

**NON-EXTRAORDINARY CIRCUMSTANCES:
THE UIGEA RULE'S DELAYS ARE ROUTINE**

I. UIGEA Timeframe

- ▶ The Unlawful Internet Gambling Enforcement Act (UIGEA) states that “Before the end of the 270-day period beginning on the date of the enactment of this subchapter, the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations....”
- ▶ The UIGEA was signed into law on October 13, 2006. Therefore, the specified time for issuance of the final rule by July 10, 2007. The Notice of Proposed Rulemaking (NPRM) was not published until October 4, 2007, almost three months after the Congressional time-frame for a final rule.
- ▶ Thus, the final rule is now almost 490 days past the timeframe. During the delay the only relevant Congressional action related to the UIGEA rulemaking has been passage by the House Financial Services Committee of H.R. 6870, the Payment System Protection Act, which would prohibit current implementation of the UIGEA and require a new rulemaking using revised regulatory criteria.

II. Procedural Deficiencies

A. Regulatory Flexibility Act

- The US Small Business Administration’s Office of Advocacy formally determined and informed the agencies that they “...have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA).”
- Moreover, SBA requested that the agencies “...prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities; identify duplicative, overlapping or conflicting regulations; and consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule.”
- The agencies have yet to comply with SBA’s request and the requirements of the Regulatory Flexibility Act.

B. Paperwork Reduction Act

- The agencies have not yet complied with the requirements of the PRA. Specific deficiencies include:
 1. The agencies have not provided the required “specific, objectively supported estimate of burden” for the 19 discrete mandates that would be imposed by the rule.

2. Is not “written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond.” Instead, as numerous domestic and international commentators have pointed out, the information collection is written in vague, opaque and ambiguous language.

C. Executive Order 12866

- The agencies have not conducted the analyses required for an economically significant regulatory action which is defined by the Order as including rules which would “adversely affect in a material way the economy, a sector of the economy,” The rule would most certainly materially adversely affect the financial industry – a crucial and fragile sector of the economy – since the 19 mandates would, according to the Treasury Department, affect:
 - Over 240,000 small money transmitting business, this is 95% of all businesses in the industry;
 - More than 7,600 small credit unions, this is 90% of all credit unions; and
 - Almost 4,800 small banks, this is almost 60% of all banks.

D. G-20 Discussions

- Discussions among the G-20 nations on stabilizing the international financial system are to begin in Washington on November 15th. Since the UIGEA rule would materially and unilaterally affect cross-border capital flows, finalization of the regulation prior completion of the discussions would:
 - Undermine the G-20 discussions before they begin;
 - Be taken without regard to consistency with any agreements reached in the discussions.

E. Bolten “Midnight Regulation” Memorandum

- Josh Bolten’s memo of May 9, 2008 requires that final regulations be issued no later than November 1, 2008 except in “extraordinary circumstances.” As discussed below, there is nothing exceptional about the circumstances of the UIGEA delay.

III. Non-Extraordinary Circumstances: Delays Beyond Deadlines Are Routine

There are no “extraordinary circumstances” which justify promulgation of the UIGEA rule in violation of the Bolten memo and the statutory requirements of the Paperwork Reduction Act and Regulatory Flexibility Act. To the contrary, there are two extraordinary circumstances which both support delaying the rule until the next Administration:

1. Financial Crisis. The financial crisis, the fragility of the international payments system and the pending G-20 discussions all heavily weigh against issuing a rule would impose unilateral cross-border restrictions on capital flows. Stakeholder, including the British Bankers Association, have warned of the disruptive consequences of the rule and called for international discussions on the law's implementation.
2. Payment System Protection Act. The House Financial Services Committee has recognized the threat the UIGEA rule poses to the financial industry and passed a bill that would delay the UIGEA implementation and revise the criteria for developing the regulation to ensure that it "does not cause harm to the payments system." Finalizing the rule now pending further Congressional action on the Payment System Protection Act would simply induce additional and needless uncertainty and instability into the financial system while imposing immediate costs on financial institutions.

It is important to recognize that there is nothing "extraordinary" about agencies not meeting statutory or even court-ordered deadlines for rules. To the contrary, agencies routinely exceed specified regulatory time-frames. For example:

- ▶ The Treasury Department's rule on "Terrorism Risk Insurance Program; Cap on Annual Liability and Pro Rata Share of Insured Losses (RIN: 1505-AB92) was, by statute, supposed to be final by August 26, of this year. Instead, the proposed rule was not published until September 30, 2008. Treasury's most recent Unified Agenda (Spring 2008) does not provide even a projected date for final action.
- ▶ The Treasury Department's rule implementing certain provision of the Dog and Cat Protection Act of 2000 (RIN: 1505-AB31) was required by P.L. 106-476 to be final by September 9, 2001. The rule, which was proposed in August 2001, has not yet been finalized. There has been regulatory action on this rule for more than seven years despite the statutory deadline to prevent the importation of items containing dog or cat hair.
- ▶ The Treasury Department's Harbor Maintenance Fee rulemaking (RIN: 1505-AB11) had a statutory deadline of April 1987 for issuing a final rule. While the agency issued and accepted comment on an interim final rule in March 1987, the agency has yet to finalize the rule. Despite the statutory deadline, the rulemaking has remained an open item on Treasury's regulatory calendar for more than twenty years.

IV. Recommendation

- ▶ The UIGEA rule should be deferred until the next Administration.