

COMMENT

Internet Gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme

*Mark D. Schopper**

I. INTRODUCTION

Entrepreneurs have exploited technological advances and consumer demand to build a global gambling market on the Internet. In response, members of the U.S. Congress have repeatedly attempted to pass legislation prohibiting Internet gambling. Although all federal legislative attempts to place an outright ban on Internet gambling have failed, attempts to find an enforceable method of prohibition continue. Congress's most recent attempt to prevent Americans from gambling on the Internet is contained in proposed legislation, the Unlawful Internet Gambling Funding Prohibition Act (UIGFPA), which would institute a monetary control scheme in the United States preventing the use of credit cards and other bank instruments for Internet gambling.¹ The *raison d'être* for this legislative effort is purportedly to prevent money laundering.

This comment examines the monetary control scheme being considered by Congress, and the possible consequences of using it as a method of enforcing a prohibition on Internet gambling. To

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¹ H.R. 556, 107th Cong. (2001).

this end, the comment identifies related issues involved in Internet gambling, money laundering, and the emergent technology of electronic money. This comment will seek to show that the current proposal pending in Congress to ban the use of credit cards and other payment systems as a means of preventing Internet gambling will not only fail to achieve its intended result, but may in fact unleash market forces that could have vast and unintended consequences—including the promotion of both Internet gambling and money laundering.

For a glimpse of the likely results of the UIGFPA or similar monetary control schemes, consider the following scenario: more than one million Americans per day log on to the Internet and play casino-style games or make sports wagers for real money. The federal government moves to prohibit this activity. After numerous failed attempts at passing prohibition legislation, the government develops what appears to be an “effective” method of achieving this goal: a monetary control scheme that would effectively make it impossible for Americans to fund their Internet gambling activities. To this end, the government passes legislation banning the use of credit cards, checks, and electronic funds in Internet gambling. It claims these measures are necessary to thwart criminals and terrorists from laundering the proceeds of their illegal activity through Internet gambling sites. Millions of Americans, denied the use of their credit cards for Internet gambling, seek alternative funding mechanisms.

The market quickly realizes that an alternative mechanism already exists in the form of electronic money, and gamblers begin using it to place bets or play casino-style games on the Internet. This alternative method of payment is completely anonymous, untraceable, and more secure than a credit card. Unlike current payment systems, such as credit cards, the new payment mechanism allows for immediate payoffs, much like in “brick and mortar” casinos. Internet gambling therefore becomes even more attractive to potential online gamblers. Indeed, the numerous advantages of this alternative payment mechanism lead to its use for other transactions on the Internet. As a result, the alternative payment method enjoys widespread use, and it soon becomes a commercial success.

And here is the clincher: this alternative method of payment is perhaps the most powerful and untraceable money-laundering tool ever imagined by criminals. Additionally, once the alternative payment method “catches on,” it would be nearly impossible to stop its use without pulling the plug on the entire Internet (and maybe not even then). Current congressional efforts to ban credit cards and other payment methods for use in Internet gambling

could facilitate a consumer shift to this alternative method of payment—"electronic money."²

II. BACKGROUND

A. Internet Gambling

To gamble on the Internet, consumers use personal computers to access Internet gambling websites offering sports wagers or casino-style games of skill or chance.³ Internet gamblers locate gambling websites much the same way as they would any other website: through search engines, online advertising, or a variety of other methods. The gambler generally has two types of gambling from which to choose—casino-style games, "such as blackjack, poker, slot machines, and roulette,"⁴ and sports wagering.⁵

Most Internet gambling sites require the gambler to fill out an online registration form,⁶ and to open an account with the gambling site or a related bank.⁷ Once the account is established, the gambler needs to fund the account; payment can be made via credit cards, debit cards, wire transfers, checks, smart cards, or other electronic payment systems.⁸ Until recently, approximately ninety-five percent of Internet bets or wagers have been made through use of credit cards.⁹ The Internet gambler uses a credit card to fund a "front money" account with the Internet casino or related bank,¹⁰ which can then be used to wager up to the amount of the available balance. A gambler's winnings are usually "distributed as checks in the mail, bank drafts, or credits to the [gambler's] credit or debit card account."¹¹

As of 2001, the burgeoning Internet gambling industry was valued at approximately two billion dollars (U.S.) annually.¹² This

² The terms electronic money (e-money), electronic cash, and digital cash are used interchangeably throughout this comment. Various names have evolved for electronic money: It is referred to as digital cash, electronic cash, digital money, cyberpayments, and cybercash. Sarah N. Welling & Andy G. Rickman, *Cyberlaundering: The Risks, The Responses*, 50 FLA. L. REV. 295, 298 (1998).

³ See ANTHONY CABOT, THE INTERNET GAMBLING REPORT IV 5-12 (2001).

⁴ NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT at 5-3 (1999), available at <http://www.govinfo.library.unt.edu/ngisc/index.html> [hereinafter NGISC FINAL REPORT].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; CABOT, *supra* note 3, at 26-27.

⁸ NGISC FINAL REPORT, *supra* note 4, at 5-3.

⁹ See Kevin Ferguson, *Wells Fargo Bars Use of ATM, Credit Cards for Online Gambling*, LAS VEGAS REV.-J., Dec. 15, 2000, at 3E, available at 2000 WL 8216923 (quoting Internet gambling analyst Sebastian Sinclair).

¹⁰ CABOT, *supra* note 3, at 26-27.

¹¹ Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1049 (1999).

¹² Jon Baumgarten, Alec Farr, & Susan Brinkerhoff Proskauer Rose LLP, *Congress Again Confronts Internet Gambling*, CYBERSPACE LAW, vol. 6 No. 6, at 13 (Sept. 2001) [hereinafter *Congress Again Confronts*]. Unless otherwise indicated, all currency figures are in U.S. dollars.

figure is projected to exceed six billion dollars by 2004, with about half of this figure originating from gamblers in the United States.¹³ The number of Internet gambling businesses has multiplied in a few short years to at least two hundred,¹⁴ offering a combined total of more than 1400 websites at which a patron can gamble.¹⁵ These online gambling websites are accessible to anyone with Internet access—anywhere in the world.¹⁶ The physical location of these “virtual casinos” is presently outside of the United States, in places like Antigua or the Netherlands Antilles.¹⁷ The main reason for the lack of domestic Internet gambling sites is that ambiguity in U.S. federal law currently makes it unclear whether some forms of Internet gambling are legal.

The federal government has traditionally left decisions regarding the legalization of gambling to the states.¹⁸ Furthermore, courts have generally held that the regulation of gambling is a right reserved for the states by the Tenth Amendment to the U.S. Constitution.¹⁹ Nevertheless, there are federal statutes that apply to gambling.²⁰ Thus, it is conceivable that the federal government could regulate Internet gambling and, in fact, Congress has made numerous attempts to do so. Citing the rapid expansion of Internet gambling and the Internet’s borderless nature as potent reasons for intervention, members of Congress have attempted to bring this form of gambling under federal control.

From 1995 to the present, legislation has been introduced in both the House of Representatives and Senate to prohibit Internet gambling.²¹ Internet gambling opponents claim that prohibition is necessary to deal with, among other things, social problems and criminal activities linked to gambling.²² However, members of Congress opposed to Internet gambling have been unsuccessful with their legislative attempts to place an outright ban on this

¹³ *Id.*

¹⁴ CABOT, *supra* note 3, at 54.

¹⁵ *Congress Again Confronts*, *supra* note 12.

¹⁶ *See* CABOT, *supra* note 3, at 5-12.

¹⁷ *Congress Again Confronts*, *supra* note 12.

¹⁸ Stevie A. Kish, Note, *Betting on the Net: An Analysis of the Government’s Role in Addressing Internet Gambling*, 51 FED. COMM. L.J. 449, 450 (1999).

¹⁹ Peter Brown, *Regulation of Cybercasinos and Internet Gambling*, 547 PLI/Pat 9, 14 (1999).

²⁰ *See, e.g.*, The Wire Act, 18 U.S.C. § 1084 (2001).

²¹ *See Congress Again Confronts*, *supra* note 12; Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 134-150 (2000). As of the writing of this comment, two bills are currently making their way through the U.S. Congress. H.R. 556, 107th Cong. (2001) (sponsored by Rep. Leach (R-Iowa)); H.R. 3215, 107th Cong. (2001) (sponsored by Rep. Goodlatte (R-Virginia)). Congress is expected to consider the legislation in 2002. Tony Batt, *Leach Takes Aim at Web Gambling*, LAS VEGAS REV.-J. Nov. 23, 2001, at 1D, available at 2001 WL 9543589 [hereinafter Batt, *Leach Takes Aim*].

²² For a good discussion of the perceived dangers of Internet gambling, see Theresa E. Loscalzo & Stephen J. Shapiro, *Internet Gambling Policy: Prohibition Versus Regulation*, 7 VILL. SPORTS & ENT. L.J. 11 (2000).

activity. Consequently, some members of Congress are now trying to prevent the use of certain bank instruments for Internet gambling. Before discussing the merits of this proposed monetary control scheme, it will be helpful to understand the political climate in the U.S. Congress regarding Internet gambling, and how prohibition efforts have arrived at this monetary control methodology.

B. Efforts to Prohibit Internet Gambling

There have been a number of unsuccessful attempts to pass Internet gambling prohibition legislation. These unsuccessful attempts have varied in both approach and stated purpose. In fact, the legislative approach has evolved significantly over the past seven years, as opponents of Internet gambling have gradually come to realize that Internet gambling is extremely difficult to regulate.

The first proposal to prohibit Internet gambling was introduced by Senator Jon Kyl (R-Arizona) as part of the 1995 Crime Prevention Act.²³ It targeted individual gamblers and would have imposed a harsh one-year prison sentence.²⁴ The proposal died in committee.²⁵ In 1997, Senator Kyl proposed the Internet Gambling Prohibition Act, again attempting to criminalize Internet gambling.²⁶ This bill was more successful than Senator Kyl's previous attempt. After undergoing a series of revisions, a version was approved by the Senate in July 1998,²⁷ but failed in the House of Representatives. Undaunted, Senator Kyl reintroduced the bill in March 1999,²⁸ and the Senate unanimously passed a revised version.²⁹ Nevertheless, the bill again died in the House of Representatives.

Representative Bob Goodlatte (R-Virginia) has also introduced legislation to prohibit Internet gambling. His bill, the Combating Illegal Gambling Reform and Modernization Act,³⁰ would update the Wire Act.³¹ Courts have held that the current statutory language restricts the applicability of the Wire Act to "sport-

²³ See 141 CONG. REC. S19110-07 (1995) (overview of the Crime Prevention Act of 1995), available at 1995 WL 755393.

²⁴ *Id.* In addition to the prison sentence, the convicted individual's computer equipment would be confiscated. *Id.*

²⁵ *Id.*

²⁶ See Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

²⁷ Compare S. 474 (introduced by Sen. Jon Kyl on March 19, 1997), with 144 Cong. Rec. S8815 (1998) (Senate Bill 474 as passed by the Senate, July 23, 1998).

²⁸ S. 692, 106th Cong. (1999).

²⁹ See 145 CONG. REC. S14863-02 (daily ed. Nov. 19, 1999).

³⁰ H.R. 3215, 107th Cong. (2001).

³¹ The Wire Act, 18 U.S.C. §1084 (2001). The Wire Act provides criminal liability for anyone who engages in "the business of betting or wagering" using:

[W]ire communication facility for the transmission in interstate or foreign commerce of [1] bets or wagers or [2] information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of [3] a wire com-

ing events or contests", thus excluding casino-style games.³² The proposed revisions to the Wire Act would include nearly every type of gambling conducted over the Internet, including casino style games.³³ Unlike the Kyl bill, however, the Goodlatte legislation targets the offshore Internet casino operator rather than the individual gambler. A number of commentators contend that Representative Goodlatte's proposed legislation would be difficult to enforce, and could be easily circumvented.³⁴ In light of this view, a third legislative approach, which targets the payment mechanisms used by Internet gamblers, has surfaced in Congress.

C. Congress's Monetary Control Schemes and Internet Gambling

1. Efforts to Disrupt Payment Methods Used by Internet Gamblers

In the National Gambling Impact Study Commission's (NGISC) 1999 report on gambling in America, the NGISC recommended prohibition of Internet gambling to the President and Congress.³⁵ The NGISC recommended "the passage of legislation stating that any credit card debts incurred while gambling on the Internet are unrecoverable."³⁶ It also endorsed "the passage of legislation prohibiting wire transfers to known Internet gambling sites, or the banks who represent them."³⁷ The NGISC recom-

munication which entitles the recipient to receive money or credit as a result of bets or wagers.

Id.

³² *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480-81 (E.D. La. 2001).

³³ H.R. 3215.

³⁴ *E.g.*, Tony Batt, *Bill to Ban Web-Based Gambling Toughened*, LAS VEGAS REV.-J., Nov. 2, 2001, at 1D (Las Vegas gaming expert and Internet gambling specialist, Anthony Cabot, taking the position that Goodlatte's bill will not stop the expansion of Internet gambling); Peter Hardin, *U.S. Backs Goodlatte Bill Barring Internet Gambling*, RICHMOND TIMES-DISPATCH, Dec. 2, 2001, at A26 (Frank Catania, former Director of the New Jersey Division of Gaming Enforcement, criticizing the bill, and Representative Robert Scott questioning whether the bill will be effective).

³⁵ See NGISC FINAL REPORT, *supra* note 4, at 5-12.

The Commission recommends to the President, Congress, and the Department of Justice (DOJ) that the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United States and any foreign jurisdiction. Further, the Commission recommends that the President and Congress direct the DOJ to develop enforcement strategies that include, but are not limited to, Internet service providers, credit card providers, money transfer agencies, makers of wireless communications systems, and others who intentionally or unintentionally facilitate Internet gambling transactions. Because it crosses state lines, it is difficult for states to adequately monitor and regulate such gambling.

Id.

³⁶ *Id.*

³⁷ *Id.*

mended prohibition, in part due to its conclusion that Internet gambling sites provide criminals with “easy” money-laundering opportunities.³⁸

Not long after the NGISC made its recommendations, Congress began looking at this method of prohibiting Internet gambling. In May 2000, the House Committee on Banking and Financial Services introduced House Bill 4419,³⁹ which included language that would have made it illegal for an Internet gambling operation to accept a bank instrument in connection with Internet gambling.⁴⁰ The logic underlying this scheme was that if the flow of money to Internet gambling sites could be blocked, Internet gambling would be effectively prohibited. Representative John LaFalce (D-New York), who cosponsored the bill, stated that the bill offered the “only realistic approach for restricting the expansion of Internet gambling by restricting the electronic payments that make online betting and, thus, Internet gambling possible.”⁴¹

Although Congress did not enact House Bill 4419, its concept has survived. The idea of preventing Internet gambling by this monetary control approach resurfaced shortly after the World Trade Center and Pentagon terrorist attacks of September 11, 2001. House and Senate negotiators agreed to include money-laundering legislation in the Anti-Terrorism Package to be sent to President Bush.⁴² Included in this legislation was a provision prohibiting payments for wagers to Internet gambling sites. The prohibited payment methods would have included credit cards, checks, or funds transferred electronically.⁴³ The House Financial Services Committee pushed for the bill, which would have made it illegal for banks or credit card companies to intentionally process illegal Internet gambling transactions.⁴⁴ The inclusion of the Internet gambling provision was reportedly for the purpose of preventing money laundering linked to terrorism.⁴⁵ The bill represented a tactical shift by Internet gambling opponents; unlike the bills proposed by Senator Kyl and others to prohibit “Internet gambling,” the inclusion of anti-Internet gambling language in the Anti-Terrorism Package was to prevent “money laundering.”

The Justice Department, including the Federal Bureau of Investigation (FBI), supported the legislation.⁴⁶ Some legislators

³⁸ *Id.* at 5-6.

³⁹ H.R. 4419, 106th Cong. (2000).

⁴⁰ *Id.*

⁴¹ *Congressional Panel Seeks to Ban Credit, Debit Card Use for Online Gambling*, CARD NEWS, June 28, 2000, available at 2000 WL 4447497.

⁴² *Money Laundering Monitor*, Business Crimes Bulletin: Compliance and Litigation, vol. 8 No. 9, at 2 (Oct. 2001).

⁴³ *Congress Again Confronts*, *supra* note 12.

⁴⁴ *Money Laundering Monitor*, *supra* note 42.

⁴⁵ *Congress Again Confronts*, *supra* note 12.

⁴⁶ *Money Laundering Monitor*, *supra* note 42.

pushed for even stronger legislation;⁴⁷ they sought to prohibit all forms of Internet gambling, including Internet gambling not considered illegal in the jurisdiction in which it was located.⁴⁸ The proposed monetary control scheme and its justification also had critics. Not everyone in Congress liked the idea of prohibiting Internet gambling through the money-laundering legislation. For example, Representative Ron Paul (R-Texas) and other legislators criticized the legislation, arguing that the connection between Internet gambling and terrorism was too weak for such legislation to be a part of the broader money-laundering package.⁴⁹ Representatives of both the financial services industry and the gambling industry, who also opposed the legislation, joined these legislators.

Financial industries, which would have been impacted by the prohibition, opposed the bill, maintaining that it would be difficult to enforce.⁵⁰ Credit card giants like Visa International (Visa), MasterCard International Inc., Bank One Corp., and Bank of America supported this contention and lobbied against the legislation, claiming that it simply would not work.⁵¹ They pointed out that individuals purchasing "electronic cash" with their credit cards for use in online gambling could easily bypass the proposed prohibitions.⁵² Moreover, one Visa senior vice president predicted that such "alternative forms of payment will become the payment system of choice for Internet gambling."⁵³ Visa representatives also claimed the bill would place an undue burden on Visa and other credit card companies.⁵⁴ Representatives of the gambling industry reported to a congressional panel that a ban on Internet gambling would be unsuccessful for a number of reasons, claiming that the Internet is a borderless medium, and that alternative

47 *Id.* Representative John LaFalce, who has also introduced anti-Internet gambling legislation in the past, for example, 147 CONG. REC. H4377-06 (2001) (introducing House Bill 2579), available at 2001 WL 819229, was behind the push to add the "legal gambling" language to the bill. The LaFalce language would have made it illegal for states to legalize Internet gambling within their borders. *Money Laundering Monitor*, *supra* note 42.

48 *Money Laundering Monitor*, *supra* note 42.

49 Tony Batt, *House Panel Oks Internet Gambling Restrictions Move*, LAS VEGAS REV.-J., Oct. 12, 2001, at 7A, available at 2001 WL 9541371.

50 *Money Laundering Monitor*, *supra* note 42.

51 *Congress Again Confronts*, *supra* note 12; see also Kathleen Day, *Money-Laundering Bill Passes: House Strips Measure of Web Gambling Limit Opposed by Banks*, WASH. POST, Oct. 18, 2001, at E1, available at 2001 WL 29162604.

52 *Congress Again Confronts*, *supra* note 12; see also *Gambling on The Internet: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. of Financial Services*, 106th Cong. (2001) (written Statement of Mark MacCarthy, Senior Vice President, Public Policy Visa U.S.A.), available at 2001 WL 21757109 [hereinafter MacCarthy Statement].

53 MacCarthy Statement, *supra* note 52.

54 *Congress Again Confronts*, *supra* note 12; see also MacCarthy Statement, *supra* note 52.

payment systems were already available for those who wished to gamble online.⁵⁵

Apparently, the opposition to the inclusion of an Internet gambling prohibition in the money-laundering bill was effective because the provision was stripped from the bill eventually presented to the President.⁵⁶ Undaunted, many in Congress are still attempting to prohibit Internet gambling through similar legislation. As of the writing of this comment, a bill currently being considered by Congress aims to prevent the use of credit cards and other bank instruments for Internet gambling.⁵⁷

2. Unlawful Internet Gambling Funding Prohibition Act

United States Representative James Leach (R-Iowa) sponsored the UIGFPA.⁵⁸ The stated purpose of the legislation is “[t]o prevent the use of certain bank instruments for unlawful Internet gambling, and for other purposes.”⁵⁹ The UIGFPA would prohibit financial service organizations, such as credit card providers, from collecting the gambling debts of customers who use credit cards to gamble online.⁶⁰ The bill would also impose penalties on financial institutions that knowingly participate in Internet gambling transactions.⁶¹ The civil and criminal penalties include fines and up to five years in prison.⁶²

The UIGFPA, lists, *inter alia*, the following congressional finding: “Internet gambling conducted through offshore jurisdictions has been identified by United States law enforcement officials as a significant money laundering vulnerability.”⁶³ Additionally, Representative Leach, in his testimony before the House Judiciary Committee, Subcommittee on Crime, stated, “Internet gambling specifically is a particularly attractive method to launder money because of the heightened level of anonymity and a virtual lack of governmental regulation.”⁶⁴

The concern that Internet gambling could become a “haven” for money laundering is justified. In the words of one commenta-

⁵⁵ *Congress Again Confronts*, *supra* note 12.

⁵⁶ Day, *supra* note 51.

⁵⁷ H.R. 556, 107th Cong. (2001).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ H.R. 556 § 5. This section states, in pertinent part, that financial intuitions may not engage in “Paying, transferring, or collecting on any check, draft, or other instrument drawn on any depository institution with the actual knowledge that any person is violating section 3(a) of the Unlawful Internet Gambling Funding Prohibition Act in connection with such check, draft, or other instrument.” *Id.*

⁶¹ H.R. 556.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Illegal Gambling: Hearing on H.R. 556 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 107th Cong. (2001) (testimony of U.S. Rep. Leach), available at 2001 WL 1519433.

tor, "The greatest criminal threat posed by the blossoming virtual gaming industry is the unprecedented potential it presents for criminal elements seeking to launder their ill-gotten gains."⁶⁵ The NGISC concluded that Internet gambling might provide an "easy means" for criminals to launder their illicit funds.⁶⁶ Additionally, the FBI claims that offshore Internet gambling sites are a great resource for money launderers, and has reportedly investigated two websites that it claims were being used by organized crime to launder money.⁶⁷ Moreover, beyond Internet gambling there appears to be a general link between money laundering and computer technology. The Financial Crimes Enforcement Network (FinCEN),⁶⁸ a branch of the Treasury Department, has found evidence that computers and the Internet in general are being used to facilitate money laundering.⁶⁹

Regarding enforceability, many members of Congress generally view the approach of the UIGFPA to be the best method of preventing Americans from gambling at offshore websites.⁷⁰ At first glance, this method of enforcement seems logical. Credit cards provide consumers with a mechanism to fund their online gambling. Theoretically, if you cut off the funding source, Americans will not be able to gamble online. However, the monetary control scheme has much broader implications than its supporters realize. Indeed, the UIGFPA may unintentionally promote an anonymous form of e-money as a replacement of credit cards for Internet gambling. Ironically, this form of e-money could poten-

⁶⁵ Jon Mills, *Internet Casinos: A Sure Bet for Money Laundering*, 19 DICK. J. INT'L L. 77, 78 (2000).

⁶⁶ See NGISC FINAL REPORT, *supra* note 4, at 5-6. The NGISC report describes the possible method of laundering money via Internet gambling as follows: "To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small percentage of the original funds, then cash out the remaining funds." *Id.*

⁶⁷ *Money Laundering Monitor*, *supra* note 42.

⁶⁸ The Financial Crimes Enforcement Network is an arm of the Treasury Department. FinCEN, About FinCEN/FAQS, at http://www.ustreas.gov/fincen/af_faqs.html (last visited Mar. 29, 2002). FinCEN states its mission as follows:

[T]o support law enforcement investigative efforts and foster interagency and global cooperation against domestic and international financial crimes; and to provide U.S. policy makers with strategic analyses of domestic and worldwide trends and patterns. FinCEN works toward those ends through information collection analysis and sharing, as well as technological assistance and innovative, cost-effective implementation of the Bank Secrecy Act and other Treasury authorities.

FinCEN, Mission, at http://www.ustreas.gov/fincen/af_mission.html (last visited Mar. 29, 2002).

⁶⁹ See generally FINCEN, U.S. Treas. Dept., A SURVEY OF ELECTRONIC CASH, ELECTRONIC BANKING AND INTERNET GAMING, FINANCIAL CRIMES ENFORCEMENT NETWORK (2000), available at <http://www.ustreas.gov/fincen/e-cash.pdf> [hereinafter FINCEN, SURVEY OF ELECTRONIC CASH].

⁷⁰ *Internet Gambling Bills Should Be Enacted Separately, Leach Says*, WASH. INTERNET DAILY, Nov. 30, 2001, available at http://www.offshoretoday.com/NEWS/19892_8.html [hereinafter *Leach Says*].

tially lead to an actual increase in Internet gambling and money laundering.

D. Money Laundering

Money laundering is a process through which criminals legitimize proceeds derived from illegal activity.⁷¹ It is a serious form of criminal activity, not only in the United States, but worldwide.⁷² Between five hundred billion and two trillion dollars in illicit funds are estimated to be laundered every year.⁷³ Money laundering has been shown to facilitate all types of nefarious activity, including "terrorism, fraud, robbery, corruption, bribery, extortion, immigrant smuggling, kidnapping, and tax evasion."⁷⁴

The actual process of laundering money is a complicated method of disguising the origin of money so that it appears to have been derived from legal activity. This legitimization of money is generally carried out in a three-stage process: (1) the placement stage, (2) the layering stage, and (3) the integration stage.⁷⁵ "Placement" requires physically moving the illicit funds into financial institutions or the retail economy.⁷⁶ The second stage, "layering," generally involves multiple wire transfers of the funds, or other complex financial transactions.⁷⁷ The layering process disguises or eliminates any audit trail, thereby making it difficult for law enforcement to trace or pinpoint the origin of the funds.⁷⁸ The final stage, "integration," involves reintroducing the funds back into the economy to appear as though they were legitimate.⁷⁹ The integration of illicit funds into a legitimate economy is difficult for law enforcement to detect without an audit trail established during the placement or layering stage.⁸⁰

Law enforcement agencies in the United States rely on a comprehensive financial transaction reporting system imposed on U.S. banks and other financial institutions to detect and prevent money laundering.⁸¹ Under the Bank Secrecy Act, banks and other financial institutions are required to record and report fi-

⁷¹ Andres Rueda, *The Implications of Strong Encryption Technology On Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1, 7-8 (2001).

⁷² See Mills, *supra* note 65, at 77.

⁷³ Rueda, *supra* note 71, at 7.

⁷⁴ *Id.* at 8.

⁷⁵ FinCEN, U.S. Treas. Dept., *Suspicious Activity Reporting and Casinos*, at <http://www.treas.gov/fincen/sarcasin.html> (last visited Mar. 16, 2002).

⁷⁶ *Id.* "During placement, the money is most vulnerable to detection and seizure. To assist in the placement stage, the funds may be initially smuggled across a nation's borders and placed into financial institutions located in foreign countries." *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ ROGER C. MOLANDER ET AL., CYBERPAYMENTS AND MONEY LAUNDERING 6 (Rand 1998).

⁸¹ Rueda, *supra* note 71, at 8-9.

financial transactions to the federal government.⁸² The information supplied by these financial institutions creates a “paper trail,” which is then used by law enforcement to “trace laundered funds to the illegal activity from which they were originally derived.”⁸³

E. Electronic Money

1. E-Money

Since at least 1992, a process had been contemplated that would allow a person to “transfer money (or credentials) over an electronic network and obtain a service without the service provider ever knowing the actual identity of the individual but with the assurance that money would be received for the service or that the individual had the appropriate credentials to receive the service.”⁸⁴ With the advent of e-commerce, and a corresponding demand for an efficient form of online payment, this process has materialized in the form of electronic money.

Electronic money is a digital representation of money that can be placed on a computer hard drive, smart card, or other device with memory, including cellular phones and other electronic communication devices.⁸⁵ Electronic money payment schemes, which currently consist of smart cards and computer-based e-money, allow for the storage and redemption of financial value.⁸⁶ Simply put, electronic money is a money replacement based on encryption technologies,⁸⁷ which disguise the electronic information so that only the intended recipient can access its meaning.⁸⁸ In the context of e-money, the information that forms the basis of the money can be encrypted to a level that makes it completely anonymous and untraceable—even to its issuer.⁸⁹

The process of obtaining and using electronic money is straightforward. A consumer purchases e-money with a form of conventional money or credit. The e-money can then be stored on a smart card or memory-based electronic device until the con-

⁸² *Id.*

⁸³ *Id.* at 8.

⁸⁴ Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy: (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 51 (2001).

⁸⁵ FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 15.

⁸⁶ *Id.*; see also *Dreams of a Cashless Society: Virtual Money v the Real Thing: It Remains a Challenge to Connect the Futuristic Payment Methods to a 14th-Century Banking System*, ECONOMIST, May 5, 2001, available at 2001 WL 7318797 (Reportedly, mobile-phone users in countries like Germany, Austria, and Spain can already send money using their phones with a service called Paybox.).

⁸⁷ Rueda, *supra* note 71, at 36.

⁸⁸ *Id.* at 17-18.

⁸⁹ See Welling & Rickman, *supra* note 2, at 322. DigiCash, one of the first e-money providers, offered encryption technology so strong that it could not track how its customers used the e-money, making the currency completely anonymous. *Id.*

sumer is ready to spend it.⁹⁰ With computer-based e-money, a government or private business issues an electronic coin or note that “represents a claim against the issuer and can be redeemed in exchange for traditional money (e.g., dollars).”⁹¹ Once the coin or note has been issued, it can be used online over wires or wireless technology.⁹² Unlike credit cards, this coin or note can be used without the assistance of a bank or other traditional financial institution.⁹³

Another form of e-money is based on “smart-card” technology. A smart card resembles a credit card in physical form.⁹⁴ After a consumer purchases a smart card, he or she can then load it with electronic money at a “vending machine, bank, ATM, personal computer over the Internet, or through a specially equipped telephone.”⁹⁵ Once the e-money is loaded on the card, the money can then be spent over the Internet or through other communication devices.⁹⁶

Consumers can spend e-money online, much the same as they do cash at the local shopping mall. Individuals can also use e-money in anonymous peer-to-peer transactions. In this regard, e-money is essentially an electronic form of real-world cash. E-money has many advantages over real cash, though. For example, because e-money lacks the geographical constraints of traditional cash,⁹⁷ one can transmit electronic money to another country as easily as transmitting it across the street.⁹⁸ Electronic money is efficient and economical to store and transmit, which ultimately lowers the cost of exchange.⁹⁹ Additionally, it offers a number of advantages over credit cards, including lower transaction costs, immediate transaction processing, and a reduced potential for fraud.¹⁰⁰ Although one risks having his or her identity stolen with credit cards, identity theft is not an issue with electronic money. Because e-money can be encrypted and used anonymously over the Internet, it offers significantly better privacy than credit cards

90 FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 15.

91 David D. Friedman & Kerry L. Macintosh, *The Cash of the Twenty-First Century*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 273, 278 (2001).

92 FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 15.

93 *Id.*; Michael Anastasio, *The Enforceability of Internet Gambling Debts: Laws, Policies, and Causes of Action*, 6 VA. J.L. & TECH. 6, 19 (2001).

94 FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 15.

95 Wendy J. Weimer, Note and Comment, *Cyberlaundering: An International Cache for Microchip Money*, 13 DEPAUL BUS. L.J. 199, 223 (2000-2001).

96 FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 15.

97 See Friedman & Macintosh, *supra* note 91, at 279.

98 Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 RUTGERS COMPUTER & TECH. L.J. 1, 56 (1996).

99 See Friedman & Macintosh, *supra* note 91, at 280.

100 Rueda, *supra* note 71, at 29; Declan McCullagh, *Digging Those Digicash Blues*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,44507,00.html> (last visited Mar. 16, 2002).

and even traditional cash.¹⁰¹ In contrast, “credit cards and checks are not anonymous” because they leave an audit trail that can be followed and that can identify one or more of the parties to the transaction in question.¹⁰²

With all of the obvious benefits of electronic money, it is easy to see why commentators believe it has the potential to revolutionize the modern economy.¹⁰³ Some commentators predict “[t]he transition from a paper-based monetary system to an electronic payments system will reduce transaction costs, expand markets, and empower individuals.”¹⁰⁴ This is high praise. Indeed, electronic money has received such laudatory praise from pundits and commentators that it could lead one to believe it is exactly what the consumers of the world need.¹⁰⁵

Nevertheless, electronic money also has drawbacks, which have caused federal law enforcement agencies and the Treasury Department to voice serious concerns about this new form of currency. Most notably, the Treasury Department is concerned with the potential use of e-money in “money laundering, offshore banking, and tax havens.”¹⁰⁶ A Treasury Department report recently warned that “technologies such as the Internet and electronic cash could thwart the federal government’s efforts to conduct surveillance of bank and credit card transactions.”¹⁰⁷ Thus, the potential effect of the widespread use of e-money is that law enforcement may be unable to detect and prevent money laundering and other serious crimes.

¹⁰¹ Friedman & Macintosh, *supra* note 91, at 278.

¹⁰² *Id.* at 275.

¹⁰³ Welling & Rickman, *supra* note 2, at 299.

¹⁰⁴ JAMES A. DORN, *Introduction to THE FUTURE OF MONEY IN THE INFORMATION AGE 2* (James A. Dorn ed., 1997).

¹⁰⁵ See Alan S. Frankel, *Monopoly and Competition in the Supply and Exchange of Money*, 66 ANTITRUST L.J. 313 (1998).

The right to monopolize new, cost-saving forms of money and payment systems has for centuries been guarded jealously by those lucky, powerful, or resourceful enough to obtain it. From gold coins to debit cards, market power by banks and their clearinghouse organizations has combined with price coherence—the tendency in some markets for competing products to transact at a single common price—and Gresham’s Law to generate significant monopoly and profits. Suppliers of money and payment systems have taken advantage of transaction costs and vigorously used vertical pricing restrictions, reinforced by statutes, to export onto others the incidence of their market power, thereby facilitating and exacerbating the exploitation of that market power, increasing the harm to consumers, and stifling competition between rival payment systems.

Id. at 359.

¹⁰⁶ McCullagh, *supra* note 100.

¹⁰⁷ Declan McCullagh, *Feds: Digital Cash Can Thwart Us*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,38955,00.html> (last visited Mar. 24, 2002).

2. The Outlook for E-Money

The commercial potential of e-money technology has spurred many commercial entities to venture into the market. Scholars and commentators have suggested that electronic money could "revolutionize the consumer market and eventually make traditional cash obsolete."¹⁰⁸ However, to date the e-money market has not been successful in the United States.¹⁰⁹ In fact, "electronic money barely registers in terms of overall volume of [U.S.] payment transactions."¹¹⁰ Some analysts estimate that in 2002, only one percent of online transactions will be made using e-money.¹¹¹

Understandably, the lack of consumer demand has caused real problems for e-money providers. A recent *Wired News* article reported "[t]he electronic cash landscape is littered with the looted corpses of companies that tried and failed to compete with credit cards for online purchases."¹¹² The electronic currency market pioneer, DigiCash, was one of the first victims, having declared bankruptcy in 1998.¹¹³ It sold its domain name and patents to eCash Technologies, another electronic money company,¹¹⁴ which is having troubles of its own.¹¹⁵ In fact, all of the early leaders in the online money field are "either bankrupt or have gone through complete overhauls."¹¹⁶ This corporate bad news has not deterred financial institutions and software developers in the United States from embracing the promising technology and developing new forms of e-money.¹¹⁷

¹⁰⁸ Welling & Rickman, *supra* note 2, at 300.

¹⁰⁹ FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 12. Various forms of electronic e-money are already available in a number of countries and have reportedly enjoyed "relatively wide acceptance" in Europe and the Far East. *Id.* Electronic money is reportedly available in places like Great Britain, Denmark, Belgium, Brazil, Mexico, Argentina, Colombia, and other countries in Europe and South America. *Id.*; Welling & Rickman, *supra* note 2, at 308.

¹¹⁰ FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 22.

¹¹¹ *Show Me E-Money*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,13277,00.html> (last visited Mar. 27, 2002) (Forecast made by Jupiter Communications).

¹¹² McCullagh, *supra* note 100.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* In March 2001, eCash laid off twenty-five of its sixty-five employees. *Id.*

¹¹⁶ Noah Shachtman, *Does P2P Fit Consumers' Bill?*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,36709,00.html> (last visited Mar. 16, 2002).

¹¹⁷ A number of U.S. banks and financial institutions have already developed, or are currently developing a form of electronic currency. Mark G. Tratos, *Gaming on the Internet*, 3 STAN. J.L. BUS. & FIN. 101, 110 (1997). The Mark Twain Bank of St. Louis was the first bank in the United States to offer electronic cash accounts. *Id.* Both Visa and American Express are supporting the development of Internet currencies. Rueda, *supra* note 71, at 36. Even the software giant Microsoft is apparently making plans to enter the electronic cash market. Microsoft was awarded a patent in June 1998 on technology, which allows for anonymous electronic cash transactions. Chris Oakes, *MS Patents Anonymous Ecash*, WIRED NEWS, at <http://www.wired.com/news/technology/0,1282,13277,00.html> (last visited Mar. 29, 2002). The Microsoft technology reportedly could allow consumers to make untraceable transactions on the Internet. *Id.*

The market for e-money has struggled in large part because Internet consumers have become comfortable using credit cards to make online purchases.¹¹⁸ Because credit cards are not sufficient for all forms of e-commerce, however, some demand has been created for new forms of payment. An example of a new type of payment system benefiting from increased demand is the "PayPal" system. This online payment system, launched by a Silicon Valley duo in 1999, found an ideal application with the online market and auction service eBay.¹¹⁹ PayPal offers the innovative service of providing Internet users with a way to transfer money via e-mail.¹²⁰ The company struggled until early 2000, when customers of eBay, which reportedly has 42.4 million registered users, gained access to PayPal's service.¹²¹ Before the advent of PayPal, eBay customers generally had to pay for their online purchases by sending a check via traditional mail.¹²² This process reportedly added a week or more to individual transactions.¹²³ When eBay users realized that PayPal would allow them to pay or be paid instantly by e-mail, they began flocking to the service.¹²⁴ Although PayPal had only about ten thousand users in 1999, the number of registered users has grown to more than thirteen million in 2002, and continues to grow.¹²⁵

PayPal is not electronic money *per se*; however, its payment scheme approximates the use of e-money. It is therefore a good indicator of the potential of e-money. It is also a good example of how e-money can thrive when coupled with a well-matched application and consumer demand.

III. DISCUSSION

A. The Feasibility of the UIGFPA

At first glance, it appears that the UIGFPA could be successful at blocking access to Internet gambling through a credit card prohibition. As previously noted, most Internet gamblers fund

¹¹⁸ *DigiCash Outta Cash*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,16113,00.html> (last visited Mar. 16, 2002).

¹¹⁹ eBay claims to be the world's largest online marketplace. Its company overview states that it was founded in September 1995, and is "the leading online marketplace for the sale of goods and services by a diverse community of individuals and businesses." eBay, Company Overview, at [wysiwyg://2/http://www.ebay.com/community/aboutebay/overview/index.html](http://www.ebay.com/community/aboutebay/overview/index.html) (last visited Mar. 27, 2002). "Today, the eBay community includes 42.4 million registered users, and is the most popular shopping site on the Internet when measured by total user minutes according to Media Metrix." *Id.*

¹²⁰ Adam Cohen, *PayPal's Big Play; An Online Payment Firm Rises from the Dotcom Ashes*, TIME, Feb. 11, 2002, available at 2002 WL 8385732.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

their gambling activity with credit cards. The underlying premise of the UIGFPA is simple: if Internet gamblers cannot fund their online wagers with credit cards, then they cannot gamble. The burden of enforcing this monetary control scheme will fall on the shoulders of credit card providers.¹²⁶ Under the UIGFPA, any credit card provider that *knowingly* processes a gambling transaction could face both criminal and civil penalties.¹²⁷ Moreover, the UIGFPA would prohibit credit card providers from collecting the gambling debts of customers who use credit cards to gamble online.¹²⁸ The threat of these penalties has understandably caused concern among credit card providers. One commentator has noted that the UIGFPA “might motivate banks, wishing to avoid additional regulation and the threat of penalties, to try to pre-empt passage [of the UIGFPA] by stepping up their efforts to reject gambling transactions.”¹²⁹ In fact, there is some indication that the UIGFPA has motivated credit card companies to do this.

In 2002, credit card companies are reportedly rejecting online gambling transactions at an ever-increasing rate.¹³⁰ Two factors appear to explain this trend. The first factor is a rash of cases in the United States by Internet gamblers seeking to have their credit card debts, which they incurred while gambling online, declared unenforceable as against public policy.¹³¹ Thus far, these cases have been unsuccessful;¹³² however, they remain a cause of concern for credit-card providers. The second factor is the uncertainty caused by the UIGFPA. As a result of this uncertainty, many credit card companies are processing fewer Internet gambling transactions, and some credit card providers have completely banned the use of their credit cards for Internet gambling. The result has been a corresponding drop in Internet gambling.¹³³ The UIGFPA is already having an effect, without having been enacted. Thus, at first glance it appears that the UIGFPA could be successful.

¹²⁶ H.R. 556, 107th Cong. (2001).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Matt Richtel, *A Credit Crisis for Web Casinos: Card Companies Are Growing Wary of Online Betting*, N.Y. TIMES, Jan. 12, 2002, at C1.

¹³⁰ *Id.*

¹³¹ See, e.g., *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468 (E.D. La. 2001) (where plaintiffs, who lost money to Internet casinos while using credit cards to finance their wagers, sued credit card companies for injunctive relief, claiming the debts were unenforceable); *Jubelirer v. MasterCard Int'l. Inc.*, 68 F. Supp. 2d 1049 (W.D. Wis. 1999) (plaintiff, who lost twenty dollars plus a \$4.95 processing fee at an Internet casino, sued his credit-card company and bank under RICO).

¹³² *In re MasterCard*, 132 F. Supp. 2d at 468; *Jubelirer*, 68 F. Supp. 2d at 1049. But see CABOT, *supra* note 3, at 288-89 (discussing *Providian v. Haines*, a California case, which settled out of court).

¹³³ Richtel, *supra* note 129.

Nevertheless, two main factors will likely frustrate the success of the UIGFPA. First, Internet gambling is, by all accounts, too popular with Americans to be eliminated without great difficulties. Second, alternative payment schemes are available to fill the gap left by credit cards, some of which, such as e-money, are based on technology that make enforcement of a ban impracticable at this time.

The first factor that will frustrate the success of the UIGFPA is that Internet gambling has become a very popular activity with Americans. The number of gamblers located in the United States placing sports wagers or playing casino-style games at Internet websites is estimated at over one million per day.¹³⁴ Moreover, although limited statistics are available on the total number of unique visitors to gambling sites every month, one study placed that number at 13.6 million for December 2001.¹³⁵ The reality is that Internet gambling provides the gambler with "an outlet for sports gambling as well as casino-style gambling far beyond what a local bookie can offer and far less expensive than a vacation to Reno."¹³⁶ The consumers who enjoy this form of entertainment are unlikely to suddenly refrain *en masse* from Internet gambling solely because their chosen payment method will no longer work.

Americans have already shown that they will gamble, regardless of whether it is legal to do so. The U.S. federal and state governments have been incapable of preventing illegal gambling, even before recent campaigns to prohibit Internet gambling emerged. Studies have shown that for every one dollar wagered in United States with a legal sportsbook, another thirty-four dollars are wagered with illegal bookies.¹³⁷ The situation is no different with Internet gambling. As noted, the federal Wire Act makes sports wagering over the Internet illegal. Nevertheless, offshore bookies take more money in bets on the Super Bowl than all the sportsbooks in Las Vegas combined.¹³⁸ Thus, it is readily apparent that Americans are going to gamble, regardless whether it is legal to do so. If Americans are willing to gamble on sports, even when it is clearly illegal, it logically follows that they will also continue to participate in Internet gambling despite the UIGFPA, so long as they can find an alternative payment mechanism to credit cards.

¹³⁴ Batt, *Leach Takes Aim*, *supra* note 21.

¹³⁵ Leslie Walker, *Gambling Sites Betting Heavily on Advertising*, WASH. POST, Feb. 24, 2002, at H7, available at 2002 WL 13820521.

¹³⁶ John Edmond Hogan, Comment, *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONST. L.J. 815, 816 (1998).

¹³⁷ Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 602 (1997).

¹³⁸ Ryan D. Hammer, Note, *Does Internet Gambling Strengthen the U.S. Economy? Don't Bet On It*, 54 FED. COMM. L.J. 103, 107 (2001).

The second factor that will frustrate the success of the UIGFPA is the availability of alternative payment methods to credit cards. Currently, there are a number of alternative payment instruments that Internet gamblers can use.¹³⁹ However, many of these traditional methods of transferring funds would also be prohibited by the UIGFPA, including wire transfers, checks, drafts, money orders, and other similar payment instruments.¹⁴⁰ Therefore, a key assumption underlying the proposition that Internet gambling will continue despite the UIGFPA is that Americans will find an alternative method of transferring funds to Internet gambling sites, which the government cannot effectively prevent. These consumers have options. In fact, even Representative Goodlatte, one of the sponsors of current legislation to prohibit Internet gambling,¹⁴¹ has acknowledged that potential alternative payment instruments to credit cards exist.¹⁴² Nevertheless, Goodlatte argued that the inconvenience to gamblers of having to use alternative payment systems would solve “the largest portion of the problem.”¹⁴³ This view seems overly optimistic.

In fact, as a result of the recent initiative by credit card companies to limit gambling transactions, Internet casinos and Internet gamblers have already begun looking for alternative payment methods. Many Internet gamblers and casinos have already turned to “third-party credit card processors like SureFire or PayPal” to continue using credit cards to place online wagers.¹⁴⁴ These processors enable Internet gamblers to use their credit cards at Internet casinos even if the casinos do not have a relationship with the bank that issued the credit card.¹⁴⁵ This method of payment is already in jeopardy, however, because companies like MasterCard are implementing policies forbidding the use of their credit cards at third-party processors for Internet gambling.¹⁴⁶ Moreover, this method of payment would also be made illegal by the UIGFPA.¹⁴⁷ Regardless, these recent efforts to circumvent the credit card companies’ self-imposed bans illustrate that Americans will seek out ways to fund their online gambling despite a legislated credit card prohibition. Thus, the question to be answered concerns how gamblers will transfer their funds to

¹³⁹ Alternative payments systems could include: e-money, checks, wire transfers, money orders deposited with the Internet casinos, credit cards issued by banks outside the United States, etc.

¹⁴⁰ H.R. 556, 107th Cong. (2001).

¹⁴¹ H.R. 3215, 107th Cong. (2001).

¹⁴² *Leach Says*, *supra* note 70.

¹⁴³ *Id.*

¹⁴⁴ Richtel, *supra* note 129.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ H.R. 556, 107th Cong. (2001).

Internet casinos. The best prospect by far is anonymous electronic money.

Although Internet gamblers rarely use electronic money for payment at online casinos today,¹⁴⁸ this could quickly change if the UIGFPA is enacted. Internet gamblers will look for alternative payment methods, and they will likely have plenty of help in finding them. Unregulated offshore operators have no incentive to prevent Americans from accessing their websites. With billions of dollars at stake, one can well imagine that innovative offshore operators will provide their customers with a payment mechanism consistent with the developing need. Again, the most obvious choice is anonymous electronic money. An anonymous form of e-money would be of great long-term benefit to offshore Internet casino operators, chiefly because e-money would ensure access to the lucrative U.S. gaming market.

Arguably, the broad restrictions of payment mechanisms in the UIGFPA could be interpreted to cover e-money. Nevertheless, because there are anonymous forms of e-money issued abroad that can be purchased over the Internet, there is no practical way to enforce a ban against the use of e-money for Internet gambling. Accordingly, Americans wishing to gamble online can purchase e-money over the Internet with a credit card, and then use it to gamble at offshore sites, rendering any monetary control scheme like the UIGFPA obsolete. In addition to potentially rendering the UIGFPA obsolete, e-money could actually bring about an *increase* in Internet gambling.

B. The Unintended Consequences of the UIGFPA

1. The UIGFPA and E-Money Could Promote Internet Gambling

Passage of the UIGFPA will likely promote e-money as the payment method of choice for Internet gambling. If e-money does become the payment method of choice, there is the very real potential that Internet gambling will increase as a result. As previously noted, Internet gambling is currently funded by "front money" and credit card accounts. These payment mechanisms have been called an "impediment to the growth of the Internet gambling industry."¹⁴⁹ There are a number of reasons for this position, including the fact that these methods of placing bets "lack immediacy, security and anonymity."¹⁵⁰ E-money has the potential to remove these impediments.

¹⁴⁸ See Anastasio, *supra* note 93, at 19.

¹⁴⁹ CABOT, *supra* note 3, at 27.

¹⁵⁰ *Id.*

Gamblers generally “expect immediate payment of wagers” when they win.¹⁵¹ Under the current credit card model, though, gamblers do not have immediate access to their deposited funds and thus have no way of knowing if the Internet gambling site has credited their account until the gamblers actually request a withdrawal of their funds.¹⁵² With e-money, however, “immediacy” would no longer be an impediment to the growth of Internet gambling. A gambler would no longer have to wait for a check in the mail or a charge back to his or her credit card or debit card account.¹⁵³ Indeed, with e-money, gamblers’ winnings could be immediately transferred to their personal computers.¹⁵⁴ Thus, an Internet gambling operation could configure its site to either transfer winnings to a gambler after every win, or when the gambler chooses to cash out.¹⁵⁵

There are a number of other ways in which e-money would improve the Internet gambling experience and thereby make it more appealing to current and potential gamblers. The fear of fraud is another problem hindering the growth of offshore Internet gambling operations.¹⁵⁶ Documented cases exist of Internet gambling operators who did not pay or return deposits or winnings to gamblers.¹⁵⁷ Immediate payback could largely eliminate this problem, and thereby make Internet gambling more attractive to potential gamblers. The anonymity of e-money will also make Internet gambling attractive to potential gamblers.¹⁵⁸ Particularly troublesome to many Americans is the audit trail left by their transactions with Internet gambling sites. This trail leaves gamblers open to possible charges of both illegal gambling and tax evasion.¹⁵⁹ With anonymous e-money, the government would have little, if anything to trace. As a final reason for its appeal to Internet gamblers, e-money is less expensive than credit card transactions.¹⁶⁰

With immediate payoff, better security, anonymity, and lower transaction costs, the benefits of e-money to the Internet gambler cannot be overstated. The functionality of e-money, combined with these other benefits, would make Internet gambling much more attractive to people inclined to gamble. Moreover, even those individuals previously deterred by the problems associated

¹⁵¹ *Id.* at 26.

¹⁵² *Id.* at 27.

¹⁵³ *Id.* at 25-29.

¹⁵⁴ *Id.* at 29.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 32.

¹⁵⁷ *Id.* The two operators were shown to have been involved with bank fraud, and both were known to have associations with organized crime. *Id.*

¹⁵⁸ *Id.* at 29.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

with credit cards and other payment methods might be persuaded to try Internet gambling.

2. The UIGFPA Could Promote Money Laundering with E-money

Commentators have repeatedly predicted that technological development and the advent of online commerce would bring a wave of new private and public electronic currencies.¹⁶¹ These new currencies currently exist and are being further developed. However, as noted, they have thus far been largely unsuccessful. Consumer demand is the greatest factor in any commercial success, including payment systems. Congress's proposed monetary control scheme could create (and arguably already has created) consumer demand for an alternative to credit cards, such as e-money. Moreover, with millions of Americans gambling on the Internet every day, legislation such as the UIGFPA could very rapidly create the consumer demand necessary to facilitate widespread use of electronic money. As the PayPal/eBay example demonstrates,¹⁶² development in the various needs of online consumers will continue to strongly influence the design of future electronic money systems. As one commentator aptly stated: "A basic need of a society is money, the form of which adapts contextually. History, replete with examples, confirms that the evolution (or devolution) of monetary systems hinges upon the varying needs of society."¹⁶³ The millions of Americans participating in Internet gambling will need an easy to use and untraceable form of payment to circumvent the UIGFPA. E-money is exactly that.

Because the type of e-money that will eventually become standard in the marketplace could be heavily influenced by the UIGFPA or similar monetary control scheme, serious consideration should be given to the consequences that might flow from the type of e-money the UIGFPA would unintentionally promote. The following discussion focuses on the potential negative consequences of widespread use of e-money, including its use as a money-laundering tool and its effect on the government's power to regulate. This discussion is based on the premise that the UIGFPA would promote an anonymous e-money system for the Internet gambling market, which would act as a catalyst for the proliferation of this form of e-money for other uses.

¹⁶¹ Friedman & Macintosh, *supra* note 91, at 274; Rotenberg, *supra* note 84, at 51.

¹⁶² See discussion *supra* Part II.E.2.

¹⁶³ Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 59 (1996).

E-money holds the potential for large-scale criminal use.¹⁶⁴ The most obvious criminal use is money laundering. The potential use of electronic money as a facilitator for money laundering is enormous.¹⁶⁵ Indeed, electronic money is ideal for money-laundering purposes. Millions of dollars can be stored on a laptop computer or on a cellular phone with memory and can be transferred anywhere in the world with the simple push of a button.¹⁶⁶ The transfer of funds takes only seconds¹⁶⁷ and can be accomplished with available anonymous re-mailers concealing the point of origin.¹⁶⁸ Consequently, money launderers and other criminals could pass millions of dollars worth of electronic money back and forth around the world by computer Internet access or by cell-phone calls. Encryption-based e-money would achieve this result, while avoiding U.S. banks and the financial transaction reporting system.¹⁶⁹

Electronic money has applications in all three stages of money laundering, but the stages where it is most applicable are placement and integration.¹⁷⁰ In the placement stage, money launderers could readily avoid the financial reporting systems because the e-money could be laundered independently of the financial institutions historically needed to achieve placement.¹⁷¹ Electronic money could also be used to facilitate the integration stage of money laundering. Exporting large amounts of currency in electronic form to countries that have little or no money-laundering controls and reintegrating it into the global economy could accomplish this integration.¹⁷²

The most significant threat posed by anonymous e-money is its potential to bypass traditional money-laundering controls. As noted, anonymous forms of electronic money do not leave a paper trail.¹⁷³ These anonymous forms of e-money, which can be exchanged multiple times in unrecorded peer-to-peer transactions, are understandably the most troublesome for law enforcement.¹⁷⁴ First, these forms of e-money can “facilitat[e] the money launderer’s task by approximating the functionality of cash.”¹⁷⁵ Second, electronic money “moves along multiple channels largely

¹⁶⁴ *The Future of Money*, BUS. WK., June 12, 1995, available at <http://www.businessweek.com/1995/24/b3428001.htm>.

¹⁶⁵ *Id.*

¹⁶⁶ Welling & Rickman, *supra* note 2, at 311.

¹⁶⁷ *Id.*

¹⁶⁸ MOLANDER ET AL., *supra* note 80, at 19.

¹⁶⁹ Rueda, *supra* note 71, at 86.

¹⁷⁰ See discussion *supra* Part II.D.

¹⁷¹ Rueda, *supra* note 71, at 88.

¹⁷² *Id.* at 91.

¹⁷³ Welling & Rickman, *supra* note 2, at 311.

¹⁷⁴ CABOT, *supra* note 3, at 29.

¹⁷⁵ *Id.*; Rueda, *supra* note 71, at 44.

outside the established network of banks, checks, and paper currency overseen by the Federal Reserve."¹⁷⁶ This "disintermediation"¹⁷⁷ removes third-party banks and other financial institutions, which are subject to governmental oversight.¹⁷⁸ The removal of these "choke points," which are used to regulate the flow of currency, helps money launderers avoid traditional money tracking methods.¹⁷⁹ In sum, e-money is a money launderer's dream.

Not surprisingly, FinCEN views the development of technology like electronic money as the single-largest potential money-laundering threat.¹⁸⁰ FinCEN currently estimates that less than one percent of computerized money laundering is detected and prosecuted.¹⁸¹ FinCEN's view of electronic money is shared by a number of legal commentators as well, some of whom have suggested that the government consider placing broad-based restrictions on electronic money.¹⁸² In fact, the criminal potential for electronic money is so great that a number of legal scholars believe that some governments will likely oppose the advent of private currencies altogether.¹⁸³ This solution may not be practical for the United States, however, because such domestic restrictions or regulations could be "undermined by the widespread availability in the United States of electronic currency issued abroad."¹⁸⁴

Electronic money may "take off" regardless of what steps Congress takes toward Internet gambling. Congress should be very careful, however, not to encourage an anonymous form of e-money before it is prepared to deal with the consequences. One scholar noted that "[i]n many ways the foundation of the federal government's power rests on its prerogative to create and manipulate

¹⁷⁶ *The Future of Money*, *supra* note 164.

¹⁷⁷ Disintermediation removes the "choke points" through which illicit money generally passes, effectively limiting governmental access to the information it needs to trace the funds as they pass through financial institutions. *MOLANDER ET AL.*, *supra* note 80, at 16.

¹⁷⁸ *Id.*

¹⁷⁹ See Rueda, *supra* note 71, at 4; see also *MOLANDER ET AL.*, *supra* note 80, at 16.

¹⁸⁰ Welling & Rickman, *supra* note 2, at 310. In fact, FinCEN is so concerned with the money laundering potential of electronic cash that it commissioned a think tank to produce a study on the subject. See *MOLANDER ET AL.*, *supra* note 80, at ix.

¹⁸¹ Welling & Rickman, *supra* note 2, at 316.

¹⁸² *Id.* at 327. Welling and Rickman suggest that the government keep a number of considerations "in mind." Some suggestions they make include:

[L]imiting the value of electronic cash that can be put on smart cards and Internet-based accounts and limiting the number of peer-to-peer transactions. More importantly, the government should work to be sure (1) that electronic cash systems are engineered to produce an audit trail; (2) that the trail can be decrypted on a showing of probable cause by use of the Clipper Chip; and (3) that the trail can be followed by continuing efforts toward international cooperation.

Id.

¹⁸³ Friedman & Macintosh, *supra* note 91, at 273.

¹⁸⁴ Rueda, *supra* note 71, at 92. One way to combat this would be through international regulation involving multilateral efforts enforced by sanctions. *Id.*

money—the medium of exchange.”¹⁸⁵ The government may not have the power to manipulate e-money. Interestingly, the “very feature that makes such monies threatening—encryption—may make it impossible for governments to enforce [a] ban.”¹⁸⁶ One electronic money expert points out “[y]ou don’t need a nation-state to do finance. All you need is financial cryptography.”¹⁸⁷ Accordingly, anonymous electronic money has the potential to strip the federal government of much of its power.

Clearly, money laundering would be greatly facilitated by the proliferation of an anonymous form of e-money. Moreover, the government’s power to regulate or tax could be seriously impeded by anonymous electronic money.¹⁸⁸ Even the Treasury Department has recognized these potential problems and is looking at ways to combat them.¹⁸⁹ With this in mind, Congress should take a second look at the UIGFPA before deciding to enact it. At the very least, if Congress is compelled to regulate Internet gambling, it should search out other methodologies and not encourage a form of electronic money it cannot effectively monitor, let alone control. Some form of e-money will eventually become commonplace and will benefit society in many ways. However, it is not clear whether it will be an anonymous and untraceable form that will eventually dominate the market. Congress should play a role (knowingly) in determining which type of electronic money takes hold in the marketplace. For the reasons set forth in this comment, it should be apparent that electronic money, as anonymous and untraceable as real cash, would be a regulator’s nightmare. Nevertheless, this is exactly the type of e-money the UIGFPA will promote. Therefore, Congress and the President should examine the issue very carefully before enacting the UIGFPA.

C. A Workable Solution

Both encryption and electronic money will eventually make it impossible for the government to prevent Americans from gambling via the Internet.¹⁹⁰ The reality is that U.S. legislators opposed to Internet gambling are seeking to exercise control over a borderless medium that is not within the control of the federal government. Such reality begs the question of what could and

¹⁸⁵ Solomon, *supra* note 163.

¹⁸⁶ Friedman & Macintosh, *supra* note 91, at 282.

¹⁸⁷ McCullagh, *supra* note 100 (quoting Robert Hettinga, founder of the Digital Commerce Society of Boston and co-founder of the Financial Cryptography Conference).

¹⁸⁸ *The Future of Money*, *supra* note 164.

¹⁸⁹ McCullagh, *supra* note 100.

¹⁹⁰ The technology of encryption is beyond the scope of this comment. However, for a good discussion of this topic see Christopher D. Hoffman, Note, *Encrypted Digital Cash Transfers: Why Traditional Money Laundering Controls May Fail Without Uniform Cryptography Regulations*, 21 FORDHAM INT’L L.J. 799 (1998).

should be done regarding Internet gambling and money laundering. Two options are available: Congress can either continue to try to pass a domestic prohibition on Internet gambling, or it can legalize and regulate it.

A domestic prohibition will not likely have an effect on Internet gambling as a money-laundering platform. One scholar has noted that "international cooperation is a prerequisite to any prevention of money laundering through Internet casinos."¹⁹¹ Furthermore, because many jurisdictions have legalized Internet gambling,¹⁹² international cooperation on this issue will be a difficult task.¹⁹³ Without international cooperation, Internet casinos will remain a money-laundering threat because, "[i]n order to detect, and then prosecute, money laundering through on-line casinos, law enforcement must be able to either monitor the businesses for suspicious transactions, or periodically review their financial records for such transactions."¹⁹⁴ Monitoring Internet casinos would be impossible if gamblers are using anonymous e-money, even if U.S. law enforcement had access to the financial records of these offshore sites.

If the true purpose behind the anti-Internet gambling legislation were to hinder money launderers, then the legalization and regulation of Internet gambling in the United States would be a better solution than prohibition.¹⁹⁵ A well-designed and well-regulated Internet casino located in the United States would not be a good vehicle for money launderers because all gambling transactions could be recorded and readily traceable. Credit cards, checks, or money transfers could be used at the sites removing consumer need for electronic money, and creating an audit trail for law enforcement to monitor suspected criminals. In addition, even if e-money were used at domestic Internet casinos, other verification processes could be developed to identify the gambler.

Indeed, the best way to monitor suspicious currency transactions is to "monitor" them. If Internet casinos were located in the United States, the federal and state governments would have the

¹⁹¹ Mills, *supra* note 65, at 86.

¹⁹² By 2000, fifty-five countries had legalized some form of Internet gambling. CABOT, *supra* note 3, at 54.

¹⁹³ See Mills, *supra* note 65, at 96-115.

¹⁹⁴ *Id.* at 114.

¹⁹⁵ This proposition assumes that Americans would choose to place their wagers and gamble at a brand name, licensed, and regulated domestic casino. This is a fairly safe assumption given recent survey results showing approximately sixty percent of Americans believe that offshore Internet casinos are fixed. Lori Enos, *Most Net Gamblers Say Fix Is In*, E-COMMERCE TIMES, Sept. 6, 2000, at www.osopinion.com/perl/4204 (last visited Mar. 26, 2002). This proposition was also put forth by former director of the New Jersey Division of Gaming Enforcement and Internet gaming expert, Frank Catania. *Illegal Gambling: Hearing on H.R. 556 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 107th Cong. (2001) (testimony of Frank Catania, Director of the New Jersey Division of Gaming Enforcement).

ability to do so. The technology of computers, combined with competent regulation, would likely enable an even greater level of control than that found in the traditional "brick and mortar" casinos. If legitimate gambling enterprises in the United States were given the legal right to open web-based casinos, then techniques and safeguards could be designed to minimize the problems associated with money laundering.

Admittedly, effective regulations and a regulatory process would need to be developed to address legalized Internet gambling.¹⁹⁶ The complexities of this medium make regulation a daunting task. Nonetheless, a comprehensive legal framework regulating domestic Internet gambling could develop standards and license qualified entities to provide reliable and honest entertainment for Americans.¹⁹⁷ More importantly, regulation could reduce criminal activities and other social costs associated with Internet gambling.¹⁹⁸

If Internet gambling operations are not allowed to exist legally in the United States, American gamblers will continue to access the offshore market. This market is largely unregulated or loosely regulated by foreign governments, representing a significant and growing problem in online gambling.¹⁹⁹ Because offshore Internet gambling operations are not going to vanish, and the United States government cannot effectively prevent Americans from accessing these offshore sites, these operations will remain a platform for money laundering.

Legalization of Internet gambling is the key to hindering money laundering. In fact, FinCEN concluded in a recent survey that most countries subscribe to the position that Internet gambling legalization with oversight and regulation is a "workable solution" from economic and law enforcement standpoints.²⁰⁰ The United States should consider this solution.

IV. CONCLUSION

Congress's monetary control scheme, as a method of dealing with Internet gambling, will only produce an undesirable outcome. Unfortunately, as with so much legislation, outcome is less important than appearance with the UIGFPA. If the legislative

¹⁹⁶ In fact, examples are already in place. See Frank Catania, *Internet Gaming Regulation: The Kahnawake Experience*, 5 Chap. L. Rev. 209 app. (2002).

¹⁹⁷ Some of the factors a regulatory scheme might include are: background checks of operators, prize payment bonding, cash reporting practices, random testing of games and software to ensure fairness and compliance, licensing requirements, procedures to protect against money laundering, prevention of underage gambling, methods to identify and help problem gamblers, and tax revenue reporting practices.

¹⁹⁸ Loscalzo & Shapiro, *supra* note 22, at 27.

¹⁹⁹ See Kelly, *supra* note 21, at 117.

²⁰⁰ FINCEN, SURVEY OF ELECTRONIC CASH, *supra* note 69, at 51.

motive behind the UIGFPA is really to thwart money laundering, then legalization and regulation would be a far better method. This proposition is, of course, only true if the regulation is sensible. Legalization and regulation may not be a magic potion that will cure all of the ills associated with Internet gambling. Nevertheless, it is clear that legalized and regulated Internet gambling in America would be far superior to the monetary control scheme being considered by Congress. Ultimately, the United States will be forced to develop an appropriate policy toward Internet gambling. In doing so, the government will achieve, through legalization and regulation, what it could not through prohibition. Because the realities surrounding Internet gambling are so strongly in favor of legalization, it becomes clear that the appropriate question is not whether it should be legalized and regulated, but why it should not.