DICKSTEINSHAPIRO LLP

American Greyhound Track Operators Association
Concerns with the Proposed UIGEA Regulation

Pari-Mutuel Greyhound Racing Industry Background

Greyhound racing is recognized as one of the nation's largest spectator sports and has been expressly excluded by Congress from the broad sports wagering prohibitions found in the Professional and Amateur Sports Prohibition Act (28 U.S.C. §§ 3701 et seq.). Pari-mutuel wagering pools for state-sanctioned greyhound races are legal in 16 states: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Iowa, Kansas, Massachusetts, New Hampshire, Oregon, Rhode Island, South Dakota, Texas, West Virginia, and Wisconsin. These states authorize pari-mutuel wagering and actively license, regulate, monitor, and supervise pari-mutuel tracks and the businesses that support them. States impose fees and taxes in various forms, making pari-mutuel wagering an important source of revenue generation for many states.

Greyhound tracks rely heavily on *legal* interstate wagers through simulcasted races and common pool wagering. A "*legal* interstate wager" is a pari-mutuel wager placed by a person located in one state on a race performed in another state, where it is *legal* to do so in *both* states. Horse tracks and greyhound tracks simulcast each other's races as well as permit betting on both the live and simlucasted races. Moreover, horse and dog racing use the same technology. Many pari-mutuel transactions use the Internet or a telephone line to simulcast and reconcile the merged betting pool. This facilitates and promotes the efficacy of the transactions.

Congressional Intent Protects Greyhound Racing

Congress explicitly affirmed that the pari-mutuel industry should be exempt, since the industry is licensed and regulated by states. The UIGEA's legislative history clearly states, "if the use of the Internet in connection with dog racing is approved by state regulatory agencies and does not violate any Federal law, then it is allowed under the new sections 5362(10)(A) of title 31." 152 Cong. Rec. H8026-04 (Sept. 29, 2006) (legislative history submitted by Sen. Leach). Congress also included a provision that stated. "...no provision of this subchapter shall be construed as altering, limiting or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." (31 U.S.C. §5361(b)). Furthermore, Congress exempted pari-mutuel wagering from the broad sports betting prohibitions contained in the Professional and Amateur Sports Prohibition Act.

Congressional actions, legislative history, and statutory language was very mindful of *lawful* pari-mutuel wagering when it adopted the Act and explicitly protected legal pari-mutuel wagering and transactions. A final regulation must follow suit and proactively protect such legal transactions.

Over-Blocking In the Proposed Regulation Harms Legal American Businesses

Congressional intent is clear that legal state-licensed and regulated pari-mutuel transactions should be permitted. However, the protection for over-blocking included in the Proposed Regulation is contrary to Congressional intent. While the Proposed Regulation makes a reference to the state law protections in the statute, it confuses the matter by also including liability protections to financial institutions who block a transaction regardless of whether it is legal or not.

Under Section 5(a) of the Proposed Regulation, participants in designated non-exempt payment systems (which includes financial transaction providers) can (1) simply rely on established written policies and procedures of the payment systems which are reasonably designed to identify, block, and otherwise prevent restricted transactions; or (2) establish and comply with their own written policies and procedures that are reasonably designed to accomplish the same thing. In other words, the Administration causes participants to create policies to block illegal transactions but does not encourage the financial institutions to additionally create policies to permit legal transactions, such as those in the pari-mutuel industry.

When presented with a choice of processing legal pari-mutuel transactions in the face of an ambiguous regulation, payment processors will, in all likelihood, avoid processing any transaction and could block legal transactions. During the comment period of the Proposed Regulations, many financial institutions noted that the over-blocking provisions would allow them to block all transactions regardless of their legality. For example, the Kansas Bankers Association stated that the over-blocking provisions permit "institutions to decide to completely avoid processing **any** gambling transactions and thereby avoid the potential liability presented by this proposal."

Any final regulation must not encourage over-blocking of legal transactions. Instead, it should provide a similar process to permit legal transactions as it does for blocking illegal transactions.

Liability Protection for Legal Transactions

While the Proposed Regulation provides liability protection for financial institutions that over-block, it fails to provide similar protections to legal American businesses whose transactions are refused by a payment processor.

Under the Proposed Regulation a payment processor can determine that processing any transaction is not of financial benefit, since the processor could be burdened by the expense of guessing incorrectly. Therefore all legal transactions, such as those in the pari-mutuel industry, would be in jeopardy. Under the Proposed Regulation, greyhound track operators would have no legal recourse against a payment processor to re-instate the processing of legal transactions.

A significant portion of the pari-mutuel industry is involved with simlucasting, account wagering, and common pool wagering. If these transactions are blocked, the entire greyhound

industry in the United States is in peril, which is why Congress included language into the legislative history to protect the industry Any final regulation must provide a procedure for recourse if legitimate businesses, like those in the greyhound racing industry, are harmed if a payment processor blocks their legal transactions.

Clarification of Legal vs. Illegal Transactions

States that authorize pari-mutuel wagering implement a myriad of regulatory measures that must be viewed in light of numerous controlling federal gambling laws. Payment processors are not considered experts in this field, and therefore any regulation should provide clarity and not ambiguity.

The Proposed Regulation provides no definition of "unlawful gambling activity" for the regulated community. This lack of clarification combined with the over-blocking provisions encourages an unintended regulatory scheme resulting in legal activity being re-defined as illegal. Without clearly defined transactional definitions for the regulated communities, the Proposed Regulation raises questions about fairness to impacted entities.

Principles of fundamental fairness require that the Proposed Regulation be sufficiently clear that a person of common intelligence need not guess at its meaning and application [*Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983)]. The Administration also has the "responsibility to state with ascertainable certainty what is meant by the standards" in a rule and "to give sufficient guidance to those who enforce ..., to those who are subject to civil penalties, or to those courts who may be charged to interpret and apply the standards." [*Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999, 1005–1006, (11th Cir.1994); accord, *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1297 (D.C. Cir.1995)]. In drafting any rule, the Administration must structure the regulation so that the regulated party is given a reasonable opportunity to bring its conduct into conformity with the agency's policy judgments or view of the law. It is not enough for the agency to describe its regulatory goals or regulatory objectives. The agency should give the regulated persons guidelines by which to measure their performance against the agency's or Congress' objectives [*Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 465 (D.C. Cir.1979)]. The Proposed Regulation fails on all of these requirements.

The Act makes abundantly clear that the placing of an Internet bet or wager that is legal under federal or state law is not "unlawful." Yet, the Proposed Regulation does not designate what is legal and what is not, and therefore payment processors will have to engage in a guessing game if they pick and choose which transactions they will accept. Such confusion could be easily fixed by clearly identifying what is, and what is not, considered a legal transaction. Failure to do so only places an unfair and onerous burden upon financial institutions and ultimately harms legal American businesses, such as those in the greyhound racing industry.

Any final regulation should clearly define which transactions are legal and which are not. Moreover, it should provide guidelines for policies to not only to block illegal transactions, but

also to protect those that are legal under State, Tribal, and Federal laws. Such clarity would reduce the confusion and burdens places on businesses.

Current Financial Transaction Codes are Misleading:

The Proposed Regulation stated that, with respect to credit card systems, a merchant category code ("MCC") accompanying a credit card transaction authorization request can be used by payment systems participants to separate restricted from un-restricted transactions. However, according to a December 2002 GAO Report titled: "*INTERNET GAMBLING: An Overview of the Issues*," many banks use the same MCC for legal state sanctioned pari-mutuel wagering as well as for other types of on-line gambling, such as sports betting. The Proposed Regulation fails to make note of the current limitations in credit card coding programs.

A final rulemaking should provide a recommended policy for an updated coding system. That, in conjunction with clearly defined list of permissible and restricted transactions, would address the current coding shortfalls. The creation of a unique transaction code for non-restricted transactions would allow the credit card issuers to reject payment for defined unlawful on-line gambling activities, while accepting those transactions which are lawful.

Small Businesses in Pari-Mutuel Industry at Risk

The greyhound racing industry is a combination of small, city-specific, and family owned businesses. Its owners, operators, and employees are all at risk under the Proposed Regulation. Beyond the over-blocking, lack of clarity, and lack of recourse mentioned above, there is little information available to determine if small businesses can adhere to the Proposed Rule, and how they may be affected by such regulations.

The Small Business Administration's Office of Advocacy has argued that the Administration failed to conduct a thorough impact analysis of the regulatory burdens placed on small businesses, such as those in the greyhound pari-mutuel industry. According to its December 17, 2007 comments on the Proposed Rule, "The Office of Advocacy believes that Department of Treasury and the Federal Reserve System … have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act."

Any final regulation must include a complete regulatory impact analysis on all impacted entities, including the small businesses within the greyhound racing industry. Failure to do so, would be in opposition to Executive Order 13272 which not only directs Federal agencies to implement policies and regulations protecting small businesses, but also require agencies to give appropriate consideration to the SBA's Office of Advocacy's comments.

Conclusion

The Proposed Regulation put forth by the Administration needs significant changes before being finalized. A final regulation should: 1) provide clarity for impacted businesses and the regulated community; 2) protect legal transactions, like those in the greyhound racing pari-mutuel industry; 3) update current transactional coding systems so they meet the needs of today's society; 4) provide recourse for legitimate businesses if their legal transactions are blocked; 5) reject the over-blocking provisions; 6) include a complete regulatory impact analysis of small businesses; and 7) ensure that Congressional intent is respected, followed, and implemented.

With regard to the greyhound racing industry specifically, and the pari-mutuel industry as a whole, the Administration must not assume that financial institutions are experts in the intricate state-authorized gambling laws, including pari-mutuel wagering activities. To do so would place an onerous burden on payment processors and harm the lawful greyhound racing industry – an outcome Congress explicitly opposed.