



WIRE ACT FIX 2015 WHILE IDENTICAL TO 2014, IT COULD BE A GREATER THREAT TO STATE LOTTERIES

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On February 4, 2015, Representative Jason Chaffetz (R-UT) introduced in Congress H.R.707, entitled the “Restoration of America’s Wire Act” (the “RAWA”), and the bill now is with the House Committee on the Judiciary. The RAWA is identical to the bill Chaffetz introduced on March 26, 2014 (H.R.4301) and to the companion bill introduced on that same day by Senator Lindsey Graham (R-SC) (S.2159). As of the date of this writing, the RAWA has fourteen co-sponsors (eleven Republicans and three Democrats—Congressman Brad Ashford (D-NE), Congresswoman Tulsi Gabbard (D-HI) and Congressman Pedro Pierluisi (D-PR). Thus, it is being touted as “bipartisan legislation.”¹

The RAWA’s sponsors and supporters assert that it would merely

“restore” the federal Wire Act² to the status quo that existed prior to the issuance, on December 23, 2011, of the Department of Justice’s opinion³ confirming that the Wire Act applies only to sports betting, thus removing the cloud that had prevented states from authorizing non-sports internet gaming. This claim is inaccurate, because:

1. the legislative history of the Wire Act shows that it was always intended to be limited to sports betting, as discussed in detail in the DoJ Opinion;
2. several federal bills introduced in the 1990s that would have broadened the scope of the Wire Act show that members of Congress believed the Wire Act was limited to sports betting;⁴ and
3. in 2002, the U.S. Fifth Circuit Court of Appeals, the only federal circuit court to decide the issue, held that the Wire Act applied only to sports betting.⁵

Most important, the assertion that the RAWA would restore the pre-DoJ Opinion status quo is incorrect because the RAWA would eliminate substantial rights that states enjoyed prior to the issuance of the DoJ Opinion. While the elimination of states’ rights was discussed in this magazine in reference to last year’s version of the RAWA,⁶ a review here is worthwhile, given the severity of the RAWA’s adverse effects.

If the RAWA became law, the Wire Act, as amended, would prohibit gambling businesses (including state lotteries) from using any network involving a wire or like connection, including the “internet,”⁷ to transmit in “interstate or foreign commerce”:

1. any bet or wager,
2. information assisting in the placing of any bet or wager,⁸ or
3. a communication entitling the recipient to receive money or credit as a result of any bet or wager, or for information assisting in the placing of any bet or wager.

However, the RAWA would provide four important exemptions. It would:

1. preserve the status quo as to internet betting on horse races;⁹
2. preserve the status quo as to internet betting on charitable games;¹⁰

1 “Chaffetz, Gabbard Work to Restore America’s Wire Act,” press release issued by Rep. Chaffetz on Feb. 4, 2015, at <http://chaffetz.house.gov/press-release/chaffetz-gabbard-work-restore-america%E2%80%99s-wire-act> (last accessed March 9, 2015).

2 18 U.S.C. §§ 1081, 1084.

3 Memorandum Opinion for the Assistant Attorney General, Criminal Division, “Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act,” September 20, 2011 (issued December 23, 2011) (the “DoJ Opinion”).

4 “The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling,” by Michele Minton, Occasional Paper Series, 29, Las Vegas: Center for Gaming Research, University Libraries, 2014.

5 *In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002).

6 “A Federal Law Restricting Internet Gambling Could Lead to Unintended And Devastating Consequences for State Lotteries,” by Mark Hichar, Public Gaming International, September, 2014.

7 “Internet” is not defined in the RAWA, nor is it defined in the Wire Act (which was enacted decades before the internet existed). Thus, courts looking for its

meaning would likely refer to the Unlawful Internet Gaming Enforcement Act (31 U.S.C. § 5361 et seq.). There, “internet” is defined as the “international computer network of interoperable packet switched data networks.” (31 U.S.C. § 5362(5)).

8 Oddly, the RAWA would leave intact the Wire Act’s existing exception pertaining to the transmission of information assisting in sports betting transmitted between states in which such sports betting was legal. Because this exception applies only to information assisting in betting on sports events, Congress’ enactment of the RAWA in this form would suggest that Congress intended to favor (and create a special exception unique to) sports betting. This is the opposite of what Congress intended in 1961 when the original Wire Act was enacted, and indeed, it is very unlikely that Congress intends to uniquely favor sports betting today. One would expect that this exception will be amended so as to apply to information assisting in making any bet or wager, before the RAWA proceeds to a final vote in either the House or Senate.

9 It is generally accepted that internet betting on horse races is lawful under a 2000 amendment to the Interstate Horseracing Act (15 U.S.C. § 3001 et seq.).

10 Thus, to the extent internet betting on charitable games was lawful under state laws in effect on the date the RAWA became law, it would remain lawful.

3. not apply to pay-for-play online fantasy sports tournaments conducted in accordance with the Unlawful Internet Gambling Enforcement Act; and
4. not change or limit “the ability of a State licensed lottery retailer to make in-person, computer-generated retail lottery sales under applicable Federal and State laws in effect on the date of the enactment of [the RAWA].” Thus, “in-person” lottery sales by licensed lottery retailers would remain lawful to the extent they were lawful on the date the RAWA became law.

As a result of the RAWA, the Wire Act would very likely render unlawful the following lottery activities, as none would be exempted by any of the above exemptions:

1. the operation of a state lottery (including traditional online games!) by any current non-lottery state that had not enacted lottery legislation by the date the RAWA became law (assuming, as is traditionally the case, that lottery retailer terminals would exchange wagering information (even if not actual wagers) with a central system via the internet);
2. the implementation of video lottery games by existing lottery states if state laws existing when the RAWA became law did not allow for video lottery games (assuming wagers or information assisting in wagering would be communicated with a central system via the internet);
3. sales of lottery draw games via PCs and/or mobile devices, as now being conducted by a few state lotteries;
4. sales of lottery ticket subscriptions via PCs and/or mobile devices, as now being conducted by several state lotteries;
5. sales of lottery products by the state lotteries themselves (as is allowed in several states), unless such state lotteries were licensed as lottery retailers;
6. sales of lottery products via telephone; and
7. sales of lottery and casino games (including poker) via PCs and/or mobile devices, as currently is done by the Delaware Lottery.

In addition, as a result of the RAWA, the Wire Act could render unlawful the following state lottery activities because in each case it is not clear that such sales would meet the “in person” licensed retailer sales requirement of the RAWA’s lottery exemption:

1. existing video lottery gaming where the video lottery terminals exchange wagering information (even if not actual wagers) with a central system via the internet;
2. existing (and future) video lottery wide-area progressive games (“WAPs”)—even if the bets are received in the same state in which they are placed—if the video lottery terminals exchange wagering information (even if not actual wagers) among themselves or with a central system via the internet;

3. sales of traditional lottery draw games via player-activated terminals (“PATs”) and sales of physical instant tickets via instant ticket vending machines (“ITVMs”) where the PATs and ITVMs exchange wagering information with a central system via the internet. (A narrow reading of the RAWA’s “in-person” licensed retailer sales exemption could be held to require direct player interaction with lottery retailer personnel and no such interaction is necessary with PATs and ITVMs); and
4. player-operated ticket checkers, as these too could be deemed to be outside of—and thus not covered by—the “in-person” licensed retailer sales exemption.

Finally, if amended by the RAWA, the Wire Act most likely would render unlawful several non-lottery internet gaming activities, including the intrastate internet casino games currently operated by certain Atlantic City casinos in New Jersey, and the intrastate internet poker currently conducted by commercial licensees in Nevada.

Unless one of the four above-described exemptions applied, wagers or wagering information sent via the internet would be prohibited—even if sent between points in the same state. This is because the RAWA clarifies that a “transmission in interstate or foreign commerce,” as used in the Wire Act, “includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise.” (emphasis added) Thus, considering a transmission of wagers or wagering information between points in the same state, if the intermediate routing of such transmission crossed state lines, it would violate the Wire Act (assuming none of the four exemptions applied). In addition, the U.S. courts of appeal in the first, third and fifth federal circuits have held that transmissions via the internet are in interstate commerce, regardless of the actual routing.¹¹

Finally, the RAWA does not address the advertising or payment prohibitions that exist in the Wire Act. Accordingly, if the RAWA were enacted, lotteries also:

1. could be prohibited from paying prizes electronically, because it would be unlawful to transmit via the internet a “communication which entitles the recipient to receive money or credit as a result of any bet or wager,” and a court could interpret this to preclude electronic funds transfers and wire transfers of prizes; and
2. might be prohibited from posting on the internet lottery game rules, “how to play” advice or advertising. This would be the case if such posted information was deemed to “assist” in the placing of any bet or wager” and its ban was not deemed to change or limit the ability of licensed lottery retailers to make in-person sales. (However, such a ban on commercial speech might be un-

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11 The U.S. Court of Appeals for the Third Circuit stated: “[B]ecause of the very interstate nature of the Internet, once a user submits a connection request to a website server ... the data has traveled in interstate commerce.” *U.S. v. MacEwan*, 445 F.3d 237, 244 (3rd Cir. 2006); and the U.S. Court of Appeals for

the First Circuit stated: “Transmission...by means of the Internet is tantamount to moving [data] across state lines.” *U.S. v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997), followed by *U.S. v. Runyan*, 290 F.3d 223 (5th Cir. 2002) and by *U.S. v. Yong Wang*, 2013 U.S. Dist. LEXIS 16153 (S.D.N.Y. 2013).

constitutional under United States Supreme Court precedent applicable to broadcast advertising of lawful gaming.)

In summary, while the RAWA may be intended to prohibit wagering via laptop computers and mobile devices,¹² its actual effects would be much more far-reaching. If enacted, the RAWA would make unlawful several of state lotteries' customary and traditional activities.

As has been widely reported, the RAWA is backed by Sheldon Adelson,¹³ the billionaire owner of Las Vegas Sands, which operates casinos in Nevada, Pennsylvania and Macau. Mr. Adelson has vowed "to spend whatever it takes"¹⁴ to stop online gaming in the United States. According to one industry source: "Adelson met [in January 2015] with House Speaker John Boehner of Ohio and Republican members of the House Judiciary Committee who told him the ban could be passed by the committee and sent to the House floor as early as the Easter recess."¹⁵

It is highly ironic that the RAWA is being championed mainly by conservatives, who generally seek to shrink the size and influence of the federal government and champion the right of states to govern themselves. On this basis, however, numerous conservative organizations and individuals have come out against the RAWA. These include the American Conservative Union, the Campaign for Liberty, the Taxpayers Protection Alliance and the Competitive Enterprise Institute, as well as Grover Norquist, President of Americans for Tax Reform¹⁶ and former Presidential candidate Ron Paul (who has called Adelson's backing of the bill political "cronyism.")¹⁷ The primary reason for their opposition is essentially the same as in 2014, namely, that it would usurp the historic prerogative of states to decide for themselves what, if any, gambling shall be permitted within their borders.

The National Council of Legislators from Gaming States ("NCLGS") is another strong and important¹⁸ supporter of states' rights. On January 10, 2015, less than a month before the RAWA was introduced, this non-partisan organization of state lawmakers

issued its Policy Framework for the Regulation of Internet Gaming,¹⁹ a set of standards to help safeguard both states that wish to participate in internet gaming as well as those states that do not. In that document, the NCLGS presented its core belief: "NCLGS does not support or oppose gaming, but supports effective regulation and believes that decisions related to gaming should be made by citizens of the individual states and their elected officials."²⁰ In 2014, the NCLGS was strongly opposed to that year's version of the RAWA (which is identical in language), stating that the bill "would effectively preempt the historical and constitutional right of states to regulate gambling within their borders."²¹

As to the likelihood of the RAWA becoming law, one commentator has stated that: "Even if you reject [the conservative opposition, the poor-optics associated with Sheldon Adelson's support of the RAWA and certain other factors], general Congressional inertia and the lack of broad political interest in the issue of online gambling basically guaranty that this bill never makes it to a vote, let alon[e] into law."²² However, in our view, the risks to state lotteries associated with possible passage of the RAWA are so great that state lotteries would be wise to voice a strong and unified opposition to the bill, whether or not they currently have plans to implement lottery games online. As stated by many state lotteries already, it has long been—and it should remain—the prerogative of the individual states to determine the types of gambling allowed within their respective borders. ■



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12 Rep. Chaffetz was quoted in reference to the RAWA as follows: "Putting an app on every phone that allows people to gamble wherever they are is not a good idea." "Congress Revives Sheldon Adelson-backed Plot to Kill Online Gambling," by Dustin Volz, NationalJournal.com, February 4, 2015, at <http://www.nationaljournal.com/tech/congress-revives-sheldon-adelson-backed-plot-to-kill-online-gambling-20150204> (last accessed March 9, 2015).

13 "House introduces online gambling bill backed by Sheldon Adelson," by Alex Rogers, Fortune.com, February 4, 2015, at <http://fortune.com/2015/02/04/online-gambling-bill-adelson/> (last accessed March 9, 2015).

14 "Sheldon Adelson Says He Is 'Willing To Spend Whatever It Takes' To Stop Online Gambling," by Nathan Vardi, Forbes.com, November 22, 2013, at <http://www.forbes.com/sites/nathanvardi/2013/11/22/sheldon-adelson-says-he-is-willing-to-spend-whatever-it-takes-to-stop-online-gambling/> (last accessed March 9, 2015).

15 "Adelson Resumes Aggressive Push For Internet Gambling Ban," by Tony Batt, GamblingCompliance, January 27, 2015, at http://www.gamblingcompliance.com/premium-content/news_analysis/adelson-resumes-aggressive-push-internet-gambling-ban (last accessed March 9, 2015).

16 "The Return of RAWA Has Been Met With Fierce Opposition," by Steve Ruddock, Bluff.com, February 12, 2015, at <https://www.bluff.com/news/the-return-of-rawa-has-been-met-with-fierce-opposition-63677/> (last accessed March 9, 2015).

17 "Ron Paul Attacks Sheldon Adelson-for Fighting Online Gambling," by Dustin Volz, NationalJournal.com, November 17, 2014, at <http://www.nationaljournal.com/tech/ron-paul-attacks-sheldon-adelson-for-fighting-online-gambling-20141117> (last accessed March 9, 2015).

18 "When the NCLGS makes a statement on a major gaming issue, it carries the weight of lawmakers from states where gambling is highly important." "NCLGS States Opposition to Federal Online Gambling Ban," by David Sheldon, Casino.org, April 16, 2014, at <http://www.casino.org/news/nclgs-states-opposition-federal-online-gambling-ban#ixzz3SDOVXAGY> (last accessed March 9, 2015).

19 "Policy Framework for the Regulation of Internet Gaming," by the National Council of Legislators from Gaming States, available at <http://www.nclgs.org/PDFs/2015/01142015NCLGSPolicyGamblingNew.pdf> (last accessed March 9, 2015).

201d., p. 5.

21 "NCLGS Urges Congress To Support States' Rights On Internet Gaming," press release issued by Representative James W. "Jim" Waldman on April 9, 2014, at <http://www.nclgs.org/PDFs/8001038.pdf> (last accessed March 9, 2015).

22 "The Restoration of America's Wire Act – Breaking Down The Sheldon Adelson-Backed Online Gambling Ban," by Chris Grove, OnlinePokerReport.com, February 4, 2015, at <http://www.onlinepokerreport.com/11725/graham-chaffetz-introduce-anti-online-gambling-bill/> (last accessed March 9, 2015).