



Internet Gaming in Nevada, New Jersey & Delaware

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Introduction

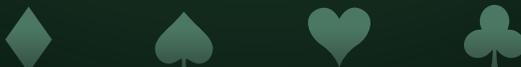
On February 26, 2013, New Jersey became the third state to authorize Internet casino gaming when Governor Chris Christie signed a bill amending the New Jersey Casino Control Act (the “N.J. Act”).¹ Before Internet gaming can “go live” in New Jersey, however, the New Jersey Division of Gaming Enforcement (the “DGE”) must adopt implementing regulations, issue Internet gaming permits to casino licensees that choose to offer games over the Internet, processes a multitude of applications from vendors wishing to provide goods and services related to Internet gaming, and test and approve all the software and other computer equipment that will be utilized in Internet gaming. The DGE published its proposed regulations on June 3, 2013.² It also established deadlines³ for filing applications and submission of other materials requiring approvals, the understanding being that only those companies that met the deadlines (and are granted the required licenses, permits and other approvals) may begin Internet gaming operations on the go-live date, November 26, 2013. It is an ambitious timetable, but speed is called for if New Jersey wants to keep pace with Nevada and Delaware. Nevada has already licensed dozens of interactive gaming operators, manufacturers of interactive gaming systems, and associated interactive gaming equipment, service providers, interactive gaming distributors and independent test laboratories, with more applications pending. The first interactive poker

website launched in Nevada on April 30, 2013. Delaware has selected a provider for its Internet gaming site, and expects to launch by September 30, 2013.⁴

Interactive Gaming in Nevada

Internet gaming (or “interactive gaming”) was initially introduced in Nevada in 2001. Nevada Assembly Bill 466 allowed the Commission to adopt interactive gaming regulations upon the advice and assistance of the Nevada Gaming Control Board (the “Board”) after a determination by the Nevada Gaming Commission (the “Commission”) as to whether, among other things, interactive gaming was legal. In March 2011, the Nevada legislature introduced AB 258, which instructed the Commission to adopt regulations and “grant licenses to operators of Internet poker and to manufacturers of interactive gaming systems, manufacturers of equipment associated with interactive gaming and interactive gaming service providers who provide services, software or equipment to operators of Internet poker.”⁵

As adopted, AB 258 provided that: “[A]ny license to operate interactive gaming does not become effective until: (1) A federal law authorizing interactive gaming is enacted; and (2) The United States Department of Justice notifies the Board or Commission in writing that it is permissible under federal law to operate interactive gaming.”⁶ During



its most recent session, the Nevada legislature removed this language from Nevada law. The condition that a license to operate interactive gaming is not effective until the passage of federal legislation or notice providing interactive gaming is permissible under federal law has been eliminated.⁷

On December 22, 2011, the Commission adopted regulations for the establishment of a regulatory framework for the state regulation of Internet poker pursuant to AB 258. Nevada was the first state to adopt regulations and develop a licensing procedure for interactive wagering, which is currently limited to poker. Board Regulation 5A governs the operation of interactive gaming. Nevada Internet gaming operator licenses may only be issued to licensed brick-and-mortar casinos. Servers must be located in Nevada unless the Board Chairman permits otherwise.

As of the writing of this article, Nevada remains the only state in the U.S. to authorize and license wagers over the Internet. The first Internet poker wager was accepted in Nevada on April 30, 2013, by Ultimate Poker, the first legal pay-to-play Internet gaming website in the U.S. Station Casinos, Inc. is the majority owner of Ultimate Poker.



Internet Gaming in Delaware

On June 28, 2012, Delaware Governor Jack Markell signed the Delaware Gaming Competitiveness Act of 2012 (the “Delaware Act”), the day after the bill passed the state Senate.⁸ Unlike Nevada, Delaware authorized a wide variety of casino games. Online slot machine play and casino games, such as blackjack and poker will be accessible through each Delaware casino’s website and controlled centrally by the Delaware Lottery. State lottery tickets will also be offered for sale on the Delaware Lottery website. The Delaware Act provides for a portion of the expected profits from Internet gaming to be used to offset the license fees currently paid by Delaware’s three brick-and-mortar casinos.

Delaware has established a timetable to license Internet gaming providers that is arguably even more aggressive than New Jersey’s. On January 31, 2013, the Delaware State Lottery issued a request for proposals (“RFP”) seeking bids from vendors to operate the state’s Internet gaming system. The RFP contained a statement that the Delaware system be operable no later than September 30, 2013.⁹ The Lottery

described the services to be provided for the implementation of its Internet gaming system and services solution as “a turnkey offering inclusive of a back-end technology platform, operations management and support services as well as an array of game content from multiple Vendors to offer casino table games, video lottery games, poker, bingo and keno. The solution may at some point in the future integrate with the Delaware State Lottery’s future Internet lottery system and Internet sports wagering system, which does not currently exist and is not included in this request for proposal.”¹⁰ After reviewing RFP responses from fourteen groups interested in serving as the primary vendor of Internet gaming systems and services to the Delaware State Lottery, Delaware selected a joint offer from Scientific Games Corporation, Williams Interactive LLC and 888 Holdings. Scientific Games Corporation is currently the Delaware State Lottery’s video lottery operator.

The Delaware Act authorizes the State Lottery Director to promulgate rules and regulations governing the establishment and operation of the Delaware “Internet lottery” which is defined under the Delaware Act as “all lottery games in which the player’s interaction with the game operated by the Office occurs over the Internet. . . including Internet ticket games, the Internet video lottery and Internet table games.” The Director is also authorized to promulgate regulations for a Delaware “sports lottery” which is “a lottery in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university and amateur or professional sporting events that involve a Delaware team.”¹¹ As of the writing of this article, these regulations have not been published or made available for public review or comment.

Internet Gaming in New Jersey

Casino regulatory responsibilities in New Jersey are divided between two state agencies, the Casino Control Commission (the “CCC”) and the DGE. The CCC’s role with respect to Internet gaming is essentially limited to granting or denying casino license applications filed by an “Internet gaming affiliate,” a new type of entity that, if licensed, may own and operate an Internet gaming system on behalf of the licensees with which it is affiliated.¹² The DGE is responsible for virtually everything else: investigating all license applicants; granting, denying or revoking all vendor license applications and registrations, issuing Internet gaming permits to casino licensees, promulgating and enforcing regulations, and testing and approving or disapproving all software, hardware and other equipment used in Internet gaming.¹³

Entities supplying goods or services directly related to Internet gaming will be required to obtain either a casino service industry enterprise (“CSIE”) license or an ancillary casino service industry enterprise (“ACSIE”) license. In very circumscribed instances, some companies may require only “vendor registration,” which involves a comparatively simple administrative process.¹⁴ CSIE licenses are required of suppliers of software or systems that directly relate to Internet gaming activity, companies that manage, control or administer Internet games and associated

Internet wagers, and providers of customer lists and any other business that the DGE deems appropriate for this highest level of service industry licensure. Payment processors and entities that provide customer identity, age verification and geo-location services are among the types of business entities that will require an ACSIE license.¹⁵ All CSIEs and ACSIEs are responsible for the full cost of their licenses, including investigative costs.¹⁶ All the information provided in the initial license applications must be updated at five-year intervals.¹⁷

There are two significant differences between the two license categories. Firstly, depending on how the applicant company is organized, ASCIEs may involve fewer entities and individuals that are subject to the extensive qualification process. Essentially, only the license applicant company and its direct holding company, and the officers, directors and owners of 5% or more of such companies, must apply. For CSIEs, the applicant and each of its direct and indirect holding and intermediary companies to the top of the ownership chain, as well as the officers, directors and owners of each such company must file the requisite disclosure forms. Secondly, ASCIEs can begin conducting business with casinos immediately upon filing a completed application, whereas CSIEs must either be fully licensed (a process which can take many months or even years) or go through a temporary approval process known as a "Transactional Waiver." While these waivers are generally granted, they involve costs and administrative processes not required of ASCIEs.

Vendor registration is a category reserved for companies whose business is only tangentially related to Internet gaming, such as those providing telecommunication services not specifically designed for Internet gaming and patron interaction. Vendor registration is a one-time process that requires only minimal filings and fees, and no prior investigation or approval.¹⁸

Highlights of the New Jersey Internet Gaming Law and Regulations

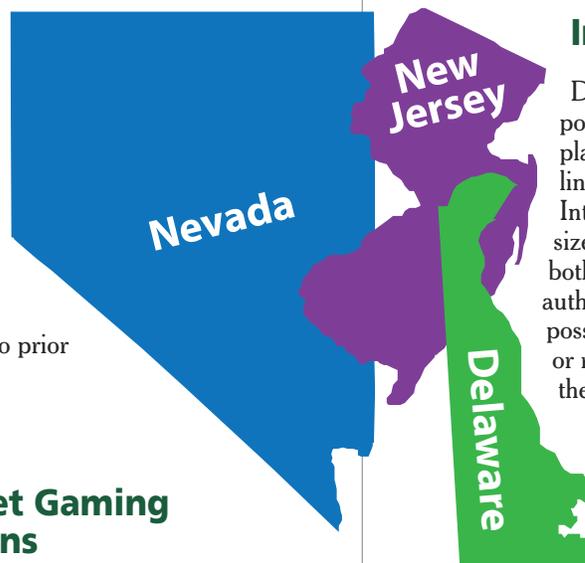
By any measure, New Jersey's casino regulatory process is extensive and its oversight of Internet gaming will be no exception. The statute allows more varied gaming than either Nevada or Delaware, although the DGE is likely to approve only a limited number of games at the outset.

While different words are used, New Jersey's definition of Internet gaming is not substantively different from Nevada or Delaware law: "The placing of wagers with a casino licensee at a casino located in Atlantic City using a computer network of both federal and non-federal interoperable packet switched data networks through which the casino licensee may offer authorized games to individuals who have established a

wagering account with the casino licensee and who are physically present in this State."¹⁹ Interestingly, the definition of Internet gaming in the proposed regulations does not include the clause that restricts participation to those players "physically present in this State."²⁰ This undoubtedly intentional omission is to accommodate the notion of "reciprocal agreements" (known elsewhere as "interstate compacts") whereby players located in other jurisdictions where Internet gaming is not unlawful may join with New Jersey players on websites hosted by New Jersey licensees. However, at this stage of the development of Internet gaming in the U.S., no such agreements or compacts exist.

A casino licensee that intends to host an Internet gaming site must first obtain a permit to do so. The DGE will issue such a permit "upon a finding that the Internet gaming complies in all respects with the requirements" of the Act and the regulations.²¹ The permit is valid for one year and costs \$650,000 for the first year and \$500,000 each year thereafter. Gross gaming revenues from Internet gaming are subject to a tax of 15%, not the 8% tax that applies to gaming revenues taken in at the casino.²²

Among the provisions included in the Internet gaming bill that satisfied Governor Christie's conditional veto was a sunset provision that requires the New Jersey Legislature to revisit the wisdom and effectiveness of Internet gaming in ten years.²³ Re-authorization will depend on the success of Internet gaming from both revenue and regulatory perspectives.



Interstate Compacting

Despite more than a million hands of virtual poker in the first two weeks of legal pay-to-play Internet gaming in the U.S., there are lingering questions regarding a Nevada-based Internet website because of the relatively small size of the potential player pool. Now that both Delaware and New Jersey have also authorized Internet wagering, it would be possible for participants in one state to place or receive wagers from another state over the Internet.

For the time being, just as in Nevada and Delaware, all players on New Jersey websites must be located within the geographical boundaries of the state. The equipment used to conduct Internet gaming must be capable of verifying, through GPS software or otherwise, that every player on the website is physically present in New Jersey each time he or she logs onto a new player session.²⁴ The regulations further require that the Internet gaming systems be able to discern the player's location every hour after initial log on.²⁵ The fact that participation in Internet gaming is restricted to persons within the geographical boundaries of the State is a problem -- known in the industry as "the liquidity problem" -- that New Jersey shares with Nevada and Delaware. The problem, simply stated, is that the size of the pool of potential Internet gamblers is limited by the number of persons located within the state at any given time. Reciprocal agreements (or interstate

compacts) might provide relief from the liquidity problem;²⁶ federal legislation permitting Internet gaming in any jurisdiction that did not prohibit it would provide even more.

Facilities, equipment and personnel directly engaged in the conduct of Internet gaming activity must be located on casino premises in Atlantic City.²⁷ Backup equipment used on a temporary basis can be located at DGE-approved locations outside Atlantic City.²⁸ The backup equipment can be utilized to conduct Internet gaming activities for a maximum period of 60 days, although the DGE has the discretion to extend this period.²⁹



On June 11, 2013, the Governor of Nevada signed AB360, which allows the Governor, upon recommendation from the Commission, to enter into compacts with other jurisdictions authorizing the commingling of games and pots between such jurisdictions.³⁰ Interestingly, this bill allows Nevada to enter into compacts with states, tribal jurisdictions and foreign governments. Such jurisdictions must prohibit operators, service providers, manufacturers or distributors that are not licensed by Nevada or by the other signatory jurisdiction, provided that the other jurisdiction has requirements "that are materially consistent" with Nevada's interactive gaming licensing requirements. AB360 further provides that the other jurisdiction must "establish and maintain regulatory requirements governing interactive gaming that are materially consistent with the requirements" of Nevada.

While the Delaware Act allows the Governor to explore compacts with other states, it is unlikely Delaware will compact with New Jersey. The states are too close geographically and have historically competed for casino patrons. If New Jersey and Nevada were to enter into such a compact, they would need to grapple with the regulation and licensing of, and the taxation of the revenues generated from, interstate Internet wagering. The one sure bet in all three states is that the licensing processes and the applicable regulations for Internet gaming will continue to evolve.

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Dennis Daly, of counsel, was an attorney for 23 years with the New Jersey Casino Control Commission – most recently as its General Counsel. He possesses a comprehensive knowledge and understanding of gaming law, particularly in the casino regulatory arena. His diverse duties with the Commission also provided him with extensive experience in conducting business with other New Jersey state agencies, particularly the Office of Administrative Law, the Department of Treasury and the Office of the Governor. His practice is based in the Atlantic City office of Brownstein Hyatt Farber Schreck.

¹ N.J.S.A. 5:12-1 through 223.

² Changes to these regulations may have occurred after publication and public comment.

³ Which will have passed by the time this article is published.

⁴ Delaware State Lottery Request for Proposal Internet Gaming System and Services Solution, January 31, 2013, p. 3.

⁵ AB 258, Section 7, as introduced.

⁶ (Emphasis supplied). AB 258 amended NRS 463.750 to require the Commission to adopt regulations re the licensing of interactive gaming and amended NRS 463.01425 to specifically include internet poker in definition of interactive gaming.

⁷ AB 114, Section 10.

⁸ Delaware Gaming Competitiveness Act of 2012, HB 333.

⁹ *Supra*. Note 4.

¹⁰ *Id.* at 1.

¹¹ *Supra* note 8 at Section 3.

¹² N.J.S.A. 5:12-28.1.

¹³ N.J.S.A. 5:12-76. The N.J. Division may utilize appropriately licensed, private testing laboratories to supplement the capabilities of its Technical Services Bureau.

¹⁴ These are the three credentials for service industries extant at the time of this writing. The N.J. Division is contemplating an additional category of licensure which would warrant less scrutiny than an ACSIE, but more than a vendor registrant.

¹⁵ N.J.A.C. 13:69J-1.2(b) and (c).

¹⁶ N.J.A.C. 13:69A-9.4(d) and 9.8(b).

¹⁷ N.J.A.C. 13:69A-9.8(a).

¹⁸ N.J.A.C. 13:69J-1.2(d).

¹⁹ N.J.S.A. 5:12-28.1

²⁰ N.J.A.C. 13:690-1.1.

²¹ N.J.S.A. 5:12-95.21.

²² N.J.S.A. 5:12-95.19.

²³ N.J.S.A. 5:12-95.33b.

²⁴ N.J.S.A. 5:12-100h(6).

²⁵ N.J.A.C. 13:690-1.2(e).

²⁶ An interstate compacting model raises constitutional questions. An online business that crosses state lines over the Internet is arguably an area for Congress to regulate. See U.S. Const. art.I, sec.8, cl.3. The U.S. Constitution provides, in part, "No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign power..." U.S. Const., art.I, sec.10, cl.3. Congress may feel compelled to act on an agreement between the states or between a state and a foreign government. As noted by Frank Fahrenkopf in an earlier article in this issue of the Nevada Gaming Lawyer, Congress has typically not intervened over the years regarding interstate compacts since most dealt with relatively common subject matter like energy. There is an open question as to whether Congress will take the same view regarding Internet gaming compacts. Some have even suggested, at least from a policy standpoint, Congress may take a hands off approach to gaming, an area traditionally left to the states to regulate under the powers reserved to them under the Tenth Amendment. Specifically, Congress may limit itself to those areas where it has already acted, such as the Wire Act of 1961 (18 U.S.C. §1084) and the Illegal Gambling Business Act of 1970 (18 U.S.C. §1955) that were a direct exercise of power to regulate interstate commerce and the activities that substantially affect such commerce. See Jeffrey R. Rodefer, Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466, 6 Gaming L. Rev. 393, 397-403 (2002).

²⁷ N.J.S.A. 5:12-95.22.

²⁸ *Ibid.*

²⁹ N.J.A.C. 13:690-1.2(n).

³⁰ It should be noted that AB114, which became effective on February 21, 2013, authorized the Commission to adopt regulations, pursuant to the Nevada Administrative Procedures Act (NRS Chapter 233B) that would establish the process for the Governor to follow when entering into an interstate gaming compact. Sections 11 and 12 of AB360 subsequently amended AB114 to: (1) permit such agreements not only with other states, but also local governments and foreign nations; and (2) provide that the Commission need not adopt a related regulation pursuant to NRS Chapter 233B, as NRS 233B.039(1)(e) and (f) specifically exclude the actions of the Board and the Commission from the Nevada Administrative Procedures Act.