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IS THE DECK STACKED AGAINST INTERNET GAMBLING? A COST-BENEFIT ANALYSIS OF PROPOSED REGULATION

*Nicholas Bamman**

INTRODUCTION

The Internet has fundamentally changed the face of gambling. With the click of a mouse, a person can wager money in real time from anywhere in the world.¹ Over the past two decades, millions of customers have used online casinos to play poker, blackjack, and other games.² To some, Internet gambling is a harmless pastime, but to others the explosion of Internet gambling represents a financial and social threat to their community.³

Since its inception in the mid-1990s, Internet gambling has quickly become the highest grossing internet-based industry.⁴ In fact, Internet gambling has boasted an average annual growth of

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¹ See, e.g., PARTYGAMING, <http://www.partygaming.com> (last visited Aug. 24, 2010).

² See, e.g., *How Many People Gamble Online?*, CASINO BONUSES, <http://www.bonusbomb.com/gambling/how-many-people-gamble-online.html> (last visited Aug. 24, 2010) (“Although the exact size of the online gaming industry is unknown, the current number of online gamblers is in the millions, and analysts agree that industry growth is rapid.”).

³ E.g., NATIONAL GAMBLING IMPACT STUDY COMMISSION, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT, ch. 7, at 7-3 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/7.pdf> [hereinafter NGISC, ch. 7].

⁴ Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 CARDOZO J. INT’L & COMP. L. 533, 533 (2009).

more than 20%,⁵ culminating in an estimated \$24 billion of revenue in 2010.⁶ Despite recent legislation designed to curtail the industry, Americans still comprise an estimated 25% of the global market.⁷

Since the birth of Internet gambling, the Department of Justice prosecuted online gambling executives pursuant to antigambling laws written before the advent of the Internet.⁸ As a result, American entrepreneurs initiated Internet gambling companies overseas.⁹ As money flows directly to Internet gambling companies abroad, Internet gambling drains billions of dollars annually from the American economy.¹⁰ Indeed, the United States derives no tangible national benefit, but suffers all of the social costs, of Internet gambling.¹¹

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”) to address these concerns.¹² The UIGEA prohibits American financial institutions from processing fund transfers to Internet gambling companies and their affiliates, thereby eliminating the funding for Internet gambling.¹³ Under this framework, American financial institutions carry the burden of policing these Internet gambling fund transfers.¹⁴ However, the

⁵ Anne Von Lehman, *American Entrepreneurs and Internet Gambling: Are the Odds Stacked Against Them?*, 3 *ENTREPREN. BUS. L.J.* 135, 137–39 (2008).

⁶ See Rich Chlodofsky, *Internet Gambling Perplexes Officials*, *TRIBLIVE* (Jan. 15, 2006), http://www.pittsburghlive.com/x/pittsburghtrib/s_413842.html.

⁷ Eric Pfanner, *A New Chance for Online Gambling in the U.S.*, *N.Y. TIMES*, Apr. 26, 2009, <http://www.nytimes.com/2009/04/27/technology/internet/27iht-gamble.html?scp=1&sq=A%20New%20Chance%20for%20Online%20Gambling%20in%20the%20U.S.&st=cse>.

⁸ See *infra* Part I.A.

⁹ See Von Lehman, *supra* note 5, at 137.

¹⁰ Gale, *supra* note 4, at 547.

¹¹ See Kraig P. Grahmann, *Betting on Prohibition: The Federal Government’s Approach to Internet Gambling*, 7 *NW. J. TECH. & INTELL. PROP.* 162, 166 (2009) (describing addiction and underage gambling as social costs of online gambling). See also *infra* Part II.B.

¹² See Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5361(a) (West 2010). Other principal concerns included debt collection problems for the consumer credit industry and money laundering. *Id.*

¹³ See *id.* § 5363.

¹⁴ *Id.*

UIGEA does not criminalize Internet gambling at the customer level either by fine or incarceration.¹⁵

To evaluate whether any legislation is beneficial to the United States, it is necessary to scrutinize the legislation's costs and benefits—both economic and social.¹⁶ To the extent benefits exceed costs, the legislation bestows a net benefit to the United States. When there is more than one legislative option, the cost-benefit analysis of each option must be compared against one another. The option that bestows the largest net benefit is the legislative most favorable to the United States.

In applying this theory to gambling law, a cost-benefit analysis of the UIGEA alone provides minimal insight. While the UIGEA may bestow a net benefit to the United States over a complete absence of legislation, it is impossible to know whether the UIGEA has provided the largest net benefit possible absent a comparison to other legislative options. Therefore, this Note will compare the costs and benefits of the UIGEA with the Internet Gambling Regulation, Consumer Protection, and Enforcement Act¹⁷ (“Regulation Bill”) proposed by Representative Barney Frank and the Internet Gambling Regulation and Tax Enforcement Act¹⁸ (“Taxation Bill”) proposed by Representative James McDermott (collectively “Proposed Bills”). These Proposed Bills operate in tandem to create a framework to license, regulate, and tax Internet gambling. This Note will analyze the costs and benefits of the UIGEA compared with the costs and benefits of the Proposed Bills. The results of that analysis should indicate that the Proposed Bills bestow a larger net benefit to the United States than the UIGEA.

¹⁵ See *id.* §§ 5361–67.

¹⁶ See RICHARD A. POSNER, *THE NATURE OF ECONOMIC REASONING*, 3–21 (6th ed. 2003), for an in depth discussion and analysis of the legal economic analysis. For the foundation to the theory, see generally Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960). For the purposes of this Note, the theory behind law and economics need not be scrutinized thoroughly. This Note attempts a comparative analysis, not a quantitative one.

¹⁷ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009).

¹⁸ Internet Gambling Regulation and Tax Enforcement Act of 2009, H.R. 2268, 111th Cong. (2009).

Part I of this Note explores the current state of American Internet gambling legislation. Part II examines the costs and benefits of the UIGEA. Part III examines the costs and benefits of the Proposed Bills. Part IV explores potential improvements to the Proposed Bills. Finally, the conclusion weighs the costs and benefits of the Proposed Bills against those of the UIGEA.

I. EXISTING GAMBLING LEGISLATION IN THE UNITED STATES: WHAT'S THE DEAL?

Previous legislation failed to curtail Internet gambling in part because Internet gambling reaches consumers in a nontraditional manner.¹⁹ To wager on the Internet, customers must deposit money into an online gambling account.²⁰ Before the UIGEA limited deposit method options, Internet gamblers funded accounts with credit cards, checks, e-checks, money orders, "e-wallets,"²¹ or other transaction devices.²² After funding an account, a customer could wager on casino games such as blackjack, roulette, poker, or even backgammon.²³ To withdraw or cash out, customers used the same process in reverse, eventually receiving a credit to his or her bank account.²⁴

Internet gambling sites have accepted deposits, processed wagers, and transmitted payouts without ever physically touching American soil, which has created enormous jurisdictional problems

¹⁹ Internet gambling companies never have to submit to U.S. jurisdiction and there is no physical product to regulate.

²⁰ See, e.g., *Playing with Real Money*, POKERSTARS, <http://www.pokerstars.com/poker/real-money/> (last visited Sept. 2, 2010) (providing instructions on current valid methods depending on the customer's country of residence).

²¹ E-wallets are third party transfer companies, such as PayPal. See, e.g., *Top Ten Things to Know About Pay Pal*, PAYPAL, https://personal.paypal.com/cgi-bin/marketingweb?cmd=_render-content&content_ID=marketing_us/PayPal_FAQ (last visited Sept. 2, 2010). PayPal acts as an intermediary in all types of transactions over the Internet—not just gambling, and allows customers to make purchases at several online vendors while limiting their financial information to just one company. *Id.*

²² See POKERSTARS, *supra* note 20.

²³ See, e.g., PARTYGAMING, *supra* note 1.

²⁴ See, e.g., *Cashout Policy*, POKERSTARS, <http://www.pokerstars.com/poker/real-money/cashouts/> (last visited Sept. 6, 2010).

for American law enforcement officials.²⁵ In general, these companies have paid taxes and abided by their respective country's Internet gambling laws.²⁶ Thus, foreign governments are unlikely to extradite executives for prosecution in the United States.²⁷

A. American Gambling Law Prior to the UIGEA

The interplay between federal, state, and tribal gambling law has created a confusing array of rules. Historically, the federal government left gambling regulation to the states and only passed legislation to protect state sovereignty.²⁸ Although state gambling laws vary drastically, all fifty states except Hawaii and Utah have some form of legal gambling.²⁹ Even within state boundaries, however, laws may differ due to sovereign tribal legislation.³⁰

For example, the federal Wire Act of 1961 prohibits bookmakers³¹ from taking bets in states where gambling is illegal

²⁵ See Michael J. Vener, *Internet Gambling Law: Is Prohibition Really Good Policy?*, 15 SW. J.L. & TRADE AM. 199, 211–14 (2008).

²⁶ See *id.* at 214.

²⁷ See *id.* Gambling companies provide large benefits for safe haven countries. For example, Antiguan gambling companies provide millions in government revenue and employ nearly 5% of its 68,000 citizens. Katherine A. Valasek, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 MICH. ST. L. REV. 753, 768 (2007).

²⁸ See, e.g., Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5362(10)(A) (West 2010) (defining gambling by existing state and federal law); Interstate Wire Act, 18 U.S.C.A. § 1084(a) (West 2010) (protecting states that prohibit gambling by disallowing wagers transmitted via the telephone wire). See also Jason A. Miller, *Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling*, 12 N.C. BANKING INST. 185, 189 (2008) (explaining the Congress' intent behind these laws.).

²⁹ Miller, *supra* note 28, at 188–89; see Ian Urbina, *States Face Drop in Gambling Revenues*, N.Y. TIMES, Sept. 9, 2009, <http://www.nytimes.com/2009/09/10/us/10gambling.html?hp> (noting that forty-two states have state run lotteries, twelve have commercial casinos, twenty-nine states have Indian casinos, and twelve have “racinos”—horseracing with slots machines and other gambling games.).

³⁰ See Indian Gaming Regulation, 25 U.S.C.A. §§ 2701–21 (West 2010).

³¹ A bookmaker is “a person who determines odds and receives bets on the

and delivering those bets via the telephone “wire” to states where the bets are legal.³² Congress did not want legal gambling in one state to effectively legalize gambling in all states.³³ The Department of Justice has taken the position that the Wire Act covers Internet gambling, although the Act makes no mention of the Internet or electronic communications.³⁴ Indeed, the text of the statute and court decisions have limited the Wire Act to apply only to sports betting.³⁵ Consequently, law enforcement officials required a regulatory mechanism that would enable them to prosecute online gambling executives who do not specialize in sports betting.

However, it has never been Congress’s intention to ban Internet gambling entirely.³⁶ Presumably, if Internet gambling presents a net loss to the United States, then all forms of Internet gambling should be banned. Instead, the Interstate Horseracing Act of 1978 (IHA), enacted to “further the horseracing and legal off-track betting industries in the United States,” openly promotes domestic horserace gambling over the Internet.³⁷ As amended in 2000, the IHA protects off-track wagers placed “via telephone or other

outcome of events, esp. sports events.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³² See 18 U.S.C.A. § 1084 (West 2010).

³³ See Jeffrey Rodefer, *Federal Wire Wager Act*, GAMBLING LAW US, <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> (last visited Sept. 1, 2010) (stating that the Wire Act was intended to help states in enforcing their respective laws on gambling and bookmaking).

³⁴ Valasek, *supra* note 27, at 757.

³⁵ Compare *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (using the Wire Act to prosecute an Internet sports gambling company executive), with *Thompson v. MasterCard Int’l, Inc.*, 313 F.3d 257, 262 (5th Cir. 2002) (prohibiting reliance on the Wire Act where plaintiffs failed to allege defendants engaged in Internet sports gambling). Under this interpretation, the Wire Act could not be used to prosecute executives of online poker companies. See *Thompson*, 313 F.3d at 262.

³⁶ See *Interstate Horseracing*, 15 U.S.C.A. §§ 3001–3007 (West 2010) (permitting horserace gambling over the Internet). See also *Unlawful Internet Gambling Enforcement Act*, 31 U.S.C.A. § 5363 (West 2010) (prohibiting American financial institutions from processing fund transfers to Internet gambling companies unless an exemption, such as horserace gambling, applies).

³⁷ 15 U.S.C.A. § 3001.

electronic media.”³⁸ The amendment essentially legalizes and regulates domestic Internet gambling on horse races, and prohibits foreign competition.³⁹ Had the UIGEA not specifically carved out an exception for horseracing,⁴⁰ this lucrative industry would have been eliminated.⁴¹ As these two examples demonstrate, Congress sometimes takes conflicting positions with respect to Internet gambling legislation.

B. The Unlawful Internet Gambling Enforcement Act

Legislators attached the UIGEA to the enormously popular SAFE Port Act,⁴² which passed by an overwhelming majority in the house and unanimously in the Senate.⁴³ Although Internet gambling and traditional gambling offer the same games, the UIGEA’s Congressional findings note that there are social costs particular to Internet gambling.⁴⁴ Congress further noted that “Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit

³⁸ *Id.* § 3002(3).

³⁹ See, e.g., Yevgeniya Roysen, *Taking Chances: The United States’ Policy on Internet Gambling and its International Implications*, 26 *CARDOZO ARTS & ENT. L.J.* 873, 878, 882–86 (2009).

⁴⁰ 31 U.S.C.A. § 5362(10)(B)(iii).

⁴¹ See *infra* Part II.B.1. (describing the principal role this exemption played in America’s World Trade Organization dispute, resulting in billions of dollars of sanctions and trade concessions).

⁴² Security and Accountability For Every Port Act, 6 U.S.C.A. § 901 (West 2010) [hereinafter SAFE Port Act]. The SAFE Port Act was passed to increase port security in response to threats of terrorism. H.R. REP. NO. 109-347, at 1 (2006). Its enormous popularity made it politically difficult to vote against the bill.

⁴³ Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 75 Stat. 1884.

⁴⁴ See Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5361(3) (West 2010). Empirical evidence for the social costs appear in the rather out-of-date National Gambling Impact Study Commission Report. See NGISC, ch.7, *supra* note 3 (stating, for example, that Internet gambling is less regulated than casino resorts and will incur more social costs by permitting easier access to gambling services). However, the Internet gambling landscape has changed dramatically since 1999. This Note will use updated sources, where available, to analyze new empirical data.

industry.”⁴⁵ Ironically, the financial institutions that provide these services—the institutions that the law purports to protect—are adamantly opposed to the legislation.⁴⁶

The UIGEA prohibits financial transaction providers (“FTP’s”) from processing restricted transactions to Internet gambling sites.⁴⁷ Restricted transactions encompass a broad swath of financial interactions. “No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling:”⁴⁸ (1) credit; (2) electronic transfers; (3) checks; and (4) other financial instruments to be decided by future regulation.⁴⁹ The legislation places the onus of policing restricted transactions on FTPs, and provides both civil and criminal penalties for noncompliance.⁵⁰ However, the UIGEA explicitly exempts certain activities that would otherwise fall within the statute such as fantasy sports, horseracing (but not dog racing), gambling on tribal

⁴⁵ 31 U.S.C.A. § 5361(c). The sparse congressional record on this issue also cited underage gambling and problem gambling as increasing concerns. 152 CONG. REC. S11045-01 (daily ed. Nov. 16, 2006) (statement of Sen. Jon Kyl), available at 2006 WL 3330257.

⁴⁶ See Miller, *supra* note 28, at 201–04.

⁴⁷ 31 U.S.C.A. §§ 5363–5364. FTPs are creditors, credit card issuers, electronic fund transmitters, money transmitting businesses, payment processors, stored value product transaction providers, electronic fund processors, money transmitting services, or any other participant in a designated payment system. *Id.* § 5362(4). In other words, the UIGEA affects many American financial institutions.

⁴⁸ *Id.* § 5363. A wager is defined as staking something of value on a contest, sporting event or game subject to chance. *Id.* § 5362(1)(A). Some advocates have questioned whether “a game subject to chance” includes games such as poker, backgammon, scrabble, or other games that contain an element of chance, but also require a great deal of skill. See Michael A. Tselnik, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1643–50 (2007), for a more in-depth discussion on the interplay between luck and skill.

⁴⁹ 31 U.S.C.A. § 5363. The Treasury has already passed the “future regulation” mentioned in the section. See *infra* Part I.C.

⁵⁰ 31 U.S.C.A. §§ 5365–5366. The UIGEA provides for injunctions against companies permitting restricted transactions and/or up to five years imprisonment. *Id.*

lands, state lotteries, and investing in financial securities.⁵¹ These exemptions provide critics with ammunition to question whether the exceptions undermine the prohibition.⁵²

To further complicate matters, the meaning of unlawful Internet gambling itself is vague. The UIGEA defines Internet gambling by cross-referencing existing federal, state and tribal laws.⁵³ As these laws vary enormously by jurisdiction, large FTPs operating across the United States are responsible for knowing fifty different state laws and adjusting their regulatory mechanisms accordingly.⁵⁴ FTPs have expressed particular concern because judicial interpretations of federal law differ by jurisdiction.⁵⁵ In addition, absent specific lists of prohibited transactions, FTPs will have to err on the side of compliance by over-restricting.⁵⁶ Although the UIGEA limits FTPs' civil liability for prohibiting legitimate transactions on the mistaken, but reasonable belief, that they were restricted transactions;⁵⁷ FTPs have not been shy in expressing their discontent.⁵⁸

C. The Prohibition on Funding of Unlawful Internet Gambling

Congress mandated that the Federal Reserve System and the Department of the Treasury ("Agencies") promulgate regulations to implement the provisions of the UIGEA within 270 days of the bill's passage.⁵⁹ On November 18, 2008, more than 700 days after

⁵¹ *Id.* § 5362(1)(E).

⁵² The drafters of the UIGEA likely realized that absent specific exemptions, the legislation would prohibit many transactions Americans take for granted. Stocks, mutual funds and financial securities would all be subject to prohibition because they "stake something of value on an uncertain outcome." *See id.* § 5362(1)(A).

⁵³ *Id.* § 5362(10)(A).

⁵⁴ Miller, *supra* note 28, at 202.

⁵⁵ *See id.*

⁵⁶ For example, FTPs worry that over-restricting customers' legitimate transactions may hamper global competitiveness. *See id.* at 206–08.

⁵⁷ 31 U.S.C.A. § 5364(d)(2).

⁵⁸ *See* Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69382, 69383 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233) [hereinafter PFUIG].

⁵⁹ 31 U.S.C.A. § 5364(a).

former President Bush signed the UIGEA, the Agencies finally passed the Prohibition on Funding of Unlawful Internet Gambling (“PFUIG”).⁶⁰ This delay led critics to question whether the U.S. government was fully committed to enforcing the UIGEA.⁶¹ Agency officials, on the other hand, blamed the delay on the vague language of the UIGEA.⁶²

The PFUIG requires FTPs to either: a) develop regulations that are reasonably designed to prohibit restricted transactions, or; b) comply with non-exclusive examples of regulation.⁶³ The most onerous provision requires FTPs to perform due diligence checks for restricted transactions on new and existing customers.⁶⁴ However, the PFUIG provides some latitude by permitting FTPs to develop their own mechanisms to determine whether a commercial customer presents a “minimal risk of engaging in an Internet gambling business.”⁶⁵ Although FTPs are exempt from performing due diligence checks on some payment systems ostensibly due to cost considerations,⁶⁶ there are no exemptions for card systems and money transmitting businesses.⁶⁷ Commentators noted that the exemptions for FTPs undermined the efficacy of the regulations.⁶⁸

⁶⁰ PFUIG, 73 Fed. Reg. at 69382.

⁶¹ See, e.g., Miller, *supra* note 28, at 196 (noting that “[t]his delay led Senator Sam Brownback (R-Kan.) to question the intentions of the Treasury Department. ‘Are they going to be committed to enforcing this law,’ Brownback asked, ‘and putting the personnel in place that it needs[?]’”).

⁶² *Id.*

⁶³ See PFUIG, 73 Fed. Reg. at § 5(a)–(b). Designated payment systems include automated clearing house systems, card systems, check collection systems, and money transmitting business. *Id.* § 3. The designated “Federal functional regulator,” or if none exists, the Federal Trade Commission, will be responsible for enforcement. *Id.* § 5(c).

⁶⁴ See *id.* § 6(b). The PFUIG also provides non-exclusive examples of due diligence that, if followed, carry a presumption of compliance. *Id.*

⁶⁵ *Id.* § 6.

⁶⁶ Miller, *supra* note 28, at 200.

⁶⁷ *Id.* Card systems and money transmitting businesses include credit cards and money delivery companies such as Western Union. See Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5362(11)(E) (West 2010).

⁶⁸ See Kristina L. Perry, Afterword, *The Current State of the Unlawful Internet Gambling Enforcement Act and Recently Adopted Prohibition on Funding of Unlawful Internet Gambling*, 8 RICH. J. GLOBAL L. & BUS. 29, 33–

For example, banks are only required to perform due diligence checks on commercial customers, but not for personal banking customers.⁶⁹ Furthermore, only the depository bank is responsible for check collection systems.⁷⁰ Therefore, the PFUIG would not restrict an Internet gambling company's payout to a customer via check if the Internet gambling company used a foreign bank account.

Pragmatically, FTPs will have trouble policing restricted transactions as required by the PFUIG because entrepreneurs are able to constantly open new foreign e-wallets to process Internet gambling transactions.⁷¹ If an FTP refuses to process the transactions of a specific e-wallet, that same e-wallet can reincorporate under a different name, and elude detection in a subsequent due diligence check.⁷²

The government's prosecution of Neteller and its executives is a revealing example of just how difficult it can be to distinguish between e-wallets that process restricted transactions and those that do not. Neteller was an e-wallet from the Isle of Man, used for all types of Internet purchases, although Internet gambling transactions represented the bulk of Neteller's revenue.⁷³ In 2007, the U.S. government arrested the Canadian owners of Neteller while they were in the United States,⁷⁴ and froze millions of dollars of Neteller assets.⁷⁵ After negotiations, Neteller agreed to pay a

34 (2008).

⁶⁹ PFUIG, 73 Fed. Reg. at § 6(e).

⁷⁰ *Id.* § 4(b).

⁷¹ Miller, *supra* note 28, at 204–05.

⁷² *Id.* at 205.

⁷³ *Neteller Founders Arrested by FBI, Charged with Money Laundering*, POKER PAGES (Jan. 17, 2007, 12:00 AM), <http://www.pokerpages.com/poker-news/news/neteller-founders-arrested-by-fbi-charged-with-money-laundering-29454.htm>. Customers used Neteller to confine their financial information to just one merchant, decreasing opportunities for identity theft and fraud. See Miller, *supra* note 28, at 204–05 (describing how individuals can use money transmitting businesses to keep their financial information secure).

⁷⁴ Christopher Costigan, *NETeller Founders Arrested in U.S.*, GAMBLING911.COM (Jan. 15, 2007, 6:39 PM), <http://www.gambling911.com/NETeller-Founders-Arrested-011507.html>.

⁷⁵ Amy Calistri, *Neteller Announces US Distribution Plans for Frozen Funds*, POKERNEWS (June 4, 2007, 6:39 PM), <http://www.pokernews.com/>

\$136 million penalty to the U.S. government to avoid prosecution.⁷⁶ Subsequently, the U.S. government unfroze Neteller's customers' accounts.⁷⁷ Thus, the U.S. government froze the funds of millions of Neteller customers, although many of the affected customers had never transferred a single dollar to an Internet gambling account.⁷⁸ The prosecution of Neteller illustrates that the government itself has found it difficult to cast a net that captures only restricted transactions. It is unreasonable to expect FTPs to fare better.⁷⁹

II. EFFECTS OF THE UIGEA AND PFUIG

To properly assess the net benefit of the UIGEA and PFUIG, it is necessary to analyze the costs and benefits. Although this analysis will not yield a precise numeric result, the benefits can be compared categorically with the benefits of the Proposed Bills.

A. Benefits of the UIGEA and PFUIG

The UIGEA has slowed the explosive growth rate of Internet gambling in the United States.⁸⁰ Although private ownership of foreign Internet gambling companies makes it difficult to estimate the extent of the Internet gambling market, one study from H2 Gambling Capital⁸¹ estimated that the United States contributed \$6 billion to the \$22.6 billion global Internet gambling market in

news/2007/06/neteller-announces-plan-frozen-funds.htm.

⁷⁶ *Neteller Back in Business*, EXTRA (July 26, 2007, 3:34 PM), http://www.onlinecasinoextra.com/casino_news_1010.html.

⁷⁷ *See id.*

⁷⁸ *See TheDo, Neteller Update about Frozen Accounts*, POCKET FIVES (Feb. 3, 2007, 9:15 PM), <http://www.pocketfives.com/f7/neteller-update-about-frozen-accounts-65931/>.

⁷⁹ *See Miller, supra* note 28, at 204–05.

⁸⁰ *See Von Lehman, supra* note 5, at 144.

⁸¹ H2 Gambling Capital is considered the leading Internet gambling research company globally. *See About H2*, H2 GAMBLING CAPITAL, <http://www.h2gc.com/aboutus.php> (last visited Sept. 13, 2010). PricewaterhouseCoopers derives its calculations from research performed by H2 Gambling Capital. *See id.*

2008.⁸² By contrast, immediately preceding the passage of the UIGEA in 2006, the United States contributed \$3–4.2 billion to a \$6 billion market.⁸³ Although Internet gambling revenue derived from American customers increased in real terms, the UIGEA approximately halved the percentage of American contribution to the industry as a whole.⁸⁴

In addition, the UIGEA provides social benefits by curbing gambling addiction.⁸⁵ Generally speaking, problem gamblers file bankruptcy at 4–5 times the national rate and are more likely to commit crimes and be arrested.⁸⁶ Moreover, adolescents between the ages of 12–18, who are more susceptible to gambling addiction, have reported gambling by traditional means at a median rate of 85%.⁸⁷ If these traditional gambling statistics apply equally to Internet gambling, legalization of Internet gambling could increase social costs enormously because everyone in the United States with an Internet connection will have access to gambling services. Therefore, by increasing the difficulty of accessing Internet gambling, the UIGEA should curb the rates of problem gambling, underage gambling, and bankruptcies.⁸⁸ The fewer

⁸² Pfanner, *supra* note 7.

⁸³ See Von Lehman, *supra* note 5, at 139.

⁸⁴ *Id.* These statistics may indicate that Internet gambling simply became popular earlier in America than other countries. However, even if the UIGEA is not responsible for the full slowdown, common sense dictates that the UIGEA at least contributed.

⁸⁵ See generally NATIONAL GAMBLING IMPACT STUDY COMMISSION, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT, ch. 5 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf> (describing how “problem gamblers” are “susceptible to problems with Internet gambling”) [hereinafter NGISC, ch.5].

⁸⁶ See NGISC, ch. 7, *supra* note 3, at 7-16.

⁸⁷ *Id.* at 7-20. Only 1% of adolescents reported having gambled in a casino. *Id.* Whether Internet casinos could equally restrict adolescents remains to be seen.

⁸⁸ See generally *id.* (describing various social problems associated with gambling). Of course, this assumes that the removal of casinos has the opposite effect as the opening of new casinos. Another issue with this analysis is that problem gamblers are the least likely group to be deterred by additional transaction costs due to addiction. Currently, there is no empirical data to assess whether the UIGEA has successfully decreased problem gambling.

people that have access to Internet gambling, the less social costs the United States should suffer from Internet gambling.

Although the UIGEA does not criminalize Internet gambling at the user level, the UIGEA does create higher access costs because gamblers are forced to find ways around the UIGEA.⁸⁹ A general rule of economic theory is that higher transaction costs discourage specific behavior.⁹⁰ Therefore, in theory, the UIGEA discourages Internet gambling by prohibiting the most convenient methods of funding Internet gambling accounts, such as credit cards.⁹¹ Credit cards are especially problematic due to the potential to quickly accumulate debt beyond one's means.⁹² By eliminating American credit cards as a method of funding Internet gambling, the UIGEA has increased the transactions costs of Internet gambling. As a result, bankruptcies and excessive credit card debt should decrease. To the extent that Americans stop or never start gambling over the Internet due to these considerations, the UIGEA has been a success.⁹³

B. The Costs of Prohibition

There are two principal categories of costs: economic and social. This section will consider each of these categories in order to facilitate a comparison with the Proposed Bills.

⁸⁹ Even if the UIGEA does not stop the dedicated Internet gambler from funding an account, the increased difficulty involved with funding an account will certainly deter the casual gambler.

⁹⁰ See POSNER, *supra* note 16, at 1–13.

⁹¹ The UIGEA does not provide FTPs an exemption for credit cards. See PFUIG, 73 Fed. Reg. at § 4 (listing exemptions).

⁹² See generally NGISC, ch. 7, *supra* note 3 (describing financial and credit issues associated with gambling).

⁹³ Unfortunately, the UIGEA did not mandate any research to document whether and how the bill was a success. As a result, the benefits of the UIGEA are difficult to quantify, while the costs of the UIGEA are far easier to quantify. Strikingly, nobody can accurately estimate how many people stopped gambling over the Internet as a result of the UIGEA.

I. Economic Costs

The UIGEA has particularly affected American FTPs. In the context of a severe recession, the imposition of expensive regulations decreases American FTPs' global competitiveness.⁹⁴ To avoid regulation, commercial customers have an incentive to use foreign FTPs.⁹⁵ Furthermore, Internet gambling customers that use foreign accounts will be tempted to conceal gambling winnings from the Internal Revenue Service ("IRS").⁹⁶ IRS audits of individuals often have trouble obtaining international bank records.⁹⁷ The UIGEA's objective to tackle fraud and money laundering, although well intentioned, has had the unintended consequence of incentivizing crimes such as tax evasion.

In addition, American FTPs have lost revenue streams derived from fund transfer processing fees.⁹⁸ The Agencies estimate that the cost to FTPs of complying with the PFUIG will surpass \$100 million in just the first year, without specifying an upward estimate.⁹⁹ On the other hand, assuming a \$6 billion domestic

⁹⁴ See generally Miller, *supra* note 28 (arguing that U.S. legislation puts a heavy burden on domestic FTPs, decreasing competitiveness).

⁹⁵ There is no law that prohibits U.S. citizens and businesses from setting up foreign bank accounts. *Id.* at 206–07. Indeed, customers will want to avoid FTPs' mistaken reasonable restrictions of legitimate transactions that have no redress in law. *Id.* at 203. Furthermore, multinational banks with a presence in the United States are in the uncomfortable position of taking measures to comply with the UIGEA, while at the same time providing financial services for legal Internet gambling clients abroad. *See id.* at 202–03.

⁹⁶ See Mark Scott, *UBS U.S. Tax Dispute: Who Are the Winners*, BUS. WK., Aug. 6, 2009, http://www.businessweek.com/globalbiz/blog/europeinsight/archives/2009/08/ubs_us_tax_disp.html (describing an example of tax evasion in which wealthy Americans took advantage of "Switzerland and its famous bank secrecy rules").

⁹⁷ *See id.* The dispute revolves around whether America has a right of access to the names of Americans potentially hiding vast sums of money from the IRS in Swiss bank accounts. *See id.* After months of negotiations, UBS released the names of about 4,450 American clients to the federal government. Lynnley Browning, *14,700 Disclosed Offshore Accounts*, N.Y. TIMES, Nov. 17, 2009, http://www.nytimes.com/2009/11/18/business/global/18irs.html?_r=2&hp. Some 10,000 people came forward voluntarily out of fear. *See id.*

⁹⁸ See Miller, *supra* note 28, at 216.

⁹⁹ See PFUIG, 73 Fed. Reg. at 69397.

Internet gambling industry, estimates of bank fees under a regulatory framework would total \$420 million.¹⁰⁰ The difference between these two numbers represents the total estimated loss to American FTPs—a minimum of half a billion dollars.

Internationally, Internet gambling has become a recognized service industry.¹⁰¹ Over 80 countries have legalized and regulated the business.¹⁰² In 2003, the small island nation of Antigua, home to the most Internet gambling companies in the world, filed a complaint against the United States with the World Trade Organization (“WTO”) for instituting policies that constitute illegal trade restrictions in violation of the 1994 General Agreement on Trade in Services (“GATS”) treaty.¹⁰³ In 2005, the WTO ruled against the United States,¹⁰⁴ and later affirmed the decision on appeal in 2007.¹⁰⁵ Although the GATS provides an exception to free trade policies in order to protect public morals, the WTO found that the United States’ laws treated traditional and online gambling differently, which presented a free trade violation.¹⁰⁶ The WTO rejected the United States’ argument that there is a moral distinction between online and traditional gambling.¹⁰⁷ In particular, the WTO noted that the IHA regulated and legalized Internet gambling for domestic horseracing, but excluded foreign competition.¹⁰⁸

In response, the United States took the unprecedented step of

¹⁰⁰ Miller, *supra* note 28, at 216.

¹⁰¹ *Id.* at 207.

¹⁰² Rich Cholodofsky, *Internet Gambling Perplexes Officials*, TRIBLIVE (Jan. 15, 2006), http://www.pittsburghlive.com/x/pittsburghtrib/s_413842.html. The list includes many first world important allies such as England. *See id.*

¹⁰³ Miller, *supra* note 28, at 207.

¹⁰⁴ *See* Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 340–73, WT/DS285/AB/R (Apr. 7, 2005), available at http://www.antiguawto.com/wto/51_Antigua%20_WTO_Appellate_Body_Report_7Apr05.pdf.

¹⁰⁵ *See* Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7.1, WT/DS285/RW (Mar. 30, 2007), available at <http://www.antiguawto.com/wto/72Article215Paneldecision.pdf>.

¹⁰⁶ Roysen, *supra* note 39, at 885.

¹⁰⁷ *Id.* at 884–85.

¹⁰⁸ *See id.* at 885.

unilaterally rescinding its GATS obligations with respect to Internet gambling.¹⁰⁹ This is especially alarming because of the precedent it establishes. For example, China now has precedent to unilaterally rescind its WTO Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) obligations after recently losing a WTO suit initiated by the United States. China’s infringement cost the American entertainment industry an estimated \$3.7 billion in lost sales.¹¹⁰ The economic costs of the UIGEA will not be quarantined to Internet gambling.

The WTO fiasco has been a financial boondoggle of epic proportions. Although the United States must pay Antigua only \$21 million annually under the WTO’s order,¹¹¹ the United States has subsequently settled with other nations, some of whom are powerful allies.¹¹² For example, the European Union dropped its WTO claim against the United States in exchange for undisclosed benefits in other trade sectors.¹¹³ Commentators estimate that total settlements, including cash and trade concessions, could total \$100 billion.¹¹⁴ This number fails to capture losses to good will and American political capital.

2. Social Costs

Once market leaders, publicly traded Internet gambling sites

¹⁰⁹ Miller, *supra* note 28, at 208.

¹¹⁰ Lesley Cole, *WTO Tells China It Must Do more to Combat Copyright Infringement*, VENTURES (Feb. 19, 2009), <http://venturesdialogue.ca/mainland-china/2009/634/>.

¹¹¹ Alex Binkley, *Remote Gambling Legislation in the United States: A Burden on the System*, 27 REV. BANKING & FIN. L. 537, 546 (2008).

¹¹² Miller, *supra* note 28, at 207–08 (stating that the U.S. government has negotiated settlements with nations including Australia, Japan, and the European Union).

¹¹³ *Id.* at 208. It is alarming that the U.S. has provided concessions to other countries, but refuses to reveal the extent. Secrecy surrounding concessions, whether trade or cash, begs the inference that the concessions are enormous, or otherwise not in America’s best interests. This information is currently the subject of a claim under the Freedom of Information Act. Sarah Polson, *Congressmen Request Trade Settlement Details*, POKER LISTINGS (Apr. 2, 2008), <http://www.pokerlistings.com/frank-paul-request-gats-agreement-24836>.

¹¹⁴ Miller, *supra* note 28, at 208.

can no longer service the lucrative American Internet gambling market.¹¹⁵ Publicly traded corporations are subject to increased oversight, transparency requirements, and fiduciary duties to shareholders.¹¹⁶ As a result, millions of American Internet gamblers must now rely on private companies in notoriously “under-regulated” countries.¹¹⁷ These companies refuse to publicly divulge their financial or employment information. As a result of lax oversight and government regulation, the industry has been plagued by several high-profile cheating scandals.¹¹⁸ In the under-regulated Internet gambling market, the players themselves must uncover these nefarious plots because no specific regulations exist to mandate security and fairness.¹¹⁹ Ironically, the UIGEA forced Americans to switch from publicly traded, regulated, and secure Internet gambling sites, to privately owned, under-regulated sites.¹²⁰ To consumers, the UIGEA has damaged the quality,

¹¹⁵ Bradley Vellarius, *PartyPoker Leads Exodus of Public Companies out of U.S.*, RGT ONLINE (Oct. 3, 2006), <http://www.rgtonline.com/Article.cfm?ArticleId=67868&CategoryName=Featured&SubCategoryName=>.

¹¹⁶ *See id.*

¹¹⁷ PeterPaul Shaker, *America's Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House*, 12 FORDHAM J. CORP. & FIN. L. 1183, 1200–01 (2007). Although no regulations existed at the industry's inception, even Antigua has promulgated vague regulations requiring fairness. Tselnik, *supra* note 48, at 1639. There are no specific rules, however, to ensure this result. *Id.* Thus, the term under-regulated is used instead of unregulated.

¹¹⁸ *See, e.g., '60 Minutes' on Sunday: How Online Gamblers Unmasked Cheaters*, CNET NEWS (Nov. 26, 2008), http://news.cnet.com/8301-1023_3-10108293-93.html (elaborating on the Absolute Poker scandal in which poker players themselves had to discover that a former employee could see everyone else's cards and stealing 1.6 million in the process because there was no regulation to force gambling sites to stop cheaters); Gilbert M. Paul, *Players Gamble on Honesty, Security of Internet Betting*, WASH. POST, Nov. 30, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/29/AR2008112901679.html> (noting the Absolute Bet cheating scandal over a four year period inculcating the executives of the company).

¹¹⁹ *'60 Minutes' on Sunday, supra* note 118.

¹²⁰ *Compare* ANNUAL REPORT 2008, PARTYGAMING (2008), <http://annualreport2008.partygaming.com/?id=29369> (providing very detailed information about the company's business performance, financial statements, and governance) [hereinafter PARTYGAMING ANNUAL REPORT 2008], *and*

reliability and security of the services provided.

In addition, the UIGEA perpetuates the stranglehold of foreign Internet gambling companies over the American market by prohibiting domestic competition. As a result, Congress is unable to enact further legislation to protect underage American gamblers, which was a principal motivation behind the UIGEA. Most Internet gambling companies, complying with the laws of their own country, only attempt to limit customers under the age of eighteen.¹²¹ The age checks that do exist are cursory at best. The more stringent sites require a photocopy of a valid government issued identification card indicating the user to be eighteen-years-old.¹²² In the United States, state law governs age limits with respect to gambling, which range between sixteen and twenty-one, depending on the jurisdiction.¹²³ In most states, the minimum required age for casino gambling is twenty-one, which is three years higher than in most other parts of the world.¹²⁴ Thus, foreign

ANNUAL REPORTS AND ACCOUNTS, 888 HOLDINGS (2008), http://miranda.hemscott.com/ir/888/pdf/2008_Annual_Report.pdf (providing various reviews and reports on the state of the company as well as information on the company's governance) [hereinafter 888 HOLDINGS], *with* POKERSTARS, <http://www.pokerstars.com> (last visited Sept. 8, 2010) (providing no company information, not even its telephone contact number, on its website). PokerStars is a privately held company. *Pokerstars*, LINKEDIN, <http://www.linkedin.com/companies/pokerstars.com> (last visited Sept. 8, 2010).

¹²¹ Most Internet gambling sites require a minimum age of 18 to gamble. *See, e.g., PokerStars Responsible Gaming*, POKERSTARS, <http://www.pokerstars.com> (last visited Sept. 8, 2010); PARTY POKER, <http://www.partypoker.com> (last visited Sept. 8, 2010).

¹²² *See, e.g., Responsible Gaming*, FULL TILT POKER, <http://www.fulltiltpoker.com/realMoney.php> (last visited Sept. 8, 2010) (warning users that the company employs software that looks at drivers licenses or other government-issued identification in order to verify that players are at least 18 years old).

¹²³ *See* I. Nelson Rose, *Minimum Legal Age to Place a Bet*, CASINO CITY TIMES (June 15, 2000), <http://rose.casinocitytimes.com/article/minimum-legal-age-to-place-a-bet-966>. The legal gambling age in America varies precipitously. *See id.* Most states allow gamblers to buy lottery tickets at 18 and enter casinos at 21. *See id.* However, in a bizarre twist, Maine only requires a legal age of 16 to gamble in casinos, but requires gamblers to be 18 for the lottery. *See id.*

¹²⁴ Great Britain allows 16 year olds to play slots and the lottery. James Chapman, *Raise the Gambling Age to 18, say Tories*, MAIL ONLINE (July 6, 2007), <http://www.dailymail.co.uk/news/article-466791/Raise-gambling-age-18->

Internet gambling companies have little incentive to screen for underage American gamblers between the ages of eighteen and twenty-one.

III. THE EFFECTS OF THE PROPOSED ALTERNATIVE

On the other hand, the Regulation Bill, proposed by Representative Barney Frank, offers a framework to license and regulate the online gambling industry.¹²⁵ The Regulation Bill currently has seventy cosponsors,¹²⁶ and the Financial Services Committee has approved the bill.¹²⁷ The Regulation Bill does not repeal the UIGEA; rather, it provides an exemption for all Internet gambling operations that first obtain a federal license.¹²⁸ For all unlicensed foreign Internet gambling, the UIGEA would continue to prohibit restricted transactions.¹²⁹ In addition, state governments that do not wish to participate may opt out.¹³⁰ Unlike today's online gambling industry, the opt-out would likely be honored by regulated domestic Internet gambling companies on penalty of fines.¹³¹ The U.S. government would actually collect these fines because the bill resolves the jurisdictional problems.¹³²

In addition, the Taxation Bill, proposed by James McDermott

say-Tories.html. Canada, on the other hand, requires gamblers to be 19 in some provinces and 18 in others. Reno Rollins, *Gambling in Canada: Canadian Betting and Casino Laws*, WORLD GAMBLING REVIEW, <http://www.worldgamblingreview.com/gambling/canada/> (last visited Sept. 8, 2010).

¹²⁵ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009).

¹²⁶ *H.R. 2267: Internet Gambling Regulation, Consumer Protection, and Enforcement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2267> (last visited Sept. 14, 2010).

¹²⁷ FINANCIAL SERVICES COMMITTEE (July 27, 2010, 10:00 AM), <http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1340>. The Financial Services Committee approved the Regulation Bill with numerous amendments. *See id.* This Note incorporates those amendments.

¹²⁸ *See* Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. § 5383(b) (2009).

¹²⁹ *See id.*

¹³⁰ *Id.* § 5386(a).

¹³¹ *Id.* § 5386(c).

¹³² *Id.*

and cosponsored by Barney Frank, operates in tandem with the Regulation Bill.¹³³ The Taxation Bill taxes licensed Internet gambling companies, charges fees for the licensing process, and ensures that gamblers' winnings are documented for tax purposes.¹³⁴ Together, the Proposed Bills tax, license and regulate domestic Internet gambling companies. This section will categorically evaluate the costs and benefits of the Proposed Bills.

A. The Benefits of the Proposed Alternatives

The Proposed Bills would bestow several benefits to American government, companies and citizens. Part 1 examines how the government would benefit through increased revenue and oversight and Part 2 details the benefits to American companies and citizens through increased revenue and employment opportunities. Part 3 addresses the social benefits such as reduced cheating and underage gambling. These categories facilitate a comparison between the benefits of the UIGEA and the likely benefits of the Proposed Bills.

1. Increased Government Revenue and Enforcement

Currently, foreign Internet gambling companies render gambling services to Americans, but avoid paying American taxes.¹³⁵ As gross revenue and profits from Americans participating in Internet gambling continue to increase in real terms, lost government revenue in the form of unpaid taxes is also increasing.¹³⁶ An independent 2008 PricewaterhouseCoopers report estimates that the U.S. government would collect nearly \$40

¹³³ Internet Gambling Regulation and Tax Enforcement Act of 2009, H.R. 2268, 111th Cong. (2009).

¹³⁴ *Id.* §§ 4491, 6050X.

¹³⁵ See PRICEWATERHOUSECOOPERS, ESTIMATE OF FEDERAL REVENUE EFFECT OF PROPOSAL TO REGULATE AND TAX ONLINE GAMBLING (2008), available at <http://www.safeandsecureig.org/media/pwctaxanalysis.pdf> (noting the American government would reap 56% of additional estimated revenue from individual income taxes).

¹³⁶ See *supra* Part II.B.1. The federal government loses tax revenue from both foreign Internet gambling companies and individual Americans.

billion in revenue over the next 10 years from a regulated Internet gambling market, assuming all states opt in.¹³⁷ Individual income taxes, which are automatically reported to the IRS, would constitute 56% of the estimated \$40 billion in additional government revenue.¹³⁸ The Proposed Bills further mandate that licensed Internet gambling companies maintain and submit detailed records to the IRS, including each gambler's personal information, gross winnings, gross losses, gross wagers, net winnings, and withheld taxes.¹³⁹ No longer would the government rely on the good faith tax filings of Internet gamblers. The proposed requirements for Internet gambling are even more stringent than those for traditional casinos, which should result in lower enforcement costs and a larger gross taxable income.¹⁴⁰

Under the Taxation Bill, the government would reap a 2% annual tax on the total funds deposited by customers.¹⁴¹ To ensure compliance, the Proposed Bills provide oversight and enforcement mechanisms.¹⁴² For example, the Treasury Department ("Treasury") may perform audits to ensure that Internet gambling companies maintain adequate bookkeeping.¹⁴³ Failure to abide by

¹³⁷ PRICEWATERHOUSECOOPERS, *supra* note 135. The report gives different estimates for differing numbers of opt-in states. *Id.* Because the Regulation Bill currently prohibits bets on sports other than horseracing, the numbers provided are lower than if the Regulation Bill permitted all types of wagers. *Id.*

¹³⁸ *Id.* This figure exposes the rate of personal income tax evasion. *See id.*

¹³⁹ H.R. 2268 § 6050x(a)-(b).

¹⁴⁰ *See Nevada Gambling: What You Need to Know*, LAS VEGAS 4 NEWBIES, <http://lasvegas4newbies.com/chap10-1.html> (last visited Sept. 8, 2010). Casinos report gambling winnings for these games to the IRS when a player wins \$1,200 or more from a bingo game or slot machine or if the proceeds are \$1,500 or more from a keno game. *Id.* There is no withholding or reporting for table games in Nevada (such as blackjack, baccarat, craps, roulette or other spinning wheel games) because the casinos do not know the amount of the wager and are unable to determine taxable gain from winnings. *Id.* Thus table game winners probably do not report their gambling profits to the IRS. *Id.* The laws for traditional casinos change from game to game, and also vary from state to state. Keeping abreast of these laws for the average gambling customer is nearly impossible.

¹⁴¹ *See* H.R. 2268 § 4491(a).

¹⁴² *See, e.g.,* Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. §§ 5383(k)(1)-(2) (2009).

¹⁴³ *See id.* Internet gambling companies carry the financial burden to

these rules may result in penalties ranging from a maximum of \$100,000 to revocation of the gaming license.¹⁴⁴ Although \$100,000 is too low, the license itself would be worth millions in annual profits for a market leader, and thereby incentivize compliance.

Faced with state and federal budget crises,¹⁴⁵ states have flocked to increase taxes and government revenue from traditional gambling.¹⁴⁶ For example, “[i]n Ohio, Governor Strickland reversed his stance on video slots at racetracks based on a ‘conservative’ estimate that the new machines would net more than \$760 million to the state.”¹⁴⁷ California has considered proposals to initiate an intrastate online poker market.¹⁴⁸ Pennsylvania, seeing an opportunity to capture gambling revenue from Atlantic City, opened a new casino in Bethlehem.¹⁴⁹ If state governments collect billions of dollars in annual revenue from traditional gambling, why prohibit Internet gambling that offers the same games?

In addition, the Regulation Bill remedies the current jurisdictional problems by compelling foreign Internet gambling sites to subject themselves to U.S. jurisdiction.¹⁵⁰ Internet

produce and deliver all required documents. *Id.* § 5383(k)(2)(B).

¹⁴⁴ *Id.* § 5383(i)-(l).

¹⁴⁵ See, e.g., Claire Suddath, *Spotlight: California’s Budget Crisis*, TIME, July 27, 2009, <http://www.time.com/time/magazine/article/0,9171,1910985,00.html>; Lori Montgomery, *Federal Budget Deficit to Exceed \$1.4 Trillion in 2010 and 2011*, WASH. POST, July 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072304101.html>.

¹⁴⁶ Ian Urbina, *States Face Drop in Gambling Revenues*, N.Y. TIMES, Sept. 10, 2009, <http://www.nytimes.com/2009/09/10/us/10gambling.html?hp>.

¹⁴⁷ *Id.*

¹⁴⁸ Dan Cypra, *California Intrastate Online Poker Update*, POKER NEWS DAILY (Aug. 28, 2009), <http://www.pokernewsdaily.com/california-intrastate-online-poker-update-4537/>. The UIGEA specifically exempts intrastate Internet gambling. Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5362(10)(B)(i) (West 2010).

¹⁴⁹ *Dice Now Rolling at Sands Casino*, 69 NEWS, (July 18, 2010), <http://www.wfmz.com/lehighvalleynews/24302372/detail.html>. While states compete with one another to capture the largest share of gambling revenue, the federal government squanders potential gambling revenue to foreign nations through the UIGEA. See *supra* Part II.B.1.

¹⁵⁰ See Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2268, 111th Cong. § 5383(c)(2)(E) (2009).

gambling companies will have to “maintain all facilities within the United States for processing of bets or wagers made or placed from the United States.”¹⁵¹ Even if some facilities are located abroad, licensees are subject to administrative summonses to produce records and data within 500 miles of the licensee’s place of business in the United States.¹⁵² The Treasury would not have to travel internationally to oversee Internet gambling operations.

By requiring Internet gambling companies to submit to United States jurisdiction, the federal government would be able to enforce compliance with state opt-outs, age requirements and other state specific requirements.¹⁵³ Regulators would be able to determine the gambler’s physical location and age by, for example, cross-referencing information from governmental databases with the customer’s credit history.¹⁵⁴ In contrast, under the UIGEA, foreign Internet gambling companies do not even attempt to comply with American law.¹⁵⁵ The Proposed Bills provide sanctions for non-compliance, thereby avoiding the current situation in which Internet gambling companies flagrantly “ignor[e] and circumvent[] the State laws.”¹⁵⁶

¹⁵¹ *Id.* amend. 8, § 5383(k)(1)(D) (as offered by Rep. John Campbell, Member, Fin. Services Comm., July 28, 2010), *accord id.* amend. 16, (as offered by Rep. Roger Sherman, Member, Fin. Services Comm., July 28, 2010).

¹⁵² *See id.* § 5383(k)(2)(A). The United States is not responsible for any expenses incurred by Internet gambling companies in compliance with these summonses. *Id.* § 5383(k)(2)(B).

¹⁵³ *See id.* § 5386(a).

¹⁵⁴ SAFE AND SECURE INTERNET GAMBLING INITIATIVE, REGULATED INTERNET GAMBLING AND AGE-VERIFICATION TECHNOLOGIES EFFECTIVE IN COMBATING UNDERAGE INTERNET GAMBLING (2007), *available at* <http://www.safeandsecureig.org/media/underagerelase.pdf>. The technology has advanced to the point where given access to governmental databases, such as the DMV and Social Security Administration, the government can realistically require effective age and residency verifications. *See id.*

¹⁵⁵ *See supra* Part II.B.1.

¹⁵⁶ 152 CONG. REC. S11045-01 (daily ed. Nov. 16, 2006) (statement of Sen. Jon Kyl), *available at* 2006 WL 3330257. Ironically, this quote from Senator Kyl comes from the UIGEA’s legislative history. Senator Kyl lamented foreign Internet gambling companies flagrantly disregarding state law. *See id.* Now, foreign Internet gambling companies flagrantly disregard both federal and state law. *See supra* Part I.

2. The Benefit to Private American Companies

The Proposed Bills would pave the way for an American takeover of the Internet gambling service industry. Under this framework, American Internet gambling companies would serve the majority of the domestic market and compete for a share of the foreign market.¹⁵⁷ To achieve these ends, the Regulation Bill excludes the current foreign Internet gambling market leaders and their executives from eligibility to obtain a license.¹⁵⁸ No person or company may obtain an Internet gambling license that has previously committed a felony or is delinquent in filing any federal or state tax returns.¹⁵⁹ In particular, the Regulation Bill provides that any person, company or affiliate that accepted a bet from a person located inside the United States after the enactment of the UIGEA, or provided financial assistance to that end, is ineligible to obtain a license.¹⁶⁰ All foreign private Internet gambling companies currently accepting American wagers clearly satisfy these criteria.¹⁶¹ The bill also delegates broad discretionary power to the Treasury to deny applications in order to “protect the public trust.”¹⁶² If passed, the Proposed Bills would capture a multibillion dollar industry for American companies.

PartyGaming, the former Internet poker market leader publicly traded on the London Stock Exchange (“LSE”) and located in Gibraltar, recognized the possibility that the United States may regulate the online gambling market. PartyGaming responded by negotiating a \$105 million settlement with the U.S. Attorney’s

¹⁵⁷ As opposed to the current situation in which \$6 billion flow directly to foreign companies. *See supra* Part II.A.

¹⁵⁸ *See* Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. § 5383(d)(3)(D) (2009) (barring applicants who are delinquent in filing taxes owed to the U.S.).

¹⁵⁹ *Id.* § 5383(d)(3)(C)-(D).

¹⁶⁰ *Id.* amend. 15, § 5383(d)(3)(E)-(G) (as offered by Rep. Spencer Bachus, Rep. Michele Bachman, Members, Fin. Services Comm., July 28, 2010).

¹⁶¹ *See id.* In addition, publicly traded foreign Internet gambling companies failed to pay taxes to the American government for services provided to American customers before the enactment of the UIGEA. Grahmann, *supra* note 11, at 166.

¹⁶² *See* H.R. 2267 § 5383(d)(5).

office in New York for prior actions contrary to American law.¹⁶³ In return, the United States agreed to refrain from prosecuting the company or its executives.¹⁶⁴ Commentators speculate that the online gambling giant is attempting to fulfill the obligations under the Regulation Bill in order to be eligible to obtain an American online gambling license.¹⁶⁵ Other Internet gambling companies do not share the optimism of PartyGaming, and assume that if Internet gambling is regulated, licenses will be limited to American gambling leaders such as Harrah's and MGM.¹⁶⁶ The mere possibility that Congress will pass the Regulation Bill, and PartyGaming could share in the action, has generated over \$100 million in government revenue.

Moreover, the regulation of Internet gambling companies would create thousands of skilled domestic jobs.¹⁶⁷ In addition to computer programmers, Internet gambling companies employ marketers, customer service representatives, lawyers, and technicians.¹⁶⁸ In 2008, PartyGaming employed 1,191 people¹⁶⁹

¹⁶³ Pfanner, *supra* note 7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Jon Parker, *PartyGaming, 888 and America: Different Strokes*, EGAMING REVIEW (Oct. 13, 2009), <http://www.egmagazine.com/features/261757/feature-partygaming-888-and-america-different-strokes.shtml>. In the late 90's, MGM ran an Internet gambling site successfully in the hope that America would change its stance towards the industry. When it became clear America would take steps to prohibit the industry, MGM decided it was not worth the legal risk and potential public relations fallout and shut down its operations. DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 185 (William R. Eadington ed., 2005); Lisa M. Bowman, *MGM Mirage Shuttters Online Casino*, CNET NEWS (June 4, 2003, 11:45 AM), http://news.cnet.com/2100-1026_3-1013085.html. American companies already have the expertise to manage the industry efficiently.

¹⁶⁷ PARTYGAMING ANNUAL REPORT 2008, *supra* note 120, at 67 (exemplifying an Internet gambling company with robust employment opportunities that, if forced to move to America, would employ thousands of Americans).

¹⁶⁸ *Id.* at 65–67.

¹⁶⁹ *Id.* at 67. Comparing the employment statistics from before and after the passage of the UIGEA, PartyGaming only employed 200 less employees, a drop of less than 20%. *Id.* at 69. This data suggests that to run an Internet gambling site correctly, a company needs several hundred employees, thereby providing

despite the fact that the UIGEA eviscerated 58% of its stock value at the end of 2006.¹⁷⁰ Similarly, 888 Holdings, which is also publicly traded and based out of Gibraltar, employed 931 people in the 2008 fiscal year.¹⁷¹ The Regulation Bill capitalizes on the potential for job creation and requires that the majority of all the employees, officers and affiliated business entities of licensed Internet gambling corporations be American citizens or residents.¹⁷²

The industry will also generate opportunities in business sectors outside of Internet gambling.¹⁷³ For example, 888 Holdings spent \$80.2 million on marketing in 2008.¹⁷⁴ A regulated Internet gambling industry disperses profits and employment opportunities to diverse business sectors. Contrary to some commentators' assertions,¹⁷⁵ the Internet gambling industry provides robust employment opportunities, training programs and competitive salaries.¹⁷⁶ Considering the current high unemployment rates,¹⁷⁷ the United States should be proactive in attracting high paying, skilled employment opportunities.

Additionally, American FTPs would benefit from the proposed

relatively stable employment regardless of market fluctuations.

¹⁷⁰ Vellarius, *supra* note 115.

¹⁷¹ 888 HOLDINGS, *supra* note 120, at 31–50.

¹⁷² Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. amend. 16, § 5383(k)(1)(C)–(F) (as offered by Rep. Roger Sherman, Member, Fin. Services Comm., July 28, 2010). This section will be null and void if the WTO rules that it violates free trade agreements. However, after the unilateral withdrawal from GATS, and the large settlement payments that resulted, the WTO would have to find a violation of some other agreement. *See supra* Part II.B.1.

¹⁷³ *See* Miller, *supra* note 28, at 202, for a discussion of how banks will benefit from licensing and regulating online gambling.

¹⁷⁴ *See* 888 HOLDINGS, *supra* note 120, at 14.

¹⁷⁵ *See, e.g.,* Grahmann, *supra* note 11, at 165–66 (noting that one Internet gambling site startup employed just seventeen people compared to the traditional and highly capitalized Harrah's opening in New Orleans employing 4,259).

¹⁷⁶ *See* PARTYGAMING ANNUAL REPORT 2008, *supra* note 120, at 65–67.

¹⁷⁷ *See* BUREAU OF LABOR AND STATISTICS, NEWS RELEASE: THE EMPLOYMENT SITUATION—AUGUST 2010 (Sept. 3, 2010), *available at* <http://www.bls.gov/news.release/pdf/empst.pdf>. The rate has hovered around 10%. *See id.*

legislation. Licensing and regulating the Internet gambling industry would increase American FTPs' global competitiveness and profitability by mitigating the financial costs of the UIGEA.¹⁷⁸ Americans, who currently make up a substantial amount of Internet gamblers throughout the world,¹⁷⁹ would have a large incentive to gamble with American online gambling companies due to better security and ease of access to the services. American customers would use American FTPs' to process fund transfers.¹⁸⁰ FTPs will collect fees conservatively estimated at \$420 million.¹⁸¹ In order to address concerns regarding excessive debt through the use of credit, the Regulation Bill continues the UIGEA's prohibition on the use of credit cards for Internet gambling.¹⁸²

Despite these financial benefits, FTPs would still incur costs to comply with the provisions of the UIGEA. The UIGEA cannot be repealed because if Congress repeals the UIGEA and enacts the Proposed Bills, established foreign Internet gambling companies would compete equally with licensed domestic Internet gambling companies. Under the Proposed Bills, domestic companies would incur federal licensing fees, taxes and regulations that foreign private companies would not.¹⁸³ Therefore, without protection from unlicensed foreign competition, federally licensed Internet gambling companies would be at a significant competitive disadvantage, and the newly created domestic Internet gambling industry would be destined to fail. Therefore, if Congress passes the Proposed Bills, Congress cannot repeal the UIGEA as applied

¹⁷⁸ The bills would increase banks global competitiveness by at least half a billion dollars a year. *See supra* Part II.B.1.

¹⁷⁹ *See Gale, supra* note 4, at 534.

¹⁸⁰ Customers will most likely use debit cards to fund Internet gambling accounts because they are the most convenient method other than credit cards, which are prohibited under the Proposed Bills. Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. amend. 12, § 5388(a) (as offered by Rep. Barney Frank, Chairman, Fin. Services Comm., July 28, 2010).

¹⁸¹ *See Miller, supra* note 28, at 216.

¹⁸² H.R. 2267, 111th Cong. amend. 12, § 5388(a) (as offered by Rep. Barney Frank, Chairman, Fin. Services Comm., July 28, 2010). The bill provides a grandfather exception for persons already licensed under the IHA. *See id.* § 5388(b)(1).

¹⁸³ *See supra* Part III.A.1.

to unlicensed Internet gambling companies.

3. Social Benefits: Increased Security and Responsible Gaming

The Regulation Bill requires Internet gambling companies to adequately protect customers.¹⁸⁴ No longer would foreign Internet gambling companies “self-regulate.”¹⁸⁵ Companies would lose their license or face civil fines for failing to take “appropriate safeguards to protect the privacy and security of any person engaged in Internet gambling.”¹⁸⁶ To obtain a license, companies must create a detailed plan to guarantee that games are fair.¹⁸⁷ To ensure strict adherence to these vetted plans, the Treasury may issue summonses to inspect books, records and data of Internet gambling companies.¹⁸⁸ The Treasury would also test Internet gambling code to ascertain whether measures taken to protect security and eliminate cheating are adequate.¹⁸⁹ By bringing Internet gambling under government control, customers’ would benefit from enhanced security.

In addition, the Regulation Bill would compel companies to maintain mechanisms to combat “fraud, money laundering, and terrorist finance.”¹⁹⁰ Currently, the UIGEA does not stop money laundering through privately owned foreign Internet gambling companies if players use foreign FTPs. Moreover, the money, once deposited in a foreign bank account, can be wired to a domestic bank account, without violating the provisions of the UIGEA.¹⁹¹

¹⁸⁴ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2268, 111th Cong. § 5383(g) (2009).

¹⁸⁵ Some commentators have suggested that Internet gambling companies have implemented significant security, privacy protection and problem gambling support policies through “self-regulation.” *E.g.*, Valasek, *supra* note 27, at 774–80. However, the efficacy of such regulation is highly dubious given the cheating scandals and rampant tax evasion prevalent today. *See supra* Parts II.B.2, III.A.3.

¹⁸⁶ H.R. 2268 §§ 5383(g)(7), (i)(1) (2009). The Treasury would be responsible for promulgating additional regulations. *Id.* § 5383(k)(1)(B).

¹⁸⁷ *Id.* § 5383(c)(2)(D)(ii).

¹⁸⁸ *See id.* §§ 5383(k), 5384(b).

¹⁸⁹ *Id.* § 5383(k)(1)(F).

¹⁹⁰ *Id.* § 5383(g)(5).

¹⁹¹ *See* Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. § 5361

The Regulation Bill attacks money laundering more effectively by granting the federal government access to the paper trail.¹⁹² Accordingly, the United States would gain a considerable advantage in the battle against money laundering.

Additionally, the Regulation Bill levies penalties against individuals who cheat in Internet gambling games.¹⁹³ Those convicted of using any type of cheating device may be permanently barred from all Internet gambling sites and subject to a fine or up to five years' imprisonment.¹⁹⁴ These measures are necessary because cheaters have not been punished adequately in the past.¹⁹⁵ Poker is especially vulnerable to cheating methods such as individuals colluding, using multiple aliases at one table, or dumping chips in tournaments.¹⁹⁶ However, Internet poker companies currently have an incentive to conceal breaches of security rather than undertake potentially expensive and embarrassing regulatory mechanisms to minimize cheating. The penalties under the Regulation Bill address these perverse incentives.

To obtain a license, applicants must submit a proposed program to prohibit underage gambling, provide responsible gaming materials, and enact regulation as the Treasury, state

(West 2010) (providing no mention of a prohibition in bank to bank wire transfers).

¹⁹² H.R. 2268 § 5383(k).

¹⁹³ *Id.* § 5390.

¹⁹⁴ *Id.* Cheating is defined broadly including hacking the system code, colluding with other players or using any device to obtain an advantage with the intent to defraud a licensee or other player. *Id.*

¹⁹⁵ See ABSOLUTE POKER SCANDAL, <http://www.absolutepokerscandal.com/> (last visited Sept. 8, 2010) (describing a cheating scandal implicating employees at an online poker site, which was not uncovered by authorities, but by other players). See also *supra* Part II.B.1.

¹⁹⁶ See *Cheating in Online Poker*, TIGHT POKER, http://www.tightpoker.com/online_poker_cheating.html (last visited Sept. 8, 2010) (defining collusion as when two players act in concert around one poker table). Using multiple aliases happens when one player controls what appears to be several players around one table. *Id.* Chip dumping occurs when one player purposely loses his chips to another player in a tournament, which gives the remaining player a significant advantage. *Id.*

regulator, or tribal regulatory board mandates.¹⁹⁷ For example, to help combat problem gambling, the Treasury would require Internet gambling companies to maintain a privacy-protected national “List of Persons Self-Excluded from Gambling Activities.”¹⁹⁸ Moreover, to begin gambling, players must electronically submit maximum loss limits by the hour, day, week, or month, at the discretion of the player.¹⁹⁹ Upon, reaching this preordained amount, licensee sites may not honor any gambling winnings or losses.²⁰⁰ Gamblers who have outstanding child support payments would be automatically excluded from Internet gambling sites.²⁰¹ These measures would help minimize some of the social costs of problem gambling.

The Regulation Bill also establishes the legal Internet gambling age at 21 in order to avoid disparate state laws and promote effective monitoring of underage gamblers.²⁰² Further, the Regulation Bill prohibits advertisements that target minors and provides for sanctions, including the revocation of the license and/or a fine, for a licensee “whose minor protection software, mechanisms, and other systems are found to be insufficiently effective.”²⁰³ To properly monitor compliance with these provisions, the Regulation Bill requires annual reports on the status of Internet gambling regulation, including the efficacy of protections against underage and problem gambling.²⁰⁴ The Regulation Bill also provides regulators the power to investigate licensees to enforce these regulations.²⁰⁵ These provisions would

¹⁹⁷ See Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. § 5384(b) (2009).

¹⁹⁸ See *id.* § 5384(c).

¹⁹⁹ *Id.* amend. 8, § 5384(b)(1)(G) (as offered by Rep. John Campbell, Member, Fin. Services Comm., July 28, 2010).

²⁰⁰ *Id.* § 5384(c).

²⁰¹ *Id.* amend. 13(a), § 5384(b)(3) (as offered by Rep. Barney Frank, Chairman, Fin. Services Comm., July 28, 2010).

²⁰² *Id.* amend. 8, § 5384(b)(1)(B) (as offered by Rep. John Campbell, Member, Fin. Services Comm., July 28, 2010).

²⁰³ *Id.* amend. 11, § 5384(p) (as offered by Rep. Melissa Bean, Rep. Mary Jo Kilroy, Members, Fin. Services Comm., July 28, 2010).

²⁰⁴ See *id.* § 3(b)(5).

²⁰⁵ *Id.* § 5383(o).

help minimize underage gambling.

To further address the social costs of Internet gambling, the federal government could use the billions of dollars in additional revenue from Internet gambling to finance programs designed to ameliorate the social costs of Internet gambling. Currently, the federal government does not fund any programs or research for problem gambling.²⁰⁶ Representative Jim Moran recently proposed the first attempt by federal legislators to understand and attack this problem.²⁰⁷ However, the bill provides that “it is the *sense of the Congress* that every state should contribute a percentage of its revenue from gambling [to the program].”²⁰⁸ States are unlikely to comply with “senses of Congress” absent federal authority to compel states to act. Without adequate funding, meaningful research and programs have not been developed. In contrast, the Regulation Bill requires the public availability of detailed statistics and logs on gambling behavior.²⁰⁹ The Proposed Bills provide the funds, tools, and knowledge necessary to tackle social costs particular to Internet gambling.

B. The Costs of Regulation

Community groups and activists often oppose the construction of new casinos.²¹⁰ Traditional casinos tend to attract crime and

²⁰⁶ See Terry Goodwin, *U.S. Government Tackles Problem Gambling in New Legislation Proposal*, CASINO GAMBLING WEB (June 18, 2009), http://www.casinogamblingweb.com/gambling-news/online-casino/us_government_tackles_problem_gambling_in_new_legislation_proposal_51419.html.

²⁰⁷ See Comprehensive Problem Gambling Act of 2009, H.R. 2906, 111th Cong. (2009).

²⁰⁸ See *id.* § 7 (emphasis added).

²⁰⁹ H.R. 2267, amend. 17, § 5383(k)(4) (as offered by Rep. Mary Jo Kilroy, Member, Fin. Services Comm., July 28, 2010). This database would be enormously helpful to properly assess the effects of Internet gambling. Currently, researchers must use foreign databases and educated guesses to determine the extent of the Internet gambling market. Anonymous publicly disseminated Internet gambling information would facilitate an analysis of the precise social and economic costs and benefits associated with this industry.

²¹⁰ See, e.g., Michael Levinson, *Church Facing Uphill Fight on Casino*, BOSTON.COM (Aug. 12, 2007), <http://www.boston.com/news/local/articles/>

social ills such as drunk driving, prostitution, bankruptcies, personal debt, and cheating.²¹¹ Problem gamblers accumulate an average of \$55,000 to \$90,000 of debt.²¹² After casinos opened in Atlantic City total crimes increased by 100%.²¹³ If Internet gambling follows comparable trends, every community in the United States could suffer a similar increase of social costs. Although Internet casinos can avoid some of the crime normally associated with traditional casinos—such as prostitution, drunk driving and petty theft, because Internet gambling does not require a physical presence—regulated Internet gambling would likely increase problem gambling and underage gambling, perhaps even at a rate higher than traditional gambling.²¹⁴

Problem gambling is a serious condition that affects not just the gambler, but also his social network.²¹⁵ Although the industry is new and statistics are scarce, common sense dictates that increased access to gambling services would increase the incidence of problem gambling. However, because many Americans already have access to gambling, either traditional gambling or illegal foreign Internet gambling, problem gambling is unlikely to increase significantly. Nevertheless, increased rates of problem gambling, and the strain on the community, are among the most serious social costs of the Proposed Bills.

Internet gambling could increase social costs in other ways as well. For example, the anonymity of Internet gambling provides underage gamblers an opportunity to circumvent age restrictions.²¹⁶ Unlike traditional casinos, there is no physical

2007/08/12/church_facing_uphill_fight_on_casino/.

²¹¹ See NGISC, ch.7, *supra* note 3.

²¹² GAMBLING FACTS AND STATISTICS, <http://www.overcominggambling.com/facts.html> (last visited Sept. 15, 2010).

²¹³ *Id.*

²¹⁴ See NGISC, ch. 5, *supra* note 85.

²¹⁵ See NGISC, ch. 7, *supra* note 3, at 7-18 (stating that those who suffer from problem gambling engage in behavior that is destructive to their families, their work, and even their communities).

²¹⁶ See NGISC, ch. 5, *supra* note 85, at 5-4 to 5-5. It is important to note that while the UIGEA relies almost exclusively on this report, the NGISC's conclusions are not derived from empirical research on trends in Internet gambling. For example, the conclusion that underage gamblers are at particular risk comes from the observation that young people use the Internet more

inspection of a state issued identification. Should new technology prove unable to adequately detect underage gamblers,²¹⁷ Internet gambling may fuel problem gambling and addiction at young ages. Although age detection technology has progressed significantly since the National Gambling Impact Study,²¹⁸ the potential for underage gamblers to wager over the Internet is another social cost that weighs against regulating Internet gambling. However, it is important to recognize that while the provisions of the Regulation Bill may not detect every underage gambler, the UIGEA has no provision to specifically prevent underage gambling. Certainly, underage gamblers must make up some portion of the estimated \$6 billion Americans currently gamble over the Internet.

In addition, the Proposed Bills would likely further injure foreign relations. Although the United States has already rescinded its GATS obligations with regard to Internet gambling, the Proposed Bills are protectionist policies.²¹⁹ In response, foreign nations may erect trade barriers in other trade sectors to counterbalance these impediments to the free market. Depending on the severity of international reaction and damage to relationships with allies, this cost may be enormous from both a financial and social aspect.

Finally, there is the unquantifiable moral objection. The objection is unquantifiable because no benefit, no matter how extraordinary, can outweigh the moral objection.²²⁰ Those who see

frequently. *Id.* at 5-4. The NGISC does not address whether age verification through regulation would better protect against underage gambling. *See id.*

²¹⁷ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. amend 8, §5384(b)(1)(A) (as offered by Rep. John Campbell, Member, Fin. Services Comm., July 28, 2010). Although the Regulation Bill opens real time government databases to Internet gambling companies for age verification purposes, the technology has yet to be tested. Further, it is easy to conceive of ways that minors would be able to circumvent rules because Internet gambling never requires a personal physical verification of the identification.

²¹⁸ *Id.* (allowing access to government databases).

²¹⁹ Miller, *supra* note 28, at 208.

²²⁰ *See, e.g.,* Michael K. Chung, Editorial, *Gambling is Exploitative, Immoral*, THE TECH, Oct. 5, 1993, <http://tech.mit.edu/V113/N47/chung.47o.html> (arguing that the money and increased tourism which could result from opening casinos are not sufficient reasons for opening casinos because gambling is

gambling as immoral will fundamentally object to the government profiting from this “vice.”²²¹ However, American governments have profited from gambling since at least the early 1960s.²²² If gambling is truly immoral, then all gambling should be outlawed, not just Internet gambling. Until that day, Congress should treat Internet gambling and traditional gambling alike, and reject the unreasonable argument that Internet gambling is immoral while traditional gambling is not.²²³

IV. LOOKING FORWARD: PROPOSALS FOR IMPROVEMENT

Further improvements to the Proposed Bills could increase the benefits, decrease the costs and, thus, increase the net benefit to the United States. First, the legislation should allocate a portion of the government revenue derived from the Proposed Bills to programs designed to combat social costs specific to Internet gambling. A small percentage of the \$40 billion in increased revenue over the next ten years could fund meaningful progress towards reducing underage and problem gambling.²²⁴ Indeed, the proposed bills could fund the problem gambling research proposed by the Comprehensive Problem Gaming Act.²²⁵ Furthermore, Congress could fund research toward state of the art age verification and problem gambling detection methods.²²⁶ Although the Treasury may need some flexibility to enact these measures, a budget floor should be set to adequately address the social costs of licensed Internet gambling.

Second, the legislation should include language requiring

simply immoral; criticizing the government for exploiting citizens in the name of increasing revenues).

²²¹ *See id.*

²²² *See, e.g.,* 7 THE NEW ENCYCLOPEDIA BRITANNICA 490 (15th ed. 2005) (stating that the Louisiana lottery had acquired enormous profits by 1963).

²²³ This Note does not address unquantifiable arguments such as the desire to maximize personal freedom and minimize government paternalism. Like the moral argument, these arguments cannot be quantified as a cost or benefit.

²²⁴ PRICEWATERHOUSECOOPERS, *supra* note 135.

²²⁵ *See supra* Part III.A.iii.

²²⁶ *See* Internet Gambling Regulation and Tax Enforcement Act of 2009, H.R. 2268, 11th Cong. § 3(b)(5) (2009).

licensees to obtain consent from foreign gamblers to submit to U.S. jurisdiction. Although the Regulation Bill provides both civil and criminal penalties for cheaters,²²⁷ absent gamblers' consent to U.S. jurisdiction, foreign cheaters are unlikely to be brought to justice. American prosecutors would face the same jurisdictional problems presented by foreign privately owned Internet gambling companies violating the UIGEA.²²⁸ Alternatively, the Regulation Bill could levy a large fine against Internet gambling companies for breaches of security. Although individual cheaters would not be brought to justice in this scenario, the fine would give companies a strong incentive to proactively prevent cheating.

Third, Congress should raise the maximum civil fines levied on Internet gambling companies for violating the provisions of the Regulation bill. In 2008, PartyGaming posted almost half a billion dollars in revenue and nearly \$80 million in profit.²²⁹ The current \$100,000 maximum fine amounts to less than one day of profit.²³⁰ Thus, the Treasury's two options for punishment are to revoke the company's license or invoke a paltry penalty. One option is too severe and the other is too lenient. To address this issue, the Treasury should have the discretion to levy fines of up to \$10 million, while retaining the same mitigating factors.²³¹

These suggestions should increase the benefits, decrease the costs and eliminate loopholes to the Proposed Bills. The modifications, which address the concerns that gave rise to the UIGEA, would thus increase the net benefit of the Proposed Bills.

CONCLUSION

Despite the enactment of the UIGEA, Americans continue to

²²⁷ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 11th Cong. § 5390 (2009).

²²⁸ See *supra* Part I.

²²⁹ PARTYGAMING ANNUAL REPORT 2008, *supra* note 120, at 104. PartyGaming posts these figures even without access to the American market. See Parker, *supra* note 166.

²³⁰ See H.R. 2267 § 5383(1)(1)(A).

²³¹ See *id.* § 5383(1)(2)(D) (listing good faith, gravity of the violation and size of the financial resources of the company as factors in determining the penalty amount).

gamble over the Internet and represent a significant portion of total global Internet gambling revenue.²³² This money goes directly overseas, but the social costs of Internet gambling—such as addiction and bankruptcy—remain in the United States. While the UIGEA has unsuccessfully addressed these concerns by attempting to prohibit Internet gambling, the Proposed Bills would capture the benefits of the industry and develop regulations to minimize the costs.

Financially, the Proposed Bills are unquestionably superior to the UIGEA. The United States government would reap nearly \$40 billion over the next ten years and private American companies would compete for a multibillion dollar domestic Internet gambling market. Eventually, licensed domestic Internet gambling companies would make inroads into foreign Internet gambling markets and increase the financial benefits to the United States. The newly created domestic Internet gambling industry would create skilled jobs and business opportunities in diverse sectors of the economy such as advertising and marketing. Instead, the United States now hemorrhages billions of dollars directly to private illegal foreign Internet gambling companies. Furthermore, American FTPs will spend an estimated \$100 million to comply with the PFUIG in just the first year of the PFUIG's passage.²³³

On the other hand, it is less clear whether the Proposed Bills will decrease or increase social costs and, if they do, by how much. With respect to the security of gambling services, regulated Internet gambling companies subject to punishment by the U.S. government would be superior to under-regulated foreign gambling companies. However, the Proposed Bills would increase the numbers of American gamblers and, thus, probably increase the numbers of underage and problem gamblers. The pivotal issue is the extent to which the provisions of the Proposed Bills would ameliorate these social costs. Although unknown numbers of underage and problem gamblers currently exist under the UIGEA and would exist under the Proposed Bills, the Proposed Bills attempt to counteract these social costs, while the UIGEA does

²³² Pfanner, *supra* note 7.

²³³ *Supra* Part II.B.1.

not.²³⁴ Surely confronting these social costs and attempting a solution is more desirable to ignoring the problem wholesale. Unfortunately, even if Congress passes the Proposed Bills, the absence of information with respect to the current social costs of Internet gambling would provide no baseline with which to compare whether the Proposed Bills have decreased or increased these social costs such as problem gambling and underage gambling.²³⁵

Over all, the benefits of the Proposed Bills far outweigh the benefits of the UIGEA. Under either framework, millions of Americans will gamble over the Internet. Under the UIGEA, the United States reaps none of the benefits of Internet gambling but retains the costs. On the other hand, under the Proposed Bills, the United States would exploit the benefits and mitigate the potentially higher costs of an increased domestic Internet gambling market. With higher benefits and social costs that are addressed instead of ignored, the Proposed Bills provide a larger net benefit to the United States than does the UIGEA.

Internet gambling is not meaningfully different than traditional gambling. Faced with an economic crisis, the federal government should capture this multibillion dollar industry for the United

²³⁴ Compare *supra* Part II.B.2. (noting the lack of protection against cheating and underage gambling under the UIGEA), with *supra* Part III.A.3. (describing the provisions under the Proposed Bills designed to combat cheating, money laundering, underage gambling, and problem gambling). Even if Congress does not pass the Regulation Bill, Congress would be wise to allocate resources towards combating the social costs of Internet gambling under the UIGEA. See Comprehensive Problem Gambling Act of 2009, H.R. 2267, 111th Cong. (2009).

²³⁵ In the spring of 2011, England will release the results of its first national survey on the prevalence of problem gambling since regulating Internet gambling in 2005. See *British Gambling Prevalence Survey 2010*, GAMBLING COMMISSION, http://www.gamblingcommission.gov.uk/research__consultations/research/bgps/bgps_2010.aspx (last visited Sept. 8, 2010). England began keeping statistics in 2000. See *British Gambling Prevalence Survey 2000*, GAMBLING COMMISSION, http://www.gamblingcommission.gov.uk/research__consultations/research/bgps/bgps_2000.aspx (last visited Sept. 8, 2010). To the extent American problem gambling trends are comparable to English trends, the study should be informative on the effects regulating Internet gambling will have on problem gambling in America.

States. The successful implementation of Internet gambling regulation by our international allies demonstrates the potential for success domestically.²³⁶ The United States' national interests are best served by controlling this industry, reaping its benefits, and effectively regulating it to minimize its costs.

²³⁶ See generally GAMBLING COMMISSION, <http://www.gamblingcommission.gov.uk/default.aspx> (last visited Sept. 8, 2010).