U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 14, 2003

The Honorable John Conyers, Jr .
Ranking Minority Member
U .S .House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Dear Congressman Conyers:

This is in response to your written follow-up questions to the April 29, 2003, hearing on H.R. 21, the "Unlawful Internet Gambling Funding Prohibition Act."

Your written questions concern the definition of the term "bet or wager" that is contained in Section 3(b)(1)(E)(ix) of H.R. 21. This definition excludes "any lawful transaction with a business licensed or authorized by a State" from the definition of the term "bet or wager." The Department recognizes that this provision has become the subject of controversy, and believes that these controversies exist because the provision is ambiguous. We support clarifying the provision to eliminate the ambiguity, and doing so in a manner that does not allow the expansion of gambling opportunities by making lawful transactions that are currently unlawful.

The definition of "unlawful Internet gambling" contained in H.R. 21 states that a bet or wager is unlawful if it is "unlawful under any applicable federal or State law in the State in which the bet or wager is initiated, received, or otherwise made." Because the exclusion under Section 3(b)(1)(E)(ix) references "lawful" transactions, one interpretation of subsection (ix) is that it only clarifies that the bill will not affect otherwise lawful transactions. In other words, if the transaction is unlawful under Federal law or the laws of one State, then subsection (ix) cannot operate to make the transaction lawful because, by its terms, it only applies to "lawful" transactions.

The provision can be interpreted in other ways, however, which could make otherwise illegal transactions legal, For example, one could argue that because the provision does not specify which State's laws must be considered, only the laws applicable in the State in which the gambling business is located need to be consulted in order to determine if the transaction is lawful. Under this interpretation, because the provision does not specify which State's laws must be considered, only the laws applicable in the State in which the gambling business is located need to be consulted in order to detem1ine if me transaction is lawful. This interpretation would make lawful

transactions that are currently unlawful in the state where the bet is initiated. Furthermore, under this interpretation, one could argue that H.R. 21 would make lawful transactions that otherwise violate other Federal statutes. For example, 18 U.S.C. § 1084 prohibits one in the business of betting or wagering from using a wire communication facility in interstate or foreign commerce to transmit a bet or wager on sporting events or contests. The Department of Justice believes that the transmission of a bet or wager over the Internet would constitute such a use of a wire col1mlunication facility in interstate or foreign commerce. Section 1084 doesn't contain any exceptions for bets placed with a gambling business licensed or authorized by a State. Yet, while violating Section 1084, if the bet was placed with a business licensed in a State, it might not be deemed a "bet or wager" under H.R. 21. Since H.R. 21 and Section 1084 contain similar terminology, and since H.R. 21 purports to amend Section 1081 and Section 1084, defendants may raise the argument that Congress has now defined the term "bet or wager," and that this new definition should be made applicable to existing statutes, such as Section 1084. In other words, since both H.R. 21 and Section 1084 concern gambling, the interpretation of the term "bet or wager" used in H.R. 21 might be applied by a court to interpret Section 1084, which does not define the term "bet or wager ."

This provision is ambiguous and can be interpreted in these contrary ways, and the Department cannot predict which way courts will rule and what interpretation of subsection (ix) will be imposed. Different courts may even interpret the provision in the different ways. Accordingly, we believe this proposed exception to the term "bet or wager" adds confusion and uncertainty not only to H.R. 21, but to existing federal law , as well. We therefore believe it should be clarified.

With respect to your specific questions, the Department has the following responses.

1) Does the Department believe that current law prohibits all types of internet, gambling, including gambling on horse racing, dog racing, or lotteries?

Response; The Department of Justice believes that current federal law, including 18 U.S.C. §§ 1084, 1952, and 1955, prohibits all types of gambling over the Internet. We do not believe that the December 2000 amendment to the Interstate Horseracing Act, a civil statute in which the federal government has no role, amended 18 U.S.C.§ 1084 (a pre-existing criminal statute) .While we note that the Fifth Circuit's decision, In re Mastercard, 313 F.3d 257 (5th Cir. 2002), held that Section 1084 did not apply to casino style gambling on the Internet, the court did not consider other federal gambling statutes. In addition to believing that this case was wrongly-decided on the law, the United States was not a party in that case and does not believe that it would constitute binding precedent in other circuits.

2) Does the Department believe that the language, quoted above, would allow internet gambling on horse racing, if the entity was licensed or authorized by a state?

Response: As stated above, one of the concerns that the Department of Justice has about H.R. 21 is that, if enacted, the definitions of terms used in H.R. 21 might be applied to other federal gambling statutes. Indeed, Internet service providers have already told the Department that they believe that the definition of the term "bet or wager" in H.R. 21 should be made applicable to Section 1084.

As set forth above, this provision only states that the transaction must be a "lawful transaction" without a reference to which State's law must be considered. If H.R. 21 is enacted, and courts interpret this provision to require that only the law of the State in which the business accepting wagers on horse racing is located needs to be referenced to determine that the transaction is "lawful," then gambling on a horse race with a business licensed by a State would not be considered a bet or wager under H.R. 21.

Under H.R. 21, if the transaction is not deemed to constitute a "bet or wager," then the general prohibition provisions on payments is not applicable. If the definitions contained in H,R. 21 are applied to other federal gambling statutes such as Section 1084, then such transactions would no longer violate those other statutes either, even though statutes like Section 1084 are clearly intended to prohibit such transactions.

Similarly, 18 U.S.C. § 1955 requires a violation of state law, and 18 U.S.C. § 1952 requires that the gambling business violate either federal or state law. Given that H.R. 21 would be the most recently enacted statute and would be Internet specific, courts might use the definitions in H.R. 21 to determine that wagering on a horse race is not a "bet or wager."

With respect to horse racing, the Interstate Horseracing Act permits "interstate off-track wagers," which are defined as "a legal wager placed or accepted in one State with respect to the outcome of a horse race taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or anotl1er State, as well as the combination of any pari-mutuel wagering pools." 15 U.S.C. § 3002(3). While the Department of Justice does not believe that this amendment to the Interstate Horseracing Act amended Section 1084 to permit the interstate transmission of bets on horse racing, the definitions in the Interstate Horseracing Act would make the argument to apply H.R. 21' s definition of tl1e tem1'bet or wager" to other federal gambling statutes even stronger.

3) Does the Department believe that the language, quoted above, would allow internet gambling on dog racing, if the entity was licensed or authorized by a state?

Response: While there is no federal statute for dog racing similar to the Interstate Horseracing Act. the Department believes that the same analysis would apply to dog racing. as well as other state legalized gambling, including lotteries.

4) Does the Department believe that the language, quoted above, therefore, expands legal gambling opportunities on the internet?

Response: The Department believes that, under one interpretation and using the analyses set forth above, it could expand legal gambling opportunities.

5) Does the Department believe that the language, quoted above, requires that an entity be licensed or authorized by a state to conduct internet gambling or that it would suffice for an entity be licensed or authorized by a state for some other purpose?

Response: The provision states only that the transaction be" a lawful transaction with a business licensed or authorized by a State." The plain language of this provision does not require that the business be licensed to conduct Internet gambling by a state. Therefore, it would suffice for the entity to be a gambling business that was licensed or authorized by a state for that purpose, assuming such license or authorization is required under that state's law.

At this time, the legislative history of H.R. 21 does not indicate that Congress intended this provision to require that the business be licensed to conduct Internet gambling by a State. The Committee on Financial Service's report on H.R. 21 does not provide any detailed explanation of this provision and does not state that the provision requires that the business be licensed by a state to conduct Internet gambling. See H.R. Rep. No.108-51 (2003).

Further, H.R. 21 was introduced by Representative Leach in this Congressional session. In the 107th Congress, Representative Leach introduced H.R. 556. which is basically the same bill as H.R. 21. This particular provision was added to H.R. 556 during the October 21, 2001, markup session held by the Committee on Financial Services without extensive debate. The Committee on Financial Services report on H.R. 556 also does not contain any detailed analysis of this provision. See H.R. Rep. 107-339 (2001).

6) Would the Department support an amendment to strike the language, quoted above, or otherwise clarify that the bill does not weaken the prohibitions in current law on internet wagering?

Response: The Department believes that this provision can be interpreted differently and thus has created confusion and possible inconsistencies with existing federal statutes. The Department supports efforts to restrict and contain illegal Internet gambling, and believes this is the intent of H.R. 21. As such, the Department supports clarifying the meaning of this provision so that it cannot be interpreted as expanding Internet gambling opportunities by possibly making legal transactions that are currently illegal. We look forward to working with you and the Committee toward this end.

Again, thank you for the opportunity to comment on this legislation. Please do not hesitate to call on us if you would like us to answer any additional questions or to provide any additional assistance.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman