

TO: Massachusetts State Lottery Commission
FROM: Greenberg Traurig, LLP *(Greenberg Traurig)*
DATE: March 27, 2012
RE: Internet Sale of Lottery Products

INTRODUCTION

In connection with the creation of the Treasurer's Online Products Task Force and in light of the Department of Justice's Memorandum Opinion, released on December 23, 2011, captioned: "Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act" (the "DOJ Opinion"), the Massachusetts State Lottery Commission (the "Lottery" or the "Commission") has asked us to render an opinion and supporting memorandum, based on an examination of both federal and state law, with respect to the following questions:

- 1) Is the Massachusetts State Lottery Commission currently authorized to sell products over the Internet or other electronic communications? If so, what products may it sell or not sell?
- 2) Does the DOJ opinion limit its scope to intrastate sales to adults?
- 3) Is an individual/entity that is not the Massachusetts State Lottery Commission currently authorized to sell gaming products over the Internet or other electronic communications in the Commonwealth?

This Memorandum presents our opinion and supporting analysis as to each question in turn.

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OPINION AND LEGAL ANALYSIS

(1) Is the Massachusetts State Lottery Commission currently authorized to sell products over the Internet or other electronic communications?¹

A. Short Answer

No. The Massachusetts State Lottery Commission is not authorized by its enabling act or other state law to sell products over the Internet. While the DOJ Opinion concludes that the Wire Act does not prohibit state lottery commissions from using the Internet for the in-state sale of lottery games, the Massachusetts State Lottery Commission would still need state law authorization to sell products over the Internet.

B. Legal Analysis

i. Federal Law

The governing principle in this area is that federal law does not prohibit state lottery commissions from conducting Internet lottery games, provided that such games are duly authorized under the law of the relevant state. As discussed in greater detail below, while there are several federal statutes that regulate wagering, federal law is generally deferential to state law in this area.

There are six primary federal statutes addressing the acceptance of bets or wagers. The Unlawful Internet Gambling Enforcement Act (“UIGEA”), 31 U.S.C § 5361 *et seq.*, is the only statute that specifically addresses the issue of transmitting bets or wagers over the Internet or by electronic communications. The other five statutes at issue are the Wire Act, 18 U.S.C. § 1084;

¹ The second part of the question, regarding products that may be sold, is discussed in Section 1.1, *infra*.

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the Exceptions Relating to State-Conducted Lotteries Act, 18 U.S.C. § 1307; the Travel Act, 18 U.S.C. § 1952; the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953; and the Illegal Gambling Business Act, 18 U.S.C. § 1955. Each of these statutes targets various components of unlawful gambling.

Historically, the federal government has demonstrated great deference to state law on the subject of gambling. The Exceptions Relating to State-Conducted Lotteries Act reflects this deference by providing that restrictions on transporting lottery tickets, 18 U.S.C. § 1301, mailing lottery tickets, *id.* § 1302, acting as a lottery agent, *id.* § 1303, and broadcasting lottery information, *id.* § 1304, do not apply to state lotteries acting under the authority of state law, *id.* § 1307. Likewise, courts have recognized gambling as a “matter reserved to the states,” *State v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977), and the scope of laws regulating gambling and lotteries as “a matter of predominantly state concern,” *Chun v. State of New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992).

The Unlawful Internet Gaming Enforcement Act

The UIGEA, 31 U.S.C. § 5361 *et seq.*, was enacted in 2006. It represents a congressional effort directed specifically at Internet gambling. UIGEA operates by attempting to combat the use of financial instruments that facilitate online wagering. In response to legislative findings that Internet gambling is primarily conducted through the use of personal payment systems, credit cards, and wire transfers, UIGEA prohibits acceptance of certain financial instruments for unlawful Internet gambling. 31 U.S.C. § 5361(a)(1); *id.* § 5363.

UIGEA, however, grants deference to state gambling laws. For example, UIGEA contains an explicit rule of construction that states that “[n]o provision of this subchapter shall be

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construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States.” 31 U.S.C. § 5361(b). Additionally, the Act exempts state lotteries through two provisions within its definition of “unlawful Internet gambling.”² Under UIGEA, conduct that is not unlawful under application of federal or state law does not violate the Act; nor do transactions that satisfy the “intrastate transactions” requirements. *Id.* § 5362(10)(B).

As its name implies, UIGEA regulates “unlawful” gambling. A lottery lawfully conducted by a state would not fall within the restrictions imposed by UIGEA. Only when an Internet wager is unlawful—because it violates either a state or federal law—does UIGEA impose penalties for the financial transactions that facilitate the wager.

Prior to the enactment of UIGEA, law enforcement relied primarily on four other laws to combat illegal gambling involving interstate commerce: the Travel Act, the Interstate

² UIGEA defines “unlawful Internet gambling” as follows:

(A) In general.--The term “unlawful Internet gambling” 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.

(B) Intrastate transactions.--The term “unlawful Internet gambling” does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State’s law or regulations

31 U.S.C. § 5362(10).

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Transportation of Wagering Paraphernalia Act, the Illegal Gambling Business Act, and the Wire Act.

The Travel Act

The Travel Act, 18 U.S.C. § 1952, imposes criminal penalties on travelers in interstate or foreign commerce who intend to (1) distribute the proceeds of any unlawful activity, (2) commit any crime of violence to further any unlawful activity, or (3) promote, manage, establish, carry on, or facilitate unlawful activity. *Id.* § 1952(a). The Act includes, among the actions defined as “unlawful activity,” business enterprises that involve gambling, but it requires that the gambling be “in violation of the laws of the State in which they are committed or of the United States.” *Id.* § 1952(b). In other words, the Travel Act does not itself create a new class of criminal activity. Rather, the Travel Act prohibits interstate and foreign travel in the pursuit of an underlying activity that is criminal under a state or federal law.³ Lawful activity, such as a lottery acting within state law, is outside the scope of the Travel Act.

Interstate Transportation of Wagering Paraphernalia Act

The Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953, prohibits knowingly carrying or sending certain enumerated items for use in bookmaking, sports wagering pools, or numbers, policy, bolita, or similar games. *Id.* § 1953(a). The Act, however, specifically exempts “equipment, tickets, or materials used or designed for use within a State in a

³ See, e.g., *United States v. Goldfarb*, 643 F.2d 422, 426 (6th Cir. 1981) (“It is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engaged in some form of unlawful activity prohibited by the law of the State of Nevada.”); see also *United States v. Truesdale*, 152 F.3d 443, 450 (5th Cir. 1998) (requiring an underlying criminal activity to support a Travel Act prosecution).

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lottery conducted by that State acting under authority of State law.” *Id.* § 1953(b). Accordingly, the Act does not apply to the activities of a state lottery operating under state law.

Illegal Gambling Business Act

The Illegal Gambling Business Act, 18 U.S.C. § 1955, was enacted nine years after Congress passed the Travel Act, Interstate Transportation of Wagering Paraphernalia Act, and the Wire Act in an effort to combat the financing of illegal gambling businesses. Again, however, like the Interstate Transportation of Wagering Paraphernalia Act, activity is only covered by this Act to the extent that it violates the law of a state or political subdivision in which it is conducted.⁴ Thus, the activities of a state lottery acting in accordance with state law could not be the basis for a violation of the Illegal Gambling Business Act.

The Wire Act

Since its enactment in 1961, the Wire Act has been a primary tool that the federal government has utilized to combat illegal gambling. The Wire Act is specifically targeted at the utilization of wire communications for wagers on sporting events or contests.⁵ Cases decided under the Wire Act are divided on whether a wager on a sporting event is an essential element of Wire Act prosecutions. *Compare Thompson v. MasterCard Int’l, Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (holding that “the Wire Act does not prohibit non-sports Internet gambling”), *with*

⁴ Title 18, United States Code, Section 1955(b) defines “illegal gambling business” as “a gambling business which . . . is a violation of the law of a State or political subdivision in which it is conducted.”

⁵ Title 18, United States Code, Section 1084 states that “[w]hoever 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.”

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United States v. Lombardo, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (holding that Wire Act “is not confined entirely to wire communications related to sports betting or wagering”).

In addition, prior to the issuance of the DOJ Opinion, the Department of Justice’s Criminal Division had taken the view that the Wire Act prohibited states from conducting in-state lottery transactions over the Internet if the transmissions over the Internet during the transaction crossed state lines, regardless of whether the wager was sports-related or not. *See* DOJ Opinion at 1; *see also* Statement of Catherine L. Hanaway, U.S. Attorney, E.D. Mo., U.S. House of Representatives, Comm. on the Judiciary Hearing, “Establishing Consistent Enforcement Policies in the Context of Internet Gambling” (Nov. 14, 2007), *available at* <http://judiciary.house.gov/hearings/pdf/Hanaway071114.pdf> (“It is the Department’s view, and that of at least one federal court [the Eastern District of Missouri], that [Section 1084] applies to both sporting events and other forms of gambling”)

The position of the Criminal Division was reversed by the DOJ Opinion, which stands for the broad principle that “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside of the reach of the Wire Act.” DOJ Opinion at 1. The Department reached this conclusion after an extensive analysis of the Wire Act’s plain language and legislative history, as well as principles of statutory construction.

Having concluded that the Wire Act prohibitions apply specifically to sporting events and contests, the DOJ Opinion examined whether the state lotteries proposed by New York and Illinois amount to a wager on sporting events or contests. In concluding that they do not, the DOJ Opinion states that “the ordinary meaning of the phrase ‘sporting event or contest’ does not

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encompass [state] lotteries.” *Id.* at 12. Additionally, the DOJ Opinion noted several other statutes where Congress has distinguished between sports gambling and lotteries. *Id.*

In sum, the federal statutes that potentially implicate Internet gambling specifically exempt the operation of state lotteries (Exceptions Relating to State-Conducted Lotteries Act, and Interstate Transportation of Wagering Paraphernalia Act); require activity that is otherwise unlawful (Travel Act, and Illegal Gambling Business Act); or provide an avenue for state lotteries to avoid federal prohibitions (Wire Act - as recently interpreted in the DOJ Opinion - and UIGEA). None of these federal statutes restrict the Lottery from using the Internet to sell lottery products, provided that Massachusetts state law is amended to authorize the use of the Internet for such purposes.⁶

ii. Massachusetts State Law

The Massachusetts State Lottery is governed by a Commission consisting of the State Treasurer, the Secretary of Public Safety (or designee), the State Comptroller (or designee), and two individuals appointed by the Governor for terms coterminous with that of the Governor. Mass. Gen. Laws ch. 10, § 23. The Legislature has empowered the Lottery to conduct a state lottery and to determine the types of lotteries to be conducted; the types of locations at which tickets may be sold; the method to be used in selling tickets; and “such other matters necessary or desirable for the efficient and economical operation and administration of the lottery and for the convenience of the purchasers of tickets.” *Id.* § 24.

⁶ We note, that although relatively rare, DOJ opinions from the Office of the Legal Counsel may be subsequently overruled or modified. *See* Trever W. Morrison, *Stare Decision in the Office of Legal Counsel*, 2010 Colum. L. Rev. 1448 (1998) (concluding after review of empirical data that “OLC does not often overrule itself”). In addition, a federal court could reach a different conclusion from the DOJ. While the DOJ Opinion might rule out federal criminal prosecution, private parties, in a variety of contexts, continue to assert that the Wire Act is violated by non-sports internet gaming. We are unaware of any imminent appellate-level decision on the issue.

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The Lottery is also authorized to enter into agreements with other states and jurisdictions to participate in multi-jurisdictional lottery games pursuant to written agreements. *Id.* § 24A.

The Lottery may also offer the game known as Keno. *Id.* § 27A. Through these provisions, the Lottery's enabling statute endows the Commission with broad authority to operate the Lottery.

One specific restriction on the Lottery, however, with respect to the manner in which lottery tickets may be sold, is particularly relevant to the use of the Internet. Section 24 provides, in pertinent part, that "no tickets or shares, other than season tickets . . . shall be sold, offered for sale, or purchased . . . **by telephone or by the use of computer or facsimile services**" except for "the transmittal of lottery information and sales through telephone services strictly between the lottery commission and its duly licensed sales agents." *Id.* § 24 (emphasis added). In addition, Mass. Gen. Laws c. 137, § 3 voids all notes, bonds and other securities, the consideration for which was derived from gaming. *See also Connecticut Nat'l Bank of Hartford v. Kommit*, 31 Mass. App. Ct. 348, 353 (1991) (referencing c. 137, § 3 and a similar Connecticut law in suggesting that an ATM transaction that occurred at a casino in Atlantic City may be void depending upon whether the bank knew or should have known that the funds would be used for gambling).

In light of these statutory provisions, we believe that in order for the Commission to offer Internet lottery games, new specific authorizing legislation would be required.⁷ Any such

⁷ We note, however, the provisions of Massachusetts law granting the Executive Director of the Lottery substantial discretion regarding the disbursement of lottery tickets and funds. This may allow some use of the Internet (not including sales) in connection with existing games. For example, despite limitations on selling tickets by means of the Internet, the Lottery may, pursuant to Section 33, devise unique methods to accept deposits, disburse tickets, and otherwise manage the functions of the Lottery. Mass. Gen. Laws c. 10, § 33. Depending on the particulars of any given arrangement, current law could permit the Lottery to utilize the Internet for various purposes, short of actually selling products.

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legislation would need to expressly authorize Internet lottery games, and would need to address other issues, including interstate sales, age verification and any other existing statutes that might impede Internet lottery games. We note that in establishing simulcast and Internet betting on horse racing, the Legislature specifically authorized the establishment of accounts to be funded by, among other devices, credit and debit cards. Mass. Gen. Laws c. 128A, §5C. For further illustration, we attach, as *Exhibit A*, Illinois legislation establishing an Internet lottery under a pilot program and authorizing multi-jurisdictional games over the Internet. We note that the Illinois legislation specifically requires technological safeguards ensuring sales only to individuals over 18 and only within Illinois.

(1.1) If the Massachusetts State Lottery Commission is currently authorized to sell products over the Internet or other electronic communications, what products may it sell or not sell?

A. Short Answer

We do not believe that the Commission is authorized to sell products on the Internet. When and if the Commission is so authorized, the section below discusses limitations under current law on products that could be sold.

B. Legal Analysis

If the Lottery were authorized to sell products over the Internet, the primary restrictions imposed by federal law are contained in the Wire Act and UIGEA. As discussed above, the Wire Act's applicability is limited to "the transmission in interstate or foreign commerce . . . of bets or wagers on any sporting event or contest." 18 U.S.C. § 1084(a). So long as the Lottery does not sell products involving sporting events or contests, the Wire Act does not restrict its ability to operate on the Internet.

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UIGEA prohibits the processing of certain transactions related to unlawful Internet gambling. To overcome this prohibition, prospective sellers of online lottery tickets need to demonstrate that the wager does not constitute “unlawful Internet gambling.” UIGEA states that “unlawful Internet gambling” does not include instances where the bet or wager is initiated or received within a single state and instances where the bet or wager is placed in accordance with the laws of the state, provided that those state laws include age and location verification requirements and appropriate data security standards to prevent unauthorized access. 31 U.S.C. § 5362(10)(B). Thus, an Internet lottery program that is authorized by the Commonwealth, not related to sports betting, and consistent with UIGEA exceptions would be a lawful intrastate lottery for the purposes of federal law.

As the federal law primarily defers to state law in this area, a determination of what constitutes a “lawful” gambling product is resolved by a review of Massachusetts law. Currently, under authority of Section 24, among other things, the Lottery offers three draw games and approximately 27 to 29 instant ticket games. Under Section 24A, the Lottery offers two multi-state jackpot games and a regional draw game. Section 27 authorizes the game of Keno. Since each of these games is lawful under the laws of the Commonwealth, they could be eligible for online sales provided that the online program does not involve wagering on sporting events or contests, complies with the UIGEA exceptions to unlawful Internet gambling, and is authorized under state law.

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(2) Does the DOJ opinion limit its scope to intrastate sales to adults?

A. Short Answer

Yes. The specific question that the DOJ Opinion sought to address concerned the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. The DOJ Opinion concludes that these state proposals fall outside the Wire Act because they do not constitute sports gambling and are, therefore, not prohibited by federal law.

B. Legal Analysis

i. Sale to Adults

The DOJ Opinion addresses “whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act.” The DOJ Opinion addresses only this question; it does not contemplate the permissibility of selling lottery tickets or permitting online gambling under other state or federal statutes. Significantly, the opinion states that “we express no view about the proper interpretation or scope of UIGEA.” DOJ Opinion at 13. The opinion thus does not address the interstate sale of tickets or the sale of tickets to persons who are not adults. Therefore, an analysis of the question presented to us requires resort to authorities beyond the DOJ Opinion.

First, as addressed above, the Exceptions Relating to State-Conducted Lotteries Act, Travel Act, the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling Business Act all protect the activities of state lotteries. However, these protections

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apply only to the extent that the lotteries are acting under authority of state law.⁸ If a state lottery were to act in a manner contrary to its state law, it likely would lose the protections extended by federal law.

Turning to Massachusetts law, we note that the Legislature has explicitly determined that tickets or shares may not be sold to any person under the age of 18. Mass. Gen. Laws ch. 10, § 29. As a result, if the Lottery were to sell tickets to persons under that age, it would be in violation of state law and would be subject to the provisions of the various federal statutes regarding unlawful gambling.

Further, to avoid UIGEA restrictions on the processing of financial transactions over the Internet, state laws or regulations must include age verification requirements reasonably designed to block access by minors. 31 U.S.C. § 5362(10)(B)(ii)(1). Were the Lottery to permit minors to purchase lottery tickets over the Internet, this could be considered “unlawful Internet gambling” under the Act. In that event, the sale of lottery tickets would be subject to the prohibitions on financial instruments in Section 5363 of UIGEA, the policies and procedures established by the Secretary of the Treasury and the Federal Reserve under Section 5364, and the civil remedies available to the U.S. Attorney General and the appropriate state authorities under Section 5365. Thus, though the DOJ Opinion did not specifically address whether sales must be to adults, selling tickets to persons under 18 would violate Massachusetts and federal law.

⁸ The Exceptions Relating to State-Conducted Lotteries Act, 18 U.S.C. § 1307, and the Illegal Gambling Business Act, *id.* § 1955, require that lotteries act under authority of state law. The Travel Act, *id.* § 1952(b), includes within its definition of “unlawful activity” business enterprises that are “in violation of the laws of the State in which they are committed.” The exemption for state lotteries in the Interstate Transportation of Wagering Paraphernalia Act, *id.* § 1953, also requires that the state lotteries act under authority of state law for the exemption to apply.

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ii. Interstate Sales

With respect to interstate sales, we note that the DOJ Opinion addresses a specific inquiry as to the applicability of the Wire Act to proposals to sell lottery tickets to *in-state* adults.⁹ Thus, the DOJ Opinion does not purport to address whether interstate sales are otherwise permissible under federal law. Nor does the DOJ Opinion address the applicability of other federal laws to the interstate sales of lottery products. But neither does the DOJ Opinion, by its own terms, conclude that interstate sales are prohibited.

Other provisions of federal law would, however, potentially apply to this question. If a state did not have authority under its state laws to offer out-of-state wagers or to receive wagers from out-of-state, the transaction would potentially violate numerous federal laws, including UIGEA, the Illegal Gambling Business Act, the Travel Act, the Interstate Paraphernalia Act, and the Exceptions Relating to State-Conducted Lotteries Act. However, if the state did possess such authority under its state laws, and had arrangements in place with another state that likewise possessed authority, then the permissibility of the wager would depend upon the particular structure in place. UIGEA would likely not apply because the wager would not constitute “unlawful Internet gambling,” 31 U.S.C. § 5362(10).

The applicability of other federal laws would be contingent on the nature of the interstate sale. For example, arguably, for a state lottery to avail itself of the exceptions in the Exceptions Relating to State-Conducted Lotteries Act, the state lottery may actually need to conduct the lottery or have an agreement in place with another state for a multi-state game and not merely

⁹ The specific issue presented in the Opinion is “whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act.” DOJ Opinion. at 1.

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receive wagers. If one state lottery were simply receiving wagers and selling tickets for another state lottery, it is possible that, under federal law, it would not be considered to be conducting a lottery, a requirement of the statutory exemption that is based on a factual determination.¹⁰ This, however, remains an open question and would depend upon the unique factual circumstances of any given situation.

In summary, we believe the state of the law is as follows with respect to interstate sales. First, the sale of multi-jurisdictional game tickets within Massachusetts is addressed above. In the event that the legislature authorized the online sale of a properly compacted multi-jurisdictional lottery game within the Commonwealth, federal law would not preclude such a game. In Illinois, for example, the legislature has authorized the Lottery to sell Mega-Millions tickets via the Internet and is currently considering additional authority for the online sale of Powerball tickets. *See* 20 ILCS 1605/7.12; Illinois Senate Bill 3497, 97th General Assembly.

A second potential scenario is the sale of Massachusetts lottery tickets via the Internet or other electronic communication to another state or the sale of another state's tickets within Massachusetts. This would be contingent on the law of both Massachusetts and the other state and the particulars of the arrangement. At a minimum, both states would need to authorize the sale. If one state did not possess authority under its state laws, the arrangement would raise

¹⁰ *See* Office of Legal Counsel, *Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law: Memorandum Opinion for Acting Assistant Attorney General, Criminal Division* (Oct. 16, 2008). In the context of private entities operating lotteries on behalf of a state, the Office of Legal Counsel has observed that "the statutory exemption for lotteries 'conducted by a State' requires that the State exercise actual control over all significant business decisions made by the lottery enterprise." *Id.* at 1. The opinion further observes that the state must "manage and direct the course of the lottery venture" and that the phrase "conducted by the State" contemplates that the state will manage, direct, carry on, and do business as a state-run enterprise. *Id.* at 4.

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numerous concerns under both state and federal law. The Lottery does not currently possess this authority under Massachusetts law.

As to the third potential scenario, the establishment of Internet casino games involving out-of-state players, we note again that the Massachusetts Lottery does not currently have the ability to conduct these games. Should such authority be granted by the legislature, under the current DOJ interpretation of the Wire Act, such games would be compliant with federal law only if the following conditions are met: the Lottery is licensed or otherwise authorized by the state(s) in which the players were located; the games do not involve wagering on sporting events or contests; and the federal requirements discussed above are complied with. If all the foregoing requirements were met, such games could be conducted within Massachusetts by the Lottery or any entity so authorized.

(3) Is an individual/entity that is not the Massachusetts State Lottery Commission currently authorized to sell gaming products over the Internet or other electronic communications in the Commonwealth?

A. Short Answer

No, with the exception of certain rights granted to the horse racing and dog racing industries concerning the processing of wagers through the Internet.

B. Legal Analysis

The federal laws discussed in this memorandum do not permit any transaction that would not be allowable under state law. The Travel Act, the Illegal Gambling Business Act, and UIGEA all require the conduct at issue to be lawful under state law to avoid their strictures. Thus entities that are not the Lottery would also need to be authorized by state law to provide Internet gaming. However, if such entities were determined to be so authorized, or became so

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authorized, then under the DOJ Opinion, so long as their offerings did not involve sporting events or contests, they would be able to provide Internet gaming.

Current Massachusetts law has numerous limitations on various forms of gambling, prohibiting, among other things: winnings in excess of \$5 from gaming or betting, Mass. Gen. Laws ch. 271, § 1; keeping a house of gaming or playing an unlawful game, *id.* § 5; maintaining gambling devices, *id.* § 5A; promoting a game of skilo, *id.* § 6B; setting up or promoting a lottery based on lot, dice, numbers, game, hazard, or other gambling device, *id.* § 7; permitting a lottery to be drawn, *id.* § 8; selling lottery tickets, *id.* § 9; organizing registration of bets or pools, *id.* § 16A; and keeping a building or room for registering bets, *id.* § 17. The chapter also specifically prohibits the use of telephones for gaming purposes: Section 17A provides that “[w]hoever uses a telephone . . . for the purpose of accepting wagers or bets . . . shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year.” *Id.* § 17A. Together, these laws appear to prohibit the placement of wagers on games of skill or chance regardless of whether they are placed in-person or via the Internet.

Analysis of the Commonwealth’s recent gaming expansion legislation supports this result. Section 37(a) of new Chapter 23K restricts the operation of games or gaming devices to those authorized by Chapter 23K. Mass. Gen. Laws ch. 23K, § 37(a). Chapter 23K establishes a detailed application, approval, referendum, and licensure process for applicants who wish to operate gaming devices. Absent completion of this process, prospective operators cannot conduct gaming operations. It is also important to note that this legislation leaves in place the restrictions related to illegal gaming currently established by law, including the provisions of Chapter 271, Section 17A prohibiting the use of a telephone for gaming purposes. Under these

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current conditions, Massachusetts law would not permit individuals or entities that are not the Lottery to sell gaming products over the Internet or via other electronic communications because doing so would violate the laws of the Commonwealth, and would trigger various violations of the respective federal laws discussed above.¹¹

¹¹ Beyond these general gaming provisions, Massachusetts law provides for wagering on horse racing in person, Mass. Gen. Laws ch. 128A, via simulcast, *id.* ch. 128C, and over the Internet, *id.* ch. 128A, §5C. We do not believe these statutes authorize any other forms of Internet gaming generally.

**EXHIBIT A:
ILLINOIS LEGISLATION**



Effective: October 15, 2011

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 20. Executive Branch
 [§] Department of Revenue (Formerly the Lottery) (Refs & Annos)
 [§] Act 1605. Illinois Lottery Law (Refs & Annos)
 → → 1605/7.12. Internet pilot program

§ 7.12. Internet pilot program. The General Assembly finds that:

- (1) the consumer market in Illinois has changed since the creation of the Illinois State Lottery in 1974;
- (2) the Internet has become an integral part of everyday life for a significant number of Illinois residents not only in regards to their professional life, but also in regards to personal business and communication; and
- (3) the current practices of selling lottery tickets does not appeal to the new form of market participants who prefer to make purchases on the internet at their own convenience.

It is the intent of the General Assembly to create an Internet pilot program for the sale of lottery tickets to capture this new form of market participant.

The Department shall create a pilot program that allows an individual 18 years of age or older to purchase lottery tickets or shares on the Internet without using a Lottery retailer with on-line status, as those terms are defined by rule. The Department shall restrict the sale of lottery tickets on the Internet to transactions initiated and received or otherwise made exclusively within the State of Illinois. The Department shall adopt rules necessary for the administration of this program. These rules shall include requirements for marketing of the Lottery to infrequent players. The provisions of this Act and the rules adopted under this Act shall apply to the sale of lottery tickets or shares under this program.

Before beginning the pilot program, the Department of the Lottery must submit a request to the United States Department of Justice for review of the State's plan to implement a pilot program for the sale of lottery tickets on the Internet and its propriety under federal law. The Department shall implement the Internet pilot program only if the Department of Justice does not object to the implementation of the program within a reasonable period of time after its review.

The Department is obligated to implement the pilot program set forth in this Section and Sections 7.15 and 7.16 only at such time, and to such extent, that the Department of Justice does not object to the implementation of the program within a reasonable period of time after its review. While the Illinois Lottery may only offer Lotto and Mega Millions games through the pilot program, the Department shall request review from the federal Department of Justice for the Illinois Lottery to sell lottery tickets on the Internet on behalf of the State of Illinois that are not limited to just these games.

The Department shall authorize the private manager to implement and administer the program pursuant to the man-

agement agreement entered into under Section 9.1 and in a manner consistent with the provisions of this Section. If a private manager has not been selected pursuant to Section 9.1 at the time the Department is obligated to implement the pilot program, then the Department shall not proceed with the pilot program until after the selection of the private manager, at which time the Department shall authorize the private manager to implement and administer the program pursuant to the management agreement entered into under Section 9.1 and in a manner consistent with the provisions of this Section.

The pilot program shall last for not less than 36 months, but not more than 48 months from the date of its initial operation.

Nothing in this Section shall be construed as prohibiting the Department from implementing and operating a website portal whereby individuals who are 18 years of age or older with an Illinois mailing address may apply to purchase lottery tickets via subscription.

CREDIT(S)

P.A. 78-20, 3rd Spec. Sess., Art. 1, § 7.12, added by P.A. 96-34, § 900, eff. July 13, 2009. Amended by P.A. 96-37, § 60-10, eff. July 13, 2009; P.A. 96-840, § 5, eff. Dec. 23, 2009; P.A. 97-464, § 10, eff. Oct. 15, 2011.

VALIDITY

<Provision added by P.A. 96-34 is unconstitutional because P.A. 96-34 violates the single subject rule of Section 8 of Article IV of the Illinois Constitution. Wirtz v. Quinn, 2011 WL 255644 (1st Dist. 2011).>

<Provisions added by P.A. 96-35, P.A. 96-37, and P.A. 96-38 are invalid. The aforementioned Public Acts were contingent on the passage of P.A. 96-34, which was found to violate the single subject rule of Section 8 of Article IV of the Illinois Constitution. Wirtz v. Quinn, 2011 WL 255644 (1st Dist. 2011).>

HISTORICAL AND STATUTORY NOTES

P.A. 96-840 incorporated the amendments by P.A. 96-34 and P.A. 96-37.

LAW REVIEW AND JOURNAL COMMENTARIES

The Video Gaming Act: Gambling with Illinois' future. E. Tanner Warnick, 2011 U. Ill. L. Rev. 775.

20 I.L.C.S. 1605/7.12, IL ST CH 20 § 1605/7.12

Current through P.A. 97-679 of the 2011 Reg. Sess.

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Effective: December 23, 2009

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness

Chapter 20. Executive Branch

Department of Revenue (Formerly the Lottery) (Refs & Annos)

Act 1605. Illinois Lottery Law (Refs & Annos)

→→ 1605/7.15. Verification of age and residency for Internet program; security for Internet lottery accounts

§ 7.15. Verification for Internet program; security for Internet lottery accounts. The Department must establish a procedure to verify that an individual is 18 years of age or older and that the sale of lottery tickets on the Internet is limited to transactions that are initiated and received or otherwise made exclusively within the State of Illinois, unless the federal Department of Justice indicates that it is legal for the transactions to originate in states other than Illinois. An individual must satisfy the verification procedure before he or she may establish one Internet lottery account and purchase lottery tickets or shares through the Internet pilot program. By rule, the Department shall establish funding procedures for Internet lottery accounts and shall provide a mechanism to prevent the unauthorized use of Internet lottery accounts. If any participant in the pilot program violates any provisions of this amendatory Act of the 96th General Assembly or rule established by the Department, the participant's winnings shall be forfeited. Such forfeited winnings shall be deposited in the Common School Fund.

CREDIT(S)

P.A. 78-20, 3rd Spec. Sess., Art. 1, § 7.15, added by P.A. 96-34, § 900, eff. July 13, 2009. Amended by P.A. 96-840, § 5, eff. Dec. 23, 2009.

VALIDITY

<Provision added by P.A. 96-34 is unconstitutional because P.A. 96-34 violates the single subject rule of Section 8 of Article IV of the Illinois Constitution. Wirtz v. Quinn, 2011 WL 255644 (1st Dist. 2011).>

HISTORICAL AND STATUTORY NOTES

P.A. 96-840 incorporated the amendment by P.A. 96-34.

20 I.L.C.S. 1605/7.15, IL ST CH 20 § 1605/7.15

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