

## DOJ Reshuffles the Deck on Online Gaming

January 17, 2019

### Key Points

- On January 14, 2019, the U.S. Department of Justice released a November 2, 2018, opinion from its Office of Legal Counsel reversing previously issued guidance under the Obama Administration that interpreted the Wire Act to exclude non-sports-related gambling.
- The new opinion parses the syntax of the Wire Act's leading provision—Section 1084(a)—to determine that the phrase “on any sporting event or contest” modifies just one of the four prohibitions outlined in that section.
- Deputy Attorney General Rod Rosenstein has instructed Department of Justice attorneys to refrain from applying the new guidance for 90 days to allow businesses to bring their operations into compliance.
- The opinion creates greater uncertainty around compliance in the online gambling industry and is likely to face legal challenges from both private companies and state governments that have recently legalized various forms of online gambling.

### In-Depth:

The Wire Act, originally created in 1961, prohibits the use of wire communication facilities<sup>1</sup> to send bets, information assisting in placing bets, or money or credit resulting from those bets internationally or between states. Section 1084(a) provides:

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

### Contact

**Brian T. Carney**

Partner  
bcarney@akingump.com  
New York  
+1 212.872.8156

**Donald R. Pongrace**

Partner  
dpongace@akingump.com  
Washington, D.C.  
+1 202.887.4466

**Allison C. Binney**

Partner  
abinney@akingump.com  
Washington, D.C.  
+1 202.887.4326

**Elizabeth C. Rosen**

Associate  
erosen@akingump.com  
New York  
+1 212.872.8079

---

<sup>1</sup> “Wire communication facility” is defined as “any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.” 18 U.S.C. § 1081.

assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a).

In 2011, at the request of the U.S. Department of Justice's (DOJ) Criminal Division, the DOJ's Office of Legal Counsel (OLC) issued an opinion that the Wire Act only prohibited conduct related to sports betting. See *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. \_\_ (2011).<sup>2</sup> In reaching that conclusion, the OLC stated that the statutory text was ambiguous, but that the most logical reading applied the Act's modifier "on any sporting event or contest" to all of Section 1084(a), not just the portion referring to the interstate transmission of "information assisting in the placing of bets or wagers."

The new OLC opinion from 2018 "supersedes and replaces" the 2011 opinion and concludes that Section 1084(a)'s use of "on any sporting event or contest" is unambiguous and applies to only the clause that immediately precedes it. *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (2018).<sup>3</sup>

The new opinion breaks Section 1084(a) into two primary and four subordinate clauses:

First, the clause that begins, "for the transmission in interstate or foreign commerce," "bars anyone in the gambling business from knowingly using a wire" to do two things:

- (1) transmit "bets or wagers" or
- (2) transmit "information assisting in the placing of bets or wagers on any sporting event or contest."

Second, the clause that begins, "for the transmission of a wire communication," bars "any such person" "from transmitting wire communications that entitle the recipient to 'receive money or credit' either":

- (1) "as a result of bets or wagers" or
- (2) "for information assisting in the placing of bets or wagers."

As this breakdown suggests, the OLC determined that the "grammar of the provision" unambiguously conveys that "the sports-gambling modifier applies only to the second prohibition in the first clause." As a result, the OLC concluded, the prohibitions articulated in the first, third, and fourth subordinate clauses of Section 1084(a) apply with equal force to all kinds of gambling, not just gambling that is sports-related.

Although the OLC framed this opinion as the consequence of the unambiguous and plain language of the statute, the OLC took additional steps that signal its recognition of the controversial and impactful nature of its new guidance. First, the opinion contains a lengthy, citation-heavy analysis of "[t]raditional canons of statutory

---

<sup>2</sup> <https://www.justice.gov/file/18341/download>

<sup>3</sup> <https://www.justice.gov/olc/file/1121531/download>

construction” to “confirm” its interpretive conclusion. Second, the opinion provides a defense of the “logic” of the new interpretation, including a discussion of congressional intent and legislative history. Third, the opinion emphasizes the “considerable caution” that the OLC exercises in connection with reconsidering prior opinions. Finally, the opinion explicitly anticipates coming legal challenges, noting that “[r]eaching a contrary conclusion from our prior opinion will also make it more likely that the Executive Branch’s view of the law will be tested in the courts.” The opinion appears to welcome those challenges, stating that the “possibility of judicial review” provides “a one-way check on the correctness of today’s opinion” and “weighs in favor of our change in position.”

The new opinion acknowledges that various individuals and entities have relied on the OLC’s 2011 opinion, including states that began selling lottery tickets online. The opinion determines that any interests those states may have are outweighed by the plain language of Section 1084(a) and notes that Congress can always act separately to protect those interests. The opinion does not squarely address a New Jersey-Delaware-Nevada compact that purports to allow poker players in all three states to play against one another online, but those three states could be the first in line to challenge the new guidance in the courts. The fight would not be a new one for New Jersey; it led the legal battle to strike down a 1992 law prohibiting states from legalizing sports betting. The Supreme Court ultimately determined that the law was invalid. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018). New Jersey legalized sports betting in mid-2018, shortly after the Supreme Court decision, resulting, in part, in a 9.2 percent year-over-year increase in gaming revenue.

In a January 15, 2019 memorandum to U.S. Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation, Deputy Attorney General Rod Rosenstein instructed DOJ attorneys not to apply the new guidance on the Wire Act in criminal or civil actions until April 15, 2019 (90 days from the date of the memorandum).<sup>4</sup> Rosenstein stated that the “90-day window” would “give businesses that relied on the 2011 OLC opinion time to bring their operations into compliance with federal law.” Rosenstein also emphasized that the delay in application was “an internal exercise of prosecutorial discretion . . . not a safe harbor for violations of the Wire Act.”

### **Practical Impact:**

Although the impact of the new OLC opinion is not yet clear, and much will depend on how the DOJ’s enforcement divisions apply the guidance, the opinion threatens the viability of interstate online gambling platforms and may be only the federal government’s first attempt to discourage the nationwide expansion of legalized gambling following *Murphy*. States have clearly viewed *Murphy* as a potential gold mine of new, previously unavailable tax revenue, but this opinion signals that the executive branch is not yet willing to yield all interstate gambling regulation to the states. This opinion will likely chill, at least in the short term, new and innovative interstate gambling concepts for consumers, but it could also encourage the gambling industry to push for a legislative solution in Congress.

---

<sup>4</sup> <https://www.justice.gov/file/1124286/download>