

NATIONAL COUNCIL OF LEGISLATORS FROM GAMING STATES  
STATE-FEDERAL RELATIONS COMMITTEE  
NAPA, CALIFORNIA  
JUNE 17, 2011  
DRAFT MINUTES

The State-Federal Relations Committee of the National Council of Legislators from Gaming States (NCLGS) met at the Napa Valley Marriott in Napa, California, on Friday, June 17, 2011, at 4:15 p.m.

Rep. Kevin Ryan from Connecticut, acting chair of the Committee, presided.

Legislators present included:

Rep. Helene Keeley, DE  
Rep. John Viola, DE  
Rep. Jerry Chang, HI  
Sen. Jason Frerichs, SD  
Rep. Gary Alexander, WA

Others present were:

Susan Nolan, Nolan Associates, NCLGS Executive Director

#### INTERNET GAMING

##### *IMPACT OF UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT ON BANKING INDUSTRY*

Ted Kitada, Senior Company Counsel at Wells Fargo Bank, gave NCLGS legislators an overview of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). He said that UIGEA (31 U.S.C. 5361 et seq.) prohibits any person engaged in the business of betting or wagering from knowingly accepting payments in connection with the participation of another person in unlawful Internet gambling.

Mr. Kitada said that such transactions are termed “restricted transactions” and that as participants in the payment systems, the banking industry is required to identify and block, or otherwise prevent or prohibit, restricted transactions through the establishment of written policies and procedures.

Mr. Kitada said that designated payment systems comprise automated clearing house systems, card systems, check collection systems, wire transfer systems, and money transmitting businesses. He said that exemptions under UIGEA include intrastate transactions, intra-tribal transactions, and any activity allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

Mr. Kitada said that non-exempt participants in the designated payment systems must establish and implement written policies and procedures reasonably designed to identify and block, or

otherwise prevent or prohibit, restricted transactions. He said that examples of policies and procedures are provided in Regulation GG (12 C.F.R. Part 233), issued by the feds and the U.S. Treasury and effective June 1, 2010.

Mr. Kitada reported that for new commercial customers, at the establishment of the account or relationship, the participant conducts due diligence of the customer and its activities commensurate with the participant's judgment of the risk of restricted transactions presented by the customer's business. He added that based on that due diligence, the participant makes a risk determination (1) of the minimal risk of engaging in an Internet gambling business or (2) that the participant cannot determine that the customer presents a minimal risk. Mr. Kitada said that the customer assumes burden to show lawful business.

Mr. Kitada said that if the participant cannot determine that the customer presents a minimal risk, it must obtain either (1) a certification from the commercial customer that it does not engage in an Internet gambling business; or if the commercial customer does engage in such business, it must obtain each of the following: evidence of legal authority to engage in such business and a third party certification that the customer's systems for engaging in such business are reasonably designed to ensure that the business will remain within licensed or lawful limits, including with respect to age and location verification.

Mr. Kitada said the evidence of legal authority to engage in the Internet gambling business includes a copy of the commercial customer's license expressly authorizing the customer to engage in the business issued by the appropriate authority. He said that in the absence of such a license, evidence of legal authority includes a reasoned legal opinion demonstrating that the business does not involve restricted transactions and a written commitment by the customer to notify the participant of any change in its legal authority to engage in the business.

Mr. Kitada said that for existing commercial customers, the participant should notify all of its commercial customers, through provisions in the account agreement or otherwise, that restricted transactions are prohibited from processing through the account or relationship. He said that this notification obligation includes existing commercial customers as well as new customers, but account agreements of existing customers need not be modified.

Mr. Kitada said that the policies and procedures of a card system operator, a merchant acquirer, third party processor, or a card issuer, are deemed to be reasonably designed to identify and block, or otherwise prevent or prohibit, restricted transactions, if they provide for (1) methods to conduct due diligence in establishing a commercial account or relationship and address methods to conduct due diligence in the event a participant has actual knowledge that an existing customer engages in an Internet gambling business; or (2) implementation of a code system, such as transaction codes and merchant/business category codes ("MCC"), that are required to accompany the authorization request for a transaction, including the operational functionality to enable the card system operator or card issuer to reasonably identify and deny authorization for a transaction that the coding procedure indicates may be a restricted transaction; and procedures for ongoing monitoring and testing by the card system operator to detect potential restricted transactions. Mr. Kitada said that the MCC for gaming is 7995.

Mr. Kitada said that procedures for ongoing monitoring and testing by the card system operator to detect potential restricted transactions include conducting testing to ascertain whether transaction authorization requests are coded correctly; and monitoring and analyzing payment patterns to detect suspicious payment volumes from a merchant customer.

Mr. Kitada said the requirements under Regulation GG are subject to the exclusive regulatory enforcement of the federal functional regulators under section 505(a) of the Gramm-Leach-Bliley Act. He said for national banks, this section provides for enforcement under 12 USC §1818, which provides for a number of enforcement actions, including involuntary termination of status as an insured institution, cease-and-desist proceedings, and civil money penalties.

Mr. Kitada said that court challenges to UIGEA include *Interactive Media Entertainment and Gaming Association Inc. v. Attorney General of the United States, et al.*, Case Number 08-1981, Filed September 1, 2009, Court of Appeals, Third Circuit.

#### DEPARTMENT OF JUSTICE INDICTMENTS AGAINST OFF-SHORE POKER COMPANIES

Mr. Alex Ripps of *Gambling Compliance* said that on April 15, 2011, Preet Bharara, U.S. Attorney for the Southern District of New York, unsealed a federal indictment charging 11 individuals associated with the three largest off-shore poker operators with bank fraud, money laundering and illegal gambling offenses. He said that asset forfeitures sought included \$1.5 billion from PokerStars, one billion from Full Tilt Poker, and \$500 million from Absolute Poker and Ultimate Bet.

Mr. Ripps said that bank accounts and domain names seized include 75 foreign and domestic bank accounts, PokerStars.com, FullTilt.com, UltimateBet.com, AbsolutePoker.com, and UB.com. He said that charges included conspiracy to violate UIGEA, violation of UIGEA, operation of an illegal gambling business, and conspiracy to commit bank and wire fraud. He said that maximum penalties for these charges ranged from 5 years and \$25,000 to 30 years and \$1,000,000.

Mr. Ripps said that UIGEA requires a predicate offense, meaning "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."

Mr. Ripps said that New York Penal Law Sections 225.00 and 225.05 makes it a class A misdemeanor for a person to knowingly advance or profit from unlawful gambling activity. He said defendants operated unlawful "gambling" operations which involved the processing of payment transactions. He said that the New York Penal Code Section 225.00 in Section 225.00(2) states that a person "engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."

Mr. Ripps said Section 225.00(1) defines contest of chance to mean "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding the skill of the contestants may also be a factor there in." He said that the New York Penal Code makes it a crime to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. He said that like UIGEA, it requires a predicate offense (NY Penal Code 225). Mr. Ripps said that it defines 'illegal gambling business' to mean a business that involves 5 or more people and has been in substantially continuous operation for a period over 30 days or has a gross revenue of \$2,000 in any single day.

Mr. Ripps said that to prove wire fraud the prosecution must prove beyond a reasonable doubt a scheme to defraud or obtain money or property by fraudulent pretences, intent, the making of materially false representations, and transmission by wire, radio, or television communication in interstate or foreign commerce.

Mr. Ripps said that to prove bank fraud the prosecution must show beyond a reasonable doubt one knowingly acted in a scheme or artifice to defraud a financial institution or to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretences, representations, or promises.

Mr. Ripps said that to prove money laundering the prosecution must show beyond a reasonable doubt that a financial transaction over \$10,000 was attempted or conducted; the defendant knew the transaction involved proceeds of an illegal activity; the property involved was in fact proceeds of the illegal activity; and the defendant had the specific intent to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity. He said that no 'overt act' was required.

Mr. Ripps said that it was all about the money and those payments were made to non-existent merchants to skirt gambling transaction codes, such as [www.petfoodstore.biz](http://www.petfoodstore.biz) and [www.bedding-superstore.tv](http://www.bedding-superstore.tv). He said that fraudulent e-checking accounts paid high transaction fees to payment processors who acted as the middle-men. He noted that bank statements would list phony companies as source of transactions. He asked why lie to banks when you can just buy one? Mr. Ripps said that certain defendants made payments to SunFirst Bank in Utah in exchange for processing of gambling transactions.

In conclusion, Mr. Ripps said that the majority of those indicted remain at large overseas, including all the principals of the three operators. He said that meanwhile, the DOJ reached agreements with the three companies to release their seized domain names to facilitate the refunding of player money and that while some players have received their money back, many have not, while renewed calls from online poker proponents stress the need for consumer protection.

In response to a question from Rep. Danielson regarding activity in the U.S. being shut down, Mr. Ripps said that PartyPoker reached a non-prosecution agreement with the DOJ and paid a huge fine and then withdrew from the U.S. because they believe that legal internet gaming will eventually come to the U.S. When they withdrew, other companies stepped in but none of

them have the brand cache of PartyPoker. He said that at peak ten to twenty million players were estimated to be playing in the U.S.

## TRIBAL GAMING

### *CURRENT TRIBAL GAMING*

Jason Giles, Deputy Executive Director and General Counsel of the National Indian Gaming Association (NIGA) said NIGA represented 237 tribes in the U.S., of which 184 tribes have casino operations in 446 gaming facilities in 28 states. He said that estimated casino revenue in 2010 was at about 25 billion dollars. Mr. Giles said that tribal gaming employs over 500,000 people nationwide, down from 600,000 at its peak in 2007.

Mr. Giles said that Indian gaming is very fragmented across the country and performance varies widely from state to state especially since the economic downturn. He said that the top 25 casinos (17 percent) are making about 70 percent of the revenue. He said that includes Connecticut, California, Oklahoma, and Florida. He said that the vast majority of tribal operations are just breaking even, if that. He said they are used for economic diversification purposes and the means for supplying jobs on the reservations.

Mr. Giles said that in 2011 \$25 billion is expected in revenues, which is down but not very much. He said that tribal gaming revenues are holding steady, especially as compared to commercial casinos in Nevada and New Jersey. He said that Oklahoma is recently new to Class II gaming. He said that Oklahoma is number two in tribal gaming and is doing very well compared to the rest of the country, as it draws revenue from Texas and other nearby states, as well as because it has a low tax base and a lot of disposable income.

### *OFF-RESERVATION GAMING ISSUES*

Mr. Giles said that there was a recent announcement on off-reservation gaming from the Assistant Secretary of the Interior Larry Echo Hawk. He reported that Mr. Echo Hawk said that the Department of Interior (DOI) was going to review tribal applications for so-called off-reservation casinos. He said that DOI was going to undo what was done under the Bush Administration in a so-called commutability memorandum. He said that many tribes felt that the 2008 memo was intended to curb gaming land acquisitions across the board, not just off-reservation acquisitions. He said that at the time of the 2008 memo, the DOI had 30 applications to take off-reservation land into trust for tribes under Indian Gaming Regulatory Act (IGRA) Section 20 regulations. Since 1988, when IGRA was first passed, only five tribes have navigated to get off-reservation lands into trust. He said that it is a laborious process. Mr. Giles said that the rise in applications to 30 in 2008 is somewhat because they have been sitting on them for years—and largely investor-driven. He said that in many instances the land is just treaty reservation land that has been whittled down over the years.

Mr. Giles said there is a two-part process. He said first a state governor's approval is necessary and then the DOI has to put the land into trust under the Indian Reorganization Act (IRA). He said that is where the commutability issue comes into play—when the Secretary is evaluating whether to put the land into trust under the IRA. He said discretion of the Secretary and

multiple factors to consider are laid out very carefully in a regulation, Section 151, the Code of Federal Regulation, which is how they evaluate the land-to-trust applications.

Mr. Giles said that in these land-to-trust applications, for decades, it was written that the Secretary was to give greater scrutiny as the distance the acquired land was from the tribal reservation increased because of to the essential benefits and the local government concerns regarding impacts on jurisdictional taxes and special assessments. He said that the 2008 memo was supposed to clarify what greater scrutiny or greater weight was supposed to be imposed. Mr. Giles said that the commutability standard just muddled things more because it didn't define "commutability" and never gave an actual distance, which can be relative.

Mr. Giles said Indian country had concerns because the memo did not go through due process. He said now the 2008 memo has been rescinded. He said that the Assistant Secretary Echo Hawk said that not much is going to change, scrutiny will still increase as distance does, that the same process needed to be followed, and governor approval will be necessary.

Mr. Giles said that legislatively, California Senator Feinstein has again introduced a bill that would amend the Section 20 two-part process. He said that the Senator felt that the commutability memo did not go far enough and he felt that she wanted to end off-reservation land-to-trust acquisitions.

Mr. Giles said that with rescission of the memo, NIGA believes that the backlogged applications will now be processed and perhaps quickly, for example the Delaware tribe in Oklahoma and tribes that once lived in Pennsylvania and Ohio. He said that Congress through IGRA in 1988 recognized that there should be recourse for tribes that lost lands due to fraud or theft, or squatters, especially for treaty land that was never ceded. Mr. Giles said this still requires the approval of the governor and takes into account local concerns.

Mr. Giles said that in October, NIGA adopted six principles for internet gaming, which include the same treatment for tribes as for states; existing state-tribal gaming compacts respected; regarding taxation and jurisdictional issues, federal tribes and tribal authorities should not be subordinated to any non-federal entity. He said that NIGA has established a subcommittee on internet gaming within its Executive Board and is meeting across the country.

## ADJOURNMENT

There being no further business, the meeting adjourned at 5:15 p.m.