

# Will Banks Gamble on New Interactive Gaming Opportunities Available to Customers?

Consumers utilize online and mobile banking to pay everything from mortgage payments to concert tickets to kids' school lunch bills. Online purchases linked to a credit card or bank account can be made simply by speaking in the presence of a smart device. All of this is done increasingly through a variety of mobile applications specific to the service if not through a bank directly. Consumers increasingly demand the ease of online/mobile payment systems and financial institutions are meeting the challenge.

Pennsylvania and a handful of other states have recently increased gaming opportunities. In Pennsylvania, Act 42 of 2017 made several changes to Pennsylvania's gaming laws, including creating a mechanism for internet-based gaming - in the parlance of the statute - "interactive gaming." This legislation has paved the way for legal sports betting and other forms of virtual gambling in the Commonwealth. The industry has enormous potential. Estimates for Pennsylvania sports betting alone exceed \$12 billion annually. This figure would triple the sports wagering that occurs in Nevada.

At the time it was passed, portions of Act 42 directly conflicted with the federal Professional and Amateur Sports Protection Act (PASPA) which prohibited sports gambling in most states. However, PASPA was already the subject of a court challenge at the time

Act 42 was passed, and in May 2018, the U.S. Supreme Court declared PASPA unconstitutional. This removed the final hurdle for states to legalize sports betting and hastened progress towards interactive gaming in the Commonwealth. Since then, the Pennsylvania Gaming Control Board has implemented several regulations consistent with Act 42 and is in the process of accepting applications to permit entities to conduct interactive gaming.

Interactive gaming is expected to be available sometime in 2019 after interactive gaming licenses are in place. If current consumer habits hold, people will be extremely receptive to online gaming supported by the mobile and internet payment systems that are already commonplace. Undoubtedly, many who try their luck with this new pastime will seek funding through their existing financial institutions on a credit or debit basis.

Act 42 allows participants to create "interactive gaming accounts" to be funded by "money, checks, electronic checks, electronic transfers of money, credit cards or any other instrumentality to transmit electronic information." The law interprets all wagers made through interactive gaming as "deemed to be initiated, received or otherwise made within the geographic boundaries of this Commonwealth."

Clearly the intent is to keep all aspects of interactive gaming within the borders of the Commonwealth. However, despite authority to do so on the state level, financial institutions should consider whether federal law may limit their ability to provide funding for interactive gaming.

In particular, two federal laws may impact funding of interactive gaming accounts - the Unlawful Internet Gambling Enforcement Act (UIGEA) and The Wire Act.

UIGEA is likely the law of primary concern to financial institutions. UIGEA prohibits persons "engaged in the business of betting or wagering" from knowingly accepting payments in connection with the participation of another person in unlawful internet gambling.

Gambling that is entirely intrastate is excluded from UIGEA. This qualification seemingly provides a safe harbor for gambling under Act 42, which must be conducted entirely within the Commonwealth. However, interactive gaming adds the element of the internet to the equation. Federal courts have held that the internet is inherently an interstate activity regardless of whether the activity crosses state borders. Because the internet is "an instrumentality of interstate commerce," federal law may reach internet use even if the actions occur entirely within the borders

of a single state. Therefore, while in-person cash transactions permitted by Act 42 are outside the reach of UIGEA, funding an interactive gaming account online could trigger federal jurisdiction.

Further, although UIGEA's application to "persons engaged in the business of betting or wagering" would seemingly exclude financial institutions, regulations promulgated by the Treasury Department and the Federal Reserve require entities under their supervision to block prohibited transactions. The joint Treasury/Federal Reserve regulation requires financial institutions to follow procedures designed to prevent payments relating to unlawful internet gambling. Whether a wager is unlawful in any particular case will depend on the specific facts and the jurisdiction involved. But, since the regulation applies to ACH transfers, card systems, check collection systems, wire transfer systems and money transmitting businesses, it is generally safe to assume it is applicable to all electronic payments.

Even though Act 42 provides that all interactive gaming is deemed to occur wholly within the Commonwealth, it may be risky for financial institutions to rely on this safe harbor because of the existing interpretations of federal law. Pennsylvania financial institutions should be mindful of this conflict if they are considering policy changes in the wake of Act 42.

The second federal law that may impact funding of interactive gaming accounts is the Wire Act. The Wire Act is a law originally passed to fight organized crime. Like UIGEA, the Wire Act is directed towards those "engaged in the business of betting or wagering." Therefore, the Wire Act is not directed at financial institutions in normal circumstances. But, a financial institution could unwittingly find itself in the middle of a Wire Act case because of a reality of online gambling that ironically exists, in part, due to UIGEA regulations.

It is common in the online gambling world for bettors to use third-party hosts to route payments. Precisely because financial institutions have existing UIGEA policies that limit funding sources, bettors utilize third parties to mask the true nature of the transaction and avoid UIGEA detection. These third-party hosts, located almost exclusively overseas, exist for the purpose of facilitating online gaming accounts.

Even if a financial institution could not commit an underlying Wire Act offense, it could unwittingly bring itself within the scope of the Wire Act by funding a third-party host. In practice, financial institutions may be protected from penalties in this situation due to the requirement that they act with knowledge of such transactions. Nevertheless, it may be advisable to implement policies to provide additional protection to guard against this possibility. This is

especially necessary given recent efforts by the Department of Justice to expand the reach of the Wire Act.

On Jan. 14, 2019, the DOJ delivered a new opinion expanding the previous scope of the Wire Act. Since 2011, the DOJ had interpreted the Wire Act as applicable only to sports gambling. The new opinion interprets the Wire Act as applying to all forms of gambling. While it remains to be seen, a broader interpretation of the Wire Act could be a harbinger of more federal scrutiny of gambling that is otherwise legal under state law as has occurred with marijuana legalization.

Act 42 has already delivered expanded gaming opportunities to Pennsylvanians. These opportunities are sure to increase in 2019 once interactive gaming is available. But as customers seek methods to finance these opportunities, financial institutions should make sure that any services they provide in this area not only comply with Act 42 but also do not ignore federal law.



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