

Practice Update

Online Gambling and The DOJ's Wire Act Reinterpretation

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When your opponent hands you its playbook, read it.

On January 14, 2019, the U.S. Department of Justice issued a memorandum on its new interpretation of the Wire Act. The memorandum is a complete reversal by the DOJ from its 2011 memorandum on the same subject. Though the memorandum was anticipated, its breadth and scope nonetheless have taken gaming industry participants and regulators by surprise. Lest there be any doubt, the new position adopted by the DOJ concludes that the Wire Act, a federal law enacted in 1961, makes online gambling an illegal activity across state lines. The memorandum's dramatic shift from the interpretation provided less than eight years prior will likely have a chilling effect on the rapidly developing, burgeoning online industry. This new guidance makes it clear that the federal government – or at least, the executive branch – now perceives the ban on interstate online gaming as not just a sports betting issue; rather, all forms of gambling on the Internet are subject to the Wire Act's restrictions.

In its opinion, the DOJ goes so far as to single out the online lotteries currently being offered as a consequence of the 2011 interpretation. Indeed, some states have entered into liquidity pools offering interstate online gaming opportunities in other

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arenas as well. Such interstate activity may very likely be the subject of investigation, prosecution, and/or litigation in the near future.

Companies that operate or support online gaming and the jurisdictions that authorize and regulate them, however, can take comfort in that the DOJ's reinterpretation of the Wire Act is not necessarily the law. The memorandum is quite simply an insight into the federal government's position and approach to all forms of wagering and betting that occur on the Internet.

Thus, with the publication of this memorandum, the DOJ has left its playbook wide open. And, courts of law are not required to blindly apply the DOJ's latest analysis either. In fact, the case law interpreting the Wire Act finds otherwise. In the only Circuit Court case law on the scope of the Wire Act, both the Fifth Circuit and the First Circuit concluded that the Wire Act applies solely to sports betting. This precedent is binding law within those circuits and highly persuasive throughout the remainder of the country where no binding Circuit Court precedent holding one way or the other on the scope of the Wire Act exists.

Those looking to the Supreme Court's recent repeal of PASPA in the *Murphy* case for help will be disappointed. *Murphy* turned on the Tenth Amendment's anti-commandeering principle. The language of the Wire Act does not appear to present the same constitutional violation. While *Murphy* was a boon for states' rights, it does not confer upon the states exclusivity over online gaming authorization and regulation.

Instead, online gaming industry participants should take this memorandum for what it effectively is: the federal government's legal brief in support of its case. While litigants normally have mere weeks to respond to the adverse party during litigation, in this case, at least 90 days has been provided as a grace period before any action is taken. It is very likely an

insufficient amount of time to determine with certainty the widespread reach of this new memorandum opinion and to effect the changes deemed necessary in order to come into compliance, but this is the time to get legal affairs in order and to strategize with litigation counsel.

Though the government is changing course and attempting to undo decades of law, the good news for states and operators alike is that they can come prepared for the inevitable legal battle. Online gaming industry participants should develop a game plan with their legal teams and discuss the appropriate steps to take to protect their interests while continuing to advance and effectively regulate this dynamic industry.

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