

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

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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.¹ Moneymaker won his \$10,000 entry fee to the tournament by winning a \$39 satellite tournament on the poker website, pokerstars.com.² The next year at the Main Event, hundreds of amateurs won entry to the tournament through low buy-in, online satellite tournaments.³ The number of entrants in the Main Event increased from 839 in 2003 to 2,576 in 2004.⁴ Yet another amateur, attorney Greg Raymer, won the 2004 Main Event, bringing home an astonishing \$5 million.⁵

* This Comment will also be published in Volume 45, Issue 1 of the Tulsa Law Review.

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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/players/results/Chris-Moneymaker/1691> (updated Sept. 28, 2008).

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

⁵ PokerStars, *Greg Raymer*, <http://www.pokerstars.com/team-pokerstars/greg-raymer/> (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/players/results/Greg-Raymer/4018> (updated Sept. 28, 2008).

The number of entrants into the Main Event continued to rise with the number peaking at 8,773 in 2006.⁶ However, in 2007, the number of entrants decreased to 6,358,⁷ the first Main Event since 1992 that fielded fewer players than the previous year.⁸ Poker commentators widely attributed this decrease in participation to a single event: the passage of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).⁹

While the UIGEA attempts to ban “unlawful Internet gambling,”¹⁰ its efforts have been largely unsuccessful.¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.

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> (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> (accessed Sept. 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> (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> (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> (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 (2006).

¹¹ Chuck Blount, *On Poker: Bet That Online Poker Finds Ways to Play*, http://www.mysanantonio.com/sports/MYSA101107_blount_onpoker_en_33f6cfc_html5327.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 (2006).

players if problems occur during the transaction.¹⁵ The need for protection will only increase as the popularity of internet gambling continues to rise in the U.S.¹⁶ The UIGEA is an ineffective method of dealing with internet gambling and that it should be abandoned in favor of 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 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. 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.

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/ALeqM5gSosJ3yBl86H6_d8cUo1a3tZgCgAD94DN1A00 (Nov. 12, 2008) ("U.S. bettors have been estimated to supply at least half the revenue of the \$16 billion Internet gambling industry.").

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.¹⁷ After creating a user profile, the poker player would then provide funding.¹⁸ Prior to the passage of the UIGEA, "e-wallets" were the method of choice for U.S. players.¹⁹ An "e-wallet" is "an online account in which money can be deposited and used in commercial transactions."²⁰ An e-wallet can be linked to a player's checking account, credit card, or debit card.²¹

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").²² 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."²³ The Safe Port Act provided \$300 million in order to provide protection for U.S. ports from possible terrorist attacks.²⁴ Many members of Congress considered this bill a "must-pass,"²⁵ and it passed

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://www.fcw.com/online/news/96101-1.html> (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).

through the House with a 421-2 majority and through the Senate with a unanimous 98-0 vote.²⁶ Because there were differences between the House and Senate versions of the bill, the bill then went to conference committee.²⁷ It was at this time that Senator Bill Frist (R. Tenn.) attached the UIGEA to the Safe Port Act.²⁸ 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.²⁹ 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.³⁰ 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.”³¹ Notably, President Bush did not mention the UIGEA or internet gambling in his speech on the Safe Port Act.³²

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.³³ Under the UIGEA, “unlawful Internet gambling” means

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

²⁷ *Id.*

²⁸ Rose, *supra* n. 22, at 1.

²⁹ United States Senate, *Senate Legislative Process*, “Conference Committees,” http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (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://www.whitehouse.gov/news/releases/2006/10/20061013-2.html>).

³² *Id.*

³³ Rose, *supra* n. 22, at 1.

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.³⁴

Thus, the UIGEA does not define unlawful internet gambling, “but rather relies on the underlying substantive Federal and State laws.”³⁵ Another crucial aspect of the UIGEA is that it does not make the act of placing a bet on a gambling website illegal.³⁶ As one scholar notes, “For 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.”³⁷ The one felony created under the UIGEA is for *accepting* a financial instrument for unlawful internet gambling.³⁸ A person who violates this section of the UIGEA can be imprisoned for a maximum of 5 years, fined, or both.³⁹

Along with targeting internet gambling companies, the UIGEA also seeks to prevent financial institutions from transacting with the internet gambling companies.⁴⁰ 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 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.”⁴¹ 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

³⁴ 31 U.S.C. § 5362 (2006).

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 31 U.S.C. § 5366 (2006).

⁴⁰ 31 U.S.C. § 5364(a) (2006).

⁴¹ *Id.*

of prohibiting restricted transactions.⁴² 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.⁴³

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.⁴⁴

Because the neither the UIGEA nor the rules specifies what gambling activities are illegal, financial institutions must make that determinations for themselves.⁴⁵ Many in the banking industry opposed this imposition⁴⁶ and declared that the industry will respond to it by blocking all internet gambling transactions, whether legal or illegal.⁴⁷ The financial industry has strong

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 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> (updated July 5, 2008) (quoting poker legend, Doyle Brunson: “‘Poker players have to support Obama,’ he said. ‘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.”).

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.⁴⁸

While the rules do not mandate specific procedures for identifying unlawful transactions, they do provide a “safe harbor” provision.⁴⁹ The safe harbor provision 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.”⁵⁰ The procedures differ depending on the type of financial institution involved.⁵¹ For example, in order to receive safe harbor protection, credit card companies must establish a number of procedures designed to prohibit restricted transactions.⁵² 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 uses the card system to process a restricted transaction.⁵³ The Federal Reserve System estimates the cost to the financial industry for implementing these procedures to be \$88.5 million and annual cost of maintaining the procedures to be \$3.3 million.⁵⁴

While the rules place a duty on some financial institutions to prohibit restricted transactions, many financial institutions are exempt from the regulations.⁵⁵ All participants in the automatic clearing house, check clearing, and wire transfer systems are exempt from the

⁴⁸ 31 U.S.C. § 5364(d) (2006); *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.

⁵⁰ *Id.*

⁵¹ *Id.* at 69409-69411.

⁵² *Id.* at 69410.

⁵³ *Id.*

⁵⁴ 73 Fed. Reg. at 69397.

⁵⁵ *Id.* at 69408-69409.

regulations unless they have a customer relationship with an internet gambling business.⁵⁶ The purpose of these exemptions is to ease the burden on the financial industry, especially in regard to paper checks.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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."⁶⁰

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.⁶¹ The largest and most successful company to pull out of the U.S. market was PartyGaming.⁶² PartyGaming is a publicly traded company on the U.K. stock exchange.⁶³ Prior to the passage of the UIGEA, PartyGaming derived 77% of its revenue from U.S. players.⁶⁴ After it announced that it would no longer allow U.S. players to gamble on its websites, the

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/article/5336/partypoker-still-recovering-from-uigea> (Oct. 21, 2008).

⁶² *Id.*

⁶³ PR Web, *WhichPoker.com Figures Show Exact Effect of UIGEA on Online Poker Rooms, Party Poker and Poker Stars*, <http://www.prweb.com/releases/UIGEA/online-poker/prweb488623.htm> (Dec. 8, 2006).

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

company's stock plummeted 57%.⁶⁵

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.⁶⁶ 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.⁶⁷ Soon after PartyGaming's withdrawal, PokerStars's site traffic increased 24% and Full Tilt Poker's site traffic increased 50%.⁶⁸ 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.⁶⁹

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

⁶⁵ Alexander, *supra* n. 15, at ¶ 34.

⁶⁶ PR Web, *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/ (Jan. 17, 2007).

⁷³ *Id.*

revenue.⁷⁴ Soon after, Neteller's stock prices plunged to £128 from a high of £919.50.⁷⁵

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.⁷⁶ For example, PokerStars provides twelve payment methods and nine cashout methods for players residing in the United Kingdom.⁷⁷ These methods include prominent companies such as Neteller, Click2Pay, and ClickandBuy.⁷⁸ With these methods, a U.K. player can make an instant deposit and have funds available from a cashout within one business day.⁷⁹ Conversely, PokerStars provides five payment methods but only one cashout method for U.S. players.⁸⁰ 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.⁸¹ 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.⁸²

E. Does the UIGEA Apply to Internet Poker?

While the UIGEA attempts to prohibit online casinos, some online poker rooms claim

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 (accessed Nov. 30, 2008).

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

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

⁷⁸ *Id.*

⁷⁹ See e.g. Neteller, *Withdrawals*, http://public.neteller.com/content/en_US/services_withdrawals.htm (accessed Nov. 10, 2008).

⁸⁰ PokerStars, *supra* n. 77.

⁸¹ *Id.*

⁸² See e.g. PokerStars, *Pokerstars.com – Our Business Continues As Before*, <http://www.pokerstars.com/legislation/uigea/> (accessed October 18, 2008).

that they are exempt from the UIGEA because poker is predominantly a skill game.⁸³ 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.”⁸⁴ PokerStars’s position is based upon the traditional tripartite division of gaming.⁸⁵ Some games are pure chance games, such as roulette, while others are pure skill, such as chess or checkers.⁸⁶ Finally, some games, such as poker, are hybrid games that have elements of both skill and chance.⁸⁷ The determination of whether poker is a game of skill or chance is critical because many states prohibit wagers only on games of chance.⁸⁸

The traditional test for determining whether a game is skill or chance is the predominance test, which focuses on which aspect of the game, skill or chance, predominates over the other.⁸⁹ In *Joker Club, L.L.C. v. Hardin*, the North Carolina Court of Appeals applied the predominance test to poker.⁹⁰ 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.⁹¹ 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 Carolina’s gambling statute, which prohibits wagers on “[games] of chance.”⁹²

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.

⁹² *Id.*

The district court ruled that poker was a game of chance and therefore illegal under the statute.⁹³

On appeal, the plaintiff argued that although poker involved chance, skill predominated.⁹⁴

The plaintiff called four individuals involved in the poker industry: two professional poker players, a poker tournament consultant, and a casino manager.⁹⁵ 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.⁹⁶ 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.⁹⁷ The plaintiff compared this to an amateur playing a round of golf with Tiger Woods.⁹⁸ The amateur may win a single hole, but Woods would win the round.⁹⁹ 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.¹⁰⁰ The North Carolina Court of Appeals, applying the predominance test, agreed with the defendant and held that chance predominated over skill in poker.¹⁰¹ The court reasoned that poker differed from games, such as billiards, golf, and bowling, where skill is the predominant factor; “Whereas 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.”¹⁰² As the court adroitly stated, “No

⁹³ *Id.*

⁹⁴ *Id.* at 628-629.

⁹⁵ *Joker Club*, 643 S.E.2d at 629.

⁹⁶ *Id.*

⁹⁷ *Id.* at 630.

⁹⁸ *Id.*

⁹⁹ *Joker Club*, 643 S.E.2d at 630.

¹⁰⁰ *Id.* at 629.

¹⁰¹ *Id.* at 631.

¹⁰² *Id.* at 630-631.

amount of skill can change a deuce into an ace.”¹⁰³

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.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ While some poker players assert that poker is purely a game of skill, this appears to be an untenable position that a court would likely reject.¹⁰⁸ 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.¹⁰⁹ Australians have traditionally been quite fond of gambling,¹¹⁰ and

¹⁰³ *Joker Club*, 643 S.E.2d at 630.

¹⁰⁴ 31 U.S.C. § 5363.

¹⁰⁵ 31 U.S.C. § 5362.

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

¹⁰⁷ *Id.*

¹⁰⁸ Neil King, Jr., *Harvard Ponders Just What It Takes to Excel at Poker*, <http://pokerplayersalliance.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, he says, are decided after all players except the winner have folded. So if no one shows his cards, Mr. Lederer says, ‘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) [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.’”).

so it should come as no surprise that internet gambling has been popular in Australia.¹¹¹ Australia first responded to internet gambling through regulation.¹¹² In Australia, like the U.S., regulation of gambling is left to the states and territories.¹¹³ In March 2000, there were fourteen licensed online gambling operators which were regulated by various state and territory gaming authorities.¹¹⁴ Because of these regulations, Australia became an early leader in online gambling.¹¹⁵ For example, Lasseters Online was the first regulated online casino and was the first online casino to be operated by a land-based casino.¹¹⁶ In 2000, Lasseter's clientele was 86% international, with 161 different countries represented.¹¹⁷ Lasseters claimed that one of its best selling points to international customers was its regulation by the Northern Territory government.¹¹⁸ Also, in 2000, the Australian Senate Select Committee on Information Technologies released a report, entitled *Netbets*, on the proper governmental response to online gambling.¹¹⁹ The committee recognized that internet gambling held the potential to exacerbate problem gambling.¹²⁰ 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 gambling."¹²¹

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) [hereinafter *IGA Review*] (citing a Nielsens Netstudy finding that up to 700,000 Australians participated in internet poker).

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 *Netbets*, *supra* n. 110, at 2.14.

¹¹⁷ *Id.* at 2.20.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1.4.

¹²⁰ *Netbets*, *supra* n. 110, at 1.3.

¹²¹ *Id.* at 1.27.

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.¹²² First, in May 2000, the government passed a bill which placed a year-long moratorium on the development of the internet gambling industry.¹²³ During the moratorium, the government released a report concluding that it was technically feasible to prohibit internet gambling.¹²⁴ On July 11, 2001, less than two months after the end of the moratorium, the Interactive Gambling Act 2001 (“IGA”) became law.¹²⁵ The IGA makes it a crime “to provide interactive gambling services to customers physically located in Australia.”¹²⁶ Notably, under the IGA, an internet gambling provider can legally base its operation in Australia as long as it does not cater to Australians.¹²⁷ Furthermore, it is not a crime under the IGA for an Australian to use a foreign internet gambling provider.¹²⁸ 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 minimisation 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 minimisation 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.¹²⁹

Thus, by preventing Australians from accessing sites regulated by the government, the IGA may

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.).

actually increase the number of problem gamblers in Australia.¹³⁰

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 industry¹³¹ and government regulation.¹³² 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 websites.¹³³

Self-regulation proponents argue that regulations enacted by individual nations have not kept pace with new technologies and new attitudes towards gambling.¹³⁴ 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.¹³⁵ Today, however, “[e]very laptop and cell phone is now a potential business hub, retail center, music station, or casino.”¹³⁶ Changing social attitudes

¹³⁰ See Essa, *supra* n. 122, 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).

¹³³ Owens, *supra* n. 131, at 93-101.

¹³⁴ *Id.* at 94.

¹³⁵ *Id.*

¹³⁶ *Id.*

towards gambling may also reflect a need for updated regulations.¹³⁷ When many gambling regulations were enacted, legislators viewed gambling as “a social nuisance and a minor crime.”¹³⁸ Today, 48 states have some type of legalized gambling and gambling is now seen as a legitimate, multi-billion dollar entertainment industry.¹³⁹

Self-regulation proponents also argue that the global nature of internet gambling is incapable of being regulated by a single sovereign.¹⁴⁰ 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.¹⁴¹ First, a foreign national may voluntarily submit to the sovereign’s jurisdiction.¹⁴² 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.¹⁴³ The next method of imposing criminal liability on a foreign national is through extradition treaties with other sovereigns.¹⁴⁴ While an extradition is a seemingly plausible method of arresting an internet gambling operator, Owens argues that there are practical obstacles to this method.¹⁴⁵ 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.¹⁴⁶ The final possible method is a unilateral extension of jurisdiction.¹⁴⁷ However, this is an

¹³⁷ Owens, *supra* n. 131, at 94.

¹³⁸ *Id.*

¹³⁹ *Id.* at 95.

¹⁴⁰ *Id.* at 96.

¹⁴¹ Owens, *supra* n. 131, at 96.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Owens, *supra* n. 131, at 97.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

extraordinary method which requires that “the activity complained of . . . be directly harmful to the security of the moving nation.”¹⁴⁸ Considering that most nations that attempt to ban online gambling allow other types of gambling, this standard would be difficult, if not impossible, to prove.¹⁴⁹

Owens goes on to argue that even when individual nations prosecute internet gambling, the effect is counterproductive to their stated goals.¹⁵⁰ 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.¹⁵¹ These companies are usually less concerned with fair dealing and consumer protection than their competitors.¹⁵² 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.¹⁵³

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.¹⁵⁴ As evidence of the success of the direct cooperation method, Owens points to the horse racing industry.¹⁵⁵ The horse racing industry has set up a system where gamblers in the U.S. and Canada can bet on races throughout the world.¹⁵⁶ Funds are able to flow through this system in spite of

¹⁴⁸ *Id.* (citing *Restatement (Third) of the Foreign Relations Law of the United States* § 402(3) (1987).

¹⁴⁹ Owens, *supra* n. 131, at 97.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Owens, *supra* n. 131, at 97.

¹⁵⁴ *Id.* at 98.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

jurisdictional differences in gambling regulations and tax structures.¹⁵⁷

The second alternative Owens proposes is self-regulation of the internet gambling industry.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ Furthermore, information about disreputable companies is widely disseminated through internet gambling “watchdog” sites.¹⁶¹ Owens ultimately concluded that the industry should establish a self-governing body.¹⁶² 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.”¹⁶³ This governing body would be sanctioned by the government in the jurisdictions in which it operates.¹⁶⁴ This way, internet gambling companies would be taxed in exchange for a guarantee from the sovereign that the industry can use the state’s financial institutions in order to fund the sites.¹⁶⁵

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.¹⁶⁶ In response to Owens’s argument for self-regulation, attorneys Dan W. Goldfine and Eric L. Kitner wrote an article extolling the merits of

¹⁵⁷ Owens, *supra* n. 131, at 98.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 98-99.

¹⁶¹ Owens, *supra* n. 131, at 99.

¹⁶² *Id.*

¹⁶³ *Id.* at 100.

¹⁶⁴ *Id.*

¹⁶⁵ Owens, *supra* n. 131, at 100.

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

government regulation of internet gambling.¹⁶⁷ 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.¹⁶⁸ While jurisdictional issues may exist, these issues have not stopped government authorities from criminally prosecuting those who violate existing law concerning internet gambling.¹⁶⁹

As evidence of a successful national regulatory program, Goldfine and Kitner point toward the United Kingdom's Gambling Act of 2005.¹⁷⁰ 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.¹⁷¹ 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.¹⁷² After this report, the government issued a report entitled *A Safe Bet for Success*.¹⁷³ *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.¹⁷⁴ The report recognized that British citizens already had access to overseas companies that provided internet

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*].

gambling.¹⁷⁵ 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.”¹⁷⁶ Because it found prohibition unattractive, the government advocated for the adoption of a regulatory system for online gambling.¹⁷⁷ The government also recognized that a strict regulatory system would give British internet gambling companies a competitive advantage in the global market.¹⁷⁸ Based largely upon the recommendations found in *A Safe Bet for Success*, the Gambling Act became law on April 8, 2005.¹⁷⁹

Britain’s Gambling Act legalizes, but also strictly regulates, internet gambling.¹⁸⁰ 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.¹⁸¹

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.¹⁸² 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.¹⁸³

¹⁷⁵ *Id.* at 22.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Safe Bet*, *supra* n. 174, at 22.

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/ukpga_20050019_en_2#pt1-pb1-11g1).

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).

One of the primary purposes of the Gambling Act was to prevent minors from accessing internet gambling websites.¹⁸⁴ With this in mind, the act creates a number of offenses designed to protect minors.¹⁸⁵ First, a person commits a crime if he “invites, causes or permits a child or young person to gamble.”¹⁸⁶ 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.¹⁸⁷ The act also prevents a casino or other gambling institution from employing minors;¹⁸⁸ 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].”¹⁸⁹ Finally, the act places criminal liability on minors who gamble, enter the premises of a gambling facility, or operate gambling facilities.¹⁹⁰ Violators of these provisions are subject to fines and up to 51 weeks imprisonment.¹⁹¹

The Gambling Act also authorizes the Gambling Commission to create a code of practice for licensed gaming establishments.¹⁹² The code of practice requires licensees to establish procedures that address problem gamblers.¹⁹³ First, licensees “must make information readily available to their customers on how to gamble responsibly and how to access information about . . . problem gambling.”¹⁹⁴ The information must include information concerning: (1) the

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: June 2007* 34-39 (2007) (available at <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP%20June%202007.pdf>).

¹⁹⁴ *Id.* at 34.

availability of monitoring methods; (2) the availability of timers; (3) self-exclusion options; and (4) the availability of further help or advice.¹⁹⁵ Next, licensees must establish policies and procedures for the purposes of identifying problem gamblers.¹⁹⁶ Finally, licensees must establish self-exclusion policies and procedures.¹⁹⁷ Through self-exclusion, a gambler voluntarily places himself on a list of individuals banned from a gambling establishment.¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰ 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%.²⁰¹ The study also found that only 3% of the population gambled online,²⁰² and that the number of problem gamblers, only 0.6% of the total population, did not increase from 1999 to 2007.²⁰³ 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

¹⁹⁵ *Id.* at 34-35.

¹⁹⁶ Gambling Commn., *supra* n. 193, at 35.

¹⁹⁷ *Id.* at 36.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

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

²⁰¹ *Id.*

²⁰² *Id.* at 19.

²⁰³ *Id.* at 10.

internet gambling.²⁰⁴

III. Analysis

A. Prohibition

The UIGEA fails to prohibit internet gambling.²⁰⁵ Even a cursory search of the internet reveals dozens of gambling sites that continue to cater to U.S. players.²⁰⁶ Because most, if not all, of these companies are based overseas, it is very difficult to enforce the provisions of the UIGEA.²⁰⁷ Finally, because the UIGEA does not criminalize the act of placing a bet via an internet gambling site, U.S. players continue to gamble online without fear of criminal liability.²⁰⁸

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;²⁰⁹ however, the exception made for paper checks will render these regulations ineffective.²¹⁰ Even if the regulations could block restricted transactions through all other methods, internet gambling

²⁰⁴ *Gambling Survey*, *supra* n. 176, at 10.

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> (accessed Nov. 10, 2008) (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 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/poker.asp?news=kyl-bachus-pen-pro-uigea-letter-congress>).

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

companies could simply use paper checks to avoid detection.²¹¹ In fact, PokerStars already sends payments to U.S. customers via paper checks.²¹² 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.²¹³ Therefore, the regulations place a multi-million dollar burden on the financial industry,²¹⁴ in the midst of a financial crisis,²¹⁵ in order to implement a scheme that will be unable to stop transactions between internet gambling companies and U.S. players.²¹⁶

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.²¹⁷ Proponents of prohibition argue that internet gambling poses the following societal problems: risk of addiction, underage gambling, money laundering, and fraud.²¹⁸ Prohibitionists argue that internet gambling increases the risk of addiction because players have continuous, convenient access to an online casino.²¹⁹ 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.²²⁰

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://forumsserver.twoplustwo.com/28/internet-gambling/pokerstars-paper-check-verification-174425/> (accessed Nov. 28, 2008).

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.

For example, in a 2004 study, a 16 year old was able to register and play on 30 out of 37 gambling sites.²²¹ 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.²²² Finally, prohibitionists are concerned that fraudulent internet gambling sites could withhold funds from a player or misrepresent the odds of winning a bet.²²³

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.²²⁴ Currently, the U.S. does not attempt to address these specific concerns because it attempts to completely prohibit internet gambling,²²⁵ and it is unlikely to address these concerns as long as the UIGEA is in effect.²²⁶ But because the UIGEA fails to prohibit internet gambling, the problems cited by opponents of internet gambling go unaddressed by the government.²²⁷ 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.²²⁸

1. Problem Gambling

²²¹ John Hand, *Schoolgirl Tests Online Gambling*, http://news.bbc.co.uk/2/hi/uk_news/3928261.stm (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).

Many internet gambling sites already have procedures in place to address problem gamblers.²²⁹ Unlike traditional brick-and-mortar casinos, an online casino can easily track the betting patterns of its patrons.²³⁰ 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.²³¹ Along with limiting deposits, many online casinos also have exclusion procedures in place.²³² 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.²³³ The player's decision to exclude himself is irrevocable.²³⁴ Furthermore, a player can also purchase software that can block access to all gambling websites.²³⁵

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.²³⁶ It could also require additional methods to protect problem gamblers.²³⁷ One concern with current methods, like self-exclusion, is that they require the problem gambler to recognize his addiction.²³⁸ Under

²²⁹ See e.g. PokerStars, *PokerStars Responsible Gaming*, <http://www.pokerstars.com/about/responsible-gaming/> (accessed Nov. 13, 2008); Full Tilt Poker, *Responsible Gaming*, <http://www.fulltiltpoker.com/responsible-gaming> (accessed Nov. 13, 2008).

²³⁰ Valasek, *supra* n. 218, at 763.

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/> (accessed Nov. 13, 2008).

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 Commn. & St. Gaming Control Bd. Mar. 31, 1999) (available at 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 (accessed Nov. 13, 2008) (documenting the limitations of self-exclusion programs).

a regulatory model, the government could require a gambling site to automatically exclude players if they reach a certain limit.²³⁹ Furthermore, the sites could share their decision to exclude with other sites so that they could exclude the problem gambler as well.²⁴⁰

2. Underage Gambling

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

While age verifications methods such as Integrity ensure that the provided information represents a person of legal gambling age, they can not guarantee that the person placing bets is

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/> (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 (accessed Nov. 13, 2008).

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

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

actually who they represent to be.²⁴⁸ For example, Integrity's software would be unable to detect a child registering on a gambling website with his parent's information.²⁴⁹ 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.²⁵⁰ For example, thousands of minors access traditional, brick-and-mortar casinos every year with the help of false identification.²⁵¹ Finally, the age verification systems currently employed by internet gambling sites have been successful in other regulated industries, such as online alcohol sales.²⁵²

3. Money Laundering²⁵³

Regulation can also help prevent criminals from using gambling sites as avenues for

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

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 specialising 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'").

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> (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://www.alcoholpolicy.niaaa.nih.gov/index.asp?Type=BAS_API&SEC=%7BE8988D1D-B915-4133-808E-23443EF43867%7D (accessed Nov. 13, 2008) ("All States prohibit use of false identification by minors to obtain alcohol.").

²⁵¹ See B. Grant Stitt, David Giacompassi, and 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 (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 (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).

money laundering.²⁵⁴ Under the current regime of attempted prohibition, some have argued that the opportunity for money laundering is actually greater than under regulation.²⁵⁵ 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.²⁵⁶ For example, Neteller employs sophisticated identification methods and reports activities that raise a suspicion of money laundering to the appropriate authorities.²⁵⁷ These reputable companies have been replaced in some cases by companies that actively participate in money laundering.²⁵⁸ Under a regulatory scheme, the government could make policies that successfully address money laundering mandatory.²⁵⁹ Furthermore, companies that facilitated money laundering would be unable to obtain a license.²⁶⁰

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.²⁶¹ While regulation could address fraudulent practices, the market already provides a significant incentive for companies to

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.

²⁵⁷ Neteller, *Security*, <https://merchant.neteller.com/security.html> (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/> (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.”).

avoid fraud.²⁶² Because gamblers can choose between thousands of gambling sites, a site that “loaded the dice”²⁶³ or refused to pay out winnings would not remain in the market for long.²⁶⁴

Information about gambling websites is widely disseminated through watchdog sites and message boards.²⁶⁵ Regulation could supplement these market forces by requiring licensed sites to maintain financial reserves sufficient to pay winning bets and mandating odds authentication software.²⁶⁶

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,²⁶⁷ 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.²⁶⁸ Scholars have suggested many different regulatory schemes, which generally either call for self-regulation by the internet gambling industry²⁶⁹ or some type of governmental regulation.²⁷⁰

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 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; 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, *Overplaying 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.

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.²⁷¹ The internet gambling industry has already established two organizations that could serve in this capacity: E-Commerce and Online Gaming Regulation and Assurance,²⁷² and the Interactive Gaming Council.²⁷³ Proponents of self-regulation argue that because internet gambling has a global presence, one individual nation cannot effectively regulate it.²⁷⁴ They also argue that the market effectively discourages internet gambling fraud without the aid of governmental regulation.²⁷⁵ Furthermore, many nations have outdated gambling laws²⁷⁶ and a self-regulatory scheme could ensure that internet gambling regulations reflect current technology.²⁷⁷

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.²⁷⁸ Currently, industry organizations attempting to regulate the internet gambling

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 Online Gaming Regulation and Assurance, *Welcome to eCOGRA.org*, <http://www.ecogra.org/default.aspx?OP=P> (accessed Nov. 21, 2008). Members must comply with “generally accepted practices” that address underage gambling, problem gambling, fair play, and money laundering prevention. E-Commerce Online Gaming Regulation and Assurance, *Generally Accepted Practices – Casinos, Poker, Bingo & Sportsbook*, <http://www.ecogra.org/egap.aspx?Page=1&OP=O> (accessed Nov. 21, 2008). The organization also provides dispute mediation for players and member sites. E-Commerce Online Gaming Regulation and Assurance, *Dispute Resolutions*, <http://www.ecogra.org/dispute.aspx?Page=1&OP=P> (accessed Nov. 21, 2008).

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/> (accessed Nov. 21, 2008).

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,

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.²⁷⁹ Furthermore, some scholars note that under a self-regulatory scheme, an industry's self-interest is often given priority over public concerns.²⁸⁰ While internet gambling companies need to instill consumer confidence in order to be profitable, this incentive may not sufficiently ensure effective self-regulation.²⁸¹ 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.²⁸² Governmental regulation could inspire more confidence in the fairness of the internet gambling industry.²⁸³ 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."²⁸⁴ Finally, while having the appearance of a financially prudent practice, some scholars assert that self-regulation

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.

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 429 (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) (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 Shampaner, *Internet Gambling in Nevada* 5 (U. Nev. Las Vegas 2007) (available at 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).

imposes a greater financial burden on taxpayers than governmental regulation.²⁸⁵

2. Governmental Regulation

Congress should be as careful in implementing a regulatory scheme as it was careless in passing the UIGEA.²⁸⁶ As stated above, the UIGEA passed as a rider to the Safe Port Act, a crucial national security bill.²⁸⁷ 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.²⁸⁸ In contrast, the U.K.'s decision to regulate internet gambling was the product of six years of research and debate.²⁸⁹ The government issued multiple reports on the feasibility, benefits, and disadvantages of regulating the internet gambling industry.²⁹⁰ Both Parliament and the general public extensively debated the issue before the government finally decided to regulate the industry.²⁹¹ 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 Internet Gambling Study Act.²⁹² This act would have commissioned the National Academy of Sciences to study the internet gambling industry and the feasibility of a regulatory scheme.²⁹³ While Congress failed to pass this bill,²⁹⁴ it should thoroughly research any regulatory scheme adopting it, as the UIGEA demonstrates the folly of passing legislation

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.

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> (updated Nov. 6, 2008).

without sufficient knowledge of the internet gambling industry.²⁹⁵

Congress should begin its research into the internet gambling industry by studying how the U.K. regulates the industry.²⁹⁶ 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.²⁹⁷ 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 2007.²⁹⁸ Furthermore, with 170 applicants seeking an internet gambling license and the accompanying 15% tax rate,²⁹⁹ the U.K. stands to substantially increase its tax revenue through regulation.³⁰⁰

While many internet gambling companies have sought a license from the U.K.,³⁰¹ 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.³⁰² The Gambling Act of 2005 authorizes internet gambling companies

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> (accessed Nov. 23, 2008).

licensed by nations in the European Economic Area (“EEA”) to advertise in the U.K.³⁰³ 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.³⁰⁴ 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.”³⁰⁵ The country must also “have the facilities and resources in place to ensure compliance and enforcement with those values and the regulatory regime in operation.”³⁰⁶ Thus far, the Secretary of State has “whitelisted” Antigua and Barbuda, Alderney, the Isle of Man, and Tasmania.³⁰⁷ A company licensed in a White List country has little incentive to seek a U.K. license.³⁰⁸ For example, PokerStars is licensed in the Isle of Man, which has a 1.5% duty and no corporation tax.³⁰⁹ 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.³¹⁰

The U.S. must learn from the U.K.’s mistakes and employ methods that prevent internet

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.

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.*

gambling companies from profiting from U.S. players without a government license.³¹¹ First, Congress should ban all non-licensed internet gambling companies from advertising in the U.S.³¹² This ban is feasible because the U.S. Justice Department already prohibits all internet gambling advertisements.³¹³ It recently collected \$31.5 million in fines from Microsoft, Yahoo, and Google for promoting internet gambling.³¹⁴ 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.³¹⁵

Internet gambling is a \$16 billion a year industry and analysts estimate that half of the revenue comes from U.S. gamblers.³¹⁶ 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.³¹⁷ While these companies may claim that U.S. gamblers will continue to play on their sites 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

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. § 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) (“[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 (Dec. 20, 2007) (quoting a Google spokesperson: “[T]he Department of Justice has advised that online gambling is illegal in the United States, and ads to promote it are improper.”).

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> (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.

players.³¹⁸ 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.³¹⁹ With these incentives for seeking a license in place, the government can tap in to a substantial, new revenue stream.³²⁰ 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.³²¹

An additional benefit of a governmental regulatory scheme is the boost that it would give to the ailing financial industry.³²² Gamblers use credit cards in roughly 90% of all transactions with internet gambling companies.³²³ Credit card transaction fees cost internet gambling companies up to 7.5% per transaction.³²⁴ 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.³²⁵ Thus, while the UIGEA requires financial institutions to spend millions of dollars in an attempt to block restricted transactions,³²⁶ regulation will enable financial institutions to tap into a multi-million dollar market currently dominated by foreign entities.³²⁷

D. Obstacles to the Implementation of a Governmental Regulatory Scheme

While Congress has the authority to regulate internet gambling through the Commerce

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

³¹⁹ See Scollidge, *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 (Nat'l. 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.

Clause,³²⁸ states have traditionally regulated gambling through their police powers.³²⁹ Because of this, states vary considerably from one another in the type of gambling permitted.³³⁰ Two states, Hawaii and Utah, ban all forms of gambling.³³¹ Other states, such as Tennessee, allow only state-sponsored gambling.³³² Finally, some states, such as Nevada, permit virtually all types of gambling.³³³ 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.³³⁴ Furthermore, states that rely on state-sponsored gambling for revenue would face competition from internet casinos.³³⁵

In 2007, Rep. Barney Frank (D. Mass.) proposed a regulatory scheme allowing individual states to decide whether to regulate or prohibit internet gambling.³³⁶ The scheme also allows states that regulate internet gambling to place restrictions on it that go beyond federal regulations.³³⁷ Under this scheme, an internet gambling company would establish its businesses in a state that regulated the industry.³³⁸ The company could accept players from its home state and all other states that allowed internet gambling; however, it would be forbidden from

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. N.Y. Co. 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.*

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?bill=h110-2046> (updated Nov. 6, 2008).

³³⁷ *Id.*

³³⁸ *Id.*

accepting funds from residents of states that banned internet gambling.³³⁹ The companies could verify a gambler's residence with the same technology used for age-verification.³⁴⁰ Under this state-level approach, states that see internet gambling as a danger could protect its residents through prohibition, while other states that see it a potential revenue source could regulate the industry.³⁴¹

There are several problems with a state level approach to internet gambling.³⁴² 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.³⁴³ 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.³⁴⁴ This race to the bottom would work against one of the purposes of regulating internet gambling by reducing the protections afforded to internet gamblers.³⁴⁵ Also, the rationale for state regulation of land-based gambling does not apply to internet gambling.³⁴⁶ States need to regulate land-based casinos because they affect both gamblers and non-gamblers.³⁴⁷ 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

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.").

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).

³⁴⁷ See generally *id.*

negatively affect home values in the area.³⁴⁸ In contrast, internet gambling takes place in the privacy of one's home and thus does not evoke the same rationale for state regulation.³⁴⁹ 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."³⁵⁰ Because of these reasons, the federal government, rather than the states, should regulate internet gambling.³⁵¹

The gaming interests of Indian tribes represent another obstacle to a regulatory scheme.³⁵² In 2006, revenue from Indian gaming exceeded \$25 billion and the industry employed 670,000 people, 75% of whom were Indian.³⁵³ Congress regulates Indian gaming through the Indian Gaming Regulatory Act ("IGRA").³⁵⁴ The IGRA divides Indian gaming activities into three classes.³⁵⁵ Tribes have exclusive control over Class I gaming, which involves games played between tribal members for small prizes.³⁵⁶ Class II gaming includes bingo and non-casino card games.³⁵⁷ Tribes are free to conduct these activities without state interference as long as the state does not completely ban the activity.³⁵⁸ Class III gaming includes casino style games such as blackjack, roulette, and craps.³⁵⁹ In order to offer Class III gaming, a tribe must

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/library/indian-gaming-facts/index.shtml> (Accessed Nov. 29, 2008).

³⁵⁴ See Rose & Owens, *supra* n. 352, at 164-65.

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.

enter into a compact with the state in which tribe is located.³⁶⁰ The IGRA prohibits states from taxing Indian gaming;³⁶¹ 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.³⁶² For example, Oklahoma created a State-Tribal Gaming Act that gives Oklahoma tribes total exclusivity for card games.³⁶³ 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.³⁶⁴

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.³⁶⁵ Furthermore, tribes that choose to allow internet gambling could place extra restrictions on the industry above and beyond federal regulations.³⁶⁶ Companies that violate these tribal regulations could have their licenses revoked, or even face criminal liability.³⁶⁷ This approach to Indian gaming places a tremendous burden on internet gambling companies.³⁶⁸ There are 562 federally-recognized Indian tribes in the U.S.³⁶⁹ 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.³⁷⁰

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. 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).

Congress should not adopt this onerous approach, but instead should allow tribes to compete in the internet gambling market.³⁷¹ Indian tribes would have an advantage in the internet gambling industry because of their years of gaming experience.³⁷² 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.³⁷³ 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.³⁷⁴ 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.³⁷⁵

IV. Conclusion

Internet gambling is a \$16 billion a year industry and analysts estimate that half of the revenue comes from U.S. gamblers.³⁷⁶ Instead of regulating and taxing this lucrative industry, Congress has pursued a policy of prohibition through the UIGEA.³⁷⁷ However, the UIGEA has failed to stop internet gambling and instead has only driven reputable companies out of the industry.³⁷⁸ Furthermore, the rules promulgated by the Federal Reserve System will not strengthen the UIGEA because they leave too many loopholes internet gambling companies can

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/> (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.

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

exploit.³⁷⁹ 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.³⁸⁰

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.³⁸¹ Regulation effectively addresses the potential problems associated with internet gambling: underage gambling, problem gambling, money laundering, and fraud.³⁸² Moreover, governmental regulation has the potential to add millions of dollars to both the tax coffers and the national economy.³⁸³ While issues remain concerning state and tribal interests, regulation is the most effective way for the U.S. to address internet gambling.³⁸⁴

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.

