The voice of banking
& financial services

Implementing the Prohibition of Funding of Unlawful Internet Gambling Act 2006

BBA Response to Consultation on Regulation GG; Docket No R-1298

1. The BBA is the leading UK banking and financial services trade association and acts on behalf of its members on domestic and international issues. Our 225 banking members are from 60 different countries and collectively provide the full range of banking and financial services. They operate some 130 million accounts, contribute £50bn to the economy and together make up the world's largest international banking centre.

2. The BBA welcomes the opportunity to comment on the Regulations to implement the provisions of the Unlawful Internet Gambling Enforcement Act 2006. In general, members are concerned at uncertainties over the scope of the Regulation and in particular the implications for non-US banks. Many non-US financial institutions have already voluntarily instituted reasonable measures to safeguard against the processing of restricted online gambling transactions but have encountered substantial practical and technological difficulties in policing their systems on a continuous and real-time basis.. The industry considers that more consideration needs to be given to the practical aspects of implementation, in view of the lack of detail in the current version of the draft Regulations, as to how implementation is to be achieved. BBA members see a need for clarity on several key issues.

Detail

3. The consultation document makes it clear that the key area for careful consideration will be cross-border relations between US correspondent banks and their foreign respondents. Foreign banks will need to be involved in discussion with their US partners to be clear on what type of assurances US banks could reasonably expect. In view of the complexity of the implied obligations and the uncertainties surrounding the legal position, it is an area where a risk-based approach will inevitably have to be employed to lessen the potential collateral damage on legitimate banking business. A zero-tolerance approach by US regulators is likely to lead to extensive collateral damage on legitimate banking business. The onus on members to obtain or provide documentation and certificates is constantly increasing and banks need reassurance that any added burden will be reasonable, proportionate and necessary. Members suggest that it would be helpful for US regulators, after consulting the industry further, to issue guidance to encourage consistency across the US banking sector; there is an overriding concern that, given discretion, US correspondent banks may set extreme parameters or requirements on relationships with foreign banks beyond the requirements of the Regulations in order to mitigate their own uncertainty and risk. Members have already

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seen some evidence of legitimate transactions such as loan repayments being blocked because of a link with the internet gambling industry. Banks naturally do not want to see legitimate transactions being unduly hindered, nor do they want to see non-US banks placed under a greater burden of obligation than their US counterparts.

4. The industry appreciates that it would not only be undesirable, but virtually impossible to compile a list of unlawful internet gambling businesses, as referred to in Section E sub-section 6. However a clear definition of what constitutes 'illegal internet gambling' under the Act would be invaluable to non-US banks who will otherwise have real difficulty in understanding the nuances of the interplay between US Federal and State laws and their effects in this area, especially when there appears to be a difference of view between US government agencies for example in relation pari-mutual betting on US horse racing. Particular areas of concern include the status of games of skill as opposed to games of chance, simulation contests, intra-state gambling, gaming connected to Indian reservations, and how the authorities will decide who is ultimately responsible for any breaches in what are often complex financial structures between and within banks. Financial institutions with a shareholding in an internet gambling company are concerned as to whether any dividend profit from the shares would be considered as the proceeds of or an involvement in internet gambling and thereby leave them open to penalties. Although there are some, very limited, definitions in the Act, these and similar uncertainties are simply not answered by the general allusion to" involvement" in unlawful internet gambling expressed in the Regulations.

5. Members understand the Regulations to apply only to relationships with business customers, since an obligation to monitor the internet gambling transactions of personal customers would be virtually impossible to implement.

6. Members also note that section 5367 of the Act creates liability in relation to parent and subsidiary companies but that there does not appear to be any detailed guidance on this aspect in the Regulations. Members need further information on the degree to which they will be considered liable for breaches so that they can examine what could be done in practical terms mitigate the risk of involvement in unlawful gambling.

7. BBA members are concerned at the practical difficulties of having to police on a continuous basis their entire business customer base for any indication of internet gambling activity and then dedicate further resource to ascertaining the legality of the activity. As previously stated, a definition of legal and illegal activity would be helpful but even with such a definition, members would still have to check manually individual transactions to ascertain their legitimacy; we are not aware of current technology that would effectively accomplish the goals expressed in the Regulation. Monitoring of payment systems cannot be undertaken on a 'real-time' basis and so banks will generally be unable to prevent or prohibit acceptance of most of these transactions. Any breaches would only be discovered post-event leaving banks open to penalties unless the Agencies deem that an exemption applies, which does not provide a bank with much reassurance if they possess the customer relationship. The limitation on the application of exemptions under Section C does not reflect the practical reality of managing the transactions.

8. Members believe that requirements with respect to card systems will be difficult to enforce. Although credit card transactions for gambling are processed under a specific Merchant Category Code (MCC 7995) there is no separate MCC to distinguish between

lawful or unlawful internet gambling transactions. As a consequence, the acquiring bank is not able to determine if a transaction constitutes an unlawful transaction since it is only notified of the credit card number, amount of transaction and expiration date of the card prior to the transaction being authorised. The acquiring bank will not know the issuer of the card or the location of the cardholder and must rely on the internet gambling business to block inappropriate transactions. Members also inform us that there is no automated technological solution available to notify the acquiring bank in advance if a US customer is involved. Activity can only be monitored manually and assessed after the transaction has been completed, potentially leaving the bank open to enforcement action.

9. More generally, unusual transactions would be most likely to come to light through existing transaction monitoring systems, due diligence and 'Know Your Customer' (KYC) procedures but any additional requirement to monitor specifically for illegal internet gambling transactions would be nearly impossible to meet. In regards to large companies who may own a small internet gambling operation there would be little grounds for questioning the overall customer relationship and, as previously stated, it would be very difficult in practical terms to monitor every single transaction that the company as a whole undertakes. The underlying emphasis is firmly on the relationship between a financial institution and an internet gaming firm as being the best vehicle for identifying and preventing illegal transactions, as indicated by Section C sub-section 1. This could be stated more clearly at the beginning of the draft Regulations, but the practical limitations of monitoring ongoing relationships must be acknowledged in any interpretation.

10. Members also point out that blocking or freezing transactions could very well open them to claims of civil liability by the customer if such actions are taken in a non-US legal jurisdiction to comply with US Regulations. Similarly, a US bank operating in a non-US country could be sued in that jurisdiction's courts for failing to honour a payment without legal justification under the appropriate national law. The problem would be particularly acute if the action were taken on the basis of reasonable belief, given the uncertainties over definitions which, under the terms of the draft Regulation, the Federal Reserve System and the Department of Justice take no responsibility for resolving.

11. Given the level of uncertainty around many important areas required to implement the Regulations and the Act, BBA members would be very much in favour of an opportunity for further consultation on cross borders issues and a period of at least 24 months for implementation. Further, members suggest that extending the consultation period would allow the Agencies time for consultation with other national jurisdictions during which all the appropriate legal and practical considerations could be addressed and, if possible, resolved.