



## Research Brief: Reversal of the 2011 Wire Act Memo January 15, 2019

Late in the afternoon of January 14, 2019, the U.S. Department of Justice (“DOJ”) issued a new [memo](#) reversing its stance on the Interstate Wire Act of 1961 (“Wire Act”). This 23-page memo issued by the DOJ’s Office of the Legal Counsel (“OLC”) dated November 2, 2018, stressed that all forms of gaming apply to the Wire Act. It reversed an earlier DOJ memo issued in 2011 that stated that the Wire Act only applied to sports betting.

The action, which at best can be described as reversing a reversal, raises several concerns for the gaming industry, especially for online gaming that occurs in the states of Nevada, New Jersey, and Delaware, with active startups underway in Pennsylvania. The decision also may have serious implications for mobile gaming, sports betting, daily fantasy sports (“DFS”), lottery, and potentially even internet/social media marketing programs. Global Market Advisors (“GMA”) had predicted for some time that the reversal of the 2011 Memo would occur during the Trump Administration through the efforts of the Committee to Stop Internet Gaming (“CSIG”).

The memo, written by Acting Assistant Attorney General Steven Engel, states:

*“Based upon the plain language of the statute, however, we reach a different result. ... While the Wire Act is not a model of artful drafting, we conclude that the words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling. We further conclude that the 2006 enactment of the (Unlawful Internet Gambling Enforcement Act (UIGEA)) did not alter the scope of the Wire Act.”*

The opinion also noted that the previous memo “devoted insufficient attention to the statutory text and applicable canons of construction” of the Wire Act.

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The memo provides distinct conclusions on how the Wire Act should treat all forms of gaming, but it does not give a full analysis on several issues or spells out the implications to the existing market. It only raises further questions on how responsible operators should act in the current environment.

## THE WIRE ACT AND RECENT NOTABLE ACTIONS

The United States Congress passed the Wire Act in 1961, which specifically banned the transmission of sports wagers across state lines. The act was passed as part of a series of anti-racketeering laws, including the Illegal Gambling Business Act, the Interstate Transportation of Wagering Paraphernalia Act, and the Travel Act. It was designed to aid states in enforcing state-specific bookmaking and gambling laws focused on helping the Justice Department battle organized crime and trafficking during the Kennedy Administration.

Specific language from the Wire Act included a criminal provision:

*Whoever being engaged in the business of betting or wagering knowingly uses 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, shall be fined under this title or imprisoned not more than two years, or both.*

Significant technological advances have been made since the law was enacted over fifty years ago allowing state governments to recognize legal versus illegal activities. Many have interpreted language in the Wire Act to prohibit the use of the internet for transmission of sports bets or wagers, along with information assisting in the placement of such bets or wagers, subject to certain exceptions. It is important to note that the internet did not exist in 1961 as it does today. In addition, the Wire Act itself does not specifically discuss how it may apply to other forms of gambling. As such, the law has been open to interpretation as to whether it prohibits internet gambling. Regardless of differing interpretations, the DOJ and Attorney Generals from multiple states have deemed the Wire Act as applying broadly and covering all forms of internet gaming, including iLottery. This is in direct conflict to laws passed in New Jersey, Nevada, Delaware, Pennsylvania, New York and Illinois, and others.

## THE 2011 DOJ OPINION MEMO

In 2011, the DOJ Office of Legal Counsel released an opinion that allowed for online gaming as it was not restricted under the Wire Act. The opinion was required by New York and Illinois to



clarify whether or not they could sell lottery tickets over the internet within their own borders. At the same time, Senators Harry Reid (D-NV) and John Kyl (R-AZ) asked for either the DOJ to take a position on the prohibition of internet gaming or Congress to craft legislation to address online gaming. Because of the opinion, the states of Nevada, New Jersey, and Delaware have entered into pacts for online gaming, specifically poker and other casino-style games. Other states like Pennsylvania have passed online gaming and have over 10 operators launching operations while states like Michigan and others continue to push forward efforts to legalize.

In another development in 2017, former Attorney General Jeff Sessions said that he would review the 2011 opinion by the Justice Department once he was sworn into office. However, Sessions recused himself on the online gaming issue because of a potential conflict of interest. The conflict arose when Sessions hired attorney Charles Cooper to represent him for congressional investigations relating to the firing of James Comey, former director of the Federal Bureau of Investigation (“FBI”). Charles Cooper had also been hired by the Coalition to Stop Internet Gambling to lobby on their behalf. This left any review of the 2011 opinion up to the Deputy Attorney General.

Many took the 2011 memo to mean that states can band together to allow gambling across state lines. Opponents of online gaming will contend that Congress needs to clarify what is, and is not, allowed under the Wire Act, especially as it relates to modern day telecommunications. Those opposed to current interpretation of the Wire Act continue to push legislation of the Restoration of America’s Wire Act (“RAWA”), which is an act that has been advocated by several members of Congress over the years. As previously proposed, the bill would grant an exemption to online activities like fantasy sports.

## **POST-PASPA U.S. HOUSE OF REPRESENTATIVE HEARING**

In a hearing held by a subcommittee of the U.S. House of Representatives in September 2018, former Nebraska Attorney General Jon Bruning delivered his [testimony](#) stating that the U.S. Supreme Court decision on the Professional and Amateur Sports Protection Act (“PASPA”) created an opportunity for criminal organization and potential exploitations of individuals. Bruning, who represented the Committee to Stop Internet Gaming (CSIG), said that Congress needed to act on the issue to provide federal guardrails that would work in conjunction with states to put protections in place while allowing states to earn revenue from legal online sports books and gambling. Through his testimony, he continued to advocate for the Wire Act to be restored, as well as the enforcement of other federal acts including UIGEA to combat the illegal market. Bruning highlights this by stating:

*“Even though the Supreme Court tossed the federal sports betting ban, online sports betting is still illegal. The Wire Act applies to all forms of gambling and even under DOJ’s*



*current interpretation, the Wire Act applies to sports betting. This means sportsbooks wanting to hedge their risk by establishing a national pool, creating interstate compacts, or laying off bets across state lines – all would do so in violation of the Wire Act.”*

Bruning compared the emergence of sports betting to the existing marijuana market and the ability to regulate within states that have legalized, as well as neighboring states that do not have it legalized in any form. Let it be noted that the current DOJ also issued a memo about one year ago regarding the enforcement of marijuana, which put the legal market of each state into question.

## POTENTIAL IMPACT ON THE GAMING MARKET

Global Market Advisors believes that today’s decision can only lead to one of two real outcomes: either an official court interruption of the Wire Act as it relates to the modern world, or legislation that would be enacted at the federal level. In the coming days and months, many legal scholars will make their interpretation of what the latest memo asserts as the new “governing view” for the gaming industry. It only continues to bring ambiguity to a process that for nearly the last eight years has allowed states to craft online, mobile, and DFS legislation. Global Market Advisors believes that the federal government should not govern by executive order or interruption through memo. It is time to actually legislate policy and let the courts reach conclusions on the laws that are on the books.

This latest action may force federal legislation to not only address the Wire Act but the floating legislation regarding sports betting. A bill drafted by former Senator Orrin Hatch (R-UT) and current Senator Chuck Schumer (D-NY) that outlines a federal framework for sports betting may now become the vehicle to offer such a legislative solution. However, the gaming industry, which has long been divided on online gaming and now even on sports betting, will have to be focused on what this may do to operations in their existing jurisdictions and beyond. As with any piece of legislation, the good comes with the bad, and it may take years to address this issue through legislation or through lawsuits within the judicial system.

The gaming industry in the early 2010s was not able to find consensus with Congress on how to enact a federal framework to regulate online gaming. It will be more challenging for that to occur now, not only because of the current political climate but also because of division within the gaming industry. The involvement of other stakeholders, such as professional leagues and the NCAA, also adds several new voices and competing interests to the debate. Furthermore, as of the writing of this brief, the federal government has been shut down for over three weeks with little end in sight to come to terms on a continuing resolution to fund the government.



While some have suggested the implementation of federal guardrails, this may ultimately interfere with state sovereignty over their existing gaming regulations. However, modernizing the existing Wire Act and UIGEA should be addressed. There will be altering views as to how this can be done to bring further compliance and allow gaming operators to continue to act with integrity as technology continues to advance.

One place to look as to the next steps that may be made by CSIG may have occurred in September 2018 during Jon Bruning's testimony to Congress on protections needed in sports betting, but advocating for the restoration of the Wire Act. Yesterday's memo takes a step toward backdoor the RAWA legislation that has been proposed by this group for some time. While this group will argue that technology only aids in the development of the illegal world, GMA, like other key stakeholders in the gaming industry, believes that this is just another prime example of why this market needs to be legalized to bring it out of the shadows through regulation.

While many in the gaming industry did not believe this day would come, some stakeholders continued to watch closely for any moves made to overturn the 2011 DOJ interpretation, as well as any grassroots efforts with legislators made behind the scenes. GMA believes this may light a fire in the industry to push forward a movement to bring clarity to the issue and allow responsible consumers to play online and through mobile apps in a strictly regulated environment. Mobile and online play should not be limited solely within the four walls of a brick-and-mortar casino.

Over 30 states and territories are actively having discussions on potential sports betting legislation, and this decision has definitive implications for those efforts. Many other states within this group are also having discussions to allow online gaming or DFS. This decision will surely cause instability in the current legislative landscape.

Each state provides a safe environment on how they regulate their own gaming market between brick-and-mortar casinos, tribal casinos, lottery, horse racing, keno, and other forms of gaming. Integrity is first and foremost an established principle in all of the laws and regulations promulgated by these states. The memo brings current operations into question, and it potentially hinders each state's ability to regulate their own market effectively. Ironically, this interpretation of the Wire Act may result in expanding the illegal gaming rather than reducing its presence, which is certainly not the result intended by Congress when it passed the Wire Act.



## ABOUT GLOBAL MARKET ADVISORS, LLC

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