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THE U.S. DEPARTMENT OF JUSTICE RESTORES AMERICA'S WIRE ACT BY OPINION

by Greg Gemignani, Kate Lowenhar-Fisher, Jeff Silver, Jennifer Gaynor

On January 14, 2019, the U.S. Department of Justice ("DOJ") issued a new opinion memorandum from "the Office of Legal Counsel ("OLC") regarding its interpretation of the Federal Wire Act. The Federal Wire Act is a federal criminal gambling statute enacted in 1961 as part of a package of laws to deprive organized crime of its funds from illicit gambling activities. The prohibition language of the statute is as follows:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

From 1961 until 2011, the DOJ held the position that the Federal Wire Act's prohibition of the transmission of wagers and wagering information applied to all forms of wagering. In part, the DOJ argued that the phrase "sporting event or contest" in the first clause of the prohibition applied to "sporting events" as separate from "contests. Namely, "sporting events" were athletic events and racing events, while "contests" encompassed all other forms of wagering.

In 2001, a federal court in Louisiana was faced with interpreting this language in a civil RICO action filed against credit card companies. The plaintiffs in the suit argued that the largest credit card companies in the country were part of a criminal gambling enterprise that violated the Federal Wire Act, and that they profited from this activity through credit card fees. The credit card companies resisted being held liable for the actions of merchants and argued that because the plaintiffs failed to allege any sports wagering, there could be no predicate Federal Wire Act offense on which to base the civil racketeering action. The federal court in Louisiana agreed with the credit card companies and the Fifth Circuit Court of Appeals affirmed the opinion. Despite this opinion that the prohibition on transmitting wagers applied only to sports wagers, the DOJ continued to assert

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that the Federal Wire Act applied to all forms of wagering. In a letter to Nevada gaming regulators in 2002, the DOJ affirmed that the Federal Wire Act applied to all forms of gaming and prohibited intrastate online gaming.

In 2009, the lotteries of the states of Illinois and New York petitioned the DOJ for an opinion regarding their planned intrastate sale of lottery tickets using out-of-state payment processors. The DOJ remained silent on the issue until it released an opinion on December 23, 2011 (“the 2011 Opinion”). In the 2011 Opinion, the DOJ stated that the Federal Wire Act only applies to sports wagering, and that tension with the Unlawful Internet Gambling Enforcement Act of 2006 (the “UIGEA”) led to their conclusion that the Federal Wire Act does not apply when the betting service provider and patron are in the same state.

In the wake of the 2011 Opinion, several states began offering intrastate online lottery products; Nevada, New Jersey and Delaware began offering intrastate online poker; and several states began offering intrastate online sports betting. A few states even entered into agreements to offer *interstate* wagering between their states on casino style games (such as poker).

This activity by the states sparked a movement to counter the 2011 opinion that culminated with a bill entitled “Restoration of America’s Wire Act” (“RAWA”), which was intended to expand the prohibitions of the Federal Wire Act to apply to all forms of wagering and to clarify that the Wire Act applies to intrastate transactions that use internet communications. RAWA was subjected to difficult Congressional hearings and met with limited support in Congress.

In 2017, Senator Jeff Sessions testified in his Attorney General confirmation hearing that he was shocked by the 2011 Obama-era DOJ opinion and would revisit that opinion. On January 14, 2019, the DOJ issued a new opinion that essentially holds the 2011 Opinion to be invalid (“the 2019 Opinion”).

The 2019 Opinion holds that the Federal Wire Act applies to all forms of wagering. It does so by reinterpreting the phrase “on sporting event or contest” to only apply to the prohibition on information assisting in the placement of bets or wagers in the first clause. Using such an interpretation means that the prohibition on the transmission of bets or wagers is unencumbered by the phrase “on any sporting event or contest.” It then interprets the remaining prohibitions that do not mention “sporting

event or contest” to apply to all forms of betting or wagering. Thus, the new interpretation is similar to the old pre-2011 interpretation, albeit using somewhat different interpretation logic.

Additionally, the 2019 Opinion states that there is no tension between the Federal Wire Act and the UIGEA. This leads the OLC to conclude that Illinois and New York’s online intrastate sale of lottery tickets is prohibited by the FWA. The implication of that conclusion is that the FWA prohibits all forms of online wagering, even where the bettor and operator are located in the same state. How the opinion may impact state-regulated intrastate online casino gaming, state-regulated multi-state wide area progressives, state-regulated mobile sports wagering, online casino marketing for licensed casinos, e-mail casino marketing, and the transmission for licensed casinos of wagering contracts transmitted by regulated casinos, remains to be seen. Although the 2019 Opinion is explicit regarding the application of the Federal Wire Act to all forms of wagering, it apparently addresses intrastate online wagering in an implicit manner by identifying the intrastate lottery products at issue in the 2011 opinion to be subject to the Federal Wire Act pursuant to the 2019 Opinion. How this impacts state-regulated intrastate online casino gaming, state-regulated multi-state wide area progressives, state-regulated mobile sports wagering, online casino marketing for licensed casinos, e-mail casino marketing, and the transmission for licensed casinos of wagering contracts transmitted by regulated casinos, remains to be seen.

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