

# Client Alert

Latham & Watkins Corporate Department

## Online Gambling: The Geolocated Road Ahead

### Introduction

On December 23, 2011, the United States Department of Justice (DOJ) publicly released a legal opinion which reversed its long-held stance that the federal Wire Act<sup>1</sup> (Wire Act) outlaws almost all forms of internet gambling. The DOJ opinion, actually dated September 2011, but not publicly released until December 23, 2011, was prompted by the plans of New York and Illinois to sell lottery tickets delivered to computers or mobile phones using the Internet, to adults within their state borders, using out-of-state transaction processors. These states' inquiries gave the DOJ a chance to publicly reverse its long-held view and instead opine that the Wire Act covers only *sports-related* gambling, betting and wagering and that a lottery is not a "sporting event or contest."

The Wire Act prohibits those engaged in the business of betting or wagering from using "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." Many commentators and the Fifth Circuit Court of Appeals<sup>2</sup>

were of the view that the Wire Act only covered sports-related transactions. For years, however, the DOJ took the view that the Wire Act applied broadly to nearly all forms of gambling, betting and wagering regardless of whether it was sports-related. In explaining its new view, the DOJ noted that the Wire Act's legislative history and plain language should be interpreted to prohibit only "*sports-related* gambling activities in interstate and foreign commerce."<sup>3</sup> Continuing its analysis, the DOJ opinion states that the "ordinary meaning of the phrase 'sporting event or contest' does not encompass lotteries." In its description of the online lottery programs being considered, the DOJ also noted that Illinois planned to restrict sales to "transactions initiated and received or otherwise made exclusively within the State of Illinois" using geolocation technology.<sup>5</sup>

Does the DOJ opinion clear the way for online gambling? No, but it represents a clear step toward liberalizing online gaming in the United States. Although the DOJ opinion is not binding law, as a practical matter it would be difficult for the DOJ to bring a prosecution action under the old interpretation of the Wire Act. In the meantime, the opinion clears the way for states to decide, on a state-by-state basis, whether they wish to allow online gambling unrelated to sporting events or contests within their borders.

"In view of the fundamental (though perhaps not unexpected) shift in the DOJ's view on the federal regulation of online gambling unrelated to sporting events, gaming companies have already commenced making substantial investments."

While online gaming may have been liberalized, it still carries political risk. Congress could conceivably pass preemptive federal legislation that expressly outlaws some or all forms of online gaming. Future administrations could revert to the older DOJ interpretation of the Wire Act. State laws that legalize online gambling but discriminate against out-of-state, non-US service providers may raise free trade issues. Most importantly, there are additional steps that must be taken for widespread legal online gambling to become a reality. Individual states must legalize online gambling within their borders, or (and less likely) Congress must pass comprehensive federal legislation legalizing online gambling. By implementing regulations for online poker, Nevada has charged fully ahead and, by virtue of its head start, could be the regulatory model for other states to follow.

## Federal Gambling Laws

As a practical matter, the Wire Act was the only federal law that, as formerly interpreted, directly prohibited online gambling. Other federal laws that criminalize aspects of gambling require a violation of some other federal law or a violation of state law before being triggered.

For example, the Unlawful Internet Gambling Enforcement Act<sup>6</sup> (UIGEA) prohibits accepting credits, fund transfers or other payments from anyone “engaged in the business of betting or wagering, in connection with the participation of another person in unlawful Internet gambling.”<sup>7</sup> UIGEA defines “unlawful Internet gambling” as “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise

made.”<sup>8</sup> On April 15, 2011 (known as Black Friday in the online poker world), the DOJ unsealed indictments of the then three-largest online poker companies and their executives. They were charged with bank fraud, money laundering and violating the UIGEA. Those defendants have either entered into plea bargains or their prosecutions are, as of this date, continuing.<sup>9</sup> Notably, the DOJ did not charge the defendants with violating the Wire Act.

The Illegal Gambling Businesses Act<sup>10</sup> (IGBA) is another federal gambling law. The IGBA makes it illegal to “conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business . . . .”<sup>11</sup> It defines an “illegal gambling business” as any “gambling business which (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”<sup>12</sup> Thus, like UIGEA, the IGBA prohibits gambling only if it is made illegal by virtue of some *other* law.

Finally, the federal Travel Act<sup>13</sup> prohibits, in relevant part, a person or entity from using “any facility in interstate or foreign commerce” with the intent to “(1) distribute the proceeds of any unlawful activity; or . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,” and thereafter performing or attempting to perform such conduct.<sup>14</sup> Unlawful activity is defined to include “any business enterprise involving gambling” in violation of state or federal laws.<sup>15</sup> The Travel Act may be violated whenever the internet (an interstate facility) is used to place or receive a bet in a jurisdiction where gambling is prohibited. The Travel Act thus covers,

for example, the case where an offshore operator of an online gambling business accepts bets originating from the US if those bets otherwise violate federal or state law.<sup>16</sup>

If online gambling unrelated to sports betting is not covered by the Wire Act, then neither UIGEA nor the Travel Act would apply unless, as a threshold matter, such online gambling violates state law.

## State Gambling Laws

Every state and the District of Columbia have some form of gambling or lottery statutes. These statutes apply to gambling, whether conducted in person or over the internet. The laws vary from state to state, but generally outlaw or at least regulate lotteries. They generally define lotteries as games that include three basic elements: (1) something of value is wagered (the "consideration"), (2) for a reward of value (the "prize"), (3) on a game or contest of chance or where the bettor has no control over the outcome.

The element of consideration is satisfied by whatever a bettor chooses to risk, whether it takes the form of money or some other source of commercial value. Rules of promotional contests often specify that "no purchase is required" in an effort to avoid triggering the element of consideration.

The prize element is what a bettor hopes to win through his or her wagers. Although any prize could conceivably have subjective value, courts seldom find that rewards of only intangible value (*e.g.*, a sense of personal accomplishment) satisfy the prize element. In general, the greater the ease with which a reward may be liquidated or used as currency outside a game, the more likely the reward is to meet the "prize" element. Publishers of online video games and social games often limit a player's ability to cash out his game winnings partly in an effort to avoid the element of "prize."

The third element—whether the game in question is one of skill or chance—is where much of the debate over whether poker is a form of gambling occurs.<sup>17</sup>

While some may debate whether poker is predominantly a game of skill,<sup>18</sup> no state views slot machines, blackjack, craps, roulette or other games commonly found on casino floors as anything but games of chance.

Moreover, many states expressly outlaw poker and slot machines. In addition to prohibiting wagering on games of chance, some states, including Arizona, Iowa, Louisiana, Maryland, Montana, South Dakota and Tennessee, also arguably prohibit wagering on games of skill.<sup>19</sup> The states of Illinois, Indiana, Louisiana, Oregon, South Dakota, Washington and Wisconsin explicitly prohibit online gambling. While not all of the online gambling prohibitions use the term "online gambling," these statutes generally define the concept of "online gambling" as the use of the internet to place wagers or to transmit information for placing or receiving wagers.<sup>20</sup> Some states also outlaw receiving, recording or registering bets or wagers, or of selling pools of bets or wagers (*i.e.*, bookmaking and or pool selling).<sup>21</sup>

Although several states (including California) are considering online gambling as a potential source of new revenue, as of the date of this publication, only Nevada has explicitly legalized certain forms of online gambling (currently only for online poker).<sup>22</sup>

## Nevada: The Model for eGaming Regulation?

During its 2011 session, the Nevada legislature passed a law allowing qualified persons and entities to become licensed to conduct in-state "interactive gaming"<sup>23</sup> and "mobile gaming."<sup>24</sup> The day before the DOJ opinion was made public, the Nevada Gaming

Commission (the Commission) adopted regulations drafted by the Nevada Gaming Control Board (the Board) to implement Nevada's new interactive gaming laws for online poker.<sup>25</sup> While a full review of the Nevada legislation and accompanying regulations is beyond the scope of this article, certain provisions require operators to have effective, and virtually foolproof, geolocation and player authentication capabilities, and are therefore worth noting.

The regulations direct the chairman of the Board to adopt and publish minimum internal control standards that "interactive gaming operators" must follow concerning such matters as system security; authorized player identification and registration; the confidentiality of player accounts; precautions against the use of automated software programs (sometimes called "bots") that interface with websites to calculate odds and process wagers more rapidly, and other automated, non-human player software programs; the prevention of player collusion; periodic system testing; the adoption of self-exclusion programs and protecting players' personally identifiable information (as rather narrowly defined in the regulations).<sup>26</sup>

While delegating to the Board chairman broad authority to define and mandate certain licensing mechanics, minimal internal controls and a variety of other matters, the Commission took care to include in the regulations themselves specific provisions concerning player registration procedures.<sup>27</sup> Recognizing that authenticating the identity of online gamblers is perhaps the greatest technological hurdle to be overcome, the regulations reflect an effort to shift the risk of "getting it wrong" to those players who misrepresent their age, location or identity.

Before allowing any "wagering communication" over the internet (or other specified media), an interactive gaming operator must obtain a host of information from the individual,

including an acknowledgment that if the operator "is unable to verify the information provided by the individual" within 30 days of registration, then any winnings attributed to the individual "will" be retained by the operator and the individual will have no rights to any winnings.<sup>28</sup> Pending "verification" of the information provided, the individual may not deposit more than \$5,000 into his or her interactive gaming account or withdraw *any* funds from his or her interactive gaming account.<sup>29</sup> The regulations also state that the operator "shall verify the information provided by the individual" within 30 days of registration and "must record and maintain" the "physical location, by state or foreign jurisdiction, of the authorized player while logged in to [his or her] interactive gaming account."<sup>30</sup>

Importantly, the operator's obligation here is not to use its commercially reasonable or best efforts to geolocate the authorized player; the obligation is an absolute one. Likewise, the regulations mandate that the operator "shall ensure" that the "individual registered as an authorized player holds only one interactive gaming account with the operator."<sup>31</sup> Thus, regardless of imperfections in available technology for geolocating a person and confirming his identity, if the operator unintentionally engages in a wagering communication with someone located in a state where online gambling remains illegal, then that communication could violate state law and, in turn, trigger a violation of the IGBA, the Travel Act or, if related to sports betting, UIGEA.

The penalties for non-compliance with Nevada's interactive gambling requirements can be severe. Under the regulations, the Commission "may limit, condition, suspend, revoke or fine any license, registration finding of suitability or approval given or granted under this regulation on the same grounds as it may take such action with respect to any other license, registration, finding of suitability or approval."<sup>32</sup>

As for the risk of underage players, the Nevada law states that "a debt incurred by a patron at an interactive gaming system of an establishment licensed to operate interactive gaming is valid and may be enforced by legal process."<sup>33</sup> Thus, minors who misrepresent their age are still "patrons" whose gambling debts are valid and enforceable, rather than minors who otherwise lack the capacity to contract and whose contractual commitments are therefore voidable.<sup>34</sup>

## Possible WTO Considerations

United States federal and state laws that restrict online gambling raise potential unfair trade practice considerations.

In 1995, the United States became a party to the General Agreement on Trade in Services (GATS).<sup>35</sup> At a high level, the way the GATS works is to require all parties to it to comply with general obligations and specific commitments. General obligations in the GATS, which apply automatically to all parties, most significantly include the obligation to extend to all parties "treatment no less favourable than that it accords to like services and services suppliers of any other country."<sup>36</sup> In addition, all parties to the GATS must submit a schedule of specific commitments that indicates those commercial service sectors and subsectors to which such country is willing to make free trade commitments.<sup>37</sup> This schedule is where each signing country has a chance to expressly define the scope of market access it will grant to foreign service suppliers, and also impose limits upon the requirement that such foreign suppliers will receive treatment no less favorable than local suppliers. The list of all possible service sectors and subsectors takes the form of a pre-populated list maintained by the staff of the World Trade Organization (WTO), which is charged with administering the GATS. One of the service sectors on the GATS schedule is "other recreational

services," and one of the subsectors under that sector is "gambling and betting services."

Separate and apart from a country's ability to determine the terms of its own GATS schedule, the GATS permits parties in specified circumstances to maintain measures in contravention of both their general obligations and specific commitments, such as where the measures are "necessary" in order to protect "public morals" and maintain "public order."<sup>38</sup>

When the US signed on to the GATS, US negotiators inserted a parenthetical that read "(except sporting)" next to the words "other recreational services" in the US' schedule. However, perhaps inadvertently, the US negotiators wrote "none" next to the subsector, thereby indicating that the US did not wish to impose any trade restrictions on the cross-border supply into the US of "other recreational services (except sporting)."<sup>39</sup>

In March 2003, Antigua and Barbuda (Antigua) brought a claim against the US before the WTO, alleging that the Wire Act, IGBA, Travel Act and various US state laws prohibiting online gambling all violated both the US' general obligations and its specific commitments under its GATS schedule, and injured Antigua's burgeoning online gambling industry.<sup>40</sup>

The US mounted a strenuous and years-long defense to the Antigua case. US negotiators first claimed that these laws were necessary to maintain public morals. The WTO rejected this argument in light of the various forms of gambling already permitted under US federal and state law.<sup>41</sup>

US negotiators also argued that its insertion of the parenthetical "(except sporting)" next to "other recreational services" sector excluded all forms of gambling from the US' specific commitments under its GATS schedule.<sup>42</sup> Somewhat ironically, given the DOJ's reversal on the Wire Act's coverage, the

US argued to the WTO in 2003 that all forms of gambling constituted forms of "sporting."<sup>43</sup> The WTO disagreed, noting that the ordinary meaning of "sporting" did not cover all forms of gambling.<sup>44</sup>

Finally, US negotiators told the WTO that they had not *meant* to include all forms of gambling and betting in its free trade commitments. The WTO expressed sympathy but refused to consider evidence of the US negotiators' intent, given the breadth and clarity of the word "none."<sup>45</sup>

The WTO first-instance Panel ruled against the US. It held that the Wire Act, IGBA and Travel Act violated the US' specific commitments under its GATS schedule and that anti-gambling laws of four states (Louisiana, Massachusetts, South Dakota and Utah) did as well.<sup>46</sup> The US appealed. The WTO's appellate body upheld the WTO's lower level ruling as it related to the Wire Act, IGBA and Travel Act. It held, however, that Antigua had failed to identify specific provisions of state statutes that allegedly violated the US' GATS commitments.<sup>47</sup>

Approximately a year after the decision of the WTO appellate body, Antigua complained to the WTO that the US had not complied with the appellate body's rulings.<sup>48</sup> This complaint was upheld by the WTO. One month later, Antigua requested permission to suspend trade concessions which it had granted the US.<sup>49</sup> This request was granted by the WTO, which allowed Antigua to suspend concessions at a level not exceeding \$21 million annually.<sup>50</sup>

During these moves by Antigua in the WTO, the US took the unusual step of attempting to modify its GATS schedule to exclude gambling services.<sup>51</sup> The GATS permits such modifications but requires the country seeking to make the change to compensate member countries that are adversely affected.<sup>52</sup> As of the date of this publication, the trade dispute is still ongoing, with the US and Antigua trying to reach a mutually agreed solution on the matter.<sup>53</sup>

The DOJ opinion reversing its view of the Wire Act raises several WTO free trade considerations. First, by opining that the Wire Act does not outlaw all online gambling, the DOJ has undermined its ability to argue in future WTO proceedings that, as a policy matter, the federal criminalization of online gambling is required in order to protect public morals and maintain public order in the US. Second, recall that in reversing its view of the Wire Act, the DOJ stated that the ordinary meaning of the term "sporting event" does not include "a lottery" and, thus, the online lotteries proposed by New York and Illinois were outside the scope of the Wire Act. This interpretation of "sporting event" as it appears in the Wire Act undermines the US' ability to argue in any future WTO proceeding that the parenthetical "(except sporting)" in the US' specific commitments under its original GATS schedule covers all forms of gambling. Thus, until the US is successful in amending its specific commitments under its GATS schedule to carve out "gambling and betting services," state laws and regulations that legalize online gaming but favor in-state gaming companies over non-US gaming providers could be challenged in future WTO proceedings.

## The Road Ahead

Given the variety and inconsistency in states' approaches to regulating gambling activities, Nevada Senator Harry Reid and others have urged Congress to pass overriding federal legislation that spells out where and when online gambling should be legal.<sup>54</sup> There is irony in these calls for a federal online gambling law because the DOJ's pivot around the Wire Act may reflect its growing comfort with emerging technologies that can be used to quickly locate would-be online gamblers<sup>55</sup> and block transactions from individuals located outside participating states' boundaries. Even absent federal

legislation, prospective online gambling operators aiming to position themselves to compete in online gambling markets would be wise to secure access to best-of-breed geolocation technology services to meet the standards set forth in Nevada's interactive gaming regulations.<sup>56</sup>

## Conclusion

In view of the fundamental (though perhaps not unexpected) shift in the DOJ's view on the federal regulation of online gambling unrelated to sporting events, gaming companies have already commenced making substantial investments to position themselves to compete in the anticipated online gambling marketplace. As of this writing, various manufacturers, operators and service providers, including Caesars Entertainment, International Game Technology (IGT), Fertitta Interactive, South Point and Boyd Gaming, have already submitted proposals to obtain interactive gaming licenses from the Nevada Gaming Control Board.<sup>57</sup> Caesars bought a 51 percent interest in Israeli social game developer Playtika for \$90 million in June of 2011 and purchased the remaining 49 percent in December of 2011.<sup>58</sup> On January 12, 2012, IGT announced that it purchased the social game developer Double Down Interactive for up to \$500 million, including an earn-out.<sup>59</sup> We can expect to see more mergers, collaborations and cross-licenses between developers of free-to-play, virtual good-filled, social games played on mobile phones, tablets and computers, on the one hand, and casino and casino equipment owners and operators, on the other hand. These collaborations require special attention to structuring for, and documenting, the unique strengths that each of the participants will bring to their unions and how, going forward, the new online gambling legal requirements will be met.

## Endnotes

- <sup>1</sup> 18 U.S.C. § 1084.
- <sup>2</sup> *In re: Mastercard Int'l Inc., Internet Gambling Litig.*, 313 F.3d 257, 262–63 (5th Cir. 2002).
- <sup>3</sup> Memorandum Opinion for the Assistant Attorney General, Criminal Division, from Virginia A. Seitz, Assistant Attorney General (September 20, 2011) at 12 (emphasis added).
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.* at 2. "Geolocation" and "geolocated" refer to the process of obtaining geographic information about the location of a computer, including the computer's country, city, or zip code. The role of geolocation is to ensure that online wagering is restricted to players within a particular jurisdiction.
- <sup>6</sup> 31 U.S.C. §§ 5361–5367.
- <sup>7</sup> 31 U.S.C. § 5363.
- <sup>8</sup> 31 U.S.C. § 5362(10)(A).
- <sup>9</sup> See, e.g., Samuel Rubinfeld, "Man Pleads Guilty in US Internet Gambling Crackdown," WALL ST. J. BLOGS, Jan. 17, 2012, [http://blogs.wsj.com/corruption-currents/2012/01/17/man-pleads-guilty-in-us-internet-gambling-crackdown/?mod=google\\_news\\_blog](http://blogs.wsj.com/corruption-currents/2012/01/17/man-pleads-guilty-in-us-internet-gambling-crackdown/?mod=google_news_blog).
- <sup>10</sup> 18 U.S.C. § 1955.
- <sup>11</sup> 18 U.S.C. § 1955(a).
- <sup>12</sup> 18 U.S.C. § 1955(b)(1).
- <sup>13</sup> 18 U.S.C. § 1952.
- <sup>14</sup> 18 U.S.C. § 1952(a).
- <sup>15</sup> 18 U.S.C. § 1952(b).
- <sup>16</sup> For brevity, we have somewhat glossed over tribal laws. In the case of gambling activities on Indian reservations, gambling is regulated by a combination of tribal, state and federal government bodies under the Indian Gaming Regulatory Act, depending on the type of gambling offered. As a practical matter, Class I and Class II categories of gaming, which mostly include social gaming for prizes of minimal value, traditional Indian gaming, bingo and related games, and card games played exclusively against other players and not against a "bank," are regulated by tribal governments. For Class III gaming, which includes gaming that is not Class I or Class II gaming, state and tribal governments often enter into compacts to determine what Class III gaming activity is permissible on tribal lands. The federal government plays a role in regulation of Class III gaming.

<sup>17</sup> To determine whether a game's outcome is determined by chance or by skill, many states apply the "Dominant Factor Test" or "Predominance Test." The test is a fact-intensive inquiry that requires a court to carefully analyze the nature of the game and decide whether elements of skill or chance are more dominant for determining the game's outcome. Four common elements of games where skill is found to be the dominant factor are where (1) players have a possibility of using skill and have enough information to make an informed judgment; (2) players have the opportunity to use skill, and the general group of participants have the required skill; (3) skill must play a significant part in determining the outcome; and (4) the standard of skill must be known to the players, and that standard must determine the outcome. See *Morrow v. State*, 511 P.2d 127, 129-130 (Alaska 1973).

<sup>18</sup> The "sportification" of poker through the branding and sports channel broadcasting of the World Series of Poker no doubt enhances the game's image as an endeavor where the outcome is determined by stamina, body control and exquisite skill.

<sup>19</sup> See, e.g., Ariz. Rev. Stat. § 13-3301(4) ("Gambling" or "gamble" means one act of risking or giving something of value for the opportunity to gain a benefit from a game or contest of chance or skill . . ."); Iowa Code § 725.7 ("[A] person shall not do any of the following: (a) participate in a game for any sum of money or other property of any value. (b) Make any bet . . ."); La. Rev. Stat. § 14:90(A)(1)(a) ("Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit."); Md. Code § 12-102(a) ("A person may not: (1) bet, wager, or gamble; (2) make or sell a book or pool on the result of a race, contest, or contingency . . ."); Mont. Code § 23-5-112(12)(a) ("Gambling" or "gambling activity" means risking any money, credit, deposit, check, property, or other thing of value for a gain that is contingent in whole or in part upon lot, chance, or the operation of a gambling device or gambling enterprise."); S.D. Codified Laws § 22-25-1 ("Any person who engages in gambling in any form with cards, dice, or other implements or devices of any kind wherein anything valuable is wagered upon the outcome . . . is guilty of a Class 2 misdemeanor."); Tenn. Code § 39-17-501(1) ("Gambling is contrary to the public policy of this state and means risking anything of

value for a profit whose return is to any degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like.").

<sup>20</sup> See, e.g., 720 Ill. Comp. Stat. 5/28-1(a)(12) ("A person commits gambling when he . . . [k]nowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet . . ."); Ind. Code § 35-45-5-3(b) ("An operator who knowingly or intentionally uses the Internet to . . . (4) conduct lotteries or policy or numbers games or sell chances in lotteries or policy or numbers games . . . (5) conduct any banking or percentage games played with the computer equivalent of cards, dice, or counters, or accept any fixed share of the stake in those games . . . or (6) accept, or offer to accept, for profit, money or other property risked in gambling . . . commits professional gambling over the Internet, a Class D felony."); La. Rev. Stat. § 14:90.3(B) ("Gambling by computer is the intentional conducting, or directly assisting in the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet, World Wide Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server."); Or. Rev. Stat. § 167.109(1) ("A person engaged in an Internet gambling business may not knowingly accept, in connection with the participation of another person in unlawful gambling using the Internet: (a) Credit, or the proceeds of credit, extended to or on behalf of such other person, including credit extended through the use of a credit card; (b) An electronic funds transfer or funds transmitted by or through a money transmission business, or the proceeds of an electronic funds transfer or money transmission service, from or on behalf of the other person; (c) Any check, draft or similar instrument that is drawn by or on behalf of the other person and is drawn on or payable at or through any financial institution; or (d) The proceeds of any other form of financial transaction that involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person."); S.D. Codified Laws § 22-25A-7 ("Internet betting by person engaged in gambling business prohibited. [N]o person engaged in a gambling business may use the internet or an interactive computer service to bet or wager.") and S.D. Codified Laws § 22-25A-8 ("Establishment of internet gambling business prohibited. . . . [N]

o person may establish a location or site in this state from which to conduct a gambling business on or over the internet or an interactive computer service.”); Wash. Rev. Code § 9.46.240 (“Whoever knowingly transmits or receives gambling information by . . . the internet, a telecommunications transmission system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony . . . . However, this section shall not apply to such information transmitted or received or equipment installed or maintained relating to activities authorized by this chapter or to any act or acts in furtherance thereof when conducted in compliance with the provisions of this chapter and in accordance with the rules adopted under this chapter.”); Wis. Stat. § 945.03(1m) (“Whoever intentionally does any of the following is engaged in commercial gambling . . . (g) [f]or gain, uses a wire communication facility for the transmission or receipt of information assisting in the placing of a bet or offer to bet on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or offer to bet.”).

<sup>21</sup> See, e.g., Cal. Penal Code § 337a(a) (“[E]very person who engages in one of the following offenses, shall be punished for a first offense by imprisonment in a county jail for a period of not more than one year or in the state prison, or by a fine not to exceed five thousand dollars (\$5,000), or by both imprisonment and fine: (1) Pool selling or bookmaking, with or without writing, at any time or place. . . . (3) Whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever. (4) Whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed

or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever. . . . (6) Lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus.”); S.C. Code § 16-19-130 (“Any person within this State who: (1) [e]ngages in betting at any race track, pool selling or bookmaking, with or without writing, at any time or place; . . . (3) [r]ecords or registers bets or wagers or sells pools or makes books, with or without writing, upon the result of any (a) trial or contest of skill, speed or power of endurance of man or beast, (b) political nomination, appointment or election or (c) lot, chance, casualty, unknown or contingent event whatsoever; (4) [r]eceive[s], registers, records or forwards or purports or pretends to receive, register, record or forward, in any manner whatsoever, any money, thing or consideration of value bet or wagered or offered for the purpose of being bet or wagered by or for any other person or sells pools upon any such result; . . . or (6) [a]ids, assists or abets in any manner in any of the aforesaid acts, which are hereby forbidden; [s]hall be guilty of a misdemeanor.”).

<sup>22</sup> Nevada’s online gaming regulations currently apply only to online poker. See Nev. Gaming Comm’n Reg. § 5A.140(1)(a) (“Operators shall not accept or facilitate a wager: [o]n any game other than the game of poker and its derivatives as approved by the chairman and published on the board’s website.”).

<sup>23</sup> “‘Interactive gaming’ means the conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information.” Nev. Rev. Stat. § 463.016425(1). The term “does not include the operation of a race book or sports pool that uses communications technology approved by the [Nevada Gaming Control] Board pursuant to regulations adopted by the [Nevada Gaming] Commission to accept wagers originating within this state for races, or sporting events or other events.” Nev. Rev.

- Stat. § 463.016425(1)(b). “[C]ommunications technology’ means any method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wire, cable, radio, microwave, light, optics or computer data networks, including, without limitation, the Internet and intranets.” Nev. Rev. Stat. § 463.016425(2).
- <sup>24</sup> “‘Mobile gaming’ means the conduct of gambling games through communications devices operated solely in public areas of an establishment which holds a nonrestricted gaming license and which operates at least 100 slot machines and at least one other game by the use of communications technology that allows a person to transmit information to a computer to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. For the purposes of this section: ‘Communications technology’ means any method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wireless network, wireless fidelity, wire, cable, radio, microwave, light, optics or computer data networks. The term does not include the Internet.” Nev. Rev. Stat. § 463.0176. The 2011 bill that modified Nevada’s interactive gaming laws, dubbed the “online poker bill,” was A.B. 258, 2011 Leg., 76th Sess. (Nev. 2011).
- <sup>25</sup> The new and amended regulations are found at Nev. Gaming Comm’n Reg. §§ 3, 4, 5, 5A, 8, 14, 15, 15A and 15B. Brian Duffrin, Nev. Gaming Comm’n, Notice to Licensees, Jan. 5, 2012, available at [http://gaming.nv.gov/industry\\_ltrs/industry\\_ltr\\_355.pdf](http://gaming.nv.gov/industry_ltrs/industry_ltr_355.pdf).
- <sup>26</sup> Nev. Gaming Comm’n Reg. § 5A.070.
- <sup>27</sup> Nev. Gaming Comm’n Reg. § 5A.110.
- <sup>28</sup> Nev. Gaming Comm’n Reg. § 5A.110(1), (6), (7).
- <sup>29</sup> Nev. Gaming Comm’n Reg. § 5A.110(5)(a), (b).
- <sup>30</sup> Nev. Gaming Comm’n Reg. §§ 5A.110(5) and 5A.120(1)(c).
- <sup>31</sup> Nev. Gaming Comm’n Reg. § 5A.120(2)(a).
- <sup>32</sup> Nev. Gaming Comm’n Reg. § 5A.200(2).
- <sup>33</sup> Nev. Rev. Stat. § 463.780.
- <sup>34</sup> See, e.g., Nev. Rev. Stat. § 129.130(3)(a) (A valid emancipation decree “emancipates the minor for all purposes and removes the disability of minority of the minor insofar as that disability may effect [t]he incurring of indebtedness or contractual obligations of any kind.”).
- <sup>35</sup> General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183. See also World Trade Organization, Understanding the WTO: Members and Observers, available at [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).
- <sup>36</sup> General Agreement on Trade in Services Art. II, Apr. 15, 1994, 1869 U.N.T.S. 183. Some derogations from such “most-favoured nation treatment” are possible, provided they were negotiated before the GATS entered into force or before the time of accession of a new Member. New exemptions from the MFN treatment obligation may also be negotiated by way of a waiver under Article IX:3 of the WTO Agreement (the covering treaty which links all of the other treaties overseen by the WTO, including the GATS).
- <sup>37</sup> General Agreement on Trade in Services Art. XX, Apr. 15, 1994, 1869 U.N.T.S. 183.
- <sup>38</sup> General Agreement on Trade in Services Art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183.
- <sup>39</sup> See, e.g., World Trade Org., United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, Report of the Panel 16–17, 200, and C-26 to C-28 (2004), available at [http://www.antiguawto.com/wto/37\\_WTO\\_Panel\\_Report\\_%2010Nov04.pdf](http://www.antiguawto.com/wto/37_WTO_Panel_Report_%2010Nov04.pdf).
- <sup>40</sup> World Trade Organization, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Request for Consultations by Antigua and Barbuda, March 27, 2003, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm), then click “Request for Consultations” hyperlink. Other GATS signatories, namely the European Union, Canada, Japan, Mexico and Chinese Taipei, reserved their rights to participate in the WTO proceedings as a third party.
- <sup>41</sup> Report of the Panel at 233–34, 271.
- <sup>42</sup> *Id.* at 145.
- <sup>43</sup> *Id.* at 149.
- <sup>44</sup> *Id.* at 152–53.
- <sup>45</sup> See *Id.* at 169–70.
- <sup>46</sup> *Id.* at 272–73. The WTO first-instance Panel also rejected Antigua’s argument that the measures at issue were inconsistent with the general obligation in the GATS that domestic regulation be “administered in a reasonable, objective and impartial manner” and be conducted, in respect of the grant of authorisations to supply services falling within a scheduled commitment, in a timely manner. *Id.* at 232.

- <sup>47</sup> World Trade Org., United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services AB-2005-1, WT/DS285/AB/R, Report of the Appellate Body 47, 123–26, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/285abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf).
- <sup>48</sup> See, e.g., Antigua – United States WTO Internet Gambling Case, available at <http://www.antiguawto.com/WTODispPg.html>.
- <sup>49</sup> *Id.*
- <sup>50</sup> In essence, this suspension of concessions meant that the WTO gave Antigua permission “to violate intellectual property laws of another – the United States — by allowing them to distribute copies of American music, movie and software products, among other items.” James Kanter & Gary Rivlin, “WTO Gives Antigua Right to Violate US Copyrights in Gambling Dispute,” N.Y. Times, Dec. 21, 2007, available at <http://www.nytimes.com/2007/12/21/business/worldbusiness/21iht-wto.html>.
- <sup>51</sup> *Id.*
- <sup>52</sup> Article XXI of the GATS provides that a “Member (referred to in this Article as the ‘modifying Member’) may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force” and that “[a]t the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an ‘affected Member’) by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment.”
- <sup>53</sup> See, e.g., Ronald Kirk, Office of the US Trade Representative, 2011 Trade Policy Agenda and 2010 Annual Report 80, available at [http://www.ustr.gov/webfm\\_send/2597](http://www.ustr.gov/webfm_send/2597).
- <sup>54</sup> See e.g., Steve Tetreault, “Reid Offers Fresh Hope for Web Poker,” Las Vegas Rev. J., Jan., 20, 2012, available at [http://www.lvrj.com/blogs/politics/Reid\\_in\\_favor\\_of\\_federal\\_gaming\\_legislation.html](http://www.lvrj.com/blogs/politics/Reid_in_favor_of_federal_gaming_legislation.html).
- <sup>55</sup> See, for example, product descriptions for NetAccuity marketed by Digital Element and “IP Intelligence” services marketed by Neustar (formerly Quova).
- <sup>56</sup> This is easier said than done. Over the past ten or so years, a host of geolocation-related patents have been issued. In contracts with geolocation technology providers, interactive game operators will want to seek fulsome intellectual property infringement indemnification rights backed by identifiable assets.
- <sup>57</sup> See, e.g., Richard N. Velotta, “Nevada Approves Nation’s First Regulations for Internet Poker Play,” Vegasinc.com, Dec. 22, 2011, available at <http://www.vegasinc.com/news/2011/dec/22/nevada-gaming-commission-approves-rules-internet-/>; Steven Stradbroke, “MGM, Boyd Apply for Nevada Poker Licenses; Bwin Party’s Ryan Talks Germany,” CalvinAyre.com, February 4, 2012, available at <http://calvinayre.com/2012/02/04/business/mgm-boyd-nevada-poker-licenses-bwin-party-germany/>.
- <sup>58</sup> See, e.g., “Caesar’s Acquires the Remaining 49 Percent of Playtika,” Reviewed-Casinos.com, Dec. 23, 2011, available at <http://www.reviewed-casinos.com/news/caesars-acquires-the-remaining-49-percent-of-playtika.html>.
- <sup>59</sup> See, e.g., Howard Stutz, “Benefits Touted to IGT Acquisition of Double Down Interactive,” Las Vegas Rev. J., Jan. 14, 2012, available at <http://www.lvrj.com/business/benefits-touted-to-igt-acquisition-of-double-down-interactive-137340488.html>.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

**Roxanne E. Christ**

+1.213.891.8300  
roxanne.christ@lw.com  
Los Angeles

**Lei Zhang**

+1.213.891.8913  
lei.zhang@lw.com  
Los Angeles

**Sony Ben-Moshe**

+1.619.238.2933  
Sony.ben-moshe@LW.com  
San Diego

**Michael Bond**

+44.20.7710.1067  
michael.bond@lw.com  
London

**Alice Fisher**

+1.202.637.2232  
Alice.fisher@lw.com  
Washington, D.C.

**Raymond Lin**

+1.212.906.1369  
raymond.lin@lw.com  
New York

**Charles Ruck**

+1.714.755.8245  
Charles.Ruck@lw.com  
Orange County

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our website at [www.lw.com](http://www.lw.com).

If you wish to update your contact details or customize the information you receive from Latham & Watkins, please visit [www.lw.com/LathamMail.aspx](http://www.lw.com/LathamMail.aspx) to subscribe to our global client mailings program.

**Abu Dhabi**

**Barcelona**

**Beijing**

**Boston**

**Brussels**

**Chicago**

**Doha**

**Dubai**

**Frankfurt**

**Hamburg**

**Hong Kong**

**Houston**

**London**

**Los Angeles**

**Madrid**

**Milan**

**Moscow**

**Munich**

**New Jersey**

**New York**

**Orange County**

**Paris**

**Riyadh\***

**Rome**

**San Diego**

**San Francisco**

**Shanghai**

**Silicon Valley**

**Singapore**

**Tokyo**

**Washington, D.C.**

\* In association with the Law Office of Mohammed A. Al-Sheikh