the person.” Id.

### ***VII. Provisions Related to Compulsive Gaming, Responsible Gaming, Self-Exclusion Requirements***

As detailed above, proposed § 106(a) would require each qualified State agency, before issuing a license pursuant to Title I, to “establish requirements for the development of a Compulsive Gaming, Responsible Gaming, and Self-Exclusion Program that each [of its] licensees ... shall implement as a condition of licensure.” In addition, qualified State agencies are required to establish and maintain “a list of persons self-excluded from playing Internet poker” through their licensees and to, weekly, submit a current list to the Secretary; the Secretary is to maintain a “master list” of such persons and make it “available to all qualified State agencies and licensees.” Proposed §§ 106(c)(1)(A) & (B).

The U.S., the Secretary, a qualified State agency, the State or Tribe in which a qualified State agency is located, and the employees and agents of a qualified State agency are not liable for any harm resulting from “(i) any failure to withhold gaming privileges from, or to restore gaming privileges to, a self-excluded person; (ii) otherwise permitting a self-excluded person to engage in gaming activity while on the list of self-excluded persons; or (iii) disclosure of information about individuals placed on the list of self-excluded persons.” Proposed § 106(c)(2). Licensees, and their employees or agents, are also not liable for such harm, except as provided under the law of the State or Tribe of the qualified State agency issuing a licensee’s license. Id.

<sup>7</sup> Proposed § 105(a)(8) allows the Secretary or a qualified State agency to make referrals to the U.S. Attorney General if they “find[] a substantial basis to believe that a person has violated section 103.” Proposed § 103, however, sets forth the responsibilities of the Secretary, the Office of Internet Poker Oversight, and the qualifying State agencies. Accordingly, it appears the reference to “section 103” is a typographical error. It appears likely the cross-reference should be to proposed § 105(b)(1)(D) (“failure to obtain a license”), discussed in Section VI.

## VIII. Reinforcement of What Title I Does and Does Not Do

Proposed § 107(a)(1) would reinforce that Title I permits licensees to accept bets or wagers only on Internet poker and is not to be construed to authorize the acceptance of bets or wagers on any other game, event, or activity, specifically, on “any sporting event in violation of any applicable provision of Federal or State law.” Proposed § 107(a)(2) provides that “[n]othing in [Title I] shall be construed to repeal or to amend any provision of Federal or State law prohibiting, restricting, or otherwise addressing bets or wagers on sporting events, including provisions of Federal and State law that permit participation in fantasy or simulation sports games.” In short, proposed § 107(a) emphasizes that sports wagering is not authorized by Title I and appears to provide that Title I makes no change to other Federal or State law related to betting or wagering on sporting events. However, as later sections show, Title I amends the Wire Act, which is a Federal law related to betting or wagering on sporting events.

Proposed § 107(c)(1) provides that it would be “a violation” of Title I “to operate a place of public accommodation, club (including a club or association limited to dues-paying members or similar restricted groups), or similar establishment in which computer terminals or similar access devices are made available to be used principally for the purpose of accessing Internet gambling facilities.” This is a ban on what is commonly referred to as Internet poker and Internet gambling parlors.

## IX. Prohibition Of Credit Cards

Proposed § 107(b)(1) would prohibit the use of credit cards for making or settling bets or wagers authorized under Title I. Proposed § 107(b)(2) clarifies the prohibition, providing that for licensees who are also licensed to take bets or wagers in accordance with the Interstate Horseracing Act of 1978 (“IHA”) or “involved in legal, land-based or State- or tribal-regulated intrastate gambling,” the ban on credit card use applies only to activities conducted pursuant to a license under Title I to operate an Internet poker facility.

## X. Affirmative Defense Provided by Title I and the IHA

Proposed § 108 provides that if the activity forming the basis of a prosecution or enforcement action under Federal, State, or Tribal law is authorized by and has been conducted in accordance with Title I or with the IHA, this fact would provide an affirmative defense to such prosecution or enforcement action. This is an explicit recognition that the IHA provides an exception to the Wire Act, 18 U.S.C. § 1084.

## XI. Cheating and Other Fraud and Related Reports

Proposed §§ 110(a) and (b) would prohibit cheating and cheating devices, such as bots, in connection with actual or live play, although, if registered with the Secretary and applicable qualifying State agency, such devices could be used for testing an Internet poker facility. A person convicted of violating these provisions may be permanently enjoined “from initiating, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers” and is to be fined and/or imprisoned for up to three years. Proposed §§ 110(c) & (d).

Proposed § 110(e) provides for two reports. One, to be submitted to Congress by the Secretary within 180 days of enactment, is to recommend the “minimum standards” that qualifying State agencies should adopt to detect the use of cheating and cheating devices. The other, to be submitted

to Congress by the Director of the National Institute of Standards and Technology within a year after licenses are first issued,<sup>8</sup> is to identify “threats to the integrity of Internet poker facilities operated by licensees, including identification of technologies that could be used to hack computer networks, facilitate cheating, or otherwise place consumers at risk of fraud or monetary loss.”

## XII. Relationship with Other Laws

### A. Generally

Proposed § 112(a) provides that nothing in Title I is to be construed to require licensing for games of skill that “are not regarded as gambling under all provisions of Federal, State, or tribal law in effect” when Title I is enacted and that “fees paid to participate in such games shall not be regarded as bets or wagers for purposes of” Title I. However, it also provides that Title I may not “be relied on as support for the legality or permissibility” of such games, “without compliance with the licensing and other requirements of” Title I. The implication that licensure and compliance with Title I would support the legality of skill games would only apply for games that qualify as Internet poker games, as those are the only games the Title authorizes.

Subsection (b) provides that nothing in proposed § 112 “shall be construed to repeal, to amend, or to affect the interpretation of any provision of Federal or State law that was in effect” prior to enactment of the Barton bill that “(1) prohibits, restricts, or otherwise addresses bets or wagers, or (2) prohibits fraud or unfair or deceptive acts or practices, or other criminal activity.”

### B. Wire Act

Proposed § 112(e) would amend the Wire Act, 18 U.S.C. § 1084, by adding a new subsection (f) that provides:

This section [18 U.S.C. § 1084], [UIGEA], and any other provision of Federal law that establishes criminal penalties for any activity involved in placing, receiving, or otherwise transmitting a bet or wager, information assisting in the placing of bets or wagers, or a communication which entitles the recipient to received money or credit as a result of bets or wagers, shall not apply to any activity that is permissible under the Interstate Horseracing Act of 1978 ... or [Title I].

This language would remove uncertainty as to the lawfulness of off-track wagering facilities, including advance deposit wagering sites, operating in compliance with the IHA.

### C. Gambling Devices Transportation Act

Proposed § 112(d) provides that, in connection with the Gambling Devices Transportation Act, 15 U.S.C. § 1171, “equipment used by a licensee or a significant vendor in the furtherance of licensed activities” under Title I “shall not be considered a gambling device within the meaning of section 1 of the Act.”

### D. Relationship with UIGEA

Proposed § 109 would establish that UIGEA does not apply to a bet or wager taking place pursuant to a license issued under Title I or a bet or wager “permissible” under the IHA.

<sup>8</sup> Proposed § 110(e)(2) refers to licenses “issued under section 118(a).” There is no section 118(a) in Title I. Licensing is addressed in proposed §§ 104 and 115 of Title I. Only proposed § 115 relates to the time for granting licenses, providing that licenses may not be issued before the later of the date on which: final regulations under Title I are prescribed; final regulations under Title II are prescribed; or the list of unlicensed Internet gambling enterprises required by Title II is submitted to the Secretary of the Treasury.

## E. IGRA

Proposed § 112(f) addresses Tribal/State relations, in particular, those concerning the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§2701-2721. Subsection (f)(1) provides that there is to be no effect on IGRA or any Tribal-State compact as a result of Title I or any decision or action taken by a State or Tribe pursuant to Title I. Subsection (f)(2) provides that (i) the operation of Internet poker facilities by a Tribe under Title I is not to be considered class II or class III gaming<sup>9</sup> under IGRA and (ii) a Tribe’s “status, category, or class” under IGRA will “not impact its status or ability to offer bets or wagers pursuant” to Title I. Subsection (f)(e) provides that no negotiations related to a Tribal-State compact will be necessary as a result of activities and actions taken by a Tribe or a State under Title I, even if a Tribal-State compact prohibits or limits Internet bets or wagers or a Tribe obtains a license to operate an Internet poker facility.

## F. IHA

Proposed § 111, reiterating in more expansive terms the principles of proposed §§108 and 109, provides that “the provisions of [Title I] requiring a license and [UIGEA], restricting acceptance of bets or wagers made by individuals located in the [U.S.] or requiring the blocking or other prevention of restricted transactions shall not apply with respect to the placing, transmitting, or receiving of interstate off-track wagers, as such term is defined in ... the [IHA], that are permissible under such act, whether such off-track wager is made by telephone, Internet, satellite, or other wire or wireless communication facility, service, or medium.”

## G. Preemption

Proposed § 112(c) would have implications beyond the licensure and regulation of Internet poker. If Title I is enacted and this provision remains, it would appear that neither States nor Tribes would then be able to legalize or make illegal Internet gambling and that any State or Tribal law making Internet gambling illegal would be superseded. For example, the Washington State law (RCW §9.46.240) that criminalizes engaging in Internet gambling of all kinds, would no longer be effective.

Proposed subsection (c)(1), as noted above in the opening discussion of Title I, provides that Title I, except as otherwise expressly provided, supersedes State and Tribal law “expressly relating to the permitting, prohibiting, licensing, or regulating of Internet gambling facilities, including Internet poker facilities, and the law of any State or Indian tribe expressly relating to the permitting, prohibiting, licensing, or regulation of gambling, except to the extent such State or tribal laws are not inconsistent with” Title I. Proposed subsection (c)(2) provides that Title I is not to be construed to “have any effect on the rights, privileges, or obligations of a State or tribal lottery, as may be provided under other applicable Federal, State, or tribal law.”

## XIII. Regulations

Within 180 days of the enactment of Title I, the Secretary would be required to prescribe the regulations required by Title I and any the Secretary considered necessary. Proposed § 113.

<sup>9</sup> IGRA governs the conduct of Class II and Class III gaming by Tribes.

<sup>10</sup> Section 5363 is the UIGEA provision that defines a crime.

<sup>11</sup> Subsection (d) includes a definition of “sports organization,” although that term is not used in §5369.

## Title II—Strengthening of UIGEA

Title II of the Barton bill contains four proposed sections. Proposed §§201 (“Financial Transaction Providers”) and 202 (“List of Unlicensed Internet Gambling Enterprises”) would, respectively, add two new sections to UIGEA—31 U.S.C. §§5368 and 5369. Proposed §203 (“Regulations”) would address changes needed to address the requirements of the proposed new sections and would make the Secretary of Treasury exclusively responsible for prescribing regulations. Proposed §204 would make conforming amendments to Title 31 to address the changes that would be made by proposed §§201-203.

### I. The List

Proposed UIGEA §5369 responds to a request by the financial industry for a list of persons and entities conducting unlawful Internet gambling. It would require the Director of Financial Crimes Enforcement Network to provide the Secretary of the Treasury with a list of “unlicensed Internet gambling enterprises” within 120 days of the enactment of the Barton bill and to update the list at least every 60 days. Proposed §5369(a)(1). An “unlicensed Internet gambling enterprise” is defined as “any person who, on or after the date of the enactment of the [Barton bill] violates any provision of” 31 U.S.C. §5363 or “knowingly assists” a person to violate 31 U.S.C. §5363.<sup>10</sup> Proposed §5369(d)(3).<sup>11</sup>

The Director would be required to give notice thirty days in advance to those persons the Director determines should be included on the list, and those persons would have thirty days to file a written appeal and agree to submit to U.S. jurisdiction. Proposed §§5369(b)(3) & (4)(A). If an appeal is filed, the Director is not to include the person on the list and is to provide an opportunity for a hearing within thirty days of receipt of the appeal. Proposed §5369(b)(5). If, after the hearing, the Director still believes the person should be on the list, the person is to be added to the list but may file a “petition for injunctive relief” with the U.S. District Court for the District of Columbia. Proposed §5369(b)(6) & 7(A). If the person prevails, the district court may direct that the person not be added to or be removed from the list. Proposed §5369(b)(7)(E). No other relief may be sought or granted. Proposed §5369(b)(7)(F).

In constructing the list, the Director is to include, for each listing: (1) “all known” web addresses; (2) “[t]he name of any person who controls, finances, manages, supervises, directs, or owns all or part of the enterprise (as such terms are used in section 1955 of title 18);” and (3) “information identifying the financial agents and account numbers of the enterprise and the persons described” in the prior clause. Proposed §5369(a)(2). The Secretary is required to post the list on the Department of Treasury’s website and distribute the list to those subject to the UIGEA regulations. Proposed §5369(a)(3).

Financial transaction providers will be deemed to have actual knowledge that a person or entity is an unlicensed Internet gaming enterprise if the person or entity is on the list. Proposed §5369(c).

## II. Liability of Financial Transaction Providers

Proposed §5368(a) provides that a financial transaction provider will not be held liable for any financial activity it conducts “in connection with a bet or wager permitted by” Title I of the Barton bill or the IHA “unless the financial transaction provider has actual knowledge that the financial activity or transaction was conducted in violation of either such Act or any other applicable provision of Federal or State law.” This provision responds to complaints of the financial industry concerning UIGEA’s lack of a clear definition of “unlawful Internet gambling.”<sup>12</sup>

Proposed §5368(b) lists specific financial transactions for which a financial provider will not incur liability to any party if the originator of the transaction is a person or entity on the list or the financial provider reasonably believed the originator was on the list or had information that showed the originator to be an unlicensed Internet gambling enterprise. These transactions are: (1) blocking a transaction; (2) “prevent[ing] or prohibit[ing] the acceptance of its products or services in connection with a transaction or refus[ing] to honor a transaction;” or (3) “clos[ing] an account or end[ing] a financial relationship.” Proposed §5368(b)(2).

## III. UIGEA Regulations

Proposed §203(b) would amend UIGEA §5364(a) to strike the language that requires the Secretary of the Treasury and the Board of Governors of the Federal Reserve System, in consultation with the U.S. Attorney General, to prescribe regulations within 270 days of UIGEA’s enactment and instead give sole regulatory authority to the Secretary of the Treasury. Proposed §203(a) requires the Secretary of the Treasury to prescribe the regulations needed to carry out proposed §§5368 and 5369 within 180 days of enactment of the Barton bill, and proposed §203(c) requires the Secretary of the Treasury to make whatever amendments to the UIGEA regulations are required in order to make them consistent with Title I of the Barton bill, and to do so within 180 days of the enactment of the Barton bill.

## Conclusion

Throughout the above discussion, a number of apparent drafting errors and ambiguities are noted. If not remedied by amendment, they are areas that should be kept in mind, should the Barton bill be enacted, for clarification through the development of regulations. In addition, the above discussion reveals that, as drafted, some sectors of the gambling industry appear to be winners, some to be losers, and some to be receiving mixed results. It does not appear, however, too late to be heard. Comments seen in media reports appearing after the Congressional hearings on Internet gaming held on October 24 (Subcommittee of the House Energy and Commerce Committee), November 17 (Senate Indian Affairs Committee), and November 18, 2011 (Subcommittee of the House Energy and Commerce Committee) indicate that additional hearings are likely before the Barton bill (and perhaps any bill that would provide for licensure and regulation of Internet gambling) will be ready for committee consideration and markup.

<sup>12</sup> UIGEA defines “unlawful Internet gambling” by reference to the other Federal, State, and Tribal laws. In general, the term “means 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).



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