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## Folding a Losing Hand: Why Congress Should Replace the Unlawful Internet Gambling Reinforcement Act with a Regulatory Scheme

Ross A. Crutchfield

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# COMMENT

## FOLDING A LOSING HAND: WHY CONGRESS SHOULD REPLACE THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT WITH A REGULATORY SCHEME

### I. INTRODUCTION

On May 23, 2003, the aptly-named, amateur poker player Chris Moneymaker won the Main Event of the World Series of Poker and took home the first-place prize of \$2.5 million.<sup>1</sup> Moneymaker won his \$10,000 entry fee to the tournament by winning a \$39 satellite tournament on the poker website, Pokerstars.com.<sup>2</sup> The next year at the Main Event, hundreds of amateurs won entry to the tournament through low buy-in, online satellite tournaments.<sup>3</sup> The number of entrants in the Main Event increased from 839 in 2003 to 2,576 in 2004.<sup>4</sup> Yet another amateur, attorney Greg Raymer, won the 2004 Main Event, bringing home an astonishing \$5 million.<sup>5</sup> The number of entrants into the Main Event continued to rise with the number peaking at 8,773 in 2006.<sup>6</sup> However, in 2007, the number of entrants decreased to 6,358,<sup>7</sup> the first Main Event since 1992 that fielded

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1. Associated Press, *Mr. Moneymaker Nets \$2.5m Poker Prize*, <http://www.cnn.com/2003/US/West/05/24/offbeat.poker.win.ap/> (May 24, 2003). Moneymaker's victory at the 2003 Main Event was improbable to say the least, considering that all his previous poker experience had been online. *Id.* Since winning the 2003 Main Event, Moneymaker has played the major poker tournament circuit with limited success, earning \$291,622. Card Player, *Results for Chris Moneymaker*, <http://www.cardplayer.com/poker-players/1691-chris-moneymaker> (last updated Sept. 15, 2009).

2. PokerStars, *Chris Moneymaker*, <http://www.pokerstars.com/team-pokerstars/chris-moneymaker/> (last accessed Sept. 28, 2008).

3. Craig Tapscott, *Online Poker Shoots and Scores with World Series of Poker Entries*, <http://www.cardplayer.com/magazine/article/15511> (June 27, 2006) ("In 2003, PokerStars sent 33 players to the WSOP main event; in 2004, 316 players . . . [i]n 2004, PartyPoker gave away 250 seats").

4. World Series of Poker, *World Series of Poker: 2003 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=7&grid=5> (last accessed Sept. 28, 2008); World Series of Poker, *World Series of Poker: 2004 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=28&grid=23> (last accessed Sept. 28, 2008).

5. PokerStars, *Greg Raymer*, <http://www.pokerstars.com/team-pokerstars/greg-raymer/> (last accessed Sept. 28, 2008). Unlike the 2003 Main Event winner, Chris Moneymaker, Raymer's poker success has continued, with net earnings since the 2004 Main Event totaling \$927,666. Cardplayer, *Results for Greg Raymer*, <http://www.cardplayer.com/poker-players/4018-greg-raymer/overall/results> (last updated May 31, 2009).

6. World Series of Poker, *World Series of Poker: 2006 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=1141&grid=146> (last accessed Sept. 28, 2008).

7. World Series of Poker, *World Series of Poker: 2007 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=3482&grid=309> (last accessed Sept. 28, 2008).

fewer players than the previous year.<sup>8</sup> Poker commentators widely attributed this decrease in participation to a single event: the passage of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).<sup>9</sup>

While the UIGEA attempts to ban “unlawful Internet gambling,”<sup>10</sup> its efforts have been largely unsuccessful.<sup>11</sup> While some gambling websites no longer allow U.S. players since the passage of the UIGEA, many sites continue to cater to U.S. players, taking the position that the legislation does not apply to their websites.<sup>12</sup> Despite the efforts of the UIGEA, a U.S. gambler can establish an account with an Internet gambling company, transfer funds to the site, and begin placing bets in a matter of minutes.<sup>13</sup> Because Congress intended the UIGEA to effectively prohibit online gambling, no regulations currently exist to ensure that players are adequately protected while using gambling websites.<sup>14</sup> For example, the websites that continue to operate in the U.S. use privately held, foreign companies as e-wallets, which provide little recourse to U.S. players if problems occur during the transaction.<sup>15</sup> The need for protection will only increase as the popularity of Internet gambling continues to rise in the U.S.<sup>16</sup> The UIGEA is an ineffective method of dealing with Internet gambling and Congress should replace it with a regulatory system modeled after the regulatory system employed by Great Britain. A regulatory system effectively addresses the problems associated with Internet gambling: underage gambling, problem gambling, money laundering, and fraud. Finally, the U.S. could tax Internet gambling companies in exchange for a license, providing a much-needed additional stream of revenue for the government.

This Comment examines the UIGEA, how other nations address Internet gambling, and the benefits and disadvantages of implementing a regulatory scheme for Internet gambling. Part II of this Comment examines how Internet gambling websites operated prior to the passage of the UIGEA, the manner in which Congress passed the UIGEA, the specific provisions of the UIGEA, and their effect on Internet gambling. It also discusses Australia’s attempt to prohibit Internet gambling. Finally, Part II presents two

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28, 2008).

8. World Series of Poker, *World Series of Poker: 1991 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=2074&grid=207> (last accessed Sept. 28, 2008) (215 entrants); World Series of Poker, *World Series of Poker: 1992 Official Tournament Coverage and Results*, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=2056&grid=206> (last accessed Sept. 28, 2008) (201 entrants).

9. Associated Press, *WSOP Entrants Down as Play Begins in Las Vegas*, <http://sports.espn.go.com/espn/poker/news/story?id=2928413> (last updated July 7, 2007) (“It would mark the first decrease in the number of entrants at the \$10,000 buy-in main event since 1992 and was widely blamed on a U.S. law signed by President Bush in October that cracks down on online gambling.”).

10. 31 U.S.C. § 5363.

11. Chuck Blount, *On Poker: Bet That Online Poker Finds Ways to Play*, [http://www.mysanantonio.com/sports/MYSA101107\\_blount\\_onpoker\\_en\\_33f6cfc\\_html15327.html](http://www.mysanantonio.com/sports/MYSA101107_blount_onpoker_en_33f6cfc_html15327.html) (posted Oct. 10, 2007) (“Despite the halt of bank account transactions, it’s still pretty easy to put money into online accounts.”).

12. *Id.*

13. *Id.*

14. 31 U.S.C. §§ 5361–5367.

15. Gerd Alexander, Student Author, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 Duke L. & Tech. Rev. 6, ¶ 39.

16. Erica Warner, *Feds Issue Rule Aimed at Internet Gambling Ban*, [http://ap.google.com/article/ALeqM5gS0sJ3yBI86H6\\_d8cUo1a3tZgCgAD94DN1AO0](http://ap.google.com/article/ALeqM5gS0sJ3yBI86H6_d8cUo1a3tZgCgAD94DN1AO0) (Nov. 12, 2008) (“U.S. bettors have been estimated to supply at least half the revenue of the \$16 billion Internet gambling industry.”).

regulatory models: industry self-regulation and the United Kingdom's approach to governmental regulation. Part III first analyzes the success of the UIGEA in prohibiting Internet gambling. It then examines the justifications for prohibition and demonstrates that regulation can address these concerns more effectively than prohibition. It will then show that governmental regulation, loosely based upon the U.K.'s regulatory scheme, is better suited to U.S. interests than industry self-regulation. Finally, this section will examine obstacles that must be overcome in order for the U.S. government to regulate Internet gambling. Part IV concludes that the UIGEA is an ineffective method of addressing Internet gambling and that the U.S. should replace it with a regulatory scheme.

## II. BACKGROUND

### A. *How Internet Gambling Companies Operated Prior to the Passage of the UIGEA*

Before the passage of the UIGEA, an online poker player, for example, would first download the poker room's software and then create a user profile, consisting of basic information such as name, address, and date of birth.<sup>17</sup> After creating a user profile, the poker player would then provide funding.<sup>18</sup> Prior to the passage of the UIGEA, "e-wallets" were the method of choice for U.S. players.<sup>19</sup> An "e-wallet" is "an online account in which money can be deposited and used in commercial transactions."<sup>20</sup> An e-wallet can be linked to a player's checking account, credit card, or debit card.<sup>21</sup>

### B. *The Manner in Which Congress Passed the UIGEA*

The UIGEA passed through Congress as a rider to the Security and Accountability for Every Port Act (Safe Port Act).<sup>22</sup> Senator Patty Murray (D. Wash.) regarded the Safe Port Act as necessary in order to "close a dangerous security gap and keep our country safe."<sup>23</sup> The Safe Port Act provided \$300 million in order to provide protection for U.S. ports from possible terrorist attacks.<sup>24</sup> Many members of Congress considered this bill a "must-pass,"<sup>25</sup> and it passed through the House with a 421-2 majority and through the Senate with a unanimous 98-0 vote.<sup>26</sup> Because there were differences between the House and Senate versions of the bill, the bill then went to conference committee.<sup>27</sup> It was at this time that Senator Bill Frist (R. Tenn.) attached the UIGEA to the Safe Port Act.<sup>28</sup>

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17. Alexander, *supra* n. 15, at ¶ 5.

18. *Id.*

19. *Id.* at ¶ 6.

20. *Id.*

21. *Id.*

22. I. Nelson Rose, *Congress Makes Sausages*, 11 *Gaming L. Rev.* 1, 1 (2007).

23. Bob Brewin, *Senate Passes SAFE Port Act*, [http://fcw.com/articles/2006/09/15/senate-passes-safe-port-act.aspx?sc\\_lang=en](http://fcw.com/articles/2006/09/15/senate-passes-safe-port-act.aspx?sc_lang=en) (Sept. 15, 2006).

24. *Id.*

25. Michelle Minton, *Lawmakers: Rounders on the Hill*, <http://www.openmarket.org/2008/03/26/lawmakers-rounders-on-the-hill/> (Mar. 26, 2008).

26. GovTrack.us, *H.R. 4954 [109th]: SAFE Port Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h109-4954> (last accessed Sept. 29, 2008).

27. *Id.*

28. Rose, *supra* n. 22, at 1.

Because a conference committee report is not subject to amendment, members of Congress who opposed the UIGEA were in the unenviable position of having to choose between voting against a vital port security bill or voting for it and allowing the UIGEA to pass through Congress.<sup>29</sup> While some in Congress knew that the UIGEA had been attached to the Safe Port Act, many claimed later that they had no idea that it was part of the Safe Port Act.<sup>30</sup> After Congress passed the Safe Port Act, President George W. Bush signed the bill into law, stating, "The [Safe] Port Act will make this nation more prepared, more prosperous and more secure."<sup>31</sup> Notably, President Bush did not mention the UIGEA or Internet gambling in his speech on the Safe Port Act.<sup>32</sup>

### C. *The Provisions of the UIGEA*

The UIGEA is solely an enforcement statute; it does not prohibit any form of gambling that is not illegal under some other state or federal regulation.<sup>33</sup> Under the UIGEA, "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.<sup>34</sup>

Thus, the UIGEA does not define unlawful Internet gambling, "but rather relies on the underlying substantive Federal and State laws."<sup>35</sup> Another crucial aspect of the UIGEA is that it does not make the act of placing a bet on a gambling website illegal.<sup>36</sup> As one scholar notes, "[f]or a law designed to stop the flow of money, it is bizarre to make it a crime only to receive the funds, but not to send them or transmit them: Neither the player nor the intermediary can be charged with this crime."<sup>37</sup> The one felony created under the UIGEA is for *accepting* a financial instrument for unlawful Internet gambling.<sup>38</sup> A person who violates this section of the UIGEA can be imprisoned for a maximum of 5 years, fined, or both.<sup>39</sup>

Along with targeting Internet gambling companies, the UIGEA also seeks to prevent financial institutions from transacting with the Internet gambling companies.<sup>40</sup> The UIGEA allows the Federal Reserve System, in consultation with the U.S. Attorney General, to promulgate regulations requiring financial institutions "to identify and block

29. United States Senate, *Senate Legislative Process*, "Conference Committees," [http://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm](http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm) (last accessed Sept. 29, 2008) ("Approval of the conference report itself is subject to extended debate, but conference reports are not open to amendment.").

30. Rose, *supra* n. 22, at 1.

31. George W. Bush, Speech, *President Bush Signs SAFE Port Act*, (D.C., Oct. 13, 2006) (available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061013-2.html>).

32. *Id.*

33. Rose, *supra* n. 22, at 1.

34. 31 U.S.C. § 5362 (10)(A).

35. 73 Fed. Reg. 69382, 69382 (Nov. 18, 2008).

36. I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 *Gaming L. Rev.* 537, 539 (2006).

37. *Id.*

38. 31 U.S.C. § 5363.

39. *Id.* at § 5366.

40. *Id.* at § 5364(a).

or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions.”<sup>41</sup> On October 4, 2007, the Federal Reserve System, along with the Department of the Treasury, published proposed rules designed to further the UIGEA’s objective of prohibiting restricted transactions.<sup>42</sup> The Federal Reserve System finalized these rules on Nov. 18, 2008 and they will become effective on January 19, 2009, the last day of the Bush Administration.<sup>43</sup>

The rules do not attempt to provide a more definitive definition of what gambling activities are actually prohibited by the UIGEA:

The proposed rule does not specify which gambling activities or transactions are legal or illegal because the Act itself defers to underlying State and Federal gambling laws in that regard and determinations under those laws may depend on the facts of specific activities or transactions.<sup>44</sup>

Because neither the UIGEA nor the rules specify what gambling activities are illegal, financial institutions must make those determinations for themselves.<sup>45</sup> Many in the banking industry opposed this imposition<sup>46</sup> and declared that the industry will respond to it by blocking all Internet gambling transactions, whether legal or illegal.<sup>47</sup> The financial industry has strong incentive to take this approach because while a bank could be fined for permitting an illegal transaction, the UIGEA exempts banks from liability for blocking a legal transaction as long as the bank reasonably believed the transaction was prohibited.<sup>48</sup>

While the rules do not mandate specific procedures for identifying unlawful transactions, they do provide a “safe harbor” provision.<sup>49</sup> The safe harbor provision

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41. *Id.*

42. 72 Fed. Reg. 56680, 56680 (Oct. 4, 2007); see Jason A. Miller, *Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling*, 12 N.C. Banking Inst. 185, 197–203 (providing an extensive discussion of the proposed rules).

43. Shari Geller, *Govt. Issues Final Rule on UIGEA*, <http://www.pokerlistings.com/govt-issues-final-rule-on-uigea-32748> (Nov. 13, 2008). Some poker commentators are hopeful that President-elect Barack Obama, an avid poker player, will work to overturn these regulations. See Tim Shipman, *US Election: Poker Player Barack Obama Has Better Odds Than Dice Man John McCain*, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/article2252578.ece> (last updated July 5, 2008) (quoting poker legend Doyle Brunson: “Poker players have to support Obama . . . God help the internet gambling business if McCain does happen to win.”).

44. 72 Fed. Reg. at 56681.

45. See Miller, *supra* n. 42, at 202.

46. Lori Tripoli, *Commentators Criticize Proposed Regs' Clarity, Practicality*, 12 Gaming L. Rev. 5, 6 (2008) (quoting a comment to the proposed rules made by Nessa Feddis and Richard R. Riese of the American Bankers Association: “But the UIGEA takes banks beyond the role of reporting *potentially or allegedly* illegitimate financial activity, and makes banks and other financial institutions, police, prosecutors, judges, and executing marshals in place of real law enforcement officers when it comes to one of the most elusive of modern crimes, namely, unlawful Internet gambling.”).

47. *Id.* at 8 (quoting Francis Lee of U.S. Central, a federally chartered credit union: “However, the inability to easily distinguish between Internet gambling transactions that are lawful and those that are unlawful places financial transaction providers with a difficult choice. Because of the difficulty of determining what Internet gambling transactions are lawful, it is likely that depository institutions will simply choose to refuse to do business with persons who engage in Internet gambling transactions.”).

48. 31 U.S.C. § 5364(d)(2); see also Tripoli, *supra* n. 46, at 6 (quoting Edward Leyden, president of the Interactive Media Entertainment & Gaming Association: “You can’t get into trouble for blocking a transaction, but you sure can for letting one through that somebody later down the line decides is unlawful.”).

49. 73 Fed. Reg. at 69396.

provides “non-exclusive examples of policies and procedures which would be deemed to be reasonably designed to . . . prevent or prohibit unlawful Internet gambling transactions within the meaning of the Act.”<sup>50</sup> The procedures differ depending on the type of financial institution involved.<sup>51</sup> For example, in order to receive safe harbor protection, credit card companies must establish a number of procedures designed to prohibit restricted transactions.<sup>52</sup> These procedures include: establishing a screening procedure in order to ascertain the nature of a merchant’s business; monitoring a merchant’s website in order to detect unauthorized use; and imposing fines or denying access to merchants who use the card system to process a restricted transaction.<sup>53</sup> The Federal Reserve System estimates the cost to the financial industry for implementing these procedures to be \$88.5 million and an annual cost of maintaining the procedures to be \$3.3 million.<sup>54</sup>

While the rules place a duty on some financial institutions to prohibit restricted transactions, many financial institutions are exempt from the regulations.<sup>55</sup> All participants in the automatic clearing house, check clearing, and wire transfer systems are exempt from the regulations unless they have a customer relationship with an Internet gambling business.<sup>56</sup> The purpose of these exemptions is to ease the burden on the financial industry, especially in regard to paper checks.<sup>57</sup> The financial industry processes around 40 billion checks each year and it lacks an automated system to determine to whom a paper check is made.<sup>58</sup> If the government required the financial industry to ensure that it did not facilitate transactions between gamblers and Internet gambling companies through the use of paper checks, it would cost the industry billions of dollars.<sup>59</sup> However, by exempting paper checks from the regulations, the Federal Reserve System created an easy method for Internet gambling companies to avoid the industry’s attempt to “identify and block . . . restricted transactions.”<sup>60</sup>

#### D. *The UIGEA’s Effect on Internet Gambling*

Soon after President Bush signed the UIGEA into law, several Internet gambling companies announced that they would no longer provide services to customers located in the U.S.<sup>61</sup> The largest and most successful company to pull out of the U.S. market was PartyGaming.<sup>62</sup> PartyGaming is a publicly traded company on the U.K. stock

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50. *Id.*

51. *Id.* at 69409.

52. *Id.* at 69410.

53. *Id.*

54. 73 Fed. Reg. at 69397.

55. *Id.* at 69408–69409.

56. *Id.* at 69388.

57. See I. Nelson Rose, *Regulators Punt on Proposed Internet Gaming Regulations*, 12 Gaming L. Rev. 1, 3 (2008).

58. *Id.*

59. *Id.*

60. 73 Fed. Reg. at 69409.

61. See e.g. Bob Pajich, *PartyPoker Still Recovering from UIGEA*, <http://www.cardplayer.com/poker-news/5336-partypoker-still-recovering-from-uigea> (Oct. 21, 2008).

62. *Id.*

exchange.<sup>63</sup> Prior to the passage of the UIGEA, PartyGaming derived 77% of its revenue from U.S. players.<sup>64</sup> After it announced that it would no longer allow U.S. players to gamble on its websites, the company's stock plummeted 57%.<sup>65</sup>

While PartyGaming's withdrawal from the U.S. market represented a victory for Internet gambling prohibitionists, competing Internet gambling companies soon filled the void left by PartyGaming.<sup>66</sup> As PartyGaming took the position that the UIGEA prohibited its continued operation in the U.S., privately held companies, such as PokerStars and Full Tilt Poker, announced that they would continue to cater to U.S. players, in spite of the UIGEA.<sup>67</sup> Soon after PartyGaming's withdrawal, PokerStars's site traffic increased 24% and Full Tilt Poker's site traffic increased 50%.<sup>68</sup> Thus, while the UIGEA has been effective in prohibiting *publicly* held companies from operating in the U.S., it has been unable to stop privately held companies from providing gambling services to U.S. players.<sup>69</sup>

The phenomenon of privately held companies replacing publicly traded companies has also occurred in the e-wallet industry.<sup>70</sup> For example, before Congress passed the UIGEA, Neteller, a publicly traded company on the London Stock Exchange Alternative Investment Market,<sup>71</sup> provided payment processing services to 80% of all online casinos.<sup>72</sup> In 2005 alone, the company processed over \$7 billion in transactions.<sup>73</sup> However, after the passage of the UIGEA, Neteller pulled out of the U.S. market, which had provided 75% of the company's revenue.<sup>74</sup> Soon after, Neteller's stock prices plunged to £128 from a high of £919.50.<sup>75</sup>

Because Neteller and other reputable e-wallet companies no longer operate in the U.S., U.S. players who continue to gamble online face limited funding options.<sup>76</sup> For example, PokerStars provides twelve payment methods and nine cashout methods for players residing in the United Kingdom.<sup>77</sup> These methods include prominent companies

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63. Multileveler, *WhichPoker.com Figures Show Exact Effect of UIGEA on Online Poker Rooms, Party Poker and Poker Stars*, <http://www.multileveler.com/PressReleases/release12408.php> (Dec. 8, 2006).

64. Aaron Todd, *PartyPoker Mucks U.S. Hand*, <http://www.casinocitytimes.com/news/article.cfm?contentID=161766> (Oct. 13, 2006).

65. Alexander, *supra* n. 15, at ¶ 34.

66. Multileveler, *supra* n. 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. Alexander, *supra* n. 15, at ¶ 39.

71. PokerPages, *Neteller Shares in Restoration of Trading on Alternative Investment Market*, <http://www.pokerpages.com/poker-news/news/neteller-shares-in-restoration-of-trading-on-alternative-investment-market-29884.htm> (July 26, 2007).

72. Burke Hansen, *Gambling Enabler Neteller Craps Out*, [http://www.theregister.co.uk/2007/01/17/neteller\\_founders\\_arrested/](http://www.theregister.co.uk/2007/01/17/neteller_founders_arrested/) (Jan. 17, 2007).

73. *Id.*

74. Vin Narayanan, *Neteller Founders Charged with Money Laundering*, <http://vinnarayanan.casinocitytimes.com/articles/35450.html> (Jan. 16, 2007).

75. NEOVIA Financial, *Share Price*, [http://www.neovia.com/content/en/investors\\_shareprice.htm](http://www.neovia.com/content/en/investors_shareprice.htm) (last accessed Oct. 29, 2009).

76. Alexander, *supra* n. 15, at ¶¶ 39–40.

77. PokerStars, *Playing with Real Money*, <http://www.pokerstars.com/poker/real-money/> (last accessed Nov. 10, 2008).

such as Neteller, Click2Pay, and ClickandBuy.<sup>78</sup> With these methods, a U.K. player can make an instant deposit and have funds available from a cashout within one business day.<sup>79</sup> Conversely, PokerStars provides five payment methods but only one cashout method for U.S. players.<sup>80</sup> While U.S. players can make an instant deposit with an e-check, they will have to wait up to fifteen days to receive funds from a cashout via a paper check.<sup>81</sup> These examples demonstrate that Internet gambling is still readily available in the U.S. because companies that have withdrawn from the U.S. market have been replaced by companies that either believe that the UIGEA is unenforceable or believe that the UIGEA does not apply to their business.<sup>82</sup>

*E. Does the UIGEA Apply to Internet Poker?*

While the UIGEA attempts to prohibit online casinos, some online poker rooms claim that they are exempt from the UIGEA because poker is predominantly a skill game.<sup>83</sup> Soon after Congress passed the UIGEA, PokerStars management issued a statement that the site would continue to operate in the U.S., maintaining that poker is a game of skill and, therefore, the UIGEA did not “alter the U.S. legal situation with respect to [its] offering of online poker games.”<sup>84</sup> PokerStars’s position is based upon the traditional tripartite division of gaming.<sup>85</sup> Some games are pure chance games, such as roulette, while others are pure skill, such as chess or checkers.<sup>86</sup> Finally, some games, such as poker, are hybrid games that have elements of both skill and chance.<sup>87</sup> The determination of whether poker is a game of skill or chance is critical because many states prohibit wagers only on games of chance.<sup>88</sup>

The traditional test for determining whether a game is a game of skill or chance is the predominance test, which focuses on which aspect of the game, skill or chance, predominates over the other.<sup>89</sup> In *Joker Club, L.L.C. v. Hardin*, the North Carolina Court of Appeals applied the predominance test to poker.<sup>90</sup> In *Joker Club*, the plaintiff wished to open a poker club and sought the Durham County District Attorney’s opinion regarding the legality of poker in North Carolina.<sup>91</sup> When the District Attorney replied that poker was an illegal game of chance, the plaintiff then sued the District Attorney, seeking a declaratory judgment that poker is a game of skill and thus not subject to North

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78. *Id.*

79. See e.g. Neteller, *Withdrawals*, [http://public.neteller.com/content/en\\_US/services\\_withdrawals.htm](http://public.neteller.com/content/en_US/services_withdrawals.htm) (last accessed Oct. 29, 2009).

80. PokerStars, *supra* n. 77.

81. PokerStars, *Receiving Checks from PokerStars*, <http://www.pokerstars.com/poker/real-money/checks/> (last accessed Oct. 29, 2009).

82. See e.g. PokerStars, *Pokerstars.com—Our Business Continues As Before*, <http://www.pokerstars.com/legislation/uigea/> (last accessed October 29, 2009).

83. *Id.*

84. *Id.*

85. See Alexander, *supra* n. 15, at ¶ 26.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 628–631 (N.C. App. 2007).

91. *Id.* at 627.

Carolina's gambling statute, which prohibits wagers on "[games] of chance."<sup>92</sup> The district court ruled that poker was a game of chance and therefore illegal under the statute.<sup>93</sup>

On appeal, the plaintiff argued that although poker involved chance, skill predominated.<sup>94</sup> The plaintiff called four individuals involved in the poker industry: two professional poker players, a poker tournament consultant, and a casino manager.<sup>95</sup> The witnesses testified that a poker player needed the following skills in order to be successful: patience, strong memory, ability to analyze odds, ability to "read" people, and self-control.<sup>96</sup> The plaintiff also argued that while a novice could beat a professional poker player in a single hand, the professional would win over an extended session.<sup>97</sup> The plaintiff compared this to an amateur playing a round of golf with Tiger Woods.<sup>98</sup> The amateur may win a single hole, but Woods would win the round.<sup>99</sup> In response, the defendant argued that chance was the predominating factor in poker and called one witness, a North Carolina Alcohol Law Enforcement officer, who testified that, based upon his thirty-nine years of playing poker, it was his opinion that chance predominated over skill.<sup>100</sup> The North Carolina Court of Appeals, applying the predominance test, agreed with the defendant and held that chance predominated over skill in poker.<sup>101</sup> The court reasoned that poker differed from games, such as billiards, golf, and bowling, where skill is the predominant factor; "[w]hereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control."<sup>102</sup> As the court adroitly stated, "No amount of skill can change a deuce into an ace."<sup>103</sup>

The UIGEA proscribes a person "engaged in the business of betting or wagering" from knowingly accepting funds from another person in connection with unlawful Internet gambling.<sup>104</sup> The statute defines a bet or wager as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance."<sup>105</sup> Therefore, the use of the term "subject to chance" may indicate a rejection of the predominance test and the application of the UIGEA to all games that have any element of chance.<sup>106</sup> Thus, regardless of whether skill predominates over chance in poker, it seems that the UIGEA applies to poker, as long as poker involves some element of chance.<sup>107</sup> While some poker players assert that poker is

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92. *Id.* at 627–628.

93. *Id.* at 627.

94. *Id.* at 628–629.

95. *Joker Club*, 643 S.E.2d at 629.

96. *Id.*

97. *Id.*

98. *Id.* at 630.

99. *Id.*

100. *Joker Club*, 643 S.E.2d at 629.

101. *Id.* at 631.

102. *Id.* at 630–631.

103. *Id.* at 630.

104. 31 U.S.C. § 5363.

105. *Id.* at § 5362.

106. See Alexander, *supra* n. 15, at ¶ 27.

107. *Id.*

purely a game of skill, this appears to be an untenable position that a court would likely reject.<sup>108</sup> Because of this, this Comment will proceed on the assumption that the UIGEA applies to Internet poker.

#### F. *Australia's Attempt to Prohibit Internet Gambling*

Australia's Interactive Gambling Act of 2001 provides an example of an attempt to prohibit Internet gambling.<sup>109</sup> Australians have traditionally been quite fond of gambling,<sup>110</sup> and so it should come as no surprise that Internet gambling has been popular in Australia.<sup>111</sup>

Australia first responded to Internet gambling through regulation.<sup>112</sup> In Australia, like the U.S., regulation of gambling is left to the states and territories.<sup>113</sup> In March 2000, there were fourteen licensed online gambling operators which were regulated by various state and territory gaming authorities.<sup>114</sup> Because of these regulations, Australia became an early leader in online gambling.<sup>115</sup> For example, Lasseters Online was the first regulated online casino and was the first online casino to be operated by a land-based casino.<sup>116</sup> In 2000, Lasseters's clientele was 86% international, with 161 different countries represented.<sup>117</sup> Lasseters claimed that one of its best selling points to international customers was its regulation by the Northern Territory government.<sup>118</sup> Also, in 2000, the Australian Senate Select Committee on Information Technologies released a report, entitled *Netbets*, on the proper governmental response to online gambling.<sup>119</sup> The committee recognized that Internet gambling held the potential to exacerbate problem gambling.<sup>120</sup> While the committee considered prohibition of online gambling to prevent problem gambling, it ultimately concluded that "a national prohibition is not the best policy option for preventing an increase in problem

108. Neil King, Jr., *Harvard Ponders Just What It Takes to Excel at Poker*, <http://theppa.org/headlines/2007/05/03/harvard-ponders-just-what-it-takes-to-excel-at-poker/> (May 3, 2007) (citing Howard Lederer's reasoning as to why poker is a skill game: "The 'vast majority' of high-betting poker hands . . . are decided after all players except the winner have folded. So if no one shows his cards . . . can you legally argue that the outcome was determined by luck?").

109. Interactive Gambling Act 2001 (Cth) (available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/a9addc00214ecf6bca25702600029eeb/\\$file/interactgamb2001wd02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/a9addc00214ecf6bca25702600029eeb/$file/interactgamb2001wd02.pdf)).

110. Austrl. Parliament Sen. Select Comm. on Info. Tech., *Netbets: A Review of Online Gambling in Australia* 2.1 (Sen. Prtg. Unit 2000) (available at [http://www.aph.gov.au/Senate/Committee/it\\_ctte/completed\\_inquiries/1999-02/gambling/report/c02.pdf](http://www.aph.gov.au/Senate/Committee/it_ctte/completed_inquiries/1999-02/gambling/report/c02.pdf)) [hereinafter *Netbets*] ("We are a gambling nation. We will bet on anything . . . We cannot watch two people playing any sport without saying 'I bet he misses.'").

111. Austrl. Gov. Dept. of Commun., *Review of the Operation of the Interactive Gambling Act 2001* 22 (Austrl. Gov. Dept. of Commun. 2004) (available at [http://www.archive.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/10950/Review\\_of\\_the\\_Operation\\_of\\_the\\_Interactive\\_Gambling\\_Act\\_2001\\_Report.pdf](http://www.archive.dbcde.gov.au/_data/assets/pdf_file/0015/10950/Review_of_the_Operation_of_the_Interactive_Gambling_Act_2001_Report.pdf)) [hereinafter *IGA Review*] (citing a Nielsens Netstudy finding that up to 700,000 Australians participated in Internet gambling in 2002).

112. *Netbets*, *supra* n. 110, at 1.2.

113. *Id.* at 2.38.

114. *Id.* at 2.10.

115. *Id.* at 1.14–1.15.

116. *Id.* at 2.14.

117. *Netbets*, *supra* n. 110, at 2.20.

118. *Id.*

119. *Id.* at 1.4.

120. *Id.* at 1.3.

gambling.”<sup>121</sup>

However, soon after the release of the *Netbets* report, the Australian federal government started to move away from regulation and towards prohibition of Internet gambling.<sup>122</sup> First, in August 2000, the government passed a bill which placed a year-long moratorium on the development of the Internet gambling industry.<sup>123</sup> During the moratorium, the government released a report concluding that it was technically feasible to prohibit Internet gambling.<sup>124</sup> On July 11, 2001, the Interactive Gambling Act 2001 (IGA) became law.<sup>125</sup> The IGA makes it a crime “to provide interactive gambling services to customers physically located in Australia.”<sup>126</sup> Notably, under the IGA, an Internet gambling provider can legally base its operation in Australia as long as it does not cater to Australians.<sup>127</sup> Furthermore, it is not a crime under the IGA for an Australian to use a foreign Internet gambling provider.<sup>128</sup> The Northern Territory government has noted a curious paradox in this partial prohibition:

As Australian gambling operators will have access to a world market, excluding Australia, they will be providing the other citizens of the world leading player protection and harm minimization measures whilst Australian residents, who will have access only to non-Australian operators, will not have anywhere near the same standard of player protection and harm minimization measures. As a result of this there is a real likelihood that the scope for problem gambling in this country will be expanded, not limited.<sup>129</sup>

Thus, by preventing Australians from accessing sites regulated by the government, the IGA may actually increase the number of problem gamblers in Australia.<sup>130</sup>

### G. *Self-Regulation by the Internet Gambling Industry*

Two alternatives to the prohibition attempted by Congress through the UIGEA are self-regulation by the Internet gaming industry<sup>131</sup> and government regulation.<sup>132</sup> Proponents of self-regulation argue that it is the most effective means of regulating Internet gambling because: (1) regulations enacted by individual countries have not kept pace with new technologies and attitudes; (2) even when a sovereign promulgates modern regulations, issues of enforcement and jurisdiction remain; (3) zealous enforcement campaigns by individual nations are only effective against responsible and respectable establishments; and (4) self-regulation would allow the reputable companies to succeed and disreputable companies to fail through market forces and watchdog

121. *Id.* at 1.27.

122. Andrew Essa, Student Author, *The Prohibition of Online Casinos in Australia: Is It Working?* 4 Queensland U. Tech. L. & Just. J. 88, 97 (2004).

123. *Id.*

124. *IGA Review*, *supra* n. 111, at 3.

125. *Id.* at 4.

126. *Id.*

127. *See* Essa, *supra* n. 122, at 94.

128. *Id.*

129. *Id.* (quoting N. Terr. Gov. Submission to Commn. Info. Tech. and the Arts Legis. Comm., Austrl. Sen.).

130. *See id.* at 94.

131. Martin D. Owens, Jr., *The Limits of Coercion and the Case for I-Gaming Self-Regulation*, 12 Gaming L. Rev. & Econ. 93, 93 (2008) (“Where the law is uncertain, there is no law.”).

132. Dan W. Goldfine & Eric L. Kintner, *The Case for Government Regulation of I-Gaming: A Counterpoint to Owens’s Advocacy of Self-Regulation*, 12 Gaming L. Rev. & Econ. 101, 101 (2008).

websites.<sup>133</sup>

Self-regulation proponents argue that regulations enacted by individual nations have not kept pace with new technologies and new attitudes towards gambling.<sup>134</sup> Before the advent of modern technological innovations such as high-speed Internet and cellular telephones, gambling regulation was relatively easy because all the participants needed to be in one physical location, e.g. a brick-and-mortar casino.<sup>135</sup> Today, however, “[e]very laptop and cell phone is now a potential business hub, retail center, music station, or casino.”<sup>136</sup> Changing social attitudes towards gambling may also reflect a need for updated regulations.<sup>137</sup> When many gambling regulations were enacted, legislators viewed gambling as “a social nuisance and a minor crime.”<sup>138</sup> Today, 48 states have some type of legalized gambling and gambling is now seen as a legitimate, multi-billion dollar entertainment industry.<sup>139</sup>

Self-regulation proponents also argue that the global nature of Internet gambling is incapable of being regulated by a single sovereign.<sup>140</sup> In an article supporting self-regulation, attorney Martin D. Owens, Jr. cites three different methods in which a sovereign can attempt to impose criminal liability on a foreign national living outside of the sovereign’s jurisdiction.<sup>141</sup> First, a foreign national may voluntarily submit to the sovereign’s jurisdiction.<sup>142</sup> This is unlikely to occur in most cases because the foreign national can market and provide his Internet gambling operation to the citizens of the sovereign without ever having to set foot within the jurisdiction of the sovereign.<sup>143</sup> The next method of imposing criminal liability on a foreign national is through extradition treaties with other sovereigns.<sup>144</sup> While extradition is a seemingly plausible method of arresting an Internet gambling operator, Owens argues that there are practical obstacles to this method.<sup>145</sup> He argues that extradition is not intended as a day-to-day procedure and that the political costs of a massive extradition would be prohibitive.<sup>146</sup> The final possible method is a unilateral extension of jurisdiction.<sup>147</sup> However, this is an extraordinary method which requires that “the activity complained of . . . be directly harmful to the security of the moving nation.”<sup>148</sup> Considering that most nations that attempt to ban online gambling allow other types of gambling, this standard would be

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133. Owens, *supra* n. 131, at 93–101.

134. *Id.* at 94.

135. *Id.*

136. *Id.*

137. *Id.* at 94.

138. Owens, *supra* n. 131, at 94.

139. *Id.* at 95.

140. *Id.* at 96.

141. *Id.*

142. *Id.*

143. Owens, *supra* n. 131, at 96.

144. *Id.*

145. *Id.* at 97.

146. *Id.*

147. *Id.*

148. Owens, *supra* n. 131, at 97 (citing *Restatement (Third) of the Foreign Relations Law of the United States* § 402(3) (1987)).

difficult, if not impossible, to prove.<sup>149</sup>

Owens goes on to argue that even when individual nations prosecute Internet gambling, the effect is counterproductive to their stated goals.<sup>150</sup> For example, when a government shuts down a high profile, publicly traded, transparent company, such as Neteller, the result is often times that the reputable company is replaced by a company that is more adept at evading government interference.<sup>151</sup> These companies are usually less concerned with fair dealing and consumer protection than their competitors.<sup>152</sup> Therefore, by shutting down reputable companies, Owens argues that governments do not stop Internet gambling, but rather degrade the quality of the businesses involved in the practice.<sup>153</sup>

After enumerating the perceived difficulties associated with government regulation of Internet gambling, Owens proposes two alternatives: (1) direct cooperation among governments and private industry, and (2) self-regulation of the Internet gambling industry.<sup>154</sup> As evidence of the success of the direct cooperation method, Owens points to the horse racing industry.<sup>155</sup> The horse racing industry has set up a system where gamblers in the U.S. and Canada can bet on races throughout the world.<sup>156</sup> Funds are able to flow through this system in spite of jurisdictional differences in gambling regulations and tax structures.<sup>157</sup>

The second alternative Owens proposes is self-regulation of the Internet gambling industry.<sup>158</sup> While many have expressed concern over the lack of recourse a gambler has if a foreign company fraudulently takes his money, Owens argues that the fierce competitive nature of the Internet gambling industry remedies this situation.<sup>159</sup> A myriad of Internet gambling companies exist, and if one company is in the habit of defrauding its customers, it should not expect to remain in business long.<sup>160</sup> Furthermore, information about disreputable companies is widely disseminated through Internet gambling “watchdog” sites.<sup>161</sup> Owens ultimately concluded that the industry should establish a self-governing body.<sup>162</sup> The main functions of this governing body would be “to oversee and influence the introduction of new technology, provide a reliable dispute resolution forum, and compose a code of ethics.”<sup>163</sup> This governing body would be sanctioned by the government in the jurisdictions in which it operates.<sup>164</sup> This way, Internet gambling companies would be taxed in exchange for a guarantee from the

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Owens, *supra* n. 131, at 97.

154. *Id.* at 98.

155. *Id.*

156. *Id.*

157. *Id.*

158. Owens, *supra* n. 131, at 98.

159. *Id.*

160. *Id.* at 98–99.

161. *Id.* at 99.

162. *Id.*

163. Owens, *supra* n. 131, 100.

164. *Id.*

sovereign that the industry can use the state's financial institutions in order to fund the sites.<sup>165</sup>

#### H. *Governmental Regulation of Internet Gambling: The United Kingdom's Approach*

Not all Internet gambling commentators share Owens's preference towards self-regulation of the Internet gambling industry.<sup>166</sup> In response to Owens's argument for self-regulation, attorneys Dan W. Goldfine and Eric L. Kitner wrote an article extolling the merits of government regulation of Internet gambling.<sup>167</sup> Goldfine and Kitner argue that instead of looking for jurisdictional loopholes around a sovereign's attempts to regulate or prohibit Internet gambling, Internet gambling advocates should focus on changing these regulations or prohibitions.<sup>168</sup> While jurisdictional issues may exist, these issues have not stopped government authorities from criminally prosecuting those who violate existing laws concerning Internet gambling.<sup>169</sup>

As evidence of a successful national regulatory program, Goldfine and Kitner point toward the United Kingdom's Gambling Act of 2005.<sup>170</sup> As opposed to the covert passage of the UIGEA, the Gambling Act was the product of six years of research into the Internet gambling industry.<sup>171</sup> In 1999, an independent board reviewed the state of the existing gambling regulations and made 176 recommendations, including the implementation of a regulatory system for online gambling.<sup>172</sup> After this report, the government issued a report entitled *A Safe Bet for Success*.<sup>173</sup> *A Safe Bet for Success* recognized that Britain's gambling laws had not been updated since the 1960s and had not kept pace with technological innovations.<sup>174</sup> The report recognized that British citizens already had access to overseas companies that provided Internet gambling.<sup>175</sup> Furthermore, it understood that "the prohibition of online gambling by British consumers would be an entirely unrealistic objective, even if it were thought to be desirable."<sup>176</sup> Because it found prohibition unattractive, the government advocated for the adoption of a regulatory system for online gambling.<sup>177</sup> The government also recognized that a strict regulatory system would give British Internet gambling companies a competitive

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165. *Id.*

166. Goldfine & Kintner, *supra* n. 132, at 101.

167. *Id.*

168. *Id.*

169. *Id.* at 102 ("In the last two years, the U.S. Department of Justice indicted Beton-Sports, an offshore gambling business, and its officers for violating a number of federal laws relating to gaming, and indicted the two founders of NETeller, an online payment services center, for laundering funds from online gaming." (footnote omitted)).

170. *Id.* at 103.

171. Carl Rohsler & Katherine Conlon, *An Analysis of the Chief Features of the Gambling Act 2005*, 15 Ent. L. Rev. 226, 227 (2005).

172. Gambling Rev. Body, *Gambling Review Report 165* (2001) (available at <http://www.culture.gov.uk/images/publications/gamblingreviewchapter30.pdf>).

173. See Rohsler & Conlon, *supra* n. 171, at 227.

174. Dept. for Culture, Media & Sport, *Safe Bet for Success: Modernising Britain's Gambling Laws 6* (2002) (available at <http://www.culture.gov.uk/images/publications/gamblingreportpgs.pdf>) [hereinafter *Safe Bet*].

175. *Id.* at 22.

176. *Id.*

177. *Id.*

advantage in the global market.<sup>178</sup> Based largely upon the recommendations found in *A Safe Bet for Success*, the Gambling Act became law on April 8, 2005.<sup>179</sup>

Britain's Gambling Act legalizes, but also strictly regulates, Internet gambling.<sup>180</sup> In licensing Internet gambling, the U.K. government sought to achieve three purposes:

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.<sup>181</sup>

Furthermore, in order to prevent over-proliferation of Internet gambling companies, the Gambling Act taxes Internet companies at 15%, the same rate as traditional brick-and-mortar casinos.<sup>182</sup> The Act also allows British residents to use Internet gambling companies outside of the U.K.'s jurisdiction; however, these foreign companies are subject to strict scrutiny by the Gambling Commission.<sup>183</sup>

One of the primary purposes of the Gambling Act was to prevent minors from accessing Internet gambling websites.<sup>184</sup> With this in mind, the act creates a number of offenses designed to protect minors.<sup>185</sup> First, a person commits a crime if he "invites, causes or permits a child or young person to gamble."<sup>186</sup> Second, the act forbids a person to invite a minor into a location that holds a casino license at a time when the location is acting in reliance on the license.<sup>187</sup> The act also prevents a casino or other gambling institution from employing minors;<sup>188</sup> however, a person may argue as an affirmative defense to any of these violations that he "took all reasonable steps to determine the individual's age, and he reasonably believed that the individual was not a [minor]."<sup>189</sup> Finally, the act places criminal liability on minors who gamble, enter the premises of a gambling facility, or operate gambling facilities.<sup>190</sup> Violators of these provisions are subject to fines and up to 51 weeks imprisonment.<sup>191</sup>

The Gambling Act also authorizes the Gambling Commission to create a code of practice for licensed gaming establishments.<sup>192</sup> The code of practice requires licensees to establish procedures that address problem gamblers.<sup>193</sup> First, licensees "must make

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178. *Id.*

179. See Rohsler & Conlon, *supra* n. 171, at 227.

180. Goldfine & Kintner, *supra* n. 132, at 103.

181. Gambling Act 2005 pt. 1.1 (available at [http://www.opsi.gov.uk/Acts/acts2005/pdf/ukpga\\_20050019\\_en.pdf](http://www.opsi.gov.uk/Acts/acts2005/pdf/ukpga_20050019_en.pdf)).

182. Goldfine & Kintner, *supra* n. 132, at 103.

183. Michael Blankenship, Student Author, *The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!* 60 Rutgers L. Rev. 485, 511-512 (2008).

184. See Gambling Act 2005 pt. 4.

185. *Id.*

186. *Id.* at pt. 4.46.

187. *Id.* at pt. 4.47.

188. *Id.* at pt. 4.51.

189. Gambling Act 2005 pt. 4.63.

190. *Id.* at pt. 4.48-4.50.

191. *Id.* at pt. 4.62.

192. *Id.* at pt. 2.24.

193. Gambling Commn., *License Conditions and Codes of Practice: October 2008* 31-37 (2008) (available at <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP%20June%202007.pdf>).

information readily available to their customers on how to gamble responsibly and how to access information about . . . problem gambling.”<sup>194</sup> The information must include information concerning: (1) the availability of monitoring methods; (2) the availability of timers; (3) self-exclusion options; and (4) the availability of further help or advice.<sup>195</sup> Next, licensees must establish policies and procedures for the purposes of identifying problem gamblers.<sup>196</sup> Finally, licensees must establish self-exclusion policies and procedures.<sup>197</sup> Through self-exclusion, a gambler voluntarily places himself on a list of individuals banned from a gambling establishment.<sup>198</sup> If the gambler attempts to gamble again after the self-exclusion period ends, the licensee must provide a cooling off period of at least one day before it accepts the gambler’s funds.<sup>199</sup>

One initial concern with the Gambling Act was that by legalizing and regulating gambling, the number of participants would skyrocket; however, initial empirical evidence suggests that the number of gamblers has remained static.<sup>200</sup> A 2007 study conducted by the National Centre for Social Research found that 68% of the adult population in the U.K. participated in some sort of gambling activity in the past year, while in 1999, the number was 72%.<sup>201</sup> The study also found that only 3% of the population gambled online,<sup>202</sup> and that the number of problem gamblers, only 0.6% of the total population, did not increase from 1999 to 2007.<sup>203</sup> Tellingly, the percentage of problem gamblers in the U.K. was lower than the percentage of problem gamblers in the U.S. and Australia, nations that have attempted to prohibit Internet gambling.<sup>204</sup>

### III. ANALYSIS

#### A. Prohibition

The UIGEA fails to prohibit Internet gambling.<sup>205</sup> Even a cursory search of the Internet reveals dozens of gambling sites that continue to cater to U.S. players.<sup>206</sup> Because most, if not all, of these companies are based overseas, it is very difficult to enforce the provisions of the UIGEA.<sup>207</sup> Finally, because the UIGEA does not

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194. *Id.* at 31.

195. *Id.* at 32.

196. *Id.* at 32–33.

197. *Id.* at 33.

198. *See generally* Gambling Commn., *supra* n. 193, at 33–37.

199. *Id.* at 37.

200. Natl. Ctr. for Soc. Research, *British Gambling Prevalence Survey 2007* 9 (available at <http://www.gamblingcommission.gov.uk/pdf/British%20Gambling%20Prevalence%20Survey%202007.pdf>) [hereinafter *Gambling Survey*].

201. *Id.*

202. *Id.*

203. *Id.* at 10.

204. *Id.*

205. *See* Miller, *supra* n. 42, at 203–206.

206. *See e.g.* Bonus Geek, *Online Casinos That Accept USA Players*, <http://www.bonusgeek.com/sites-accepting-usa-players.htm> (last accessed Oct. 26, 2009) (listing 30 sites including poker rooms, sports books, and online bingo halls).

207. *See* James N. Brenner, Student Author, *Betting on Success: Can the Unlawful Internet Gambling Enforcement Act Help the United States Achieve Its Internet Gambling Policy Goals?* 30 *Hastings Commun. & Ent. L.J.* 109, 125 (2007) (“Because most of the offshore Internet casinos are companies that do not have offices, employees, or financial assets in the United States, federal prosecutors may have problems establishing

criminalize the act of placing a bet via an Internet gambling site, U.S. players continue to gamble online without fear of criminal liability.<sup>208</sup>

Some proponents of the UIGEA argue that it will successfully prohibit Internet gambling once the regulations promulgated by the Federal Reserve System are in place,<sup>209</sup> however, the exception made for paper checks will render these regulations ineffective.<sup>210</sup> Even if the regulations could block restricted transactions through all other methods, Internet gambling companies could simply use paper checks to avoid detection.<sup>211</sup> In fact, PokerStars already sends payments to U.S. customers via paper checks.<sup>212</sup> While this method is slow compared to credit and debit card transactions, Internet gambling companies will readily employ paper checks, rather than abandoning the lucrative U.S. market.<sup>213</sup> Therefore, the regulations place a multi-million dollar burden on the financial industry<sup>214</sup> in the midst of a financial crisis<sup>215</sup> in order to implement a scheme that will be unable to stop transactions between Internet gambling companies and U.S. players.<sup>216</sup>

While the UIGEA fails to stop Internet gambling, prohibition supporters maintain that the only way to properly address Internet gambling is through a complete ban.<sup>217</sup> Proponents of prohibition argue that Internet gambling poses the following societal problems: risk of addiction, underage gambling, money laundering, and fraud.<sup>218</sup> Prohibitionists argue that Internet gambling increases the risk of addiction because players have continuous, convenient access to an online casino.<sup>219</sup> They further argue that it is much easier for minors to gamble online because a minor could easily establish an account with his parent's credit card or bank account information.<sup>220</sup> For example, in a 2004 study, a 16 year old was able to register and play on 30 out of 37 gambling

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extraterritorial jurisdiction over them.”).

208. Congress's decision to not criminalize placing a bet online through the UIGEA stands in sharp contrast to an earlier attempt to prohibit Internet gambling: The Internet Gambling Prohibition Act of 1999. H.R. 3125, 106th Cong. (Oct. 21, 1999). This act would have criminalized placing a bet online. *Id.* The punishment for a violation of the act included a fine and the possibility of up to four years of imprisonment. *Id.*

209. See Ltr. from Sen. John Kyl & Rep. Spencer Bachus to U.S. Cong., *Unlawful Internet Gambling Enforcement Act* (April 24, 2008) (available at <http://www.pokersource.com/news/kyl-bachus-pen-pro-uigea-letter-congress.asp>).

210. See Alexander, *supra* n. 15, at ¶ 32.

211. See *id.*

212. PokerStars, *supra* n. 77.

213. Conversations on poker message boards suggest that U.S. players are satisfied with this payment method. See e.g. Two Plus Two Poker Forum, *PokerStars Paper Check-Verification?* <http://forumserver.twoplustwo.com/28/internet-gambling/pokerstars-paper-check-verification-174425/> (last accessed Oct. 29, 2009).

214. 73 Fed. Reg. at 69397.

215. See Associated Press, *Administration Finalizing Internet Gambling Regs*, <http://www.iht.com/articles/ap/2008/11/11/america/Internet-Gambling.php> (Nov. 11, 2008) (quoting Rep. Barney Frank (D. Mass.): “This midnight rulemaking will tie the hands of the new administration, burden the financial services industry at a time of economic crisis and contradict the stated intent of the Financial Services Committee[.]”).

216. See Miller, *supra* n. 42, at 203–206.

217. See e.g. Ltr. from Sen. John Kyl & Rep. Spencer Bachus to U.S. Cong., *supra* n. 209.

218. Katherine A. Valasek, Student Author, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 Mich. St. L. Rev. 753, 760.

219. *Id.* at 762.

220. *Id.* at 764.

sites.<sup>221</sup> Also, money laundering is a concern with Internet gambling because an individual could launder drug funds through a site by depositing the funds, making a few bets, and then cashing out the funds so that they appear to be gambling winnings.<sup>222</sup> Finally, prohibitionists are concerned that fraudulent Internet gambling sites could withhold funds from a player or misrepresent the odds of winning a bet.<sup>223</sup>

### B. Regulation Can Effectively Address the Negative Aspects of Internet Gambling

While substantial problems accompany Internet gambling, some scholars and analysts suggest that these problems could be more effectively addressed through regulation rather than prohibition.<sup>224</sup> Currently, the U.S. does not attempt to address these specific concerns because it attempts to completely prohibit Internet gambling<sup>225</sup> and it is unlikely to address these concerns as long as the UIGEA is in effect.<sup>226</sup> But because the UIGEA fails to prohibit Internet gambling, the problems cited by opponents of Internet gambling go unaddressed by the government.<sup>227</sup> A regulatory scheme for Internet gambling could address potential risks associated with Internet gambling in an effective way while also providing an additional revenue base for the government.<sup>228</sup>

#### 1. Problem Gambling

Many Internet gambling sites already have procedures in place to address problem gamblers.<sup>229</sup> Unlike traditional brick-and-mortar casinos, an online casino can easily track the betting patterns of its patrons.<sup>230</sup> Many sites limit the amount that can be deposited on a daily, weekly, or monthly basis, and players have the option to reduce the limits for their own accounts.<sup>231</sup> Along with limiting deposits, many online casinos also have exclusion procedures in place.<sup>232</sup> For example, a poker player on Full Tilt Poker can exclude himself from the site, either permanently or for a limited period up to ninety days.<sup>233</sup> The player's decision to exclude himself is irrevocable.<sup>234</sup> Furthermore, a player can also purchase software that can block access to all gambling websites.<sup>235</sup>

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221. John Hand, *Schoolgirl Tests Online Gambling*, [http://news.bbc.co.uk/2/hi/uk\\_news/3928261.stm](http://news.bbc.co.uk/2/hi/uk_news/3928261.stm) (last updated July 26, 2004). Because this study was conducted in the U.K. prior to the enactment of the Gambling Act 2005, a new study should be conducted in order to gauge the success of the act in deterring Internet gambling.

222. Valasek, *supra* n. 218, at 765.

223. *Id.* at 766.

224. *See e.g. id.* at 784.

225. *See* 31 U.S.C. §§ 5361–5367.

226. *See generally* Peter J. Schoolidge, *Gambling Blindfolded: The Need for a Regulated Domain for Gambling Web Sites*, 10 *Gaming L. Rev.* 252, 252–253 (2006).

227. *See* Brenner, *supra* n. 207, at 133–134.

228. For a thorough examination of this assertion, *see infra* pt. III(B)(1)–(4) and pt. III(C)(2).

229. *See e.g.* PokerStars, *PokerStars Responsible Gaming*, <http://www.pokerstars.com/about/responsible-gaming/> (last accessed Oct. 30, 2009); Full Tilt Poker, *Responsible Gaming*, <http://www.fulltiltpoker.com/responsible-gaming> (last accessed Oct. 30, 2009).

230. Valasek, *supra* n. 218, at 762.

231. *See e.g.* PokerStars, *supra* n. 229.

232. *See e.g.* Full Tilt Poker, *supra* n. 229.

233. *Id.*

234. *Id.*

235. *See* GamBlock, *GamBlock: We Block Access to Online Gambling*, <http://www.gamblock.com/> (last

A regulatory scheme could provide greater support to problem gamblers by requiring all licensees to have similar deposit limits and self-exclusion procedures in place.<sup>236</sup> It could also require additional methods to protect problem gamblers.<sup>237</sup> One concern with current methods, like self-exclusion, is that they require the problem gambler to recognize his addiction.<sup>238</sup> Under a regulatory model, the government could require a gambling site to automatically exclude players if they reach a certain limit.<sup>239</sup> Furthermore, the sites could share their decision to exclude with other sites so that they could exclude the problem gambler as well.<sup>240</sup>

## 2. Underage Gambling

A regulatory approach to Internet gambling could also address underage gambling by requiring all Internet casinos to implement age detection procedures.<sup>241</sup> Many sites already have sophisticated detection methods in place.<sup>242</sup> Full Tilt Poker employs Integrity Age Verification Services to ensure that its players are of legal age.<sup>243</sup> This service verifies age by cross referencing the data provided by the prospective player with its database.<sup>244</sup> Integrity's database is derived from public information in 157 countries and includes an individual's name, address, and date of birth.<sup>245</sup> If a discrepancy exists between the provided information and the database, an individual will be unable to register on the gambling site.<sup>246</sup> Parents can also prevent minors from accessing gambling sites by installing filtering software, such as Net Nanny.<sup>247</sup>

While age verifications methods such as Integrity ensure that the provided information represents a person of legal gambling age, they cannot guarantee that the person placing bets is actually who they represent themselves to be.<sup>248</sup> For example,

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accessed Oct. 30, 2009).

236. This would be similar to the requirements that a brick-and-mortar casino would have to meet in order to obtain a gambling license from states, like Nevada, that regulate gambling. *See e.g. Programs to Address Problem Gambling*, Reg. 5, Operation of Gaming Estab. at § 5.170 (Nev. Gaming Comm. & St. Gaming Control Bd. Mar. 31, 1999) (available at [http://gaming.nv.gov/stats\\_regs/reg5.pdf](http://gaming.nv.gov/stats_regs/reg5.pdf)).

237. *See e.g. Gambling Commn., supra n. 193*, at 34–35.

238. *See Nadine Nowatzki & Robert Williams, Casino Self-exclusion Programmes: A Review of the Issues*, [http://74.125.95.104/search?q=cache:lxL2Wtk\\_EsUJ:gaming.uleth.ca/agri\\_downloads/973/Nowatzki.ppt+self+exclusion+requires+a+problem+gambler+to+recognize&hl=en&ct=clnk&cd=1&gl=us](http://74.125.95.104/search?q=cache:lxL2Wtk_EsUJ:gaming.uleth.ca/agri_downloads/973/Nowatzki.ppt+self+exclusion+requires+a+problem+gambler+to+recognize&hl=en&ct=clnk&cd=1&gl=us) (last accessed Nov. 13, 2008) (documenting the limitations of self-exclusion programs).

239. This requirement would be similar to regulations that forbid liquor licensees from serving an intoxicated person. *Cf. Mass. Gen. Laws ch. 138, § 69* (2002).

240. This process already exists in regard to the dissemination of self-exclusion decisions. *See Integrity, Self-Exclusion List*, <http://integrity.aristotle.com/content/view/255/197/> (last accessed Nov. 13, 2008) (“Should an individual whose name is on the [self-exclusion] list attempt to open an account with a participating gaming site, Integrity would not return a match (approval) code to the merchant, thus blocking the user’s access to the site.”).

241. *See e.g. Gambling Commn., supra n. 193*, at 27–34.

242. *See e.g. Full Tilt Poker, supra n. 229*.

243. *Id.*

244. *Id.*

245. Integrity, *Cosmos*, [http://integrity.aristotle.com/index.php?option=com\\_content&task=view&id=113&Itemid=145](http://integrity.aristotle.com/index.php?option=com_content&task=view&id=113&Itemid=145) (last accessed Nov. 13, 2008).

246. *See e.g. Full Tilt Poker, supra n. 229*.

247. *See Net Nanny, Net Nanny: Online Peace of Mind for the People You Love*, <http://www.netnanny.com/> (last accessed Nov. 13, 2008).

248. *See e.g. Integrity, Integrity: Direct*, <http://integrity.aristotle.com/content/view/47/197/> (last accessed Nov. 13, 2008).

Integrity's software would be unable to detect a child registering on a gambling website with his parent's information.<sup>249</sup> While this loophole in the age verification methods employed by Internet gambling sites is cause for concern, it is a risk that the U.S. accepts in other areas that it regulates rather than prohibits.<sup>250</sup> For example, thousands of minors access traditional, brick-and-mortar casinos every year with the help of false identification.<sup>251</sup> Finally, the age verification systems currently employed by Internet gambling sites have been successful in other regulated industries, such as online alcohol sales.<sup>252</sup>

### 3. Money Laundering<sup>253</sup>

Regulation can also help prevent criminals from using gambling sites as avenues for money laundering.<sup>254</sup> Under the current regime of attempted prohibition, some have argued that the opportunity for money laundering is actually greater than under regulation.<sup>255</sup> As noted above, the UIGEA drove many reputable e-wallet companies, which have policies in place to prevent money laundering, out of the U.S. Internet gambling market.<sup>256</sup> For example, Neteller employs sophisticated identification methods and reports activities that raise a suspicion of money laundering to the appropriate

249. See *id.*; see also Severin Carrell, *Children Using Debit Cards to Gamble Online*, <http://www.independent.co.uk/news/business/news/children-using-debit-cards-to-gamble-online-656035.html> (Mar. 31, 2002) ("Gamcare, a charity specializing in problem gambling, has seen a surge in cases where children lied about their identities to register on Internet sites, and either used their own debit cards or stole their parents's").

250. For example, minors frequently use "fake IDs" to obtain alcohol; however, states have responded to this phenomenon by criminalizing the use of fake IDs, rather than prohibiting both minors and adults from purchasing alcohol. See e.g. Elena Grimm, *Out to Get 'em: Minors Watch Out*, <http://www.winona.edu/winonan/s2007/1-31/Outtogetem.htm> (last accessed Nov. 13, 2008) ("Eighteen percent of underage college students use fake IDs to obtain alcohol, according to a Harvard study."); Alcohol Policy Info. Sys., *False Identification for Obtaining Alcohol*, [http://alcoholpolicy.niaaa.nih.gov/index.asp?SEC={E8988D1D-B915-4133-808E-23443EF43867}&Type=BAS\\_APIIS](http://alcoholpolicy.niaaa.nih.gov/index.asp?SEC={E8988D1D-B915-4133-808E-23443EF43867}&Type=BAS_APIIS) (last accessed Nov. 13, 2008) ("All States prohibit use of false identification by minors to obtain alcohol.").

251. See B. Grant Stitt, David Giacompassi, & Margaret Vandiver, *A Minor Concern? Underage Casino Gambling and the Law*, 37 Soc. Science J. 361, 363 (2000).

252. See Integrity, *Case Study: Age Verification for Online Alcohol Sales*, [http://www.aristotle.com/documents/Online\\_Wine\\_Sales-WhitePaper2006.pdf](http://www.aristotle.com/documents/Online_Wine_Sales-WhitePaper2006.pdf) (last accessed Nov. 13, 2008) (describing online wine retailer Sherry-Lehmann's use of Integrity's age verification software in order to comply with regulations in Massachusetts); see also Donna Leinwand, *Teens Not Rushing Online to Buy Wine, Survey Shows*, [http://www.usatoday.com/tech/news/2006-08-09-survey-online-alcohol\\_x.htm](http://www.usatoday.com/tech/news/2006-08-09-survey-online-alcohol_x.htm) (Aug. 9, 2006) ("A year after the Supreme Court made it easier for wineries to ship products to customers in a different state, a new survey indicates that teens haven't necessarily rushed to use the Internet to buy alcohol, as critics of the court's decision have feared. The survey . . . found that 2% of youths ages 14-20 reported having purchased alcohol online, and that 12% reported having a friend who had ordered alcohol online.").

253. Considering that the characters from *Office Space* were unfamiliar with what money laundering actually entails, it may be helpful to provide the definition here. See *Office Space* (20th Century Fox 1999) (motion picture) ("I can't believe what a bunch of nerds we are. We're looking up 'money laundering' in a dictionary."). So without further ado, Money laundering is "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced." *Black's Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004).

254. Valasek, *supra* n. 218, at 765.

255. Benjamin B. Nelson, Student Author, *Regulation or Prohibition? The Troubled Legal Status of Internet Gambling Casinos in the United States in the Wake of the Unlawful Internet Gambling Enforcement Act of 2006*, 9 Tex. Rev. Ent. & Sports L. 39, 64 (2007).

256. Alexander, *supra* n. 15, at ¶ 39.

authorities.<sup>257</sup> These reputable companies have been replaced in some cases by companies that actively participate in money laundering.<sup>258</sup> Under a regulatory scheme, the government could make policies that successfully address money laundering mandatory.<sup>259</sup> Furthermore, companies that facilitated money laundering would be unable to obtain a license.<sup>260</sup>

#### 4. Fraud

Because players cannot actually see the dice rolling or the roulette wheel spinning, the need for integrity within the Internet gambling industry is paramount.<sup>261</sup> While regulation could address fraudulent practices, the market already provides a significant incentive for companies to avoid fraud.<sup>262</sup> Because gamblers can choose between thousands of gambling sites, a site that “loaded the dice”<sup>263</sup> or refused to pay out winnings would not remain in the market for long.<sup>264</sup> Information about gambling websites is widely disseminated through watchdog sites and message boards.<sup>265</sup> Regulation could supplement these market forces by requiring licensed sites to maintain financial reserves sufficient to pay winning bets and mandating odds authentication software.<sup>266</sup>

#### C. Which Regulatory Scheme Will Best Serve U.S. Interests in Internet Gambling?

Because a regulatory scheme can address the problems presented by Internet gambling more effectively than the attempted prohibition scheme established by the UIGEA,<sup>267</sup> Congress should implement the regulatory scheme that best provides an additional revenue stream for the government while also ensuring that Internet gambling does not encourage underage gambling, problem gambling, money laundering, or fraud.<sup>268</sup> Scholars have suggested many different regulatory schemes, which generally

257. Neteller, *Security*, <https://merchant.neteller.com/security.html> (last accessed Nov. 13, 2008).

258. Alexander, *supra* n. 15, at ¶ 46.

259. The prevention of money laundering in Internet gambling is one of the primary objectives of the U.K.’s Gambling Act 2005 and licensees must have procedures in place to deter money laundering. *See* Gambling Act 2005 pt. 1.1 (“In this Act a reference to the licensing objectives is a reference to the objectives of preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime . . . .”); Gambling Commn., *supra* n. 193, at 26–27 (licensees must “establish procedures of internal control and communication to prevent money laundering.”).

260. *See e.g.* Gambling Commn., *supra* n. 193, at 26–27.

261. *See* Interactive Gaming Council, *Code of Conduct*, <http://www.igcouncil.org/content/view/20/37/> (last accessed Nov. 14, 2008) (“To enhance customer confidence in gaming integrity, IGC Members agree to make every reasonable effort to ensure their systems, algorithms and practices perform in the manner intended and as portrayed to the customer.”).

262. *See* Owens, *supra* n. 131, at 98.

263. While this is a concern for online casinos that provide games where gamblers play against the house, it is not an issue for poker sites because there players compete against themselves while the site takes a fixed percentage of the pot. *See e.g.* PokerStars, *supra* n. 77. Thus, in the words of Doc Holliday in the film *Tombstone*, “I said poker’s an honest trade. Only suckers buck the tiger. The odds are all with the house.” *Tombstone* (Hollywood Pictures 1993) (motion picture).

264. *See* Owens, *supra* n. 131, at 98.

265. *Id.* at 99.

266. Valasek, *supra* n. 218, at 766.

267. For a detailed discussion, see *supra* pt. III(B).

268. Many scholars who have proposed regulatory schemes for Internet gambling cite the ability of their

either call for self-regulation by the Internet gambling industry<sup>269</sup> or some type of governmental regulation.<sup>270</sup>

### 1. Self-regulation by the Internet Gambling Industry

Under a self-regulatory scheme, the Internet gambling industry would create a governing body to serve in the place of a government agency.<sup>271</sup> The Internet gambling industry has already established two organizations that could serve in this capacity: E-Commerce and Online Gaming Regulation and Assurance,<sup>272</sup> and the Interactive Gaming Council.<sup>273</sup> Proponents of self-regulation argue that because Internet gambling has a global presence, one individual nation cannot effectively regulate it.<sup>274</sup> They also argue that the market effectively discourages Internet gambling fraud without the aid of governmental regulation.<sup>275</sup> Furthermore, many nations have outdated gambling laws<sup>276</sup> and a self-regulatory scheme could ensure that Internet gambling regulations reflect current technology.<sup>277</sup>

While the Internet gambling industry should be praised for its self-regulatory efforts, some form of governmental regulation is needed to legitimize the industry and fully protect players.<sup>278</sup> Currently, industry organizations attempting to regulate the Internet gambling industry rely on voluntary compliance, and the most severe punishment that an organization can inflict on a company is the removal of its seal of approval.<sup>279</sup> Furthermore, some scholars note that under a self-regulatory scheme, an

schemes to address some or all of these factors. See e.g. Miller, *supra* n. 42, at 216–220; Valasek, *supra* n. 218, at 761–767, 772–773; Owens, *supra* n. 131, at 98–100.

269. See e.g. Owens, *supra* n. 131, at 98–100.

270. See e.g. Ryan S. Landes, Student Author, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. Rev. 913, 936–943 (2007); Nicholas M. Wajda, Student Author, *Over-playing a Weak Hand: Why Giving Individual States a Choice Is a Better Bet for Internet Gambling in the United States*, 29 Thomas Jefferson L. Rev. 313, 313–314 (2007); Valasek, *supra* n. 218, at 777–784.

271. See Owens, *supra* n. 131, at 98–100.

272. The stated purpose of this organization is to ensure “proper and transparent monitoring of approved online casinos and poker rooms.” E-Commerce and Online Gaming Reg. and Assurance, *Welcome to eCOGRA.org*, <http://www.ecogra.org/default.aspx?OP=P> (last accessed Oct. 28, 2009). Members must comply with “Generally Accepted Practices” that address underage gambling, problem gambling, fair play, and money laundering prevention. E-Commerce and Online Gaming Reg. and Assurance, *Generally Accepted Practices—Casinos, Poker, Bingo & Sportsbook*, <http://www.ecogra.org/egap.aspx?Page=1&OP=O> (last accessed Oct. 28, 2009). The organization also provides dispute mediation for players and member sites. E-Commerce and Online Gaming Reg. and Assurance, *Dispute Resolutions*, <http://www.ecogra.org/dispute.aspx?Page=1&OP=P> (last accessed Oct. 28, 2009).

273. The Interactive Gaming Council has also established a code of conduct and provides voluntary mediation for members. Interactive Gaming Council, *Interactive Gaming Council*, <http://www.igcouncil.org/> (last accessed Oct. 28, 2009).

274. See Owens, *supra* n. 131, at 96.

275. See *id.* at 98–99.

276. See *id.* at 95.

277. See *id.* at 100; see generally Valasek, *supra* n. 218, at 777–779.

278. See Scoolidge, *supra* n. 226, at 261–262 (“The industry recognizes the need for government regulation if it is to attain the same level of legitimacy enjoyed by traditional casinos in reputable jurisdictions.”); Keith Furlong, *Gaming Continues as an Internet Success Story, Despite Obstructions from the U.S. Government: The Industry Uses Self-Regulation to Fill the Void Left by Governmental Inaction*, 9 Gaming L. Rev. 211, 213 (2005) (“Government regulation is the only way to move the Internet gaming industry, as a subset of eCommerce in general, to the next level of legitimacy.”).

279. Scoolidge, *supra* n. 226, at 261.

industry's self-interest is often given priority over public concerns.<sup>280</sup> While Internet gambling companies need to instill consumer confidence in order to be profitable, this incentive may not sufficiently ensure effective self-regulation.<sup>281</sup> The Internet gambling industry desperately needs to inspire more consumer confidence, as 55% of Internet gamblers believe that online casinos may find ways to cheat players.<sup>282</sup> Governmental regulation could inspire more confidence in the fairness of the Internet gambling industry.<sup>283</sup> Even the Interactive Gaming Council realizes that it alone cannot sufficiently regulate online gambling: "Rather than allow the industry to continue in uncharted territory, regulation is needed to protect players, instill confidence and to potentially create a new revenue source."<sup>284</sup> Finally, while having the appearance of a financially prudent practice, some scholars assert that self-regulation imposes a greater financial burden on taxpayers than governmental regulation.<sup>285</sup>

## 2. Governmental Regulation

Congress should be as careful in implementing a regulatory scheme as it was careless in passing the UIGEA.<sup>286</sup> As stated above, the UIGEA passed as a rider to the Safe Port Act, a crucial national security bill.<sup>287</sup> Congress did not debate the merits of the UIGEA, and some members of Congress did not even know that it was part of the act.<sup>288</sup> In contrast, the U.K.'s decision to regulate Internet gambling was the product of six years of research and debate.<sup>289</sup> The government issued multiple reports on the feasibility, benefits, and disadvantages of regulating the Internet gambling industry.<sup>290</sup> Both Parliament and the general public extensively debated the issue before the government finally decided to regulate the industry.<sup>291</sup> Congress should take a similar approach in implementing a regulatory scheme. In fact, in 2007, Rep. Shelley Berkley (D. Nev.) attempted to begin research into the Internet gambling industry through the

280. See e.g. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 Duke L.J. 389, 427-430 (2003) ("The regulatory standards produced by the self-regulatory body are likely to reflect the interests of the industry it is regulating.").

281. See *id.* at 430 (discussing fraudulent practices in self-regulated stock markets, Shapiro concludes that "these events do suggest that self-regulation is not to be trusted, even in industries where public confidence is important to the sales of their products").

282. Am. Gaming Assn., *State of the States 2006: The AGA Survey of Casino Entertainment 27* (Am. Gaming Assn. 2006) (available at [http://www.americangaming.org/assets/files/2006\\_Survey\\_for\\_Web.pdf](http://www.americangaming.org/assets/files/2006_Survey_for_Web.pdf)) (finding that 15% of Internet gamblers strongly agreed and 40% somewhat agreed with the following statement: "I believe that online casinos find ways to cheat people").

283. A study conducted by the International Gaming Institute at the University of Nevada, Las Vegas found that if Internet gambling was licensed and regulated, it would engender more trust in some Internet gamblers. See Bo J. Bernhard, Anthony F. Lucas & Elena Shampner, *Internet Gambling in Nevada 5* (U. Nev. Las Vegas 2007) (available at [http://gaming.nv.gov/documents/pdf/igi\\_ngcb\\_internet\\_gaming\\_nvfinalrpt.pdf](http://gaming.nv.gov/documents/pdf/igi_ngcb_internet_gaming_nvfinalrpt.pdf)).

284. Interactive Gaming Council, *IGC Urges Australia to Regulate*, <http://www.igcouncil.org/content/view/115/99/> (Apr. 23, 2003).

285. See Shapiro, *supra* n. 280, at 426 ("In most instances, the costs associated with these properties are likely to exceed any savings that an agency gains by employing self-regulation.").

286. Cf. Barack Obama, *My Plan for Iraq*, <http://www.nytimes.com/2008/07/14/opinion/14obama.html> (July 14, 2008) ("As I've said many times, we must be as careful getting out of Iraq as we were careless getting in.").

287. Rose, *supra* n. 22, at 1.

288. *Id.*

289. See Rohsler & Conlon, *supra* n. 171, at 227.

290. See e.g. Gambling Rev. Body, *supra* n. 172, at 165; *Safe Bet*, *supra* n. 174, at 6.

291. See Rohsler & Conlon, *supra* n. 171, at 227.

Internet Gambling Study Act.<sup>292</sup> This act would have commissioned the National Academy of Sciences to study the Internet gambling industry and the feasibility of a regulatory scheme.<sup>293</sup> While Congress failed to pass this bill,<sup>294</sup> it should thoroughly research any regulatory scheme before adopting it, as the UIGEA demonstrates the folly of passing legislation without sufficient knowledge of the Internet gambling industry.<sup>295</sup>

Congress should begin its research into the Internet gambling industry by studying how the U.K. regulates the industry.<sup>296</sup> The U.K. approach is admirable because it safeguards against the potential problems associated with Internet gambling: underage gambling, problem gambling, money laundering, and fraud.<sup>297</sup> Early studies suggest that this approach has been successful at least in curbing problem gambling, as the number of problem gamblers in the U.K. did not increase from 1999 to 2007.<sup>298</sup> Furthermore, with 170 applicants seeking an Internet gambling license and the accompanying 15% tax rate,<sup>299</sup> the U.K. stands to substantially increase its tax revenue through regulation.<sup>300</sup>

While many Internet gambling companies have sought a license from the U.K.,<sup>301</sup> the large, established Internet gambling companies have not sought a license because the “White List” program ensures that they can market to British gamblers while remaining licensed in their tax-friendly nations.<sup>302</sup> The Gambling Act of 2005 authorizes Internet gambling companies licensed by nations in the European Economic Area (EEA) to advertise in the U.K.<sup>303</sup> Under the White List program, non-EEA countries may apply for consideration as an EEA nation so that Internet gambling companies licensed by these countries can also advertise in the U.K.<sup>304</sup> The Secretary of State may accept these applications upon a showing that the country regulates gambling “in order to protect children and vulnerable people from being harmed or exploited; to keep crime out; and to ensure that gambling is conducted fairly.”<sup>305</sup> The country must also “have the facilities and resources in place to ensure compliance and enforcement with those values

292. H.R. 2140 110th Cong. §§ 1–3 (May 3, 2007).

293. *Id.* at § 3.

294. Govtrack.us, *H.R. 2140: Internet Gambling Study Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2140> (last accessed Oct. 30, 2009).

295. *See* Rose, *supra* n. 22, at 1.

296. *See* Blankenship, *supra* n. 183, at 512 (“The United States could create a commission similar to the Gambling Commission to oversee the licensing of Internet gambling operators. In this way, the United States could benefit from financial collection and regulatory credibility.”); Goldfine & Kintner, *supra* n. 132, at 103 (“A good example of a national regulatory approach is the UK’s Gambling Act that was enacted in 2007 and makes it legal for its citizens to gamble online.”).

297. *See* Gambling Commn., *supra* n. 193, at 9–11, 26–39.

298. *See* *Gambling Survey*, *supra* n. 200, at 10.

299. Scott Longley, *Gambling Commission ‘Surprised’ As Remote License Count Tops 170*, <http://www.gamblingcompliance.com/node/13808> (Apr. 29, 2008).

300. *See* Goldfine & Kintner, *supra* n. 132, at 103.

301. Longley, *supra* n. 299.

302. *See* Simon Bowers, *Online Gambler Seeks U.K. Licence*, <http://www.guardian.co.uk/business/2008/feb/08/gambling.bodog> (Feb. 8, 2008) (“Almost all of the other online casino and poker groups targeting British punters have chosen to boycott the UK regulatory regime because of the 15% remote gaming tax imposed last year by the Treasury.”). For your information, “punter” is a British term for a gambler. *See* Merriam-Webster, *Punter*, <http://www.merriam-webster.com/dictionary/punter> (last accessed Oct. 27, 2009).

303. Gambling Act 2005 pt. 16.331.

304. Dept. for Media, Culture, & Sport, *Gambling Act 2005: “Whitelisting” 1.1* (Dept. for Media, Culture, & Sport 2007) (available at <http://www.culture.gov.uk/images/publications/WhiteListingCriteria.pdf>).

305. *Id.* at 1.17.

and the regulatory regime in operation.”<sup>306</sup> Thus far, the Secretary of State has “whitelisted” Antigua and Barbuda, Alderney, the Isle of Man, and Tasmania.<sup>307</sup> A company licensed in a White List country has little incentive to seek a U.K. license.<sup>308</sup> For example, PokerStars is licensed in the Isle of Man, which has a 1.5% duty and no corporation tax.<sup>309</sup> Because the Isle of Man is on the White List, PokerStars is free to advertise to British gamblers while avoiding the 15% tax rate imposed by the U.K.<sup>310</sup>

The U.S. must learn from the U.K.’s mistakes and employ methods that prevent Internet gambling companies from profiting from U.S. players without a government license.<sup>311</sup> First, Congress should ban all non-licensed Internet gambling companies from advertising in the U.S.<sup>312</sup> This ban is feasible because the U.S. Justice Department already prohibits all Internet gambling advertisements.<sup>313</sup> It recently collected \$31.5 million in fines from Microsoft, Yahoo, and Google for promoting Internet gambling.<sup>314</sup> While Internet gambling companies currently exploit a loophole in the ban by promoting a company’s “play money” site, which is linked to its “real money” site, Congress could easily close this loophole for non-licensed companies.<sup>315</sup>

Internet gambling is a \$16 billion a year industry and analysts estimate that half of the revenue comes from U.S. gamblers.<sup>316</sup> Because the U.S. represents such a large part of the industry, established companies would have a great incentive to become licensed in the U.S., especially if they could no longer advertise in the U.S. without a license.<sup>317</sup> While these companies may claim that U.S. gamblers will continue to play on their sites

306. *Id.*

307. Pokerpages, *Antigua Now on UK White List of Approved Gaming Advertisers*, <http://www.pokerpages.com/poker-news/news/antigua-now-on-uk-white-list-of-approved-gaming-advertisers-31255.htm> (Nov. 5, 2008).

308. See generally Pokerpages, *UK White List Who Can Advertise is Published—Includes PokerStars*, <http://www.pokerpages.com/poker-news/news/uk-white-list-who-can-advertise-is-published--includes-pokerstars-29905.htm> (Aug. 11, 2007) (discussing how companies licensed in countries not on the White List are considering moving to a White List country rather than seeking a U.K. license).

309. See Isle of Man Gov., *Isle of Man Confirmed on U.K. White List*, <http://www.gov.im/lib/news/dti/isleofmanconfirm.xml> (Aug. 9, 2007) (“Any e-Gaming business locating in the Isle of Man can expect not only full access to the UK market, one of the strongest in Europe, but also the added benefits of 1.5% duty, 0% corporation tax, [and] a world class telecommunications infrastructure.”).

310. *Id.*

311. If the government cannot persuade or compel Internet gambling companies to seek a license, then measures designed to protect the public are ineffective. See generally Landes, *supra* n. 270, at 936–938.

312. Cf. Ariz. Rev. Stat. Ann. § 32-1151 (West 2008) (requiring a license in order to advertise as a contractor).

313. Ltr. from John G. Malcolm, Dep. Asst. Atty. Gen. U.S. Dept. of Justice, to Natl. Assn. of Broadcasters, *Advertising for Internet Gambling and Offshore Sportsbooks Operations 1* (June 11, 2003) (available at [http://www.igamingnews.com/articles/files/NAB\\_letter-030611.pdf](http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf)) (“[T]he Department of Justice, as a public service, would like you to be aware that the entities and individuals placing these [Internet gambling] advertisements may be violating state and federal laws and that entities and individuals that run and accept such advertisements may be aiding and abetting these illegal activities.”).

314. Associated Press, *Internet Giants Settle U.S. Case on Gambling Ads*, [http://www.nytimes.com/2007/12/20/technology/20soft.html?\\_r=1&scp=24&sq=microsoft%20google%20yahoo%20internet%20gambling&st=cse](http://www.nytimes.com/2007/12/20/technology/20soft.html?_r=1&scp=24&sq=microsoft%20google%20yahoo%20internet%20gambling&st=cse) (Dec. 20, 2007) (“[T]he Department of Justice has advised that online gambling is illegal in the United States, and ads to promote it are improper.” (quoting a Google spokesperson)).

315. See Chuck Humphrey, *Advertising Online Gambling Casinos: Advertising for ‘Dot.net’ Websites*, <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm> (last updated Aug. 6, 2006).

316. Warner, *supra* n. 16.

317. The fall of PartyGaming’s revenues after Congress passed the UIGEA demonstrates the importance of the U.S. market to Internet gambling companies. See Pajich, *supra* n. 61.

even if they were unlicensed, they would be hard pressed to claim that they have a legion of loyal customers considering that a majority of Internet gamblers believe that these companies try to cheat players.<sup>318</sup> Under the current system, U.S. gamblers do not have a domestic alternative; however, under a regulatory scheme, they could play on government licensed sites, which would likely engender more trust than the foreign, unlicensed sites.<sup>319</sup> With these incentives for seeking a license in place, the government can tap in to a substantial new revenue stream.<sup>320</sup> For example, a PricewaterhouseCoopers study found that regulation of Internet gambling could increase federal revenue by up to \$42.8 billion over a ten year period.<sup>321</sup>

An additional benefit of a governmental regulatory scheme is the boost that it would give to the ailing financial industry.<sup>322</sup> Gamblers use credit cards in roughly 90% of all transactions with Internet gambling companies.<sup>323</sup> Credit card transaction fees cost Internet gambling companies up to 7.5% per transaction.<sup>324</sup> Analysts estimate that based upon these fees and the size of the U.S. Internet gambling market, financial institutions stand to gain \$420 million in annual revenues from the regulation of Internet gambling.<sup>325</sup> Thus, while the UIGEA requires financial institutions to spend millions of dollars in an attempt to block restricted transactions,<sup>326</sup> regulation will enable financial institutions to tap into a multi-million dollar market currently dominated by foreign entities.<sup>327</sup>

#### D. *Obstacles to the Implementation of a Governmental Regulatory Scheme*

While Congress has the authority to regulate Internet gambling through the Commerce Clause,<sup>328</sup> states have traditionally regulated gambling through their police powers.<sup>329</sup> Because of this, states vary considerably from one another in the type of gambling permitted.<sup>330</sup> Two states, Hawaii and Utah, ban all forms of gambling.<sup>331</sup> Other states, such as Tennessee, allow only state-sponsored gambling.<sup>332</sup> Finally, some

318. See Am. Gaming Assn., *supra* n. 282, at 27.

319. See Scoolidge, *supra* n. 226, at 264 (“[E]-casinos registered in a regulated gambling domain would get the majority of online gambling patrons.”).

320. PricewaterhouseCoopers, *Estimate of Federal Revenue Effect of Proposal to Regulate and Tax Online Gambling 2* (Natl. Econ. Consulting 2007) (available at <http://www.safeandsecureig.org/media/taxestimate.pdf>).

321. *Id.*

322. See Miller, *supra* n. 42, at 216.

323. *Id.*

324. *Id.*

325. *Id.*

326. 73 Fed. Reg. at 69397.

327. See Alexander, *supra* n. 15, at ¶¶ 39–40.

328. U.S. Const. art. I, § 8; see *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 862 (N.Y. Sup. 1999) (“[T]he Interstate Commerce Clause gives Congress the plenary power to regulate illegal gambling conducted between a location in the United States and a foreign location.”).

329. See Kiran S. Raj, Student Author, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 Emory L.J. 777, 780 (2006).

330. *Id.*

331. *Id.* at 781.

332. *Id.*

states, such as Nevada, permit virtually all types of gambling.<sup>333</sup> If Congress implemented a regulatory scheme that treated all states equally, states that ban all other types of gambling would be forced to permit Internet gambling.<sup>334</sup> Furthermore, states that rely on state-sponsored gambling for revenue would face competition from Internet casinos.<sup>335</sup>

In 2007, Rep. Barney Frank (D. Mass.) proposed a regulatory scheme allowing individual states to decide whether to regulate or prohibit Internet gambling.<sup>336</sup> The scheme also allows states that regulate Internet gambling to place restrictions on it that go beyond federal regulations.<sup>337</sup> Under this scheme, an Internet gambling company would establish its businesses in a state that regulated the industry.<sup>338</sup> The company could accept players from its home state and all other states that allowed Internet gambling; however, it would be forbidden from accepting funds from residents of states that banned Internet gambling.<sup>339</sup> The companies could verify a gambler's residence with the same technology used for age-verification.<sup>340</sup> Under this state-level approach, states that see Internet gambling as a danger could protect their residents through prohibition, while other states that see it as a potential revenue source could regulate the industry.<sup>341</sup>

There are several problems with a state level approach to Internet gambling.<sup>342</sup> First, since some states would ban Internet gambling, an Internet gambling license would have less value because the number of potential gamblers would be much lower.<sup>343</sup> Furthermore, a state level approach to regulation runs the risk of creating a "race to the bottom" effect where states regulate and tax to the least extent possible in order to attract Internet gambling companies.<sup>344</sup> This race to the bottom would work against one of the purposes of regulating Internet gambling by reducing the protections afforded to Internet gamblers.<sup>345</sup> Also, the rationale for state regulation of land-based gambling does not

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333. *Id.* at 782.

334. *See generally* Landes, *supra* n. 270, at 927–943 (proposing a regulatory system that allows Internet gambling nationwide without exempting states that ban all types of gambling).

335. *See generally id.*

336. H.R. 2046, 110th Cong. § 5385(a) (Apr. 24, 2007). This bill died in committee. Govtrack.us, *H.R. 2046: The Internet Gambling Regulation and Enforcement Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2046> (last updated Nov. 6, 2008).

337. *Id.*

338. *Id.*

339. *Id.*

340. *See* Raj, *supra* n. 329, at 808–809.

341. *See generally id.* at 812–813.

342. *Infra* nn. 343–350 and accompanying text.

343. Washington, Illinois, South Dakota, Louisiana, Indiana, Michigan, Montana, and Oregon already ban Internet gambling. Mark B. Dubnoff, *State Bans on Internet Gambling May Be Unconstitutional*, 12 *Gaming L. Rev. & Econ.* 207, 213–214 (2008).

344. *Cf.* David M. Konisky, *Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?* 51 *Am. J. Political Sci.* 853, 853 (2007) ("In the U.S. context, critics of decentralization argue that states are primarily concerned with economic development, and, when faced with interstate competition for mobile capital, they will relax their environmental regulation to gain an advantage over other states.").

345. *See e.g.* Gambling Act 2005 § 1.1 ("In this Act a reference to the licensing objectives is a reference to the objectives of protecting children and other vulnerable persons from being harmed or exploited by gambling.").

apply to Internet gambling.<sup>346</sup> States need to regulate land-based casinos because they affect both gamblers and non-gamblers.<sup>347</sup> For example, if a state could not control where a company builds a casino through zoning laws and building permits, the construction of a casino in an inappropriate area could cause traffic jams and negatively affect home values in the area.<sup>348</sup> In contrast, Internet gambling takes place in the privacy of one's home and thus does not evoke the same rationale for state regulation.<sup>349</sup> Finally, some scholars argue that state bans of Internet gambling violate the Constitution's dormant Commerce Clause when the state allows similar land-based gambling because the bans favor "in-state economic interests over out-of-state economic interests."<sup>350</sup> Because of these reasons, the federal government, rather than the states, should regulate Internet gambling.<sup>351</sup>

The gaming interests of Indian tribes represent another obstacle to a regulatory scheme.<sup>352</sup> In 2006, revenue from Indian gaming exceeded \$25 billion and the industry employed 670,000 people, 75% of whom were Indian.<sup>353</sup> Congress regulates Indian gaming through the Indian Gaming Regulatory Act (IGRA).<sup>354</sup> The IGRA divides Indian gaming activities into three classes.<sup>355</sup> Tribes have exclusive control over Class I gaming, which involves games played between tribal members for small prizes.<sup>356</sup> Class II gaming includes bingo and non-casino card games.<sup>357</sup> Tribes are free to conduct these activities without state interference as long as the state does not completely ban the activity.<sup>358</sup> Class III gaming includes casino style games such as blackjack, roulette, and craps.<sup>359</sup> In order to offer Class III gaming, a tribe must enter into a compact with the state in which the tribe is located.<sup>360</sup> The IGRA prohibits states from taxing Indian gaming;<sup>361</sup> however, the U.S Department of the Interior has approved compacts that provide for revenue sharing between states and tribes in exchange for exclusivity in providing the gaming activity.<sup>362</sup> For example, Oklahoma created a State-Tribal Gaming

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346. See generally Eric B. Becker, Student Author, *Slots in the City: A Critical Look at the Balance of Decision-Making Power in Gaming Legislation*, 35 *Fordham Urb. L.J.* 1033, 1050–1055 (2008). (discussing reasons states may choose to regulate land-based gaming and the ramifications such decisions can have locally).

347. See generally *id.*

348. See generally *id.*

349. See Scoolidge, *supra* n. 226, at 252.

350. Dubnoff, *supra* n. 343, at 207.

351. See generally Landes, *supra* n. 270, at 927–943 (proposing a regulatory system on the federal level rather than the state level).

352. See generally I. Nelson Rose & Martin D. Owens, *Internet Gaming Law* 161–175 (Mary Ann Liebert, Inc. 2005).

353. Natl. Indian Gaming Assn., *Indian Gaming Facts*, [http://www.indiangaming.org/info/pr/press-releases-2007/NIGA\\_econ\\_impact\\_2006.pdf](http://www.indiangaming.org/info/pr/press-releases-2007/NIGA_econ_impact_2006.pdf) (last accessed Oct. 28, 2009).

354. See Rose & Owens, *supra* n. 352, at 164–165.

355. See *id.*

356. See *id.* at 164; Jeffrey A. Dempsey, *Surfing for Wampum: Federal Regulation of Internet Gambling and Native American Sovereignty*, 25 *Am. Indian L. Rev.* 133, 144 (2001).

357. See Dempsey, *supra* n. 356, at 144.

358. See Rose & Owens, *supra* n. 352, at 164–165.

359. See *id.* at 165.

360. See *id.*

361. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 *Nev. L.J.* 285, 291 (2004).

362. See Katie Eidson, Student Author, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 *Am. Indian L.*

Act that gives Oklahoma tribes total exclusivity for card games.<sup>363</sup> However, it appears that this exclusivity arrangement does not apply to the Internet, because Internet gambling is illegal in Oklahoma, according to the official opinion of the Oklahoma Attorney General.<sup>364</sup>

Rep. Barney Frank's proposed regulatory scheme addresses the issue of Indian gaming by allowing each Indian tribe to decide whether to regulate or prohibit Internet gambling.<sup>365</sup> Furthermore, tribes that choose to allow Internet gambling could place extra restrictions on the industry above and beyond federal regulations.<sup>366</sup> Companies that violate these tribal regulations could have their licenses revoked, or even face criminal liability.<sup>367</sup> This approach to Indian gaming places a tremendous burden on Internet gambling companies.<sup>368</sup> There are 562 federally-recognized Indian tribes in the U.S.<sup>369</sup> Since each tribe could make its own Internet gambling regulations, companies would have to comply with up to 562 different regulatory schemes depending on a gambler's residence.<sup>370</sup>

Congress should not adopt this onerous approach, but instead should allow tribes to compete in the Internet gambling market.<sup>371</sup> Indian tribes would have an advantage in the Internet gambling industry because of their years of gaming experience.<sup>372</sup> Over the years, tribes have built up a loyal cadre of customers who would likely prefer to gamble online with the same entity that operates their preferred brick-and-mortar casino.<sup>373</sup> Participation in the Internet gambling industry, where location is not a factor, would also benefit tribes located in remote areas who have been unable to successfully run casinos because of their distance from major population areas.<sup>374</sup> Finally, Internet gambling should not harm the tribe's existing gaming operations considering that in a 2007 study, four out of five Internet gamblers said that gambling online did not affect their gambling in brick-and-mortar casinos.<sup>375</sup>

#### IV. CONCLUSION

Internet gambling is a \$16 billion a year industry and analysts estimate that half of

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Rev. 319, 326 (2004).

363. *See id.* at 328-329.

364. *See* Okla. Atty. Gen. Op. 02-25 (June 26, 2002) (available at <http://www.oscn.net/applications/oscn/deliverdocument.asp?id=406357&hits=>).

365. H.R. 2046, 110th Cong. at § 5385(b).

366. *Id.*

367. *Id.*

368. *See generally id.*

369. *See* Natl. Indian Gaming Assn., *supra* n. 353.

370. *See* H.R. 2046, 110th Cong. at § 5385(b).

371. *See generally* Dempsey, *supra* n. 356, at 151.

372. For example, the Mashantucket Pequot Tribal Nation began its gaming operation in 1986 and now operates one of the largest casinos in the world, the Foxwoods Resort Casino. Foxwoods Resort Casino, *About Foxwoods*, <http://www.foxwoods.com/AboutFoxwoods/> (last accessed Nov. 29, 2008).

373. *See e.g. id.* ("More than 40,000 guests visit Foxwoods each day."); *see generally* Landes, *supra* n. 270, at 938 (discussing how gamblers would be drawn to Internet casinos established by reputable brick-and-mortar casinos).

374. *See* Rose & Owens, *supra* n. 352, at 171.

375. *See* Bernhard, Lucas, & Shampaner, *supra* n. 283, at 3.

the revenue comes from U.S. gamblers.<sup>376</sup> Instead of regulating and taxing this lucrative industry, Congress has pursued a policy of prohibition through the UIGEA.<sup>377</sup> However, the UIGEA has failed to stop Internet gambling and instead has only driven reputable companies out of the industry.<sup>378</sup> Furthermore, the rules promulgated by the Federal Reserve System will not strengthen the UIGEA because they leave too many loopholes Internet gambling companies can exploit.<sup>379</sup> Thus, under the current system, the Internet gambling industry uses the U.S. as its primary revenue source and leaves the government to address the problems associated with Internet gambling without any revenue from the industry.<sup>380</sup>

Instead of pursuing a fruitless effort to prohibit Internet gambling, the U.S. should follow the U.K.'s lead by regulating and taxing the Internet gambling industry.<sup>381</sup> Regulation effectively addresses the potential problems associated with Internet gambling: underage gambling, problem gambling, money laundering, and fraud.<sup>382</sup> Moreover, governmental regulation has the potential to add millions of dollars to both the tax coffers and the national economy.<sup>383</sup> While issues remain concerning state and tribal interests, regulation is the most effective way for the U.S. to address Internet gambling.<sup>384</sup>

Ross A. Crutchfield

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376. Warner, *supra* n. 16.

377. For a description of the UIGEA, see *supra* pt. II(C), and for an analysis of the UIGEA, see *supra* pt. III(A).

378. See *supra* pt. II(D) for a discussion of the effect of the UIGEA on the Internet gambling industry.

379. For a description of these rules, see *supra* pt. II(C), and for an analysis of these rules, see *supra* pt. III(A).

380. *Supra* pt. III(A)–(B) details the problems that accompany Internet gambling.

381. *Supra* pt. II(H) describes the U.K.'s regulatory scheme, while *supra* pt. III(C)(2) discusses the merits and disadvantages of the scheme.

382. For a detailed analysis of each of these problems, see *supra* pt. III(B)(1)–(4).

383. For a discussion of the steps that the U.S. will need to take to ensure that a regulatory scheme provides a reliable stream of tax revenue, see *supra* pt. III(C)(2).

384. *Supra* pt. III(D) details potential obstacles that must be overcome in order for Congress to implement a regulatory scheme.