



CLIENT ALERT:
DOJ Reverses Position on Scope of Wire Wager Act

To Our Clients and Friends:

On December 23, 2011, the Department of Justice's Office of Legal Counsel (the "OLC") released an opinion that the Wire Wager Act (18 U.S.C. § 1084) applies only to interstate transmissions of wire communications that relate to sports wagering. This opinion reversed the Department's long-held view that the Act could prohibit other forms of interstate gambling such as poker and other card games. Prepared in response to a request by the Department's Criminal Division regarding the legality of state-sponsored plans to sell lottery tickets on the Internet, the opinion represents a significant shift in the Department's policies with regard to iGaming. Nevertheless, a cautious interpretation of this reversal is warranted.

Enacted in 1961, the Wire Wager Act prohibits the use of interstate wire communications for the transmission of "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." Courts interpreting this provision have split on whether the phrase "on any sporting event or contest" applies to all bets or wagers or only sports bets or wagers. In 2002, the U.S. Court of appeals for the Fifth Circuit affirmed a district court opinion that "the statutory language clearly requires that the object of the gambling be a sporting event or contest." *In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp.2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002). Other district courts, however, have held that such a limitation does not exist and that the Act covers other forms of iGaming. *See, e.g., U.S. v. Lombardo*, 639 F. Supp.2d 1271 (D. Utah 2007). Moreover, for many years, the Criminal Division had broadly expressed the view that the Wire Wager Act applied to all forms of gambling. Indeed, as recently as 2008, Party Poker founder Anurag Dikshit pleaded guilty to charges filed by the Department of Justice for violating the Wire Wager Act by offering Internet poker services to U.S. residents.

Some proponents of online gambling have been quick to herald the OLC's opinion as signaling a broad shift towards legalization of *all* forms of Internet non-sports gambling. The reality is more complex. Most importantly, there are several other federal criminal statutes which regulate gambling activity – including the Illegal Gambling Business Act (18 U.S.C. § 1955), the Travel Act (18 U.S.C. § 1952), and the Unlawful Internet Gambling Enforcement Act (31 U.S.C. § 5363 *et. seq.*). While the specific activities proscribed by these laws vary, they all share one important detail: they do not specifically define what types of



99 Park Avenue, 16th Floor New York, New York 10016 Tel: 212.922.9499 Fax: 212.922.1799

www.devoredemarco.com

gambling they prohibit. Rather, these prohibitive statutes specifically hinge on whether the underlying gambling is prohibited by the state in which it occurs. State gambling laws, in turn, range from highly prohibitive to highly permissive. Accordingly, the OLC's limiting view of the Wire Wager Act may be better understood as a shift by the Department towards greater deference to state regulation of gambling activity. For businesses considering entering into or already in the iGaming space, the OLC opinion and the lack of a unified definition of "gambling" among the states therefore underscore the need for a thorough understanding of state and federal gambling laws *and* a careful assessment of how those laws apply to new and emerging e-commerce models.

* Please note that this article is for general informational purposes only and should not be construed as legal advice. If you would like more information about the matters discussed in this client alert, please contact DeVore & DeMarco LLP.