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INTERNET GAMBLING FUNDING PROHIBITION ACT

OCTOBER 27, 2003.—Ordered to be printed

Mr. SHELBY, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

R E P O R T

[To accompany S. 627, as amended]

[Including cost estimate of the Congressional Budget Office]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill, S. 627, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

INTRODUCTION

On July 31, 2003, the Senate Committee on Banking, Housing, and Urban Affairs considered S. 627, entitled "The Unlawful Internet Gambling Prohibition Act of 2003," a bill to prohibit the acceptance of any bank instrument for unlawful Internet gambling. The Committee voted 21–0 to report the bill, as amended by a managers' amendment that was adopted by voice vote, to the Senate for consideration.

PURPOSE OF THE LEGISLATION

Internet gambling web sites allow users of personal computers and other Internet access devices to place bets from their homes or offices (or from any place at which Internet access can be obtained). Such web sites permit betting on sporting events of all kinds and can produce a virtual form of any casino game. They thus make possible immediate, 24-hour access to the full range of wagering opportunities. Anyone, anywhere, can bet at any hour on sporting events and casino games. Bets can be made from any computer or Internet-ready hand-held device. A potential gambler simply logs on to the web site, uses a credit card or similar payment device to

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open and fund an account, and is then permitted to gamble all or any part of the account (the initial fund, plus gains, minus losses).[1]

There are estimated to be between 1,500–1,800 Internet gambling web sites, virtually all of which operate from computer servers located in the Caribbean and other jurisdictions outside of the United States in which Internet gambling has been legalized.[2] (In the United States, only Nevada has enacted legislation that could permit Internet gambling.) Total 2003 operator revenues from Internet gambling are projected to run at least $4 billion, 50 to 70 percent of which will come from wagering from within the United States, despite the fact that no state currently permits Internet gambling and only one state, Nevada, permits any general sports betting at all.[3]

Its opponents argue that Internet gambling is especially dangerous, because it can foster or enhance gambling addiction, provides no assurances against rigged games, and offers enhanced opportunities for money laundering. In addition, of course, Internet gambling diverts revenue—and taxes—from lawfully authorized gaming within the United States and permits greatly expanded gambling by U.S. individuals on sporting events.

The Internet provides anonymity to the user and thus raises the possibility that minors could participate in gambling. Children are the most computer literate segment of our society and can find these sites with ease. Unfortunately, they are also the most susceptible to gambling's addictive powers. A study conducted by the Harvard School of Medicine, whose findings were published in the September 1999 issue of the American Journal of Public Health, estimates that nearly 6 percent of American children under the age of 18, or more than one million teenagers, have a serious gambling problem. The Harvard study's findings are consistent with other studies that found that 30 percent of New Jersey high school students surveyed admitted to gambling at least twice a week, and 90 percent admitted to betting at least once a year.

In June 2002, Federal Trade Commission (FTC) Chairman Timothy J. Muris announced the results of an informal survey of websites to determine the access and exposure teens have to online gambling. The FTC visited over 100 popular gambling websites and found that minors can, indeed, access these sites easily. FTC staff found that the gambling sites had inadequate or hard-to-find warnings about underage gambling prohibitions, and that some 20 percent had no warnings at all. The survey also found that these gambling sites had no effective mechanism to block minors from entering.

The National Collegiate Athletic Association (NCAA) reports that many college students lose thousands of dollars on gaming sites—often using their parents' credit cards. Young people use the Internet more than any other age group. The NCAA has also voiced its concern over the problem of Internet sports gambling among col-

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[1] See generally, General Accounting Office, Internet Gambling, An Overview of the Issues (GAO–03–89, December 2002) (the "GAO Study").

[2] H.R. Rept. 107–339, 107th Cong., 2nd Sess. at 6 (2002)(1,500 sites); Wall Street Journal, "Internet Casinos Lose Allies, Threatening Winning Streak" (November 26, 2002, p. B–1)(1,800 sites, "mostly based in the Caribbean."). Internet gambling has been legalized in at least 50 countries, primarily in Europe and the Caribbean.

[3] Compare GAO Study at 6 (50–70 per cent from within the U.S.) with Wall Street Journal, supra ($4.2 billion, 60 per cent from within the U.S.). Industry analysts now believe that most additional growth will come from betting outside the United States.

lege students. William S. Saum, Director of Agent, Gambling and Amateurism Activities for the NCAA, testified: "This is a matter of great importance to the more than 1,000 colleges and universities that are members of the NCAA and to the hundreds of thousands of student-athletes who participate in intercollegiate athletics annually." Saum called for strong legislation to prohibit gambling over the Internet.

The same anonymity concerns make real the risk that Internet gambling can increase problems of gambling abuse and addiction. For 15 million Americans with gambling problems, gambling is every bit as addictive as alcohol or illegal drugs can be. Recovering from a gambling problem is a lifelong struggle. Internet access tilts the playing field against the addict, by making gambling easily accessible in the comfort and privacy of the home. And, in so doing, Internet gaming removes the impediment of traveling to a casino or track, and shields the problem gambler from the public stigma that may help the addict to refrain. Gambling is not a harmless vice or victimless crime. According to the National Academy of Sciences, "pathological gamblers engage in destructive behaviors: they commit crimes, they run up large debts, they damage relationships with family and friends, and they kill themselves." The fallout of problem gambling—domestic violence, theft, burglary, foreclosure, bankruptcy and suicides—is as devastating to family and friends as it is to the gambler himself.

Finally, Internet gambling raises money laundering concerns. Law enforcement officials point to the fact that many Internet gambling sites are located off-shore and the relative ease of using the Internet for international transactions. The operation of Internet gambling operations offshore also limits significantly the protection against rigged games at which traditional gambling regulation is aimed. In a March 2002 report, a State Department International Narcotics Control Strategy Report noted Internet gambling using credit cards and offshore banks as a vehicle for money laundering and tax evasion.

Congressional efforts against Internet gambling began in 1995 and gathered steam following the 1999 recommendation of the Congressionally-created National Gambling Impact Study Commission (NGISC) that the federal government bar both Internet gambling and the collection of credit card debt incurred in the course of Internet gambling. The NGISC evaluated the impact of technology on gambling in the United States and recommended the passage of legislation prohibiting wire transfers to known Internet gambling sites, or the banks that represent them.

Since the Commission's 1999 study, off-shore Internet casinos have continued to proliferate and illegal Internet gambling continues unabated. As Senator Jon Kyl testified before the Committee: "When I first proposed a ban in late 1995, there were roughly two dozen gaming sites. Today, there are nearly 2,000. Without Congressional action, nearly $5 billion will be wagered on Internet gaming sites this year alone."

The bill builds on the recommendations of the NGISC by prohibiting gambling businesses from accepting credit cards or other bank instruments in connection with unlawful Internet gambling. Internet gambling could not attract customers without making use of our payments system. Every Internet gambler must use a credit

card, fund transfer, or bank instrument to open and fund an account from which to gamble on a web site. The uncertain legal status of Internet gambling (in terms of potential criminal liability and of the collectibility of gambling debts incurred over the Interne[4]) has already caused some responsible banks and Internet service providers to move away from a connection with Internet gambling web sites.[5] But those commendable private efforts do not amount to an adequate solution to the problem.[6]

The bill makes illegal the receipt of funds from the payments system by the operator of an Internet gambling site. Because of the anticipated difficulty in enforcing this prohibition against persons outside a particular jurisdiction, the legislation also authorizes the Attorney General (and appropriate State officials) to seek an injunction against any person to prevent or restrain a violation of the ban, or to prohibit banks and other financial service providers from processing any credit card or other financial transaction with a specified illegal Internet gambling site. The bill also requires the Department of the Treasury, in consultation with the Federal Reserve Board and the Attorney General, to issue rules requiring each designated payment system, and all of its participants, to identify and prevent transactions barred by the bill—that is remittances to the operators of Internet gambling sites—through establishment of policies and procedures reasonably designed to allow identification and blocking of such transactions and to prohibit the use of payment system services for such transactions.

The bill thus contemplates, in part, an enforcement mechanism whereby banks and other financial service providers will be provided, pursuant to an injunctive proceeding, with the names of specific Internet gambling operations to which payments are to be prohibited. The obligation of financial institutions pursuant to such an injunction would be similar, in effect, to their obligations under certain other U.S. laws, such as those administered by the Office of Foreign Assets Control (OFAC) under U.S. economic sanctions programs.

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[4] Most courts that have ruled on the matter have held that the operation of offshore Internet gambling sites to which bets and funds are posted from the United States is illegal, because the wager is made at the gambler's computer, not in the jurisdiction in which the wagering instruction is received. At least one successful federal prosecution of the operator of an offshore Internet sportsbook (who was found in the United States) has occurred. *U.S.* v. *Cohen,* 260 F.3d 68 (2001). However, another federal court of appeals recently limited the most directly relevant federal statute, the so-called "Wire Act," 18 U.S.C. 1084, to sports betting, adopting a Louisiana District Court's analysis. *In re MasterCard Int'1 Inc., Internet Gambling Litigation,* 313 F. 3d 257, 262–263 (5th Cir. 2002), citing *In re MasterCard Int'l Inc., Internet Gambling Litigation*, 132 F.Supp. 2d 468, 479–81 (E.D. La. 2001) (Wire Act could not form basis for civil RICO recovery in class action on behalf of gamblers on Internet sites). Several other courts have ruled that gambling debts incurred on the Internet are not collectible under the law of contracts.

[5] GAO reports that the eight largest U.S. credit-card issuing banks, accounting for an estimated 80 per cent of U.S. credit card volume, have voluntarily sought to block credit card use for Internet gambling, because of the Internet gambling industry's unclear legal status and doubts about the validity of debts incurred for such purposes under state law. (GAO Report, supra, at p. 24). Yahoo and several other Internet content providers have stopped carrying advertisements for Internet casinos. These restrictions have caused industry growth and revenue projections to fall. However, the voluntary restrictions are not uniformly effective, do not apply to credit cards issued by overseas banks, which can be used for wagering, and can be avoided by various payment routing schemes.

[6] In July 2003, PayPal, Inc., an online payment network, and eBay, Inc., its parent company, entered into a $10 million agreement with the United States Attorney for the Eastern District of Missouri to settle allegations that PayPal had aided in illegal offshore and on-line gambling activities between mid-June 2000 and November 2002 (before eBay's purchase of PayPal). The settlement related to the processing of illegal gambling transactions involving both sportsbooks and on-line casino gambling. PayPal had ended its gambling payment service in November 2002.

HEARINGS

The Committee heard testimony on March 18, 2003 regarding proposals to regulate illegal Internet gambling. The witnesses testifying were Senator John Kyl; Mr. John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice; Mr. Richard Blumenthal, Attorney General, State of Connecticut; Mr. L. Richard Fischer, Attorney-at-Law, Morrison & Foerster L.L.P; Mr. Frank Fahrenkopf, President and CEO, American Gaming Association; Mr. William S. Saum, Director of Agent, Gambling, and Amateurism Activities, National Collegiate Athletic Association; Mr. Stewart Baker, General Counsel, U.S. Internet Service Provider Association and Attorney-at-Law, Steptoe and Johnson, L.L.P.; and Mr. Frank Catania, President, Catania Consulting.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title; table of contents

Section 1 contains the short title of the bill, "the Internet Gambling Funding Prohibition Act".

Section 2. Findings and purposes

Section 2 states the Congressional findings underlying the bill. These are that:

1. Internet gambling is primarily made possible by bettors' use of credit cards, wire transfers, and other payment system instruments to fund gambling accounts;
2. The 1999 Report of the Congressionally-created National Gambling Impact Study Commission recommended legislative prohibition of wire transfers to Internet gambling sites or their banks;
3. Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry;
4. Internet gambling conducted through off-shore jurisdictions has been identified by U.S. law enforcement officials as a significant money laundering vulnerability; and
5. Gambling through the Internet has grown rapidly in last half-decade and opens up the possibility of immediate, individual, 24-hour access in every home to the full range of wagering opportunities on sporting events or casino-like contests, such as roulette, slot machines, poker, or blackjack.

Section 3. Prohibition on acceptance of any payment system instrument, credit card, or fund transfer for internet gambling

Section 3 of the bill adds a new Subchapter IV, "Prohibition of Funding of Internet Gambling", to Chapter 53 of title 31 of the United States Code. The new Subchapter has eight sections.

Section 5361. Definitions.

Section 5362. Office of Electronic Funding Oversight; policies and procedures to identify and prevent restricted transactions.

Section 5363. Prohibition on acceptance of any bank instrument for Internet gambling.

Section 5364. Civil remedies.

Section 5365. Criminal penalties.

Section 5366. Circumventions prohibited.
Section 5367. Rule of construction.
Section 5368. Authorization of appropriations.

Section 5361. Definitions

Section 5361 contains a set of definitions that are used throughout the new Subchapter.

1. A "bet or wager" is the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that that person or another person will receive something of value in the event of a certain outcome. The term includes the purchase of a chance or opportunity to win a lottery or to win another prize (if the opportunity to win is predominantly subject to chance); a scheme of a type described in 28 U.S.C. 3702 (relating to unlawful sports gambling); and any instructions or information pertaining to establishment or movement of funds in, to, or from an account by a bettor or customer with respect to the business of betting or wagering.

The term "bet or wager" does not include, for purposes of the bill, any activity governed by the federal securities laws for the purchase or sale of securities[7]; a transaction conducted on or subject to the rules of a registered entity or exempt board of trade pursuant to the Commodity Exchange Act[8]; any over-the-counter derivative instrument; any other transaction that is excluded or exempt from regulation under the Commodity Exchange Act or is exempt from state gambling or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934[9]; and any contract of indemnity or guarantee, contract for insurance, or deposit or other transaction with an "insured institution."[10]

Finally, for purposes of the bill, the term "bet or wager" does not include participation in a simulation sports game, an educational game, or a contest, subject to three conditions, all of which must apply for the exclusion to obtain. First, the game or contest must not be dependent solely on the outcome of a single sporting event or on a singular individual performance, by a nonparticipant, in any single sporting event. Second, the game or contest must have an outcome that reflects the relative knowledge of the participants or their skill at physical reaction or physical manipulation, rather than chance, and, in addition, in the case of a simulation sports game, must have an outcome determined predominantly by the accumulated statistical results of sporting events. Finally, the prize or award offered to the participant in the game or contest must have been established in advance and not be determined by the number of participants in the game or contest or the amount of fees they pay to participate.

2. The term "business of betting or wagering" is specified not to include, except for purposes of the provisions of section 5366, dis-

[7] The terms "securities laws" and "securities" have the terms given them in sections 3(a)(47) and 3(a)(10), respectively, of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47) and (a)(10)

[8] 7 U.S.C. 1, et seq.

[9] 7 U.S.C. 16(e); 15 U.S.C. 78bb(a).

[10] See section 5361(12)(D), proposed by the bill, for the definition of "insured institution".

cussed below,[11] any creditor, credit card issuer, insured institution, or other financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or any participant in such network, or any interactive computer service or telecommunications service.

3. A "closed-loop subscriber-based service" is an information service or system that uses one or more devices, that are expressly authorized and operated in accordance with the laws of a state (the "authorizing state"), exclusively for placing, receiving, or otherwise making a bet or wager that is described in section 5363(b) or (c),[12] so long as three conditions are met. First, the service or system must require persons in any state to register with the provider of the wagering service by giving the provider their names, addresses, and appropriate billing information, before being authorized to use the system to place, receive or otherwise make a bet or wager; and must allow those persons to wager using the system only when they are present within that state. Second, the closed-loop service must include an effective customer verification and age verification system, expressly authorized and operated in accordance with the laws of the authorizing state, as well as a system reasonably designed to verify the location at which a bet or wager is made, to ensure that all applicable federal and state legal and regulatory requirements for lawful gambling are met. Finally, the subscriber-based service must include appropriate data security standards to prevent unauthorized access by any person who has not subscribed or who is a minor.

4. A "designated payment system" is any system used by any creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or any participant in such network, that the Secretary, in consultation with the Board of Governors of the Federal Reserve System and the Attorney General, determines, by regulation or order, could be utilized in connection with, or to facilitate, any transaction—called a "restricted transaction"—barred by section 5363. It is expected that the Secretary will designate at least the major national and international funds transfer systems as well as, for example, credit and debit card systems, closed loop and other systems used by money transmitters and Internet-based payment systems.

5. The "Internet" is the international computer network of interoperable packet switched data networks.

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[11] Under the latter provision the exclusion does not apply in specified circumstances, and one of the specified persons—for example a creditor or an international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or any participant in such a network—can be found to be in the business of betting and wagering for purposes of the bill.

[12] Sections 5363(b) and (c) exempt betting on certain live horse and dog racing events and on certain games authorized under the Indian Gaming Regulatory Act from the operation of the bill.

6. "Interactive computer service" has the same meaning as in section 230(f) of the Communications Act of 1934. The latter section defines an "interactive computer service" as any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.[13]

7. "Internet gambling" is the placing, receipt, or other transmission of a bet or wager by any means which involves the use, at least in part, of the Internet.

8. The "Office" is the Office of Electronic Funding Oversight established at the Department of Treasury by section 5362(a).

9. A "private network" is a communications channel or channels, including voice or computer data transmission facilities, that use either private dedicated lines or the public communications infrastructure that is secured, by means of the appropriate private communications technology, to prevent unauthorized access.

10. A "restricted transaction" is any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363(a) which a person engaged in the business of betting or wagering is prohibited from accepting under the bill.

11. "Secretary" means the "Secretary of the Treasury."

12. "Credit," "creditor," "credit card," and "card issuer" have the same meanings as in section 103 of the Truth in Lending Act.[14]

13. "Electronic fund transfer" generally has the meaning given that term in section 903 of the Electronic Fund Transfer Act (EFTA).[15] However, the exclusion from the EFTA definition of certain transfers of funds initiated by telephone conversations is not recognized for purposes of the bill.[16]

14. "Financial institution" also generally has the meaning given that term in section 903 of the EFTA. However, for purposes of the bill, the term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received, regardless of whether such an entity would be treated as a financial institution under the EFTA.

15. An "insured institution" is an insured depository institution, as defined in section 3 of the Federal Deposit Insurance Act or an insured credit union, as defined in section 101 of the Federal Credit Union Act.[17]

16. The terms "money transmitting business" and "money transmitting service" have the same meanings as in 31 U.S.C. 5330. However, that meaning is to be determined without regard to any regulations issued by the Secretary to narrow the definition of those terms for purposes of the implementation of section 5330.

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[13] 47 U.S.C. 203(f)(2).

[14] 15 U.S.C. 1601 et seq.

[15] U.S.C. 1693a et. seq. (EFTA).

[16] Thus, a "transfer of funds which is initiated by a telephone conversation between a consumer and an officer or employee of a financial institution which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated," is an electronic fund transfer subject to the restrictions of the bill, although such a transfer is excluded from the definition of electronic fund transfer for purposes of the general provisions of the EFTA.

[17] 12 U.S.C. 1751.

Section 5362. Office of Electronic Funding Oversight; policies and procedures to identify and prevent restricted transactions

Section 5362(a) creates within the Department of the Treasury an Office of Electronic Funding Oversight. The Director of the Office, who is to be appointed by the Secretary of the Treasury, is given specific responsibilities in the bill. The Director is also given the more general responsibility for coordinating federal efforts to prevent transactions or transmittals involving credit, funds, instruments, or proceeds, from individuals in the United States to persons engaged in the business of betting or wagering and involving Internet gambling.

Restricted Transaction Regulations. Section 5362(b) requires the Secretary of the Treasury to prescribe regulations (the "restricted transaction regulations"), in consultation with the Board of Governors of the Federal Reserve System and the Attorney General of the United States, within 270 days of the bill's enactment. The restricted transaction regulations must require each designated payment system, and all of its participants, to identify and prevent restricted transactions through establishment of policies and procedures reasonably designed to

(1) Allow the payment system and any person involved in the payment system to identify restricted transactions by means of codes in authorization messages or by other means;

(2) Block restricted transactions identified as a result of thereof; and

(3) Prevent the acceptance of the products or services of the payment system in connection with a restricted transaction.

Section 5362(c) describes specific subjects with which the restricted transaction regulations must deal. First, those regulations must identify types of policies and procedures which would be deemed, as applicable, to be "reasonably designed to identify", "reasonably designed to block," or "reasonably designed to prevent the acceptance of [designated payment system] products or services" with respect to each type of restricted transaction. The necessary policies and procedures are to be illustrated by "non-exclusive examples" that financial institutions can use as guidance to adjust the application of the policies and procedures to their own situations.

Second, to the extent practical, the regulations are to permit any payment system participant a choice among alternative means of identifying and blocking, or otherwise preventing, the acceptance of the products or services of the payment system or payment system participant in connection with restricted transactions.

Finally, the Secretary is given the authority to exempt a transaction from any requirement imposed under the restricted transaction regulations, if a finding is made that it is not reasonably practical to identify and block, or otherwise prevent, the transaction. It is anticipated that this authority is to be used sparingly and to be focused on specific types of transactions rather than broad classes either of payment systems, gambling businesses, or types of transactions. (The designation and exemption provisions, in any event, apply only to the regulatory authority created by section 5362, not to the general operation of sections 5363–5368.)

Compliance with and enforcement of restricted transaction regulations

Effect of Compliance. Under section 5362(c), a person will be considered to be in compliance with the restricted transaction regulations if the policies and procedures of the payment system of which the person is a member or in which it participates comply with those regulations, and the person relies on and complies with those policies and procedures to identify and block restricted transactions and to prevent acceptance of its own products or services, and those of the payment system, in connection with restricted transactions.

Protection from Liability to Private Third Parties. Under section 5362(e), a person subject to the restricted transaction regulations who blocks, or otherwise refuses to honor, a restricted transaction (or a transaction that such person reasonably believes to be a restricted transaction), or who, as a member of a designated payment system, relies on the policies and procedures of the payment system, in an effort to comply with the restricted transaction regulations, shall not be liable to any private third party for such action.

Enforcement Jurisdiction. Section 5362(f) provides that the restricted transaction regulations are to be enforced by the Federal functional regulators and the Federal Trade Commission, in the manner provided in section 505(a) of the Gramm-Leach-Bliley Act, 15 U.S.C. 6805(a).

Section 5363. Prohibition on acceptance of any bank instrument for Internet gambling

Section 5363(a) provides that no person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in Internet gambling, any of the following:

1. Credit, or the proceeds of credit, extended, through a credit card or other means, to or on behalf of such other person;
2. An electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
3. Any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
4. The proceeds of any other form of financial transaction, as the Secretary may prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

This is the basic prohibition of the statute. The language makes illegal the knowing acceptance of funds through any of these means by a person engaged in the business of betting or wagering, in connection with another's participation in Internet gambling. Making knowing acceptance of such funds by operators of Internet gambling websites and similar businesses a violation of federal law does not lessen or alter, and is not intended to supersede or affect, the application to an Internet gambling business of other relevant provisions of federal or state law under which operation of such businesses may be illegal, or to affect operation of contract law

rules that, e.g., make collection of gambling debts illegal, when such a law or rule would otherwise apply.[18]

Rules of application. Sections 5363(b) and (c) exclude certain types of gaming arrangements that make use of electronic transmissions from the scope of the general prohibition of section 5363(a).

Live horse and dog racing. The prohibition does not apply, under section 5363(b), to any otherwise lawful bet or wager on a closed-loop subscriber-based service (whether on an interstate or intrastate basis) on a live horse or live dog race, or to the sending or receiving, or inviting of, information assisting in the placing of such a bet or wager, so long as several conditions are met. First, as noted, the bet or wager must be placed, received, or otherwise made on a closed-loop subscriber service that satisfies the terms set out in section 5361(3). Second, the bet or wager must be expressly authorized, and licensed or regulated, by the state in which the bet or wager is received, under both applicable Federal law and the laws of the state. Third, the bet or wager must be initiated from and received in states in which betting or wagering on that same type of live horse or live dog racing is lawful. Fourth, any bets or wagers placed in this manner must be subject to the regulatory oversight of the state in which the bet or wager is received, and be subject to minimum control standards for the accounting, regulatory inspection, and auditing by such state of all such bets or wagers transmitted from one state to another. Fifth, any such bets or wagers must, in the case of live horse racing, be made in accordance with the Interstate Horse Racing Act of 1978.[19] Finally, the exception does not apply to any bet or wager placed, received, or otherwise made by the use of an agent or proxy using the Internet or an interactive computer service.[20]

Certain electronic links between tribal gaming sites. Under section 5363(c), the general prohibition does not apply to any otherwise lawful bet or wager on a closed-loop subscriber-based service or private network on any game that constitutes class II gaming or class III gaming under the Indian Gaming Regulatory Act (the "IGRA"),[21] or to the sending, receiving, or inviting of information assisting in the placing of any such bet or wager, as applicable, so long, again, as several conditions are met.

First, the game must be permitted under and conducted in accordance with the IGRA so that all provisions of the IGRA are satisfied in connection with the offering and operation of the game. Second, the game must be conducted on a closed-loop subscriber-

[18] Similarly, the fact that certain limited types of gaming are not covered by section 5363(a) does not imply any view of the application of other federal or state laws to those types of gaming. See section 5367, below. See also, e.g., Internet Gambling, An Overview of the Issues, General Accounting Office (GAO–03–89) (December 2002), Appendix II: Interstate Horseracing Act (possible conflict between the Wire Act, 18 U.S.C. 1084, and the Interstate Horseracing Act).

[19] 15 U.S.C. 3001 et seq. In the case of live dog racing any such bets must be subject to consent agreements comparable to those required by the Interstate Horse Racing Act, approved by the appropriate state regulatory agencies, in the state receiving the signal, and in the state in which the bet or wager originates. Again, however, Section 5363(b) is not intended to imply any view as to the application of other federal or state laws to gaming described in that section, see fn 19, supra.

[20] The owner-operator of a parimutuel wagering facility that is licensed by a state may employ an agent in the operation of the account wagering system owned or operated by the parimutuel facility. However, that agent must be an agent of the owner-operator, and may not accept bets from or on behalf of third parties who could not place bets directly under the terms of the exception.

[21] 25 U.S.C. 2701 et seq.

based service, or on a private network, that satisfies the terms set out in section 5361(3) or 5361(9) of the bill respectively. Third, each person placing, receiving, or otherwise making such bet or wager, or transmitting such information, must be physically located on Indian lands (as that term is defined in section 4 of the IGRA[22]), when such person places, receives, or otherwise makes the bet or wager, or transmits such information. Fourth, any game that constitutes class III gaming must be authorized under, and conducted in accordance with, the respective tribal-state compacts, entered into and approved pursuant to[23] the IGRA, in each respective state in which each person is physically located when he or she places, receives, or otherwise makes the bet or wager, or transmits such information. Finally, each such compact must expressly provide that the Class III game may be conducted using the Internet or other interactive computer service only on a closed-loop subscriber-based system or a private network. (Section 5363(d)(2) contains a transitional rule easing the latter requirement for gaming that was being conducted on Indian lands on July 31, 2003, using the Internet or other interactive computer service, with the approval of the state gaming commission or like regulatory authority of the state in which the Indian lands are located.)

Section 5364. Civil remedies

The district courts of the United States will have original and exclusive jurisdiction to prevent and restrain violations of the bill or of the rules or regulations issued under the bill by issuing appropriate orders in accordance with the provisions of section 5364. Such orders, if otherwise justified, may be issued whether or not a prosecution has been initiated under section 5365 for criminal violations of the bill.

Standing. Civil enforcement of the bill may be sought by the United States, acting through the Attorney General or, if the proceedings involve the restricted transaction regulations, by an agency authorized to enforce those regulations under section 5363(f) of the bill. In addition, the attorney general (or other appropriate state official) of a state in which a violation of the bill allegedly has occurred or will occur may institute proceedings to prevent or restrain the violation or threatened violation.

If a violation of the bill or the relevant rules or regulations is alleged to have occurred, or may occur, on Indian lands,[24] the Attorney General (or the relevant functional regulator) is to have general enforcement authority, but the enforcement authorities specified in any applicable tribal-state compact shall also apply in accordance with the terms of that compact.

Relief. Upon application of the United States (whether by the Attorney General or a federal functional regulator) or of the attorney general (or other appropriate state official) of an affected state, the district court may enter a preliminary injunction or a permanent injunction (or both) against any person to prevent or restrain a violation or threatened violation of the bill. In exigent circumstances, the court may enter a temporary restraining order against a person

[22] 25 U.S.C. 2703. Section 5363(c)(2)(B) contains a special definition of Indian lands for purposes of a transitional rule for gaming under certain tribal-state compacts.

[23] See section 1(d) of the IGRA, 25 U.S.C. 2710(d).

[24] Again, the relevant definition of "Indian lands" is that contained in section 4 of the IGRA.

alleged to be in violation of the bill or the rules or regulations issued under the bill, either upon application of the United States or an appropriate official of an affected state.

Section 5364(f) contains a special procedural rule designed to coordinate regulatory and injunctive enforcement of the bill and allow a reasonable period for financial institutions and system operators to reprogram computerized processing systems. Under that rule, before seeking a preliminary injunction[25] against, among others, any creditor, credit card issuer, financial institution, money transmitting business, or international, national, regional, or local network utilized to effect various kinds of fund transfers, or any participant in such a network, (i) the relevant government official must notify that person, and the appropriate federal functional regulator, of the violation or potential violation and the remedy to be sought; and (ii) the person must be given not longer than 60 days for implementation of a remedy (in conjunction with such action as the appropriate regulator may take), so long as the person takes reasonable steps within that 60-day period to prevent the occurrence of the violation or potential violation pending implementation of the more complete long-term remedy.

Section 5363(e) lists factors the district courts are to consider in granting injunctive relief against a payment system or payment system participant. Those factors include:

(1) The extent to which the person extending credit or transmitting funds knew or should have known that the transaction was in connection with Internet gambling;

(2) The history of such person in extending credit or transmitting funds when such person knew or should have known that the transaction is in connection with Internet gambling;

(3) The extent to which such person has established and is maintaining policies and procedures in compliance with rules and regulations issued under the bill;

(4) The extent to which it is feasible for any specific remedy prescribed as part of such relief to be implemented by such person without substantial deviation from normal business practice; and

(5) The costs and burdens that the specific remedy will have on such person.

Interactive Computer Services. Section 5364(d) limits the grant of civil relief under the bill against an interactive computer service. That relief is limited to removal of, or disabling of access to, an online site violating the bill or a hypertext link to such an online site that resides on a computer server that such service controls or operates.[26] In addition any such relief (i) is available, in the case of an interactive computer service, only after notice to the computer service and an opportunity for the service to appear are provided, (ii) may not impose any obligation on the interactive computer service to monitor its service or to affirmatively seek facts indicating activity violating the bill's terms, (iii) must specify the interactive computer service to which it applies; and (iv) must specifi-

[25] The same notice and "period to cure" requirements apply before an official may seek expedited relief that involves an insured institution or a broker or dealer or investment company registered with the Securities and Exchange Commission.

[26] The limitation does not apply—and broader relief is potentially available—against interactive services arrangements that are found to violate the anti-circumvention rules in section 5366.

cally identify the location of the online site or hypertext link to be removed or access to which is to be disabled.

An interactive computer service that does not violate the bill will not be liable under 18 U.S.C. 1084 for conduct within the scope of the bill, so long as the computer service does not have actual knowledge and control of bets and wagers; does not itself operate, manage, supervise, or direct an Internet website at which bets or wagers may be placed, received, or otherwise made or at which bets or wagers are offered to be placed, received, or otherwise made; and does not own or control, and is not owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which bets or wagers may be placed, received, or otherwise made, or at which bets or wagers are offered to be placed, received, or otherwise made. However, the absence of liability under section 1084 does not affect any potential liability of an interactive computer service or other person under any other provision of Title 18 of the United States Code.

Section 5365. Criminal penalties

Section 5365 concerns criminal enforcement of the bill. Under that section, a person who violates any provision of the bill or the restricted transaction regulations shall be subject to fine, imprisonment for not more than five years, or both. Upon conviction, the court may enter a permanent injunction enjoining such person from placing, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers.

Section 5366. Circumventions prohibited

Section 5361(2) generally excludes financial institutions, creditors, payment system operators or participants, interactive computer services, or telecommunications services from the definition of "business of betting and wagering." Under the anti-circumvention provision of section 5366, however, any financial institution or other person listed in section 5361(2) may be treated as engaged in the business of betting and wagering (and be directly subject to the prohibitions of the statute) if such person (i) operates, manages, supervises, or directs an Internet website at which bets or wagers may be placed, received, or otherwise made, or at which bets or wagers are offered to be placed, received, or otherwise made; or (ii) owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which bets or wagers may be placed, received, or otherwise made, or at which bets or wagers are offered to be placed, received, or otherwise made.

Section 5367. Rule of construction

As noted above, no provision of the bill shall be construed as altering, superseding, or otherwise affecting the application of the IGRA.

Section 5368. Authorization of appropriations

Section 5368 simply authorizes the appropriation to the Secretary of such sums as may be necessary to carry out the new provisions added to Title 31 by section 3 of the bill.

Section 4. Internet gambling in or through foreign jurisdictions

Section 4 provides that, in deliberations between the U.S. Government and any other country on money laundering, corruption, and crime issues, the U.S. Government shall: encourage cooperation by foreign governments in identifying whether Internet gambling operations are being used for money laundering, corruption, or other crimes; advance policies that promote the cooperation by foreign governments in the enforcement of the bill; and encourage the Financial Action Task Force on Money Laundering to study the extent to which Internet gambling operations are being used for money laundering. Section 4 also requires the Secretary of the Treasury to submit an annual report to Congress on the deliberations between the United States and other countries on issues relating to Internet gambling.

Section 5. Amendments to criminal gambling provisions

Section 5 amends the Wire Act definitions under section 1081 of Title 18 and increases the penalty for unlawful wire transfers of wagering information to five years imprisonment from two years imprisonment under present law.

CHANGES IN EXISTING LAW

On June 18, 2003, the Committee unanimously approved a motion by Senator Shelby to waive the Cordon rule. Thus, in the opinion of the Committee, it is necessary to dispense with the requirement of section 12 of Rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact of the bill. The Committee, after due consideration, concludes that the bill will not have significant regulatory impact.

The bill would prohibit gambling businesses from accepting credit cards, checks, or other bank instruments from gamblers who bet over the Internet. To accomplish this purpose, the bill would require designated payment systems to establish policies and procedures designed to identify and prevent transactions in connection with Internet gambling. Most financial institutions have some capacity to identify and block restricted transactions for the purposes of compliance with other laws, such as those relating to U.S. economic sanctions programs and money laundering prevention. Some participants in these payment networks have already voluntarily established policies to prohibit these types of transactions. Thus, it is anticipated that the costs of compliance imposed by this bill would be small. In addition, to the extent that individual gamblers will be precluded from using bank instruments, financial entities may experience some cost savings as they will be less likely to have gamblers defaulting on debts incurred.

COST OF LEGISLATION

Section 11(b) of rule XXVI of the Standing Rules of the Senate, and Section 403 of the Congressional Budget Impoundment and Control Act, require that each committee report on a bill contain a statement estimating the cost of the proposed legislation. The Congressional Budget Office has provided the following cost estimate and estimate of costs of private-sector mandates.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 8, 2003.

Hon. RICHARD C. SHELBY,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 627, the Internet Gambling Funding Prohibition Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kathleen Gramp (for federal costs), Sarah Puro (for the impact on state and local governments), and Cecil McPherson (for the impact on the private sector).

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

S. 627—Internet Gambling Funding Prohibition Act

Summary: S. 627 would prohibit gambling businesses from accepting credit cards, checks, or other bank instruments from gamblers who illegally bet over the Internet. The bill also would require financial institutions to take steps to identify and block gambling-related transactions that are transmitted through their payment systems. The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) would enforce the provisions of S. 627 as they apply to financial institutions. The Federal Trade Commission and the Department of Justice would be responsible for other enforcement actions. Finally, S. 627 would establish an Office of Electronic Funding Oversight in the Department of Treasury to issue regulations, coordinate federal programs, and implement certain initiatives.

Assuming appropriation of the necessary amounts, CBO estimates that implementing this legislation would cost about $1 million in 2004 and a total of $9 million over the 2004–2008 period. The bill could affect direct spending and revenues, but CBO estimates that any impact on direct spending and revenues would not be significant.

S. 627 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but any costs incurred by state, local, and tribal governments would not be significant and would not exceed the threshold established in that act ($59 million in 2003, adjusted annually for inflation).

The bill would impose new private-sector mandates, but CBO estimates that the direct costs of the mandates would fall below the annual threshold established in UMRA ($117 million in 2003, adjusted annually for inflation) in any of the next five years.

Estimated Cost to the Federal Government: The estimated budgetary impact of S. 627 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—				
	2004	2005	2006	2007	2008
CHANGES IN SPENDING SUBJECT TO APPROPRIATION [1]					
Estimated Authorization Level	2	2	2	2	2
Estimated Outlays	1	2	2	2	2

[1] Enacting S. 627 also could affect direct spending and revenues by less than $500,000 a year.

Basis of Estimate: For this estimate, CBO assumes that S. 627 will be enacted in the fall of 2003 and that the funds authorized will be appropriated each year. The estimate of outlays is based on spending patterns for similar activities.

Spending subject to appropriation

Based on information from the Department of Treasury and other affected agencies, CBO estimates that implementing this bill would cost about $2 million a year, assuming appropriation of the necessary amounts. Most of this spending would be for the new Office of Electronic Funding Oversight; we expect that any additional spending by the Department of Justice and the Federal Trade Commission would be negligible. Because S. 627 would establish new federal crimes relating to Internet gambling, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects, however, that most cases would be pursued under existing state laws. Therefore, we estimate that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant. Any such additional costs would be subject to the availability of appropriated funds.

Direct spending and revenues

The NCUA, the OTS, and the OCC charge fees to cover all their administrative costs; therefore, any additional spending by those agencies to implement the bill would have no net budgetary effect. That is not the case with the FDIC, however, which uses deposit insurance premiums paid by banks to cover the expenses it incurs to supervise state-chartered institutions. (Under current law, CBO estimates that the vast majority of thrift institutions insured by the FDIC would not pay any premiums for most of the 2004–2013 period.)

The bill would cause a small increase in FDIC spending but would not affect its premium income. In total, CBO estimates that S. 627 would increase direct spending and offsetting receipts of the NCUA, OTS, OCC, and FDIC by less than $500,000 a year over the 2004–2013 period.

Budgetary effects on the Federal Reserve are recorded as changes in revenues (governmental receipts). Based on information

from the Federal Reserve, CBO estimates that enacting S. 627 would reduce such revenues by less than $500,000 a year.

Because those prosecuted and convicted under the bill could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (i.e., revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. Any additional collections are likely to be negligible because of the small number of cases involved. Because any increase in direct spending would equal the amount of fines collected (with a lag of one year or more), the additional direct spending also would be negligible.

Estimated impact on state, local, and tribal governments: S. 627 contains an intergovernmental mandate as defined in UMRA because it would preempt state laws and prohibit states from fully regulating gambling within their borders. Under the bill, any gambling done using the Internet would be regulated by the federal government, no longer allowing states to sanction and regulate Internet gambling within their own borders. Further, all Internet gambling, with the exception of horse and dog racing but including state-run lotteries, would be illegal. Since no state or tribal government currently sells lottery tickets over the Internet, CBO estimates that, over the next five years, the costs to state, local, and tribal governments resulting from the prohibition would not be significant; therefore, the mandate costs would not exceed the threshold established in UMRA ($59 million in 2003, adjusted annually for inflation).

Estimated impact on the private sector: S. 627 would impose two federal mandates on the private sector. First, the bill would require designated payment systems to establish policies and procedures designed to identify and prevent transactions in connection with Internet gambling. Designated payment systems are defined in the bill to include any system utilized by businesses such as creditors, credit card issuers, or financial institutions to effect a credit transaction, an electronic fund transfer, or other transfer of funds. Information provided by representatives of the financial services industry indicates that such transactions can currently be identified through the use of codes. Most financial institutions are currently able to identify and block restricted transactions by using the coding system. Thus, CBO estimates that the private sector's cost to comply with the mandate would be small. There also could be direct savings to those entities subject to the mandate as the bill limits their liability arising from their compliance with the requirement.

Second, the bill would prohibit gambling businesses, with some exceptions, from accepting credit card payments or other bank instruments of payment from person who bet or wager over the Internet. At the same time, S. 627, would exempt such transactions, under certain conditions, involving bets or wagers placed, received, or otherwise made on an interstate or intrastate basis on a live horse or a live dog race; and class II gaming (bingo, etc.) or class III gaming (casino games) on Indian reservations. Such a prohibition would have only a limited effect because, under current federal and state law, most gambling businesses are generally prohibited from accepting bets or wagers over the Internet. Further, CBO ex-

pects that the incremental costs to the entities that would have to comply with the requirements of the bill to participate in the gaming would not be substantial. CBO estimates that the total direct costs for private-sector mandates in this bill would fall below the annual threshold established in UMRA ($117 million in 2003, adjusted annually for inflation).

Previous estimate: CBO has transmitted three cost estimates for legislation related to internet gambling. On April 1, 2003, CBO transmitted a cost estimate for H.R. 21, as reported by the House Committee on Financial Services on March 27, 2003; on May 16, CBO transmitted a cost estimate for H.R. 21 as ordered reported by the House Committee on the Judiciary on May 14, 2003; and on May 22, CBO transmitted a cost estimate for H.R. 2143, the Unlawful Internet Gambling Funding Prohibition Act, as ordered reported by the House Committee on Financial Services on May 20, 2003. The estimated cost of S. 627 is higher than those bills because of the costs associated with the activities of the proposed Office of Electronic Funding Oversight. CBO estimated no significant federal costs for the House bills.

Unlike H.R. 21 as ordered reported by the House Committee on the Judiciary and H.R. 2143 as ordered reported by the House Committee on Financial Services, S. 627 would not permit states to sanction and regulate Internet gambling within their own borders. Therefore, S. 627 contains a mandate in the form of a preemption that the other versions of the legislation did not. The different cost estimates reflect those differences.

The private-sector mandate in S. 627 on designated payment systems is similar to the mandate identified in the previous three estimates. CBO estimated that the total direct costs of mandates contained in the bills would fall below the annual threshold for private-sector mandates established in UMRA.

Estimate prepared by: Federal Spending: Lanette J. Walker and Kathleen Gramp; Federal Revenues: Mark Booth; Impact on State, Local, and Tribal Governments: Sarah Puro; Impact on the Private Sector: Cecil McPherson.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

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